

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Consolidated Duke Energy Ohio, Inc. Rate	)	Case No. 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

**DUKE ENERGY-OHIO, INC., CINERGY CORP. AND  
DUKE ENERGY RETAIL SALES, LLC'S REPLY TO  
THE MEMORANDUM CONTRA MOTION TO EXTEND THE PROTECTIVE ORDER  
AND SPECIFIC IDENTIFICATION OF PAGES TO REMAIN UNDER PROTECTIVE  
ORDERS OF DUKE ENERGY, OHIO, INC., CINERGY CORP., AND DUKE ENERGY  
RETAIL SALES BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

**I. INTRODUCTION**

The Office of the Ohio Consumers' Counsel (OCC) opposes two of Duke Energy, Ohio, Inc. (Duke Energy Ohio), Cinergy Corp., and Duke Energy Retail Sales' (collectively, Movants') requests for the extension of the Protective Order that the Public Utilities Commission of Ohio (Commission) issued in this proceeding to protect certain information contained in various documents filed in this case in November of 2008.<sup>1</sup> Specifically, OCC argues that the marquee customer names of a Duke Energy Ohio unregulated affiliate, which is not a party to these proceedings, should not enjoy continued protection. OCC also contends that the Commission should not extend the Protective Order to maintain confidential Duke Energy Ohio's own capacity positions, costs, and related information. OCC does not, however, oppose the extension of the Protective Order to protect load factors for Movants' individual customers or to protect

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<sup>1</sup> See *Consolidated Duke Energy Ohio, Inc. Rate Stabilization Plan Remand and Rider Adjustment Cases*, Case No. 03-93-EL-ATA *et al.*, Entry ordering that the Commission's docketing division release, into the public domain, the redacted documents addressed by the Commission in these proceedings as referenced in this entry, at 1 (Nov. 10, 2008).

Movants' customer account numbers contained in the documents. Still, OCC contends that Movants have not properly identified the Commission's Bates numbers for the pages that contain customer account numbers and customer load factors that are entitled to continued protection.

Movants address the issues that OCC has raised below. In addition, Movants respectfully request that the Commission extend its Protective Order to additional Commission Bates pages identified herein, which Movants have determined still constitute trade secrets or which contain other confidential information that has been redacted.

## **II. ISSUES RAISED IN OCC'S MEMORANDUM CONTRA**

### **A. CUSTOMER ACCOUNT NUMBERS**

After reviewing the page numbers identified in its Specific Identification of Pages to Remain under Protective Orders, Movants have determined an inadvertent error was made in identifying those pages that contain customer account numbers. The documents that have been filed within this case contain up to four different sets of Bates numbers, including the Commission's own Bates numbers, Bates numbers from the *Williams* case, Movants' internal Bates numbers, and the Bates numbers of Movants' counsel. When identifying the pages that contain customer account numbers, Movants mistakenly referred to what appear to be Movants' own Bates numbers rather than the Commission's Bates numbers. Movants therefore provide the following corrected list of page numbers, using the Commission's Bates numbers to identify those pages which contain redactions that protect customer account numbers from public disclosure and which should remain protected: 100, 135, 162, 317, 336, 352, 353, 369, 370, 371, 386, 400, 413, 426, 440, 454, 467, 480, 496, 497, 512, 525, 541, 558, 572, 586, 600, 613, 627, 641, 642, 643, 646, 648, 796, 797, 1022, 1230, 1594, 1595, 1596, 1597, 1598, 1599.

For the reasons stated in its Motion to Extend the Protective Order and its Specific Identification of pages, Movants respectfully request that the Commission maintain redacted the customer account numbers on the foregoing pages for no less than four years after it issues an entry in response to Movants' Motion.

## **B. CUSTOMER GENERATION LOAD FACTORS**

As noted above, OCC does not oppose the extension of the Commission's Protective Order to continue to maintain the redactions for those documents which reveal Duke Energy Ohio's customer generation load factors. OCC argues, however, that only Commission Bates No. 1091 contains such information while Commission Bates Nos. 1092, 1093, 1107 and 1108 do not. Upon further review, Movants agree that Commission Bates No. 1092 does not contain customer load capacity information and may be released. Commission Bates No. 1107 and 1108, however, plainly provide customer load factors within the "Annual MWH" column on those pages. Commission Bates No. 1093 also contains load information, as revealed through capacity pricing information presented on that page. Because Commission Bates Nos. 1091, 1093, 1107 and 1108 all contain customer generation load factors and because OCC does not oppose the continued protection of such trade secrets, Movants respectfully request that the Commission grant their request for continued protection of the redacted information on these pages.

