BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

THE DAYTON POWER AND LIGHT COMPANY'S MEMORANDUM IN OPPOSITION TO OCC'S MOTION TO COMPEL DISCOVERY RESPONSES

I. INTRODUCTION AND SUMMARY

OCC asks the Commission to compel DP&L to respond to three categories of discovery requests. The Commission should deny OCC's motion for the following reasons:

1. The AES Corporation and DPL Inc. are not subject to discovery: Two of the categories of discovery requests at issue seek discovery from AES and DPL Inc. However, those entities are not subject to discovery in Commission proceedings (with limited exceptions, not relevant here).

2. Analysis by non-testifying experts is work product: DP&L engaged NorthBridge as a non-testifying consultant to advise DP&L as to litigation and settlement strategy in this case. OCC asks the Commission to compel production of that advice. However, NorthBridge's work is plainly protected by the work product doctrine, and is not discoverable.

The Commission should thus deny OCC's motion to compel.

II. THE COMMISSION SHOULD DENY IEU'S MOTION TO COMPEL

A. AES CANNOT BE COMPELLED TO ANSWER INTERROGATORIES

As the Commission knows, DP&L's parent is DPL Inc.; DPL Inc.'s parent is AES DPL Holdings, LLC; and it is a subsidiary of AES. OCC asks (p. 5) that the Commission compel AES to explain what it meant when it used certain phrases (INT-255), what DPL did with money that it received from AES (INT-260), and AES' plans for making future distributions to DPL (INT-261).

As the Commission knows, AES and DPL Inc. are not parties to this case, and are not subject to discovery in this case. In the Matter of Duke Energy Ohio, Inc., No. 10-2586-EL-SSO, 2010 Ohio PUC LEXIS 1336, at *8-9 (PUCO Dec. 13, 2010) (granting IEU's motion to

compel but limiting IEU's original request for "any studies or analysis conducted or commissioned by Duke or its affiliates regarding any revenues Duke's affiliated companies will receive if Duke remains a member of MISO or transitions to PJM" to "require Duke to produce only information and documents within the possession of Duke Energy Ohio, not its affiliates") (emphasis added); In the Matter of Manchester Group, LLC, No. 08-360-GA-CSS, 2009 Ohio PUC LEXIS 988, at *1-3 (Nov. 13, 2009) (denying complainant's motion to compel Columbia Gas to produce "all documents and correspondence of Columbia and Columbia's affiliates, subsidiaries, and parent companies that relate to the sale of Columbia Service Partners (CSP) to the CSP Acquisition Company" as to the "documents not in possession of Columbia" because such request is overbroad, but granting the motion to compel as to the documents in the possession of Columbia) (emphasis added).

The Commission thus should not compel AES and DPL Inc. to respond to OCC's discovery requests.

B. THE DPL INC. GOODWILL IMPAIRMENT IS NOT RELEVANT TO THIS PROCEEDING

On October 31, 2012, DPL Inc. announced that it was taking a $1.7 to $2.0 billion goodwill impairment relating to its acquisition by AES. Also on that day, DP&L announced that it was taking an $80.8 million asset impairment associated with two generation plants that it owns. DPL Inc. and DP&L stated publicly that the reasons for the write-down of those assets included the downturn in generation market. DP&L has provided discovery associated with its asset impairment, but has not provided discovery associated with the DPL Inc. goodwill impairment.

OCC again asserts (pp. 6-8) that DPL Inc. is subject to discovery before this Commission and that it should identify assumptions that it made in the goodwill impairment (INT-333 & INT-334), and should produce documents associated with the goodwill impairment (RFPD 69, RFPD 71, and RFPD 73).

Again, DPL Inc. is not subject to discovery in this proceeding. OCC's discovery requests are thus improper.

C. ALTERNATIVE ANALYSIS AS TO SSR AMOUNTS

In DP&L's Application in this case, it seeks a $137.5 million Service Stability Rider. Application, para 12. To assist DP&L with litigation and settlement strategy in this case, DP&L engaged The NorthBridge Group as economic consultants; NorthBridge was not engaged to testify and will not be sponsoring testimony in this case; it is a consulting expert only. Among the work that NorthBridge performed was analysis of the return on equity that DP&L would earn under various alternative scenarios.

OCC argues (pp. 8-9) that DP&L should be compelled to produce the analysis that NorthBridge has performed as to the ROE that DP&L would earn under alternative litigation scenarios (INT-227, INT-239, INT-260; RFPD-37, RFPD-39).

The Commission should deny OCC's motion because the requested information is plainly protected by the work product doctrine. The work product doctrine protects materials "prepared in anticipation of litigation" that was prepared by a party "including his attorney, consultant, surety, indemnitor, insurer, or agent." Ohio R. Civ. P. 26(B)(3). For another party to obtain such protected materials, it must show "good cause." Id. The Commission has recognized the work product doctrine. In the Matter of the Complaint of the City of Huron, No.

