**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Commission's Review of Chapter 4901:1-25 of the Ohio  Administrative Code, Regarding Market  Monitoring. | )  )  )  ) | Case No. 12-2053-EL-ORD |

**COMMENTS**

**BY**

**THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

The Public Utilities Commission of Ohio’s (“PUCO”) market monitoring rules[[1]](#footnote-1) are important to customers because they serve to protect customers from unfair market practices that may impair or impede retail electric competition. And because competition is one tool to achieve reasonably priced retail electric service, the rules protecting competition are important to consumers.

By Entry dated January 29, 2014, the PUCO invited interested persons to file comments (and reply comments)[[2]](#footnote-2) concerning the PUCO Staff’s proposed changes to the market monitoring rules.[[3]](#footnote-3) The Office of the Ohio Consumers’ Counsel (“OCC”) appreciates the opportunity to provide these comments on the proposed revisions to the market monitoring rules.[[4]](#footnote-4)

In the retail competition proceeding, Case No. 12-3151-EL-UNC, the PUCO Staff advocated for a change in a PUCO rule[[5]](#footnote-5) that kept the number of customers and load

served by competitive retail electric service (“CRES”) providers concealed from the public.[[6]](#footnote-6) In that proceeding, the PUCO Staff noted that “the number of customers served and load in MWh for each CRES in each EDUs service territory should not be confidential because this type of information is not confidential in other industries.”[[7]](#footnote-7) Furthermore, the PUCO Staff maintained that designating information as “confidential, when it is often public knowledge in non-regulated markets, can create public mistrust.”[[8]](#footnote-8) OCC agrees.

Additionally, the Ohio General Assembly has determined that, except as provided in R.C. 149.43 and consistent with the purposes of Title 49, “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.”[[9]](#footnote-9) And information is “trade secret” and exempt from Ohio’s public records law[[10]](#footnote-10) only if it “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 “is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”[[11]](#footnote-11)

To assist in determining whether a trade secret claim meets the statutory definition as codified in R.C. 1333.61(D), the Ohio Supreme Court has adopted, and this Commission has recognized,[[12]](#footnote-12) a six-factor test:

(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.[[13]](#footnote-13)

And this Commission has held that the trade secret exception is a **very limited and narrow exception**.[[14]](#footnote-14) And information that “is often public knowledge”[[15]](#footnote-15) does not qualify as a trade secret under Ohio law.[[16]](#footnote-16)

Finally, this information (number of customers and load served) may be helpful to customers in determining whether they want to choose an alternative supplier. It will assist customers in engaging in and being informed regarding choice for retail competition.

Thus, consistent with Ohio law and the PUCO Staff’s recommendation in the retail competition proceeding, the PUCO should amend Ohio Adm. Code 4901:1-25-02(A)(5) so that information filed pursuant to Ohio Adm. Code 4901:1-25-02(A)(3) is deemed to be public information. The necessary changes are as follows:

(5) The information contained in the reports provided to the commission and/or staff pursuant to paragraph (A) of this rule shall be treated in the following manner:

(a) Any information filed pursuant to paragraphs (A)(1), ~~and~~ (A)(2) to (A)(2)(c), and (A)(3) of this rule shall be deemed to be public information.

(b) Any information filed pursuant to paragraphs (A)(2)(d), ~~(A)(3),~~ and (A)(4) of this rule shall be deemed to be confidential information, unless and until the interconnection applicant or customer owner may make, or agree to make, such information public.

Respectfully submitted,

BRUCE J. WESTON

OHIO CONSUMERS’ COUNSEL

*/s/ Maureen R. Grady*\_\_\_\_\_\_\_\_\_\_\_

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of these *Comments* was served on the persons stated below via electronic transmission, this 26th day of February, 2014.

*/s/ Maureen R. Grady*

Maureen R. Grady

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**SERVICE LIST**

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1. Ohio Adm. Code 4901:1-25. [↑](#footnote-ref-1)
2. Entry (January 19, 2014) at page 3. [↑](#footnote-ref-2)
3. Ohio Adm. Code 4901:1-25. [↑](#footnote-ref-3)
4. Ohio Adm. Code 4901:1-25. [↑](#footnote-ref-4)
5. Ohio Adm. Code 4901:1-25-02(A)(5)(b). [↑](#footnote-ref-5)
6. *In the Matter of the Commission’s Investigation of Ohio’s Retail Electric Service*, Case No. 12-3151-EL-COI, Staff Report of Investigation (January 16, 2014) at 11-12. [↑](#footnote-ref-6)
7. *Id*. at 12. [↑](#footnote-ref-7)
8. *Id.*at 11. [↑](#footnote-ref-8)
9. R.C. 4905.07. [↑](#footnote-ref-9)
10. R.C. 149.43(A)(1)(v). [↑](#footnote-ref-10)
11. R.C. 1333.61(D). [↑](#footnote-ref-11)
12. *See* *In the Matter of the Application of Constellation NewEnergy, Inc. for Renewal of its Certification as a Retail Electric Service Provider*,Case No. 09-870-EL-AGG, *Entry* at 2 (November 21, 2011); *In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, *Entry* at 8-9 (Nov. 25, 2003) (citations omitted). [↑](#footnote-ref-12)
13. *State ex rel.* *Plain Dealer v. Department of Insurance*, 80 Ohio St. 3d 513, 524-524 (1998)(citations omitted); *see also The State ex rel. Perrea v. Cincinnati Pub. Schools*, 123 Ohio St.3d 410, 414 (2009). [↑](#footnote-ref-13)
14. *See In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No 93-487-TP-ALT, *Entry* at 7 (Nov. 25, 2003) (citations omitted) (emphasis added). [↑](#footnote-ref-14)
15. *In the Matter of the Commission’s Investigation of Ohio’s Retail Electric Service*, Case No. 12-3151-EL-COI, Staff Report of Investigation (January 16, 2014) at 11. [↑](#footnote-ref-15)
16. R.C. 1333.61(D). [↑](#footnote-ref-16)