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

MOTION OF THE DAYTON POWER AND LIGHT COMPANY TO COMPEL INDUSTRIAL ENERGY USERS-OHIO AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL TO RETURN ALL PAPER COPIES AND DESTROY ALL ELECTRONIC COPIES OF INADVERTENTLY-PRODUCED DOCUMENTS; MOTION FOR ORDER BARRING THOSE SAME PARTIES FROM USING OR DISCLOSING INFORMATION FROM THOSE INADVERTENTLY-PRODUCED DOCUMENTS

The Dayton Power and Light Company moves the Commission for an order (1) requiring Industrial Energy Users-Ohio and The Office of the Ohio Consumers' Counsel to return all paper copies and destroy all electronic copies of three documents that were inadvertently produced by DP&L; and (2) that IEU-Ohio and OCC be barred from using or disclosing the information contained in those three inadvertently-produced documents. The Commission should issue the requested orders because the documents at issue are documents that belong to DP&L's affiliate, DPL Inc., and thus are not subject to discovery in this matter.

Further, the documents contain information that the Attorney Examiners have already held was privileged and work product.

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MEMORANDUM IN SUPPORT OF MOTION OF THE DAYTON POWER AND LIGHT COMPANY TO COMPEL INDUSTRIAL ENERGY USERS-OHIO AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL TO RETURN ALL PAPER COPIES AND DESTROY ALL ELECTRONIC COPIES OF INADVERTENTLY-PRODUCED DOCUMENTS; MOTION FOR ORDER BARRING THOSE SAME PARTIES FROM USING OR DISCLOSING INFORMATION FROM THOSE INADVERTENTLY-PRODUCED DOCUMENTS

I. INTRODUCTION

DP&L has inadvertently produced three confidential DPL Inc. documents. Portions of those documents contain information that the Attorney Examiners have already held was privileged. DP&L has requested that IEU-Ohio and OCC return the documents at issue, but they have refused to do so. DP&L asks the Commission to issue the following orders:

The Commission should order that the entire documents be returned/destroyed because they are DPL Inc. documents. Specifically, the Stipulated Protective Agreement between DP&L and IEU-Ohio provides that "[t]he inadvertent production or disclosure during discovery of an attorney-client privileged, work product, or other protected document" shall not be a waiver of the protection. The Attorney Examiners have already ruled that DPL Inc. documents are not subject to discovery in this case. The DPL Inc. documents thus fall within the scope of the "other protected" clause in the Stipulated Protective Agreement, and the production of those documents does not constitute a waiver. The Stipulated Protective Agreement between DP&L and OCC does not address whether or not the inadvertent production of protected material that is not privileged or work product constitutes a waiver; as demonstrated below, the Commission should hold that the production of such information does not constitute a waiver.

In the alternative, if the Commission were to rule that IEU-Ohio or OCC were not required to return/destroy the entire inadvertently-produced DPL Inc. documents, then the Commission should order them to return/destroy the documents, and should permit DP&L to

produce new copies of the documents with the privileged and work product information redacted.

II. THE DOCUMENTS AT ISSUE ARE DPL INC. DOCUMENTS THAT CONTAIN PRIVILEGED INFORMATION

DPL Inc. is DP&L's parent corporation, and DPL Inc. has other subsidiaries in addition to DP&L (e.g., DPL Energy Resources, Inc.; DPL Energy LLC; etc.). C. Jackson Dec., ¶ 2. DPL Inc. has its own board of directors, maintains its own books and records, and makes its own filings with the Securities and Exchange Commission. C. Jackson Dec., ¶ 2.

On January 24, 2013, DP&L inadvertently produced three DPL Inc. documents:

1. A September 30, 2012 Memorandum titled "Sale and Purchase Agreement. Acquisition of DPL Final Acquisition Accounting," which addressed DPL Inc. accounting questions associated with the acquisition of DPL Inc. by AES.

2. An October 17, 2012 Memorandum titled "Long-Live Asset Impairment analysis as of September 30, 2012 at DPL Inc. level," which addressed whether there is an impairment of certain assets at the DPL Inc. level. (There was a separate analysis performed as to whether there was an asset impairment at the DP&L level; that document has been produced; it is not the subject of this motion.)

3. An October 19, 2012 Memorandum titled "DPL Q-3 2012 Interim Goodwill Impairment Evaluation," that evaluates whether DPL Inc.'s goodwill was impaired.

C. Jackson Dec., ¶ 3.

The first two listed documents were authored by Jared Hoying; the third listed document was authored by Karin Nyhuis. C. Jackson Dec., ¶ 4. Those persons are employed by DPL Inc. C. Jackson Dec., ¶ 4.

At the January 30, 2013 discovery conference, the Attorney Examiners ruled that documents in the possession of DP&L's affiliates were not subject to discovery. January 30, 2013 Transcript, p. 145 (denying motion to compel filed by OCC because the requests at issue sought "discovery from documents in the possession of DP&L's affiliates"). (A copy of that transcript was filed with the Commission on February 13, 2013). In addition, the inadvertently-produced documents contained attorney-client privileged information, including DP&L projections as to possible results of this case and its analysis of possible cost savings. The Attorney Examiners also ruled that the cost-saving analysis was privileged: "[w]e reviewed the underlying documents in camera and it is clear that the documents were prepared in anticipation of litigation and at the direction of their counsel. . . . there's no way to extract out what's clearly their attorney's advice from these documents." Id. at 143-44 (emphasis added).

