

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates.	)	Case No. 17-32-EL-AIR
)	
In the Matter of the Application of Duke Energy Ohio, Inc. for Tariff Approval.	)	Case No. 17-33-EL-ATA
)	
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Change Accounting Methods.	)	Case No. 17-34-EL-AAM
)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Modify Rider PSR.	)	Case No. 17-872-EL-RDR
)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Amend Rider PSR.	)	Case No. 17-873-EL-ATA
)	
In the Matter of the Application of Duke Energy Ohio Inc., for Approval to Change Accounting Methods.	)	Case No. 17-874-EL-AAM
)	
In the Matter of the Application of Duke Energy Ohio Inc., for Authority to Establish a 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.	)	Case No. 17-1263-EL-SSO
)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Amend its Certified Supplier Tariff, P.U.C.O. No. 20.	)	Case No. 17-1264-EL-ATA
)	
In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Defer Vegetation Management Costs.	)	Case No. 17-1265-EL-AAM
)	
In the Matter of the Application of Duke Energy Ohio, Inc., to Establish Minimum Reliability Performance Standards Pursuant to Chapter 4901:1-10, Ohio Admin. Code.	)	Case No. 16-1602-EL-ESS
)	

**JOINT MOTION FOR RECONSIDERATION AND REQUEST FOR
EXPEDITED TREATMENT SUBMITTED ON BEHALF OF THE
ENVIRONMENTAL LAW & POLICY CENTER, ENVIRONMENTAL DEFENSE
FUND, NATURAL RESOURCES DEFENSE COUNCIL, OHIO
ENVIRONMENTAL COUNCIL, & THE SIERRA CLUB.**

The Natural Resources Defense Council, Environmental Law and Policy Center, Sierra Club, Environmental Defense Fund, and Ohio Environmental Council (collectively, the “Conservation Groups”), respectfully request that the Attorney Examiners reconsider the decision to grant trade secret status to certain Duke information, referred to below as Duke’s Rider PSR Annual Margin Projection, in the hearing in the above consolidated cases. The Conservation Groups seek this relief because the undisputed record shows no possibility of competitive harm from the release of this information, the release would promote public accountability and transparency, and Ohio law requires it. *See* O.R.C. 4901.12 and 4905.07. The Conservation Groups, also respectfully request that the Commission grant its motion on an expedited basis pursuant to O.A.C. 4901-12(C), but do not certify that no party objects to the issuance of an immediate ruling or to the requested reconsideration. The Conservation Groups seek to cite to this information in their initial post-hearing brief, which is due to be filed on September 11, 2018, and request a decision on this motion in advance of that filing date. The reasons for this motion are set forth more fully in the attached Memorandum in Support.

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Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

In this proceeding, Duke Energy Ohio (“Duke”) seeks approval of a “Price Stabilization Rider” (“Rider PSR”) that, if approved, would require Duke’s customers to pay the net costs or receive the net revenues of Duke’s 9% ownership share in the Ohio Valley Electric Corporation (“OVEC”) through May 2025.¹ In support of its request to flow OVEC costs through Rider PSR, Duke provided the Supplemental Testimony of Judah Rose. Mr. Rose projects a total customer loss, if Rider PSR were approved, of \$77 million, and also provides annual projections indicating that Duke’s customers would lose money in each year of Rider PSR, i.e., 2018 through 2025. At the same time, Duke has suggested that this arrangement would benefit customers by acting as a hedge and reducing volatility.² Annual expected losses under Rider PSR are therefore relevant to the Commission’s decision on Rider PSR with respect to both the projected benefits of an OVEC “hedge” and its effects on customers’ bill volatility. Overall, these annual projections would provide important additional information to the public and Duke’s customers beyond the currently public aggregate value, by showing the different projections for losses under Rider PSR in the near-term years, when there is more certainty about the relevant variables, versus the long-term years, when that certainty lessens.

On July 9, 2018, the consolidated hearing began in the Duke consolidated cases at the Commission. On July 10, 2018, Mr. Rose testified at the hearing. In his testimony, Rose provided forecasts of the annual net margins regarding the OVEC that Duke posited

¹ See Stipulation and Recommendation, dated April 13, 2018, pages 18-20.

² See Rose Supplemental Testimony, page 21.

should be considered confidential. When questioned about some of the information, specifically the numbers found in the column labeled “Net Margins, With Total Demand Charges” on Witness Rose’s Supplemental Testimony Exhibit 39 (the “Rider PSR Annual Margin Projection”), Mr. Rose state, “there is not enough information [in the column] to back out specific parameters but just overall competitive position.”³

Thereafter, counsel for Sierra Club moved to make that specific column public based on the witness’ statements that there is no way to back calculate any specific trade secret information.⁴ Upon hearing the positions of the various parties, the Attorney Examiners decided to maintain the confidentiality of the Rider PSR Annual Margin Projection column over the objections of several parties.⁵ However, the Attorney Examiners did not make a finding as to how these annualized projections could cause competitive harm. Nor did Duke take the opportunity to develop any facts to demonstrate a possibility of competitive harm.

