

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Amendment of Ohio)
Adm. Code 4901-1-24 Regarding Motions) Case No. 18-322-AU-ORD
for Protective Orders.)

**COMMENTS ON THE PUCO’S PROPOSED REVISIONS TO OHIO
ADMINISTRATIVE CODE 4901-1-24 REGARDING THE WITHHOLDING OF
INFORMATION ALLEGED TO BE CONFIDENTIAL IN PUBLIC
PROCEEDINGS
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

The Office of the Ohio Consumers’ Counsel (“OCC”) submits these comments on behalf of all of Ohio’s residential utility consumers. In this proceeding, the Public Utilities Commission of Ohio (“PUCO”) seeks comments on its proposal to modify paragraphs (D) through (F) of Ohio Adm. Code 4901-1-24 in order to require the filing of an affidavit and potentially scheduling a hearing when considering motions for protective treatment of confidential information filed in PUCO proceedings.

The PUCO should adopt its proposal to require facts supporting a motion for protective order to be set forth in an affidavit made on personal knowledge. Such an affidavit requirement will assist with ensuring the PUCO has sufficient information to cite evidence or offer an explanation regarding why information should be protected from disclosure, as well as how information held as confidential has retained its economic value

over time.¹ OCC also makes the following recommendations to the PUCO regarding amending Ohio Adm. Code 4901-1-24:

1. The PUCO should file unredacted versions of documents held as confidential when such confidentiality expires after twenty-four months;
2. The PUCO should prohibit protective orders from being used to prevent discovery; and
3. The PUCO should amend Ohio Adm. Code 4901-1-24(G) to allow parties to electronically file confidential information.

Adopting these amendments to Ohio Adm. Code 4901-1-24 will promote open government, protect consumers, and ease the administrative burden on parties.

II. RECOMMENDATIONS

- A. **To promote open and transparent government, the PUCO should file unredacted versions of all documents held as confidential when such confidentiality automatically expires under PUCO rules, twenty-four months after protection was granted.**

According to Ohio Adm. Code 4901-1-24(F), unless ordered otherwise, an order prohibiting disclosure will automatically expire twenty-four months after the date of the issuance of the order, and such information may then be included in the public record of the proceeding. When such an order expires after twenty-four months, the PUCO should file an unredacted version of the document into the docket to promote open and transparent government.

The Court noted in *FirstEnergy* that: “[w]hile trade secrets may continue to be protected if the information retains some measure of value, the commission failed to

¹ See *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229 at ¶¶33-39.

show that to be the case here.”² Often times, information held as confidential does not retain its measure of value, whether due to market conditions or regulatory change. In such instances, the PUCO should routinely file in the docket the unredacted version of all documents containing information held as confidential, since there is no continuing reason to withhold such information from the public.

OCC recommends the PUCO adopt the following amendment to the first sentence of Ohio Adm. Code 4901-1-24(F): “Unless otherwise ordered, any order prohibiting public disclosure pursuant to paragraph (D) of this rule shall automatically expire twenty-four months after the date of its issuance, and such information ~~may~~ SHALL then be included in the public record of the proceeding.”

B. The PUCO should uphold its existing precedent and amend Ohio Administrative Code 4901-1-24(A) to prohibit parties from filing motions for protective orders to prevent discovery.

Ohio Adm. Code 4901-1-24(A) provides, in part: “Upon motion of any party or person from whom discovery is sought, the commission, the legal director, the deputy legal director, or an attorney examiner may issue any order that is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” However, in some instances, a party will file a motion seeking a protective order to prevent discovery where there would be no annoyance, embarrassment, oppression, or undue burden or expense.

While parties argue that discovery would result in undue burden or expense, they provide no specifics regarding the burden or expense caused by responding to the

² *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229 at ¶39.

discovery. Nevertheless, discovery is halted while the PUCO rules on the motion, which can take months. Filing a motion for protective order to prevent discovery violates the legal right to discovery under R.C. 4903.082 (“All parties and intervenors shall be granted ample rights of discovery”) and Ohio Adm. Code 4901-1-17(A) (“[D]iscovery may begin immediately after a proceeding is commenced”).

Further, the PUCO has historically denied such motions for protective orders in cases where parties have attempted to prevent discovery. In *In re Columbia Gas of Ohio, Inc.*, Case No. 11-5351-GA-UNC, Entry (Jan. 27, 2012) the PUCO denied the motion filed by Columbia Gas of Ohio, Inc. (“Columbia”) for a protective order to stay discovery until such time that the PUCO determined whether to conduct further proceedings in the case. In denying Columbia’s motion, the PUCO stated: “Section 4903.082, Revised Code, requires the Commission to ensure ample rights of discovery, while Ohio Adm. Code 4901-1-17(A) generally provides that discovery may begin immediately after a proceeding is commenced and should be completed as expeditiously as possible.”³ In addition, the PUCO has noted that filing a motion to dismiss does not relieve a party from the obligation to respond to discovery.⁴

Even though the PUCO has established that a motion for protective order should not be used as a tactic to stall or prevent discovery, parties have continued to file such motions for this very reason. Most recently, in *In re Joint Application of Direct Energy*, Case No. 17-2358-GA-WVR, the gas marketers filed a motion for protective order asserting that discovery not be had until the PUCO adopts a procedural schedule in the

³ Case No. 11-5351-GA-UNC, Entry (Jan. 27, 2012) at ¶8. The PUCO has yet to rule on this motion, effectively denying the discovery rights granted OCC under Ohio law and PUCO rules.

