

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's Review)
of Chapter 4901:1-25 of the Ohio) Case No. 12-2053-EL-ORD
Administrative Code, Regarding Market)
Monitoring.)

**APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Public Utilities Commission of Ohio (“PUCO”), in this proceeding, was deciding whether to make certain information public that could assist customers in evaluating competitive offers from suppliers. The PUCO decided to protect this information in contravention of Ohio law and PUCO rules. As part of advocating for residential customers in the State of Ohio to receive adequate, reliable, and reasonably priced retail electric service, the Office of the Ohio Consumers’ Counsel (“OCC”) files this Application for Rehearing. OCC seeks rehearing of the Finding and Order issued by the Public Utilities Commission of Ohio (“Commission” or “PUCO”) in the above-captioned proceeding that, inter alia, treats certain marketer-supplied information as protected information that is kept from the public.

OCC is authorized to file this application for rehearing under R.C. 4903.10 and Ohio Adm. Code 4901-1-35. Rehearing is sought of the October 15, 2014 Finding and Order based on the following Assignment of Error:

- (A) The PUCO erred when it ruled that certain marketer-supplied information filed at the PUCO be kept confidential in violation of R.C. 4905.07, 149.43, 4901.12. 4928.02(E) and Ohio Admin. Code 4901-1-24.

The basis of this Application for Rehearing is set forth in the attached Memorandum in Support. Consistent with R.C. 4903.10 and OCC's claim of error, the PUCO should modify or abrogate its Finding and Order.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The PUCO, through the adoption of the Market Monitoring Rules, requires that electric service providers file important market information that assists consumers in making informed decisions about obtaining electric generation service from marketers. However, the PUCO, through its Order in this case, eliminated the necessary transparency in the process. It did so by holding that the information be kept confidential (not public), with a presumption that it should not be publically disclosed.

Specifically, the PUCO ruled that certain marketer-supplied information be treated as confidential, without the marketer filing a motion for protection. Under the PUCO's ruling, the information is presumed to be confidential—not public—and remains confidential unless and until a public request for disclosure is made. Only then does the marketer have to file a motion for protection to affirmatively show the information is deserving of protective treatment. This process undermines Ohio statutes, including R.C. 149.43, 4901.12, and R.C. 4905.07. Rehearing should be granted on this issue.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10 and Ohio Adm. Code 4901-1-35. This statute provides that, within thirty days after issuance of an order from

the PUCO, “any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding.”¹ Furthermore, the application for rehearing must be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.”²

In considering an application for rehearing, Ohio law provides that the PUCO “may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear.”³ Furthermore, if the PUCO grants a rehearing and determines that “the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same * * *.”⁴

OCC meets both the statutory conditions applicable to an applicant for rehearing under R.C. 4903.10 and the requirements of the PUCO’s rule on applications for rehearing.⁵ Accordingly, OCC respectfully requests that the PUCO grant rehearing on the matters specified below.

¹ R.C. 4903.10.

² R.C. 4903.10(B).

³ Id.

⁴ Id.

⁵ See Ohio Admin. Code 4901-1-35.

II. LAW AND ARGUMENT

ASSIGNMENT OF ERROR:

A. The PUCO Erred When It Ruled That Certain Marketer-Supplied Information Filed At The PUCO Be Kept Confidential In Violation Of R.C. 4905.07, 149.43, 4901.12, 4928.02(E) And Ohio Admin. Code 4901-1-24.

The PUCO's Opinion and Order in this case was unlawful and unreasonable.

This is because its decision violates, inter alia, the Public Records Act. It does so by automatically protecting data from public disclosure without requiring parties to establish that the information is a trade secret deserving of protection. This presumption is contrary to the Public Records Act.

The Public Records Act, as set forth in R.C. 149.43, "allows public access to public records with certain exceptions and is based on the 'fundamental policy of promoting open government, not restricting it.'"⁶ Therefore, it has long been held that "R.C. 149.43 [the Public Records Act] is construed liberally in favor of broad access, and any doubt is resolved in favor of disclosure of public records."⁷ The Public Records Act has been directly applied to the PUCO whereby "[e]xcept as provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX [49] of the Revised Code, all proceedings of the public utilities commission and all documents and

⁶ *Gilbert v. Summit County*, 2004-Ohio-7108, 104 Ohio St.3d 660, 821 N.E.2d 564, ¶7 (quoting *State ex rel. The Miami Student v. Miami Univ.*, 79 Ohio St.3d 168, 171, 680 N.E.2d 956 (1997)).

⁷ *Gilbert*, 2004-Ohio-7108, at ¶7, (quoting *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St. 3d 374, 376, 1996 Ohio 214, 662 N.E.2d 334; (1996); see also, *In the Matter of the Application of NOPEC, Inc. for Authority to Operate as a Certified Retail Electric Supplier in the State of Ohio*, Case No. 07-891-EL-CRS, Entry at 1 (citing *State ex rel. Williams v. Cleveland*, 64 Ohio St.3d 544, 549, 597 N.E.2d 147 (1992)).

records in its possession are public records,”⁸ and “all facts and information in the possession of the public utilities commission shall be public.”⁹

To advance the important public principles behind the Public Records Act, a government entity “has the burden of proving that the records are excepted from disclosure by R.C. 149.43.”¹⁰ Accordingly, Ohio Adm. Code 4901-1-24 requires a party to file a motion for protective order and “[t]he party requesting such protection shall have the burden of establishing that such protection is required.”¹¹ Thus, it comes as no surprise that this Commission has held that confidential treatment, based on claims of a trade secret,¹² should only be given in “extraordinary circumstances.”¹³ Moreover, a party seeking such protection must file a motion for protective order either concurrently or prior to filing the information for which it seeks protection.¹⁴

In the October 15, 2014 Finding and Order, the PUCO recognized the burden associated with establishing information as confidential and subject to protection from disclosure. The PUCO acknowledged that a party seeking to protect information from being disclosed, must file a motion in accordance with Ohio Adm. Code 4901-1-24.¹⁵ But then the PUCO inexplicably contradicted its position and relieved the marketer of its

⁸ R.C. 4901.12.

