**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 ENERGY OHIO’S MOTION FOR PROTECTIVE ORDER REGARDING THE DIRECT TESTIMONY OF MITCHELL A. CARMOSINO**

**BY**

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

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1. **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 the motion for protective order filed on December 30, 2015 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 30, 2015, Duke filed a confidential version and a public version of the Direct Testimony of Mitchell A. Carmosino in this case. Mr. Carmosino is the Manager of Accounts Receivable Residential Operations for Duke. His testimony explains Duke’s policies and practices as they existed in 2011 for disconnecting residential customers for nonpayment of their bills.

In a motion for protective order filed with Mr. Carmosino’s testimony, Duke claims that portions of Mr. Carmosino’s testimony contained “trade secrets” that, if made public, could damage Duke’s “business interests.”[[2]](#footnote-2) The purported trade secrets involve Duke’s processes and procedures related to disconnecting residential customers’ utility service for nonpayment.[[3]](#footnote-3) Duke also claims that it seeks to prevent disclosure of “proprietary third-party information.”[[4]](#footnote-4)

OCC opposes Duke’s motion for protective order. In a previous case, the PUCO rejected Duke’s arguments for protecting information similar to that which Duke seeks to protect in this case.[[5]](#footnote-5) And it appears that the third-party information Duke seeks to keep from public disclosure is not propriety. Disclosure of the third-party information would be less favorable to Duke, and more favorable to the Complainant in this case. The PUCO should deny Duke’s motion for a protective order, as Duke has failed to show that the information sought to be protected is a trade secret protected by law or is otherwise entitled to protection under the law.

1. **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 has established a policy that confidential treatment is to be given only under extraordinary circumstances.[[6]](#footnote-6) 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.’”[[7]](#footnote-7) 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.”[[8]](#footnote-8) 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.” [[9]](#footnote-9)

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.”[[10]](#footnote-10) 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:

information, 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.

1. **LAW AND 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.” In its motion, Duke provided nothing to support the notion that the redacted information meets the statutory definition of a trade secret as spelled out in R.C. 1333.61(D)(1) and (2).

As mentioned above, in order for information to qualify as a trade secret the statute mandates that the information must have the following qualities:

(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.

Duke has presented no explanation as to how it derives any independent economic value from the information it claims to be a trade secret. More importantly, Duke fails to make any claim whatsoever as to how any other persons can obtain economic value from the information’s disclosure. Instead, Duke merely states that public disclosure of the information “could invite a comparison of procedures, release proprietary third-party information into the public domain, and prejudice Duke Energy Ohio in the conduct of its business.”[[11]](#footnote-11) This general statement is not sufficient for the PUCO to grant Duke’s motion.

The PUCO has already allowed public disclosure of Duke’s policies and practices regarding disconnection of residential customers’ natural gas service for nonpayment. In the PUCO’s review of natural gas companies’ policies and practices concerning their riders for uncollectible accounts,[[12]](#footnote-12) Duke sought a protective order concerning its practices regarding disconnection of service and payment arrangements for natural gas customers.[[13]](#footnote-13) There, Duke claimed that the information “would be of value to customers seeking to understand the parameters of the Company’s collection practices and to avoid responsibility for payment of their bills. This would increase the amount of bad debt which Duke Energy Ohio would necessarily accrue and could substantially exacerbate the uncollectible problem.”[[14]](#footnote-14) Duke went on to argue that if the information is disclosed, Duke “will be placed at a disadvantage, in among other things, reducing its ability to terminate service and make payment arrangements for those customers who are delinquent in payments and gaming the system.”[[15]](#footnote-15) Duke also claimed that a customer accessing the information “could take actions that, in the absence of this information, it would not otherwise take.”[[16]](#footnote-16)

OCC opposed Duke’s effort to conceal information regarding its processes and policies for disconnecting customers for nonpayment. The PUCO agreed with OCC that the information does not constitute a trade secret and denied Duke’s motion in its entirety.[[17]](#footnote-17)

Further, disclosing the information would allow the public to know what Duke’s (a public utility) policies and procedures are so that customers may be educated as to such policies and procedures. Additionally, the PUCO and the public should be aware of Duke’s stated positions. This would be a reason in favor of disclosure.

In addition, Duke does not explain how the third-party information included in Mr. Carmosino’s testimony is “proprietary.” The only “third-party information” identified as confidential in Mr. Carmosino’s testimony are general statements regarding the Easterlings’ account.[[18]](#footnote-18) Such general statements should never be deemed to be trade secrets. Further, given that more personal details regarding the account (such as the account number and the payments the Easterlings made from August through November 2011, among other things) are already in the public record of this proceeding, there is every reason to make public Mr. Carmosino’s general statements regarding the account.

In this proceeding, Duke has offered only general statements regarding the nature of the information it considers confidential and the supposed harm that Duke incur if the information is disclosed. The PUCO should not keep information from the public based on such flimsy support.

1. **CONCLUSION**

Ohio law sets forth very specific requirements that must be satisfied before information can be considered trade secret and thus be eligible for protection as confidential information in PUCO proceedings. Duke’s motion has not met these requirements. The PUCO should reject Duke’s attempt to conceal information from the public. Hence, the PUCO should deny Duke’s motion and make public the redacted information in Mr. Carmosino’s testimony.

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 January 13, 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. Motion at 3. [↑](#footnote-ref-2)
3. *See id*.; *see also* Carmosino Testimony at 2. [↑](#footnote-ref-3)
4. Motion at 3. [↑](#footnote-ref-4)
5. *See* *In the Matter of the Five-Year Review of Natural Gas Company Uncollectible Riders,* Case No. 08-1229-GA-COI, Entry (November 3, 2010) at 4. [↑](#footnote-ref-5)
6. *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-6)
7. *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.*, 80 Ohio St.3d 513, 518 (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-7)
8. 93-487 Entry at 3. [↑](#footnote-ref-8)
9. *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-9)
10. R.C. 149.43(A)(1)(v). [↑](#footnote-ref-10)
11. Motion at 4. [↑](#footnote-ref-11)
12. *In the Matter of the Five-Year Review of Natural Gas Company Uncollectible Riders,* Case No. 08-1229-GA-COI. [↑](#footnote-ref-12)
13. *Id*., Duke Motion for Protective Order (May 5, 2010) at 3. [↑](#footnote-ref-13)
14. *Id*. [↑](#footnote-ref-14)
15. *Id*. at 4. [↑](#footnote-ref-15)
16. *Id*. [↑](#footnote-ref-16)
17. *Id*., Entry (November 3, 2010) at 4. [↑](#footnote-ref-17)
18. See Carmosino Testimony at 11, 13, 14. [↑](#footnote-ref-18)