

**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.	)	

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**DUKE ENERGY OHIO, INC.'S REPLY TO MEMORANDUM CONTRA  
ITS MOTION FOR PROTECTIVE ORDER REGARDING THE DEPOSITION  
TRANSCRIPT OF MARION BYNDON**

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Duke Energy Ohio, Inc. (Duke Energy Ohio or Company), pursuant to O.A.C. 4901-1-24(A) and 4901-1-12(B)(2), hereby submits to the Public Utilities Commission of Ohio (Commission) its reply to a memorandum (Memorandum) contra the Company's motion for a protective order (Motion), which Memorandum was filed by the Office of the Ohio Consumers' Counsel (OCC) on February 8, 2016.

**I. The OCC Mischaracterizes Current Commission Practice and Improperly Relies Upon Outdated Decisions.**

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."<sup>1</sup> Yet the OCC does not substantiate this statement with reference to current regulations or recent Commission decisions. Indeed, it offers no Commission decision for this OCC-proclaimed "guiding principle." Rather, it attempts to support its proclamation by reference to decades-old

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<sup>1</sup> OCC Memorandum, at pg. 2.

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.<sup>2</sup>

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."<sup>3</sup> The proponent of the confidential material is required to make certain demonstrations, but, if they are made, existing Commission regulation undeniably allows for the protection of confidential information.<sup>4</sup>

The OCC's attempt to reframe the Commission's issuance of protective orders into a method by which information can be made public must fail. This approach is the antithesis of the actual function of protective orders: to allow the Commission's access to, and use of, information that is legitimately the proprietary property of an entity under the Commission's jurisdiction.

## **II. The Information for which Duke Energy Ohio Seeks Confidential Treatment Is, in fact, Confidential, Trade Secret Information.**

After concluding its unsupported effort to view protective orders as if they were "disclosure orders," the OCC finally discusses the legal parameters of confidential treatment of proprietary information. It correctly summarized the two requirements: Information to be

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<sup>2</sup> See, generally, O.A.C. 4901-1-24(G) and R.C. 4901.16.

<sup>3</sup> O.A.C. 4901-1-24(D).

<sup>4</sup> 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).

protected “must have ‘independent economic value’ and it must have been kept under circumstances that maintain its secrecy.”<sup>5</sup>

**A. The Information in Question Derives Economic Value from its Confidentiality.**

Marion Byndon’s deposition addressed, among other things, the Company’s internal customer account system, specific customer transactions, and account detail. In addition, questions during that deposition related to the processes that the Company follows with regard to customer payments, notices, and termination of service. These internal processes and procedures relate to all customers, not just the customer at issue in the present proceeding.

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

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<sup>5</sup> Memorandum, at pg. 4.

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.<sup>6</sup>

Nevertheless, the OCC erroneously complains about precedent relied upon in the Company’s motion. For example, Duke Energy Ohio had cited a 1986 Ohio Supreme Court case<sup>7</sup> for the proposition “that a ‘trade secret’ may relate to operations of a business, such as accounting methods or other management” methods.<sup>8</sup> The OCC claimed that the cited case did not address this matter.<sup>9</sup> But even a cursory review of the *Valco* case reveals that Justice Holmes, authoring the Court’s opinion, positively quoted this very information from a comment

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<sup>6</sup> *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).

<sup>7</sup> *Valco Cincinnati, Inc. v. N & D Machining Service, Inc.*, 24 Ohio St.3d 41, 492 N.E.2d 814 (1986).

<sup>8</sup> Motion, at pg. 5, fn. 5.

<sup>9</sup> Memorandum, at pg. 5.

to a section within the Restatement of Torts.<sup>10</sup> Similarly, the OCC complains about the Company's reference to a 1997 Ohio Supreme Court case.<sup>11</sup> In that proceeding, the Court concluded that certain information was confidential, on the ground that it "related to a single, ephemeral event in the conduct of a business." The Court contrasted such information with "the requirement that a trade secret be 'a process or device for continuous use in the operation of the business.'"<sup>12</sup> This is precisely what the Company said: The information in Ms. Byndon's deposition reflects processes that are continuously used in the operation of the Company's business.

**B. The Information in Question Has Been Kept Under Circumstances that Maintain its Secrecy.**

The OCC, in an additional argument, suggests that the Company failed to explain how it maintains the information as confidential, other than to say it is not shared externally and internal access is limited to those with a business need for the information.<sup>13</sup> The OCC proposes that, to meet its burden, Duke Energy Ohio would have had to disclose how many of its employees have access to the information, whether those employees have a confidentiality obligation with regard to the information, and what other efforts the Company has made to maintain secrecy.

The OCC itemizes these "missing" disclosures as if discussion of these specific factors were required by law, rules, or Commission precedent. But it cites to no such authorities. Indeed, it could not do so, because there is no such authority. The Commission regularly grants protective orders based upon movants' statements that they maintain internal safeguards against disclosure of proprietary information. The OCC may wish the situation were different, but it is not.

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<sup>10</sup> *Id.*, at pg. 44 (*citing* IV Restatement of Torts (1939) 1, Section 757 (Comment (b))).

<sup>11</sup> *State ex rel. Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 687 N.E.2d 661 (1997).

<sup>12</sup> *Id.*, at 526 (*citing* Restatement of the Law, Torts (1939), Section 757, Comment (b)).

<sup>13</sup> Memorandum, at pp. 4-5.


### **III. CONCLUSION**

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 attempts here to disturb this important balance. But Duke Energy Ohio is 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.

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

Respectfully submitted,


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### **CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served on the following parties this 11<sup>th</sup> day of February, 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 its Motion for Protective Order Regarding the Deposition Transcript of Marion Byndon electronically filed by Ms. E Minna Rolfes on behalf of Amy B. Spiller and McMahon, Robert A. and Duke Energy Ohio, Inc.