BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of its Market Rate Offer.	)))	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 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

MOTION TO COMPEL RESPONSES TO DISCOVERY
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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January 23, 2013

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In this case where just one of the utility's many proposals would cost customers more than $600 million, the Office of the Ohio Consumers' Counsel ("OCC") must seek enforcement of discovery law and rules to obtain the information needed for presenting the consumer perspective on the issues. OCC, on behalf of the residential utility consumers of the Dayton Power & Light Company ("DP&L" or "Company"), moves[2] the Public Utilities Commission of Ohio ("PUCO" or "Commission"), the legal director, the deputy legal director, or an attorney

[2] See Ohio Adm. Code 4901-1-12 and 4901-1-23.

examiner for an order compelling the Company to fully and specifically respond to OCC Interrogatories 227, 239, 255, 260, 261, 268, 333, and 334, and requests for production of documents RPD 37, 39, 69, 71, and 73 which are attached hereto as OCC Exhibits 1-13.

As demonstrated in the attached Memorandum in Support, DP&L objected to this discovery based on a litany of objections, including privilege. Yet DP&L failed to do any more than assert a blanket claim of privilege. DP&L has never identified on a document-by-document basis the justification for any alleged privilege. To date, even when asked for a privilege log, DP&L has not produced one. DP&L initially offered to produce a privilege log to justify its numerous privilege claims only if OCC would pay $180 per hour for one of its legal firm's attorneys to conduct a computer search. Although later (late December, 2012) DP&L agreed to do a computer search of the law firm files, using search terms provided by OCC, there has been no privilege log provided to OCC to date.

With the upcoming discovery conference set for January 30, 2013, and Attorney Examiner Price's indicated preference that discovery matters be addressed by written motion, OCC files this Motion to Compel, with the reasons supporting this motion set forth in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

DP&L has failed to provide complete responses to discovery requests propounded by the OCC. Instead, DP&L repeatedly asserts a litany of rote objections and relies in some instances upon blanket claims of privilege as a shield.[4] At the same time DP&L has been unwilling and unable to produce a discovery log, when asked to do so by OCC.[5] Additionally, while DP&L claims that some of the discovery requests are "unduly

[4] See DP&L response to OCC Interrogatories 227, 239, 268 (Exhibits 1, 2, 6); Request for Production 37 and 39 (Exhibits 9, 10).

[5] See attached Affidavit of Counsel.

burdensome" to respond to,[6] it does not explain what efforts would be necessary to respond. DP&L also tries to hide behind its affiliates by claiming that the information requested is in the affiliates' possession, and the affiliates are not subject to discovery.[7] DP&L also maintains objections that the information is "proprietary"[8] even though OCC and DP&L have executed a protective agreement setting forth agreed upon terms to treat proprietary information and protect it from disclosure.

These responses are evasive, incomplete, and insufficient. Such responses are contrary to the Commission's rules.[9] The Attorney Examiner should overrule the objections to the discovery, and order DP&L to immediately provide complete responses to OCC's discovery.

II. STANDARD OF REVIEW

According to the Commission, "the policy of discovery is to allow the parties to prepare cases and to encourage them to prepare thoroughly without taking undue advantage of the other side's industry or efforts."[10] The Commission's rules on discovery "do not create an additional field of combat to delay trials or to appropriate the Commission's time and resources; they are designed to confine discovery procedures to

[6] See DP&L Response to OCC Interrogatories 255, 260, 261, 333, 334 (Exhibits 3, 4, 5, 7, 8) ; RFP 69, 71, and 73 (Exhibits 11,12, 13).

[7] See DP&L Response to OCC Interrogatories 255, 260, 261, 333,334 (Exhibits 3, 4, 5, 7, 8); RFP 69, 71, and 73 (Exhibits 11, 12, 13).

[8] See DP&L Response to OCC Interrogatories 227, 239, 268, 333, 334 (Exhibits 1, 2, 6, 7, 8), RFP 37, 39, 69, 71, and 73 (Exhibits 9-13).

[9] Ohio Admin. Code 4901-1-19 requires that interrogatories "shall be answered separately and fully" in writing and under oath. See also Ohio Civil Rule 33 (A)(3).

[10] *In the Matter of the Investigation into the Perry Nuclear Power Plant*, Case No. 85-521-EL-COI, Entry at 23 (Mar.17, 1987).

counsel and to expedite the administration of the Commission proceedings."[11] These rules are intended to assure full and reasonable discovery, consistent with the statutory discovery rights of parties under R.C. 4903.082.

Specifically, R.C. 4903.082 states that the OCC and "[a]ll parties and intervenors shall be granted ample rights of discovery." Therefore the OCC, a party and intervenor, is entitled to timely and complete responses to its discovery inquiries. Additionally, R.C. 4903.082 directs the Commission to ensure that parties are allowed "full and reasonable discovery" under its rules.

Accordingly, the Commission has adopted Ohio Adm. Code 4901-1-16(B) that provides:

> any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The PUCO's discovery rule is similar to Ohio Civ. R.26 (B)(1), which governs the scope of discovery in civil cases. Civ. R. 26(B) has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding.[12]

This scope of discovery is applicable to written interrogatories. Written interrogatories may elicit facts, data, or other information known or readily available to the party upon whom the discovery is served, under Ohio Adm. Code 4901-1-19. Each

[11] Id., citing *Penn Central Transportation Co. v. Armco Steel Corp*. (C.P. 1971), 27 Ohio Misc. 76.

[12] *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 300, ¶83, citing to *Moskovitz v. Mt. Sinai Med. Ctr*. (1994), 69 Ohio St.3d 638, 661 and *Disciplinary Counsel v. O'Neill* (1996), 75 Ohio St. 3d 1479.

interrogatory must be answered "separately and fully, in writing and under oath, unless objected to, in which case the reasons for the objection shall be stated in lieu of an answer. The answer shall be signed by the person making them, and the objections shall be signed by the attorney or other person making them."

In Ohio Adm. Code 4901-1-23, the PUCO provided the procedure for parties to obtain the enforcement of these discovery rights, guaranteed by law and rule. Ohio Adm. Code 4901-1-23(A) and (B) provide for the PUCO to compel a party to answer discovery when the party has failed to do so, including when answers are evasive or incomplete. Ohio Adm. Code Rule 23(C) details the technical requirements for a motion to compel, all of which are met in this OCC pleading.

The motion to compel is to be accompanied by a memorandum in support setting forth the basis of the motion and authorities relied upon; a brief explanation of how the information sought is relevant; and responses to objections raised by the party from whom the discovery is sought.[13] Copies of the discovery requests and the responses are to be attached.[14] Finally, Rule 4901-1-23, subsection (C) also requires the party seeking discovery to file an affidavit explaining how it has exhausted all other reasonable means of resolving the differences with the party from whom the discovery is sought.

The OCC has detailed in the attached affidavit, consistent with Rule 4901-1-23(C)(3), the efforts which have been undertaken to resolve differences between it and the Company. At this point it is clear that there can be no resolution worked out. OCC seeks responses to its discovery requests and is unable to obtain the responses without the Commission compelling such a result.

[13] See Ohio Adm. Code 4901-1-23(C)(1).

[14] Ohio Adm. Code 4901-1-23(C)(2).

III. ARGUMENT

A. The Discovery Sought Is Reasonably Calculated To Lead To The Discovery Of Admissible Evidence.

1. Information reported about distributions to DPL by AES and other DP&L specific information contained in presentations to shareholders. (Interrogatory 255, 260, 261) (Exhibits 3-5).

Interrogatory 255 seeks DP&L specific information reported by AES Corporation in its Third Quarter 2012 Financial Review.[15] The information was presented by AES as an "Update on DP&L" at a presentation to the investment community. OCC seeks to understand the effect on DP&L's cash flow of AES' plans to "de-lever 'the business' with cash generated at DPL." Interrogatories 260 and 261 pertain to information reported by AES that relates to distributions that AES has made and will make to DP&L, another factor impacting DP&L's cash flow.[16]

DP&L objects to the discovery on grounds of relevance, that it is "unduly burdensome," "calls for a narrative answer," is in the "possession of DP&L's unregulated affiliate, and "further objects because AES is not subject to discovery in this matter."

