

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

MEMORANDUM REGARDING
MODIFICATION OF THE PROTECTIVE ORDER
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") hereby responds to the Entry dated August 8, 2007 ("August Entry") in the above-captioned cases. The August Entry states that the Public Utilities Commission of Ohio ("Commission" or "PUCO") received a public records request on July 26, 2007, in which the PUCO was asked to release certain documents in its possession that are relevant to the above-captioned cases.¹ The August Entry states that satisfaction of the public records request may involve documents previously protected under a prior PUCO protective order, and that "[p]arties may file

¹ Entry at 2.

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.
Technician JS Date Processed 8/16/07

10
RECEIVED-DOCKETING DIV
2007 AUG 16 AM 11:42
PUCO

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.”²

The PUCO’s protective order that is being considered for modification in the August Entry resulted from the PUCO granting motions for protective orders that were filed by the Duke-affiliated companies – Duke Energy Ohio, Inc. (“Duke Energy”), Duke Energy Retail Sales (“DERS”), and Cinergy Corp. (“Cinergy”) -- as well as the Ohio Hospital Association, and the Kroger Company.³ These parties sought and obtained an Attorney Examiner ruling that prevented certain information in the possession of the PUCO from being disclosed to the public.

During discovery in the earlier phase of this proceeding, Duke Energy did not acknowledge the existence of some of these documents that are now in the possession of the PUCO. Duke Energy obtained a PUCO ruling that prevented OCC from obtaining, via discovery, documents that OCC would have used as evidence⁴ in this case that involved consumers’ electricity rates for the years 2006, 2007 and 2008. The OCC appealed the issue to the Supreme Court of Ohio, where the Court reversed and remanded the case to the PUCO with the requirement that OCC be given access to the documents.⁵

Despite the Court’s ruling, Duke Energy and its affiliates that became involved in these cases resisted the OCC’s efforts to obtain information in discovery and present that

² Id. OCC is commenting on the PUCO’s consideration of the public records request it received, per the PUCO’s invitation for parties to comment. A state agency such as the PUCO must exercise independent judgment whether to release information in response to a public records request, under R.C. 149.43.

³ All motions were filed on March 2, 2007.

⁴ *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 at ¶78 (“*Consumers’ Counsel 2006*”).

⁵ *Consumers’ Counsel 2006* at ¶94.

information to the Commission for its consideration. For example, the Duke-affiliated companies filed motions to limit the OCC's inquiries into the role of DERS in matters related to these cases and the involvement of DERS in the partial settlement reached in these cases.⁶ After OCC obtained documents, the Duke-affiliated companies attempted to limit the testimony that the OCC could present by way of numerous motions *in limine*.⁷ The documents were largely contained within the offices of the Duke-affiliated companies. When OCC finally presented documentation of its case before the Commission, the Duke-affiliated companies were successful in securing the above-referenced protective order that prevented the public disclosure of documents in the PUCO's possession unless the Commission changed the order upon further consideration on the merits of the cases.

The OCC has extensively addressed the issue of whether or not certain documents in these cases should be available in the public domain. In earlier pleadings, the OCC explained that various documents in the PUCO's possession (that are the subject of the PUCO's August Entry) should be in the public domain. Those earlier pleadings that OCC filed included OCC's Memorandum Contra the Motions for Protection⁸ that OCC filed in response to the motions filed by the Duke-affiliated companies, the OHA, and Kroger, as well as the post-hearing briefs that OCC filed.⁹ This OCC Memorandum Regarding Modification of the Protective Order ("Memorandum") sets out applicable law and directs

⁶ DERS Objections and Motion to Quash and for a Protective Order Prohibiting Discovery Requests to DERS (December 20, 2006) and Duke Energy Motion for Protective Order (December 20, 2006)

⁷ Motions *in limine* were submitted by Duke Energy, DERS, and Cinergy on February 2, 2007.

⁸ OCC Memorandum Contra Motions for Protection (March 13, 2007).

⁹ OCC Initial Post-Remand Brief, Phase I (April 13, 2007) and OCC Reply Post-Remand Brief, Phase I (April 27, 2007).

the reader to the OCC's previously filed arguments in favor of the PUCO conducting these cases, now more than four years old, in the public light.

