

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
The Dayton Power and Light Company for)	Case No. 16-395-EL-SSO
Approval of Its Electric Security Plan)	

In the Matter of the Application of)	
The Dayton Power and Light Company for)	Case No. 16-396-EL-ATA
Approval of Revised Tariffs)	

In the Matter of the Application of)	
The Dayton Power and Light Company for)	Case No. 16-397-EL-AAM
Approval of Certain Accounting Authority)	
Pursuant to Ohio Rev. Code § 4905.13)	

**INDUSTRIAL ENERGY USERS-OHIO'S MOTION TO COMPEL DISCOVERY
RESPONSES FROM THE DAYTON POWER AND LIGHT COMPANY AND
MEMORANDUM IN SUPPORT**

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ATTORNEYS FOR INDUSTRIAL ENERGY USERS-OHIO

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Pursuant to Rule 4901-1-23, Ohio Administrative Code (“O.A.C.”), Industrial Energy Users-Ohio (“IEU-Ohio”) hereby files this Motion to Compel Discovery Responses from The Dayton Power and Light Company (“DP&L”). IEU-Ohio has served proper discovery requests upon DP&L, but has not received complete discovery responses from DP&L. The discovery requests seek the identification and production of impairment analyses related to the Stuart, Killen, Zimmer, Miami Fort, Conesville, Kyger Creek, and Clifty Creek plants that form the basis of DP&L’s requests for the Reliable Energy Rider (“RER”). The requests are therefore reasonably calculated to lead to the discovery of admissible evidence. DP&L’s objections to identifying and producing the requested documents are without merit. As detailed in the attached Memorandum in

Support, affidavit and exhibits, IEU-Ohio has attempted in good faith to resolve DP&L's failure to provide complete discovery responses but those efforts have failed.

Accordingly, IEU-Ohio moves the Public Utilities Commission of Ohio ("Commission") for an order compelling DP&L to provide the requested impairment analyses sought in IEU-Ohio's discovery requests. Recognizing the Commission's standard practice for resolving claims of privilege, IEU-Ohio would request that the Commission timely set this matter for a prehearing conference and direct DP&L to produce a privilege log to IEU-Ohio at least three days in advance of the prehearing and to further direct DP&L to bring the documents that it is claiming are privileged to the prehearing conference for an *in camera* review by the Attorney Examiners.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

On May 31, 2016, IEU-Ohio served its Fourth Set of Interrogatories (“IEU-Ohio’s Fourth Set”) upon DP&L (Attachment A). On June 16, 2016, DP&L requested an extension of time, which IEU-Ohio agreed to. However, DP&L’s responses to IEU-Ohio’s Fourth Set (Attachment B) were incomplete, specifically DP&L’s response to IEU-Ohio INT 4-19 and RPD 4-1. These two discovery requests asked DP&L to identify and produce copies of any “impairment analysis conducted in the past 10 years relating to the Conesville, Killen, Miami Fort, Stuart, Zimmer, Kyger Creek, or Clifty Creek plants.”¹

DP&L did not identify or produce any impairment analyses related to these plants. Public documents filed by DP&L acknowledge that it has conducted (or caused

¹ Attachment A at 11, 13.

to be conducted) such analyses.² Through its attempt to informally resolve the discovery dispute, IEU-Ohio was also informed by counsel for DP&L that responsive documents do in fact exist.

Instead of identifying and producing all of the impairment analyses (including those which it has publicly acknowledged exist), DP&L provided six general objections and one specific objection. The six general objections were: “relevance,” “unduly burdensome,” “privileged and work product,” “proprietary,” “inspection of business records,” and “unregulated affiliates.”³ DP&L’s specific objection was that “DP&L objects to producing documents that were prepared by and are in the custody of DP&L’s unregulated affiliates.”⁴

On August 9, 2016, counsel for IEU-Ohio notified DP&L of the deficiencies, and on August 25, 2016 met with counsel for DP&L to discuss the deficiencies.⁵ After discussions with counsel for DP&L, DP&L agreed to waive its “unduly burdensome,” and “inspection of business records” general objections to IEU-Ohio INT 4-19 and RPD 4-1.

As demonstrated below, IEU-Ohio’s discovery requests are proper and DP&L’s remaining objections to providing the requested information are meritless. IEU-Ohio

² DP&L SEC Form 8-K at 3 (Oct. 31, 2012) (identifying that DP&L took an impairment of \$80.8 million related to the Conesville and Hutchings generating plants), available at: <https://www.sec.gov/Archives/edgar/data/874761/000119312512446900/d431640d8k.htm>; DPL Inc./DP&L SEC Form 10-Q at 51, 61 (June 30, 2016) (identifying that DP&L took an impairment of \$857 million related to the Stuart, Killen, and Zimmer generating plants), available at: <https://www.sec.gov/Archives/edgar/data/27430/000078725016000053/dpl10q20160630q2.htm>.

³ Attachment B at 23.

⁴ *Id.*

⁵ An affidavit of counsel setting forth the good faith efforts to informally resolve the discovery dispute is attached hereto as Attachment C. Correspondence between counsel for IEU-Ohio and DP&L detailing IEU-Ohio’s good faith efforts to informally resolve the discovery dispute is attached hereto as Attachment D.

has attempted in good faith to resolve the issue with DP&L but has been unsuccessful. Accordingly, IEU-Ohio seeks an order from the Commission compelling DP&L to identify and produce the impairment analyses sought in IEU-Ohio INT 4-19 and RPD 4-1.

I. DISCOVERY STANDARDS

Rule 4901-1-16(B), O.A.C. (General provisions and scope of discovery), states:

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. Discovery may be obtained through interrogatories, requests for the production of documents and things or permission to enter upon land or other property, depositions, and requests for admission.

Rule 4901-1-19(B), O.A.C. (Interrogatories and response time), provides:

Subject to the scope of discovery set forth in rule 4901-1-16 of the Administrative Code, interrogatories may elicit facts, data, or other information known or readily available to the party upon whom the interrogatories are served. An interrogatory which is otherwise proper is not objectionable merely because it calls for an opinion, contention, or legal conclusion

Additionally, Rule 4901-1-20(A)(2), O.A.C. (Production of documents and things; entry upon land or other property), provides that, subject to the scope of discovery in Rule 4901-1-16, O.A.C., a party may request another party to “[p]roduce for inspection, copying, sampling, or testing any tangible things which are in the possession, control, or custody of the party upon whom the request is served.”

Finally, Rule 4901-1-23, O.A.C., governs motions to compel and provides that any party may file a motion to compel with respect to:

- (1) Any failure of a party to answer an interrogatory served under rule 4901-1-19 of the Administrative Code.

- (2) Any failure of a party to produce a document or tangible thing or permit entry upon land or other property as requested under rule 4901-1-20 of the Administrative Code.
- (3) Any failure of a deponent to appear or to answer a question propounded under rule 4901-1-21 of the Administrative Code.
- (4) Any other failure to answer or respond to a discovery request made under rules 4901-1-19 to 4901-1-22 of the Administrative Code.

The Rule also treats evasive answers as a failure to answer.⁶ Finally, before the Commission allows a motion to compel to be filed, the party seeking discovery must exhaust all other reasonable means of obtaining discovery.

II. ARGUMENT

A. IEU-Ohio's discovery requests seek information that is reasonably calculated to lead to the discovery of admissible evidence; therefore DP&L's relevancy objection is without merit

DP&L's proposed electric security plan ("ESP") includes a request for a new nonbypassable rider, the RER. The RER is designed to ensure that DPL Inc. receives a return of and return on the ownership of DP&L's legacy coal generating plants. These plants include Stuart, Zimmer, Conesville, Miami Fort, Killen, Kyger Creek, and Clifty Creek (collectively, "RER plants"). DP&L witness Malinak provides the formula for calculating the projected annual RER revenue requirements in Exhibit RJM-9 attached to his prefiled direct testimony.

As detailed in this exhibit, Mr. Malinak first calculates the necessary annual revenue to recover DP&L's investment in the generating plants and produce DP&L's desired return on its investment.⁷ Mr. Malinak labels this return on and of its investment

⁶ Rule 4901-1-23(B), O.A.C.

⁷ Direct Testimony of R. Jeffrey Malinak at Exhibit RJM-9 (Feb. 22, 2016). The rate of return assumes a 50/50 debt to equity ratio with a cost of debt of 5.29% and a return on equity of 10.7%. *Id.*

as Required Operating Revenue (Line 18), which equals the sum of the annual Fuel Related Costs, Including Emission Costs (Line 9), Direct O&M Expense (Line 10), Indirect O&M Expense (Line 11), General Taxes (Line 12), Depreciation (Line 13), Imputed Debt Expense (Line 15), Income Taxes (Line 16) and Cost of Equity (Line 17).⁸

Mr. Malinak next calculates the projected annual market revenue, labeled Projected Operating Revenue (Line 22), for the generating plants. The annual Projected Operating Revenue includes projected Energy, Ancillary and Other Revenue (Line 19), Capacity Revenue (Line 20) and Less Capacity Penalties (net of bonuses) (Line 21).⁹

Finally, Mr. Malinak subtracts the annual Projected Operating Revenue (Line 22) from the annual Required Operating Revenue (Line 18) to arrive at an annual revenue requirement for the RER (Line 23).¹⁰

As this math indicates, the annual depreciation expense (Line 13) and the annual market revenue the generating plants are expected to receive have a role in determining the projected RER revenue requirements.

