

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
Energy Ohio for Authority to Establish a) Case No. 14-841-EL-SSO
Standard Service Offer Pursuant to)
Section 4928.143, Revised Code, in the)
Form of an Electric Security Plan,)
Accounting Modifications and Tariffs for)
Generation Service.)

In the Matter of the Application of Duke)
Energy Ohio for Authority to Amend its) Case No. 14-842-EL-ATA
Certified Supplier Tariff, P.U.C.O.)
No. 20.)

**MOTION TO HOLD IN ABEYANCE A RULING ON DUKE’S MOTION FOR
PROTECTION
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

In the interest of transparency of these regulatory proceedings, the Office of the Ohio Consumers’ Counsel (“OCC”), on behalf of all of the residential utility consumers of Duke Energy Ohio, Inc. (“Duke Energy” or “Duke”), moves the Public Utilities Commission of Ohio (“PUCO”) to hold in abeyance a ruling on the Motion for Protective Order (“Motion for Protection”) filed by Duke Energy on May 20, 2014.

The PUCO’s impending ruling on Duke’s Motion for Protection should be held in abeyance until such time that Duke provides the information over which it seeks confidential treatment to parties willing to enter into a reasonable protective agreement. The PUCO’s ruling should also be held in abeyance until after the PUCO is able to consider any arguments presented in responsive pleadings, pursuant to Ohio Adm. Code

4901-1-12, after Duke provides the information that is the subject of its Motion for Protection.

The reasons for granting the OCC's Motion are further set forth in the attached Memorandum in Support.

Respectfully submitted,

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

/s/ Maureen R. Grady

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**MEMORANDUM IN SUPPORT OF OCC’S MOTION
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION AND STATEMENT OF FACTS

On May 29, 2014, Duke Energy Ohio, Inc. (“Duke” or “the Utility”) filed an Application to establish an Electric Security Plan (“ESP”). On the same day, Duke also filed a Motion for a Protective Order. Duke explained in its Motion for a Protective Order that it was seeking a PUCO determination that its filings contain confidential, trade secret information.¹

The Office of the Ohio Consumers Counsel (“OCC”) filed a Motion to Intervene on June 6, 2014.² OCC has not been able to view the materials that are subject to the

¹ See, e.g., Motion at 3-5.

² Even before filing its Motion to Intervene, OCC initiated contact with Duke on June 2, 2014 to enter into a reasonable protective agreement (identical in terms to the protective agreement signed between OCC and Duke in Duke’s recent natural gas and electric rate cases, Case Nos. 12-1685-GA-AIR et al. and 12-1682-EL-AIR et al.). That arrangement would have allowed OCC timely access to the information that Duke alleges to be proprietary. Despite that early and timely contact, over 30 days later, Duke has still not agreed to terms with the OCC on a Protective Agreement.

Motion for Protective Order because Duke and OCC have not entered into a confidentiality agreement. Indeed, OCC and Duke have been engaging in negotiation efforts over a protective agreement since June 2, 2014, to no avail.

Recently, OCC filed a Motion to Compel the PUCO to order Duke to enter into a protective agreement that was negotiated by Duke and OCC years ago and that has been executed in any number of PUCO cases. Without the benefit of an executed Protective Agreement, OCC has not been privy to the allegedly proprietary information. Thus, OCC cannot determine the merits of Duke's claims that the information is confidential, and a trade secret. And OCC cannot determine whether the information is the proper subject of a motion to compel.

Accordingly, OCC asks that the PUCO hold in abeyance its impending ruling on Duke's Motion for Protective Order until OCC has executed an appropriate protective agreement and had the opportunity to review the alleged proprietary trade secret information.

II. MOTION TO HOLD RULING IN ABEYANCE

Duke has refused to provide the OCC with information that it alone has determined deserves confidential treatment. The PUCO's rules were promulgated to prevent such actions.

Duke's actions in not providing the allegedly trade secret information and in not reaching an agreement regarding a reasonable protective agreement prejudices the OCC (and any other interested Intervenor) in its efforts to evaluate the merits of Duke's Motion for Protection. Duke's actions deny the OCC the details of the subject matter covered by the Duke's Motion for Protection. Under such circumstances, a ruling on the Motion for

Protection should be held in abeyance until such time as Duke provides the entire information over which it seeks confidential treatment to the OCC. The ruling should also be held in abeyance until after the PUCO is able to consider any arguments presented in responsive pleadings, pursuant to the Ohio Administrative Code.

Such action would be consistent with the Attorney Examiner's Entry in Case No. 07-723-EL-UNC. There, in similar circumstances, Duke refused to enter into a reasonable protective agreement which would allow OCC to review the allegedly trade secret information to determine if the request for a Protective Order was reasonable.³ In that case, the Attorney Examiner ruled it was reasonable for OCC to review the information sought to be protected before it was required to prepare a response to the motion for protection:

[W]e agree with OCC that, prior to our ruling on Duke's motion for a protective order, **it is reasonable that OCC be permitted to review the information in question in order to prepare a response to Duke's motion for a protective order.** Therefore, within three days of the parties entering into a protective agreement, Duke shall provide all requested information to OCC and shall notify the attorney examiner by electronic mail that such information has been provided to OCC. Thereafter, OCC shall have a period of ten days within which to review this information and file a response to Duke's motion for a protective order for filed in 07-723 and 07-975. Duke shall then have a period of seven days to file a reply. (Emphasis added).⁴

Once a reasonable protective agreement is ordered by the PUCO, OCC will be able to review the information and respond to the Motion appropriately.

³ *In the Matter of the Commission's Review and Adjustment of the Fuel and Purchased Power and the System Reliability Tracker Components of Duke Energy Ohio, Inc., and Related Matters*, Case Nos. 07-723-EL-UNC et al, Entry at 4 (October 29, 2007).

⁴ *In the Matter of the Commission's Review and Adjustment of the Fuel and Purchased Power and the System Reliability Tracker Components of Duke Energy Ohio, Inc., and Related Matters*, Case Nos. 07-723-EL-UNC et al, Entry at 4-5 (October 29, 2007).

OCC will be then able to assess whether the information constitutes a trade secret under Ohio law. OCC will also be able to decipher whether non-disclosure of the materials will be consistent with the purposes of Title 49, Revised Code.

Additionally, OCC will be able to weigh in on whether the confidential material can reasonably be redacted.

All of these issues must be considered in ruling on Duke's Motion to Compel.⁵ But OCC can only conduct its review after it has access to the information through a confidentiality agreement. Input from OCC should assist the PUCO in its determination as to whether Duke's Motion for Protection should be granted.

III. CONCLUSION

The PUCO should not rule on Duke's Motion for Protection until such time as OCC has access to the entire information over which Duke seeks confidential treatment. The PUCO should thereafter make its determination, but only after providing the OCC and any other interested party an opportunity to comment upon Duke's Motion for Protection. The PUCO's determination should consider the objective of assuring the public that the process is open and transparent concerning the means by which their utility rates are determined.

⁵See, e.g., *In the Matter of the Application of Vectren Retail, LLC d / b / a Vectren Source for Certification as a Retail Natural Gas Supplier*, Case No. 02-1668-GA-CRS, Entry at 3 (January 7, 2007).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Motion to Hold in Abeyance* has been served upon the below-stated counsel, via electronic transmission, this 18th day of July, 2014.

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Summary: Motion Motion to Hold in Abeyance a Ruling on Duke's Motion for Protection by the Office Of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Grady, Maureen R. Ms.