BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of the Annual Audit Report for Rider SCR, Rider RE, Rider LFA, Rider ESSC, and Rider ECF.	)))))	Case No. 18-0046-EL-RDR

MEMORANDUM CONTRA DUKE ENERGY OHIO'S MOTION FOR PROTECTIVE ORDER BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

In the interest of furthering policies favoring transparency in proceedings at the Public Utilities Commission of Ohio ("PUCO"), the Office of the Ohio Consumers' Counsel ("OCC") files this memorandum Contra the motion for protective order filed by Duke Energy Ohio, Inc. ("Duke") in this significant case for Duke's 630,000 residential utility customers.

Duke filed a request for a PUCO Staff audit of certain riders in compliance with its Standard Service Offer ("SSO") on January 31, 2018.[1] In a separate Motion for Protective Order, Duke alleges that certain information in its Application should be kept from the public because it satisfies the requirements of a trade secret under the law. The information that Duke seeks to keep hidden are the amount of auction fees paid to a third-

[1] *In the Matter of the Application of Duke Energy Ohio, Inc., for the Annual Audit of Rider SCR, Rider RE, Rider RC, Rider LFA, Rider ESSC, and Rider ECF,* Case No. 18-0046-EL-RDR, Application (January 31, 2018).

party vendor.[2] Duke alleges that these costs are "trade secrets" because: (1) a confidential agreement exists between Duke and the third party, (2) Duke has kept the costs private to both outside parties and their own employees, and (3) there would be some damage to the general public if this information is released. Duke's allegations fail to meet the strict burden of proof required by the PUCO and the Supreme Court of Ohio ("Court") for declaring information as trade secret and, therefore, confidential. Duke's motion should be denied.

II. APPLICABLE LAW

The guiding principle of the PUCO's rules regarding protective orders is not to conceal information, but to make information public. The PUCO has established a policy that confidential treatment is to be given only under extraordinary circumstances.[3] Ohio Adm. Code 4901-1-24(D) specifies that a protective order "shall minimize the amount of information protected from public disclosure."

The PUCO has emphasized the importance of the public records laws and has noted that "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 very few limited exceptions.'"[4] The PUCO has noted that "[a]ll proceedings at the

[2] *Id.* Motion for Protective Order (January 31, 2018).

[3] *See In the Matter of the Application of The Cleveland Electric Illumination Company for Approval of an Electric Service Agreement with American Steel & Wire Corp.*, Case No. 95-77-EL-AEC, Supplemental Entry on Rehearing (September 6, 1995) at 3.

[4] *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 (November 25, 2003) Entry ("93-487 Entry") at 3, citing *State ex rel Williams v. Cleveland,* 64 Ohio St.3d 544 (1992) and *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 518 (1997) ("*Plain Dealer*"). See also *In the Matter of the Application of Cincinnati Bell Any Distance, Inc. for New Operating Authority*, Case No. 07-539-TP-ACE, Entry (June 1, 2007) at 1.

Commission and all documents and records in its possession are public records, except as provided in Ohio's public records law (149.43, Revised Code) and as consistent with the purposes of Title 49 of the Revised Code."[5] Additionally, under R.C. 4905.07, "all facts and information in the possession of the public utilities commission shall be public, and all reports, records, files, books, accounts, papers, and memorandums of every nature in its possession shall be open to inspection by interested parties or their attorneys." The PUCO also has noted that R.C. 4901.12 and R.C. 4905.07 "provide a strong presumption in favor of disclosure, which the party claiming protective status must overcome." [6]

R.C. 149.43 broadly defines public records to include records kept at any state office but excludes or exempts from the definition of public records those records "whose release is prohibited by state or federal law."[7] R.C. 149.43 prohibits the PUCO and other public agencies from releasing public documents that qualify as trade secrets.

Ohio has adopted the Uniform Trade Secrets Act, and has codified the definition of "trade secrets." R.C. 1331.61(D) defines a trade secret as:

> information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:
>
> (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.

[5] 93-487 Entry at 3.

[6] *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, Opinion and Order (October 18, 1990), 1990 Ohio PUC LEXIS 1138 at *5.

[7] R.C. 149.43(A)(1)(v).

(2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Thus, to qualify as a trade secret under R.C. 1331.61(D), information must be shown to fall within the definition of a trade secret and must satisfy two requirements: it must have "independent economic value" and it must have been kept under circumstances that maintain its secrecy.

