

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

---

**INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA  
THE DAYTON POWER AND LIGHT COMPANY'S MOTION TO COMPEL**

---

Samuel C. Randazzo (Counsel of Record)  
Frank P. Darr  
Matthew R. Pritchard  
Joseph E. Olikier  
MCNEES WALLACE & NURICK LLC  
21 East State Street, 17<sup>th</sup> Floor  
Columbus, OH 43215-4228  
Telephone: (614) 469-8000  
Telecopier: (614) 469-4653  
sam@mwncmh.com  
fdarr@mwncmh.com  
mpritchard@mwncmh.com  
joliker@mwncmh.com

**January 16, 2013**

**Attorneys for Industrial Energy Users-Ohio**

## **TABLE OF CONTENTS**

I.	DP&L'S INTERROGATORIES 1 AND 2 .....	2
II.	DP&L'S INTERROGATORY 3 AND REQUEST FOR PRODUCTION OF DOCUMENTS 9 .....	4
III.	DP&L'S INTERROGATORIES 4, 5, 6 AND 7 .....	7
IV.	DP&L'S REQUEST FOR PRODUCTION OF DOCUMENTS 1 .....	10
V.	DP&L'S REQUEST FOR PRODUCTION OF DOCUMENTS 2 .....	10
VI.	DP&L'S REQUESTS FOR PRODUCTION OF DOCUMENTS 5 AND 6 .....	11
VII.	DP&L'S REQUEST FOR PRODUCTION OF DOCUMENTS 7 .....	14
VIII.	DP&L'S REQUEST FOR PRODUCTION OF DOCUMENTS 8 .....	15
IX.	CONCLUSION.....	18

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

---

**INDUSTRIAL ENERGY USERS-OHIO’S MEMORANDUM CONTRA  
THE DAYTON POWER AND LIGHT COMPANY’S MOTION TO COMPEL**

---

In accordance with Rule 4901-1-12(B)(1), Ohio Administrative Code (“O.A.C.”), Industrial Energy Users-Ohio (“IEU-Ohio”) hereby submits its Memorandum Contra The Dayton Power and Light Company’s (“DP&L”) Motion to Compel.<sup>1</sup> IEU-Ohio has appropriately responded to DP&L’s objectionable discovery requests, and IEU-Ohio has turned over the documents in its possession or control related to DP&L’s ESP Applications. Additionally, IEU-Ohio has sought a protective order regarding DP&L’s

---

<sup>1</sup> Motion of The Dayton Power and Light Company to Compel Industrial Energy Users-Ohio to Answer Interrogatories and Produce Documents in Response to The Dayton Power and Light Company’s First Set of Discovery to Industrial Energy Users-Ohio (Jan. 9, 2013) (hereinafter, “DP&L’s Motion to Compel”).

efforts to have IEU-Ohio provide information which is not currently known, and regarding DP&L's inquisition into information related to DP&L's withdrawn market rate offer ("MRO") application and Ohio Power Company ("AEP-Ohio's") electric security plan ("ESP") proceeding.<sup>2</sup> Because IEU-Ohio has provided complete and proper responses to DP&L's objectionable requests, DP&L's Motion to Compel is meritless and should be denied.

#### **I. DP&L'S INTERROGATORIES 1 AND 2**

Section II.A of DP&L's Motion to Compel addresses DP&L's Interrogatories 1 and 2. IEU-Ohio has fully answered these two requests in accordance with Rule 4901-1-19(C), O.A.C. DP&L's first request seeks information related to IEU-Ohio's position on whether "DP&L should be given an opportunity to earn a reasonable return on equity." IEU-Ohio has extensively briefed this issue in its public filings filed with the Commission. Rule 4901-1-19(C), O.A.C., provides:

Where the answer to an interrogatory may be derived or ascertained from public documents on file in this state, ... it is a sufficient answer to such interrogatory to specify the title of the document, the location of the document or the circumstances under which it was furnished to the party submitting the interrogatory, and the page or pages from which the answer may be derived or ascertained.

In compliance with this rule, IEU-Ohio identified that the answer may be derived or ascertained from public documents on file in this state. IEU-Ohio identified the title of the document, IEU-Ohio's September 7, 2012 Application for Rehearing filed in AEP-Ohio's ESP proceeding, and by email indicated that the responsive pages were

---

<sup>2</sup> *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.* (hereinafter, "AEP-Ohio's ESP proceeding").

