

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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**THE DAYTON POWER AND LIGHT COMPANY'S MEMORANDUM  
IN OPPOSITION TO IEU-OHIO'S MOTION TO COMPEL**

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**I. INTRODUCTION**

The Commission should deny IEU's Motion to Compel because most of the requested information has already been produced and IEU's requests for the other information is baseless. Indeed, when IEU filed its Motion to Compel, DP&L had already promised to produce most of the requested information to IEU; IEU thus knew that it was going to be receiving the requested information when it filed its motion. In addition, the Commission should conclude that DP&L has not been dilatory in complying with its discovery obligations; as demonstrated below, DP&L's short delays in serving discovery responses were due to work that DP&L needed to perform to correct the error in its ESP Application.

## II. BACKGROUND

A short timeline will assist the Commission to understand the background leading to IEU's Motion to Compel:

<u>Date</u>	<u>Description</u>
October 5, 2012	-- DP&L filed its ESP Application
November 29, 2012	-- DP&L discovered error in its ESP Application that required changes to ESP Application. DP&L employees began working around the clock to correct the error, determine whether there were additional errors, and make a revised filing
November 30, 2012	-- DP&L responds to IEU's Second Set of discovery requests. Due to the fact that DP&L employees are working around the clock to correct the errors and make a new filing, DP&L is unable to answer several IEU interrogatories; DP&L stated in its response to IEU that it will supplement those responses
December 3, 2012	-- Jeff Sharkey (counsel for DP&L) and Joe Olier (counsel for IEU) have telephone conversation. Mr. Sharkey explains the existence of the error in DP&L's filing, and that DP&L will supplement its discovery responses promptly after DP&L files its Second Revised Application
December 5, 2012	-- DP&L sent email to all parties explaining that there was an error in its filing, and that DP&L will update its discovery responses once the Second Revised Application is filed (copy attached at Ex. 1)
December 12, 2012	-- Second Revised Application filed
December 17, 2012	-- IEU sends email to DP&L renewing a prior IEU threat to file a motion to compel if DP&L does not supplement its responses.
December 17, 2012	-- DP&L tells IEU that it plans to supplement its responses on December 18, 2012 (the next day) (copy attached at Ex. 2)
December 18, 2012	-- IEU files its motion to compel
December 18, 2012	-- DP&L supplements its responses to IEU's discovery requests
December 20, 2012	-- IEU asks DP&L to provide additional information relating to DP&L's supplemental responses

**Date**

**Description**

December 27, 2012 -- DP&L provides supplemental information to IEU

The timeline establishes two critical points.

First, DP&L has not been dilatory in its responses. DP&L made a mistake in its filing, and it was reasonable for DP&L to dedicate all of its available personnel to correcting that error, determining whether there were other errors, and then revising the necessary schedules and testimony to file its Second Revised ESP Application. Once the Second Revised ESP Application was filed, DP&L immediately began working to update its discovery responses and it completed that work promptly. Further, between November 29, 2012 (the date the error was discovered) and the date of this filing, DP&L has responded to 16 sets of discovery requests from various parties that included a total of 313 interrogatories and 94 requests for production.

Second, IEU filed its motion to compel on December 18, 2012, despite the fact that it knew that DP&L was going to be supplementing its responses that same day.

**III. THE COMMISSION SHOULD DENY IEU'S MOTION TO COMPEL**

IEU states (p. 9) that its Motion to Compel seeks five categories of information; as demonstrated below, the motion actually seeks seven categories. As also demonstrated below, IEU's Motion to Compel as to four categories (1, 2, 3 and 7) is moot, and its Motion to Compel as to three categories (4, 5 and 6) is meritless.

1. Category 1 -- Total Company ROE: IEU's Motion to Compel sought (pp. 9-10) a response to INT 2-10; however, IEU withdrew that aspect of the Motion in a December 26, 2012 letter to the Commission.

2. Category 2 -- Wholesale Revenue (IEU INT 2-4(D), INT 2-5(D)).<sup>1</sup>

INT 1-27, INT 1-29, INT 1-34, RFA 1-6, RFA 1-12, RFA 1-25<sup>2</sup>: IEU states (p. 10) that it seeks information relating to DP&L's wholesale revenues. DP&L permitted IEU to inspect documents that contained that information on December 17, 2012, and provided copies of those documents to IEU on December 19, 2012. In a December 20, 2012 email, IEU stated that it wanted certain additional information relating to DP&L's response to INT 2-4(D) and 2-5(D); that information was served on IEU on December 27, 2012. DP&L has thus complied with IEU's requests. (IEU's Motion to Compel sought (pp. 9-10) a response to INT 2-4(E), INT 2-4(F), INT 2-5(E), INT 2-5(F), INT 2-5(G); however, IEU withdrew that aspect of the Motion in a December 26, 2012 letter to the Commission.)

