

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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**REPLY MEMORANDUM OF THE DAYTON POWER AND LIGHT COMPANY TO  
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**

The Commission should order the Office of the Ohio Consumers' Counsel ("OCC") to produce two categories of information: (1) documents relating to writings between OCC and third parties (DP&L's Request for Production of Documents No. 11); and (2) documents relating to OCC's communications with OCC's testifying experts (DP&L's Request for Production of Documents No. 13). Before DP&L filed its initial motion to compel, OCC failed to offer any reasonable justification for withholding the above-requested documents; its Memorandum Contra to Motion to Compel of the Dayton Power and Light Company by the

Office of the Ohio Consumers' Counsel ("Memorandum Contra") fares no better, and OCC should be ordered to produce the requested documents.

**II. OCC's Reliance on the Attorney-Client Privilege and Work Product Doctrine is Misplaced**

OCC initially refused to produce the requested documents based on claims that DP&L's Requests for Production of Documents Nos. 11 and 13 were overly broad, unduly burdensome, irrelevant, and protected by the attorney-client privilege and work product doctrine. DP&L's Motion to Compel, pp. 4-5, 9. In its Memorandum Contra, however, OCC appears to have abandoned most of those grounds and now relies solely on the attorney-client privilege and work product doctrine as its bases for refusing production. As shown below, neither reason holds merit and DP&L is entitled to production of the documents.

**A. OCC Should be Ordered to Produce Documents Relating to Communications Among OCC and Other Persons (Including Intervenors)**

DP&L's Request for Production of Documents No. 11 seeks: "All 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." As DP&L's counsel stated at the January 30, 2013 Hearing, DP&L does not seek the production of settlement communications. OCC claims (Memorandum Contra, pp. 6-9) that all of these documents are protected by the attorney-client privilege, but the Commission should reject OCC's argument for the following reasons. First, as OCC itself correctly points out, the attorney-client privilege protects disclosure of communications between a client and his or her attorney. OCC then

spends much time discussing waiver of the attorney-client privilege (*id.* at 7-9),<sup>1</sup> but OCC's argument misses the point. DP&L's request simply does not seek communications between OCC and its client. Rather, DP&L seeks communications between OCC and outside parties, including other intervenors, which communications are clearly not privileged. Thus, the issue is not whether there has been a waiver of the privilege, but rather whether the privilege even applies at all; DP&L submits that the privilege is not applicable to its request.

Second, OCC has not met its burden of proving that documents falling under Request No. 11 are in fact privileged.<sup>2</sup> Ohio law is clear that "the burden of showing that testimony [or documents] sought to be excluded under the doctrine of privileged attorney-client communications rests upon the party seeking to exclude [them] . . . ." Peyko v. Frederick, 25 Ohio St. 3d 164, 166, 495 N.E.2d 918, 920 (alterations in original) (internal quotation marks and citations omitted) ("blanket assertion" that documents contained privileged information, along with failure to have court conduct in camera inspection and lack of proof that the documents were privileged, meant that party failed to satisfy burden). Accord: Nageotte v. Boston Mills Brandywine Ski Resort, No. 26563, 2012 Ohio App. LEXIS 5266, at \*4 (Summit Cty. Dec. 26, 2012) ("The party seeking protection under the privilege carries the burden of establishing the existence of that privilege.") (internal quotation marks and citations omitted). OCC's "blanket assertion[s]" of privilege and work product protection in its Memorandum Contra do not suffice to establish that the documents are, in fact, privileged or protected by the work product doctrine.<sup>3</sup> At the least, the Commission should have the opportunity to review all documents that

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<sup>1</sup> DP&L agrees that Ohio Rev. Code § 2317.02 sets forth the parameters for application and waiver of the attorney-client privilege in Ohio.

<sup>2</sup> This burden of proof analysis applies to both of DP&L's requests (Nos. 11 and 13).

<sup>3</sup> Indeed, OCC agrees that the burden is on the party asserting privilege. During the January 30, 2013 Hearing, counsel for OCC stated: "We would note, your Honors, as you're well aware, the burden of proof on asserting (footnote cont'd...)"

