BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan	:	Case No. 16-0395-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs	:	Case No. 16-0396-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code § 4905.13	:	Case No. 16-0397-EL-AAM

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

REQUEST FOR HEARING

Charles J. Faruki (0010417)
(Counsel of Record)
D. Jeffrey Ireland (0010443)
Jeffrey S. Sharkey (0067892)
FARUKI IRELAND & COX P.L.L.
110 North Main Street, Suite 1600
Dayton, OH 45402
Telephone: (937) 227-3705
Telecopier: (937) 227-3717
Email: cfaruki@ficlaw.com
djireland@ficlaw.com
jsharkey@ficlaw.com

Attorneys for The Dayton Power
and Light Company

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY

Industrial Energy Users-Ohio ("IEU") asks the Commission to compel The Dayton Power and Light Company ("DP&L") to produce the impairment analysis that underlies the $857 million impairment of Stuart, Killen and Zimmer plants that DP&L disclosed on June 30, 2016 in a filing at the Securities and Exchange Commission. The Commission should deny that motion for the following separate and independent reasons:

1. AES Documents: The documents at issue are AES documents that are not subject to discovery. In DP&L's prior ESP case, the Attorney Examiners twice held that documents of DP&L's affiliates are not subject to discovery.

2. Privilege: The documents contain privileged information. If DP&L were to be ordered to produce them, then the privileged information would need to be redacted.

3. Obligation to Deloitte: Several of the documents were prepared by Deloitte, and DP&L owes an obligation to Deloitte not to produce the documents.

4. Relevance: IEU seeks ten years' worth of impairment analysis, and the older documents that IEU seeks are not relevant, given the significant changes in market conditions.

DP&L requests a hearing before the Attorney Examiners on IEU's motion.

II. THE IMPAIRMENT DOCUMENTS ARE NOT SUBJECT TO DISCOVERY

A. AES DOCUMENTS ARE NOT SUBJECT TO DISCOVERY

It is well settled that affiliates of a utility are not subject to discovery in a proceeding before the Commission. In the Matter of Application of Duke Energy Ohio, Inc.,

Pub. Util. Comm. No. 10-2586-EL-SSO, 2010 Ohio PUC LEXIS 1336, at *8-9 (Dec. 13, 2010) (granting IEU's motion to compel but limiting IEU's original request for "any studies or analysis conducted or commissioned by Duke or its affiliates regarding any revenues Duke's affiliated companies will receive if Duke remains a member of MISO or transitions to PJM . . . to require Duke to produce only information and documents within the possession of Duke Energy Ohio, not its affiliates") (emphasis added); In the Matter of the Complaint of Manchester Group, LLC, Pub. Util. Comm. No. 08-360-GA-CSS, 2009 Ohio PUC LEXIS 988, at *1-3 (Nov. 13, 2009) (denying complainant's motion to compel Columbia Gas to produce "all documents and correspondence of Columbia and Columbia's affiliates, subsidiaries, and parent companies that relate to the sale of Columbia Service Partners (CSP) to the CSP Acquisition Company" as to the "documents not in possession of Columbia" because such request is overbroad, but granting the motion to compel as to the documents in the possession of Columbia) (emphasis added).

Indeed, at a Discovery Hearing in DP&L's prior ESP case, the Attorney Examiners ruled that documents of DP&L's affiliates were not subject to discovery. February 13, 2013 Transcript of January 30, 2013 hearing, p. 145 (Case No. 12-426-EL-SSO) (motion to compel documents was "denied based upon they are seeking discovery from documents in the possession of DP&L's affiliates") (excerpt attached as Exhibit 1).

IEU argues (p. 13) that the fact that Craig Jackson -- a shared employee -- could access the impairment analyses shows that they are within DP&L's custody and control. IEU made exactly that same argument in DP&L's prior ESP case. February 22, 2013 Motion of Industrial Energy Users-Ohio to Compel Discovery Responses from The Dayton Power and Light Company, pp. 10-13 (Case No. 12-426-EL-SSO) (arguing that DPL Inc. documents were

"in DP&L's physical possession . . . because DP&L employees . . . have access to the documents"). At a discovery hearing, the Attorney Examiners squarely rejected that argument:

> "EXAMINER PRICE: Finally, with respect to the documents where the dispute was whether or not the documents are in the possession or control or access of Dayton Power and Light, we find those documents are not discoverable. Documents that Dayton Power and Light employees have access to in their capacity as shared employees are not discoverable and are not within the rightful control or authority of the utility, Dayton Power and Light; therefore, those documents are not discoverable and may be withheld."