II. STATEMENT OF LAW AND BURDEN OF PROOF

R.C. 149.43 is Ohio's public records law that the OCC addressed earlier in these proceedings and that has been addressed in numerous other proceedings before the Commission. R.C. 4901.12 requires that "all proceedings of the public utilities commission and all documents and records in its possession are public records," except as provided in the exceptions under R.C. 149.43. R.C. 4905.07 requires 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 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 Commission 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."¹⁰

Ohio Admin. Code 4901-1-24(D) requires of the PUCO that "[a]ny order issued under this paragraph shall minimize the amount of information protected from public disclosure." The Commission stated in a 2004 case:

The Commission has emphasized, in *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 issued November 23, 2003, that:

¹⁰ *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* at 5 (October 18, 1990).

[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 (Section 149.43, Revise Code) and as consistent with the purposes of Title 49 of the Revised Code. 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 few very limited exceptions.' *State ex. rel. Williams v. Cleveland* (1992), 64 Ohio St. 3d 544, 549, [other citations omitted].¹¹

The Commission's entry in the above-quoted case is as informative for its details as it is for the cited legal authority. Faced with demands for "wholesale removal of the document from public scrutiny,"¹² the Commission reviewed several documents and determined in each case how documents could be redacted "without rendering the remaining document incomprehensible or of little meaning...."¹³

The Commission has also used a balancing approach in its consideration of efforts to protect information from public scrutiny. For instance, the PUCO has noted "it is necessary to strike a balance between competing interests. On the one hand, there is the applicant's interest in keeping certain business information from the eyes and ears of its competitors. On the other hand, there is the Commission's own interest in deciding this case through a

¹¹ *In re MxEnergy, Inc.*, Case No. 02-1773-GA-CRS *et al.*, Entry at (3) (September 7, 2004) (notations in original).

¹² *Id.* at 3.

¹³ *Id.*

fair and open process, being careful to establish a record which allows for public scrutiny of the basis for the Commission's decision."¹⁴

The Supreme Court of Ohio has addressed the test for protection from disclosure under R.C. 149.43 as the "state or federal law" exemption.

We have also adopted the following factors in analyzing a trade secret claim:

(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.¹⁵

These factors were not carefully analyzed in the various motions for protection that were submitted regarding documents that are now subject to a public records request.¹⁶

While the PUCO has invited comments from all parties, it should be recognized that not all parties bear the burden of proof. The burden of proving that information should be withheld from disclosure to the public remains with the parties that seek such confidential

¹⁴ *In the Matter of the Application of Rapid Transmit Technology Inc. for Certificate of Public Convenience and Necessity to Provide Local Telecommunications Service in the State of Ohio*, Case No. 99-890-TP-ACE, Entry at 2-3 (October 1, 1999); see also *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 at 7 (October 18, 1990) (holding that "any interest which the joint applicants might have in maintaining the confidentiality of this information [fair market value and net book value of assets proposed to be transferred] is outweighed by the public's interest in disclosure.").

¹⁵ *Besser* at 399-400.

¹⁶ See, e.g., OHA Motion for Protective Order at 4-5 (March 2, 2007), which does not apply the test to any actual document or type of document.

treatment, pursuant to Ohio Adm. Code 4901-1-27(B)(7)(e). Those asking the PUCO to withhold documents from the public in this case cannot meet their burden of proof.

III. THE INFORMATION REQUESTED, AS STATED IN PARAGRAPH 4 OF THE PUCO'S AUGUST ENTRY, INCLUDES RECORDS IN THE PUCO'S POSSESSION THAT SHOULD BE DISCLOSED TO THE PUBLIC BECAUSE THE RECORDS DO NOT QUALIFY AS TRADE SECRETS THAT WOULD BE EXEMPT FROM DISCLOSURE TO THE PUBLIC UNDER OHIO'S PUBLIC RECORDS LAW.

The records that are referenced in paragraph 4 of the August Entry have been withheld from disclosure by the PUCO's earlier ruling, but are not precluded from disclosure by Ohio's public records law in R.C. 149.43. The records referenced in the August Entry include those in OCC Exhibit 2A which contains Attachments 2 through 24 to the testimony of OCC Witness Hixon, which is on file at the PUCO. The records would also include the transcript containing the cross-examination of Witness Hixon and various parties' briefs in Phase I of these proceedings (including, but not limited to the OCC's initial and reply briefs) that refer to the testimony and the transcript. The text of OCC Exhibit 2A contains quotations from the attached documents as well as general descriptions of the attachments.

