

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 :

**THE DAYTON POWER AND LIGHT COMPANY'S REPLY IN SUPPORT OF ITS
MOTION TO COMPEL INDUSTRIAL ENERGY USERS-OHIO TO ANSWER
INTERROGATORIES AND PRODUCE DOCUMENTS**

**THE DAYTON POWER AND LIGHT COMPANY'S MEMORANDUM IN
OPPOSITION TO IEU'S MOTION FOR PROTECTIVE ORDER**

I. INTRODUCTION AND SUMMARY

This memorandum is both a Reply to IEU's Memorandum in Opposition to DP&L's Motion to Compel and a Memorandum in Opposition to IEU's Motion for a Protective Order. IEU's Motion for a Protective Order argues that the Commission should not grant DP&L's Motion to Compel, so the two IEU filings are unnecessarily duplicative.

IEU seems to believe that it has no obligation to provide information to DP&L before IEU's testimony is due, but that is not so. It is important to DP&L's ability to prosecute this case that IEU be compelled to respond to discovery in advance of the date that its testimony is due. Testimony is due only two weeks before the hearing, and DP&L is entitled to conduct discovery now to assist it to respond to the filed testimony. The Commission should therefore compel IEU to respond to DP&L's discovery requests.

IEU also suggests that DP&L's discovery requests are unreasonably burdensome, but that is not so either. IEU has served ten sets of discovery requests upon DP&L, which have included 122 interrogatories, 32 requests for production, and 29 requests for admission. DP&L has produced 52,984 pages of documents as well as 5 documents in native format (with formulas intact) to IEU in response. In contrast, DP&L has served very few discovery requests upon IEU. DP&L has served one set of discovery requests that included 8 interrogatories and 9 requests for production; IEU has produced only 16 pages of documents to DP&L in response. DP&L seeks highly-relevant information and the number and scope of its requests are not unreasonable.

II. THE COMMISSION SHOULD GRANT DP&L'S MOTION TO COMPEL

A. INTERROGATORIES 1 AND 2 ASK SIMPLE "YES" OR "NO" QUESTIONS

DP&L's interrogatories 1-2 ask simple "yes" or "no" questions:

"Interrogatory 1: State whether IEU agrees that DP&L should be given an opportunity to earn a reasonable return on equity.

a. If the answer to the preceding interrogatory is affirmative, then identify the return on equity that IEU asserts is reasonable.

b. If the answer to the preceding interrogatory is negative, then explain why not.

Interrogatory 2: State whether the IEU agrees that 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.

a. If the answer to the preceding interrogatory is affirmative, then (1) identify the level of non-bypassable charges that IEU asserts is reasonable; (2) explain why IEU asserts that the level is reasonable; and (3) state the return on equity that IEU contends that DP&L would earn with such a charge.

b. If the answer to the preceding interrogatory is negative, then explain why not."

IEU claims (Memo. Contra., pp. 2-4) to have answered those questions, but it has not. Its answers do not include a "yes" or a "no"; or an "affirmative" or "negative"; or any other form of a direct answer.

IEU further claims (id.) that a brief that it filed in AEP's case is responsive to DP&L's questions, but that is not so. The paragraphs in IEU's brief from AEP's case that IEU cites in its Memorandum Contra reveal that IEU believed that (1) a utility's return on equity is irrelevant in an ESP proceeding,¹ (2) certain charges that AEP sought to recover were transition charges and thus unrecoverable,² (3) certain charges that AEP sought to recover were related to

¹ September 7, 2012 Application for Rehearing, p. 42 (Case No. 11-346-EL-SSO).

²Id. at 50-57.

corporate separation issues and were thus unrecoverable,³ and (4) that AEP should not be permitted to recover its proposed RSR charge.⁴

However, those points are not directly responsive to the questions that DP&L asked. DP&L's questions require a simple yes or no, and IEU should be compelled to respond.