March 22, 2013 Transcript of March 7, 2013 hearing, pp. 96-97 (Case No. 12-426-EL-SSO) (excerpt attached as Exhibit 2).

IEU also argues (p. 14) that DP&L has produced DPL Inc. documents in this case. That is simply irrelevant to this motion. Specifically, DP&L's request for a stability charge in this case was, in part, to maintain the financial integrity of DPL Inc. Application, ¶ 12. DPL Inc. has thus consented to the production of some of its documents. However, the impairment documents at issue are AES documents, and (1) AES' financial integrity is not at issue in this case; and (2) AES has not consented to the production of those documents.

IEU also asserts (p. 14) that the documents are DP&L documents because DP&L has disclosed the impairment in SEC filings. The Commission should reject that argument because the fact that DP&L disclosed the impairment in an SEC filing does not change the character of the documents -- the documents are AES documents that are not subject to discovery. DP&L discussed the impairment, as required by law, but that disclosure does not convert the impairment documents into DP&L documents. Indeed, the details in the documents sought by IEU were not disclosed in the SEC filing.

B. PORTIONS OF THE DOCUMENTS ARE PRIVILEGED AND CONTAIN WORK PRODUCT

The impairment analyses contain privileged information. A document is privileged if it "reveal[s], directly or indirectly, the substance of a confidential attorney-client communication." Smithkline Beecham Corp. v. Apotex Corp., 193 F.R.D. 530, 534 (N.D. Ill. 2000). Accord: United States v. Defazio, 899 F.2d 626, 635 (7th Cir. 1990) ("Communications from attorney to client are privileged only if they constitute legal advice, or tend directly or indirectly to reveal the substance of a client confidence.") (emphasis added).

Accordingly, courts have repeatedly held that documents were protected by the attorney-client privilege, even though the documents at issue were not a direct communication between an attorney and a client, when the document in question would reveal the advice of the attorney. Alexander v. Fed. Bur. of Investigation, 186 F.R.D. 154, 161 (D.D.C. 1999) ("'[t]he attorney-client privilege applies to entries in a client's diaries that describe communications from attorneys or are based on such communications'") (alteration in original), overruled on other grounds, 691 F.Supp.2d 182 (D.D.C. 2010) (quoting 24 Wright & Graham, Federal Practice & Procedure § 5491, at 102 (Supp. 1998)) (and cases cited); Kelly v. Ford Motor Co. (In re Ford Motor Co.), 110 F.3d 954, 966 (3d Cir. 1997) (holding that minutes of an advisory board's meetings that reflected attorneys' advice were privileged); Great Plains Mut. Ins. Co. v. Mut. Reinsurance Bureau, 150 F.R.D. 193, 197-98 (D.Kan. 1993) (minutes of board of directors' meeting that included attorneys' advice to board were privileged).

Courts have applied this rule to protect financial documents from disclosure. E.g., Simon v. G.D. Searle & Co., 816 F.2d 397, 401 (8th Cir. 1986). In Simon, the defendant's "risk management department monitor[ed] the company's products liability litigation and analyze[d]

its litigation reserves, apparently utilizing individual case reserve figures determined by the legal department's assessment of litigation expenses." Id. at 399. The court held that the risk management documents -- which were prepared by the risk management department, not the legal department -- would be protected from discovery as they revealed the attorneys' conclusions as to likely case results:

> "Although the risk management documents were not themselves prepared in anticipation of litigation, they may be protected from discovery to the extent that they disclose the individual case reserves calculated by [defendant's] attorneys. The individual case reserve figures reveal the mental impressions, thoughts, and conclusions of an attorney in evaluating a legal claim. By their very nature they are prepared in anticipation of litigation and, consequently, they are protected from discovery as opinion work product."

Id. at 401 (emphasis added).[1]

Other courts have similarly held that documents setting case reserves were protected from discovery because producing them would reveal legal counsel's evaluation of the merits of the case. Certain Underwriters at Lloyds v. Fid. & Cas. Ins. Co., N.D.Ill. No. 89 C 876, 1998 U.S. Dist. LEXIS 3654, at *6 (Mar. 20, 1998) ("We conclude that reserve recommendations, in this case, do reveal attorney mental impressions, thoughts, and conclusions since the reserve figures were calculated only after an attorney acting in his legal capacity carefully determined the merits and value of the underlying case."); Gen. Elec. Capital Corp. v. DIRECTV, Inc., 184 F.R.D. 32, 35-36 (D.Conn. 1998) (quoting Simon, and finding certain case reserve documents to be privileged).

