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August 16, 2007

VIA MESSENGER DELIVERY

Ms. Renee Jenkins
Chief, Docketing Division
Public Utilities Commission of Ohio
180 E. Broad Street, 13th Floor
Columbus, Ohio 43215

PUCO

2007 AUG 16 AM 11:47

RECEIVED-DOCKETING DIV

Re: In The Matter of: The Consolidated Duke Energy Ohio, Inc.
Rate Stabilization Plan Remand and Rider Adjustment Cases
Case Nos. 03-93-EL-ATA, 03-2079-EL-AAM, 03-2080-EL-ATA,
03-2081-EL-AAM, 05-724-EL-UNC, 05-725-EL-UNC,
06-1068-EL-UNC, 06-1069-EL-UNC & 06-1085-EL-UNC

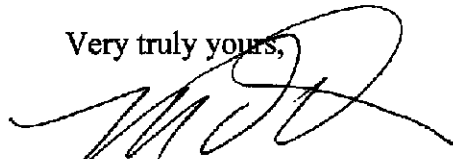
Dear Ms. Jenkins:

Enclosed please find an original and fifteen copies of Duke Energy Retail Sales, LLC's Response to the August 8, 2007 Attorney Examiner's Entry Regarding a Public Records Request.

Please accept the original and fifteen copies of this document for filing in the above identified matters. I would appreciate the return of a time stamped copy via the individual who delivers the same to you.

As always, please call me if you have any questions concerning this filing. Thank you.

Very truly yours,



Michael D. Dortch

Enclosures

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the	:	
Consolidated Duke Energy Ohio, Inc.	:	Case Nos. 03-93-EL-ATA
Rate Stabilization Plan Remand and	:	03-2079-EL-AAM
Rider Adjustment Cases	:	03-2080-EL-AAM
	:	03-2081-EL-ATA
	:	05-724-EL-UNC
	:	05-725-EL-UNC
	:	06-1068-EL-UNC
	:	06-1069-EL-UNC
	:	06-1085-EL-UNC

**MEMORANDUM IN RESPONSE TO THE ATTORNEY EXAMINER'S
AUGUST 8, 2007 ENTRY REGARDING PUBLIC RECORDS REQUEST**

On July 26, 2007, the Public Utilities Commission of Ohio ("PUCO") received a public records request (the "Request") from an individual unaffiliated with the above-captioned matters requesting the following:

1. Any and all documents, from January 1, 2003 to the present, in PUCO's possession related to any and all "Option Agreements," between Cinergy Retail Services, LLC ("CRS") and any other firm or business entity, arising out of, or in connection with, the rate increase CG&E requested in 2003.
2. Any and all records, from January 1, 2003 to the present, of any communications between PUCO (and/or any PUCO employees) and CG&E, Cinergy, CRS, Duke Energy (and/or their personnel, employees or agents) or any other entity concerning any and all "Option Agreements," between CRS and any other firm or business entity, arising out of, or in connection with, the rate increase CG&E requested in 2003.
3. Any and all documents, from January 1, 2003 to the present, related to any "Option Payments" made by CRS to any other firm or business entity in connection with any of the "Option Agreements" referenced in Items [1] and [2].

(hereinafter, all such records shall be referred to as the "Requested Records.")

On August 8, 2007, the Attorney Examiner issued an Entry directing the parties to file Memoranda discussing why the PUCO should or should not modify the Attorney Examiners'

March 19, 2007 Protective Order regarding the Requested Records. (PUCO Entry, Aug. 8, 2007.)

Duke Energy Retail Sales, LLC, f/k/a Cinergy Retail Sales, LLC ("DERS") hereby objects to the release of any and all records subject to the protective orders previously granted in these matters. DERS further objects to the release of any and all documents filed under seal in these matters (together with records subject to previously-issued protective orders, the "Protected Records"). DERS asserts that the release of the Protected Records would be in violation of Ohio law and would substantially impair the proper adjudication of these matters and the interests of the parties involved. In the event that the PUCO decides to rescind the protective order and release documents pursuant to the Request, DERS requests the PUCO conduct an *in camera* review of all documents that the PUCO intends to disclose to the Requestor. Parties seeking to protect documents should be present during such a review and the Requestor should not.