OCC claims are privileged so that the Commission can determine whether the documents should be produced.<sup>4</sup>

Third, despite claiming that the entire request is subject to the attorney-client privilege and work product protection, OCC discusses only one narrow type of document that purportedly falls within the request -- "communications between parties regarding the joint preparation of pleadings" (Memorandum Contra, p. 6) -- when explaining why it believes the documents are privileged. OCC fails to discuss the myriad of other types of documents that fall under DP&L's request for communications among OCC and other persons or entities, such as non-privileged emails between OCC and other intervenors that do not include joint preparation of pleadings. In any event, to satisfy its burden of proving that all documents within DP&L's Request No. 11 are privileged, OCC must prove that each and every document is privileged; it cannot just halfheartedly describe one narrow type of document when claiming privilege as to a potentially vast amount of documents response to DP&L's request.

As of the filing of this Reply, OCC has not shown that the documents requested in DP&L's Request for Production of Documents No. 11 are privileged or protected by the work product doctrine, for good reason: they are not. OCC should be ordered to produce the

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(...cont'd)

privilege lies with the party asserting it, not with the party that is challenging it." January 30, 2013 Hearing Transcript, p. 123 (relevant excerpts attached as Exhibit A).

<sup>4</sup> It is unclear whether, at the January 30, 2013 Hearing, OCC provided to the Attorney Examiners a copy of all documents responsive to DP&L's Request for Production of Documents Nos. 11 and 13 but that are being withheld for privilege or work product purposes. Nothing was mentioned regarding the latter request (No. 13). As to the former, counsel for OCC stated, in relevant part: "So I have a log of the communications; I have brought that. I have brought the correspondence. Some of the attachments of the actual documents that were draft are not included, but I have a log and I can provide that." January 30, 2013 Hearing Transcript, p. 84. Counsel for OCC later stated (id. at 87) that "[w]e [OCC] have the documents here[.]" but again it is unclear whether the Attorney Examiners had an opportunity to review the requested documents.

documents, or at the least should produce the documents to the Commission for an in camera inspection.

**B. OCC Should be Ordered to Produce Documents Relating to Communications with its Testifying Expert Witnesses**

OCC's claim (Memorandum Contra, pp. 9-12) that DP&L is not entitled to documents evidencing communications between OCC and its testifying experts because they are privileged again misses the mark. Again, the issue is not one of waiver of the attorney-client privilege (*id.* at 9-10), but rather whether the privilege even attaches in the first place; it does not. For example, the Ohio Rules of Civil Procedure provide that communications between a party's attorney and its expert witness(es) expected to testify are discoverable if they (1) "relate to compensation for the expert's study or testimony," (2) "identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed," or (3) "identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed." Ohio R. Civ. P. 26(B)(5)(d) (emphasis added). OCC's claim (Memorandum Contra, p. 12) that such communications would be further protected by the work product doctrine is simply wrong.

Ohio courts reach the same conclusion, e.g., Masters v. Kraft Foods Global, Inc., No. L-11-1273, 2012 Ohio App. LEXIS 4647, at \*3-4, \*5-7 (6th Cir. Nov. 16, 2012) (rejecting claim of privilege and ordering production of memoranda submitted by expert witness to in-house counsel; such information and documents were discoverable from expert witness); Wilson v. Wilkinson, No. 2:04-cv-00918, 2006 U.S. Dist. LEXIS 32113, at \*11-17 (S.D. Ohio May 19, 2006) (holding that communications between testifying experts and the attorneys are discoverable); In re Commercial Money Ctr., Inc., Equip. Lease Litig., 248 F.R.D. 532, 536-37

(N.D. Ohio 2008) (holding that "[a] majority of courts, including the Sixth Circuit, hold that even otherwise protected work product and attorney-client communications must be disclosed if considered by the expert in forming his or her opinions").

Importantly, the determination of whether an expert has "considered" certain information is expansive. In re Commercial Money Ctr., Inc., Equip. Lease Litig., 248 F.R.D. at 537 (holding that "a testifying expert has 'considered' data or information if the expert has read or reviewed the privileged materials before or in connection with formulating his or her opinion.") (internal quotation marks and citations omitted). Accord: Evercare Co. v. 3M Co., No. 1:08 MC 42, 2008 U.S. Dist. LEXIS 117037, at \*19 (N.D. Ohio July 10, 2008) ("An expert is deemed to have considered anything received, reviewed, read, or authored by the expert, before or in connection with forming his opinion, if the subject matter relates to the facts or opinions expressed by the expert."); Ohio R. Civ. P. 26(B)(5)(d)(ii). It matters not whether the expert actually relies on the information in generating his or her conclusions, just that the expert read, and thus considered, the information. In re Commercial Money Ctr., Inc. Equip. Lease Litig., 248 F.R.D. at 537. Here, then, documents or communications from OCC to its testifying experts, even though provided by or to counsel, have been "considered" and are thus discoverable under Ohio R. Civ. P. 26(B)(5)(d).

