**Before**

**The Public Utilities Commission of Ohio**

In the Matter of the Application of )

The Dayton Power and Light Company for ) Case No. 16-395-EL-SSO

Approval of Its Electric Security Plan )

In the Matter of the Application of )

The Dayton Power and Light Company for ) Case No. 16-396-EL-ATA

Approval of Revised Tariffs )

In the Matter of the Application of )

The Dayton Power and Light Company for ) Case No. 16-397-EL-AAM

Approval of Certain Accounting Authority )

Pursuant to Ohio Rev. Code § 4905.13 )

**Industrial Energy Users-Ohio’s Motion to Compel Discovery Responses from The Dayton Power and Light Company and Memorandum in Support**

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Pursuant to Rule 4901-1-23, Ohio Administrative Code (“O.A.C.”), Industrial Energy Users-Ohio (“IEU-Ohio”) hereby files this Motion to Compel Discovery Responses from The Dayton Power and Light Company (“DP&L”). IEU-Ohio has served proper discovery requests upon DP&L, but has not received complete discovery responses from DP&L. The discovery requests seek the identification and production of impairment analyses related to the Stuart, Killen, Zimmer, Miami Fort, Conesville, Kyger Creek, and Clifty Creek plants that form the basis of DP&L’s requests for the Reliable Energy Rider (“RER”). The requests are therefore reasonably calculated to lead to the discovery of admissible evidence. DP&L’s objections to identifying and producing the requested documents are without merit. As detailed in the attached Memorandum in Support, affidavit and exhibits, IEU-Ohio has attempted in good faith to resolve DP&L’s failure to provide complete discovery responses but those efforts have failed.

Accordingly, IEU-Ohio moves the Public Utilities Commission of Ohio (“Commission”) for an order compelling DP&L to provide the requested impairment analyses sought in IEU-Ohio’s discovery requests. Recognizing the Commission’s standard practice for resolving claims of privilege, IEU-Ohio would request that the Commission timely set this matter for a prehearing conference and direct DP&L to produce a privilege log to IEU-Ohio at least three days in advance of the prehearing and to further direct DP&L to bring the documents that it is claiming are privileged to the prehearing conference for an *in camera* review by the Attorney Examiners.

Respectfully submitted,

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**Memorandum in Support**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

On May 31, 2016, IEU-Ohio served its Fourth Set of Interrogatories (“IEU-Ohio’s Fourth Set”) upon DP&L (Attachment A). On June 16, 2016, DP&L requested an extension of time, which IEU-Ohio agreed to. However, DP&L’s responses to IEU‑Ohio’s Fourth Set (Attachment B) were incomplete, specifically DP&L’s response to IEU-Ohio INT 4-19 and RPD 4-1. These two discovery requests asked DP&L to identify and produce copies of any “impairment analysis conducted in the past 10 years relating to the Conesville, Killen, Miami Fort, Stuart, Zimmer, Kyger Creek, or Clifty Creek plants.”[[1]](#footnote-1)

DP&L did not identify or produce any impairment analyses related to these plants. Public documents filed by DP&L acknowledge that it has conducted (or caused to be conducted) such analyses.[[2]](#footnote-2) Through its attempt to informally resolve the discovery dispute, IEU-Ohio was also informed by counsel for DP&L that responsive documents do in fact exist.

Instead of identifying and producing all of the impairment analyses (including those which it has publicly acknowledged exist), DP&L provided six general objections and one specific objection. The six general objections were: “relevance,” “unduly burdensome,” “privileged and work product,” “proprietary,” “inspection of business records,” and “unregulated affiliates.”[[3]](#footnote-3) DP&L’s specific objection was that “DP&L objects to producing documents that were prepared by and are in the custody of DP&L’s unregulated affiliates.”[[4]](#footnote-4)

On August 9, 2016, counsel for IEU-Ohio notified DP&L of the deficiencies, and on August 25, 2016 met with counsel for DP&L to discuss the deficiencies.[[5]](#footnote-5) After discussions with counsel for DP&L, DP&L agreed to waive its “unduly burdensome,” and “inspection of business records” general objections to IEU-Ohio INT 4-19 and RPD 4-1.