3. Category 3 -- Financial Information Segregated by Business Function

(IEU INT 1-23, INT 2-12): IEU states (p. 10) that it seeks financial information segregated by business function. All of the information that DP&L possesses was provided to IEU on December 18, 2012. (IEU's Motion to Compel sought (pp. 9-10) a response to INT 2-4(C), INT 2-8, INT 2-9, INT 2-11, INT 2-13, INT 2-14, INT 2-15; however, IEU withdrew that aspect of the Motion in a December 26, 2012 letter to the Commission.)

4. Category 4 -- the SSR (IEU INT 1-13): IEU states (p. 11) that it seeks

information relating to DP&L's proposed Service Stability Rider. In that interrogatory, IEU asks DP&L to answer "how the SSR will ensure customer certainty regarding electric service" and "how the SSR will promote stable retail electric prices." IEU INT 1-13. In its responses to those

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<sup>1</sup> IEU's Motion does not list IEU INT 2-4(D), INT 2-5(D) among the categories of documents for the requests that are at issue (pp. 9-10), but IEU does ask that DP&L be compelled to respond to them in the portion of IEU's Motion addressing specific requests (pp. 26-28). Those requests fall within Category 1.

<sup>2</sup> See footnote 1.

requests, DP&L states "as described in the testimony of William Chambers, DP&L needs the SSR to maintain its financial integrity." *Id.* Mr. Chambers' prefiled testimony explains in detail why DP&L needs the SSR to maintain its financial integrity. Chambers Testimony, pp. 40-43. IEU is sophisticated, and surely understands that if DP&L is unable to maintain its financial integrity, then "customer certainty regarding electric service" and "stable electric service prices" will not be able to be maintained. The Commission should thus conclude that DP&L has adequately responded to IEU INT 1-13.

5. Category 5 -- Discovery from AES, DPL Inc. and DPLER (IEU INT 1-17, INT 1-20, INT 1-35,<sup>3</sup> and IEU RFA 1-16, RFA 1-28<sup>4</sup>): IEU states (p. 11) that it seeks discovery from AES, DPL Inc. and DPLER. Those requests are improper; it is well settled that affiliates of a utility are not subject to discovery in a proceeding before the Commission. In the Matter of Duke Energy Ohio, Inc., No. 10-2586-EL-SSO, 2010 Ohio PUC LEXIS 1336, at \*8-9 (PUCO Dec. 13, 2010) (granting IEU's motion to compel but limiting IEU's original request for "any studies or analysis conducted or commissioned by Duke or its affiliates regarding any revenues Duke's affiliated companies will receive if Duke remains a member of MISO or transitions to PJM" to "require Duke to produce only information and documents within the possession of Duke Energy Ohio, not its affiliates") (emphasis added); In the Matter of Manchester Group, LLC, No. 08-360-GA-CSS, 2009 Ohio PUC LEXIS 988, at \*1-3 (Nov. 13, 2009) (denying complainant's motion to compel Columbia Gas to produce "all documents and correspondence of

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<sup>3</sup> IEU's Motion does not include INT 1-35 in any of the 5 categories that IEU lists. However, in the section of its Motion in which IEU addresses specific interrogatories, IEU asks (p. 24) that DP&L be compelled to respond to INT 1-35, and provide "documents that describe or discuss the means by which DPLER's resource adequacy or capacity obligation stemming from its status as a load serving entity is satisfied." That request thus falls within this category.

<sup>4</sup> See footnote 3.

Columbia and Columbia's affiliates, subsidiaries, and parent companies that relate to the sale of Columbia Service Partners (CSP) to the CSP Acquisition Company" as to the "documents not in possession of Columbia" because such request is overbroad, but granting the motion to compel as to the documents in the possession of Columbia) (emphasis added).

IEU argues (p. 16) that it is entitled to the requested discovery pursuant to Ohio Rev. Code § 4928.145. However, that section permits discovery of certain "contract[s] or agreement[s]" involving a utility's affiliates. Ohio Rev. Code § 4928.145. None of IEU's requests seek contracts or agreements. That section is thus not on point.