Subsequent to filing Mr. Malinak's testimony, DP&L took an impairment charge of \$857.1 million to the net book value of the Stuart, Killen, and Zimmer generating plants it has recorded on its books.¹¹ DPL Inc. also took a separate impairment charge of

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ DPL Inc./DP&L SEC Form 10-Q at 61 (June 30, 2016). DP&L has also previously taken an impairment charge for the full value of the Conesville generating plant recorded on DP&L's books. DPL Inc./DP&L SEC Form 8-K at 3 (Oct. 31, 2012). The impairment analysis is the product of accounting requirements. If an entity believes that there are indicators present that might result in the inability to recover a long-lived asset's book value, it must perform an impairment analysis. The first step is to compare projected undiscounted cash flows against the book value. If the undiscounted cash flows are less than the book value, then an impairment loss must be calculated. The impairment loss is calculated using methods that

\$230.8 million to the net book value of the Killen generating plant that it had recorded on its books.¹² These impairment charges were reported to the Securities and Exchange Commission (“SEC”) in the SEC Form 10-Q filed on June 30, 2016. In the Form 10-Q, DPL Inc. and DP&L indicated that the impairment charges they each took were based on a discounted cash flow (“DCF”) analysis.¹³ Based on this DCF analysis, DPL Inc. and DP&L reported projected revenue growth ranges from a low of -14% to maximum of +13% across the Stuart, Killen, and Zimmer generating plants.¹⁴ DPL Inc. and DP&L further add in the Form 10-Q that their respective impairment charges are based on lower than previously projected capacity revenue and greater than previously projected environmental compliance costs.¹⁵

As noted in the SEC Form 10-Q, the impairment analyses include projections of market revenue. Although not explicit in the SEC Form 10-Q, the projected market revenue under the impairment analysis is for the remaining life of the plants, which DP&L has identified as extending beyond the 10-year term of the RER. Thus, it is expected that the recent impairment analysis will contain DP&L’s recent forecast of market prices for the term of the proposed RER. Based on experience, IEU-Ohio reasonably expects that the impairment analysis will contain projections of market price,

market participants would utilize to value the asset and could include a projected sale price or a discounted cash flow analysis. In its recent June 30, 2016 SEC Form 10-Q filing, DP&L and DPL Inc. indicated that they relied on a discounted cash flow analysis to estimate the impairment loss for the Stuart, Killin, and Zimmer plants. *Id.* at 22, 51.

¹² DPL Inc./DP&L SEC Form 10-Q at 37 (June 30, 2016). DP&L has also made other public SEC filings acknowledging other impairments to the generating plants proposed for inclusion in the RER. DPL Inc./DP&L SEC Form 8-K (Oct 31, 2012).

¹³ DPL Inc./DP&L SEC Form 10-Q at 22, 51 (June 30, 2016).

¹⁴ *Id.* The ranges for each generating plant were: Stuart -9% to +10%; Killen -11% to +13%; Zimmer -14% to +13%. *Id.* at 51.

¹⁵ *Id.* at 37, 61.

generation dispatch, and revenue for the plants as well as information related to projected market revenue from a sale of the assets. Market prices, generation dispatch, and fuel prices are essential assumptions that drive the RER calculation, and projected revenue from a sale impacts DP&L's claimed need for the nonbypassable RER subsidy for the RER plants. Thus, IEU-Ohio's request for the impairment analysis referenced in the June 30, 2016 Form 10-Q filed by DP&L and DPL Inc. at the SEC is reasonably calculated to lead to the discovery of admissible evidence.

Moreover, prior projections of the market revenue (including the market price and cost of fuel) and generation dispatch of these generating plants may also shed light on the consistency and reliability of the projections embedded in DP&L's Rider RER calculation and that underlie DP&L's claimed need for the RER.

Accordingly, IEU-Ohio's request that DP&L identify and produce the impairment analyses conducted over the past 10 years (the same 10-year duration as the proposed RER) associated with the generating plants proposed for inclusion in the RER is reasonably calculated to lead to the discovery of admissible evidence.

B. Claims of confidential trade secrets and purported non-disclosure clauses do not make documents non-discoverable; therefore DP&L's proprietary objection is without merit

DP&L objects to IEU-Ohio INT 4-19 and RPD 4-1 on grounds that the information is "proprietary, competitively sensitive or valuable, or constitutes trade secrets."¹⁶ Initially, IEU-Ohio would note that it has entered into a protective agreement with DP&L and would treat any documents identified by DP&L as confidential in accordance with that protective agreement. Additionally, after discussing the objection with counsel for

¹⁶ Attachment B at 2.

DP&L, DP&L clarified that it only objects to producing a subset of the responsive documents it informally acknowledged exist. Specifically, counsel for DP&L indicated that some of the informally identified responsive documents were prepared by a third party, Deloitte, and that the contractual agreement with Deloitte prohibits the disclosure of responsive information.

While parties may enter into contracts with confidentiality clauses, such clauses may not validly impair a party's right to discovery. *Svoboda v. Clear Channel Communs. Inc.*, 2003-Ohio-6201, 2003 Ohio App. LEXIS 5563 (Ohio Ct. App. 6th Dist.). In *Svoboda*, the defendant refused to produce employee contracts on grounds that the contract was a trade secret and contained a clause prohibiting its disclosure.¹⁷ Over the defendant's objection, the contract was ordered to be compelled subject to a protective order.¹⁸ Affirming the trial court, the Sixth District Court of Appeals explained that "[e]ven if the information were a trade secret, it is not absolutely privileged. *Civ.R. 26(C)* clearly contemplates the discoverability of trade secrets and expressly provides that trade secrets may be disclosed with an appropriate protective order."¹⁹

Although implicit in *Svoboda*, other Ohio courts have expressly overturned confidentiality clauses where they were contrary to Ohio law. *Teodecki v. Litchfield Twp.*, 2015-Ohio-2309, 38 N.E.3d 355 (Ohio Ct. App. 9th Dist). In *Teodecki*, the court found that the confidentiality agreement between Mrs. Teodecki and Litchfield Township violated Ohio's Public Records Act and was therefore void *ab initio*.²⁰ Acknowledging

¹⁷ *Svoboda*, 2003-Ohio-6201 at ¶17.

¹⁸ *Id.* at ¶ 4-5, 44.

¹⁹ *Id.* at ¶19.

²⁰ *Teodecki*, 2015-Ohio-2309 at ¶ 25.

the importance of the right to enter into contracts, the Ninth District Court of Appeals explained that “it is well-settled that a valid contract cannot be made if its purpose or performance is contrary to statute.”²¹ “Similarly, the Ninth District Court of Appeals held that a contract may be void if it violates public policy.”²²

Based on the Commission’s rules and practice, the Deloitte documents are discoverable. Like Civ.R. 26(C), the Commission’s rules clearly contemplate the discoverability of trade secrets subject to a protective order. Rule 4901-1-24(A)(7), O.A.C. And under the structure provided by the rule, parties in countless Commission proceedings, including DP&L in this proceeding, have produced documents identified as confidential trade secrets under agreed-upon protective orders. There is nothing unique about the Deloitte documents to distinguish them from the countless other documents containing claimed confidential trade secrets that are produced in discovery.

Furthermore, any restriction in the Deloitte documents designed to interfere with parties’ proper discovery rights would be void. As noted above, contracts that frustrate public policy are void.²³ As explained by the Ohio Supreme Court:

The text of Ohio Adm.Code 4901-1-16(B), the commission's discovery rule, is similar to 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.²⁴

Here, IEU-Ohio has a right to seek discovery of the relevant Deloitte documents which are in DP&L’s possession or control and which are not privileged.

²¹ *Id.* at ¶ 22 (*citing Bell v. N. Ohio Tel. Co.* 149 Ohio St. 157, 158 (1948)).

²² *Id.*

²³ *Teodecki*, 2015-Ohio-2309, at ¶ 22.

²⁴ *Ohio Consumers' Counsel v. PUC*, 111 Ohio St.3d 300, 2006-Ohio-5789, at ¶ 83.

Finally, although IEU-Ohio has not seen the contract with Deloitte, IEU-Ohio would not be surprised if the contract created an exception in circumstances where a party has been compelled by a court of competent jurisdiction to produce documents. Such a clause, for example, exists in IEU-Ohio's protective with DP&L in this case and is a standard provision of the protective agreements in other Commission proceedings.

In sum, the Commission's rules allow for the discovery of confidential trade secrets under a protective order. IEU-Ohio has agreed with DP&L upon such a protective order. Furthermore, to the extent that the Deloitte documents do not contain a provision allowing them to be turned over pursuant to an order from the Commission, the clause prohibiting the documents disclosure is void as contrary to public policy.

C. The requested documents are discoverable as they are within DP&L's possession, custody, or control; therefore DP&L's unregulated affiliate objection is without merit

DP&L also objected to identifying or producing any of the impairment analyses on grounds that the impairment analyses were prepared by and are in the possession of DP&L's unregulated affiliate. Initially, DP&L's objection misstates the correct standard for discovery under both the Ohio Rules of Civil Procedure and the Commission's rules. Moreover, after discussions with DP&L's counsel, it is IEU-Ohio's understanding that the basis for the objection is not that the documents are DPL Inc. documents, but rather AES Corporation ("AES") documents. Regardless of this clarification, the information IEU-Ohio seeks is discoverable.

The Ohio Rules of Civil Procedure and the Commission's rules both support IEU-Ohio's right to the impairment analyses sought in IEU-Ohio INT 4-19 and RPD 4-1. Both the Ohio Rules of Civil Procedure and Rule 4901-1-20(A)(1), O.A.C., permit a party to seek another party to produce any documents which are in the "possession,

custody, or control of the party upon whom the request is served.”²⁵ As described in Anderson’s treatise on the Ohio Rules of Civil Procedure:

The documents or things [sought through the request for production] must be in the possession, custody, or control of the party. The key word is control and the important consideration is whether the party has access to the document or thing. Control is defined not only as possession but as the legal right to obtain a document requested upon demand.²⁶

Thus, if DP&L either has physical possession or custody of the impairment analyses or may obtain the analyses upon request, they are discoverable.²⁷

Based on DP&L’s objections as well as discussions with DP&L’s counsel, it is IEU-Ohio’s understanding that DP&L has possession, custody, or control of the impairment analyses. Counsel for DP&L implied, if not acknowledged, that at least one DP&L employee and witness in this proceeding (*i.e.* Craig Jackson) does in fact have access to the impairment analyses.

Furthermore, because DP&L’s counsel has asserted that the requested documents contain information that is protected by the attorney-client privilege and work product doctrine, IEU-Ohio assumes that DP&L produced the documents to DP&L’s

²⁵ Civ.R. 34(A)(1); Rule 4901-1-20(A)(1), O.A.C.

²⁶ Anderson’s Ohio Civil Rules Practice with Forms (2015) (*citing* Searock v. Stripling, 736 F.2d 650 (11th Cir. 1984); Moore’s Federal Practice—Civil § 34.14[2]).

