

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

ENTRY

Entered in the Journal on March 20, 2024

I. SUMMARY

{¶ 1} The Commission grants Duke Energy Ohio, Inc.'s motions for protective order and denies, as moot, the motions to extend such protective orders.

II. PROCEDURAL HISTORY

{¶ 2} Duke Energy Ohio, Inc. (Duke) is an electric light company as defined by R.C. 4905.03 and a public utility as defined by R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 3} On October 1, 2021, Duke filed its application to increase its rates pursuant to R.C. 4909.18.

{¶ 4} On October 1, 2021, Duke filed a motion for a protective order specific to information regarding Duke's current budget guidelines and assumptions, explanations of its cybersecurity policy, as well as internal asset management policy and third-party service

provider standards. On October 6, 2023, Duke filed a motion to extend protection of the same information for the same reasons as the October 1, 2021 motion.

{¶ 5} No memoranda contra the October 1, 2021 or October 6, 2023 motions were filed.

{¶ 6} On October 15, 2021, Duke filed a motion for a protective order specific to information regarding its customer service survey results and methodologies, wholesale lighting asset costs, and documents detailing employee compensation and incentive plans. On October 6, 2023, Duke filed a motion to extend protection of the same information for the same reasons as the October 15, 2021 motion.

{¶ 7} On November 1, 2021, the Ohio Consumers' Counsel (OCC) filed a memorandum contra Duke's October 15, 2021 motion. On November 8, 2021, Duke filed its reply. No memoranda contra the October 6, 2023 motion were filed.

{¶ 8} On December 14, 2022, the Commission issued an Opinion and Order, approving the stipulation and recommendation filed by Duke.

{¶ 9} Pursuant to R.C. 4903.10, on January 13, 2023, OCC filed an application for rehearing regarding the Opinion and Order. On February 8, 2023, the Commission issued an Entry on Rehearing, granting OCC's application for rehearing for the purpose of further consideration of the matters specified in the application for rehearing.

III. DISCUSSION

A. *October 1, 2021 Motion for Protective Order and October 6, 2023 Motion for Extension of Such Protective Order*

{¶ 10} In its motion, Duke contends that without protective treatment, disclosure of information related to three areas of its application could damage Duke's competitive position and business interests. First, Duke contends that information contained within Supplemental (C)(10) to the application is guidance considering labor inflation rates, which

are, in part, based on confidential labor contracts that include negotiated wage increases. Duke argues that disclosure of this information would negatively affect Duke's ability to reasonably retain its labor force. Second, Duke asserts that Exhibit IT-5 lays out Duke's cybersecurity policy. Publication of such information, Duke states, would jeopardize the safety and security of Duke's electronic operations. Lastly, Duke proffers Exhibits IT-2 and IT-3, which were provided in response to the second of the three functional areas chosen by Staff and describe the internal asset management policy and third-party service provider standard. Further, these exhibits detail information that has been created by Duke in order to ensure the confidentiality of electronic data and cyber security risks the protection of which is critical to Duke's ability to provide reliable service and maintain confidentiality of customer data.

{¶ 11} R.C. 4905.07 provides that all facts and information in the possession of the Commission shall be public, except as provided in R.C. 149.43 and as consistent with the purposes of Title 49 of the Revised Code. R.C. 149.43 specifies that the term "public record" excludes information which, under state or federal law, may not be released. The Ohio Supreme Court has clarified that the "state or federal law" exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State*, 89 Ohio St. 396, 399, 732 N.E.2d 373 (2000).

{¶ 12} Similarly, Ohio Adm.Code 4901-1-24 allows the Commission to issue an order to protect the confidentiality of information contained in a filed document, "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, and where nondisclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code."

{¶ 13} Ohio law defines a 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.” R.C. 1333.61(D).

{¶ 14} The Ohio Supreme Court has also established a six-factor test for determining the existence of a trade secret. *State ex rel. the Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 687 N.E.2d 661 (1997). A trade secret claim is analyzed according to these factors: (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., 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. *Plain Dealer*, 80 Ohio St.3d at 524-525, 687 N.E.2d 661 (1997).

{¶ 15} The attorney examiner has reviewed the arguments presented and the information included in the motion for protective order. Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to R. C. 1333.61(D), as well as the six-factor test set forth by the Ohio Supreme Court, the attorney examiner finds documents labeled Supplemental (C)(10), Exhibits IT-2, IT-3, and IT-5 contain trade secret information. Their release is, therefore, prohibited under state law. The attorney examiner also finds that nondisclosure of this information is not inconsistent with the purposes of Title 49 of the Revised Code. Therefore, the attorney examiner finds that Duke’s motion for protective order is reasonable with regard to Supplemental (C)(10), Exhibits IT-2, IT-3, and IT-5, and should be granted.

