

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

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January 29, 2013

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<sup>1</sup> Mr. Berger is representing OCC in PUCO Case No. 12-426-EL-SSO.

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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<sup>2</sup> the Public Utilities Commission of Ohio ("PUCO" or "Commission"), the legal director, the deputy legal director, or an attorney

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<sup>2</sup> 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 Requests for Production of Documents (RPD) 89 which is attached hereto as OCC Exhibits 1 and 2.

As demonstrated in the attached Memorandum in Support, DP&L objected to this discovery based on a litany of objections, including “privileged” and “work product.” The privilege DP&L is asserting is the work product doctrine. With respect to RPD 89, DP&L has withheld all unnamed, responsive documents on the ground that the communications are work product and reveal DP&L’s expectations as to the results of this case.

Yet DP&L failed to identify the responsive documents, and did not explain exactly how the documents fall within the work product doctrine. DP&L has never identified on a document-by-document basis the justification for the alleged “privilege.” OCC requested a privilege log to enable it to determine the validity of the work product claim, and to enable an in camera inspection of the documents at the upcoming January 30, 2013 discovery conference. Nonetheless, DP&L has not produced a privilege log, nor provided any further information to back up its work product claim.

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. OCC’s Motion to compel should be granted, for the reasons set forth below. If the Attorney Examiner does not outright grant this motion, the Attorney Examiner should conduct an in camera inspection of the documents subject to this motion to compel at the January 30, 2013 discovery conference.

Respectfully submitted,

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ATTACHMENT 1 – OCC to DP&L – 1/22/13 e-mail  
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ATTACHMENT 4 – OCC TO DP&L – 1/24/13 e-mail

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

OCC has sought (several times) to obtain documents that DP&L provided to the three credit rating agencies during 2012 and 2013 related to its creditworthiness, its future business conditions, and its ability to repay interest and capital.<sup>4</sup> DP&L did not produce any documents, but instead relies upon a litany of rote objections and upon an unsubstantiated claim of work product as a reason to not respond.<sup>5</sup> At the same time DP&L has not produced a discovery log, nor identified responsive documents that are

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<sup>4</sup> See OCC RFP 89, which is a reiteration of an earlier request, OCC RFP 41.

<sup>5</sup> See DP&L response to OCC RPD 89. (Exhibit 1, 2).

being withheld. Additionally, while DP&L claims that RPD 89 is “unduly burdensome” to respond to, it does not explain what efforts would be necessary to respond. DP&L also maintains objections that the information sought is “proprietary” 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. Further DP&L objects to the information sought on grounds of relevance. But, DP&L’s own witness, Mr. Chambers, devotes 59 pages and countless exhibits to defining financial integrity in the context of the company’s overall creditworthiness, as measured by credit rating agencies. It is the very same “financial integrity” that customers are being asked to ensure through the payment of a \$687 million SSR charge.

The Company’s “responses” are evasive, incomplete, and insufficient. Such responses are contrary to the Commission’s rules.<sup>6</sup> The Attorney Examiner should overrule the objections to the discovery, and order DP&L to immediately provide complete responses to OCC’s RPD 89. In the event that the Attorney Examiner does not grant this motion outright, it should conduct an in camera inspection of the documents being withheld, to test the applicability of the Company’s work product claim.

## **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.”<sup>7</sup> The Commission’s rules on discovery

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<sup>6</sup> Ohio Adm. 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).

<sup>7</sup> *In the Matter of the Investigation into the Perry Nuclear Power Plant*, Case No. 85-521-EL-COI, Entry at 23 (Mar.17, 1987).



“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 counsel and to expedite the administration of the Commission proceedings.”<sup>8</sup> 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.<sup>9</sup>

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<sup>8</sup> Id., citing *Penn Central Transportation Co. v. Armco Steel Corp.* (C.P. 1971), 27 Ohio Misc. 76.

<sup>9</sup> *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.

This scope of discovery is applicable to written requests for production of documents. Written requests may seek to inspect and copy any designated documents which are in the possession, custody, or control of a party, under Ohio Adm. Code 4901-1-20. Requests for production may also request a party to produce for inspection and copying any tangible things which are in the possession, custody or control of a party. And requests for production may seek to permit entry for the purposes of inspecting the property or any designated object or operation thereon. Each request must be responded to and shall state that inspection or related activities will be permitted as requested unless the request is objected to. In such a case the reason for the objection must be stated.

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.<sup>10</sup> Copies of the discovery requests and the responses are to be attached.<sup>11</sup> 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.

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<sup>10</sup> See Ohio Adm. Code 4901-1-23(C)(1).

<sup>11</sup> Ohio Adm. Code 4901-1-23(C)(2).

The OCC has detailed in the attached affidavit, consistent with Rule 4901-1-23(C)(3), the efforts which it undertook to resolve differences between it and the Company. At this point it is clear that there is no resolution. OCC seeks responses to RPD 89 and is unable to obtain the response without the Commission compelling such a result.

### **III. ARGUMENT**

#### **A. Documents That DP&L Provided To The Credit Rating Agencies In 2012 And 2013 Are Reasonably Calculated To Lead To The Discovery Of Admissible Evidence.**

RPD 89 seeks documents that DP&L provided or that were provided on behalf of DP&L to the three credit rating agencies during 2012 and 2013 pertaining to three categories: (a) the utility's creditworthiness; (b) the utility's future business conditions; and (c) the utility's ability to repay interest and capital.<sup>12</sup>

The creditworthiness of a company, including a utility, is assessed by independent credit rating agencies. These credit rating agencies assign a credit rating as an indication of a company's overall creditworthiness. This credit rating then becomes information available to investors, who factor such ratings into their investment decisions.