The Conservation Groups respectfully request that the Attorney Examiners reconsider their decision to maintain the confidentiality of this Rider PSR Annual Margin Projection information and instead make this specific information public in accordance with state law, Ohio Supreme Court precedent, and sound public policy.

II. LAW AND ARGUMENT

Ohio Revised Code § 4905.07 & § 4901.12 require that all proceedings before the Commission and all documents and records in its possession be made publicly available

³ Consolidated Duke Cases Transcript Volume II Confidential Sessions, page 280, lines 12-14.

⁴ Id. at lines 15-19.

⁵ Id. at page 285, lines 1-7.

except in specific, limited circumstances. Documents must be made public unless they fall into a set of narrow exemptions for information that is traditionally outside of the public domain, including trade secrets. *See* R.C. 149.43(A)(1); *State ex Tel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000) (noting that while trade secrets are not expressly listed as an exemption in the Ohio Public Records Law, they fall into the exception for records protected by state or federal law).

Revised Code §1333.61(D) defines “trade secret” as information 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.

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

Whether information constitutes a trade secret is a question of fact. *See State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 401, 732 N.E.2d 373 (2000). The presumption of public access to Commission documents is liberally construed. *See State ex rel. The Miami Student v. Miami Univ.*, 79 Ohio St.3d 168, 170, 680 N.E.2d 956 (1997).

The burden of demonstrating an exemption from the baseline rule that all Commission documents are open to the public falls squarely on the party seeking to keep information from the public—in this case, Duke. *See, e.g., Besser* at 400. That burden is high. The state of Ohio has “a long-standing public policy committed to open public records.” *State ex rel. Cincinnati v. Daniels*, 108 Ohio St.3d 518, 2006-Ohio-1215, 844 N.E.2d 1181, ¶ 8; accord *State ex rel. Plain Dealer v. Ohio Dep't of Ins.*, 80 Ohio St.3d

513, 518, 687 N.E.2d 661 (1997) (noting that government records are public, “subject to only a few very limited and narrow exceptions”) (citation omitted). Indeed, all doubts as to the trade secret status of a given document must be resolved in favor of disclosure.

State ex rel. Bardwell v. Cuyahoga Cty. Bd of Comm'rs, 127 Ohio St.3d 202, 2010-Ohio-5073, 937 N.E.2d 1274, ¶ 10.

Finally, any decision to grant trade secret or proprietary status to any information must be supported by record evidence. R.C. §4903.09; *See In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229, ¶39.

A. Duke failed to offer any evidence to support its claim for trade secret status for the Rider PSR Annual Margin Projection and, in fact, the undisputed evidence shows that there would be no harm from public release of this information.

At the hearing, Duke Witness Rose testified that the Rider PSR Annual Margin Projection, if made public, would not enable a competitor to calculate OVEC’s coal price forecast.⁶ Mr. Rose also testified that, if the numbers in that column were made public, it would not enable a competitor to calculate OVEC’s projected capital spending.⁷ Mr. Rose further testified that publicizing the information in the column at issue would not enable a competitor to calculate any specific parameter.⁸ Instead, he believes, it will reveal an “overall competitive position” only.⁹ Mr. Rose did not testify that providing

⁶ Consolidated Duke Cases Transcript Volume II Confidential Sessions, pages 279-280, lines 24-25 and lines 1-3.

⁷ Id. at page 280, lines 11-14.

⁸ Id. line 13.

⁹ Id. at line 14.

“overall competitive position” evidence in public would somehow cause any competitive harm.

Likewise, Duke relied on conclusory statements and arguments with no evidentiary support in record in an effort to rebut several parties’ request that this information be made public. Duke stated that this information demonstrates a “potential outlook” and could have impacts on Duke’s ability to obtain financing, despite the fact that OVEC’s current negative financial outlook is public knowledge (from among other sources, the FirstEnergy Solutions bankruptcy proceeding).¹⁰ In addition, as a legal argument detached from the facts of this case, Duke claimed that this type of future information has traditionally been held as confidential by the Commission.¹¹ However, despite having the opportunity to do so during the confidential portion of Mr. Rose’s testimony, Duke never offered any evidence in support of its position that the Rider PSR Annual Margin Projection information would reveal anything beyond the well-known fact that OVEC is in financial difficulty. Thus, there is no record basis for finding that this Rider PSR Annual Margin Projection information is a trade secret under Ohio law.

