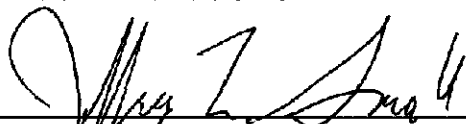


information that is subject to the existing protective order has been released to the public as part of an action in federal court. This information should, therefore, be released in the PUCO's docket after the Commission modifies the existing protective order.

The reasons for granting this Motion to Modify Protective Order are set forth in the accompanying Memorandum in Support.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



Jeffrey L. Small, Counsel of Record

Ann M. Hotz

Larry S. Sauer

Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

Telephone: 614-466-8574

E-mail: small@occ.state.oh.us

hotz@occ.state.oh.us

sauer@occ.state.oh.us

**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

MEMORANDUM IN SUPPORT

I. INTRODUCTION

On October 1, 2008, the Public Utilities Commission of Ohio (“PUCO” or “Commission”) issued its October Entry regarding public access to information that accumulated under a protected status over the years of litigation in the above-captioned cases. The October Entry addressed the Commission’s decision in the Order on Remand that certain information from the above-captioned cases should be withheld from public scrutiny. The October Entry also addressed the OCC’s pleading in which the OCC informed the PUCO that information protected by the PUCO in the Order on Remand had already been released to the public as part of a wrongful discharge case that was pending before the Hamilton County Court of Common Pleas.

An important component of the ruling in the Order on Remand dated October 24, 2007, is the treatment of side deals. In the Order on Remand, the Commission identified only eight items that it believed met the two-prong test of “trade secret” under R.C. 1333.61(D). The Commission ordered:

That, regarding side agreements and documents discussing such side agreements, customer names, account numbers, and customer social security or employer identification numbers, contract termination date or termination provisions, financial consideration for each contract, price or generation referenced in each contract, and volume of generation covered by each contract shall all be deemed trade secret information and shall be maintained on a confidential basis under protective orders for a period of eighteen months from March 19, 2007.³

At an earlier point in the Order on Remand, the Commission Order on Remand also stated that “terms under which any options may be exercisable” should be redacted.⁴ These items are repeated in an entry dated May 28, 2008.⁵

On the subject of the redaction of documents, the Entry dated May 28, 2008, explains that the release of documents to the public means that the information is not a trade secret.⁶ This subject was again discussed in the first Entry on Rehearing whereby the Commission rejected efforts by the Duke-affiliated companies to keep information concealed in the PUCO’s files that had already been released to the public.⁷ “[T]he Commission agrees with OCC that information already released in the proceeding is not trade secret.”⁸

The October 1, 2008 Entry, mentioned above in the OCC’s Motion to Modify Protective Order (“Motion to Modify”), restates the PUCO’s framework for adjusting its protective order to reflect the public release of information. The October Entry states that

³ Order on Remand at 44 (October 27, 2007).

⁴ Id. at 15.

⁵ Entry at 1-2, ¶(3) (May 28, 2008).

⁶ Id. at 4-5, ¶¶(10) and (11).

⁷ Entry on Rehearing at 2-4 (July 31, 2008).

⁸ Id. at 4.

if information has “been released to the public, [the PUCO] will not maintain a protective order prohibiting its release.”⁹ Some of the documents that are subject to the Commission’s protective order in these cases have also been used by private litigants before the United States District Court, Southern District of Ohio. Information that is covered by the PUCO’s protective agreement has been released in that federal case. The PUCO’s protective order should, therefore, be modified.

II. ARGUMENT: The Commission’s Protective Order Should be Modified Because the Commission’s Redactions Cover Information that is Available to the Public and Therefore Cannot Possibly be Considered “Trade Secret.”

A. Ohio Law Supports the Modification of the Protective Order.

The Ohio Supreme Court has addressed the test for protection from disclosure under Ohio’s Trade Secrets Law. R.C. 149.43 provides, the “state or federal law” exemption to Ohio’s Public Records Law, and has been considered by the Court in light of “trade secrets” allegations:

We have also 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.¹⁰

⁹ October Entry at 4, ¶(11) (October 1, 2008).

¹⁰ *Besser v. Ohio State University* (August 9, 2000), 89 Ohio St. 3d 396, 399-400.

From the foregoing analysis regarding the public nature of information, the fact that information has already been released to the public destroys any claim of “trade secret” status.