{¶ 16} Ohio Adm.Code 4901-1-24(F) provides that, unless otherwise ordered, protective orders issued pursuant to Ohio Adm.Code 4901-1-24(D) automatically expire after 24 months. Therefore, confidential treatment shall be afforded for a period ending 24 months from the date of this Entry. Until that time, the Docketing Division should maintain, under seal, the information filed confidentially.

{¶ 17} Ohio Adm.Code 4901-1-24(F) requires a party wishing to extend a protective order to file an appropriate motion at least 45 days in advance of the expiration date. If Duke wishes to extend this confidential treatment, it should file an appropriate motion at least 45 days in advance of the expiration date. If no such motion to extend confidential treatment is filed, the Commission may release this information without prior notice to Duke.

{¶ 18} On October 6, 2023, Duke filed a motion to extend the protective order sought in the October 1, 2021 motion. Since this Entry grants the October 1, 2021 motion for protective order, thus starting the 24-month time period for protective treatment, the attorney examiner finds the October 6, 2023 motion for extension moot and, therefore, should be denied.

B. October 15, 2021 Motion for Protective Order and October 6, 2023 Motion for Extension of Such Protective Order

{¶ 19} In its October 15, 2021 motion for protective order, Duke contends that without protective treatment, disclosure of information from six documents could damage Duke's competitive position and business interests. These six documents are found in the attachments to the testimony of three witnesses. First, Duke states that Attachment ABS-2 CONF, attached to the witness testimony of Amy B. Spiller, contains the results of various customer satisfaction and sentiment survey information. This information, Duke asserts, is proprietary and the result of substantial effort and cost to Duke. Therefore, its release could be used by competitors to contrast or disparage Duke's customer service. Duke claims that this information is closely held within its business. Second, Duke requests protection of Attachments BLS-4 CONF and BLS-5 CONF which are attachments to the testimony of Bruce L. Sailors. These attachments, according to Duke, include the prices Duke pays to wholesalers for certain lighting assets. Releasing this information would compromise Duke's competitive position by enabling other companies to act as they otherwise would not with the absence of the information and would undermine Duke's future negotiations. Duke asserts that this information derives actual, independent economic value to Duke as a result of it not being generally known or readily ascertainable by other persons who could

use it to affect market prices and availability of commodities in the market. Duke attempts to ensure this market information remains a secret both internally and externally. Third, Attachments JJS-3(a) CONF, JJS-3(b) CONF, and JJS-3(c) CONF, attachments to the testimony of Jacob J. Stewart, provide copies of Duke's employee incentive plan. Duke asserts the release of this information would provide their competitors with insight into their compensation philosophy and policies, leaving the company vulnerable to a "plunder" of their talent pool.

{¶ 20} In its memo contra, OCC argues that consumer protection requires public disclosure of information except in the most extraordinary of circumstances, which Duke has not shown here. According to OCC, the exception to public disclosure is limited, only information that is deemed to be a trade secret may be protected from disclosure. Further, OCC argues that Duke must show that the protected information contains "some novelty," an element to trade secret determination in patent law, to warrant trade secret protection. Regarding Duke's specific requests, OCC argues that Duke has failed to show that its customer surveys should be kept secret from the public. Duke provides overly broad arguments supporting this request, according to OCC, and failed to apply the six-factor test, as well as failed to address the novelty of the information to prevent public disclosure. OCC believes, due to Ohio having a competitive electric supply market, consumers' thoughts on the quality of Duke's service, as well as information facilitating competitors' ability to contrast themselves to Duke regarding quality of service, should be public. OCC also argues that Duke failed to show that its employee incentive plans should be kept secret from the public. OCC contends that Duke did not provide any authority to support its contention nor did it weigh the appropriate factors to prevent public disclosure. OCC believes that consumers should know for which they are specifically being charged.