42, 50-57, and 60-65: 15 pages of legal analysis complete with citations to legal authorities address the issue on which DP&L seeks IEU-Ohio's determination that return on equity is not relevant in an ESP proceeding. IEU-Ohio has fully responded to this request.

DP&L's Interrogatory 2 seeks information from IEU-Ohio regarding IEU-Ohio's opinion about whether "DP&L should be permitted to implement a non-bypassable charge that will allow DP&L the opportunity to earn a reasonable return on equity." In compliance with Rule 4901-1-19(C), O.A.C., IEU-Ohio identified that the answer may be derived or ascertained from public documents on file in this state. IEU-Ohio identified the title of the document, IEU-Ohio's September 7, 2012 Application for Rehearing filed in AEP-Ohio's ESP proceeding, and by email indicated that the responsive pages were 36-46: 11 pages of legal analysis complete with citations to legal authorities addressing this very issue. IEU-Ohio has fully responded to this request.

DP&L's Motion to Compel argues that the identified document does not answer the questions posed by Interrogatories 1 and 2. Such a response is confounding. The first page cited in response to Interrogatory 1 reads:

First, the financial integrity of an EDU's generation is, as a general matter, not relevant in an ESP proceeding. Since the end of AEP-Ohio's Market Development Period ("MDP") on December 31, 2005, AEP-Ohio's generation business has been required to be on its "own in the competitive market." AEP-Ohio has previously argued, and the Commission has agreed, that AEP-Ohio's earnings for its generation business are not a relevant consideration when fixing its default SSO rates.<sup>3</sup>

IEU-Ohio's Application for Rehearing goes on and discusses this issue for more than 10 pages. In response to Interrogatory 2, where DP&L asks whether "DP&L should be

---

<sup>3</sup> *AEP-Ohio's ESP proceeding*, IEU-Ohio's Application for Rehearing of the August 8, 2012 Opinion and Order and Memorandum in Support at 42 (Sept. 7, 2012) (internal citations omitted).

permitted to implement a non-bypassable charge that will allow DP&L the opportunity to earn a reasonable return on equity,” IEU-Ohio referenced pages 36-46, which begins with the following analysis:

The Commission may authorize a provision of an ESP only if its fits within one of the provisions of Section 4928.143(B)(2), Revised Code. Of the provisions in (B)(2), only divisions (b) and (c) allow for a generation-related non-bypassable charge. However, the RSR, the PTR, and the Capacity Shopping Tax were not authorized under divisions (b) or (c), nor could they be.

A non-bypassable charge under (B)(2)(b) or (c) is only available to recover costs associated with generating facilities under construction or constructed after 2009 that meet additional statutory requirements.<sup>4</sup>

IEU-Ohio’s Application for Rehearing continues for an additional 10 pages discussing the flaws with AEP-Ohio’s proposed non-bypassable riders.

DP&L’s assertion that IEU-Ohio has not answered the questions posed by Interrogatories 1 and 2 is without merit. IEU-Ohio provided DP&L with over 20 pages of legal analysis, complete with citations to legal authorities, demonstrating IEU-Ohio’s position on these two issues. Thus, IEU-Ohio has fully responded to the issues raised in Section II.A of DP&L’s Motion to Compel regarding Interrogatories 1 and 2 and DP&L’s Motion to Compel should be denied.

## **II. DP&L’S INTERROGATORY 3 AND REQUEST FOR PRODUCTION OF DOCUMENTS 9**

Section II.B of DP&L’s Motion to Compel seeks information that is not currently known. Specifically, DP&L seeks the identity of witnesses IEU-Ohio expects to testify, the subject matter of those witnesses’ testimony, and a brief summary of that testimony. DP&L then seeks all documents relating to communications between those experts and

---

<sup>4</sup> *Id.* at 36-37 (internal citations omitted).

anyone related to this proceeding. IEU-Ohio properly responded that the information was not currently known and that IEU-Ohio would supplement its response when such information became known. IEU-Ohio explained:

[b]ecause DP&L did not file sufficient information along with its October 5, 2012 application to establish a standard service offer (“SSO”) in the form of an electric security plan (“ESP”), IEU-Ohio was required to seek the information through discovery. DP&L, unfortunately, has not been providing IEU-Ohio with timely responses to discovery requests, which has hindered IEU-Ohio’s ability to review DP&L’s claims and prepare its case. Additionally, DP&L has had to file a second application to establish an SSO in the form of an ESP because of its own errors. That application was filed roughly one month ago. Because of DP&L’s delays, and because only one month has passed since DP&L filed its most recent application in this proceeding, IEU-Ohio has not yet been able to determine what issues it will need to pursue through the testimony of its own experts.