²⁷ The Commission in the past has required parties to produce information and documents in the possession of an affiliate that the party had access to. *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). R.C. 4928.145 further also makes clear that just because a document is in an affiliate’s possession does not make the document beyond the scope of discovery. That statute provides that an electric distribution utility (“EDU”) must “make available to the requesting party every contract or agreement that is between the utility or any of its affiliates and a party to the proceeding, consumer, electric services company, or political subdivision and that is relevant to the proceeding, subject to such protection for proprietary or confidential information as is determined appropriate by the public utilities commission.” (emphasis added).

counsel in order for counsel to review the documents and make the privilege claims contained in DP&L's discovery responses.

Finally, although DP&L has asserted that its unregulated affiliates are not subject to discovery, it has voluntarily produced DPL Inc. documents in response to discovery requests. At the June 25, 2016 meeting between counsel for DP&L and IEU-Ohio, counsel for DP&L acknowledged that DP&L was producing DPL Inc. documents and conceded that DP&L's application had put in play DPL Inc. documents and information. Thus, under even DP&L's limited (and incorrect) theory of the proper scope of discovery, if the impairment analyses are either DP&L or DPL Inc. documents they should be produced.

At least some of the responsive documents are plainly DP&L and DPL Inc. documents. On at least two occasions, DP&L and DPL Inc. have conducted impairment analyses related to the RER generating plants and incorporated those results into filings the companies made at the SEC.²⁸ Thus, DP&L attempt to limit the scope of discoverable documents to only DP&L and DPL Inc. documents does not shield DP&L from producing all of the responsive impairment analyses.

Accordingly, the impairment analyses should be turned over because they are in DP&L's possession, custody, or control.

²⁸ DP&L SEC Form 8-K at 3 (Oct. 31, 2012) (identifying that DP&L took an impairment of \$80.8 million related to the Conesville and Hutchings generating plants); DPL Inc./DP&L SEC 10-Q at 51, 61 (identifying that DP&L took an impairment of \$857 million related to the Stuart, Killen, and Zimmer generating plants).

D. The requested documents are required in the ordinary course of business; therefore DP&L's attorney-client privilege and work product objections are without merit

As its final objection to IEU-Ohio INT 4-19 and RPD 4-1, DP&L claims that the impairment analyses are protected by the attorney-client privilege and work product doctrine. The documents IEU-Ohio seeks are, however, required in the ordinary course of business by accounting rules (Financial Accounting Standards Board "FASB" Accounting Standards Codification "ASC" 360). Because the documents IEU-Ohio seeks in discovery are unrelated to the rendition of legal advice and were not prepared in anticipation of litigation, the documents are not privileged and may be discovered.

"The attorney-client privilege exempts from discovery certain communications between attorneys and their clients in the course of seeking or rendering legal advice."²⁹ The privilege "is founded on the premise that confidences shared in the attorney-client relationship are to remain confidential"³⁰ and its purpose "is 'to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.'"³¹

Under the attorney-client privilege, "(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived."³²

²⁹ *Sutton v. Stevens Painton Corp.*, 193 Ohio App.3d, 68, 951 N.E.2d 91, 2011-Ohio-841 at ¶ 15 (citing *Boone v. Vanliner Ins. Co.*, 91 Ohio St.3d 209, 210, 744 N.E. 2d 154 (2001)).

³⁰ *Sutton*, 2011-Ohio-841 at ¶ 16 (quoting *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 660, 635 N.E.2d 331 (1994)).

³¹ *Sutton*, 2011-Ohio-841 at ¶ 16 (quoting *Upjohn v. U.S.*, 449 U.S. 383, 389 (1981)).

³² *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2006-Ohio-1508, at ¶ 21 (quoting *Reed v. Baxter*, 134 F.3d 351, 355-56 (6th Cir. 1998)).

Further, for investigative facts and documents to be covered by the attorney-client privilege, “the relevant question is ... whether [the] investigation was ‘related to the rendition of legal services’”³³ and requires “the client for whom the investigation was conducted [to] show that other *legal* advice or assistance was sought and that the investigation conducted was integral to that assistance.”³⁴

The work product doctrine also offers a qualified protection against the discovery of documents prepared in preparation of litigation.³⁵ Civ. R. 26(B)(3) sets forth the work product doctrine as it applies in civil cases: “a party may obtain discovery of documents, electronically stored information and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative ... only upon a showing of good cause therefor.” “Through work-product jurisprudence ... two distinct categories of work product have been identified: ordinary fact work product and opinion work product.”³⁶

Ordinary fact or ‘unprivileged fact’ work product, such as witness statements and underlying facts, receives lesser protection. Written or oral information transmitted to the attorney and recorded as conveyed may be compelled upon a showing of good cause by the subpoenaing party. Good cause, as set forth in Civ.R. 26(B)(3), requires a showing of substantial need, that the information is important in the preparation of the party’s case, and that there is an inability or difficulty in obtaining the information without undue hardship.

The other type of work product is ‘opinion work product,’ which reflects the attorney’s mental impressions, opinions, conclusions, judgments, or legal theories.³⁷

³³ *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Authority*, 121 Ohio St.3d 537, 2009-Ohio-1767, at ¶ 27 (quoting *In re Allen*, 106 F.3d 582, 602 (4th Cir. 1997)).

³⁴ *Toledo Blade*, 2009-Ohio-1767, at ¶ 28 (emphasis in original).

³⁵ *Squire Sanders & Dempsey v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, at ¶ 55; 23 Am. Jur. 2d § 45.

³⁶ *Estate of Hohler v. Hohler*, 197 Ohio App.3d 237, 2011-Ohio-5469, 967 N.E.2d 219, ¶ 28 (7th Dist.).

³⁷ *Hohler*, 2011-Ohio-5469, at ¶¶ 29-30.

The Commission has also distinguished between discovery seeking a lawyer's legal advice and discovery requests seeking the underlying facts at issue in the litigation. The Commission has held that conversations between counsel and a utility's employees and the associated "notes, correspondence, and email created in anticipation of litigation ... would ordinarily be protected ... under attorney-client privilege and attorney work product doctrines."³⁸ The Commission, however, distinguished these types of communications from those not protected under either attorney-client privilege or under the work product doctrine.³⁹ The latter unprotected category includes documents related to the litigation produced by utility employees to, among other things, verify the accuracy of events alleged in the lawsuit.⁴⁰

Although certain information sought in discovery might be properly within the scope of the attorney-client privilege or the work product doctrine, a discovery request is still proper where the attorney-client privilege doctrine or the work product doctrine has been waived by voluntary disclosure. Additionally, discovery of work product is allowed upon a showing of good cause.

Turning first to waiver, Ohio courts have held that "a client's voluntary disclosure of confidential communications is inconsistent with an assertion of the privilege," and therefore "voluntary disclosure of privileged communications to a third party waives a

³⁸ *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of The East Ohio Gas Company d.b.a Dominion East Ohio and Related Matters*, Case No. 05-219-GA-GCR, Entry at 7 (July 28, 2006).

³⁹ *Id.*

⁴⁰ *Id.*

claim of privilege with regard to communications on the same subject matter.”⁴¹ This rule “applies to disclosure of materials covered by an attorney-client privilege and to disclosure of materials which are protected by the work product doctrine.”⁴²

Discovery of work product is also proper upon a showing of good cause. As explained by the Ohio Supreme Court, “a showing of good cause under Civ.R. 26(B)(3) requires demonstration of need for the materials— i.e., a showing that the materials, or the information they contain, are relevant and otherwise unavailable.”⁴³ The party seeking discovery bears the burden to demonstrate good cause for discovery of work product.⁴⁴

As noted above, the impairment analyses are required by accounting rule ASC 360. By definition, the documents are required and produced in the ordinary course of business and do not fall under the category of legal advice given by a lawyer in his capacity as a legal advisor to a client. Thus, the documents in their entirety are not protected by the attorney-client privilege.⁴⁵ Similarly, because the documents are produced in the ordinary course of business, they are not documents produced in anticipation of litigation and therefore do not qualify as attorney work product.

⁴¹ MA Equip. Leasing I, LLC v. Tilton, 980 N.E.2d 1072, 2012 Ohio App. LEXIS 4102, 2012-Ohio-468, at ¶ 20; *Mid-American Natl. Bank and Trust Co. v. Cincinnati Ins. Co.*, 74 Ohio App.3d 481, 599 N.E.2d 699, 704 (6th Dist. 1991) (citing *Hercules Inc. v. Exxon Corp.*, 434 F.Supp 136, 156 (D. Del. 1977)).

⁴² *Mid-American*, 599 N.E.2d at 704 (citing *Hercules Inc. v. Exxon Corp.*, 434 F.Supp 136, 156 (D. Del. 1977)).

⁴³ *Squire Sanders*, 2010-Ohio-4469, at ¶ 57.

⁴⁴ *Id.*

⁴⁵ IEU-Ohio offers the caveat about the entirety of the documents not being privileged based upon the assertion by counsel for DP&L that some of the documents might contain summaries or other write-ups identifying counsel’s expectation about certain issues. That being said, market price forecasts and projected sale prices are not advice given by legal counsel in their role as a legal advisor to a client and are therefore certainly not protected by any claim of attorney-client privilege. Without the benefit of seeing the documents, IEU-Ohio will rely on the Commission’s in camera review to determine if statements outside of the projected market values and sale prices in the responsive documents may reflect legal advice.

Even if some aspect of the impairment analyses were protected by the attorney-client privilege and work product doctrines, such claims have been waived by DP&L. Specifically, DP&L has put in play projected market prices, the projected revenue of the RER plants, and DP&L's and DPL Inc.'s future cash flows by the filing of the ESP application. Thus, any claim of privilege or work product as to any projection of market prices, projected revenue of the RER plants, or DP&L's and DPL Inc.'s future cash flows (e.g. projected future cash flow through the sale of the generating plants) has been waived.

Accordingly, because the impairment analyses are required and produced in the ordinary course of business, there is nothing inherent about the documents that would give any rise to a claim of attorney-client privilege or work product. Therefore, IEU-Ohio believes that DP&L's privilege objections are without merit.

