

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
Energy Ohio for Authority to Establish a) Case No. 14-841-EL-SSO
Standard Service Offer Pursuant to)
Section 4928.143, Revised Code, in the)
Form of an Electric Security Plan,)
Accounting Modifications and Tariffs for)
Generation Service.)

In the Matter of the Application of Duke)
Energy Ohio for Authority to Amend its) Case No. 14-842-EL-ATA
Certified Supplier Tariff, P.U.C.O.)
No. 20.)

**MEMORANDUM CONTRA
DUKE ENERGY OHIO, INC.'S
MOTION FOR A PROTECTIVE ORDER
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

What has become all too common a practice in cases before the Public Utilities Commission of Ohio ("PUCO"), is that utilities consider significant portions of their applications, testimony and/or discovery responses confidential. This confidential information is only provided to the Office of the Ohio Consumers' Counsel ("OCC") and other interested parties under a negotiated protective agreement. With the volume of information that the utilities deem confidential it becomes challenging to present a coherent case in the public record. Under the Protective Agreement OCC negotiated with Duke Energy Ohio, Inc. ("Duke" or "Utility") in this case, OCC seeks to have a limited and discreet amount of information determined by the Utility deemed confidential to be

open to the public in order to better inform Duke's 615,000 customers the details of the impact of this case may have on them.

Duke opposed OCC's efforts and filed a Motion for a Protective Order with the PUCO. OCC files this Memorandum Contra the Motion of the Duke for Protective Order to seek enforcement of Ohio's public records laws and to ensure transparency in Ohioans' government.

Duke filed a Motion for Protective Order to keep from having to disclose to the public the anticipated impact (harm or benefit) of Duke's proposed Price Stabilization Rider ("PSR"), survey responses from J.D. Power customer surveys and customer satisfaction results, and its forecasted costs for distribution infrastructure improvements that bear upon the reliability of its service. This information does not constitute "trade secret" since there is no independent economic value to this information. Rather, the projected impact on customers of one of the Utility's proposed rates is essential information required to be provided to customers by regulation. Ohio Admin. Code 4901:1-35-03(C)(3); Ohio Admin. Code 4901:1-35-04(B). And the customer surveys and customer satisfaction results that bear upon Duke's assessment of reliability and its investment in infrastructure are essential to public assessment of Duke's reliability performance and the extent to which additional investment in reliability can be justified. This is not competitively sensitive information. It is information that Duke seeks to keep to itself to keep customers, and the public, in the dark regarding its proposed charges to customers and its level of performance. The Motion for Protective Order should be denied.

II. STANDARD OF REVIEW AND BURDEN OF PROOF

A. PUCO's Standard Of Review

The PUCO's decisions resolving motions for protective orders recognize that there is a "strong presumption in favor of disclosure"¹ created by the public record statutes applicable to the PUCO² and that confidential treatment should only be given in "extraordinary circumstances."³ An Attorney Examiner Entry⁴ defines this approach as a three-part test: "(1) Are the Materials prohibited from being released by state or federal law under R.C. 149.43(A)(1)(v) i.e. a trade secret under R.C. 1333.61(D); (2) Are the Materials maintained as confidential; and, (3) Will non-disclosure be inconsistent with the purposes of Title 49?" If the first criterion is answered negatively, the PUCO need not consider the remaining two standards as the claim for protection must fail.⁵

B. Burden Of Proof

The issue before the PUCO is whether Duke has met the burden of proof necessary to establish an exception to Ohio's public records law. Duke seeks protection of information under the trade secret provisions of R.C. 1333.61(D), which the PUCO has held is a very limited and narrow exception.⁶

¹ *In the Matter of the Five-Year Review of Natural Gas Company Uncollectible Riders*, Case No. 08-1229-GA-COI, Entry on Rehearing at 4 (February 1, 2012).

² Ohio Revised Code Sec. 4901.12 and 4905.07.

³ *In the Matter of the Application of the Cleveland Electric Illuminating Company for Approval of an Electric Service Agreement with American Steel Wire Corporation*, Case No. 95-77-EL-AEC, Entry at 2-3 (September 6, 1995).