Further, during the January 30, 2013 hearing, counsel for OCC admitted that communications with a party's testifying experts are in fact discoverable. Indeed, counsel for OCC stated that under Ohio R. Civ. P. 26(B)(5)(d), "communications between a party's attorney and any witness that's identified as an expert witness may be -- may be produced despite privilege claims if they identify facts or data that the party's attorney provided and the expert

considered in forming his opinion and that -- or that they identify assumptions that the party's attorney provided and the expert relied upon." January 30, 2013 Hearing Transcript, pp. 109-10.

Counsel for OCC later conceded (again) that communications between an attorney and testifying expert are discoverable:

"I would note again, your Honor, now we are talking about not a non-testifying witness, but a testifying witness, and under Ohio Civil Rule 26(B)(5)(d), discovery of communications between an attorney and a testifying expert are not -- are not subject to privilege if the testifying witness considers the facts and the data that the party's attorney provided, and if the testifying witness relies upon assumptions provided by the party's attorney."

January 30, 2013 Hearing, pp. 124-25.

Despite the above admissions and controlling law, OCC curiously cites as support a federal case out of the Southern District of New York (and an earlier case out of the Southern District of Ohio)<sup>5</sup> for its claim that any communications between the OCC and its experts are protected and not discoverable. However, neither case cited by OCC involved communications between an attorney and a (testifying) expert; rather, the cases involved paid consultants. Both cases are factually and legally distinguishable from the instant matter. Put differently, neither case even remotely supports OCC's argument.

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<sup>5</sup> In re Copper Mkt. Antitrust Litig., 200 F.R.D. 213 (S.D.N.Y. 2001) (involving issue of attorney-client privilege in context of PR firm working for defendant, not testifying expert witness); Baxter Travenol Labs. v. Lemay, 89 F.R.D. 410 (S.D. Ohio 1981) (involving issue of attorney-client privilege in context of litigation consultant hired by plaintiff, not testifying expert witness).

Respectfully submitted,

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I certify that a copy of the foregoing Reply Memorandum of The Dayton Power and Light Company to Memorandum Contra to Motion to Compel of The Dayton Power and Light Company by the Office of The Ohio Consumers' Counsel has been served via electronic mail upon the following counsel of record, this 14th day of February, 2013:

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# **EXHIBIT A**

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

In the Matter of the :  
Application of The Dayton :  
Power and Light Company : Case No. 12-426-EL-SS0  
for Approval of its :  
Electric Security Plan :

In the Matter of the :  
Application of the Dayton :  
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Commission Rules :

In the Matter of the :  
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Power and Light Company :  
to Establish Tariff Riders:

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PROCEEDINGS

before Mr. Gregory Price and Mr. Bryce McKenney,  
Hearing Examiners, at the Public Utilities Commission  
of Ohio, 180 East Broad Street, Room 11-A, Columbus,  
Ohio, called at 2:00 p.m. on Wednesday, January 30,  
2013

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On behalf of Wal-Mart Stores East, LP and  
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On behalf of People Working  
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On behalf of the Ohio Environmental  
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On behalf of Duke Energy Sales, LLC and  
Duke Energy Commercial Asset Management,  
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On behalf of Honda of America  
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1 APPEARANCES: (Continued)

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13 FirstEnergy Service Company  
 14 By Mr. Mark A. Hayden  
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17 On behalf of the FirstEnergy Service  
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19 Vorys, Sater, Seymour & Pease, LLP  
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25 On behalf of the Exelon Generation  
 Company, LLC, Exelon Energy Company, Inc.  
 Constellation NewEnergy, Inc.,  
 Constellation Energy Commodities Group,  
 Inc., Retail Energy Supply Association.

- - -

1 looked at these pleadings has a common interest.

