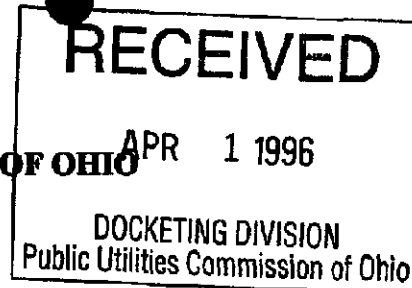


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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO



In the Matter of the Application of)
The Dayton Power and Light Company)
for Approval of an Electric Service)
Arrangement with AGA Gas, Inc.)

Case No. 96- 323 -EL-AEC

MOTION FOR A PROTECTIVE ORDER

The Dayton Power and Light Company ("DP&L"), hereby moves for a protective order to prevent public disclosure of certain proprietary business information and confidential commercial material contained in the Electric Power Supply Agreement ("Agreement") between DP&L and AGA Gas, Inc., filed for approval on this same day in this case. For the reasons explained more fully in the accompanying Memorandum in Support, DP&L respectfully requests that the Commission grant its Motion for a Protective Order.

Respectfully submitted,



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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of
The Dayton Power and Light Company
for Approval of an Electric Service
Arrangement with AGA Gas, Inc.

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Case No. 96- 323 -EL-AEC

**MEMORANDUM IN SUPPORT OF
MOTION FOR A PROTECTIVE ORDER**

I. Background

On this date, The Dayton Power and Light Company ("DP&L") submitted an Application and Statement ("Application") for the approval, pursuant to Ohio Revised Code ("R.C.") §4905.31, of the Electric Power Supply Agreement ("Agreement") it has entered into with AGA Gas, Inc. ("Customer"). Along with the Application, DP&L filed the requisite number of redacted copies for inclusion in the public case file. DP&L also filed the requisite number (three) of unredacted copies of the Agreement under seal for use by The Public Utilities Commission of Ohio ("Commission"), its Staff and employees, which copies are not to be included in the public record pending a Commission finding on DP&L's motion. The redacted portions are narrowly tailored to withhold only that information which is a trade secret and should be protected.

The Agreement provides Customer a package of non-firm electric power services and provides that DP&L will be its supplier of such services for a term of four (4) years. The Agreement contains an option to renew such services for an additional two (2) year period. The redacted language represents confidential rate and service information negotiated by the parties to take into account Customer's unique size, load and operating characteristics, and Customer's acceptance of a certain level of risk.

If the structure of the services and rates were to be disclosed, it may seriously jeopardize DP&L's ability to compete with other electric service providers, would jeopardize DP&L's ability to optimize revenue in rate negotiations which DP&L is currently conducting with other customers that have requested non-firm service, and would negatively impact DP&L's plans to

seek tariff approval for non-firm service. Section 14.10 of the Agreement recognizes that DP&L may do what is appropriate to protect the confidential information and trade secrets contained in the Agreement. DP&L and Customer have taken all appropriate steps to ensure that the information has not been publicly released.

II. Authority to Protect Confidential Information

A. Protection as a Trade Secret

R.C. §1333.61 defines "trade secrets" to include any business information or plans, financial information, or listing of names, that derives independent economic value, actual or potential, from not being generally known to, and not readily ascertainable by other persons who can obtain economic value from its disclosure or use, and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The redacted information has independent economic value to DP&L since its disclosure may jeopardize DP&L's ability to compete with other electric providers. DP&L currently faces potential competition from municipals, cogenerators, and other electric services providers. With the restructuring efforts underway in both the natural gas and electric industries, the pace at which this competition occurs may accelerate and prompt new sources of competition from both inside and outside of Ohio.

Disclosure of the redacted information would also harm DP&L's ability to negotiate rates and service terms and conditions with other customers that request non-firm service since these customers will attempt to obtain equivalent benefits by pursuing similar agreements; in many instances, DP&L fears that such customers would possess dissimilar operating characteristics and risk tolerances. Recently, the Commission recognized in its Motion to Dismiss in Ohio Supreme Court Case No. 95-946 at page 21 that customers' attempts to obtain equivalent benefits by pursuing "me too" agreements satisfied the "independent economic value" criteria of R.C. §1333.61.

Further, the Commission recently granted a motion for a protective order in a similar situation. The Commission's April 13, 1995 Finding and Order in PUCO Case No. 95-77-EL-AEC granted The Cleveland Electric Illuminating Company's ("CEI") request for protected

treatment of an agreement for electric services filed pursuant to R.C. §4905.31. As is true here, CEI sought protection of certain proprietary business information and confidential commercial information contained in its agreement. In granting protected status, the Commission stated that its actions were consistent with R.C. §1333.61. Therefore, the Commission has already gone on record as recognizing the issue and its impact on utilities, and has indicated that such information constitutes trade secrets.

