

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.)	03-2081-EL-AAM
)	03-2080-EL-ATA
)	05-724-EL-UNC
)	05-725-EL-UNC
)	06-1068-EL-UNC
)	06-1069-EL-UNC
)	06-1085-EL-UNC

SECOND ENTRY ON REHEARING

The Commission finds:

- (1) On July 31, 2008, the Commission issued an entry on rehearing (July entry on rehearing) concerning the redaction of trade secret information from numerous documents filed in these cases.
- (2) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission, within 30 days of the entry of the order upon the Commission's journal. Section 1.14, Revised Code, provides that, when the last day of a period within which an act may be done falls on a legal holiday, that act may be done on the next succeeding day that is not Sunday or a legal holiday. That same section also provides that, when a public office in which such an act is to be performed is closed to the public for the entire day that constitutes the last day for doing the act, such act may be performed on the next succeeding day that is not a Sunday or a legal holiday.
- (3) On August 30, 2008, the Commission's office was closed for the entire day. August 31, 2008, was a Sunday. September 1, 2008, was a legal holiday. On September 2, 2008, the office of the Ohio Consumers' Counsel (OCC) filed an application for rehearing of the Commission's July entry on rehearing. On September 12, 2008, Duke Energy Ohio, Inc. (Duke); Duke Energy Retail Sales, LLC (DERS); and Cinergy Corp. (jointly, the Duke entities) filed a memorandum contra the application for rehearing. In summary, OCC submits that the entry on rehearing incorrectly addressed the

redaction of certain customer names and, in addition, that the release of certain information in a separate forum requires that numerous pages of information that were previously determined to be trade secrets now be made public. The Duke entities disagree.

- (4) OCC asserts that the Commission's July entry on rehearing is "unreasonable and unlawful because the Commission redacted portions of filed information that is available to the public and therefore cannot possibly be considered 'trade secret' information." (Application for rehearing at 1.) OCC separates its concerns into a discussion of the names of certain customers of one or more of the Duke entities that are described as "marquee customers" and a discussion related to the release of certain information by the Court of Common Pleas for Hamilton County, Ohio.
- (5) With regard to the marquee customers, OCC points to four specific pages on which the names can be found. OCC claims that the "Duke affiliates that actually engage in commercial activities *advertise* their activities and achievements rather than conceal their existence." OCC goes on to explain that the documents attached to the application for rehearing are copies of internet pages that "provide examples that show how the Duke affiliated companies release information about their 'marquee customers' to the public." (Application for rehearing at 5-6.)
- (6) In response to this argument, the Duke entities clarify the situation, stating that the customers in question are customers of Cinergy Solutions, Inc., (CSI) an affiliate of Duke and DERS. According to Duke, CSI is not a party to these proceedings and therefore is not in a position to defend the confidentiality of its information. Further, release of the customers' names, according to Duke, would reveal which customers are linked to certain CSI cogeneration percentages and target industrial market potentials.
- (7) Duke's arguments are persuasive on this issue. The pages in question are clearly designated as information concerning CSI, a Duke affiliate that is not a party to these proceedings. The "marquee customers" are customers of CSI, not the Duke affiliates that are parties. As the information attached to OCC's application for rehearing does not clearly reflect the public disclosure of the specific CSI "marquee customers," we will maintain their names as confidential.

- (8) With regard to the release of certain information in another proceeding, OCC points out that some of the side agreements at issue in these proceedings were released by the Hamilton County Court of Common Pleas, as of August 14, 2008, in *Deeds v. Duke Energy Ohio*, Case No. A 0701671 (Deeds). OCC contends that the Commission should release all information that was made public in the Deeds case. According to OCC, that court released all of the information in its possession, including "more than one of the option agreements." (Application for rehearing at 7.) Therefore, OCC declares, the Commission should release to the public pages 323 through 641 of the Commission's Bates-stamped pages. OCC identifies information on certain pages within its filings that it believes should be released on the ground that the underlying information is now public. OCC also argues that the Commission should reevaluate the record for analogous changes in the filings of other parties. (Application for rehearing at 8-9.)
- (9) Duke, in response, first suggests that OCC is not arguing that the entry on rehearing was unreasonable or unlawful but, rather, is collaterally attacking the entry on the basis of the Deeds ruling. Duke contends that the entry was lawful and reasonable when it was issued and that, therefore, new events should not be interjected into these proceedings to undermine the finality of the order. (Memorandum contra at 4-5.)
- (10) With regard to Duke's contention that the subsequent release of documents should not impact the Commission's determination that certain information is a trade secret, the Commission first notes that Duke cited no statutes, rules, or precedent to support its position. The Commission is bound by Rule 4901-1-24, Ohio Administrative Code (O.A.C.), which allows us to protect the confidentiality of information contained in a filed document, "to the extent that state or federal law prohibits release of the information, including where the information is deemed . . . to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code." Ohio law defines a trade secret as "information . . . 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." Section 1333.61(D), Revised Code. The Ohio