{¶ 21} In its reply, Duke argues that OCC mischaracterizes the protective order standard and incorrectly adds "novelty" to the six-factor test. Regarding the "novelty" factor, Duke noted that the Ohio Supreme Court has expressly stated that this factor, in the patent law sense, is not required for a trade secret. According to Duke, the Commission has

never used this factor, and, in a review of court decisions citing that Ohio Supreme Court decision, no court used “novelty” as a factor when determining a trade secret. Duke states that the customer surveys are subject to reasonable efforts to maintain their secrecy both internally and externally, that the surveys were developed with substantial effort and cost, that such investment will be compromised since competitors could use this data to disparage Duke or make comparisons with Duke’s service, and that the data is significant to Duke because it can be used internally with regard to business improvement. Regarding the incentive plans, Duke asserts that they are subject to reasonable efforts to maintain their secrecy both internally and externally; that they were developed with substantial effort and cost and represent an accumulation of decades of best practices in human capital management; that, if disclosed, Duke’s investment in that development would be compromised; that losing talent to other entities as a result of the information’s disclosure would increase Duke’s costs and could affect customer service. Duke also notes that the Commission found that the employee incentive plans presented in Duke’s 2017 rate case contained trade secret information and issued a protective order.

{¶ 22} The attorney examiner has reviewed the arguments presented and the information included in the motion for protective order. In response to arguments related to the “novelty” factor made by OCC, the Commission has not previously used novelty as part of its protective treatment analysis and does not intend to do so here. As to the contested portions of the motion for protective order, as noted by Duke, we have previously granted protective treatment for Duke’s employee incentive plans in a prior case and again do so here, as noted below. *In re Duke Energy Ohio, Inc.*, Case No. 17-32-EL-AIR, et al., Opinion and Order (Dec. 19, 2018) at ¶ 163. Also, we believe Duke’s arguments asking for protective treatment of Attachment ABS-2 CONF are persuasive. Therefore, applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to R.C. 1333.61(D), as well as the six-factor test set forth by the Ohio Supreme Court, the attorney examiner finds documents labeled Attachment ABS-2 CONF, Attachment BLS-4 CONF, Attachment BLS-5 CONF,

Attachment JJS-3(a) CONF, Attachment JJS-3(b) CONF, and Attachment JJS-3(c) CONF contain trade secret information. Their release is, therefore, prohibited under state law. The attorney examiner also finds that nondisclosure of this information is not inconsistent with the purposes of Title 49 of the Revised Code. Therefore, the attorney examiner finds that Duke's motion for protective order is reasonable with regard to Attachment ABS-2 CONF, Attachment BLS-4 CONF, Attachment BLS-5 CONF, Attachment JJS-3(a) CONF, Attachment JJS-3(b) CONF, and Attachment JJS-3(c) CONF and should be granted.

{¶ 23} Ohio Adm.Code 4901-1-24(F) provides that, unless otherwise ordered, protective orders issued pursuant to Ohio Adm.Code 4901-1-24(D) automatically expire after 24 months. Therefore, confidential treatment shall be afforded for a period ending 24 months from the date of this Entry. Until that time, the Docketing Division should maintain, under seal, the information filed confidentially.

{¶ 24} Ohio Adm.Code 4901-1-24(F) requires a party wishing to extend a protective order to file an appropriate motion at least 45 days in advance of the expiration date. If Duke wishes to extend this confidential treatment, it should file an appropriate motion at least 45 days in advance of the expiration date. If no such motion to extend confidential treatment is filed, the Commission may release this information without prior notice to Duke.

{¶ 25} On October 6, 2023, Duke filed a motion to extend the protective order sought in the October 15, 2021 motion. Since this Entry grants the October 15, 2021 motion for protective order, thus starting the 24-month time period for protective treatment, the attorney examiner finds the October 6, 2023 motion for extension moot and, therefore, should be denied.

IV. ORDER

{¶ 26} It is, therefore,

{¶ 27} ORDERED, That the October 1, 2021 and October 15, 2021 motions for protective order should be granted. It is further,

{¶ 28} ORDERED, That the October 6, 2023 motions for extension of the protective orders be denied, as moot. It is, further,

{¶ 29} ORDERED, That the Commission's Docketing Division continue to maintain the designated information under seal in accordance with Paragraphs 15 and 22. It is, further,

{¶ 30} ORDERED, That a copy of this Entry be served upon all parties and interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/Matthew J. Sandor

By: Matthew J. Sandor
Attorney Examiner

NJW/dr

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in

Case No(s). 21-0887-EL-AIR, 21-0888-EL-ATA, 21-0889-EL-AAM

Summary: Attorney Examiner Entry granting the October 1, 2021 and October 15, 2021 motions for protective order, denying the October 6, 2023 motions for extension of the protective orders, as moot, and directing the Commission's Docketing Division to continue to maintain the designated information under seal in accordance with Paragraphs 15 and 22 electronically filed by Debbie S. Ryan on behalf of Matthew J. Sandor, Attorney Examiner, Public Utilities Commission of Ohio.