In addition, Movants respectfully request that the Commission continue to protect the capacity information redacted in Commission Bates Nos. 773, 774, 775, 780, 786, 788, 789, 790, 793, and 794, which Movants inadvertently failed to identify in their original Motion. These pages consist of two Cinergy Services, Inc. energy contracts. The customer names identified on these pages may be unredacted as they have been in other contracts. However, the capacity

terms in these contracts have never been released, and should be maintained confidential for the reasons stated above.

**C. DUKE ENERGY OHIO'S OWN CAPACITY POSITIONS, COSTS, AND RELATED INFORMATION**

OCC contends that Duke Energy Ohio's own 2005 and 2006 capacity positions, costs, and related information, which have been redacted from Commission Bates Page Nos. 3071–3116 and 3120, should be unredacted because Movants have not alleged that those capacity positions, costs, and related information are durable. OCC ignores, however, Movants' assertion that while Duke Energy Ohio's 2010 and 2011 capacity positions and costs are somewhat different than its 2005 and 2006 positions and costs, information concerning the 2005 and 2006 positions remains highly sensitive as it provides confirmation of "baseline" information to competitors and others attempting to extrapolate current information regarding Duke Energy Ohio's current positions and costs. Thus, even though there is some variation in Duke Energy Ohio's own capacity positions, those positions are quite comparable overtime, and have obvious economic value to competitive suppliers of electric services and are not readily ascertainable.

This Commission has previously recognized the confidentiality of the protected information. Duke Energy Ohio finds this information to be competitively sensitive, and continues to exercise efforts reasonable in the circumstances to protect that information from public disclosure. Duke Energy Ohio respectfully requests the continued protection of this information.

In addition, Movants have determined that Commission Bates Nos. 3125, 3126, 3130, and 3131 also contain redacted information that reveals Duke Energy Ohio's capacity positions and costs, which Movants inadvertently failed to identify in their original Motion. Movants

respectfully request that the Commission grant continued protection of these pages for the reasons stated above.

**D. THE "MARQUEE" CUSTOMERS OF AN UNREGULATED AFFILIATE OF THE DUKE FAMILY OF CORPORATE ENTITIES.**

OCC makes the same argument that it has made throughout these proceedings that the marquee customer names of Movants' unregulated affiliate, which is not a party to these proceedings, should be released because those names are "known outside the business."<sup>2</sup> To support this factual allegation, OCC cites to a prior memorandum contra it filed in this case which asserts that the marquee customer names of Movants' unregulated affiliate have been released to "the financial community."<sup>3</sup> The Commission, however, did not find OCC's position persuasive in its July 31, 2008, Entry on Rehearing, which held that:

OCC contends that [the marquee customer names] have already been revealed to "the financial community."

The Commission notes that, according to an affidavit attached to Duke's motion for a protective order on this information, the credit rating analysts to whom Duke released this information had agreed to keep it confidential. We find, like other customers' names, the identification of these is a trade secret.<sup>4</sup>

Commission Bates Nos. 2318, 2373, 2437, and 2535 continue to derive independent economic value from not being generally known and continue to be the subject of efforts that are reasonable under the circumstances to maintain their secrecy. OCC has provided no additional evidence beyond its prior allegations to support its contention that this information is "known outside the business." Therefore, on behalf of their affiliate entity, which has never been named

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<sup>2</sup> Case No. 03-93-EL-ATA *et al.*, Memorandum Contra Motion to Extend the Protective Order and Specific Identification of Pages to Remain under Protective Orders of Duke Energy Ohio, Inc., Cinergy Corp., and Duke Energy Retail Sales by The Office of the Ohio Consumers' Counsel, at 6 (Dec. 7, 2010).

<sup>3</sup> Case No. 03-93-EL-ATA *et al.*, Memorandum Contra Joint Application for Rehearing of the Duke-Affiliated Companies and Application for Rehearing of IEU by OCC, at 4 (July 17, 2008).

