

FILE

**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

**REPLY TO MEMORANDUM CONTRA MOTION TO
MODIFY PROTECTIVE ORDER
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential consumers of Duke Energy Ohio, Inc. ("Company" or "Duke Energy," including its predecessor The Cincinnati Gas and Electric Company), moved on March 13, 2009 to modify a Protective Order ("Motion to Modify") that was previously approved in the Second Entry on Rehearing ("October Entry") issued by the Public Utilities Commission of Ohio ("PUCO" or "Commission") on October 1, 2008. The OCC stated that the Commission's Protective Order and the associated treatment of information that restricts public access to public records in the above-captioned cases should be changed according to the statement of law contained in the October Entry and based upon the fact that much

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of the information that is subject to the existing Protective Order has been released to the public as part of an action in federal court.¹

On March 19, 2009, Duke Energy and its affiliated companies Cinergy Corp. and Duke Energy Retail Sales, LLC. (collectively, "Duke") moved for a twenty-day extension for their deadline to file a responsive pleading ("Motion for Extension") and for modification of the expedited timetable set for pleadings in these cases. On March 27, 2009, an Attorney Examiner Entry ("March Entry") granted the unopposed motion to terminate the expedited timetable for pleadings in the above-captioned cases.² That Entry also approved the request for a twenty-day extension,³ and Duke filed its Memorandum Contra the Office of the Consumers' Counsel's Motion to Modify ("Memo Contra") on April 9, 2009.

After Duke's review of the documents, its Memo Contra states that the OCC's report that information was released in federal court was "confirmed."⁴

II. ARGUMENT: The Commission's Protective Order Should be Modified Because the Commission's Redactions Cover Information that is Available to the Public and Therefore Cannot Possibly be Considered "Trade Secret."

Duke's arguments in its Memo Contra echo its approach in its Motion for Extension that reveal Duke's refusal to recognize Ohio law regarding trade secrets and the Commission's rulings regarding the public release of documents. In its Motion for

¹ Motion to Modify at 1.

² March Entry at 2, ¶(6) (March 27, 2009) ("expedited schedule will be terminated").

³ Id. at 2, ¶(5). The OCC opposed Duke's request for additional time. OCC Memorandum Contra Duke Motion for an Extension of Time (March 24, 2009) ("Duke intends to argue matters of law that are well settled in these cases," id. at 4).

⁴ Memo Contra at 2.

Extension, Duke asked for additional time to “review the protected materials” and to “take action in the *Williams* matter to further protect these materials.”⁵ In its Memo Contra, Duke again asks for additional time to deal with the “inadvertent disclosure of personal identification information . . . [before] the *Williams* Court” after which the “Commission will be free to modify its Protective Order . . . if it believes further modification is in Order.”⁶ After its review, Duke confirms the facts stated in the OCC’s Motion to Modify regarding the release of information approximately seven months ago in *Williams*. Additional delay is unwarranted, the Commission is “free to modify its Protective Order” without further delay or further argument by Duke,⁷ and the Commission should modify the Protective Order by granting the OCC’s Motion to Modify.

Duke’s argument is based upon its claim that Duke’s counsel in the *Williams* case failed to inform Duke about developments in that case. The general rule regarding legal representation is well-known: A party chooses its attorney “as his representative in the action, and he cannot . . . avoid the consequences of the acts or omission of this freely

⁵ Motion for Extension at 3. The reference to “Williams” is to *Williams v. Duke Energy International, Inc.*, Case No. 1:08-CV-00046 (U.S. Dist. Ct., Southern Dist. of Ohio) (hereinafter, “*Williams*”).

⁶ Memo Contra at 12 (April 9, 2009). Duke’s reference to “personal identification information” apparently refers to the customer identification numbers contained in the option agreements. Duke’s Memo Contra appears to simply ask the Commission to redact these identification numbers, a limited request to which the OCC does not object regarding the information released in the *Williams* case. This objective does not require additional delay. The Second Entry on Rehearing addressed the issue of two option agreements that were previously released by the *Deeds* court. Second Entry on Rehearing at 4-5 (October 1, 2008). Those option agreements appear on the Commission’s web site with the customer identification numbers redacted. See Released Documents (November 10, 2008), pages 369-371 in the PUCO’s numbering system (Marathon) and page 386 (General Motors). The OCC did not object to that treatment and has not objected to the redaction of such customer identification numbers throughout the proceedings in the above-captioned cases.

⁷ Memo Contra at 12. Duke offers no timeframe in which it will take actions that it is unwilling to specify.

selected agent.”⁸ Duke’s explanation for its failure to take action in federal court regarding the release of information is that “[Duke] counsel in the *Williams* matter failed to recognize and apprise DE-Ohio, DERS, and Cinergy that unredacted versions of the option contracts had been filed in the public record in that forum.”⁹ The identification by Duke’s regulatory counsel of other Duke representatives (i.e. counsel in *Williams*) who failed to respond to the potential and actual release of information does *not* provide Duke with a legally cognizable argument against modification of the Protective Order. The PUCO should recognize that documents have been publicly released for an extended period of time and modify the Protective Order.