Duke’s arguments, unaccompanied by any factual support, do not satisfy the high burden placed on the utility to prove trade secret status. *See Besser* 89 Ohio St.3d at 400-401, 403, 732 N.E.2d 373 (holding that “conclusory statements” cannot establish that a document “retains any potential economic value” where the statements are not supported by “any factual evidence”; rather, a party must provide “specific, credible evidence” in support of its trade secret claim); *see also Arnos v. MedCorp, Inc.*, 6th Dist. Lucas No. L09-1248, 2010-Ohio-1883, ¶ 28 (rejecting trade secret claim based on affidavit asserting

¹⁰ Id. page 281, lines 12-14.

¹¹ Id. lines 15-25.

that release of documents would reveal a valuable accounting process, where it was not supported by “any factual detail”). Simply put, the law requires Duke to demonstrate, with factual evidence, that there is independent economic value, actual or potential, to the information not being known or readily attainable by proper means. Duke has failed to do this and that is the end of the matter.

Duke’s first argument that these “potential outlooks” may impact its ability to obtain financing is meritless. Duke offers no evidence to support this theory and it is not clear what financing Duke is referring to or how the revelation of Duke’s projected annual losses under Rider PSR could even theoretically have any such impact on its finances. The fact that Duke is likely to lose money on its OVEC contract is already public. And any theory that the revelation of annual losses would somehow harm Duke was not pursued by the admission of evidence at the hearing.

Duke’s second argument, that future-looking information has previously been protected by the Commission is similarly meritless. While Commission precedent is to some extent instructive, when it comes to trade secret determinations each decision must be made based on the evidence in the record. R.C. §4903.09; *See In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229, ¶39. It is not relevant what the Commission has done in past cases with entirely different information and entirely different evidence. Duke cannot escape its burden to prove the information it seeks to protect is a trade secret based on what the Commission has done in other cases in which other facts were presented. The law is clear: each utility arguing for trade secret protection of certain, defined information must demonstrate, through record evidence, independent economic value, actual or potential,

to the information not being generally known or readily available by other means. Duke failed to satisfy this burden and instead relied on conclusory arguments with no support in the record.

The only piece of evidence Duke did proffer was Witness Rose's statement that while no specific parameters could be calculated from publicizing the information, an "overall competitive position" may be ascertainable.¹² In addition to already being public information (in both FirstEnergy bankruptcy proceeding, among other sources), this statement is far too general to satisfy the high burden required as a conclusory statement. An "overall competitive position" is already readily determined by the information Duke already agreed to release, and is confirmed by public information filed at the Federal Energy Regulatory Commission and in other venues such as the bankruptcy proceeding involving FirstEnergy Solutions. Taking that general, publicly available knowledge, along with the publicly available aggregate number would likely produce a similar understanding of Duke/OVEC's "overall competitive position" as the Rider PSR Annual Margin Projection information.

Finally, O.R.C. §4903.09 requires all decisions by the Commission to be based on findings of fact and contain citations to the evidence of record which supports those decisions. Duke failed to offer any evidence on which the Attorney Examiners could reasonably rely and therefore the Rider PSR Annual Margin information does not qualify for trade secret protection. *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229, ¶39.

¹² Id. page 280, line 14.

Ohio law requires transparency and openness in public utility proceedings, except in rare instances, and Duke failed to satisfy its burden to prove that the information seeking to be protected is a trade secret. Therefore, the Conservation Groups, respectfully request that the Attorney Examiners reconsider their ruling and make public this Rider PSR Annual Margin information in accordance with Ohio law, Ohio Supreme Court precedent, and sound public policy.

B. Expedited treatment is appropriate so that the parties can provide as full a picture as possible in their initial public briefs.

Ohio Admin. Code 4901-12(C) authorizes any party to request expedited treatment for any motion and to provide the grounds for the request in the memorandum in support. As discussed above, Ohio law and public policy requires openness and transparency in Commission proceedings. Only in select circumstances, should information be withheld from the public. Therefore, in an effort to provide the public with as much information as possible, Conservation Groups are requesting expedited treatment so that the information sought to be released can be used in the parties' public briefs, which are due to be filed on September 11, 2018. As shown above, the Rider PSR Annual Margin information is not entitled to trade secret status and therefore it rightfully belongs to the public and should be included in public briefs. The Ohio public, especially Duke's customers who would have to pay Rider PSR if approved, are entitled to have as much access as possible to projections of costs related to Duke's OVEC share.

III. CONCLUSION

For the reasons stated herein, the Conservation Groups, respectfully request that the Commission grant this Motion to Reconsider, publicize the information, and render a

decision in an expedited manner pursuant to the timeline established in O.A.C. 4901-12(C) for a non-certified request for expedited treatment.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via regular electronic transmission to the persons listed below, on August 9, 2018.

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Summary: Motion for Reconsideration and Request for Expedited Treatment electronically filed by Mr. Robert Dove on behalf of Natural Resources Defense Council and Environmental Defense Fund and Environmental Law and Policy Center and Ohio Environmental Council and Sierra Club