

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The)
Dayton Power and Light Company for) Case No. 13-2420-EL-UNC
Authority to Transfer or Sell Its)
Generation Assets.)

**REPLY TO DAYTON POWER & LIGHT COMPANY'S
MEMORANDUM CONTRA
MOTION TO COMPEL RESPONSES TO DISCOVERY
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

Edmund "Tad" Berger, Counsel of Record
Maureen R. Grady
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: (614) 466-1292 - Berger
Telephone: (614) 466-9567 - Grady
Edmund.berger@occ.ohio.gov
Maureen.grady@occ.ohio.gov

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REPLY TO MEMORANDUM CONTRA

I. INTRODUCTION

Dayton Power & Light Company (“DP&L” or “Utility”) seeks to evade answering questions about its undefined proposal to sell or transfer its generation assets and requests for special rate treatment, which could substantially impact electric service and rates charged to customers. After an initial comment process regarding DP&L’s numerous undefined proposals and requests for waiver of a hearing and other requirements, the Office of the Ohio Consumers’ Counsel (“OCC”) sought information related to DP&L’s proposals. OCC served discovery on claims made in DP&L’s application and supplemental application even though those applications fail to meet legal and regulatory requirements. But DP&L refused to answer those questions and has filed a Motion for Protection to prevent discovery from taking place unless the Public Utilities Commission of Ohio (“PUCO”) schedules a hearing in this proceeding.

As emphasized by OCC in its Motion to Compel, the law affords ample rights of discovery to every party in a proceeding¹ and the PUCO’s rules provide that the right to

¹ R.C. 4903.082.

discovery begins with commencement of a proceeding.² DP&L has failed to cite to any law or regulation that limits a party's rights to discovery simply because a hearing has not been scheduled. Yet DP&L seeks to limit OCC – and presumably other parties – from inquiring into the basis of its claims because a hearing has not yet been scheduled.

DP&L cites to two PUCO cases – 9 and 15 years old respectively – where the PUCO denied parties discovery because the PUCO found that a hearing was not necessary for its review. In the instant case, however, a hearing is required under the PUCO's rules. A hearing – and ample rights to discovery – are necessary to protect the customers who are being asked to pay for DP&L's proposals.

Although DP&L's claims are largely focused on denying OCC's rights to discovery in its entirety, DP&L's Memo Contra also iterates its claims of interference with DP&L's sales process, claims that OCC's discovery request are overly broad and therefore unduly burdensome to answer, and that OCC has improperly asked for discovery of AES and DPL Inc. DP&L also contends that a privilege log would be unduly burdensome and should not be required until its objections on the merits are resolved. All of these issues were discussed in OCC's Motion to Compel and OCC's Memorandum Contra to DP&L's Motion for Protective Order. The arguments lack merit and should be rejected. DP&L should be compelled to respond.

² Ohio Admin. Code 4901-1-17(A).

II. ARGUMENT

A. **Discovery Rights Are Not Limited When The PUCO Requests That Parties File Comments Or When A Request To Waive A Mandatory Hearing Is Pending.**

DP&L makes the statement that because the PUCO requested and received comments on DP&L's Application and Supplemental Application, and the PUCO has not yet scheduled a hearing, means that "there are no pending issues before the Commission for the parties to litigate."³ But all of the issues are being "litigated." The PUCO received comments to DP&L's filings. But the PUCO has not yet developed an evidentiary record in this matter. OCC's discovery is designed to elicit information related to specific statements in the Utility's initial filing and supplemental application. Such information then may be relied on for testimony or cross-examination at a hearing on DP&L's proposals.

All of the issues in this matter are currently subject to litigation and the PUCO's rules recognize that discovery commences when the proceeding commences.⁴ A hearing is required in this matter not only because it is required by regulation⁵ but because of the significant impact that DP&L's proposals will likely have on customers. OCC's discovery is directed toward determining the factual underpinnings of DP&L's proposals as well as the impact of its proposals.

DP&L appears to suggest that if OCC was intending to perform discovery, it should have conducted that discovery before filing Comments to DP&L's Application

³ DP&L Memo Contra at 63.