In accordance with Rule 4901-1-16(D)-(E), O.A.C., IEU-Ohio indicated in its discovery responses that it will supplement its response to Interrogatory 3 and Request for Production of Documents 9 if and when it identifies any witnesses it expects to testify.

Although IEU-Ohio maintains it will respond to Interrogatory 3, as appropriate, IEU-Ohio properly objected to DP&L’s request that IEU-Ohio produce any documents “constituting or relating to communications among those persons identified in Interrogatory No. 3 and any other person relating to DP&L’s MRO Application or ESP Application.”<sup>5</sup> While it is impossible to know what objections would be appropriate since IEU-Ohio has not yet identified an expert witness, the request is objectionable on grounds that this request would be unduly burdensome, and would also likely be objectionable on grounds that it seeks information subject to the attorney-client privilege and/or work-product doctrine, could seek information that constitutes a trade secret, and

---

<sup>5</sup> DP&L’s Motion to Compel, Memorandum in Support at 5.

could seek information that is not relevant or reasonably calculated to lead to the discovery of admissible evidence. IEU-Ohio properly raised these grounds for objection in its responses.

DP&L has failed to limit the scope of its request to something that even remotely attempts to mirror the scope of discovery contained in Rule 4901-1-16, O.A.C. DP&L did not limit its request to communications related to its ESP; its request seeks all documents related to communications between an expected expert witness and any other person related to this proceeding, no matter when the communications occurred, and no matter what subject matter was discussed in those communications. Because of the overbroad nature of this request, the request would encompass all communications between such experts and counsel for IEU-Ohio, which would clearly raise issues regarding the attorney-client privilege.

DP&L's Motion to Compel limits its analysis to two incorrect assumptions. First, DP&L claims that the "fact the IEU-Ohio has not made a final decision is irrelevant."<sup>6</sup> IEU-Ohio did not object to this request on grounds that it has not made a final decision: IEU-Ohio responded that it was still reviewing all of the information and that "it does not currently know which experts are expected to testify." Second, DP&L claims that it "is not plausible" that IEU-Ohio does not know what witnesses that it reasonably expects to testify in this proceeding. The procedural schedule in this case has now been vacated based on the joint motion filed in this proceeding which, among other things, identified the same concerns IEU-Ohio raised in its discovery responses. DP&L filed a revised application two months into the compressed procedural schedule and DP&L's discovery

---

<sup>6</sup> DP&L's Motion to Compel at 5.

responses were untimely, thus parties needed additional time to review DP&L's filing and prepare their own cases. The deadline to file testimony is no longer "three weeks away" and IEU-Ohio is still diligently reviewing the information it has been provided by DP&L. Once IEU-Ohio determines which, if any, expert witnesses it expects to testify, it will supplement its responses and objections.

IEU-Ohio has fully responded to DP&L's Interrogatory 3 and Request for Production of Documents 9 and IEU-Ohio has indicated that if and when it identifies a witness it expects will testify, IEU-Ohio would provide DP&L with a supplemental response and updated objections.<sup>7</sup> Accordingly, the Commission should deny Section II.B of DP&L's Motion to Compel.

### **III. DP&L'S INTERROGATORIES 4, 5, 6 AND 7**

Section II.C of DP&L's Motion to Compel seeks to have IEU-Ohio respond to DP&L's Interrogatories 4, 5, 6 and 7. IEU-Ohio, however, has already fully responded: IEU-Ohio does not currently possess the information that DP&L seeks. IEU-Ohio indicated it would provide supplemental responses as appropriate and as required by Rule 4901-1-16(D), O.A.C. These interrogatories read:

Interrogatory 4: Identify any respect in which IEU contends that DP&L's Second Revised Application, the supporting testimony, workpapers, schedules, or other documents fail to comply with any applicable legal or regulatory requirement, and identify the reason for that contention.

Interrogatory 5: Identify any and all charges, rates, or other relief that is sought in the Second Revised Application, the supporting testimony, workpapers, schedules, or other documents that IEU contends that DP&L is not entitled to receive under applicable laws and regulations, and identify the reason for that contention.

---

<sup>7</sup> Since DP&L's Request for Production of Documents 9 is not currently applicable, it would be impossible to fully know what types of objections IEU-Ohio could properly raise. The analysis contained herein is just illustrative of the likely objections IEU-Ohio would make if it identifies a witness.