2 As well as the procedural schedule, which  
3 was another pleading, everybody has a right and a  
4 common interest in a fair procedural schedule. And I  
5 believe that these parties all were in agreement that  
6 they could support a similar concept.

7 MS. YOST: Your Honor?

8 EXAMINER PRICE: Yes.

9 MS. YOST: I just want to clarify. I  
10 never indicated I didn't bring a log. I'm just not  
11 calling it a privilege log. My concerns are these  
12 may not be our documents or our privilege to release.  
13 So I have a log of the communications; I have brought  
14 that. I have brought the correspondence. Some of  
15 the attachments of the actual documents that were  
16 draft are not included, but I have a log and I can  
17 provide that.

18 I would also like to provide the Supreme  
19 Court case law that I was referring to, from 2005.  
20 May I approach the Bench and provide a copy?

21 EXAMINER PRICE: You may.

22 MS. YOST: I'll provide a copy to  
23 Mr. Sharkey, too. Paragraph 11 is what I'm referring  
24 to.

25 EXAMINER PRICE: Have you given

1 Ms. Yost address that question. Maybe she did and I  
2 missed it.

3 MS. YOST: We have the documents here.

4 EXAMINER PRICE: She has the documents.

5 MR. SHARKEY: Okay. Thank you.

6 MS. YOST: My concerns are not in regards  
7 to asserting a joint defense privilege or common  
8 interest privilege. It's just the matter of some of  
9 these documents that were provided to us are edits of  
10 attorneys and it's their attorney-client information  
11 and it's not waived by sharing it with a third person  
12 under Ohio law. That's my point. Nothing beyond  
13 that. Thank you.

14 EXAMINER PRICE: Mr. Sharkey.

15 MR. SHARKEY: Briefly, your Honor. If,  
16 for example, IEU provided, even under this argument  
17 that Ms. Yost has identified, and I need to read and  
18 research further about it, but even under that theory  
19 that means that we couldn't send a discovery request  
20 to IEU saying give us your privileged communications,  
21 but you can still stand on a privilege objection.  
22 But Ms. Yost can't assert IEU-Ohio's privilege  
23 objections.

24 EXAMINER PRICE: Do you care to respond  
25 to the case that Ms. Yost cited or is this the first

1 EXAMINER PRICE: Aren't there cases out  
2 there, though, saying that economic disparity between  
3 the parties is not good cause? The fact that they  
4 might be able to afford it and you can't, although  
5 I'm sympathetic to that, aren't there cases out there  
6 saying that is not good cause?

7 MS. GRADY: Well, your Honor, I have  
8 cases that would argue opposite, that opposite point.  
9 There very well may be cases out there, but the case  
10 authority that I am aware of and I'm prepared to cite  
11 to you is of the opposite view.

12 Secondly, your Honor, we believe that the  
13 information, it would actually be information that is  
14 discoverable under the Ohio Civil Rule of Evidence  
15 26(B)(6) -- I'm sorry, (B)(5)(d) section (i) and  
16 section (ii). Those rules were amended in 2012 to  
17 bring them into compliance with the Federal Rules of  
18 Evidence.

19 And under those rules, communications  
20 between a party's attorney and any witness that's  
21 identified as an expert witness may be -- may be  
22 produced despite privilege claims if they identify  
23 facts or data that the party's attorney provided and  
24 the expert considered in forming his opinion and that  
25 -- or that they identify assumptions that the party's

1 attorney provided and the expert relied upon.

2 There is case law, your Honors, with  
3 respect to the non-testifying expert that suggest  
4 that if the non-testifying expert provides data,  
5 information, or assumptions and inputs, and gives  
6 those to a testifying expert that that work product  
7 privilege is -- that the work product privilege no  
8 longer applies.

9 Given this reading of the rule and given  
10 the fact that parties are entitled to cross-examine,  
11 and to the extent an expert, a testifying expert  
12 relies on a non-testifying expert's work, that  
13 parties should be able to cross-examine the  
14 testifying expert as to those underlying facts and  
15 data they have relied upon and used for purposes of  
16 their testimony.

17 EXAMINER MCKENNEY: Mr. Sharkey.

18 MR. SHARKEY: Yes, your Honor. Let me  
19 start by addressing the question about the  
20 attorney-client privilege listed in the log.

