**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| |  |  |  | | --- | --- | --- | | In the Matter of the Complaint of Jeffrey Pitzer,  Complainant,  v.  Duke Energy Ohio, Inc.,  Respondent. | ) ) ) )  ) )  )  )  )  ) | Case No.15-298-GE-CSS | |

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**MEMORANDUM CONTRA TO DUKE’S MOTION FOR PROTECTIVE ORDER REGARDING THE DEPOSITION TESTIMONY OF MARION BYNDON**

**BY**

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

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# I. INTRODUCTION

In the interest of furthering policies favoring transparency in proceedings at the Public Utilities Commission of Ohio (“PUCO”), the Office of the Ohio Consumers’ Counsel (“OCC”) files this Memorandum Contra to the motion for protective order filed on January 22, 2016 by Duke Energy Ohio, Inc. (“Duke”) in this significant case for Ohio’s residential utility customers. Ohio utilities must adhere to the intent and requirements of the PUCO’s winter reconnect orders.[[1]](#footnote-1) This case is about whether Duke unlawfully and unreasonably disconnected electrical service at a residence in November 2011. Two Ohioans died.

On December 31, 2015, the Complainant in this case filed under seal the entire transcript of the deposition of Marion Byndon, the manager of Duke’s Midwest consumer affairs department. No public version, with allegedly confidential information redacted, was filed. Ms. Byndon was designated by Duke to answer questions regarding account-related documents in response to a notice of corporate designee filed by the Complainant on October 8, 2015. The deposition occurred on December 3, 2015. On January 13, 2016, OCC filed a Memorandum Contra Complainant’s filing.

On January 22, 2016, Duke filed a Motion for a Protective Order regarding certain portions of the deposition transcript of Ms. Byndon and refiled the transcript with redactions. In this Memorandum Contra, OCC opposes Duke’s motion for a protective order.[[2]](#footnote-2) The information contained in the deposition fails to qualify as a “trade secret” under Ohio law and the PUCO’s rules.[[3]](#footnote-3) Therefore, the PUCO should deny the motion for protective order.

# II. APPLICABLE LAW

The guiding principle of the PUCO’s rules regarding protective orders is not to conceal information, but to make information public. The PUCO established a policy that confidential treatment is to be given only under extraordinary circumstances.[[4]](#footnote-4) Ohio Adm. Code 4901-1-24(D) specifies that a protective order “shall minimize the amount of information protected from public disclosure.”

The PUCO has emphasized the importance of the public records laws and has noted that “Ohio public records law is intended to be liberally construed to ‘ensure that governmental records be open and made available to the public … subject to only a very few limited exceptions.’”[[5]](#footnote-5) The PUCO has noted that “[a]ll proceedings at the Commission and all documents and records in its possession are public records, except as provided in Ohio’s public records law (149.43, Revised Code) and as consistent with the purposes of Title 49 of the Revised Code.”[[6]](#footnote-6) Additionally, under R.C. 4905.07, “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.” The PUCO also has noted that R.C. 4901.12 and R.C. 4905.07 “provide a strong presumption in favor of disclosure, which the party claiming protective status must overcome.”[[7]](#footnote-7)

R.C. 149.43 broadly defines public records to include records kept at any state office but excludes or exempts from the definition of public records those records “whose release is prohibited by state or federal law.”[[8]](#footnote-8) R.C. 149.43 prohibits the PUCO and other public agencies from releasing public documents that qualify as trade secrets.

Ohio has adopted the Uniform Trade Secrets Act, and has codified the definition of “trade secrets.” R.C. 1331.61(D) defines a trade secret as:

[I]nformation, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

(1) 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.

(2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Thus, to qualify as a trade secret under R.C. 1331.61(D), information must be shown to fall within the definition of a trade secret and must satisfy two requirements: it must have “independent economic value” and it must have been kept under circumstances that maintain its secrecy.