DP&L Witness Chambers testifies that credit ratings are important and crucial to maintaining the financial integrity of DP&L. Indeed, Mr. Chambers opines that one way of defining "financial integrity" is to relate it to a company's overall creditworthiness—with the creditworthiness being measured by credit rating agencies.<sup>13</sup> It is the same

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<sup>12</sup> See Exhibit 1, 2.

<sup>13</sup> Second Revised Testimony of DP&L Witness Chambers at 9.

“financial integrity” that DP&L is asking customers to pay \$687 million for through the SSR.

Mr. Chambers testifies that if the Company’s proposed SSR is not approved, DP&L’s financial integrity will not be maintained and DP&L would “probably” lose its investment grade credit rating from all the rating agencies.<sup>14</sup> This in turn will cause DP&L’s cost of capital to increase and access to capital may be restricted.<sup>15</sup> According to Mr. Chambers, these effects would harm both DP&L and its customers through higher costs and diminished quality of service.<sup>16</sup> Thus, DP&L’s justification for customers paying \$687 million, is attributable, in part, to the need for DP&L to maintain an investment grade credit rating.

As Mr. Chambers testified, the debt rating process by credit agencies “involves a great deal of interaction between the rated entity (the debt issuer) and the rating agency.”<sup>17</sup> Mr. Chambers testifies to DP&L’s current long-term credit rating and discusses recent actions in November 2012 by all three agencies that have changed DP&L’s ratings in some respect.<sup>18</sup> Yet, at the same time, DP&L seeks to preclude OCC from discovering information DP&L provided to those agencies that were the basis of DP&L’s current long-term credit rating as well as the November 2012 ratings changes.

DP&L objects to the discovery on grounds of relevance but, as explained above, the discovery is appropriate as it is reasonably calculated to lead to the discovery of admissible evidence. It is directed to exploring the justification for the \$687 million SSR

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<sup>14</sup> Id. at 4.

<sup>15</sup> Id. at 1.

<sup>16</sup> Id. at 8.

<sup>17</sup> Id. at 14.

<sup>18</sup> See Second Revised Testimony of Witness Chambers at 12.

charge. And it is directed specifically to Mr. Chambers' testimony where he discusses the current debt ratings of DP&L and the recent changes to the debt ratings. Mr. Chambers testifies that such ratings are developed with a great deal of interaction between the debt issuer and the rating agency. Mr. Chambers most likely considered, if not relied upon, the information OCC is seeking discovery of. That discovery-- documents pertaining to interaction between the credit rating agencies and the Company—is reasonably calculated to lead to the discovery of admissible evidence. OCC is seeking to obtain documents that constitute underlying facts or data pertaining to Mr. Chamber's expert opinion. The Company's objections to this discovery on grounds of relevance should be overruled.

**B. The Company's Numerous Objections Should Be Overruled.**

**1. The Company's objections to discovery of information based on work product must fail because the Company has failed to establish that the work product doctrine applies.**

While DP&L relies upon "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.<sup>19</sup>

DP&L advised that the "privilege" it claimed is not attorney-client privilege, but the work product doctrine.<sup>20</sup> DP&L claims that all of the information provided to the credit rating agencies over the past two years is work product because the information conveyed pertains to DP&L's expectations as to the results of this case.

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<sup>19</sup> *Herbert v. Lando*, 441 U.S. 153, 175, 99 S.Ct. 1635, 1648; *In re Allen*, 106 F.3d 582, 600 (4<sup>th</sup> Cir. 1997), cert. denied, 522 U.S. 1047 (1998).

<sup>20</sup> See Attachment 3.

But a blanket assertion of privilege<sup>21</sup> is insufficient to meet the burden of establishing that the work product doctrine applies. DP&L needs to provide information to enable OCC and the PUCO to determine whether the work product doctrine applies, and if it is applicable, whether it has been waived<sup>22</sup> or there is an exception to the doctrine.<sup>23</sup>

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.<sup>24</sup> Under Ohio Civ. R. 26(B)(6)(a) “[w]hen information 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 has the burden of proving that the materials should not be discoverable.<sup>25</sup> The burden is fulfilled only if the party can show 1) the material is a document, electronically

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<sup>21</sup> *Hitachi Medical Systems America, Inc. v. Branch*, 2010 U.S. District, Lexis 1597 at 7 (N.D. Ohio) (Sept. 24, 2010).

<sup>22</sup> See *U.S. v. Nobles*, 422 U.S. 225, 239 (1975) (holding that work product protection could be waived with regard to matters raised in testimony).

<sup>23</sup> See Ohio R. Civ. P. 26(B)(5)(d)(ii), (iii). Under 2012 amendments to Ohio R. Civ. P. 26(B) (and federal rules of civil procedure) there are exceptions to the attorney work product doctrine that permit discovery of work product where a testifying expert considers or relies on facts, data, and assumptions that the party’s attorney provided.

<sup>24</sup> *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.

