

FILE

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review )  
and Adjustment of the Fuel and Purchased )  
Power and the System Reliability Tracker )  
Components of Duke Energy Ohio, Inc., )  
and Related Matters. )

Case No. 07-723-EL-UNC

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MOTION TO COMPEL DUKE TO RESPOND TO DISCOVERY  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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Pursuant to Ohio Adm. Code 4901-1-12 and 49091-1-23, the Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential utility consumers of Duke Energy Ohio Inc. ("Duke," "DE-Ohio" or the "Company"), moves the Public Utilities Commission of Ohio ("Commission" or "PUCO") to compel Duke to respond to OCC discovery requests. Duke's stated reason for not responding to OCC's discovery is the responses are deemed confidential, and to date the parties have been unable to reach an understanding on a protective agreement. OCC requests the Commission grant OCC's Motion and instruct Duke to enter the protective agreement (or order into effect the protective agreement) that OCC offered to Duke and that the PUCO accepted in resolving a recent case involving discovery with another utility. The reasons supporting this motion are set forth in the attached Memorandum in Support.

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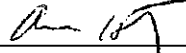
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Respectfully submitted,

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**BEFORE  
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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

This case involves the Commission's review and adjustment of the fuel and purchased power ("FPP") and the system reliability tracker ("SRT") components of Duke's rate stabilization plan ("RSP") that will affect 607,000 electric customers. The OCC is diligently pursuing discovery under these circumstances, and is entitled to timely and complete responses to its discovery inquiries. An impasse has been reached in the negotiations of a protective agreement for both this case and for Cases No. 07-589-GA-AIR, et al.<sup>1</sup>

Through counsel, Duke has stated that it refuses to sign OCC's proposed protective agreement (which the parties have repeatedly signed in other cases in recent years). OCC cannot accept either of Duke's proposals -- a Joint Motion for a Protective Order, which is patently biased against OCC, or Duke's desired protective agreement that for the reasons set forth below, would be inappropriate for OCC, as a state agency, to sign. The Commission should reject Duke's efforts to interpose delay in executing a protective agreement and in OCC's case preparation and should institute a protective agreement that is substantively

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<sup>1</sup> OCC today is filing a similar Motion to Compel in Case 07-589-GA-AIR.

similar to a protective agreement that Duke and OCC signed in the past<sup>2</sup> and that the PUCO just a few weeks ago accepted for the purpose of resolving this sort of issue in another case.<sup>3</sup>

## **II. THE APPLICABLE LAWS AND BURDEN OF PROOF**

Under R.C. 4903.082 “All parties and intervenors shall be granted ample rights of discovery” and “The present rules of the public utilities commission should be reviewed regularly by the Commission to aid full and reasonable discovery by all parties.” Under PUCO rule Ohio Adm. Code 4901-1-16 the Commission has identified the scope of discovery as broad:

Except as otherwise provided in paragraphs (G) and (I) of this rule, any party to a commission proceedings may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

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<sup>2</sup> *In the Matter of the Application of Duke Energy-Ohio Inc. to Adjust and Set the Annually Adjusted Standard Service Offer*, Case No. 06-1085-EL-UNC, Protective Agreement (executed October 3, 2006); *In the Matter of the Application of Duke Energy-Ohio Inc. to Modify its Certified Supplier Tariff, Application of Duke Energy-Ohio Inc.* Case No. 06-723-EL-ATA, Protective Agreement (executed October 3, 2006); *In the Matter of the Application of Duke Energy Ohio, Inc. To Modify Its Market-Based Standard Service Offer*, Case No. 06-986-EL-UNC, Protective Agreement (executed October 3, 2006); *In re DE-Ohio Post-MDP Service Case, In the Matter of the Regulation of the Fuel and Economy Purchased Power Component of the Cincinnati Gas & Electric Company's Market-Based Standard Service Offer*, Case No. 05-806-EL-UNC, et al., Protective Agreement (executed November 15, 2005); Case No. 03-93-EL-ATA, Protective Agreement (executed May 13, 2004); *In re DE-Ohio Post-MDP Service Remand Case*, Case No. 03-93-EL-ATA, Protective Agreement (executed January 17, 2007); *In re DE-Ohio Post-MDP Service Remand Case*, Case No. 03-93-EL-ATA, Protective Agreement (executed by DE-Ohio Affiliate Cinergy January 17, 2007); *In re DE-Ohio Post-MDP Service Remand Case*, Case No. 03-93-EL-ATA, Protective Agreement (executed by DE-Ohio Affiliate Duke Energy Retail Sales January 9, 2007); *In the Matter of the Application of the Cincinnati Gas & Electric Company for an Increase in Rates*, Case No. 01-1228-GA-AIR, et al., Protective Agreement (executed February 7, 2006); *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained within the Rate Schedules of the Cincinnati Gas & Electric Company*, Case No. 05-218-GA-GCR, Protective Agreement (executed February 8, 2006).