Supreme Court has adopted the following six factors to be used in analyzing a claim that information is a trade secret under that section:

- (a) The extent to which the information is known outside the business.
- (b) The extent to which it is known to those inside the business, i.e., by the employees.
- (c) The precautions taken by the holder of the trade secret to guard the secrecy of the information.
- (d) The savings effected and the value to the holder in having the information as against competitors.
- (e) The amount of effort or money expended in obtaining and developing the information.
- (f) The amount of time and expense it would take for others to acquire and duplicate the information.

State ex rel. The Plain Dealer v. Ohio Dept. of Ins., 80 Ohio St.3d 513, 524-525 (1997). Where information that may previously have met the trade secret test has now been released to the public, we will not maintain a protective order prohibiting its release. However, from a procedural standpoint, a suggestion that a protective order be modified due to the release of information in another forum, subsequent to the initial grant of the protective order, would be more appropriately handled through the filing of a motion. Thus, while we will consider modification of the protective order through the vehicle of OCC's application for rehearing, any additional modifications to the protective order, due to any subsequent releases, should be addressed by motion.

- (11) Duke's next argument goes to the question of precisely which information should be released in light of the Deeds release. In that discussion, Duke concedes that, as a result of the Deeds order, "all the Original Direct Serve Contracts and all the November Direct Serve Contracts were, indeed, revealed to the public." With regard to the option contracts, Duke suggests that OCC was "deliberately imprecise" in stating that the release included "more than one" of the option contracts. Duke asserts that exactly two such contracts

were released: one with Marathon/Ashland Petroleum and one with General Motors. (Memorandum contra at 6-7.) Therefore, Duke disagrees with OCC's proposed wholesale release of all side agreements.

- (12) The Commission agrees that information that has been released to the public must similarly be released in these proceedings. However, we will not release more than was, according to Duke, released in the Deeds case. Therefore, the Commission has reviewed all of the redaction modifications specifically proposed by OCC, together with Duke's responses to those proposals. In addition, the Commission has reviewed all previously proposed redactions and is proposing to release any information that clearly stems from, or discusses, contracts that are now public information.
- (13) The following chart addresses the specific redaction modifications proposed by OCC, thereby granting or denying rehearing on each ground. Additional changes to the redactions, in other documents, being proposed by the Commission in response to OCC's assertion that a review of all confidential documents was necessary, are not included in this chart. However, as with previous entries, the Commission has prepared a computer disk that shows all changed pages (as well as the reverse side of any page, where the page had information on two sides). Parties should also note that this disk includes pages 2318, 2373, 2437, and 2535, which the Commission determined should be redacted in the first entry on rehearing but were omitted from the disk that was a part of that entry.

Pages	OCC's rationale	Duke's response	Grant or deny	Commission rationale
215-217	Reference to option agreement.	The names of option contract customers other than Marathon and GM have not been disclosed.	Grant in part.	Only references to Marathon or GM contracts will be released.
248	Customer	Fourteen	Grant.	Although these customer

	names.	customers are option contract customers whose names were not released.		names may or may not also be the names of option contract customers, in this location the list is an exhibit to a contract that has, according to Duke, been released.
249	Customer names.	Customers are option contract customers whose names were not released.	Grant.	This is the first page of a contract that has, according to Duke, been released.
250-255	Customer names.	No response.	Grant in part.	Pages 250-254 are part of a contract that, according to Duke, has been released. It appears that page 255 is not a part of the agreement that appears at pages 249-254. It appears to discuss an option agreement and, therefore, will not be released.
256-261	Customer names.	No response.	Grant.	Pages 256-261 are part of contract that, according to Duke, has been released.
282-288	Customer names.	No response.	Grant.	Pages 282-288 are part of contract that, according to Duke, has been released.
289-295	Customer names.	No response.	Grant.	Pages 289-295 are part of contract that, according to Duke, has been released.
323-641	All side agreements should be public.	Not all side agreements were released in Deeds case.	Deny in part.	Only side agreements that Duke concedes were released in Deeds case will be released in full. Each of such agreements will be released every time it appears in the

				documents.
1769-1772	References to option agreements.	Of the option contract customers referenced, only Marathon has been revealed. Quote from Ziolkowski is public.	Deny in part.	Only references to Marathon, as well as the Ziolkowski email quote, will be released.
1775-1776	References to option agreements.	No response as to 1775. References on 1776 are public.	Grant.	This information was released in the Deeds case.
1780	References to option agreements.	No response.	Grant in part.	The information on this page that references option information that, according to Duke, has been released will be made public.
1929	References option agreement.	This information references the name of an option contract customer that has not been revealed.	Deny.	The name of the customer in this option contract has not been released and will not, therefore, be made public.
1932	References option contract.	Only the name of Marathon should be released on this page.	Grant.	The only option contract name on this page is Marathon.