Interrogatory 6: Identify any and all charges, rates, or other relief requested in the Second Revised Application, the supporting testimony, workpapers, schedules, or other documents that IEU claims is not adequately supported in DP&L's filing, and identify the reason for that contention.

Interrogatory 7: Identify any and all mathematical, computational, or other errors that IEU contends exist in the Second Revised Application, the supporting testimony, workpapers, schedules, or other documents, and identify the reason for that contention.<sup>8</sup>

DP&L has not provided all of the information necessary to review DP&L's ESP applications, and the information that has been provided was done so only recently. DP&L's revised ESP application was filed roughly one month ago. And much of the information IEU-Ohio received through discovery was received in late December.<sup>9</sup> Having only recently obtained much of the substantive information necessary to review DP&L's application (with other requested information still outstanding and the subject of two motions to compel), IEU-Ohio does not currently know the answers to DP&L's requests. Specifically, IEU-Ohio has not had sufficient time to review all of the information to determine each and every aspect in DP&L's revised ESP application, the supporting testimony, workpapers, schedules, or other documents, to determine what legal or mathematical errors exist.

---

<sup>8</sup> Motion to Compel, Memorandum in Support at 5-6..

<sup>9</sup> DP&L provided IEU-Ohio with initial responses to IEU-Ohio's first set of discovery on November 8, 2012, and supplemental responses on November 16, 2012, December 18, 2012, and December 27, 2012. DP&L provided initial responses to IEU-Ohio's second set of discovery requests on November 20, 2012, and supplemental responses on December 18, 2012. DP&L responded to IEU-Ohio's third set of discovery on December 18, 2012 (which were incomplete and the subject of IEU-Ohio's second motion to compel). DP&L responded to IEU-Ohio's fourth set of requests on December 21, 2012. DP&L responded to IEU-Ohio's fifth set of requests on December 31, 2012. DP&L responded to IEU-Ohio's sixth set of discovery on January 15, 2013. IEU-Ohio is still waiting on responses to IEU-Ohio's seventh, and eighth set of discovery requests (the 10-day response timeframe on these last three requests has not yet passed).

Furthermore, DP&L's Interrogatories 4 through 7 are overly broad and responding would cause IEU-Ohio an undue burden or expense. Additionally, these four interrogatories seek information that is subject to the attorney-client privilege and/or work-product doctrine. Specifically, any legal advice and recommendations that would be transmitted from IEU-Ohio's counsel to IEU-Ohio regarding DP&L's ESP application is requested as part of these interrogatories, but that information would be subject to the attorney-client privilege and/or work-product doctrine. IEU-Ohio indicated if it files testimony, it will identify concerns raised by IEU-Ohio's review. And IEU-Ohio has appropriately sought a protective order to prevent DP&L from further harassing IEU-Ohio about these four interrogatories.

DP&L's response to IEU-Ohio's objections fails to address IEU-Ohio's objections. DP&L has not addressed IEU-Ohio's objection that these interrogatories are overbroad. DP&L merely states IEU-Ohio's response is "wholly inadequate."<sup>10</sup> DP&L then jumps to its assertion that "IEU-Ohio is required to identify any such issues that it has now."<sup>11</sup> DP&L's lack of analysis is telling. DP&L's requests are clearly overbroad and DP&L does not have any credible reason why it has not limited its requests to any specific subject matter or scope. Furthermore, DP&L bears the statutory burden of demonstrating that its proposed ESP is lawful and DP&L cannot transfer this statutory burden to other intervenors such as IEU-Ohio by merely serving discovery requests that would require IEU-Ohio to identify all legal and mathematical flaws associated with DP&L's application.<sup>12</sup>

---

<sup>10</sup> DP&L's Motion to Compel at 6.

<sup>11</sup> *Id.*

<sup>12</sup> Section 4928.143(C)(1), Revised Code.

In conclusion, IEU-Ohio does not possess the information that DP&L seeks, and if such information is obtained from IEU-Ohio's counsel in the rendition of legal advice, the information DP&L seeks would be protected from disclosure under the attorney-client privilege and/or work-product doctrine. Therefore, the Commission should deny Section II.C of DP&L's Motion to Compel that seeks IEU-Ohio to respond to Interrogatories 4 through 7.