As demonstrated below, IEU-Ohio’s discovery requests are proper and DP&L’s remaining objections to providing the requested information are meritless. IEU-Ohio has attempted in good faith to resolve the issue with DP&L but has been unsuccessful. Accordingly, IEU-Ohio seeks an order from the Commission compelling DP&L to identify and produce the impairment analyses sought in IEU-Ohio INT 4-19 and RPD 4-1.

# DISCOVERY STANDARDS

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

any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may be obtained through interrogatories, requests for the production of documents and things or permission to enter upon land or other property, depositions, and requests for admission.

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

Subject to the scope of discovery set forth in rule 4901-1-16 of the Administrative Code, interrogatories may elicit facts, data, or other information known or readily available to the party upon whom the interrogatories are served. An interrogatory which is otherwise proper is not objectionable merely because it calls for an opinion, contention, or legal conclusion ….

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

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

(1) Any failure of a party to answer an interrogatory served under rule 4901-1-19 of the Administrative Code.

(2) Any failure of a party to produce a document or tangible thing or permit entry upon land or other property as requested under rule 4901-1-20 of the Administrative Code.

(3) Any failure of a deponent to appear or to answer a question propounded under rule 4901-1-21 of the Administrative Code.

(4) Any other failure to answer or respond to a discovery request made under rules 4901-1-19 to 4901-1-22 of the Administrative Code.

The Rule also treats evasive answers as a failure to answer.[[6]](#footnote-6) Finally, before the Commission allows a motion to compel to be filed, the party seeking discovery must exhaust all other reasonable means of obtaining discovery.

# ARGUMENT

## IEU-Ohio’s discovery requests seek information that is reasonably calculated to lead to the discovery of admissible evidence; therefore DP&L’s relevancy objection is without merit

DP&L’s proposed electric security plan (“ESP”) includes a request for a new nonbypassable rider, the RER. The RER is designed to ensure that DPL Inc. receives a return of and return on the ownership of DP&L’s legacy coal generating plants. These plants include Stuart, Zimmer, Conesville, Miami Fort, Killen, Kyger Creek, and Clifty Creek (collectively, “RER plants”). DP&L witness Malinak provides the formula for calculating the projected annual RER revenue requirements in Exhibit RJM-9 attached to his prefiled direct testimony.

As detailed in this exhibit, Mr. Malinak first calculates the necessary annual revenue to recover DP&L’s investment in the generating plants and produce DP&L’s desired return on its investment.[[7]](#footnote-7) Mr. Malinak labels this return on and of its investment as Required Operating Revenue (Line 18), which equals the sum of the annual Fuel Related Costs, Including Emission Costs (Line 9), Direct O&M Expense (Line 10), Indirect O&M Expense (Line 11), General Taxes (Line 12), Depreciation (Line 13), Imputed Debt Expense (Line 15), Income Taxes (Line 16) and Cost of Equity (Line 17).[[8]](#footnote-8)

Mr. Malinak next calculates the projected annual market revenue, labeled Projected Operating Revenue (Line 22), for the generating plants. The annual Projected Operating Revenue includes projected Energy, Ancillary and Other Revenue (Line 19), Capacity Revenue (Line 20) and Less Capacity Penalties (net of bonuses) (Line 21).[[9]](#footnote-9)

Finally, Mr. Malinak subtracts the annual Projected Operating Revenue (Line 22) from the annual Required Operating Revenue (Line 18) to arrive at an annual revenue requirement for the RER (Line 23).[[10]](#footnote-10)

As this math indicates, the annual depreciation expense (Line 13) and the annual market revenue the generating plants are expected to receive have a role in determining the projected RER revenue requirements.