<sup>3</sup> *In the Matter of the Application of United Telephone Company of Ohio d/b/a/ Embarq for Approval of an Alternative Form of Regulation of Basic Local Exchange Service And Other Tier 1 Services Pursuant to Ohio Administrative Code Chapter 4901:104, Ohio Administrative Code*, Case No. 07-760-TP-BLS, Entry at 2 (August 10, 2007).

Additionally, under Ohio Adm. Code 4901-1-16(A) the Commission identified the purpose of the discovery rules:

The purpose of rules 4901-1-16 to 4901-1-24 of the Administrative Code is to encourage the prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation for participation in commission proceedings. These rules are also intended to minimize commission intervention in the discovery process.

In order to achieve those goals, Ohio Adm. Code 4901-1-23 provides for motions to compel discovery. Parties are permitted to move for an order compelling discovery if another party fails to provide responses to discovery under Ohio Adm. Code 4901-1-23(A)(1) and if another party fails to produce documents requested under Ohio Adm. Code 4901-1-23(A)(2). Under Ohio Adm. Code 4901-1-23(C) a party must first exhaust all reasonable means of resolving differences with the party or person from whom discovery is sought before filing a motion to compel. Under Ohio Adm. Code 4901-1-23(C)(1) a party must file a memorandum in support that identifies the basis of the motion, an explanation as to how the information sought is relevant to the proceeding, responses to any objections raised by the party from whom discovery is sought, copies of specific discovery requests and an affidavit of counsel, or of the party seeking to compel discovery identifying the efforts that he or she has made to resolve differences with the party from whom discovery is sought. Duke made no objections to the discovery, but declined to respond due to the claim of confidentiality.

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.”<sup>4</sup> 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.”<sup>5</sup> The PUCO’s rules on protective orders recognize this presumption of disclosure. Ohio Adm. Code 4901-1-24(D) states, “Any order issued under this paragraph shall minimize the amount of information protected from public disclosure.”

Under R.C. 4901.12, all PUCO proceedings and all documents and records in the PUCO’s possession are public records. 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.” These statutes,<sup>6</sup> specifically applicable to the Commission, provide a strong presumption in favor of disclosure. These statutes also recognize exceptions to the Commission’s open records policy found in Ohio’s Public Records Law, R.C. 149.43.

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.”<sup>7</sup> R.C. 149.43 prohibits the PUCO and other

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<sup>4</sup> *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 at 3 (November 25, 2003) (“93-487 Entry”).

<sup>5</sup> *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) (“89-365 O&O”), 1990 Ohio PUC LEXIS 1138 at \*5.

<sup>6</sup> See also Ohio Adm. Code 4901-1-24(D) and 4901-1-27(B)(7)(e).

<sup>7</sup> R.C. 149.43(A)(1)(v).

public agencies from releasing public documents that qualify as a trade secret and requires a state agency to exercise its independent judgment in this regard.<sup>8</sup>

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 one of the types of information listed, must have “independent economic value” and must have been kept under circumstances that maintain its secrecy.