This information is sought in the context of DP&L's claims that it needs revenues from its Ohio customers over the term of the ESP in order to maintain its financial integrity. Distributions by AES to DP&L may affect DP&L's cash flow, and may diminish the need for customers to pay a $687 million SSR (not that the SSR is needed in any event). The discovery is appropriate as it is reasonably calculated to lead to the discovery of admissible evidence. The Company's objections to this discovery on grounds of relevance should be overruled.

[15] See Exhibit 3.

[16] Exhibits 4, 5.

2. Information supplied by DP&L to AES pertaining to estimates of revenues, expenditures, customer switching and aggregation trends, capacity and energy price curves, etc. which was ultimately the basis of a $2.4 billion good will impairment. (Interrogatories 333, 334, RFP 69, 71, and 73) (Exhibits 7, 8, 11, 12, 13).

Interrogatory 333 asked the Company to identify the estimates and assumptions used in the testing for good will impairment, as reported in the DP&L Form 10Q, for the third quarter of 2012.[17] Interrogatory 334 asked for the assumptions that were described in the Form 10Q as "material" to the impairment analysis.[18] Requests for production of documents 69, 71, and 73 seek documents identified in the description of the impairment analysis, a copy of the values assigned to the factors, and a copy of the report which reflected the results of the impairment analysis.[19]

DP&L objected to this discovery on the basis of "relevance," "unduly burdensome," "proprietary," "calls for a narrative answer," "possession of DP&L's unregulated affiliate," and "DPL Inc. is not subject to discovery in this matter and because the requested information is irrelevant."

After some communication between counsel, OCC proposed to limit its discovery to information supplied by DP&L to AES and DPL Inc. for use in the good will impairment study. In this way, the DP&L supplied information would be segregated from AES' conclusions on that information.[20] DP&L did not respond to OCC's proposal.

[17] Exhibit 7.

[18] Exhibit 8.

[19] Exhibits 11, 12, 13.

[20] See Attachment 10.

As explained to the Company, as part of the impairment analysis a "fair value" of DP&L was determined using a discounted cash flow valuation model. In order to conduct that analysis, assumptions were made as to various factors--factors that pertain to and are related to the financial integrity of DP&L. As reported in the 10Q, values were assigned for factors of: customer switching and aggregation trends, capacity and energy price curves, the amount of the standard service offer charge, the transition period for converting to wholesale competitive bidding, and dispatching.

In the pro forma financials presented by Mr. Jackson, many of these same factors are assigned values, and underlie the financial projections. And the financial projections are the basis for the $687 million SSR requested by DP&L. While the "good will" impairment pertains to AES, it is based on projections that are DP&L-specific. It can be reasonably assumed that information on the assumptions was provided by DP&L to AES.[21]

Because the Company has put its financial integrity into issue as a reason why customers should have to pay hugely expensive charges, parties can challenge the data and assumptions made pertaining to the Company's financial projections. These challenges provide information to the PUCO for its decision-making under R.C. 4903.09. One way of doing this is by discovering how the financial projections made in the ESP compare to other financial projections (such as those presented in the good will impairment analysis) that are being made about DP&L to the investment community. Thus, the discovery is reasonably calculated to lead to the discovery of admissible

[21] The Company has not refuted this.

evidence and is proper. The Company's objections to this discovery on grounds of relevance should be overruled.

3. Discovery directed at alternative scenarios where the value of the SSR and the move to market differs from the values incorporated into the pro forma financials (Interrogatory 239, Request for Production 39; Interrogatory 227, 268, RPD 37) (Exhibits 2, 10, 1, 6, 9).

Interrogatory 239 asks the Company whether it has developed ROE projections based on a quicker move to 100% competitive bid-based rates, and asks the Company to identify such scenarios and the resulting ROE projections.[22] It is very appropriate to be considering a quicker move to market since the market is producing very good generation prices for customers now (and considering that Ohio utilities were supposed to be on an arc for market pricing dating back to Senate Bill 3 in 1999).

Request for Production 39 asks the Company to produce a copy of the return on equity projections associated with Interrogatory 239.[23] Interrogatories 227 and 268 ask the Company whether it undertook any analysis of its financial position if the amount of the SSR approved varies from the amount DP&L requests.[24] RPD 37 asks for the documents associated with financial analysis of alternate SSR scenarios.[25]

The Company objects to these discovery requests claiming that it is privileged and work product, and proprietary.[26] The Company also states that it "objects to providing this information since it is privileged and work product."

[22] Exhibit 2.

[23] Exhibit 10.

[24] Exhibits 1, 6.

[25] Exhibit 9.

[26] With respect to Interrogatory 239, the Company also claims the discovery is "unduly burdensome."

The information sought by OCC pertains to whether the Company has made financial projections that reflect a quicker move to 100% competitive bid. As stated, the transition to market –how fast customers will be able to access 100% competitive bids— is an important issue in this proceeding for reducing consumers' rates.

This discovery also seeks to explore the financial effect of approving a lower SSR charge than that proposed by the Company. The value of the SSR and its impact on the Company's financial stability is an issue in this proceeding. One of the outcomes the Commission must consider is whether the Company's SSR should be rejected altogether (or reduced from the amount requested). So the information is reasonably calculated to lead to the discovery of admissible evidence.

B. The Company's Numerous Objections Should Be Overruled And The Company Should Be Required To Provide A Complete Response To The Questions Posed.

1. The Company's objections to discovery of information based on privilege and work product must fail because the Company has failed to establish privilege.

While DP&L relies upon attorney client privilege and work product doctrine to shield it from answering discovery, it fails to meet the burden which it uniquely bears: to establish that a privilege exists. It is uncontroverted that the burden of establishing the applicability of privilege rest upon the party asserting the privilege.[27]

For instance, when claiming attorney client privilege, the party raising the privilege must establish that the privilege applies to a particular communication that is sought to be disclosed.[28] The mere existence of a lawyer-client relationship does not

[27] *Herbert v. Lando*, 441 U.S. 153, 175, 99 S.Ct. 1635, 1648; *In re Allen*, 106 F.3d 582, 600 (4th Cir. 1997), cert. denied, 522 U.S. 1047 (1998).

[28] *In re: Guardianship of Marcia S. Clark*, 2009-Ohio-6577 at ¶8.

create, without the privilege being asserted with specificity, a "cloak of protection…draped around all occurrences and conversations which have any bearing, direct, or indirect upon the relationship of the attorney with his client."[29] The privilege must be proven document by document, with the demonstration typically being made with a privilege log.[30] Thus, a separate claim must be raised in response to each request for disclosure.[31]

In order to meet the burden of establishing an attorney client privilege, each element of the privilege must be demonstrated with specificity.[32] The basic criteria required to establish the privilege are (1) a communication (2) made in confidence (3) to an attorney (4) by a client (5) for the purpose of seeking or obtaining legal advice (6) and the privilege has been affirmatively asserted (7) and not waived (8) or covered by any of the exceptions to the privilege.[33]

But DP&L failed to establish any of these elements. Rather it relied upon an unexplained blanket attorney client privilege claim that was presented with no attempt to identify specific documents that it applies to. DP&L merely claims that any document that is responsive would be protected by attorney-client privilege.[34]

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[29] Sec. 5.02[8], 4 Weinstein's Federal Evidence, Chapter 503, Lawyer-Client Privilege (Matthew Bender 2d ed.).

[30] *United States v. Rockwell,* 897 F.2d 1255 (3rd Cir. 1990).

[31] Sec. 5.02[11a], 4 Weinstein's Federal Evidence, Chapter 503, Lawyer-Client Privilege.

[32] *State ex rel Dann v. Taft,* (2006), 109 Ohio St.3d 364.

[33] See *United States v. United Shoe Machinery Corp.*.(D.Mass. 1950), 89 F. Supp. 357, 359.

[34] DP&L offered to provide OCC a declaration that it was not aware of documents that are responsive to OCC's request that fall outside of four categories: (1) communication between DP&L and the firm; (2) communications between DP&L employees and DP&L's in-house counsel; (3) communications between DP&L or its counsel and non-testifying experts or (4) work done by DP&L on the SSO filings at the direction of legal counsel. See Attachment 4.

A blanket assertion of privilege is insufficient to meet this burden.[35] A representation by an attorney that there are no documents that are not covered by attorney client privilege, with no specific identification of documents is insufficient. DP&L needs to provide information to enable OCC and the PUCO to determine whether privilege exists, and if it exists, whether it has been waived or is covered by an exception to privilege.

