

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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

**MEMORANDUM OF THE DAYTON POWER AND LIGHT COMPANY IN
REPLY TO MEMORANDUM CONTRA DAYTON POWER & LIGHT MOTION FOR
PROTECTIVE ORDER BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

The Motion for Protective Order filed by The Dayton Power and Light Company ("DP&L") presents a simple issue -- can DP&L file under seal with the Commission certain information that is confidential, competitively sensitive, and trade secret information ("Confidential Information")?¹ The answer is yes. Contrary to the Office of the Ohio

¹ The Confidential Information is included in the testimony and exhibits of DP&L witnesses Craig Jackson, Aldyn Hoekstra and William Chambers, which was filed with DP&L's ESP application on Oct. 5, 2012.

Consumers' Counsel's ("OCC") contention,² the Confidential Information has significant economic value and DP&L has taken significant efforts to maintain the secrecy of the Confidential Information. Disclosure of the Confidential Information to the general public would provide DP&L's competitors with an unfair competitive advantage, threaten the financial integrity of DP&L, and harm DP&L's ability to provide service to the public. As shown below, these factors outweigh any claimed interest that the public and DP&L's competitors may have in viewing the Confidential Information.³ Further, the public disclosure of this information will do nothing to further a fair and reasonable resolution of this case. The OCC, as a signatory to a stipulated protective agreement with DP&L, already has access to the redacted material. Public disclosure is unnecessary, and it will *only* serve to cause the harm described below.

OCC evidently does not understand that companies need to prevent competitors from seeing information that could give the competitors an edge. OCC ought not to impede competition by forcing DP&L to disclose business data that is necessary to keep confidential to enable it to compete.

II. DESCRIPTION OF CONFIDENTIAL INFORMATION

The Confidential Information includes certain information relating to DP&L's actual and projected costs, pricing, revenues, profits, return on equity, and shopping rates. Specifically, the "Confidential Information" consists of the following:

² Memorandum Contra Dayton Power and Light Motion for Protective Order by the Office of the Ohio Consumers' Counsel ("Memorandum Contra"), pp. 1-2.

³ As noted in DP&L's Memorandum in Support of Motion for Protective Order (p. 1), the Commission (and its Staff) have full access to the Confidential Information in order to fulfill its statutory obligations. Further, only those portions of the ESP application as are essential to prevent disclosure of Confidential Information were redacted from the publically-filed documents. Id.

1. *Craig Jackson Testimony (in part), and Exhibits CLJ-1 (in part), CLJ-2, CLJ-3 (in part), and CLJ-4 (in part):* The redacted portions of these documents contain DP&L's projected financial statements (including revenues and profits), forecasted return on equity, and projected cost of debt.
2. *Aldyn Hoekstra Testimony (in part):* The redacted portions of these documents contain DP&L's actual and projected switching rates and their impact in DP&L's service territory.
3. *William Chambers Testimony (in part), and Exhibits WJC-1 (in part), WJC-1.A to 1.D (in part), WJC-2 (in part), WJC-2.A to 2.C (in part), WJC-3 (in part), WJC-3.A to 3.D (in part), WJC-4 (in part), WJC-4.A to 4.D (in part), WJC-5 (in part), WJC-5.A to 5.D (in part), WJC-6.A to 6.F (in part), WJC-7.A to 7.B (in part), and WJC-8 (in part):* The redacted portions of these documents contain DP&L's projected return on equity under the new ESP application, projected revenues and profits, and other confidential financial information relating to DP&L's business plans and operations.

III. THE INFORMATION IS CONFIDENTIAL AND PROPRIETARY

The Confidential Information is confidential, proprietary and trade secret information. Indeed, the Confidential Information derives its economic value from the fact that it is not known to persons outside DP&L who would obtain significant economic value from its disclosure.