⁴ See *In the Matter of the Application of NOPEC, Inc. for Authority to Operate as a certified Retail Electric Supplier in the State of Ohio*, Case No. 07-891-EL-CRS, Entry at 2 (October 7, 2009).

⁵ *In the Matter of the Investigation of the Cincinnati Gas & Electric Company Relative to the Compliance With the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 00-681-GA-GPS, Entry at 7-8 (December 17, 2003).

⁶ See *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 at 7 (November 25, 2003)(citations omitted).

The PUCO has made it clear that a movant who seeks to protect information from the public must raise “specific arguments as to how public disclosure of the specific items could cause them harm, or how disclosure of the information would permit the companies’ competitors to use the information to their advantage.”⁷ This is consistent with Ohio Adm. Code 4901-1-24(D)(3) that requires movants for confidentiality to file a pleading “setting forth the specific basis of the motion, including a detailed discussion of the need for protection from disclosure * * * .”⁸ Ohio Adm. Code 4901-1-27(B)(7)(e) requires that “[t]he party requesting such protection shall have the burden of establishing that such protection is required.”

In order to overcome the presumption in favor of disclosure, the movant’s interest in maintaining confidentiality of the information must outweigh the public’s interest in full disclosure.⁹ In this case, the public’s interest in disclosure is great because the public interest is not served when a public utility is relieved from producing information that is relevant and material to the ultimate issue in this proceeding -- whether Duke’s customers should have to pay more for their electric service.

⁷ *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 5-6 (October 18, 1990).

⁸ The Commission has recognized that this rule is intended to strike a reasonable balance between the legitimate interests of a company in keeping a trade secret confidential and the obligations of the Commission relative to the full disclosure requirements mandated by Ohio law and public policy. *See In the Matter of the Amendment of Chapters 4901-1 et al. of the Ohio Administrative Code*, Case No. 95-985-AU-ORD, Entry at 11 (March 21, 1998).

⁹ *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 5-6 (October 18, 1990).

III. APPLICABLE LAWS

A. The Public Records Laws In Ohio: R.C. 149.43, R.C. 4901.12, And R.C. 4905.07

Under R.C. 4901.12, all proceedings of the public utilities commission and all documents and records in its possession are public records. Additionally, under R.C. 4905.07, “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.” These public records statutes that are specifically applicable to the PUCO “provide a strong presumption in favor of disclosure.”¹⁰

R.C. 149.43 is Ohio’s Public Records Law. It broadly defines public records to include records kept at any state office but excludes or exempts from the definition of public records those records “whose release is prohibited by state or federal law.”¹¹ Because Ohio has adopted the Uniform Trade Secrets Act, and has codified the definition of “trade secrets,”¹² the PUCO and other public agencies are prohibited from releasing public documents that qualify as a trade secret, per R.C. 149.43.

Accordingly, “[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 (R.C. 149.43) and as consistent with the purposes of Title 49 of the Revised Code.”¹³ The

¹⁰ See, e.g., *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 5-6 (October 18, 1990); *In the Matter of the Five-Year Review of Natural Gas Company Uncollectible Riders*, Case No. 08-1229-GA-COI, Entry on Rehearing at 4 (February 1, 2012).

¹¹ R.C. 149.43(A)(1)(v).

¹² R.C. 1331.61(D) defines trade secrets.

¹³ *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 at 7 (November 25, 2003)(citations omitted).

PUCO 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.”¹⁴

The PUCO has emphasized the importance of the public records laws and has noted that “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 very few limited exceptions.’”¹⁵ Furthermore, the PUCO has established a policy that confidential treatment is to be given only under extraordinary circumstances.¹⁶

Often the PUCO has used a balancing approach in its review of motions for protective orders. For instance, the PUCO has noted “it is necessary to strike a balance between competing interests. On 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 fair and open process, being careful to establish a record which allows for public scrutiny of the basis for the Commission’s decision.”¹⁷

¹⁴ *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).

¹⁵ See, e.g., *In the Matter of the Application of NOPEC, Inc. For Authority to Operate as a Certified Retail Electric Supplier in the State of Ohio*, Case No. 07-891-EL-CRS, Entry at 1, citing *State ex rel. Williams v. Cleveland*, 64 Ohio St.3d 544, 549 (1992).