The nature of these documents and their treatment under Ohio law regarding trade secrets were addressed by the OCC in its Memorandum Contra Motions for Protection¹⁷ and in the OCC's briefs.¹⁸ As stated therein, the text and attachments that comprise OCC Remand Ex. 2A and the transcript¹⁹ containing the cross-examination of OCC's witness

¹⁷ OCC Memorandum Contra Motions for Protection at 13-19 (March 13, 2007).

¹⁸ See, e.g., OCC Initial Post-Remand Brief, Phase I at 32-59 (April 13, 2007) and OCC Reply Post-Remand Brief, Phase I at 18-31, 62-72, 108-132 (April 27, 2007).

¹⁹ Tr. Vol. Remand III at 35-50 (March 21, 2007).

with regard to that Remand Exhibit, both of which are filed at the PUCO, do not contain information that should be classified as trade secrets. Briefs in Phase I of these proceedings were also redacted to protect references to the record containing the information subject to the protective order, and do not contain information that should be considered trade secrets. While the details of OCC's positions are in OCC's aforementioned pleadings, the general reason the records should be released as public records for public inspection is that the subject of the documents is the settlement between Duke Energy and various intervenors to these cases.

The August Entry contains the Attorney Examiner's request that parties address whether the prior protective order should be modified for "all protected information."²⁰ In the same paragraph, the August Entry asks parties to address whether there should be confidential treatment for document titles, identification of persons or entities, dates, payments, quantities and load information, account numbers, other customer identification, and other terms and conditions.²¹ In this Memorandum, the OCC has referenced its earlier filings that address what records should be in the public domain, and that the documents should be released for public inspection in their entirety.

With respect to components listed in paragraph 6 of the August Entry, the PUCO must comply with its legal obligation under R.C. 4903.09 to "file . . . findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." The Commission's opinion and order on remand cannot comply with this requirement unless its opinion includes document titles, identification of persons and

²⁰ Entry at 2, ¶(6).

²¹ Id.

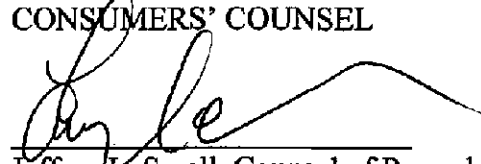
entities, dates, payments, customer identification, and other terms and conditions of documents that are the subject of the August Entry and are at issue in these cases.

IV. CONCLUSION

The records that are currently subject to the initial order of protection and that are on file at the PUCO, as those records relate to the testimony of OCC Witness Hixon, are not trade secrets under R.C. 149.43. The records should not be withheld from public scrutiny under Ohio's public records law and under the statutes, R.C. 4901.12 and R.C. 4905.07, that require PUCO proceedings to be conducted in the public light.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

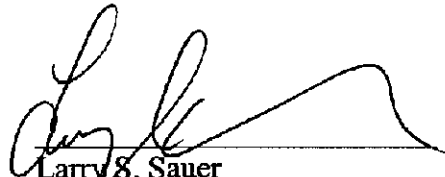


Jeffrey L. Small, Counsel of Record
Ann M. Hotz
Larry S. Sauer
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 (T)
(614) 466-9475 (F)
small@occ.state.oh.us
hotz@occ.state.oh.us
sauer@occ.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that a copy of the OCC's Memorandum was served electronically on the persons listed on the electronic service list as shown below, provided by the Attorney Examiners, this 16th day of August 2007.



Larry S. Sauer
Assistant Consumers' Counsel

emooney2@columbus.rr.com
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com
sam@mwncmh.com
dneilsen@mwncmh.com
barthroyer@aol.com
mhpetricoff@vssp.com

WTPMLC@aol.com
tschneider@mgsglaw.com
cgoodman@energymarketers.com
sbloomfield@bricker.com
TOBrien@Bricker.com
dane.stinson@baileycavalieri.com
korkosza@firstenergycorp.com

mchristensen@columbuslaw.org
paul.colbert@duke-energy.com
rocco.d'ascenzo@duke-energy.com
mdortch@kravitzllc.com
Thomas.McNamee@puc.state.oh.us
ricks@ohanet.org
anita.schafer@duke-energy.com

Scott.Farkas@puc.state.oh.us
Jeanne.Kingery@puc.state.oh.us