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BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review And Adjustment of the Fuel and Purchased Power and System Reliability Tracker Components of Duke Energy Ohio, Inc., and Related Matters	:	Case No. 07-723-EL-UNC

DUKE ENERGY OHIO, INC'S MEMORANDUM CONTRA THE OHIO CONSUMERS' COUNSEL'S MOTION TO COMPEL DUKE TO RESPOND TO DISCOVERY

INTRODUCTION

The Ohio Consumers' Counsel (OCC) filed a Motion to Compel Discovery from Duke Energy Ohio, Inc. (DE-Ohio) before the Public Utilities Commission of Ohio (Commission) on August 30, 2007. The OCC frames the issues necessitating its Motion to Compel as the need to obtain information in a timely manner to prepare for these cases and compliance with Ohio's Public Records laws.[1] DE-Ohio believes the issues before the Commission in this Motion to Compel are different.

DE-Ohio asserts that the primary issue is how parties to a contested proceeding will work with each other to exchange information in discovery and later to present exhibits and create record evidence. DE-Ohio has attempted to reach a reasonable protective agreement with OCC but has been unable to do so because OCC refuses to agree to protect any information submitted to it during discovery, even where such information is protected by federal law or state law including R.C. 4901.16, O.A.C. 4901-1-24 or by Commission order. OCC unreasonably insists that, at its whim, it should be

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[1] *In re DE-Ohio's FPP*, Case No. 07-723-EL-UNC (OCC's Motion to Compel at 1-6) (August 30, 2007).

able to thrust DE-Ohio's confidential and proprietary information into the public domain without regard to the sensitivity of the information. Such a position has proven time and time again to be unworkable and distracting from the primary issues in a case.

None of the confidential information that OCC presently seeks is "public record" because it remains in DE-Ohio's sole possession as it has not been distributed to any public entity, including OCC or the Commission. Further, the confidential information cannot be "public record," even if turned over to the OCC because it is not "record" at all.[2] The Ohio Supreme Court has consistently held that public records only result from "records" as that term is defined by R.C. 149.011.[3]

ARGUMENT

Propositions of Law:

I. There is no "public record" at issue concerning OCC's motion to compel as DE-Ohio has not transferred any confidential material to OCC or the Commission and the information does not constitute "record" pursuant to R.C. 149.011.

Before R.C. 149.43, the public records act, applies to any situation, the information sought must be "records" as defined pursuant to R.C. 149.011.[4] Revised Code Section 149.011 defines "records" as:

> [A]ny document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the Revised Code, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, *which serves to document the* organization, functions, policies, *decisions*, procedures, operations, or other activities of the office.[5]

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2 Ohio Rev. Code Ann. § 149.011 (Baldwin 2007).

3 *Ex. Rel. MCCleary v. Roberts*, 88 Ohio St. 3d 365, 367-368, 725 N.E.2d 1144, 1146-1147 (2000).

4 *Id.*

5 Ohio Rev. Code Ann. § 149.011 (Baldwin 2007) (emphasis added).

The Court, in discussing the application of R.C. 149.011 to a public records request held that:

> We recognize that "one of the salutary purposes of the Public Records Law is to ensure accountability of government to those being governed." *State ex rel. Strothers v. Wertheim* (1997), 80 Ohio St. 3d 155, 158, 684 N.E.2d 1239, 1242. Inherent in Ohio's Public Records Law is the public's right to monitor the conduct of government. However, in the instant matter, disclosing the requested information would do nothing to further the purposes of the Act.[6]

In these cases, to paraphrase the *MCCleary* Court, there is no public record at issue because the release of information gained through discovery would not provide further insight into OCC's operation.[7]

DE-Ohio continues to take every reasonable means to protect its confidential information and Ohio Supreme Court precedent supports the ability of DE-Ohio to protect confidential information even under circumstances where it must transfer the information to a governmental entity.[8] The Commission should support the position of DE-Ohio and the Court and reject OCC's Motion to Compel.

II. The information OCC seeks through discovery is clearly confidential in nature and still OCC will not agree to its protection.

To further understand the absurdity of OCC's position it is important to understand the documents OCC wants DE-Ohio to provide it without a protective agreement pursuant to its Motion to Compel, which are clearly confidential in nature. OCC wants DE-Ohio to provide OCC with confidential and proprietary information regarding its calculation of SRT load, peak load, generating capacity owned, available

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6 *Ex. Rel. MCCleary v. Roberts*, 88 Ohio St. 3d 365, 369, 725 N.E.2d 1144, 1148 (2000).