<sup>4</sup> Case No. 03-93-EL-ATA *et al.*, Entry on Rehearing, ¶ 13 (July 31, 2008).

a party to these proceedings, Movants respectfully request that the Commission continue to maintain the redactions on Commission Bates Nos. 2318, 2373, 2437, and 2535.<sup>5</sup>

### **III. MOVANTS' ADDITIONAL REQUESTS FOR CONTINUED PROTECTION OF DOCUMENTS**

#### **A. MOVANTS' REQUEST FOR CONTINUED PROTECTION OF DUKE ENERGY OHIO'S FUEL PURCHASE POWER CONTRACTS**

When filing their initial Motion, Movants neglected to request that the Commission's Protective Order be extended to ensure the continued protection of Duke Energy Ohio's Fuel Purchase Power (FPP) audit report contained in the documents filed in this case. The pages of this document which contain redactions are located at Commission Bates Nos. 3141, 3143, 3151, 3153, 3163, 3164, 3165, 3166, 3167, 3169, 3170, 3171, 3172, 3173, 3174, 3175, 3176, 3177, 3178, 3179, 3180, 3181, 3182, 3183, 3184, 3185, 3186, 3187, 3188, 3189, 3193, 3194, 3220, 3269, and 3270. In addition to its FFP audit report, additional pages containing redacted confidential Duke Energy Ohio FPP information are located at Commission Bates Nos. 1110, 2864, 2866, 2867, 2909, 2983, 3274, 3275, 3276, 3277, 3278, 3288, 3289, 3293, 3306,

Movants request that the Commission maintain the redactions on the foregoing pages because these redactions protect Duke Energy Ohio's trade secrets. The redacted FPP information from Duke the foregoing pages constitutes a trade secret because that information satisfies both prongs of the test of a trade secret:

- (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.<sup>6</sup>

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<sup>5</sup> In the event that the Commission should choose not to continue to protect this information, Movants respectfully request that their affiliate be provided notice of that decision and an opportunity to intervene in order to seek the continued protection of this information.

<sup>6</sup> Ohio Rev. Code §1133.61(D).

While the FPP audit report is from the last quarter of 2006, the report reveals information about Duke Energy Ohio's inventory levels, its coal positions, its procurement administration, specific coal supply agreements, SO<sub>2</sub> protocols, and EA trades. The additional pages identified (Commission Bates Nos. 1110, 2864, 2866, 2867, 2909, 2983, 3274, 3275, 3276, 3277, 3278, 3288, 3289, 3293, 3306) contain the redacted names of Duke Energy Ohio's FPP vendors as well as redacted references to the terms of Duke Energy Ohio contracts with those vendors, dating from 2002 through 2007. Thus, the FPP audit report and the additional pages identified in this section reveal Duke Energy Ohio's fuel buying patterns and positions, as well as the entities that Duke Energy Ohio deals with for fuel and prices for contracts. Duke Energy Ohio's buying patterns and its FPP vendors are stable overtime. Therefore, disclosure of the redacted information in the FPP audit report and the additional pages identified herein would provide Duke Energy Ohio's competitors with a great amount of insight into Duke Energy Ohio's current fuel buying patterns and its FPP positions, as well as the identity of entities that Duke Energy Ohio deals with for fuel. Furthermore, disclosure of this information would not provide any benefit to Duke Energy Ohio's customers.

This Commission has previously recognized the confidentiality of this protected information. Duke Energy Ohio finds this information to be competitively sensitive, and continues to exercise efforts reasonable in the circumstances to protect that information from public disclosure. Duke Energy Ohio respectfully requests the continued protection of this information.

**B. MOVANTS' REQUEST FOR CONTINUED PROTECTION OF DUKE ENERGY OHIO'S FUEL PURCHASE POWER CONTRACTS**

Finally, Movants request that portions of Commission Bates No. 645 remain subject to the Commission's Protective Order. Specifically, Movants request that the Commission

maintain redacted a Cingery Corp. vendor's Tax I.D. number and the vendor's bank account and routing number, which are contained on that page. This information constitutes confidential identifying information that is entitled to protection pursuant to Ohio Rev. Code §149.45.

#### **IV. CONCLUSION**

Pursuant to O.A.C. § 4901-1-24(F), Movants respectfully request the PUCO extend the protective orders issued in this case as detailed above. Due to the nature of the protected information and the probability that the information will retain significant value over an extended period of time, Movants further request that the Commission Order the information protected for an additional forty-eight (48) months.

Respectfully Submitted,

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## **CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served electronically upon parties, their counsel, and others through use of the following email addresses this December 29, 2010.

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Summary: Reply Duke Energy-Ohio, Inc., Cinergy Corp. and Duke Energy Retail Sales, LLC's Reply to the Memorandum Contra Motion to Extend the Protective Order and Specific Identification of Pages to Remain under Protective Orders of Duke Energy, Ohio, Inc., Cinergy Corp., and Duke Energy Retail Sales by the Office of the Ohio Consumers' Counsel electronically filed by Mr. Michael D. Dortch on behalf of Duke Energy Ohio, Inc. and Duke Energy Retail Sales, LLC and Cinergy Corp.