

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Amendment of Ohio  
Adm. Code 4901-1-24, Regarding  
Motions for Protective Orders**

**Case No. 18-322-AU-ORD**

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**COMMENTS OF  
THE DAYTON POWER AND LIGHT COMPANY**

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**I. INTRODUCTION**

Pursuant to the Commission’s Entry of February 28, 2018 (“Entry”), the Dayton Power and Light Company (“DP&L” or “the Company”) submits its initial comments in this proceeding addressing recommended amendments to rules contained in Chapter 4901-1-24 of the Ohio Administrative Code (“O.A.C.”). DP&L appreciates the opportunity to comment and provide input into the proposed amendments to O.A.C. 4901-1-24. DP&L respectfully suggests that the Public Utilities Commission of Ohio (“PUCO” or “the Commission”) consider minor changes to the proposed amendment, to ensure that the rule is not unduly burdensome or cause unintended chilling of discovery productions.

**II. COMMENTS**

In response to a recent Supreme Court of Ohio decision, the Commission proposes the same amendment to Rule 4901-1-24(D)(3) and 4901-1-24(F) by adding the language: “Facts supporting [a motion for protective order] shall be set forth in an affidavit made on personal knowledge.” Such a requirement, however, could prove to be logically burdensome due to the physical locations of affiants. Because this requirement applies to all motions for protective order, this rule as proposed could also chill the utilities ability to share confidential information with intervenors in contested proceedings. The rule is also unnecessary for protecting

information that is already deemed confidential by the Ohio Revised Code or the PUCO's rules.

For these reasons, the Commission should amend the rules to accommodate these concerns.

**A. The Commission should amend the proposed rule to accommodate practical difficulties in filing sworn affidavits at the time of filing a motion to compel.**

DP&L recommends that the Commission consider the practical impacts of requiring the filing of an affidavit upon personal knowledge as a condition precedent anytime a motion for protective order is filed. The Commission explained that this proposed rule change is in response to the Supreme Court of Ohio's January 24, 2018 ruling in *In Re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.* In that case, the Court held that "the Commission erred in making a trade secret determination in the absence of any discussion of evidence supporting the request for protective treatment."<sup>1</sup> Although the Court explained that trade secret information is a factual determination,<sup>2</sup> an affidavit is unnecessary in instances where precedent is on all-fours. Therefore, a sworn affidavit based upon personal knowledge is not necessary in all instances as this proposed rule requires.

Moreover, instead of requiring a sworn statement, the Commission should also permit an unsworn declaration, which is an acceptable practice under the Federal Rules of Evidence. The Federal Rules of Evidence state:

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter ***may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed***

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<sup>1</sup> *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229, at p. 12 (January 24, 2018).

<sup>2</sup> *Id.*

*by him*, as true under penalty of perjury, and dated, in substantially the following form:

...

(2) If executed within the United States, its territories, possessions, or commonwealths: “I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)”.

28 U.S.C. 1746 (emphasis added).

Often times motions for protective order must be filed in a very short period of due to a public records request or pursuant to the terms of a confidentiality agreement. Many of the utilities in this state, however, are part of larger corporations that have shared employees throughout the country. This creates a situation where affiants could work out-of-state or in remote regional or field offices resulting in logistical difficulties for obtaining notarization to timely file evidence in support of a motion for protective order. Certainly, a sworn declaration would be a sufficient factual mechanism upon which to base a decision regarding trade secret and would help reduce the administrative burden associated with filing factual support with a motion for protective order.

**B. The Commission should create an exception for information that has been provided to intervenors pursuant to a confidentiality agreement.**

The Commission’s proposed amendment to 4901-1-24(D)(3) and (F) apply to all parties filing a motion for protective order, including moving parties that do not own the confidential information. Intervenors in a contested proceeding often file comments, testimony, and/or briefs that contain confidential information acquired during the course of discovery pursuant to a confidentiality agreement. Historically, those parties file the confidential version of their pleading under seal, along with a motion for protective order. Such motions for protective order often point solely to a confidentiality agreement for factual support. Under the new rule as proposed, however, those same intervenors would now have to file an affidavit based upon

personal knowledge stating the facts as to why the information is confidential. Intervening parties that have been provided information pursuant to a confidential agreement should not be required to submit an affidavit based upon personal knowledge.

In these circumstances, the information is owned by and deemed confidential by the utility. Therefore, intervenors are unlikely to have the ability to swear upon personal knowledge, sufficient factual information to address the six-factor test set forth in *State ex rel. Plain Dealer*, 80 Ohio St.3d at 524-525, 687 N.E.2d 661 (1997). To the contrary, OCC often states in their motions for protective order, that “OCC does not concede that the information in the [testimony] is trade secret information under R.C. 1333.61(D) and does not concede that the information is deserving of protection from public revelation under Ohio Adm. Code 4901-1-24(D).”<sup>3</sup> Absent an exception to the proposed amendment to proposed Ohio Adm. Code 4910-1-24(D)(3) and (F), utilities would be chilled from providing intervenors with confidential information. Certainly, the Commission does not intend to inhibit the free flow of information in proceedings that are already incredibly complicated and administratively complex. Therefore, the Commission should create an exception for motions for protective order that are filed by intervenors pertaining to information attained pursuant to a confidentiality agreement.

**C. The Commission should create an exception for information that is otherwise protected by the Ohio Revised Code or the PUCO’s rules.**

The Commission should also permit an exception to the requirement for an affidavit in proposed Ohio Adm. Code 4901-1-24(D)(3) and (F) for information already deemed confidential by the Ohio Revised Code or the Commission’s rules. For instance, Ohio Adm. Code 4901-10-12 provides certain protections of customer privacy information such as customer account

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<sup>3</sup> See e.g., *In Re the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 16-395-EL-SSO, OCC Motion for Protective Order (March 29, 2017).

numbers, social security numbers, and customer energy usage data that is more granular than the monthly historical consumption data.<sup>4</sup> But sections 4901-1-24(D) and 4901-1-24(F) of the proposed rule are not limited in applicability to trade secret information or to the moving parties' own internal data. Thus, the amendments would require motions for protective order supported by sworn affidavits anytime customer information is provided to the PUCO. It seems unnecessary and unduly burdensome to require such efforts to protect information that is already deemed protected under the Rules. Therefore, the Commission should except such information from the requirements of proposed Ohio Adm. Code 4901-1-24.

### **III. CONCLUSION**

DP&L understands the Commission's desire to respond effectively to the Supreme Court of Ohio's decision issued in January. The Company urges the Commission, however, to adopt further amendments to the proposed amendments to Ohio Adm. Code 4901-1-24 to avoid unintended consequences in litigated matters and improve the practicability of the proposed rule.

Respectfully submitted,

/s/ Michael J. Schuler

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<sup>4</sup> Ohio Adm. Code 4901:1-10-12(F).

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Comments of The Dayton Power and Light and Company were filed with the Commission's Docketing Division on this 16th day of March 2018 and is available to all interested parties.

/s/ Michael J. Schuler  
Michael J. Schuler (0082390)

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Summary: Comments electronically filed by Mrs. Jessica E Kellie on behalf of The Dayton Power and Light Company