



The Office of the Ohio Consumers' Counsel ("OCC") hereby responds to both the Movants' motion ("Motion") and their second pleading ("Pages Pleading") as provided for in the Attorney Examiner's Entry.<sup>2</sup> In this Memorandum, the OCC explains why information other than customer account numbers should be made public.

**II. THE LAW REGARDING CLAIMS OF CONFIDENTIALITY AND MOVANTS' REQUIREMENTS UNDER THE NOVEMBER ENTRY.**

Ohio Adm. Code 4901-1-27(B)(7)(e) requires that "[t]he party requesting such protection shall have the burden of establishing that such protection is required." Case law states "the inherent, fundamental policy of R.C. 149.43 ... to promote open government, not restrict it."<sup>3</sup>

Ohio Adm. Code 4901-1-24(D) requires of the PUCO that "[a]ny order issued under this paragraph shall minimize the amount of information protected from public disclosure."

The Commission stated in a 2004 case:

The Commission has emphasized, in *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 issued November 23, 2003, 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 records law (Section 149.43, Revise Code) and as consistent with the purposes of Title 49 of the Revised Code. 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 few very limited exceptions.' *State ex. rel. Williams v.*

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<sup>2</sup> Id.

<sup>3</sup> *Besser v. Ohio State University* (August 9, 2000), 89 Ohio St. 3d 396, 396.

*Cleveland* (1992), 64 Ohio St. 3d 544, 549, [other citations omitted].<sup>4</sup>

The Commission's Entry in the above-quoted case is as informative for its details as it is for the cited legal authority. Faced with demands for "wholesale removal of the document from public scrutiny,"<sup>5</sup> the Commission reviewed several documents and determined in each case how documents could be redacted "without rendering the remaining document incomprehensible or of little meaning...."<sup>6</sup>

Ohio's Public Records Law exempts from disclosure "[r]ecords the release of which is prohibited by state or federal law."<sup>7</sup> The Ohio Supreme Court has addressed the test for protection from disclosure under R.C. 149.43 under this "state or federal law" exemption.

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.<sup>8</sup>

Regarding the fourth factor adopted by the Ohio Supreme Court, information may not have the same "value to the holder in having information as against competitors" after the passage

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<sup>4</sup> *In re MxEnergy, Inc.*, Case No. 02-1773-GA-CRS *et al.*, Entry at (3) (September 7, 2004) (notations in original).

<sup>5</sup> *Id.* at 3.

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

<sup>7</sup> R.C. 149.43(A)(1)(v).

<sup>8</sup> *Besser* at 399-400.

of time, and may lose all value from being outdated as time progresses. Additional periods of protection of information as “trade secret” should be limited in time.

The Commission requires specificity from those that seek to keep information from the public record. Ohio Adm. Code 4901-1-24(D)(3) requires a movant for confidentiality to file a pleading “setting forth the specific basis of the motion, including a detailed discussion of the need for protection from disclosure....” The specificity required by law was missing from the Motion regarding information other than customer account information.

The November Entry reflects the absence of specificity in the Motion regarding information other than account information. The November Entry required the Duke-affiliated companies to “explain for any page which contains a redaction other than a customer account number, why that redacted information should continue to be held as protected by the Commission.”<sup>9</sup> The November Entry also provided, for all pages for which Movants sought continued redactions (including pages on which customer account numbers appear), that Movants “identify, by Commission stamped page number, any documents . . . that [they] believe[ ] should remain subject to the protective order by the Commission.”<sup>10</sup> Movants have failed to adequately explain their desire for additional redactions. They also failed to adequately identify pages for redaction according to the Commission’s numbering system.

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<sup>9</sup> November Entry at 2, ¶(5).

<sup>10</sup> Id.

### III. ARGUMENT

#### A. Protections Should Continue for Only Some Information.

Movants argue in their Motion that customer account numbers should remain protected, as directed by Ohio Adm. Code 4901:1-10-12(F)(1)<sup>11</sup> and the “state or federal law” exemption stated above, but Movants inconsistently asked the PUCO to “continu[e] the protections afforded to the information redacted . . . in these cases.”<sup>12</sup> The OCC does not oppose the extension of protection regarding customer account numbers. The Pages Pleading argues for the continuation of protections in addition to those provided for customer account numbers,<sup>13</sup> contradicting the statement in the Motion that the “information that remains protected in this case consists almost entirely – if not entirely – of customer account numbers.”<sup>14</sup> The requirements regarding specificity, stated in the November Entry, unearthed an important weakness in the Motion.

The OCC does not contest that load factors for Duke’s individual customers should also continue to be protected for some additional time.<sup>15</sup> Time is an important element in the protection of document, and is especially important to efforts to extend “trade secret” status. The Pages Pleading states that “[i]nformation regarding customer load factors tends to be remarkably stable over periods of time, and changes to those factors are dependent

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<sup>11</sup> Motion at 2.

<sup>12</sup> Id. at 1. The request is the same in Movants’ conclusion. Motion at 4 (“extend the protective order . . . for an additional forty-eight (48) months.”). However, immediately above the request stated in the conclusion to the Motion, the Duke-affiliated companies “ask . . . that the PUCO order . . . account numbers maintained under seal . . .” Motion at 4. The latter request is inconsistent with the statement in the Motion itself and the conclusion to the Memorandum in Support.