<sup>25</sup> *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, 166.

stored information or tangible thing; 2) prepared in anticipation of litigation and 3) prepared by a party or its representative.<sup>26</sup>

Upon a showing of all of these requirements, the burden shifts to the opposing party to show “good cause” for obtaining such documents.<sup>27</sup> 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.<sup>28</sup>

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 based on privilege, it must show sufficient facts as to bring the identified and described discovery within the “narrow

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<sup>26</sup> See Ohio Civ. R. 26(B)(3).

<sup>27</sup> Id.

<sup>28</sup> 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 -i.e., 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. The information that OCC seeks goes to the information that the Company provided to the credit rating agencies. This information will test the Company’s claimed need for a \$687 million SSR. It is relevant under the test set forth in Rule 403. Good cause can be shown.

confines” of the privilege.<sup>29</sup> And it must show that it has not waived the privilege and that there are no exceptions to the privilege. DP&L however, failed to do either. All it has done is claim that all documents provided to credit rating agencies from 2011 forward are work product.<sup>30</sup> To date, it has not produced a discovery log.

By failing to produce a privilege log in a timely manner, the Company has failed to demonstrate that 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.<sup>31</sup> 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 the work product doctrine applies. Nor can the OCC (or the Commission) determine whether the work product doctrine has been waived or some exception to the doctrine applies.

Apart from the general statements that all communications that are responsive to OCC’s discovery are privileged, the Company failed to show how the work product document applies to any particular document. On this basis, the Commission should

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<sup>29</sup> 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).

<sup>30</sup> OCC inquired as to whether all such documents were tied to the attorney’s assessment of the results of the case. See Exhibit 4. DP&L’s Attorney did not respond to OCC’s inquiry in this regard.

<sup>31</sup> 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).



compel answers to the discovery, finding that doctrine does not apply. This would be appropriate because the Company has failed to establish that the responsive documents fall under the work product doctrine.

Such a ruling would be in keeping with Attorney Examiner Price's ruling in the FirstEnergy all electric case.<sup>32</sup> 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.<sup>33</sup>

Moreover, at the heart of this request is an attempt to discover facts or data that Mr. Chambers considered or relied upon in forming his opinions expressed in testimony. Disclosure of the information requested will permit OCC to effectively cross-examine Mr. Chambers on all bases for opinions expressed, including information that might have been provided to him by his attorney. There is no sufficient reason that an unsubstantiated claim of work product should be accepted to shield facts, data, and assumptions that underlie Mr. Chambers testimony, even if these were provided by DP&L's attorneys. This is especially true when the facts, data, and assumptions were provided to a third party—a credit rating agency. If Mr. Chambers considered facts, or data that was supplied by DP&L's attorney(s), DP&L should produce such facts or data when asked. If Mr. Chambers relied upon assumptions provided by DP&L's attorney(s), then DP&L should produce such assumptions.

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<sup>32</sup> Id., Tr. 112 (Jan. 7, 2011).

<sup>33</sup> *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).

**2. The Company's objections 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 RPD 89. 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 totaling hundreds of millions of dollars, DP&L should be extremely limited in what it would describe to this Commission its 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 OCC RPD 89 would be unduly burdensome. Federal case law<sup>34</sup> 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.<sup>35</sup> In objecting, the party must submit affidavits or offer evidence revealing the nature of the burden.<sup>36</sup> General objections without specific support may result in waiver of the objection.<sup>37</sup>

Here, the utility has failed to specifically show how the request for production is unduly burdensome. Because the burden falls upon the party resisting discovery to

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<sup>34</sup> 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."

<sup>35</sup> *Trabon Engineering Corp. v. Eaton Manufacturing Co.* (N.D. Ohio 1964), 37 F.R.D. 51, 54.

<sup>36</sup> *Roesberg v. Johns-Manville* (D.Pa 1980), 85 F.R.D. 292, 297.

<sup>37</sup> *Id.*, citing *In re Folding Carton Anti-Trust Litigation* (N.D. Ill. 1978), 83 F.R.D. 251, 264.

clarify and explain its objections and to provide support<sup>38</sup> and DP&L has failed to do so, the Commission should overrule this objection.

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). Such a filing requires the party to present specific and detailed reasons why providing a response to matters will be unduly burdensome.<sup>39</sup> DP&L did not seek a protective order.

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.<sup>40</sup> Additionally, it must prove that the provisions of the ESP are consistent

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<sup>38</sup> *Gulf Oil Corp. v. Schlesinger* (E.D.Pa. 1979), 465 F.Supp. 913, 916-917.

<sup>39</sup> 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).

<sup>40</sup> See R.C. 4928.143(C)(1).

with state policy enunciated in R.C. 4928.02.<sup>41</sup> Given the magnitude of its requested increase, DP&L should expect vigorous discovery to be conducted. Ample rights of discovery are afforded parties in Commission proceedings, by law<sup>42</sup> and by rule<sup>43</sup> and precedent.<sup>44</sup> The Company's objection should be overruled.

**3. DP&L's objections that the request seeks "proprietary" documents and is vague or undefined should be overruled.**

DP&L also objects on grounds that the information sought is "proprietary" and "vague or undefined." OCC will address these seriatim.

If the information is objectionable because it is "proprietary" then it may be treated as protected information under the current protective agreement that OCC and DP&L executed.<sup>45</sup> That protective agreement provides specific safeguards to ensure that alleged proprietary information is not disclosed to third parties. This objection should be overruled.