The Commission’s Entry dated May 28, 2008 recognizes that “information that is or already has been made public cannot be treated as a trade secret under Section 1333.61.”¹⁰ The Entry on Rehearing contains essentially the same analysis.¹¹ The October Entry again states this treatment: “Where information that may previously have met the trade secret test has now been released to the public, we will not maintain a

⁸ *Link v. Wabash R. R. Co.* (1962), 370 U.S. 626, 633-634, cited with approval by *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St. 2d 146, 152. The case addresses the “fairness” issue raised by Duke. Memo Contra at 11. “There is certainly no merit to the contention that dismissal of petitioner’s claim because of his counsel’s unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the act of his lawyer-agent and is considered to have ‘notice of all facts, notice of which can be charged upon the attorney.’” *Link* at 633-634.

⁹ Memo Contra at 10. Duke also states: “Presumably because of confusion regarding what had been disclosed as a result of the Court’s action in *Deeds*, DE-Ohio’s counsel in that matter did not recognize at the time the option agreements were attached to the September 18, 2009 Motion that the option agreements had still not been disclosed to the public and thus contained Protected Information.” Memo Contra at 3 (emphasis added). Thus, Duke’s argument is not only based upon criticism of its own legal work but offers mere speculation to the Commission regarding the inaction by its own legal counsel.

¹⁰ Entry at 4, ¶(10) (May 28, 2008).

¹¹ Entry on Rehearing at 4 (July 31, 2008).

protective order prohibiting its release.”¹² The March Entry states that “public information cannot be held by the Commission under a protective order.”¹³ Information regarding the option agreements that are part of the record in these cases before the PUCO was filed in federal court on September 18, 2008 (i.e. in *Williams*) without any protection from release to the public.¹⁴ Ohio law regarding trade secrets and the Commission’s earlier rulings require the modification of the Protective Order and the release of additional information by the PUCO.

Duke’s Memo Contra ignores the Commission’s pronouncements and, like its earlier memorandum on the subject, Duke counters the Motion to Modify with a barrage of inapplicable case law.¹⁵ Duke includes many of the same arguments (and case law) that were rejected by the Commission regarding the release of information in *Deeds*.¹⁶ Furthermore, the case law cited by Duke does not include a circumstance where a party prevailed despite its failure to respond to the release of documents, an important factor in any discussion of “trade secrets” under Ohio law.¹⁷

¹² October Entry at 4, ¶(10) (October 1, 2008).

¹³ March Order at 2, ¶(5) (March 27, 2009).

¹⁴ OCC Motion to Modify at 5-6.

¹⁵ Duke Memorandum Contra OCC Application for Rehearing at 7-9 (July 17, 2008).

¹⁶ Entry on Rehearing at 2-4 (July 31, 2008). “*Deeds*” refers to *Deeds v. Duke Energy*, Case No. A 0701671 (Hamilton Cty. Ct. of Common Pleas). See Memo Contra at 2.

¹⁷ See, e.g., Second Entry on Rehearing at 4 (October 1, 2008) (discussion of factors to consider, including the “precautions taken by the holder of the trade secret to guard the secrecy of the information,” citing *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.* (1997), 80 Ohio St.3d 513).

Duke argues that it has “zealously sought throughout the duration of *this proceeding* to preserve the confidentiality of information,”¹⁸ but Duke does not claim similar efforts before the *courts*. Duke did not take an interlocutory appeal in *Deeds* to prevent the release of option agreements, and Duke has failed to take any action for over six months regarding the release of information in *Williams*.¹⁹ Duke states that its inaction in *Williams* is attributable to its counsel’s failure to “recognize and apprise [Duke]” of the situation,²⁰ which is an assessment of blame directed at Duke’s representatives but not an argument against the OCC’s Motion to Modify. It is the actions (and inactions) before the *courts* (not before the Commission) that the OCC raised in its Motion to Modify. Duke has been inattentive to confidentiality issues before the courts, and its argument before the Commission must therefore be rejected.

Duke states as fact matters that it makes no attempt to document, and some Duke statements seem contradicted within its Memo Contra. The unavailability of legal means to prevent the release of information in the *Deeds* case is unsupported. Duke states that information from the *Deeds* case was “published within a Cincinnati newspaper before DE-Ohio had any opportunity to be heard upon the subject of the disclosure.”²¹ Duke

¹⁸ Memo Contra at 9 (emphasis added). Gaps have appeared in Duke’s efforts to limit the public’s view of documents in these proceedings. See, e.g., Third Entry on Rehearing at 3 (November 5, 2008) (“the time for filing any applications for rehearing concerning the redacted documents has expired”).