The Commission’s Entry dated May 28, 2008 recognizes that “information that is or already has been made public cannot be treated as a trade secret under Section 1333.61.”¹¹ The Entry on Rehearing contains essentially the same analysis.¹² The October Entry again states this treatment: “Where information that may previously have met the trade secret test has now been released to the public, we will not maintain a protective order prohibiting its release.”¹³ The October Entry also states that “any additional modifications to the protective order, due to any subsequent releases, should be addressed by motion.”¹⁴ The OCC has learned of additional releases, and herein proceeds by motion as directed by the Commission.

Instances where the Commission’s redactions cover information that has already been released to the public should be addressed by the PUCO under Ohio law, but should also be addressed to clarify the status of the information. No decision by the Commission that declares information “trade secret” can be, as a practical matter, effective in protecting information from public inspection that has been released elsewhere. However, the situation where the Commission declares information “trade secret” when it is available from other public sources can confuse matters.

¹¹ Entry at 4, ¶(10) (May 28, 2008).

¹² Entry on Rehearing at 4. (July 31, 2008).

¹³ October Entry at 4, ¶(10) (October 1, 2008).

¹⁴ Id.

B. The Commission's Protective Order Should be Modified to Recognize the Release of Information to the Public by the United States District Court, Southern District of Ohio.

Information regarding the option agreements that are part of the record in these cases before the PUCO was also filed in federal court without any protection from release to the public. The release is contained in the attachments to Plaintiffs' Motion for a Preliminary Injunction filed on September 18, 2008 in *Williams v. Duke Energy International, Inc.*, Case No. 1:08-CV-00046 (U.S. Dist. Ct., Southern Dist. of Ohio). Previously, regarding a wrongful discharge case filed by John Deeds before the Hamilton County Court of Common Pleas, the OCC brought to the PUCO's attention that more than one of the option agreements attached to the testimony of OCC Witness Hixon had been released to the public.¹⁵ As the October Entry states, "Duke concedes that, as a result of the Deeds order, 'all Original Direct Serve Contracts and the November Direct Serve Contracts were, indeed, revealed to the public.'"¹⁶ While Duke Energy previously stated that "exactly two such [option] contracts were released,"¹⁷ all the option agreements are contained in the public files of the United States District Court, Southern

¹⁵ OCC Application for Rehearing at 7 (September 2, 2008).

¹⁶ October Entry at 4, ¶(11) (October 1, 2008).

¹⁷ Id. at 5, ¶(11), summarizing Duke Energy's admissions in its Memorandum Contra dated September 12, 2008.

District of Ohio, as the result of a filing submitted a week after Duke Energy's filing at the PUCO.¹⁸

Documents in the case before the federal court were attached to Plaintiffs' Motion for a Preliminary Injunction that was filed on September 18, 2008.¹⁹ In recognition of the repeated filing of contracts in the above-captioned PUCO dockets, the documents attached to the pleading in federal court are not again attached to this pleading. The OCC expects the fact of the release of information will be undisputed, and can provide copies of the public documents to the PUCO in the OCC's subsequent reply pleading if this becomes necessary.²⁰ The Commission should modify its protective order and correspondingly release to the public pages 323-641 of the PUCO's numbered pages in their entirety. These are the pages that correspond to the documents available to the public from the federal courts that also continue to show redactions in the PUCO's electronic files after documents were released in response to the October Entry.²¹

¹⁸ *Williams v. Duke Energy International, Inc.*, Case No. 1:08-CV-00046, Plaintiffs' Motion for a Preliminary Injunction, Attachments (U.S. Dist. Ct., Southern Dist. of Ohio, September 18, 2008). The attachments identify the information as coming from "Case 1:008-cv-00046-EAS-MRA," documents 57-2 (185 pages) and 57-3 (158 pages). No redactions exist in the documents obtained by the OCC from the federal court. The documents attached to Plaintiffs' Motion for a Preliminary Injunction are those that are also attached to the testimony of OCC Witness Hixon in the above-captioned PUCO cases (i.e. the unredacted versions constituting part of OCC Ex. 2(A)). The attachments to OCC Witness Hixon's testimony that are duplicated in the documents available from the federal court are attachments 6, 8, 9, 10, and 17 (attachment 17 being a compilation of all the "option agreements" presented to the PUCO in the above-captioned cases).