DP&L's objection that OCC's request is vague or undefined is hard to understand. OCC requested discrete materials that were provided to the credit rating agencies. If there is an issue about the meaning of the terms "creditworthiness" "future business conditions" or "ability to repay interest and principal" OCC would be willing to accept a broader base of documents that covers all documents provided by DP&L or on its behalf to the credit rating agencies. Moreover, these terms should be familiar to

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<sup>41</sup> *Elyria Foundry Co. v. Pub Util. Comm.* (2007), 114 Ohio St.3d 305.

<sup>42</sup> R.C. 4903.082.

<sup>43</sup> Ohio Admin. Code 4901 -1-16 (scope of discovery is wide—reasonably calculated to lead to the discovery of admissible evidence).

<sup>44</sup> See, e.g., *Ohio Consumers' Counsel v. Pub. Util. Comm.*(2006), 111 Ohio St.3d 300, 320.

<sup>45</sup> See Exhibit 3.

DP&L as they come from the testimony of their own witness, Mr. Chambers. DP&L's objection should be overruled.

**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.<sup>46</sup> Once OCC received the responses and objections, OCC communicated to Company Counsel its concerns. OCC offered legal authority to back up its view of the Company's responsibilities under the discovery provisions of the Ohio Admin. Code. OCC offered to further discuss the issues with Company Counsel. Reasonable efforts to resolve this discovery dispute were undertaken. Those efforts failed, necessitating this motion to compel.

**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 this one request for production. And the Company relies upon a blanket claim of

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<sup>46</sup> See also Attachments 1-4.

work product to shield it from discovery, without making a document by document showing. Such a claim is inconsistent with PUCO practice.<sup>47</sup>

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.

Respectfully submitted,

BRUCE J. WESTON  
OHIO CONSUMERS' COUNSEL

/s/ Maureen R. Grady

Melissa R. Yost, Counsel of Record

Maureen R. Grady

Tad Berger<sup>48</sup>

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<sup>47</sup> 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.)

<sup>48</sup> 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 29th 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 |
|  | ) |                        |
|  | ) |                        |

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**AFFIDAVIT OF MAUREEN R. GRADY**

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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 Request for Production of Documents 89:

1. OCC submitted its twenty third set of discovery to DP&L on January 4, 2013. This discovery was served by electronic message as well as first class mail, postage prepaid, consistent with Ohio Adm. Code 4901:1-1-05(C)(4).

2. On January 4, 2013 DP&L served its Objections and Responses to OCC's Twenty Third Set of discovery by electronic message. In its responses to OCC RFP 89 (a)-(c), it objected on numerous grounds, but indicated that "Subject to all general objections, DP&L states that it will supplement this response." (Exhibit 1).

3. On January 16, 2013, DP&L served its Supplemental Objections and Responses to OCC's Twenty Third Set of discovery by electronic message. With respect to RPD 89, there was no "supplementation" supplied. (Exhibit 2). Rather, the only difference between the January 14 response and the January 16 response was that the sentence "Subject to all general objections, DP&L states that it will supplement this response" was gone.

4. On January 22, 2013, OCC by e-mail notified the Company that there were discovery issues that OCC wanted to discuss with Company Counsel. (Attachment 1). OCC identified RPD 41, which was similar in many respects to OCC RPD 89. OCC explained how the information being sought was relevant and sought clarification from the Company as to its remaining objections.

5. The following day, January 23, 2013, OCC sent a second –mail to the Company Counsel asking that OCC RPD 89, be the subject of discussion instead of RPD 41, since RPD 89 was more targeted. (Attachment 2).

6. That day Company Counsel indicated that he had withheld communications with credit rating agencies on the ground that all of the communications are work product. (Attachment 3). Counsel also claimed that work product protections are not waived by sharing the work product with third parties.

7. In response OCC Counsel sent an e-mail indicating its concerns with DP&L's response, including that Counsel had not identified responsive documents. (Attachment 4). OCC Counsel requested that DP&L prepare a privilege log for RPD 89, prior to the discovery conference of January 30, 2013. OCC offered to further discuss the issues, but informed Company Counsel that, per the Attorney Examiner's preference, it would file a motion to compel in the very near term if the issue could not be resolved very shortly.

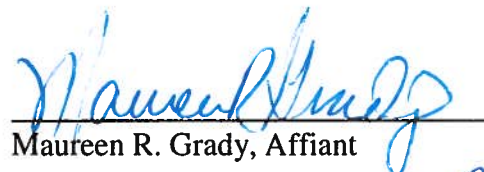
8. Having heard nothing further from Company Counsel, and having no privilege log produced in response to OCC's request, it appears that reasonable resolution of this discovery dispute may not be achieved without Commission intervention. In light of the scheduling of a discovery conference for January 30, 2012 to address pending discovery issues, OCC files this motion to compel.

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.

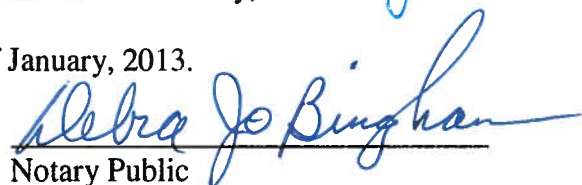
Further affiant sayeth naught.