03-1238-EL-CSS, 2005 Ohio PUC LEXIS 413, at *7 (PUCO Aug. 2, 2005) (finding "electronic mail messages between the in-house counsel for [the utility] and employees of [the utility] and its affiliates," specifically documents "prepared at the direction of counsel after the commencement of this proceeding," to be protected by the work-product privilege and that the opposing party had "not shown that there is an inability or difficulty in obtaining the information without undue hardship") (citations omitted). Accord: Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp., 127 Ohio St. 3d 161, 175-76 (2010) ("Attorney work product, including but not limited to mental impressions, theories, and legal conclusions, may be discovered only by a showing of good cause if it is directly at issue in the case, the need for the information is compelling, and the evidence cannot be obtained elsewhere"); Jackson v. Greger, 110 Ohio St. 3d 488, 491 (2006) ("The purpose of the work-product rule is '(1) to preserve the right of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (2) to prevent an attorney from taking undue advantage of his adversary's industry or efforts.'") (citing Ohio R. Civ. P. 26(A)).

The American Bar Association's committees on Professional Conduct, business Corporate Litigation, and Cyberspace Law discussed the work product doctrine in their publication, "The Attorney-Client Privilege and Work Product in the Post-Enron Era":

> "There are two categories or types of attorney work product: 'fact' or 'ordinary' work product, but better described as 'tangible' work product; and 'opinion' or 'core' work product, sometimes termed 'intangible' work product. . . .
>
> Work product protection is not absolute. A party may discover its adversary's tangible work product if it demonstrates substantial need for the materials to prepare its case and it is unable without undue hardship to obtain the substantial equivalent of the materials

> by other means. The discovering party must specifically explain its need for the materials sought. . . .
>
> Opinion work product, on the other hand, receives almost absolute protection against discovery. To discover an adversary's opinion work product a party must demonstrate something far greater than the substantial need and undue hardship necessary to obtain tangible work product. Discovery of opinion work product may be permitted only where the attorneys' conclusions, mental impressions or opinions are at issue in the case and there is a compelling need for their discovery."

Douglas R. Richmond and William Freivogel, The Attorney-Client Privilege and Work Product in the Post-Enron Era, ABA Section of Business Law, p. 5 (2004) (emphasis added), http://apps.americanbar.org/buslaw/newsletter/0027/materials/11.pdf

The Supreme Court of Ohio's decision in Squire, Sanders & Dempsey is illustrative. In that case, SS&D's client had a general counsel, and that general counsel terminated SS&D with respect to a case that SS&D was handling for the client. 127 Ohio St. 3d at 161-62. SS&D sued its former client to recover amounts owed to SS&D for services performed, and the client claimed that it was not obligated to pay SS&D because the client's general counsel had concluded that SS&D had performed inadequately in the underlying litigation. Id. at 163.

SS&D sought discovery (documents and depositions) from the general counsel of SS&D's former client, and the former client refused to provide that information, claiming that the information was protected by the work product doctrine. Id. SS&D moved to compel the production of the information and documents at issue, and the Court described the work product doctrine:

> "Attorney work product, including but not limited to mental impressions, theories, and legal conclusions, may be discovered

> only by a showing of good cause if it is directly at issue in the case, the need for the information is compelling, and the evidence cannot be obtained elsewhere"

Id. at 175-76 (emphasis added).

The Court held that the mental impression of the former client's general counsel satisfied the "directly at issue in the case" criterion because the basis of the former client's defense was that its general counsel had concluded that SS&D had performed inadequately and overcharged for its services. Id. at 176. The Court thus compelled the former client's general counsel to testify and the client to provide documents relating to the value and quality of the legal services performed by SS&D. Id.

Here, there is no similar issue. NorthBridge was engaged by DP&L's counsel to assist DP&L to evaluate litigation and settlement strategy. The mental impressions of NorthBridge are not "directly at issue" in this case. Rather, the issue in this case is whether DP&L's proposed rate plan is reasonable and lawful. NorthBridge's analysis related to this case thus is not "directly at issue" in this case and is not discoverable.

Nor can OCC establish the second criterion -- that its "need for the information is compelling." For example, in Jackson, the Court held that information in an attorney's files was protected by the work product doctrine because the opposing party could hire an "expert who could independently determine the facts." 110 Ohio St. 3d at 492. Similarly here, OCC could engage its own experts who could analyze the ROE that DP&L could earn under different scenarios. OCC thus cannot establish that it has a compelling need for the information.

The Commission should therefore conclude that NorthBridge's work is protected by the work product doctrine, and should deny OCC's motion to compel.

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Summary: Memorandum The Dayton Power and Light Company's Memorandum in Opposition to OCC's Motion to Compel Discovery Responses electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company