Subsequent to filing Mr. Malinak’s testimony, DP&L took an impairment charge of $857.1 million to the net book value of the Stuart, Killen, and Zimmer generating plants it has recorded on its books.[[11]](#footnote-11) DPL Inc. also took a separate impairment charge of $230.8 million to the net book value of the Killen generating plant that it had recorded on its books.[[12]](#footnote-12) These impairment charges were reported to the Securities and Exchange Commission (“SEC”) in the SEC Form 10-Q filed on June 30, 2016. In the Form 10-Q, DPL Inc. and DP&L indicated that the impairment charges they each took were based on a discounted cash flow (“DCF”) analysis.[[13]](#footnote-13) Based on this DCF analysis, DPL Inc. and DP&L reported projected revenue growth ranges from a low of -14% to maximum of +13% across the Stuart, Killen, and Zimmer generating plants.[[14]](#footnote-14) DPL Inc. and DP&L further add in the Form 10-Q that their respective impairment charges are based on lower than previously projected capacity revenue and greater than previously projected environmental compliance costs.[[15]](#footnote-15)

As noted in the SEC Form 10-Q, the impairment analyses include projections of market revenue. Although not explicit in the SEC Form 10-Q, the projected market revenue under the impairment analysis is for the remaining life of the plants, which DP&L has identified as extending beyond the 10-year term of the RER. Thus, it is expected that the recent impairment analysis will contain DP&L’s recent forecast of market prices for the term of the proposed RER. Based on experience, IEU-Ohio reasonably expects that the impairment analysis will contain projections of market price, generation dispatch, and revenue for the plants as well as information related to projected market revenue from a sale of the assets. Market prices, generation dispatch, and fuel prices are essential assumptions that drive the RER calculation, and projected revenue from a sale impacts DP&L’s claimed need for the nonbypassable RER subsidy for the RER plants. Thus, IEU-Ohio’s request for the impairment analysis referenced in the June 30, 2016 Form 10-Q filed by DP&L and DPL Inc. at the SEC is reasonably calculated to lead to the discovery of admissible evidence.

Moreover, prior projections of the market revenue (including the market price and cost of fuel) and generation dispatch of these generating plants may also shed light on the consistency and reliability of the projections embedded in DP&L’s Rider RER calculation and that underlie DP&L’s claimed need for the RER.

Accordingly, IEU-Ohio’s request that DP&L identify and produce the impairment analyses conducted over the past 10 years (the same 10-year duration as the proposed RER) associated with the generating plants proposed for inclusion in the RER is reasonably calculated to lead to the discovery of admissible evidence.

## Claims of confidential trade secrets and purported non-disclosure clauses do not make documents non-discoverable; therefore DP&L’s proprietary objection is without merit

DP&L objects to IEU-Ohio INT 4-19 and RPD 4-1 on grounds that the information is “proprietary, competitively sensitive or valuable, or constitutes trade secrets.”[[16]](#footnote-16) Initially, IEU-Ohio would note that it has entered into a protective agreement with DP&L and would treat any documents identified by DP&L as confidential in accordance with that protective agreement. Additionally, after discussing the objection with counsel for DP&L, DP&L clarified that it only objects to producing a subset of the responsive documents it informally acknowledged exist. Specifically, counsel for DP&L indicated that some of the informally identified responsive documents were prepared by a third party, Deloitte, and that the contractual agreement with Deloitte prohibits the disclosure of responsive information.

While parties may enter into contracts with confidentiality clauses, such clauses may not validly impair a party’s right to discovery. *Svoboda v. Clear Channel Communs. Inc.*, 2003-Ohio-6201, 2003 Ohio App. LEXIS 5563 (Ohio Ct. App. 6th Dist.). In *Svoboda,* the defendant refused to produce employee contracts on grounds that the contract was a trade secret and contained a clause prohibiting its disclosure.[[17]](#footnote-17) Over the defendant’s objection, the contract was ordered to be compelled subject to a protective order.[[18]](#footnote-18) Affirming the trial court, the Sixth District Court of Appeals explained that “[e]ven if the information were a trade secret, it is not absolutely privileged. *Civ.R. 26(C)* clearly contemplates the discoverability of trade secrets and expressly provides that trade secrets may be disclosed with an appropriate protective order.”[[19]](#footnote-19)

Although implicit in *Svoboda,* other Ohio courts have expressly overturned confidentiality clauses where they were contrary to Ohio law. *Teodecki v. Litchfield Twp.*, 2015-Ohio-2309, 38 N.E.3d 355 (Ohio Ct. App. 9th Dist). In *Teodecki,* the court found that the confidentiality agreement between Mrs. Teodecki and Litchfield Township violated Ohio’s Public Records Act and was therefore void *ab initio*.[[20]](#footnote-20) Acknowledging the importance of the right to enter into contracts, the Ninth District Court of Appeals explained that “it is well-settled that a valid contract cannot be made if its purpose or performance is contrary to statute.”[[21]](#footnote-21) “Similarly, the Ninth District Court of Appeals held that a contract may be void if it violates public policy.”[[22]](#footnote-22)