⁴ Ohio Admin. Code 4901-1-17(A).

⁵ Ohio Admin. Code 4901:1-37-09(D).

and Supplemental Application.⁶ However, the time frame for submitting Comments to both the Application and Supplemental Application allowed little time to submit discovery and receive responses prior to filing such comments -- even if DP&L would have provided substantive responses. The Application was filed on December 30, 2013 and Comments had to be filed by February 4, 2014. The Supplemental Application was filed on February 25, 2014 and Comments were due on March 25, 2014. More importantly, as OCC has repeatedly emphasized, DP&L's Application and Supplemental Application were completely inadequate. And OCC has urged the PUCO to reject those filings and require DP&L to submit substantially adequate filings that meet the requirements of the Commission's rules. The PUCO should do so -- in addition to requiring DP&L to provide responses to OCC's discovery.

DP&L points to a PUCO decision in a merger case⁷ to support its position that parties' rights to discovery may not automatically attach where a hearing has not been scheduled. In the *Cinergy* case, the PUCO reviewed a change in control of the holding company for Cincinnati Gas & Electric Company. In an Entry issued two weeks after that application was filed and before many parties had moved to intervene -- and before the PUCO had considered intervention of many parties, the PUCO scheduled a comment process specifically to consider the nature and scope of its review. In the interim, it prevented discovery from commencing.

In the *Cinergy* case, the PUCO was acting pursuant to R.C. 4905.02(A)(2) -- the utility merger statute -- which specifically provides the PUCO with discretion to set a

⁶ DP&L Memo Contra at 6, n. 3.

⁷ *In the Matter of the Joint Application of Cinergy Corp., on Behalf of the Cincinnati Gas & Electric Company, and Duke Energy Holding Corp. for Consent and Approval of a Change of Control of The Cincinnati Gas & Electric Company, et al.*, Case No. 05-732-EL-MER, pp. 6-7 (Dec. 7, 2005 ("Cinergy")).

hearing “if the commission considers a hearing necessary.” Here, in contrast, the PUCO’s rules specifically require a hearing where an application proposes to alter the PUCO’s jurisdiction over a utility’s generation assets. Ohio Admin. Code 4901:1-37-09(D). And that rule applies to this case because the PUCO has not granted DP&L’s request to waive the hearing requirement.

B. OCC’s Discovery Requests Are Not Unduly Burdensome Or Overly Broad.

DP&L claims that OCC’s discovery requests are unduly burdensome, pointing to the number of such requests (113 interrogatories and 47 requests for production of documents).⁸ DP&L also claims that OCC’s discovery requests are “overbroad” because they seek support and documentation for certain statements in DP&L’s Application and Supplemental Application.⁹ But it is the “overbroad” statements in DP&L’s Application and Supplemental Application that compel such questions. For instance, DP&L attempts to base its claims of relief in this proceeding on factors such as “current poor market conditions” without pointing to any specifics or providing further, appropriate, details of what it means. Given the broad nature of the claims, OCC’s requests are entirely appropriate and justified.

This is a case where DP&L has burdened the parties with two separate filings in three months and a third was just filed last week. It is a case where, if DP&L prevails, then its customers will be paying tens of millions, if not hundreds of millions, of dollars more for electric service. Given the broad nature of the charges sought by DP&L, the PUCO should not protect DP&L from having to answer questions about the bases of

⁸ DP&L Memo Contra at 6, 8.

⁹ DP&L Memo Contra at 8.

those charges. Unfortunately, DP&L has not been forthcoming with meaningful information about its proposal to collect more money from customers and, in fact, has avoided sharing essential information needed to understand the basis and justification of its claims. Consequently, discovery is necessary to fill in the information that DP&L has failed to provide.

Moreover, DP&L has failed to explain how responding to these discovery requests would be unduly burdensome. All it has offered is conclusory statements devoid of factual support (*i.e.*, information like the number of hours, the cost, or the volume of information that would be required to comply with the discovery). Federal case law¹⁰ has held that, when a party objects to an interrogatory based on oppressiveness or undue burden that party must specifically show how each interrogatory is overly broad, burdensome, or oppressive, despite the broad and liberal construction afforded discovery rules.¹¹ In objecting, the party must submit affidavits or offer evidence revealing the nature of the burden.¹² General objections without specific support can waive the objection.¹³

Here, the Utility has merely alleged that responding to each and every discovery request is unduly burdensome. These unsubstantiated assertions do not demonstrate how responding to OCC's interrogatories and requests for production is unduly burdensome.