The Ohio Rules of Civil Procedure are instructive in this regard, and the PUCO may apply those rules as appropriate, under its broad discretion in the conduct of its hearings.[36] Under that rule, "When information is privileged or subject to discovery is withheld on a claim that it is privileged or is subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest that claim."

A party wishing to protect a document from disclosure under the work product doctrine also has the burden of proving that the materials should not be discoverable.[37] The burden is fulfilled only if the party can show 1) the material is a document, electronically stored information or tangible thing; 2) prepared in anticipation of litigation and 3) prepared by a party or its representative.[38] Upon a showing of all of these requirements, the burden shifts to the opposing party to show "good cause" for

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[35] *Hitachi Medical Systems America, Inc. v. Branch*, 2010 U.S. District, Lexis 1597 at 7 (N.D. Ohio) (Sept. 24, 2010).

[36] *Greater Cleveland Welfare Rights Organization, Inc. et al., v. Public Utilities Commission of Ohio et al.*, 2 Ohio St.3d 62 at 68 (1982), citation omitted. See also R.C. 4903.22 and 4901.13.

[37] *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, 166.

[38] See Ohio Civ. R. 26(B)(3) (2008).

obtaining such documents.[39] But here, even though work product is claimed, the Company has failed to identify specifically what tangible information exists, and how it meets the definition of work product. So the burden has not shifted to OCC.[40]

A proper claim of privilege, whether attorney-client or trial preparation/work product doctrine, requires a specific designation and description of documents within its scope as well as precise and certain reasons for preserving their confidentiality. Unless the description is precise there is no basis on which to weigh the applicability of the claim of privilege. Hence, if a party is resisting disclosure on the privilege, it must show sufficient facts as to bring the identified and described discovery within the "narrow confines" of the privilege.[41] DP&L did not.

On December 7, 2012, OCC requested that DP&L produce a privilege log.[42] DP&L's response, one week later, was that it would not because it would be "unduly

[39] Ohio Civ. R. 26(B)(3).

[40] Moreover, even if DP&L had initially met its burden of establishing the work product doctrine applies to specific information OCC has requested, the inquiry does not end. If a party can show good cause—a demonstrated "need for the materials -ie., a showing that the materials or the information they contain, are relevant and otherwise unavailable"--discovery of the requested materials may be granted. Here there is good cause because the information requested is relevant and otherwise unavailable. Under Ohio Civil Rules of Evidence, Rule 403, relevant evidence is defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The facts of consequence to this proceeding include determining the appropriate amount, if any, to be established to ensure the financial integrity of the utility; and the blending period for the transition to 100% competitive bid. The information that OCC seeks is the Company's analysis of alternate scenarios which vary the level of the SSR or the blending period for 100% CBP. This information will test the Company's claimed need for a $687 million SSR, and a specific transition to 100% CBP. It is relevant under the test set forth in Rule 403. Good cause can be shown.

[41] The lawyer-client privilege is inconsistent with the common law rule of evidence that any witness with knowledge of the facts at issue may be called to testify about what he knows. This is because the privilege "impedes full and free discovery of the truth" and is "in derogation of the public's 'right to every man's evidence.'" The privilege is not favored by the federal courts and should be "strictly confined within the narrowest possible limits consistent with the logic of its principle." Bender's Forms of Discovery Treatise Sec. 5.02[2][b] (citations omitted).

[42] See Attachment 1.

burdensome."[43] DP&L offered to do so only if OCC would pay an attorney at Counsel's law firm to create a privilege log. When pressed into defining how burdensome it would be, DP&L responded that it would take 50-70 hours and the billing rate would be $180/hour.[44] In other words, DP&L would create a privilege log but only with charging OCC $9,000-$13,500--in this case where just one of DP&L's proposals tops $600 million for customers to pay. OCC declined that offer.[45] Subsequently, DP&L agreed to conduct a search of the law firm's e-mail with targeted search terms that OCC would provide. On December 20, 2012, OCC provided proposed terms. To date, a discovery log has not been produced.

By failing to produce a privilege log in a timely manner, the Company has failed to demonstrate that either the attorney client privilege or the work product/trial preparation doctrine applies to some unnamed and unidentified documents. As the Commission has recognized, the purpose of a privilege log is to assist the parties contesting the privilege claim as well as the attorney examiner in evaluating the merits of the privilege claim to understand both the parameters of the claim and its legal sufficiency.[46] Because DP&L has not produced a privilege log, and has not otherwise provided a document-by-document description of the information responsive to discovery, OCC (and the Commission) have been precluded from determining whether privilege actually exists. Nor can the OCC (or the Commission) determine whether the

[43] See Attachment 4.

[44] See Attachment 4.

[45] See Attachment 8.

[46] See *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider*, Case No. 10-176-EL-ATA, Entry at ¶19 (Jan. 27, 2011).

alleged privilege has been waived or whether there is an exception to privilege for the discovery in question.

Apart from the general statements that all communications that are responsive to OCC's discovery are privileged, the Company failed to show how the privilege (attorney-client or trial preparation) applies to any particular document. On this basis, the Commission should compel answers to the discovery, finding that privilege does not apply. This would be appropriate because the Company has failed to establish that a privilege or doctrine exists and applies to any particular documents.

Such a ruling would be in keeping with Attorney Examiner Price's ruling in the FirstEnergy all electric case.[47] There parties were ordered to produce responsive documents because they failed to establish, on a document by document basis, that an attorney-client privilege or trial preparation privilege applies. Attorney Examiner Price's ruling was subsequently confirmed by the Commission when it denied an interlocutory appeal that was taken of Examiner Price's ruling.[48]

2. The Company's objections to OCC discovery based on undue burden should be overruled because the Company has failed to establish undue burden and should have moved for protection if the discovery was truly burdensome.

DP&L claimed there was an undue burden to respond to OCC discovery requests.[49] In a case where DP&L has burdened the parties with three filings in succession and where DP&L would burden Ohio customers with paying for proposals

[47] Id., Tr. 112 (Jan. 7, 2011).

[48] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider*, Case No. 10-176-EL-ATA, Entry at ¶21 (Jan. 27, 2011).

[49] See DP&L response to OCC Interrogatories 239, 255, 260, 261, 268, 333, 334, RFP 69, 71, 73 (Exhibits 2-13).

totaling hundreds of millions of dollars, DP&L should be extremely limited in what it would describe to this Commission as DP&L's burden in answering questions. Unfortunately, DP&L has not been so circumspect in its efforts to avoid sharing meaningful information about its case.

DP&L has failed to explain how responding to these discovery requests would be unduly burdensome. Federal case law[50] has held that, when a party objects to an interrogatory based on oppressiveness or undue burden, that party must show specifically how, despite the broad and liberal construction afforded discovery rules, each interrogatory is overly broad, burdensome, or oppressive.[51] In objecting, the party must submit affidavits or offer evidence revealing the nature of the burden.[52] General objections without specific support may result in waiver of the objection.[53] Perhaps the objection was designed to test whether OCC would move to compel answers to the inadequate responses.

Here, the Company has failed to specifically show how the interrogatories and requests for production are unduly burdensome. Because the burden falls upon the party resisting discovery to clarify and explain its objections and to provide support[54] and the Company has failed to do so, the Commission should overrule this objection.

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[50] Although federal case law is not binding upon the PUCO with regard to interpreting the Ohio Civil Rules of Practice (upon which the PUCO discovery rules are based), it is instructive where, as here, Ohio's rule is similar to the federal rules. Ohio Admin. Code 4901-1-24 allows a protective order to limit discovery to protect against "undue burden and expense." C.R.26(c) similarly allows a protective order to limit discovery to protect against "undue burden and expense." Cf. *In the Matter of the Investigation into Perry Nuclear Power Station*, Case No. 85-521-EL-COI, Entry at 14-15 (Mar. 17, 1987), where the Commission opined that a motion for protective order on discovery must be "specific and detailed as to the reasons why providing the responses to matters…will be unduly burdensome."

[51] *Trabon Engineering Corp. v. Eaton Manufacturing Co*.(N.D. Ohio 1964), 37 F.R.D. 51, 54.

[52] *Roesberg v. Johns-Manville* (D.Pa 1980), 85 F.R.D. 292, 297.

[53] Id., citing *In re Folding Carton Anti-Trust Litigation* (N.D. Ill. 1978), 83 F.R.D. 251, 264.

[54] *Gulf Oil Corp. v. Schlesinger* (E.D.Pa. 1979), 465 F.Supp. 913, 916-917.