B. Trade secret information is exempt from disclosure under Ohio's public records laws.

R.C. § 149.43 addresses the definition of "public records" and what items are exempt from disclosure. R.C. §149.43(A)(1) defines "public record", in part, as any record that is kept by any public office, except for certain itemized items and "records the release of which is prohibited by state or federal law." (emphasis added). As mentioned earlier, R.C. §1333.51(C) prohibits the disclosure and release of trade secret information.

It is well established that trade secrets which are prohibited from public disclosure pursuant to R.C. §1333.51 may be exempt from the definition of "public record" contained in R.C. §149.43. State, ex rel. Seballos v. School Employees Retirement System (1994), 70 Ohio St.3d 667, 670. See also, State, ex rel Toledo Blade Co. v. Univ. of Toledo Found. (1992), 65 Ohio St.3d 258, 264. In the above cases, the Ohio Supreme Court indicated that prior to disclosing information, material should undergo an *in camera* review to determine if it contains trade secret information. Once a determination is made that material contains trade secret information, then a determination should be made whether the provider of the information waived protection, or consented to disclosure, of the information.

DP&L respectfully requests that the Commission follow the *in camera* review procedure for trade secret information as set forth by the Ohio Supreme Court.

C. The protection currently given to special contract natural gas transportation rates should be extended to special contract electric rates as well.

The Commission issued guidelines regarding the confidential treatment of special contract gas transportation rates in an Entry dated December 1, 1994 in Cases Nos. 93-1636-GA-UNC,

85-800-GA-COI. In the Matter of the Implementation of FERC Order 636. These guidelines establish that, under certain circumstances, special contract rates filed by local gas distribution companies were entitled to confidential treatment with regard to transportation rates. The rate is to be held confidential if it is found that disclosure would impair the utility's ability to compete and would jeopardize the utility's ability to optimize revenues in future negotiations. Entry at 22.

The protection afforded gas companies was a result of the changes that occurred in that industry in moving it to open-market competition. Now that the electric industry is being pushed towards competition, the same protection afforded natural gas special contract rates should be extended to electric utilities as well. While the competitive nature of the electric industry has lagged that of the natural gas industry, the same reasoning that applies to keeping price information confidential on the gas side applies here. Not only would the disclosure of the Agreement's rates impair DP&L's ability to compete with other electric suppliers, it would give DP&L's other customers an unfair advantage in their negotiations with DP&L, thus jeopardizing DP&L's ability to optimize revenues in these future negotiations.

D. Proposed Revision to the Ohio Administrative Code ("O.A.C.")

The Commission issued an Entry on November 22, 1995 in Case No. 95-985-AU-ORD which proposes amendments to Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code ("O.A.C."). Specifically, changes proposed to Rule 4901-1-24 would expand the instances in which a party could file a motion for a protective order beyond when discovery is sought, and permit a party filing a document with the Commission to seek protection for confidential information, such as in the present matter, to the extent state and federal law prohibits its release. The proposed amendment goes on to specifically cite the protection of trade secrets under Ohio law. On March 21, 1996, the Commission issued an Entry in Case No. 95-985-AU-ORD ordering, *inter alia*, that the above-mentioned amendments to O.A.C. 4901-1-24 be adopted as soon as possible. Although the proposed amendment is in the process of being fully adopted and has not yet been formally codified, the information redacted in the Agreement complies with and is consistent with the provisions of the proposed rule change. Further, DP&L has followed the procedural and filing requirements of the proposed amendment.

III. Period of Confidential Treatment Requested

DP&L is aware of the Commission's policy not to grant confidential treatment for an indefinite term or for a term which is longer than needed. In the April 13, 1995 Finding and Order in Case No. 95-77-EL-AEC, the Commission granted confidential treatment for CEI's agreement for eighteen (18) months. DP&L requests that the Commission grant confidential treatment of these trade secrets for a period of eighteen (18) months. This period would allow DP&L to complete its negotiations with its other customers and conforms with the length of the period set forth in the previously-discussed proposed amendment to O.A.C. 4901-1-24. Confidential treatment for a period of eighteen (18) months is a reasonable request.

IV. Conclusion

In recognition of the severe and irreparable negative consequences which DP&L would suffer as a result of public disclosure of redacted information, DP&L hereby respectfully requests that the Commission grant its Motion for a Protective Order.

Respectfully submitted,



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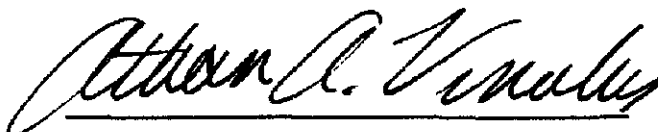
Attorneys for The Dayton
Power and Light Company

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Motion for a Protective Order has been served by regular U.S. Mail, postage prepaid, this 1st day of April, 1996, upon the following:

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