

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MEMORANDUM CONTRA DUKE’S MOTIONS FOR PROTECTIVE ORDERS
REGARDING ITS BRIEF AND THE HEARING TRANSCRIPT FROM THE
CONFIDENTIAL SESSIONS
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 to the motions for protective orders filed on February 11, 2016 by Duke Energy Ohio, Inc. (“Duke”) in this significant case for Ohio’s residential utility customers.¹ Ohio utilities must adhere to the intent and requirements of the PUCO’s winter reconnect orders.² This case is about whether Duke

¹ OCC files this memorandum contra pursuant to Ohio Adm. Code 4901-1-12(B)(1).

²See *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.

unlawfully and unreasonably disconnected electrical service at a residence in November 2011. Two Ohioans died.

On February 11, 2016, Duke filed a confidential version of its post-hearing brief in this case.³ On the same day, the court reporter, Armstrong and Okey, Inc., filed under seal the transcript from the confidential sessions of the hearing. Concurrently, Duke filed motions for protective orders regarding the confidential version of its post-hearing brief (“Brief Motion”) and the transcript from the hearing’s confidential sessions (“Transcript Motion”) (collectively, “motions”). Duke makes nearly identical arguments in both motions. In this Memorandum Contra, OCC opposes Duke’s motions for protective orders.⁴ The information for which Duke seeks confidential treatment fails to qualify as a “trade secret” under Ohio law and the PUCO’s rules.⁵ Therefore, the PUCO should deny both motions.

II. APPLICABLE LAW

The fundamental principle of the PUCO’s rules regarding protective orders is not to conceal information, but to make information public. The PUCO has a long-established policy that confidential treatment is to be given only under extraordinary circumstances.⁶ Ohio Adm. Code 4901-1-24(D) specifies that a protective order “shall minimize the amount of information protected from public disclosure.”

³ Duke also filed a public version of the brief with the alleged confidential portions redacted.

⁴ At the hearing in this case, the Attorney Examiner deferred ruling on motions for protection until a future time.

⁵ Ohio Adm. Code 4901-1-24(D).

⁶ 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.

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.’”⁷ 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.”⁸ 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.”⁹

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 release is prohibited by state or federal law.”¹⁰ 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.” In R.C. 1333.61(D), a “trade secret” is defined as:

⁷ *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.*, 1997-Ohio-75, 80 Ohio St.3d 513, 518, 687 N.E.2d 661 (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.

⁸ 93-487 Entry at 3.

⁹ *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.

¹⁰ R.C. 149.43(A)(1)(v).

[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.

Thus, to qualify as a trade secret under R.C. 1333.61(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.

III. DISCUSSION

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 motions, Duke seeks to protect information regarding its “internal account system, specific customer transactions, and account detail.”¹¹ Duke also asks that information concerning the processes it follows for “customer mailings, payments,

¹¹ Motions at 4.

notices, and termination of service” not be disclosed.¹² The PUCO should reject Duke’s arguments for preventing disclosure of the information.

Regarding its policies and procedures for disconnection of residential service, Duke claims that “public disclosure to others would allow them to benefit unfairly from the Company’s efforts.”¹³ Duke contends that customers could avoid the criteria for disconnection, which would harm Duke financially.¹⁴ The PUCO rejected these arguments by Duke six years ago.

At that time, the PUCO was reviewing natural gas companies’ policies and practices concerning their riders for uncollectible accounts.¹⁵ There, Duke sought a protective order concerning its practices regarding disconnection of service and payment arrangements for natural gas customers.¹⁶ Duke claimed that the information “would be of value to customers seeking to understand the parameters of the Company’s collection practices and to avoid responsibility for payment of their bills. This would increase the amount of bad debt which Duke Energy Ohio would necessarily accrue and could substantially exacerbate the uncollectible problem.”¹⁷ Duke went on to argue that if the information is disclosed, Duke “will be placed at a disadvantage, in among other things, reducing its ability to terminate service and make payment arrangements for those customers who are delinquent in payments and gaming the system.”¹⁸ Duke also claimed

¹² *Id.*

¹³ Brief Motion at 5.

¹⁴ Transcript Motion at 5.

¹⁵ *In the Matter of the Five-Year Review of Natural Gas Company Uncollectible Riders*, Case No. 08-1229-GA-COI.

¹⁶ *Id.*, Duke Motion for Protective Order (May 5, 2010) at 3.

¹⁷ *Id.*

¹⁸ *Id.* at 4.

that a customer accessing the information “could take actions that, in the absence of this information, it would not otherwise take.”¹⁹

In that case, OCC opposed Duke’s effort to conceal information regarding its processes and policies for disconnecting customers for nonpayment. The PUCO agreed with OCC that the information does not constitute a trade secret and denied Duke’s motion in its entirety.²⁰ The PUCO should, consistent with its precedent, hold that the same information in this case, does not constitute a trade secret.

Further, disclosing the information would allow the public to know what Duke’s (a public utility) policies and procedures are. Informing customers of this information would educate them as to such policies and procedures. This is a good thing, not a bad thing as Duke professes. The PUCO too should be aware of Duke’s stated positions. This is a reason in favor of denying Duke’s motion to keep such information secret.

Duke also claims that disclosure of the allegedly confidential information in the brief and the hearing transcript would “compromise the Company’s internal procedures and its status as an entity that procured competitive contracts.”²¹ Duke cites three cases in support of its position that the information discussed in its brief and the hearing transcript constitutes a trade secret.²² But none of those cases accord with the information at issue in this proceeding.

In the *Valco Cincinnati* case,²³ the Supreme Court of Ohio did not address the “accounting methods or other management” as trade secrets, as Duke contends.²⁴ Rather,

¹⁹ *Id.*

²⁰ *Id.*, Entry (November 3, 2010) at 4.

