

FILE

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the five-Year Review of )  
Natural Gas Company Uncollectible ) Case No. 08-1229-GA-COI  
Riders. )

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MEMORANDUM CONTRA COLUMBIA GAS AND  
DUKE'S  
MOTIONS FOR PROTECTIVE ORDER  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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I. INTRODUCTION AND SUMMARY

The Office of the Ohio Consumers' Counsel ("OCC"),<sup>1</sup> on behalf of residential natural gas customers, submits this Memorandum Contra<sup>2</sup> Columbia Gas of Ohio, Inc. ("Columbia" or "COH") Motion for a Protective Order, filed on May 3, 2010 ("Columbia Motion"), and the Motion for a Protective Order, filed on May 5, 2010 by Duke Energy Ohio, Inc. ("Duke Motion"). Columbia and Duke are natural gas Companies under the jurisdiction of the Public Utilities Commission of Ohio ("Commission" or "PUCO").

Pursuant to Ohio Adm. Code 4901-1-24(D), Columbia claims that "information related to its customer segmentation process" is confidential.<sup>3</sup> Columbia argues that "threshold numbers for shut-offs for the different customer groups" might provide

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<sup>1</sup> OCC previously file Initial Comments on March 23, 2009 and Reply Comments on April 2, 2009.

<sup>2</sup> Ohio Adm. Code 4901-1-12(B).

<sup>3</sup> Columbia Motion at 1-2.

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customers with information that they could use to the detriment of Columbia because the customer would have little incentive to pay his bill on time.<sup>4</sup>

Duke also relies on Ohio Adm. Code 4901:1-24 (D), and claims that the allegedly confidential information “would enable customers to ascertain the manner in which Duke Energy Ohio plans, manages and operates its termination and payments procedures.”<sup>5</sup> Duke also claims that if “customers are aware of the termination procedures, they would then be able to determine how much of an unpaid bill to maintain and never be sent for termination due to an unpaid bill.”<sup>6</sup>

Both the Columbia Motion and the Duke Motion are deficient and the Public utilities Commission of Ohio (“PUCO” or “the Commission”) should deny the Motions and require Columbia and Duke to release the data so that the Northstar Consulting Group (“Northstar”) Report can be issued on the public record in its entirety.

## **II. THE APPLICABLE LAWS**

Ohio Adm. Code 4901-1-24 controls the process for motions for protection in PUCO proceedings. And the rule mandates that if a protective order is issued, then it “shall minimize the amount of information protected from public disclosure.”<sup>7</sup>

The PUCO has noted that “[a]ll proceedings at the Commission and all documents and records in its possession are public records, except as provided in Ohio’s public

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<sup>4</sup> Columbia Motion at 2.

<sup>5</sup> Duke Motion at 1, 3-4.

<sup>6</sup> Duke Motion at 4.

<sup>7</sup> Ohio Adm. Code 4901-1-24(D).

records law (149.43, Revised Code) and as consistent with the purposes of Title 49 of the Revised Code.”<sup>8</sup> Additionally, under R.C. 4905.07, “all facts and information in the possession of the public utilities commission shall be public, and all reports, records, files, books, accounts, papers, and memorandums of every nature in its possession shall be open to inspection by interested parties or their attorneys.” The PUCO also has noted that R.C. 4901.12 and R.C. 4905.07 “provide a strong presumption in favor of disclosure, which the party claiming protective status must overcome.”<sup>9</sup> The PUCO’s rules on protective orders recognize this presumption of disclosure. Ohio Adm. Code 4901-1-24(D) states, “Any order issued under this paragraph shall minimize the amount of information protected from public disclosure.”

Under R.C. 4901.12, all PUCO proceedings and all documents and records in the PUCO’s possession, are public records. Additionally, under R.C. 4905.07, “all facts and information in the possession of the public utilities commission shall be public, and all reports, records, files, books, accounts, papers, and memorandums of every nature in its possession shall be open to inspection by interested parties or their attorneys.” These statutes,<sup>10</sup> specifically applicable to the Commission, provide a strong presumption in favor of disclosure. These statutes also recognize exceptions to the Commission’s open records policy found in Ohio’s Public Records Law, R.C. 149.43.

R.C. 149.43 broadly defines public records to include records kept at any state office but excludes or exempts from the definition of public records those records “whose

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<sup>8</sup> *In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, Entry (November 25, 2003) (“93-487 Entry”) at 3.

<sup>9</sup> *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, Opinion and Order (October 18, 1990) (“89-365 O&O”), 1990 Ohio PUC LEXIS 1138 at \*5.

<sup>10</sup> See also Ohio Adm. Code 4901-1-24(D) and 4901-1-27(B)(7)(e).

release is prohibited by state or federal law.”<sup>11</sup> R.C. 149.43 prohibits the PUCO and other public agencies from releasing public documents that qualify as trade secrets.

Ohio has adopted the Uniform Trade Secrets Act, and has codified the definition of “trade secrets.” R.C. 1331.61(D) defines a trade secret as:

information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

- (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.

Thus, to qualify as a trade secret under R.C. 1331.61(D), information must be one of the types of information listed, must have “independent economic value” and must have been kept under circumstances that maintain its secrecy.

This Commission has emphasized the importance of the public records laws and has noted that “Ohio public records law is intended to be liberally construed to ‘ensure that governmental records be open and made available to the public ... subject to only a very few limited exceptions.’”<sup>12</sup> Furthermore, this Commission has established a policy

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<sup>11</sup> R.C. 149.43(A)(1)(v).

