

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Complaint of Jeffrey)	
Pitzer,)	
)	Case No.15-298-GE-CSS
Complainant,)	
)	
v.)	
)	
Duke Energy Ohio, Inc.,)	
)	
Respondent.)	

**MEMORANDUM CONTRA TO COMPLAINANT’S MOTION FOR
PROTECTIVE ORDER REGARDING THE DEPOSITION TESTIMONY OF
MARION BYNDON
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

In the interest of furthering policies favoring transparency in proceedings at the Public Utilities Commission of Ohio (“PUCO”), the Office of the Ohio Consumers’ Counsel (“OCC”) files this Memorandum Contra the motion for protective order filed on December 31, 2015 by the Complainant in this significant case for Ohio’s residential utility customers. Ohio utilities must adhere to the intent and requirements of the PUCO’s winter reconnect orders.¹ This case is about whether Duke Energy Ohio, Inc. (“Duke”) unlawfully and unreasonably disconnected electrical service at a residence in November 2011. Two Ohioans died.

¹ See *In the Matter of the Commission’s Consideration of Solutions Concerning the Disconnection of Gas and Electric Service in Winter Emergencies for the 2015-2016 Winter Heating Season*, Case No. 15-1460-GE-UNC, Entry on Rehearing (October 28, 2015) at 5.

On December 31, 2015, the Complainant in this case filed under seal the transcript of the deposition of Marion Byndon, the manager of Duke's Midwest consumer affairs department. Ms. Byndon was designated by Duke to answer questions regarding account-related documents in response to a notice of corporate designee filed by the Complainant on October 8, 2015. The deposition occurred on December 3, 2015.

Concurrently with the deposition transcript, the Complainant filed a motion for protective order. The motion states that the transcript was filed under seal because Duke had asked that the transcript be kept confidential and Complainant agreed to the request. Thus, Duke, and not Complainant, appears to actually be seeking non-disclosure of the deposition transcript.

OCC opposes Complainant's motion for a protective order. The motion does not meet the requirements for protective orders in the PUCO's rules because the motion does not include a memorandum in support, setting forth the specific basis of the motion and citations of any authorities relied upon.² In addition, the reason given for confidentiality of the document does not demonstrate that the transcript contains information that constitutes a "trade secret," as required under Ohio Adm. Code 4901-1-24(D). The PUCO should deny the motion for protective order.

II. APPLICABLE LAW

The guiding principle of the PUCO's rules regarding protective orders is not to conceal information, but to make information public. The PUCO has established a policy

² Ohio Adm. Code 4901-1-24(B)(1).

that confidential treatment is to be given only under extraordinary circumstances.³ Ohio Adm. Code 4901-1-24(D) specifies that a protective order “shall minimize the amount of information protected from public disclosure.”

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.’”⁴ The PUCO has noted that “[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 (149.43, Revised Code) and as consistent with the purposes of Title 49 of the Revised Code.”⁵ 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.” The PUCO also 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.”⁶

R.C. 149.43 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

³ 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 (September 6, 1995) at 3.

⁴ *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 (November 25, 2003) Entry (“93-487 Entry”) at 3, citing *State ex rel Williams v. Cleveland*, 64 Ohio St.3d 544 (1992) and *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 518 (1997). See also *In the Matter of the Application of Cincinnati Bell Any Distance, Inc. for New Operating Authority*, Case No. 07-539-TP-ACE, Entry (June 1, 2007) at 1.

⁵ 93-487 Entry at 3.

⁶ *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 (October 18, 1990), 1990 Ohio PUC LEXIS 1138 at *5.

release is prohibited by state or federal law.”⁷ R.C. 149.43 prohibits the PUCO and other public agencies from releasing public documents that qualify as trade secrets.

Ohio has adopted the Uniform Trade Secrets Act, and has codified the definition of “trade secrets.” 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.