¹⁶ See *In the Matter of the Application of The Cleveland Electric Illumination Company for Approval of an Electric Service Agreement With American Steel & Wire Corp.*, Case No. 95-77-EL-AEC, Supplemental Entry on Rehearing at 3 (September 6, 1995).

¹⁷ *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, Opinion and Order 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.”)

B. Trade Secret Information As Codified By The Ohio General Assembly

R.C. 1331.61(D) defines a trade secret as:

information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, 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. (Emphasis added).

Under R.C. 1331.61(D) a trade secret must qualify under Section (D) as one of the forms of information listed and must then satisfy both criterion one and two: the information must have “independent economic value” and must have been kept under circumstances that maintain its secrecy.

IV. ARGUMENT

A. The Information That Duke Seeks To Protect -- Customer Survey Results, And Budgetary Projections -- Are Not Trade Secret. Duke Has Failed To Demonstrate That The Customer Survey Information, Or The Budgetary Projections Have Economic Value And That Other Persons Can Obtain Economic Value From Their Disclosure Or Use.

Under the Protective Agreement, OCC notified Duke of its intention to seek a ruling, from the PUCO, that the following Protected Materials should be in the public domain:

- 1) The net cost to customers of the PSR that Duke has calculated for the three year ESP term;¹⁸
- 2) Duke Witness Arnold's attachments to testimony:
 - a. MWA- 2: Excerpt from 2014 JD Power Study Showing the Power Quality and Reliability Performance Rankings;
 - b. MWA-3: Excerpt from J.D. Power 2013 Residential Electric Study;
 - c. MWA-4: Customer Satisfaction Results for Ohio/Kentucky for Calendar Year 2013; and
 - d. MWA-7: Distribution Program Details.

Duke argues that this information attached to Mr. Arnold's testimony should be treated as confidential trade secret information because it is provided to the Utility confidentially, via a paid subscription and pursuant to a license agreement that includes restriction on disclosures.¹⁹ Duke also alleges that the information is not disclosed in any public forum.²⁰ Although Duke makes these general arguments and claims regarding the alleged proprietary nature of the information in the attachments to Mr. Arnold's testimony, Duke makes no specific argument regarding Attachments MWA-2, MWA-3 and MWA-4. In fact, Duke's Motion does not even mention the three attachments by name, or make any specific argument with regard to the trade secret nature of the information contained therein.

Moreover, Duke made no demonstration of the alleged economic value of the customer survey information or how any other person could obtain economic value from

¹⁸ This information was initially derived from the Company's response to OEG-DR-01-001 which provided such information on a calendar-year basis. Subsequently, Duke provided this information for the ESP term in response to OCC-INT-16-413, Attachment A.

¹⁹ Duke Motion for Protective Order at 7.

²⁰ Duke Motion for Protective order at 8.

its disclosure. Such a showing is a mandatory requirement of the R.C. 1333.61(D).²¹ In fact, Duke does not even identify any other parties that might get any economic value from the public disclosure of this customer survey information, or how such unknown entities might get economic benefit from customer surveys information. Such a showing is especially important inasmuch as Duke has no competitor who can offer Dukes customers electric distribution service if they are somehow dissatisfied with Duke's service. Duke is relying on this customer survey information to justify significant investments in distribution programs that will result in greater costs for customers. Therefore, customers have an even greater right to have that information be part of the public record.

Duke argues that the customer survey information is trade secret because Duke uses it to "evaluate the ongoing operation of its business."²² However, Duke's usage of the data is not a criteria for a trade secret designation according to the statute.

Rather, the first requirement of R.C. 1333.61(D), is that the information at issue derive independent actual or potential economic value, and that the information is not readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.²³ Duke has failed to meet this prong of the test. Instead, Duke focuses on the steps it has taken to not disseminate the data in compliance with the second prong of the statute.²⁴ In order to meet the statutory requirements, Duke must demonstrate that it has met **both** prongs of the statute, by not demonstrating that the

²¹ R.C. 1331.61(D).

²² Duke Motion for Protective Order at 8.

²³ R.C. 1333.61 (D).

²⁴ Duke Motion for Protective Order at 8.

protected materials have economic value to other parties, Duke's Motion for Protective Order must be denied.