IEU also cites (p. 16 n.17) the Commission's decision in 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 (October 2, 2009). In that decision, the Attorney Examiner ordered the production of certain information to which the utility had "access." Id. at 2. Here, in contrast, IEU wants to conduct discovery of information that is exclusively within the possession of DP&L's affiliates, and to which DP&L does not have access; specifically, IEU seeks information relating to a presentation made by AES (IEU INT 1-17, INT 1-20, RFA 1-16). The Commission's decision in Manchester Group is thus not on point.

Finally, IEU INT 1-35 seeks documents that "describe or discuss the means by which DPLER's resource adequacy or capacity obligation stemming from its status as a load-serving entity is satisfied." Agreements between DP&L and DPLER that describe how DPLER satisfies those obligations were produced to IEU on December 19, 2012. DP&L then made a supplemental production of that information on December 27, 2012.

6. Category 6 -- Asset Separation (IEU INT 1-11): Although not listed by IEU in its five topics, IEU also states (p. 18) that it seeks information relating to any studies DP&L performed as to the value of its generation assets associated with corporate separation. Specifically, in DP&L's current ESP Application, DP&L commits to filing an Application with the Commission by December 31, 2013, and that when DP&L files that application, DP&L expects to request Commission authority to transfer DP&L's generation assets by December 31, 2017. Testimony of Timothy G. Rice, p. 4. To assist DP&L to prepare for that to-be-filed matter, DP&L engaged certain non-testifying experts to advise it.

IEU's motion asks the Commission to order DP&L to produce work performed by those non-testifying experts that relates to the to-be-filed application. IEU INT 1-11. The Commission should deny IEU's motion for two separate and independent reasons:

First, DP&L has yet to file its Application to separate its generation assets. The requested information is entirely irrelevant in this proceeding; and

Second, in any event, the Commission has repeatedly applied the work product doctrine, including using it as a basis to protect work undertaken in anticipation of litigation or preparation for trial. In the Matter of the Complaint of Toledo Premium Yogurt, Inc. dba Freshens Yogurt, No. 91-1528-EL-CSS, 1993 Ohio PUC LEXIS 850, at \*2 (PUCO Sept. 22, 1993) (denying certification of interlocutory appeal denying motion for issuance of a subpoena because the information sought -- an "investigation in preparation for its defense in this case" -- was protected by the work-product doctrine); In the Matter of the Complaint of Fitzgerald, No. 10-791-EL-CSS, 2011 Ohio PUC LEXIS 415, at \*6-7 (PUCO Apr. 4, 2011) (denying motion to compel "[c]opies of all respondent's correspondence" to the extent that the information sought

was "privileged information protected by the attorney-client privilege and/or Work Product Doctrine"); In the Matter of the Complaint of Cameron Creek Apartments, No. 08-1091-GA-CSS, 2009 Ohio PUC LEXIS 505, at \*6-7 (PUCO June 8, 2009 (denying motion to compel to the extent the requested documents contained "information that is protected under the attorney-client privilege or the work product doctrine"); In the Matter of the Application of Time Warner Commc'ns of Ohio, L.P., No. 94-1695-TP-ACE, 1995 Ohio PUC LEXIS 428, at \*11 (PUCO June 8, 1995) (stating that in regards to not disclosing documents constituting work product, "[t]hat such privileged materials are not subject to discovery is a basic tenet of the discovery process itself"); Ohio R. Civ. P. 26(B)(5)(a) "[A] party may discover facts known or opinions held by an expert retained or specially employed by another party in anticipation of litigation or preparation for trial only upon a showing that the party seeking discovery is unable without undue hardship to obtain facts and opinions on the same subject by other means or upon a showing of other exceptional circumstances indicating that denial of discovery would cause manifest injustice.") (emphasis added). The work performed by those non-testifying experts is thus protected work product.

The Commission should thus deny IEU's Motion to Compel that information.

7. Category 7 -- Winning Bid for Duke Auction (IEU INT 1-41): Although also not listed in its five categories, IEU's motion also seeks (p. 25) information relating to DP&L's winning bid price in the Duke auction. DP&L's written response identified responsive documents, and on December 27, 2012, DP&L made a supplemental production of documents to IEU.



**IV. CONCLUSION**

The Commission should deny IEU's Motion to Compel because most of the information requested has already been produced and IEU's request for the other information is baseless.

