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

MEMORANDUM CONTRA DAYTON POWER & LIGHT MOTION FOR PROTECTIVE ORDER BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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I. INTRODUCTION AND BACKGROUND

On October 5, 2012, Dayton Power & Light ("DP&L" or "the Company") filed its Application for a new Electric Security Plan ("ESP"). The Application included a Motion for a Protective Order, among other things. The Office of the Ohio Consumers' Counsel ("OCC") files this Memorandum Contra to explain why DP&L's Motion for a Protective Order should be denied and this case affecting consumers' rates should be conducted in a transparent manner in the public light. Much of the type of information that DP&L seeks to

keep secret does not meet the standard necessary for protection, including significant similar types of data to what was actually disclosed in the Company's filing earlier this year for a Market Rate Offer ("MRO").

As background, on June 24, 2009, the Public Utilities Commission of Ohio ("PUCO" or "the Commission") issued an Opinion and Order ("ESP I Order") in Case Nos. 08-1094-EL-SSO,*et al*. (*"ESP I Case"*) adopting a stipulation and recommendation ("ESP I Settlement") and approving an ESP for DP&L. Among other items, the ESP I Settlement contained the following provision:

> DP&L will file a new ESP and/or MRO case by March 31, 2012 to set SSO rates to apply for period beginning January 1, 2013. At least 120 days prior to March 31, 2012, DP&L will consult with interested Signatory Parties to discuss the filing.[1]

On March 30, 2012, in compliance with the deadline established by the ESP I Settlement, DP&L filed an Application which among other things sought approval of a MRO form of Standard Service Offer ("SSO") under R.C. Sections 4928.141 and 4928.142, in Case Nos. 12-426-EL-SSO, *et al*. (*"MRO Case"*). The Company's MRO Application also sought other charges to be paid by customers, including an Electric Service Stability Charge and a five-year five-month blending period to go to market.

After almost 6 months of discovery by the various Intervenors and numerous settlement discussions among all of the parties, on September 7, 2012, DP&L filed a Notice of Withdrawal of its MRO Application ("MRO Withdrawal Notice"). The MRO Withdrawal Notice noted:

[1] ESP I Settlement at 7 (Section 9).

> Please take notice that Applicant The Dayton Power and Light Company withdraws without prejudice its March 30, 2012 Application for a Market Rate Offer in this docket.[2]

Also on September 7, 2012, the Company in the *MRO Case* docket and before filing either a new MRO Application or an ESP Application filed a Motion to Set Procedural Schedule for Its Electric Security Plan Filing ("ESP II Procedural Motion"). In the ESP II Procedural Motion, DP&L stated that it would file an ESP Application ("ESP II Application") on or before October 8, 2012 in the *MRO Case*.[3]

Late on Friday, October 5, 2012, DP&L filed its ESP II Application. Among other things, the Application also included a Motion for Protective Order. The Motion for Protective Order included a request to protect information that the Company claims to be highly confidential information relating to DP&L's business plans, projected sales and profits, and other financial information.[4] The Confidential Information is included in the testimony and exhibits of DP&L witnesses Craig Jackson, Aldyn Hoekstra and William Chambers. Despite the Company's claims of confidentiality, much of the information for which protection is sought in the ESP Application was previously made public as part of the MRO filing.

[2] MRO Withdrawal Notice at 1.

[3] DP&L's ESP Procedural Motion has since been rejected. See Entry at 2 (September 27, 2012).

[4] Motion for Protective Order at 1.

II. STANDARD OF REVIEW AND BURDEN OF PROOF

A. PUCO's Standard of Review

This Commission's approach to resolving motions for protective orders recognizes that there is a "strong presumption in favor of disclosure"[5] created by the public record statutes applicable to the Commission[6] and that confidential treatment should only be given in "extraordinary circumstances."[7] An Attorney Examiner Entry[8] defines this approach as a three-part test: "(1) Are the Materials prohibited from being released by state or federal law under R.C. 149.43(A)(1)(v) i.e. a trade secret under R.C. 133.61(D); (2) Are the Materials maintained as confidential; and, (3) Will non-disclosure be inconsistent with the purposes of Title 49?" If the first criterion is answered negatively, the Commission need not consider the remaining two standards as the claim for protection must fail.[9]

B. Burden of Proof

The issue before this Commission is whether DP&L has met the burden of proof necessary to establish an exception to Ohio's public records law. DP&L seeks protection of

[5] *In the Matter of the Five-Year Review of Natural Gas Company Uncollectible Riders*, Case No. 08-1229-GA-COI, Entry on Rehearing at 4 (February 1, 2012).

