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. 21-887-EL-AIR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	)))	Case No. 21-888-EL-ATA
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval To Change Accounting Methods.	)))	Case No. 21-889-EL-AAM

MEMORANDUM CONTRA MOTION OF DUKE ENERGY OHIO, INC. FOR A PROTECTIVE ORDER
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

Duke Energy Ohio, Inc. ("Duke") seeks to increase the rates that its consumers pay for electric distribution service. Duke's 640,000 residential consumers would be hit hard by this requested rate increase. Even though Duke is asking for its customers to pay more, Duke wants to keep secret information about its public customer surveys and so-called "incentive plans."[1] Duke's request to deny public access to information should be denied.

II. ARGUMENT

A. Consumer protection requires public disclosure of information except in the most extraordinary of circumstances, which Duke has not shown here.

To prevail on its motion for a protective order, Duke must overcome a "strong

[1] Motion to Duke Energy Ohio, Inc., for Protective Order (October 15, 2021) ("Motion").

presumption" that citizens have a right to access information and documents involving governmental proceedings.[2] By law, "all proceedings of the public utilities commission and all documents and records in its possession are public records," with limited exceptions.[3] R.C. 4905.07 similarly says that "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," again, subject to limited exceptions. To overcome the strong presumption in favor of public disclosure, the party that seeks to keep information private (here, Duke) bears the burden of proving that "state or federal law prohibits release of the information."[4]

The law *requires* the information to be made public unless *Duke* proves that it should be protected from public disclosure. By default, all documents in PUCO proceedings are publicly available, and it is *Duke* who is asking the PUCO to conceal information from public disclosure. But Duke has failed to meet its burden to keep the information secret.

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[2] *In re Joint Application of the Ohio Bell Tel. Co. & Ameritech Mobile Servs., Inc. for Approval of the Transfer of Certain Assets*, No. 89-365-RC-ATR, 1990 Ohio PUC LEXIS 1138, at *5 (Oct. 18, 1990).

[3] R.C. 4901.12.

[4] Ohio Adm. Code 4901-1-24(D) (PUCO may redact documents "to the extent that state or federal law prohibits release of the information, including where the information is deemed ... to constitute a trade secret under Ohio law"). *See also In re Application of Jay Plastics Div. of Jay Indus., Inc. for Integration of Mercantile Cust. Energy Efficiency or Peak-Demand Reduction Programs with the Ohio Edison Co.*, Case No. 13-2440-EL-EEC, 2015 Ohio PUC LEXIS 139, at *6 ("an entity claiming trade secret status bears the burden to identify and demonstrate that the material is included in categories of protected information under the statute and additionally must take some active steps to maintain its secrecy") (Feb. 11, 2015).

B. The exception to public disclosure in consumers' interest is limited -- only information that is deemed to be trade secret may be protected from disclosure.

Duke asserts that the customer surveys and so-called "incentive plans" should be kept secret because they are trade secrets.[5] Under Ohio law, information is a trade secret only if it satisfies two conditions: "(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," and "(2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."[6]

In attempting to prove that the information in question has value to the party seeking to keep it secret and to its competitors (as is required by the statute), the Supreme Court of Ohio has ruled that a party claiming trade secret status must do more than provide "conclusory affidavits."[7] Other Ohio courts have consistently done the same, rejecting trade secret claims where the party relied only on conclusory statements and vague assertions about the potential value of the claimed trade secret.[8]

Ohio courts and the PUCO sometimes consider the following factors when evaluating a utility's trade secret claim: (1) the extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, *i.e.*,

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[5] *See* Motion at 4-6.

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

[7] *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St. 3d 396, 404 (2000) ("reliance on conclusory affidavit statements is insufficient to satisfy [the] burden to identify and demonstrate that the records withheld and portions of records redacted are included in categories of protected information under R.C. 1333.61(D).").

[8] *See, e.g., Buduson v. City of Cleveland*, 2019-Ohio-963 (rejecting trade secret claim where party relied "only on speculative and conclusory statements" and failed to show *how* a competitor could derive value from the information claims to be a trade secret); *Arnos v. MedCorp., Inc.*, 2010-Ohio-1883, ¶ 28 ("Conclusory statements as to trade secret factors without supporting factual evidence are insufficient to meet the burden of establishing trade secret status.").

by the employees; (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 for others to acquire and duplicate the information.[9] Accordingly, information is not deemed a trade secret if the party holding the information derives no independent economic value from keeping it secret *or* if competitors would gain no advantage if the information were disclosed to them.

A party claiming trade secret status must also prove that the alleged trade secrets are novel or unique. Common, typical business information does not become a trade secret by virtue of a company trying to keep such information a secret.

The United States Supreme Court, in *Kewanee v. Bicron*,[10] interpreted Ohio's trade secret law (as codified in R.C. Chapter 1333). The Court ruled that a trade secret need not meet the stringent novelty requirements for a patent, but that "some novelty will be required if merely because that which does not possess novelty is usually known; secrecy, in the context of trade secrets, thus implies at least minimal novelty."[11] Ohio courts have followed *Kewanee* in requiring a party to demonstrate some degree of novelty for a trade secret claim.