However, on January 24, 2013 (six days before the discovery conference), DP&L inadvertently produced those three documents in response to OCC's 24th set of discovery requests. Sharkey Dec., ¶ 2. Those documents were served upon OCC, IEU-Ohio, FirstEnergy Solutions, Border Energy, Wal-Mart/Sam's East, Federal Executive Agencies, Kroger and Interstate Gas Supply. Sharkey Dec., ¶ 2.

On February 4, 2013, OCC served follow-up discovery requests that asked specific questions about how certain analysis discussed in the inadvertently-produced documents was performed. Sharkey Dec., ¶ 3. DP&L first discovered that it had inadvertently produced the documents at issue while preparing draft objections and responses to that set of OCC discovery requests. Sharkey Dec., ¶ 3. Counsel for DP&L promptly contacted counsel for the receiving parties and requested that they return or destroy the documents in question. Sharkey Dec., ¶ 4. Counsel for FirstEnergy Solutions, Border Energy, Wal-Mart/Sam's East, Federal Executive

Agencies, Kroger and Interstate Gas Supply have agreed to destroy all copies of the documents. Sharkey Dec., ¶ 4. However, counsel for IEU-Ohio and OCC have not agreed to return or destroy the documents. Sharkey Dec., ¶ 4.

On February 7, 2013, counsel for DP&L met with counsel for IEU-Ohio and OCC to discuss those documents, and the parties exchanged subsequent emails and subsequent discussions. Sharkey Dec., ¶ 5. However, the parties were unable to negotiate an acceptable resolution. Sharkey Dec. ¶ 5. Counsel for those parties did agree that they would not use or disclose information in those documents until the issues relating to them were resolved. Sharkey Dec., ¶ 5.

III. THE COMMISSION SHOULD ORDER THE RECIPIENTS TO RETURN THE ENTIRE SET OF DOCUMENTS

This section demonstrates that the Commission should order the recipients of the three documents at issue to return or destroy the entire copies of the DPL Inc. documents that were inadvertently produced.

A. DP&L'S STIPULATED PROTECTIVE AGREEMENT WITH IEU-OHIO REQUIRES THAT IT RETURN THE ENTIRE DOCUMENTS

DP&L and IEU-Ohio are parties to a Stipulated Protective Agreement, which states:

> "The inadvertent production or disclosure during discovery of an attorney-client privileged, work product, or other protected document or information ('Protected Material') shall not be deemed a waiver of privilege, work product, or other protection or immunity from discovery by the producing Stipulating Party. Upon notice by the producing Stipulating Party that Protected Material was produced or disclosed, all recipients of the Protected Material shall not use it (or information in it) in any litigation, not

> permit it to be copied, distributed or otherwise disclosed to any other person until the matter of its production or disclosure is resolved either amicably by the parties, or by order of the Commission."

Stipulated Protective Agreement, ¶ 17 (emphasis added) (copy of the IEU-Ohio Stipulated Protective Agreement attached to the Sharkey Declaration as Ex. A).

That Stipulated Protective Agreement thus establishes that the inadvertent production of "attorney-client privileged, work product or other protected document" shall not be deemed a waiver. The Attorney Examiners have ruled that DPL Inc. documents are not subject to discovery. January 30, 2013 Transcript, p. 145 (denying motion to compel certain documents because they sought "discovery from documents in the possession of DP&L's affiliates"). The documents are DPL Inc. documents and thus fall within the scope of the "other protected" clause in the Stipulated Protective Agreement that IEU-Ohio has signed.

However, in plain violation of the Stipulated Protective Agreement, IEU-Ohio has refused to return or destroy the documents. The Commission should thus order IEU-Ohio to return/destroy the documents.

B. THE COMMISSION SHOULD ORDER OCC TO RETURN OR DESTROY THE DPL INC. DOCUMENTS

DP&L's Stipulated Protective Agreement with OCC does not address whether or not the inadvertent production of documents that are not privileged or work product constitutes a waiver. As demonstrated below, the Commission should conclude that there is no principled

difference between the inadvertent production of privileged documents and the inadvertent production of other documents that are not subject to discovery.[1]

The reason that the inadvertent production of privileged documents does not constitute a waiver has been described as follows:

> "Given the number of documents which are produced in litigation, it is not unusual that a document subject to one type of privilege or another is occasionally inadvertently produced for inspection and copying. Of course, the party to whom the production is made typically argues that the production has waived any privilege which previously attached to the document. Conversely, the producer of the document asserts that such privileges cannot be waived through inadvertence.
>
> * * *
>
> [G]iven the number of documents which are typically produced in litigation, even the most diligent of parties will occasionally produce a privileged document inadvertently, and it ignores the realities of a discovery process to conclude that such a production is always a waiver of the attorney-client privilege even when the party made reasonable efforts to protect the privilege."

Hawkins v. Anheuser-Busch, 2006 U.S. Dist. LEXIS 40461, at *3, 6 (S.D. Ohio June 19, 2006) (emphasis added).

DP&L submits that there is no principled difference between the inadvertent production of privileged documents and the inadvertent production of documents that are protected from discovery for other reasons.[2] Just as "it ignores the realities of a discovery process to conclude that [an inadvertent] production is always a waiver of the attorney-client

[1] If the Commission were to rule that DP&L's Stipulated Protective Agreement with IEU-Ohio did not require the return/destruction of the DPL Inc. documents, then this section shows that IEU-Ohio should also be ordered to return/destroy the documents.