[6] Ohio Revised Code Sec. 4901.12 and 4905.07.

[7] *In the Matter of the Application of the Cleveland Electric Illuminating Company for Approval of an Electric Service Agreement with American Steel Wire Corporation*, Case No. 95-77-EL-AEC, Entry at 2-3 (September 6, 1995).

[8] See *In the Matter of the Application of NOPEC, Inc. for Authority to Operate as a certified Retail Electric Supplier in the State of Ohio*, Case No. 07-891-EL-CRS, Entry at 2 (October 7, 2009).

[9] *In the Matter of the Investigation of the Cincinnati Gas & Electric Company Relative to the Compliance With the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 00-681-GA-GPS, Entry at 7-8 (December 17, 2003).

information under the trade secret provisions of R.C. 1333.64, which this Commission has held is a very limited and narrow exception.[10]

The Commission has made it clear that a movant who seeks to protect information from the public must raise "specific arguments as to how public disclosure of the specific items could cause them harm, or how disclosure of the information would permit the companies' competitors to use the information to their advantage."[11] This is consistent with Ohio Adm. Code 4901-1-24(D)(3) that requires movants for confidentiality to file a pleading "setting forth the specific basis of the motion, including a detailed discussion of the need for protection from disclosure * * * ."[12] Ohio Adm. Code 4901-1-27(B)(7)(e) requires that "[t]he party requesting such protection shall have the burden of establishing that such protection is required."

In order to overcome the presumption in favor of disclosure, the movant's interest in maintaining confidentiality of the information must outweigh the public's interest in full disclosure.[13] In this case, the public's interest in disclosure is great because the public interest is not served when a public utility is relieved from producing information that is relevant and

[10] See *In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, Entry at 7 (November 25, 2003)(citations omitted).

[11] *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, Opinion and Order at 5-6 (October 18, 1990).

[12] The Commission has recognized that this rule is intended to strike a reasonable balance between the legitimate interests of a company in keeping a trade secret confidential and the obligations of the Commission relative to the full disclosure requirements mandated by Ohio law and public policy. *See In the Matter of the Amendment of Chapters 4901-1 et al. of the Ohio Administrative Code*, Case No. 95-985-AU-ORD, Entry at 11(March 21, 1998).

[13] *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, Opinion and Order at 5-6 (October 18, 1990).

material to the ultimate issue in this proceeding -- whether DP&L's customers should have to pay more for their electric service.

III. APPLICABLE LAWS

A. The Public Records Laws in Ohio: R.C. 149.43, R.C. 4901.12, and R.C. 4905.07

Under R.C. 4901.12, all proceedings of the public utilities commission and all documents and records in its possession are public records. Additionally, under R.C. 4905.07, "all facts and information in the possession of the public utilities commission shall be public, and all reports, records, files, books, accounts, papers, and memorandums of every nature in its possession shall be open to inspection by interested parties or their attorneys." These public records statutes that are specifically applicable to the Commission "provide a strong presumption in favor of disclosure."[14]

R.C. 149.43 is Ohio's Public Records Law. It broadly defines public records to include records kept at any state office but excludes or exempts from the definition of public records those records "whose release is prohibited by state or federal law."[15] Because Ohio has adopted the Uniform Trade Secrets Act, and has codified the definition of "trade secrets,"[16] the PUCO and other public agencies are prohibited from releasing public documents that qualify as a trade secret, per R.C. 149.43.

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[14] See, e.g., *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, Opinion and Order at 5-6 (October 18, 1990); *In the Matter of the Five-Year Review of Natural Gas Company Uncollectible Riders*, Case No. 08-1229-GA-COI, Entry on Rehearing at 4 (February 1, 2012).

[15] R.C. 149.43(A)(1)(v).

[16] R.C. 1331.61(D) defines trade secrets.

