

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates.	)	Case No. 17-32-EL-AIR
)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	)	Case No. 17-33-EL-ATA
)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)	Case No. 17-34-EL-AAM
)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Modify Rider PSR.	)	Case No. 17-872-EL-RDR
)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Amend Rider PSR.	)	Case No. 17-873-EL-ATA
)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)	Case No. 17-874-EL-AAM
)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service.	)	Case No. 17-1263-EL-SSO
)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Amend its Certified Supplier Tariff, P.U.C.O. No. 20.	)	Case No. 17-1264-EL-ATA
)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Defer Vegetation Management Costs.	)	Case No. 17-1265-EL-AAM
)	
In the Matter of the Application of Duke Energy Ohio, Inc., to Establish Minimum Reliability Performance Standards Pursuant to Chapter 4901:1-10, Ohio Administrative Code.	)	Case No. 16-1602-EL-ESS
)	

**MEMORANDUM CONTRA MOTION FOR RECONSIDERATION
AND REQUEST FOR EXPEDITED RULING**

I. INTRODUCTION

On July 9, 2018, hearings commenced in the above-captioned proceedings initiated by Duke Energy Ohio, Inc. (Duke Energy Ohio or Company). On July 10, during the second day of hearing, the Sierra Club, the Environmental Law & Policy Center, and the Office of the Ohio Consumers' Counsel (collectively, Original Movants) moved the Attorney Examiner to remove the confidential protection for a specific column of numbers entitled "Net Margins – with Total Demand Charges" contained within the testimony of Duke Energy Ohio witness Judah Rose.¹ After oral argument on the matter, the Attorney Examiner ruled from the bench that the specific information in question would remain confidential.² None of the Original Movants filed an interlocutory appeal of that decision.

Now, thirty days later, two of the three Original Movants, together with the Environmental Defense Fund, Natural Resources Defense Council, Ohio Environmental Council and the (collectively, the Conservation Group), seek "reconsideration" of the Attorney Examiner's ruling.

The Motion for Reconsideration should be dismissed as procedurally defective or denied on substantive grounds.

II. DISCUSSION

A. The Motion Should Be Dismissed as Procedurally Defective.

The Public Utilities Commission of Ohio has established procedural rules that provide that any party who is adversely affected by a ruling may take an immediate interlocutory appeal. Rule

¹ Tr. Vol. II (Confidential), pg. 280, lines 15-19.

² Tr. Vol. II (Confidential), pg. 285, lines 1 to 7; pg. 287, line 21 to pg. 288, line 2.

4901-1-15(C), O.A.C., provides that any party wishing to take an interlocutory appeal from a ruling, must file the appeal with the Commission within five days after the ruling is issued. The rule then goes on to allow an exception, where the party chooses not to take an interlocutory appeal or where such appeal is not certified by the Attorney Examiner for consideration by the Commission. Under that exception, the adversely affected party may raise the propriety of the ruling “as an issue for the commission’s consideration” in a subsequent filing.³

Here, neither the Original Movants nor the Conservation Group filed an interlocutory appeal, under the standard five-day requirements. Indeed, if they had done so, the appeal would likely not have been certified, as the issue was certainly not a new or novel question of interpretation, law, or policy; nor did it represent a departure from past precedent. Rather, the Conservation Group has waited thirty days since the ruling was issued prior to filing its “Motion for Reconsideration.”

Although the Company does not disagree that parties have the opportunity to seek reconsideration of an Attorney Examiner’s ruling in two ways, the Conservation Group has failed to use the standard approach (the interlocutory appeal) and has also failed to comply with the process set forth in the applicable rule. The rule, as quoted above, specifically requires that the alternate approach raise the propriety of the ruling as an issue for the *Commission’s* decision. The Conservation Group, however, directs its Motion for Reconsideration to the Attorney Examiners:

The [Conservation Group members] respectfully request that the Attorney Examiners reconsider the decision to grant trade secret status to certain Duke information . . .

....

The Conservation Groups respectfully request that the Attorney Examiners reconsider their decision . . .⁴

³ O.A.C. 4901-1-15.

⁴ Motion for Reconsideration, pp. 1, 5.

The Attorney Examiners, under Commission processes, have the power to grant or deny certification of an interlocutory appeal. However, they do not grant or deny such appeals. Neither do they grant or deny motions for “reconsideration” of their own rulings.

