

Respectfully submitted,

DUKE ENERGY OHIO, INC.

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MEMORANDUM IN SUPPORT

I. Procedural Background

On December 3, 2015, Complainant, through counsel, took the oral deposition of Marion Byndon, testifying on behalf of Duke Energy Ohio. Said deposition was taken pursuant to O.A.C. 4901-1-21(F), as Ms. Byndon was designated as a corporate representative to testify as “to the abbreviations and acronyms in the account notes that have been produced in discovery and how those activities relate to what occurred on the account through November 20, 2011.”¹

Relative to the deposition of Ms. Byndon, Complainant’s counsel submitted both utility bills for the property located at 11312 Orchard Street, Cincinnati, Ohio, and Duke Energy Ohio’s internal business records applicable to the utility account. Notwithstanding the specific date parameters associated with Ms. Byndon’s deposition, these records included activities and/or account detail subsequent to November 20, 2011.

On December 31, 2015, Complaint filed Ms. Byndon’s deposition transcript. Said filing was under seal, consistent with the agreement of the parties during Ms. Byndon’s deposition. Simultaneous with that filing, Complainant filed a motion for protective treatment of the deposition transcript and also a motion for a subpoena directed to Ms. Byndon. The subpoena seeks to direct Ms. Byndon to appear and give oral testimony during the hearing of this matter. Given that Ms. Byndon is expected to appear, her deposition transcript will not be admissible as evidence in this proceeding. Nevertheless, Duke Energy Ohio hereby files a motion for a protective order, allowing the redaction of certain portions of the deposition transcript, as well as identified portions of the attachments thereto. As demonstrated herein, the redacted information in this testimony and these attachments reflects business proprietary, trade secret information and it is thus entitled to protection under O.A.C. 4901-1-24(D).

¹ Transcript of Prehearing Conference, at pg. 46 (November 10, 2015).

II. Legal Argument

O.A.C. 4901-1-24(D) provides that the Commission or its attorney examiners may issue a protective order to assure the confidentiality of information contained in filed documents, to the extent that state or federal law prohibits the release of the information, and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code. The rule further provides that information constituting a trade secret under Ohio law is to be protected.

R.C. 1333.61(D) defines a “trade secret” as:

[I]nformation, 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.²

The Ohio Supreme Court has provided further guidance on what qualifies as a trade secret under Ohio law, delineating those factors to be considered:

- (1) The extent to which the information is known outside the business, (2) the extent to which it is known to those inside the business, *i.e.*, by the employees, (3) precautions taken by the holder of the trade secret to guard the secrecy of the of the information, (4) the savings effected and the value to the holder in having the information as against competition, (5) the amount of effort or money expended in obtaining and developing the information, and (6) the amount of time and expense it would take of others to acquire and duplicate information.³

Additionally, the Commission has imposed certain restrictions upon public utilities, precluding them from initiating the public dissemination of customer information.⁴

² R.C. 1333.61(emphasis added).

³ *State ex. rel. The Plain Dealer v. Ohio Dept. of Insurance*, (1998), 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661.

⁴ See, generally, O.A.C. 4901:1-37-04(D); O.A.C. 4901:1-10-24(E).

The deposition of Ms. Byndon conducted for purposes of this individual customer complaint proceeding concerned the Company's internal customer account system – a system that is used in respect of all Duke Energy Ohio customers. The questioning, which extended to printouts from the internal customer account system, also addressed specific customer transactions and account detail. As discussed herein, the information proposed for redaction is trade secret and thus subject to protection under O.A.C. 4901-1-24(D).

At its core, Duke Energy Ohio's internal customer account system reflects the Company's internal processes and procedures or, stated another way, its internal workings. The internal customer account system details certain processes that the Company follows and when they may occur in respect of all customers, not just the customer of record with regard to the utility account at issue in this proceeding. The system therefore reflects the processes and procedures for continuous, internal use by Duke Energy Ohio. Under Ohio law, as has been confirmed by the Ohio Supreme Court, it constitutes a trade secret.⁵

Further, the internal customer account system serves as a database for customer information, including information related to credit, billing histories, and usage that the Company steadfastly guards from public disclosure, consistent with Commission regulation.

Additionally, the Company's processes and procedures, as reflected in its internal customer account system, were not developed for public dissemination. They are not shared externally and internal access is restricted to those having a business need for such information. Further, Duke Energy Ohio has expended resources to develop these internal procedures and public disclosure to

⁵ *Valco Cincinnati, Inc. v. N&D Machining Service, Inc.*, (1986) 24 Ohio St. 3d 41, 44, 492 N.E.2d 814 (finding that a "trade secret" may relate to operations of a business, such as accounting methods or other management); See also, *State ex rel. The Plain Dealer v. Ohio Dept. of Insurance*, 80 Ohio St. 3d 513, 673 1997-Ohio-75 (relying on the Restatement of the Law, Torts, Section 757, Comment b to explain that trade secret reflects "a process...for continuous use in the operation of the business"). See also, *State ex rel. Besser v. Ohio State University*, 89 Ohio St. 3d 396, 400-401, 2000-Ohio-207 (recognizing prior holding in *State ex rel. Plain Dealer* and further finding that the Uniform Trade Secrets Act, adopted in Ohio, provides an even broader definition of "trade secret").

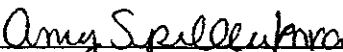
others would allow them to unfairly benefit from the Company's efforts. The Commission has found that internal policies and procedures are subject to protection as trade secrets.⁶ Consistent with such a determination, entries in the Company's customer account system that reflect its internal workings merit protection.

As required under O.A.C. 4901-1-24(D)(1), Duke Energy Ohio has redacted only that information in, or attached to, the deposition transcript that it believes constitutes trade secret information.

WHEREFORE, Duke Energy Ohio respectfully requests that the Commission, pursuant to O.A.C. 4901-1-24(D), grant its Motion for Protective Order by making a determination that the redacted information is confidential, proprietary, and a trade secret under O.A.C. 4901-1-24(D).

Respectfully submitted,

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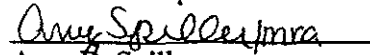
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⁶ *In the Matter of the Investigative Audit of Northeast Ohio Natural Gas Corporation, Orwell Natural Gas Company, and Brainard Gas Corporation*, Case No. 14-205-GA-COI, Entry, at ¶10 (August 4, 2015).

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on the following parties this 22nd day of January, 2016, by regular U. S. Mail, overnight delivery or electronic delivery.


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