BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

# **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, competively sensitive, and trade secret information ("Confidential Information")?[[1]](#footnote-2) The answer is yes. Contrary to the Office of the Ohio Consumers' Counsel's ("OCC") contention,[[2]](#footnote-3) 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]](#footnote-4) 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.

# **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:

* + 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.

# **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.

# **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:

### 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

### 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.

# **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.

# **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,  s/ Judi L. Sobecki  Judi L. Sobecki (0067186)  THE DAYTON POWER AND   LIGHT COMPANY  1065 Woodman Drive  Dayton, OH 45432  Telephone: (937) 259-7171  Telecopier: (937) 259-7178  Email: judi.sobecki@dplinc.com  s/ Charles J. Faruki  Charles J. Faruki (0010417)  (Counsel of Record)  Jeffrey S. Sharkey (0067892)  FARUKI IRELAND & COX P.L.L.  500 Courthouse Plaza, S.W.  10 North Ludlow Street  Dayton, OH 45402  Telephone: (937) 227-3705  Telecopier: (937) 227-3717  Email: cfaruki@ficlaw.com  Attorneys for The Dayton Power and  Light Company |

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.

|  |  |
| --- | --- |
| Samuel C. Randazzo, Esq. Frank P. Darr, Esq.  Matthew R. Pritchard, Esq.  Joseph E. Oliker, Esq. MCNEES WALLACE & NURICK LLC 21 East State Street, 17th Floor Columbus, OH 43215-4228 sam@mwncmh.com fdarr@mwncmh.com mpritchard@mwncmh.com  joliker@mwncmh.com  Attorneys for Industrial Energy Users-Ohio  Philip B. Sineneng, Esq.  THOMPSON HINE LLP  41 South High Street, Suite 1700  Columbus, OH 43215  Philip.Sineneng@ThompsonHine.com | Mark A. Hayden, Esq.  FIRSTENERGY SERVICE COMPANY  76 South Main Street  Akron, OH 44308  haydenm@firstenergycorp.com  James F. Lang, Esq.  Laura C. McBride, Esq.  N. Trevor Alexander, Esq.  CALFEE, HALTER & GRISWOLD LLP  1400 KeyBank Center  800 Superior Avenue  Cleveland, OH 44114  jlang@calfee.com  lmcbride@calfee.com  talexander@calfee.com |
| Amy B. Spiller, Esq.  Deputy General Counsel  Jeanne W. Kingery, Esq.  Associate General Counsel  DUKE ENERGY RETAIL SALES, LLC and DUKE ENERGY COMMERCIAL ASSET MANAGEMENT, INC.  139 East Fourth Street  1303-Main  Cincinnati, OH 45202  Amy.Spiller@duke-energy.com  Jeanne.Kingery@duke-energy.com  Attorneys for Duke Energy Retail Sales, LLC and Duke Energy Commercial Asset Management, Inc. | David A. Kutik, Esq.  JONES DAY  North Point  901 Lakeside Avenue  Cleveland, OH 44114  dakutik@jonesday.com  Allison E. Haedt, Esq.  JONES DAY  325 John H. McConnell Blvd., Suite 600 Columbus, OH 43215-2673  aehaedt@jonesday.com  Attorneys for FirstEnergy Solutions Corp. |

