

**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 REPLY TO THE DAYTON POWER AND LIGHT
COMPANY'S MEMORANDUM IN OPPOSITION TO DISCOVERY RESPONSES FROM
THE DAYTON POWER AND LIGHT COMPANY, REQUEST FOR HEARING**

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ATTORNEYS FOR INDUSTRIAL ENERGY USERS-OHIO

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Industrial Energy Users-Ohio (“IEU-Ohio”) has served discovery on The Dayton Power and Light Company (“DP&L”) seeking impairment analyses from DP&L that contain projections of market prices and projections of revenue for its generation plants. DP&L has acknowledged that there are several documents responsive to IEU-Ohio’s discovery request, but claims it does not have possession of the documents to produce them. It is IEU-Ohio’s understanding that the responsive documents were created by either AES Corporation (“AES”) shared service employees or an outside consultant, Deloitte, and that all of the responsive documents are physically located at AES. However, these analyses were created for DP&L and were paid for by DP&L and therefore are within DP&L’s control.

DP&L also claims that it should not have to produce any of the impairment analyses because only the most recent one is relevant, the documents created by Deloitte contain provisions that restrict their use and disclosure, and the documents contain privileged information. As demonstrated in IEU-Ohio's Motion to Compel,¹ parties cannot by contract restrict third parties', such as IEU-Ohio, access to documents through the discovery process. Furthermore, based on the assertions in DP&L's Memo Contra,² it appears that any claim to privilege has been waived.

As discussed in additional detail below, the Public Utilities Commission of Ohio ("Commission") should grant IEU-Ohio's Motion to Compel.

I. ARGUMENT

A. The requested impairment analyses are within the proper scope of discovery

The results of the most recent impairment analysis demonstrate that projections required under accounting rules and reported to the Securities and Exchange Commission ("SEC") differ significantly from the projections DP&L has presented in its prefiled direct testimony in support of the Reliable Energy Rider ("RER"). DP&L does not dispute that its most recent internal impairment analysis is relevant and within the proper scope of discovery.

¹ Industrial Energy Users-Ohio's Motion to Compel Discovery Responses from The Dayton Power and Light Company and Memorandum in Support (Aug. 30, 2016) ("IEU-Ohio Motion to Compel").

² 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 (Sept. 7, 2016) ("DP&L Memo Contra").

As to prior impairment analyses, DP&L argues that 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.”³ DP&L is incorrect.

The prior impairment analyses may shed light on DP&L’s ability to predict market prices over an extended period of time. The RER proposal is for a 10-year term. DP&L relies on 10-year projections of market prices to predict that over its 10-year life the RER proposal will result in a net credit for customers. Thus, at issue in the case is the potential range of error in the market price forecasts that drive the RER projections.

Furthermore, the prior analyses may shed light on the prudence of DP&L’s prior and proposed actions in light of DP&L’s proposal to shift future risk as to the operating performance and costs of the plants to customers via the RER.

In sum, the impairment analyses IEU-Ohio seeks are reasonably calculated to lead to the discovery of admissible evidence.

B. The documents are within DP&L’s possession, custody, or control

DP&L claims that the responsive impairment analysis documents are in the possession of AES and therefore beyond the reach of IEU-Ohio’s discovery requests. In response to IEU-Ohio’s discovery, however, DP&L acknowledged that DP&L paid for the impairment analysis performed by Deloitte.⁴ Based on communication with DP&L’s counsel, IEU-Ohio believes the Deloitte documents relate to at least the most recent

³ DP&L Memo Contra at 11.

⁴ DP&L objected to responding to IEU-Ohio’s INT 6-12 in which IEU-Ohio requested DP&L to identify whether DP&L was billed for any of the impairment analysis. Through efforts to resolve that discovery issue, DP&L provided an informal supplemental response indicating that DP&L paid for the Deloitte analysis. Attachment A. IEU-Ohio is still working with DP&L to obtain a formal supplemental discovery response and a response to whether DP&L paid for or was allocated the costs to create the other impairment analyses and related documents DP&L had identified as responsive to IEU-Ohio INT 4-19 and RPD 4-1.

impairment analysis. Documents are properly discoverable if in a party's possession, custody, or control, where control turns on the legal right to obtain a document on demand.⁵ The fact that DP&L paid for the analysis yields but one conclusion; it has a legal right to the document. Thus, the impairment analyses paid for by DP&L are properly discoverable.