Accordingly, "[a]ll proceedings at the Commission and all documents and records in its possession are public records, except as provided in Ohio's public records law (R.C. 149.43) and as consistent with the purposes of Title 49 of the Revised Code."[17] The Commission has noted that R.C. 4901.12 and R.C. 4905.07 "provide a strong presumption in favor of disclosure, which the party claiming protective status must overcome."[18]

This Commission has emphasized the importance of the public records laws and has noted that "Ohio public records law is intended to be liberally construed to 'ensure that governmental records be open and made available to the public * * * subject to only a very few limited exceptions.'"[19] Furthermore, this Commission has established a policy that confidential treatment is to be given only under extraordinary circumstances.[20]

Often the Commission has used a balancing approach in its review of motions for protective orders. For instance, the PUCO has noted "it is necessary to strike a balance between competing interests. On one hand, there is the applicant's interest in keeping certain business information from the eyes and ears of its competitors. On the other hand, there is the Commission's own interest in deciding this case through a fair and open process, being careful

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[17] *In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, Entry at 7 (November 25, 2003)(citations omitted).

[18] *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, Opinion and Order at 5 (October 18, 1990).

[19] See, e.g., *In the Matter of the Application of NOPEC, Inc. For Authority to Operate as a Certified Retail Electric Supplier in the State of Ohio*, Case No. 07-891-EL-CRS, Entry at 1, citing *State ex rel. Williams v. Cleveland*, 64 Ohio St.3d 544, 549 (1992).

[20] See *In the Matter of the Application of The Cleveland Electric Illumination Company for Approval of an Electric Service Agreement With American Steel & Wire Corp*., Case No. 95-77-EL-AEC, Supplemental Entry on Rehearing at 3 (September 6, 1995).

to establish a record which allows for public scrutiny of the basis for the Commission's decision."[21]

B. Trade Secret Information As Codified by the Ohio General Assembly

R.C. 1331.61(D) defines a trade secret as:

> 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. (Emphasis added).

Under R.C. 1331.61(D) a trade secret must qualify under Section (D) as one of the forms of information listed and must then satisfy both criterion one and two: the information must have "independent economic value" and must have been kept under circumstances that maintain its secrecy. As discussed below, the evidence shows that DP&L has failed to put forth the effort necessary to maintain the secrecy of much of the information that it seeks to now conceal because it was publicly disclosed in its MRO filing and DP&L fails to produce anything but general conclusory statements to address the "economic value" issue.

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[21] *In the Matter of the Application of Rapid Transmit Technology Inc. for Certificate of Public Convenience and Necessity to Provide Local Telecommunications Service in the State of Ohio*, Case No. 99-890-TP-ACE, Entry at 2-3 (October l, 1999); *see also In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, Opinion and Order at 7 (October 18, 1990) (holding that "any interest which the joint applicants might have in maintaining the confidentiality of this information [fair market value and net book value of assets proposed to be transferred] is outweighed by the public's interest in disclosure.")

IV. THE SECRECY SOUGHT BY DP&L IS NOT SUPPORTED BY DECISIONS OF THE SUPREME COURT OF OHIO AND THE PUCO THAT INTERPRET THE TRADE SECRET EXEMPTION FROM PUBLIC DISCLOSURE

This Commission, as well as the Ohio Supreme Court, has had several occasions to address what constitutes a "trade secret." The Ohio Supreme Court has adopted, and this Commission has recognized,[22] the following factors in analyzing a trade secret claim:

> (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.[23]

The Companies do not address the Ohio Supreme Court's six factors, beyond (1), (2) and (3), which are elements of the statute defining a "trade secret," in supporting their trade secret claim.[24]

Additionally, the Commission has held that information freely disclosed cannot be considered a "trade secret".[25] In the CG&E Pipeline Case, the Commission addressed a motion for a protective order filed by CG&E to prohibit disclosure of the complete and final

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[22] See *In the Matter of the Application of Constellation NewEnergy, Inc. for Renewal of its Certification as a Retail Electric Service Provider*, Case No. 09-870-EL-AGG, Entry at 2 (November 21, 2011); *In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, Entry at 8-9 (November 25, 2003)(citations omitted).

[23] *State ex rel. Plain Dealer v. Department of Insurance*, 80 Ohio St. 3d 513, 524-524 (1998)(citations omitted); *see also The State ex rel. Perrea v. Cincinnati Pub. Schools*, 123 Ohio St.3d 410, 414 (2009).

[24] Dayton Power & Light's Memorandum in Support of Motion for Protective Order, Filed on Oct. 5, 2012 in PUCO Case No. 12-426-EL-SSO at 3.