[1] The Simon Court concluded that the specific documents at issue were not protected by the attorney-client privilege, because they aggregated the legal department's opinions about likely liability in many cases into a single figure. Id. at 402. Here, in contrast, DP&L's financial documents are specific to this case, and are thus protected under the rule described in Simon.

IEU argues (p. 18) that the impairment analysis documents were prepared "in the ordinary course of business" and thus are not protected by the attorney/client privilege. That is not the law. As demonstrated above, documents are privileged if producing them would reveal legal advice. Since the impairment analysis documents include privileged advice of counsel, they are protected.

Information in the impairment analyses is also protected by the work product doctrine. The information at issue is opinion work product of DP&L's counsel, and the work product doctrine provides "near absolute protection":

> "¶ 28 Through work-product doctrine jurisprudence, much of which descends from Hickman v. Taylor (1946), 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451, a United States Supreme Court case involving the federal analogue to Civ.R. 26(B)(3), two distinct categories of work product have been identified: ordinary fact work product and opinion work product.
>
> ¶ 29 '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. . . .'
>
> ¶ 30 'The other type of work product is "opinion work product," which reflects the attorney's mental impressions, opinions, conclusions, judgments, or legal theories. . . . Because opinion work product concerns the mental processes of the attorney, not discoverable fact, opinion work product receives near absolute protection. . . .' (Emphasis added.)
>
> * * *
>
> ¶ 32 More recently, the Ohio Supreme Court squarely addressed the standard for disclosure of opinion work product in syllabus law:
>
> ¶ 33 'Attorney work product, including but not limited to mental impressions, theories, and legal conclusions, may be discovered upon a showing of good cause if it is directly at issue in the case,

> the need for the information is compelling, and the evidence cannot be obtained elsewhere.' Squire, Sanders & Dempsey, LLP v. Givaudan Flavors Corp., 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 533, at paragraph two of the syllabus." (Emphasis deleted.)

In re Estate of Hohler v. Hohler, 197 Ohio App.3d 237, 2011-Ohio-5469, 967 N.E.2d 219, ¶ 28-30, 32-33 (7th Dist.) (citations omitted).

The Supreme Court of Ohio's decision in Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp. is illustrative. In that case, SS&D's client had a general counsel, and that general counsel terminated SS&D with respect to a case that SS&D was handling for the client. 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 533, ¶ 6. SS&D sued its former client to recover amounts owed to SS&D for services performed, and the client claimed that it was not obligated to pay SS&D because the client's general counsel had concluded that SS&D had performed inadequately in the underlying litigation. Id. at ¶ 7.

SS&D sought discovery (documents and depositions) from the general counsel of SS&D's former client, and the former client refused to provide that information, claiming that the information was protected by the work product doctrine. Id. at ¶ 8. SS&D moved to compel the production of the information and documents at issue, and the Court described the work product doctrine:

> "[A]ttorney work product, including but not limited to mental impressions, theories, and legal conclusions, may be discovered upon a showing of good cause if it is directly at issue in the case, the need for the information is compelling, and the evidence cannot be obtained elsewhere"

Id. at ¶ 60 (emphasis added).

The Court held that the mental impression of the former client's general counsel satisfied the "directly at issue in the case" criterion because the basis of the former client's defense was that its general counsel had concluded that SS&D had performed inadequately and overcharged for its services. Id. at ¶ 61-62. The Court thus compelled the former client's general counsel to testify and the client to provide documents relating to the value and quality of the legal services performed by SS&D. Id. at ¶ 63-66.

Here, the analysis of DP&L's attorneys that is contained in the impairment documents is opinion work product, because the documents contain the attorneys' analysis of legal issues. Under Squire Sanders & Dempsey, the "good cause" exception would apply only if the mental impressions of DP&L's attorneys are "directly at issue in the case." The mental impressions of DP&L's attorneys are not at issue at all. The issues in this case relate to DP&L's costs and revenues, and the amounts DP&L needs to maintain its financial integrity. Further, IEU does not have a compelling need for the information, as its own lawyers can perform their own legal analysis. The good cause exception of the work product doctrine is thus not applicable.