#### **IV. DP&L'S REQUEST FOR PRODUCTION OF DOCUMENTS 1**

Section II.D of DP&L's Motion to Compel seeks to have IEU-Ohio respond to DP&L's Request for Production of Documents 1, which seeks IEU-Ohio to identify all documents relied upon in preparing discovery responses to DP&L's requests. IEU-Ohio identified the documents it relied upon. In preparing its responses to DP&L's requests, IEU-Ohio relied upon the information contained in DP&L's applications, testimony, workpapers, discovery requests and discovery responses, FERC Form 1's, SEC Form 10-K's, and the public documents filed by IEU-Ohio in AEP-Ohio's ESP proceeding. IEU-Ohio did not rely upon other documents.<sup>13</sup> Accordingly, Section II.D of DP&L's Motion to Compel should be denied because IEU-Ohio has responded.

#### **V. DP&L'S REQUEST FOR PRODUCTION OF DOCUMENTS 2**

Section II.E of DP&L's Motion to Compel seeks to have IEU-Ohio respond to DP&L's Request for Production of Documents 2, which seeks IEU-Ohio to identify all documents that IEU-Ohio may introduce at any deposition or hearing. DP&L's request is clearly overbroad: it does not ask IEU-Ohio to identify anything which it plans to

---

<sup>13</sup> IEU-Ohio's objections on grounds of undue burden and that the request seeks information subject to the attorney-client privilege and/or work-product doctrine was included to reflect IEU-Ohio's objections to DP&L's other discovery requests.

introduce or expects to introduce; rather it seeks the never-ending category of documents that IEU-Ohio may introduce. IEU-Ohio, indicated that it may introduce any document produced by any party or Staff in discovery, in the public domain, or included in the various filings of DP&L. IEU-Ohio also identified that it was still in the process of reviewing DP&L's revised ESP application and to the extent IEU-Ohio identifies a document that is not within the scope of the documents listed in its discovery response, IEU-Ohio will supplement its response as necessary.

Accordingly, Section II.E of DP&L's Motion to Compel should be denied. IEU-Ohio has provided DP&L with a list of documents it may introduce; IEU-Ohio is still reviewing DP&L's revised ESP application and will supplement its response to the extent appropriate.

## **VI. DP&L'S REQUESTS FOR PRODUCTION OF DOCUMENTS 5 AND 6**

Section II.F of DP&L's Motion to Compel seeks to have IEU-Ohio respond to DP&L's Requests for Production of Documents 5 and 6, which seek IEU-Ohio to produce all communications "among IEU-Ohio and any of its members relating to DP&L's ESP Application" and all communications "among IEU-Ohio and any of its members relating to DP&L's ESP proceeding or MRO application." The same day that DP&L filed its Motion to Compel, IEU-Ohio produced all non-privileged documents in its possession related to DP&L's ESP application. IEU-Ohio maintains that the documents that were in its possession related to DP&L's ESP application were not reasonably calculated to lead to the discovery of admissible evidence, but IEU-Ohio attempted in good faith to resolve DP&L's discovery dispute with IEU-Ohio. Despite producing all

non-privileged documents, DP&L has not withdrawn this portion of its Motion to Compel, or even contacted IEU-Ohio regarding these requests.

DP&L's requests seek any communication between IEU-Ohio and its members related to either DP&L's withdrawn MRO application or ESP applications. DP&L claims that any communication between IEU-Ohio and its members can never be privileged because neither IEU-Ohio nor its individual members are law firms; but DP&L is incorrect. To the extent these requests seek communications between IEU-Ohio, the individual members of IEU-Ohio, and counsel for IEU-Ohio, these communications could still be covered by the attorney-client privilege if the communications were for purposes of obtaining legal advice. IEU-Ohio has appropriately withheld privileged documents that contain legal advice and recommendations given by counsel for IEU-Ohio to IEU-Ohio.

Finally, DP&L's Request for Production of Documents 6 is not reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks information from IEU-Ohio related to DP&L's withdrawn MRO application. DP&L has not demonstrated that the information it seeks is within the proper scope of discovery; neither DP&L's formal discovery requests, informal communications to IEU-Ohio, nor its Motion to Compel attempt to demonstrate that the information it seeks is relevant or reasonably calculated to lead to the discovery of admissible evidence. DP&L's Motion to Compel contains two references to relevance, but neither contains any analysis or support:

The information sought by DP&L is highly relevant and necessary for DP&L to most efficiently engage in settlement discussions and prepare for the hearing in this matter.<sup>14</sup>

---

<sup>14</sup> DP&L's Motion to Compel, Memorandum in Support at 2.

...