Thus, to qualify as a trade secret under R.C. 1331.61(D), information must be shown to fall within the definition of a trade secret and must satisfy two requirements: it must have “independent economic value” and it must have been kept under circumstances that maintain its secrecy.

The PUCO also has specific filing requirements for information purported to be confidential. In addition to filing two copies of the unredacted information under seal,⁸ the party seeking a protective order must also file a public version “with only such information redacted as is essential to prevent disclosure of the allegedly confidential information.”⁹ The party seeking a protective order must also file a motion accompanied

⁷ R.C. 149.43(A)(1)(v).

⁸ Ohio Adm. Code 4901-1-24(D)(2).

⁹ Ohio Adm. Code 4901-1-24(D)(1).

by a memorandum in support, setting forth the specific basis of the motion and citations of any authorities relied upon.¹⁰

III. ARGUMENT

Ohio Adm. Code 4901-1-24(D) provides that the PUCO may issue a protective order “to protect the confidentiality of information contained in the document, to the extent that state or federal law prohibits release of the information, including where the information is deemed by the commission, the legal director, the deputy legal director, or the attorney examiner to constitute a trade secret under Ohio law, and where nondisclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code.” In its motion, Complainant provided nothing to support the notion that the redacted information meets the statutory definition of a trade secret as spelled out in R.C. 1333.61(D)(1) and (2).

As mentioned above, in order for information to qualify as a trade secret the statute mandates that the information must have the following qualities:

- (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.

Complainant has presented no explanation as to what information deserving protection is included in the transcript or how the Complainant or Duke derives any independent economic value from the information. More importantly, Complainant does

¹⁰ Ohio Adm. Code 4901-1-24(B)(1).

not make any claim whatsoever as to how any other persons can obtain economic value if the information is disclosed.

Rather, the sole reason given for preventing public disclosure of the information is that Duke desires to keep the information secret. Duke, however, did not file its own motion for a protective order or join Complainant's motion, did not file a motion in support, and has not in any way attempted to protect the alleged confidential information or to explain why the information should be concealed from the public record. Accordingly, Complainant's motion is insufficient for the entire deposition transcript to be hidden from the public. The PUCO should deny Complainant's motion and make public the entire deposition transcript.

Also, placing the entire deposition transcript under seal runs counter to PUCO rules and precedent. The PUCO has stated that "where confidential material can be reasonably redacted from a document without rendering the remaining document incomprehensible or of little meaning, redaction should be ordered rather than wholesale removal of the document."¹¹ In this instance, there appears to have been no attempt to provide a redacted version of the deposition transcript. In the past, the PUCO has required parties who jointly seek confidentiality for information to work together in filing a redacted version of the information.¹²

If the PUCO does not deny Complainant's motion for the entirety of the deposition transcript, the PUCO should require Complainant and/or Duke to file a

¹¹ *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Case No. 03-93-EL-ATA, Order on Remand (October 24, 2007) at 11, citing Ohio Adm. Code 4901-1-24(D)(1).

¹² *See id.* at 17.

redacted version of the transcript in the public record of this case. The redactions, of course, would still be subject to challenge for confidentiality under Ohio law and the PUCO's rules.

IV. CONCLUSION

Ohio law Ohio sets forth very specific requirements that must be satisfied before information can be considered trade secret and thus eligible for protection as confidential information in PUCO proceedings. Complainant's motion has not met these requirements. Hence, the PUCO should deny the motion and make public the entire transcript of Ms. Byndon's deposition. If the PUCO does not deny Complainant's motion for the entirety of the deposition transcript, then the PUCO should require Complainant and/or Duke to file a redacted version of the transcript in the public record of this case, subject to challenge for confidentiality under Ohio law and the PUCO's rules.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *Memorandum Contra Motion for Protective Order* was served upon the following parties via electronic transmission on January 13, 2016.

/s/ Terry L. Etter
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Summary: Memorandum Memorandum Contra to Complainant's Motion for Protective Order Regarding the Deposition Testimony of Marion Byndon by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Etter, Terry L.