[2] DP&L has searched Ohio caselaw, and has not found any Ohio case (state or federal) addressing whether the inadvertently-produced documents that are not privileged or work product constitute a waiver.

privilege,"[3] it would ignore the reality of the discovery process to hold that the inadvertent production of other documents that are exempt from discovery constitutes a waiver.

Indeed, the likelihood of an inadvertent production is considerably greater in Commission proceedings than in court cases. Specifically, in court, parties have 28-30 days to respond to requests for production of documents (Ohio R. Civ. P. 34(B)(1); Fed. R Civ. P. 34(b)(2)(A)), and parties are limited to 25-40 interrogatories (Ohio R. Civ. P. 33(A); Fed. R Civ. P. 33(a)(1)).

Here, in contrast, DP&L is required to respond to discovery requests in 10 days,[4] and there is no limit on the number of discovery requests that can be served. As of the date of the inadvertent production, DP&L had responded to 54 sets of discovery requests, which included 819 interrogatories (many with numerous subparts), 210 requests for production, and 37 requests for admission; DP&L had produced over 53,900 pages of documents, plus numerous documents in native format with formulas intact. OCC has served about one-half of those discovery requests; as of the date of the inadvertent production, OCC had served 26 sets of discovery requests, 462 interrogatories (many with numerous subparts) and 104 requests for production.

The 10-day deadline to respond to discovery gives DP&L very little time to analyze the requests, identify the persons who might have responsive information or documents, answer the interrogatories, locate the requested documents, assemble the documents in a central location, review the documents, and process the documents (print, Bates stamp, etc.) for

[3] Hawkins, 2006 U.S. Dist. LEXIS 40461, at *6.
[4] November 14, 2012 Entry, ¶ 5 ("response time for discovery should be shortened to 10 days").

production. DP&L made a mistake in that process, and inadvertently produced three documents. DP&L submits that OCC should not be permitted to benefit from DP&L's mistake. DP&L further submits that the most reasonable result would be for the Commission to order OCC to return or destroy the inadvertently produced documents.

In short, DP&L has worked diligently to comply with the 10-day deadline to respond to discovery requests in this case, and in doing so, DP&L mistakenly produced documents that are not subject to discovery. This Commission should not allow OCC to use that mistake to its benefit, and should thus order OCC to return/destroy the documents.

IV. THE DOCUMENTS CONTAIN INFORMATION THAT IS PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE

This section demonstrates that if the Commission were to deny DP&L's motion that the entirety of all three documents should be returned/destroyed, then the Commission should allow DP&L to redact privileged and work product information that is contained within the documents.

The inadvertent production of privileged documents does not waive the privilege, and such documents must be returned to the entity that produced them. August 2, 2005 Entry, pp. 3-4 (Case No. 03-1238-EL-CSS) ("the Supreme Court has held that Section 2317.02(A), Revised Code provides the *exclusive* means by which privileged communications between an attorney and a client can be waived. Section 2317.02(A), Revised Code provides that the attorney-client privilege may be waived: (1) by *express* consent of the client; or (2) if the client voluntarily testifies on the same subject. In this case, the inadvertent disclosure of documents in discovery constitutes neither of the means specified by Section 2317.02(A), Revised Code.

Therefore, there was no waiver of the attorney-client privilege. . . . Since the examiner finds that the documents are privileged and that the privilege has not been waived by their inadvertent disclosure, OE's motion to compel should be granted. Huron shall return the privileged documents to OE.") (emphasis in original) (Attorney Examiner G. Price).

A document is privileged if it "reveal[s], directly or indirectly, the substance of a confidential attorney-client communication." Smithkline Beecham Corp. v. Apotex Corp., 193 F.R.D. 530, 534 (N.D. Ill. 2000). Accord: United States v. Defazio, 899 F.2d 626, 635 (7th Cir. 1990) ("Communications from attorney to client are privileged only if they constitute legal advice, or tend directly or indirectly to reveal the substance of a client confidence.") (emphasis added).

Accordingly, courts have repeatedly held that documents were protected by the attorney-client privilege, even though the document at issue was not a direct communication between an attorney and a client, when the document in question would reveal the advice of the attorney. Alexander v. Fed. Bureau of Investigation, 186 F.R.D. 154, 161 (D.D.C. 1999) ("'[t]he attorney-client privilege applies to entries in a client's diaries that describe communications from attorneys or are based on such communications'") (alteration in original) (quoting 24 Wright & Graham, Federal Practice & Procedure § 5491, at 102 (Supp. 1998)) (and cases cited); Kelly v. Ford Motor Co. (In re Ford Motor Co.), 110 F.3d 954, 966 (3d Cir. 1997) (holding that minutes of board of directors' meetings that reflected attorneys' advice were privileged); Great Plains Mut. Ins. Co. v. Mutual Reinsurance Bureau, 150 F.R.D. 193, 197-98 (D. Kan. 1993) (minutes of board of directors' meeting that included attorneys' advice to board were privileged).