This Commission 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

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<sup>8</sup> *In the Matter of the Application of United Telephone Company of Ohio d/b/a Embarq for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Ohio Adm. Code Chapter 4901:1-4*, Case No. 07-760-TP-BLS, Entry at 5-6 (August 10, 2007).



few limited exceptions.”<sup>9</sup> Furthermore, this Commission has established a policy that confidential treatment is to be given only under extraordinary circumstances.<sup>10</sup>

The Commission has previously used a balancing approach in its review of motions for protective orders. For instance, the PUCO has noted:

it is necessary to strike a balance between competing interests. On the one hand, there is the applicant’s interest in keeping certain business information from the eyes and ears of its competitors. On the other hand, there is the Commission’s own interest in deciding this case through a fair and open process, being careful to establish a record which allows for public scrutiny of the basis for the Commission’s decision.<sup>11</sup>

As OCC will explain below, Duke’s proposals under which OCC could receive protected/confidential information either fails to take into account OCC’s obligations under the public records law or fails to provide OCC with adequate rights to challenge the confidentiality of the information that it might expect to receive through discovery. Duke’s proposals fail to strike such a balance.

Moreover, the Company has the burden of demonstrating that the information at issue constitutes a trade secret. This burden is established by Ohio Adm. Code 4901-1-27(B)(7)(e).

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<sup>9</sup> 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). 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 at 1 (June 1, 2007).

<sup>10</sup> 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 at 3 (September 6, 1995).

<sup>11</sup> *In the Matter of the Application of Rapid Transmit Technology Inc. for Certificate of Public Convenience and Necessity to Provide Local Telecommunications Service in the State of Ohio*, Case No. 99-890-TP-ACE, Entry at 2-3 (October 1, 1999); see also 89-365 O&O at \*6-\*7 (holding that “any interest which the joint applicants might have in maintaining the confidentiality of this information [fair market value and net book value of assets proposed to be transferred] is outweighed by the public’s interest in disclosure.”).

### **III. MOTION TO COMPEL**

The Company's non-responses to OCC's discovery are increasingly prejudicial and have culminated in this Motion to Compel. The OCC is entitled to discovery within the scope provided by the Commission's rules: "[A]ny party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding."<sup>12</sup> The Company has provided no responses to the OCC's first set of discovery - transmitted on July 19, 2007, stating that the responses are confidential. The specific OCC discovery requests to which Duke has not responded, on the basis that the responses are confidential, are as follows:

- INT-1. Regarding capacity involved in calculations covering the SRT:
- (a) How does Duke calculate the total load for its SRT calculations (hereafter, "SRT Load") (include an explanation of whether the load for Duke customers who shop for their generation supply are included in the calculations)?
  - (b) For the total load described in response to OCC INT-1(a), what was the daily peak load for each day of Audit Period 1 (i.e. July 1, 2006 through June 30, 2007 as elsewhere defined) and for the historical portion of Audit Period 2?
- INT-2. For each day listed in response to OCC INT-1(b), how much generating capacity did Duke own (including the portion of jointly owned generating units owned by the Company) to cover the SRT Load?

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<sup>12</sup> Ohio Adm. Code 4901-1-16.

- INT-3. For each day listed in response to OCC INT-1(b), how much additional generation capacity did Duke have available to it from generators not owned by the Company to cover the SRT Load?
- INT-4. How much capacity, by plant, is owned by Duke (i.e. identify the plant and list its capacity, including de-ratings and the circumstances under which the plant(s) are de-rated)?
- INT-5. From which generating units has Duke purchased capacity during the Audit Periods (i.e. identify the units)?
- INT-6. For each generating unit owned by Duke (including jointly owned units), what were the planned outages for these units during the Audit Periods (i.e. by unit, reason for outage, as well as date and time for outages)?
- INT-7. For each generating unit owned by Duke (including jointly owned units), what were the unplanned outages for these units during the Audit Periods (i.e. by unit, reason for outage, as well as date and time for outages)?
- INT-8. Regarding the use of the DENA Midwest Assets to meet capacity requirements for the SRT Load:
- (a) When were the DENA Midwest Assets used (i.e. by unit, by time period in days and hours)?
  - (b) How many megawatts were used to provide capacity for the SRT Load?
  - (c) What price did Duke charge as part of its SRT calculations?