IEU acknowledges (p. 18 n.45) that portions of the documents that contain privileged or work product information are not subject to discovery, and states that the Commission should review the documents *in camera*. If the Commission were to reject the argument that the documents are not subject to discovery because they belong to DP&L's affiliates, or find that they are not protected by the privilege and work product in total, then DP&L agrees that an *in camera* inspection of them is appropriate to determine which portions would need to be redacted.

C. DP&L HAS AN OBLIGATION TO DELOITTE NOT TO PRODUCE DOCUMENTS PREPARED BY DELOITTE

Several of the impairment analysis documents that IEU seeks were prepared by Deloitte. Those documents state "[t]his report is intended solely for the informational purposes and internal use of AES U.S. Services, LLC, and is not intended to be and should not be used by any other person or entity. No other person or entity is entitled to rely, in any manner or for any purpose, on this report." Those documents further state that "this summary report should not be used for other purposes or distributed, in whole or in part, to third parties without the express knowledge and written consent of Deloitte Advisory." (Emphasis added.) DP&L thus has an independent obligation to Deloitte not to provide the documents to third parties.

Without citing any relevant legal authority, IEU argues (pp. 10-11) that as a matter of public policy, DP&L must produce Deloitte's impairment analysis despite a contractual agreement prohibiting its disclosure without Deloitte's consent. That argument is unsupported by Ohio law.

The Supreme Court of Ohio has held that "[t]he right to contract freely with the expectation that the contract shall endure according to its terms is as fundamental to our society as the right to write and to speak without restraint." Lake Ridge Academy v. Carney, 66 Ohio St.3d 376, 381, 613 N.E.2d 183 (1993) (internal quotation marks and citation omitted). Courts do not lightly disregard contracts on public policy grounds. Royal Idemn. Co. v. Baker Protective Servs., Inc., 33 Ohio App.3d 184, 186, 515 N.E.2d 5 (2nd Dist. 1986) ("Absent some overwhelming public policy such as the concept of unconscionability, which we do not have here, Ohio courts have held the concept of 'freedom of contract' to be fundamental to our society."); Gross v. Campbell, 26 Ohio App. 460, 471, 160 N.E. 511 (7th Dist. 1927) ("The

power of courts to declare a contract void as being against public policy is a delicate and undefined one, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt."). (Internal quotation marks and citation omitted.)

For support, IEU relies on only two distinguishable cases: Svoboda v. Clear Channel Communications, Inc., 6th Dist. Lucas No. L-02-1149, 2003-Ohio-6201, and Teodecki v. Litchfield Twp., 2015-Ohio-2309, 38 N.E.3d 355 (9th Dist.). In Svoboda, the defendants refused to produce salary and personal income information for three of their employees during discovery. Svoboda at ¶ 5. They argued that such information constituted trade secrets pursuant to Ohio Rev. Code § 1333.61. Id. at ¶ 17. To show steps taken to maintain its secrecy, they cited confidentiality terms in their employees' contracts and handbook, which prohibited the disclosure of trade secrets. Id. However, the court ruled that the definition of trade secrets in those terms "[did] not include an employee's compensation," and, therefore, did not show an attempt to maintain the secrecy of that information. Id. Rather than find the terms unenforceable, the court simply found them inapplicable. Id. Thus, it is disingenuous for IEU to argue that Svoboda creates an unfettered discovery right to information subject to confidentiality agreements.

Teodecki is likewise inapplicable. Although the court refused to enforce a confidentiality clause, its rationale was narrowly based on a public office's statutory obligation to release public records under Ohio Rev. Code § 149.43. Id. at ¶ 24. In that case, a township fire chief agreed to resign her position following a report on her compliance with Ohio law. Id. at ¶ 3. Her agreement allegedly contained a confidentiality clause, which prohibited the release of that report. Id. After the township later released that report, she sued for breach of contract. Id. at ¶ 4. The trial court entered summary judgment for the township, and the appellate court

affirmed, refusing to enforce the confidentiality clause because it violated the statutory mandates of the Public Records Act. Id. at ¶ 24, 26. Thus, Teodecki does not stand for IEU's broader proposition that all confidentiality agreements are unenforceable in civil discovery. Rather, that case was specifically limited by the confines of the Public Records Act, which does not apply to DP&L. Thus, the Ninth District found that public policy comes into play only when a statute is directly violated – in that case, it was the Public Records Act. No such statute is implicated in this matter.