III. CONCLUSION

IEU-Ohio has served DP&L with proper discovery requests asking DP&L to identify and produce impairment analyses related to the RER plants that may shed light on the validity of the information contained in DP&L's application and prefiled testimony. DP&L has refused to identify or produce any of the requested documents but has acknowledged that responsive documents exist. Because DP&L's objections are without merit, the Commission should grant this motion to compel. Recognizing the Commission's standard practice for resolving claims of privilege, IEU-Ohio would request that the Commission timely set this matter for a prehearing conference and direct DP&L to produce a privilege log to IEU-Ohio at least three days in advance of the prehearing and to further direct DP&L to bring the documents that it is claiming are

privileged to the prehearing conference for an *in camera* review by the Attorney Examiners.

Respectfully submitted,

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ATTORNEYS FOR INDUSTRIAL ENERGY USERS-OHIO

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)
The Dayton Power and Light Company for) Case No. 16-395-EL-SSO
Approval of Its Electric Security Plan)

In the Matter of the Application of)
The Dayton Power and Light Company for) Case No. 16-396-EL-ATA
Approval of Revised Tariffs)

In the Matter of the Application of)
The Dayton Power and Light Company for) Case No. 16-397-EL-AAM
Approval of Certain Accounting Authority)
Pursuant to Ohio Rev. Code § 4905.13)

**INDUSTRIAL ENERGY USERS-OHIO'S INTERROGATORIES UPON THE DAYTON
POWER AND LIGHT COMPANY
FOURTH SET
(MAY 31, 2016)**

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May 31, 2016

Attorneys for Industrial Energy Users-Ohio

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The Dayton Power and Light Company for)	Case No. 16-397-EL-AAM
Approval of Certain Accounting Authority)	
Pursuant to Ohio Rev. Code § 4905.13)	

**INDUSTRIAL ENERGY USERS-OHIO’S INTERROGATORIES UPON THE DAYTON
POWER AND LIGHT COMPANY
FOURTH SET
(MAY 31, 2016)**

Industrial Energy Users-Ohio (“IEU-Ohio”) in the above-captioned proceeding before the Public Utilities Commission of Ohio (“Commission”) submits the following Interrogatories upon The Dayton Power and Light Company Second Set pursuant to Rules 4901-1-16, 4901-1-17, 4901-1-18, 4901-1-19, and 4901-1-20, Ohio Administrative Code (“OAC”), for response from The Dayton Power and Light Company (“DP&L” or “Company”).

All responses should be directed to:

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Additionally, DP&L must follow the instructions provided herein in responding to the inquiries. As required by Rule 4901-1-16, OAC, responses must be subsequently supplemented as required.

DEFINITIONS

As used herein, the following definitions apply:

1. “Document” or “Documentation” when used herein, is used in its customary broad sense and means all originals of any nature whatsoever, identical copies, and all non-identical copies thereof, pertaining to any medium upon which intelligence or information is recorded in your possession, custody, or control regardless of where located; including any kind of printed, recorded, written, graphic, or photographic matter and things similar to any of the foregoing, regardless of their author or origin. The term specifically includes, without limiting the generality of the following: punch cards, printout sheets, movie film, slides, PowerPoint slides, phonograph records, photographs, memoranda, ledgers, work sheets, books, magazines, notebooks, diaries, calendars, appointment books, registers, charts, tables, papers, agreements, contracts, purchase orders, checks and drafts, acknowledgments, invoices, authorizations, budgets, analysis, projections, transcripts, electronic mail, minutes of meetings of any kind, telegrams, drafts, instructions, announcements, schedules, price lists, electronic copies, reports, studies, statistics, forecasts, decisions, and orders, intra-office and inter-office communications, correspondence, financial data, summaries or records of conversations or interviews, statements, returns, diaries, work papers, maps, graphs, sketches,

summaries or reports of investigations or negotiations, opinions or reports of consultants, brochures, bulletins, pamphlets, articles, advertisements, circulars, press releases, graphic records or representations/publications of any kind (including microfilm, videotape and records, however produced or reproduced), electronic, mechanical and electrical records of any kind and computer produced interpretations thereof (including, without limitation, tapes, tape cassettes, disks and records), other data compilations (including source codes, object codes, program documentation, computer programs, computer printouts, cards, tapes, disks and recordings used in automated data processing together with the programming instructions and other material necessary to translate, understand or use the same), all drafts, prints, issues, alterations, modifications, changes, amendments, and mechanical or electric sound recordings and transcripts to the foregoing. A request for discovery concerning documents addressing, relating or referring to or discussing a specified matter encompasses documents having a factual, contextual, or logical nexus to the matter, as well as documents making explicit or implicit reference thereto in the body of the documents. Originals and duplicates of the same document need not be separately identified or produced; however, drafts of a document or documents differing from one another by initials, interlineations, notations, erasures, file stamps, and the like shall be deemed to be distinct documents requiring separate identification or production. Copies of documents shall be legible.

2. "Communication" shall mean any transmission of information by oral, graphic, written, pictorial, electronic or otherwise perceptible means, including, but not limited

to, telephone conversations, letters, telegrams, and personal conversations. A request seeking the identity of a communication addressing, relating or referring to, or discussing a specified matter encompasses documents having factual, contextual, or logical nexus to the matter, as well as communications in which explicit or implicit reference is made to the matter in the course of the communication.

3. The “substance” of a communication or act includes the essence, purport or meaning of the same, as well as the exact words or actions involved.
4. “And” or “or” shall be construed conjunctively or disjunctively as necessary to make any request inclusive rather than exclusive.
5. “You” and “your” or “yourself” refer to the party requested to produce documents and any present or former director, officer, agent, contractor, consultant, advisor, employee, partner, or joint venture of such party.
6. Each singular shall be construed to include its plural, and vice versa, so as to make the request inclusive rather than exclusive.
7. Words expressing the masculine gender shall be deemed to express the feminine and neuter genders; those expressing the past tense shall be deemed to express the present tense; and vice versa.
8. “Person” includes any firm, corporation, joint venture, association, entity or group of persons unless the context clearly indicates that only an individual person is referred to.
9. “DP&L” or “Company” means the Dayton Power and Light Company.
10. “DPL” or “DPL Inc.” means DPL Inc.

11. "Ohio Genco" means the affiliate to which plants identified in paragraph 4 of the Application in this Case will be transferred.
12. "FERC" means the Federal Energy Regulatory Commission.
13. "RER" means Reliable Electricity Rider as referred to on page 4 of the Application in this Case.
14. "Identify," or "state the identity of," or "identified" means as follows:
 - A. When used in reference to an individual, to state his full name and present or last known position and business affiliation, and his position and business affiliation at the time in question;
 - B. When used in reference to a commercial or governmental entity, to state its full name, type of entity (e.g., corporation, partnership, single proprietorship), and its present or last known address;
 - C. When used in reference to a document, to state the date, author, title, type of document (e.g., letter, memorandum, photograph, tape recording, etc.) and its present or last known location and custodian;
 - D. When used in reference to a communication, to state the type of communication (i.e., letter, personal conversation, etc.), the date thereof, and the parties thereto and, in the case of a conversation, to state the substance, place, and approximate time thereof, and identity of other persons in the presence of each party thereto;

- E. When used in reference to an act, to state the substance of the act, the date, time, and place of performance, and the identity of the actor and all other persons present.

INSTRUCTIONS FOR ANSWERING

1. Where an interrogatory calls for an answer in more than one part, each part should be separate in the answer so that the answer is clearly understandable.
2. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections are to be signed by the attorney making them.
3. If any answer requires more space than provided, continue the answer on the reverse side of the page or on an added page.
4. You are under a continuing duty to supplement your responses with respect to any question directly addressed to the identity and location of persons having knowledge of discoverable matters, the identity of any person expected to be called as a witness at trial, and the subject matter on which he or she is expected to testify and to correct any response which you know or later learn is incorrect.

INTERROGATORIES

- 4-1. Identify all projections of capacity prices made by Mr. Meehan in the past 10 years that cover the timeframe of 2017 to 2026 for capacity prices in the unconstrained region of PJM (the rest of RTO region).

RESPONSE:

- 4-2. Identify all projections of energy prices in PJM made by Mr. Meehan in the past 10 years that cover the timeframe of 2017 to 2026 and address prices at the AEP-Dayton Hub, DEOK load zone, ATSI load zone, or DP&L load zone.

RESPONSE:

- 4-3. Has Mr. Meehan submitted testimony to any regulatory body or court addressing projections of wholesale energy or capacity prices in PJM that covers the period of 2017 to 2026?

RESPONSE:

- 4-4. If the answer to the prior interrogatory is in the affirmative, identify the testimonies in which Mr. Meehan has made such projections.

RESPONSE:

- 4-5. For any testimonies identified in the prior interrogatory, indicate whether Mr. Meehan took the stand and presented the testimony under oath.

RESPONSE:

- 4-6. Has Mr. Meehan prepared any projections of capacity prices in PJM for the period of 2017 to 2026 that incorporates the results of the PJM Base Residual Auction results for the 2019/20 PJM delivery year?

RESPONSE:

- 4-7. If the answer to the prior interrogatory is in the affirmative, identify all such projections.

RESPONSE:

- 4-8. Has Mr. Meehan calibrated his forecast methodology used in this proceeding for capacity prices as a result of the PJM Base Residual Auction results for the 2019/20 delivery year?

RESPONSE:

- 4-9. If the answer to the prior interrogatory is in the affirmative, identify the projected capacity prices that result from the calibrated modeling for the PJM delivery years 2020/21 through 2026/27.