Moreover, if the discovery requests were truly burdensome, DP&L has a remedy. Where a party finds that compliance with a discovery request would be burdensome or costly, the party may seek a protective order under Ohio Admin. Code 4901-1-24(B), O.A.C. Such a filing requires the party to present specific and detailed reasons why providing a response to matters will be unduly burdensome.[55] DP&L did not seek a protective order and its failure to do so speaks volumes.

Additionally, courts have recognized that it is not a valid objection that compilation of data through discovery will necessitate large expenditures of time and money. *Adelman v. Nordberg Manufacturing Co.* (1947 DC Wis), 6 F.R.D. 383; *Burns v. Imagine Films Entertainment* (1996, WD NY), 164 F.R.D. 589. Rather, parties are expected to bear expenses incident to litigation. *Life Music, Inc. v. Broadcast Music, Inc.* (1996, SD NY), 41 F.R.D. 16.

DP&L should expect that detailed discovery will be "incident" to seeking hundreds of millions of dollars from Ohio customers. Here the Company is requesting the authority to collect $687 million from customers for one charge in the ESP plan—the SSR rider. DP&L bears the burden of proving its ESP provisions, including the SSR, are permitted under R.C. 4928.143(B)(2), and that the ESP is more favorable in the aggregate than the MRO.[56] Additionally, it must prove that the provisions of the ESP are consistent with state policy enunciated in R.C. 4928.02.[57] Given the magnitude of its requested increase, DP&L should expect vigorous discovery to be conducted. Ample rights of

[55] See, e.g., *In the Matter of the Investigation into Perry Nuclear Power Station*, Case No. 85-521-EL-COI, Entry at 16 (Mar. 17, 1987).

[56] See R.C. 4928.143(C)(1).

[57] *Elyria Foundry Co. v. Pub Util. Comm.* (2007), 114 Ohio St.3d 305.

discovery are afforded parties in Commission proceedings, by law[58] and by rule[59] and precedent.[60] The Company's objection should be overruled.

3. The Company's objections to OCC discovery based on affiliates not being subject to discovery should be overruled because the discovery being sought is DP&L-specific and is known by DP&L or readily available to it.

The Company objects to providing certain discovery[61] alleging that OCC is seeking to do discovery on its affiliates. A close review of the discovery in question reveals that the information sought is limited to DP&L-specific information. OCC's discovery at issue does not seek information pertaining to the affiliate or the affiliates' business. For instance, Interrogatories 255, 260, and 261 seek to discover DP&L-specific information that was reported by AES Corporation in a public presentation to investors. Interrogatories 333 and 334 seek DP&L specific information that was used in AES' impairment analysis.

While DP&L at times proclaims that the information sought to be discovered is in the possession of it unregulated affiliate,[62] this does not insulate DP&L from its obligation to provide sufficient responses to appropriate discovery requests. Under Ohio Admin. Code 4901-1-19, interrogatories may elicit "facts, data, or other information *known or readily available* to the party upon whom the interrogatories are served."

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[58] R.C. 4903.082.

[59] Ohio Admin. Code 4901 -1-16 (scope of discovery is wide—reasonably calculated to lead to the discovery of admissible evidence).

[60] See, e.g., *Ohio Consumers' Counsel v. Pub. Util. Comm.*(2006), 111 Ohio St.3d 300, 320.

[61] See DP&L Response to OCC Interrogatories 255, 260, 261. 333, 334, Requests for Production 69, 71 (Exhibits 3, 4, 5, 7, 8, 11, 12).

[62] See DP&L Response to OCC Interrogatories 255, 260, 261, 333, 334, RFP 69, 71 (Exhibits 3, 4, 5, 7, 8, 11, 12).

Certainly, the discovery OCC seeks is known by DP&L or readily available to it. Just because the information may be in the possession of an affiliate does not mean it is not known by DP&L or readily available to it. Indeed, DP&L has made no such claim that the information is not known or not readily available to it.

DP&L has a legal duty to discover and produce readily available evidence pertaining to its case.[63] In other words if DP&L has access to the information sought, then it must produce it.[64] Clearly, the information sought was supplied by DP&L to its affiliate, is known by DP&L, and would be readily available to it. It would be inconsistent with the Commission's discovery rules to allow DP&L to shield the information from discovery by shipping it off to its affiliate.

Moreover, the shielding of affiliate information from discovery runs counter to provisions under S.B. 221[65] and the Ohio Admin. Code [66] which requires disclosure of affiliate information,[67] provided an appropriate discovery request is made. In particular, the Commission rules require utilities to provide information with respect to corporate separation (Ohio Admin. Code 4901-35-11, Appendix B, subsection (D), and permit the PUCO Staff to investigate the operations of the electric utility affiliate, with the affiliates employees, officers, books, and records being made available to them.[68]

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[63] See, e.g., *In the Matter of the Complaint of Carpet Color Systems v. Ohio Bell Telephone Co*., Case No. 85-1076-TP-CSS, Opinion at 22 (May 17, 1988); *General Dynamics Corp. v. Selb. Manufacturing Co.* (1973, CA8), 481 F.2d 1204, cert. den. (1974), 414 U.S. 1162.

[64] See *In the Matter of the Complaint of the Manchester Group, LLC. v. Columbia Gas of Ohio, Inc*., Case No. 08-360-GA-CSS, Entry at 2 (Oct. 2, 2009)(granting the motion to compel "to the extent Columbia has access" to the relevant information sought in discovery).

[65] See R.C. 4928.145.

[66] Ohio Adm. Code 4901:1-35-07.

[67] See also *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 (holding that side agreements between utilities and third parties are discoverable).

[68] See Ohio Adm. Code 4901:1-37-07.

For these reasons the Company's objections to discovery on these grounds should be overruled.

4. The Company's objections that the discovery calls for a narrative answer should be overruled because the Company has failed to provide authority for such an objection.

The Company objects to certain of the discovery requests on grounds that the discovery calls for a narrative answer.[69] However, there is nothing in the Commission's rules that suggest that such discovery is objectionable. And when asked for authority for this objection, the response from the Company was merely that the objection came from one of the Company's senior counsel. With no authority to attest to the legitimacy of the objection, the Commission should overrule it.

C. OCC Undertook Reasonable Efforts To Resolve The Discovery Dispute.

As detailed in the attached affidavit OCC took reasonable efforts to resolve the discovery dispute.[70] Once OCC received the responses and objections, OCC communicated to Company Counsel its concerns. OCC explained why the information needed was relevant. OCC offered legal authority to back up its view of the Company's responsibilities under the discovery provisions of the Ohio Admin. Code. In some instances OCC offered to narrow its discovery. In other instances, OCC offered search terms for a more targeted search of records to occur. Reasonable efforts to resolve this discovery dispute were undertaken. Those efforts failed, necessitating this motion to compel.

[69] DP&L response to OCC Interrogatories 255, 260,261, 333,334, Request for production 69, 71, 73 (Exhibits 3-5, 7-8, 11-13).

[70] See also Attachments 1-9.

IV. CONCLUSION

When utilities file applications (and DP&L has by now essentially filed three in one case) for massive collections of money from their customers, they should expect under law, rule and reason that there will be thorough discovery. The PUCO allows for that discovery, pursuant to R.C. 4903.082 and Ohio Adm. Code 4901-1-16 and other authority.

Ohio Adm. Code 4901-1-16(B) provides the recipient of discovery the opportunity to prove that the discovery in question will not lead to the discovery of admissible evidence. DP&L did not supply that proof. Nor has the Company provided anything but conclusory statements as to the "burden" that will be imposed upon it to answer these interrogatories. And the Company relies upon blanket claims of privilege to shield it from discovery, without making a document by document showing. Such claims are inconsistent with PUCO practice.[71]

It is appropriate and fitting that the PUCO, consistent with its rules and the statutes discussed herein, grant OCC's Motion to Compel. Granting OCC's motion to compel will further the interests of consumers by requiring information to be produced by DP&L that will enable OCC to further evaluate the Company's claims for a $687 million charge.

[71] See *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider*, Case No. 10-176-EL-ATA, Entry at ¶21 (Jan. 27, 2011) (Commission found that attorney-client privilege or work product must be shown to apply to particular documents, and that general statements claiming that all communications between certain individuals are privileged fails to establish privilege.)

