

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

ENTRY

The attorney examiner finds:

- (1) On various dates during the proceedings in the above-captioned cases, the parties have filed numerous documents along with motions for protective orders. In part, some of the documents or portions thereof, have been determined to constitute trade secrets, and have been granted protective status under a protective order. All such documents have been stamped with a Commission Bates number (page) for reference purposes.
- (2) On November 12, 2010, Duke Energy Ohio, Inc. (Duke) filed a motion to extend the protective order regarding documents filed June 22, 2009, and August 17, 2009. Duke states that it has complied with the procedures established in these cases regarding the treatment of protected materials. Duke claims that the information that remains protected in these cases consists almost entirely, if not entirely, of customer account numbers and that account numbers have independent economic value from not being generally known or readily ascertainable and that they have been and remain the subject of efforts that are reasonable to preserve their secrecy. Duke also contends that such information has traditionally been protected from public disclosure by the Commission. Duke requests that the current protective order be extended for an additional 48 months, if not longer.

- (3) By entry of November 18, 2010, Duke was directed to identify any page currently subject to the protective order in the above-captioned cases that it believed should remain subject to the protective order. Duke was also directed to explain for any page which contains a redaction, other than a customer account number, why that redacted information should continue to be treated as confidential under the Commission's protective order.
- (4) On November 30, 2010, as amended on December 29, 2010, Duke filed a list of pages that it requested be maintained under the Commission's protective order. Duke claims that the identified pages still constitute trade secrets or contain other confidential information. In addition, Duke contends that, due to the nature of the protected information, and the probability that the information will retain significant value over an extended period of time, the Commission should extend the current protective order for an additional 48 months.
- (5) On December 7, 2010, and January 6, 2011, the Office of the Ohio Consumers' Counsel (OCC) filed a memorandum contra and comments in response to Duke's requests for extension of the protective order.
- (6) Section 4905.07, Revised Code, provides that all facts and information in the possession of the Commission shall be public, except as provided in Section 149.43, Revised Code, and as consistent with the purposes of Title 49 of the Revised Code. Section 149.43, Revised Code, specifies that the term "public records" excludes information which, under state or federal law, may not be released. The Ohio Supreme Court has clarified that the "state or federal law" exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State* (2000), 89 Ohio St.3d 396, 399.
- (7) Similarly, Rule 4901-1-24, Ohio Administrative Code (O.A.C.), allows the Commission to issue an order 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."

- (8) 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.
- (9) First, Duke claims that the Commission should grant an extension of the existing protective order so as to protect customer account numbers from public disclosure because this information is confidential and is unlikely to change in the future. Duke identified the following pages: 100, 135, 162, 317, 318, 319, 320, 321, 336, 352, 353, 369, 370, 371, 386, 400, 413, 426, 440, 454, 467, 480, 496, 497, 512, 525, 541, 558, 572, 586, 600, 613, 627, 641, 642, 643, 646, 648, 796, 797, 1022, 1230, 1594, 1595, 1596, 1597, 1598, and 1599, as warranting protective status. Duke also identified page 645 as having a tax identification number that it claims warrants similar confidential status. In its comments, OCC explains that it does not contest the protection of customer account numbers; however, it claims that page 642 does not contain a customer account number and page 317 contains a federal tax identification number, and not a customer account number. In addition, OCC contends that Duke failed to identify pages 318-321 which it notes also contain customer account numbers and OCC argues that the Commission should also include these pages under the extension of the protective order.
- (10) The attorney examiner finds that, with the exception of two pages, all of the pages identified by Duke and OCC contain customer account numbers and should continue to remain subject to the protective order. It is noted that, although page 317 does not contain a customer account number, it does contain a federal tax identification number, and this information warrants similar protective status. With respect to pages 641 and 642, these pages should no longer be considered subject to the protective order. Page 641 is a blank page that contains no information and page 642 is a page that contains no customer account numbers or similar-type information. Therefore, pages 641 and 642 will no longer be subject to the Commission's protective

order. Accordingly, the protective order should continue for pages 100, 135, 162, 317, 318, 319, 320, 321, 336, 352, 353, 369, 370, 371, 386, 400, 413, 426, 440, 454, 467, 480, 496, 497, 512, 525, 541, 558, 572, 586, 600, 613, 627, 643, 645, 646, 648, 796, 797, 1022, 1230, 1594, 1595, 1596, 1597, 1598, and 1599.