RESPONSE:

- 4-10. Please fill in the table that follows this interrogatory with respect to information requested in this interrogatory. For Conesville, Killen, Miami Fort, Stuart, Zimmer, Kyger Creek, and Clifty Creek plants identify the following:
- Whether the plants have coal contracted for beyond 2016.
 - If the response to part 'a' is in the affirmative for any plant, identify the coal contract(s).
 - If the response to part 'a' is in the affirmative for any plant, identify the end date of the coal contract(s).
 - If the response to part 'a' is in the affirmative for any plant, identify the quantity of coal in tons under contract
 - Identify the percentage by year for 2017 through 2026 of the projected coal needs of the plants (based upon forecasted generation output of the plants) that is currently contracted for.
 - If the response to part 'a' is in the affirmative for any plant, identify the contract price for the coal (in terms of dollars per MWh)
 - Identify the current average delivered cost of coal per ton under the contract(s) (in terms of \$/ton).
 - Identify the current average delivered cost of coal per ton under the contract(s) (in terms of \$/MMBtu).
 - Identify the average delivered cost of coal per ton (in terms of \$/MWh) for each plant and for each year from 2017 to 2026 that were utilized in DP&L's financial projections of the plants in this case.
 - Identify the average delivered cost of coal per ton (in terms of \$/ton) for each plant and for each year from 2017 to 2026 that were utilized in DP&L's financial projections of the plants in this case.
 - Identify the average delivered cost of coal per ton (in terms of \$/MMBtu) for each plant and for each year from 2017 to 2026 that were utilized in DP&L's financial projections of the plants in this case.

RESPONSE:

	a. Coal contracted (yes/no)	b. Contract name(s)	c. End date(s)	d. Tons	e. Percentage	f. Cost (\$/MWh)	g. Cost (\$/ton)	h. Cost (\$/MMBtu)	i. Cost (\$/MWh)	j. Cost (\$/ton)	k. Cost (\$/MMBtu)
Conesville											
Killen											
Miami Fort											
Stuart											
Zimmer											
Kyger Creek											
Clifty Creek											

4-11. Identify all projections of forecasted capital expenditures for the years 2017 to 2026 necessary to comply with environmental regulations associated with the Conesville, Killen, Miami Fort, Stuart, Zimmer, Kyger Creek, and Clifty Creek plants?

RESPONSE:

4-12. For the projections identified in response to the prior interrogatory, are all of these projected expenditures included in Mr. Malinak's financial projections in this proceeding? If not, identify the expenditures that are not included in his financial projections.

RESPONSE:

4-13. If the expected retirement dates for Conesville, Killen, Miami Fort, Stuart, Zimmer, Kyger Creek, or Clifty Creek plants changed, would the annual depreciation expense embedded in the Rider RER calculation change?

RESPONSE:

4-14. Will the Rider RER revenue requirement calculation include any costs associated with any of the following:

- a. Plant closure costs
- b. Plant decommissioning costs
- c. Environmental remediation costs

RESPONSE:

4-15. If the response to the prior interrogatory is in the affirmative identify by year and by plant the projected plant closure costs, plant decommissioning costs, and the environmental remediation costs.

RESPONSE:

4-16. Did DP&L consider including in the revenue requirement calculation for Rider RER any plants that DP&L did not previously have an ownership interest in?

RESPONSE:

4-17. If the answer to the prior interrogatory is in the affirmative, identify the additional plants that DP&L considered including in the Rider RER revenue requirement calculation.

RESPONSE:

4-18. Are the projected PJM capacity prices contained in Mr. Meehan's testimony an output or an input of the Aurora model?

RESPONSE:

4-19. Identify any impairment analysis conducted in the past 10 years relating to the Conesville, Killen, Miami Fort, Stuart, Zimmer, Kyger Creek, or Clifty Creek plants?

RESPONSE:

4-20. Has Mr. Meehan backcasted his modeling to determine how well the model reproduced prices at the AEP/Dayton Hub, Duke Energy Ohio and Kentucky ("DEOK") load zone, the FirstEnergy ("ATSI") load zone, or the DP&L load zone?

RESPONSE:

- 4-21. If the answer to the prior interrogatory is in the affirmative, identify:
- a. The backcasted prices at each hub and load zone.
 - b. The delta (in terms of \$/MWh) between the actual price and the backcasted price.
 - c. The delta (in terms of a percentage) between the actual price and the backcasted price.
 - d. The date(s) when such backcasting occurred.

RESPONSE:

- 4-22. Referencing page 18 lines 4 to 7 of Mr. Meehan's testimony, identify:
- a. The load growth Mr. Meehan relied upon for delivery years where planning parameters had not yet been established.
 - b. The total load utilized by Mr. Meehan for each PJM delivery year for delivery years 2019/20 through 2026/27.

RESPONSE:

4-23. Explain Mr. Meehan's rationale for conducting a zonal analysis with the Aurora model instead of a nodal analysis.

RESPONSE:

4-24. In Mr. Meehan's Aurora modeling did he utilize full load heat rates. If not, please explain what heat rates were utilized and how they were determined.

RESPONSE:

4-25. Referencing page 11, lines 4-5 of Mr. Meehan's testimony, identify by PJM delivery year for the years 2019/20 to 2026/27 the "baseline unit addition assumptions" utilized in his modeling.

RESPONSE:

4-26. Did DP&L utilize a nodal or zonal energy price when calculating energy margins for the Stuart, Zimmer, Miami Fort, Killen, Conesville, and OVEC plants.

RESPONSE:

4-27. Identify the UCAP values for DP&L's share of the Stuart, Zimmer, Miami Fort, Killen, Conesville, and OVEC plants for the 2019/20 PJM delivery year.

RESPONSE:

4-28. Identify the MWs (in terms of UCAP) that cleared for DP&L's share of the Stuart, Zimmer, Miami Fort, Killen, Conesville, and OVEC plants for the 2019/20 PJM delivery year.

RESPONSE:

4-29. For the MWs (in terms of UCAP) identified in the prior interrogatory, indicate what portion of the MWs cleared as a base capacity resource and what portion cleared as a capacity performance resource.

RESPONSE:

4-30. Are the capacity supply values identified in Table 2 on page 19 of Mr. Meehan's testimony amounts that were bid into the RPM auctions, amounts that cleared in the auctions, total supply eligible to bid into the auctions, total installed capacity in PJM, or does it represent something else? If something else, please describe what these values represent.

RESPONSE:

4-31. Does Mr. Meehan's forecasted price of capacity in Table 2 for the 2019/20 delivery year reflect the price of capacity performance, the price of base capacity, the weighted blend of the prices of capacity performance and base capacity, or some other value? If it represents some other value, please explain what the value represents.

RESPONSE:

- 4-32. Referencing page 21 lines 13 to 16 of Mr. Meehan's testimony, identify the three capacity supply values relied upon by Mr. Meehan to determine the three year average referenced in this testimony.

RESPONSE:

- 4-33. Identify any documents referenced or relied upon in answering these interrogatories that was not previously identified in response to the interrogatories above.

RESPONSE:

REQUEST FOR PRODUCTION OF DOCUMENTS

- 4-1. Produce a copy of any document identified in the interrogatories above.

Respectfully submitted,

/s/ Matthew R. Pritchard

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Industrial Energy Users-Ohio's Interrogatories upon The Dayton Power and Light Company Fourth Set* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 31st day of May 2016, *via* electronic transmission.

/s/ Matthew R. Pritchard

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Attachment B

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of : Case No. 16-0395-EL-SSO
The Dayton Power and Light Company for
Approval of Its Electric Security Plan :

In the Matter of the Application of : Case No. 16-0396-EL-ATA
The Dayton Power and Light Company for
Approval of Revised Tariffs :

In the Matter of the Application of : Case No. 16-0397-EL-AAM
The Dayton Power and Light Company for
Approval of Certain Accounting Authority :
Pursuant to Ohio Rev. Code § 4905.13

**THE DAYTON POWER AND LIGHT COMPANY'S RESPONSE TO
INDUSTRIAL ENERGY USERS-OHIO'S INTERROGATORIES UPON
THE DAYTON POWER AND LIGHT COMPANY
FOURTH SET (MAY 31, 2016)**

The Dayton Power and Light Company ("DP&L") objects and responds to the Industrial Energy Users-Ohio's Interrogatories upon The Dayton Power and Light Company, Fourth Set, May 31, 2016, 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).

2. DP&L objects to and declines to respond to each and every discovery request to the extent that it is harassing, unduly burdensome, oppressive or overbroad. Ohio Admin. Code §§ 4901-1-16(B) and 4901-1-24(A).

3. DP&L objects to each and every discovery request to the extent that it seeks information that is privileged by statute or common law, including privileged communications between attorney and client or attorney work product. Ohio Admin. Code § 4901-1-16(B). Such material or information shall not be provided, and any inadvertent disclosure of material or information protected by the attorney-client privilege, the attorney work product doctrine or any other privilege or protection from discovery is not intended and should not be construed to constitute a waiver, either generally or specifically, with respect to such information or material or the subject matter thereof.

4. DP&L objects to each and every discovery request to the extent that it seeks information that is proprietary, competitively sensitive or valuable, or constitutes trade secrets. Ohio Admin. Code § 4901-1-24(A).

5. To the extent that interrogatories seek relevant information that may be derived from the business records of DP&L or from an examination or inspection of such records and the burden of deriving the answer is the same for the party requesting the information as it is for DP&L, DP&L may specify the records from which the answer may be derived or ascertained and afford the party requesting the information the opportunity to examine or inspect such records. Ohio Admin. Code § 4901-1-19(D).

6. DP&L objects to each and every interrogatory that can be answered more efficiently by the production of documents or by the taking of depositions. Under the comparable Ohio Civil Rules, "[a]n interrogatory seeks an admission or it seeks information of major significance in the trial or in the preparation for trial. It does not contemplate an array of details or outlines of evidence, a function reserved by rules for depositions." Penn Cent. Transp.

Co. v. Armco Steel Corp., 27 Ohio Misc. 76, 77, 272 N.E.2d 877, 878 (Montgomery Cty. 1971).

As Penn further noted, interrogatories that ask one to "describe in detail," "state in detail," or "describe in particulars" are "open end invitation[s] without limit on its comprehensive nature with no guide for the court to determine if the voluminous response is what the party sought in the first place." Id., 272 N.E.2d at 878.

7. DP&L objects to each and every discovery request to the extent that it calls for information that is not in DP&L's current possession, custody, or control or could be more easily obtained through third parties or other sources. Ohio Admin. Code § 4901-1-19(C) and 4901-1-20(D). DP&L also objects to each and every discovery request that seeks information that is already on file with the Public Utilities Commission of Ohio or the Federal Energy Regulatory Commission. To the extent that each and every discovery request seeks information available in pre-filed testimony, pre-hearing data submissions and other documents that DP&L has filed with the Commission in the pending or previous proceedings, DP&L objects to it. Ohio Admin. Code § 4901-1-16(G).