|  |  |
| --- | --- |
| Robert A. McMahon, Esq.  EBERLY MCMAHON LLC  2321 Kemper Lane, Suite 100  Cincinnati, OH 45206  [bmcmahon@emh-law.com](mailto:bmcmahon@emh-law.com)  Rocco O. D'Ascenzo, Esq.  Associate General Counsel  Elizabeth Watts, Esq.  Associate General Counsel  DUKE ENERGY OHIO, INC.  139 East Fourth Street  1303-Main  Cincinnati, OH 45202  Elizabeth.Watts@duke-energy.com  Rocco.D'Ascenzo@duke-energy.com  Attorneys for Duke Energy Ohio, Inc. | Jay E. Jadwin, Esq.  AMERICAN ELECTRIC POWER SERVICE CORPORATION  155 W. Nationwide Blvd., Suite 500  Columbus, OH 43215  jejadwin@aep.com  Attorney for AEP Retail Energy Partners LLC  M. Anthony Long, Esq.  Senior Assistant Counsel  HONDA OF AMERICA MFG., INC.  24000 Honda Parkway  Marysville, OH 43040  tony\_long@ham.honda.com  Attorney for Honda of America Mfg., Inc. |
| David F. Boehm, Esq. Michael L. Kurtz, Esq. BOEHM, KURTZ & LOWRY 36 East Seventh Street Suite 1510 Cincinnati, OH 45202-4454 [dboehm@BKLlawfirm.com](mailto:dboehm@BLKlawfirm.com)  [mkurtz@BKLlawfirm.com](mailto:mkurtz@BLKlawfirm.com)  Attorneys for Ohio Energy Group  Gregory J. Poulos, Esq.  EnerNOC, Inc.  471 East Broad Street  Columbus, OH 43215  Telephone: (614) 507-7377  Email: gpoulos@enernoc.com  Attorney for EnerNOC, Inc. | Richard L. Sites, Esq. General Counsel and Senior Director of  Health Policy OHIO HOSPITAL ASSOCIATION 155 East Broad Street, 15th Floor Columbus, OH 43215-3620  ricks@ohanet.org  Thomas J. O'Brien, Esq. BRICKER & ECKLER LLP 100 South Third Street Columbus, OH 43215-4291 tobrien@bricker.com  Attorneys for Ohio Hospital Association  Thomas W. McNamee, Esq. Assistant Attorney General |
| Colleen L. Mooney, Esq.  OHIO PARTNERS FOR AFFORDABLE ENERGY 231 West Lima Street  P.O. Box 1793 Findlay, OH 45839-1793  cmooney2@columbus.rr.com  Attorney for Ohio Partners for Affordable Energy | Devin D. Parram, Esq.  Assistant Attorneys General  180 East Broad Street Columbus, OH 43215  Thomas.mcnamee@puc.state.oh.us devin.parram@puc.state.oh.us  Attorneys for the Staff of the Public Utilities Commission of Ohio |
| Mark S. Yurick, Esq. (Counsel of Record)  Zachary D. Kravitz, Esq.  TAFT STETTINIUS & HOLLISTER LLP 65 East State Street, Suite 1000 Columbus, OH 43215 [myurick@taftlaw.com](mailto:myurick@cwslaw.com)  zkravitz@taftlaw.com  Attorneys for The Kroger Company | Joseph P. Serio, Esq. (Counsel of Record)  Melissa R. Yost, Esq.  Assistant Consumers' Counsel  Office of The Ohio Consumers' Counsel  10 West Broad Street, Suite 1800  Columbus, OH 43215-3485  serio@occ.state.oh.us  yost@occ.state.oh.us  Attorneys for Office of the Ohio Consumers' Counsel |
| Mark A. Whitt, Esq. (Counsel of Record)  Andrew J. Campbell, Esq.  WHITT STURTEVANT LLP  PNC Plaza, Suite 2020  155 East Broad Street  Columbus, OH 43215  whitt@whitt-sturtevant.com campbell@whitt-sturtevant.com  Vincent Parisi, Esq.  Matthew White, Esq.  INTERSTATE GAS SUPPLY, INC.  6100 Emerald Parkway  Dublin, OH 43016  vparisi@igsenergy.com mswhite@igsenergy.com  Attorneys for Interstate Gas Supply, Inc.  Steven M. Sherman, Esq. Counsel of Record  Joshua D. Hague, Esq. | Christopher L. Miller, Esq.  (Counsel of Record)  Gregory H. Dunn, Esq.  Asim Z. Haque, Esq.  ICE MILLER LLP  250 West Street  Columbus, OH 43215  Christopher.Miller@icemiller.com  Gregory.Dunn@icemiller.com  Asim.Haque@icemiller.com  Attorneys for the City of Dayton, Ohio  M. Howard Petricoff, Esq.  Stephen M. Howard, Esq.  VORYS, SATER, SEYMOUR AND  PEASE LLP  52 East Gay Street  P.O. Box 1008  Columbus, OH 43216-1008  mhpetricoff@vorys.com  smhoward@vorys.com  Attorneys for the Retail Energy Supply Association |
