

**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).

**REPLY OF THE DAYTON POWER AND LIGHT COMPANY IN SUPPORT OF
ITS MOTION FOR A PROTECTIVE ORDER RELATING TO CONFIDENTIAL
INFORMATION CITED IN DIRECT TESTIMONY OF MATTHEW I. KAHAL**

The Dayton Power and Light Company ("DP&L" or the "Company") has demonstrated with evidence that the Commission should enter a Protective Order under Ohio Adm.Code 4901-1-24(D) to prevent The Office of the Ohio Consumers' Counsel ("OCC") from disclosing certain Confidential Information constituting trade secrets under R.C. 1333.61(D). Nov. 19, 2020 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 ("Motion"). In response, OCC failed to address that evidence, cites no evidence of its own, and all but ignores the applicable statutory standard. Dec. 4, 2020 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 ("Opposition"). For the reasons established in the Motion and as further shown below, the Commission should reject OCC's arguments and continue to protect the Company's sensitive financial information.

I. DP&L HAS SHOWN THAT THE CONFIDENTIAL INFORMATION
CONSTITUTES PROTECTED TRADE SECRETS UNDER OHIO LAW

A. The Confidential Information Is Protected by R.C. 1333.61(D)

Whether information is a trade secret under Ohio law is governed by the two-part test in R.C. 1333.61(D). *In re Alternative Energy Rider Contained in the Tariffs of Ohio Edison Co.*, 153 Ohio St.3d 289, 2018-Ohio-229, 106 N.E.3d 1, ¶ 33 (analyzing whether the information at issue was a trade secret under R.C. 1333.61); *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853, ¶ 27 (applying R.C. 1333.61 to affirm a Commission ruling that certain information was a trade secret). Although the Supreme Court of Ohio has identified six factors that courts may consider in applying that test, those factors are meant only "to assist courts and factfinders in their analysis." *MNM & MAK Ents., LLC v. HIIT Fit Club, LLC*, 2019-Ohio-4017, 134 N.E.3d 242, ¶ 25 (10th Dist.) (citing *Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 687 N.E.2d 661 (1997)). Indeed, "no single factor of the *Plain Dealer* test is dispositive," and not all of the factors may be "applicable in the context of the alleged trade secrets at issue." *Id.* (quotation marks omitted). *Accord: Heartland Home Fin., Inc. v. Allied Home Mtge. Capital Corp.*, 258 F.Appx. 860, 862 (6th Cir.2008).

Pursuant to R.C. 1333.61, the Confidential Information here constitutes trade secrets and, therefore, must be protected from public disclosure. The statute defines a "trade secret" as information that (1) "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," and (2) "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." R.C. 1333.61(D)(1) and (D)(2). Trade secrets are exempt from public disclosure by the Commission under R.C. 4905.07. *E.g., In re Duke Energy Ohio, Inc.'s Alternative Energy Recovery Rider*, Case No. 19-51-EL-RDR,

Entry, ¶ 24 (Dec. 2, 2020) (citing *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 399, 732 N.E.2d 737 (2000)). *Accord*: Ohio Adm.Code 4901-1-24(D) ("the commission . . . may issue any order which is necessary to protect the confidentiality of information . . . to the extent that state or federal law prohibits release of the information, including where the information is deemed . . . a trade secret under Ohio law . . .").

As shown in the Motion, DP&L subjects the Confidential Information to reasonable efforts to maintain its secrecy, and that information derives independent economic value from not being generally known to others persons who could obtain economic value from its disclosure or use. Nov. 19, 2020 Affidavit of Karin Nyhuis ("Nyhuis Aff.") (attached as Exhibit 1 to Motion), ¶ 9-10. In response, OCC did not address that evidence, did not present any evidence of its own, and made only one passing reference (p. 1) to R.C. 1333.61 without analysis. DP&L has, thus, established that the Confidential Information constitutes trade secrets under Ohio law and should be protected under Ohio Adm.Code 4901-1-24(D). *Accord*: *Besser*, 89 Ohio St.3d at 399.

