

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Five-Year Review of :
Natural Gas Company Uncollectable : Case No. 08-1229-GA-COI
Riders :

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**DUKE ENERGY OHIO, INC.'S REPLY TO
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S
MEMORANDUM CONTRA DUKE ENERGY OHIO, INC.'S
MOTION FOR PROTECTIVE ORDER**

On May 5, 2010, Duke Energy Ohio, Inc. (Duke Energy Ohio) moved this Honorable Commission for the entry of an Order, pursuant to Ohio Admin. Code § 4901-1-24, protecting from disclosure and placing under seal certain information contained within Northstar Consulting Group's (Northstar's) audit report, Chapter V, Section C, titled, "Key Practice Comparison" (Audit Comparison). Specifically, Duke Energy Ohio seeks to protect from disclosure those portions of the Audit Comparison that contain its termination and payment arrangements for its customers (termination and payment procedures), from which one could derive the figure at which a Duke Energy Ohio customer is effectively exempt from disconnection. On May 21, 2010, the Office of Ohio Consumers' Counsel (OCC) filed a Memorandum Contra in opposition to Duke Energy Ohio's Motion and to a very similar Motion for Protective Order filed by Columbia Gas of Ohio, Inc.

OCC argues that Duke Energy Ohio termination and payment procedures do not meet the definition of a trade secret and therefore are not entitled to protection from disclosure.¹ Under Ohio law:

¹ In the Matter of the Five-Year Review of Natural Gas Company Uncollectable Riders, Case No. 08-1229-GA-COI, Memo. Contra Columbia Gas & Duke's Mot. for Protective Order by OCC, at 6 (May 21, 2010).

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"Trade secret" means information, including . . . business information or plans, [or] financial information . . . 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.²

OCC does not dispute that the information Duke Energy Ohio seeks to protect is "the subject of efforts that are reasonable under the circumstances to maintain its secrecy."³ Indeed, Duke Energy Ohio closely guards the information contained in the Audit Comparison, as allowing it to become public knowledge would have a detrimental economic effect on Duke Energy Ohio. Instead, OCC appears argues that the information contained in the Audit Comparison is not a trade secret because it does not have independent actual or potential economic value from not being known to others.⁴ OCC's argument is not persuasive.

Duke Energy Ohio's termination and payment procedures clearly have potential, if not actual, economic value from not being generally known. As Duke Energy Ohio stated in its initial motion, if customers become aware of Duke Energy Ohio's termination and payment procedures, they will be able to determine the minimum amount they can pay on their past due bills without being subject to termination. This situation plainly represents lost dollars to Duke Energy Ohio and economic gains to those customers who choose to take advantage of the disclosed propriety information. Thus, Duke Energy Ohio's termination and payment procedures have potential, if not actual, economic value to Duke Energy from not being known to others who can obtain economic benefit from their use.

² Ohio Rev. Code § 1333.61(D).

³ See Case No. 08-1229-GA-COI, Memo. Contra Columbia Gas & Duke's Mot. for Protective Order by OCC, at 6.

⁴ *Id.*

Nonetheless, OCC argues that Duke Energy Ohio must offer definitive evidence that its customers will actually use this information to their benefit.⁵ The problem with OCC's argument is that definitive proof that others will use confidential information to their advantage can never be proffered. Instead, it is the laws of economics and self-interest that demonstrate others tend to use propriety, confidential information to their benefit. The only way to satisfy OCC's proposed trade secret test would be to provide evidence that someone outside of the organization that owns the confidential information in question has actually used it to his or her economic advantage. Of course, because information that is kept confidential necessarily means that it is protected from disclosure to others, there should never be any proof that someone outside of the protecting organization has put it to his or her economic advantage, so long as the protecting organization has properly protected it. In short, the only way to satisfy OCC's trade secret test would be to release the information and wait for it to be used to someone else's economic benefit. This is not the test Ohio Rev. Code § 1333.61(D) provides. Instead, the test is whether the information derives actual or potential value from not being known by others who "can" economically benefit from knowing that information. Duke Energy has proven that its termination and payment procedures meet this definition.

In sum, the termination and payment procedures information contained in the Audit Comparison meets the definition of a trade secret under Ohio Rev. Code § 1333.61(D). Information meeting this definition is protected from disclosure by numerous provisions of law, including Ohio's Trade Secrets Act (Ohio Rev. Code § 1333.61), Ohio's Public Records Act, (Ohio Rev. Code § 149.011), the federal Trade Secrets Act (18 U.S.C. § 1905), and the federal Freedom of Information Act (5 U.S.C. § 552(b)(4)). Therefore, this Commission is required by

⁵ *Id.*

law to protect Duke Energy Ohio's confidential, proprietary trade secret against public disclosure and should grant Duke Energy Ohio's Motion for a Protective Order.

Respectfully submitted,

 (by R.R. Persons
08/20/70 w/
permission)

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on the following parties this 20 day of May, 2010, by electronic mail.

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