[25] *In the Matter of The Cincinnati Gas & Electric Company Relative to Its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 00-681-GA-GPS Entry (March 3, 2005), Entry on Rehearing, (March 23, 2005) ("CG&E Pipeline Case").

report authored by a retained outside expert, Battelle. The report contained the results of research conducted by Battelle relating to riser leaks on CG&E's distribution system.[26] Battelle was retained by the Company to determine the cause of the riser failures and to assist CG&E in developing a comprehensive remedial plan.[27] At the same time CG&E filed its Motion for protective order, it filed the direct expert testimony of Mr. Pimputkar, Vice President of Technology Development for Battelle. Part of the purpose of his testimony was to discuss the Battelle research.[28] The Commission concluded that the contents of the Battelle Report were not trade secrets because the company had made the preliminary report public, and had disclosed some of the results through filed testimony in the proceeding.[29]

This precedent is applicable because, as discussed below, much of the same type of information OCC seeks to maintain in the public domain has been already disclosed by DP&L in its MRO filing. DP&L's free disclosure causes its claim for protection under the trade secret exemption to fail under this precedent.

The PUCO has held, in analyzing whether others can obtain "economic value" from the disclosure, that economic value is not derived simply by the fact that the information is not generally known by other persons.[30] And this is the only argument that DP&L alleges in regards to the "economic value" of the information. Specifically,

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[26] Id. at 3.

[27] Id.

[28] Id.

[29] Id. at 6. (March 3, 2005).

[30] *In the Matter of the Application of the Ohio Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, Entry at 10 (November 25, 2003). There the Commission found that data compiled by SBC Ohio that listed locations where broadband service had been deployed was not a trade secret. Id.

DP&L alleges that, "Maintaining the confidentiality of this information will prevent an undue competitive disadvantage to DP&L[.]"[31]

Numerous Commission holdings over the years provide guidance as to what information qualifies as trade secret. The Commission has held that financial data, including basic financial arrangements, do not contain proprietary information worthy of trade secret protection.[32] Additionally, financial statements of an inter-exchange carrier have likewise been found not to be a trade secret.[33] Even detailed financial information such as balance sheets, plant, accumulated depreciation and amortization has been found to fail to meet the trade secret definition.[34]

The details of business arrangements between utilities and third parties have been determined by the Commission to not qualify for protection from disclosure. For instance, contracts between a utility and its customers have been found not to meet the definition of trade secrets.[35] The Commission has also held that inter-connection agreements containing

[31] Memorandum in Support (October 5, 2012 Motion for Protection) at p. 3.

[32] See *In the Matter of the Applications of Vectren Retail, LLC et al. for Renewal of Certification as a Competitive Retail Natural Gas Supplier and for Approval to Transfer that Certification*, Case No. 02-1668-GA-CRS, Entry at 5 (August 11, 2004).

[33] *In the Matter of the Application of Rapid Transmit Technology, Inc. for a Certificate of Public Convenience and Necessity to Provide Local Telecommunications Service in the State of Ohio*, Case No. 99-890-TP-ACE, Attorney Examiner Entry at 2-3 (October 1, 1999).

[34] *In the Matter of the Filing of Annual Reports by Regulated Public Utilities*, Case No. 89-360-AU-ORD, Entry at 7-11 (August 1, 1989). *See also In the Matter of the Application of Ernest Communications, Inc. for a Certificate of Public Convenience and Necessity to Provide Local Exchange Telecommunications Services in the State of Ohio*, Case No. 01-3079-TP-ACE, Finding and Order at 3 (May 14, 2003) (holding that year 2000 financial statements were not trade secrets).

[35] *In the Matter of Several Applications of Cincinnati Bell Telephone Company for Approval of a Contract or Other Arrangement between Cincinnati Bell Telephone Company and Various Customers*, Case No. 96-483-TP-AEC, Entry at 4-7 (February 12, 1998).

the rates, terms, and conditions of interconnection between a local exchange company and a competitive local service provider do not amount to a trade secret.[36]

Moreover, the Commission has found on occasion that sensitive business information may not be protected from disclosure. For instance, the Commission has declined to interpret as a trade secret calling data that reveals business information such as traffic volume and revenues from interLATA calls between exchanges.[37] Interconnection demand letters and timelines for interconnection have been determined not to amount to trade secrets.[38]

The Commission has also ruled that the fair market value and net book value of assets sought to be transferred need not be protected from disclosure.[39] Furthermore, the Commission has ruled that information produced by third party experts that a utility retains are not necessarily subject to protection from disclosure. For instance, inputs and outputs of computer programs used for inventory management, which are the property of third parties and subject to licensing agreements, have been determined to be non-proprietary.[40]

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[36] *In the Matter of Application of Ameritech Ohio for Approval of an Interconnection Agreement between Ameritech Ohio and Communications Buying Group, Inc. Pursuant to Section 252 of the Telecommunications Act of 1996*, Case No. 96-604-TP-UNC, Attorney Examiner Entry at 2-3 (July 10, 1996).