As the Motion for Reconsideration does not comply with the Commission’s procedural rules, it must be dismissed.

B. The Motion for Reconsideration Should Be Denied on Substantive Grounds.

The Conservation Group’s major substantive argument is that the Company failed to meet its burden of proof with regard to showing that the information in question is a trade secret. They are incorrect.

Duke Energy Ohio does not dispute that it is a question of fact, not law, whether information constitutes a trade secret under the definition set forth in R.C. 1333.61(D). Neither does the Company dispute that it carries the burden of proof on this issue. The Conservation Group, however, states that the Company “failed to offer any evidence to support its claim for trade secret status” for the information at issue. This is untrue; the Conservation Group just disagrees with the conclusion that the evidence offered by the Company is sufficient to justify confidential treatment. The Conservation Group raises no new argument that was not already considered, countered by the Company, and ultimately rejected by the Attorney Examiners. The Attorney Examiners’ decision to reject the Conservation Group’s initial argument was correct and should stand.

In the Motion for Reconsideration, the Conservation Group itself recounted the evidence that was offered by the Company’s witness, Judah Rose: He stated, unequivocally, that disclosure of the information referenced by the Conservation Group would reveal an overall competitive position.⁵ Mr. Rose indicated that it is important information and the Attorney Examiners agreed,

⁵ Tr. Vol. II (Confidential), pg. 280, line 14.

evidenced by the fact that they denied the Original Movants' request to remove the protective order's protection.

It is also important to recognize that the decision whether or not to treat particular information as confidential is, in reality, a process of weighing the public's need for the information against the company's need to keep it confidential.⁶ As the decider of fact, the Commission (or, on the Commission's behalf, the Attorney Examiner) is uniquely qualified to weigh the evidence before it and to find that the Company's evidence is sufficient to protect the information from disclosure. That is precisely what happened here. The Company's witness explained the need for the confidential treatment and the Attorney Examiners agreed.

The Conservation Group also disputes the importance to be placed on the treatment of comparable information in other electric utilities' proceedings. In the Motion for Reconsideration the Conservation Group states that, although "Commission precedent is to some extent instructive, when it comes to trade secret determinations each decision must be made based on the evidence in the record."⁷ On this basis, the Conservation Group concludes that "[i]t is not relevant what the Commission has done in past cases with entirely different information and entirely different evidence."⁸

The Conservation Group apparently failed to notice that the Company's reference was to exactly the same evidence. The Company referred to the Commission's protection of projections of OVEC's annual net margins in other utilities' cases. This is hardly the "entirely different information" that the Conservation Groups characterize it as.

⁶ See, e.g., *In the Matter of the Application of The Toledo Company for Authority to Amend and Increase Certain of Its Rates and Charges for Electric Service, et al.*, Case No. 95-299-EL-AIR, *et al.*, 1996 Ohio PUC LEXIS 36, ¶6 (January 4, 1996); *In the Matter of the Application of The Cleveland Electric Illuminating Company for Approval to an Electric Service Agreement with American Steel & Wire Corporation*, Case No. 95-77-EL-AEC, 1995 Ohio PUC LEXIS 436, ¶5 (June 8, 1995).

⁷ Motion for Reconsideration, pg. 9.

⁸ *Id.*

One final item is worthy of comment. The Conservation Group seems to suggest either that the Attorney Examiners' decision was made in violation of R.C. 4903.09 on the ground that such statute requires all decisions to contain citations to the evidence of record in support of such decisions. The statute does require Commission decisions to explain the rationale therefor; it does not place such a requirement on Attorney Examiners.

On the basis of its substantive arguments, the Conservation Group's Motion for Reconsideration should be denied.

III. CONCLUSION

WHEREFORE, for the reasons stated herein, Duke Energy Ohio requests that the Commission dismiss or deny the Conservation Group's Motion for Reconsideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 16th day of August 2018, by U.S. mail, postage prepaid, or by electronic mail upon the parties listed below.

/s/ Jeanne W. Kingery

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Summary: Memorandum Memorandum Contra Motion for Reconsideration and Request for Expedited Ruling electronically filed by Mrs. Debbie L Gates on behalf of Duke Energy Ohio Inc. and D'Ascenzo, Rocco O. Mr. and Kingery, Jeanne W