

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**INDUSTRIAL ENERGY USERS-OHIO'S REPLY TO
THE DAYTON POWER AND LIGHT COMPANY'S
MEMORANDUM IN OPPOSITION TO
IEU'S MOTION TO COMPEL DISCOVERY RESPONSES**

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The Dayton Power and Light Company (“DP&L”) is seeking to increase its total compensation through its electric security plan (“ESP”) application by hundreds of millions of dollars on the theory that it needs the increase to protect its financial integrity based on its projected total company return on equity. Industrial Energy Users-Ohio (“IEU-Ohio”) has sought to investigate that claim through its discovery requests seeking information concerning potential cost control and revenue enhancements, and compliance with DP&L’s cost allocation manual (“CAM”). DP&L has refused to turn

over this critical information.¹ DP&L admits it has responsive information (the “Financial Integrity Study”) in its possession that demonstrates that there may be internal means of satisfying its goal of financial integrity, but refuses to disclose this information on claims that the information is privileged.² Additionally, when pressed to demonstrate its compliance with corporate separation requirements such as the maintenance of a proper CAM, DP&L claims that it need not provide copies or permit copying of the core corporate documents mandated by statute and administrative rule on grounds of relevance and privilege.

In accordance with Rule 4901-1-12(B)(2), Ohio Administrative Code (“O.A.C.”), IEU-Ohio hereby files its Reply to DP&L’s Memo Contra the Motion of Industrial Energy Users-Ohio to Compel Discovery Responses from The Dayton Power and Light Company and Memorandum in Support filed on January 3, 2012 (“IEU-Ohio’s 2nd Motion to Compel”). Because the reasons supporting DP&L’s refusal to comply with legitimate discovery requests are groundless,³ the Commission should grant IEU-Ohio’s 2nd Motion to Compel.

¹ The Commission has held that this information is critical in addressing a financial integrity claim:

[f]ifth, and perhaps most importantly, the Commission believes that the companies absolutely must take very aggressive steps to enhance their revenues and minimize their expenses particularly during this interim period in order to avoid the negative consequences of the current financial emergency.

In the Matter of the Application of The Cleveland Electric Illuminating Company for Authority to Amend and to Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service, Case Nos. 88-170-EL-AIR, et al., Opinion and Order at 15 (Aug. 23, 1988).

² DP&L’s discovery response raised additional objections (relevance, propriety, possession of unregulated affiliate, and unduly burdensome), but those objections were not addressed in The Dayton Power and Light Company’s Memorandum in Opposition to IEU’s Motion to Compel Discovery Responses (hereinafter, “DP&L’s Memo Contra”). Accordingly, IEU-Ohio is treating those objections as waived.

³ For example, DP&L’s Memo Contra fails to cite a single decision from the Commission or Ohio courts in support of its legal arguments.

I. DP&L'S FINANCIAL INTEGRITY STUDY

IEU-Ohio requested information regarding whether DP&L had investigated alternatives to satisfy its financial integrity goal if the Commission did not approve its ESP. DP&L has indicated that it has an analysis, the Financial Integrity Study, but refused to provide it, claiming it is protected by the attorney-client privilege and work-product doctrine.⁴

DP&L's Memo Contra fails to demonstrate that either the attorney-client privilege or the work-product doctrine is applicable to protect the Financial Integrity Study from disclosure. In any event, as demonstrated below, IEU-Ohio can demonstrate good cause for the information and DP&L has waived any claim that the attorney-client privilege or work-product doctrine allow it to withhold the Financial Integrity Study.

A. The attorney-client privilege does not allow DP&L to withhold the Financial Integrity Study. DP&L admits that the information contained in the Financial Integrity Study is not itself covered by the attorney-client privilege, and only asserts that the Financial Integrity Study could be used to reverse engineer legal advice.

For investigative facts and documents to be covered by the attorney-client privilege, "[t]he relevant question is ... whether [the] investigation was 'related to the rendition of legal services'"⁵ 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."⁶

DP&L has failed to demonstrate that the Financial Integrity Study was integrally related to the rendition of legal advice; DP&L only asserts that its counsel asked that the

⁴ See DP&L's Memo Contra at 2-7.

⁵ *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Authority*, 121 Ohio St.3d 537, 2009-Ohio-1767, ¶ 27 (quoting *In re Allen*, 106 F.3d 582, 602 (4th Cir. 1997)).