Respectfully submitted,

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

/s/ Maureen R. Grady
Melissa R. Yost, Counsel of Record
Maureen R. Grady
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Assistant Consumers' Counsel

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[72] Mr. Berger is representing OCC in PUCO Case No. 12-426-EL-SSO.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Motion to Compel Responses to Discovery by the Office of the Ohio Consumers' Counsel was provided to the persons listed below electronically this 23rd day of January 2013.

/s/ Maureen R. Grady
Maureen R. Grady
Assistant Consumers' Counsel

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of its Market Rate Offer.	)))	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 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

AFFIDAVIT OF MAUREEN R. GRADY

I, Maureen R. Grady, attorney for the Office of the Ohio Consumers' Counsel ("OCC") in the above captioned case, being first duly sworn, depose and state that the following efforts have been made to resolve the differences with Dayton Power & Light Company ("DP&L" or "Company") as to the motion to compel responses to OCC discovery: OCC Interrogatories 227, 239, 255, 260, 261, 268, 333, and 334, and requests for production of documents RPD 37, 39, 69, 71, 73:

1. OCC submitted its seventh set of discovery to the Company on July 13, 2012. OCC's thirteenth set of discovery was served on November 16, 2012. OCC's fourteenth Set was served on November 26, 2012. OCC's 19th set of discovery was

served on December 12, 2012. All of OCC's discovery was served on the Company by electronic message as well as first class mail, postage prepaid, consistent with Ohio Adm. Code 4901:1-1-05(C)(4).

2. On August 6, 2012 the Company served its responses to OCC's Seventh Set of discovery by electronic message. On November 30, 2012, the Company served its responses to OCC's Thirteenth Set of Discovery. On December 6, 2012, the Company served its responses to OCC's Fourteenth Set of Discovery. On December 28, 2012, the Company served its responses to OCC's nineteenth set of discovery.

3. On December 7, 2012, OCC by e-mail notified the Company that there were discovery issues that OCC wanted to discuss with Company Counsel. (Attachment 1). OCC's communication listed five specific areas, and included a specific request for DP&L to provide a privilege log for the following discovery responses, where the Company was relying on privilege as an objection to discovery: OCC Interrogatories 227, 236, 239, and 268.

4. In response to OCC's e-mail communication, DP&L's Counsel, Mr. Sadlowski, arranged for brief call to discuss the items in question. That brief call took place on December 11, 2012. (Attachment 2). OCC explained each one of the disputed discovery requests. Mr. Sadlowski indicated he was not in a position to respond to OCC, but would convey OCC's concerns to Attorneys Sharkey and Faruki, and they would respond accordingly.

5. On December 14, 2012, Attorney Sharkey communicated his response by e-mail. (Attachment 3). There he indicated that the Company objected to providing a privilege log because it would be "unduly burdensome." He alleged that "the documents

for which DP&L has assert (sic) privilege or work product in response to your listed request constitute (1) communication between DP&L and our firm; (2) communications between DP&L's employees and DP&L's in-house counsel; (3) communications between DP&L or its counsel and non-testifying experts that were engaged to work on DP&L's SSO filing; or (4) work done by DP&L on the SSO filings at the direction of legal counsel. Documents that fall into those categories plainly are not discoverable, and there are thousands of documents that fall within those categories; given that those documents are plainly privileged and/or protected by the work product it would be an unreasonable burden on DP&L to review those thousands of documents to determine which ones were responsive to the OCC requests that you listed for the purpose of listing them in a log." Mr. Sharkey at no time identified any specific document that was being withheld that pertained to the discovery requests in question.

6. In response, on December 17, 2012, OCC inquired into what efforts would have to be undertaken as to each discovery request and asked how many hours would be entailed with producing a discovery log. (Attachment 4). OCC also asked the Company to reconsider its request, given that it bears the burden of proving privilege, and must provide a basis for OCC and the PUCO to judge the merits of its claim and its legal sufficiency.

7. On December 18, 2012, Mr. Sharkey advised that it would stand by its objection to producing a privilege log. Mr. Sharkey offered to provide OCC "a declaration that DP&L was not aware of any documents that are responsive to OCC's request (sic) that fall outside of the four categories" or if that is not acceptable, "OCC pay an attorney at our firm to create the privilege log." (Attachment 5).

That day, OCC responded to Mr. Sharkey's proposal. (Attachment 6). OCC asked how much it would cost for OCC to pay for an attorney to create a privilege log. OCC also asked if the declaration would provide a description of the efforts the Company had undertaken to determine that no responsive documents exist outside the four categories, and whether the declaration would affirm that there had been no waiver of the privilege and no exception to the privilege rule.

8. On December 19, 2012, Mr. Sharkey responded that the estimate of the cost for a privilege log would be between $9,000 to $13,500 based on a billing rate of $180/hour and an estimated 50-75 hours for the task. (Attachment 7). Mr. Sharkey declined to expand the scope of the declaration but proposed alternatively that individuals involved in the case could sign declarations that pertain to responsive documents they are aware of; that the documents they are aware of have not been shared with persons other than clients, attorneys and non-testifying experts; and that they have conferred with the case team and confirmed they are not aware of any such documents either.

9. Later that day, on December 19, 2012, OCC advised that it could not agree to such approaches and would be filing a motion to compel the Company to produce a privilege log. OCC advised that if the Company wished to discuss the matters further, OCC was available, but would go forward with filing its motion to compel in the meantime. (Attachment 8).

10. Subsequently, on December 20, 2012, Mr. Sharkey discussed with OCC counsel a targeted search of the law firm's e-mail. OCC offered to provide search terms to assist. OCC communicated the search terms to Attorney Sharkey later that day. (Attachment 9).

11. On December 21, 2012, Counsel for OCC discussed search terms with Attorney Cline and Attorney Cline indicated she would conduct the search. To date, OCC has not received any further information about the search. Nor has a privilege log been produced.

12. In light of the scheduling of a discovery conference for January 30, 2012 to address pending discovery issues, OCC files this motion to compel, since there has been no reasonable resolution of the discovery disputes discussed herein to date.

STATE OF OHIO)
) **SS:**
COUNTY OF FRANKLIN)

The undersigned, being of lawful age and duly sworn on oath, hereby certifies, deposes and state the following:

I have caused to be prepared the attached written affidavit for OCC in the above referenced docket. This affidavit is true and correct to the best of my knowledge, information and belief.

Further affiant sayeth naught.

Maureen R. Grady, Affiant

Subscribed and sworn to before me this 23rd day of January, 2013.

Debra Jo Bingham
Notary Public

NOTARIAL SEAL
STATE OF OHIO

Debra Jo Bingham, Notary Public
Union County, State of Ohio
My Commission Expires June 13, 2015

INT-227. Did the Company undertake any financial analysis of alternate scenarios under which the amount of the SSR varied from the amount requested in the ESP?

RESPONSE: General Objections Nos. 3 (privileged and work product) and 4 (proprietary). DP&L further objects because this Interrogatory calls for information that is both privileged and work product.

WITNESS RESPONSIBLE: None.

INT-239. Has the Company developed ROE projections based on a quicker move to 100% competitive bid-based rates? If so please identify the scenarios that were considered and the ending ROE projections under such scenarios.

RESPONSE: General Objections Nos. 2 (unduly burdensome), 3 (privileged and work product), and 4 (proprietary). DP&L objects to providing this information since it is privileged and work product.

WITNESS RESPONSIBLE: None.

INT-255. Referring to The AES Corporation Third Quarter 2012 Financial Review, dated November 7, 2012, at page 4, entitled "Update on DP&L":

A. Please explain what is meant by "balance sheet optimization"

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 6 (calls for narrative answer), and 10 (possession of DP&L's unregulated affiliate). DP&L further objects because AES is not subject to discovery in this matter.

B. Please explain what is meant by "de-lever the business with cash generated at DPL."

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 6 (calls for narrative answer), and 10 (possession of DP&L's unregulated affiliate). DP&L further objects because AES is not subject to discovery in this matter.

WITNESS RESPONSIBLE: None.

INT-260. Referring to The AES Corporation Third Quarter 2012 Financial Review, dated November 7, 2012, at page 34, identify the DPL portion of the subsidiary distributions listed as "Utilities- North America" for third Quarter 2012 and YTD 2012. With respect to the "Top 10 Subsidiary Distributions" listed specifically identify what corporate purpose/activities DPL used the distributions for.

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 4 (proprietary), 6 (calls for narrative answer), and 10 (possession of DP&L's unregulated affiliate). DP&L further objects because AES is not subject to discovery in this matter.