Respectfully submitted,

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**From:** Seabold, Teri  
**Sent:** Wednesday, December 05, 2012 5:05 PM  
**To:** 'Alan G. Starkoff'; 'Allison E. Haedt'; 'Amy Spiller'; 'Andrew J. Campbell'; 'Barry McClelland'; 'Barth Royer'; 'Cathryn N. Loucas'; 'Chris Miller'; 'Colleen Mooney'; 'Cynthia Fonner Brady'; 'Dave Rinebolt'; 'David A. Kutik'; 'David Boehm'; 'David Lipthrott'; 'Devin Parram'; 'Edmund Berger'; 'Elizabeth Watts'; 'Ellis Jacobs'; 'Frank Darr'; 'Grant E. Chapman'; 'Gregory H. Dunn'; 'Gregory J. Poulos'; 'J. Thomas Siwo'; 'James F. Lang'; 'Jay E. Jadwin'; 'Jeanne Kingery'; 'Jodi Bair'; 'Joe Oliker'; 'Joe Serio'; 'Joel E. Sechler'; 'Joseph M. Clark'; 'Joshua D. Hague'; 'Kim Bojko'; 'Laura C. McBride'; 'Lou D'Alessandris'; 'M. Howard Petricoff'; 'Mark A. Whitt'; 'Mark Hayden'; 'Mark Yurick'; 'Matt Pritchard'; 'Matthew R. Cox'; 'Matthew Satterwhite'; 'Matthew W. Warnock'; 'Matthew White'; 'Melissa R. Yost'; 'Michael Kurtz'; 'Michael L. Dillard, Jr.'; 'Mike Settineri'; 'N. Trevor Alexander'; 'Philip Sineneng'; 'Rick Sites'; 'Robert A. McMahon'; 'Rocco D'Ascenzo'; 'Sam Randazzo'; 'Scott C. Solberg'; 'Stephanie M. Chmiel'; 'Stephen Bennett'; 'Stephen M. Howard'; 'Steven M. Sherman'; 'Steven T. Nourse'; 'Tamara Turkenton'; 'Thomas O'Brien'; 'Tom McNamee'; 'Tony Long'; 'Trent A. Dougherty'; 'Vincent Parisi'; 'Zack Kravitz'  
**Cc:** 'judi.sobecki@aes.com'; 'dona.seger-lawson@aes.com'; Faruki, Charles J.; Sharkey, Jeffrey S.; Sadlowski, Adam V.; Cline, Kelly M.  
**Subject:** DP&L/SSO [IWOV-DMS.FID83439]

Dear All,

The purpose of this email is to alert you that DP&L recently found an error in some of the cost data in DP&L's ESP filing; unfortunately, that error flows through to a number of schedules and workpapers. DP&L plans to revise the portions of the filing that are affected by that error, and has been working hard since last Thursday to revise those documents; DP&L is committed to keeping on schedule for both settlement discussions and, if necessary, a hearing, and to that end will be making the revised filing shortly. DP&L also intends within days of the revised filing to update its previously-served discovery responses to reflect the revised information.

In addition, DP&L wants to let you know that the reason that it cancelled the prior settlement meeting is that the error was discovered only 1-2 hours before that meeting; DP&L again apologizes for that inconvenience. DP&L remains committed to attempting to settle this case, and will circulate a written proposal in advance of the next settlement meeting.

Jeff

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**Sharkey, Jeffrey S.**

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**From:** Sharkey, Jeffrey S.  
**Sent:** Monday, December 17, 2012 11:46 PM  
**To:** 'Matthew Pritchard'  
**Cc:** Joe Olikar; Judi L. Sobecki Esq. (Judi.Sobecki@AES.com); Dona R Seger-Lawson; Faruki, Charles J.; Sadlowski, Adam V.; Cline, Kelly M.  
**Subject:** RE: Outstanding DP&L discovery. [IWOV-DMS.FID83439]

Matt:

DP&L responds to your list of items as follows:

1. INT1-17 and 1-20: IEU's requests seeks discovery from AES, which is not subject to discovery in the case. In any event, DP&L identified the Commission's decision in the AEP case in response to 1-17.
2. INT 1-27: DP&L will supplement its response (this item does not relate to the documents that Joe inspected this morning since those were the current contracts, and 1-27 seeks prior contracts).
3. INT 1-29, 1-34, 1-35: As I told you in a prior email, DP&L will provide copies.
4. RFA's, 1-6, 1-12, 1-16, 1-25, 1-28: DP&L responded to 1-25, so I do not understand your complaint. The other RFAs seek discovery from AES, DPL or DPLER, which are not subject to discovery in this case.
5. INT 1-13: DP&L's answer is responsive. A motion to compel would be futile, since DP&L has no additional information to provide.
6. INT 1-25. Resolved.
7. INT 1-41: as stated below, DP&L will be producing documents.
8. INT 2-4, 2-5 and 2-10: DP&L will be supplementing
9. INT 1-23, 2-8, 2-9, 2-11, 2-12, 2-13, and 2-15: DP&L will be supplementing.
10. 1-11: I am puzzled by your assertion that DP&L's communications with non-testifying experts is not entitled to work product protection; that type of information is at the core of the work product doctrine; DP&L stands by its objection.
11. 1-42: Resolved.

As to those items that will require supplementation, DP&L's responses to those requests were delayed slightly by DP&L's extensive efforts to prepare its Second Revised ESP Application to correct the errors that I described to you. DP&L has been working diligently to supplement its responses, and plans to have supplemental responses to you by tomorrow.

DP&L believes that it has made good faith efforts to resolve IEU's requests, and that it has produced or will produce shortly all of the responsive information to which IEU is entitled. The items for which DP&L has objected to providing are either attempts by IEU to conduct discovery as to non-parties or requests by IEU for information from non-testifying experts; DP&L's objections to those requests are plainly proper.

DP&L asks that IEU attach this email to any motion to compel, so that the Attorney Examiner will see the good faith efforts that DP&L has made to resolve the disputed items.

Jeff.

---

**From:** Matthew Pritchard [mailto:[mpritchard@mwncmh.com](mailto:mpritchard@mwncmh.com)]  
**Sent:** Monday, December 17, 2012 4:11 PM



**To:** Sharkey, Jeffrey S.  
**Cc:** Joe Olikier  
**Subject:** RE: Outstanding DP&L discovery. [IWOV-DMS.FID83439]

Jeff,

I just wanted to follow up with a few items.

- 1-20: DP&L objected to this response in the cover letter to Joe Olikier dated November 16 2012 (that accompanied your supplemental responses to our first set of discovery requests). Interrogatory 1-17 references the same presentation that was referenced in interrogatory 1-20. The cover letters states that DP&L does not plan on providing this type of information. We take your responses as a statement that you will not be supplementing your response to INT 1-17.
- 1-27, 1-29, 1-34, 1-35: We raised issues with your responses in our November 9, 2012 email. These questions related to agreements with DPLER that Joe Olikier viewed this morning. While we appreciate being able to view the documents, we will be moving for production of copies of these documents in accordance with Rule 4901-1-20, O.A.C.
- RFA's, 1-6, 1-12, 1-16, 1-25, 1-28: From your email on Friday (and consistent with your objection to 1-20 contained in your November 16, 2012 cover letter to Joe Olikier) I interpret your response as you will not be providing a supplemental response. We will be moving to compel responses to these requests for admission.
- INT 1-13: While DP&L did provide an answer, subject to objections, to part (a) and part (b) of the interrogatory, your response did not answer the question asked.
- INT 1-25: While we raised this in our November 9, 2012 email, it appears your cover letter to your supplemental responses indicated that you did not have any responsive documents. We will withdraw this interrogatory from our motion to compel.
- 1-41: While IEU-Ohio appreciates DP&L will supplement the response, we feel that we have been very lenient on the supplemental time we have allowed DP&L. I raised this issue during my phone call with you on December 3, 2012 and in my email on December 11, 2012. The rules only allow 5 business days for supplemental responses, and given the compressed procedural schedule we simply cannot wait any longer.
- INT 2-4, 2-5, and 2-10: DP&L has indicated, repeatedly, that it will be supplementing its response. The responses were due on November 20, 2012, any supplement was due within 5 business days. Accordingly, we will be moving to compel responses.
- 1-23, 2-8, 2-9, 2-11, 2-12, 2-13, and 2-15: Thank you for providing the bate stamp page identifiers in your email on Friday (the first time we have seen that reference). You provided the Business Unit Report in response to our first set, however, you failed to reference in either the cover letter, the discovery response, or the title of the attachment that you had produced the document. In fact you said you will produce it, implying that it had not yet been produced. Likewise, in reference to our second set of requests, you also indicated that you "will" produce it, even though you already had. In the future, we can likely avoid discovery issues by simply identifying the responsive documents. The document is labeled "November 8, 2012 production." The title of the document does not indicate what discovery requests it responds to, and the document itself lacks a cover page or any way of identifying what responses are contained therein. In the future please separate attachments and label them in accordance with the request they respond to, or at the very least reference the bate stamp pages in the discovery response so IEU-Ohio can identify your responses. Finally, the report does not fully

address all of the discovery requests listed. Accordingly, we will still be moving to compel these requests.