Based on the Commission’s rules and practice, the Deloitte documents are discoverable. Like Civ.R. 26(C), the Commission’s rules clearly contemplate the discoverability of trade secrets subject to a protective order. Rule 4901-1-24(A)(7), O.A.C. And under the structure provided by the rule, parties in countless Commission proceedings, including DP&L in this proceeding, have produced documents identified as confidential trade secrets under agreed-upon protective orders. There is nothing unique about the Deloitte documents to distinguish them from the countless other documents containing claimed confidential trade secrets that are produced in discovery.

Furthermore, any restriction in the Deloitte documents designed to interfere with parties’ proper discovery rights would be void. As noted above, contracts that frustrate public policy are void.[[23]](#footnote-23) As explained by the Ohio Supreme Court:

The text of Ohio Adm.Code 4901-1-16(B), the commission's discovery rule, is similar to Civ.R. 26(B)(1), which governs the scope of discovery in civil cases. Civ.R. 26(B) has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding.[[24]](#footnote-24)

Here, IEU-Ohio has a right to seek discovery of the relevant Deloitte documents which are in DP&L’s possession or control and which are not privileged.

Finally, although IEU-Ohio has not seen the contract with Deloitte, IEU-Ohio would not be surprised if the contract created an exception in circumstances where a party has been compelled by a court of competent jurisdiction to produce documents. Such a clause, for example, exists in IEU-Ohio’s protective with DP&L in this case and is a standard provision of the protective agreements in other Commission proceedings.

In sum, the Commission’s rules allow for the discovery of confidential trade secrets under a protective order. IEU-Ohio has agreed with DP&L upon such a protective order. Furthermore, to the extent that the Deloitte documents do not contain a provision allowing them to be turned over pursuant to an order from the Commission, the clause prohibiting the documents disclosure is void as contrary to public policy.

## The requested documents are discoverable as they are within DP&L’s possession, custody, or control; therefore DP&L’s unregulated affiliate objection is without merit

DP&L also objected to identifying or producing any of the impairment analyses on grounds that the impairment analyses were prepared by and are in the possession of DP&L’s unregulated affiliate. Initially, DP&L’s objection misstates the correct standard for discovery under both the Ohio Rules of Civil Procedure and the Commission’s rules. Moreover, after discussions with DP&L’s counsel, it is IEU-Ohio’s understanding that the basis for the objection is not that the documents are DPL Inc. documents, but rather AES Corporation (“AES”) documents. Regardless of this clarification, the information IEU-Ohio seeks is discoverable.

The Ohio Rules of Civil Procedure and the Commission’s rules both support IEU-Ohio’s right to the impairment analyses sought in IEU-Ohio INT 4-19 and RPD 4-1. Both the Ohio Rules of Civil Procedure and Rule 4901-1-20(A)(1), O.A.C., permit a party to seek another party to produce any documents which are in the “possession, custody, or control of the party upon whom the request is served.”[[25]](#footnote-25) As described in Anderson’s treatise on the Ohio Rules of Civil Procedure:

The documents or things [sought through the request for production] must be in the possession, custody, or control of the party. The key word is control and the important consideration is whether the party has access to the document or thing. Control is defined not only as possession but as the legal right to obtain a document requested upon demand.[[26]](#footnote-26)

Thus, if DP&L either has physical possession or custody of the impairment analyses or may obtain the analyses upon request, they are discoverable.[[27]](#footnote-27)

Based on DP&L’s objections as well as discussions with DP&L’s counsel, it is IEU-Ohio’s understanding that DP&L has possession, custody, or control of the impairment analyses. Counsel for DP&L implied, if not acknowledged, that at least one DP&L employee and witness in this proceeding (*i.e.* Craig Jackson) does in fact have access to the impairment analyses.

Furthermore, because DP&L’s counsel has asserted that the requested documents contain information that is protected by the attorney-client privilege and work product doctrine, IEU-Ohio assumes that DP&L produced the documents to DP&L’s counsel in order for counsel to review the documents and make the privilege claims contained in DP&L’s discovery responses.