WITNESS RESPONSIBLE: None.

INT-261. Please identify any planned or known distributions to DPL by AES Corporation for the term of the ESP. Please include the amount, date, and the activities that distribution funds will be used toward.

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 4 (proprietary), 6 (calls for narrative answer), and 10 (possession of DP&L's unregulated affiliate). DP&L further objects because AES is not subject to discovery in this matter.

WITNESS RESPONSIBLE: None.

INT-268. Did the Company generate a pro forma case including the consequence of a partial rejection of the proposed SSR? If so, identify the results of such analysis, including the expected ROE.

RESPONSE: General Objections Nos. 2 (unduly burdensome), 4 (proprietary), and 6 (calls for narrative answer). DP&L objects because the requested information is privileged and work product.

WITNESS RESPONSIBLE: None.

333. Please identify all estimates and assumptions about revenue, operating cash flow, capital expenditures, growth rates, and discount rates that were used in the Company's testing for the latest good will impairment analysis conducted pertaining to DP&L, as these documents were specified in the DPL Inc. and DP&L Form 10Q, for the quarterly period ending September 20, 2012, page 19.

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 4 (proprietary), 6 (calls for narrative answer), and 10 (possession of DP&L's unregulated affiliate). Subject to all general objections, DP&L objects to providing that information because DPL Inc. is not subject to discovery in this matter and because the requested information is irrelevant.

WITNESS RESPONSIBLE: Craig Jackson.

334. Please identify the material assumptions made in the preliminary step 1 and 2 of the interim impairment test, as referred to in the DPL and DP&L Inc. Form 10Q, for the quarterly period ending September 20, 2012, page 62, related to:

A. customer switching and aggregation trends

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 4 (proprietary), 6 (calls for narrative answer), and 10 (possession of DP&L's unregulated affiliate). Subject to all general objections, DP&L objects to providing that information because DPL Inc. is not subject to discovery in this matter and because the requested information is irrelevant.

B. capacity price curves

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 4 (proprietary), 6 (calls for narrative answer), and 10 (possession of DP&L's unregulated affiliate). Subject to all general objections, DP&L objects to providing that information because DPL Inc. is not subject to discovery in this matter and because the requested information is irrelevant.

C. energy price curves

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 4 (proprietary), 6 (calls for narrative answer), and 10 (possession of DP&L's unregulated affiliate). Subject to all general objections, DP&L objects to providing that information because

DPL Inc. is not subject to discovery in this matter and because the requested information is irrelevant.

D. amount of the non-bypassable charge

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 4 (proprietary), 6 (calls for narrative answer), and 10 (possession of DP&L's unregulated affiliate). Subject to all general objections, DP&L objects to providing that information because DPL Inc. is not subject to discovery in this matter and because the requested information is irrelevant.

E. commodity price curves

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 4 (proprietary), 6 (calls for narrative answer), and 10 (possession of DP&L's unregulated affiliate). Subject to all general objections, DP&L objects to providing that information because DPL Inc. is not subject to discovery in this matter and because the requested information is irrelevant.

F. dispatching

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 4 (proprietary), 6 (calls for narrative answer), and 10 (possession of DP&L's unregulated affiliate). Subject to all general objections, DP&L objects to providing that information because

DPL Inc. is not subject to discovery in this matter and because the requested information is irrelevant.

G. transition period for the conversion to a wholesale competitive bidding structure

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 4 (proprietary), 6 (calls for narrative answer), and 10 (possession of DP&L's unregulated affiliate). Subject to all general objections, DP&L objects to providing that information because DPL Inc. is not subject to discovery in this matter and because the requested information is irrelevant.

H. amount of the standard service offer charge

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 4 (proprietary), 6 (calls for narrative answer), and 10 (possession of DP&L's unregulated affiliate). Subject to all general objections, DP&L objects to providing that information because DPL Inc. is not subject to discovery in this matter and because the requested information is irrelevant.

I. valuation of regulatory assets and liabilities

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 4 (proprietary), 6 (calls for narrative answer), and 10 (possession of DP&L's unregulated affiliate). Subject to all general objections, DP&L objects to providing that information because

DPL Inc. is not subject to discovery in this matter and because the requested information is irrelevant.

J. discount rates

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 4 (proprietary), 6 (calls for narrative answer), and 10 (possession of DP&L's unregulated affiliate). Subject to all general objections, DP&L objects to providing that information because DPL Inc. is not subject to discovery in this matter and because the requested information is irrelevant.

K. deferred income taxes.

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 4 (proprietary), 6 (calls for narrative answer), and 10 (possession of DP&L's unregulated affiliate). Subject to all general objections, DP&L objects to providing that information because DPL Inc. is not subject to discovery in this matter and because the requested information is irrelevant.

WITNESS RESPONSIBLE: Craig Jackson.

RPD-37. If the Company, or an individual at the direction of the Company, undertook any financial analysis of alternate scenarios under which the amount of the SSR varied from the amount requested in the ESP, please provide a copy of such analysis.

RESPONSE: General Objections Nos. 2 (unduly burdensome), 3 (privileged and work product), and 4 (proprietary).

RESPONSES TO REQUESTS FOR PRODUCTION OF DOCUMENTS

RPD-39. If the answer to INT- 239 is affirmative, please provide a copy of those ROE projections.

RESPONSE: General Objections Nos. 2 (unduly burdensome), 3 (privileged and work product), and 4 (proprietary). Subject to all general objections, DP&L states: Inapplicable.

RESPONSES TO REQUESTS FOR PRODUCTION OF DOCUMENTS

69. Please provide a copy of all budgets, long term forecasts, macroeconomic projections, and current market expectations of returns on similar assets related to the Company's testing for the latest good impairment analysis pertaining to DP&L, as these documents were specified in the DPL Inc. and DP&L Form 10Q, for the quarterly period ending September 20, 2012, page 19.

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 4 (proprietary), 6 (calls for narrative answer), and 10 (possession of DP&L's unregulated affiliate). Subject to all general objections, DP&L objects to providing that information because DPL Inc. is not subject to discovery in this matter and because the requested information is irrelevant.

71. Please provide a copy of the "values that were assigned to various intangible assets, including customer relationships, customer contracts and the value of our ESP" as referred to in the DPL Inc. and DP&L Form 10Q, for the quarterly period ending September 20, 2012, page 21.

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 4 (proprietary), 6 (calls for narrative answer), and 10 (possession of DP&L's unregulated affiliate). Subject to all general objections, DP&L states: Inapplicable.

73. Please provide a copy of the interim impairment test results on the $2.4 billion of good will at the DP&L Reporting Unit level.

RESPONSE: General Objections Nos. 1 (relevance) and 2 (unduly burdensome). Subject to all general objections, DP&L states: Inapplicable.

Attachment 1

From: MAUREEN GRADY
To: jsharkey@ficlaw.com
Date: 12/7/2012 2:30 PM
Subject: Miscellaneous Discovery Matters
CC: Berger, Tad; Yost, Melissa

Jeff, I am a recent "add-on" attorney to the DPL ESP case. I will be addressing a number of the issues in the case, and wanted to touch base with you on a number of areas.

1. Privilege Log: I am requesting that you provide a privilege log for the following discovery responses, where you are relying upon privilege as an objection to discovery: OCC Interrogatories: 147, 148, 149, 227, 236, 239, 240, and 268. OCC RFP: 21,24,39, and 36.

2. I would like to schedule some time early next week to discuss the Company's objections to the following OCC discovery: 255 (A), (C); 257 A-C; 258, 259, 260, 261, 262, 263. Our discussion will be directed to resolving the differences in discovery that otherwise will need to be resolved through a motion to compel. This is in keeping with our obligation under OAC 4901-1-23(C). I will be available at your earliest convenience.

3. In discovery responses to OCC INT 216, and 220 (and RFP-32) you refer to the following "internal documents" :
"CLJ-1 FILING with Detail.xlsx"
"CLJ-1-FILING-incr switching with Detail.xlsx,"
and "Additional detail for financial integrity_9.28.12.xlsx"

We are unable to locate such documents and would request that you send us a copy of the same.

4. With respect to OCC RFP 38, we requested "electronic datasets" that are fully functional related to Mr. Chambers calculations. Your response was that you had already produced the spreadsheets containing the exhibits. Can you specifically identify what date those were provided and confirm that those were electronic and fully functional?