¹⁹ *Id.*

²⁰ Duke Energy should be familiar with the case in federal court since Duke Energy International, Inc., Duke Energy, Inc., and Duke Energy Corp. are named defendants in the case. Furthermore, electronic versions of the documents can be retrieved from the federal court, and interested persons should be able to confirm the representations made in this pleading.

²¹ The documents released in federal court are those in Ex. 6 (pages 266-272 in the PUCO's numbering system), Ex. 8 (pages 277-281), Ex. 9 (pages 282-288), Ex. 10 (289-295), and Ex. 17 (pages 323-641). Only the documents in Ex. 17 contain redactions after the rulings in the October Entry.

The additional information that should be released by the PUCO is that contained within all of the “option agreements” that are contained in Attachment 17 to the testimony of OCC Witness Hixon. The corresponding “option agreement” information (e.g. parties to the agreements, the numbers of such agreements, and consideration in each) that appears elsewhere in the record (e.g. pleadings) should also be unredacted and that information should also be released to the public.²² References in materials submitted to the Commission in Phase II of the proceedings conducted in these consolidated cases should be included in the additional release of information to the public.²³

The Commission should no longer undertake, as part of its handling of documents in its possession, to withhold information that has been released elsewhere and is public.

III. CONCLUSION

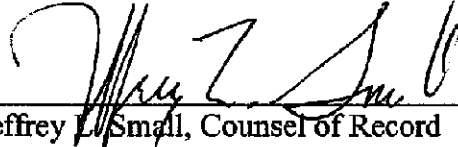
Pursuant to Ohio law and the consistent holdings by the Commission, the PUCO should modify its protective order in these cases. Documents that have been released elsewhere to the public cannot continue under a protected status in the PUCO’s files.

²² See, e.g., OCC Ex. 5(A) (text of testimony by OCC Witness Hixon). The testimony of OCC Witness Hixon should be unredacted from page 215 of the PUCO’s numbered pages to page 217 (i.e. pages 50-52 of OCC Ex. 5(A)). See also OCC Ex. 5(A), Attachment 7 (page 275 of the PUCO’s numbered pages) which contains terms that are restated in the option agreements. The OCC’s Initial Post-Remand Brief, Hearing Phase I, should be unredacted on the bottom half of page 1769 (page 55 of the Brief) and page 1780 (page 66 of the Brief). The OCC’s Reply Post-Remand Brief, Hearing Phase I, should be unredacted on page 1929 for footnote 122 (page 32 of the Reply) and on page 1932 for footnote 132 (page 35 of the Reply). Similar adjustments to the redactions should be performed on other submissions to the Commission, including those by other parties.

²³ See, e.g., OCC’s Initial Post-Remand Brief, Hearing Phase II, page 2934 (page 22 of the Brief); OCC’s Application for Rehearing regarding Phase II, page 3344 (page 25 of the Application).

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

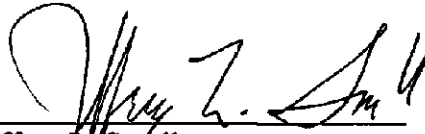


Jeffrey L. Small, Counsel of Record
Ann M. Hotz
Larry S. Sauer
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: 614-466-8574
E-mail small@occ.state.oh.us
hotz@occ.state.oh.us
sauer@occ.state.oh.us

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Motion to Modify Protective Order by the Office of the Ohio Consumers' Counsel* has been served upon the below-named persons (pursuant to the Attorney Examiners' instructions) via electronic transmittal this 13th day of March, 2009.



Jeffrey D. Small
Assistant Consumers' Counsel

cmooney2@columbus.rr.com
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com
sam@mwncmh.com
dneilsen@mwncmh.com
jclark@mwncmh.com
barthroyer@aol.com
mhpetricoff@vssp.com

mchristensen@columbuslaw.org
rocco.d'ascenzo@duke-energy.com
mdortch@kravitzllc.com
Thomas.McNamee@puc.state.oh.us
ricks@ohanet.org
anita.schafer@duke-energy.com

WTPMLC@aol.com
tschneider@mgsclaw.com
cgoodman@energymarketers.com
sbloomfield@bricker.com
TOBrien@Bricker.com
dane.stinson@baileycavalieri.com
korkosza@firstenergycorp.com

Scott.Farkas@puc.state.oh.us
Jeanne.Kingery@puc.state.oh.us