BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

DUKE ENERGY OHIO, INC.'S REPLY TO MEMORANDUM CONTRA BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL TO DUKE ENERGY OHIO'S MOTION FOR PROTECTIVE ORDER REGARDING THE DIRECT TESTIMONY OF MITCHELL A. CARMOSINO

Duke Energy Ohio, Inc. (Duke Energy Ohio or Company), pursuant to O.A.C. 4901-1-24(A), hereby submits to the Public Utilities Commission of Ohio (Commission) its reply to a memorandum contra to the Company's motion for a protective order (Memorandum) filed by the Office of the Ohio Consumers' Counsel (OCC).

I. The OCC Mischaracterizes Current Commission Practice and Improperly Relies Upon Outdated Decisions.

In its Memorandum, the OCC wrongly contends that the disclosure of confidential and propriety information "would be less favorable to Duke, and more favorable to the Complainant in this case."[1] Curiously, however, the OCC does not even suggest how disclosure in any way favors the allegations, as asserted by the Complainant, or how confidential treatment could have any impact on the case whatsoever in light of the Commission's ability to review all information

[1] OCC Memorandum, at pg. 2.

in the docket, whether confidential or not. Furthermore, the OCC does not address how the disclosure of policies and procedures benefits the Complainant where the Complainant has admitted that the utility account at issue was in arrears at the time electric service was disconnected on November 4, 2011, and complains only that the Company failed to adhere to Commission regulations and orders. The OCC instead relies upon unsubstantiated conclusions and outdated decisions to mischaracterize the rules on confidentiality.

As an initial matter, the OCC boldly contends that the "guiding principle of the PUCO's rules regarding protective orders is not to conceal information, but to make information public."[2] Yet the OCC does not substantiate this statement with reference to current regulations or Commission decisions. Indeed, it offers no Commission decision for this proclaimed guiding principle. It attempts to support its interpretation of the requirements for protective orders with reference to decades-old decisions and ignores the existing process as to the exchange of information. Importantly, not all information that may be shared with representatives of the Commission is automatically stripped of its confidential nature. Indeed, the Commission has expressly found that the discovery rules, including those pertaining to protective orders, do not apply to Commission Staff. And this regulation correlates with the General Assembly's directive that Staff not freely divulge information belonging to a public utility that may come into its possession.[3]

The Commission does have requirements for protective orders, including those orders applicable to confidential information. And, in those rules, the Commission expressly and unambiguously confirms that an order may be issued where "necessary to protect the confidentiality of information contained in the document."[4] The proponent of the confidential

[2] OCC Memorandum, at pg. 3.
[3] See, generally, O.A.C. 4901-1-24(G) and R.C. 4901.16.
[4] O.A.C. 4901-1-24(D).

material is required to make certain demonstrations, but, if they are made, existing Commission regulation undeniably allows for the protection of confidential information.[5]

The OCC also errs in its argument that the Commission has previously found that information related to internal policies and procedures was not confidential at that time and that such a ruling cannot now be disturbed. As discussed herein, the OCC is incorrect.

As an initial matter, consideration must be given to the circumstances under which the prior order was issued. That prior proceeding concerned a Commission-mandated five-year review of the uncollectible expense riders of Ohio's local distribution companies (LDCs).[6] It was a consolidated review of the practices, then in existence, of four companies, with an identified purpose to:

> [A]udit, evaluate, and recommend improvements in the collections policies, practices, and performance of the gas companies; evaluate whether the four companies' collection practices and policies are effective in minimizing uncollectible expense (uncollectibles); ascertain benchmarks to be used by the Commission to monitor the effectiveness of the Ohio natural gas companies' collection policies, practices and performance; and recommend "best practices" to be employed to minimize uncollectible expense.[7]

Significantly, since this five-year review of the four LDCs, no similar such review has occurred for those entities and no similar review has been undertaken in respect of Ohio's electric distribution companies. Rather, to the extent the Commission seeks to inquire, on a discrete basis, into a company's credit and collections practices, such a review may occur under the Commission's general grant of authority to regulate public utilities.[8] And to the extent

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[5] See, *e.g.*, *In The Matter of the Investigative Audit of Northeast Ohio Natural Gas Corporation, Orwell Natural Gas Company, and Brainard Gas Corporation*, Case No. 14-205-GA-COI, Entry, at ¶ 11 (August 4, 2015).
[6] *In the Matter of the Five-Year Review of Natural Gas Company Uncollectible Riders*, Case No. 08-1229-GA-COI.
[7] Id, Review of the Credit and Collection Policies and Practices, at pg. I-1 (May 3, 2010).
[8] See, generally, R.C. 4905.04, 4905.05, and 4905.15.

Commission Staff comes to possess a public utility's confidential and business proprietary information, it must retain the confidential nature of that information.[9]

Moreover, insofar as audits are concerned, the Commission employs a specific process for purposes of balancing the right of a utility to protect its confidential information from public disclosure and the Commission's obligations in responding to requests for public records. Specifically, the Commission expressly subjects the selected independent auditor to the provisions of R.C. 4901.16, thereby precluding the disclosure of information outside of very specific circumstances. And, should such a circumstance arise, the Commission provides a procedure to enable the utility to seek protection of its confidential information.[10] As such, it cannot be said, as the OCC claims here, that full disclosure is always preferred and utilities have little chance of protecting their confidential information. The Commission has, time and again, recognized the confidential nature of information that a public utility possesses and has consistently protected it.