D. THE OLDER DOCUMENTS THAT IEU SEEKS ARE NOT RELEVANT

IEU argues (p. 9) that DP&L should be required to produce any impairment analyses as to the plants conducted by DP&L in the last ten years. However, the older impairment analyses (i.e., the ones prior to the analysis underlying the June 30, 2016 SEC disclosure) are simply not relevant to any issue in the case. IEU asserts (p. 9) that those older analyses "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." Yet, DP&L's views years ago as to market conditions are irrelevant at this time, as market conditions have changed drastically over the last ten years. The Commission should thus reject IEU's request for those irrelevant documents.

Respectfully submitted,

/s/Charles J. Faruki
Charles J. Faruki (0010417)
(Counsel of Record)
D. Jeffrey Ireland (0010443)
Jeffrey S. Sharkey (0067892)
FARUKI IRELAND & COX P.L.L.
110 North Main Street, Suite 1600
Dayton, OH 45402
Telephone: (937) 227-3705
Telecopier: (937) 227-3717
Email: cfaruki@ficlaw.com
djireland@ficlaw.com
jsharkey@ficlaw.com

Attorneys for The Dayton Power
and Light Company

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing The Dayton Power and Light Company's Memorandum in Opposition to Industrial Energy Users-Ohio's Motion to Compel Discovery Responses from The Dayton Power and Light Company, Request for Hearing, has been served via electronic mail upon the following counsel of record, this 7th day of September, 2016:

Thomas McNamee
Natalia Messenger
Public Utilities Commission of Ohio
180 East Broad Street, 12th Floor
Columbus, OH 43215
Email:Thomas.McNamee@ohioattorneygeneral.gov
Natalia.Messenger@ ohioattorneygeneral.gov

Attorneys for PUCO Staff

Kimberly W. Bojko
Danielle M. Ghiloni
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, OH 43215
Email: Bojko@carpenterlipps.com
Ghiloni@carpenterlipps.com

Attorneys for The Ohio Manufacturers' Association Energy Group

Kevin R. Schmidt
88 East Broad Street, Suite 1770
Columbus, OH 43215
Email: Schmidt@sppgrp.com

Attorney for The Energy Professionals of Ohio

Frank P. Darr (Counsel of Record)
Matthew R. Pritchard
McNees Wallace & Nurick
21 East State Street, 17th Floor
Columbus, OH 43215
Email: fdarr@mwncmh.com
mpritchard@mwncmh.com

Attorneys for Industrial Energy Users – Ohio

David F. Boehm
Michael L. Kurtz
Kurt J. Boehm
Jody Kyler Cohn
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
Email: dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com

Attorneys for The Ohio Energy Group

Joseph Oliker
IGS Energy
6100 Emerald Parkway
Dublin, OH 43016
Email: joliker@igsenergy.com

Attorney for IGS Energy

Jeffrey W. Mayes
Monitoring Analytics, LLC
2621 Van Buren Avenue, Suite 160
Valley Forge Corporate Center
Eagleville, PA 19403
Email: Jeffrey.mayes@monitoringanalytics.com

Evelyn R. Robinson
PJM Interconnection, LLC
2750 Monroe Blvd
Audubon, PA 19403
Email: evelyn.robinson@pjm.com

Attorney for Monitoring Analytics, LLC as
The Independent Market Monitor for PJM

Trent Dougherty
Ohio Environmental Council
1145 Chesapeake Ave., Suite 1
Columbus, OH 43212-3449
Email: tdougherty@the OEC.org

Attorney for the Ohio Environmental
Council and Environmental Defense Fund

William J. Michael
Kevin F. Moore
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
Email: William.Michael@occ.ohio.gov
Kevin.Moore@occ.ohio.gov

Attorneys for Ohio Consumers' Counsel

Michael D. Dortch
Richard R. Parsons
Kravitz, Brown & Dortch, LLC
65 East State Street, Suite 200
Columbus, OH 43215
Email: mdortch@kravitzllc.com
rparsons@kravitzllc.com

Attorneys for Noble Americas
Energy Solutions LLC

Joel E. Sechler
Carpenter Lipps & Leland
280 N. High St., Suite 1300
Columbus, OH 43215
Email: Sechler@carpenterlipps.com

Gregory J. Poulos
EnerNOC, Inc.
P.O. Box 29492
Columbus, OH 43229
Email: gpoulos@enernoc.com

Attorneys for EnerNOC, Inc.