Finally, although DP&L has asserted that its unregulated affiliates are not subject to discovery, it has voluntarily produced DPL Inc. documents in response to discovery requests. At the June 25, 2016 meeting between counsel for DP&L and IEU-Ohio, counsel for DP&L acknowledged that DP&L was producing DPL Inc. documents and conceded that DP&L’s application had put in play DPL Inc. documents and information. Thus, under even DP&L’s limited (and incorrect) theory of the proper scope of discovery, if the impairment analyses are either DP&L or DPL Inc. documents they should be produced.

At least some of the responsive documents are plainly DP&L and DPL Inc. documents. On at least two occasions, DP&L and DPL Inc. have conducted impairment analyses related to the RER generating plants and incorporated those results into filings the companies made at the SEC.[[28]](#footnote-28) Thus, DP&L attempt to limit the scope of discoverable documents to only DP&L and DPL Inc. documents does not shield DP&L from producing all of the responsive impairment analyses.

Accordingly, the impairment analyses should be turned over because they are in DP&L’s possession, custody, or control.

## The requested documents are required in the ordinary course of business; therefore DP&L’s attorney-client privilege and work product objections are without merit

As its final objection to IEU-Ohio INT 4-19 and RPD 4-1, DP&L claims that the impairment analyses are protected by the attorney-client privilege and work product doctrine. The documents IEU-Ohio seeks are, however, required in the ordinary course of business by accounting rules (Financial Accounting Standards Board “FASB” Accounting Standards Codification “ASC” 360). Because the documents IEU-Ohio seeks in discovery are unrelated to the rendition of legal advice and were not prepared in anticipation of litigation, the documents are not privileged and may be discovered.

“The attorney-client privilege exempts from discovery certain communications between attorneys and their clients in the course of seeking or rendering legal advice.”[[29]](#footnote-29) The privilege “is founded on the premise that confidences shared in the attorney-client relationship are to remain confidential”[[30]](#footnote-30) and its purpose “is ‘to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.’”[[31]](#footnote-31)

Under the attorney-client privilege, "(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived."[[32]](#footnote-32)

Further, for investigative facts and documents to be covered by the attorney-client privilege, “the relevant question is ... whether [the] investigation was ‘related to the rendition of legal services’”[[33]](#footnote-33) and requires “the client for whom the investigation was conducted [to] show that other *legal* advice or assistance was sought and that the investigation conducted was integral to that assistance.”[[34]](#footnote-34)

The work product doctrine also offers a qualified protection against the discovery of documents prepared in preparation of litigation.[[35]](#footnote-35) Civ. R. 26(B)(3) sets forth the work product doctrine as it applies in civil cases:  “a party may obtain discovery of documents, electronically stored information 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 ... only upon a showing of good cause therefor.” “Through work-product jurisprudence ... two distinct categories of work product have been identified: ordinary fact work product and opinion work product.”[[36]](#footnote-36)

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

The other type of work product is ‘opinion work product,’ which reflects the attorney's mental impressions, opinions, conclusions, judgments, or legal theories.[[37]](#footnote-37)

The Commission has also distinguished between discovery seeking a lawyer’s legal advice and discovery requests seeking the underlying facts at issue in the litigation. The Commission has held that conversations between counsel and a utility’s employees and the associated “notes, correspondence, and email created in anticipation of litigation … would ordinarily be protected … under attorney-client privilege and attorney work product doctrines.”[[38]](#footnote-38) The Commission, however, distinguished these types of communications from those not protected under either attorney-client privilege or under the work product doctrine.[[39]](#footnote-39) The latter unprotected category includes documents related to the litigation produced by utility employees to, among other things, verify the accuracy of events alleged in the lawsuit.[[40]](#footnote-40)

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

Turning first to waiver, Ohio courts have held that “a client’s voluntary disclosure of confidential communications is inconsistent with an assertion of the privilege,” and therefore “voluntary disclosure of privileged communications to a third party waives a claim of privilege with regard to communications on the same subject matter.”[[41]](#footnote-41) This rule “applies to disclosure of materials covered by an attorney-client privilege and to disclosure of materials which are protected by the work product doctrine.”[[42]](#footnote-42)

