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PUCO

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)
The Cincinnati Gas & Electric Company)
To Modify its Non-Residential Generation)
Rates to Provide for Market-Based Standard) Case No. 03-93-EL-ATA
Service Offer Pricing and to Establish a Pilot)
Alternative Competitively-Bid Service Rate)
Option Subsequent to Market Development)
Period.)

In the Matter of the Application of The)
Cincinnati Gas & Electric Company for)
Authority to Modify Current Accounting) Case No. 03-2079-EL-AAM
Procedures for Certain Costs Associated)
with The Midwest Independent Transmission)
System Operator.)

In the Matter of the Application of The)
Cincinnati Gas & Electric Company for)
Authority to Modify Current Accounting) Case No. 03-2081-EL-AAM
Procedures for Capital Investment in its) Case No. 03-2080-EL-ATA
Electric Transmission and Distribution)
System And to Establish a Capital)
Investment Reliability Rider to be Effective)
After the Market Development Period.)

**MEMORANDUM CONTRA DUKE ENERGY OHIO'S MOTION FOR
CONTINUATION OF THE PROTECTIVE ORDER
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION AND FACTS

The Office of the Ohio Consumers' Counsel ("OCC") hereby responds to Duke Energy Ohio's ("Duke Energy's") Motion for Continuation of the Protective Order ("Motion"), filed on September 17, 2007. The information that is the subject of the Motion has remained under a protective status pursuant to orders issued on May 13, 2004 and May 2, 2006.

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II. LAW AND ARGUMENT

A. The Motion For Continuation Is Not Properly Supported.

The Motion does not satisfy the Public Utility Commission of Ohio's ("Commission" or "PUCO") requirements pursuant to Ohio Adm. Code 4901-1-24(F):

A party wishing to extend a protective order beyond eighteen months shall file an appropriate motion at least forty-five days in advance of the expiration date of the existing order. The motion shall include a *detailed discussion* of the need for continued protection from disclosure.¹

The Motion does not provide a "detailed discussion of the need for continued protection from disclosure," instead relying heavily upon the Commission's initial approval of a protective order.² The Motion rests its argument on an extremely short narrative that describes the information as "projected market pricing information dating from 2003"³ and a conclusory representation by Duke Energy counsel that the protection granted thus far by the Commission "remains as appropriate now as it did when first granted."⁴ These simple statements fail to provide the detail that is required pursuant to Ohio Adm. Code 4901-1-24(F) to support an extension of a protective order.

Movants bear the burden to prove that the Commission should keep the information from the public. Pursuant to Ohio Adm. Code 4901-1-27(B)(7)(e), "the party requesting such protection shall have the burden of establishing that such protection is required." The

¹ Emphasis added.

² See, e.g., Motion at 6 ("appropriate now as it did when first granted").

³ Motion at 3.

⁴ Id. at 6.

Movants have not provided sufficient detail and proof that all the information should be protected for an additional period of time.

The Motion fails to specify the time period over which Duke Energy seeks the extension. Time is an important element in the protection of document, and is especially important to the Motion that seeks a third time period (i.e. a second extension) over which information would be extended. The Ohio Supreme Court has adopted the following factors in analyzing a trade secret claim:

(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.⁵

As to the fourth factor adopted by the Ohio Supreme Court, the information may not have the same “value to the holder in having information as against competitors” after two consecutive periods of protection, and may have lost all value from being outdated as time has progressed. As Duke Energy states, the information “dat[es] from 2003.”⁶ Additional protection, if any, should be limited in time.

B. Duke Energy’s New Theory Regarding Public Records Should Be Rejected.

The Motion contains scant argument to meet the PUCO’s rule for continuing protection, and Duke Energy has inappropriately taken the opportunity of the Motion to seek

⁵ *Besser v. Ohio State University* (August 9, 2000), 89 Ohio St. 3d 396, 399-400 (“*Besser*”).

⁶ Motion at 3.

a PUCO declaration about the meaning of Ohio's Public Records Act.⁷ The Commission should either reject Duke's position or decline to resolve it.

The Commission has previously refused to state the legal procedure under which another government agency could release information in response to a public records request. In an order issued in 2006, the Commission specifically held that "the establishment of such a procedure, binding upon another government agency, is beyond . . . [the PUCO's] statutory authority."⁸ Furthermore, an Attorney Examiner recently refused to "limit the lawful exercise of OCC's judgment in response to a future public records request."⁹ In any event, the Commission should not issue any ruling on Ohio's Public Records Law that would be applicable to any state agency other than the PUCO since the PUCO lacks jurisdiction to resolve public records issues that involve the exercise of independent judgment by other state agencies. That jurisdiction is reserved for courts, including the Supreme Court of Ohio, under R.C. 149.43(C)(1).

Duke Energy argues that the PUCO does not need to concern itself over public records requests for the information at issue since the information provided by the Company cannot, in Duke Energy's opinion, constitute a "record" pursuant to R.C. 149.011.¹⁰ Duke Energy asks the Commission to rely upon the Company's legal theory to refuse all potential

⁷ Duke Energy has argued its legal theory that documents provided to public agencies in the course of litigation are not "records" in other recent pleadings. See, e.g., *In re FPP and SRT Filings*, Case No. 07-723-EL-UNC, Duke Energy Memorandum Contra OCC Motion to Compel Discovery at 2-3 (September 17, 2007). The OCC's counter argument is contained in its Reply filed on September 27, 2007. Duke Energy's argument has not been favorably ruled upon by the Commission.