21 Ms. Grady is correct that that's in  
22 error. The log lists from pages 33 to 36 in my  
23 chart. It's the work-product doctrine that we're  
24 standing on as to those objections, your Honor.

25 And, specifically, your Honor, The Dayton

1                   In Request for Production of Document 89,  
2                   we asked that DP&L provide a copy of all documents  
3                   that it has provided during 2012 and 2013 to the  
4                   three credit rating agencies, specifically with  
5                   documents that relate to the credit worthiness of the  
6                   company, its future business condition, and its  
7                   ability to repay interest and principal.

8                   We fully set forth in our motion to  
9                   compel why we believe this is reasonable. Needless  
10                  to say, Mr. Chambers, the Company's expert, testifies  
11                  for 59 pages about the importance of credit rating  
12                  agencies and also testifies as to the actions taken  
13                  by the credit rating agencies with respect to DP&L.  
14                  We are just seeking to find out what information DP&L  
15                  provided to these credit rating agencies during 2012  
16                  and 2013.

17                  We would note, your Honors, as you're  
18                  well aware, the burden of proof on asserting  
19                  privilege lies with the party asserting it, not with  
20                  the party that is challenging it. We also believe  
21                  that with respect to work product privilege that's  
22                  being claimed, there has been no showing that the  
23                  documents were produced in anticipation of litigation  
24                  which is one of the three prongs required for the  
25                  work product showing.



1           In anticipation of litigation does not  
2           mean that documents prepared through the regular  
3           business process in the ordinary course of business  
4           are protected. There is no work product immunity for  
5           these.

6           We submit, your Honor, that information  
7           that DP&L has provided to the credit rating agencies  
8           during 2012 and 2013 was information that it  
9           regularly provides to credit rating agencies and that  
10          were not documents and information created  
11          specifically in anticipation of litigation.

12          These companies, and Mr. Chambers  
13          testifies that these companies have regular  
14          interactions with the credit rating agencies, and  
15          part of the interaction with the credit rating agency  
16          is for the utility to advise the credit rating agency  
17          of the regulatory climate in the state, and that is  
18          what this information directly goes to.

19          I would note again, your Honor, now we  
20          are talking about not a non-testifying witness, but a  
21          testifying witness, and under Ohio Civil Rule  
22          26(B)(5)(d), discovery of communications between an  
23          attorney and a testifying expert are not -- are not  
24          subject to privilege if the testifying witness  
25          considers the facts and the data that the party's

1 attorney provided, and if the testifying witness  
2 relies upon assumptions provided by the party's  
3 attorney.

4 Again, these were the 2012 amendments to  
5 the Ohio Civil Rules of Procedure following the  
6 Federal Rules of Civil Procedure which amended them  
7 two years earlier.

8 I also have, your Honor, to the extent  
9 that your Honor wishes, I have a series of  
10 Sixth Circuit cases which go to that exact point  
11 which essentially was codified, if you will, in the  
12 holdings of the Sixth Circuit as well as the Federal  
13 Circuit courts. The majority of courts found that  
14 this was not work product, as well as attorney-client  
15 was not shielded, and should be produced if the  
16 witness, the testifying witness relies on the  
17 information as part of their testimony.

18 EXAMINER PRICE: Did your witness rely  
19 upon the information as part of his testimony?

20 MR. SHARKEY: No, your Honor. I believe  
21 she might be referring to -- your Honor, I'm not sure  
22 which witness she's referring to. I believe she's  
23 referring to Mr. Chambers. Mr. Chambers was not  
24 involved in any of the communications with any of  
25 these credit rating agencies.

CERTIFICATE

I do hereby certify that the foregoing is a true and correct transcript of the proceedings taken by me in this matter on Wednesday, January 30, 2013, and carefully compared with my original stenographic notes.

Carolyn M. Burke  
Carolyn M. Burke, Registered  
Professional Reporter, and  
Notary Public in and for the  
State of Ohio.

My commission expires July 17, 2013.

- - -

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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: Reply Reply Memorandum of the Dayton Power and Light Company to  
Memorandum Contra to Motion to Compel of the Dayton Power and Light Company by the  
Office of The Ohio Consumers' Counsel electronically filed by Mr. Jeffrey S Sharkey on behalf  
of The Dayton Power and Light Company