

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. 21-887-EL-AIR
))	
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.))	Case No. 21-888-EL-ATA
))	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.))	Case No. 21-889-EL-AAM
))	

**REPLY BY DUKE ENERGY OHIO, INC.,
TO
MEMORANDUM CONTRA MOTION FOR PROTECTIVE ORDER**

Duke Energy Ohio, Inc. (Duke Energy Ohio or Company), pursuant to O.A.C. 4901-1-24(D) and 4901-1-12(B)(2), hereby submits to the Public Utilities Commission of Ohio (Commission) the Company’s Reply to the Ohio Consumers’ Counsel’s (OCC) November 1, 2021, Memorandum Contra (Memorandum) the Company’s Motion for a Protective Order (Motion) in this case. For the reasons set forth herein, Duke Energy Ohio respectfully requests that its Motion be granted.

- I. OCC mischaracterizes the current standard for the Commission’s issuance of a protective order.**
 - A. OCC overstates the showing required to protect the Company’s proprietary information.**

As an initial matter, OCC claims, incorrectly, that protective orders such as the one requested by Duke Energy Ohio in this case are warranted only “in the most extraordinary of

circumstances.”¹ However, the purported extraordinary-circumstances standard OCC relies upon does not exist in Commission authorities, including those cited by the OCC. In particular, the two statutes that OCC most heavily relies on for support, R.C. 4901.12 and 4905.07, do not relate to the Commission’s rule on protective orders but rather are general statutory provisions on Commission public records.² In any event, neither of these rules speaks to extraordinary circumstances.

Instead, O.A.C. 4901-1-24(D) establishes the Commission’s standard for issuing protective orders. This rule expressly provides that the Commission may issue “any order which is necessary to protect the confidentiality of information contained in the document,” including if the information is a trade secret.³ While the party seeking protection of the confidential information must make certain demonstrations and the rule contemplates protection of only the material that requires protection, if so made, then the rule undeniably allows for issuance of a protective order without the added burden of showing extraordinary circumstances.⁴ Rather, the rule contemplates that trade secret or confidential information shall be protected as such.

B. OCC adds factors to the test for issuing a protective order.

Duke Energy Ohio’s proprietary customer surveys and employee incentive plans warrant protection as trade secrets. R.C. 1333.61(D) defines a “trade secret” as information that meets both of the following: “(1) [i]t 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,” and “(2) [i]t is the subject of efforts

¹ OCC Memorandum, p. 1.

² See O.A.C. 4901-1-24 (“Authorized By: 4901.13” and “Amplifies: 4901.13, 4901.18”); R.C. 4901.12 (discussing proceedings as public records); R.C. 4905.07 (discussing information and records as public records).

³ O.A.C. 4901-1-24(D).

⁴ 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, ¶ 10 (Aug. 4, 2015).

that are reasonable under the circumstances to maintain its secrecy.”⁵ The Ohio Supreme Court has established a six-factor test to analyze a claim that information is a trade secret under this statute.⁶ These six factors include: (1) the extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, *i.e.*, by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information (*Plain Dealer* factors).⁷

OCC contends that, in addition to the *Plain Dealer* factors, it is also necessary to prove novelty.⁸ OCC cites to a United States Supreme Court decision for this contention,⁹ claiming that “Ohio courts have followed *Kewanee* in requiring a party to demonstrate some degree of novelty for a trade secret claim.”¹⁰ There are three problems with OCC’s claim:

- First, OCC failed to include the fact that the *Kewanee* Court also stated, in no uncertain terms, that “[n]ovelty, in the patent law sense, is not required for a trade secret.”¹¹
- Second, a review of those decisions by the Ohio Supreme Court where *Kewanee* was cited produces no instances whatsoever where the Court required novelty, as that concept was discussed in *Kewanee*, to demonstrate the existence of a trade secret.

⁵ R.C. 1333.61(D).