Ryan P. O'Rourke
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, OH 43215
Email: O'Rourke@carpenterlipps.com

Attorney for The Kroger Company

Colleen Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
P.O. Box 1793
Findlay, OH 45839-1793
Email: cmooney@ohiopartners.org

Attorney for Ohio Partners for Affordable
Energy

Madeline Fleisher
Environmental Law & Policy Center
21 West Broad Street, Suite 500
Columbus, OH 43215
Email: mfleisher@elpc.org

Attorneys for The Environmental Law &
Policy Center

Steven D. Lesser
James F. Lang
N. Trevor Alexander
Calfee, Halter & Griswold LLP
41 South High Street
1200 Huntington Center
Columbus, OH 43215
Email: slesser@calfee.com
jlang@calfee.com
talexander@calfee.com

Attorneys for The City of Dayton and
Honda of America Mfg., Inc.

Michael J. Settineri
Stephen M. Howard
Gretchen L. Petrucci
Ilya Batikov
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
Columbus, OH 43215
Email: mjsettineri@vorys.com
smhoward@vorys.com
glpetrucci@vorys.com
ibatikov@vorys.com

Attorneys for Dynegy Inc. and
PJM Power Providers Group and
The Retail Energy Supply Association

Michelle Grant
Dynegy Inc.
601 Travis Street, Suite 1400
Houston, TX 77002
Email: michelle.d.grant@dynegy.com

Attorneys for Dynegy Inc.

Glen Thomas
1060 First Avenue, Suite 400
King of Prussia, PA 19406
Email: gthomas@gtpowergroup.com

Sharon Theodore
Electric Power Supply Association
1401 New York Ave. NW 11th Floor
Washington, DC
Email: stheodore@epsa.org

Richard C. Sahli
Richard C. Sahli Law Office, LLC
981 Pinewood Lane
Columbus, OH 43230-3662
Email: rsahli@columbus.rr.com

Tony G. Mendoza, Staff Attorney (pro hac vice)
Sierra Club Environmental Law Program
2101 Webster Street, 13th Floor
Oakland, CA 94612
Email: tony.mendoza@sierraclub.org

Attorneys for Sierra Club

Lisa M. Hawrot
Spilman Thomas & Battle, PLLC
Century Centre Building
1233 Main Street, Suite 4000
Wheeling, WV 26003
Email: lhawrot@spilmanlaw.com

Derrick Price Williamson
Spilman Thomas & Battle, PLLC
1100 Bent Creek Blvd., Suite 101
Mechanicsburg, PA 17050
Email: dwilliamson@spilmanlaw.com

Carrie M. Harris
Spilman Thomas & Battle, PLLC
310 First Street, Suite 1100
P.O. Box 90
Roanoke, VA 24002-0090
Email: charris@spilmanlaw.com

Steve W. Chriss
Senior Manager, Energy Regulatory Analysis
Greg Tillman
Senior Manager, Energy Regulatory Analysis
Wal-Mart Stores, Inc.
2001 SE 10th Street
Bentonville, AR 72716-0550
Email: Stephen.Chriss@walmart.com
Greg.Tillman@walmart.com

Attorneys for Wal-Mart Stores East, LP
and Sam's East, Inc.

Laura Chappelle
201 North Washington Square, Suite 910
Lansing, MI 48933
Email: laurac@chappelleconsulting.net

Attorneys for PJM Power Providers Group

Ellis Jacobs
Advocates for Basic Legal Equality, Inc.
130 West Second Street, Suite 700 East
Dayton, OH 45402
Email: ejacobs@ablelaw.org

Attorney for Edgemont Neighborhood Coalition

Amy B. Spiller
Jeanne W. Kingery
Elizabeth H. Watts
Duke-Energy Ohio, Inc.
139 East Fourth Street
1303-Main
Cincinnati, OH 45202
Email: amy.spiller@duke-energy.com
elizabeth.watts@duke-energy.com
jeanne.kingery@duke-energy.com

Attorneys for Duke-Energy Ohio, Inc.