2078-2079	References option contract.	Information references names of option contract customers that have not been released, as well as pricing methodology.	Deny in part.	The name of one option contract customer that has not been revealed will be retained as confidential. In addition, the names of the only two customers who did not have option contracts will be maintained as confidential in order not to divulge the identities of the option contract customer list.
2085	References option contracts.	Marathon's name has been revealed but the other name on the page is an option contract customer whose name has not been revealed.	Grant in part.	Although Duke states, in the memorandum contra, that the customer named on this page (other than Marathon) is an option contract customer, that is contrary to the testimony on page 213. However, as noted previously, disclosure of the names of the two customers who do not have option contracts would tend to reveal the option contract customer list. Therefore, the customer name on this page other than Marathon will not be released.
2934	References option contracts.	Of the information on this page, only Marathon's contract has been revealed.	Grant in part.	Only Marathon's information will be released as the other information is still confidential.
3344	References option contracts.	Of the information on this page, only	Grant in part.	Only Marathon's information will be released as the other information is still

		Marathon's contract has been revealed.		confidential.
--	--	--	--	---------------

- (14) The revised version of the Commission-redacted documents will be filed publicly in these dockets on November 14, 2008, unless an application for rehearing is filed under Section 4903.10, Revised Code. Parties to these proceedings may contact the attorney examiners in order to receive an electronic copy (on a computer disk) of the documents, with highlighting to indicate the Commission's revised redactions. Parties will note that this disk includes every page on which any alteration of the redactions has been made. In addition, where a change was made on only one side of a two-sided document, an image of the unchanged side is also included.
- (15) The parties should understand that this copy of the information must be treated under the same confidentiality restrictions that apply to any previous copies or versions of the information that they have previously obtained, regardless of the medium in which, or the party from whom, such information was conveyed. Therefore, the disks, and the information thereon, are not to be copied or transmitted in any way to any other person or entity. As has been the case through the remand process with regard to those parties who have not entered into confidentiality agreements with Duke or its affiliates relating to this information, such information is also not to be shared by any counsel with his or her client or with any other person or entity.
- (16) If any party, after reviewing the Commission's revised redactions, chooses to file an application for rehearing, each asserted error should be specifically referenced and explained. For this purpose, the Commission-redacted documents have again been arranged on the disk in chronological order. A table of contents, referencing Commission page numbers, has been prepared and will be included on the disk. Assignments of error should refer to such Commission page numbers and the specific text on such pages. Parties should not expect the Commission to locate additional similar instances of asserted errors. Assignments of error that do not use Commission page numbers or that are general in nature

will be denied, as will assignments of error that relate to matters not determined in this entry on rehearing.

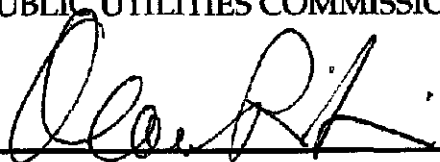
It is, therefore,

ORDERED, That the application for rehearing by OCC be granted in part and denied in part, as set forth herein. It is, further,

ORDERED, That the parties comply with the requirements of this entry. It is, further,

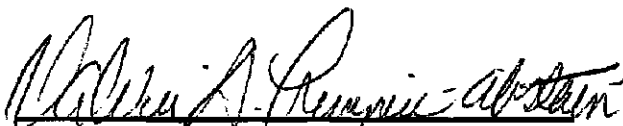
ORDERED, That a copy of this entry be served upon all parties of record in these proceedings.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Alan R. Schriber, Chairman


Paul A. Centolella


Ronda Hartman Fergus

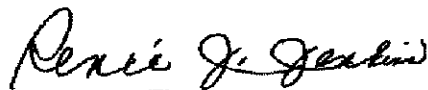

Valerie A. Lemmie


Cheryl L. Roberto

JWK;geb

Entered in the Journal

OCT 01 2008



Renee J. Jenkins
Secretary