[37] *In the Matter of the Petition of Alvahn L. Mondell, et al. v. The Ohio Bell Telephone Company Relative to a Request for Two-Way, Non-Optional Extended Area Service Between the Salem Exchange and the Alliance and Sebring Exchanges of the Ohio Bell Telephone Company*, Case No. 89-221-TP-PEX, Entry (May 16, 1989). *See also, In the Matter of the Petition of Michael and Carol Schlagenhauser, Relative to a Request for Two-Way, Non-Optional Extended Area Service*, Case No. 02-954-TP-PEX, Entry (July 30, 2002) (Commission held that information containing the number of access lines in the Perrysville exchange was not a trade secret).

[38] See *In the Matter of the Application of CTC Communications Corp. for a Certificate of Public Convenience and Necessity to Provide Local and Telecommunication services in Ohio*, Case No. 00-2247-TP-ACE, Entry at 3-4 (February 8, 2001).

[39] *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, Opinion and Order at 3-8 (October 18, 1990).

[40] *In the Matter of the Application of Ohio Edison Company for Authority to Change Certain of its Filed Schedules Fixing Rates and Charge for Electric Service*, Case No. 89-1001-EL-AIR, Attorney Examiner Entry (December 11, 1989).

Additionally the manner in which a utility applies the results of the computer runs to its inventory has been found to be non-proprietary.[41]

Finally, in order to overcome the presumption in favor of disclosure, the movant's interest in maintaining the confidentiality of the information must outweigh the public's interest in full disclosure.[42] The need for protection from public disclosure must amount to an extraordinary circumstance as this Commission's policy mandates. The Company made no showing of the necessary extraordinary circumstances.

DP&L has failed to overcome this presumption because it has not provided specific examples of how disclosure of the information would put it at a competitive disadvantage. DP&L's attempt to keep from the public domain projected balance sheets and revenues while considering increasing the rates of their customers is not an extraordinary circumstance that warrants confidential treatment. Based on DP&L's failure to offer proof that the information sought to be protected is a trade secret, and its failure to prove that the information warrants protection, this Commission should deny DP&L's Motion for Protection. *See for example, In the Matter of the Petition of Alvahn L. Mondell et al. v. The Ohio Bell Telephone Company, Relative to A Request for Two-Way , Non-Optional Extended Area Service Between the Salem Exchange and the Alliance and Sebring Exchanges of the Ohio Bell Telephone Company,* Case No. 89-221-TP-PEX, Entry at 4 (May 16, 1989) (finding that "due to the lack of detail

[41] Id.

[42] *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, Opinion and Order at 5-6 (October 18, 1990).

offered" in the motion for protective order, "the Commission cannot find the information should be afforded protected status.")[43]

V. DP&L HAS FAILED TO PROVE THAT THE INFORMATTION THAT IT SEEKS TO PROTECT IS EXEMPT FROM DISCLOSURE.

DP&L's Motion fails to describe specifically why the disclosure of the alleged confidential information would put the Company at a competitive disadvantage sufficient to warrant confidentiality. The failure to do so is magnified by the fact that DP&L previously publicly disclosed (in its MRO Application) similar types of information that was redacted as part of their ESP Application. Moreover, similar types of information such as that sought to be protected by DP&L has also been publicly disclosed by other utilities in recent similar type of SSO proceedings. Finally, DP&L has not addressed the public's interest in disclosure of the redacted information, which is an interest that must be balanced against the utility's interest in confidentiality to decide if protection is warranted.

[43] See also *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, Opinion and Order at 6-7 (October 18, 1990) (finding that joint applicants had failed "by not raising specific arguments as to how public disclosure of the specific items could cause them harm, or how disclosure of the information would permit the companies' competitors to use the information to their advantage.")