The discovery sought by DP&L is not only highly relevant, but is basic in nature, such as the identity of those IEU-Ohio experts to call to testify as an expert. The information requested by DP&L is relevant to this proceeding, and as set forth in detail below, IEU-Ohio's objections are improper.<sup>15</sup>

Despite indicating that its conclusion would be supported below, the remainder of DP&L's Motion to Compel is silent on the issue. Thus, DP&L has failed to demonstrate how the information it seeks from IEU-Ohio relative to DP&L's withdrawn MRO application is reasonably calculated to lead to the discovery of admissible evidence.

Because DP&L continues to seek information from IEU-Ohio that is not within the scope of discovery, IEU-Ohio has filed a motion with the Commission seeking a protective order. IEU-Ohio requests that the Commission grant that motion and hold that any information that might be in IEU-Ohio's possession or control related to DP&L's withdrawn MRO application is not reasonably calculated to lead to the discovery of admissible evidence and, therefore, DP&L may not inquire into such matters. In addition to granting IEU-Ohio's motion for a protective order, the Commission should deny Section II.F of DP&L's Motion to Compel (as to the MRO application) because DP&L has completely failed to offer any support for its conclusion that all of the information it seeks is relevant.

In conclusion, Section II.F of DP&L's Motion to Compel should be denied. IEU-Ohio has produced all non-privileged documents in its possession or control related to DP&L's ESP applications, IEU-Ohio's claim of privilege is related to documents that contain confidential legal advice and recommendations from IEU-Ohio's counsel to

---

<sup>15</sup> DP&L's Motion to Compel, Memorandum in Support at 3.

IEU-Ohio, and DP&L's Request for Production of Documents 6 is overbroad and seeks information outside the scope of discovery.

## **VII. DP&L'S REQUEST FOR PRODUCTION OF DOCUMENTS 7**

Section II.G of DP&L's Motion to Compel seeks to have IEU-Ohio respond to DP&L's Request for Production of Documents 7. This request seeks "communications among IEU-Ohio and any person (including, but not limited to, intervenors) relating to DP&L's ESP Application or MRO Application." This request should be denied for several reasons. First, IEU-Ohio has provided DP&L with all non-privileged documents in its possession related to DP&L's ESP applications. Second, as discussed and demonstrated above, the documents withheld by IEU-Ohio contain legal advice given in confidence by counsel for IEU-Ohio to IEU-Ohio. Third, any information that might be in IEU-Ohio's possession or control related to DP&L's MRO application is not within the proper scope of discovery, as discussed above, and IEU-Ohio has appropriately filed a motion seeking a protective order on this issue. Fourth, the request is ambiguous and grammatically unsound: does the last clause "relating to DP&L's ESP Application or MRO Application" modify "person" or modify "communications?"

If this clause modifies "communications," IEU-Ohio has produced all non-privileged documents in its possession or control related to DP&L's ESP application. If this clause modifies "person," the request is clearly overbroad and not reasonably calculated to lead to the discovery of admissible evidence. The latter interpretation (which is how the sentence is grammatically written) would request all communications between IEU-Ohio and any person that is related to this proceeding; regardless of the

subject matter of such communication and regardless of how many years ago the communication was made. Such a request would clearly be improper.

Accordingly, Section II.G of DP&L's Motion to Compel should be denied. IEU-Ohio has produced all non-privileged documents in its possession or control related to DP&L's ESP applications, IEU-Ohio's claim of privilege is related to documents that contain counsel for IEU-Ohio's confidential legal advice and recommendations to IEU-Ohio, and to the extent DP&L's Request for Production of Documents 7 seeks information that is not related to DP&L's ESP application, the request is not reasonably calculated to lead to the discovery of admissible evidence.

#### **VIII. DP&L'S REQUEST FOR PRODUCTION OF DOCUMENTS 8**

Section II.H of DP&L's Motion to Compel seeks to have IEU-Ohio respond to DP&L's Request for Production of Documents 8, which requests IEU-Ohio produce all "communications among IEU-Ohio and any other person (including, but not limited to, intervenors) relating to the Commission's decision in AEP's ESP proceeding ...." This request should be denied.

First, as discussed above, the request is ambiguous and grammatically unsound. It is not clear whether the last clause "relating to the Commission's decision in AEP's ESP proceeding" modifies "person" or modifies "communications." If this clause modifies "person," the request is clearly overbroad and not reasonably calculated to lead to the discovery of admissible evidence. This interpretation (which is how the sentence is grammatically written) would request all communications between IEU-Ohio and any person that is related to AEP-Ohio's ESP proceeding; regardless of the subject matter of such communications (communications not related to utility or energy matters

would be covered by this request) and regardless of how many years ago the communication was made. Such a request is clearly improper because it is overbroad, vague, and not reasonably calculated to lead to the discovery of admissible evidence. However, even assuming the clause modifies “communications,” the request is still improper because it is overbroad and the information it seeks is not reasonably calculated to lead to the discovery of admissible evidence. Because the request seeks information that is not within the proper scope of discovery, IEU-Ohio has sought a protective order from the Commission regarding this request.