  
Maureen R. Grady, Affiant

Subscribed and sworn to before me this 29th day of January, 2013.



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

  
Notary Public

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               | : |                        |

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**OBJECTIONS AND RESPONSES OF THE DAYTON POWER AND LIGHT  
COMPANY TO THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S  
INTERROGATORIES PROPOUNDED UPON THE DAYTON POWER AND LIGHT  
COMPANY - TWENTY-THIRD SET (DATED JANUARY 4, 2013)**

---

The Dayton Power and Light Company ("DP&L") objects and responds to The Office of the Ohio Consumers' Counsel's ("OCC") Interrogatories, Twenty-Third Set as follows.

**GENERAL OBJECTIONS**

1. DP&L objects to and declines to respond to each and every discovery request to the extent that it seeks information that is irrelevant and is not reasonably calculated to lead to the discovery of admissible evidence. Ohio Admin. Code § 4901-1-16(B).

**RESPONSES TO REQUESTS FOR PRODUCTION OF DOCUMENTS**

RPD-87. Please provide a copy of the Black study performed by Witness Strunk in Case No. 05-276-EL-AIR and provide a copy of the workpapers that support the study.

**RESPONSE:** General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), and 4 (proprietary). Subject to all general objections, DP&L states: See Mr. Strunk's filed testimony in that case.

RPD-88. Please provide a copy of all documents asked to be identified in OCC INT-403.

**RESPONSE:** General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary), and 9 (vague or undefined). Subject to all general objections, DP&L states that it does not possess responsive documents.

RPD-89. Please provide a copy of all documents provided by DP&L or on DP&L's behalf (during 2012 and 2013) to the three credit rating agencies that relate to

a. The Company's creditworthiness

**RESPONSE:** General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary), and 9 (vague or undefined). Subject to all general objections, DP&L states that it will supplement this response.

b. The Company's future business conditions,

**RESPONSE:** General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary), and 9 (vague or undefined). Subject to all general objections, DP&L states that it will supplement this response.

c. The Company's ability to repay interest and principal.

**RESPONSE:** General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), and 4 (proprietary). Subject to all general objections, DP&L states that it will supplement this response.

Respectfully submitted,

s/ Judi L. Sobecki

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s/ Charles J. Faruki

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### CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Objections and Responses of The Dayton Power and Light Company to the Office of the Ohio Consumers' Counsel's Interrogatories Propounded Upon Dayton Power and Light Company, Twenty-Third Set (Dated January 4, 2013) has been served via electronic mail upon the following counsel of record, this 14th day of January, 2013:

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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 |
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| Approval of Revised Tariffs              | : |                        |
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| The Dayton Power and Light Company for   | : |                        |
| Approval of Certain Accounting Authority | : |                        |
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| 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               | : |                        |

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**SUPPLEMENTAL OBJECTIONS AND RESPONSES OF THE DAYTON POWER AND  
LIGHT COMPANY TO THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S  
INTERROGATORIES PROPOUNDED UPON THE DAYTON POWER AND LIGHT  
COMPANY - TWENTY-THIRD SET (DATED JANUARY 4, 2013)**

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The Dayton Power and Light Company ("DP&L") objects and responds to The Office of the Ohio Consumers' Counsel's ("OCC") Interrogatories, Twenty-Third Set as follows.

**GENERAL OBJECTIONS**

1. DP&L objects to and declines to respond to each and every discovery request to the extent that it seeks information that is irrelevant and is not reasonably calculated to lead to the discovery of admissible evidence. Ohio Admin. Code § 4901-1-16(B).

## RESPONSES TO REQUESTS FOR PRODUCTION OF DOCUMENTS

RPD-87. Please provide a copy of the Black study performed by Witness Strunk in Case No. 05-276-EL-AIR and provide a copy of the workpapers that support the study.

**RESPONSE:** General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), and 4 (proprietary). Subject to all general objections, DP&L states: See Mr. Strunk's filed testimony in that case.

RPD-88. Please provide a copy of all documents asked to be identified in OCC INT-403.

**RESPONSE:** General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary), and 9 (vague or undefined). Subject to all general objections, DP&L states that it does not possess responsive documents.

RPD-89. Please provide a copy of all documents provided by DP&L or on DP&L's behalf (during 2012 and 2013) to the three credit rating agencies that relate to

a. The Company's creditworthiness

**RESPONSE:** General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary), and 9 (vague or undefined). DP&L further objects because the documents that it possesses are protected by the work-product doctrine.

b. The Company's future business conditions,

**RESPONSE:** General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary), and 9 (vague or undefined). DP&I further objects because the documents that it possesses are protected by the work-product doctrine.

c. The Company's ability to repay interest and principal.

**RESPONSE:** General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), and 4 (proprietary). DP&I further objects because the documents that it possesses are protected by the work-product doctrine.

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Supplemental Objections and Responses of The Dayton Power and Light Company to the Office of the Ohio Consumers' Counsel's Interrogatories Propounded Upon Dayton Power and Light Company, Twenty-Third Set (Dated January 4, 2013) has been served via electronic mail upon the following counsel of record, this 16th day of January, 2013:

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

**PROTECTIVE AGREEMENT**

This Protective Agreement ("Agreement") is entered into by and between The Dayton Power and Light Company ("DP&L" or "Company") and the Office of the Ohio Consumers' Counsel ("OCC") (collectively, "the Parties"). This Agreement is designed to facilitate and expedite the exchange with OCC of all information in the discovery process in this proceeding, as this "Proceeding" is defined herein. It reflects agreement between the Company and OCC as to the manner in which "Protected Materials," as defined herein, are to be treated. This Agreement is not intended to constitute any resolution of the merits concerning the confidentiality of any of the Protected Materials.