⁹ R.C. 4905.07.

¹⁰ *Gilbert*, 2004-Ohio-7108 at ¶ 6, quoting *State ex. rel. Natl. Broadcasting Co., Inc. v. Cleveland* (1988), 38 Ohio St.3d 79, 526 N.E.2d 786, paragraph two of the syllabus.

¹¹ Ohio Adm. Code 4901-1-27-(B)(7)(e).

¹² See, R.C. 1331.61; *State ex rel. Plain Dealer v. Department of Ins.*, 80 Ohio St.3d 513, 687 N.E.2d 661 (1998).

¹³ *In the Matter of the Application of the Cleveland Electric Illuminating Company for Approval of an electric Service Agreement with American Steel Wire Corporation*, Case No. 95-77-EL-AEC, Entry at 2-3 (September 6, 1995).

¹⁴ Ohio Adm. Code 4901-1-02(E).

¹⁵ Finding and Order at 7.

obligation to meet that burden of proof. It held that information filed pursuant to Ohio Adm. Code 4901:1-25-02(A)(2)(d), (A)(3), and (A)(4) will be held as confidential, without a motion for protective order.¹⁶ The information will be deemed confidential until any interested party files a request for disclosure. Only then will the PUCO require the party seeking protection to file a motion for protection.¹⁷

The PUCO's holding disregards the fact that this is the very information customers need to effectively exercise customer choice. Customers may base their shopping decisions upon the size and reliability of the company, or a marketer's ability to specifically serve the residential class. Allowing public access to this useful information is precisely the purpose behind the Public Records Act. The PUCO's Finding and Order in this case unlawfully and unreasonably undermines the intent of R.C. 4901.12, R.C. R.C. 4905.07, and R.C. 149.43.

Under the PUCO's Opinion and Order in this case any "request for disclosure should identify the information being sought and the report from which it is being sought."¹⁸ The respective party seeking confidentiality would then have to file a motion for protective order within three days.¹⁹ This shifts the burden to the public to make a request to obtain market-monitoring data – information that is of particular importance to the public. Customers may want access to such information in order to make more informed decisions when choosing a marketer. Such a process, therefore, undermines the state policy of affording customers "cost-effective and efficient access to information

¹⁶ Finding and Order at 7.

¹⁷ Finding and Order at 7.

¹⁸ Finding and Order at 7.

¹⁹ Finding and Order at 7.

. . . in order to promote both effective customer choice of retail electric service . . .”²⁰

And requiring customers to request disclosure of such information is likely to impede customer choice in the marketplace.

Throughout the development of the competitive electric market in Ohio, the idea has been to empower (not impede) consumers to make choices. An integral part of the decision-making process “is also dependent upon transparent terms”²¹ The need for transparency in the electric service market was in fact the reason why the PUCO’s own staff recommended similar information be treated as public (and not confidential). See *In the Commission’s Investigation of Ohio’s Retail Electric Service Market*, Case No. 12-3151-EL-COI Staff Work Plan at 10 (Jan. 16, 2014).

Specifically, the Staff recommended “that the number of customers served and load in megawatt-hours (MWh) for each CRES provider in each EDU’s service territory should be made public because this information is not confidential in other industries.”²² Staff commented that the “fact that this data is confidential, when it is often public knowledge in non-regulated markets, can create public mistrust. In an effort to create an effective and competitive retail electric service market it is imperative that the public trust the market and know that information is available and accurate. The Commission must strive for transparency within the retail electric service market.”²³

²⁰ R.C. 4928.02(E).

²¹ *In the Matter of the Commission’s Investigation of Ohio’s Retail Electric Service Market*, Case No. 12-3151-EL-COI, Concurring Opinion of Chairman Snitchler at 2 (March 26, 2014).

²² *In the Matter of the Commission’s Investigation of Ohio’s Retail Electric Service Market*, Case No. 12-3151-EL-COI, Staff Work Plan at 10 (Jan. 16, 2014).

²³ *In the Matter of the Commission’s Investigation of Ohio’s Retail Electric Service Market*, Case No. 12-3151-EL-COI, Staff Work Plan at 11 (Jan. 16, 2014).

The PUCO Staff had it right. The information should not be presumed to be confidential. Instead, the presumption, according to the law, must be that it is public information.

For these reasons, the PUCO should grant OCC's Application for Rehearing. It should require that marketers and aggregators carry their appropriately high burden of establishing that the information is a trade secret before it is withheld from the public.

III. CONCLUSION

To make informed decisions, consumers should have access to marketer-supplied information about aggregation, number of customers served, and the load served. This can assist customers in engaging in and being better informed about retail competition. The PUCO has a duty under law to ensure that such information is available to the public – it should not be presumed confidential and shielded from the public view.

In addition, under the laws of Ohio, information in the PUCO's possession is considered to be public records. Limited exceptions to the public records law protect trade secrets from disclosure—but only after the party seeking to prevent disclosure has affirmatively proven the materials are deserving of protection.

The PUCO's rulings must comply with the law. But here they do not. The PUCO has allowed information to be treated as confidential, without the party affirmatively proving that the information deserves protection. This ruling is wrong. Rehearing should be granted. The Commission's ruling should be amended to require public disclosure of the marketer-supplied information for consumers' benefit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application for Rehearing was served on the persons stated below via electronic transmission, this 14th day of November 2014.

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