Regarding the DENA Midwest Assets during the Audit Periods:

- (a) What sales of capacity (i.e. megawatts) were made from the DENA Midwest Assets that were made into MISO (i.e. by unit, quantity, price per megawatt hour, date and hours)?
- (b) During the hours the DENA Midwest Assets generation was being sold into MISO, what were the days and hours when Duke was also (i.e. simultaneously) purchasing megawatts from MISO and what were the amounts of those purchases?
- (c) What sales of capacity (i.e. megawatts) were made from the DENA Midwest Assets that were made into PJM (i.e. by unit, quantity, price per megawatt hour, date and hours)?
- (d) What agreements has Duke entered into regarding the sales of capacity off the DENA Midwest Assets to one or more counterparties (i.e. identify the agreements, and include the DENA Midwest Asset unit involved, the contract quantity, contract price per megawatt, the time period covered by the agreement, and the identity of the counterparty)?
- (e) How could units that are part of the DENA Midwest Assets, other than those located at the Vermillion site, have been used to meet the requirements of the SRT Load (i.e. what transactions would be required to utilize the units)?

- INT-10      Regarding use of the DENA Midwest Assets, other than those located at the Vermillion site, for use to meet the requirements of the SRT Load:
- (a)      What changes could be made that would permit the use of the non-Vermillion units to meet the capacity requirements of the SRT Load?
  - (b)      What steps has Duke taken that would permit the use of the non-Vermillion units to meet the capacity requirements of the SRT Load?

**REQUESTS FOR PRODUCTION OF DOCUMENTS**

- RPD-1.      Please provide a copy of all of Duke's capacity purchase contracts that were applicable for days included within the Audit Periods.
- RPD-2.      Please provide a copy of all of Duke's capacity sales contracts that were applicable for days included within the Audit Periods that involved the DENA Midwest Assets.
- RPD-3.      Please provide a copy of all documents regarding the steps taken by Duke that are responsive to OCC INT-10(b) (including, but not limited to, correspondence with PJM and MISO and all studies related thereto).

The OCC's inquiry is relevant to the matter of the FPP and SRT components of Duke's RSP case. A final resolution to this impasse must be reached, in a timely manner in order

to permit OCC to thoroughly and adequately prepare for participating in this Commission proceeding as guaranteed by law and rule.<sup>13</sup>

While Duke has the burden to prove under Ohio Adm. Code 4901-1-27(B)(7)(e) that it is proposing a reasonable arrangement for protection of documents it considers confidential, OCC is addressing in this Motion the issue of a protective agreement to facilitate the PUCO's resolution of the issue and to advance the timing of that resolution. (For example, OCC cannot control when Duke will even file for the protective arrangement that is needed for OCC to obtain its discovery.) In this regard, the negotiations between OCC and Duke regarding the terms under which an exchange of protected/confidential information could be possible have reached an impasse.<sup>14</sup>

Duke has refused to sign OCC's proposed protective agreement that is substantively similar to the protective agreement signed by other utilities<sup>15</sup> including Duke.<sup>16</sup> Instead Duke has proposed two alternative documents (a joint motion for a protective order and a protective agreement) representing Duke's resolution of the current

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<sup>13</sup> R.C. 4903.082 and Ohio Adm. Code 4901-1-16.

<sup>14</sup> See Exhibit 1, Affidavit of Larry S. Sauer, Attachment 2 (electronic correspondence between OCC and Duke is attached) (August 30, 2007).

