

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Consolidated Duke Energy Ohio, Inc. Rate)
Stabilization Plan Remand and Rider) Case Nos. 03-93-EL-ATA
Adjustment Cases.) 03-2079-EL-AAM
) 03-2080-EL-ATA
) 03-2081-EL-AAM
) 05-724-EL-UNC
) 05-725-EL-UNC
) 06-1068-EL-UNC
) 06-1069-EL-UNC
) 06-1085-EL-UNC

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ADDITIONAL COMMENTS
ON DUKE ENERGY, OHIO, INC., CINERGY CORP., AND DUKE ENERGY
RETAIL SALES' DECEMBER 29, 2010 SPECIFIC IDENTIFICATION OF PAGES
TO REMAIN UNDER A PROTECTIVE ORDER
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

On November 12, 2010, Duke Energy Ohio, Inc. ("Duke") and two of its affiliated companies (the "Duke-affiliated companies" or "Movants") filed for the extension for protections provided by the Public Utilities Commission of Ohio ("PUCO" and "Commission") regarding some of Movants' information that was filed in these cases. On November 30, 2010, Movants filed a second pleading. Movants' pleading responded to an Entry dated November 18, 2010 ("November Entry") whereby the PUCO (*sua sponte*) required the "specific identification of the documents Duke believes should remain subject to a protective order" and required Movants 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."¹

¹ November Entry at 2, ¶(5).

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On December 7, 2010, the Office of the Ohio Consumers' Counsel ("OCC") responded to both the Movants' motion ("Motion") and their second pleading ("Pages Pleading I") as provided for in the Attorney Examiner's Entry.² The OCC commented ("Comment Pleading") upon inaccuracies in Movants' identification of page numbers. The OCC also argued in its Comment Pleading that continued protection over other documents was either inappropriate or unsupported.

On December 29, 2010, following two requests for additional time to further study redactions,³ the Duke-affiliated companies submitted a new list of pages ("Pages Pleading II") over which they seek continued protection. Styled by Movants as a "Reply to the Memorandum Contra" submitted by the OCC, Pages Pleading II goes well beyond any reply to the OCC's Comment Pleading. Pages Pleading II corrects previously identified pages, expands the number of pages identified under certain categories, opens up new categories of pages for protection under the pretense that earlier pleadings contained arguments for protection, and requests additional protection for entirely new categories of documents without any connection with argument in a previously submitted pleading.

The substance of the Entry on November 18, 2010 was that Movants would identify documents they sought to continue protection over and that any other party would have seven days to respond. Since the Duke-affiliated companies went well outside the bounds of a reply in their Pages Pleading II, the OCC submits these

² Id.

³ Motions were filed by the Duke-affiliated companies on December 14, 2010 and December 21, 2010. In hopes of improved accuracy in the identification of documents, the OCC did not oppose an extension of the timeline for Movants to identify pages for continued protection

Additional Comments within seven days of Movants' latest pleading to abide by the framework set out in the Entry dated November 18, 2010.

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."⁴ Other relevant law is stated in the OCC's Comment Pleading.⁵

The November Entry reflects the absence of specificity in the Motion regarding Movants' desire to extend protections. 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."⁶ 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."⁷

In several respects, Movants have failed to adequately explain their desire for additional redactions, and they refer in their most recent submission to arguments in Pages Pleading I that do not contain argument in support of the desired redactions. For example,

⁴ *Besser v. Ohio State University* (August 9, 2000), 89 Ohio St. 3d 396, 396.

⁵ Comment Pleading at 2-4 (December 7, 2010).

⁶ November Entry at 2, ¶(5).

⁷ *Id.*

Pages Pleading I argued in favor of continued protection for five pages that Movants claimed held “customer load factors.”⁸ Under the heading “Customer Generation Load Factors,” Movants claim they supported redactions regarding “load information” and “capacity pricing information.”⁹ Movants did not make these arguments in Pages Pleading I, and they do not explain their expanded list of requests for protection. Movants also failed to adequately identify pages for redaction according to the Commission’s numbering system.

III. ARGUMENT: 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)¹⁰ and the “state or federal law” exemption to the Public Records Law. The OCC does not oppose the extension of protection regarding customer account numbers (and has never opposed such protection). However, Movants have not accurately identified the page numbers that contain the customer account numbers. Pages Pleading I listed 26 page numbers,¹¹ all incorrectly identified.¹² Pages Pleading II states that the Duke-affiliated companies used the wrong

⁸ Pages Pleading I at 2.

⁹ Pages Pleading II at 3.

¹⁰ Motion at 2.

¹¹ Pages Pleading at 1.

¹² Comment Pleading at 7.

numbering system in the earlier pleading,¹³ and lists 44 “replacement” page numbers that Movants claim contain customer account numbers.¹⁴

Movants’ latest pleading incorrectly identifies pages that do not contain customer account numbers.¹⁵ Page 317 contains a federal tax identification number, but does not contain customer account numbers. Pages 318-321, however, contain customer account numbers that are not listed by Movants. Disturbingly, pages 318 and 321 were pages identified by the OCC in its Comment Pleading because they contain customer account numbers.¹⁶ Page 641 (listed by Movants¹⁷) contains customer account numbers, but page 642 (also listed by Movants¹⁸) does not contain customer account numbers.

