

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
Energy Ohio, Inc. to Adjust Rider DR-) Case No. 10-2326-GE-RDR
IM and Rider AU for 2010 SmartGrid)
Costs and Mid-Deployment Review.)

**MEMORANDUM CONTRA DUKE’S MOTION TO CONTINUE PROTECTIVE
ORDER THAT KEEPS CERTAIN INFORMATION ABOUT DUKE’S SMART
GRID SECRET FROM THE PUBLIC
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

Since 2009, Ohioans have paid more than \$300 million to Duke Energy Ohio (“Duke”) for deployment of its “smart grid.”¹ This case involves the mid-deployment audit (“MetaVu Report”) of the costs and benefits of Duke’s smart grid conducted on behalf of the Public Utilities Commission of Ohio (“PUCO”).²

¹ From Duke’s previous smart grid rider cases, its electric customers have paid a total of \$338.6 million and its gas customers have paid a total of \$55.6 million. *See* Case No. 10-867-GE-RDR, Opinion and Order (March 23, 2011) at 7 (electric customers pay \$8.6 million and gas customers pay \$5.0 million); Case No. 10-2326-GE-RDR, Opinion and Order (June 13, 2012) at 13 (electric customers pay \$19.2 million and gas customers pay \$9.2 million); Case No. 12-1811-GE-RDR, Opinion and Order (March 27, 2013) at 5 (electric customers pay \$28.5 million and gas customers pay \$12.3 million); Case No. 13-1141-GE-RDR, Opinion and Order (April 9, 2014) at 7 (electric customers pay \$41.8 million and gas customers pay \$7.0 million); Case No. 14-1051-GE-RDR, Second Entry on Rehearing (July 1, 2015) at 2 (electric customers pay \$52.5 million and gas customers pay \$7.2 million); Case No. 15-883-GE-RDR, Opinion and Order (March 31, 2016) at 7 (electric customers pay \$55 million and gas customers pay \$6.4 million); Case No. 16-794-GA-RDR, Application (April 18, 2016), Testimony of Peggy Laub, Attachment PAL-1, page 17 (gas customers pay \$4.5 million); Case No. 16-1404-EL-RDR, Entry (December 21, 2016) at 2 (electric customers pay \$42.7 million); Case No. 17-690-GA-RDR, Application (March 24, 2017), Testimony of Peggy Laub, Attachment PAL-1, page 17 (gas customers pay \$4.0 million); Case No. 17-1403-EL-RDR, Entry (January 17, 2018) at 2 (electric customers pay \$40.3 million).

² Duke Energy Ohio Smart Grid Audit and Assessment prepared by MetaVu, Inc. (June 30, 2011) at 13. Meta Vu estimated the operational benefits to range between \$325.8 million and \$447.5 million. The mid-range of the estimate \$382.8 million.

It has been seven years since the MetaVu Report was issued. At the time, portions of Duke's application, the MetaVue Report, and the PUCO Staff's comments alluding to those portions of the report were redacted because Duke claimed that they contained proprietary information and trade secrets.³ Duke has sought to continue the protective order in this case four times, most recently on November 20, 2018.

The Office of the Ohio Consumers' Counsel ("OCC") files this Memorandum Contra Duke's most recent motion to further extend the time that information be shielded from consumers who are asked to pay the smart grid costs. Duke seeks to withhold information from the public regarding weaknesses that MetaVue found in Duke's smart grid system seven years ago. In addition, Duke claims that cost information in its application from seven years ago could affect current competitive bidding for its products and services.

After seven years, however, it is likely that much of the information Duke seeks to continue shielding from the public no longer qualifies for protection. Further, the MetaVue Report was overly redacted and contrary to the principle that filings receive minimal protection for confidentiality.⁴ The PUCO should give the MetaVue Report, Duke's Application, and the PUCO Staff's comments a fresh look to determine whether the redacted information is still worthy of protection under the law.

II. STANDARD OF REVIEW

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

³ Duke Motion for Protective Order (June 30, 2011).

⁴ Application (June 30, 2011).

that confidential treatment is to be given only under extraordinary circumstances.⁵ 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.’”⁶ The PUCO has noted that “[a]ll proceedings at the 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.”⁷ 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.”⁸

⁵ 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.