# III. ARGUMENT

Ohio Adm. Code 4901-1-24(D) provides that the PUCO may issue a protective order:

to protect the confidentiality of information contained in the document, to the extent that state or federal law prohibits release of the information, including where the information is deemed by the commission, the legal director, the deputy legal director, or the attorney examiner to constitute a trade secret under Ohio law, and where nondisclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code.

Duke presented no explanation as to how it derives any independent economic value from the information or how any other persons can obtain economic value if the information is disclosed. Nor has Duke explained what efforts it has taken to maintain the secrecy of that information except that the information is “not shared externally and internal access is restricted to those having a business need for such information.” In addition, Duke has not disclosed how many of its employees have access to the information, whether those employees are under an obligation of confidentiality with regard to that information, or what other efforts it has taken to maintain the secrecy of its purported trade secrets.

Duke cites three cases in an attempt to support its position that the information discussed in Ms. Byndon’s deposition constitutes a trade secret. But none of those cases accord with the information Ms. Byndon discussed during her deposition. In the *Valco Cincinnati* case,[[9]](#footnote-9) the Supreme Court of Ohio did not address the “accounting methods or other management” as trade secrets, as Duke contends.[[10]](#footnote-10) Rather, the Court addressed a unique valve and other elements used in manufacturing, including “the end face of the cone spring used in the glue applicator had to be ground in a certain manner, and that such spring had to be of a certain type of metal.”[[11]](#footnote-11)

Duke explained its inclusion of *State ex rel. The Plain Dealer*[[12]](#footnote-12) as standing for the proposition that a “trade secret reflects ‘a process…for continuous use in the operation of the business.’”[[13]](#footnote-13) But the Court did not state that any process for continuous use would qualify as a trade secret. Instead, the Court excluded documents dealing with “a single, ephemeral event in the conduct of a business” that is one requirement for a trade secret.[[14]](#footnote-14)

By inclusion of a reference to *State ex rel. Besser*,[[15]](#footnote-15) Duke asserts that “the Uniform Trade Secrets Act, adopted in Ohio, provides an even broader definition of ‘trade secret’.”[[16]](#footnote-16) The referenced case, however, actually states that the Uniform Trade Secrets Act is in accord with Ohio’s trade secret statute, R.C. 1333.61(D), not broader.[[17]](#footnote-17)

Duke then argues that “the Commission has found internal policies and procedures are subject to protection as trade secrets.”[[18]](#footnote-18) Duke’s interpretation of the PUCO Entry is without merit. The Entry does not cite to internal policies and procedures to conclude that the information meets the applicable requirements for trade secrets under Ohio law.[[19]](#footnote-19) The public utility in Case No. 14-205 sought protection of specific customer information such as customer identification numbers, account numbers, and usage data.[[20]](#footnote-20) The utility also sought to protect bank account numbers and copies of checks and invoices.[[21]](#footnote-21) Lastly, the utility sought protection of its gas procurement strategy, which is a competitive strategy that could derive independent economic value.[[22]](#footnote-22) Contrary to Duke’s claims, the utility in that case, did not seek protection of general internal processes and procedures or “its internal workings.”[[23]](#footnote-23) It sought confidential treatment of very specific customer and financial data and one procurement practice which affects the competitive market.

Duke, on the other hand, did not limit its request for protection to those types of specific customer information, financial data, or a competitive strategy of the company. The sole reason given by Duke for preventing public disclosure of the information is that Duke desires to keep the information secret. Duke states that the deposition concerned “its internal workings.” But general internal systems, processes, and procedures or a company’s “internal workings” do not constitute trade secrets under Ohio law and, thus, are not protected. Duke offers no cases in which a court found “internal workings” to be trade secrets that can be protected.

Accordingly, Duke failed to meet its burden of demonstrating that the information constitutes trade secrets. Duke did not even assert that it derives independent economic value from keeping the redacted information from the public, and it did not meet its burden in demonstrating the efforts to maintain the secrecy of the information. The PUCO should deny Duke’s motion and make public the entire deposition transcript.

