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BEFORE

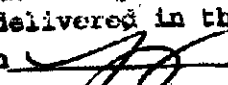
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the	:	Case Nos.	03-93-EL-ATA
Consolidated Duke Energy Ohio, Inc.	:		03-2079-EL-AAM
Rate Stabilization Plan Remand and	:		03-2081-EL-AAM
Rider Adjustment Cases	:		03-2080-EL-ATA
	:		05-725-EL-UNC
	:		06-1069-EL-UNC
	:		05-724-EL-UNC
	:		06-1068-EL-UNC
	:		06-1085-EL-UNC

**DUKE ENERGY OHIO'S MEMORANDUM OPPOSING MODIFICATION OF
THE PROTECTIVE ORDER GRANTED BY THE ATTORNEY EXAMINERS
ON MARCH 19, 2007.**

Duke Energy Ohio (DE-Ohio) objects to the release by the Public Utilities Commission of Ohio (Commission) of any information covered by the protective order issued by the examiners in this case in response to a Public Records Request¹ from Stanley M. Chesley, Esq. to the Commission. The requested information relates to confidential commercial contracts covered by a protective order issued by the Attorney Examiner upon the Motion of DE-Ohio and Duke Energy Retail Sales (DERS). Because DE-Ohio is not a party to such contracts, DE-Ohio will leave discussion of their confidential nature to the contracting parties. DE-Ohio notes, however, that it produced certain related financial data in discovery and redacted portions of its pleadings referencing the protected material that are covered by the protective order and may be the subject of the Public Records Request.

¹ Throughout this pleading the term "Public Records Request" refers to a request to a governmental agency for information in its possession made pursuant to R.C. 149.43.

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DE-Ohio is concerned about the policy issues raised by the Public Records Request. Specifically, DE-Ohio is concerned about the Commission's ability to maintain confidential information as confidential and, if it cannot, the chilling effect such a development will have on the exchange of information between all stakeholders, including utilities, consumers, competitive suppliers, Staff, the Ohio Consumers' Counsel, and the Commission.

BACKGROUND:

On July 26, 2007, the Commission received a Public Records Request from Mr. Chesley asking for various records related to "Option Agreements" entered into by Cinergy Retail Services, LLC (CRS) and certain parties. The request alleges that the Option Agreements and other requested information relate to "the rate increase [DE-Ohio] requested in 2003." The Attorney Examiner issued an Entry on August 8, 2007, inviting parties to file memoranda discussing why the Commission should or should not modify the protective order granted in this case on March 19, 2007. Specifically, the Attorney Examiner requested all parties to:

[F]ile memoranda discussing why the Commission should or should not modify the protective order granted by the examiners from the bench as it relates to all protected information. Specifically, parties should address appropriate confidential treatment of (a) document titles, (b) identification of persons or entities, (c) dates, (d) payments, (e) quantities and load information, (f) account numbers, (g) other customer identification, and (h) other terms and conditions. Parties should support their responses, citing and applying all relevant law.²

² *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al*, (Entry at 2) (August 8, 2007).

DISCUSSION:

The Attorney Examiner's Entry raises concerns because it: (1) assumes that the requested documents are public records; (2) implies that a Public Records Request may compel the Commission to reconsider a protective order; and (3) requires parties to specifically identify documents prematurely.

Pertinent to fully address the issues raised by the Attorney Examiner's Entry and the Public Record Request are the definition of "Public Record" and "Record." Revised Code Section 149.43 defines a "Public Record" as any:

[R]ecords kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for profit entity operating the alternative school pursuant to section 3313.533 [3313.53.3] of the Revised Code. "Public record" does not mean any of the following:...

*(v) Records the release of which is prohibited by state or federal law;*³

Thus a "Public Record" must be a "Record" and the release of the "Record" cannot be prohibited by state or federal law. Revised Code Section 149.011 defines "Records" as:

*[A]ny document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the Revised Code, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.*⁴

³ Ohio Rev. Code Ann. § 149.43 (Baldwin 2007) (emphasis added).

⁴ Ohio Rev. Code Ann. § 149.011 (Baldwin 2007) (emphasis added).

Thus, a "Record" must be a document received by, and under the jurisdiction of, the Commission and which serves to document its decisions. DE-Ohio submits, as discussed in detail below, that the information that is the subject of the Public Records Request does not consist of R.C. 149.011 Records and therefore cannot be Public Record pursuant to R.C. 149.43 and even if it does consist of Records, is not R.C. 149.43 Public Record because the Attorney Examiner has already determined the information to be confidential trade secret and ordered it filed under seal for the next eighteen months absent a Commission decision to the contrary.⁵

Because the records requested were filed under seal pursuant to a protective order effective for the next eighteen months, and remain under the protective order at this time, release of the records will raise serious issues regarding the ability of the Commission to maintain the confidentiality of information submitted to it under any circumstance.⁶ Particularly because the Commission must address the needs of stakeholders in competitive, as well as regulated markets, stakeholders must have confidence in the ability of the Commission to maintain confidential information. Absent such assurance it may become increasingly difficult for the Commission to obtain the information that it needs to make informed decisions in its proceedings.