In light of the confidential and proprietary nature of the information, DP&L has taken reasonable steps to ensure the confidentiality of this information. Among the measures taken to limit access to the Confidential Information and related supporting documents, DP&L has: (1) kept the documents in files that are designated as "Confidential;" (2) segregated the documents from DP&L's general files in a secure location at the Company; (3) made the documents available only to DP&L's executive and financial planning teams on a need to access

basis; and (4) entered into confidentiality agreements with persons outside DP&L who are afforded access for legitimate purposes (e.g., discovery requests served on DP&L during the course of this case).

The Confidential Information included in the testimony and exhibits of DP&L witnesses Craig Jackson, Aldyn Hoekstra and William Chambers consists of actual and projected financial data relating to revenues, profits, return on equity, cost of debt, and switching rates. OCC argues that this information should not be protected because, OCC speculates, it consists of "just highly speculative financial projections." Memorandum Contra, p. 17.

OCC's theory is misplaced for two reasons. First, the Confidential Information (which includes financial forecasts and projections) is precisely the type of proprietary and competitively sensitive information that the Commission has consistently protected from public disclosure. In the Matter of the Application of Stream Ohio Gas and Electric, LLC, PUCO Case No. 07-1283-GA-CRS, 2012 Ohio PUC LEXIS 143, *2-3 (February 14, 2012) (granting motion for protective order relating to applicant's financing structure; accepting applicant's position that "the Commission has consistently protected financial documents such as financial statements, financial arrangements, and forecasted financial statements because they constitute trade secret information"); In the Matter of the Application of Hog Creek Wind Farm, LLC, Ohio, PUCO Case No. 11-5542-EL-BGA, 2011 Ohio PUC LEXIS 1268, at *5-7 (November 28, 2011) (granting motion for protective order for financial information that included "estimated capital and intangible costs; average estimate costs for the applicant's similar facilities; present worth and annualized capital costs; operation and maintenance (O&M) costs; present worth and annualized O&M costs; and the estimated monthly loss due to one month's delay in construction"); In the Matter of the Application of Constellation New Energy -- Gas Division,

LLC, PUCO Case No. 09-459-GA-CRS, 2011 Ohio PUC LEXIS 851, at *1, *5 (July 7, 2011) (granting motion for protective order for "applicant's forecasted financial statements"); In the Matter of the Application of Priority Power Management LLC, PUCO Case No. 11-1420-EL-AGG, 2011 Ohio PUC LEXIS 540, at *1, *4-5 (April 29, 2011) (granting motion for protective order for applicant's "2009 and 2010 financial statements (exhibit C-3) and 2011 and 2012 forecasted financial statements (exhibit C-5)").

The Commission's rulings that financial information constitutes a protectable trade secret is consistent with the decisions of Ohio courts. Kenker Box Co. v. Riemeier Lumber Co. (Dec. 29, 2000), Hamilton App. Nos. C-990803, C-990824, 2000 Ohio App. LEXIS 6198, at *10 ("A company's determination of its costs, overhead and volume of sales, and particularly its calculation of profit margins on customers' purchases may be the kind of information that the trade secret statute seeks to protect."); Alpha Benefits Agency, Inc. v. King Ins. Agency, Inc. (Cuyahoga Cty. 1999), 134 Ohio App. 3d 673, 683 (holding that trial court should have ordered plaintiff to produce its "profitability information" to defendant subject to a protective order); Vanguard Transportation Systems v. Edwards Transfer & Storage Co. (Franklin Cty. 1996), 109 Ohio App. 3d 786, 789-90 (affirming trial court order that held that various information including "corporate financial information" constituted a "trade secret").

Second, the projections and forecasts contained in the Confidential Information are not "highly speculative" as the OCC asserts. Memorandum Contra, p. 17. On the contrary, DP&L's projections and forecasts are the work of in-house and outside experts who expended many hours and relied on the most accurate up-to-date information available at the time that DP&L filed its ESP application. OCC's attempt to dismiss the significant time, resources, and

expertise that DP&L devoted to preparing its financial projections and forecasts is misleading, inaccurate, and pure speculation.

