BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of 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).	))))))	Case No. 20-680-EL-UNC

MEMORANDUM CONTRA DP&L'S MOTION FOR A PROTECTIVE ORDER TO KEEP SECRET ALLEGED CONFIDENTIAL INFORMATION CITED UNDER SEAL IN THE DIRECT TESTIMONY OF OCC WITNESS MATTHEW KAHAL
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

Christopher Healey (0086027)
Counsel of Record
William J. Michael (0070921)
Amy Botschner O'Brien (0074423)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215
Telephone [Healey]: (614) 466-9571
Telephone [Michael]: (614) 466-1291
Telephone [Botschner O'Brien]: (614) 466-9575
christopher.healey@occ.ohio.gov
william.michael@occ.ohio.gov
amy.botschner.obrien@occ.ohio.gov
(willing to accept service by e-mail)

December 4, 2020

TABLE OF CONTENTS

PAGE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of 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).	))))))	Case No. 20-680-EL-UNC

MEMORANDUM CONTRA DP&L'S MOTION FOR A PROTECTIVE ORDER TO KEEP SECRET ALLEGED CONFIDENTIAL INFORMATION CITED UNDER SEAL IN THE DIRECT TESTIMONY OF OCC WITNESS MATTHEW KAHAL BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

The PUCO should deny DP&L's motion for a protective order[1] because the information found in OCC witness Kahal's testimony does not include trade secrets and therefore should not be kept from the public.[2] OCC redacted (kept under seal) the information based on DP&L's claims of alleged confidentiality (for the "non-disclosed information"), DP&L has failed to establish that the non-disclosed information constitutes a trade secret under the plain language of R.C. 1333.61(D) or the Supreme Court's six-part *Plain Dealer* test. Thus, the PUCO should not allow the information to be withheld from public view.

The non-disclosed information includes important information about rates that customers might pay, and the amount of profit that DP&L could make from those rates, if DP&L is allowed to continue charging customers nearly $80 million per year under the unlawful rate stabilization charge or "RSC." It includes, among other things, (i) the amount of hypothetical, so-called

[1] Motion of the Dayton Power and Light Company for Entry of a Protective Order Relating to Confidential Information Cited in the Direct Testimony of Matthew I. Kahal (Nov. 19, 2020) (the "Motion").

financial integrity charges that DP&L claims the PUCO might approve in an MRO case,[3] (ii) DP&L's projections for its expected return on equity (profit),[4] (iii) costs that DP&L has projected it will incur for environmental remediation of a power plant and the name of that power plant,[5] (iv) the amount that DP&L claims customers would save as a result of continuing with an electric security plan ("ESP") instead of a market rate offer ("MRO"),[6] (v) DP&L's estimated revenues from its standard service offer ("SSO") compared to a hypothetical SSO that does not include the RSC or a similar financial integrity charge ("FIC")[7], (vi) Mr. Kahal's calculations of DP&L's expected return on equity under different circumstances,[8] (vii) Mr. Kahal's calculation of the increase in costs paid by customers,[9] and (viii) Mr. Kahal's calculations regarding the extent to which DP&L's earnings depend on the RSC as opposed to other sources.[10]

For the reasons described below, these are not trade secrets. The public has a right to know this important information about the subsidies that customers are paying and the amount of profit that DP&L is making and could continue to make because of these subsidies.

---

[2] Direct Testimony of Matthew I. Kahal on Behalf of the Office of the Ohio Consumers' Counsel (Oct. 22, 2020) (the "Kahal Testimony").

[3] Kahal Testimony at 8, 28, 34, 37.

[4] *Id.* at 9, 17, 48, 50.

[5] *Id.* at 28.

[6] *Id.* at 29.

[7] *Id.* at 37.

[8] *Id.* at 34, 35, 37.

[9] *Id.* at 37.

[10] *Id.* at 38, 39, 40, 43, 51.

II. LEGAL STANDARD

For the non-disclosed information to remain withheld from the public, DP&L must overcome the "strong presumption" that citizens have a right to access information and documents involving governmental proceedings.[11] By law (R.C. 4901.12), "all proceedings of the public utilities commission and all documents and records in its possession are public records," with limited exceptions (as found in R.C. 149.43). R.C. 4905.07 similarly says that "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," again, subject to limited exceptions (as found in R.C. 149.43). The Supreme Court of Ohio has ruled that these exceptions are to be "strictly construed" in favor of disclosure.[12]

To overcome the strong presumption in favor of public disclosure, the party that seeks to keep information private bears the burden of proving that "state or federal law prohibits release of the information."[13] As explained below, no state or federal law prohibits the release of the non-disclosed information. It must be released for the public to see.