DP&L’s request also incorrectly implies that the Commission’s decisions regarding AEP-Ohio’s ESP application are somehow precedential and relevant to this proceeding. DP&L is incorrect. The Commission has indicated that the result it crafted for AEP-Ohio was unique to AEP-Ohio’s circumstances.<sup>16</sup> Although IEU-Ohio has challenged the legality and reasonableness of the Commission’s orders regarding AEP-Ohio’s ESP, the Commission has indicated these orders are only applicable to the unique circumstances that AEP-Ohio faced. Thus, any information in IEU-Ohio’s possession or control related to AEP-Ohio’s ESP proceeding is not reasonably calculated to lead to the discovery of admissible evidence.

Additionally, DP&L has not attempted to demonstrate any connection between that proceeding and this proceeding; thus, DP&L has failed to demonstrate that the information it seeks is reasonably calculated to lead to the discovery of admissible evidence.

---

<sup>16</sup> *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Entry on Rehearing at 18 (Oct. 17, 2012). In calculating the revenue requirement of AEP-Ohio’s Retail Stability Rider (“RSR”), the Commission relied heavily on the unique circumstances the Commission addressed in Case No. 10-2929-EL-UNC. *AEP-Ohio’s ESP Proceeding*, Opinion and Order at 26-38 (Aug. 8, 2012).

If the Commission determines that information related to AEP-Ohio's ESP proceeding is within the scope of discoverable information in this proceeding, DP&L's request is still objectionable because it is overbroad and lacks any defined scope.<sup>17</sup> The breadth of the request is also objectionable because it seeks communications between IEU-Ohio and counsel for IEU-Ohio. Any information that IEU-Ohio might have in its possession or control related to AEP-Ohio's ESP proceeding that contains confidential communications between counsel for IEU-Ohio and IEU-Ohio regarding legal advice or recommendations would be subject to the attorney-client privilege and/or work-product doctrine.

Finally, information exchanged in AEP-Ohio's ESP proceeding contained protected trade secret information. At page 9 of the Commission's August 8, 2012 Opinion and Order in that proceeding, the Commission noted that the Attorney Examiners had granted all of the motions for protective orders filed in the proceeding, and the Commission's Opinion and Order stated that the protective orders would extend for 18 months after the issuance of the order. Thus, DP&L's overbroad discovery request extends to information that is available to IEU-Ohio subject to protective orders.

For these reasons, Section II.H of DP&L's Motion to Compel should be denied. DP&L's Request for Production of Documents 8 is overbroad, not reasonably calculated to lead to the discovery of admissible evidence, seeks information available to IEU-Ohio

---

<sup>17</sup> The overbroad discovery request raises many issues because it would impose an undue burden or expense upon IEU-Ohio to identify each and every responsive document in IEU-Ohio's possession or control before IEU-Ohio could raise specific relevance objections or specific attorney-client privilege and/or work-product doctrine objections. Accordingly, IEU-Ohio has filed a motion for a protective order regarding any information that might be in IEU-Ohio's possession or control related to AEP-Ohio's ESP proceeding. DP&L has refused to narrow the scope of its requests and, therefore, IEU-Ohio is obligated to issue blanket objections to address potential issues that could arise if IEU-Ohio were required to respond to the overly broad request. For example, IEU-Ohio referenced that a joint defense agreement was entered into with other parties in AEP-Ohio's ESP proceeding to illustrate some of the potential problems that exist due to DP&L's overly broad requests.

subject to the Commission's protective orders, and seeks information protected by the attorney-client privilege and/or work-product doctrine. Because this request is not proper, IEU-Ohio filed a motion for a protective order. Accordingly, the Commission should grant IEU-Ohio's motion for a protective order but, at the very least, should deny Section II.H of DP&L's Motion to Compel.

## **IX. CONCLUSION**

IEU-Ohio has attempted to work with DP&L to resolve the issues raised in DP&L's Motion to Compel, but to no avail. As demonstrated above, IEU-Ohio has properly complied with the Commission's discovery rules and therefore DP&L's Motion to Compel should be denied.

