

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Amendment of Ohio       )  
Adm. Code 4901-1-24 Regarding Motions       )     Case No. 18-322-AU-ORD  
for Protective Orders.                               )

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**INITIAL COMMENTS OF DUKE ENERGY OHIO, INC.**

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Comes now Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) and respectfully submits its comments regarding Ohio Administrative Code (O.A.C.) Rule 4901-1-24 (Rule), concerning motions for protective orders. The Public Utilities Commission of Ohio (Commission) issued an entry on February 28, 2018, proposing to make limited changes to the Rule, in order to address the recent conclusions of the Ohio Supreme Court.<sup>1</sup> Pursuant to the Commission entry, comments are to be filed no later than March 16, 2018.

**COMMENTS**

**Affidavits Are Not Needed to Meet the Court's Standard**

In the recent opinion issued by the Ohio Supreme Court in the *Ohio Edison* case, the Court concluded that Commission's finding of a trade secret was not supported by evidence of record.<sup>2</sup> Specifically, the Court was concerned that the Commission failed to identify any evidence showing that the release of the information in question would be competitively harmful to the utility or to suppliers,<sup>3</sup> would impact future auctions,<sup>4</sup> or would discourage suppliers' confidence in the market or impede the function of the market.<sup>5</sup>

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<sup>1</sup> *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229 (*Ohio Edison*).

<sup>2</sup> *Id.* at ¶24.

<sup>3</sup> *Id.* at ¶35.

<sup>4</sup> *Id.* at ¶36.

The Court has, however, previously upheld similar Commission conclusions, without the use of affidavits. For example, in 2009, the Court found that the Commission's conclusion that information had independent economic value was reasonable, based on the utility's "evidence showing the economic significance of [the] contracts and [an intervenor's] representation that the material allows the contracting parties to run their businesses more economically and to compete more effectively."<sup>6</sup> No affidavits were filed in that proceeding, but the Commission carefully crafted the explanation of its rationale.

It is certainly true that the Court, in *Ohio Edison*, demanded support for the Commission's conclusion. However, that support need not come with the burdens and formality of the affidavit process.

Furthermore, in light of the fact that an affidavit was actually filed in the Commission proceeding underlying *Ohio Edison*,<sup>7</sup> it is also evident that the filing of an affidavit is by no means a panacea. If the Commission ultimately decides to require the filing of an affidavit, it would perhaps be helpful if the rule addressed the substance that should be included, such that the necessary evidence could both be in the record and be consistently addressed in Commission rulings.

#### Affidavits Should Not Be Required in All Situations

As the Commission is aware, there are numerous, uncontested situations in which confidential information is filed in its proceedings. Not all should require the use of affidavits,

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<sup>5</sup> *Id.* at ¶37.

<sup>6</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 369, 2009-Ohio-604, ¶28.

<sup>7</sup> *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 11-5201-EL-RDR, Reply Brief of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company in Support of their Motion for a Protective Order (Oct. 25, 2012).

as some situations are ones in which the Commission has repeatedly recognized the need for protective orders. For example, with regard to the filing of applications for certification of electric or gas suppliers, the Commission had historically granted confidential treatment of financial statements, financial arrangements, and forecasts, with nothing more than a motion.<sup>8</sup> Following many years recognizing the need for confidentiality in this situation, the Commission modified the rules governing such applications to allow confidential treatment of certain identified information, without even the filing of a motion.<sup>9</sup> Additional information can be protected under these rules through the filing of a simple motion, which is then subject to an automatic approval process.<sup>10</sup> Again, no affidavit is required.

As it did for certification of suppliers, the Commission should consider carving out categories of information that can be protected without the filing of an affidavit. Such categories of information could include not only financial data but also the locations and specifications of critical energy infrastructure, and other matters that are already specifically identified as exceptions to sunshine laws or other disclosures, pursuant to federal or state law.

#### Affidavits May Need To Be Confidential

The Commission, in its proposed rules, anticipates that the affidavits themselves will be part of the public record. However, depending on the circumstances, it is possible that the basis for confidentiality will not be explainable in public. The rule should account for that fact, as an exception to the general standard.

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<sup>8</sup> See, e.g., *In the Matter of the Application of Ambit Energy, LP, for Certification as a Competitive Retail Natural Gas Supplier*, Case No. 08-980-GA-CRS, Entry (Oct. 27, 2008).

<sup>9</sup> O.A.C. 4901:1-24-08(A); O.A.C. 4901:1-27-08(A).

<sup>10</sup> O.A.C. 4901:1-24-08(B); O.A.C. 4901:1-27-08(B).

## **CONCLUSION**

For the reasons stated above, Duke Energy Ohio respectfully suggests that the Commission modify the proposed Rule as described.

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 via electronic mail delivery or by U.S. mail, postage prepaid, as indicated, on this 16<sup>th</sup> day of March, 2018.

/s/ Jeanne W. Kingery  
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**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**3/16/2018 3:21:51 PM**

**in**

**Case No(s). 18-0322-AU-ORD**

Summary: Comments Initial Comments of Duke Energy Ohio, Inc. electronically filed by Carys Cochern on behalf of Kingery, Jeanne W Ms.