Discovery of work product is also proper upon a showing of good cause. As explained by the Ohio Supreme Court, “a showing of good cause under Civ.R. 26(B)(3) requires demonstration of need for the materials— i.e., a showing that the materials, or the information they contain, are relevant and otherwise unavailable.”[[43]](#footnote-43) The party seeking discovery bears the burden to demonstrate good cause for discovery of work product.[[44]](#footnote-44)

As noted above, the impairment analyses are required by accounting rule ASC 360. By definition, the documents are required and produced in the ordinary course of business and do not fall under the category of legal advice given by a lawyer in his capacity as a legal advisor to a client. Thus, the documents in their entirety are not protected by the attorney-client privilege.[[45]](#footnote-45) Similarly, because the documents are produced in the ordinary course of business, they are not documents produced in anticipation of litigation and therefore do not qualify as attorney work product.

Even if some aspect of the impairment analyses were protected by the attorney-client privilege and work product doctrines, such claims have been waived by DP&L. Specifically, DP&L has put in play projected market prices, the projected revenue of the RER plants, and DP&L’s and DPL Inc.’s future cash flows by the filing of the ESP application. Thus, any claim of privilege or work product as to any projection of market prices, projected revenue of the RER plants, or DP&L’s and DPL Inc.’s future cash flows (*e.g.* projected future cash flow through the sale of the generating plants) has been waived.

Accordingly, because the impairment analyses are required and produced in the ordinary course of business, there is nothing inherent about the documents that would give any rise to a claim of attorney-client privilege or work product. Therefore, IEU-Ohio believes that DP&L’s privilege objections are without merit.

# conclusion

IEU-Ohio has served DP&L with proper discovery requests asking DP&L to identify and produce impairment analyses related to the RER plants that may shed light on the validity of the information contained in DP&L’s application and prefiled testimony. DP&L has refused to identify or produce any of the requested documents but has acknowledged that responsive documents exist. Because DP&L’s objections are without merit, the Commission should grant this motion to compel. Recognizing the Commission’s standard practice for resolving claims of privilege, IEU-Ohio would request that the Commission timely set this matter for a prehearing conference and direct DP&L to produce a privilege log to IEU-Ohio at least three days in advance of the prehearing and to further direct DP&L to bring the documents that it is claiming are privileged to the prehearing conference for an *in camera* review by the Attorney Examiners.

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**Attachment A**

**Attachment provided in PDF version of filing**

**Attachment B**

**Attachment provided in PDF version of filing**

**Attachment C**

**Attachment provided in PDF version of filing**

**Attachment D**

**Attachment provided in PDF version of filing**

**Certificate of Service**

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e‑filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Industrial Energy Users-Ohio’s Motion to Compel Discovery Responses from The Dayton Power and Light Company and Memorandum in Support* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 30th day of August 2016, *via* electronic transmission.

