

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION OF THE DAYTON POWER AND LIGHT COMPANY D/B/A AES OHIO FOR PROTECTIVE ORDER

Pursuant to Ohio Adm.Code 4901-1-24(D), The Dayton Power and Light Company d/b/a AES Ohio ("AES Ohio") moves for entry of a Protective Order to exempt from public disclosure certain information as confidential, proprietary, and competitively sensitive trade secret information. Specifically, AES Ohio requests that certain confidential information relating to financial data contained in AES Ohio's Reply Brief quoted from Confidential Exhibit 8 to the Direct Testimony of David Crusey in this proceeding be exempt from public disclosure as confidential, proprietary, and competitively sensitive trade secret information ("Confidential Information"). AES Ohio and OVEC would be prejudiced if the information was released publicly, and that it is maintained as confidential by AES Ohio and OVEC. The Confidential Information contains confidential financial information.

Section 4901-1-24(D) of the Ohio Administrative Code provides that the Commission may issue an order which is necessary to protect the confidentiality of information contained in documents filed with the Commission's Docketing Division to the extent that state or federal law prohibits the release of the information, and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code. *Accord:* R.C. 4905.07 (providing that "[e]xcept as provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX [49] of the Revised Code, all facts and information in the possession of the public utilities commission shall be public").

The release of trade secret information by the Commission is prohibited by state law. *In the Matter of the Joint Application of The Dayton Power and Light Company for Integration of an Energy Efficiency or Peak-Demand Reduction Program with Honda of Am.*

Mfg., Inc., Pub. Util. Comm. No. 10-2205-EL-EEC, 2011 Ohio PUC LEXIS 1313, at *3 (Dec. 7, 2011) (Finding and Order) ("Section 149.43, Revised Code, specifies that the term 'public records' excludes information which, under state or federal law, may not be released. The Ohio Supreme Court has clarified that the 'state or federal law' exemption is intended to cover trade secrets.") (citing *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000)). The definition of a "trade secret" includes "any business information or plans [and] financial information." R.C. 1333.61(D).

"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." *Kenker Box Co. v. Riemeier Lumber Co.*, 1st Dist. Hamilton Nos. C-990803 and C-990824, 2000 Ohio App. LEXIS 6198, at *10 (Dec. 29, 2000). *Accord: Alpha Benefits Agency, Inc. v. King Ins. Agency, Inc.*, 134 Ohio App.3d 673, 683, 731 N.E.2d 1209 (8th Dist.1999) (holding that trial court should have ordered plaintiff to produce its "profitability information" to defendant subject to a protective order); *Vanguard Transp. Sys. v. Edwards Transfer & Storage Co. Gen. Commodities Div.*, 109 Ohio App.3d 786, 789-90, 673 N.E.2d 182 (10th Dist.1996) (affirming trial court order that held that various information including "corporate financial information" constituted a trade secret).

This definition reflects the state policy favoring the protection of trade secrets such as the information that is the subject of this Motion. The Commission has issued protective orders in numerous prior proceedings to prevent the public disclosure of trade secrets. *E.g., In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Pub. Util. Comm. No. 17-32-EL-AIR, *et al.*, 2018 Ohio PUC LEXIS 1268, at *93 (Dec. 19, 2018) (Opinion and Order), ¶ 161-163 ("we note that the Commission has previously granted

protective treatment for portions of briefs filed under seal and testimony containing sensitive data, including information that appears to reveal matters relating to competitive business information"); *In the Matter of the Application of Midwest Utility Consultants, Inc. for Certification as a Competitive Retail Natural Gas Aggregator/Broker*, Pub. Util. Comm. No. 09-893-GA-AGG, 2012 Ohio PUC LEXIS 103 (Jan. 30, 2012) (Entry) (forecasted financial statements were trade secrets and granted protective treatment); *In the Matter of the Application of the Ohio Power Co. and Columbus S. Power Co. for Authority to Merge and Related Approvals, et al.*, Pub. Util. Comm. No. 10-2376-EL-UNC, *et al.*, 2011 Ohio PUC LEXIS 1325, at *22-23 (Dec. 14, 2011) (Opinion and Order) (forecasted fuel expenditures were trade secrets and granted protective treatment); *In the Matter of the Joint Application of The Dayton Power and Light Company for Integration of an Energy Efficiency or Peak-Demand Reduction Program with Honda of Am. Mfg., Inc.*, Pub. Util. Comm. No. 10-2205-EL-EEC, 2011 Ohio PUC LEXIS 1313, at *2-5 (Dec. 7, 2011) (Finding and Order) (release of trade secrets prohibited by state law). *Accord: Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853, ¶ 8.

Here, the Confidential Information constitutes "business information or plans, [and] financial information" that is confidential, proprietary, and competitively sensitive trade secret information under R.C. 1333.61(D). AES Ohio and OVEC maintain the Confidential Information subject to reasonable efforts to keep its secrecy, and the Confidential Information derives independent economic value from not being generally known to other persons who could obtain economic value from its disclosure or use.

The Commission (and its Staff) will have full access to the Confidential Information in order to fulfill its statutory obligations. For these foregoing reasons, AES Ohio

requests that the Commission issue a Protective Order that permits the Confidential Information to be designated as confidential and to remain under seal.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion of The Dayton Power and Light Company d/b/a AES Ohio for a Protective Order has been served via electronic mail upon the following counsel of record, this 4th day of December, 2023:

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Summary: Motion Motion of The Dayton Power and Light Company d/b/a AES Ohio for a Protective Order electronically filed by Mr. Jeffrey S. Sharkey on behalf of The Dayton Power and Light Company.