- 1-11: IEU-Ohio appreciates your updated response to what responsive documents were withheld. However, your description does not appear it is within the realm of materials protected under the attorney-client privilege or the work-product doctrine. See Case No. 05-219-GA-GCR, Entry at 7 (July 28, 2006). Accordingly, we will be moving to compel production.
- 1-42: Thanks for the updated response to this interrogatory, accordingly we will withdraw it from our motion to compel.

You can expect our motion to compel sometime tomorrow.

Thanks,

**Matt Pritchard**

Associate

McNees Wallace & Nurick LLC

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Columbus, OH 43215-4228

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[mpritchard@mwncmh.com](mailto:mpritchard@mwncmh.com)



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**From:** Sharkey, Jeffrey S. [<mailto:JSharkey@fclaw.com>]

**Sent:** Friday, December 14, 2012 5:45 PM

**To:** Matthew Pritchard; Faruki, Charles J.; 'Judi Sobbecki'

**Cc:** Joe Olikier; Frank Darr; Sam Randazzo; Sadlowski, Adam V.; Cline, Kelly M.; Dona R Seger-Lawson

**Subject:** RE: Outstanding DP&L discovery. [IWOV-DMS.FID83439]

Matt,

As an initial matter, as you know, about two weeks ago DP&L discovered an error in its filing and DP&L's employees have been working long hours to correct the error and to correct all of the associated filings in the case. DP&L's Second Revised ESP Application was filed on Wednesday. DP&L is now in the process of updating its responses to the discovery requests that were served upon it that related to its original ESP Application. Currently, I anticipate that those updated discovery responses will be served early next week. In addition to updating prior responses, those updated responses will respond to the IEU requests in its Second Set as to which DP&L stated that it would supplement its response.

Let me respond to your specific points as follows:

1. INT 1-17; 1-20: These items relate to DP&L's objections to providing information from AES or DPL. I have been working with the client to respond to Joe Olier's December 6, 2012 email and your December 11, 2012 email, but these items were not addressed in those emails. I was not aware there were ongoing disputes as to those items. I will need to communicate with the client before I can respond further.
2. INT 1-27: DP&L will provide responsive information when it updates its discovery responses, which I expect to occur early next week.
3. INT 1-29, 1-34, 1-35: These requests relate to pricing as to DPLER. I believe that the documents that we will be permitting IEU to inspect on Monday, December 17, 2012, will be responsive to those requests.
4. RFAs 1-6, 1-12, 1-16, 1-25, and 1-28: These RFAs were not mentioned in Joe's or your prior emails, and I thus have not had an opportunity to discuss them with DP&L. I note that a number of those RFAs relate to information that is not available to DP&L, but instead, relate to AES, DPL or DPLER; those requests are thus objectionable.
5. INT 1-13: I do not understand your statements that DP&L's objections are improper, because DP&L responded to this request.
6. INT 1-25: This request dealt with documents discussing the expense incurred by DP&L to provide the RSC. This request was not the subject of Joe's or your prior emails, and I thus have not been able to discuss it with DP&L.
7. INT 1-41: IEU's interrogatory asked for documents that "describe or discuss the winning bid price that is compensating DP&L for supplying load in Duke's territory." DP&L objects to this request because it is overbroad. Subject to all objections, DP&L will produce additional responsive documents when it updates its discovery responses next week.
8. INT 2-4, 2-5 and 2-10: DP&L will be supplementing its responses when it provides discovery responses early next week.
9. INT 1-23, 2-8, 2-9, 2-11, 2-12, 2-13, 2-14 and 2-15: DP&L produced the Business Unit Reports at Bates Nos. DP&L 49738-40. Let Adam Sadlowski know if you did not receive those documents, and we will

resend. Further, when DP&L provides its discovery responses next week it will supplement that information. My understanding is that DP&L does not possess additional responsive documents.