---

[11] *In re Joint Application of the Ohio Bell Tel. Co. & Ameritech Mobile Servs., Inc.*, No. 89-365-RC-ATR, 1990 Ohio PUC LEXIS 1138, at *5 (Oct. 18, 1990) ("The public record statutes applicable to the Commission (Section 4901.12 and 4905.07, Revised Code) provide a strong presumption in favor of disclosure, which the party claiming protective status must overcome."). *See also In re Application of the Cincinnati Gas & Elec. Co.*, Case No. 03-93-EL-ATA, Order on Remand at 14 (Oct. 24, 2007) ("the Commission has held that, pursuant to Sections 4901.12 and 4905.07, Revised Code, there is a strong presumption in favor of disclosure that the party claiming protective status must overcome").

[12] *State ex re. Williams v. Cleveland*, 64 Ohio St.3d 544, 547 (1992).

[13] Ohio Adm. Code 4901-1-24(D) (PUCO may redact documents "to the extent that state or federal law prohibits release of the information, including where the information is deemed ... to constitute a trade secret under Ohio law"). *See also In re Application of Jay Plastics Div. of Jay Indus., Inc.*, Case No. 13-2440-EL-EEC, 2015 Ohio PUC LEXIS 139, at *6 ("an entity claiming trade secret status bears the burden to identify and demonstrate that the material is included in categories of protected information under the statute and additionally must take some active steps to maintain its secrecy") (Feb. 11, 2015).

III. ARGUMENT

A. DP&L has failed to show, or even attempt to show, that its trade secret claims pass the *Plain Dealer* test for trade secrets.

Ohio courts and the PUCO consider the following factors when evaluating a utility's 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.[14]

DP&L did not mention *Plain Dealer* or these six factors in its Motion and thus made no attempt to show how its trade secret claims satisfy the *Plain Dealer* test. This alone is grounds for denying the Motion. Further, DP&L's trade secret claims fail the *Plain Dealer* test, as follows.

Regarding the first factor, DP&L has failed to show that the information is not known outside the business. One key piece of information is DP&L's projected return on equity.[15] While DP&L has claimed that the exact number (as found in Mr. Kahal's testimony) is confidential, there is publicly available information about this projection. DP&L witness Malinak, for example, publicly testified that the projected return on equity is expected to be below 12.4%.[16] DP&L has not explained why this information can be shared with the general

[14] *See State ex rel Plain Dealer v. Ohio Dep't of Ins.*, 80 Ohio St.3d 513, 524-25 (1997) (establishing the six-part test); *In re Application of Windstream Ohio, Inc.*, Case No. 15-950-TP-ATA, 2016 Ohio PUC LEXIS 487, at *15 (May 17, 2016) (applying the six-factor test for trade secrets set forth in *Plain Dealer* and denying motion for protective order).

[15] *See* Kahal Testimony at 9, 17, 48, 50.

[16] Testimony of R. Jeffrey Malinak at 15-16 (Apr. 1, 2020).

public, but the similar information redacted in the Kahal Testimony cannot. With respect to projected costs for environmental compliance (see Kahal Testimony at 28), DP&L has publicly disclosed this type of information in the past. For example, with respect to DP&L's Hutchings unit, DP&L reported its projected environmental costs in a 10-K filing with the SEC.[17] DP&L has not explained why this type of information could be shared with the public in the past but is now a trade secret.

Regarding the second factor, DP&L has failed to show that it takes any steps to reduce the extent to which the non-disclosed information is shared among its employees. If DP&L shares the non-disclosed information with employees beyond those that need to know, it would not be taking appropriate steps to reduce the extent to which the non-disclosed information is shared among its employees.

Regarding the third factor, DP&L has failed to explain the precautions it takes to guard the secrecy of the information. We know that DP&L filed the information under seal in this case and that it provided the information to OCC under the terms of a protective agreement. But DP&L has not provided any information about the extent to which it may have shared any of this information with other parties, including the public, outside consultants, investors, shareholders, or others. Nor has DP&L provided any information about the instructions it provides to its employees with access to the information about sharing it with others.

Regarding the fourth factor—the savings effected and the value to the holder in having the information as against competitors—DP&L cannot satisfy this part of the test because DP&L has no competitors. It is a monopoly, which by definition competes with no one.

[17] *See* https://www.sec.gov/Archives/edgar/data/27430/000078725013000009/c250-20121231x10k.htm at 20 (disclosing projected $26 million in environmental matters for the Hutchings Unit in 2013).

Regarding the fifth factor, DP&L has provided no information about the amount of effort or money expended in obtaining and developing the information. Further, DP&L spent zero dollars developing some of the information because some of the information was created by OCC witness Kahal.[18] While Mr. Kahal used some information that DP&L claims is confidential, DP&L did not incur any costs for Mr. Kahal's calculations.

Regarding the sixth factor, the amount of time and expense it would take for others to acquire and duplicate the information, DP&L has again provided no information.