8. DP&L reserves its right to redact confidential or irrelevant information from documents produced in discovery. All documents that have been redacted will be stamped as such.

9. DP&L objects to each and every discovery request to the extent that it is vague or ambiguous or contains terms or phrases that are undefined and subject to varying interpretation or meaning, and may, therefore, make responses misleading or incorrect.

10. DP&L objects to any discovery request to the extent that it calls for information not in its possession, but in the possession of DP&L's unregulated affiliates.

11. DP&L objects to each and every discovery request to the extent that it calls for a legal conclusion, and thus seeks information that cannot be sponsored by a witness.

12. DP&L further objects because these discovery requests seek information that DP&L does not know at this time.

13. DP&L objects to the request to the extent that it mischaracterizes previous statements or information or is an incomplete recitation of past statements or information or takes those statements or information outside of the context in which they were made.

OBJECTIONS AND RESPONSES TO INTERROGATORIES

- 4-1. Identify all projections of capacity prices made by Mr. Meehan in the past 10 years that cover the timeframe of 2017 to 2026 for capacity prices in the unconstrained region of PJM (the rest of RTO region).

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary), 5 (inspection of business records), 6 (calls for narrative answer), 7 (not in DP&L's possession or available on PUCO website), 9 (vague or undefined). DP&L further objects because the request can be performed by IEU. Subject to all general objections, DP&L states that Mr. Meehan has not made any such projections.

Witness Responsible: Eugene T. Meehan

- 4-2. Identify all projections of energy prices in PJM made by Mr. Meehan in the past 10 years that cover the timeframe of 2017 to 2026 and address prices at the AEP-Dayton Hub, DEOK load zone, ATSI load zone, or DP&L load zone.

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary), 5 (inspection of business records), 6 (calls for narrative answer), 7 (not in DP&L's possession or available on PUCO website), 9 (vague or undefined). DP&L further objects because the request can be performed by IEU. Subject to all general objections, DP&L states that Mr. Meehan has not made any such projections.

Witness Responsible: Eugene T. Meehan

- 4-3. Has Mr. Meehan submitted testimony to any regulatory body or court addressing projections of wholesale energy or capacity prices in PJM that covers the period of 2017 to 2026?

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary), 5 (inspection of business records), 6 (calls for narrative answer), 7 (not in DP&L's possession or available on PUCO website) 9 (vague or undefined). DP&L further objects because the request can be performed by IEU. Subject to all general objections, DP&L states that Mr. Meehan has submitted such testimony.

Witness Responsible: Eugene T. Meehan

4-4. If the answer to the prior interrogatory is in the affirmative, identify the testimonies in which Mr. Meehan has made such projections.

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary), 5 (inspection of business records), 6 (calls for narrative answer), 7 (not in DP&L's possession or available on PUCO website) 9 (vague or undefined). DP&L further objects because the request can be performed by IEU. Subject to all general objections, DP&L states that Mr. Meehan's testimony was before the Public Service Commission of Maryland on behalf of Baltimore Gas & Electric Company and Potomac Edison Company (Allegheny Power) in Case 9117. In addition, please see DP&L-SSO 0005317 – DP&L-SSO 0005566.

Witness Responsible: Eugene T. Meehan

- 4-5. For any testimonies identified in the prior interrogatory, indicate whether Mr. Meehan took the stand and presented the testimony under oath.

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary), 5 (inspection of business records), 6 (calls for narrative answer), 7 (not in DP&L's possession or available on PUCO website), 9 (vague or undefined). DP&L further objects because the request can be performed by IEU. Subject to all general objections, DP&L states that, to the best of Mr. Meehan's recollection, Mr. Meehan did present the testimony under oath.

Witness Responsible: Eugene T. Meehan

- 4-6. Has Mr. Meehan prepared any projections of capacity prices in PJM for the period of 2017 to 2026 that incorporates the results of the PJM Base Residual Auction results for the 2019/20 PJM delivery year?

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary), 5 (inspection of business records), 6 (calls for narrative answer), 7 (not in DP&L's possession or available on PUCO website), 9 (vague or undefined). DP&L further objects because the request can be performed by IEU. Subject to all general objections, DP&L states that Mr. Meehan has not prepared any such projections.

Witness Responsible: Eugene T. Meehan

4-7. If the answer to the prior interrogatory is in the affirmative, identify all such projections.

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary), 5 (inspection of business records), 6 (calls for narrative answer), 7 (not in DP&L's possession or available on PUCO website) 9 (vague or undefined). Subject to all general objections, DP&L states please see the Company's response to INT 4-6.

Witness Responsible: Eugene T. Meehan

- 4-8. Has Mr. Meehan calibrated his forecast methodology used in this proceeding for capacity prices as a result of the PJM Base Residual Auction results for the 2019/20 delivery year?

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary), 5 (inspection of business records), 6 (calls for narrative answer), 7 (not in DP&L's possession or available on PUCO website), 9 (vague or undefined). Subject to all general objections, DP&L states that Mr. Meehan has not calibrated his methodology used in this proceeding as a result of the 2019/20 Base Residual Action results. The results of that auction were not available at the time Mr. Meehan developed his testimony.

Witness Responsible: Eugene T. Meehan

- 4-9. If the answer to the prior interrogatory is in the affirmative, identify the projected capacity prices that result from the calibrated modeling for the PJM delivery years 2020/21 through 2026/27.

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary), 5 (inspection of business records), 6 (calls for narrative answer), 7 (not in DP&L's possession or available on PUCO website), 9 (vague or undefined). Subject to all general objections, DP&L states please see the Company's response to INT 4-8.

Witness Responsible: Eugene T. Meehan

- 4-10. Please fill in the table that follows this interrogatory with respect to information requested in this interrogatory. For Conesville, Killen, Miami Fort, Stuart, Zimmer, Kyger Creek, and Clifty Creek plants identify the following:
- Whether the plants have coal contracted for beyond 2016.
 - If the response to part 'a' is in the affirmative for any plant, identify the coal contract(s).
 - If the response to part 'a' is in the affirmative for any plant, identify the end date of the coal contract(s).
 - If the response to part 'a' is in the affirmative for any plant, identify the quantity of coal in tons under contract
 - Identify the percentage by year for 2017 through 2026 of the projected coal needs of the plants (based upon forecasted generation output of the plants) that is currently contracted for.
 - If the response to part 'a' is in the affirmative for any plant, identify the contract price for the coal (in terms of dollars per MWh)
 - Identify the current average delivered cost of coal per ton under the contract(s) (in terms of \$/ton).
 - Identify the current average delivered cost of coal per ton under the contract(s) (in terms of \$/MMBtu).
 - Identify the average delivered cost of coal per ton (in terms of \$/MWh) for each plant and for each year from 2017 to 2026 that were utilized in DP&L's financial projections of the plants in this case.
 - Identify the average delivered cost of coal per ton (in terms of \$/ton) for each plant and for each year from 2017 to 2026 that were utilized in DP&L's financial projections of the plants in this case.
 - Identify the average delivered cost of coal per ton (in terms of \$/MMBtu) for each plant and for each year from 2017 to 2026 that were utilized in DP&L's financial projections of the plants in this case.

RESPONSE: General Objections Nos. 2 (unduly burdensome), 4 (proprietary), 5 (inspection of business records), 6 (calls for narrative answer). Subject to all general objections, DP&L states that it will supplement this response.

	a. Coal contracted (yes/no)	b. Contract name(s)	c. End date(s)	d. Tons	e. Percentage	f. Cost (\$/MWh)	g. Cost (\$/ton)	h. Cost (\$/MMBtu)	i. Cost (\$/MWh)	j. Cost (\$/ton)	k. Cost (\$/MMBtu)
Conesville											
Killen											
Miami Fort											
Stuart											
Zimmer											
Kyger Creek											
Clifty Creek											

- 4-11. Identify all projections of forecasted capital expenditures for the years 2017 to 2026 necessary to comply with environmental regulations associated with the Conesville, Killen, Miami Fort, Stuart, Zimmer, Kyger Creek, and Clifty Creek plants?

RESPONSE: General Objections Nos. 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary), 5 (inspection of business records), 6 (calls for narrative answer).

Subject to all general objections, DP&L states that it will supplement this response.

4-12. For the projections identified in response to the prior interrogatory, are all of these projected expenditures included in Mr. Malinak's financial projections in this proceeding? If not, identify the expenditures that are not included in his financial projections.

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

4 (proprietary), 5 (inspection of business records), 6 (calls for narrative answer).

Subject to all general objections, DP&L states that the capital expenditures used

in Mr. Malinak's projections are based on the 'CapEx' tab of 'Financial

Inputs.xlsx,' CONFIDENTIAL – ATTORNEYS' EYES ONLY, DP&L-SSO

0001178. The capital expenditures are the total of environmental, maintenance,

and growth capital expenditures for Conesville, Killen, Miami Fort, Stuart, and

Zimmer.

Witness Responsible: R. Jeffrey Malinak

4-13. If the expected retirement dates for Conesville, Killen, Miami Fort, Stuart, Zimmer, Kyger Creek, or Clifty Creek plants changed, would the annual depreciation expense embedded in the Rider RER calculation change?

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

4 (proprietary), 5 (inspection of business records), 6 (calls for narrative answer).

Subject to all general objections, DP&L states that the annual depreciation

expense for all years from 2017 through 2026 is calculated as the product of gross

plant book value and the depreciation rates, which are set forth in the column

labeled 'Blended Depreciation Rate' of the 'Accounting' tab in 'Financial

Inputs.xlsx' CONFIDENTIAL – ATTORNEYS' EYES ONLY, DP&L-SSO

0001178. To the extent that depreciation expense changes, the RER calculated on

Exhibit RJM-9 also would change.

Witness Responsible: R. Jeffrey Malinak

- 4-14. Will the Rider RER revenue requirement calculation include any costs associated with any of the following:
- a. Plant closure costs
 - b. Plant decommissioning costs
 - c. Environmental remediation costs

RESPONSE: Subject to all general objections, DP&L states that the Rider RER revenue requirement calculated on Exhibit RJM-9 does not include plant closure costs, plant decommissioning costs, and environmental remediation costs.