John R. Doll
Matthew T. Crawford
Doll, Jansen & Ford
111 West First Street, Suite 1100
Dayton, OH 45402-1156
Email: jdoll@djflawfirm.com
mcrawford@djflawfirm.com

Attorneys for Utility Workers of
America Local 175

Richard L. Sites
Ohio Hospital Association
155 East Broad Street, 3rd Floor
Columbus, OH 43215-3620
Email: rick.sites@ohiohospitals.org

Matthew W. Warnock
Dylan F. Borchers
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
Email: mwarnock@bricker.com
dborchers@bricker.com

Attorneys for The Ohio Hospital Association

Raymond D. Seiler
Terrence N. O'Donnell
Dickinson Wright PLLC
150 East Gay Street, Suite 2400
Columbus, OH 43215
Email: todollell@dickinsonwright.com
rseiler@dickinsonwright.com

Attorneys for Mid-Atlantic Renewable
Energy Coalition

/s/ Jeffrey S. Sharkey
Jeffrey S. Sharkey

1077248.1

EXHIBIT 1

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

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

- - -

PROCEEDINGS

before Mr. Gregory Price and Mr. Bryce McKenney, Hearing Examiners, at the Public Utilities Commission of Ohio, 180 East Broad Street, Room 11-A, Columbus, Ohio, called at 2:00 p.m. on Wednesday, January 30, 2013

- - -

motions to compel, vis-à-vis OCC, based upon our discussion off the record that OCC should be provided an opportunity to file a memo contra and Dayton should have a chance to respond to the memo contra.

We're going to deny the request for production of documents 1-8 and 1-12 related to communications between the parties regarding the AEP case based on relevance.

We're going to defer ruling on RPD 1-13, communications between OCC and its third-party experts at this time. I believe OCC desires to file a memo contra on that motion to compel.

With respect to OCC's motion to compel, Interrogatories 227, 239, and 255 will be denied based upon attorney-client -- attorney work product. I think those are the ones we've been discussing as the ones involving the NorthBridge materials.

RPD 89 will be denied based upon attorney-client work -- attorney work product. And 255, 260, and 261 will be denied based upon they are seeking discovery from documents in the possession of DP&L's affiliates.

MR. ALEXANDER: Your Honor, just repeat, 89 was denied?

EXAMINER PRICE: RPD 89 was -- OCC RPD 89

EXHIBIT 2

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

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

- - -

PROCEEDINGS

before Mr. Gregory Price and Mr. Bryce McKenney, Hearing Examiners, at the Public Utilities Commission of Ohio, 180 East Broad Street, Room 11-A, Columbus, Ohio, called at 10:00 a.m. on Thursday, March 7, 2013.

- - -

EXAMINER McKENNEY: With regards to OCC 1-13, consistent with the rules provided to us by OCC, we find that all facts and data provided to the experts should be considered as having been considered by the experts and, therefore, discoverable.

As to assumptions provided by OCC to its experts, it is OCC's responsibility to inquire about whether those experts relied upon those assumptions. If the experts did rely upon the assumptions provided to them by OCC, then those assumptions are discoverable.

Other communications with the experts are not discoverable.

With regards to IEU's distribution rate case data, we have reviewed the documents provided to us. Today we find that the documents are all attorney-client and work-product privilege, and, therefore, are not discoverable.

However, the underlying facts and data that led to the documents provided to us today regarding the distribution rate case may not fall under the attorney-client work-product privilege.

EXAMINER PRICE: Finally, with respect to the documents where the dispute was whether or not

the documents are in the possession or control or access of Dayton Power and Light, we find those documents are not discoverable. Documents that Dayton Power and Light employees have access to in their capacity as shared employees are not discoverable and are not within the rightful control or authority of the utility, Dayton Power and Light; therefore, those documents are not discoverable and may be withheld.

MR. SHARKEY: Question, your Honor.

EXAMINER PRICE: Yes.

MR. SHARKEY: I didn't exactly understand your second ruling as to OCC's communications with its experts. Maybe if I see the written record I will, but can I ask a little more information on the scope of that ruling?

EXAMINER PRICE: I think the point is that OCC needs to -- you have asked for all communications. The general rule is communications are not discoverable except with the three exceptions outlined in Ohio Civil Rules 26(D), I think. OCC's duty is to determine whether any of these communications fall within those three exceptions, and to the extent they do, they need to tender those communications to you.

Summary: Memorandum The Dayton Power and Light Company's Memorandum in Opposition to Industrial Energy Users-Ohio's Motion to Compel Discovery Responses from The Dayton Power and Light Company - Request for Hearing electronically filed by Mr. Charles J. Faruki on behalf of The Dayton Power and Light Company