C. Private contracts do not trump the discovery process

The absurdity of DP&L's contention that the Deloitte documents are not subject to discovery because DP&L and Deloitte agreed as much needs little attention. If the Deloitte documents contain information that meets the definition of trade secrets, they may nonetheless be discovered under a protective agreement, such as that which IEU-Ohio has with DP&L in this case. Any attempt by private parties to rely on contracts to shield certain information in their possession from the discovery process renders the contractual provision void under Ohio law.⁶

Separately and apart from IEU-Ohio's right to obtain the impairment analyses under the Commission's discovery rules, the impairment analyses performed by AES or Deloitte are available to the Commission under both state and federal law. R.C. 4928.18 provides that the Commission may access the books and records of any affiliate of DP&L. At the federal level, the Energy Policy Act of 2005 ("EPAAct") provides that any state commission with jurisdiction over a public utility in a holding company system may access the books and records of the holding company and any associate company that are necessary for the state commission to reasonably discharge its

⁵ IEU-Ohio Motion to Compel at 13 (*citing* Anderson's Ohio Civil Rules Practice with Forms (2015)).

⁶ *Id.* at 10-11.

duties.⁷ Accordingly, under both state and federal law, the impairment analyses in AES' possession that relate to the value of generation plants recorded on DP&L's books and for which DP&L seeks cost recovery in this proceeding through the RER must be turned over to the Commission upon request.

D. The market projections in the impairment analyses are not subject to any claim of privilege, and any remaining information that might have been privileged in the documents has likely been waived

Finally, DP&L claims that the impairment analyses should not be ordered to be produced because they contain privileged information. In support of this claim, DP&L asserts that "the impairment analysis documents include privileged advice of counsel" and that "the documents contain the attorneys' analysis of legal issues."⁸ DP&L bears the burden of demonstrating that the documents contain privileged information and these two blanket assertions fall well short of an affirmative demonstration that there is privileged information in the documents.⁹

Moreover, an impairment analysis is unrelated to legal advice protected by the attorney-client privilege or an attorney's work-product protected by the work-product privilege. An impairment analysis is required in the ordinary course of business pursuant to accounting rules so that investors and regulators can ensure that a company's books accurately reflect the value of certain assets. The analysis itself is supposed to reflect the market value of certain assets, and in the context of the valuation of DP&L's generation plants include assumptions about future market prices

⁷ 42 U.S.C. 16453 Sec. 1265.

⁸ DP&L Memo Contra at 6, 8.

⁹ *MA Equip. Leasing I, LLC v. Tilton*, 2012-Ohio-4668, 980 N.E.2d 1072, ¶ 21 (Ohio App. Ct. 10th District) ("The trial court was correct that the burden of showing that evidence ought to be excluded under the attorney-client privilege rests upon the party asserting the privilege.").

and future revenue for each plant. Because the impairment analyses are required in the ordinary course of business, they, by definition, cannot be attorney work-product prepared in anticipation of litigation.¹⁰

Additionally, the projections of market prices and projections of market revenue for DP&L's generation plants are the product of experts' analyses of the plants' operation in future market conditions. These projections have nothing to do with legal advice.

Thus, the core of the impairment analysis documents is not subject to the attorney-client or work-product privileges. Whether the documents contain any recitation of other information that might fall under one of the privileges is not clear because DP&L has failed to meet its burden of demonstrating specifically what information in the responsive documents should be treated as privileged. Moreover, such a conclusion would require an *in camera* review by the Attorney Examiners. But, to the extent that there is privileged information in the impairment analysis documents that does not render the entire impairment analysis documents not subject to discovery, the appropriate course of action is to redact the privileged information.

Furthermore, to the extent the impairment analysis documents contain information that might have fallen under the attorney-client or work-product privileges, the claim of privilege has likely been waived. Disclosures of privileged information to third parties generally waives the claim of privilege.¹¹ Disclosures between corporate affiliates can also waive the privilege.

¹⁰ *DeMarco v. Allstate Ins. Co.*, 2014-Ohio-933 ¶ 23 (10th Dist. Ct. App.).

¹¹ IEU-Ohio Motion to Compel at 17-18 (*quoting MA Equip.*, 2012-Ohio-4668 ¶ 20 and *citing Mid-American Natl. Bank and Trust Co. v. Cincinnati Ins. Co.*, 74 Ohio App.3d, 599 N.E.2d 699, 704 (6th Dist. 1991)).