Courts have applied this rule to protect financial documents from disclosure, e.g., Simon v. G.D. Searle & Co., 816 F.2d 397, 401 (8th Cir. 1986), cert. denied, 484 U.S. 917, 108 S. Ct. 268 (1987). In Simon, the defendant's "risk management department monitor[ed] the company's products liability litigation and analyze[d] its litigation reserves, apparently utilizing individual case reserve figures determined by the legal department's assessment of litigation expenses." Id. at 399. The court held that the risk management documents -- which were prepared by the risk management department, not the legal department -- were protected from discovery because they revealed the attorneys' conclusions as to likely case results. Id. at 401 (emphasis added).[5] Accord: Certain Underwriters at Lloyds v. Fid. & Cas. Ins. Co., No. 89 C 876, 1998 U.S. Dist. LEXIS 3654, at *6 (N.D. Ill. Mar. 20, 1998) ("We conclude that reserve recommendations, in this case, do reveal attorney mental impressions, thoughts, and conclusions since the reserve figures were calculated only after an attorney acting in his legal capacity carefully determined the merits and value of the underlying case."); Gen. Elec. Capital Corp. v. DIRECTV, Inc., 184 F.R.D. 32, 35-36 (D. Conn. 1998) (quoting Simon, and finding certain case reserve documents to be privileged).

Here, the Attorney Examiners have already ruled that the cost-saving information contained within the documents is privileged and work product. Specifically, in IEU-Ohio's January 3, 2013 Motion to Compel, it asked the Commission to compel DP&L to produce certain analysis DP&L performed of potential cost-reduction measures in response to IEU INT 3-1, INT 3-2, and INT 3-3. In response, DP&L demonstrated that the information at issue was protected

[5] The Simon Court concluded that the specific documents at issue were not protected by the attorney-client privilege, because they aggregated the legal department's opinions about likely liability in many cases into a single figure. Id. at 402. Here, in contrast, DP&L's financial documents are specific to this case, and are thus protected under the rule described in Simon.

by the attorney-client privilege and the work product doctrine. January 11, 2013 DP&L Memorandum Contra, pp. 2-7. Specifically, DP&L demonstrated that revealing its analysis of possible cost savings would reveal advice from DP&L's counsel as to possible case results. Id.; Sobecki Dec., ¶¶ 2-4 (attached to DP&L's January 11, 2013 Memorandum Contra); Jackson Dec., ¶¶ 2-7 (attached to DP&L's January 11, 2013 Memorandum Contra).

DP&L brought copies of the cost-savings documents in question to the January 30, 2013 discovery conference with the Attorney Examiners. After reviewing the cost-savings documents in camera, the Attorney Examiners agreed with DP&L that producing the information would reveal privileged communications and work product:

> "EXAMINER MCKENNEY: . . . .
>
> In regard to IEU's motion to compel regarding Interrogatories 3-1, 3-2, and 3-3, those are also denied.
>
> * * *
>
> MR OLIKER: -- the basis for denying 3-1 through 3-3, would that be – can you give us the basis for that now?
>
> EXAMINER PRICE: They were – the analysis was prepared at the direction of their attorney, Ms. Sobecki, underlying those documents.
>
> EXAMINER MCKENNEY: Prepared in anticipation of litigation.
>
> MR. OLIKER: Okay. Thank you.
>
> EXAMINER PRICE: We reviewed the underlying documents in camera and it is clear that the documents were prepared in anticipation of litigation and at the direction of their counsel.
>
> MR. OLIKER: And, I'm sorry, I don't want to belabor the point.
>
> EXAMINER PRICE: No.
>
> MR. OLIKER: The underlying expense reductions themselves, just an understanding –

> EXAMINER PRICE: They cannot be easily extracted. We took a look at the documents. There's no way to extract out what's clearly their attorney's advice from these documents. I know I'm saying trust me, but, you know, the examiners have looked at these in camera and the documents need to be withheld."

January 30, 2013 Transcript, pp. 141-44 (emphasis added).

The inadvertently-produced DPL Inc. documents include the same cost-savings information that the Attorney Examiners ruled was privileged and work product. Specifically, the documents that the Attorney Examiners inspected in camera contained figures showing DP&L's analysis of potential generation operation and maintenance savings and total operation and maintenance savings. January 30, 2013 Log of Privileged Documents Relating to DP&L's Analysis of Potential Cost Saving Measures for DP&L, Tab 5, p. 27; Tab 7, pp. 2, 3; Tab 8, pp. 1, 2, 7; Tab 9, pp. 1, 8; Tab 10, pp. 1, 8; Tab 11, pp. 1, 6; Tab 12, pp. 1, 6, 13; Tab 13, pp. 1, 2; Tab 15, p. 1; Tab 16, pp. 1, 3; Tab 17, pp. 1, 2, 9; Tab 18, pp. 1, 8, 19; Tab 19, pp. 4, 10, 21; Tab 20, pp. 4, 11, 14, 23; Tab 23, p. 2; Tab 24, p. 1; Tab 46, p. 3; Tab 54, p. 1; Tab 56, pp. 7, 8; Tab 57, p. 1; Tab 58, p. 1; Tab 59, p. 1; Tab 60, p. 1; Tab 62, p. 1; Tab 70, p. 1. That same information is included in the inadvertently-produced DPL Inc. documents. C. Jackson Dec., ¶ 6.

The Attorney Examiners have already ruled that "[t]here's no way to extract out what's clearly [DP&L's] attorney's advice from these [cost-savings] documents" that they reviewed in camera. January 30, 2013 Transcript, p. 144. The cost-savings information in the inadvertently-produced DPL Inc. documents was extracted from the documents that the Attorney Examiners reviewed in camera, and is thus plainly protected by the work product and privileged doctrines. C. Jackson Dec., ¶ 6.

The inadvertently-produced DPL Inc. documents also contain references to DP&L's expectations as to possible case results (e.g., length of time to competitive bidding; level of non-bypassable charge). C. Jackson Dec., ¶ 7. That analysis of possible case results was prepared based upon advice of counsel and reflects advice of counsel (C. Jackson Dec., ¶ 7), and is thus plainly privileged and work product.