A. The Information Redacted by DP&L is not Information that Should be Shielded From the Public.

1. The information that DP&L seeks the Commission's approval to protect has been publicly disclosed.

As demonstrated above, the Commission has held that information freely disclosed cannot be considered a "trade secret".[44] At the start of this case, DP&L applied for a MRO.[45] DP&L withdrew its MRO Application on September 7, 2012. On October 5, 2012, DP&L applied for approval of an ESP, and filed the present Motion to protect information contained in testimony submitted as part of its ESP Application. Many of the same witnesses in the MRO Application have also filed testimony in the ESP Application.[46] A substantial part of the same type of information, such as the projected statements of income, the projected balance sheet, and projected statements of cash flow, that DP&L sought to redact in the testimony and exhibits filed as part of its ESP were already disclosed in the MRO Application.[47] The numbers may be different under an ESP, but the type of information is the same. The previous public disclosure of the same type of information in similar form supports the denial of protection for the information as part of the ESP Application.

For example, Company witnesses Craig Jackson and Aldyn Hoekstra each submitted testimony for both the MRO and ESP Applications. For Craig Jackson's testimony in the ESP Application, DP&L redacted information contained in exhibits marked CLJ-1, CLJ-2, CLJ-3,

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[44] *In the Matter of The Cincinnati Gas & Electric Company Relative to Its Compliance With the Natural Gas Pipeline Safety Standards and related Matters*, Case No. 00-681-GA-GPS, Entry (March 3, 2005), Entry Denying Rehearing, (March 23, 2005) ("CG&E Pipeline Case").

[45] See *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Market Rate Offer*, Case No. 12-426-EL-SSO, Application (March 30, 2012).

[46] *See* the direct testimonies of Aldyn W. Hoekstra and Craig L. Jackson (March 30, 2012) in the MRO Application, and the direct testimonies of Aldyn W. Hoekstra and Craig L. Jackson (October 5, 2012) in the ESP Application. Jackson.

[47] *See* Workpapers 12, 12.1, and 12.1a referenced in testimony of Craig L. Jackson (March 10, 2012).

and CLJ-4, and testimony related to those exhibits. CLJ-3 and CLJ-4 were contained in the MRO Application as WP 12.1 and WP 12.1A, respectively, with no information redacted. Since this information was publicly disclosed in the MRO Application, such information should not be redacted from the ESP Application.

Additionally, Lines 1-31 of CLJ-2 were contained in the MRO Application as exhibit WP 12. Even though the redacted portions of Jackson's testimony and Exhibit relate to the projected return on equity ("ROE") were not explicitly present in WP 12 of the MRO Application, this projected ROE information that DP&L sought to protect can easily be calculated based on the publicly disclosed information in Workpapers W-12, W-12.1, and W-121A. CLJ-1, Overview of Historical Return on Equity, did not appear in the MRO Application, and DP&L does not explain why historical and projected ROE information, wholesale energy price, wholesale capacity price and switched load should be protected from public disclosure. The public disclosure, in the MRO Application, of all information DP&L sought to protect as presented in CLJ-2, further supports OCC's argument that none of the testimony and exhibits of Craig L. Jackson in the ESP Application warrants protection.

A majority of the testimony and Workpapers provided by Hoekstra for the ESP Application (related to the "Distribution Sales Baseline Volumes" and "SSO Sales Baseline Volumes) is identical to his testimony provided in the MRO Application and all have been publicly disclosed. The redacted exhibits related to Hoekstra's ESP testimony, those related to realized and projected annualized switching in DP&L territory, did not appear in the MRO Application. But DP&L has not demonstrated why this type of information should be protected. Once again, this type of information is highly speculative projections well into the

future and they do not indicate or represent any business plans and actions that DP&L might take in the future. This type of information has no economic value to other parties.

William Chambers did not offer testimony in the MRO Application. His testimony focus in this case is on the projected ROE of DP&L over the next five years under the proposed ESP. The parts of redacted testimony and exhibits in Chambers' testimony are the same information (projected income statements, balance sheet, and cash flows) DP&L sought to protect in Craig L. Jackson's testimony and exhibits, and they were already publicly disclosed in the MRO Application. Specifically, Exhibits WJC-1.B (Projected Statements of Income), WJC-1.C (Projected Balance Sheet), WJC-1.D (Projected Statement of Cash Flow) are identical to Exhibit CLJ-2, CLJ-3, and CLJ-4. For the same reason outline above that CLJ-2, and CLJ-3, and CLJ-4 should be publicly disclosed, Exhibits WJC-1.B, WJC-1.C, and WJC-1.D and related testimony should also be publicly disclosed.