⁴ *OCC/CUFA v. Duke*, Case No. 15-1588-GE-CSS, Entry (October 11, 2017), n. 2 (Duke had sought a protective order to stay discovery pending the PUCO’s ruling on its motion to dismiss).

case.⁵ The PUCO should find that filing a motion for protective order to prevent discovery is procedurally improper. Instead, in these cases where there is no undue burden or expense, parties should file motions to stay discovery under Ohio Adm. Code 4901-1-12.

Protective orders should only be issued by the PUCO to prevent disclosure of confidential trade secret or competitively sensitive information, or where an undue burden exists. If an affidavit is required along with a motion for protective order, then the memorandum in support and affidavit should set forth the undue burden that would be caused by responding to discovery. Where no such undue burden is established, the motion to stay discovery should instead be filed under Ohio Adm. Code 4901-1-12. Accordingly, the PUCO should uphold its existing precedent and amend Ohio Adm. Code 4901-1-24(A) to prohibit parties from using motions for protective orders to stall or prevent discovery.

In order to prevent parties from using a motion for protective order to stall or prevent discovery, the PUCO should adopt the following amendment to Ohio Adm. Code 4901-1-24(A): “Upon motion of any party or person from whom discovery is sought, the commission, the legal director, the deputy legal director, or an attorney examiner may issue any order that is necessary to protect a party or person from ~~annoyance,~~ ~~embarrassment,~~ oppression, or undue burden or expense. . . .”

Further, the PUCO should amend Ohio Adm. Code 4901-1-24(B) to reinforce what is already stated in Ohio Adm. Code 4901-1-17(A), that discovery may begin immediately after a proceeding is commenced: “No motion for a protective order shall be

⁵ *In re Joint Application of Direct Energy, et al.*, Case No. 17-2358-GA-WVR, Joint Motion (Jan. 17, 2018) at 1.

filed under paragraph (A) of this rule until the person or party seeking the order has exhausted all other reasonable means of resolving any differences with the party seeking discovery. DISCOVERY MAY BEGIN IMMEDIATELY AFTER A PROCEEDING IS COMMENCED, UNLESS ORDERED OTHERWISE BY THE COMMISSION, THE LEGAL DIRECTOR, THE DEPUTY LEGAL DIRECTOR, OR AN ATTORNEY EXAMINER.”

C. To ease the administrative burden on parties, the PUCO should amend Ohio Administrative Code 4901-1-24(G) to allow parties to electronically file confidential information.

The PUCO should allow parties to electronically file confidential information. As the PUCO’s 5-year review of Ohio Adm. Code 4901-1-24 will arrive early next year, the PUCO should begin exploring the option now for implementation in 2019. Allowing parties to electronically file confidential information will ease the administrative burden of hand-delivering confidential documents to docketing after electronically filing the redacted version of that same document.

The PUCO should follow the example of the North Carolina Utilities Commission (“NCUC”) which implemented a streamlined process for electronically filing confidential information. The NCUC allows electronic filings to consist of one or multiple files, but all of the files in a filing must be either public or confidential and so marked when made electronically. Further, when any document is electronically filed, paper copies of such documents are not to be filed.⁶ The process of filing confidential documents in North Carolina is easy, ensures that information remains confidential, and places the burden on

⁶ NCUC Rule R1-28(b) <http://www.ncuc.commerce.state.nc.us/ncrules/Chapter01.pdf>

the party making the filing to ensure that documents are properly marked as confidential to maintain their confidentiality.⁷

In order to allow the filing of confidential information, OCC recommends the PUCO delete the last sentence of Ohio Adm. Code 4901-1-24(G): ~~“No document received via fax or e-filing will be given confidential treatment by the commission.”~~ Further, the PUCO should adopt language similar to NCUC Rule R1-29(b) and (c), which allow parties to electronically file confidential information in NCUC proceedings.⁸

While the PUCO’s Docketing Information System is generally a user-friendly system, the PUCO should revise the antiquated process of requiring parties to personally deliver hard-copies of confidential documents. Further, if done properly, such a change could ease the administrative burden on the PUCO’s docketing department of maintaining a significant number of confidential documents in hard-copy format.

III. CONCLUSION

The PUCO should promote open and transparent government by ensuring that only documents containing trade secret or competitively sensitive information be protected from disclosure to the public. Filing an affidavit along with a motion for protective order is a step in the right direction. However, the PUCO should routinely file unredacted versions of all documents when their confidentiality automatically expires

⁷ <http://www.ncuc.commerce.state.nc.us/efilingsummary.pdf>

⁸ NCUC Rule R1-28(b) <http://www.ncuc.commerce.state.nc.us/ncrules/Chapter01.pdf>

after twenty-four months. Further, the PUCO should amend Ohio Adm. Code 4901-1-24 to prevent parties from using motions for protective order to stall or prevent discovery. Finally, the PUCO should begin exploring options for parties to electronically file confidential information. These recommendations will promote open government, protect consumers, and ease the administrative burden on parties.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of these Comments was served on the persons stated below *via* electronic transmission, this 16th day of March 2018.

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Summary: Comments Comments on the PUCO's Proposed Revisions to Ohio Administrative Code 4901-1-24 Regarding the Withholding of Information Alleged to be Confidential in Public Proceedings by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of McKenney, Bryce