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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the	:	Case Nos.	03-93-EL-ATA
Consolidated Duke Energy Ohio, Inc.	:		03-2079-EL-AAM
Rate Stabilization Plan Remand and	:		03-2081-EL-AAM
Rider Adjustment Cases	:		03-2080-EL-ATA
	:		05-725-EL-UNC
	:		06-1069-EL-UNC
	:		05-724-EL-UNC
	:		06-1068-EL-UNC
	:		06-1085-EL-UNC

**DUKE ENERGY OHIO'S RESPONSE TO THE LETTER DATED
AUGUST 17, 2007, FROM MR. STANLEY M. CHESLEY**

The Public Utilities Commission of Ohio (Commission) received a Public Records Request dated July 26, 2007, from Mr. Stanley M. Chesley seeking certain confidential information filed under seal in these proceedings.¹ The Attorney Examiner, through an Entry issued on August 8, 2007, asked the Parties to file comments regarding the Public Records Request and the confidential nature of the requested information. Duke Energy Ohio (DE-Ohio) filed comments objecting to the release by the Commission of any information covered by the protective order issued by the examiners in this case. Other Parties filed similar pleadings and the matter is currently under consideration by the Attorney Examiner. On August 17, 2007, Mr. Chesley filed a letter in these proceedings responding to the comments of the Parties, including DE-Ohio, objecting to his Public Records Request.

¹ Throughout this pleading the term "Public Records Request" refers to a request to a governmental agency for information in its possession made pursuant to R.C. 149.43.

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Mr. Chesley's filing contains several points that require a response. First, ignoring all other Commission statutes and rules, Mr. Chesley cites R.C. 4901.12 and R.C. 4905.07 for the proposition that every document in the possession of the Commission is "public record" except as provided in R.C. 149.43.² Mr. Chesley's assertion is simply incorrect as there are two exceptions to R.C. 4901.12 and R.C. 4905.07. Revised Code Section 4901.16 represents the first exception to the public records pronouncement of R.C. 4901.12 and R.C. 4905.07. Revised Code Section 4901.16 requires the Commission, its employees and agents to maintain the confidentiality of information collected by certain individuals regarding the transaction, property, or business of a public utility.³ Information gathered pursuant to R.C. 4901.16 may be released only in a report to the Commission or in testimony before the Commission or Court.

In a case very similar to that at issue, the Commission was faced with a Public Records Request regarding a confidential report provided to the Commission Staff by DE-Ohio's predecessor, The Cincinnati Gas & Electric Company (CG&E), as part of an ongoing investigation.⁴ The only substantive factual difference between the two cases is that the report in Case No. 00-681-GA-GPS was never offered as evidence in testimony by any Party, but was given to Staff with the expectation that it would remain confidential, however, in these proceedings, Duke Energy Retail Sales (DERS) provided the information to Parties through discovery under the expectation that the information

² *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al*, (Chesley Letter at 1) (August 17, 2007).

³ Ohio Rev. Code Ann. § 4901.16 (Baldwin 2007).

⁴ *In re CG&E's Compliance With Natural Gas Pipeline Safety Standards*, Case No. 00-681-GA-GPS (Entry on Rehearing) (July 28, 2004).

would remain confidential, and ultimately filed the information under seal. In both cases Staff did not disclose the information through a report or testimony.

In addressing the issue in Case No. 00-681-GA-GPS the Commission balanced the interest of open access government with the need to maintain an exchange of information with public utilities. The Commission concluded as follows:

We are not willing to accept CG&E's sweeping claim that Section 4901.16, Revised Code, precludes disclosure of all utility business information that is informally acquired by the Commission and staff (including the Report). *Likewise, we are not willing to reach a conclusion that discourages utilities from sharing information with the Commission and staff, or one that effectively negates a statutory provision.* After weighing all of the arguments, we believe this situation involves a unique set of circumstances under which CG&E agreed to provide regular reports to our staff and our staff agreed to continue to monitor CG&E's riser replacement and inspection activities. Moreover, CG&E and our staff agreed to consult with one another to develop a comprehensive plan (which is to be filed with the Commission) to address the riser failures in CG&E's territory. See, First Amended Corrective Action Plan, at II.E, filed May 23, 2003. *Thus, we believe that the Report was shared as part of the staff's ongoing activities with the gas riser situation in CG&E's territory and Section 4901.16, Revised Code, is triggered.* We reverse our December 17, 2003 decision in this respect. *In summary, we conclude that, while the Report is a public record within the definition of Section 149.43, Revised Code, and not a trade secret within the definition of Section 1333.61, Revised Code, the continuing nature of the investigation surrounding gas riser failures in CG&E's territory convinces us that Section 4901.16, Revised Code, is triggered and the Report should not be disclosed under Norton's public record request.*⁵

Assuming, *arguendo*, that Mr. Chesley's apparent theory of the case is true and, that the documents requested by Mr. Chesley represent "side agreements" to which DE-Ohio is a Party, a theory that DE-Ohio has consistently denied, the requested information

⁵ *Id.* at 5-6 (emphasis added).

would then represent company business or transactions that have not been released through Staff testimony or report and, like the report in Case No. 00-681-GA-GPS, would remain protected pursuant to R.C. 4901.16.