Witness Responsible: R. Jeffrey Malinak

4-15. If the response to the prior interrogatory is in the affirmative identify by year and by plant the projected plant closure costs, plant decommissioning costs, and the environmental remediation costs.

RESPONSE: General Objections Nos. 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary), 5 (inspection of business records), 6 (calls for narrative answer).

Subject to all general objections, DP&L states that the Rider RER revenue requirement calculation does not include the specified costs.

Witness Responsible: R. Jeffrey Malinak

4-16. Did DP&L consider including in the revenue requirement calculation for Rider RER any plants that DP&L did not previously have an ownership interest in?

RESPONSE: General Objections Nos. 1 (relevance), 3 (privileged and work product), 4

(proprietary). DP&L further objects because this request seeks privileged and work product information.

4-17. If the answer to the prior interrogatory is in the affirmative, identify the additional plants that DP&L considered including in the Rider RER revenue requirement calculation.

RESPONSE: General Objections Nos. 1 (relevance), 3 (privileged and work product), 4 (proprietary). DP&L further objects because this request seeks privileged and work product information.

4-18. Are the projected PJM capacity prices contained in Mr. Meehan's testimony an output or an input of the Aurora model?

RESPONSE: Subject to all general objections, DP&L states that the capacity price forecasts are neither an output of nor input to the AURORAxmp model. AURORAxmp does not model the PJM RPM auction process.

Witness Responsible: Eugene T. Meehan

4-19. Identify any impairment analysis conducted in the past 10 years relating to the Conesville, Killen, Miami Fort, Stuart, Zimmer, Kyger Creek, or Clifty Creek plants?

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary), 5 (inspection of business records), 10 (unregulated affiliates). DP&L objects to producing documents that were prepared by and are in the custody of DP&L's unregulated affiliates.

4-20. Has Mr. Meehan backcasted his modeling to determine how well the model reproduced prices at the AEP/Dayton Hub, Duke Energy Ohio and Kentucky (“DEOK”) load zone, the FirstEnergy (“ATSI”) load zone, or the DP&L load zone?

RESPONSE: General Objections Nos. 1 (relevance), 9 (vague and undefined). Subject to all general objections, DP&L states that Mr. Meehan has not backcasted his modeling. Instead, he calibrated the model results based on forward prices.

Witness Responsible: Eugene T. Meehan

- 4-21. If the answer to the prior interrogatory is in the affirmative, identify:
- a. The backcasted prices at each hub and load zone.
 - b. The delta (in terms of \$/MWh) between the actual price and the backcasted price.
 - c. The delta (in terms of a percentage) between the actual price and the backcasted price.
 - d. The date(s) when such backcasting occurred.

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary). Subject to all general objections, DP&L states please see the Company's response to INT 4-20.

Witness Responsible: Eugene T. Meehan

- 4-22. Referencing page 18 lines 4 to 7 of Mr. Meehan's testimony, identify:
- a. The load growth Mr. Meehan relied upon for delivery years where planning parameters had not yet been established.
 - b. The total load utilized by Mr. Meehan for each PJM delivery year for delivery years 2019/20 through 2026/27.

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary), 5 (inspection of business records). Subject to all general objections, DP&L states please see IEU 4th Set INT 4-22 Attachment 1 – CONFIDENTIAL – ATTORNEYS' EYES ONLY, DP&L-SSO 0005567.

Witness Responsible: Eugene T. Meehan

4-23. Explain Mr. Meehan's rationale for conducting a zonal analysis with the Aurora model instead of a nodal analysis.

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary), 6 (calls for narrative answer). Subject to all general objections, DP&L states that, in Mr. Meehan's opinion, a zonal model is the appropriate model for this sort of long-term forecast. In his opinion, there is no accuracy to be gained from the use of a nodal model, while the data is more complex and the time for the model to solve significantly greater. Adjustment from zonal to nodal prices is accomplished using historical relationships.

Witness Responsible: Eugene T. Meehan

4-24. In Mr. Meehan's Aurora modeling did he utilize full load heat rates. If not, please explain what heat rates were utilized and how they were determined.

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary), 6 (calls for narrative answer). Subject to all general objections, DP&L states that the heat rate information used was that contained in the AURORAxmp database. AURORAxmp uses heat rate curves for generators such that the heat rate varies with output level.

Witness Responsible: Eugene T. Meehan

4-25. Referencing page 11, lines 4-5 of Mr. Meehan's testimony, identify by PJM delivery year for the years 2019/20 to 2026/27 the "baseline unit addition assumptions" utilized in his modeling.

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary), 6 (calls for narrative answer). Subject to all general objections, DP&L states that information on baseline unit addition assumptions is contained in an attachment to this document, IEU 4th Set INT-25 Attachment 1, DP&L-SSO 0005568 – DP&L-SSO 0005571.

Witness Responsible: Eugene T. Meehan

4-26. Did DP&L utilize a nodal or zonal energy price when calculating energy margins for the Stuart, Zimmer, Miami Fort, Killen, Conesville, and OVEC plants.

RESPONSE: General Objections Nos. 1 (relevance), 3 (privileged and work product), 4

(proprietary), 5 (inspection of business records). Subject to all general objections,

DP&L states that nodal energy prices were used in calculating energy margins.

Witness Responsible: Eugene T. Meehan

4-27. Identify the UCAP values for DP&L's share of the Stuart, Zimmer, Miami Fort, Killen, Conesville, and OVEC plants for the 2019/20 PJM delivery year.

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 4 (proprietary), 5 (inspection of business records), 6 (calls for narrative answer). Subject to all general objections, DP&L states please see IEU 4th Set 4-27 Attachment 1 – CONFIDENTIAL, DP&L-SSO 0005314.

Witness Responsible: Mark Miller

4-28. Identify the MWs (in terms of UCAP) that cleared for DP&L's share of the Stuart, Zimmer, Miami Fort, Killen, Conesville, and OVEC plants for the 2019/20 PJM delivery year.

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary), 5 (inspection of business records), 6 (calls for narrative answer). Subject to all general objections, DP&L states please see IEU 4th Set 4-28 Attachment 1 – CONFIDENTIAL, DP&L-SSO 0005315.

Witness Responsible: Mark Miller

4-29. For the MWs (in terms of UCAP) identified in the prior interrogatory, indicate what portion of the MWs cleared as a base capacity resource and what portion cleared as a capacity performance resource.

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary), 5 (inspection of business records), 6 (calls for narrative answer). Subject to all general objections, DP&L states please see IEU 4th Set 4-29 Attachment 1 – CONFIDENTIAL, DP&L-SSO 0005316.

Witness Responsible: Mark Miller

4-30. Are the capacity supply values identified in Table 2 on page 19 of Mr. Meehan's testimony amounts that were bid into the RPM auctions, amounts that cleared in the auctions, total supply eligible to bid into the auctions, total installed capacity in PJM, or does it represent something else? If something else, please describe what these values represent.

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary), 6 (calls for narrative answer). Subject to all general objections, DP&L states that capacity supply values identified in Table 2 of Mr. Meehan's testimony are forecasted levels of market-clearing capacity supply.

Witness Responsible: Eugene T. Meehan

4-31. Does Mr. Meehan's forecasted price of capacity in Table 2 for the 2019/20 delivery year reflect the price of capacity performance, the price of base capacity, the weighted blend of the prices of capacity performance and base capacity, or some other value? If it represents some other value, please explain what the value represents.

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary), 6 (calls for narrative answer). Subject to all general objections, DP&L states that Mr. Meehan's capacity price forecast for the 2019/20 delivery year is a forecasted price for the capacity performance product.

Witness Responsible: Eugene T. Meehan

- 4-32. Referencing page 21 lines 13 to 16 of Mr. Meehan's testimony, identify the three capacity supply values relied upon by Mr. Meehan to determine the three year average referenced in this testimony.

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary), 5 (inspection of business records), 6 (calls for narrative answer). Subject to all general objections, DP&L states that the market-clearing capacity supply values relied upon by Mr. Meehan to determine the three-year average referenced in his testimony are for delivery years 2016/17 through 2018/19.

	2016/2017	2017/2018	2018/2019
Market-clearing Supply (MW)	169,159.7	167,003.7	166,836.9

Witness Responsible: Eugene T. Meehan

4-33. Identify any documents referenced or relied upon in answering these interrogatories that was not previously identified in response to the interrogatories above.

RESPONSE: DP&L incorporates its objections to the prior Interrogatories. Subject to all general objections, DP&L states that it relied upon "Financial Inputs.xlsx." – CONFIDENTIAL – ATTORNEYS' EYES ONLY file, which was produced at DP&L-SSO 0001178.

Witness Responsible: R. Jeffrey Malinak

REQUEST FOR PRODUCTION OF DOCUMENTS

4-1. Produce a copy of any document identified in the interrogatories above.

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 3 (privileged and work product), 4 (proprietary). Subject to all general objections, DP&L states that it will produce responsive unprivileged documents that have not already been produced. In addition, please see DP&L-SSO 0005572 – DP&L-SSO 0005680.