Duke's efforts to maintain the confidentiality of customer survey data in this case is inconsistent with Duke's position in other cases. There have been customer service reliability cases at the PUCO involving similar customer survey information that was routinely provided as part of the public record. For example in Case No. 13-1539-EL-ESS, Duke's Service Reliability Standards Case, Residential survey results are part of the public record, and are in fact regularly filed with the PUCO.²⁵ Duke has failed to explain the fundamental difference between customer survey information that is public as a matter of routine and the customer survey information that is allegedly a trade secret in this case.

In fact, according to J.D. Power Press Releases similar general information is routinely published in the open record.²⁶ According to 2014 public press release and survey findings, J.D. Powers has conducted these surveys for 16 years to serve as a baseline for measuring customer satisfaction with electric utilities by examining power quality and reliability, price, billing and payments, corporate citizenship, communications and customer service. While Duke may allege that customer satisfaction survey results are a trade secret, the same survey results are not considered to be a trade secret by other

²⁵ See Ohio PUC Reliability Residential Survey Results Q1-13 Update, Attachment JDW-15 to the Direct Testimony filed by OCC Witness Jim Williams on September 26, 2014.

²⁶ <http://www.jdpower.com/press-releases/2014-electric-utility-residential-customer-satisfaction-study>

electric utilities including other Ohio electric utilities such as AEP Ohio, Cleveland Electric Illuminating Company and Ohio Edison Company.²⁷

Finally to the extent that the information has any economic value to J.D. Power, it is J.D. Power who should be making these arguments, and not Duke. Duke is not the correct party to allege and argue in favor of J.D Power. In making those arguments J.D. Power would have to meet the same legal standards set forth in R.C. 1331.61. Duke has failed to meet those standards.

Duke has argued that the information in revised Attachment MWA-7, budgeting and forecast information, is trade secret because its disclosure would negatively impair the Utility.²⁸ However in making this argument, again Duke fails to demonstrate that the information contained in revised Attachment MWA-7 has any economic value.

Budgeting forecasts are only projections and do not reflect the actual spending that will occur in the future. Moreover, this type of budget forecast information is also routinely provided in PUCO distribution rate proceedings.²⁹ Duke has not demonstrated that the budgeting and forecast information currently protected in MWA-7 is different than the publicly filed budgeting forecast information in other cases. More importantly; however, Duke has not demonstrated that this budget and forecast information has any independent actual or potential economic value. While Duke claims that the PUCO has consistently afforded such information confidential treatment by the PUCO,³⁰ Duke cited no examples

²⁷ Id.

²⁸ Duke Motion for Protective Order at 8.

²⁹ For example see *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Gas Rates*, Case No. 12-1685-GA-AIR; and *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates*, Case No. 12-1682-EL-AIR, Application at S-1, Capital Expenditure Budget Projections, and S-2, Revenue Requirements Projections.

³⁰ Duke Motion for Protective Order at 8.

to support its claim. Duke has failed to meet the statutory requirements to establish that the information in Attachment WMA-7 is trade secret and as such Duke's Motion for a protective Order should be denied.

B. The Information Duke Seeks To Protect -- Duke's Estimate Of The Net Cost Or Benefit Of The Price Stabilization Rider Over The Term Of The ESP -- Is Not Trade Secret And Is Information That Duke Is Required To Provide To Customers. The Fact That The Information Is Derived From A Proprietary Economic Model Does Not Give The Bottom Line Customer Impact Itself Economic Value.

Duke provided a response to an Ohio Energy Group ("OEG") discovery request that included a dollar amount related to the Utility's net OVEC cost/benefit for the period 2015 – 2024. Subsequently, in response to OCC-INT-16-413, Duke provided an assessment of the net OVEC cost/benefit over the term of Duke's proposed electric security plan (ESP). The net OVEC cost/benefit is the amount that would be charged to customers through Duke's Price Stabilization Rider ("PSR"). Duke correctly stated that OCC seeks to publicly disclose this information."³¹ In other words, OCC seeks to use and disclose Duke's own calculations, as well as OCC's calculated amount based on Duke's information, to publicly reveal what will be the impact of the PSR on customers. In contravention of the PUCO's regulations, the impact was not provided as a requisite component of Duke's ESP filing. Therefore, Duke's customers were not informed of that impact as required by Ohio Admin. Code 4901:1-35-03(C)(3); Ohio Admin. Code 4901:1-35-04(B).³²

³¹ Duke Motion for Protective Order at 4.

