

**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 TO MOTION FOR PROTECTIVE ORDER
REGARDING HEARING TRANSCRIPT AND BRIEF**

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 the Office of the Ohio Consumers' Counsel's (OCC) memorandum contra the Company's motions for a protective order relating to the hearing transcript and Company brief. Duke Energy Ohio notes that the Complainant, the only party who actually has asserted a claim against the Company, does not oppose the Company's motions.

The arguments and counter-arguments on this issue have been made in numerous filings in this proceeding.¹ Their repetition by the OCC in its most recent memorandum contra (Memorandum Contra) the protection of the Company's trade secret information comes as no surprise. The Company will, nevertheless, reply briefly.

¹ See Motions filed by the Company on December 30, 2015 (prefiled testimony of Mitchell Carmosino); January 22, 2016 (deposition transcript of Marion Byndon); January 22, 2016 (deposition transcript of Mitchell Carmosino); February 11, 2016 (hearing transcript); February 11, 2016 (post-hearing brief); and Replies filed by the Company on January 20, 2016 (prefiled testimony of Mitchell Carmosino); and February 11, 2016 (deposition transcript of Marion Byndon). The Company's arguments in such motions and replies are hereby incorporated by reference.

Applicable Law and Policy

As in similar filings, the OCC attempts to change recent history by claiming that the Commission's "fundamental principle" with regard to protective order is to make information public. It argues that protective orders are only granted under "extraordinary circumstances."²

Duke Energy Ohio has previously debunked this argument, pointing out that the purported precedents upon which the OCC relies are entirely out of date. In addition, Duke Energy Ohio notes that it would be almost impossible to count the number of protective orders that the Commission has issued in, for example, the last five years. Protecting trade secret information is simply not an extraordinary circumstance. And, rather than being used for the purpose of disclosure, protective orders allow utilities (and other parties, at times) to maintain the confidentiality of sensitive information while still giving intervening and opposing parties the opportunity for due process.

The OCC's revisionist history should be ignored. Instead, the Commission must focus on the actual definition of trade secrets, as found in R.C. 1333.61(D): Information that is to be protected must have independent economic value and it must have been kept under circumstances that maintain its secrecy.

Applicability of Prior Ruling

The OCC claims that the Commission has already ruled on the confidentiality of the materials at issue here.³ Although on its face, the Commission's prior ruling appears similar, the situations are indisputably distinguishable, as Duke Energy Ohio has previously explained.

The prior ruling to which OCC points was made in the context of a Commission investigation into precisely the information that was sought to be protected. Specifically, the

² Memorandum Contra, at pg. 2.

³ Memorandum Contra, at pp. 5-6.

Commission was investigating the uncollectible expense recovery mechanisms of Ohio's natural gas utility companies, to "identify amounts recovered pursuant to the mechanism[s], [and] address the impact of any changes to companies' credit and collection policies and procedures . . ."⁴ The policies and procedures for collecting payments from customers were at the heart of the investigation. In contrast, the present case is a complaint case alleging that Duke Energy Ohio shut off service without complying fully with applicable law, rules, or Commission requirements. Thus, the Company's internal policies concerning how to comply with the law are not at the center of this case. Indeed, such policies are formulated with the advice of counsel, making the need for confidentiality even more clear.

The Commission's prior ruling, in which it provided absolutely no explanation for its decision, should not be seen as directly applicable here.

Independent Economic Value

In its motion, the Company explained that the information in question has independent economic value as a result of its confidentiality. In the course of that explanation, the Company cited to three opinions by the Ohio Supreme Court, each touching on the fact that an internal system or process can constitute a trade secret.

As is the case with its other arguments, this is not the first time that the OCC has attempted to refute the applicability of these cases. For example, Duke Energy Ohio had cited a 1986 Ohio Supreme Court case⁵ for the proposition "that a 'trade secret' may relate to operations of a business, such as accounting methods or other management" methods.⁶ The OCC claims

⁴ *In the Matter of the Five-Year Review of Natural Gas Company Uncollectible Riders*, Case No. 08-1229-GA-COI, Entry (Feb. 25, 2009); *Id.*, Findings and Recommendations of the Staff of the Public Utilities Commission of Ohio (Feb. 5, 2009)..

⁵ *Valco Cincinnati, Inc. v. N & D Machining Service, Inc.*, 24 Ohio St.3d 41, 492 N.E.2d 814 (1986).

⁶ Motion, at pg. 5, fn. 5.

that the cited case did not address this matter.⁷ 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 to a section within the Restatement of Torts.⁸ Similarly, the OCC complains about the Company's reference to a 1997 Ohio Supreme Court case.⁹ 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.'"¹⁰ This is precisely what the Company maintains here: the information in question reflects processes that are continuously used in the operation of the Company's business.

As the Company previously explained, this information, if released publicly, would allow others to obtain economic value from its disclosure and, in doing so, would deprive Duke Energy Ohio of the economic value that it currently obtains from its confidentiality.

Maintenance of Confidentiality

The OCC also proposes that, in order to be granted a protective order, an applicant must explain details around how confidentiality is maintained internally, including such matters as the number of employees having access to the information and the employees' obligation to keep the information secret. The Company will not waste the Commission's time with a recitation of the countless other cases in which protective orders have been issued without the presentation of such details. The law requires the Company to make reasonable efforts to maintain secrecy. The Company does so. More is not needed.

⁷ Memorandum, at pg. 5.

⁸ *Id.*, at pg. 44 (citing IV Restatement of Torts (1939) 1, Section 757 (Comment (b))).

⁹ *State ex rel. Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 687 N.E.2d 661 (1997).


¹⁰ *Id.*, at 526 (citing Restatement of the Law, Torts (1939), Section 757, Comment (b)).

Conclusion

For these reasons and the reasons more fully set forth in the original motions, Duke Energy Ohio respectfully requests that the Commission grant its motions for a protective order with respect to both the hearing transcript and the Company's brief.

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 4th day of March, 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 to Motion for Protective Order Regarding Hearing Transcript and Brief electronically filed by Ms. E Minna Rolfes on behalf of Amy B. Spiller and McMahon, Robert A. and Duke Energy Ohio, Inc.