B. THE COMMISSION'S RULES REQUIRE IEU TO IDENTIFY THE PERSONS IT EXPECTS TO CALL AS WITNESSES

DP&L also asked IEU to identify the experts it expected to call as witnesses:

"Interrogatory 3: Pursuant to Ohio Admin. Code § 4901-1-16(C), identify each expert witness that IEU expects to testify on its behalf at the hearing, and state the subject matter on which each expert is expected to testify, and provide a brief summary of such experts expected testimony.

Request for Production of Documents 9: All writings 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."

DP&L's request is plainly appropriate since Ohio Admin. Code § 4901-1-16(C) expressly requires IEU to identify the persons it "expects" to call as witnesses in response to an interrogatory, and to state the subject matter of their testimony.

IEU's response -- that it has not made a final decision on witnesses that it will use -- is not responsive. The Commission's rules expressly require IEU to identify the persons it "expect[s]" to testify and the expected subject of their testimony. Ohio Admin. Code § 4901-1-16(C). DP&L is not suggesting that IEU is required to provide it a final witness list at this time;

³ Id. at 60-65.

⁴ Id. at 36-46.

IEU is free to amend its response later if it changes its mind. However, IEU is required by Commission rule to state its current expectations.

IEU also asserts (Memo. Contra, pp. 6-7) that the document request is overbroad, but that is not so. DP&L is entitled to any communications involving IEU's witnesses relating to this case. Such documents are plainly relevant, and may reveal important information related to the witnesses' testimony. (DP&L notes that it has repeatedly asked IEU to explain how its emails are processed and stored, so that DP&L could respond to IEU's arguments that requiring it to produce its communications was overbroad and unduly burdensome; IEU has failed to respond to DP&L's requests.)

C. ALLEGED ERRORS OF WHICH IEU IS AWARE

DP&L interrogatories 4-7 asked IEU about whether it was aware of any alleged errors in DP&L's filing:

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.

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."

Those requests are directly related to this case and are plainly appropriate; IEU, nevertheless has not responded to them.

IEU claims (p. 8) that DP&L has not produced all of the information that it needs and has not had sufficient time to review all of the information that it has received. That is not responsive. IEU must identify all of the responsive information of which it is currently aware. There are some isolated pieces of information that IEU has moved to compel, and if the Commission were to grant IEU's motion, then IEU could review the information and supplement its responses if necessary. Further, as to IEU's time objection, if IEU later identifies additional alleged deficiencies, then it can supplement its response. However, IEU must be required to identify the alleged deficiencies of which it is currently aware.

IEU's argument (p. 9) that the requested information is privileged since IEU has shared the information with its lawyers is plainly wrong. Interrogatories 5-7 ask IEU to identify facts; IEU cannot hide facts from discovery by providing those facts to its attorneys. State v. Hoop, 134 Ohio App. 3d 627, 640 (Brown Cty. 1999) ("[T]he underlying facts of a case are not privileged."); Upjohn Co. v. U.S., 449 U.S. 383, 395-396 (1981) ("The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.") (emphasis added). Interrogatory 4 is a contention interrogatory that asks for IEU's legal position; Ohio Admin. Code § 4901-1-19(B) expressly authorizes interrogatories as to a "legal conclusion."

D. DP&L REQUEST FOR PRODUCTION NO. 1

Based upon representations made by IEU's counsel (Memo. Contra, p. 10), DP&L withdraws its motion that IEU be compelled to respond to DP&L's request for production No. 1.

E. DOCUMENTS IEU MAY USE

DP&L's request for production No. 2 states:

"Request for Production of Documents 2: All writings that IEU may introduce at any depositions or hearings in this matter."

IEU's response -- that it may use documents in the "public domain" -- is not responsive. IEU argues (Memo. Contra, pp. 10-11) that the request is overbroad, but that is not so. DP&L does not expect IEU to search the public domain to identify documents that it may use at the hearing. However, IEU should be compelled to identify and produce the documents of which it is currently aware.

