

**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke	)	
Energy Ohio for Authority to Establish a	)	
Standard Service Offer Pursuant to Section	)	
4928.143, Revised Code, in the Form of	)	Case No. 14-841-EL-SSO
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.	)	

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**REPLY OF DUKE ENERGY OHIO, INC.  
TO MEMORANDUM CONTRA MOTION FOR PROTECTIVE ORDER  
OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**I. INTRODUCTION**

Pursuant to a procedure outlined in the Confidentiality Agreement in these proceedings, between Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) and the Office of the Ohio Consumers' Counsel (OCC), OCC notified that it wished to use the Company's confidential information in a manner that would disclose the information to the public. On October 1, 2014, Duke Energy Ohio, also following that procedure, filed a motion seeking an order to protect the confidentiality of its information.

Arguing against the Company's motion, OCC begins its Memorandum Contra Duke Energy Ohio, Inc.'s Motion for a Protective Order (Memorandum Contra), filed on October 6, 2014, by arguing against confidential treatment of utility information, as a general policy. OCC then asserts that the Company failed to demonstrate why and how the information in question

meets the standard test for trade secrets. But OCC is wrong on both the policy argument and the information-specific analysis.

## II. DISCUSSION

### A. OCC's Policy Discussion

OCC asserts that utilities' practice of seeking protection for confidential documents is "all too common a practice."<sup>1</sup> OCC complains about the difficulty of presenting a "coherent case" when that confidential information is only provided to OCC and other interested parties under a negotiated protective agreement.<sup>2</sup> Unfortunately for OCC, neither the amount of confidential data nor the resultant difficulty for counsel is a factor that Ohio law allows the Commission to consider in determining whether to protect any particular information.

In a transparent attempt to narrow the scope of the Commission's current practice with regard to protective orders, OCC reaches back to decades-old statements by the Commission or attorney examiners, as well as arguments made by the OCC itself (even where those arguments were rejected by the Commission).

- OCC states that Commission decisions "recognize that there is a 'strong presumption in favor of disclosure . . .'"<sup>3</sup> But, in the entry cited in support of this statement, the quoted language was the Commission's recitation of OCC's own argument. And, later on that same page, the entry concludes that OCC's argument was "misguided." No Commission finding concludes that there is any presumption in favor of disclosure.

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<sup>1</sup> Memorandum Contra at pg. 1.

<sup>2</sup> Id.

<sup>3</sup> Id. at pg. 3 (citing *In the Matter of the Five-Year Review of Natural Gas Company Uncollectible Riders*, Case No. 08-1229-GA-COI, Entry on Rehearing, at pg. 3 (Feb. 1, 2012) (cited by OCC as appearing on pg. 4 [sic])).

- OCC states that Commission decisions “recognize . . . that confidential treatment should only be given in ‘extraordinary circumstances.’” For support, OCC looks to a two-decade-old case.<sup>4</sup> While the Commission, in 1995, did refer to its view that protection should only be granted in extraordinary circumstances, it nevertheless concluded that it would protect the redacted information, due to overriding public policy reasons. The Commission also stressed that it had “weighed the need for confidentiality and the policy in favor of disclosure” and had, therefore, granted confidential treatment for a limited time.<sup>5</sup>

More recent Commission discussions of confidentiality do not refer to them as extraordinary. As the Commission is well aware, the need for protective treatment in cases such as this one is common. Perhaps the nature of the inquiries has changed over time, but there can be no doubt that the competitiveness of the markets in which electric utilities are engaged are entirely different than anything faced by this industry two decades ago.

OCC also errs in focusing on the Ohio public records law. Importantly, the notice provided to Duke Energy Ohio by OCC, under the Confidentiality Agreement, said nothing about a public records request. The section of the Confidentiality Agreement that was referenced by OCC was that relating to general “use” of the materials by OCC. There is a separate section of the agreement that prescribes the steps to be taken in the event OCC receives a public records request for the Company’s confidential information, evidencing that even OCC recognizes the

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<sup>4</sup> Memorandum Contra, at pg. 3 (citing *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, 1995 Ohio PUC LEXIS 663, Entry, at pp. 2-3 (Sept. 6, 1995).