5. Company response to INT 233(B)-(D), the Company indicates that it objects to the request because it seeks material that is confidential, proprietary, and trade secret. Isnt this something that the protective agreement would address, allowing us to review the information?

I look forward to hearing back from you on these matters. Thank you.

From: MAUREEN GRADY
To: ASadlowski@ficlaw.com
Date: 12/11/2012 4:34 PM
Subject: discovery discussion this afternoon
CC: Berger, Tad; Yost, Melissa

Adam, this e-mail is intended to synopsize our discussion this afternoon re: the miscellaneous discovery matters I conveyed to Jeff via e-mail, dated 12/7/12.

We began the discussion with item 1, the request for a "privilege log." I explained that I am seeking a description of the nature of the documents (on a document by document basis) so that I can assess the merits of the privilege claim. This is needed so that I can determine whether to file a motion to compel. A description of each document will also be needed so that the PUCO can make a determination of whether the documents should be protected, in the event a motion to compel is filed. For Commission interpretation of this issue, a look at the
Commission ruling in Case No. 10-176-EL-ATA might be helpful, as I noted.

You indicated that you would relay this information to Charlie and that a response from Charlie/Jeff would be coming from them on this matter.

Item 2: I relayed how the discovery requests in dispute were all related to the DP&L specific information contained in the AES presentation to investors--the Third Quarter 2012 Financial Review. The information requested is reasonably anticipated to lead to the discovery of admissible evidence (the PUCO's standard under 4901-1-16) in the following manner. The Company has asked for customers to pay a considerable ESSC charge to maintain the Company's financial integrity. Mr. Jackson presents pro forma financial statements that project the earned ROE, which in turn drives the need for a certain level of revenues via an ESSC charge. Items pertaining to DP&L's cash flows (I-255); DP&L's projected growth, switching and aggregation effects (I-256); contribution to margin (I-257); distribution uses (I-260); debt level (I-262); and impairment analysis (I-263) are all related to the financial integrity of DP&L. In fact the company has made assumptions about most of these factors in its pro forma financials. We are entitled to test the consistency of the information reported to investors against the information filed by Mr. Jackson. Moreover, this information is not being sought about AES. DP&L's broad claims about the need to maintain DP&L's financial integrity opens the door to such discovery.

We then discussed DP&L's objections to the discovery. I questioned how burdensome responding to specific information requests would be, and indicated that we had tailored our requests to specific aspects of the application which would not seem to be burdensome to respond to. You indicated that the information requested would primarily be e-mails, and could be thousands. You indicated you would relay the information/discussion to Charlie/Jeff and that you would be looking into the time associated with my request.

With respect to the objection that the interrogatories call for a narrative answer, I requested that specific case law or authority be provided that establishes such a ground as a proper objection. You indicated that you would relay my request to Charlie.

With respect to the objection that the information is in the possession of DP&L's unregulated affiliate, I inquired as to whether that truly is the case. I relayed that it has been my experience that for investment presentations, the slides/materials are developed by the entity that is being reported on (DP&L) and that my expectation is the information OCC is inquiring about was likely generated or supplied by DP&L (Jackson, Campbell?) to AES for the presentation. You indicated you would relay this as well to Charlie.

You indicated that Jeff was working on items 3, 4,and 5, and that you expected he would get back to me on those items by e-mail.

You advised that you would be meeting with Jeff and Charlie and would discuss our discovery conversation, and would expect that the Company would provide a response by e-mail, addressing all the Items (1-5) in a single e-mail.

I am hopeful that this recap is consistent with your notes, and will be helpful to you in your discussions with Charlie and Jeff.

Should you have any other questions, or concerns please feel free to contact me. Thank you for your attention to this matter.

Attachment 3

From: "Sharkey, Jeffrey S." <JSharkey@ficlaw.com>
To: MAUREEN GRADY <GRADY@occ.state.oh.us>
Date: 12/14/2012 5:12 PM
Subject: RE: Miscellaneous Discovery Matters [IWOV-DMS.FID83439]
CC: Tad Berger <Berger@occ.state.oh.us>, Melissa Yost <yost@occ.state.oh.us>, "Judi L. Sobecki Esq. (Judi.Sobecki@AES.com)" <Judi.Sobecki@AES.com>, "DonaR Seger-Lawson" <dona.seger-lawson@aes.com>, "Faruki, Charles J." <CFaruki@ficlaw.com>, "Sadlowski, Adam V." <ASadlowski@ficlaw.com>, "Cline,Kelly M." <kcline@ficlaw.com>

Maureen:

The purpose of this email is to respond to your December 7, 2012 email regarding discovery.

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

In response to your items listed below, DP&L states:

1. DP&L objects to providing a privilege log on the ground that doing so would be unduly burdensome. Specifically, the documents for which DP&L has assert privilege or work product in response to your listed request constitute (1) communication between DP&L and our firm; (2) communications between DP&L's employees and DP&L's in-house counsel; (3) communications between DP&L or its counsel and non-testifying experts that were engaged to work on DP&L's SSO filing; or (4) work done by DP&L on the SSO filings at the direction of legal counsel. Documents that fall into those categories plainly are not discoverable, and there are thousands of documents that fall within those categories; given that those documents are plainly privileged and/or protected by the work product doctrine, it would be an unreasonable burden on DP&L to review those thousands of documents to determine which ones were responsive to the OCC requests that you listed for the purpose of listing them in a log. (As to Interrogatory 240, DP&L has not withheld any information or documents; it will supplement its response to that request once the corrective filing is made. As to RFPD 36, DP&L did produce responsive documents.)

2. Much of the information that you seek is not in the possession of DP&L. DP&L will produce additional responsive information that it possesses when DP&L updates its discovery responses next week.

3. Adam Sadlowski will send you responsive documents. The document identified "Additional detail for financial integrity 9.28.12.xlsx" is privileged and work product, and has not been produced to any party; it was inadvertently identified in the response.

4. Adam Sadlowski will send to you responsive documents.

5. The requested information relates to the margins earned by DPLER. That competitively-sensitive information is highly confidential, and is entirely irrelevant to this proceeding. In addition, DPLER is not subject to discovery in this case.

Jeff.

Attachment 4

From: MAUREEN GRADY [mailto:GRADY@occ.state.oh.us]
Sent: Monday, December 17, 2012 3:57 PM
To: Sharkey, Jeffrey S.
Cc: Tad Berger; Daniel Duann; KATHY HAGANS; BETH HIXON; Melissa Yost
Subject: RE: Miscellaneous Discovery Matters [IWOV-DMS.FID83439]
Importance: High

Jeff,

The purpose of this e-mail is to reply to your e-mail, and to further explore whether we have exhausted all other reasonable means of resolving these discovery differences.

1. You indicate that DP&L objects to providing a privilege log on the ground that doing so would be unduly burdensome. Please explain exactly what efforts would need to be undertaken under each discovery request and identify how many hours it would entail. My understanding of the rules and practice is that this is part of your responsibility.

While I appreciate the fact that you have provided categories under which the discovery would likely fall, this general description does not provide me with a basis for determining whether the privilege actually exists and whether it has been waived, and which category applies to which discovery response.

I need to understand the basis for each privilege claim that applies to each discovery request. You have the burden of proof in this respect. What you have given me is not sufficient, nor would it be sufficient for the PUCO, to understand whether a privilege exists and the nature of your claims. All necessary elements must be present (8): a communication, made in confidence, to an attorney, by a client, for the purpose of seeking or obtaining legal advice, affirmatively asserted, and not waived or covered by any of the exceptions to privilege.

Information needs to be provided that enables me (and the PUCO) to determine whether privilege exists, and has been waived, as it can be waived under certain circumstances.
A proper claim of privilege requires a specific designation and description of the documents within its scope as well as precise and certain reasons for preserving their confidentiality. Unless the description is precise there is no basis on which to weigh the applicability of the claim of privilege. Hence, if you are resisting disclosure on the ground of the attorney-client privilege you must show sufficient *facts* as to bring the identified and described discovery within the narrow confines of the privilege.

The PUCO has required in camera inspection of documents and privilege logs in the past. This is not unusual or foreign to the Commission. The PUCO has acknowledged that the purpose of a privilege log is to assist the party contesting the privilege claim as well as the AE in evaluating the merits of the privilege claim to understand both the parameters of the claim and its legal sufficiency. It has noted that it is common practice for a privilege log to be produced in response to a motion to compel. We will go this route if necessary.