F. DP&L REQUESTS FOR PRODUCTION NOS. 5-6

DP&L's requests for production Nos. 5-6 state:

"Request for Production of Documents 5: All writings constituting or relating to communications among IEU-Ohio and any of its members relating to DP&L's ESP Application.

Request for Production of Documents 6: All writings constituting or relating to communications among IEU-Ohio and any of its members relating to DP&L's ESP proceedings or MRO Application."

After DP&L filed its motion to compel, IEU produced documents in response to DP&L's requests for production No. 5. DP&L thus withdraws its motion to compel as to that request.

However, IEU has not produced those communications that relate to DP&L's MRO Application, which are the subject of Request No. 6. IEU claims (p. 12) that the communications between it and its members are protected by the attorney-client privilege, but that argument has several flaws. First, DP&L seeks communications between IEU and its members, neither of which are attorneys, so those communications cannot be privileged. Second, to the extent that IEU's counsel has provided legal advice to IEU's members, IEU needs to demonstrate that no persons other than IEU members have received that advice and that the information was prepared by counsel. IEU has made no effort to make such a demonstration.

G. COMMUNICATIONS WITH OTHER PARTIES

DP&L's requests sought:

"Request for Production of Documents 7: All writings constituting or relating to communications among IEU-Ohio and any other person (including, but not limited to, intervenors) relating to DP&L's ESP Application or MRO Application."

Communications that IEU has had with other parties to this case about this case are plainly relevant.

IEU claims (p. 14) that its communications with other intervenors are privileged; not so. It is well settled that communications with third parties are not privileged. IEU's statement (p. 14) that it should not be compelled to produce communications with its attorneys is unobjectionable, but the request seeks all of IEU's communications with third parties, including intervenors. IEU did not produce even a single email between it and any of the intervenors. Those communications are clearly relevant and responsive documents should be produced.

IEU also argues (p. 14) that information related to the MRO Application is not relevant. Again, not so. DP&L's MRO Application was supported by most of the same witnesses as DP&L's ESP Application, had a nearly identical plan to blend competitive bidding rates with DP&L's existing rates, had a non-bypassable charge, and had nearly identical rate structure. Additionally, the Applications had the same case numbers. The fact that IEU has information related to that case that it does not want to produce does not protect the information from discovery.

IEU's grammatical argument (p. 14) is simply meritless. The phrase "relating to DP&L's ESP Application or MRO Application" in DP&L's requests was plainly intended to modify "communications." Further, IEU's claim (p. 14) that it has produced all such communications is simply false. IEU has not provided even one email between it and any of the other parties to this case. There have plainly been such communications, because IEU and other parties have jointly filed several motions.⁵ There were undoubtedly other such communications between the intervenors, but IEU has not produced any of them.

⁵ Application for Rehearing By the Office of the Ohio Consumers' Counsel, Industrial Energy Users-Ohio, Ohio Partners for Affordable Energy, OMA Energy Group, SolarVision, the Kroger Company, Ohio Energy Group, Honda of America Manufacturing, Inc., Wal-Mart Stores East, LP and Sam's East, Inc (filed on January 18, 2013); Joint Motion to Vacate Procedural Schedule or in the Alternative to Modify Procedural Schedule, Schedule a Prehearing Conference, Request for Expedited Treatment, and Memorandum in Support (filed on January 4, 2013); Joint Memorandum Contra Dayton Power and Light Company's Motion to Extend Current Rates (filed on November 23, 2012); Joint Movants' Memorandum in Opposition to The Dayton Power and Light Company's Waiver Request (filed on November 21, 2012); Joint Movants' Amended Reply to The Dayton Power and Light Company's Memorandum in Opposition to Joint Movants' Motion Seeking an Order Directing The Dayton Power and Light Company to Comply with the Standard Filing Requirements for an Electric Security Plan (filed on November 13, 2012); Joint Movants' Motion Seeking an Order Directing The Dayton Power and Light Company to Comply with the Standard Filing Requirements for an Electric Security Plan and Memorandum in Support and Memorandum Contra The Dayton Power and Light Company's Requests for Waivers (filed on October 22, 2012); Reply to Memorandum of The Dayton Power and Light Company in Opposition to Joint Motion Seeking Enforcement of Approved Settlement Agreements and Orders Issued by the Public Utilities Commission of Ohio (filed on October 18, 2012); Joint Memorandum Contra Dayton Power and Light Company's Proposed Procedural Schedule (filed on October 16, 2012); Joint Motion Seeking Enforcement of Approved Settlement Agreements and Orders Issued by the Public Utilities Commission of Ohio and Memorandum in Support (filed on September 26, 2012) (footnote cont'd...)