³² Ohio Admin. Code 4901:1-35-03(C)(3) requires the Utility to provide "Projected rate impacts by customer class/rate schedules for the duration of the ESP, including post-ESP impacts of deferrals, if any." Ohio Admin. Code 4901:1-35-04(B) requires the Utility to provide newspaper publication that "fully discloses the substance of the application, including projected rate impacts . . . "

To publicly disclose the bottom line dollar impact of the Rider RSR on Duke's customers does not reveal any trade secret information. It does not reveal traditionally protected information such as Duke's anticipated market prices or generation output information or how they were arrived at. It only reveals the bottom line impact of Duke's proposed Price Stabilization Rider, and -- how that Rider will impact customers overall. The impact will only publicly disclose whether the proposed Rider PSR is a cost or a benefit to customers over the term of the ESP. Customers are entitled to know whether Duke's proposed rates will benefit or harm them and to what extent. Admittedly, this bottom line cash flow number may have been derived from Duke's proprietary modeling. However, the bottom line results publicly discloses nothing about how the model operates, the inputs of the model, the assumptions of the model, or anything else that arguably could be deemed proprietary.

Duke's assertion that the "financial results generated" by a proprietary model are proprietary is not consistent with the definition of "trade secret." To be a trade secret, the information must "derive[] 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."³³ Duke has not demonstrated any independent economic value derived from its analysis, and a public disclosure that Rider PSR will be positive or negative over any specific term. The true harm in maintaining the confidentiality of this information is that Duke will not have to contend with the public's negative response to rate increases.

³³ R.C. 1333.61.

Duke relies upon an affidavit submitted by Bryan Dougherty, Manager of Finance, Corporate and Commercial Forecasting for Duke's Business Services. His affidavit states that Duke "does not publicly distribute financial projections of its interests, assets and entitlements or its business units on a standalone basis."³⁴ He states that Duke only "provides financial disclosures on a consolidated basis" and that the information "reflected in the discovery requests at issue concern an interest in a corporation that operates generating assets in a competitive marketplace."³⁵ But the information sought by OCC itself must be competitively sensitive information. As discussed above, the anticipated net cost or benefit that Duke will experience from the OVEC units, and the price customers will pay or be credited from the PSR, does not reveal any competitive information. Mr. Dougherty only makes broad claims of competitive harm associated with the disclosure of the OVEC analysis without identifying how the disclosure of the bottom line impact from OVEC over the term of the ESP will produce any competitive harm.

Duke argues that its response to the OEG discovery request "concerns competitively sensitive information" in that it provides "confidential projections in respect of its OVEC contractual entitlement."³⁶ Duke claims that "public disclosure" of the net cost or benefit "would compromise Duke Energy Ohio vis-à-vis its counterparties and competitors in the marketplace" and that "[p]ublishing the Company's internally derived information for future periods would undeniably disadvantage it, as compared to

³⁴ Duke Motion for Protective Order at Ex. B, p. 2.

³⁵ Id.

³⁶ Duke Motion for Protective Order at 5-6.

those with whom it may interact in the competitive markets.”³⁷ Duke argues that the disclosure of the cash flow information “is indicative of the Company’s positions with regard to a competitive interest” and that Duke would be “compromised in its effort to engage in power sales.”³⁸ But Duke does not explain how its estimated bottom line cash flow of the OVEC units over this period would be “indicative” of the Company’s competitive position or how it would compromise Duke’s efforts to engage in power sales.

Duke’s power sales are the results of PJM hourly dispatch based on the marginal cost operation of all of the units within PJM. The cash flow of the OVEC units over the entire ESP period provides no information about hourly dispatch prices, hourly generation output from the units, costs of coal or any of the other inputs that could be argued to be competitively sensitive. The bottom line anticipated performance of Duke’s interest in these units over the term of the ESP is simply not competitively sensitive information.