Moreover, DERS respectfully represents that the Kroger Company, Duke Energy-Ohio, the Ohio Energy Group, the Industrial Energy Users of Ohio, and the Ohio Hospital Association have all indicated their support for DERS regarding this matter. These companies and entities recognize that when persons or entities are compelled to produce information to this Commission in conjunction with its proceedings, they *must* have confidence that this Commission will protect that information.

I. Introduction.

The Attorney Examiner is well aware of the facts and procedural posture of these matters, and particularly the facts pertaining to certain business agreements entered into by DERS and

other business entities.¹ For the sake of brevity, DERS submits the following abbreviated statement of facts.

The PUCO previously authorized Duke Energy Ohio, Inc. ("DE-Ohio") to create a rate stabilization plan through which DE-Ohio could recover certain costs through identified riders. On appeal of that decision, the Ohio Supreme Court remanded the proceedings to the PUCO and requested that the PUCO provide sufficient record evidence and reasoning supporting the modification of its decision on rehearing, and holding that the Ohio Consumers' Counsel ("OCC") had demonstrated a reason why it should be granted discovery it had requested prior to the Commission's ruling. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789.

On remand, the OCC received that discovery which it had sought, and also engaged in a new round of discovery that involved affiliates of DE-Ohio, ultimately prompting the intervention of DERS into this proceeding for the principal purpose of protecting from public exposure information belonging to DERS that DERS had been compelled to produce in response to OCC's discovery demands. DERS urged the Attorney Examiners to find that this information was not merely entitled to protection against public disclosure, but also irrelevant given the procedural posture of the case and the scope of the remand from the Ohio Supreme Court.

On March 19, 2007, the Attorney Examiners announced that they viewed the issues of relevance and the issue of protection from disclosure as intertwined. They therefore announced that they would provisionally admit DERS' information and contracts into evidence, pending this Commission's own determination of the relevance of that information. Subject to this Commission's determination, they also granted all pending motions for protective orders,

¹ For a detailed history of these matters, see Merit Brief of Cinergy Corp. and Duke Energy Retail Sales, LLC, Public Version, April 13, 2007.

including DERS' motion regarding the confidentiality of certain documents, thereby indicating agreement that the documents encompassed trade secrets, the release of which would violate applicable Ohio law. (See Transcript of Hearing, March 19, 2007, In the Matter of the Consolidated Duke Energy Ohio, Inc. Rate Stabilization Plan Remand and Rider Adjustment Cases, Case No. 03-93-EL-ATA, pp. 8-9.)

II. The Records Granted Protection by the PUCO and the Records Filed Under Seal in these Matters are Exempt from Disclosure under the Ohio Public Records Act.

DERS once again finds itself in the burdensome position of defending the confidentiality of its trade secrets and legitimate proprietary information – information produced subject to protective agreements in response to a subpoena and already correctly protected by the Attorney Examiners' ruling. This time, the threat of disclosure comes in the form of a public records request to this Commission, from an individual wholly uninvolved in these matters.

The Attorney Examiner has asked for the parties' guidance as to the appropriate response to this Request, specifically asking whether the Commission should or should not modify the protective order granted by the examiners, and a discussion regarding the appropriate treatment of (a) document titles, (b) identification of persons or entities, (c) dates, (d) payments, (e) quantities and load information, (f) account numbers (g) other customer identification, and (h) other terms and conditions. DERS submits that this Commission should not modify the Attorney Examiners' protective order, and that the items identified within the Attorney Examiner's August 8, 2007 Entry are *all* confidential and proprietary information in the context of the information produced by DERS – commercial contracts between DERS and its customers, communications regarding those contracts, and financial information related to DERS' performance. Such information is not to be disclosed in any shape or form. This information does not qualify as a

public record pursuant to the enumerated exemptions contained within R.C. § 149.43 and applicable case law; but even if it were a public record, the disclosure of that information would violate the law of the State of Ohio, as it constitutes trade secret information as contemplated within the Ohio Uniform Trade Secrets Act. DERS respectfully submits that Protected Records, along with any documents, communications or records in the possession of the State of Ohio pertaining to the Protected Records, should not be disclosed.