Given the importance of the Commission's response to this Public Records Request to future proceedings before the Commission DE-Ohio posits that the following questions are of paramount importance: (1) Does the Commission, pursuant to O.A.C. 4901-1-24, have the authority to issue a protective order to maintain the confidentiality of

⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al*, (Tr. I at 9) (March 19, 2007).

⁶ *Id.*

exhibits and testimony submitted to it under any circumstance; (2) Are exhibits, testimony, and pleadings, representing the records of non-governmental businesses, such as the records of competitive retail electric service (CRES) providers, records pursuant to R.C. 149.011 "created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office" such that the records are "Public Records" pursuant to R.C. 149.43; and (3) If the exhibits, testimony, and pleadings are not "public records" pursuant to R.C. 149.43, is the Commission under any obligation to make such records public upon request, such as that before the Commission in this instance?

DE-Ohio asserts that the Commission does have the authority to grant protective orders. Further, the exhibits, testimony, and pleadings requested by Mr. Chesely are not "Public Records," and as such, the Commission does not have an obligation to make such information public and, in fact, has a duty to maintain the information as confidential as trade secrets prohibited from public dissemination by state law. Even assuming for the sake of argument that the Commission may make the requested confidential information public, the law is clear that a requesting party seeking non-public record, such as Mr. Chesley, must first demonstrate a particularized need for the documents. As is clear from his written request, however, Mr. Chelsey has failed to show any need for the documents. In fact, he provides no reason to support his request for these documents.

The answers to the questions stated above are important to the Commission and the public that appears before it. Ohio has a clear policy of open government that the Commission properly supports. It is also true that the private sector, in order to compete

successfully to provide jobs and expend capital in the State, must maintain confidential information that would, if made public, place it at a competitive disadvantage. The Commission has previously maintained a reasonable balance between what information is public and what is not.

Nevertheless, this issue has become more critical as Ohio's telephone, gas, and electric utilities have become subject to increasing competition. For the first time utilities are subject to direct competition and have affiliates that are subject to the same competition. It is vital to the health of the competitive wholesale and retail telecommunication, gas, and electric markets that Ohio's utilities, and their affiliates, are afforded the same opportunities as other competitors in the utilities' markets to maintain confidential information necessary to compete successfully.

- I. **The Commission, pursuant to O.A.C. 4901-1-24, has the authority to issue a protective order to maintain the confidentiality of exhibits, testimony, and pleadings submitted to it.**

Pursuant to O.A.C. 4901-1-24, the Commission or Attorney Examiner may grant a motion that information is a trade secret or other confidential information, that it not be disclosed, and that such information acquired through discovery be used only in the pending proceeding with disclosure limited to designated persons.⁷ In the above referenced docket, the Attorney Examiner granted motions for protective orders made by DE-Ohio and DERS treating the information requested in Mr. Chesley's request as a

⁷ OHIO ADMIN. CODE ANN. § 4901-1-24 (Baldwin 2007).

trade secret or otherwise confidential and limiting disclosure to designated persons -- those persons with protective agreements or attorneys representing Parties to these cases.⁸

If the Attorney Examiner has the authority to make such a ruling, Mr. Chesley's public records request must be denied because he is not among the designated persons entitled to receive the protected information and the ruling was in force at the time of his request and remains in force at this time. If the Commission, at some future time, determines that the requested records are not protected pursuant to O.A.C. 4901-1-24, Mr. Chesley, or any other person, may seek the records pursuant to R.C. 149.43. In fact, if the protective order expires on its terms eighteen months from the date of issue, the Commission will make the records public.⁹ To maintain protection of the designated information beyond that date a Party must move the Commission to maintain the information as confidential.¹⁰ Mr. Chesley, or any other member of the public, could then oppose such motion. Thus, Mr. Chesley has a procedure to procure the confidential information in due course.

Modification of the protective order at this time would place grave doubt upon the ability of the Commission to maintain information under seal in a confidential manner in the face of a public records request. Such an outcome will chill the exchange of information between the Commission and stakeholders, including utilities and CRES providers. It is vital to the Commission's ability to conduct its business that it have uncontested access to confidential information held by stakeholders.

⁸ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (Tr. I at 9) (March 19, 2007).

⁹ *Id.*

¹⁰ OHIO ADMIN. CODE ANN. § 4901-1-24 (Baldwin 2007).

- II. Records of non-governmental businesses, such as the records of competitive retail electric service (CRES) providers, are not "Records" pursuant to R.C. 149.011 "created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office" and therefore such records are not "Public Records" under R.C. 149.43.¹¹**

Under R.C. 149.43, records become "Public Records" subject to a Public Records Request when they are "created or received by or [come] under the jurisdiction of any public office of the state or its political subdivisions, [and serve] to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." The information requested by Mr. Chesley is or relates to confidential commercial contracts between DERS and other businesses. DE-Ohio and DERS provided the information to the Ohio Consumers' Counsel (OCC) in discovery at a time when DERS was not a party to these cases.¹² The information was later submitted and admitted as evidence at hearing on March 19, 2007.

