

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of : CASE NO. 21-0588-EL-UNC
Significantly Excessive Earnings Test under
Section 4928.143(F), Ohio Revised Code, and :
Rule 4901:1-35-03(C)(10), Ohio
Administrative Code for The Dayton Power :
and Light Company d/b/a AES Ohio

**MOTION OF THE DAYTON POWER AND LIGHT
COMPANY D/B/A AES OHIO FOR A PROTECTIVE ORDER**

Pursuant to Ohio Adm.Code 4901-1-24(D), The Dayton Power and Light Company d/b/a AES Ohio ("AES Ohio" or the "Company") moves for 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 estimated future capital expenditures reflected in Exhibit PJD-3 to the Direct Testimony of Patrick Donlon, which supports the Company's Application in this proceeding.

As shown in the Direct Testimony of Patrick Donlon, the information at issue is maintained as confidential by AES Ohio, and constitutes proprietary and competitively sensitive trade secret material, the public disclosure of which would subject the Company to an unfair competitive disadvantage. May 17, 2021 Direct Testimony of Patrick Donlon, p. 8, n. 3.

Pursuant to the April 8, 2020 and September 9, 2020 Entries in *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, an unredacted copy of Exhibit PJD-3 will be filed with the Commission electronically under seal in Pub. Util. Comm. No. 20-2000-XX-XXX. AES Ohio will further provide an unredacted copy

of Exhibit PJD-3 to any party who enters into a protective agreement with the Company in this proceeding.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF MOTION OF THE DAYTON POWER
AND LIGHT COMPANY D/B/A AES OHIO FOR A PROTECTIVE ORDER**

Pursuant to Ohio Adm.Code 4901-1-24(D), AES Ohio moves for a Protective Order to exempt from public disclosure certain information as confidential, proprietary, and competitively sensitive trade secret information. Specifically, AES Ohio requests that certain confidential information relating to financial projections and data contained in Exhibit PJD-3 to the Direct Testimony of Patrick Donlon be exempt from public disclosure as confidential, proprietary and competitively sensitive trade secret information ("Confidential Information"). Exhibit PJD-3 contains estimated future capital expenditures through 2025.

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). *Accord: Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 687 N.E.2d 661 (1997).

The Commission has held that estimated future capital expenditures and related information are trade secrets that are prohibited from release under state law. *In re Columbia Gas of Ohio, Inc.*, Case No. 16-2069-GA-EDP (Nov. 18, 2016 Entry), ¶ 8. *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. Indeed, 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). As demonstrated in the Direct Testimony of Patrick Donlon, AES Ohio maintains the Confidential Information subject to reasonable efforts to keep its secrecy, and the Confidential Information derives independent economic value from not being generally known to other persons who could obtain economic value from its disclosure or use. May 17, 2021 Direct Testimony of Patrick Donlon, p. 8, n. 3.

The Commission (and its Staff) will have full access to the Confidential Information in order to fulfill their statutory obligations. For these foregoing reasons, AES Ohio 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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Summary: Motion Motion of The Dayton Power and Light Company d/b/a AES Ohio for a Protective Order electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company