- (11) Second, Duke listed pages 773-775, 780, 786, 788-790, 793, and 794. Duke claims that these pages identify the capacity terms in contracts between Cinergy Services, Inc., and several customers. While Duke states that the names on these pages can now be released, as they have been in other contracts, the capacity terms in the contracts should still be considered confidential "for the reasons stated above." The reasons stated above in its memorandum contra are in general terms and claim that the information constitutes trade secrets. OCC argues that no load factor information is identified on these pages; although it acknowledges that these pages do contain some information identifying megawatt usage.
- (12) After review, the attorney examiner finds that pages 773-775, 780, 786, 788-790, 793, and 794 should no longer be subject to the Commission's protective order. The information on these pages involves letter agreements for power dated December 14, 2000. While these agreements deal with quantities of power that were projected might be taken in the years between 2001 and 2007, the parties had the right, under the terms of the agreements, to extend the agreements and the right to change the monthly minimum load factors of the agreements. There is no evidence in this record that changes to these agreements were or were not made. As a result, the terms and conditions set forth in the agreements may or may not have changed between 2001 and 2007. In addition, Duke has provided no basis on which to find that any interested person who would review these pages would know how or if changes could have occurred with such agreements on a going-forward basis so as to affect the competitiveness of Duke and no evidence that this information retained significant value over an extended period of time. Duke has also provided no argument or rationale as to how the disclosure of this ten-year old information provides actual economic value to any other entity.

- (13) Third, Duke requested extension of the protective order for pages 2318, 2373, 2437, and 2535 because it claims that these pages contain information on the identity of "marquee customers" of an unregulated subsidiary of Duke which has never been made a party to these proceedings. For all of the identified pages, Duke states that the information 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. Duke also contends that this information has been the subject of efforts that are reasonable under the circumstances to maintain its secrecy. OCC had previously argued in a prior pleading that this information was known to others but, according to Duke, OCC provided no additional evidence to support its contention.
- (14) The attorney examiner finds that pages 2318, 2373, 2437, and 2535 should no longer be subject to the Commission's protective order. First, it should be noted that pages 2373, 2437, and 2535 are identical and that Page 2318 contains the same information as these three pages except for one number. Second, the information contained on these four pages is projected information from 2002, is general information and contains no specific information as to what portion of the total potential each "marquee customer" represented or the portion of the targeted industrial market potential. Further, while the redacted information on these pages involves the names of customers, considered "marquee" in 2002, Duke has failed to demonstrate how the identification of these "marquee" customers provides any value to any entity. There is no evidence in the record in these cases as to what considerations went into the designation of a customer as a "marquee" customer, how that designation affected anything related to the unregulated subsidiary of Duke, or whether any of these "marquee" customers were considered "marquee" anytime after 2002.
- (15) Fourth, Duke identified pages 3125, 3126, 3130, and 3131 for continued protection and claims these pages have information on Duke's capacity positions and costs. Duke maintains that this information should be protected "for the reasons stated above." Other than general trade secret

claims there were no specific arguments as to why this information constitutes trade secrets. OCC argues that these pages contain information on actions taken by Duke in the past and this information should no longer be protected.

- (16) Upon review, pages 3125, 3126, 3130, and 3131 should no longer be subject to the Commission's protective order. These four pages incorporate pages from the transcript of a hearing in the above-captioned cases that occurred on September 9, 2005. While the information that has been redacted identifies the number of times and characterizes the number of times call options were exercised over various time periods such as "summer months" or "during the summer", and that frequency was determined by the unplanned outages, such information is over six-years old. Further, this information is generalized by the witness by caveats so that the exact number of times call options were exercised cannot be discerned by revealing the redacted words. Further, there has been no showing by Duke as to what independent economic value, actual or potential, this six-year old information derives from not being generally known to and not being readily ascertainable by proper means by other persons or what economic value other persons would derive from its disclosure.
- (17) Fifth, Duke requests that the protective order be extended to pages 3141, 3143, 3151, 3153, 3163, 3164-3167, 3169-3189, 3193, 3194, 3220, 3269, and 3270. Duke contends that these pages are from an audit performed for the last quarter of 2006. According to Duke, the information redacted from these pages reveals Duke's inventory levels, coal positions, procurement administration, specific coal supply agreements, SO2 protocols, and EA trades, as well as Dukes' fuel buying patterns and positions, and the entities, and terms that Duke contracted with for fuel. According to Duke, because its buying patterns and fuel and purchased power (FPP) vendors are stable over time, disclosure of the information would provide Duke's competitors insight into Duke's current fuel buying patterns and FPP positions. Duke also contends that disclosure of this information would not provide any benefit to Duke's customers.

