

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The : Case No. 20-1651-EL-AIR
Dayton Power and Light Company to
Increase Its Rates for Electric Distribution :

In the Matter of the Application of The Dayton Power and Light Company for Accounting Authority : Case No. 20-1652-EL-AAM :

In the Matter of the Application of The DaytonPower and Light Company for Approval of Revised Tariffs : Case No. 20-1653-EL-ATA

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

Pursuant to Ohio Adm.Code 4901-1-24(D), The Dayton Power and Light Company d/b/a AES Ohio ("AES Ohio," "DP&L" 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 accrual policies contained in Exhibit PD-1 to the Supplemental Testimony of Patrick Donlon and payroll information in Exhibit CF2 to the Supplemental Testimony of Craig A. Forestal.

As will be demonstrated in their respective supplemental testimony, the information at issue is maintained as confidential by AES Ohio, and constitutes proprietary and competitively sensitive trade secret material, a public disclosure of which would subject AES Ohio to an unfair competitive disadvantage.

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 the Supplemental Testimony of Patrick Donlon and Craig A. Forestal will be filed with the Commission electronically under seal in Pub. Util. Comm. No. 20-2000-XX-XXX.

Respectfully submitted,

/s/ Michael J. Schuler

Michael J. Schuler (0082390)
AES Ohio
1065 Woodman Drive
Dayton, OH 45432
Telephone: (937) 259-7358
Telecopier: (937) 259-7178
Email: Michael.schuler@aes.com

/s/ Jeffrey S. Sharkey

Jeffrey S. Sharkey (0067892)
(Counsel of Record)
D. Jeffrey Ireland (0010443)
Christopher C. Hollon (0086480)
FARUKI PLL
110 North Main Street, Suite 1600
Dayton, OH 45402
Telephone: (937) 227-3747
Telecopier: (937) 227-3717
Email: jsharkey@ficlaw.com
djireland@ficlaw.com
chollon@ficlaw.com

Attorneys for The Dayton Power and
Light Company

(willing to accept service by email)

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

Pursuant to Ohio Adm.Code 4901-1-24(D), AES Ohio moves for entry of 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 accrual policies contained in Exhibit PD-1 to the Supplemental Testimony of Patrick Donlon and payroll information in Exhibit CF2 to the Supplemental Testimony of Craig A. Forestal 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). *Accord: Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 687 N.E.2d 661 (1997). As shown in the Supplemental Testimony of Patrick Donlon and Craig A. Forestal, AES Ohio maintains the Confidential Information subject to reasonable efforts to keep its secrecy - it is not generally known outside of the Company, and is not disseminated to internal employees unless those employees have a legitimate business need to know the information. 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 and will prevent an undue competitive disadvantage to AES Ohio.

The Commission (and its Staff) will have full access to the Confidential Information in order to fulfill its 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,

/s/ Michael J. Schuler
Michael J. Schuler (0082390)
AES Ohio
1065 Woodman Drive
Dayton, OH 45432
Telephone: (937) 259-7358
Telecopier: (937) 259-7178
Email: michael.schuler@aes.com

/s/ Jeffrey S. Sharkey
Jeffrey S. Sharkey (0067892)
(Counsel of Record)
D. Jeffrey Ireland (0010443)
Christopher C. Hollon (0086480)
FARUKI PLL
110 North Main Street, Suite 1600
Dayton, OH 45402
Telephone: (937) 227-3747
Telecopier: (937) 227-3717
Email: jsharkey@ficlaw.com
djireland@ficlaw.com
chollon@ficlaw.com

Attorneys for The Dayton Power and
Light Company

(willing to accept service by email)

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion of The Dayton Power and Light Company d/b/a AES Ohio for a Protective Order Regarding Supplemental Testimony has been served via electronic mail upon the following counsel of record, this 25th day of August, 2021:

Jodi Bair
Kyle Kern
Office of Ohio Attorney General
30 East Broad Street, 16th Floor
Columbus, OH 43215
jodi.bair@ohioattorneygeneral.gov
kyle.kern@ohioattorneygeneral.gov

Counsel for Staff of the Commission

Michael L. Kurtz
Kurt J. Boehm
Jody Kyler Cohn
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
Mkurtz@BKLawfirm.com
Kboehm@BKLawfirm.com
Jkylercohn@BKLawfirm.com

Counsel for Ohio Energy Group

Kimberly W. Bojko
Jonathan Wygonski
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, OH 43215
bojko@carpenterlipps.com
wygonski@carpenterlipps.com

Counsel for The Ohio Manufacturers'
Association Energy Group

Angela Paul Whitfield
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, OH 43215
paul@carpenterlipps.com

Counsel for The Kroger Company

Christopher Healey
Ambrosia E. Wilson
John Finnigan
The Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, OH 43215
christopher.healey@occ.ohio.gov
ambrosia.wilson@occ.ohio.gov
john.finnigan@occ.ohio.gov