Where DP&L bears the burden of proof on its motion and has failed to support its claims under the *Plain Dealer* test, the PUCO must deny the Motion and allow the public to see the entirety of Mr. Kahal's testimony.

B. DP&L claims that the non-disclosed information is "financial information of DP&L," but this does not accurately describe all of the non-disclosed information.

In the Motion, DP&L claims that the non-disclosed information in Mr. Kahal's testimony is "sensitive financial information of DP&L, including projections of the Company's potential revenues, earnings and profitability over the next three years."[19] DP&L cites projected return on equity, projected earnings, projected revenues, and costs of environmental remediation as this information that allegedly needs to be kept confidential.[20] But much of the non-disclosed information does not fall into any of these categories. Thus, even if the PUCO were to rule that some of the non-disclosed information is a trade secret, it should not do so with respect to all of it.

[18] *See* Kahal Testimony at 34, 35, 37, 38, 39, 40, 43, 51.

[19] Motion at 2.

[20] *Id.*

First, two of the key data points that DP&L claims are trade secrets are *hypothetical* charges that DP&L believes it would be allowed to charge customers in the form of a "financial integrity charge" if DP&L were to request a market rate offer ("MRO") instead of an electric security plan.[21] DP&L has not filed a request for an MRO, nor does it appear that DP&L intends to. So, the amount that DP&L believes the PUCO might approve in such a case is not a financial projection that has anything to do with DP&L's current business operations.

Another piece of non-disclosed information is the amount that DP&L claims it would save as a result of operating under an ESP instead of an MRO.[22] Again, this is a hypothetical amount, so it does not reveal anything about DP&L's financial condition. Further, it would be unfair for DP&L to claim that these alleged savings are a benefit under the settlement filed in this case but then to deny the public knowledge about the amount of the alleged benefit.

non-disclosed information

Finally, Mr. Kahal's testimony redacted the name of the facility for which the environmental remediation is required. It is unclear how the mere name of the facility, without more, could be a trade secret.

C. The non-disclosed information is stale and thus does not deserve trade secret protection.

It is well accepted that a trade secret can cease to be a trade secret if it loses its value over time.[23] Much of the non-disclosed information is based on the testimony of DP&L witness

[21] *See* Kahal Testimony at 8, 28, 34, 37 (citing two potential amounts for the hypothetical financial integrity charge, as provided by DP&L).

[22] *See* Kahal Testimony at 29.

[23] *See, e.g., Sys. Spray-Cooled, Inc. v. FCH Tech, LLC*, 2017 U.S. Disc. LEXIS 73909, at *14 (May 16, 2017) ("a trade secret may lose its protected status upon a showing that the information has become stale or outdated") (citing *Synergetics, Inc. v. Hurst*, 477 F.3d 949 (8th Cir. 2007); *Avtel Servs. v. United States*, 70 Fed. Cl. 173, 191 (2005) ("information loses its confidential nature once it becomes stale"); *Murray Energy Holdings Co. v. Mergermarket USA, Inc.*, 2016 U.S. Dist. LEXIS 79183, at *9-10 (S.D. Ohio June 17, 2016) ("Courts have generally held that trade

Malinak. Mr. Malinak's testimony was filed eight months ago. The information is stale for several reasons.

First, because the projections were prepared more than eight months ago, they are now outdated. Some of those projections pertain to 2020, which is now nearly over. Projections of what will happen in 2020 cannot have any value when the actual 2020 information is now known.

Second, since the filing of Mr. Malinak's testimony, DP&L has filed a new base rate case.[24] Mr. Malinak's projections of future return on equity, revenues, and earnings did not include any assumption of a base rate increase. Thus, new projections would need to account for this change, and the old projections would be outdated and without value. They thus cannot be trade secrets. Likewise, Mr. Kahal's references to these projections in his testimony would not be trade secrets and must be revealed.

D. OCC did not waive its right to challenge DP&L's claims of confidentiality.

DP&L claims that OCC waived its right to challenge DP&L's claims of confidentiality. According to DP&L, because it filed its initial testimony in this case under seal and OCC did not oppose the confidentiality claims at the time, OCC waived its right to challenge confidentiality of the information found in OCC witness Kahal's testimony.[25] DP&L is wrong for several reasons.

First, DP&L's argument, if adopted, would lead to substantial administrative efficiency for the PUCO, Ohio utilities, and intervenors. DP&L filed its initial testimony in this case on April 1, 2020, along with a motion for protective order regarding the direct testimony of R.

---

secret law does not protect 'information that is merely momentary or ephemeral because it quickly becomes stale.'") (quoting *State ex rel. Plain Dealer v. Ohio Dep't of Ins.*, 80 Ohio St.3d 513 (1997)).

[24] PUCO Case No. 20-1651-EL-AIR.