IEU's claim (p. 14) that it has produced all of the documents "in its possession" suggests that IEU is using an unreasonably narrow definition of "possession." Specifically, counsel for IEU has disclosed that Kevin Murray is IEU's executive director and is also an employee of the law firm McNees Wallace & Nurick LLC. When counsel for DP&L asked counsel for IEU for all emails between Mr. Murray and third parties, counsel for IEU stated that he believed that Mr. Murray received them in his capacity as an employee of McNees, and did not have access to them in his capacity as executive director of IEU.

That is simply nonsense. Mr. Murray is an executive director at IEU; DP&L believes that IEU has other representatives as well, but IEU has not identified those persons. Those persons have access to any emails they received, and IEU should be required to produce them. That production should include emails between IEU's counsel and third parties that IEU's counsel forwarded to those representatives (statements made by IEU's counsel in the process of forwarding the documents to IEU representatives could be redacted as privileged).

H. COMMUNICATION IN AEP'S CASE

DP&L's request for production No. 8 states:

"Request for Production of Documents 8: All writings constituting or relating to communications among IEU-Ohio and any other person (including, but not limited to, intervenors) relating to the Commission's decisions in AEP's ESP proceeding, PUCO Case No. 11-346-EL-SSO."

(...cont'd)

2012); Joint Memorandum in Opposition to Motion of Applicant The Dayton Power and Light Company to Set Procedural Schedule for Its Electric Security Plan Filing (filed on September 17, 2012); Motion to Modify Procedural Schedule of Joint Movants (filed on April 13, 2012).

IEU makes the same grammatical argument (p. 15) relating to this request that DP&L has already addressed above.

IEU also argues (p. 16) that the information is not relevant because the Commission's decision in AEP's case is not precedential in this case. Those simply are not valid objections. While IEU is free to argue on brief that the Commission should not follow its decision in AEP's case in this case, the fact that IEU can make that argument later in its brief does not make its communications in that case free from discovery.

Finally, IEU's trade secret argument (p. 17) misses the point. IEU should be compelled to produce all communications that are not specifically designated as trade secrets.

III. CONCLUSION

The Commission should conclude that the discovery rules apply to IEU, just like they apply to DP&L. IEU should not be permitted to recuse itself from the discovery process until it files testimony two weeks before the hearing. The Commission should grant DP&L's motion to compel.

Respectfully submitted,

s/ Judi L. Sobecki

Judi L. Sobecki (0067186)
THE DAYTON POWER AND
LIGHT COMPANY
1065 Woodman Drive
Dayton, OH 45432
Telephone: (937) 259-7171
Telecopier: (937) 259-7178
Email: judi.sobecki@dplinc.com

s/ Charles J. Faruki

Charles J. Faruki (0010417)
(Counsel of Record)
Jeffrey S. Sharkey (0067892)
FARUKI IRELAND & COX P.L.L.
500 Courthouse Plaza, S.W.
10 North Ludlow Street
Dayton, OH 45402
Telephone: (937) 227-3705
Telecopier: (937) 227-3717
Email: cfaruki@ficlaw.com