10. INT 1-11: IEU's interrogatory sought information relating to the market value of generation assets to be separated. DP&L's counsel engaged certain non-testifying experts to advise DP&L regarding the demand by certain parties that it separate its generation assets. Those documents are privileged and protected work product.
11. INT 1-42: IEU's interrogatory asked for documents discussing whether Duke's NBC would have a negative impact on competitive markets. Other than the document identified in DP&L's response, it has no responsive documents.

Jeff.

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**From:** Matthew Pritchard [<mailto:mpritchard@mwncmh.com>]  
**Sent:** Friday, December 14, 2012 4:23 PM  
**To:** Sharkey, Jeffrey S.; Faruki, Charles J.; 'Judi Sobecki'  
**Cc:** Joe Olikar; Frank Darr; Sam Randazzo  
**Subject:** Outstanding DP&L discovery.

Jeff,

In a last attempt to resolve our discovery issues before we file our motion to compel I wanted to provide a complete list of all the outstanding discovery requests that we will be moving to compel.

- Interrogatories ESP INT 1-17, 1-20, 1-27, 1-29, 1-34, 1-35 and requests for admission ESP RFA 1-6, 1-12, 1-16, 1-25, 1-28. It is IEU-Ohio's opinion that these requests are within the proper scope of discovery because they seek information related to DP&L's financial integrity. IEU-Ohio does not agree with DP&L's objections on the grounds that the information relates to affiliates or might be in the possession of affiliates. It is our opinion that based on Ohio law and Commission precedent that DP&L has to provide all information that is within the scope of discovery that DP&L has access to. While we appreciate that DP&L is willing to make the wholesale agreement available Monday morning it is still our position that we be allowed to obtain copies (see Rule 4901-1-20 O.A.C.). As a courtesy we will wait until after we view the agreements Monday morning to determine if we will move to compel the production of copies of the agreement.
- Interrogatory ESP INT 1-13. It is IEU-Ohio's opinion that this requests is properly within the scope of discovery because it seeks information regarding the proposed SSR. IEU-Ohio does not believe the request is unduly burdensome, nor do we believe the *Penn Central* case cited by DP&L is good law nor is it applicable to PUCO cases (i.e. there is no prohibition on narrative responses) and objecting on grounds that it calls for a legal conclusion is not proper (Rule 4901-1-19, O.A.C.)
- Interrogatories ESP INT 1-25, 1-29, 1-41, 2-4(C), 2-4(D), 2-4(E), 2-4(F), 2-5(D), 2-5(E), 2-5(F), 2-5(G), and 2-10. It is IEU-Ohio's opinion that these requests are properly within the scope of discovery as they relate to DP&L's total company financial performance. IEU-Ohio does not

believe the requests are irrelevant, unduly burdensome, privileged or covered by the work product doctrine, are vague or undefined, can be withheld under a claim of propriety or that the documents are too confidential to turn over, can be disregarded because the information relates to an affiliate, or can be withheld under a claim that they call for a narrative response.

- Interrogatories numbered ESP INT 1-23, 2-8, 2-9, 2-11, 2-12, 2-13, 2-14, and 2-15. It is IEU-Ohio's opinion that these requests which seek information on a business unit level (i.e. broken down by the generation, transmission, and distribution functions) are properly within the scope of discovery. It is IEU-Ohio's opinion that the corporate separation requirements require accounting information to be kept by each function. And, IEU-Ohio does not believe DP&L's objections to these requests have merit. Additionally in response to ESP INT 1-23 and 2-8 DP&L indicated it would produce the Business Unit Report; however, we have not yet obtained that document.
- .Additionally, IEU-Ohio has not heard back in regards to previous emails about interrogatories numbered ESP INT 1-11, 1-41, and 1-42. DP&L objected to these requests and provided documents subject to the objections. Were any responsive documents withheld under a claim or privilege (see DP&L's response to 1-11) or were there additional responsive documents that were not cited to (see DP&L's response to INT 1-41, 1-42).

We are still waiting to receive the supplemental discovery responses that DP&L indicated it would provide. We have drafted our motion to compel but are hoping DP&L will attempt to satisfy IEU-Ohio's discovery requests without the need for the motion to compel (or parts of it). We will wait until Monday morning to file the motion to compel but we cannot wait any longer.

Thanks,

**Matt Pritchard**

Associate

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Summary: Memorandum The Dayton Power and Light Company's Memorandum in Opposition to IEU-Ohio's Motion to Compel electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company