The United States Third Circuit Court of Appeals (“Third Circuit”) recently provided an in-depth analysis of the application of the waiver of the attorney-client privilege in scenarios that involve corporate parents, subsidiaries, and affiliates.¹² Noting the “conceptual muddle” of the application of the attorney-client privilege in the context, the Third Circuit reviewed the most cited reasons by courts for not construing the sharing of information within the corporate family as waiver of the privilege; single entity, community-of-interest, and joint client.¹³

Initially, the Third Circuit rejected the notion that the entire corporate family should be treated as a single entity for purposes of the attorney-client privilege.¹⁴ “[T]reating members of a corporate family as one client fails to respect the corporate form [and the] bedrock principle of corporate law . . . that courts must respect entity separateness unless doing so would work inordinate inequity.”¹⁵

Turning to multiple client scenarios, the Third Circuit next reviewed whether the community-of-interest (or common-interest) doctrine was applicable. The Third Circuit noted that “to be eligible for continued protection, the communication must be shared with the attorney of the member of the community of interest.”¹⁶ The community-of-interest doctrine does not apply where the information is shared with non-attorneys.¹⁷

¹² *Teleglobe Communs. Corp. v. BCE, Inc.*, 493 F.3d 345 (2007).

¹³ *MA Equip.*, 2012-Ohio-4668 ¶ 25 (citing *Teleglobe*, 493 F.3d at 361-70).

¹⁴ *Teleglobe*, 493 F.3d at 371.

¹⁵ *Id.*

¹⁶ *Id.* at 364.

¹⁷ *Id.* at 364-365 (“Because the common-interest privilege is an exception to the disclosure rule, which exists to prevent abuse, the privilege should not be used as a *post hoc* justification for a client’s impermissible disclosures. The attorney-sharing requirement helps prevent abuse by ensuring that the common-interest privilege only supplants the disclosure rule when attorneys, not clients, decide to share information in order to coordinate legal strategies.”); *id.* at 372 (“Moreover, the community-of-interest

Additionally, “all members of the community of interest must share a common legal interest in the shared communication.”¹⁸ The community-of-interest must be affirmatively demonstrated as “it assumes too much,” the Third Circuit found, “to think that members of a corporate family necessarily have a substantially similar *legal* interest . . . in *all* of each other’s communications.”¹⁹

Eliminating the single client rationale, and finding that community-of-interest situation inapplicable to most disputes, the Third Circuit concluded that “[i]t makes most sense, then, to rest not applying the disclosure rule to many intra-group disclosures on the ground that the members of the corporate family are joint clients.”²⁰ Under the joint client exception, privilege is not waived where separate clients share a common legal interest and are represented by a common attorney.²¹

The Ohio Eighth and Tenth District Courts of Appeals have both adopted the rationale set forth in *Teleglobe*,²² with the Tenth District Court of Appeals (“Tenth District”) noting that there is no material difference between Ohio’s attorney-client privilege and the federal attorney-client privilege.²³

Penning the decision for the Tenth District in *MA Equipment Leasing I LLC v. Tilton*, now Ohio Supreme Court Justice French noted that separate corporate entities

privilege only applies when those separate attorneys disclose information to one another, not when parties communicate directly.”).

¹⁸ *Id.* at 364

¹⁹ *Id.* at 372 (emphasis in original).

²⁰ *Id.*

²¹ *Id.* at 362, 369; *MA Equip.*, 2012-Ohio-4668 at ¶ 30.

²² *Galati v. Pettorini*, 2015-Ohio-1305 at ¶ 36 (Ohio Ct. App. 8th Dist.) (“While we recognize that *In re Teleglobe* is not binding on this court, both the Federal Sixth Circuit and Ohio’s Tenth Appellate District have cited *In re Teleglobe* with approval.... We find *In re Teleglobe* to be instructive in this case as well.”); *MA Equip.*, 2012-Ohio-4668 at ¶ 21-42.

²³ *MA Equip.*, 2012-Ohio-4668 at ¶ 20.

within the corporate family “do not constitute a single client” for purposes of the attorney-client privilege.²⁴ However, the Tenth District concluded that waiver of the privilege would not apply if the companies could demonstrate a joint-client relationship existed.²⁵

The Tenth District then reviewed whether appellants had demonstrated that both corporate entities were represented by the same counsel and that they had a common legal interest.²⁶ Applying the law to the facts, the Tenth District determined that the appellants had failed to demonstrate that its attorney was also engaged as an attorney for the subsidiary company.²⁷ The Tenth District also upheld the trial court’s determination that “corporate affiliation does not, as a matter of law, establish either a community of interest or that the affiliates have a substantially similar legal interest.”²⁸ Finally, the Tenth District rejected appellant’s argument that the trial court’s ruling would limit “the ability of corporate parents to engage in privileged communications with outside counsel for a subsidiary.”²⁹ The court found that the argument was circular and blurred the distinction between single-client, joint-client, and community-of-interest rationales.³⁰

²⁴ *Id.* at ¶ 34.