¹⁰ 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."

¹¹ *Trabon Engineering Corp. v. Eaton Manufacturing Co.* (N.D. Ohio 1964), 37 F.R.D. 51, 54.

¹² *Roesberg v. Johns-Manville* (D.Pa 1980), 85 F.R.D. 292, 297.

¹³ *Id.*, citing *In re Folding Carton Anti-Trust Litigation* (N.D. Ill. 1978), 83 F.R.D. 251, 264.

Because the burden falls upon the party resisting discovery to clarify and explain its objections and to provide support¹⁴ and the Utility has failed to do so, DP&L's arguments should be firmly rejected.

DP&L should expect that detailed discovery will be "incident" to seeking from customers unspecified amounts of money over an unknown period of time. DP&L bears the burden of proving its applications meet the public interest provisions of R.C. 4928.17. Given the potential for increases to customers' rates as a result of DP&L's requested special rate treatment, it should expect discovery to be conducted. Ample rights of discovery are afforded parties in PUCO proceedings, by law,¹⁵ by rule¹⁶ and by precedent.¹⁷ DP&L's claim of undue burden should be rejected.

C. DP&L's Claim That OCC's Discovery Is Improper Because It Will Interfere With An Ongoing Sales Process Is Without Merit And Is Not Grounds For Preventing Discovery.

DP&L argues that if it is required to provide responses to some of OCC's discovery requests that this "will interfere with the sale process."¹⁸ It identifies 17 interrogatories and 10 requests for production of documents that it claims will interfere with the sales process.¹⁹ It points to two specific interrogatories, one asking for "the amount of the purchase price or transfer price" and the other asking whether "DP&L or AES [has] had any preliminary discussions with any prospective buyers."²⁰

¹⁴ *Gulf Oil Corp. v. Schlesinger* (E.D.Pa. 1979), 465 F.Supp. 913, 916-917.

¹⁵ R.C. 4903.082.

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

¹⁷ See, e.g., *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 300, 320.

¹⁸ DP&L Memo Contra at 7.

¹⁹ *Id.*

²⁰ *Id.* (referring to OCC-INT-66 and OCC-INT-95(b)).

DP&L's argument that information regarding purchase price and preliminary discussions with prospective buyers will interfere with the sales process is without merit. DP&L should be required to provide OCC with the requested information. To the extent that DP&L can prove that some information that is responsive to OCC's request is deserving of protection (e.g. trade secret or commercially sensitive information), that information can be provided to OCC subject to the terms of a protective agreement. Under such an agreement the information would be protected from public disclosure (subject to OCC's rights under the protective agreement.) In this regard, if this is DP&L's claim, then the PUCO should consider DP&L's request as one to limit public disclosure of this information, not to prevent its discovery.

Moreover, it is clear that parties to this proceeding need to know the price and terms and conditions of any sale or transfer in order to fairly evaluate whether the sale or transfer is in the interest of their clients, i.e. customers. There may well be provisions in those terms and conditions that could impact on customers – such as DP&L's proposal to retain future environmental liabilities. Likewise, DP&L's proposal to continue its Service Stability Rider brings into consideration issues related to financial stability associated with sale or transfer of its generation. Consequently, it is essential that the parties are fairly apprised as to the terms and conditions of any sale or transfer. The sale price (and its terms and conditions) are inextricably linked to the financial integrity claims that underlie DP&L's alleged need to continue the Service Stability Rider after a sale or transfer.

DP&L discusses only these two specific discovery requests as ones that would interfere with the sales process. Presumably, these are the two items that it believes

would provide the most interference. But, as discussed above, the information requested is essential to assessment of DP&L's Application and Supplemental Application and could be provided under the terms of a protective agreement to the extent justified. Such an agreement would prevent any claimed harm.