¹⁹ Duke asserts that it took prompt action regarding the treatment of information before the *Williams* court, signaled by the word “immediately” three times in a single sentence. Memo Contra at 3-4 (“immediately reviewed,” “immediately contacted counsel,” and requested “immediate” action). Duke took approximately seven months to begin addressing the attachments to Plaintiffs’ Motion for a Preliminary Injunction in the *Williams* case, a pleading and attachments that are noteworthy by their content as well as their size (nearly two inches in thickness).

²⁰ Memo Contra at 10.

²¹ Id. at 2.

argued for over two pages on the issue in its pleading in the Hamilton County Court of Common Pleas on August 14, 2008,²² but Duke did not take an interlocutory appeal of the court's decision in *Deeds* that released contract information. Without any supporting documentation, Duke asserts that the release of information was "wrongful[]"²³ and asserts that the release of documents "was never authorized."²⁴ Yet, Duke's Memo Contra states that information was released as the result of an order by the Hamilton County Court of Common Pleas.²⁵

Without support, Duke argues that the public is not generally aware of the released information.²⁶ However, Duke states that the main Cincinnati newspaper has been interested in the option agreements.²⁷ Duke also states that "[s]teps are being taken to remedy that disclosure [in *Williams*]," yet no filings have recently been submitted (by

²² Duke Memorandum in Opposition to the Cincinnati Enquirer's Motion to Intervene at 3-6 (August 14, 2008) ("B. The Documents at Issue Contain Confidential Trade Secrets Protected by State Law").

²³ Memo Contra at 7.

²⁴ Id. at 4. The Entry ordering the release of information was previously attached to an OCC pleading. OCC Application for Rehearing, Attachments (Entry from Hamilton Cty. Ct. of Common Pleas, handwritten and typed) (September 2, 2008).

²⁵ Id.

²⁶ Id.

²⁷ Id. at 4-5. The Cincinnati Enquirer published the names of 22 customers in connection with option agreements. See OCC Application for Rehearing, attached newspaper article (September 2, 2008) ("Duke payout list revealed"). The Commission files contain some evidence of the public's awareness of the issue. See, e.g., *In re Electric Security Plan for Duke*, Case No. 08-920-EL-SSO, Transcript of Public Hearing at 18-19 (October 15, 2008). As previously stated by the OCC, attempts to withhold certain information from the public that is located in the PUCO's files must fail, as a practical matter, and all that can be accomplished is to confuse matters. Motion to Modify at 4 (March 13, 2009).

anyone) to the *Williams* court regarding the release of information²⁸ The PUCO should not accept Duke's assertions as "facts."

Duke's arguments are deficient on both the law and the application of the facts to Ohio law regarding trade secrets. As recognized repeatedly in the Commission's entries, the PUCO cannot continue to protect information in its files that has been released elsewhere.

III. CONCLUSION

Documents that have been released elsewhere to the public cannot continue under a protected status in the PUCO's files. Duke's first response to the OCC's Motion to Modify was to ask for additional time to make its arguments. Duke's Memo Contra again asks for additional time to obtain an unspecified result in federal court before the Commission determines the treatment of documents that are the subject of the OCC's Motion to Modify. Additional time will make no difference to the matter raised in the OCC's Motion to Modify.

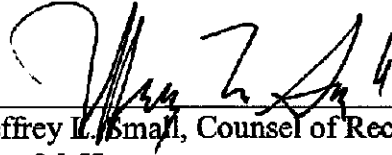
Documents were released months ago that are the subject of the PUCO's Protective Order, and Duke's counsel failed to make any objection or take any other action regarding the release. Duke's explanation in its Memo Contra -- that its counsel in

²⁸ Memo Contra at 7. Other than to point out the record in the *Williams* case, an OCC response cannot be fashioned since Duke does not further explain its argument. According to the electronic files in the *Williams* case, eight documents have been filed in the *Williams* case since the Motion to Modify was submitted to the Commission. The Order and Judgment noted by Duke (Memo Contra at 4, footnote 2) and the court's Show Cause Order (i.e. that proposes sanctions against Duke's counsel) were filed on March 31, 2009. Plaintiffs filed a Motion to Alter or Amend Judgment on April 10, 2009. Two Motions for Leave to Appear *Pro Hac Vice* were filed by Duke on April 14, 2009, and Duke also filed a Response to Show Cause Order (i.e. under seal, listed as a "Notice") on April 14, 2009. Finally, Plaintiffs' Response to Order to Show Cause was filed on April 15, 2008.

Williams was not diligent in the protection of documents -- does not support the Commission's continuation of the Protective Order over documents that have been released to the public.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Jeffrey L. Small", is written over a horizontal line.

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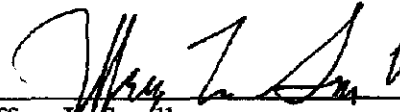
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Reply to Duke's Memorandum Contra* has been served upon the below-named persons (pursuant to the Attorney Examiners' instructions) via electronic transmittal this 16th day of April, 2009.



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