⁶ See *State ex rel. Plain Dealer v. Ohio Dep't of Ins.*, 80 Ohio St.3d 513, 524-25 (1997) (establishing the six-factor test used in trade secret analysis).

⁷ *Id.*

⁸ OCC Memorandum, p. 4.

⁹ *Kewanee v. Bicron*, 416 U.S. 470 (1974).

¹⁰ *Id.*

¹¹ *Id.*, 416 U.S. at 476 (citations omitted).

- Third, in addition to OCC’s false claim concerning Ohio courts, the Commission has never concluded that a showing of novelty is required for it to issue a protective order for a trade secret.

However, should the Commission decide to give any credence to OCC’s claims regarding novelty, it should be noted that, under Ohio law, a trade secret must be novel only in the sense that it is information not generally known to others in the industry.¹²

II. Duke Energy Ohio has met its burden of showing that the information in question is in fact confidential trade secret information.

A. The proprietary customer surveys are confidential trade secret information.

The proprietary customer surveys satisfy the *Plain Dealer* factors, and even the additional factor—although wrongly claimed by OCC—of novelty. As Duke Energy Ohio explained, the proprietary customer surveys are subject to reasonable efforts to maintain their security.¹³ Internally, the Company takes steps to ensure that this information is not disclosed to anyone who does not have a business need to know the material.¹⁴ Externally, the Company does not disclose this information other than under the terms of appropriate protective devices, such as confidentiality agreements.¹⁵ The proprietary customer surveys were also developed with substantial effort and cost.¹⁶ Further, if disclosed, Duke Energy Ohio’s investment will be compromised, as competitors (including non-regulated entities) could use the data to disparage the Company or otherwise make comparisons.¹⁷ This data is of significant value to Duke Energy Ohio because it can be used internally with regard to business improvements.¹⁸ Accordingly, the

¹² *Thermodyn Corp. v. 3M Co.*, 593 F.Supp. 2d 972, 986 (N.D. Ohio 2008).

¹³ Motion for Protective Order (Motion), p. 5 (October 15, 2021).

¹⁴ *Id.*, p. 5-6.

¹⁵ *Id.*, p. 6.

¹⁶ *Id.*, p. 4.

¹⁷ *Id.*

¹⁸ *Id.*

Commission should find that the proprietary customer surveys contain trade secret information and issue a protective order.

B. The employee incentive plans are confidential trade secret information.

Similarly, the employee incentive plans satisfy the *Plain Dealer* factors and the additional factor of novelty. As with the proprietary customer surveys, the employee incentive plans are also subject to reasonable efforts to maintain their security.¹⁹ Internally, the Company takes steps to ensure that this information is not disclosed to anyone who does not have a business need to know the material.²⁰ Externally, the Company does not disclose this information other than under the terms of appropriate protective devices, such as confidentiality agreements.²¹ The employee incentive plans were also developed with substantial effort and cost, and “represent the accumulation of decades of ‘best practices’ in human capital management.”²² Further, if disclosed, Duke Energy Ohio’s investment in that development will be compromised, as competitors could use the information to gain insight into the Company’s individual compensation philosophies, policies, and practices, and—perhaps most importantly—steal from its talent pool.²³ Losing talent to other entities increases costs to the Company and ultimately to customers, and can potentially affect customer service. These are specifically identified reasons why the information is trade secret and establishing that the Company in fact maintains it as such.

As a final note, OCC claims that there is no precedent for protecting this confidential information.²⁴ However, in Duke Energy Ohio’s 2017 rate case, the Commission found that the

¹⁹ Motion, p. 5.

²⁰ *Id.*, p. 5-6.

²¹ *Id.*, p. 6.

²² *Id.*, p. 5.

²³ *Id.*

²⁴ OCC Memorandum, p. 6-7.

employee incentive plans contained trade secret information and issued a protective order.²⁵ The Commission should do the same now.