The Court further explained the definition of a trade secret in its 1997 decision in *Plain Dealer*. In that case, the Court denied a request for trade secret status by citing to the Restatement of *Torts,* sec. 757, Comment b, which reads in part:

> A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that *it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract*. . .. A trade secret is a process or device for continuous use in the operation of the business.[8]

The PUCO has also used the following six-factor test when determining if information constitutes a protected trade secret:

1. The extent to which the information is known outside the business,
2. The extent to which is it known to those inside the business,
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,

[8] *Plain Dealer at 526* citing Restatement of *Torts,* sec. 757, Comment b (emphasis added).

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 others to acquire and duplicate the information.[9]

The Court places the burden on the party asserting trade secret status to "identify and demonstrate that the material is included in categories of protected information under the state."[10]

III. RECOMMENDATION

A. Duke has failed to meet its burden of proof to keep information from consumers.

The information Duke seeks to keep from public view are the "auction fees that are charged by a third-party vendor."[11] As mentioned above, in order for information to qualify as a trade secret the statute mandates that the information must have the following qualities:

(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.[12]

As to R.C. 1333.61(D)(1), Duke asserts that public knowledge of the amount of auction fees it pays will lead to a competitive disadvantage, potentially resulting in higher auction fees to be passed on to Duke Energy Ohio and its customers. [13] As to R.C. 1333.61(D)(2), Duke states that the information "is not known outside of Duke Energy

[9] *Id.* at 524-525.

[10] *Id.* at 525.

[11] Duke Motion for Protective Order at 2.

[12] R.C. 1333.61(D).

[13] Motion for Protective Order at 3.

Ohio and its vendor, and it is not disseminated within Duke Energy Ohio except to those employees with a legitimate business need to know and act upon the information."[14] As a result of these two statements, Duke claims that the information should be given trade secret status. Duke's arguments have no merit.

First and foremost, auction fee information does not meet the definition of a "trade secret" because it is not a "formula, pattern, device or compilation of information that is used in one's business" and it was not created or compiled in order to give Duke a competitive advantage over other utilities. It is simply an invoice for services rendered by a third party. Indeed, other large electric distribution utilities' auction expense data and information has not historically been given trade secret protection in PUCO proceedings. The Ohio Power Company has not received protective treatment for the auction costs identified in its Auction Cost Reconciliation Rider filings.[15] The Dayton Power & Light Company has not historically sought protective treatment for the auction costs and expenses identified in its Reconciliation Rider.[16] And, FirstEnergy has not received protective treatment for auction expenses in its Generation Cost Reconciliation Rider.[17] Duke provides no sound rationale why its auction expense information should be treated differently here.

[14] Motion for Protective Order at 3.

[15] See *In the Matter of the Alternative Energy Rider and Auction Cost Reconciliation Rider for Ohio Power Company,* Application, Case No. 15-1052-EL-RDR, Application at Schedule 1 (June 1, 2015).

[16] See *In the Matter of the Application of The Dayton Power and Light Company to Establish Tariff Rates,* Case No. 12-672-EL-RDR, et al., Application at WP-7A; fn 1, (March 30, 2012).

[17] See *In the Matter of the Review of the Distribution Uncollectible Rider, PIPP Uncollectible Rider, Non-Distribution Uncollectible Rider, Generation Cost Reconciliation Rider, and the Economic Development Rider of Ohio Edison Company, The Cleveland Electric Company, and The Toledo Edison Company,* Case No. 13-2175-EL-RRM, Report at Exhibits M, N, O, and P, (July 31, 2015).

In addition, the PUCO has also denied trade secret protection in other similar situations. For example, the details of business arrangements between utilities and third parties have been determined by the PUCO to not qualify for protection from disclosure.[18] Financial data, including basic financial arrangements, have been determined by the PUCO not to contain proprietary information worthy of trade secret protection.[19] And, finally, the PUCO has found on occasion that sensitive business information may not be protected from public disclosure.[20] The PUCO should continue to keep such information public.