1. The purpose of this Agreement is to permit prompt access to and review of such Protected Materials in a controlled manner that will allow their use for the purposes of this

Proceeding while protecting such data from disclosure to non-participants, without a prior ruling by an administrative agency of competent jurisdiction or court of competent jurisdiction regarding whether the information deserves protection.

2. “Proceeding” as used throughout this document means the above-captioned cases, including any appeals, remands and cases with which the above-captioned case(s) are consolidated or related thereto.

3. “Protected Materials” means documents and information furnished subject to the terms of this Agreement and so designated by the Company by conspicuously marking each document or written response as confidential. Protected Materials do not include any information or documents contained in the public files of any state or federal administrative agency or court and do not include documents or information which at, or prior to, commencement of this Proceeding, is or was otherwise in the public domain, or which enters into the public domain.

4. Protected Materials provided in the context of this Proceeding will be provided to OCC for use by OCC in conjunction with this Proceeding. Nothing in this Agreement precludes the use of any portion of the Protected Materials that becomes part of the public record or enters into the public domain. Nothing in this Agreement precludes OCC from filing Protected Materials under seal or otherwise using Protected Material in ways, such as *in camera* proceedings, that do not disclose Protected Materials.

5. As used in this Agreement, the term “Authorized Representative” includes OCC’s counsel of record in this Proceeding and other attorneys, paralegals, economists, statisticians, accountants, consultants, or other persons employed or retained by OCC and engaged in this Proceeding.

6. Access to Protected Materials is permitted to OCC's Authorized Representatives who are either a signatory to this Agreement or who have executed a Non-Disclosure Certificate in the form attached hereto as Exhibit A prior to any access. OCC must treat all Protected Materials, copies thereof, information contained therein, and writings made therefrom as proprietary and confidential, and will safeguard such Protected Materials, copies thereof, information contained therein, and writings made therefrom so as to prevent voluntary disclosure to any persons other than OCC's Authorized Representatives.

7. If any OCC Authorized Representative ceases to be engaged in this Proceeding, access to any Protected Materials by such person will be terminated immediately and such person must promptly return Protected Materials in his or her possession to another Authorized Representative of OCC and if there is no such Authorized Representative, such person must treat such Protected Materials in the manner set forth in Paragraph 17 hereof as if this Proceeding herein had been concluded. Any person who has signed the foregoing Non-Disclosure Certificate will continue to be bound by the provisions of this Agreement even if no longer so engaged.

8. In this proceeding, OCC may disclose Protected Materials or writings regarding their contents to any individual or entity that is in possession of said Protected Materials or to any individual or entity that is bound by a Protective Agreement or Order with respect to the Protected Materials. OCC may also disclose Protected Materials to employees or persons working for or representing the Public Utilities Commission of Ohio in connection with this Proceeding.

9. OCC may file Protected Materials under seal in this Proceeding whether or not OCC seeks a ruling that the Protected Materials should be in the public domain. If OCC desires to include, utilize, refer, or copy any Protected Materials in such a manner, other than in a

manner provided for herein, that might require disclosure of such material, then OCC must first give notice (as provided in Paragraph 16) to the Company, specifically identifying each of the Protected Materials that could be disclosed in the public domain. The Company will have five (5) business days after service of OCC's notice to file, with an administrative agency of competent jurisdiction or court of competent jurisdiction, a motion and affidavits with respect to each of the identified Protected Materials demonstrating the reasons for maintaining the confidentiality of the Protected Materials. The affidavits for the motion must set forth facts delineating that the documents or information designated as Protected Materials have been maintained in a confidential manner and the precise nature and justification for the injury that would result from the disclosure of such information. If the Company does not file such a motion within five (5) business days of OCC's service of the notice, then the Protected Materials will be deemed non-confidential and not subject to this Agreement.

10. The Parties agree to seek *in camera* proceedings by the administrative agency of competent jurisdiction or court of competent jurisdiction for arguments or for the examination of a witness that would disclose Protected Materials. Such *in camera* proceedings will be open only to the Parties, their counsel, other OCC Authorized Representatives, and others authorized by the administrative agency or court to be present; however, characterizations of the Protected Materials that do not disclose the Protected Materials may be used in public.

11. Any portion of the Protected Materials that the administrative agency of competent jurisdiction or court of competent jurisdiction has deemed to be protected and that is filed in this Proceeding will be filed in sealed confidential envelopes or other appropriate containers sealed from the public record.

12. The Parties agree to seek *in camera* examination of a witness for the portion of the examination that would disclose Protected Materials that the administrative agency or court



of competent jurisdiction has deemed to be protected. Such *in camera* examination will be open only to counsel for the Parties, other Authorized Representatives of OCC, and others authorized by the administrative agency or court of competent jurisdiction to be present. Transcripts of the closed hearing will be stored in sealed envelopes or other appropriate containers sealed pursuant to the order of the administrative agency or court of competent jurisdiction.