<sup>5</sup> *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, 1995 Ohio PUC LEXIS 663, Entry, at pp. 12-13 (Sept. 6, 1995).

difference. Duke Energy Ohio has made no request to “establish an exception to Ohio’s public records law.”<sup>6</sup>

The Commission has frequently recognized that it is necessary to balance the interests of parties’ confidentiality with the interests of parties to a fair and thorough hearing of the issues. In keeping with that approach, OCC summarizes its policy position by attempting to juxtapose its desire to publicize the Company’s proprietary information with the Company being “relieved from producing information that is relevant and material to the ultimate issue in this proceeding . . .”<sup>7</sup> But OCC ignores, in this supposed summary of the balance, that the Company is not seeking to be relieved from producing anything whatsoever. The information in question, indeed, has already been produced. If it had not been produced, OCC would not have the information and thus could not seek to publicize it.

As was noted recently in a brief submitted by the Company in these proceedings, safeguards for confidential information are commonplace. Moreover, such safeguards do not hamper the ability of parties to prosecute their legal arguments, but simply require that they do so with appropriate legal safeguards. Thus the balance is maintained. In this case, OCC seeks to upset this balance and argues for a one-sided approach. OCC’s manifest disdain for the necessary protection of sensitive documents serves to reinforce the need for a balanced and considered response.

The information that the Company seeks to protect is very limited, has been redacted with surgical precision, and does not preclude the OCC or any other party from pursuing legal argument. The parties may examine the material, depose witnesses with respect to the material,

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<sup>6</sup> Memorandum Contra, at pg. 3.

<sup>7</sup> *Id.*, at pg. 4.

and argue on brief with appropriate safeguards. All that the Company requests is that the material be handled appropriately to protect the Company's and its customers' interests. The Commission has authority to provide protection pursuant to requirements of R.C. 1333.61. The documents in question in this proceeding clearly fall within the purview of this statute and should be accorded trade secret protection.

**B. Information-Specific Arguments**

**1. Information Related to J.D. Power Survey**

OCC proposes that it must be permitted to disclose proprietary information contained in surveys conducted by a third party, J.D. Power and Associates (J.D. Power), and provided as confidential attachments to the testimony of Duke Energy Ohio witness Marc W. Arnold.<sup>8</sup> Duke Energy Ohio receives this information pursuant to an agreement with J.D. Power and is therefore contractually bound to protect this information. Attachments MWA-2, MWA-3 and MWA-4, all contain excerpts of survey results that disclose information specific to Duke Energy Ohio.

OCC complains that the Company has only provided "general arguments and claims" regarding this survey information and "does not even mention the three attachments by name." A quick glance at Exhibit C to the motion shows a list of the three attachments. And the arguments and claims are the same for all three. Contrary to OCC's assertion that the Company made "no demonstration of the alleged economic value . . . or how any other person could obtain economic value from its disclosure,"<sup>9</sup> it is obvious that J.D. Power did not perform and analyze surveys for Duke Energy Ohio without being paid for those services. The Company certainly found that confidential information to have enough value to pay for it – value to customers and

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<sup>8</sup> *Id.*, at pp. 7, *et seq.*

<sup>9</sup> *Id.*, at pp. 8-9.

the Company in the context of protecting its reputation and good will. J.D. Power also received economic value from the sale of its services. If the results were made public, it would be very reasonable for J.D. Power to guess that some potential customers might not subsequently hire the firm, either because internal information did not appear to be secure or because those potential customers might be able to glean some market insight from the newly public information about Duke Energy Ohio's customers. Thus, there is certainly economic value that would be lost if this information were to be made public.

With regard to the maintenance of confidentiality, OCC is correct that J.D. Power does routinely publish general, consolidated results of some of its surveys, however it never discloses results to the public that provide particular information about an individual utility. The information provided as attachments to Mr. Arnold's testimony is specific to Duke Energy Ohio. That information is not shared with the public by J.D. Power or by the Company, is provided to the Company pursuant to an agreement whereby the Company agrees to protect the material, and is used by the Company internally to assist it in making internal decisions about its business practices.

In arguing for publicizing the survey results, OCC also states that the Company's position is inconsistent with its position in other cases. This is misleading and incorrect. The Company, pursuant to Rule 4901:1-10-10(B)(4)(b), administers a customer perception survey in cooperation with the Commission Staff. The results of this Commission-mandated survey are included in publicly available compliance filings. However, these results are wholly different from the survey done by J.D. Power. The Commission's survey should not be confused with the

J.D. Power survey, results of which were included in these proceedings as attachments to Mr. Arnold's testimony.