The Commission must decide how much effort should be expended to arrive at a correct list of pages under circumstances where no dispute exists regarding the justification for continued protection of customer account numbers. Only the customer account numbers

¹³ Pages Pleading II at 2 (“Movants mistakenly referred to . . .”).

¹⁴ The “replacement” of 26 page numbers in Pages Pleading I with 44 page numbers in Pages Pleading II remains unexplained.

¹⁵ Pages Pleading II at 2.

¹⁶ The OCC identified pages 100, 135, 162, 318, and 321 in a non-exhaustive list of pages that contain customer account numbers. Pages 318 and 321, which contain customer account information, are not shown on Movants’ revised list. Pages Pleading II at 2.

¹⁷ Pages Pleading II at 2.

¹⁸ Id.

should be redacted on the pages that are correctly identified.¹⁹ Movants, however, have not provided a correct list.²⁰

Movants argued in Pages Pleading I that “customer load factors” should be withheld from public inspection.²¹ Load factor is a relationship between energy used and peak demand (i.e. providing some information on load shape), and is stated in a measurement bounded by zero and one. The OCC did not protest the continued protection of the load factor stated on page 1091, but stated that the “other pages listed by the Duke-affiliated companies (i.e. 1092, 1093, 1107, and 1108) do not contain customer load factors.”²² Pages Pleading II identifies the information that it seeks to protect on pages 1107-1108 as megawatt-hour information.²³ The information on page 1093 is identified as “capacity pricing information.”²⁴ These are not load factors (i.e. potentially sensitive information regarding load shape), as stated in the OCC’s Comment Pleading. Only the load factor information located on page 1091 should continue to be redacted.

Movants add to their list for continued redaction pages 773-775, 780, 786, 788-790, and 793-794.²⁵ Again, these are not pages on which load factors appear; some contain

¹⁹ Movants state that the “Commission [should] maintain redacted the *customer account numbers* on the . . . pages.” Pages Pleading at 3 (emphasis supplied).

²⁰ 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).

²¹ Pages Pleading I at 2.

²² Comment Pleading at 7-8.

²³ Pages Pleading at 3.

²⁴ Id.

²⁵ Id.

megawatt information contained in contracts. Pages 775 and 789-790 do not contain such information. Unlike pages 1107 and 1108 that provide some idea of customer size at an earlier point in time, the additional pages contain megawatt information from contracts that do not state the actual demand of any customer. Pages Pleading II states that it seeks continued protection for “capacity information,”²⁶ and protections on the additional pages should not extend protection beyond that request (i.e. if any protection is extended).

The OCC’s Comment Pleading argues against continued protection of Duke’s outdated capacity positions.²⁷ While those arguments will not be repeated, Movants add to their list for continued redaction pages 3125-3126 and 3130-3131.²⁸ These pages contain outdated information on actions taken by Duke, and these additions should also be rejected.

Movants overtly make additional categories for which they seek the extension of protections that were not contained in their Pages Pleading I.²⁹ However, Movants seek the continued protection of a vendor tax identification number and a bank account number on page 645 of the Commission’s numbering system.³⁰ Movants merely state, in summary fashion, that the “information constitutes confidential identifying information”³¹

²⁶ Pages Pleading II at 3.

²⁷ Comment Pleading at 6.

²⁸ Pages Pleading II at 4.

²⁹ Id. at 6-8. The OCC has not checked the accuracy of every new page for which Movants seek to extend protection.

³⁰ Id. at 7-8. The heading on the bottom of page 7 is incorrect, but Movants’ intent seems to be the creation of a new category for protection that includes vendor tax identification numbers and bank account numbers. Id. at 8.

³¹ Id. at 8.

Movants do not support that claim,³² and it is speculative whether such information is held confidentially. The information on page 645 is also located elsewhere in the docketed material.³³ Movants have failed to show that the new category deserves protection, and they have not provided an accurate list of pages for their new category.

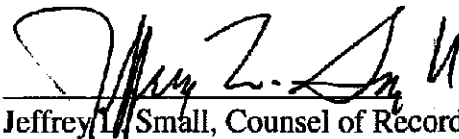
Serious deficiencies exist in Movants' arguments and their identification of pages for continued protection from public scrutiny.

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.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



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

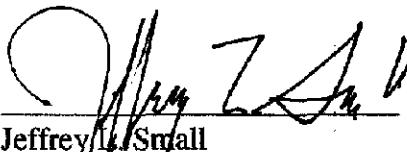
The Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 (T)
(614) 466-9475 (F)
small@occ.state.oh.us
hotz@occ.state.oh.us
sauer@occ.state.oh.us

³² The Supreme Court of Ohio's test was quoted by the OCC. Comment Pleading at 3.

³³ The OCC located the same information on the next page, page 646 of the Commission's numbering system.

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 6th day of January 2011.


Jeffrey L. Small
Assistant Consumers' Counsel

cmooney2@columbus.rr.com
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com
sam@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

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

Scott.Farkas@puc.state.oh.us