Counsel for The Office of the Ohio
Consumers' Counsel

Stephanie M. Chmiel
Kevin D. Oles
Thompson Hine LLP
41 South High Street, Suite 1700
Columbus, OH 43215
Stephanie.Chmiel@ThompsonHine.com
Kevin.Oles@ThompsonHine.com

Counsel for the University of Dayton

Matthew R. Pritchard
Rebekah J. Glover
Bryce A. McKenney
MCNEES WALLACE & NURICK LLC
21 East State Street, 17th Floor
Columbus, OH 43215
mpritchard@mcneeslaw.com
rglover@mcneeslaw.com
bmckenney@mcneeslaw.com

Counsel for Industrial Energy Users-Ohio

Robert Dove
KEGLER BROWN HILL +
RITTER CO., L.P.A.
65 East State Street, Suite 1800
Columbus, OH 43215-4295
rdove@keglerbrown.com

Counsel for Ohio Partners for
Affordable Energy

Carrie H. Grundmann
SPILMAN THOMAS & BATTLE, PLLC
110 Oakwood Drive, Suite 500
Winston-Salem, NC 27103
cgrundmann@spilmanlaw.com

Derrick Price Williamson
SPILMAN THOMAS & BATTLE, PLLC
1100 Bent Creek Boulevard, Suite 101
Mechanicsburg, PA 17050
dwilliamson@spilmanlaw.com

Counsel for Walmart Inc.

Mark A. Whitt
Lucas A. Fykes
WHITT STURTEVANT LLP
The KeyBank Building
88 East Broad Street, Suite 1590
Columbus, OH 43215
whitt@whitt-sturtevant.com
fykes@whitt-sturtevant.com

Counsel for Direct Energy Business LLC
and Direct Energy Services, LLC

Bethany Allen
Joseph Olikier
Michael Nugent
Evan Betterton
IGS ENERGY
6100 Emerald Parkway
Dublin, OH 43016
bethany.allen@igs.com
joe.oliker@igs.com
michael.nugent@igs.com
evan.betterton@igs.com

Counsel for IGS Energy

Miranda Leppla
1145 Chesapeake Avenue, Suite I
Columbus, OH 43212
mleppa@theOEC.org

Rebecca Lazer, Legal Assistant
ENVIRONMENTAL LAW & POLICY
CENTER
21 West Broad Street, 8th Floor
Columbus, OH 43215
ccox@elpc.org
rlazer@elpc.org

Counsel for Environmental Law & Policy
Center

Devin D. Parram
Rachael N. Mains
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
dparram@bricker.com
rmains@bricker.com

Counsel for The Ohio Hospital Association

Kara Herrnstein
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
kherrnstein@bricker.com

Counsel for ChargePoint, Inc.

Drew Romig
ARMADA POWER, LLC
230 West Street, Suite 150
Columbus, OH 43215
dromig@nationwideenergypartners.com

Counsel for Nationwide Energy Partners,
LLC

Christina Wieg
FROST BROWN TODD LLC
10 West Broad Street, Suite 2300
Columbus, OH 43215
cwieg@fbtlaw.com

Darren A. Craig (Pending Pro Hac Vice)
Robert L. Hartley (Pending Pro Hac Vice)
FROST BROWN TODD LLC
201 North Illinois Street, Suite 1900
P.O. Box 44961
Indianapolis, IN 46204
dcraig@fbtlaw.com
rhartley@fbtlaw.com

Counsel for Nationwide Energy Partners,
LLC

N. Trevor Aleander
Kari D. Hehmeyer
Sarah G. Siewe
BENESCH FRIEDLANDER COPLAN &
ARONOFF
41 South High Street, Suite 2600
Columbus, OH 43215
talexander@beneschlaw.com
khehmeyer@beneschlaw.com
ssiewe@beneschlaw.com

Counsel for City of Dayton

Matthew W. Warnock
Dylan Borchers
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
mwarnock@bricker.com
dborchers@bricker.com

Marion H. Little, Jr.
Christopher J. Hogan
ZEIGER, TIGGES & LITTLE LLP
41 South High Street
3500 Huntington Center
Columbus, OH 43215
little@litohio.com
hogan@litohio.com

Katie Johnson Treadway
James Dunn
ONE ENERGY ENTERPRISES LLC
Findlay, OH 45840
ktreadway@oneenergylc.com
jdunn@oneenergylc.com

Counsel for One Energy Enterprises, LLC

Miranda Leppla
Tret Dougherty
Chris Tavenor
1145 Chesapeake Avenue, Suite I
Columbus, OH 43212
mleppla@theOEC.org
tdougherty@theOEC.org
ctavenor@theOEC.org

Counsel for Ohio Environmental Council

/s/ Christopher C. Hollon
Christopher C. Hollon

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

8/25/2021 4:01:57 PM

in

Case No(s). 20-1651-EL-AIR, 20-1652-EL-AAM, 20-1653-EL-ATA

Summary: Motion Motion of The Dayton Power and Light Company D/B/A AES Ohio for a Protective Order Regarding Supplemental Testimony electronically filed by Mr. Jeffrey S. Sharkey on behalf of The Dayton Power and Light Company