B. The Confidential Information Satisfies the *Plain Dealer* Factors

Even if the Commission were to set aside R.C. 1333.61 and focus exclusively on the *Plain Dealer* factors, as OCC suggests (p. 4), the Confidential Information would still be entitled to trade-secret protection.

In *Plain Dealer*, the Supreme Court of Ohio identified the following factors to consider when 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."

State ex rel. Plain Dealer v. Ohio Dept. of Ins., 80 Ohio St. 3d 513, 524-525, 687 N.E.2d 661

(1997). Those factors weigh in favor of concluding that the Confidential Information constitutes trade secrets.

In a classic example of placing form over substance, OCC asserts (p. 4) that the Commission should deny the Motion because it does not expressly cite *Plain Dealer*. However, OCC ignores the Affidavit submitted with DP&L's Motion, which squarely addresses the *Plain Dealer* factors.

The Confidential Information satisfies the first three *Plain Dealer* factors given DP&L's reasonable efforts to maintain its secrecy both inside and outside the Company. While OCC questions (p. 5) whether the Confidential Information is shared with "employees beyond those that need to know," it disregards the sworn Affidavit of Karin Nyhuis that "[t]he Confidential Information is not generally known within DP&L or AES affiliates providing services to DP&L, and is disseminated within those organizations only if there is a legitimate business need." Nyhuis Aff., ¶ 10. (emphasis added). OCC also ignores that Affidavit in questioning (p. 5) "the extent to which [DP&L] may have shared any of this information with other parties." But, as the Affidavit explains, the Confidential Information "has been provided externally only pursuant to protective agreements, non-disclosure agreements, and legally-protected privilege." Nyhuis Aff., ¶ 10 (emphasis added). OCC cites no authority for the

proposition that DP&L must identify every person who has accessed the Confidential Information pursuant to such reasonable efforts to keep the information secret.

While OCC faults Witness Malinak (p. 4-5) for stating that DP&L's projected return is expected to fall below a certain amount, DP&L was careful not to identify any actual projected returns; such concepts are in no way "similar," as OCC suggests. OCC goes on to argue (p. 5) that DP&L has previously made Hutchings environmental liability transactions public, citing to a Form 10-K that is 7 years old. OCC's characterization of that Form 10-K is incorrect, however, since the \$26.0 million figure cited by OCC reflects DP&L's budget for all environmental capital expenditures in 2013. That information does not disclose the scope of DP&L's liabilities or a breakdown of projected costs for specific units, but rather reflected an annual budget of environmental capital expenditures in a time when DP&L still owned a fleet of generation assets. The Commission should reject OCC's apples-to-oranges comparison.

The Confidential Information also satisfies the fourth *Plain Dealer* factor in that DP&L derives value from its secrecy. OCC erroneously argues (p. 5) that DP&L cannot establish this factor because it is a regulated monopoly that necessarily has no competitors. Setting aside the fact that R.C. 1333.61(D) refers to "persons who can obtain economic value from [a trade secret's] disclosure or use" – not "competitors" as OCC may wish – accepting this argument would gut confidentiality protections for Ohio utilities that the Commission routinely provides. Moreover, DP&L does, in fact, derive value from the secrecy of the Confidential Information. Releasing that information could impair DP&L's ability to receive favorable rates on its cost of debt, *id.* at ¶ 5-6, increase litigation risk by investors and debt holders, *id.*, and affect the value of AES stock, *id.* at ¶ 7. In addition, releasing the Confidential Information

during ongoing contract negotiations relating to environmental remediation could be detrimental to the DP&L's ability to negotiate the best price. *Id.* at ¶ 8.

Finally, the Confidential Information satisfies the fifth and sixth *Plain Dealer* factors. DP&L spent time, energy, and resources to derive the Confidential Information, and that information "would be nearly impossible to acquire or duplicate without access to the Confidential Information." Nyhuis Aff., ¶ 10. OCC's argument that Mr. Kahal's testimony was prepared at no cost to the Company (p. 6) is false since his testimony relies on information that was generated by DP&L's efforts. Nyhuis Aff., ¶ 3, 10, Ex. 1.