| Grant E. Chapman, Esq.  KRIEG DEVAULT LLP  One Indiana Square, Suite 2800  Indianapolis, IN 46204-2079  ssherman@kdlegal.com  jhague@kdlegal.com  gchapman@kdlegal.com  Attorneys for Wal-Mart Stores East, LP  and Sam's East, Inc. | Trent A. Dougherty, Esq. Counsel of Record  Cathryn N. Loucas, Esq.  OHIO ENVIRONMENTAL COUNCIL  1207 Grandview Avenue, Suite 201  Columbus, OH 43212-3449  trent@theoec.org  cathy@theoec.org  Attorneys for the Ohio Environmental Council |
| Joseph M. Clark, Esq., Counsel of Record  6641 North High Street, Suite 200  Worthington, OH 43085  joseph.clark@directenergy.com  Asim Z. Haque, Esq.  Christopher L. Miller, Esq.  Gregory J. Dunn, Esq.  Alan G. Starkoff, Esq.  ICE MILLER LLP  2540 West Street  Columbus, OH 43215  Asim.Haque@icemiller.com  Christopher.Miller@icemiller.com  Gregory.Dunn@icemiller.com  Attorneys for Direct Energy Services, LLC and Direct Energy Business, LLC | Ellis Jacobs, Esq.  Advocates for Basic Legal Equality, Inc.  333 West First Street, Suite 500B  Dayton, OH 45402  ejacobs@ablelaw.org  Attorney for Edgemont Neighborhood Coalition  Stephanie M. Chmiel, Esq.  Michael L. Dillard, Jr., Esq.  THOMPSON HINE LLP  41 South High Street, Suite 1700  Columbus, OH 43215  Stephanie.Chmiel@ThompsonHine.com  Michael.Dillard@ThompsonHine.com  Attorneys for Border Energy Electric Services, Inc. |
| M. Howard Petricoff, Esq.  VORYS, SATER, SEYMOUR AND PEASE LLP  52 East Gay Street  P.O. Box 1008  Columbus, OH 43216-1008  mhpetricoff@vorys.com  smhoward@vorys.com  Attorneys for Exelon Generation Company, LLC, Exelon Energy Company, Inc., Constellation Energy Commodities Group, Inc., and Constellation NewEnergy, Inc. | Lisa G. McAlister, Esq.  Matthew W. Warnock, Esq. J. Thomas Siwo, Esq.  BRICKER & ECKLER LLP 100 South Third Street Columbus, OH 43215-4291 lmcalister@bricker.com mwarnock@bricker.com tsiwo@bricker.com  Attorneys for The Ohio Manufacturers' Association Energy Group |
| Matthew J. Satterwhite, Esq. Steven T. Nourse, Esq. AMERICAN ELECTRIC POWER SERVICE CORPORATION 1 Riverside Plaza, 29th Florr  Columbus, OH 43215  mjsatterwhite@aep.com  stnourse@aep.com  Attorneys for Ohio Power Company | Kimberly W. Bojko, Esq. Joel E. Sechler, Esq. CARPENTER LIPPS & LELAND LLP 280 Plaza, Suite 1300 280 North High Street Columbus, OH 43215 Bojko@carpenterlipps.com Sechler@carpenterlipps.com  Attorneys for SolarVision, LLC |
| Matthew R. Cox, Esq. MATTHEW COX LAW, LTD.  4145 St. Theresa Blvd.  Avon, OH 44011  matt@matthewcoxlaw.com  Attorney for the Council of Smaller Enterprises | Scott C. Solberg, Esq.  *(requested pro hac vice)*  Eimer Stahl LLP  224 South Michigan Avenue, Suite 1100  Chicago, OH 60604  ssolberg@eimerstahl.com  Attorney for Exelon Generation  Company, LLC |

/s Jeffrey S. Sharkey

Jeffrey S. Sharkey

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.

   [↑](#footnote-ref-2)
2. Memorandum Contra Dayton Power and Light Motion for Protective Over by the Office of the Ohio Consumers' Counsel ("Memorandum Contra"), pp. 1-2. [↑](#footnote-ref-3)
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. [↑](#footnote-ref-4)