Initially, DERS asserts that that its contracts and the information regarding those contracts in the possession of the PUCO are not responsive to those portions of the Request which seek information pertaining to CG&E's 2003 requested rate increase. DERS agreements are its own, not DE-Ohio's. They involve arms-length agreements negotiated between commercial entities. They are unrelated to DE-Ohio's proposed increase in its Market Based Standard Service Offer ("MBSSO"), and were entered into long after this Commission's approval of DE-Ohio's MBSSO offering. They were produced to others, subject to appropriate protective agreements, through compulsory legal process. They should be formally determined to have no relevance to this proceeding.²

Furthermore, such disclosure would be in violation of Ohio's Public Records Act, R.C. § 149.43, Uniform Trade Secrets Act, R.C. § 1333.61 et seq., and other applicable Ohio law. The Ohio Administrative Code provides, "**Except as provided in section 149.43 of the Revised Code** and as consistent with the purposes of Title XLIX [49] of the Revised Code, all proceedings of the public utilities commission and all documents and records in its possession are public records. O.A.C. § 4901.12 (emphasis added).

² For a full discussion of DERS' position regarding the applicability of alleged agreements to the 2003 proposed rate increase, see Reply Brief of Cinergy Corp. and Duke Energy Retail Sales, LLC, Public Version, April 27, 2007.

Pursuant to the Public Records Law, R.C. § 149.43(B)(1),

Subject to division (B)(4) of this section, all **public records** shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(4) of this section, upon request, a public office or person responsible for public records shall make copies available at cost, within a reasonable period of time. In order to facilitate broader access to public records, public offices shall maintain public records in a manner that they can be made available for inspection in accordance with this division.

Id. (emphasis added). However, Ohio's Public Records Law specifically exempts from the definition of public records, "Records the release of which are prohibited by state or federal law." It is well settled law in Ohio that trade secrets are exempt from the Public Records Law. *State ex rel. Besser v. Ohio State Univ.* (2000), 87 Ohio St. 3d 535.

As such, only documents falling within the Revised Code's definition of "public records" are to be released by the PUCO upon request. Pursuant to § 149.43(A)(v), "public record" does include any record the release of which is prohibited by state or federal law, including trade secrets belonging to DERS. *See State ex rel. Cincinnati Inquirer v. Division of Gannett Satellite Information Network, Inc.*, 98 Ohio St.3d 126, 2002-Ohio-7041; *Wiley v. Summit County Children Services*, Ohio App. 9th Dist. No. 23372, 2007 WL 936556. Records falling within any of the statutorily denoted exemptions are not subject to release under § 149.43. *State ex rel. WBNS TV, Inc. v. Dues*, 101 Ohio St.3d 406, 2004-Ohio-1497.

This Commission's Rules of Practice regarding the scope of discovery is modeled upon Rule 26(C) of the Ohio Rules of Civil Procedure. Like Rule 26(C), this Commission's rules expressly provide for the protection of trade secrets and confidential information, and provide wide latitude to this Commission to ensure that protection. For example, pursuant to O.A.C. § 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 the attorney examiner

assigned to the case may issue any order which is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Such a protective order may provide that . . .

- (1) Discovery not be had;
- (2) Discovery may be had only on specified terms and conditions;
- (3) Discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) Certain matters not be inquired into;
- (5) The scope of discovery be limited to certain matters;
- (6) Discovery be conducted with no one present except persons designated by the commission, the legal director, the deputy legal director, or the attorney examiner;
- (7) **A trade secret or other confidential research, development, commercial, or other information not be disclosed or be disclosed only in a designated way; or that**
- (8) **Information acquired through discovery be used only for purposes of the pending proceeding,** or that such information be disclosed only to designated persons or classes of persons.

O.A.C. § 4901-1-24(A) (emphasis added).