The other exhibits that DP&L sought to protect, WJC-2.B WJC-2.C, WJC-2.D, WJC-3.B, WJC-3.C, WJC-3.D, WJC-4.B, WJC-4.C, WJC-4.D, WJC-5.B, WJC-5.C, and WJC-5.D present similar type of information (income, balance sheet and statement of cash flow) under different scenarios as discussed in Chamber's testimony. None of these scenarios discussed will imply, disclose, or represent any business actions, plans, and strategies of DP&L. They are just highly speculative financial projections. In summary, none of the redacted exhibits and testimony related to Chambers' ESP testimony should be protected from public disclosure.

DP&L should be prohibited from attempting to protect any information that was previously publicly disclosed in its MRO Application, or any information that can be calculated directly from those publicly disclosed information. OCC asserts that nothing

related to the testimony and exhibits of Jackson, Hoekstra, and Chambers should be kept from the public because that same type of information was publicly disclosed in the MRO Application or can be directly calculated from those publicly disclosed information.

2. Other electric distribution utilities have disclosed similar types of information in recent cases before the PUCO.

DP&L seeks to protect information in its ESP Application claiming that disclosure of the information would put them at a competitive disadvantage. Competing utility companies, however, have recently disclosed the same types of information in recent cases before the PUCO that DP&L wishes to protect. DP&L cannot allege that disclosure would put them in a competitive disadvantage if other utilities have been voluntarily disclosing similar types of information to the public.

Much of what DP&L redacted from its ESP Application relates to future income, future sales and earnings, projected future balance sheets, and projected cash flow. In the most recent AEP Ohio ESP proceeding, AEP Ohio did not redact the projected future revenues and expenses, income statement, balance sheet, cash flow, and return on equity for the years of 2012 to 2016.[48] Similarly, in First Energy's first ESP proceeding (the 2009 ESP), the projected income statements, balance sheets, and sources and uses of funds for the future years of 2009 to 2011 were fully disclosed.[49]

To the extent other utilities in the State of Ohio are voluntarily disclosing information similar to the information that DP&L seeks to protect, DP&L would not be

[48] See *In the Matter of the Application of Columbus Southern Power Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, Direct Testimony of William Allen (September 13, 2011), Exhibit WAA-5.

[49] See *In the Matter of the Application of the Ohio Edison Company, et al. for Authority to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 08-0935-EL-SSO, Testimony of Harvey Wagner (July 31, 2008), Schedules 7a, 7b, and 7c.

put at a competitive disadvantage by disclosing the information they have redacted from their ESP application. Without any specific claims as to why the information warrants protection other than being financial information, DP&L should have to disclose similar types of information to what other utilities have recently disclosed.

B. DP&L's Motion for Protective Order does not Specifically Address Certain Aspects of the Established Standard to Show that the Information it Seeks to Protect Constitutes a Trade Secret.

DP&L seeks protection of alleged "Confidential Information" included in the testimony and exhibits of DP&L witnesses Craig Jackson, Aldyn Hoekstra and William Chambers. The information sought to be protected consists mostly of highly speculative un-audited projections of sales and earnings, other financial information, and estimated customer switching data well into the future, year 2017.[50] The Company failed to demonstrate the connection between the alleged confidential information and any specific business plan or action that DP&L plans to take in the future. DP&L claims that this information should be protected because the data are trade secrets.

DP&L cites several sources which support financial data such as their information warranting treatment as a trade secret, but the Company only alleges and does not demonstrate that the information "derives independent economic value," or how other parties "can obtain economic value from its disclosure or use." Typically, this highly speculative financial information far into the future is treated as "speculation" by the investors, the financial community, and the competitors. Projected earnings and sales for next quarter or next years are routinely disclosed in company presentations and filings. The information that DP&L

[50] See Testimony of Craig Jackson, Aldyn Hoekstra, and William Chambers, *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 12-426-EL-SSO (October 5, 2012).

seeks to protect has no independent economic value to other parties. The failure to address a necessary part of the test for determining a trade secret is a flaw that warrants denial of DP&L's Motion.

DP&L also states that the redacted information is not known outside the Company and is not generally disseminated to employees.[51] However, nowhere in its Motion does DP&L explain how a competitor would obtain economic value from the information if the information were to be disclosed, or how disclosure would put the Company at a competitive disadvantage. This information (that DP&L now seeks to protect) does not disclose, present, or represent any business decisions, actions, or strategies that DP&L may take at the present and in the future.