Further, with respect to DP&L's claim that this discovery is "premature, because DP&L does not even know whether an asset sale agreement will be reached," OCC disagrees. DP&L is apparently engaged in a process currently. It presumably has proposed terms and conditions for a sale and has presumably assessed an acceptable price at which it would sell its generation. And it has presented a Supplemental Application that indicates that a sale may occur as early as 2014. If a sale were to occur as early as 2014, the ability of parties to assess the implications of a sale would be severely impaired if parties are denied access to the information requested. And the PUCO's rules call for discovery to be performed as "expeditiously as possible".²¹

Additionally, OCC would emphasize DP&L's position that it will provide this information 75 days before the transfer date, "leaving ample opportunity for the Commission to evaluate the sale" is not reasonable.²² Both the parties and the PUCO need more than 75 days to evaluate the sales price. The PUCO should not be forced into an expedited review of such an issue. It should instead allow for ample time to perform discovery – and conduct a hearing – to consider the reasonableness of any sale or transfer price, along with the terms and conditions of the sale or transfer.

Moreover, under Ohio Admin. Code 4901-1-16(D)(3), if information is not known or does not exist currently, DP&L can answer accordingly. But then DP&L is

²¹ Ohio Admin. Code 4901-1-17(A).

²² DP&L Memo Contra at 7-8.

obligated to update its response to reflect information that subsequently becomes known or comes into existence. Therefore, it is not grounds to deny OCC's Motion to Compel that the information is not existent or not known at this time.

D. Information Developed By AES And DPL Inc. That Supports DP&L's Claims In Its Applications Is Not Beyond DP&L's Control And Must Be Provided.

DP&L claims in its Memo Contra that a limited number of interrogatories and requests for documents are not proper because they seek "information and documents that are beyond the knowledge and control of DP&L." This claim appears to be inaccurate. A review of the specific discovery requests shows that the information pertains to DP&L's Application, not statements made by DPL Inc. or AES. For example, OCC-INT-4 asks whether DP&L has retained "an expert or outside consulting firm to assist in determining the FMV of the generation assets" and to identify such expert. OCC also asks DP&L to identify the department that will be responsible for FMV evaluation and the individuals who will be tasked with such responsibility, whether they are at DP&L, DPL Inc., or AES. Certainly, if DP&L employs outside persons (or any of its affiliates) to perform this assessment, it should reasonably be expected that it would nonetheless have knowledge, if not control, of such information.

Similarly, OCC-INT-24 asks DP&L to identify "all efforts DP&L/AES has taken to obtain consent from other OVEC members" to allow DP&L to transfer its ownership interest in OVEC. It should be reasonably expected that if DP&L were seeking such consent, it might work through AES to do so. However, DP&L would still be knowledgeable of, if not in control over, such information. And again, for OCC-INT-95(b), if any party were having preliminary discussions to sell DP&L's generating assets,

it should reasonably be expected that DP&L would have knowledge of or be working with those individuals and entities having any such discussions.

Moreover, even if the PUCO were to entertain DP&L's objection, it should nonetheless be overruled. OCC's discovery requests are directed to statements made in DP&L's Application and Supplemental Application. Thus, one would expect that information upon which the statements were based would be known by DP&L or in DP&L's possession. To the extent that is not the case, the fact that documents may be in the possession of an affiliate or parent 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."

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 or parent company does not mean it is not known by DP&L or readily available to DP&L. Indeed, DP&L has made no such claim that the information is not readily available to it.

DP&L has a legal duty to discover and produce readily available evidence pertaining to its case.²³ In other words, if DP&L has access to the information sought, then it must produce it.²⁴ Clearly, the information sought is either known by DP&L or readily available to it through its affiliates who were acting on DP&L's behalf in obtaining such information. It would be inconsistent with the PUCO's discovery rules to

²³ 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.

²⁴ 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).

allow DP&L to shield the information from discovery by keeping the information with an affiliate or having its affiliate(s) obtain the information in the first instance. In either event, its affiliates are its agents and the information is within DP&L's control.

Moreover, the shielding of affiliate information from discovery runs counter to provisions under S.B. 221²⁵ and the Ohio Admin. Code²⁶ which requires disclosure of affiliate information,²⁷ 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.²⁸

DP&L's arguments should be rejected for the reasons stated above.

