

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY

The Commission finds:

- (1) On November 22, 2006, the Supreme Court of Ohio issued its decision in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 300, 2006-Ohio-5789, remanding certain issues to the Commission for further consideration in Cases 03-93-EL-ATA, 03-2079-EL-AAM, 03-2081-EL-AAM, AND 03-2080-EL-ATA. The additional, above-captioned cases were subsequently consolidated with the remanded proceedings.
- (2) In the course of the Commission's remand proceedings, certain information, including side agreements between parties to these proceedings, was obtained through discovery and was sought, by several of the parties to the proceedings, to be maintained as confidential. Thus, with regard to those side agreements and certain other information, numerous motions for protective orders were filed by various parties.
- (3) On October 24, 2007, the Commission issued its order on remand in these consolidated proceedings. In our order, we discussed the motions for protective orders at great length, ultimately finding that certain of the information in the documents in question is within the definition of a trade secret and should, therefore, be the subject of a protective order:

It is clear to us, from our review of the information, that at least certain portions of the documents would indeed meet this portion of the definition of trade secrets. We

agree with the parties seeking protective treatment that certain portions of the material in question have actual or potential independent economic value derived from their not being generally known or ascertainable by others, who might derive economic value from their disclosure or use. Specifically, we find that the following information has actual or potential independent economic value from its being not generally known or ascertainable: customer names, account numbers, customer social security or employer identification numbers, contract termination dates or other termination provisions, financial consideration in each contract, price of generation referenced in each contract, volume of generation covered by each contract, and terms under which any options may be exercisable.

Order on Remand at 15.

- (4) As a part of that order, the Commission directed Duke Energy Ohio, Inc., (Duke) to work with the parties to the side agreements to prepare and file "a redacted version of the confidential information attached to the prefiled testimony of Ms. Hixon . . ." After that filing, each other party to the proceedings was to redact and file all other sealed documents that such party had previously filed with the Commission. Order on remand at 17. All redactions were to be limited to that information found by the Commission to be trade secret as outlined above in finding (3).
- (5) On December 7, 2007, Duke filed its newly redacted documents. On January 23, 2008, Duke and its affiliates filed new redactions of the other documents that they had filed under seal, as did the office of the Ohio Consumers' Counsel (OCC). No other party filed the required new redactions. Following OCC's filing, various parties disputed OCC's assertions that Duke's redactions had failed to follow Commission directives. In addition, on February 13 and 14, 2008, Duke filed new versions of its proposed redactions of a number of documents previously included in its filings.
- (6) In addition to the sealed documents discussed above, certain other documents have been maintained under seal pursuant to an attorney examiner entry issued on May 13, 2004. That protective order was

continued by entry of May 2, 2006. On September 17, 2007, Duke moved, once again, to continue the protective order. Duke asserts that the documents covered by its motion are still proprietary and that they are not actually "records" under the applicable definition. OCC filed a memorandum contra Duke's motion, on October 5, 2007, arguing that the motion was not properly supported and disagreeing with Duke's definitional argument. Duke replied on October 9, 2007, providing additional support for its need for continued confidentiality and restating its argument that documents provided to the Commission, but not used by the Commission in reaching its decision, are not public records.

- (7) Duke asserts, with regard to the definition of "records" in Section 149.011, Revised Code, that the documents in question are not records because they were not received by the Commission "to document the organization, functions, policies, decision, procedures, operation, or other activities" of the Commission. Duke contends that a decision of the Supreme Court of Ohio supports this analysis through its finding that proprietary documents retain their confidential nature when they come into the possession of a public office. *State ex. Rel. Besser v. Ohio State University*, 87 Ohio St.3d 535 (2000).
- (8) We disagree with Duke's reasoning. It is certainly true that confidential documents retain that nature even when they come into the possession of the Commission, as held by the court. However, that conclusion does not support a holding that documents that are filed with the Commission are not "records" simply because they did not form the basis of a Commission opinion. Duke made the determination, in 2004, that it wished to file these documents, which were responses to discovery requests. Such a filing was not required by Commission rules. Duke's motion for a protective order referenced a dispute between Duke and OCC concerning the handling of confidential documents. Duke's filing was intended to use the Commission's protective order as a part of the resolution of that dispute. In granting the requested protective order, the attorney examiner also resolved the dispute concerning terms of the parties' confidentiality agreement. Thus, even if Duke's argument regarding the definition of "records" in Section 149.011, Revised Code, is correct, which we are not here determining, it would not result in a conclusion that these documents did not document the decisions of

the Commission. They did document the background of the examiner's granting of a protective order.