Respectfully submitted,

/s/ Matthew R. Pritchard

Samuel C. Randazzo (Counsel of Record)

Frank P. Darr

Matthew R. Pritchard

Joseph E. Olier

MCNEES WALLACE & NURICK LLC

21 East State Street, 17<sup>th</sup> Floor

Columbus, OH 43215-4228

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

sam@mwncmh.com

fdarr@mwncmh.com

mpritchard@mwncmh.com

joliker@mwncmh.com

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Memorandum Contra The Dayton Power and Light Company's Motion to Compel* was served upon the following parties of record this 16<sup>th</sup> day of January 2013, via electronic transmission.

/s/ Matthew R. Pritchard

MATTHEW R. PRITCHARD

judi.sobecki@dplinc.com  
randall.griffin@dplinc.com  
cfaruki@ficlaw.com  
jsharkey@ficlaw.com  
arthur.meyer@dplinc.com  
dboehm@BKLawfirm.com  
mkurtz@BKLawfirm.com  
etter@occ.state.oh.us  
serio@occ.state.oh.us  
yost@occ.state.oh.us  
gerger@occ.state.oh.us  
amy.spiller@duke-energy.com  
jeanne.kingery@duke-energy.com  
philip.sineneng@ThompsonHine.com  
bmcMahon@emh-law.com  
elizabeth.watts@duke-energy.com  
rocco.d'ascenzo@duke-energy.com  
ricks@ohanet.org  
tobrien@bricker.com  
barth.royer@aol.com  
gary.a.jeffries@dom.com  
drinebolt@ohiopartners.org  
cmooney2@columbus.rr.com  
whitt@whitt-sturtevant.com  
campbell@whitt-sturtevant.com  
vparisi@igsenergy.com  
mswhite@igsenergy.com  
barthroyer@aol.com  
nolan@theoec.org  
trent@theoec.org  
cathy@theoec.org  
williams.toddm@gmail.com  
ejacobs@ablelaw.org  
tobrien@bricker.com  
mwarnock@bricker.com  
tsiwo@bricker.com  
mhpeticoff@vorys.com  
smhoward@vorys.com  
david.fein@constellation.com  
cynthia.a.fonner@constellation.com  
Tasha.hamilton@constellation.com  
myurick@taftlaw.com  
zkravitz@taftlaw.com  
mhpeticoff@vorys.com  
smhoward@vorys.com  
Tony\_Long@ham.honda.com  
Stephen.bennett@exeloncorp.com

Cynthia.b.fonner@constellation.com  
LGearhardt@offb.org  
dconway@porterwright.com  
aemerson@porterwright.com  
haydenm@firstenergycorp.com  
coneil@calfee.comk  
shannon@calfee.com  
jlang@calfee.com  
lmcbride@calfee.com  
talexander@calfee.com  
dakutik@jonesday.com  
aehaedt@jonesday.com  
jejadwin@aep.com  
Thomas.Melone@AllcoUS.com  
joseph.clark@directenergy.com  
christopher.miller@icemiller.com  
gregory.dunn@icemiller.com  
alan.starkoff@icemiller.com  
ssolberg@EimerStahl.com  
stephanie.Chmiel@ThompsonHine.com  
michael.Dillard@ThompsonHine.com  
philip.sineneng@ThompsonHine.com  
mjsatterwhite@aep.com  
stnourse@aep.com  
bojko@carpenterlipps.com  
sechler@carpenterlipps.com  
matt@matthewcoxlaw.com  
gpoulos@enernoc.com  
ssherman@kdlegal.com  
jhague@kdlegal.com  
william.wright@puc.state.oh.us  
thomas.lindgren@puc.state.oh.us  
thomas.mcnamee@puc.state.oh.us  
steven.beeler@puc.state.oh.us  
devin.parram@puc.state.oh.us  
gregory.price@puc.state.oh.us  
mandy.willey@puc.state.oh.us  
bryce.mckenney@puc.state.oh.us  
henryeckhart@aol.com  
Wis29@yahoo.com  
berger@occ.state.oh.us  
bill.wells@wpafb.af.mil  
chris.thompson.2@tyndall.af.mil  
mchristensen@columbuslaw.org  
chris.michael@icemiller.com  
williams@whitt-sturtevant.com  
asim\_haque@ham.honda.com

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**1/16/2013 2:50:02 PM**

**in**

**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 Contra of IEU-Ohio to DP&L's Motion to Compel electronically filed by Mr. Matthew R. Pritchard on behalf of Industrial Energy Users-Ohio