E. DP&L's Claims Of Privilege And The Burden Of Producing A Privilege Log Should Be Rejected.

DP&L claims that OCC's discovery requests not only seek privileged documents, but that the documents are "in the custody of many different custodians." DP&L also broadly asserts that assembling the privileged documents and creating a privilege log would "require many hours of work by many different persons."²⁹ On this basis, without a single iota of evidence or an affidavit attesting to such claim, DP&L alleges undue burden in preparing a privilege log. Indeed, DP&L makes an entirely outlandish claim in stating that it would be "unduly burdensome for DP&L even to determine which

²⁵ See R.C. 4928.145.

²⁶ Ohio Admin. Code 4901:1-35097.

²⁷ 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).

²⁸ See Ohio Admin Code 4901:1-37-07.

²⁹ DP&L Memo Contra at 9.

discovery requests seek privileged materials.” DP&L asks that it not be required to assemble privileged documents and a privilege log “until the Commission concludes that OCC is entitled to conduct discovery in this proceeding.”³⁰

Again, DP&L’s claim assumes that there is a presumption that OCC is not entitled to discovery. This is contrary to Ohio law and the PUCO rules as explained above.

Moreover, a proper claim of privilege, whether attorney-client or trial preparation/work-product doctrine, requires a specific designation and description of information and documents within its scope as well as precise and certain reasons for preserving their confidentiality.³¹ Unless the description is precise, there is no basis on which to weigh whether a privilege exists. Hence, if a party is resisting discovery on a claim of privilege, it must show sufficient facts as to bring the identified and described discovery within the confines of the privilege.³² DP&L did not.

It is uncontroverted that the burden of establishing whether a privilege applies rests upon the party asserting the privilege, not on the party seeking discovery.³³ 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.³⁴ The mere existence of a lawyer-client relationship does not create, without

³⁰ *Id.*

³¹ See e.g., Notes to Decision of Ohio Civ. R. 26 citing *Frank W. Schaefer, Inc. v. C. Garfield*, 82 Ohio App.3d 322 (Ohio App. 2 Dist. 1992).; Fed. R. Civ. P. 26(b)(5)(A). *In the Matter of the Application of Duke Energy Ohio for Approval of a Market Rate Offer*, Case No. 10-2586-EL-SSO, Entry (Dec. 13, 2010) (holding that where the utility claimed privilege but did not elaborate on its claim, the examiner was unable to consider the assertion of privilege. Intervenor’s motion to compel was granted).

³² See e.g. *In the matter of the Complaint of Office of Consumers’ Counsel v. Dayton Power & Light Co.*, Case No. 90-455-GE-CSS, Entry (Aug. 16, 1990)(holding that the burden of proving an entitlement to an attorney client privilege must be met by the person asserting the privilege).

³³ *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).

³⁴ *In re: Guardianship of Marcia S. Clark*, 2009-Ohio-6577 at ¶8.

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.”³⁵ The privilege must be proven document by document, with the demonstration typically being made with a privilege log.³⁶ Thus, a separate claim must be raised in response to each request for disclosure.³⁷

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.³⁸ 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.³⁹ Upon a showing of all of these requirements, the burden shifts to the opposing party to show “good cause” for obtaining such documents.⁴⁰ But here, even though attorney work-product privilege is also claimed, DP&L has failed to identify specifically what tangible information exists,

³⁵ Sec. 5.02[8], 4 Weinstein’s Federal Evidence, Chapter 503, Lawyer-Client Privilege (Matthew Bender 2d ed.).

³⁶ *United States v. Rockwell*, 897 F.2d 1255 (3rd Cir. 1990).

³⁷ Sec. 5.02[11a], 4 Weinstein’s Federal Evidence, Chapter 503, Lawyer-Client Privilege.

³⁸ *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, 166.

³⁹ See Ohio Civ. R. 26(B)(3) (2008).