In short, if the Commission were to rule that OCC and IEU-Ohio were not required to return/destroy the entirety of the three inadvertently-produced DPL Inc. documents, then the Commission should order them to return/destroy the documents, and permit DP&L to produce new copies of the documents with the privileged and work product information redacted.

V. CONCLUSION

The Commission should order IEU-Ohio and OCC to return all paper copies and destroy all electronic copies of the inadvertently-produced DPL Inc. documents. In the alternative, the Commission should order those parties to return or destroy those documents, and permit DP&L to produce redacted copies. In either event, the Commission should issue an order barring the use or further disclosure of the protected information.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion of The Dayton Power and Light Company To Compel Industrial Energy Users-Ohio and The Office Of The Ohio Consumers' Counsel to Return All Paper Copies and Destroy All Electronic Copies of Inadvertently-Produced Documents; Motion for Order Barring Those Same Parties from Using or Disclosing Information from Those Inadvertently-Produced Documents has been served via electronic mail upon the following counsel of record, this 4th day of February, 2013:

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Jeffrey S. Sharkey

691994.2

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

DECLARATION OF CRAIG L. JACKSON

I, Craig L. Jackson, declare as follows:

1. My name is Craig L. Jackson, and I am the Chief Financial Officer of The Dayton Power and Light Company ("DP&L").

2. DPL Inc. is DP&L's parent corporation, and DPL Inc. has other subsidiaries in addition to DP&L (e.g., DPL Energy Resources, Inc.; DPL Energy LLC; etc.).

EXHIBIT 1

DPL Inc. has its own board of directors, maintains its own books and records, and makes its own filings with the Securities and Exchange Commission.

3. On January 24, 2013, DP&L inadvertently produced three DPL Inc. documents:

- A September 30, 2012 Memorandum titled "Sale and Purchase Agreement. Acquisition of DPL Final Acquisition Accounting," which addressed DPL Inc. accounting questions associated with the acquisition of DPL Inc. by AES.
- An October 17, 2012 Memorandum titled "Long-Live Asset Impairment analysis as of September 30, 2012 at DPL Inc. level," which addressed whether there is an impairment of certain assets at the DPL Inc. level. (There was a separate analysis performed as to whether there was an asset impairment at the DP&L level; that document has been produced; it is not the subject of DP&L's motion.)
- An October 19, 2012 Memorandum titled "DPL Q-3 2012 Interim Goodwill Impairment Evaluation," that evaluates whether DPL Inc.'s goodwill was impaired.

4. The first two listed documents were authored by Jared Hoying; the third listed document was authored by Karin Nyhuis. Those persons are employed by DPL Inc.

5. The inadvertently-produced DPL Inc. documents include the same cost-savings information that the Attorney Examiners ruled was privileged and work product. Specifically, the documents that the Attorney Examiners inspected in camera contained figures showing DP&L's analysis of potential generation operation and maintenance savings and total operation and maintenance savings.

6. That same information is included in the inadvertently-produced DPL Inc. documents. The information as to O&M savings in the inadvertently produced DPL Inc.

documents was extracted from the documents that the Attorney Examiners reviewed and found to be privileged.

7. The inadvertently-produced DPL Inc. documents also contain references to DP&L's expectations as to possible case results (e.g., length of time to competitive bidding; level of non-bypassable charge). That analysis of possible case results was prepared based upon advice of counsel and reflects advice of counsel.

Dated February 14, 2013.

Craig L. Jackson

692511.1

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

DECLARATION OF JEFFREY S. SHARKEY

I, Jeffrey S. Sharkey, declare as follows:

1. My name is Jeffrey S. Sharkey, and I am a partner at Faruki Ireland & Cox P.L.L. I am one of the attorneys representing Applicant The Dayton Power and Light Company ("DP&L") in this matter.

2. On January 24, 2013, DP&L inadvertently produced three DPL Inc. documents in response to OCC's 24th set of discovery requests. Those documents were served upon counsel for OCC, IEU-Ohio, FES, Border Energy, Wal-Mart/Sam's East, Federal Executive Agencies, Kroger and Interstate Gas Supply.

3. On February 4, 2013, OCC served follow-up discovery requests that asked specific questions about how certain analysis discussed in the inadvertently-produced documents

was performed. DP&L first discovered that it had inadvertently produced the documents at issue while preparing draft objections and responses to that set of OCC discovery requests.

4. On February 6, 2012, counsel for DP&L contacted counsel for the receiving parties and requested that they return or destroy the documents in question. Counsel for FirstEnergy Solutions, Border Energy, Wal-Mart/Sam's East, Federal Executive Agencies, Interstate Gas Supply, and Kroger have agreed to destroy all copies of the documents. However, counsel for IEU-Ohio and OCC have not agreed to return or destroy the documents.

5. On February 7, 2013, counsel for DP&L met with counsel for IEU-Ohio and OCC to discuss those documents. DP&L, IE-Ohio and OCC have had subsequent discussions regarding the three documents, but have been unable to resolve the dispute. Counsel for IEU-Ohio and OCC did agree that they would not use or disclose information in those three documents until the issues relating to them were resolved.

6. A copy of the Stipulated Protective Agreement between DP&L and IEU-Ohio is attached at Exhibit A.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated February 14, 2013.