A properly promulgated Ohio administrative rule has the effect of law. *See Columbus & Southern Ohio Electric Co. v. Industrial Comm'n. of Ohio* (1992), 64 Ohio St.3d 119, 1992-Ohio-112; *Doyle v. Ohio Bureau of Motor Vehicles* (1990), 51 Ohio St.3d 46. This Commission's rules regarding the issuance of protective orders was properly promulgated, having been submitted to the JCARR process. Moreover, it was properly applied by the Attorney Examiners on March 19, 2007, due to the sensitive nature of the information sought, namely, the economically valuable information regarding DERS' business, its customers, their price sensitivity, and other information contained therein. As a result, the information contained in DERS' documents, and testimony regarding that information, was disclosed only to the attorneys for parties that had executed protective agreements regarding the information, and the documents and testimony were submitted and accepted under seal, in closed proceedings as necessary. With respect to all such records, the records request is properly denied.

Furthermore, to the extent that the requested records are now within the PUCO's possession as a result of the parties' resort to discovery procedures, additional grounds exists to deny the request. In *State ex rel. WHIO-TV-7 v. Lowe*, 77 Ohio St.3d 350, 354, 1997-Ohio-271, the Supreme Court of Ohio held, "Discovery, whether civil or criminal, is essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist trial preparation. That is why parties regularly agree, and courts often order, that discovery information will remain private." In that case, the Court held that the trial court's granting of a protective order regarding certain information was not in violation of the Public Records Act, nor did it violate the requesting party's rights under the First Amendment.

In *Adams v. Metallica, Inc.*, 1st Dist. App. No. C-000513, 143 Ohio App.3d 482, 489 (2001), the court followed the Supreme Court's lead in *Lowe* and noted that while "*Lowe* concerned only discovery in a criminal case, the logic of *Lowe* would appear to apply with equal, if not more, force to civil discovery in a private lawsuit." The court noted that civil discovery often becomes a part of the trial record, and thus, protection from improper disclosure is a compelling concern of the court. *Id.*

In this case, that concern is equally compelling. The requested records within the PUCO's possession contain trade secrets warranting the PUCO's protection. Those records came into the PUCO's possession, ultimately, because DERS was compelled to produce that information in response to discovery. The Attorney Examiners have acknowledged that the trade secrets contained in the requested information should be protected from disclosure.

In *State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St.3d 382, 2007-Ohio-1581, the Supreme Court of Ohio addressed the issue of whether a request for sealed criminal records was subject to the disclosure exemptions contained in R.C. § 149.43. The Court noted that the

release of such records would violate state law due to the Revised Code's protection of such records through the expungement statutes. *Id.* at ¶ 6. Moreover, the Court noted that while both the Ohio and United States Constitutions provide the public with a right of access to courts and court records, that right is not unfettered. Courts must weight that interest against the interest of the parties and the proper functioning of the courts. *Id.* at ¶¶ 6-13. This Commission should do no less.

The fact that the Attorney Examiners have already recognized that the Protected Records include trade secrets should not be taken lightly. As stated in § 149.43(A)(1), "Public record" does not include any "[r]ecords the release of which is prohibited by state or federal law."

III. Pursuant to the Ohio Uniform Trade Secrets Act, the Release of the Records Granted Protection by the PUCO and the Records Filed Under Seal in these Matters would Violate Ohio Law.

Pursuant to R.C. § 1331.61(D), Trade Secret is defined as the following:

[I]nformation, 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.

Ohio Revised Code § 1331.61(D); *see also Valco Cincinnati, Inc. v. N&D Machining Service, Inc.*, 24 Ohio St.3d 41, 44 (1986).

The policy behind the protection of trade secrets is to maintain "standards of commercial ethics" *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481 (1974); *Valco*, 24 Ohio St.3d at 45. In fact, the nature of "trade secret laws are not those of property but the equitable

principles of good faith applicable to confidential relationships." *Valco*, 24 Ohio St.3d at 45 (citing *E.I. Dupont de Nemours Powder Co. v. Masland*, 244 U.S. 100 (1917)).