IV. DISCLOSURE OF CONFIDENTIAL INFORMATION WILL RESULT IN SIGNIFICANT HARM TO DP&L AND ITS CUSTOMERS

The Confidential Information is the product of original research and development and is kept confidential by DP&L, resulting in retained independent economic value to DP&L. It would be costly and time-consuming for third parties to replicate the Confidential Information on their own. In sum, if disclosed to competitors or otherwise made publicly available, the Confidential Information would provide an unfair competitive advantage to DP&L's competitors, which would harm the financial integrity of DP&L and impair its ability to provide services to the public. These factors outweigh any supposed interest that the public may have in viewing this information.

Specifically, the public disclosure of the Confidential Information would result in the following harm to DP&L and the public:

1. With respect to the *Jackson Testimony and Exhibits* (Section II.1. above) and *Chambers Testimony and Exhibits* (Section II.3. above): Customers and competitors would be able to replicate DP&L's projected expenditures, costs, profit margins, and floor pricing at little or no cost. The disclosure of that information would harm DP&L in future negotiations, and thereby inhibit DP&L's ability to negotiate, as both a seller and buyer, the best price possible for its customers and shareholders; and

2. With respect to the *Hoekstra Testimony* (Section II.2. above) and *Chambers Testimony and Exhibits* (Section II.3. above): The electric generation and distribution market in Ohio is extremely competitive. Access to DP&L's actual and projected switching rates and projected return on equity under the new ESP application would allow competitors to determine DP&L's business and marketing plans. In competing with DP&L, other utilities would understand better the company's financial goals and expectations, which any competitor would like to know. This information would put DP&L at an unfair competitive disadvantage that would disadvantage DP&L in making competitive decisions because DP&L's competitors would know its anticipated financial condition, and that would impair its financial integrity.

V. THE INFORMATION THAT DP&L SEEKS TO PROTECT HAS NOT BEEN PUBLICLY DISCLOSED PREVIOUSLY

OCC asserts that DP&L previously disclosed certain portions of the Confidential Information in the (now) withdrawn MRO case. Memorandum Contra, pp. 15-17. This statement is simply untrue. OCC concedes that the redacted Hoekstra Exhibits in the ESP application were not filed in the MRO case, and that William Chambers did not offer testimony in the MRO case. *Id.* at 16-17. Moreover, the Confidential Information that DP&L seeks to protect in the ESP case is different from the confidential information disclosed by DP&L in the MRO application and related settlement discussions. They are simply two different filings made under different statutory provisions, with different considerations taken into account in developing the filings. The newly developed Confidential Information contained in DP&L's ESP

application is based on current assumptions and projections than figures disclosed in DP&L's MRO application. DP&L should not be prejudiced from protecting newly developed data and information.

OCC also argues that similar information has been disclosed by other utilities in other ratemaking cases. Id. at 18-19. Each public utility makes its own independent determination as to which information it considers confidential and proprietary. The fact that other unrelated utilities in other unrelated ratemaking cases have disclosed pieces of their financial information is irrelevant to the facts of this case and to the issues presented by DP&L's Motion for Protective Order. As shown in the Motion and this Reply, the Confidential Information that DP&L seeks to protect has significant independent economic value to DP&L, and its disclosure would harm DP&L's competitive advantage, financial integrity, and ability to serve the public.

VI. CONCLUSION

DP&L is willing to compete head-to-head with any competitor. DP&L only asks that it have the opportunity to compete on a level playing field, and not be unfairly prejudiced by unnecessarily forfeiting its competitive advantages through the ratemaking process. For these foregoing reasons, DP&L requests that the Commission grant its Motion for Protective Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum of The Dayton Power and Light Company in Reply to Memorandum Contra Dayton Power and Light Motion for Protective Order by The Office of the Ohio Consumers' Counsel has been served via electronic mail upon the following counsel of record, this 29th day of October, 2012.

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