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1. Attachment A at 11, 13. [↑](#footnote-ref-1)
2. DP&L SEC Form 8-K at 3 (Oct. 31, 2012) (identifying that DP&L took an impairment of $80.8 million related to the Conesville and Hutchings generating plants), available at: <https://www.sec.gov/Archives/edgar/data/874761/000119312512446900/d431640d8k.htm>; DPL Inc./DP&L SEC Form 10-Q at 51, 61 (June 30, 2016) (identifying that DP&L took an impairment of $857 million related to the Stuart, Killen, and Zimmer generating plants), available at: <https://www.sec.gov/Archives/edgar/data/27430/000078725016000053/dpl10q20160630q2.htm>. [↑](#footnote-ref-2)
3. Attachment B at 23. [↑](#footnote-ref-3)
4. *Id.* [↑](#footnote-ref-4)
5. An affidavit of counsel setting forth the good faith efforts to informally resolve the discovery dispute is attached hereto as Attachment C. Correspondence between counsel for IEU-Ohio and DP&L detailing IEU-Ohio’s good faith efforts to informally resolve the discovery dispute is attached hereto as Attachment D. [↑](#footnote-ref-5)
6. Rule 4901-1-23(B), O.A.C. [↑](#footnote-ref-6)
7. Direct Testimony of R. Jeffrey Malinak at Exhibit RJM-9 (Feb. 22, 2016). The rate of return assumes a 50/50 debt to equity ratio with a cost of debt of 5.29% and a return on equity of 10.7%. *Id.* [↑](#footnote-ref-7)
8. *Id.* [↑](#footnote-ref-8)
9. *Id.* [↑](#footnote-ref-9)
10. *Id.* [↑](#footnote-ref-10)
11. DPL Inc./DP&L SEC Form 10-Q at 61 (June 30, 2016). DP&L has also previously taken in impairment charge for the full value of the Conesville generating plant recorded on DP&L’s books. DPL Inc./DP&L SEC Form 8-K at 3 (Oct. 31, 2012). The impairment analysis is the product of accounting requirements. If an entity believes that there are indicators present that might result in the inability to recover a long-lived asset’s book value, it must perform an impairment analysis. The first step is to compare projected undiscounted cash flows against the book value. If the undiscounted cash flows are less than the book value, then an impairment loss must be calculated. The impairment loss is calculated using methods that market participants would utilize to value the asset and could include a projected sale price or a discounted cash flow analysis. In its recent June 30, 2016 SEC Form 10-Q filing, DP&L and DPL Inc. indicated that they relied on a discounted cash flow analysis to estimate the impairment loss for the Stuart, Killin, and Zimmer plants. *Id.* at 22, 51. [↑](#footnote-ref-11)
12. DPL Inc./DP&L SEC Form 10-Q at 37 (June 30, 2016). DP&L has also made other public SEC filings acknowledging other impairments to the generating plants proposed for inclusion in the RER. DPL Inc./DP&L SEC Form 8-K (Oct 31, 2012). [↑](#footnote-ref-12)
13. DPL Inc./DP&L SEC Form 10-Q at 22, 51 (June 30, 2016). [↑](#footnote-ref-13)
14. *Id.* The ranges for each generating plant were: Stuart -9% to +10%; Killen -11% to +13%; Zimmer -14% to +13%. *Id.* at 51. [↑](#footnote-ref-14)
15. *Id.* at 37, 61. [↑](#footnote-ref-15)
16. Attachment B at 2. [↑](#footnote-ref-16)
17. *Svoboda*, 2003-Ohio-6201 at ¶17. [↑](#footnote-ref-17)
18. *Id.* at ¶ 4-5, 44. [↑](#footnote-ref-18)
19. *Id.* at ¶19. [↑](#footnote-ref-19)
20. *Teodecki*, 2015-Ohio-2309 at ¶ 25. [↑](#footnote-ref-20)
21. *Id.* at ¶ 22 (*citing Bell v. N. Ohio Tel. Co.* 149 Ohio St. 157, 158 (1948)). [↑](#footnote-ref-21)
22. *Id.* [↑](#footnote-ref-22)
23. *Teodecki*, 2015-Ohio-2309, at ¶ 22. [↑](#footnote-ref-23)
24. *Ohio Consumers' Counsel v. PUC*, 111 Ohio St.3d 300, 2006-Ohio-5789, at ¶ 83. [↑](#footnote-ref-24)
25. Civ.R. 34(A)(1); Rule 4901-1-20(A)(1), O.A.C. [↑](#footnote-ref-25)
26. Anderson’s Ohio Civil Rules Practice with Forms (2015) (*citing* Searock v. Stripling, 736 F.2d 650 (11th Cir. 1984); Moore’s Federal Practice—Civil § 34.14[2]). [↑](#footnote-ref-26)
