BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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

## I. INTRODUCTION AND SUMMARY

IEU's Motion to Compel asks the Commission to order DP&L to produce analysis that DP&L has performed relating to potential cost reductions. As demonstrated below, the Commission should deny IEU's motion because the requested information is protected by the attorney-client privilege and work product doctrine. Specifically, that information is protected since producing it would reveal advice from DP&L's counsel as to the likely results of this case.

IEU also asks the Commission to order DP&L to provide copies of DP&L's Cost Allocation Manual ("CAM") to IEU. IEU's motion on this ground is puzzling, because DP&L has permitted IEU's counsel to inspect the CAM, and told IEU that DP&L would permit it to have specific pages of the CAM if IEU could identify any specific issue in the case to which the CAM was relevant; IEU has never been able to articulate a specific issue to which the CAM was relevant, but IEU for reasons that it does not explain nevertheless filed a motion to compel DP&L to produce the CAM. The Commission should not require DP&L to produce the CAM since it is not relevant to any issue in the case. Further, the CAM is required to include the minutes from DP&L's Board of Directors meetings; the Commission should not order DP&L to produce those minutes because they are highly confidential and include attorney-client communications.

## II. THE COMMISSION SHOULD DENY IEU'S MOTION TO COMPEL

### A. DOCUMENTS THAT REVEAL THE ADVICE OF DP&L'S COUNSEL

A document is privileged if it "reveal[s], directly or indirectly, the substance of a confidential attorney-client communication." Smithkline Beecham Corp. v. Apotex Corp., 193 F.R.D. 530, 534 (N.D. Ill. 2000). Accord: United States v. Defazio, 899 F.2d 626, 635 (7th Cir.

1990) ("Communications from attorney to client are privileged only if they constitute legal advice, or tend directly or indirectly to reveal the substance of a client confidence.") (emphasis added).

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

Courts have applied this rule to protect financial documents from disclosure. E.g., Simon v. G.D. Searle & Co., 816 F.2d 397, 401 (8th Cir. 1986), cert. denied, 484 U.S. 917, 108 S. Ct. 268 (1987). In Simon, the defendant's "risk management department monitor[ed] the company's products liability litigation and analyze[d] its litigation reserves, apparently utilizing individual case reserve figures determined by the legal department's assessment of litigation expenses." Id. at 399. The Court held that the risk management documents -- which were prepared by the risk management department, not the legal department – would be protected from discovery as they revealed the attorneys' conclusions as to likely case results:

> "Although the risk management documents were not themselves prepared in anticipation of litigation, they may be protected from discovery to the extent that they disclose the individual case reserves calculated by [defendant's] attorneys. The individual case reserve figures reveal the mental impressions, thoughts, and conclusions of an attorney in evaluating a legal claim. By their very nature they are prepared in anticipation of litigation and, consequently, they are protected from discovery as opinion work product."

Id. at 401 (emphasis added).[1]

Other courts have similarly held that documents setting case reserves were protected from discovery because producing them would reveal legal counsel's evaluation of the merits of the case. Certain Underwriters at Lloyds v. Fid. & Cas. Ins. Co., No. 89 C 876, 1998 U.S. Dist. LEXIS 3654, at *6 (N.D. Ill. Mar. 20, 1998) ("We conclude that reserve recommendations, in this case, do reveal attorney mental impressions, thoughts, and conclusions since the reserve figures were calculated only after an attorney acting in his legal capacity carefully determined the merits and value of the underlying case."); Gen. Elec. Capital Corp. v. DIRECTV, Inc., 184 F.R.D. 32, 35-36 (D. Conn. 1998) (quoting Simon, and finding certain case reserve documents to be privileged).

Here, IEU seeks (p. 2) any analysis DP&L has performed relating to potential cost savings measures. However, the attached Declarations of Judi L. Sobecki ("Sobecki Dec.") and Craig L. Jackson ("Jackson Dec.") demonstrate that producing those documents would reveal legal advice from and mental impressions of DP&L's attorneys as to the likely results of this case.