It is also critical to recognize that the present matter does not concern a review of the Company's policies and procedures, or even allegations concerning same. It is not an audit of Duke Energy Ohio and its fellow utilities. The present matter concerns only the issue of whether Duke Energy Ohio disconnected the electric service for an account having admitted arrears, as provided for under applicable, identified Commission regulations and order. Further, the specific policies and procedures for which the Commission declined confidential treatment years ago are not the same as those policies and procedures existing today. The Commission's prior decision should not be found to be determinative of the Company's request for protective treatment here. The prior decision does not address the seminal question, in this proceeding, of whether today's

[9] R.C. 4901.16.

[10] See *e.g.*, *In the Matter of the Investigative Audit of Northeast Ohio Natural Gas Corporation, Orwell Natural Gas Company, and Brainard Gas Corporation*, Case No. 14-205-GA-COI, Entry, at pp. 3-4 (April 2, 2014).

policies and procedures should be afforded confidential treatment in the context of the complaint case in which the OCC intervened.

II. The Information for Which Duke Energy Ohio Seeks Confidential Treatment is, in fact, Confidential, Trade Secret Information.

The specific aspects of Duke Energy Ohio's policies and procedures for which the Company is seeking confidential treatment are not published or shared with customers. And there are valid reasons for this approach – reasons that are intended to protect both the Company and its customers, including those for whom the OCC serves as the statutory representative, both those who pay their bills and the uncollectible expense riders and those who do not pay their bills and thereby cause increases in said riders.

The aspects of the Company's policies and procedures at issue concern the criteria for which residential customers are eligible for disconnection for nonpayment. If customers were given access to the specific criteria, they would be able to avoid them. And, in that instance, Duke Energy Ohio would be deprived of full payment for the services it has provided – services for which it is legally entitled to be paid. The ramifications of such a circumstance would likely include the need for more rate cases to account for the lost revenue, and, in a more immediate fashion, adjustments to the Company's internal policies and procedures.

Notably, these policies and procedures are not prescribed by Commission regulation. As such, they are subject to change, with no existing restriction as to the degree of the change or the frequency of the change. And as even the OCC would have to admit, such changes would impact all residential customers. Indeed, alterations in the policies and procedures could result in more residential customers being placed in a disconnection queue – an outcome that would prompt the need for more resources to address both the status of the accounts and the inquiries from customers. Customer confusion would be likely, as a result of frequent policy changes, resulting

in more customers reaching out for assistance from the Company, the Commission, and the OCC. To the extent such an approach resulted in more disconnected, or charged off, accounts, the costs recovered through each of the Company's three uncollectible expense riders would increase.

Furthermore, Duke Energy Ohio has developed these internal policies and procedures, using its resources. These policies and procedures detail the inner workings of the Company and, if disclosed, would enable other entities to benefit from the resources expended by Duke Energy Ohio in developing them. Such an outcome would be unfair to the Company, as the Commission has recognized.[11]

Duke Energy Ohio has undertaken to properly balance the interests of all of its residential customers – those who may find themselves eligible for disconnection for nonpayment and those who share in the payment for uncollectible expenses caused by their neighbors. The OCC, however, intends here to disturb this important balance under the misplaced notion that all customers need to be aware of the Company's "stated positions" and that the Company is intending to "conceal information." Such is not the case. Duke Energy Ohio is, instead, seeking only to protect specific business confidential and proprietary information, information that does satisfy the definition of trade secret under Ohio law as it derives independent economic value, whether actual or potential, from not being generally known by those who can financially benefit from its disclosure and there are reasonable efforts in place to maintain the confidential nature of the information.

The third-party information referenced by Duke Energy Ohio relates to specific customer information – information that the Company believes it has an obligation to protect under

[11] *In the Matter of the Investigative Audit of Northeast Ohio Natural Gas Corporation, Orwell Natural Gas Company, and Brainard Gas Corporation*, Case No. 14-205-GA-COI, Entry, at ¶ 10 (August 4, 2015)(protective treatment afforded company's internal policies and procedures).

Commission regulation[12] and information that the Commission has routinely afforded confidential treatment.[13] And this same justification extends to the Company's account records, generally identified here the customer management system or CMS records.[14] Such records concern specific activity on individual customers' accounts, including proprietary information for which the Company cannot initiate disclosure. Consistent therewith, access to the CSM system is restricted to those with a business need for such access, thereby ensuring that the records are appropriately handled as trade secret or business proprietary and confidential records.

III. Conclusion

Duke Energy Ohio respectfully requests that the Commission grant its motion for a protective order.

[12] See, *e.g.*, O.A.C. 4901:1-37-04(D)(1) (prohibiting the release of proprietary information without consent, where such information includes, but is not limited to, billing histories).
[13] *In the Matter of the Investigative Audit of Northeast Ohio Natural Gas Corporation, Orwell Natural Gas Company, and Brainard Gas Corporation*, Case No. 14-205-GA-COI, Entry, at ¶ 10 (August 4, 2015)(protective treatment afforded customers' usage information).
[14] See Attachment MAC-6.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on the following parties this 20th day of January, 2016, by regular U. S. Mail, overnight delivery or electronic delivery.

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Summary: Reply Duke Energy Ohio, Inc.'s Reply to Memorandum Contra by the Office of the Ohio Consumers' Counsel to Duke Energy Ohio's Motion for Protective Order Regarding the Direct Testimony of Mitchell A. Carmosino electronically filed by Dianne Kuhnell on behalf of Duke Energy Ohio, Inc. and Spiller, Amy B. and McMahon, Robert