²⁵ *Id.*

²⁶ *Id.* at ¶¶ 37, 40.

²⁷ *Id.* at ¶ 40.

²⁸ *Id.* at ¶ 41.

²⁹ *Id.* at ¶ 36.

³⁰ *Id.*

Turning to the facts in this proceeding, it is apparent that the community-of-interest doctrine is inapplicable. DP&L claims in its Memo Contra that the privileged information relates to its attorney's legal advice and mental impressions.³¹ This purported legal advice and the mental impressions were then provided to employees engaged in accounting activities that relied on the impairment analysis documents to prepare and file the SEC Form 10-Q in which DP&L acknowledged the impairments. Because the purported privileged information was shared with non-attorneys, the community-of-interest doctrine is inapplicable.

There is also no demonstration in DP&L's Memo Contra that its attorneys (that provided the purported privileged information contained in the impairment analyses) are also engaged as attorneys for each of the corporate entities that have seen the purported privileged information. DP&L also acknowledges in its Memo Contra that its attorneys' purported privileged information is contained in the impairment analysis documents that reside in AES' possession.³² Because the information DP&L purports is privileged has been provided to another party, *i.e.* AES, at the very least DP&L must demonstrate that its attorneys have also been engaged by AES in the same matter.

Accordingly, the information contained in the impairment analysis documents is either not the type of information covered by the attorney-client or work-product privileges, or, if it had been subject to such a privilege has likely been waived by DP&L's voluntary disclosure of the privileged information to another party.

³¹ DP&L Memo Contra at 8 ("Here, the analysis of DP&L's attorneys that is contained in the impairment documents" is privileged).

³² See DP&L Memo Contra at 1 ("The documents at issue are AES documents"); *id.* at 3 ("the impairment documents at issue are AES documents . . . [and] AES has not consented to the production of those documents.")

II. CONCLUSION

As discussed above, the documents IEU-Ohio seeks in INT 4-19 and RPD 4-1 are within DP&L's possession, custody, or control. The information is relevant and reasonably calculated to lead to the discovery of relevant information and there is no justifiable basis for prohibiting the discovery of the information. Accordingly, the Commission should grant IEU-Ohio's Motion to Compel.

Respectfully submitted,

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Cc: Frank Darr; Hollon, Christopher C.
Subject: RE: DP&L's Incomplete Discovery Responses to IEU-Ohio INT 6-12 and 6-13 [IWOV-DMS.FID92429]

Matt: Yes, the costs of Deloitte's impairment analysis were allocated to DP&L. Jeff.

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Cc: Frank Darr
Subject: DP&L's Incomplete Discovery Responses to IEU-Ohio INT 6-12 and 6-13

Jeff,

Under Commission rules, I am pursuing efforts to resolve a discovery dispute concerning DP&L's recent responses to IEU-Ohio's Sixth Set of discovery. Because DP&L's responses to Interrogatories INT 6-12 and 6-13 are incomplete based on objections that are without merit, I am requesting that you provide complete answers to those interrogatories. I reserve the right to challenge other interrogatories in this set that are not addressed in this email.

IEU-Ohio INT 6-12 and 6-13 request DP&L to identify whether DP&L (INT 6-12) or DPL Inc. (INT 6-13) was billed or allocated any costs associated with the impairment analyses conducted over the past 10 years with regard to the Stuart, Zimmer, Conesville, Miami Fort, Killen, Kyger Creek, or Clifty Creek plants. DP&L provided 6 general objections to INT 6-12: relevance, unduly burdensome, privileged and work product, proprietary, inspection of business records, and vague or undefined. DP&L provided 7 general objections to INT 6-13: relevance, unduly burdensome, privileged and work product, proprietary, inspection of business records, vague or undefined, and possession of DP&L's unregulated affiliate.

IEU-Ohio does not believe DP&L's objections have any merit.