Jeffrey S. Sharkey

692510.1

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	:	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

STIPULATED PROTECTIVE AGREEMENT

WHEREAS, the Stipulating Parties recognize that, pursuant to discovery or otherwise during the course of this proceeding, they may be required to disclose confidential information.

WHEREAS, the Stipulating Parties have, through counsel, stipulated to this Stipulated Protective Agreement ("Agreement") in accordance with Ohio Admin. Code § 4901-1-24 to prevent unnecessary disclosure or dissemination of such confidential information.

THEREFORE, IT IS AGREED that the following provisions of this Agreement shall control the disclosure, dissemination, and use of confidential information in this proceeding:

EXHIBIT A

1. This Agreement shall apply to the Stipulating Parties. A party to the litigation may become a Stipulating Party by signing this Stipulated Protective Agreement, or by completing and signing the form attached as Exhibit A.

2. This Agreement shall apply to all information, documents and things subject to discovery in this action, including without limitation, testimony adduced at depositions upon oral examination pursuant to Ohio Admin. Code § 4901-1-21, answers to interrogatories pursuant to Ohio Admin. Code § 4901-1-19, documents and things produced pursuant to Ohio Admin. Code § 4901-1-20, and answers to requests for admission pursuant to Ohio Admin. Code § 4901-1-22.

3. A Stipulating Party may designate information or documents produced, used or disclosed in connection with this proceeding as "CONFIDENTIAL"; "CONFIDENTIAL - ATTORNEYS' EYES ONLY"; or "HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY" and subject to the protections and requirements of this Agreement, if so designated in writing, or orally if recorded as part of a deposition, pursuant to the terms of this Agreement.

a. Information and documents that a Stipulating Party in good faith believes contain or refer to information that is not generally available to or accessible by the general public, or that is to be kept confidential due to preexisting obligations, or that is otherwise confidential, may be designated as "CONFIDENTIAL."

b. Information and documents that a Stipulating Party in good faith believes contain or refer to trade secrets or other confidential research, development, business, or financial information, or other confidential

commercial information, and that, if disclosed to suppliers, competitors or customers, would tend to damage the Stipulating Party's competitive position may be designated as "CONFIDENTIAL -ATTORNEYS' EYES ONLY."

c. Information and documents that a Stipulating Party in good faith believes constitutes, contains, or refers to proprietary technology or information owned or developed by the producing party which has not previously been provided to the opposing party may be designated as "HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY."

4. Any information or document designated as "CONFIDENTIAL" shall be used by the receiving Stipulating Party solely in connection with this proceeding and shall not be disclosed to anyone other than the following persons:

a. Corporate officers or employees or volunteers who are working on the matter of a receiving Stipulating Party, and in-house counsel of a receiving Stipulating Party, provided that:

1. they sign a Declaration in the form of Exhibit B, attached;

2. the disclosure is necessary to the prosecution or defense of this action; and

3. the information is maintained in separate and identifiable files, access to which is restricted to the foregoing persons;

b. The Commission, the Attorney Examiner(s) assigned to this matter, and Commission Staff provided the information or document is filed under seal;

c. Counsel of record for the Stipulating Parties and employees of such, including attorneys, paralegals, secretaries, and clerks to whom it is necessary that the material be shown for purposes of this litigation;

d. Actual independent technical experts of the Stipulating Parties who have signed a Declaration in the form of Exhibit B, attached;

e. Document contractors, exhibit contractors, and graphic art contractors of the Stipulating Parties to whom it is necessary that the material be shown for purposes of this litigation, and who have signed a Declaration in the form of Exhibit B, attached;

f. Persons testifying in deposition to the extent the "CONFIDENTIAL" document or information was authored by or addressed to the person testifying or such person is established as knowledgeable of such information or contents of the document prior to disclosing the information or document; and

g. Court reporters.

5. Any information or document designated as "CONFIDENTIAL - ATTORNEYS' EYES ONLY" shall be used by the receiving Stipulating Party solely in connection with this proceeding and shall not be disclosed to anyone other than:

a. The Commission, the Attorney Examiner(s) assigned to this matter, and Commission Staff provided the information or document is filed under seal;

b. Counsel of record for the Stipulating Parties and employees of such, including attorneys, paralegals, secretaries, and clerks to whom it is necessary that the material be shown for purposes of this litigation;

c. Actual independent technical experts of the Stipulating Parties who have signed a Declaration in the form of Exhibit B, attached;

d. Document contractors, exhibit contractors, and graphic art contractors of the Stipulating Parties to whom it is necessary that the material be shown for purposes of this litigation, and who have signed a Declaration in the form of Exhibit B, attached;

e. Persons testifying in deposition to the extent the "CONFIDENTIAL - ATTORNEYS' EYES ONLY" document or information was authored by or addressed to the person testifying or such person is established as knowledgeable of such information or contents of the document prior to disclosing the information or document; and

f. Court reporters.

6. Any information or document designated as "HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY" shall be used by the receiving Stipulating Party solely in connection with this proceeding and shall not be disclosed to anyone other than:

a. The Commission, the Attorney Examiner(s) assigned to this matter, and Commission Staff provided the information or document is filed under seal;

b. Outside counsel of record for the Stipulating Parties and employees of such, including attorneys, paralegals, secretaries, and clerks to whom it is necessary that the material be shown for purposes of this litigation;

c. Actual independent technical experts of the Stipulating Parties who have signed a Declaration in the form of Exhibit B, attached;

d. Document contractors, exhibit contractors, and graphic art contractors of the Stipulating Parties to whom it is necessary that the material be shown for purposes of this litigation, and who have signed a Declaration in the form of Exhibit B, attached;

e. Persons testifying in deposition to the extent the "HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY" document or information was authored by or addressed to the person testifying or such person is established as knowledgeable of such information or contents of the document prior to disclosing the information or document; and

f. Court reporters.