<sup>13</sup> Pages Pleading at 2-4.

<sup>14</sup> Motion at 2.

<sup>15</sup> Pages Pleading at 2-3.

largely upon customer initiated changes in operations and/or facilities.” The argument is not specific regarding the customers mentioned in the Commission’s records, and no effort at an empirical analysis is revealed in the Pages Pleading. However, the OCC does not contest the extension of protection at this time given the expected durability of individual customer load factors.

The Duke-affiliated companies do not state that Duke’s capacity positions are similarly durable. The Pages Pleading states that Duke’s “positions and costs are somewhat different than its 2005 and 2006 positions and costs. . . .”<sup>16</sup> Again, no effort at a more analytical presentation of Duke’s argument is provided in the Pages Pleading. The Commission should end the protection provided to Duke’s old capacity positions without further explanation for the need for continued protection.

The Duke-affiliated companies argue that documents that name “marquee customers” of an affiliated company should not reveal those customers. On its face, the information was released by the Duke-affiliated companies and was “known outside the business,” as that factor has been discussed by the Supreme Court of Ohio and quoted above.<sup>17</sup> The Duke companies advertise their commercial activities on a public “marquee,” and redaction of that information by the PUCO is pointless, confusing, and is not supported by Ohio law. The Commission should unredact information regarding “marquee customers” that already exists in the public domain.

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<sup>16</sup> Pages Pleading at 3.

<sup>17</sup> *Besser v. Ohio State University* (August 9, 2000), 89 Ohio St. 3d 396, 399-400. The OCC previously pointed out that the information had already been released to the financial community. OCC Memorandum Contra Duke’s Application for Rehearing at 4 (July 18, 2008).

Movants have not supported the extension of protections beyond the customer account and load factor information. Movants have not met their burden as stated in Ohio Adm. Code 4901-1-27(B)(7)(e) with respect to other information.

**B. The Duke-Affiliated Companies Have Not Adequately Identified Page Numbers.**

The Duke-affiliated companies have placed an unnecessary burden on the OCC and the Commission itself by failing to adequately identify the information that is the subject of their arguments. Most of the Commission-stamped pages cited by the Duke-affiliated companies as containing customer account information do not contain such information.<sup>18</sup> Pages on which such account information appears are not listed in the Pages Pleading.<sup>19</sup> The information should not be released, but the Duke-affiliated companies appear unwilling to undertake the careful work required by the November Entry.<sup>20</sup> Of course, any proper redaction of pages that contain customer account information should only redact the account information and not the remainder of the information that appears on those pages.

Customer load factors appear in one column located on page 1091, a page designated by the Duke-affiliated companies as containing this information. However, the

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<sup>18</sup> E.g., pages 14, 30, 47, 48, 49, 64, 78, 91, 104, 118, 132, 145, 174, 175, 190, 203, 219, 236, 250, 264, 288, 291, 305, and 333 do not appear to contain customer account information. Pages Pleading at 1 (under "Customer Account Numbers").

<sup>19</sup> Pages that contain customer account information include pages 100, 135, 162, 318, 321.

<sup>20</sup> The Commission previously stated that sanctions might be appropriate against Duke under these circumstances. The Commission warned about "actions [that] cause[ ] the expenditure of substantial additional hours of work by numerous Commission employees," stating that if "such behavior [is] repeated, the Commission may consider the imposition of civil forfeitures under Section 4905.54, Revised Code." Entry at 4, ¶(9) (May 28, 2008). Duke's customers should not bear the burden of Duke's failure to comply with the Commission's instructions.

other pages listed by the Duke-affiliated companies (i.e. 1092, 1093, 1107, and 1108) do not contain customer load factors.<sup>21</sup>

The Duke-affiliated companies state that pages 3071-3116 and page 3120 contain information regarding “Duke Energy Ohio’s own 2005 and 2006 capacity positions, costs, and similar information.”<sup>22</sup> Those pages contain a variety of documents, including a page from a deposition transcript.<sup>23</sup> The justification for this variety of documents is not generic, and the specific explanation for withholding release of the information has not been provided as required by the November Entry.<sup>24</sup>

Serious deficiencies exist in the identification of pages that the Duke-affiliated companies wish to protect. Unfortunately, the customer account information that should continue to be protected has not been adequately identified.

#### **IV. CONCLUSION**

The Duke-affiliated companies have failed to meet the requirements under law for continued protection of much of the information over which they seek continued protection. Their identification of pages, as required in the November Entry, was inadequate. Nonetheless, the customer account numbers that have yet to be properly identified by Duke should be identified for continued protection.

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<sup>21</sup> Pages Pleading at 2.

<sup>22</sup> Id. at 3.

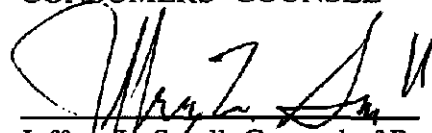
<sup>23</sup> Id. at 3, referring to page 3120 (transcript page).

<sup>24</sup> November Entry at 2, ¶(5).



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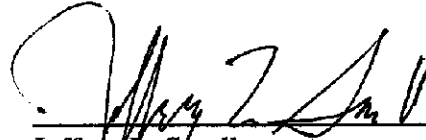
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the OCC's Memorandum Contra was served electronically on the persons listed on the service list shown below this 7<sup>th</sup> day of December 2010.



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