⁴⁰ Ohio Civ. R. 26(B)(3).

and how it meets the definition of work-product, or how tangible documents are responsive to OCC's Interrogatories. So the burden has not shifted to OCC.⁴¹

DP&L relied upon both the attorney-client privilege and the attorney work-product doctrine to avoid responding to OCC's discovery. But it made no attempt whatsoever to identify specific documents or information that these privileges apply to. DP&L merely claims that "each and every discovery request" is objectionable because it is privileged in some respect. DP&L's blanket assertion of privilege is insufficient to meet this burden.⁴²

DP&L should be compelled 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. DP&L has failed to demonstrate that either the attorney-client privilege or the attorney work-product/trial preparation doctrine applies to "each and every discovery request."

DP&L was asked by OCC to produce a privilege log, but declined to do so.⁴³ Such a log is a tool to enable parties to judge the validity of the privilege claim. It also

⁴¹ 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 whether DP&L's application is reasonable. The information sought is relevant under the test set forth in Rule 403. Good cause can be shown.

⁴² *Hitachi Medical Systems America, Inc. v. Branch*, 2010 U.S. District, Lexis 1597 at 7 (N.D. Ohio) (Sept. 24, 2010).

⁴³ See Exhibit 1.

assists the attorney examiner in evaluating the merits of a privilege claim.⁴⁴ While the PUCO rules and practice do not generally require a privilege log to be produced if privilege is claimed, the PUCO has acknowledged that it is common practice for a privilege log to be produced in response to a motion to compel.⁴⁵ Then the PUCO is required to follow up with an *in camera* inspection of each document identified as privileged.⁴⁶ Such a practice is in line with the Ohio Supreme Court dictates in *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, 167. DP&L should produce a privilege log pending the PUCO's consideration of its Motion for Protection.

III. CONCLUSION

DP&L's arguments to prevent discovery from occurring should be rejected as lacking merit. DP&L's position is inconsistent with legal requirements pertaining to discovery. The PUCO should ensure that consumers are given ample and fair opportunity to evaluate DP&L's claims and proposals through the discovery process before consideration is given to proposals that could cost customers tens of millions, if not hundreds of millions, of dollars.

⁴⁴ 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).

⁴⁵ *Id.* at ¶18.

⁴⁶ See, e.g., *In the Matter of the Complaint of AT&T v. Global NAPs Ohio, Inc.*, Case No. 08-960-TP-CSS, Entry at 4 (Mar. 17, 2008).

Respectfully submitted,

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

/s/ Edmund "Tad" Berger

Edmund "Tad" Berger, Counsel of Record
Maureen R. Grady
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

Telephone: (614) 466-9567 - Grady

Telephone: (614) 466-1292 - Berger

Edmund.berger@occ.ohio.gov

Maureen.grady@occ.ohio.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Reply to Dayton Power and Light Company's Memorandum Contra was provided to the persons listed below electronically this 27th day of May, 2014.

/s/ Edmund "Tad" Berger

Edmund "Tad" Berger
Assistant Consumers' Counsel

SERVICE LIST

Thomas.mcnamee@puc.state.oh.us
Amy.spiller@duke-energy.com
Jeanne.kingery@duke-energy.com
Joseph.clark@directenergy.com
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
williams@whitt-sturtevant.com
vparisi@igsenergy.com
lfriedeman@igsenergy.com
mswhite@igsenergy.com
amvogel@aep.com
cwalker@vankleywalker.com

haydenm@firstenergycorp.com
jmcdermott@firstenergycorp.com
jang@calfee.com
tallexander@calfee.com
Judi.sobecki@dplinc.com
cfaruki@ficlaw.com
jsharkey@ficlaw.com
Rocco.dascenzo@duke-energy.com
dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com
jkylercohn@BKLawfirm.com
Bojko@carpenterlipps.com
mohler@carpenterlipps.com
cmooney@ohiopartners.org
mhpetricoff@vorys.com
glpetrucci@vorys.com

Attorney Examiners:

Bryce.mckenney@puc.state.oh.us
Gregory.price@puc.state.oh.us

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Case No(s). 13-2420-EL-UNC

Summary: Reply Reply to Dayton Power & Light Company's Memorandum Contra Motion to Compel Responses to Discovery by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Berger, Tad Mr.