7 *Id.*

8 *Alrighi Parking v. City of Cleveland*, 63 Ohio St. 3d 772, 776, 591 N.E.2d 708, 711 (1992); *State Ex. Rel. Besser v. Ohio State University*, 87 Ohio St. 3d 535, 540, 721 N.E.2d 1044, 1048-1049 (2000).

capacity not owned, capacity by plant, capacity purchased, planned outage schedules, unplanned outages, the SRT use of certain specified assets, competitive prices charged for the specified assets, sales made into MISO of the specified assets, sales versus purchases into and from MISO, PJM capacity sales, capacity contracts with third parties, transmission path identification and cost, steps DE-Ohio has taken to obtain transmission, and copies of competitive contracts.[9] The requested information represents DE-Ohio trade secrets because:

> "(1) It 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. "(2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."[10]

First, all of the requested information relates to DE-Ohio's activities in the fully competitive wholesale and retail electric service markets. Second, the requested information has significant economic value to DE-Ohio. For example, DE-Ohio uses its own proprietary econometric model to determine weather normalized SRT load. If the model were publicly known DE-Ohio would lose all economic value derived from its proprietary model. Additionally, the amount of available capacity, outages – planned or otherwise –, sales, and purchases, would permit competitors to understand the amount of capacity and energy dedicated to Ohio load and unavailable to the bilateral market versus the amount of capacity and energy available in the secondary market after DE-Ohio has satisfied its Ohio obligations. The economic value of such information is substantial and irrefutable.

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[9] *In re DE-Ohio's FPP*, Case No. 07-723-EL-UNC. (OCC's Motion to Compel at 7-10) (August 30, 2007).

[10] *The State Ex. Rel. Besser v. The Ohio State University*, 89 Ohio St. 3d 396, 399, 732 N.E.2d 373, 377 (2000).

Further, DE-Ohio satisfies the six-part *Besser* test because its has: (1) Taken substantial efforts to protect the confidentiality of the requested information; (2) It is available to only a limited number of employees within the Company; (3) Significant efforts have been taken to guard the secrecy of the confidential information; (4) DE-Ohio derives substantial value from having the information; (5) DE-Ohio expends substantial effort and capital to develop and maintain the confidential information; and (6) It would take DE-Ohio or a third party substantial time and expense to develop and recreate the information.[11] Thus, all of the information is protected by state law and is not public record.

Even were this information not otherwise protected under state law, it is confidential pursuant to the Commission's order, which has the force of law, pursuant to its R.C. 4901.16 authority.[12] Despite the prohibition against the release of the confidential trade secret information, OCC refuses to acknowledge the confidentiality of trade secret information provided through discovery, forcing DE-Ohio, the Commission, and other stakeholders to argue over the disclosure of sensitive information time and time again, during evidentiary hearings.

DE-Ohio's position is supported by the Ohio Supreme Court's decisions in *State Ex. Rel. Besser v. Ohio State University,* 87 Ohio St. 3d 535, 721 N.E.2d 1044 (2000) and *Alright Parking v. City of Cleveland,* 63 Ohio St. 3d 772, 775, 591 N.E.2d 708, 710 (1992).

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[11] *The State Ex. Rel. Besser v. The Ohio State University,* 89 Ohio St. 3d 396, 399-400, 732 N.E.2d 373, 377-378 (2000).

[12] *In re DE-Ohio's FPP,* Case No. 07-723-EL-UNC. (Finding and Order at 2-3, RFP 3-5) (July 27, 2007).

In its *Besser Opinion,* the Ohio Supreme Court permitted The Ohio State University, a public governmental entity, to maintain confidential trade secrets in the face of a Public Records request. Specifically, the Court held:

> [W]e must presume that the General Assembly intended that trade secrets *retain their confidential nature.* See *State ex rel. Sinay v. Sodders* (1997), 80 Ohio St. 3d 224, 231-232, 685 N.E.2d 754, 760. *A contrary holding would afford no protection for an entity's trade secrets that are created or come into the possession of an Ohio public office* and would render the remedies in R.C. 1333.61 through 1333.69 meaningless when a request for these records is made under R.C. 149.43. "*We must also construe statutes to avoid unreasonable or absurd results.*" *State ex rel. Cincinnati Post v. Cincinnati* (1996), 76 Ohio St. 3d 540, 543-544, 668 N.E.2d 903, 906; R.C. 1.47(C).[13]

Pursuant to *Besser*, DE-Ohio's provision of trade secrets and other confidential information through the regulatory process deserves protection. Any other interpretation would produce the absurd and unintended result that private entities cannot protect confidential information when such information is subject to discovery.