⁶ *Toledo Blade*, 2009-Ohio-1767 at ¶ 28 (emphasis in original).

analysis be done. DP&L claims that the Financial Integrity Study is privileged not on grounds that the information contained in the study is privileged, but because the information in the study could somehow allow parties to reverse engineer DP&L's counsels' legal advice regarding the probability of DP&L's success on the merits of its ESP application. Because DP&L admits the study itself is not covered by the attorney-client privilege, the Commission should compel DP&L to produce the study.⁷

B. DP&L has failed to demonstrate that the work-product doctrine applies, but in any event IEU-Ohio can demonstrate good cause exists to compel DP&L to produce any information deemed to be work-product

As discussed above, DP&L does not assert that all of the information in the Financial Integrity Study is subject to the work-product doctrine, only that parties could reverse engineer counsel's mental impression and legal advice. Thus, DP&L has failed to demonstrate a legitimate ground for refusing to turn over the document based on the work-product doctrine.

Even if the Financial Integrity Study was covered by the work-product doctrine, good cause exists for the Commission to compel DP&L to produce the entire Financial Integrity Study. 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."⁸

⁷ Alternatively, if the Commission determines that DP&L has not waived a claim of privilege (see below), after the *in camera* review scheduled for January 30, 2013, the Commission should redact only those parts of the study that would allow parties to reverse engineer the legal advice given from counsel to DP&L and compel DP&L to produce the remaining information.

⁸ *Squire, Sanders & Dempsey v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, ¶ 57.

Because DP&L has grounded its request for an increase in compensation based on the need to assure its “financial integrity,” the Financial Integrity Study is relevant to the review of DP&L’s application. In fact, the Commission has held this type of information is not only relevant to a financial integrity claim, but is perhaps the most important information:

[f]ifth, and perhaps most importantly, the Commission believes that the companies absolutely must take very aggressive steps to enhance their revenues and minimize their expenses particularly during this interim period in order to avoid the negative consequences of the current financial emergency.⁹

Accordingly, IEU-Ohio has satisfied the first prong by demonstrating that its request for information related to DP&L’s ability to reduce its expenses and/or increase its revenue is relevant.

Second, the information IEU-Ohio seeks in Interrogatories ESP INT 3-1 through ESP INT 3-3 is not otherwise available. DP&L is the only party that can identify the possible means it can employ to reduce its expenses and increase its revenue. No other party has access to all of DP&L’s internal business information or is in a position to be able to opine as to how DP&L could reduce its expenses and increase its revenue. Thus, good cause exists to compel DP&L to produce the information; it is relevant and otherwise unavailable.

Although the Commission’s decision quoted above would imply that DP&L should have introduced the information IEU-Ohio seeks in Interrogatories ESP INT 3-1 through ESP INT 3-3 as part of its application, DP&L also seeks to shield such information from the discovery process. DP&L’s claim that the information can be protected under the

⁹ *In the Matter of the Application of The Cleveland Electric Illuminating Company for Authority to Amend and to Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, Case Nos. 88-170-EL-AIR, *et al.*, Opinion and Order at 15 (Aug. 23, 1988).

work-product doctrine is meritless. Moreover, as demonstrated above, even if the work-product doctrine was applicable, good cause exists to compel DP&L to respond and produce the requested information.

C. Even if the Financial Integrity Study were protected under the attorney-client privilege or work-product doctrine, DP&L has waived any such claim.

DP&L has provided through discovery a document titled “Additional Detail for Financial Integrity Testimony” that was labeled “Privileged and Confidential Prepared at the request of General Counsel Draft for discussion purposes only.”¹⁰ 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.”¹¹ 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.”¹²

DP&L’s assertion that the Financial Integrity Study responsive to IEU-Ohio’s Interrogatories ESP INT 3-1 through 3-3 is privileged because it was prepared at the request of counsel has been waived because DP&L voluntarily disclosed privileged information related to DP&L’s financial integrity claim in its response to OCC’s Request

¹⁰ The document was produced in response to the Ohio Consumers’ Counsel’s (“OCC”) Request for Production of Documents 36. The Document is Bates stamped DP&L 0053209.

¹¹ *MA Equipment Leasing v. Tilton*, 2012-Ohio-4668, ¶ 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)).

¹² *Mid-American*, 599 N.E.2d at 704 (citing *Hercules Inc. v. Exxon Corp.*, 434 F.Supp 136, 156 (D. Del. 1977)).

for Production of Documents 36. Thus, regardless of whether its claim of attorney-client privilege or work-product doctrine was ever applicable, such claims have been waived.

II. THE CAM IS RELEVANT

IEU-Ohio has sought a copy of DP&L's CAM. DP&L provided IEU-Ohio an opportunity to view the CAM but failed to provide a copy of the document. In response to IEU-Ohio's 2nd Motion to Compel seeking a copy of the CAM and the board of directors' minutes that should have been included as part of the CAM,¹³ DP&L's Memo Contra incorrectly claims that IEU-Ohio failed to identify any specific issue as to why the CAM is relevant, and also claims that the documents were privileged. Neither claim has merit.