The Commission has another source of statutory authority to protect confidential material and properly deny a Public Records Request. Revised Code Section 4901.13 permits the Commission to “*adopt and publish rules to govern its proceedings and to regulate the mode and manner of... hearings.*”⁶ This statutory authority is particularly important to these proceedings because the Commission adopted O.A.C. 4901-1-24, authorizing it to approve motions for a protective order and seal documents, pursuant to R.C. 4901.13.⁷

Relevant to the Commission’s authority to adopt rules governing its proceedings, including hearings, is R.C. 4903.22. Subject to appropriate Commission discretion, that section requires the Commission to adhere to the Rules of Civil Procedure and Evidence.⁸ The Commission has long understood the relationship between the Civil Rules of Procedure and its own rules of practice. Specifically, in regard to discovery issues, the Commission has held that “[w]e find no reason to limit discovery . . . since the term “clearly relevant” is undefined and since *the general assembly has already instructed us to use the Ohio Rules of Civil Procedure as a guide concerning discovery.*”⁹

Further, the Ohio Supreme Court agrees that the Commission should follow the Civil Procedure Rules. In the Court’s remand order to the Commission in these proceedings the Court, citing R.C. 4903.22, held that “[t]he present rules of the public

⁶ Ohio Rev. Code Ann. § 4901.13 (Baldwin 2007) (emphasis added)

⁷ Ohio Rev. Code Ann. § 4901.13 (Baldwin 2007); OHIO ADMIN. CODE ANN. § 4901-1-24 (Baldwin 2007).

⁸ Ohio Rev. Code Ann. 4903.22 (Baldwin 2007).

⁹ *In re Telecom Alt. Reg. Rules*, Case No. 92-1149-TP-COI (Finding and Order at ---) (January 7, 1993) (emphasis added).

utilities commission should be reviewed regularly by the commission to aid full and reasonable discovery by all parties. *Without limiting the commission's discretion the Rules of Civil Procedure should be used wherever practicable.*"¹⁰

Civil Procedure Rule 26(C) permits a motion for protective order that the adjudicatory body may grant or deny. The Commission's rules of practice, at O.A.C. 4901-1-24, include an almost identical provision. It is beyond contention that O.A.C. 4901-1-24 is a properly promulgated rule pursuant to R.C. 4901.13 and consistent with the Rules of Civil Procedure as required by R.C. 4903.22. Therefore, the Commission has the authority, in a contested proceeding, to grant a motion for protective order such that:

(7) A trade secret or *other confidential research, development, commercial, or other information not be disclosed* or be disclosed only in a designated way; or that

(8) Information acquired through discovery *be used only for purposes of the pending proceeding, or that such information be disclosed only to designated persons or classes of persons.*¹¹

In short, the Commission and the Attorney Examiners have the clear statutory authority to protect the confidential commercial contracts at issue in this case from public disclosure even in the face of a Public Records Request like the one from Mr. Chesley. Mr. Chesley's argument that R.C. 4901.12 and R.C. 4905.07 require otherwise is simply incorrect.

¹⁰ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 320, 856 N.E.2d 213, 233-234 (2006) (emphasis added).

¹¹ OHIO ADMIN. CODE ANN. § 4901-1-24 (Baldwin 2007).

Next, Mr. Chesley asserts that *Alright Parking v. Cleveland* (*Alright*) requires the Commission to release the information requested through the Public Records Request.¹² This assertion too is incorrect as a matter of law and fact.

Fundamentally, *Alright* stands for the proposition that a private entity that takes reasonable precaution to protect a trade secret does not waive the right to protect the trade secret simply by turning the information over to a public entity.¹³ Specifically, the Court held:

In the case before us, *the intervening businesses have a legitimate concern that confidential business information that was not intended for public release will be conveyed to a competitor through a public records release.* Under Ohio law, a trade secret is protected from disclosure if the owner of the trade secret *has taken measures designed to prevent the information from being made available to "persons other than those selected by the owner to have access thereto for limited purposes."* R.C. 1333.51(A)(3).¹⁴

Mr. Chesley alleges that *Alright* stands for the proposition that “if the documents have been submitted in connection with the administrative body’s decision” the documents are public record.¹⁵ The *Alright* decision contains no such holding or language that could be interpreted as such. In fact, *Alright* expressly holds that if a trade secret is transferred to a public entity in a manner ancillary to a public record, as opposed to part of the public record, it must remain protected and is “exempt from disclosure.”¹⁶ R.C. 1728.06, expressly makes an application submitted pursuant to R.C. 1728 “Public Record.”¹⁷ In contrast, R.C. 1728.06 says nothing about the treatment of confidential

¹² *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al*, (Chesley Letter at 3) (August 17, 2007).