Similarly, the Court's *Alright Decision* 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.[14] 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*

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[13] *State Ex. Rel. Besser v. Ohio State University*, 87 Ohio St. 3d 535, 540, 721 N.E.2d 1044, 1048-1049 (2000) (emphasis added).

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

other than those selected by the owner to have access thereto for limited purposes." R.C. 1333.51(A)(3).[15]

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]

In the above captioned proceedings, OCC insists upon the ability to seek the public release on its own motion as opposed to a request by a member of the public unassociated with OCC. If a member of the public seeks the release of confidential DE-Ohio information held by OCC (or the Commission) DE-Ohio has the burden to defend the protection of such material. However, this is not the current situation. Parties to a litigated proceeding must be able to exchange information with confidence that each party will respect the confidential nature of protected material tendered during discovery. OCC's position has made that impossible. Confidential and proprietary information does not and cannot lose its character and become a public record under R.C. 149.43 simply because it is the subject of a discovery request.

Previously, DE-Ohio negotiated an acceptable protective agreement with OCC. It did so because OCC did not want to provide any public perception that it might protect any document after the scandal involving the resignation of the prior Consumers' Counsel. In fact, with the involvement of the Attorney General's Office, OCC and DE-Ohio agreed upon an alternate procedure whereby OCC's attorneys would review confidential documents and decide in advance which documents were inappropriately marked, permitting OCC to protect the appropriately marked documents, even from public records requests, and permitting DE-Ohio to seek a protective order regarding

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15 *Id.*

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

those documents that OCC believed did not warrant protection. OCC withdrew from that agreement before it was ever implemented. DE-Ohio's willingness to agree to a protective agreement with an exception was based upon its good faith discussions with OCC resulting in OCC's assurance that it would not abuse the agreement and would protect the material.

Instead, in case after case, OCC has sought to make protected material public, and has inadvertently released protected material in violation of the protective agreements. In other words, the current mechanism is flawed and OCC does what suits it at a given moment. Some examples include attempts to make confidential financial information concerning certain generation assets public in DE-Ohio's merger case, attempting to make all of the confidential commercial contracts in the remand case public, and mistakenly releasing protected material in the remand case. DE-Ohio has repeatedly asked OCC to provide it a standard that it uses to determine what is confidential and what is not. OCC has provided no standard that DE-Ohio can use as a guide. Under these circumstances, DE-Ohio has come to presume that OCC will attempt to make public every document that it gives to OCC.

There is simply no reason why OCC, like every other party, cannot agree to maintain the confidentiality of properly marked information during the discovery and hearing process. Confidential information provided through a protective agreement during discovery is admissible into evidence and usable during litigation while under seal. Parties are not disadvantaged by this process.

Finally, as previously discussed, none of the information transmitted through discovery is "public record" because it is not "record" pursuant to R.C. 149.011.[17] Only discovery submitted by a party at hearing and accepted as evidence may be "record" pursuant to R.C. 149.011 because such information may serve to document the Commission's decision.[18]

III. The Commission has the statutory authority to protect confidential information.

Regardless of the status of information as "public record" the Commission has express statutory authority pursuant to R.C. 4901.16 and R.C 4903.22.[19] Revised Code Section 4901.16 permits the Commission to protect confidential information obtained during the course of an investigation. The Commission has long recognized its authority pursuant to R.C. 4901.16 holding:

> *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.*[20]

Similarly, the Commission promulgated O.A.C. 4901-1-24 that permits it to grant protective orders consistent with protective orders permitted under the Rules of Civil Procedure, pursuant to its authority under R.C. 4901.13.[21]

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17 *Ex. Rel. MCCleary v. Roberts*, 88 Ohio St. 3d 365, 367-368, 725 N.E.2d 1144, 1146-1147 (2000); Ohio Rev. Code Ann. § 149.011 (Baldwin 2007).

18 *Id.*

19 Ohio Rev. Code Ann. §§ 4901.16, 4903.22 (Baldwin 2007).

20 *In re CG&E's Compliance With Natural Gas Pipeline Safety Standards*, Case No. 00-681-GA-GPS (Entry on Rehearing at 5-6) (July 28, 2004) (emphasis added).