⁸ *In the Matter of the Review of Chapters 4901-, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685, Order at 33 (December 6, 2006).

⁹ *In the Matter of the Application of United Telephone Company of Ohio d/b/a Embarq For Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 49001:1-4, Ohio Administrative Code*, Case No. 07-760, Entry at 6 (August 10, 2007).

¹⁰ Motion at 4.

requests by the public for documents. Duke Energy presents a rather cavalier approach to a state agency's independent exercise of judgment under Ohio's Public Records Act. Duke Energy is not, of course, a state agency that carries a duty to the public under the law and is not a state agency that can be sued in court under R.C. 149.43(C)(1) for violations of the law.

Duke Energy relies upon the R.C. 149.011 definition of "records":

"Records" includes any 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.

The Company states that information provided to the Commission in the course of an active case is not a "record" because the information was not "created or received by the Commission 'to document the organization, functions, policies, decisions, procedures, operations, other activities' of the Commission."¹¹ The issue is not, however, whether the information was "created or received by the Commission" -- i.e. according to the *intent* of the Company or the Commission -- to be a "record" subject to Ohio's Public Records Law. The issue is whether the information *is* a record for purposes of Ohio's Public Records Law.

The Company acknowledges that the information in the possession of the Commission was transferred as the result of the PUCO's regulatory oversight function.¹² It is difficult to imagine, therefore, that the information (taken alone, or in combination with other PUCO documents such as entries and orders) does not record the activities of the

¹¹ Id. at 4.

¹² Motion at 3 ("gathered as part of an investigation").

Commission. The definition of “record” is broad, as shown by the inclusion of “other activities in the office” in its definition, which must be evaluated regarding any particular public records request.

Duke Energy states that “DE-Ohio’s position is supported by . . . *Besser*,” but is vague regarding the position the Company claims is supported by that decision. *Besser* does not support Duke Energy’s new legal theory that information provided to public agencies in the course of PUCO cases are not subject to public records requests because they are not “records.” Duke Energy’s new legal theory is the subject of the heading on the section in which Duke Energy cites *Besser*. Duke Energy’s quote from *Besser*,¹³ however, supports another -- this time mainstream -- legal proposition. *Besser* states that a document that contains trade secret information remains trade secret when provided to a governmental agency.¹⁴ The information submitted to the Commission (and over which the Company seeks its second extension of a protective order) is a record, but only a public record subject to disclosure under Ohio’s Public Records Act to the extent that its contents are not trade secrets.¹⁵

Duke Energy is vague in its arguments in hopes that it can persuade the Commission that documents provided by the Company in proceedings can be completely shielded from public view. Transferring documents to a government agency, in and by itself, does not

¹³ Id. at 5.

¹⁴ Duke Energy implicitly recognizes the correct interpretation of *Besser* since its short application of that case to the instant proceeding deals with trade secrets, not whether the documents are “records.” Id. at 6 (first full paragraph).

¹⁵ “Public record” is defined in R.C. 149.43(A), and does not mean “[r]ecords the release of which is prohibited by state or federal law.” R.C. 149.43(A)(1)(v). That exclusion means that trade secret information lies outside the bounds of a “public record.” The loss of trade secret status (e.g. after the passage of enough time) places the document into the “trade secret” category.

change the nature of the documents.¹⁶ However, transferring documents containing non-confidential information -- or documents that lose their confidential status while held by the Commission -- does not render the documents confidential. Documents that contain information that is embarrassing or that buttress an argument other than that supported by Duke Energy are not entitled to the "trade secret" designation simply because they are transferred to a public agency as part of a proceeding.

Duke Energy attempts to divert attention away from the main subject of its Motion: Is the information over which Duke Energy seeks to extend a protective order "trade secret" at this point in time? The Commission must make that determination, but it should reject Duke Energy's new legal theory about public records in PUCO cases.

III. CONCLUSION

For the reasons listed above, the Duke Energy has not complied with the Commission's rules regarding motions to continue protective treatment over the information in question. The Company's arguments that protection should be provided for all time, rather than for a limited time, should be rejected.

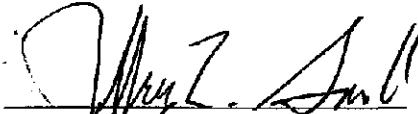
Duke Energy's novel legal theory regarding what constitutes a record for purposes of complying with Ohio's Public Records Act should also be rejected. Duke Energy presents a cavalier approach to a state agency's independent exercise of judgment under Ohio's Public Records Act. Duke Energy is of course not a state agency that carries a duty to the public under the law and is not a state agency that can be sued in court under R.C.

¹⁶ Id at 5.

149.43(C)(1) for violations of the law. The Commission should take a thoughtful approach to the subject of public records requests.

Respectfully submitted,

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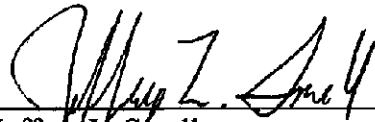


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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Memorandum Contra Motion for Continuation was served electronically and via U.S. Mail, prepaid, this 5th day of October, 2007.


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