- **Relevance:** DP&L's most recent impairment analysis (the results of which were made public on June 30, 2016 in the SEC 10-Q filing) is relevant as it is likely to shed light on the inputs to DP&L's proposed RER on both the cost and revenue side of the equation. Mr. Jackson has responded to IEU-Ohio's other discovery responses in IEU-Ohio's Sixth Set and acknowledged the relevancy of the impairment analysis with respect to the RER. (See DP&L's response to IEU-Ohio INT 6-1 and 6-2.) The other impairment analyses conducted over the last 10 years are also relevant as they may shed light on other assumptions DP&L has made in the cost and revenue sides of the RER calculation, namely the projection of market revenue that drives the projected RER revenue requirements.

Further, the scope of discovery is not limited to only evidence that may be admitted at hearing because it is relevant. The scope of discovery also includes information that is sought if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Additionally, the discovery rules provide that a party may require production of that are in the possession, custody, or control of a party upon whom a request is made. To date, DP&L has refused to provide impairment analysis on the ground that it lacks possession, custody or control of these documents. Payment is an indicator of possession, custody or control of the documents under Ohio case law. Thus, under the Commission's discovery rules, IEU-Ohio is seeking information that could lead to the discovery of relevant evidence. Your objection based on lack of relevance, therefore, is without merit.

- **Unduly burdensome:** IEU-Ohio does not believe that IEU-Ohio INT 6-12 or 6-13 which solicit a yes or no response amount to an unduly burdensome request. Furthermore, there is nothing to indicate that if DP&L's employees did not know the answer to this question off the top of their heads that they would not be able to easily locate the answer.
- **Privilege or work product:** Because IEU-Ohio only seeks in INT 6-12 and 6-13 a yes or no response as to whether certain costs were billed to or allocated to DP&L, the information is of an accounting nature and is entirely unrelated to legal advice or an attorney's work product.
- **Proprietary:** IEU-Ohio does not believe a yes or no response as to whether DP&L or DPL Inc. incurred costs associated with conducting impairment analyses required by accounting rules, where DP&L and DPL Inc. have both publicly announced that they have conducted such analyses and taken impairments likely gives rise to any confidential information. With that said, IEU-Ohio has a protective agreement with DP&L and would treat any information designed as confidential in accordance with the protective agreement. Furthermore, the nondisclosure restriction in the contract with Deloitte is not applicable here as these two requests do not seek the impairment analyses themselves, only whether DP&L or DPL Inc. incurred costs associated with the impairment analyses.
- **Inspection of business record:** DP&L's description of this objection acknowledges that the objection requires DP&L to "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." Furthermore, DP&L acknowledges that this objection is only valid where the burden of deriving the answer is the same for DP&L as it is for IEU-Ohio. Because IEU-Ohio only solicits a yes or no response in these interrogatories, the burden on IEU-Ohio to familiarize itself with all of DP&L's internal records to identify the result is significantly greater than DP&L's burden. In any event, DP&L has neither specified the documents from which IEU-Ohio may derive the information nor indicated when IEU-Ohio would have the opportunity to examine and inspect such records.
- **Vague or undefined:** I do not understand what portion of the interrogatories are vague or defined, IEU-Ohio is simply seeking a yes or no response as to whether DP&L was ultimately held responsible for the costs of the impairment analysis. I would be happy, however, to clarify any portion of the interrogatory that DP&L does not understand.
- **Possession of unregulated affiliate:** Although DP&L only made this objection as to IEU-Ohio INT 6-13, it is IEU-Ohio's position that the requested information is available to DP&L as provided by Rule 4901-1-19. Possession of an unregulated affiliate is not a responsive objection as the interrogatory does not seek production of any documents. If DP&L or its agents know the answer to the interrogatory they must provide a proper response.

Given the current procedural schedule and the fact that IEU-Ohio only seeks a yes or no response in these interrogatories, I would ask that DP&L supplement its response to these two discovery requests, providing a yes or no response to both INT 6-12 and INT 6-13, no later than 5:30 p.m. on

Friday September 9, 2016. I am also happy to clarify any portion of INT 6-12 or 6-13 that DP&L found confusing. If the matter is not resolved by 5:30 p.m. on Friday September 9, 2016, IEU-Ohio may move to compel responses to these two discovery requests.

If you have any questions, please contact me.

Matt 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 Reply to 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* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 12th day of September 2016, *via* electronic transmission.

/s/ Matthew R. Pritchard

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Summary: Reply of IEU-Ohio to DP&L's Memorandum in Opposition to Motion to Compel Discovery Responses electronically filed by Mr. Matthew R. Pritchard on behalf of Industrial Energy Users-Ohio