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing The Dayton Power and Light Company's Reply in Support of Its Motion to Compel Industrial Energy Users-Ohio to Answer Interrogatories and Produce Documents; and The Dayton Power and Light Company's Memorandum in Opposition to IEU's Motion for Protective Order has been served via electronic mail upon the following counsel of record, this 22nd day of January, 2013:

Samuel C. Randazzo, Esq.
Frank P. Darr, Esq.
Matthew R. Pritchard, Esq.
Joseph E. Olikier, Esq.
MCNEES WALLACE & NURICK LLC
21 East State Street, 17th Floor
Columbus, OH 43215-4228
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
joliker@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

Philip B. Sineneng, Esq.
THOMPSON HINE LLP
41 South High Street, Suite 1700
Columbus, OH 43215
Philip.Sineneng@ThompsonHine.com

Amy B. Spiller, Esq.
Deputy General Counsel
Jeanne W. Kingery, Esq.
Associate General Counsel
DUKE ENERGY RETAIL SALES, LLC and
DUKE ENERGY COMMERCIAL ASSET
MANAGEMENT, INC.
139 East Fourth Street
1303-Main
Cincinnati, OH 45202
Amy.Spiller@duke-energy.com
Jeanne.Kingery@duke-energy.com

Attorneys for Duke Energy Retail Sales, LLC and
Duke Energy Commercial Asset Management, Inc.

Mark A. Hayden, Esq.
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
haydenm@firstenergycorp.com

James F. Lang, Esq.
Laura C. McBride, Esq.
CALFEE, HALTER & GRISWOLD LLP
1400 KeyBank Center
800 Superior Avenue
Cleveland, OH 44114
jlang@calfee.com
lmcbride@calfee.com

N. Trevor Alexander, Esq.
CALFEE, HALTER & GRISWOLD LLP
1100 Fifth Third Center
21 E. State St.
Columbus, OH 43215-4243
talexander@calfee.com

David A. Kutik, Esq.
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, OH 44114
dakutik@jonesday.com

Allison E. Haedt, Esq.
JONES DAY
325 John H. McConnell Blvd., Suite 600
Columbus, OH 43215-2673
aehaedt@jonesday.com

Attorneys for FirstEnergy Solutions Corp.

Robert A. McMahon, Esq.
EBERLY MCMAHON LLC
2321 Kemper Lane, Suite 100
Cincinnati, OH 45206
bmcMahon@emh-law.com

Rocco O. D'Ascenzo, Esq.
Associate General Counsel
Elizabeth Watts, Esq.
Associate General Counsel
DUKE ENERGY OHIO, INC.
139 East Fourth Street
1303-Main
Cincinnati, OH 45202
Elizabeth.Watts@duke-energy.com
Rocco.D'Ascenzo@duke-energy.com

Attorneys for Duke Energy Ohio, Inc.

David F. Boehm, Esq.
Michael L. Kurtz, Esq.
BOEHM, KURTZ & LOWRY
36 East Seventh Street Suite 1510
Cincinnati, OH 45202-4454
dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com

Attorneys for Ohio Energy Group

Gregory J. Poulos, Esq.
EnerNOC, Inc.
471 East Broad Street
Columbus, OH 43215
Telephone: (614) 507-7377
Email: gpoulos@enernoc.com

Attorney for EnerNOC, Inc.

Colleen L. Mooney, Esq.
OHIO PARTNERS FOR AFFORDABLE
ENERGY
231 West Lima Street
P.O. Box 1793
Findlay, OH 45839-1793
cmooney2@columbus.rr.com

Attorney for Ohio Partners for Affordable Energy

Jay E. Jadwin, Esq.
AMERICAN ELECTRIC POWER
SERVICE CORPORATION
155 W. Nationwide Blvd., Suite 500
Columbus, OH 43215
jejadwin@aep.com

Attorney for AEP Retail Energy Partners LLC

M. Anthony Long, Esq.
Senior Assistant Counsel
Asim Z. Haque, Esq.
HONDA OF AMERICA MFG., INC.
24000 Honda Parkway
Marysville, OH 43040
tony_long@ham.honda.com
Asim Z. Haque, Esq.