27. The Commission in the past has required parties to produce information and documents in the possession of an affiliate that the party had access to. *In the Matter of the Complaint of The Manchester Group, LLC v. Columbia Gas of Ohio, Inc.*, Case No. 08-360-GA-CSS, Entry at 2 (Oct. 2, 2009) (granting the motion to compel “to the extent Columbia has access” to the relevant information sought in discovery). R.C. 4928.145 further also makes clear that just because a document is in an affiliate’s possession does not make the document beyond the scope of discovery. That statute provides that an electric distribution utility (“EDU”) must “make available to the requesting party every contract or agreement that is between the utility *or any of its affiliates* and a party to the proceeding, consumer, electric services company, or political subdivision and that is relevant to the proceeding, subject to such protection for proprietary or confidential information as is determined appropriate by the public utilities commission.” (emphasis added). [↑](#footnote-ref-27)
28. DP&L SEC Form 8-K at 3 (Oct. 31, 2012) (identifying that DP&L took an impairment of $80.8 million related to the Conesville and Hutchings generating plants); DPL Inc./DP&L SEC 10-Q at 51, 61 (identifying that DP&L took an impairment of $857 million related to the Stuart, Killen, and Zimmer generating plants). [↑](#footnote-ref-28)
29. *Sutton v. Stevens Painton Corp.*, 193 Ohio App.3d, 68, 951 N.E.2d 91, 2011-Ohio-841 at ¶ 15 (*citing Boone v. Vanliner Ins. Co.*, 91 Ohio St.3d 209, 210, 744 N.E. 2d 154 (2001)). [↑](#footnote-ref-29)
30. *Sutton*, 2011-Ohio-841 at ¶ 16 (*quoting Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 660, 635 N.E.2d 331 (1994)). [↑](#footnote-ref-30)
31. *Sutton*, 2011-Ohio-841 at ¶ 16 (*quoting Upjohn v. U.S.*, 449 U.S. 383, 389 (1981)). [↑](#footnote-ref-31)
32. *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2006-Ohio-1508, at ¶ 21 (*quoting Reed v. Baxter*, 134 F.3d 351, 355-56 (6th Cir. 1998)). [↑](#footnote-ref-32)
33. *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Authority*, 121 Ohio St.3d 537, 2009-Ohio-1767, at ¶ 27 (*quoting In re Allen*, 106 F.3d 582, 602 (4th Cir. 1997)). [↑](#footnote-ref-33)
34. *Toledo Blade*, 2009-Ohio-1767, at ¶ 28 (emphasis in original). [↑](#footnote-ref-34)
35. *Squire Sanders & Dempsey v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, at ¶ 55; 23 Am. Jur. 2d § 45. [↑](#footnote-ref-35)
36. *Estate of Hohler v. Hohler*,197 Ohio App.3d 237, 2011-Ohio-5469, 967 N.E.2d 219, ¶ 28 (7th Dist.). [↑](#footnote-ref-36)
37. *Hohler*,2011-Ohio-5469, at ¶¶ 29-30. [↑](#footnote-ref-37)
38. *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of The East Oho Gas Company d.b.a Dominion East Ohio and Related Matters*, Case No. 05‑219‑GA‑GCR, Entry at 7 (July 28, 2006). [↑](#footnote-ref-38)
39. *Id.* [↑](#footnote-ref-39)
40. *Id.* [↑](#footnote-ref-40)
41. MA Equip. Leasing I, LLC v. Tilton, 980 N.E.2d 1072, 2012 Ohio App. LEXIS 4102, 2012‑Ohio‑468, *at* ¶ 20; *Mid-American Natl. Bank and Trust Co. v. Cincinnati Ins. Co.*, 74 Ohio App.3d 481, 599 N.E.2d 699, 704 (6th Dist. 1991) (*citing Hercules Inc. v. Exxon Corp.*, 434 F.Supp 136, 156 (D. Del. 1977)). [↑](#footnote-ref-41)
42. *Mid-American*, 599 N.E.2d at 704 (*citing Hercules Inc. v. Exxon Corp.*, 434 F.Supp 136, 156 (D. Del. 1977)). [↑](#footnote-ref-42)
43. *Squire Sanders,* 2010-Ohio-4469, at ¶ 57. [↑](#footnote-ref-43)
44. *Id.* [↑](#footnote-ref-44)
45. IEU-Ohio offers the caveat about the entirety of the documents not being privileged based upon the assertion by counsel for DP&L that some of the documents might contain summaries or other write-ups identifying counsel’s expectation about certain issues. That being said, market price forecasts and projected sale prices are not advice given by legal counsel in their role as a legal advisor to a client and are therefore certainly not protected by any claim of attorney-client privilege. Without the benefit of seeing the documents, IEU-Ohio will rely on the Commission’s in camera review to determine if statements outside of the projected market values and sale prices in the responsive documents may reflect legal advice. [↑](#footnote-ref-45)