- (18) Upon review, pages 3141, 3143, 3151, 3153, 3163, 3164-3167, 3169-3189, 3193, 3194, 3220, 3269, and 3270 should no longer be subject to the Commission's protective order. While such information is accurately described by Duke, this information deals with contractual agreements in 2004, 2005, and 2006 and how four agreements, dating back to 2002, affected one of Duke's 2005 audits. Duke claims that, by revealing this information, competitors would have insight into Duke's current fuel buying patterns and its FPP positions and the identity of entities that Duke deals with for fuel. Nevertheless, Duke has failed to demonstrate how knowledge of this information to competitors, which dates back five to eight years, would jeopardize Duke's current fuel purchasing patterns or practices. As to Duke's contention that release of this information would provide no benefit to its customers, it is noted that the reason for no longer treating information as confidential is not because it will be of benefit to Duke's customers, it is because such information no longer constitutes a trade secret.
- (19) Sixth, Duke requests continued protection for pages 3071, 3116, and 3120. Page 3071 is a chart indicating estimates for five months of projected 2006 capacity and purchase power costs to serve provider of last resort (POLR) customers. Page 3116 is a chart indicating a five-month summary of the 2005 SRT costs savings for Duke. Page 3120 is a page from a hearing transcript in the above-captioned cases where megawatt information has been redacted. Duke claims that the Commission has previously recognized the confidentiality of this protected information and that Duke finds this information to be competitively sensitive and it contends that OCC does not object to the continued protection of this information.
- (20) Upon review, pages 3071, 3116, and 3120 should no longer be subject to the commission's protective order. Currently, the information on pages 3071, 3116, and 3120 is five to six years old and Duke has failed to demonstrate in what way the release of this information provides any demonstrable benefit to any competitor of Duke. The fact that the redactions on these pages provide information related to amounts of megawatts provided five years in the past is not, in and of itself, sufficient to constitute a trade secret. In addition, the claim that OCC does not oppose the

continued protection of any of this information does not constitute grounds for continued protection.

- (21) Seventh, Duke requests that the protective order be extended for pages 1091, 1093, 1107, and 1108 because these pages contain customer load factor information. Duke notes that the information regarding customer load factors tends to be remarkably stable over time and changes to those factors are dependent largely upon customer-initiated changes in operations and or facility. Duke contends that this information has obvious economic value to competitive suppliers of electric services and is not readily ascertainable unless the customer chooses to share that information with those suppliers.
- (22) Pages 1091, 1093, 1107, and 1108 should no longer be subject to the Commission's protective order. Page 1091 includes information dating back to 2004 for the cost to serve, load factors, and range in prices for three customers. The information on these pages indicates that the derivation of this information was based on seven specific load factor assumptions predating 2004. While Duke asserts that this type of information may remain stable over time, the information is not current and Duke has failed to explain why the information on these two pages remains a trade secret seven years after the fact. Page 1093 includes prices that were charged in 2004 for three groups of customers including a category labeled "All customers" and two groups of customers including the Ohio Energy Group and the Industrial Energy Group and various hospitals, rather than specific customers. There is also no related information on which another party can use to determine the factors on which these prices were calculated.
- (23) Eighth, Duke identified pages 2864, 2866, 2867, and 2909 as warranting continuation under the Commission's protective order. These pages include transcript pages from a hearing in the above-captioned cases and relate specifically to the names of parties to which Duke entered into contractual agreements prior to 2007.
- (24) Pages 2864, 2866, 2867, and 2909 should no longer be subject to the Commission's protective order. The fact that Duke entered into contractual arrangements for portions of

its coal supply is information not generally considered a trade secret and the specific details of those contractual agreements are not involved in this information, only the names of the entities. Duke has failed to set forth sufficient basis to maintain as a trade secret the names of coal suppliers to which it entered into contractual agreements prior to 2007.