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

Relevant to the Commission's authority to adopt rules governing its proceedings, including protective orders, is R.C. 4903.22.[22] That section requires the Commission, subject to appropriate discretion, to adhere to the Rules of Civil Procedure and Evidence.[23] 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.*"[24]

The Ohio Supreme Court agrees that the Commission should follow the Civil Procedure Rules. In the Court's remand order to the Commission in Case No. 03-93-EL-ATA *et al.*, the Court, citing R.C. 4903.22, held that "[t]he present rules of the public 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.*"[25] In order to permit reasonable discovery among parties 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 for the same reason. Therefore, the Commission has the authority, in a contested proceeding, to grant a motion for protective order such that:

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22 Ohio Rev. Code Ann. § 4903.22 (Baldwin 2007).

23 Ohio Rev. Code Ann. § 4903.22 (Baldwin 2007).

24 *In re Telecom Alt. Reg. Rules*, Case No. 92-1149-TP-COI (Finding and Order at ¶ F(3)) (January 7, 1993) (emphasis added).

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

> (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
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> (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.[26]

In short, the Commission and the Attorney Examiners have the clear statutory authority to protect from release DE-Ohio's confidential information sought by OCC through discovery in these proceedings.

Further, and of particular significance to OCC's motion to compel in these proceedings, in Case No. 92-1149-TP-COI the Commission recognized that:

> *Pursuant to Section 4901.16, Revised Code*, any information acquired by the staff during the course of its investigation *shall not be divulged* except in its report to the Commission or when called upon to testify. If there would be a request for such information, we anticipate that the *parties would enter into appropriate protective agreements rather than engage in a formal discovery dispute*. However, *if the matter was not resolved, the current Commission rules provide for a process in which a LLEC could request a protective order*, at which point the LLEC would have the burden to demonstrate that the information was proprietary.[27]

DE-Ohio has no objection to the process described by the Commission in Case No. 92-1149-TP-COI. DE-Ohio has attempted to reach a reasonable protective agreement with OCC but has been unable to do so because OCC refuses to agree to protect any information submitted to it during discovery, even where such information is protected by federal law or state law including R.C. 4901.16, O.A.C. 4901-1-24 or by Commission order. While OCC does not release all confidential information transferred to its

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[26] OHIO ADMIN. CODE ANN. § 4901-1-24 (Baldwin 2007).

[27] *In re Telecom Alt. Reg. Rules*, Case No. 92-1149-TP-COI (Finding and Order at ¶ B(5)) (January 7, 1993) (emphasis added).

possession, DE-Ohio cannot predict what information OCC will seek to release. Under such circumstances, DE-Ohio must either refuse to transfer confidential information to OCC to protect such information or seek protective orders during the discovery process of its proceedings for each piece of confidential information. However, to remedy this situation, DE-Ohio respectfully requests that the Commission deny OCC's motion to compel and suggest that OCC enter a reasonable protective order with DE-Ohio such as the protective order or stipulation that DE-Ohio has offered to OCC.

IV. The options available to resolve OCC's motion to compel.

DE-Ohio, OCC, and the Commission have several choices: (1) DE-Ohio and OCC can agree to a protective agreement that will protect DE-Ohio's confidential information from disclosure to the public by OCC, absent a request for the information by a member of the public; (2) DE-Ohio can file a Motion for Protective Order for every piece of confidential material that OCC requests before it turns material over to OCC so that the Commission may rule upon the confidentiality of the material prior to any determination of its relevancy to these cases; or (3) the Commission may issue an order that protects DE-Ohio's confidential material. DE-Ohio is content with either the first or third option but asserts that option number two would be a waste of all stakeholders' time and resources.

OCC's proposed solution, thus far unacceptable to DE-Ohio, is that DE-Ohio must sign a protective agreement that permits OCC to "utilize, refer, or copy any Protected Materials in such manner, *other than in a manner provided for herein, that might require disclosure* of such material."[28] In other words, OCC asks the Commission

[28] *In re DE-Ohio's FPP*, Case No. 07-723-EL-UNC, (OCC's Motion to Compel at Attached Protective Agreement at 3) (August 30, 2007) (emphasis added).

to compel DE-Ohio to sign a protective agreement that expressly gives OCC the discretion to seek the public release of the protected material. Such an agreement provides no protection at all and DE-Ohio might as well file a motion for protective order for each confidential document.

CONCLUSION:

For the reasons discussed above DE-Ohio requests that the Commission deny OCC's motion to compel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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