An owner of a trade secret has a proprietary interest in the trade secret. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002-03 (1984); *Case v. Thomas*, 1927 WL 2583, *1 (Oh. App. 6th Dist. 1927). Trade secrets are things that give one entity a competitive advantage over another, and as such, are extremely coveted. *Dexxon Digital Storage, Inc. v. Haenszel*, 161 Ohio App.3d 747, 753 (Oh. App. 5th Dist. 2005). "The subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business." *Kewanee Oil*, 416 U.S. at 484. (construing Ohio's Uniform Trade Secrets Act). The element of secrecy is not lost if the holder of the trade secret reveals the trade secret to another "in confidence, and under an implied obligation not to use or disclose it." *Id.*

It is indisputable that DERS has a proprietary interest in the information sought. It established its efforts to protect its business contracts and information regarding those contracts when it moved to protect them. The specifics of its business contracts have not been placed in the public domain, nor should they. Such disclosure would injure the counterparties to the DERS contracts by revealing information regarding their energy costs and pricing sensitivity. It would injure DERS by identifying its customers, and would usurp from DERS the ability to compete in the market and effectively utilize its lawfully acquired relationships with its customers, while improperly providing its competition with the fruits of its legitimate endeavors.

Ohio's Public Records Act and Ohio's Uniform Trade Secret Act are intertwined. A requesting party may gain access to records kept by a public office *unless* the requested records fall within an exception to the Ohio Public Records Act. *Plain Dealer*, 80 Ohio St.3d at 518.

As discussed herein, one exception to the Ohio Public Records Act's presumption of disclosure is the provision prohibiting the disclosure of "records the release of which is prohibited by state or federal law." *Id.*; R.C. § 149.43(A)(1). The fact that trade secrets are submitted to a public agency is of no consequence. When trade secrets are submitted to an agency, it would be "anomalous to find the information subject to disclosure simply because" it was a government agency that was trusted with the trade secret. *See State ex rel. Jacobs v. Prudoff*, 30 Ohio App.3d 89, 94 (Ohio App. 9th Dist. 1986).

In the case before the PUCO, the protected documents produced to OCC by DERS and the briefs and memoranda filed under seal discussing those documents fall within the protections provided by the Uniform Trade Secrets Acts. Pursuant to R.C. § 1333.65,

... under sections 1333.61 to 1333.69 of the Revised Code, a court shall preserve the secrecy of an alleged trade secret by reasonable means that may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

In this case, the PUCO's Attorney Examiners have recognized that the information submitted to this Commission by DERS amounts to trade secrets. They were unquestionably correct. DERS' commercial contracts have unquestioned economic value, both actual and potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can derive their own economic value from them. DERS' efforts to maintain the confidentiality of that information is demonstrably more than merely reasonable. The agreements, internal communications regarding those agreements, and those portions of the testimony and argument submitted under seal to this Commission regarding those agreements likewise falls within the protections of the Trade Secrets Act. They all contain information regarding contracts entered into with customers, the identities of those customers, economic

price points, DERS' marketing strategy, and even the peculiarities attractive to DERS' customers. As such, disclosure of the information in response to the Public Records Request is improper and in violation of Ohio law. The request should be denied.

In *State ex rel. Besser v. Ohio State University*, 89 Ohio St.3d 396, 2000-Ohio-207, a party requested records related to a state university's acquisition of a private hospital. The request was denied and the requesting party sought a writ of mandamus to compel disclosure of the requested information.

The Supreme Court of Ohio noted that in order for the documents to qualify as trade secrets, they were required to have potential independent economic value from not being readily ascertainable through proper means by competitors. *Id.* at 400-402. Here, the protected information and documents filed under seal are not generally known to the public, and are known at all outside DERS and the party with which it contracted only due to litigation. The documents contain sensitive information which, if disclosed, would impair DERS' ability to derive economic profit and would, in fact, benefit both DERS' competitors and the competitors of the counterparties to those contracts. The economic value of DERS' trade secrets are substantial and independent. These records qualify as trade secrets, and because the disclosure of them would violate Ohio's Uniform Trade Secret Act, the request is properly denied pursuant to the Public Records Act.