# IV. CONCLUSION

Ohio law sets forth very specific requirements that must be satisfied before information can be considered trade secret and eligible for protection from public disclosure as confidential information in PUCO proceedings. Duke’s motion has not met these requirements. Hence, the PUCO should deny the motion and make public the entire transcript of Ms. Byndon’s deposition.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing *Memorandum Contra Motion for Protective Order* was served upon the following parties via electronic transmission on February 8, 2016.

*/s/ Terry L. Etter*\_\_\_\_\_\_\_

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1. *See In the Matter of the Commission’s Consideration of Solutions Concerning the Disconnection of Gas and Electric Service in Winter Emergencies for the 2015-2016 Winter Heating Season*, Case No. 15-1460-GE-UNC, Entry on Rehearing (October 28, 2015) at 5. [↑](#footnote-ref-1)
2. At the hearing in this case, the Attorney Examiner deferred ruling on motions for protections until a future time. [↑](#footnote-ref-2)
3. Ohio Adm. Code 4901-1-24(D). [↑](#footnote-ref-3)
4. *See In the Matter of the Application of The Cleveland Electric Illumination Company for Approval of an Electric Service Agreement with American Steel & Wire Corp.*, Case No. 95-77-EL-AEC, Supplemental Entry on Rehearing (September 6, 1995) at 3. [↑](#footnote-ref-4)
5. *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 (November 25, 2003) Entry (“93-487 Entry”) at 3, citing *State ex rel Williams v. Cleveland,* 64 Ohio St.3d 544 (1992) and *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 1997-Ohio-75, 80 Ohio St.3d 513, 518, 687 N.E.2d 661 (1997). See also *In the Matter of the Application of Cincinnati Bell Any Distance, Inc. for New Operating Authority*, Case No. 07-539-TP-ACE, Entry (June 1, 2007) at 1. [↑](#footnote-ref-5)
6. 93-487 Entry at 3. [↑](#footnote-ref-6)
7. *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, Opinion and Order (October 18, 1990), 1990 Ohio PUC LEXIS 1138 at \*5. [↑](#footnote-ref-7)
8. R.C. 149.43(A)(1)(v). [↑](#footnote-ref-8)
9. *Valco Cincinnati, Inc. v. N & D Machining Serv., Inc.*, 24 Ohio St. 3d 41, 492 N.E.2d 814 (1986). [↑](#footnote-ref-9)
10. See Duke’s Motion at 5, n.5. [↑](#footnote-ref-10)
11. *Valco Cincinnati*, 24 Ohio St. 3d at 46, 492 N.E.2d at 819. [↑](#footnote-ref-11)
12. *State ex rel. The Plain Dealer v. Ohio Dep’t of Ins.*, 1997-Ohio-75, 80 Ohio St. 3d 513, 687 N.E.2d 661. [↑](#footnote-ref-12)
13. Duke’s Motion at 5, n.5. [↑](#footnote-ref-13)
14. *State ex rel. The Plain Dealer,* 80 Ohio St. 3d at 526, 687 N.E.2d at 673. [↑](#footnote-ref-14)
15. *State ex rel. Besser v. Ohio State Univ.*, 2000-Ohio-207, 89 Ohio St. 3d 396, 732 N.E.2d 373. [↑](#footnote-ref-15)
16. Duke’s Motion at 5, n.5. [↑](#footnote-ref-16)
17. *State ex rel. Besser*,89 Ohio St. 3d at 401, 732 N.E.2d at 378. [↑](#footnote-ref-17)
18. Duke’s Motion at 6, n.6. [↑](#footnote-ref-18)
19. *In the Matter of the Investigative Audit of Northeast Ohio Natural Gas Corporation, Orwell Natural Gas Company, and Brainard Gas Corporation*, Case No. 14-205-GA-COI (“Case No. 14-205”), Entry, at ¶ 10 (August 4, 2015). [↑](#footnote-ref-19)
20. Id. [↑](#footnote-ref-20)
21. Id. [↑](#footnote-ref-21)
22. Id. [↑](#footnote-ref-22)
23. Duke’s Motion at 5. [↑](#footnote-ref-23)