

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

AT&T OHIO,)	
)	
)	
Complainant,)	Case No. 06-1509-EL-CSS
)	
v.)	
)	
THE DAYTON POWER & LIGHT)	
COMPANY,)	
)	
Respondent.)	

MOTION FOR EXTENSION OF PROTECTIVE ORDER

AT&T Ohio¹ and The Dayton Power & Light Company ("the parties"), by their respective attorneys, and pursuant to O.A.C. § 4901-1-24(F), move for an extension of the protective order granted in the captioned case. In its Finding and Order adopted on November 7, 2007 the Commission granted the protective order requested by the parties that addressed confidential information contained in Section II(B) of the parties' stipulation that the Commission also approved. That information consisted of proprietary financial information regarding past charges for joint use poles. Under O.A.C. § 4901-1-24(F), the parties seek an extension of the protective order for an unlimited period of time. The reasons underlying this motion are detailed in the attached Memorandum in Support.

This motion is being filed more than 45 days prior to the expiration of the November 7, 2007 order.

¹ The Ohio Bell Telephone Company uses the name AT&T Ohio.

Dated: March 16, 2009

Respectfully submitted,

AT&T Ohio

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MEMORANDUM IN SUPPORT OF MOTION FOR
EXTENSION OF PROTECTIVE ORDER

AT&T Ohio and The Dayton Power & Light Company seek an extension of the protective order previously granted in this case for an unlimited period of time. Certain information included in the parties' stipulation which resolved this case consisted of proprietary financial information regarding past charges for joint use poles. This is competitively sensitive financial information that is deserving of further protection under Ohio law as a trade secret.

The parties seek continued protection of the information filed under seal in this case for an indefinite period of time. The information that is the subject of this motion should be considered as confidential and/or proprietary and should be further protected from public disclosure. O.A.C. § 4901-1-24(D) provides that the Commission or certain designated employees 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. As set forth herein, the information at issue here represents confidential business information and, therefore, should be protected from disclosure.

Non-disclosure of the identified confidential information will not impair the purposes of Title 49. While this case has concluded, the Commission and its Staff have full access to the information in order to review it, if necessary. No purpose of Title 49 would be served by the public disclosure of the information.

The need to protect the designated information from public disclosure is clear, and there is compelling legal authority supporting the requested protective order. While the Commission has often expressed its preference for open proceedings, the Commission also long ago recognized its statutory obligations with regard to trade secrets:

The Commission is of the opinion that the "public records" statute must also be read in pari materia with Section 1333.31, Revised Code ("trade secrets" statute). The latter statute must be interpreted as evincing the recognition, on the part of the General Assembly, of the value of trade secret information.

In re General Telephone Co., Case No. 81-383-TP-AIR (Entry, February 17, 1982). Likewise, the Commission has facilitated the protection of trade secrets in its rules (O.A.C. § 4901-1-24(A)(7)).

The definition of a "trade secret" is set forth in the Uniform Trade Secrets Act:

"Trade secret" means information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

- (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
- (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

R. C. § 1333.61(D). This definition clearly reflects the state policy favoring the protection of trade secrets such as the information which is the subject of this motion.

Courts of other jurisdictions have held that not only does a public utilities commission have the authority to protect the trade secrets of a public utility, the trade secret statute creates a duty to protect them. New York Tel. Co. v. Pub. Serv. Comm. N.Y., 56 N.Y. 2d 213 (1982). Indeed, for the Commission to do otherwise would be to negate the protections the

Ohio General Assembly has granted to all businesses, including public utilities, through the Uniform Trade Secrets Act. This Commission has previously carried out its obligations in this regard in numerous proceedings. See, e.g., Elyria Tel. Co., Case No. 89-965-TP-AEC (Finding and Order, September 21, 1989); Ohio Bell Tel. Co., Case No. 89-718-TP-ATA (Finding and Order, May 31, 1989); Columbia Gas of Ohio, Inc., Case No. 90-17-GA-GCR (Entry, August 17, 1990).

In 1996, the Ohio General Assembly amended R. C. §§ 4901.12 and 4905.07 in order to facilitate the protection of trade secrets in the Commission's possession. The General Assembly carved out an exception to the general rule in favor of the public disclosure of information in the Commission's possession. By referencing R. C. § 149.43, the Commission-specific statutes now incorporate the provision of that statute that excepts from the definition of "public record" records the release of which is prohibited by state or federal law. R. C. § 149.43(A)(1). In turn, state law prohibits the release of information meeting the definition of a trade secret. R. C. §§ 1333.61(D) and 1333.62. The amended statutes also reference the purposes of Title 49 of the Revised Code. The protection of trade secret information from public disclosure is consistent with the purposes of Title 49 because the Commission and its Staff have access to the information; in many cases, the parties to a case may have access under an appropriate protective agreement. Such a protective agreement is in place in this case. The protection of trade secret information as requested herein will not impair the Commission's regulatory responsibilities.

In Pyromatics, Inc. v. Petruziello, 7 Ohio App. 3d 131, 134-135 (Cuyahoga County 1983), the Court of Appeals, citing Koch Engineering Co. v. Faulconer, 210 U.S.P.Q.

854, 861 (Kansas 1980), has delineated factors to be considered in recognizing a trade secret:

(1) The extent to which the information is known outside the business, (2) the extent to which it is known to those inside the business, i.e., by the employees, (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information, (4) the savings effected and the value to the holder in having the information as against competitors, (5) the amount of effort or money expended in obtaining and developing the information, and (6) the amount of time and expense it would take for others to acquire and duplicate the information.

For all of the information which is the subject of this motion, the parties consider and have treated the information as a trade secret. In the ordinary course of business of both of the parties, this information is stamped confidential, is treated as proprietary and confidential by the parties' employees, and is not disclosed to anyone except in a Commission proceeding and/or pursuant to staff data request.

For the foregoing reasons, the parties request that the protective order issued in this case be extended for an unlimited period of time.

Dated: March 16, 2009

Respectfully submitted,

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Summary: Motion for extension of protective order filed by Charles J. Faruki on behalf of The Dayton Power & Light Company and electronically filed by Jon F Kelly on behalf of AT&T Ohio