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

As background, Ms. Sobecki is an in-house attorney for DP&L and has been working on the Applications in this case since before they were filed. Sobecki Dec., ¶¶ 1-2. Ms. Sobecki's principal area of practice is before this Commission, and in working on this case, she has studied (among many other things): Ohio Rev. Code § 4928.142; Ohio Rev. Code § 4928.143; and this Commission's decision in AEP's ESP case. Sobecki Dec., ¶¶ 1, 3. Ms. Sobecki has also been advised by Faruki Ireland & Cox P.L.L. Sobecki Dec., ¶ 3.

Based upon her analysis of the case, Ms. Sobecki advised other DP&L employees regarding both the likely results of the case and the range of possible results. Sobecki Dec., ¶ 2; Jackson Dec., ¶ 2. DP&L used Ms. Sobecki's advice to conduct analysis of cost savings measures. Jackson Dec., ¶ 3.

Specifically, it is difficult for DP&L to make significant cost cuts without adversely affecting service. Jackson Dec., ¶ 3. DP&L has not made any final decisions as to whether and how to make long-term cost cuts; DP&L will make final decisions on those points once a Commission decision is issued in this case. Jackson Dec., ¶ 3.

DP&L has, however, done a preliminary analysis of some potential cost cuts that it could make. Jackson Dec., ¶ 4. The goal of that analysis was to attempt to identify sufficient cost cuts to allow DP&L to earn a return on equity in the 7% to 11% range, which range the Commission held to be reasonable in its AEP ESP decision, and which range DP&L has publicly stated is its target range. Jackson Dec., ¶ 4.

To determine the amount of cost cuts that DP&L would need to make to allow it an opportunity to earn a ROE in that range, DP&L needed to know the likely outcome of this case. Jackson Dec., ¶ 5. DP&L thus relied upon advice that it received from Ms Sobecki and

outside counsel as to the likely results of this case to determine the revenue DP&L expected to earn in future years. Jackson Dec., ¶ 5. Once DP&L determined the revenue that it would earn in future years, it could determine the level of costs that it would need to cut so that it would be able to earn an ROE in that range. Jackson Dec., ¶ 5.

If DP&L was forced to disclose its analysis of costs that it would need to cut to maintain a 7% to 11% ROE, then intervenors could determine the advice of DP&L's attorneys as to the range of likely outcomes in this case. Jackson Dec., ¶ 6. Specifically, DP&L's projected revenues have been disclosed in discovery; if the amount and nature of the cost cuts that DP&L is considering were made known through discovery, then intervenors could use the 7% to 11% ROE target range to estimate the range of litigation outcomes that DP&L's attorneys have advised DP&L is likely. Jackson Dec., ¶ 6.

DP&L would be irreparably injured in this case if interevenors knew its expectations as to the likely results of this case. Jackson Dec., ¶ 7. For example, if intervenors knew what DP&L expected to occur in this case, then they could attempt to use that knowledge as an admission in the Commission proceedings or could use it to their advantage in settlement negotiations. Jackson Dec., ¶ 7. DP&L's cost savings analysis is thus privileged, since revealing that information would reveal the legal advice that DP&L's attorneys have provided to it regarding the likely results of this case.

IEU also seeks (p. 2) documents that DP&L possesses relating to analysis DP&L has performed regarding increasing its revenue. That request would encompass almost every single document in this case, since this case is part of an effort to maximize DP&L's revenues; those documents are plainly privileged. In fact, almost every document in DP&L's possession

could be linked directly or indirectly to an effort to maximize DP&L's revenue; the request is thus exceedingly overbroad.

## III. DP&L'S CAM

The Commission should not order DP&L to produce the CAM since IEU has already had an opportunity to inspect it but has not been able to identify any specific issue to which it is relevant. In particular, the Commission should not order DP&L to produce its board minutes (which are incorporated into the CAM) since they are highly confidential, and constitute privileged material. Kelly v. Ford Motor Co. (In re Ford Motor Co.), 110 F.3d 954, 966 (3d Cir. 1997) (holding that minutes of board of directors' meetings that reflected attorneys' advice were privileged); Great Plains Mut. Ins. Co., Inc. v. Mut. Reinsurance Bureau, 150 F.R.D. 193, 197-98 (D. Kan. 1993) (minutes of board of directors' meeting that included attorneys' advice to board were privileged).