IV. Request for In Camera Review.

Without waiving its assertion that the production of any information currently under seal would violate Ohio's Uniform Trade Secrets Act or its claim that documents containing such information are exempt from the Public Records Act's presumption of disclosure, DERS respectfully requests, in the event the PUCO decides to modify the Attorney Examiners' ruling in

any manner in response to the Public Records Request, that this Commission and DERS engage in pre-production, *in camera* review of all documents the Commission may contemplate producing. The purpose of such a review would include allowing DERS to identify the information that the Commission would produce and if necessary, to act to preserve the confidentiality of its sensitive information through recourse to the courts.

In this regard, DERS first notes that copies of its information have been produced, subject to appropriate protective agreements, to numerous parties to this proceeding, and that those parties have each made different uses of DERS' documents and information within the proceeding. DERS cannot, for example, be entirely certain that material has been properly redacted without examining the documents itself. In addition, DERS should have the opportunity to seek the aid of the Courts of this State, in the event that it determines it must seek judicial relief.

Accordingly, to the extent that PUCO intends to modify the Attorney Examiners' Ruling in any fashion that would result in the publication of DERS information to a person or entity to whom DERS has no confidentiality agreement, DERS respectfully requests the PUCO to conduct a thorough, *in camera* review of the documents, with DERS' participation, so that DERS' substantial interests are protected in accordance with Ohio law.

V. Conclusion.

Initially, DERS asserts that its contracts and the information regarding those contracts in the possession of the PUCO are not responsive to the stated request for information pertaining to CG&E's 2003 requested rate increase. DERS agreements are its own, not DE-Ohio's.

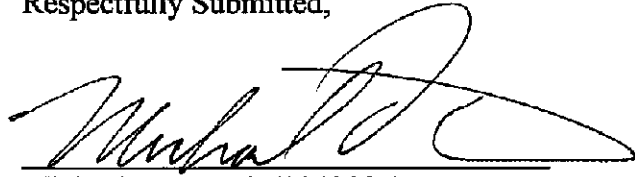
Second, while the information presently within the public record of this Commission's proceedings should of course be provided to the requesting individual, the public record of this

Commission's proceedings does not include any of the documents ordered protected by the Attorney Examiner, or any of the information regarding those documents filed under seal by the parties. That information may not be disclosed in response to the request.

Third, document titles, the identity of persons or entities in contract with DERS, contract dates, payments, quantities and load information, customer account numbers and any other customer identification, and other contractual terms and conditions, as identified within the Attorney Examiner's August 8, 2007 Entry are *all confidential and proprietary information in the context of commercial contracts between DERS and its customers*. Such information is not to be disclosed in any shape or form. This information does not qualify as a public record pursuant to the enumerated exemptions contained within R.C. § 149.43 and applicable case law, but even if it were a public record, the disclosure of that information would violate the law of the State of Ohio, as they constitute trade secrets as contemplated within the Ohio Uniform Trade Secrets Act.

Should this Commission decide, nonetheless, to modify the Attorney Examiner's ruling in a manner that would permit disclosure of Protected Records in response to the Public Records Request, DERS requests *in camera* review of such records to assure that its trade secrets and substantial business interests are protected in accordance with law, and DERS requests that an Order issue that DERS may appeal, if necessary. DERS emphatically asserts that additional redaction of protected records and/or records filed under seal will result in waste. The redacted versions of such documents would amount to no more than the public versions of the documents already available to the public.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Michael D. Dortch", written over a horizontal line.

Michael D. Dortch (0043897)

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically upon parties, their counsel, and others through use of the following email addresses this 16th day of August 2007.

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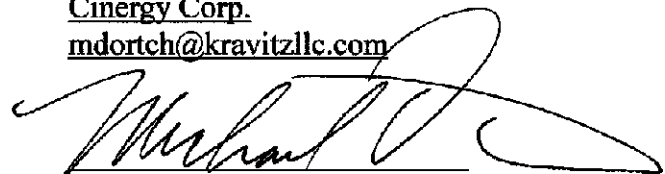
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