Upon submission to the Commission as exhibits and acceptance as evidence, the confidential information came under the Commission's jurisdiction. None of the information requested, however, was created or received by the Commission "to document the organization, functions, policies, decisions, procedures, operations, or other activities" of the Commission.¹³ Therefore, although under the Commission's jurisdiction, none of the information came under its jurisdiction for any of the enumerated purposes.

¹¹ Ohio Rev. Code Ann. § 149.011 (Baldwin 2007).

¹² DERS is now a party only because it deemed it necessary to intervene to protect its interests in the confidential nature of the information and to protect itself from certain allegations made by OCC.

¹³ Ohio Rev. Code Ann. § 149.011 (Baldwin 2007).

DE-Ohio's position is supported by the Ohio Supreme Court's decision in *State Ex. Rel. Besser v. Ohio State University*, 87 Ohio St. 3d 535, 721 N.E.2d 1044 (2000). In an Opinion permitting The Ohio State University, a public governmental entity, to maintain confidential trade secrets in the face of a Public Records request, the Court held:

[W]e must presume that the General Assembly intended that trade secrets *retain their confidential nature*. See *State ex rel. Sinay v. Sadders* (1997), 80 Ohio St. 3d 224, 231-232, 685 N.E.2d 754, 760. *A contrary holding would afford no protection for an entity's trade secrets that are created or come into the possession of an Ohio public office and would render the remedies in R.C. 1333.61 through 1333.69 meaningless when a request for these records is made under R.C. 149.43. "We must also construe statutes to avoid unreasonable or absurd results."* *State ex rel. Cincinnati Post v. Cincinnati* (1996), 76 Ohio St. 3d 540, 543-544, 668 N.E.2d 903, 906; R.C. 1.47(C).¹⁴

As in the *Besser* case, DERS's and DE-Ohio's provision of trade secrets and other confidential information to the Commission through the regulatory process deserves protection. Absent the transfer to the Commission the documents at issue do not constitute "Records" pursuant to R.C. 149.011 or "Public Records" under R.C. 149.43. Likewise, transfer of the documents to the Commission through the regulatory process, pursuant to a valid protective order, does not change the nature of the documents such that the confidential information becomes "Public Record" in the hands of the Commission. Any other interpretation would produce the absurd and unintended result that private entities cannot protect confidential information when such information is subject to discovery, even where the entity subject to discovery is not a party to the case.

¹⁴ *State Ex. Rel. Besser v. Ohio State University*, 87 Ohio St. 3d 535, 540, 721 N.E.2d 1044, 1048-1049 (2000) (emphasis added).

The information did not lose its character as private commercial confidential documents and become a public record under R.C. 149.43 because they were the subject of a discovery request. Importantly, DERS has consistently maintained their confidentiality and, in fact, properly moved the Commission to maintain the information as confidential. The Attorney Examiners granted that motion in a bench ruling that remains as appropriate now as it did when first granted.¹⁵ The Commission should protect its ability to obtain and protect confidential information and interpret the information obtained through discovery in these proceedings in the same manner as the *Besser* Court and reject the Public Records request at issue.

III. Because the exhibits, testimony, and pleadings are not R.C. 149.011 "Records" or R.C. 149.43 "Public Records," the Commission is not under any obligation to make such records public upon request.

In order to conduct its business the Commission must rely upon all stakeholders, including utilities, competitive providers, and consumers, to provide it with information. Some of that information, including the information at issue in this instance, is confidential in nature. If properly transferred to the Commission pursuant to the requirements of O.A.C. 4901-1-24, the confidential information of a private entity does not become "Record" or "Public Record" and the Commission maintains the authority to protect such information under seal.

If the Commission determines that it must adopt a standard to review such information for possible release DE-Ohio recommends that the Commission adopt the standard set forth by the Court in *Dann v. Taft* where the Court held that when a public

¹⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al*, (Tr. I at 9) (March 19, 2007).

record is not at issue a requester must demonstrate a particularized need for the information and the Commission:


*May find a particularized need when disclosure is sought by a uniquely qualified representative of the general public who demonstrates that disclosure of particular information to it will serve the public interest. Particularized need, however, does not exist when privileged information can be obtained elsewhere. Whether a requester's asserted need is sufficient is a matter of law.*¹⁶

In this instance the requestor, Mr. Chesley, has not stated or demonstrated any particularized need for the information. Therefore, his request should be rejected.

CONCLUSION:

For the all reasons provided in this memorandum, DE-Ohio asks that the Commission deny Mr. Chesley's public record request.

Respectfully Submitted,


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¹⁶ *State Ex Rel. Dann v. Taft*, 109 Ohio St. 3d 364, 378-379, 848 N.E.2d 472, 486-487 (2006) (emphasis added)

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically on the following parties this 16th day of August 2007.



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