Respectfully submitted,

/s/ Jeffrey S. Sharkey
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and Light Company

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing The Dayton Power and Light Company's Responses to Industrial Energy Users-Ohio's Interrogatories upon The Dayton Power and Light Company, Fourth Set, May 31, 2016, has been served via electronic mail upon the following counsel of record, this 20th day of June, 2016:

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Jeffrey S. Sharkey

AFFIDAVIT OF MATTHEW R. PRITCHARD

State of Ohio :
 : S.S.
County of Franklin :

I, Matthew R. Pritchard, counsel for the Industrial Energy Users-Ohio ("IEU-Ohio"), being first duly sworn, depose and say:

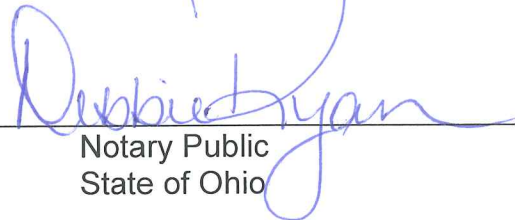
1. In attempts to resolve The Dayton Power and Light Company's ("DP&L") incomplete responses to IEU-Ohio's Fourth Set of discovery, I contacted counsel for DP&L on August 9, 2016. In my email, I indicated that DP&L's responses to IEU-Ohio INT 4-19 and RPD 4-1 were incomplete, stated IEU-Ohio's opposition to DP&L's objections, and notified DP&L that IEU-Ohio may file a motion to compel if DP&L did not provide IEU-Ohio with complete responses by August 15, 2016.
2. On August 15, 2016, counsel for DP&L indicated that it was working on a response but that key people were out of the office on vacation.
3. On August 19, 2016, counsel for DP&L indicated that DP&L still believed that the information sought in IEU-Ohio INT 4-19 and RPD 4-1 were not subject to discovery, and indicated that counsel for DP&L believed it would be useful to discuss the matter in person.
4. I accepted DP&L's invitation and counsel for IEU-Ohio met with counsel for DP&L to discuss the discovery dispute on August 25, 2016. At this meeting, counsel for DP&L indicated that DP&L agreed that two of its general objections were not applicable and would be waived (undue burden and inspection of a business record). At this meeting, counsel for DP&L further clarified its position on its remaining objections; however, counsel for IEU-Ohio indicated its continuing belief that the remaining objections were without merit. Counsel for DP&L also committed to following up with DP&L and providing a further response to IEU-Ohio. I indicated that if the matters were not resolved informally, a motion to compel may be filed.
5. On August 30, 2016, counsel for DP&L indicated that it would not be providing any substantive response to IEU-Ohio INT 4-19 or RPD 4-1 and it was standing on its objections.

6. The procedural deadlines are quickly approaching, with intervenor testimony due on September 30, 2016, and an evidentiary hearing scheduled to begin on October 16, 2016.
7. It is my belief that without intervention from the Public Utilities Commission of Ohio, DP&L will not provide responses to the discovery requests that are the subject of this motion to compel.



Matthew R. Pritchard

Sworn before me and subscribed in my presence this 30th day of August 2016.



Notary Public
State of Ohio

DEBBIE SUE RYAN
Notary Public, State of Ohio
My Commission Expires 11-14-2020

Matthew Pritchard

From: Sharkey, Jeffrey S. <JSharkey@ficlaw.com>
Sent: Tuesday, August 30, 2016 10:32 AM
To: Matthew Pritchard; Faruki, Charles J.
Cc: Frank Darr
Subject: RE: DP&L's incomplete response to IEU-Ohio discovery (16-395) [IWOV-DMS.FID92429]

Matt:

As a follow up to our discussion last week, DP&L will not agree to produce the impairment analysis documents that IEU has requested, on the following grounds:

1. The documents are AES documents and are not subject to discovery.
2. The documents contain and rely upon privileged and work product information.
3. DP&L has a contractual obligation to Deloitte not to produce its work.
4. DP&L believes that older impairment analysis documents are not relevant.

Jeff.

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Tel: 937.227.3747 | **Fax:** 937.227.3717
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From: Matthew Pritchard [<mailto:mpritchard@mwncmh.com>]
Sent: Friday, August 19, 2016 2:07 PM
To: Sharkey, Jeffrey S.; Faruki, Charles J.
Cc: Frank Darr
Subject: RE: DP&L's incomplete response to IEU-Ohio discovery (16-395) [IWOV-DMS.FID92429]

We would be more than happy to meet and discuss the matter next Wednesday or Thursday. In light of DP&L's view that the documents are not subject to discovery we are going to begin preparing the motion to compel. We will hold off on filing the motion until after we have had a chance to meet next week. Hopefully, we will be able to resolve the discovery issue and will not need to file the motion with the PUCO.

Either Wednesday or Thursday morning works best for me.

Associate

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From: Sharkey, Jeffrey S. [<mailto:JSharkey@ficlaw.com>]
Sent: Friday, August 19, 2016 1:37 PM
To: Matthew Pritchard <mpritchard@mwncmh.com>; Faruki, Charles J. <CFaruki@ficlaw.com>
Cc: Frank Darr <fdarr@mwncmh.com>
Subject: RE: DP&L's incomplete response to IEU-Ohio discovery (16-395) [IWOV-DMS.FID92429]

Matt:

DP&L believes that the documents may not be subject to discovery on various grounds, including that they are not AES documents, that they are privileged, and that DP&L has contractual obligations to third parties not to produce them. I believe that it would be useful for us to discuss IEU's requests and views as to the documents, so that we could better understand why you believe that the documents are subject to discovery. I am scheduled to be in Columbus on Wednesday-Thursday of next week on another matter, but have some flexibility as to time. Are you available to meet to discuss? I could come by your office.

Jeff.

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From: Matthew Pritchard [<mailto:mpritchard@mwncmh.com>]
Sent: Monday, August 15, 2016 4:45 PM
To: Sharkey, Jeffrey S.; Faruki, Charles J.
Cc: Frank Darr
Subject: RE: DP&L's incomplete response to IEU-Ohio discovery (16-395) [IWOV-DMS.FID92429]

Thanks for the update Jeff. I look forward to the Company's response later this week.

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From: Sharkey, Jeffrey S. [<mailto:JSharkey@ficlaw.com>]
Sent: Monday, August 15, 2016 4:40 PM
To: Matthew Pritchard <mpritchard@mwncmh.com>; Faruki, Charles J. <CFaruki@ficlaw.com>

Cc: Frank Darr <fdarr@mwncmh.com>

Subject: RE: DP&L's incomplete response to IEU-Ohio discovery (16-395) [IWOV-DMS.FID92429]

Matt:

We are working on responding to your email, but one of the key people at the client was out on vacation last week and I will not be able to speak to him until tomorrow, so I will not be able to get you a response today. I expect to be able to get back to you by the end of the week

Jeff,

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From: Matthew Pritchard [<mailto:mpritchard@mwncmh.com>]

Sent: Tuesday, August 09, 2016 3:09 PM

To: Sharkey, Jeffrey S.; Faruki, Charles J.

Cc: Frank Darr

Subject: DP&L's incomplete response to IEU-Ohio discovery (16-395)

Jeff,

I am emailing you in an attempt to resolve DP&L's incomplete discovery responses to IEU-Ohio INT 4-19 and RPD 4-1. Specifically, IEU-Ohio requested that DP&L identify and produce any impairment analysis conducted in the past 10 years related to the Conesville, Killen, Miami Fort, Stuart, Zimmer, Kyger Creek, or Clifty Creek plants. You provided a specific objection to the requests on the ground that the requested documents were "prepared by and are in the custody of DP&L's unregulated affiliate." You also included general objections of relevance, undue burden, privilege and work product, proprietary, business records, and unregulated affiliate. We do not believe that these grounds support DP&L's refusal to provide the documents that have been requested.

As to the specific objection, and the general objection identified as unregulated affiliate, DP&L has misconstrued the correct discovery standard. The correct standard is possession, control, or access. DP&L has produced numerous documents in discovery that are labeled as DPL Inc. documents. DP&L itself has also relied on the type of impairment analysis requested by IEU-Ohio and restated the value of these plants on its books, as identified in the SEC Form 10-Q filing on August 5, 2016. Thus, IEU-Ohio does not believe that DP&L does not have possession, control, or access to the impairment analyses sought in IEU-Ohio discovery requests.

As to the general objections:

- **Relevance:** DP&L has placed the relevancy of these plants at issue in the proceeding by proposing the RER. The book value of the plants and projected market revenue are significant factors driving the RER calculation and an impairment analysis directly relates to this same issue. IEU-Ohio has also limited the scope of its request to a 10-year period, the same length of time as the RER proposal.
- **Proprietary:** To the extent DP&L believes the impairment analyses are confidential, IEU-Ohio has entered into a protective agreement in this case and will treat any materials produced under the agreement in accordance with the terms of the protective agreement.

- **Inspection of Business Record:** Having seen impairment analyses produced by other EDUs in PUCO proceedings, I would not expect that the information requested would need to be compiled from other sources and does not exist in its own analysis and therefore IEU-Ohio does not agree with the general objection. For example, in its SEC Form 10-Q filed on August 5, 2016, DP&L indicated that the impairments to the Killen, Stuart, and Zimmer were the results of a discounted cash flow analysis. Thus, the information sought by IEU-Ohio is not derivative information that has not already been compiled. Furthermore, DP&L's own business record objection acknowledges that it is only a valid objection under certain conditions: (1) when DP&L identifies the other company documents where the information sought can be derived from, and (2) where the burden for IEU-Ohio compiling the information is equal to or less than DP&L's burden. Because DP&L has already completed the impairment analyses, DP&L's burden to produce the analyses would be significantly less than IEU-Ohio's burden to attempt to reproduce the analyses from DP&L's internal documents. Furthermore, DP&L has not identified any such internal documents from which IEU-Ohio could derive the impairment analyses.
- **Privilege and work product:** The impairment analyses IEU-Ohio seeks are not the result of privileged communications between a client and lawyer related to legal advice. Likewise, the impairment analyses are not part of an attorney's work product. The impairment analyses are required in the ordinary course of business under accounting rules. Furthermore, even if the analyses were privileged or work product, any such claim would have been waived by DP&L by placing at issue through the RER proposal the correct book value of the plants and the projected market revenue for the plants.

Accordingly, we ask that DP&L identify and produce any impairment analysis conducted in the past 10 years, inclusive of the recent impairment analysis related to the Killen, Zimmer, and Stuart impairments, that is either in DP&L's possession or control, or is accessible by DP&L. To clarify in advance, we are seeking the actual impairment analysis and not a discussion of the analysis that might be contained in an SEC filing.

Please provide the requested impairment analysis (or analyses) by next Monday, August 15, 2016. If we have not received the impairment analysis (analyses) by that date or otherwise resolved the issue with DP&L we may proceed with filing a motion to compel with the PUCO.

Thanks,

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Associate

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Industrial Energy Users-Ohio's Motion to Compel Discovery Responses from The Dayton Power and Light Company and Memorandum in Support* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 30th day of August 2016, via electronic transmission.

/s/ Matthew R. Pritchard

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