Attorney for Honda of America Mfg., Inc.

Richard L. Sites, Esq.
General Counsel and Senior Director of
Health Policy
OHIO HOSPITAL ASSOCIATION
155 East Broad Street, 15th Floor
Columbus, OH 43215-3620
ricks@ohanet.org

Thomas J. O'Brien, Esq.
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
tobrien@bricker.com

Attorneys for Ohio Hospital Association

Thomas W. McNamee, Esq.
Assistant Attorney General
Devin D. Parram, Esq.
Assistant Attorneys General
180 East Broad Street
Columbus, OH 43215
Thomas.mcnamee@puc.state.oh.us
devin.parram@puc.state.oh.us

Attorneys for the Staff of the Public Utilities
Commission of Ohio

Mark S. Yurick, Esq.
(Counsel of Record)
Zachary D. Kravitz, Esq.
TAFT STETTINIUS & HOLLISTER LLP
65 East State Street, Suite 1000
Columbus, OH 43215
myurick@taftlaw.com
zkravitz@taftlaw.com

Attorneys for The Kroger Company

Mark A. Whitt, Esq. (Counsel of Record)
Andrew J. Campbell, Esq.
WHITT STURTEVANT LLP
The KeyBank Building
88 East Broad Street, Suite 1590
Columbus, OH 43215
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com

Vincent Parisi, Esq.
Matthew White, Esq.
INTERSTATE GAS SUPPLY, INC.
6100 Emerald Parkway
Dublin, OH 43016
vparisi@igsenergy.com
mswhite@igsenergy.com

Attorneys for Interstate Gas Supply, Inc.

Steven M. Sherman, Esq. Counsel of Record
Joshua D. Hague, Esq. (admitted *pro hac vice*)

KRIEG DEVAULT LLP
One Indiana Square, Suite 2800
Indianapolis, IN 46204-2079
ssherman@kdlegal.com
jhague@kdlegal.com

Attorneys for Wal-Mart Stores East, LP
and Sam's East, Inc.

Melissa R. Yost, Esq., (Counsel of Record)
Maureen R. Grady, Esq.
Assistant Consumers' Counsel
Office of The Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
yost@occ.state.oh.us
grady@occ.state.oh.us

Attorneys for Office of the Ohio Consumers'
Counsel

Christopher L. Miller, Esq.
(Counsel of Record)
Gregory H. Dunn, Esq.
Christopher W. Michael, Esq.
ICE MILLER LLP
250 West Street
Columbus, OH 43215
Christopher.Miller@icemiller.com
Gregory.Dunn@icemiller.com
Christopher.Michael@icemiller.com

Attorneys for the City of Dayton, Ohio

M. Howard Petricoff, Esq.
Stephen M. Howard, Esq.
VORYS, SATER, SEYMOUR AND
PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
mhpetricoff@vorys.com
smhoward@vorys.com

Attorneys for the Retail Energy Supply
Association

Trent A. Dougherty, Esq. Counsel of Record
Cathryn N. Loucas, Esq.
OHIO ENVIRONMENTAL COUNCIL
1207 Grandview Avenue, Suite 201
Columbus, OH 43212-3449
trent@theoec.org
cathy@theoec.org

Attorneys for the Ohio Environmental
Council

Joseph M. Clark, Esq., Counsel of Record
21 East State Street, Suite 1900
Columbus, OH 43215
joseph.clark@directenergy.com

Christopher L. Miller, Esq.
Gregory J. Dunn, Esq.
Alan G. Starkoff, Esq.
ICE MILLER LLP
2540 West Street
Columbus, OH 43215
Christopher.Miller@icemiller.com
Gregory.Dunn@icemiller.com