Duke argues that it “takes steps, internally to ensure that none of the information reflected in the OEG Response is disclosed to individuals within the Duke Energy organization who do not have a business need to know of the material.”³⁹ Duke says that it has also not disclosed this information externally.⁴⁰ But Duke’s decisions whether or not to disclose information and to whom to disclose information is a consideration only for information that qualifies as a “trade secret” in the first place. The fact that Duke’s

³⁷ Duke Motion for Protective Order at 6.

³⁸ Id.

³⁹ Id.

⁴⁰ Id. at 6-7.

projections produce a net cost or benefit over the term of the ESP is information that is of significant consequence to customers but is not a trade secret since it has no independent economic value to Duke.

As evidence of the absence of independent economic value, AEP, one of Duke's competitors (as well as an affiliated interest in its ownership of OVEC), allowed the bottom line impact (net cash flow) of that Company's Power Purchase Adjustment ("PPA") Rider on customers to be disclosed. Duke's estimates of the net cost or benefit of its OVEC interest over the term of the ESP can be considered no more of a trade secret than AEP's estimate.

Duke "observes" that OCC's request "is misleading" in that OCC's request goes to the dollar amount associated with Rider PSR "for the three-year term of its proposed [ESP]" but OEG-DR-01-001 in fact is a calendar-year calculation, not an ESP-period calculation.⁴¹ Duke contends that what OCC "intends to potentially disclose is uncertain."⁴² Duke's argument obfuscates the issue. OCC intends to disclose what it says it intends to disclose, which is the net cost or benefit of the PSR over the period of the ESP. OCC witness Wilson calculated an amount for the ESP period based on the calendar-year information in OEG-DR-01-001. Duke provided a discovery response subsequently (OCC-INT-16-413) that provides Duke's own calculation over the ESP period. This was attached to Mr. Wilson's testimony as Attachment JFW-3, pp. 23-54 (Highly Confidential). OCC seeks to disclose both the calendar-year information in OEG-DR-01-001 to the extent reflected in Mr. Wilson's calculated amount, and Duke's own calculated amount for the ESP term in OCC-INT-16-413.

⁴¹ Duke Memo in Support at 7.

⁴² Id.

Several times in Duke's Motion it states that "the information was provided to OCC in good faith and in reliance upon OCC's adherence to the Protective Agreement."⁴³ There is an insinuation in such statement that the information would not have been provided if Duke knew that OCC would challenge Duke's claims of confidentiality. But OCC's letter is submitted in accordance with the terms of the Protective Agreement. No document should be presumed to be confidential simply because Duke marks it as such. Duke bears the burden of proof to demonstrate the confidential nature of the information once it is confidentiality is challenged through the submission of a letter. It is inappropriate for Duke to suggest that OCC's challenge to the confidential designation made by Duke is somehow inappropriate under the terms of the Protective Agreement or that the information would not be provided if OCC so challenged Duke's designation.

Because the bottom line impact of the Rider PSR has not been demonstrated by Duke to have independent actual or potential economic value, this information is not trade secret under R.C. 1333.61(D). Therefore, Duke's Motion for Protective Order must be denied. The public disclosure of this information is important for OCC to coherently present in the public record the impact Duke's ESP proposal has on its customers.

V. CONCLUSION

It is the policy of the state of Ohio and the PUCO that there is a string presumption in favor of disclosure of documents instead of granting them protected status. However if there is a determination that the information is trade secret information, then such information is afforded appropriate protection. In this case, Duke has failed to demonstrate that the information in question meets all of the mandatory

⁴³ Duke Motion for Protective Order at 3, 8.

criteria set forth in R.C. 1331.61. Duke has focused on the second criteria of maintaining the confidentiality of the information. However, in doing so, Duke failed to establish the first criteria -- that is that the information has economic value to other persons. Not only did Duke fail to meet the criteria, but the Utility failed to even make an argument as to the alleged economic value of the information. Having failed to meet its statutory standard, Duke's Motion for Protective Order should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Memorandum Contra* was served on the persons stated below *via* electronic transmission, this 6th day of October, 2014.

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Summary: Memorandum Memorandum Contra Duke Energy Ohio, Inc.'s Motion for a Protective Order by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Serio, Joseph P. Mr.