The Commission has stated that a movant who seeks to protect information from the public must raise "specific arguments as to how public disclosure of the specific items could cause them harm, or how disclosure of the information would permit the companies' competitors to use the information to their advantage."[52] The Ohio Administrative Code requires that "[t]he party requesting such protection shall have the burden of establishing that such protection is required."[53] DP&L has not met its burden of proof that protection is required under Ohio law.

[51] *Plain Dealer v. Dept. of Insurance*, 80 Ohio St.3d 513, 524 (1998).

[52] *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, Opinion and Order at 5-6 (October 18, 1990).

[53] Ohio Adm. Code 4091-1-27(B)(7)(e).

C. DP&L has not Addressed the Public's Interest in Disclosure of Their Financial Information.

DP&L claims that it will be disadvantaged by having to disclose projected financial information,[54] but its Motion does not identify any specific interest that the public has in that information. If DP&L is going to ask that its customers pay more for their electric service, then the public should have the right to review the financial information underlying such a request. DP&L has not addressed the harm from any interest from the public in disclosure in its Motion, thus that interest should not be considered by the Commission.

The Commission has established a policy that confidential treatment is to be given only under extraordinary circumstances.[55] The Commission has stated that "it is necessary to strike a balance between competing interests. On one hand, is the applicant's interest in keeping certain business information from the eyes and ears of its competitors. On the other hand, is the Commission's own interest in deciding this case through a fair and open process, being careful to establish a record which allows for public scrutiny of the basis for the Commission's decision."[56] The Commission has stated that R.C. 4901.12 and R.C. 4905.07 "provide a strong presumption in favor of

[54] Motion for Protective Order at 3.

[55] See *In the Matter of the Application of The Cleveland Electric Illumination Company for Approval of an Electric Service Agreement With American Steel & Wire Corp*., Case No. 95-77-EL-AEC, Supplemental Entry on Rehearing at 3 (September 6, 1995).

[56] *In the Matter of the Application of Rapid Transmit Technology Inc. for Certificate of Public Convenience and Necessity to Provide Local Telecommunications Service in the State of Ohio*, Case No. 99-890-TP-ACE, Entry at 2-3 (October l, 1999); *see also, In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Asset*s, Case No. 89-365-RC-ATR, Opinion and Order at 7 (October 18, 1990) (holding that "any interest which the joint applicants might have in maintaining the confidentiality of this information [fair market value and net book value of assets proposed to be transferred] is outweighed by the public's interest in disclosure.")

disclosure, which the party claiming protective status must overcome."[57] To overcome that presumption, the party moving for protection must show that the confidentiality of the information outweighs the public's interest in full disclosure of the information.[58]

DP&L's Motion for Protective Order neither shows that its interest in protection outweighs the public's interest in disclosure nor does it even address any public interests. OCC believes that the public interests in this situation are strong, because the public faces increasing rates by DP&L. Public disclosure of projected financial data allows the public to view the Company's need to raise rates, and react accordingly. Without disclosure of this data, the public loses their ability to make any statement on DP&L's ratemaking, because they do not know whether or not any rate changes are warranted. When the public faces increasing rates they deserve to know the reasons for it. Thus DP&L should not be able to protect the information it has redacted from its ESP Application.

VI. CONCLUSION

OCC presents three main points in favor of denial of the Motion for Protective Order and having a proceeding where key information is in the public light. The first is that DP&L has not made arguments to satisfy all parts of the trade secret standard. Without any claim as to the economic value of the information, the Company has not fully alleged that the information is a protected trade secret. The second is that the information does not warrant protection because the same type of information has previously been disclosed. In fact, DP&L itself publicly disclosed some redacted

[57] *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, Opinion and Order at 5 (October 18, 1990).

[58] Id. at 5-6.

information in its MRO Application, and other Ohio utilities have disclosed the same type of information that DP&L seeks to protect in recent cases. Finally, DP&L does not deserve protection from disclosure without a showing that its interest outweighs the public interest in disclosing the data. Because the Motion did not address any public interests, DP&L has not made a sufficient showing and the Motion for Protection should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Memo Contra w*as served on the persons stated below via electronic service, this 22nd day of October 2012.

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Summary: Memorandum Memorandum Contra Dayton Power & Light Motion for Protective Order by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Serio, Joseph P. Mr.