13. It is expressly understood that upon a filing made in accordance with Paragraph 9 or Paragraph 14 of this Agreement, the burden will be upon the Company to show that any materials labeled as Protected Materials pursuant to this Agreement are confidential and deserving of protection from disclosure.

14. OCC will give the Company notice (as provided in Paragraph 16) if OCC receives a public records request for Protected Materials. The Company will have five (5) business days after service of OCC's notice to file a pleading before a court of competent jurisdiction to prevent disclosure of the Protected Materials in question. If the Company files such a pleading, OCC will continue to protect the Protected Materials as required by this Agreement pending an order of the court. If the Company does not file at a court of competent jurisdiction within five (5) business days of service of OCC's notice, then such Protected Materials can be deemed by OCC to be non-confidential, not a trade secret and not subject to this Agreement. Alternatively, the Company may provide notice to OCC that the Protected Materials may be disclosed in response to a public records request.

15. If, under Ohio's public records law, a court awards a relator or person or party attorney's fees or statutory damages or court costs in connection with OCC's non-disclosure or delayed disclosure of Protected Materials, then the Company will pay such awarded attorney's

fees, statutory damages and/or court costs to the relator or person or party so that the State of Ohio, OCC and OCC's employees and officials are held harmless.

16. All notices required by Paragraphs 9 and 14 must be served by the Parties on each other by one of the following methods: (1) sending the notice to the counsel of record herein via e-mail; (2) hand-delivering the notice to the counsel of record in person at any location; or (3) sending the notice by an overnight delivery service to the counsel of record.

17. Once OCC has complied with its records retention schedule(s) pertaining to the retention of the Protected Materials and OCC determines that it has no further legal obligation to retain the Protected Materials and this Proceeding (including all appeals and remands) is concluded, OCC must return or dispose of all copies of the Protected Materials unless the Protected Materials have been released to the public domain or filed with a state or federal administrative agency or court under seal. OCC may keep one copy of each document designated as Protected Material that was filed under seal and one copy of all testimony, cross-examination, transcripts, briefs and work product pertaining to such information and will safeguard that copy as provided in this Agreement.

18. By entering into this Protective Agreement, OCC does not waive any right that it may have to dispute the Company's determination regarding any material identified as confidential by the Company and to pursue those remedies that may be available to OCC before an administrative agency or court of competent jurisdiction. Nothing in this Agreement precludes OCC from filing a motion to compel with regards to disclosure.

19. By entering into this Protective Agreement, the Company does not waive any right it may have to object to the discovery of confidential material on grounds other than confidentiality and to pursue those remedies that may be available to the Company before the administrative agency of competent jurisdiction or court of competent jurisdiction.

20. Inadvertent production of any document or information during discovery without a designation as "Confidential" will not be deemed to waive DP&L's claim to its confidential nature or estop DP&L from designating the document or information as "Confidential" at a later date. Disclosure of the document or information by OCC prior to such later claim or designation shall not be deemed a violation of the provisions of this Agreement and OCC bears no responsibility or liability for any such disclosure. OCC does not waive its right to challenge DP&L's delayed claim or designation of the inadvertent production of any document or information as "Confidential."

21. This Agreement represents the entire understanding of the Parties with respect to Protected Materials and supersedes all other understandings, written or oral, with respect to the Protected Materials. No amendment, modification, or waiver of any provision of this Agreement is valid, unless in writing signed by both Parties. Nothing in this Agreement should be construed as a waiver of sovereign immunity by OCC.

22. This Agreement will be governed by and construed in accordance with the laws of the State of Ohio.

The Dayton Power and Light Company

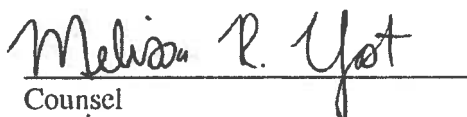
BY:

  
Counsel

May 10, 2012  
Date

Office of the Ohio Consumers' Counsel

BY:

  
Counsel

5/10/12  
Date

**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 |
|  | ) |                        |

**NON-DISCLOSURE CERTIFICATE**

I certify my understanding that Protected Materials may be provided to me pursuant to the terms and restrictions of the Protective Agreement, last executed \_\_\_\_\_ 2012, and certify that I have been given a copy of and have read the Protective Agreement, and that I agree to be bound by it. I understand that the contents of Protected Materials, and any writings, memoranda, or any other form of information regarding or derived from protected materials will not be voluntarily disclosed to anyone other than in accordance with the Protective Agreement and will be used only for the purposes of this Proceeding as defined in paragraph two of the Protective Agreement.

Name: \_\_\_\_\_

Company: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_

Date: \_\_\_\_\_

**From:** MAUREEN GRADY  
**To:** jsharkey@ficlaw.com  
**Date:** 1/22/2013 12:28 PM  
**Subject:** RPD 41  
**CC:** Berger, Tad; Yost, Melissa

Jeff, in reviewing the discovery responses of the Company, I came upon this one which seems to warrant follow-up. We asked for the documents the Company has provided to the three credit rating agencies post acquisition of DPL by AES (up through present) that relate to the Company's creditworthiness its future business conditions and its ability to repay interest and principal.

You objected on grounds of relevance, unduly burdensome, proprietary, and possession of DP&L's unregulated affiliate. You further objected because neither DP&L Inc nor AES are parties to this proceeding and are therefore not subject to discovery.