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing The Dayton Power and Light Company's Memorandum in Opposition to IEU's Motion to Compel Discovery Responses Date has been served via electronic mail upon the following counsel of record, this 11th day of January, 2013:

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683068.1

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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## DECLARATION OF JUDI L. SOBECKI

I, Judi L. Sobecki, declare as follows:

1. My name is Judi L. Sobecki, and I am Deputy General Counsel at The Dayton Power and Light Company ("DP&L"). I am licensed to practice law in the State of Ohio, and I am one of the attorneys (along with our outside counsel, Faruki Ireland & Cox P.L.L. ("FI&C")) that represent DP&L in this matter. My principal area of practice is on cases pending before this Commission.

2. For both the MRO Application and the ESP Application, I have provided legal advice to DP&L employees (including Craig Jackson, who will also be filing a Declaration) regarding both the likely outcomes and the range of possible outcomes. I provided advice

regarding likely and the range of possible outcomes repeatedly, including well before the MRO Application was filed.

3. My legal advice on the likely outcomes of the MRO Application and ESP Application was based upon my analysis of the respective statutory sections (Ohio Rev. Code §§ 4928.142; 4928.143), the arguments advanced by intervenors, the Commission's decision in AEP's ESP case, and advice I received from FI&C, and many other items.

4. I understand that some of my legal advice and the legal advice that DP&L received from FI&C as to likely and the range of possible outcomes was used in certain analysis that DP&L performed regarding potential cost-saving measures. Mr. Jackson covers that topic in his Declaration.

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

Dated January 11th, 2013.

Judi L. Sobecki

682869.1

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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## DECLARATION OF CRAIG L. JACKSON

I, Craig L. Jackson, declare as follows:

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

2. I have been involved in working on these cases since before they were filed, and during the course of that work, I have been advised by DP&L's counsel, Judi Sobecki, and DP&L's outside counsel, Faruki Ireland & Cox P.L.L. ("FI&C"), regarding both the likely outcome and the range of possible outcomes of these cases.

3. The legal advice that I have received as to likely and possible outcomes of the pending litigation was used to assist DP&L to perform certain analysis related to possible cost reductions. Specifically, it is difficult for DP&L to make significant cost cuts without adversely affecting service. DP&L has not made any final decisions as to whether and how to make long-term cost cuts; DP&L will make final decisions on those points once a Commission decision is issued in this case.

4. DP&L has, however, done a preliminary analysis of some potential cost cuts that it could make. The goal of that analysis was to attempt to identify sufficient cost cuts to allow DP&L to earn a return on equity in the 7% to 11% range, which range the Commission held to be reasonable in its AEP ESP decision, and which range DP&L has publicly stated is its target range.

5. To determine the amount of cost cuts that DP&L would need to make to allow it an opportunity to earn a ROE in that range, DP&L needed to know the likely outcome of this case. Specifically, DP&L relied upon advice that it received from in-house and outside counsel as to the likely results of this case to determine the revenue DP&L expected to earn in future years. Once DP&L determined the revenue it would earn in future years, it could determine the level of costs that it would need to cut so that it would be able to earn an ROE in that range.

6. If DP&L was forced to disclose its analysis of costs that it would need to cut to maintain a 7% to 11% ROE, then intervenors could determine the advice of DP&L's attorneys as to the range of likely outcomes in this case. Specifically, DP&L's projected revenue has been disclosed in discovery; if the amount and nature of the cost cuts that DP&L is

considering were made known through discovery, then intervenors could use the 7% to 11% ROE target range to estimate the range of litigation outcomes that DP&L's attorneys have advised DP&L is likely.

7. DP&L would be irreparably injured in this case if interevenors knew its expectations as to the likely results of this case. For example, if intervenors knew what DP&L expected to occur in this case, then they could attempt to use that knowledge as an admission in the Commission proceedings or could use it to their advantage in settlement negotiations.

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

Dated January 11, 2013.

Craig L. Jackson

682859.1

**Case No(s). 12-0426-EL-SSO, 12-0427-EL-ATA, 12-0428-EL-AAM, 12-0429-EL-WVR, 12-0672-EL-RDR**

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