<sup>12</sup> 93-487 Entry at 3, citing *State ex rel Williams v. Cleveland*, 64 Ohio St.3d 544 (1992) and *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 518 (1997). See also *In the Matter of the Application of Cincinnati Bell Any Distance, Inc. for New Operating Authority*, Case No. 07-539-TP-ACE, Entry (June 1, 2007) at 1.

that confidential treatment is to be given only under extraordinary circumstances.<sup>13</sup>

Furthermore, the PUCO has held that it does not have the statutory authority to establish the legal procedure under which another government agency can release information.<sup>14</sup> Specifically, the Commission has noted that a protective order issued by the Commission only restricts the disclosure of the information by the Commission and its staff, and is not binding on any other governmental agency responding to a public records request.<sup>15</sup>

### III. ARGUMENT

At the outset, OCC notes that Columbia's Motion is deficient because Columbia acknowledges up front "the information contained in Northstar's Audit Report **may not rise to the level of trade secret.**"<sup>16</sup> To the extent that Columbia is not even claiming that the data is a trade secret, then protecting the data would conflict with Ohio's Public Records Law, R.C. 149.43.

Duke, however, contradicts Columbia and claims that the data is a trade secret.<sup>17</sup> But the Duke Motion does nothing to explain how the disputed data meets the statutory definition of a trade secret as spelled out in R.C. 1333.61 (D) (1) and (2), which mandates that the data must have the following qualities:

(1) It derives independent economic value, actual or potential, from not being generally known to, and not being

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<sup>13</sup> See *In the Matter of the Application of The Cleveland Electric Illumination Company for Approval of an Electric Service Agreement with American Steel & Wire Corp.*, Case No. 95-77-EL-AEC, Supplemental Entry on Rehearing (September 6, 1995) at 3.

<sup>14</sup> See *In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order (December 6, 2006) at 34.

<sup>15</sup> See *id.*

<sup>16</sup> Columbia Motion at 3 (emphasis added).

<sup>17</sup> Duke Motion at 4.

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.

Duke has made no argument as to how the data derives any independent economic value and more importantly it fails to make any claim whatsoever as to how any other persons can obtain economic value from its disclosure. The applicable law is that the PUCO's proceedings are to be transparent and open to the public, subject to certain limited exceptions. Columbia and Duke do not meet the limited exceptions in the law for having information closed from the public record.

In fact the only argument made by both Columbia and Duke is that individual customers may be able to "game" the system by knowing how the Companies handle terminations.<sup>18</sup> Certainly, what the Companies allege as "gaming" the system should not be encouraged. But the law does not allow for proceedings to be closed to the public for the reason Columbia and Duke postulate. And neither Company offers any proof whatsoever that consumers would use this information in order to be able to game the system -- they simply claim that it could occur.

In whatever manner the PUCO rules on the Motions, it should be careful to note that its ruling is not intended to alter any protective agreements between parties or contravene Ohio's Public Records Law. As alluded to earlier, in ruling on protected information the PUCO should not subject other state agencies to its rulings in violation of their duty to exercise independent judgment.<sup>19</sup> For example, in 2007 a utility moved the

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<sup>18</sup> Columbia Motion at 3; Duke Motion at 4

<sup>19</sup> See *In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order (December 6, 2006) at 34.

Commission to approve a protective agreement where OCC explained that the suggested language ran counter to Ohio law and public policy concerning a state agency's responsibility with regard to responding to a request for the release of public records.<sup>20</sup> The Attorney Examiner excluded the language that would have been at odds with the imperative for Ohio agencies to exercise their independent judgments, agreeing with OCC that the language at issue would "contravene the Ohio public records law and potentially purport to limit the lawful exercise of OCC's judgment in response to a future public records request."<sup>21</sup>

Such protective agreements provide terms for protecting alleged trade secrets while still making records available via discovery. Importantly, such protective agreements preserve opportunities for the signatories to ask the PUCO to determine if records alleged to be trade secrets are properly characterized as such or instead should be released to the public domain.

#### IV. CONCLUSION

The law in Ohio sets forth very specific requirements that must be met before information can be considered trade secret and thus eligible for protection as confidential information in PUCO proceedings. Neither the Columbia Motion nor the Duke Motion has met these requirements and as such the PUCO should deny their respective Motions and should direct Northstar to submit a complete un-redacted Audit Report on the public record.

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<sup>20</sup> See *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 4901:1-4, Ohio Administrative Code*, Case No. 07-760-TP-BLS, Entry (August 10, 2007) at 1-3.

<sup>21</sup> *Id.* at 6.

Respectfully submitted,

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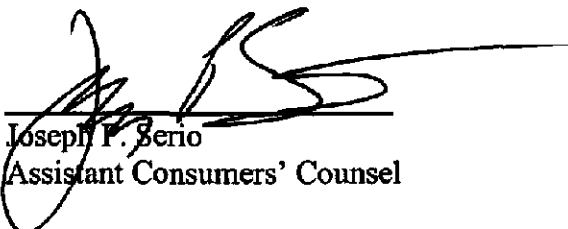
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### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Memorandum Contra Columbia's and Duke's Motion for Protective Order by the Office of the Ohio Consumers' Counsel* was served electronically and by first class U.S. Mail, postage prepaid, to the persons listed below on this 21st day of May 2010.

  
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