Jeffrey Malinak. Under the PUCO's rules, a memorandum contra a motion is due 15 days after it is filed.[26] Thus, any memorandum contra DP&L's earlier motion would have been due April 16. But the PUCO's rules also provide that responses to discovery are due 20 days after discovery is served.[27] Thus, even if OCC were to immediately intervene and serve discovery, it would not gain access to the confidential materials in DP&L's testimony until after the memorandum contra was due. OCC would have no way to know whether DP&L's confidentiality claims were legitimate until after the deadline for opposing the claims. If DP&L's waiver theory is valid, then OCC (and others) would have no choice but to file a memorandum contra every single motion for protective order filed by a utility to preserve the issue, even if the utility's confidentiality claims turn out to be entirely legitimate (as they sometimes are). This would be extremely burdensome to parties, utilities, and the PUCO, as it would clog the PUCO's dockets with unnecessary motion practice.

Second, while it is true that DP&L filed a motion for protective order, the PUCO has not granted that motion. Thus, whether the information is in fact confidential remains an open question for the PUCO's consideration.

Third, DP&L accuses OCC of "wait[ing] nearly seven months" to challenge DP&L's confidentiality claims.[28] This is not accurate. OCC raised the confidentiality issue promptly after filing its own testimony of Matthew Kahal, which relies on information that DP&L has claimed to be confidential. Because OCC's confidentiality concerns relate to Mr. Kahal's testimony, OCC addressed the issue in a timely manner.

---

[25] DP&L Motion at 6.

[26] Ohio Adm. Code 4901-1-12(B)(1).

[27] Ohio Adm. Code 4901-1-20(C).

[28] DP&L Motion at 6.

Fourth, some of the redacted information in Mr. Kahal's testimony includes his own calculations, which have been redacted only because one of the inputs was information that DP&L claims is a trade secret.[29] OCC cannot have waived the right to argue that this information should be public because it was not included in the prior Malinak testimony at all.

Fifth, DP&L's waiver claim is undermined by its protective agreement with OCC. In that agreement, DP&L agreed that OCC could file materials under seal and then provide notice to DP&L that OCC seeks to publicly reveal those materials, after which DP&L would have the burden of proving that the information must be kept confidential. That is precisely the process that OCC followed by giving notice to DP&L regarding the non-disclosed information in the Kahal Testimony.

Finally, DP&L cites no authority whatsoever for its waiver theory. DP&L points to not a single case in which the PUCO ruled that a party waived the right to challenge a utility's confidentiality claims in circumstances like this, or any other similar circumstances.

Thus, the PUCO should reject DP&L's claim that OCC is barred from challenging DP&L's claims of confidentiality.

IV. CONCLUSION

DP&L has failed to prove that the information found in OCC witness Kahal's testimony is sensitive trade secret information that overcomes the heavy burden required to deprive the public of the right to see it. The PUCO should deny the Motion.

[29] *See, e.g.,* Kahal Testimony at 34-35 (calculating different return on equity values).

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Christopher Healey
Christopher Healey (0086027)
Counsel of Record
William J. Michael (0070921)
Amy Botschner O'Brien (0074423)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215
Telephone [Healey]: (614) 466-9571
Telephone [Michael]: (614) 466-1291
Telephone [Botschner O'Brien]: (614) 466-9575
christopher.healey@occ.ohio.gov
william.michael@occ.ohio.gov
amy.botschner.obrien@occ.ohio.gov
(willing to accept service by e-mail)

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below via electronic transmission this 4th day of December 2020.

/s/ Christopher Healey
Christopher Healey
Assistant Consumers' Counsel

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

SERVICE LIST

thomas.lindgren@ohioattorneygeneral.gov

Attorney Examiners:

patricia.schabo@puco.ohio.gov
michael.williams@puco.ohio.gov

jsharkey@ficlaw.com
djireland@ficlaw.com
chollon@ficlaw.com
michael.schuler@aes.com
mkurtz@bkllawfirm.com
kboehm@bkllawfirm.com
jkylercohn@bkllawfirm.com
mpritchard@mcneeslaw.com
rglover@mcneeslaw.com
slesser@beneschlaw.com
talexander@beneschlaw.com
mkeaney@beneschlaw.com
khehmeyer@beneschlaw.com
bojko@carpenterlipps.com
paul@carpenterlipps.com
dparram@bricker.com
dstinson@bricker.com
jspottswood@bricker.com
fdarr2019@gmail.com
Michael.nugent@igs.com
Joe.oliker@igs.com
Bethany.allen@igs.com

Summary: Memorandum Memorandum Contra DP&L's Motion for a Protective Order to Keep Secret Alleged Confidential Information Cited Under Seal in the Direct Testimony of OCC Witness Matthew Kahal by The Office of The Ohio Consumers' Counsel electronically filed by Mrs. Tracy J Greene on behalf of Healey, Christopher