¹³ *Alright Parking v. City of Cleveland*, 63 Ohio St. 3d 772, 775, 591 N.E.2d 708, 710 (1992).

¹⁴ *Id.*

¹⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al*, (Chesley Letter at 3) (August 17, 2007).

¹⁶ *Alright Parking v. City of Cleveland*, 63 Ohio St. 3d 772, 776, 591 N.E.2d 708, 711 (1992).

¹⁷ *Alright Parking v. City of Cleveland*, 63 Ohio St. 3d 772, 775-776, 591 N.E.2d 708, 710-711 (1992).

information submitted ancillary to the application. The *Alright* Court held that such ancillary information could remain confidential trade secret despite the transfer to a public agency.¹⁸

In this proceeding the requested confidential information was not submitted as part of any application and was only transferred to parties as part of a protective agreement or motion for protective order, which was subsequently granted. If the information is trade secret, or otherwise confidential, then *Alright* requires the information to remain protected.

Mr. Chesley makes another error. He alleges, in concert with his flawed *Alright* argument, that the “Court already has ruled that the side agreements Duke *et al*, have submitted to the PUCO are ‘relevant to the commission’s determination of whether all parties engaged in serious bargaining.’”¹⁹ The Court, however, only held “that *if CG & E and one or more of the signatory parties* agreed to a side financial arrangement or some other consideration to sign the stipulation, that information would be relevant to the commission's determination of whether all parties engaged in “serious bargaining.” Mr. Chesley’s Public Records request does not seek any agreement or contract to which DE-Ohio is a signatory. The Court made no pronouncement regarding the relevancy of DERS contracts. Neither has the Commission.²⁰

OCC, of its own accord, and outside the purview of the Court’s Remand Order, sought discovery of DERS confidential commercial contracts. The Commission permitted OCC’s discovery pursuant to a protective agreement with OCC and ultimately, a protective order issued by the Attorney Examiners. In no way did the Commission’s

¹⁸

Id.

¹⁹

In re DE-Ohio's MBSSO, Case No. 03-93-EL-ATA *et al*, (Chesley Letter at 3) (August 17, 2007).

²⁰

In re DE-Ohio's MBSSO, Case No. 03-93-EL-ATA *et al*, (Tr. I at 9) (March 19, 2007).

actions transform the contracts sought by Mr. Chesley into Public Records documents pursuant to the standard set forth in *Alright*.

CONCLUSION:

For the all reasons provided in this memorandum, DE-Ohio asks that the Commission deny Mr. Chesley's public record request. As previously stated in DE-Ohio's comments requested by the Attorney Examiner, granting Mr. Chesley's request would chill the flow of information to the Commission and other parties in future proceedings.

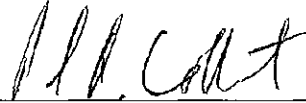
Respectfully Submitted,

A handwritten signature in black ink, appearing to read "P.A. Colbert", is written over a horizontal line.

Paul A. Colbert, Trial Attorney
Associate General Counsel
Rocco D'Ascenzo, Counsel
Duke Energy Ohio
2500 Atrium II, 139 East Fourth Street
P. O. Box 960
Cincinnati, Ohio 45201-0960
(513) 287-3015

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically on the following parties this 30th day of August 2007.



Paul A. Colbert
Rocco D'Ascenzo, Counsel

Staff of the PUCO

Anne.Hammerstein@puc.state.oh.us
Stephen.Reilly@puc.state.oh.us
Scott.Farkas@puc.state.oh.us
Thomas.McNamee@puc.state.oh.us
Werner.Margard@puc.state.oh.us

Bailey, Cavalieri

dane.stinson@baileycavalieri.com

Bricker & Eckler, LLP

sbloomfield@bricker.com
TOBrien@bricker.com;

Duke Energy

anita.schafer@duke-energy.com
paul.colbert@duke-energy.com
michael.pahutski@duke-energy.com

First Energy

korkosza@firstenergycorp.com

Eagle Energy

eagleenergy@fuse.net;

IEU-Ohio

dneilsen@mwncmh.com;
jbowser@mwncmh.com;
lmcaster@mwncmh.com;
sam@mwncmh.com;

BarthRoyer@aol.com;

ricks@ohanet.org;
shawn.leyden@pseg.com
mchristensen@columbuslaw.org;
cmooney2@columbus.rr.com
rsmithla@aol.com
nmorgan@lascinti.org
schwartz@evainc.com
WTPMLC@aol.com
cgoodman@energymarketers.com;

Boehm Kurtz & Lowry, LLP

dboehm@bkllawfirm.com;
mkurtz@bkllawfirm.com;

Duke Energy Retail Services

rocco.d'ascenzo@duke-energy.com

Cognis Corp

tschneider@mgsglaw.com

Strategic Energy

JKubacki@strategicenergy.com

Ohio Consumers Counsel
bingham@occ.state.oh.us
HOTZ@occ.state.oh.us
SAUER@occ.state.oh.us
SMALL@occ.state.oh.us

Cinergy Corp.
mdortch@kravitzllc.com