III. CONCLUSION

For the reasons stated in Duke Energy Ohio's Motion and this Reply, the Company respectfully requests that the Commission, pursuant to O.A.C. 4901-1-24(D), grant its Motion by making a determination that the redacted information is confidential, proprietary, and a trade secret under R.C. 1333.61.

Respectfully submitted,
DUKE ENERGY OHIO, INC.

/s/ Jeanne W. Kingery

Rocco O. D'Ascenzo (0077651) (Counsel of Record)

Deputy General Counsel

Jeanne W. Kingery (0012172)

Associate General Counsel

Larisa M. Vaysman (0090290)

Senior Counsel

Duke Energy Business Services LLC

139 East Fourth Street, 1303-Main

Cincinnati, Ohio 45202

(513) 287-4320 (telephone)

(513) 287-4385 (fax)

Rocco.dascenzo@duke-energy.com

Jeanne.kingery@duke-energy.com

Larisa.vaysman@duke-energy.com

Elizabeth M. Brama (PHV 22090)

TAFT STETTINIUS & HOLLISTER LLP

2200 IDS Center

80 South Eighth Street

Minneapolis, MN 55402

Phone: (612) 977-8400

Fax: (612) 977-8650

ebra@taftlaw.com

Willing to accept service via email

Attorneys for Duke Energy Ohio, Inc.

²⁵ *In the Matter of the Application of Duke Energy, Inc., for an Increase in Electric Distribution Rates*, Case No. 17-0032-EL-AIR, *et al.*, Opinion and Order, ¶ 163 (Dec. 19, 2018).

CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio’s e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document is also being served via electronic mail on the 8th day of November, 2021, upon the persons listed below.

/s/ Jeanne W. Kingery

Jeanne W. Kingery

Attorney Examiners:

Matthew Sandor,
matthew.sandor@puco.ohio.gov
Nicholas Walstra,
nicholas.walstra@puco.ohio.gov

John H. Jones
Section Chief
Robert Eubanks
Werner Margard
Assistant Attorneys General
Public Utilities Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
Telephone: 614-466-4397
Facsimile: 614-644-8764
John.jones@ohioattorneygeneral.gov
Robert.eubanks@ohioattorneygeneral.gov
Werner.margard@ohioattorneygeneral.gov

Michael L. Kurtz, Esq.
Kurt J. Boehm, Esq.
Jody Kyler Cohn, Esq.
BOEHM, KURTZ & LOWRY
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
Ph: (513) 421-2255 Fax: (513) 421-2764
mkurtz@BKLawfirm.com
kboehm@BKLawfirm.com
jkylercohn@BKLawfirm.com

Attorneys for the Ohio Energy Group

**Attorneys for Staff of the Public Utilities
Commission of Ohio**

William J. Michael (Counsel of Record)
Ambrosia E. Wilson
Amy Botschner O'Brien
Assistant Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215
Telephone [Michael]: (614) 466-1291
Telephone [Wilson]: (614) 466-1292
Telephone [Botschner O'Brien]: (614) 466-9575
William.michael@occ.ohio.gov
Ambrosia.wilson@occ.ohio.gov
Amy.botschner.obrien@occ.ohio.gov

**Attorneys for the Office of the Ohio
Consumers' Counsel**

Bethany Allen (Counsel of Record)
Michael Nugent
Evan Betterton
IGS Energy
6100 Emerald Parkway
Dublin, Ohio 43016
Telephone: (614) 659-5000
Bethany.allen@igs.com
Michael.nugent@igs.com
Evan.betterton@igs.com

Attorneys for IGS Energy

Matthew W. Warnock (Counsel of Record)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
mwarnock@bricker.com

And

Katie Johnson Treadway
James Dunn
One Energy Enterprises LLC
Findlay, OH 45840
Telephone: (419) 905-5821
ktreadway@oneenergyllc.com
jdunn@oneenergyllc.com

**Attorneys for One Energy Enterprises,
LLC**