Parties making trade secret claims also have a duty to minimize the scope of those claims by redacting from public disclosure only the information that is a trade secret. The

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[9] *See State ex rel Plain Dealer v. Ohio Dep't of Ins.*, 80 Ohio St. 3d 513, 524-25 (1997) (establishing the six-part test); *In re Application of Windstream Ohio, Inc.*, Case No. 15-950-TP-ATA, 2016 Ohio PUC LEXIS 487, at *15 (May 17, 2016) (applying the six-factor test for trade secrets set forth in *Plain Dealer* and denying motion for protective order).

[10] 416 U.S. 470 (1974).

[11] *Id.* at 476.

PUCO's rules prohibit a party from broadly marking documents as "confidential" when only some limited information constitutes a trade secret. They require that any protective order "minimize the amount of information protected from public disclosure."[12] This is consistent with R.C. 149.43(B) regarding public records. Under R.C. 149.43(B), if a document contains trade secrets, the governmental entity in possession of the document must still disclose those portions of the document that are not trade secrets.[13]

Thus, when evaluating a party's claim that a document contains confidential information, the PUCO must consider *each redaction* on an individual basis to determine whether that specific information is a trade secret.[14] The party seeking to prevent the release of information to the public must demonstrate that each and every piece of redacted information is a trade secret, not just that the document generally contains the type of information that might be considered a trade secret in some context. Duke might complain that this is an onerous task. But any burden is of Duke's own creation, resulting from its overbroad trade secret claims and attempt to protect the information from public disclosure. And that burden does not outweigh the greater harm that is done to the public when it is denied access to information that is required to be released.

[12] Ohio Adm. Code 4901-1-24(D).

[13] R.C. 149.43(B) ("If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt.").

[14] *See Naymik v. Ne. Ohio Areawide Coordinating Agency*, 2018-Ohio-1718 (requiring party to identify the specific portions of a document that it claimed were trade secrets rather than designating the entire document confidential).

C. Duke has failed to meet its burden to deny public access to information, contrary to consumers' interest.

1. Duke has failed to show that its customer surveys should be kept secret from the public.

Duke does not cite a single case in support of its Motion to keep from the public customer surveys . We have been unable to find any such Ohio authority supporting such a broad, sweeping, anti-public disclosure rule. Duke simply asserts that the information it wants to keep from the public is "proprietary," developed with "substantial cost and effort," that could be used by competitors to "disparage" or "contrast" Duke's customer service.[15] But Duke has made no effort to show any of the six factors under *State ex rel Plain Dealer* necessary to prevent public disclosure. Nor has Duke made any effort to show that the information it seeks to keep secret is novel. Neither failure is surprising.

In Ohio's competitive retail market, consumers' thoughts on the quality of Duke's service *should be* public. Information facilitating competitors' ability to contrast themselves to Duke regarding quality of service *should be* public. Such information would provide opportunity to consumers to inform themselves and choose between providers of retail electric service, fostering the competitive market, consistent with state policy.[16]

2. Duke has failed to show that its incentive plans should be kept secret from the public.

Duke does not cite a single case in support of its Motion to keep from the public incentive plans. We have been unable to find any such Ohio authority supporting such a

[15] *See* Motion at 4 (regarding customer surveys).

[16] *See, e.g.,* R.C. 4928.02(B), (C), and (E).

broad, sweeping, anti-public disclosure rule. It simply asserts that the information "would provide competitors with tremendous insight into the Company's compensation philosophies, policies, and practices, potentially allowing them to plunder from the Company's talent pool." But again, Duke has made no effort to show any of the six factors under *State ex rel Plain Dealer* necessary to prevent public disclosure. Nor has Duke made any effort to show that the information it seeks to keep secret is novel. Again, neither failure is surprising.[17]

Duke wants to charge consumers (the public) for its incentive plans.[18] Consumers (the public) *should know* what they are being charged for via public disclosure of the incentive plans themselves (not individual compensation).

III. CONCLUSION

Except in the most extraordinary circumstances, the PUCO should require that utilities make public information that they file in "support" of proposed charges on consumers. This is particularly so where, as here, a utility seeks to *increase* charges on consumers. Duke has failed to meet its burden to deny public access to its customers surveys and incentive plans. Its Motion should be denied in consumers' interest.

[17] *See* Motion at 5 (regarding incentive plans).

[18] *See* Direct Testimony of Jacob J. Stewart (October 15, 2021).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below via electronic transmission, this 1st of November 2021.

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The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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Summary: Memorandum Memorandum Contra Motion of Duke Energy Ohio, Inc. for a Protective Order by Office of The Ohio Consumers' Counsel electronically filed by Mrs. Tracy J. Greene on behalf of Michael, William J.