

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)	
The Dayton Power and Light Company)	Case No. 09-1012-EL-FAC
To Establish a Fuel Rider)	

The Dayton Power and Light Company's
Motion for Protective Order

The Dayton Power and Light Company ("DP&L" or the "Company") pursuant to Ohio Administrative Code ("O.A.C.") Rule 4901-1-24, hereby moves the Commission for a protective order regarding confidential trade secret information of the Company ("Confidential Information") included in the unredacted version of the Report of the Financial, Management and Performance Audit of The Dayton Power and Light Company (Audit Report) filed in this docket on May 29, 2011. A public version, incorporating redactions that correspond to the portions of the Audit Report to which this motion applies, was also filed on the same date. The unredacted Audit Report contains Confidential Information that constitutes trade secrets under Ohio law and that merits protection from disclosure.

MEMORANDUM IN SUPPORT

DP&L moves that Confidential Information contained in the unredacted version of Audit Report be protected from disclosure and that the public version of the Audit Report be made available through the Commission's normal disclosure process. In support of its motion, DP&L states as follows:

Description of the Confidential Information.

Confidential Information appears throughout the Audit Report and could not be easily segregated into a specific section or sections. The Company therefore worked collaboratively with the auditor to identify each instance within the Audit Report where Confidential Information appeared that was then redacted from the public version. The criteria used by the Company to identify Confidential Information was: 1) whether the information was commercially valuable such that either competitors or suppliers could use such information in a manner adverse to the interests of the Company; and 2) whether the information was not readily available already in the public domain.

As an example, the public version of the Audit Report includes the names of coal suppliers, quantities supplied, and the prices for coal delivered in 2010 because that information is filed with and made available to the public through the U.S. Energy Information Agency. However, information as to whether those contracts extend into future years, the volumes that may be delivered, the prices and any price adjustment provisions and similar information, is redacted. That information is not publicly available and, if known, could be used by coal suppliers to gain an advantage in negotiations. Also redacted is information not publicly available regarding DP&L's future plans, the importance DP&L places on certain types of provisions within contracts, the importance DP&L places on certain quality specifications both from an operational perspective and to evaluate the value of coals of different qualities, and the mechanisms DP&L uses to ensure that suppliers comply with their commitments including its procedures to investigate and resolve disputes with suppliers.

Disclosing the Confidential Information Would Harm DP&L and its Customers

The Confidential information is competitively sensitive and a trade secret because suppliers and competitors may use such data to determine the DP&L's current and projected resource costs, detailed information about the operations of DP&L's facilities and the prices, including price adjustment provisions, at which the Company has secured current and future supplies of coal for their plants. The disclosure of such information would adversely impact DP&L because it would permit suppliers and competitors to better determine how to price to their advantage their products and services, including the coal provided to the Companies' facilities. Suppliers or vendors would have the advantage of knowing how to price their bids or negotiate to provide resources if they had access to the Confidential Information. Because a retail jurisdictional share of the costs of coal are charged to ratepayers through a fuel rider, retail customers would also be harmed by the disclosure of Confidential Information that is used by a supplier to negotiate a higher price or other terms and conditions favorable to the supplier.

DP&L Takes Steps to Protect this Information from Public Disclosure.

The Confidential Information is not readily available in the public domain and DP&L takes steps to protect this information from public disclosure. The Confidential Information is not available or ascertainable by other parties through normal or proper means and no reasonable amount of proper independent research could yield this information to other parties.

Additionally, DP&L make reasonable efforts to maintain the secrecy of the Confidential Information. DP&L restricts the access of information to only those employees, officers and representatives of the Company who have a need to know about such information due to their job and management responsibilities. When disclosure is made to outside consultants, attorneys

or other non-employees, disclosure is made only if privileged or pursuant to a confidentiality agreement.

The Amount of Time and Money to Develop and Assemble the Confidential Information Is Substantial

The information redacted from the public version of the Audit Report reflects the results of hundreds of hours of work performed by DP&L employees to obtain offers from fuel suppliers, negotiate contracts, develop procedures to evaluate offers, create standard operating procedures for the procurement process, and other similar tasks. Because DP&L does not publicly reveal these processes or the resulting terms and conditions of contracts, it would be virtually impossible for a supplier or competitor to assemble the same information unless made public through this proceeding.

Applicable Law

O.A.C. Rule 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.

The criteria for determining what should be kept confidential by the Commission is well established, and the Commission also long ago recognized its statutory obligation to protect trade secrets:

The Commission is of the opinion that the "public records" statute must also be read *in pari materia* with Section 1333.61, 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. Rule 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: 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. Ohio 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. This Commission and its Attorney Examiners have previously carried out this state policy in numerous proceedings, including with respect to fuel audit reports prepared for essentially the same purpose as the Audit Report in this proceeding. *See, e.g., Columbus Southern Power Company and Ohio Power Company, Case Nos. 09-872-EL-FAC and 09-873-EL-FAC*, (Entry of June 29, 2010); *Elyria Tel. Co., Case No. 89-965- TP-AEC* (Finding and Order, September 21, 1989). *See also, State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-25 (1997), favorably citing the six factor test applied *Pyromatics, Inc. v. Petruziello* (1983), 7 Ohio App.3d 131, 134-135 as:

- (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.

DP&L submits that the application of the relevant law to the redacted information supports the issuance of a protective order with respect to the unredacted version of the Audit Report. Further, public disclosure of such information could impair DP&L's efforts to procure fuel for its generating plants on a competitive basis, and could adversely affect its ability to obtain terms, conditions and prices for its fuel supplies as advantageous as those that would otherwise be possible. Public disclosure of this information, on the other hand, is not likely to assist the Commission in carrying out its duties because the information will remain available to the Commission's Staff and those participants in this proceeding who sign a confidentiality agreement.

The Protective Order Should Be Granted For Eighteen Months with Rights to File for Further Extensions Thereafter as Provided by Law.

The commercial value of the Confidential Information will continue well beyond the eighteen-month period contemplated by O.A.C. Rule 4901-1-24 (F). DP&L recognizes, however, that the Commission's practice has generally been to shield such information for that eighteen month period with a recognition that a subsequent right to move for a further extension is authorized under the Rule. See, *Columbus Southern Power Company and Ohio Power Company, Case Nos. 09-872-EL-FAC and 09-873-EL-FAC*, (Paragraph 8 of Entry of June 29, 2010).

Conclusion

For the foregoing reasons, The Dayton Power and Light Company requests that the Commission grant its motion to maintain the redacted portions of the Audit Report, under seal.

Respectfully submitted,



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DATED: April 29, 2011

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion has been has been served either electronically or via first class mail, postage prepaid, this 29th day of April, 2011 upon counsel to the parties of record.



Randall V. Griffin
Chief Regulatory Counsel
The Dayton Power and Light Company

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Summary: Motion of The Dayton Power and Light Company for Protective Order and Memorandum in Support electronically filed by Mr. Randall V Griffin on behalf of The Dayton Power and Light Company