Further, Duke cannot satisfy the other requirements under R.C. 1333.61(D) needed for trade secret status. Although Duke claims the amount of the auction fees Duke is charged may not generally be known outside Duke, there is no discernible value attributable to Duke in having this information as against competitors. Indeed, the public's knowledge of these fees would not raise costs for Duke or its customers as Duke claims. On the contrary, public knowledge of the cost could result in Duke being able to

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[18] See *In the Matter of Several Applications of Cincinnati Bell Telephone Company for Approval of a Contractor Other Arrangement between Cincinnati Bell Telephone Company and Various Customers*, Case No. 96-483-TP-AEC, Entry at 4-7 (February 12, 1998) (contract between a utility and its customers found not to meet the definition of trade secrets); See also *In the Matter of Application of Ameritech Ohio for Approval of an Interconnection Agreement between Ameritech Ohio and Communications Buying Group, Inc. Pursuant to Section 252 of the Telecommunications Act of 1996*, Case No. 96-604-TP-UNC, Attorney Examiner Entry at 2-3 (July 10, 1996) (inter-connection agreements containing the rates, terms, and conditions of interconnection between a local exchange company and a competitive local service provider does not amount to a trade secret).

[19] *In the Matter of the Applications of Vectren Retail, LLC et al. for Renewal of Certification as a Competitive Retail Natural Gas Supplier and for Approval to Transfer that Certification*, Case No. 02-1668-GA-CRS, Entry at 5 (August 11, 2004).

[20] *In the Matter of the Petition of Alvahn L. Mondell, et al. v. The Ohio Bell Telephone Company Relative to a Request for Two-Way, Non-Optional Extended Area Service Between the Salem Exchange and the Alliance and Sebring Exchanges of the Ohio Bell Telephone Company*, Case No. 89-221-TP-PEX, Entry(May 16, 1989) (the Commission declined to interpret as a trade secret calling data that reveals business information such as traffic volume and revenues from interLATA calls between exchanges). See also, *In the Matter of the Petition of Michael and Carol Schlagenhauser, Relative to a Request for Two-Way, Non-Optional Extended Area Service*, Case No. 02-954-TP-PEX, Entry (July 30, 2002) (Commission held that information containing the number of access lines in the Perrysville exchange was not a trade secret).

negotiate for terms more favorable to its customers or be approached by a different vendor offering the same services at a lower cost. Thus, the auction fees do not reveal the substance of any business information, which might yield economic value to a competitor. Therefore, Duke cannot satisfy the definition of trade secret under R.C. 1333.61(D)(1) and cannot satisfy the fourth factor of the six-factor test.

In addition, Duke has presented no information as to how it satisfies factor five of six-factor test. Nevertheless, Duke cannot satisfy this factor because Duke did not expend great time and expense in creating the information.[21] This is because Duke did not create the information. It simply received and accepted an offer for services from a vendor.

Finally, Duke does not satisfy factor six because it was also not addressed in Duke's motion. However, when the factor is analyzed, Duke's motion fails because it would not take others any time or expense to discover the information Duke seeks to keep confidential. Any other utility could contact the third-party vendor that Duke contracts with for auction services to solicit a bid for auction services. Any other utility could also solicit bids from other vendors in order to receive lower auction fees.

In this proceeding, Duke has offered only general statements regarding the nature of the information it considers confidential and the supposed harm that Duke would incur if the information is disclosed. The PUCO should not keep information from the public regarding costs to the utility, which ultimately results in charges to consumers, based on such flimsy support.

[21] See *Pyromatics*, *Inc. v. Petruziello*, 7 Ohio. App.3d 131, 134-135 (1983).

B. Duke's presumption that a confidentiality agreement with a third party creates a trade secret is contrary to case law.

Duke also states that the amount it is charged by its vendor for auction fees should be given trade secret status because it is subject to a confidentiality agreement. This argument has no merit. The existence of a confidentiality agreement is irrelevant and does not allow Duke to sidestep its burden to produce the requested information. Indeed, the Court, in *Plain Dealer*, held that a party cannot meet the statutory trade secret definition by stating that documents for which trade secret status is claimed are protected by or referenced in a confidentiality agreement.[22] The Court determined that the documents associated with a third party confidentiality agreement were not protected simply by that agreement. Therefore, the agreement between Duke and its third-party vendor doesn't allow them to withhold the auction fees from the public.

IV. CONCLUSION

The PUCO should deny Duke's motion for protective order. Duke has failed to prove that there is any information that constitutes trade secret status. In its short memorandum in support, Duke failed to offer any evidence other than a third party confidentiality agreement and vague assumptions of negative market impact. The PUCO should find that Duke failed to meet its burden of proof and that the information is not protected as a trade secret under R.C. 1333.61(D). Therefore, Duke's motion should be denied and the auction fees be made public.

[22] *Plain Dealer* at 527.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Memorandum Contra was served upon the persons listed below via electronic transmission this 15th day of February 2018.

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Summary: Memorandum Memorandum Contra Duke Energy Ohio’s Motion for Protective Order by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Moore, Kevin F. Mr.