- (25) Ninth, Duke indentified pages 2983, 3274, 3275, 3276, 3277, 3278, 3288, 3289, 3293, and 3306 and claimed these also warrant protective status. These pages identify the name of the company to which Duke entered into a contractual agreements between 2002 and 2005 and for which the parties entered into settlements of defaults of those contracts.
- (26) Duke has failed to provide sufficient basis on which to warrant continued protection of pages 2983, 3274, 3275, 3276, 3277, 3278, 3288, 3289, 3293, and 3306 under the Commission's protective order. There is no information relating to the terms of the settlements or the contractual agreements. Rather, there is information relating to the general effect of the settlements on a portion of Duke's customers and some of the riders Duke uses in pricing its cost to serve customers and certain estimated benefits to certain riders used by Duke for customers for periods dating from 2002 to 2005.
- (27) Finally, Duke seeks protective status for pages 1107 and 1108, which include identical information for two customers and three groups of customers including annual megawatt hours and tariff charges for the period 2005 through 2008. This information on these pages is averaged over this four-year time period and is not specific to any year.
- (28) Duke has failed to provide sufficient basis to warrant continued protection of pages 1107 and 1108 under the protective order.
- (29) Accordingly, Duke's motion for protective order should be granted in part, and denied, in part. Duke's motion is granted with respect to pages 100, 135, 162, 317, 318, 319, 320, 321, 336, 352, 353, 369, 370, 371, 386, 400, 413, 426, 440, 454, 467, 480, 496, 497, 512, 525, 541, 558, 572, 586, 600, 613,

627, 643, 645, 646, 648, 796, 797, 1022, 1230, 1594, 1595, 1596, 1597, 1598, and 1599. Therefore, the docketing division should maintain these pages under seal for a period of 18 months from the date of this entry, or until July 21, 2012, in accordance with Rule 4901-1-24(F), O.A.C.

Duke's motion for continuation of the protective order is denied with respect to pages 641, 642, 773-775, 780, 786, 788-790, 793, 794, 2318, 2373, 2437, 2535, 3125, 3126, 3130, 3131, 3141, 3143, 3151, 3153, 3163, 3164-3167, 3169-3189, 3193, 3194, 3220, 3269, 3270, 3071, 3116, 3120, 1091, 1093, 1107, 1108, 2864, 2866, 2867, 2909, 2983, 3274, 3275, 3276, 3277, 3278, 3288, 3289, 3293, 3306, 1107, and 1108. These pages should be released to the public on February 8, 2011.

- (30) Rule 4901-1-24(F), O.A.C., requires a party wishing to extend a protective order to file an appropriate motion at least 45 days in advance of the expiration date. If Duke wishes to extend this confidential treatment, it should file an appropriate motion at least 45 days in advance of the expiration date. If no such motion to extend confidential treatment is filed, the Commission may release this information without prior notice to Duke.

It is, therefore,

ORDERED, That Duke's motion for the continuation of the protective order for pages 100, 135, 162, 317, 318, 319, 320, 321, 336, 352, 353, 369, 370, 371, 386, 400, 413, 426, 440, 454, 467, 480, 496, 497, 512, 525, 541, 558, 572, 586, 600, 613, 627, 643, 645, 646, 648, 796, 797, 1022, 1230, 1594, 1595, 1596, 1597, 1598, and 1599 is granted. It is, further,

ORDERED, That the redactions on pages 100, 135, 162, 317, 318, 319, 320, 321, 336, 352, 353, 369, 370, 371, 386, 400, 413, 426, 440, 454, 467, 480, 496, 497, 512, 525, 541, 558, 572, 586, 600, 613, 627, 643, 645, 646, 648, 796, 797, 1022, 1230, 1594, 1595, 1596, 1597, 1598, and 1599 remain under seal in the Commission's docketing division for a 18-month period or until July 21, 2012. It is, further,

ORDERED, That Duke's motion for continuation of the protective order for pages 641, 642, 773-775, 780, 786, 788-790, 793, 794, 2318, 2373, 2437, 2535, 3125, 3126, 3130, 3131, 3141, 3143, 3151, 3153, 3163, 3164-3167, 3169-3189, 3193, 3194, 3220, 3269, 3270, 3071, 3116, 3120, 1091, 1093, 1107, 1108, 2864, 2866, 2867, 2909, 2983, 3274, 3275, 3276, 3277, 3278, 3288, 3289, 3293, 3306, 1107, and 1108 is denied, and these pages be released to the public on February 8, 2011. 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

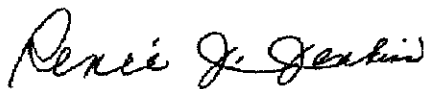


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Secretary