7. To be protected by this Agreement, a document shall be marked "CONFIDENTIAL"; "CONFIDENTIAL - ATTORNEYS' EYES ONLY"; or "HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY." In the case of documents that are inspected before copies of those documents are requested or produced, those documents and their contents shall be treated as "HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY" until copies of those documents are provided, at which time the documents shall be treated as "CONFIDENTIAL"; "CONFIDENTIAL - ATTORNEYS' EYES ONLY"; or "HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY" if so designated.

8. Information conveyed or discussed in testimony at a deposition shall be subject to this Agreement, provided that it is designated as "CONFIDENTIAL"; "CONFIDENTIAL - ATTORNEYS' EYES ONLY"; or "HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY" orally or in writing either at the time of the deposition or after receipt by the Stipulating Parties of the transcript.

a. For such time as any information or documents designated "CONFIDENTIAL"; "CONFIDENTIAL - ATTORNEYS' EYES ONLY"; or "HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY" are disclosed in a deposition, the Stipulating Party whose information or documents are to be disclosed shall have the right to exclude from attendance at the deposition any person who is not entitled to receive such information or documents pursuant to this Agreement.

b. In the event that a Stipulating Party believes that "CONFIDENTIAL"; "CONFIDENTIAL - ATTORNEYS' EYES ONLY"; or "HIGHLY

CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY" information will be disclosed during a deposition, counsel for the Stipulating Party may designate on the record that all or specific portions of the deposition transcript, and the information contained therein, is to be treated as "CONFIDENTIAL"; "CONFIDENTIAL - ATTORNEYS' EYES ONLY"; or "HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY."

c. A Stipulating Party shall have thirty (30) days after receiving a copy of the deposition transcript in which to designate all or specific portions of the transcript as "CONFIDENTIAL"; "CONFIDENTIAL - ATTORNEYS' EYES ONLY"; or "HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY," as appropriate. If, within such thirty (30) days, no Stipulating Party designates in writing certain portions of the transcript as "CONFIDENTIAL"; "CONFIDENTIAL - ATTORNEYS' EYES ONLY"; or "HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY," any Stipulating Party shall be permitted to use such portions of the transcript and the information contained therein with no restrictions of confidentiality.

d. Nothing in this Agreement shall be construed to restrict the use or disclosure of "CONFIDENTIAL"; "CONFIDENTIAL - ATTORNEYS' EYES ONLY"; or "HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY" information or documents at a hearing in this matter; provided, however, that the use or disclosure of

"CONFIDENTIAL"; "CONFIDENTIAL - ATTORNEYS' EYES ONLY"; or "HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY" information or documents at a hearing in this matter shall be addressed by this Commission at the appropriate time.

9. The failure of a Stipulating Party to designate information or documents as "CONFIDENTIAL"; "CONFIDENTIAL - ATTORNEYS' EYES ONLY"; or "HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY" in accordance with this Agreement, and the failure to object to such a designation, shall not preclude a Stipulating Party at a later time from subsequently designating or objecting to the designation of such information or documents as "CONFIDENTIAL"; "CONFIDENTIAL - ATTORNEYS' EYES ONLY"; or "HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY." The Stipulating Parties understand and acknowledge that a Stipulating Party's failure to designate information or documents as either "CONFIDENTIAL"; "CONFIDENTIAL - ATTORNEYS' EYES ONLY"; or "HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY" at or within the time specified in this Agreement relieves the other Stipulating Party of any obligation of confidentiality until the designation is actually made. If material is appropriately designated as "CONFIDENTIAL"; "CONFIDENTIAL - ATTORNEYS' EYES ONLY"; or "HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY" after the material was initially produced, then the receiving Stipulating Party, on notification of the designation, must make reasonable efforts to assure that the material is treated in accordance with the provisions of this protective Agreement.

10. Nothing shall be designated as "CONFIDENTIAL"; "CONFIDENTIAL - ATTORNEYS' EYES ONLY"; or "HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY" if it is information that:

a. is in the public domain at the time of disclosure;

b. becomes part of the public domain other than through the actions of any of the other Stipulating Parties;

c. was in the rightful and lawful possession of the receiving Stipulating Party at the time of disclosure; or

d. is lawfully received by the receiving Stipulating Party at a later date from a party without restriction as to disclosure, provided such party has the right to make the disclosure to the receiving Stipulating Party.

11. The counsel of record shall retain the original, executed Declarations in the form of Exhibit B that have been executed by that Stipulating Party, its experts, and contractors, pursuant to Paragraphs 4, 5, and 6 above.

12. Unless otherwise required by the Commission, whenever a Stipulating Party intends to file with the Commission any document (including prefiled testimony) designated as "CONFIDENTIAL"; "CONFIDENTIAL - ATTORNEYS' EYES ONLY"; or "HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY," the Stipulating Party filing such document shall:

a. file under seal with the Commission any such document designated as "CONFIDENTIAL"; "CONFIDENTIAL - ATTORNEYS' EYES ONLY";

or "HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY";

b. file under seal with the Commission any document (including prefiled testimony) that contains or is based in any part on any "CONFIDENTIAL"; "CONFIDENTIAL - ATTORNEYS' EYES ONLY"; or "HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY" information or document that was obtained from any Stipulating Party; and

c. at the same time that documents are filed under seal, file a motion for protective order, reciting the facts that the documents are confidential, that they were produced pursuant to a Stipulated Protective Agreement, that the Agreement requires that the documents be filed under seal, and that the party filing the motion expects that the party who produced the information will file a memorandum in support of the motion that more fully explains why confidential treatment is appropriate.