When you refer to the work product doctrine, as you know, even if the document is protected under the work product doctrine, parties seeking discovery of these materials may be granted discovery if they show "good cause." The Ohio Supreme Court has held that a showing of "good cause" requires "demonstration of need for the materials-i.e., a showing that the materials, or the information they contain, are relevant and otherwise unavailable."

In light of all this, I would ask you to reconsider your response to my request. If you wish to discuss this further, please call me at 614 466-9567.

As to Interrogatory 240, have you supplemented it since your corrective filing was made?

2. When do you plan to update discovery?

3. 4. Adam sent me some responsive documents. They appear to be satisfactory.

5. Initially, Mr. Jackson had specific statements in the original filing that spoke of DPLER's margins. See pages 10 and 11 of 14. You raised the issue by your filing. We are entitled to discovery on it.

I look forward to hearing further from you on these matters. Thank you.

>>> "Sharkey, Jeffrey S." <JSharkey@ficlaw.com> 12/18/2012 7:45 AM >>> Attachment 5

Maureen:

In response to your email below, DP&L states:

1. DP&L stands by its objection to producing a privilege log to you. As I describe in my email below, your request that DP&L provide a privilege log is unduly burdensome. For example, our firm maintains an electronic file of all emails that we send or receive related to the case; that file currently has over 750 emails for this month alone; the total number of emails for the case would be much higher (I do not have the total readily available); to respond to your request for a privilege log, someone from DP&L or our firm would have to review each and every email to determine whether it was responsive to OCC's request and then create a log of the ones that are responsive. That effort would be very time-consuming and entirely unnecessary, particularly given that you have not raised any reason to suggest that DP&L has been sending the responsive documents to persons that are not attorneys or non-testifying experts. To attempt to reach an amicable resolution, DP&L proposes either that (a) it provide to you a declaration that DP&L is not aware of any documents that are responsive to OCC's request that fall outside of the four categories that I identify below; or if that is not acceptable, (b) OCC pay an attorney at our firm to create the privilege log.

2. We expect updated response to be served today.

3. Resolved.

4. Resolved.

5. The information related to DPLER's margins is both irrelevant and highly confidential. As I have mentioned, that information was included in an earlier draft of Mr. Jackson's testimony to attempt to facilitate settlement (parties expressed a reservation to settle with DP&L because they believed that the reason that DP&L's margins were so low was that DPLER was now serving former DP&L customers at above-market rates and earning a high margin on those sales; DP&L included information regarding DPLER's margins in Mr. Jackson's earlier testimony to dispel that misconception to try to settle the case); that information has been withdrawn from the current version of Mr. Jackson's testimony. DP&L will not produce it.

Jeff.

Attachment 6

From: MAUREEN GRADY [mailto:GRADY@occ.state.oh.us]
Sent: Tuesday, December 18, 2012 9:13 AM
To: Sharkey, Jeffrey S.
Cc: Tad Berger; Melissa Yost
Subject: RE: Miscellaneous Discovery Matters [IWOV-DMS.FID83439]

This e-mail is sent to respond to your latest proposal to resolve the discovery dispute that currently exists pertaining to numerous discovery matters.

1. To be clear we are seeking a discovery log for a limited number of discovery requests: OCC Interrogatories: 147, 148, 149, 227, 236, 239, 240, and 268. OCC RFP: 21,24,39, and 36.

Your attempt to amicably resolve the dispute is interesting and deserving of some discussion. How much will it cost for OCC to pay an attorney at your firm to create a privilege log? In other words, how many hours, and what is the hourly rate?

And as far as the declaration goes, are you willing to include in the declaration a description of the complete efforts you have undertaken to ascertain that no documents exist that fall outside the four categories? I understand that good faith efforts are required in this regard. Are you thus willing to describe those efforts in detail so that one could judge whether you exhibited good faith in determining whether responsive materials exist?

And as part of the declaration are you willing to declare that there has been no waiver of privilege related to the documents and no exception to the privilege rule pertaining to these documents?

I await your response to this. thank you.

From: "Sharkey, Jeffrey S." <JSharkey@ficlaw.com>
To: MAUREEN GRADY <GRADY@occ.state.oh.us>
CC: "Judi L. Sobecki Esq. (Judi.Sobecki@AES.com)" <Judi.Sobecki@AES.com>, "D...
Date: 12/19/2012 8:32 AM
Subject: RE: Miscellaneous Discovery Matters [IWOV-DMS.FID83439]

Maureen:
The billing rate would be $180/hr, which is the billing rate for our firm's most junior attorney on the case. I do not know how many hours would be involved to inspect all the applicable documents and create a privilege log; many thousands of documents would have to be inspected; I would estimate 50-75 hours, but it could be considerably more or a little less. That estimate of hours results in a cost estimate of $9,000.-$13,500.
As to the declaration, the idea behind the declaration is to save DP&L the time and expense of reviewing the thousands of documents that we know to be privileged to create the privilege log. Instead of that effort, our proposal is that one (or more) persons who are actively involved in the case could sign declarations that every responsive document that they are aware of falls inside categories 1-4 below, that the documents that they are aware of have not been shared with persons other than clients, attorneys and non-testifying experts, and that they have conferred with the case team and those persons confirmed that they are not aware of any such documents either.
Jeff.

From: MAUREEN GRADY [mailto:GRADY@occ.state.oh.us]
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To: Sharkey, Jeffrey S.
Cc: Tad Berger; Melissa Yost
Subject: RE: Miscellaneous Discovery Matters [IWOV-DMS.FID83439]

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And as part of the declaration are you willing to declare that there has been no waiver of privilege related to the documents and no exception to the privilege rule pertaining to these documents?

I await your response to this. thank you.

From: MAUREEN GRADY
To: Sharkey, Jeffrey S.
Date: 12/19/2012 9:07 AM
Subject: RE: Miscellaneous Discovery Matters [IWOV-DMS.FID83439]
CC: (Judi.Sobecki@AES.com), Judi L. Sobecki Esq.; Berger, Tad; Cline, Kelly M.; Faruki, Charles J.; Sadlowski, Adam V.; Seger-Lawson, Dona R; Yost, Melissa

Jeff,

I believe that we have reached an impasse in our efforts to resolve this discovery dispute. Neither of these approaches work for us.

You have the burden of proving privilege; OCC does not have the burden of proving that privilege does not exist. Blanketly declaring that unidentified documents are privileged to your knowledge, when you have not taken efforts to identify the specific documents that are responsive, falls short of establishing that a privilege exists. And charging OCC for discovery efforts which you must undertake, since you have filed your application, is unreasonable and inconsistent with established PUCO practice.

We will be filing a motion to compel as it appears that we have exhausted all reasonable means to resolve this discovery dispute.

Should you reconsider your latest response, we will be available to discuss this further. Our motion to compel will nonetheless be filed in the meantime.
Thank you.

From: MAUREEN GRADY [mailto:GRADY@occ.state.oh.us]
Sent: Thursday, December 20, 2012 3:50 PM
To: Sharkey, Jeffrey S.
Subject: Discovery matters-privilege log

Per our brief conversation today, here are suggested search terms that I offer to you to target e-mails that would be responsive to our data requests.

INT 147, 148, 149, RFP 21: "rate stability" "stabilizing" "ESSC" "SSR"

INT 227 "SSR" "alternate runs"

INT 236 "switching tracker deferrals" "deferrals" "regulatory assets" "accounting authority"

INT 239, RPD 39 "ROE projections" "blending"

INT 240 "taking"

INT 268 "pro formas" "SSR rejected" "SSR partially rejected"

RFP 24 "workpapers"

RFP 36 "workpapers"

Please advise what you intend to do from here. thank you.

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Attachment 10

From: MAUREEN GRADY
To: jsharkey@ficlaw.com
Date: 12/31/2012 11:19 AM
Subject: Fwd: Re: RE: 19th set of discovery, etc. [IWOV-DMS.FID83439]

Jeff, what if the discovery requests were modified so that the information requested would be limited to documents, data, or information supplied by DP&L to AES and DPL Inc. that was then used in the good will impairment study? That way we are segregating DP&L supplied information from AES conclusions on that information. Would this modification be acceptable in theory (with wording to be precisely worked out)? Please let me know.

Also checking on how the privilege log is going that Ms. Cline is working on.

This foregoing document was electronically filed with the Public Utilities

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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: Motion Motion to Compel Responses to Discovery by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Grady, Maureen R. Ms.