Attorneys for Direct Energy Services, LLC
and Direct Energy Business, LLC

M. Howard Petricoff, Esq.
VORYS, SATER, SEYMOUR AND PEASE
LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
mhpeticoff@vorys.com
smhoward@vorys.com

Attorneys for Exelon Generation Company, LLC,
Exelon Energy Company, Inc., Constellation
Energy Commodities Group, Inc., and
Constellation NewEnergy, Inc.
Matthew J. Satterwhite, Esq.
Steven T. Nourse, Esq.
AMERICAN ELECTRIC POWER SERVICE
CORPORATION
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
mjsatterwhite@aep.com
stnourse@aep.com

Attorneys for Ohio Power Company

Ellis Jacobs, Esq.
Advocates for Basic Legal Equality, Inc.
333 West First Street, Suite 500B
Dayton, OH 45402
ejacobs@ablelaw.org

Attorney for Edgemont Neighborhood
Coalition

Stephanie M. Chmiel, Esq.
Michael L. Dillard, Jr., Esq.
THOMPSON HINE LLP
41 South High Street, Suite 1700
Columbus, OH 43215
Stephanie.Chmiel@ThompsonHine.com
Michael.Dillard@ThompsonHine.com

Attorneys for Border Energy Electric
Services, Inc.

Matthew W. Warnock, Esq.
J. Thomas Siwo, Esq.
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
mwarnock@bricker.com
tsiwo@bricker.com

Attorneys for The Ohio Manufacturers'
Association Energy Group

Kimberly W. Bojko, Esq.
Joel E. Sechler, Esq.
CARPENTER LIPPS & LELAND LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, OH 43215
Bojko@carpenterlipps.com
Sechler@carpenterlipps.com

Attorneys for SolarVision, LLC

Matthew R. Cox, Esq.
MATTHEW COX LAW, LTD.
4145 St. Theresa Blvd.
Avon, OH 44011
matt@matthewcoxlaw.com

Attorney for the Council of Smaller Enterprises

Cynthia Fonner Brady, Esq.
Assistant General Counsel
EXELON BUSINESS SERVICES COMPANY
4300 Winfield Road
Warrenville, IL 60555
Cynthia.Brady@constellation.com

Attorney for Constellation
an Exelon Company

Edmund J. Berger, Esq. (admitted *pro hac vice*)
Office of The Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
berger@occ.state.oh.us

Attorneys for Office of the Ohio Consumers'
Counsel

Mary W. Christensen, Esq.
Christensen Law Office LLC
8760 Orion Place, Suite 300
Columbus, OH 43240-2109
mchristensen@columbuslaw.org

Attorneys for People Working Cooperatively, Inc.

Scott C. Solberg, Esq.(admitted *pro hac vice*)
Eimer Stahl LLP
224 South Michigan Avenue, Suite 1100
Chicago, OH 60604
ssolberg@eimerstahl.com

Attorney for Exelon Generation
Company, LLC

Stephen Bennett, Manager
State Government Affairs
300 Exelon Way
Kenneth Square, PA 19348
stephen.bennett@exeloncorp.com

Bill C. Wells, Esq.
AFMCLO/CL
Industrial Facilities Division
Bldg 266, Area A
Wright Patterson AFB, OH 45433
bill.wells@wpafb.af.mil

Christopher C. Thompson, Esq.
Staff Attorney (pending *pro hac vice*)
USAF Utility Law Field Support Center
139 Barnes Drive, Suite 1
Tyndall AFB, FL 32403-5319

Attorneys for Federal Executive Agencies

s/ Jeffrey S. Sharkey
Jeffrey S. Sharkey

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

Summary: Reply The Dayton Power and Light Company's Reply in Support of Its Motion to Compel Industrial Energy Users-Ohio to Answer Interrogatories and Produce Documents; and The Dayton Power and Light Company's Memorandum in Opposition to IEU's Motion for Protective Order electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company