First, IEU-Ohio demonstrated that the CAM was relevant in its Memorandum in Support of IEU-Ohio's 2nd Motion to Compel. At pages 10-12 of IEU-Ohio's 2nd Motion to Compel, IEU-Ohio identified the reasons why the CAM is reasonably calculated to lead to the discovery of admissible evidence; specifically, IEU-Ohio identified the following reasons:

1. The CAM is cited in DP&L's own testimony;
2. In a standard service offer ("SSO") proceeding, an electric distribution utility ("EDU") must demonstrate that it is in compliance with the State policies contained in Section 4928.02, Revised Code. Section 4928.02(H), Revised Code, prohibits cross-subsidies and, therefore, the means by which DP&L allocates its costs to its business units is relevant to ensure that there are not cross-subsidies.
3. The Commission's standard filing requirements for an ESP require DP&L to demonstrate that it is currently in compliance with the corporate separation requirements. DP&L operates under

¹³ Rule 4901:1-37-08(D)(9), O.A.C.

functional separation, and according to Section 4928.17(C), Revised Code, any EDU operating under functional separation must comply with the State policy contained in Section 4928.02, Revised Code.¹⁴

Accordingly, IEU-Ohio has demonstrated that the entire CAM is reasonably calculated to lead to the discovery of admissible evidence.

DP&L's Memo Contra ignores this analysis and instead claims that it offered IEU-Ohio an opportunity to request specific pages and then argue about whether the individual pages were relevant. After reviewing the CAM (which failed to contain the board of directors' minutes), IEU-Ohio determined that the entire CAM was relevant and requested a complete copy of the CAM. IEU-Ohio's 2nd Motion to Compel demonstrates that the entire CAM is within the scope of discovery. While DP&L might want to only turn over certain pages of its CAM, the Commission's discovery rules do not limit IEU-Ohio's discovery rights to only those pages of documents that DP&L wishes to disclose. IEU-Ohio "may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding" or which is "reasonably calculated to lead to the discovery of admissible evidence."¹⁵ IEU-Ohio's discovery request is proper and within the allowed scope of discovery in Commission proceedings. Moreover, DP&L failed to raise a relevance objection in its discovery response and therefore the Commission should not entertain any arguments about relevance now.

DP&L also claims that its board of directors' minutes are "privileged material."¹⁶ Again, DP&L fails to distinguish between the attorney-client privilege and work-product doctrine, but DP&L's assertion fails either way. The party claiming that either the

¹⁴ IEU-Ohio's 2nd Motion to Compel at 10-12.

¹⁵ Rule 4901-1-16, O.A.C.

¹⁶ DP&L's Memo Contra at 7.

attorney-client privilege or work-product doctrine bears the burden of demonstrating that either applies and DP&L failed to offer any analysis on this issue. Instead, DP&L cites to two federal cases, but these two cases do not stand for the proposition that all board of directors' minutes are subject to the attorney-client privilege or work-product doctrine.

The first case cited by DP&L is *In re Ford Motor Co.*, 110 F.3d 954, 966 (3d Cir. 1997). That case held that the board of directors' minutes were subject to the attorney-client privilege because they were made for the purpose of obtaining legal advice:

the final minutes, the draft minutes, the report Nolte [Ford's general counsel] summarized at the meeting, and relevant affidavits, leads us to conclude that the communications in the meeting were made for the purpose of securing legal advice.¹⁷

The Third Circuit Court of Appeals analysis was factually driven and hinged on its determination that the communications during the board meeting were for the purpose of securing legal advice. DP&L, however, fails to include any discussion on this issue and has therefore failed to meet its burden of proof.

The second case cited by DP&L is *Great Plains Mutual Insurance Co., Inc. v. Mutual Reinsurance Bureau*, 150 F.R.D. 193, 197-98 (D. Kan. 1993). This case stands for the same proposition as the case discussed above: board of directors' minutes can be withheld under a claim of attorney-client privilege if the communications during the meeting were for the purpose of securing legal advice.¹⁸ DP&L has failed to demonstrate that the communications recorded in the meeting minutes were made for purposes of obtaining legal advice. Because DP&L's Memo Contra completely fails to include any analysis on this issue, DP&L has failed to meet its burden to demonstrate

¹⁷ *In re Ford Motor Co.*, 110 F.3d at 966.

¹⁸ See *Great Plains Mut. Ins.*, 150 F.R.D. at 196-97.

that the attorney-client privilege and/or work-product doctrine are applicable. Accordingly, the Commission should compel DP&L to produce its CAM, complete with all board of directors' minutes.

III. **CONCLUSION**

For the reasons discussed above, DP&L's objections to IEU-Ohio's discovery requests that are the subject of IEU-Ohio's 2nd Motion to Compel are meritless. Accordingly, the Commission should grant IEU-Ohio's 2nd Motion to Compel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ Matthew R. Pritchard

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