While the OCC may be entitled to receive the confidential survey information under the terms of its Confidentiality Agreement in this case, there is no compelling need to have this particular information disseminated to the public.

2. Information Related to Forecasted Budgets for Distribution Work

OCC also seeks to disclose information related to budgeting and forecasts for distribution work to be performed in the future if the Commission approves proposed Rider Distribution Capital Investment Rider (Rider DCI). This document (Attachment MWA-7) contains projected budget information that is competitively sensitive as it is broken out in detail and could provide information to entities potentially bidding on work to be done to accomplish the distribution infrastructure improvements that are proposed. As competitive bids are designed to seek the lowest and best bid, having a sense of the overall budget for an individual component of the program would understandably provide a competitive advantage to any particular bidder. This economic impact could have a material impact on the cost of the project and, by extension, the cost to customers.

OCC also attempts to analogize the information in Attachment MWA-7 with forecasts made in the context of traditional rate case applications.<sup>10</sup> OCC fails, however, to note the differences. While Attachment MWA-7 includes granular detail, the projections in rate cases disclose only total projected capital expenditures. They are not comparable situations.

OCC is welcome to examine the budget for whatever purpose needed in preparation and prosecution of its case. There is nothing positive to be gained by releasing such data to the

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<sup>10</sup> Id., at pp. 11-12.

public. Such information plainly constitutes a trade secret and has been protected by the Commission in previous proceedings.<sup>11</sup>

### 3. Information Related to Proposed Rider PSR

In discovery, Duke Energy Ohio provided OCC with a document that was designated as Attachment OEG-DR-01-001 Highly Confidential. This document was requested by the Ohio Energy Group and provided to OCC in response to OCC's discovery request to receive copies of discovery responses provided to all other parties. The document in question contains a financial analysis of Rider PSR. The document was marked *Highly Confidential*, as the Company views this information to be not only proprietary, but competitively sensitive such that, if available in the public domain, it could provide a competitive advantage to participants in the energy and capacity markets. A review of the document demonstrates that the information contained therein would be valuable for this purpose; it is not only confidential because it was created through the use of a proprietary model but, also, because it derives independent economic value from not being publicly known. Thus, the balance in favor of protecting the Company's trade secret information should certainly tip in the Company's favor.

OCC states that it must have public disclosure of this information in order to "publicly reveal what will be the impact of the PSR on customers."<sup>12</sup> OCC asserts that such information was required pursuant to Ohio Administrative Code (O.A.C.) 4901:1-35-03(C)(3) and 4901:1-35-04(B). This is not the place for such an argument, as Duke Energy Ohio's compliance with

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<sup>11</sup> Although the protection of forecasts is so customary as to need no citation, reference is made, by way of example, to the Commission's recent adoption of rules allowing forecasts in certification applications for competitive providers to be filed under seal without the need for any motion whatsoever. *In the Matter of the Commission's Review of its Rules for Competitive Retail Electric Service Contained in Chapters 4901:1-21 and 4901:1-24 of the Ohio Administrative Code*, Case No. 12-1924-EL-ORD; and *In the Matter of the commission's Review of its Rules for Competitive Retail Natural Gas Service Contained in Chapters 4901:1-27 through 4901:1-34 of the Ohio Administrative Code*, Case No. 12-925-GA-ORD.

<sup>12</sup> Memorandum Contra, at pg. 12.



filing requirements has nothing whatsoever to do with the confidential treatment of Duke Energy Ohio's forecasts.

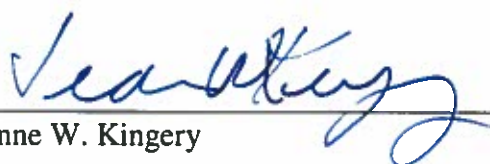
OCC is free to make its arguments based upon its own analysis and, indeed, even using the Company's analysis if it chooses to do so, with proper protection of the record. OCC is not thwarted in any way by proceeding pursuant to the agreed-upon Confidentiality Agreement. The information has been disclosed and can be used.

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Certificate of Service

I hereby certify that a true and accurate copy of the foregoing has been served upon the following parties via electronic mail, regular mail or by hand delivery this 9th day of October, 2014.

  
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