

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of : Case No. 20-0680-EL-UNC
The Dayton Power and Light Company for a
Finding That Its Current Electric Security :
Plan Passes the Significantly Excessive
Earnings Test and More Favorable in the :
Aggregate Test in R.C. 4928.143(E).

**THE DAYTON POWER AND LIGHT COMPANY'S
MOTION FOR PROTECTIVE ORDER RELATING TO ITS INITIAL COMMENTS**

Pursuant to Ohio Adm.Code 4901-1-24(D), The Dayton Power and Light Company ("DP&L") moves for the entry of a Protective Order to exempt from public disclosure certain information that is confidential, proprietary, and competitively sensitive trade secret information. R.C. 1333.61(D). The information at issue is Confidential Information relating to financial projections and data contained in the Initial Comments of The Dayton Power and Light Company, which cite and quote confidential material from the Direct Testimony of Gustavo Garavaglia M. and the Direct Testimony of R. Jeffrey Malinak in this proceeding.

The information at issue is maintained as confidential by DP&L, and constitutes proprietary and competitively sensitive trade secret material, the public disclosure of which would subject DP&L to an unfair competitive disadvantage. In accordance with Ohio Adm.Code 4901-1-24(D)(2), an original and two unredacted copies of the Confidential Information are to be filed under seal with the Commission via mail. *In the Matter of the Proper Procedures and Process for the Commission's Operations and Proceedings During the Declared State of Emergency and Related Matters*, Pub. Util. Comm. No. 20-591-AU-UNC (Mar. 16, 2020 Entry, ¶5(c)).

If this Motion is opposed, then DP&L will submit a declaration in support.

DP&L will further produce an unredacted copy of the Initial Comments of The Dayton Power and Light Company to any party who enters into a protective agreement with DP&L in this proceeding.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF THE DAYTON POWER
AND LIGHT COMPANY'S MOTION FOR
PROTECTIVE ORDER RELATING TO ITS INITIAL COMMENTS**

Pursuant to Ohio Adm.Code 4901-1-24(D), The Dayton Power and Light Company ("DP&L") moves for the entry of a Protective Order to exempt from public disclosure certain information as confidential, proprietary and competitively sensitive trade secret information. Specifically, DP&L requests that certain confidential information contained in the Initial Comments of The Dayton Power and Light Company relating to financial projections and data contained in the Direct Testimony of Gustavo Garavaglia M. and the Direct Testimony of R. Jeffrey Malinak be exempt from public disclosure as confidential, proprietary and competitively sensitive trade secret information ("Confidential Information").

Section 4901-1-24(D) of the Ohio Administrative Code provides that the Commission 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. *Accord:* R.C. 4905.07 (providing that "[e]xcept as provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX [49] of the Revised Code, all facts and information in the possession of the public utilities commission shall be public").

The release of trade secret information by the Commission is prohibited by state law. *In the Matter of the Joint Application of The Dayton Power and Light Company for Integration of an Energy Efficiency or Peak-Demand Reduction Program with Honda of Am. Mfg., Inc.*, Pub. Util. Comm. No. 10-2205-EL-EEC, 2011 Ohio PUC LEXIS 1313, at *6 (Dec. 7, 2011 Finding and Order) ("Section 149.43, Revised Code, specifies that the term 'public records'

excludes information which, under state or federal law, may not be released. The Ohio Supreme Court has clarified that the 'state or federal law' exemption is intended to cover trade secrets.") (citing *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000)). The definition of a "trade secret" includes "any business information or plans [and] financial information." R.C. 1333.61(D).

"A company's determination of its costs, overhead and volume of sales, and particularly its calculation of profit margins on customers' purchases may be the kind of information that the trade secret statute seeks to protect." *Kenker Box Co. v. Riemeier Lumber Co.*, 1st Dist. Hamilton Nos. C-990803 and C-990824, 2000 Ohio App. LEXIS 6198, at *10 (Dec. 29, 2000). *Accord: Alpha Benefits Agency, Inc. v. King Ins. Agency, Inc.*, 134 Ohio App. 3d 673, 683, 731 N.E.2d 1209 (8th Dist.1999) (holding that trial court should have ordered plaintiff to produce its "profitability information" to defendant subject to a protective order); *Vanguard Transp. Sys. v. Edwards Transfer & Storage Co. Gen. Commodities Div.*, 109 Ohio App. 3d 786, 789-90, 673 N.E.2d 182 (10th Dist.1996) (affirming trial court order that held that various information including "corporate financial information" constituted a trade secret).

This definition reflects the state policy favoring the protection of trade secrets such as the information that is the subject of this Motion. The Commission has issued protective orders in numerous prior proceedings to prevent the public disclosure of trade secrets, *e.g.*, *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Pub. Util. Comm. No. 17-32-EL-AIR, *et al.*, 2018 Ohio PUC LEXIS 1268 (Dec. 19, 2018 Opinion and Order), ¶ 161-163 ("we note that the Commission has previously granted protective treatment for portions of briefs filed under seal and testimony containing sensitive data, including information that appears to matters relating to competitive business information"); *In*

the Matter of the Application of Midwest Utility Consultants, Inc. for Certification as a Competitive Retail Natural Gas Aggregator/Broker, Pub. Util. Comm. No. 09-893-GA-AGG, 2012 Ohio PUC LEXIS 103 (Jan. 30, 2012 Entry) (forecasted financial statements were trade secrets and granted protective treatment); *In the Matter of the Application of the Ohio Power Co. and Columbus S. Power Co. for Authority to Merge and Related Approvals, et al.*, Pub. Util. Comm. No. 10-2376-EL-UNC, *et al.*, 2011 Ohio PUC LEXIS 1325, at *22-23 (Dec. 14, 2011 Opinion and Order) (forecasted fuel expenditures were trade secrets and granted protective treatment); *In the Matter of the Joint Application of The Dayton Power and Light Company for Integration of an Energy Efficiency or Peak-Demand Reduction Program with Honda of Am. Mfg., Inc.*, Pub. Util. Comm. No. 10-2205-EL-EEC, 2011 Ohio PUC LEXIS 1313, at *2-5 (Dec. 7, 2011 Finding and Order) (release of trade secrets prohibited by state law). *Accord: Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853, ¶ 8.

Here, the Confidential Information constitutes "business information or plans, [and] financial information" that is confidential, proprietary and competitively sensitive trade secret information under R.C. 1333.61(D). The Confidential Information is not known outside of DP&L, and is not disseminated to internal employees unless those employees have a legitimate business need to know the information. Maintaining the confidentiality of this information will prevent an undue competitive disadvantage to DP&L, as well as assisting in fostering the interests of maintaining a fair and robust competitive marketplace within Ohio.

The Commission and its Staff will have full access to the Confidential Information in order to fulfill its statutory obligations. Further, DP&L was careful to redact from

the publicly-filed version of the Initial Comments of The Dayton Power and Light Company only those portions that are essential to prevent disclosure of Confidential Information.

For these foregoing reasons, DP&L requests that the Commission issue a Protective Order that permits the Confidential Information to be designated as confidential and to remain under seal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing the Initial Comments of The Dayton Power and Light Company, has been served via electronic mail upon the following counsel of record, this 1st day of July, 2020.

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Summary: Motion The Dayton Power and Light Company's Motion for Protective Order
Relating to Its Initial Comments electronically filed by Mr. Jeffrey S Sharkey on behalf of The
Dayton Power and Light Company