²¹ Motions at 5.

²² *Id.* at 4.

²³ *Valco Cincinnati, Inc. v. N & D Machining Serv., Inc.*, 24 Ohio St. 3d 41, 492 N.E.2d 814 (1986).

the Court addressed a unique valve and other elements used in manufacturing, including “the end face of the cone spring used in the glue applicator had to be ground in a certain manner, and that such spring had to be of a certain type of metal.”²⁵ Such information is far afield from the information in this case.

Duke argues that *State ex rel. The Plain Dealer*²⁶ stands for the proposition that a “trade secret reflects ‘a process...for continuous use in the operation of the business.’”²⁷ But the Court did not state that any process for continuous use would qualify as a trade secret. Instead, the Court excluded documents dealing with “a single, ephemeral event in the conduct of a business” that is one requirement for a trade secret.²⁸ Here, Duke’s request for protection is much broader, spanning to policies and procedures that are at the heart of the issues in this case.

In citing to *State ex rel. Besser*,²⁹ Duke asserts that “the Uniform Trade Secrets Act, adopted in Ohio, provides an even broader definition of ‘trade secret’.”³⁰ The referenced case, however, actually states that the Uniform Trade Secrets Act is in accord with Ohio’s trade secret statute, R.C. 1333.61(D), not broader.³¹

Duke then argues that “the Commission has found internal policies and procedures are subject to protection as trade secrets.”³² Duke’s interpretation of the Entry

²⁴ See Motions at 4, n.2.

²⁵ *Valco Cincinnati*, 24 Ohio St. 3d at 46, 492 N.E.2d at 819.

²⁶ *State ex rel. The Plain Dealer v. Ohio Dep’t of Ins.*, 1997-Ohio-75, 80 Ohio St. 3d 513, 687 N.E.2d 661.

²⁷ Motions at 4, n.2.

²⁸ *State ex rel. The Plain Dealer*, 80 Ohio St. 3d at 526, 687 N.E.2d at 673.

²⁹ *State ex rel. Besser v. Ohio State Univ.*, 2000-Ohio-207, 89 Ohio St. 3d 396, 732 N.E.2d 373.

³⁰ Motions at 4, n.2.

³¹ *State ex rel. Besser*, 89 Ohio St. 3d at 401, 732 N.E.2d at 378.

³² Motions at 4, n.3.

in Case No. 14-205 is without merit. The Entry does not address internal policies and procedures to conclude that the information meets the applicable requirements for trade secrets under Ohio law.³³ The public utility in Case No. 14-205 sought protection of specific customer information such as customer identification numbers, account numbers, and usage data.³⁴ The utility also sought to protect bank account numbers and copies of checks and invoices.³⁵ Lastly, the utility sought protection of its gas procurement strategy, which is a competitive strategy that could derive independent economic value.³⁶ Contrary to Duke's claims, the utility in that case, did not seek to protect general internal processes and procedures or "its internal workings."³⁷ It sought confidential treatment of very specific customer and financial data and one procurement practice which affects the competitive market.

Duke, on the other hand, did not limit its request for protection to specific customer information, financial data, or one of its competitive strategies. The sole reason given by Duke for keeping the information secret is: Duke wants it that way. Duke states that the brief and hearing transcript concerned "its internal workings." But general internal systems, processes, and procedures or a company's "internal workings" do not constitute trade secrets under Ohio law and, thus, are not protected. Duke offers no cases in which a court found "internal workings" to be trade secrets that can be protected.

³³ *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 ("Case No. 14-205"), Entry (August 4, 2015), ¶ 10.

³⁴ *Id.*, ¶ 4.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Motions at 4.

None of the arguments Duke presented explains how it derives any independent economic value from the information it seeks to keep secret or how any other persons can obtain economic value if the information is disclosed. Duke has not offered the specifics of its efforts to maintain secrecy, i.e., how many of its employees have access to the information, whether those employees are under an obligation of confidentiality with regard to that information, or what other efforts it has taken to maintain the secrecy of its purported trade secrets. Instead, Duke merely states that the information is “not published or shared with customers”³⁸ and “is not shared externally and internal access is limited to those with a business need for the information.”³⁹ This is not adequate to keep the information from disclosure.

In this proceeding, Duke has offered only general statements regarding the nature of the information it considers confidential and the supposed harm that will befall it if the information is disclosed. The PUCO should not keep information from the public based on such flimsy support.

Accordingly, Duke failed to meet its burden of demonstrating that the information constitutes trade secrets. Duke did not even assert that it derives independent economic value from keeping the redacted information from the public, and it did not meet its burden in demonstrating the efforts to maintain the secrecy of the information. The PUCO should deny Duke’s motion and make public Duke’s entire brief and the entire hearing transcript.

³⁸ Brief Motion at 4; Transcript Motion at 5.

³⁹ Motions at 5.

IV. CONCLUSION

Ohio law sets forth very specific requirements that must be satisfied before information can be considered trade secret and eligible for protection from public disclosure as confidential information in PUCO proceedings. Duke's motions have not met these requirements. Hence, the PUCO should deny both motions and make public Duke's entire brief and the entire transcript of the hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *Memorandum Contra Motions for Protective Orders* was served upon the following parties via electronic transmission on this 26th day of February 2016.

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Summary: Memorandum Memorandum Contra Duke's Motions for Protective Orders Regarding its Brief and the Hearing Transcript from the Confidential Sessions by the Office of the Ohio Consumers' Counsel electronically filed by Patti Mallarnee on behalf of Etter, Terry L Mr.