13. Unless otherwise agreed in writing by the Stipulating Party that produced the documents, within one hundred twenty (120) days after the conclusion of the matter, including all appeals therefrom, all documents designated as "CONFIDENTIAL"; "CONFIDENTIAL - ATTORNEYS' EYES ONLY"; or "HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY," all copies of documents designated as "CONFIDENTIAL"; "CONFIDENTIAL - ATTORNEYS' EYES ONLY"; or "HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY," and all excerpts therefrom in the possession, custody or control of the Stipulating

Parties, and their experts, investigators, advisors, or consultants shall be destroyed or returned to counsel for the producing Stipulating Party. Counsel may keep one copy of such information in their file.

14. The Commission shall have jurisdiction over the Stipulating Parties for the purpose of ensuring compliance with this Agreement and granting such amendments, modifications, and additions to this Agreement and such other and further relief as may be necessary. This Agreement shall survive the final disposition of this proceeding, by judgment, dismissal, settlement, or otherwise.

15. If a receiving Stipulating Party is required to disclose any document or information designated as "CONFIDENTIAL"; "CONFIDENTIAL - ATTORNEYS' EYES ONLY"; or "HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY" pursuant to any law, regulation, subpoena, order or rule of any governmental authority, the receiving Stipulating Party shall give immediate advance written notice, to the extent possible, of any such requested disclosure in writing to the counsel of the producing Stipulating Party to afford that producing Stipulating Party the opportunity to seek legal protection from the disclosure of such information or documents.

16. In the event that anyone violates or threatens to violate the terms of this Agreement, the aggrieved Stipulating Party may apply immediately to obtain injunctive relief against any such violation or threatened violation, and in the event the aggrieved Stipulating Party shall do so, the respondent shall not employ as a defense that the aggrieved Stipulating Party possesses an adequate remedy at law.

17. The inadvertent production or disclosure during discovery of an attorney-client privileged, work product, or other protected document or information ("Protected Material") shall not be deemed a waiver of privilege, work product, or other protection or immunity from discovery by the producing Stipulating Party. Upon notice by the producing Stipulating Party that Protected Material was produced or disclosed, all recipients of the Protected Material shall not use it (or information in it) in any litigation, not permit it to be copied, distributed or otherwise disclosed to any other person until the matter of its production or disclosure is resolved either amicably by the parties, or by order of the Commission.

18. This Agreement shall not be construed as a waiver by any Stipulating Party of objection to discovery on grounds other than the confidentiality of discovery sought.

19. Nothing in the foregoing provisions of this Agreement shall be deemed to preclude a Stipulating Party from seeking and obtaining, on an appropriate showing, additional protection with respect to the confidentiality of documents or other discovery material or relief from this Agreement with respect to particular material designated as containing "CONFIDENTIAL"; "CONFIDENTIAL - ATTORNEYS' EYES ONLY"; or "HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY" information.

20. This Agreement shall be without prejudice to the right of any Stipulating Party to have determined by motion, at any time, whether any documents or information has been improperly designated as "CONFIDENTIAL"; "CONFIDENTIAL - ATTORNEYS' EYES ONLY"; or "HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY," in which event, the Stipulating Party contesting the assertion of confidentiality shall have the burden of establishing the non-confidentiality of the documents or information.

AGREED:

THE DAYTON POWER AND LIGHT COMPANY

By: _____
Jeffrey S. Sharkey

INDUSTRIAL ENERGY USERS-OHIO

By: _____
Joseph E. Oliker

DUKE ENERGY RETAIL SALES, LLC and DUKE ENERGY COMMERCIAL ASSET MANAGEMENT, INC.

By: _____
Amy B. Spiller

THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

By: _____
Lisa McAlister

FIRSTENERGY SOLUTIONS CORP.

By: _____
James F. Lang

DUKE ENERGY OHIO, INC.

By: _____
Robert A. McMahon

OHIO ENERGY GROUP

By: _____
David F. Boehm

AEP RETAIL ENERGY PARTNERS LLC

By: _____
Jay E. Jadwin

HONDA OF AMERICA MFG., INC.

By: _____
M. Anthony Long

OHIO HOSPITAL ASSOCIATION

By: _____
Thomas J. O'Brien

OHIO PARTNERS FOR AFFORDABLE ENERGY

By: _____
Colleen L. Mooney

THE KROGER COMPANY

By: _____
Mark S. Yurick

ENERNOC, INC.

By: _____
Gregory J. Poulos

INTERSTATE GAS SUPPLY, INC.

By: _____
Mark A. Whitt

OFFICE OF THE OHIO CONSUMERS' COUNSEL

By: _____
Joseph P. Serio

610783.1

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 Motion of The Dayton Power and Light Company to Compel Industrial Energy Users-Ohio and the Office of the Ohio Consumers' Counsel to Return All Paper Copies and Destroy All Electronic Copies of Inadvertently-Produced Documents; Motion for Order Barring Those Same Parties from Using or Disclosing Information from Those Inadvertently-Produced Documents electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company