DP&L's undisputed evidence shows that the Confidential Information constitutes trade secrets under the *Plain Dealer* factors. Thus, even under OCC's preferred test, the Commission should continue to protect the Confidential Information. Ohio Adm.Code 4901-1-24(D); *Plain Dealer*, 80 Ohio St. 3d at 524-525.

II. OCC HAS FAILED TO REBUT DP&L'S NEED TO PROTECT THE CONFIDENTIAL INFORMATION

None of the remaining arguments in OCC's Opposition have merit. First, OCC erroneously asserts (p. 6) that DP&L mischaracterized the Confidential Information as only "financial information . . . including projections of the Company's potential revenues, earnings and profitability over the next three years." Although the Confidential Information includes such information, it *also* includes projected cost of environmental remediation at a facility owned by DP&L. Nyhuis Aff., ¶ 3. The Confidential Information also *reveals* sensitive financial information of DP&L. Specifically, it includes hypothetical numbers, projected savings, and other sensitive information that "could be compared against publicly-available information to ascertain DP&L's protected revenues, return on equity and earnings over the next three years."

Id. OCC does not dispute that fact. As such, the Confidential Information cited in Mr. Kahal's testimony should remain redacted.

Second, OCC's contention that Mr. Kahal's calculations should not be redacted is belied by OCC's admission (p. 4) that his calculations rely directly on the trade secrets contained in Mr. Malinak's testimony. The Confidential Information cited by Mr. Kahal must remain under seal because it "constitutes confidential, proprietary, and competitively-secret financial information of DP&L"; "could be compared against publicly-available information to ascertain DP&L's projected revenues, return on equity and earnings over the next three years"; and reflects the "projected cost of environment remediation at a facility owned by DP&L." Nyhuis Aff., ¶ 3. As shown above, the Confidential Information qualifies for trade-secret protection under Ohio law.

Third, OCC's argument (p. 7) that hypothetical financial integrity charges and savings from an ESP versus an MRO test cannot qualify as trade secret information is not founded. As Controller Nyhuis explained in her Affidavit, the Confidential Information reflects not only DP&L's actual projected earnings, but also information that can be used to "ascertain DP&L's projected revenues, return on equity and earnings." Nyhuis Aff., ¶ 5. The fact that the hypothetical savings information must be reverse-engineered to reveal those projections does not negate the fact that DP&L derives value from keeping those figures secret. R.C. 1333.61(D).

Finally, OCC's contention that the Confidential Information is stale and, thus, should be disclosed is untenable. OCC provides no evidence that the Confidential Information is stale, and its bald assertion is contrary to DP&L's undisputed evidence that the information still derives independent economic value from being kept secret. *Id.* at ¶ 9. Indeed, the information was prepared only 8 months ago projecting a period through 2023. While OCC relies

significantly on the fact that DP&L has since filed a base rate case, OCC falsely states (p. 8) that Witness Malinak did not assume a base rate increase in his projections. On the contrary, he did. Apr. 1, 2020 Direct Testimony of R. Jeffrey Malinak, Ex. RJM-3. Moreover, the caselaw that OCC cites does not support its position. *Sys. Spray-Cooled, Inc. v. FCH Tech, LLC*, 2017 U.S. Disc. LEXIS 73909, at *14 (May 16, 2017) (finding that trade secret at issue was not stale); *Synergetics, Inc. v. Hurst*, 477 F.3d 949 (8th Cir. 2007) (same); *Avtel Servs. v. United States*, 70 Fed. Cl. 173 (2005) (no analysis of whether information at issue was trade secret that became stale); *Murray Energy Holdings Co. v. Mergermarket USA, Inc.*, 2016 U.S. Dist. LEXIS 79183 (S.D. Ohio June 17, 2016) (same). Thus, the Commission should reject its arguments.

III. CONCLUSION

For the foregoing reasons, the Confidential Information is entitled to trade-secret protection under Ohio law, and the Commission should continue to protect that information from public disclosure under Ohio Adm.Code 4901-1-24(D).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document has been served via electronic mail upon the following counsel of record, this 11th day of December, 2020.

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Summary: Reply Reply of The Dayton Power and Light Company in Support of Its Motion for a Protective Order Relating to Confidential Information Cited in Direct Testimony of Matthew I. Kahal electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company