Here's why the information is reasonably calculated to lead to the discovery of admissible evidence (the standard for discovery at the PUCO, and under Ohio Civil Rules):

Mr. Chambers' testimony is focused in large part on credit ratings and how important they are to maintain and their impact on financial integrity. And during this past year the rating agencies have changed or altered thier view of DP&L. Information given to the agencies by DPL, DPL Inc. and AES pertaining to DP&L is reasonably calculated to lead to the discovery of admissible evidence.

Please define how this would be unduly burdensome to respond to --what does it entail?

Isnt the proprietary nature of the information dealt with under our protective agreement?

Is the information known to DP&L or readily available, even if it is in the possession of AES or others? Wasnt it DP&L generated information?

This appears to be similar in nature to the information we requested and are moving to compel on (with the motion to be filed today).

If you could take a look at the discovery and get back to me on these questions I am asking regarding this, I would appreciate it. And if there is some compromise we can work out, I would be open to suggestions.

E-mail works or a telephone call will do.

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**From:** MAUREEN GRADY  
**To:** jsharkey@ficlaw.com  
**Date:** 1/23/2013 11:42 AM  
**Subject:** Fwd: RPD 41  
**CC:** Berger, Tad; Duann, Daniel; Yost, Melissa  
**Attachments:** RPD 41

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Jeff, in further reviewing discovery responses by the Company, I came upon your response to OCC RPD 89, which basically asks the same thing as RPD 41, although in a clearer form. I suggest our discovery discussion focus on that request.

How is it unduly burdensome--define what would be involved in the effort to answer this.

How is it privileged or work product? To assist me in understanding this I am requesting a privilege log that identifies each document that responds to my request, yet is being withheld. The information I would expect you to identify is the type of communication, the privilege asserted, the date of the communication, whom was communication made to and from, Who was copied, a brief discussion of the substance of the document, and whether there were attachments .

If proprietary, doesnt our current protective agreement address this and protect the information?

Please explain what is vague or undefined about this.

Thanks, Maureen

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**From:** "Sharkey, Jeffrey S." <JSharkey@ficlaw.com>  
**To:** 'MAUREEN GRADY' <GRADY@occ.state.oh.us>  
**Date:** 1/23/2013 7:11 PM  
**Subject:** RE: RPD 41 [IWOV-DMS.FID83439]  
**CC:** "Judi L. Sobecki Esq. (Judi.Sobecki@AES.com)" <Judi.Sobecki@AES.com>, DonaR  
Seeger-Lawson <dona.seger-lawson@aes.com>, "Faruki, Charles J."  
<CFaruki@ficlaw.com>, "Sadlowski, Adam V." <ASadlowski@ficlaw.com>, "Cline,Kelly  
M." <kcline@ficlaw.com>

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Maureen: DP&L has withheld its communications with credit rating agencies on the ground that the communications are work product. Namely, those communications reveal DP&L's expectations as to the results of this case. As you probably know, unlike privileged communications, work product protections are not waived by sharing the work product with third parties. Jeff.



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**From:** MAUREEN GRADY  
**To:** Sharkey, Jeffrey S.  
**Date:** 1/24/2013 11:55 AM  
**Subject:** RE: RPD 41 [IWOV-DMS.FID83439]  
**CC:** Berger, Tad; Yost, Melissa

---

So, you are not claiming privilege-attorney client? Ok. Now lets talk about what exactly the work-product doctrine applies to.

Here's where I have an issue: You have not told me what exact communications you have had with the rating agencies that you claim are covered by work product . All communications? Every document was prepared in anticipation of litigation? Every communication you (DP&L) have had has related to what you perceive to be the outcome of the case? There were no communications that addressed other issues that are able to be segregated from that one distinct issue? The issues I was asking about are the company's creditworthiness, and ability to repay interest and principal as well as the future business conditions (RPD 89).

I am requesting you identify each document that is responsive to OCC RPD 89 and RPD 41 but is being withheld on the basis of work product doctrine. That way I can begin to judge the merits of your claims as to work product doctrine. I am requesting a privilege log to be produced prior to the discovery conference, currently scheduled for Jan. 30. Once it is produced, consistent with the AE's ruling, I will be seeking an in camera inspection on a document by document basis to determine the validity of your work product claim. I will request that to be done at the Discovery Conference of Jan. 30.

Jeff, I am willing to discuss this issue with you further, but in order to comply with the AE's preference re: motions to compel, we will need to resolve this matter in the very near term. In other words, I will file another motion to compel on this issue if we do not resolve this very shortly.

And as I am sure you are aware the work product doctrine does not shield the information from discovery if I can demonstrate good cause. But I do not even need to do that if you cannot show that the doctrine applies to the information you are trying to shield. According to the PUCO, and the Ohio Supreme Court this must be done on a document by document basis. The authority for these assertions are all set forth in the motion to compel which I filed yesterday.

And, my understanding is that work product can be waived under certain circumstances. So there may be a legal question as to whether disclosure of your alleged workproduct to a ratings agency is a waiver. This will need to be answered provided you are able to establish that work product doctrine applies in the first place.

I look forward to a further discussion of these issues. I am available all day today and tomorrow all day. I think a call vs. e-mail would work best, but that is up to you.

Thanks, Maureen

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

**Commission of Ohio Docketing Information System on**

**1/29/2013 11:16:25 AM**

**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.