- (9) The Commission has completed an exhaustive review of all newly proposed redactions and, where parties did not file new redactions, the redactions originally proposed. The Commission's review also included the documents covered by the May 13, 2004, protective order and all other documents filed under seal in these consolidated cases. With regard to Duke's motion to extend the protective order that was first granted on May 13, 2004, we find that only a limited portion of the information in those documents remains a trade secret. With regard to documents filed under seal since the remand of these proceedings, many of the redactions proposed by the parties do not comply with our order regarding the categories of information that would be deemed a trade secret. Parties should understand that their actions caused the expenditure of substantial additional hours of work by numerous Commission employees. Should such behavior be repeated, the Commission may consider the imposition of civil forfeitures under Section 4905.54, Revised Code.
- (10) We have created a new, Commission-redacted version of each document that was filed under seal in these consolidated proceedings. The redactions prepared by the Commission follow the general instructions delineated in the order on remand, with some important exceptions. Information that is or already has been made public cannot be treated as a trade secret under Section 1333.61, Revised Code. Thus, in a situation in which information might have fallen within the categories outlined in the order on remand but was released in a public filing by one of the parties, we will not protect that information where it clearly appears in other places in the same document or in other documents.
- (11) In addition, we note, in this regard, that an e-mail, outlining the nature and certain details of the side agreements, was filed publicly by Duke and that such filing was discussed in a Cincinnati newspaper. As a result of that public release, the termination dates of the side agreements, the fact that the side agreements provide for the refund of riders, and the fact that the options agreements are full requirement contracts can no longer be considered trade secret information and, therefore, will not be treated as confidential. In addition, that e-mail referenced the level of financial impact to

Duke's affiliate that resulted from the option agreements. That information is, therefore, also no longer confidential.

- (12) We would also point out that some of the proposed redactions sought to treat, as trade secrets, categories and information that our order on remand did not allow to be so treated. We find that, under the circumstances in these proceedings, names of trade groups, names of employees, and names of attorneys (unless the attorney name makes it possible to identify a customer) are not trade secrets. In addition, we find that, in these circumstances, items such as the payment of legal fees should not be treated as trade secrets. These items would not fall within the definition of a trade secret in Section 1333.61(D), Revised Code, as we discussed in our order on remand.
- (13) Based on our analysis of the motions for protective orders, as discussed in the order on remand, and on our comprehensive review of the documents themselves, the motions for protective orders are granted in part and denied in part.
- (14) The Commission-redacted documents will be filed publicly in these dockets on July 1, 2008, unless an application for rehearing is filed under Section 4903.10, Revised Code. Parties to these proceedings may contact the attorney examiners in order to receive an electronic copy (on a computer disk) of the documents, with highlighting to indicate the Commission's proposed redactions, which computer disk should be available no later than Friday, May 30, 2008. The parties should understand that this copy of the information must be treated under the same confidentiality restrictions that apply to any previous copies or versions of the information that they have previously obtained, regardless of the medium in which, or the party from whom, such information was conveyed. Therefore, the disks, and the information thereon, are not to be copied or transmitted in any way to any other person or entity. As has been the case through the remand process with regard to those parties who have not entered into confidentiality agreements with Duke or its affiliates relating to this information, such information is also not to be shared by any counsel with his or her client or with any other person or entity.
- (15) If any party, after reviewing the Commission's redactions, chooses to file an application for rehearing, each asserted error should be specifically referenced and explained. For this purpose, the

Commission-redacted documents have been arranged on the disk in chronological order and all of the pages have been consecutively numbered at the top of the page. A table of contents, referencing Commission page numbers, has been prepared. Assignments of error should refer to such Commission page numbers and the specific text on such pages. Parties should not expect the Commission to locate additional similar instances of asserted errors. Assignments of error that do not use Commission page numbers or that are general in nature will be denied.

- (15) Rule 4901-1-24(F), Ohio Administrative Code, provides that, "[u]nless otherwise ordered, any order prohibiting public disclosure . . . shall automatically expire eighteen months after the date of its issuance, and such information may then be included in the public record of the proceeding. 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."
- (16) Although the information in question has been held in the confidential files of the Commission for some time, pending review, such information has now been fully reviewed. The Commission finds that it is appropriate in these particular circumstances to grant a protective order for a period lasting through January 1, 2011. Accordingly, on January 2, 2011, the Commission's docketing division shall release the information to the public. Any party seeking to extend the protection should file an appropriate motion, pursuant to the cited rule, setting forth in particularity what information should still be deemed to be a trade secret and why. Such a motion shall refer to the information in question based on the Commission page number, for reference purposes.

It is, therefore,

ORDERED, That the motions for protective orders be granted in part and denied in part. It is, further,

ORDERED, That the parties comply with the requirements of this entry. It is, further,

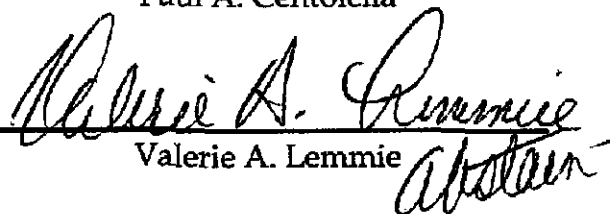
ORDERED, That a copy of this entry be served upon all parties of record in these proceedings.

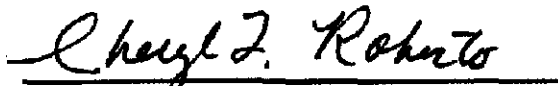
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Alan R. Schriber, Chairman

  
Paul A. Centolella

  
Ronda Hartman Fergus

  
Valerie A. Lemmie

  
Cheryl L. Roberto

SEF/JWK:geb

Entered in the Journal  
MAY 28 2008



Renee J. Jenkins  
Secretary