⁶ *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.

⁷ 93-487 Entry at 3.

⁸ *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.

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.”⁹ 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.
- (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 Supreme Court of Ohio (“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. The Court cited to the Restatement of Torts, sec. 757, Comment b, which states that a trade secret is not simply information as to single or temporary events

⁹ R.C. 149.43(A)(1)(v).

in the conduct of the business. “A trade secret is a process or device for *continuous* use in the operation of the business.”¹⁰

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,
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.¹¹

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 statute.”¹²

III. RECOMMENDATIONS

A. The PUCO should determine that information in the seven-year-old documents that are the subject of Duke’s motion no longer deserve to be protected from disclosure to the public.

Duke claims that the redacted discussions in the MetaVue Report concerning data privacy, data security, the assessment of its conformity to the Guidelines and Practices,

¹⁰ *Plain Dealer* at 526 citing Restatement of Torts, sec. 757, Comment b (emphasis added).

¹¹ *Id.* at 524-525.

¹² *Id.* at 525.

and forecast information from 2011 still deserve protection.¹³ Duke asserts that the information details weaknesses in Duke's cyber security that could be used by persons seeking "nefarious access" to its systems.¹⁴ The PUCO must make its own determination regarding whether the information should remain concealed from public view under the law.

By making its claims, Duke is actually saying that despite the hundreds of millions of consumer dollars it has spent over the past seven years on smart grid, nothing has changed regarding its ability to protect its grid and consumer information gathered through its smart grid. If that is true, then consumers deserve a refund. But if Duke has improved its cybersecurity systems, then part or all the redacted information in the MetaVue Report is no longer valid.

The PUCO should re-examine the redacted information from the MetaVue Report and determine whether it no longer deserves protection under the law. All information not worthy of protection should be disclosed to the public.

Duke also claims that the cost information in its application contains "highly-sensitive per-unit prices that could impact the competitive bidding for products and services for which customers ultimately pay."¹⁵ But again this is seven-year-old information that most certainly has changed over the years. The PUCO should also re-examine this cost information and determine that it no longer deserves protections under the law.

¹³ Motion at 4.

¹⁴ *Id.*

¹⁵ *Id.*

Duke has the burden of showing that the information identified in the motion still should not be disclosed to the public. After seven years, the PUCO should re-examine the information instead of relying on Duke's assertions.

B. The redactions in the MetaVue Report do not minimize the information is kept from public disclosure, as required by the PUCO's rules, and should be reviewed and reversed by the PUCO.

As the PUCO has recognized, 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."¹⁶ In that regard, Ohio Adm. Code 4901-1-24(D) specifies that a protective order "shall minimize the amount of information protected from public disclosure." The seven-year-old redactions in the MetaVue Report are contrary to these tenets, and should be disclosed to the public who have been charged for the smart grid.

Entire paragraphs¹⁷ and even entire pages¹⁸ of the report have been redacted. This is not minimizing the amount of information protected from public disclosure. The PUCO should determine that the report should no longer be protected, and the information in the report should be disclosed to the public under the law.

IV. CONCLUSION

Ohio law presumes that documents and information are to be made public. The person asserting that they should not be disclosed to the public has the burden of overcoming this presumption. In this case, Duke has not shown that the seven-year-old information in the MetaVue Report and its application should still be protected from

¹⁶ Case No. 89-365-RC-ATR, Opinion and Order (October 18, 1990), 1990 Ohio PUC LEXIS 1138 at *5.

¹⁷ See MetaVue Report (public version), pages 12-13, 55, 59-61, 67.

¹⁸ See *id.*, pages 65-66, 68-69.

public disclosure under the law. The PUCO should re-examine whether all the redacted information in the MetaVue Report, Duke's application, and the PUCO Staff's comments still should be protected from the public's right to know.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra was served on the persons stated below via electronic transmission on this 5th day of December 2018.

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This foregoing document was electronically filed with the Public Utilities

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12/5/2018 4:46:26 PM

in

Case No(s). 10-2326-GE-RDR

Summary: Memorandum Memorandum Contra Duke's Motion to Continue Protective Order That Keeps Certain Information About Duke's Smart Grid Secret from the Public by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Etter, Terry L.