<sup>15</sup> *In the Matter of the Application of the Dayton Power and Light Company for Approval of Tariff Changes Associated with the Request to Implement a Billing Cost Recovery Rider*, Case No. 05-792-EL-ATA, Protective Agreement (executed November 16, 2005); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices, and for Tariff Approvals*, Case No. 07-551-EL-AIR, et al., Protective Agreement (executed July 13, 2007); *In the Matter of the Self-Complaint of Columbus Southern Power Company and the Ohio Power Company Concerning Implementation of Programs to Enhance Their Currently Reasonable Level of Distribution Service Reliability*, Case No. 06-222-EL-SLF, Protective Agreement (executed October 11, 2006); *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained within the Rate Schedules of Columbia Gas of Ohio, Inc. and Related Matters*, Case No. 04-221-GA-GCR, et al., Protective Agreement (executed July 14, 2005), *In the Matter of the Application of Ohio American Water Company to Increase Its Rates for Water and Sewer Service Provided to Its Entire Service Area*, Case No. 06-433-WS-AIR, Protective Agreement (executed August 21, 2006) FirstEnergy (in its post-MDP case XXX), SBC Ohio (Case No XXX) and Columbia Gas (Case Nos. 04-221-GA-GCR and 05-221-GA-GCR).

<sup>16</sup> See Footnote 1.

dispute between OCC and Duke. OCC cannot agree to either of Duke's two proposed approaches and requests the Commission to instruct Duke to accept OCC's desired protective agreement that is based upon what was painstakingly negotiated between Duke and OCC in other cases and that is in similar form to agreements executed between OCC and other utilities.

Duke's proposal is unreasonable for reasons that include: First, Duke's proposed "Joint Motion for a Protective Order to Protect the Confidentiality, and Facilitate the Exchange of Confidential Information" leaves unresolved the matters that have been resolved in the numerous protective agreements executed between Duke and OCC. These unresolved matters include the means by which confidential information is designated, the availability of information to OCC's in-house personnel, the treatment of documents by a public agency under Ohio's records retention and public records legal requirements, and the ability to address overly broad designations by the Company, etc. Furthermore, the fact, as raised by Duke, that Ohio Partners for Affordable Energy ("OPAE") entered an agreement with Duke similar to Duke's proposal,<sup>17</sup> and that the agreement was approved by the Commission,<sup>18</sup> is of little consequence and no precedent in this instance because, among other things, OPAE is not a public agency and is not obligated by the Ohio public records requirement by which OCC is obligated.

Second, Duke's proposed protective agreement contains numerous weaknesses and retreats from the careful crafting of previous agreements. Paragraph 3 of Duke's

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<sup>17</sup> *In the Matter of the Application of Duke Energy Ohio to Modify its Market-Based Standard Service Offer*, Case No. 06-986-EL-UNC, Joint Motion for an Order Protecting Confidential and Trade Secret Information by Duke and Ohio Partners for Affordable Energy (August 2, 2007).

<sup>18</sup> *Id.* Entry at 2 (August 15, 2007).

proposal provides an example of inserted language that is difficult to interpret, and appears intended to create a grey area between otherwise public documents under previous agreements and documents protected under the proposed agreement. Further, the proposal complicates the effort to reach an agreement by needlessly attempting to make the obligations reciprocal in nature. If the circumstance were to arise where OCC would need to provide trade secret information to the Company (an event that seems exceptionally remote, if not impossible), a separate agreement can be negotiated at that time. Duke's desired draft protective agreement does not resolve issues concerning the protection of the Company's information, but creates new issues.

Furthermore, the proposed protective agreement desired by Duke fails to provide OCC with adequate rights to challenge the confidentiality of the information that it might expect to receive through discovery. In contrast, under the terms of the protective agreement that OCC proposes, OCC could not release Duke's claimed protected information without first following the processes for public disclosure of the information required by the agreement. Those processes include prior notification to Duke that OCC proposes to disclose the information, which would allow Duke to seek a ruling from the Commission or other body of competent jurisdiction as to whether the information deserves protection. Duke's proposal fails to ensure under Ohio Adm. Code 4901-1-24(D) that information kept from the public is "minimize[d]." Thus, protection under Duke's approach could be given to information that should in fact be part of the public record.

For the reasons stated above, Duke's desired protective agreement would not be appropriate for OCC, as a state agency, to sign. Therefore, the Commission should not



consider approving a protective agreement proposed by Duke that, *inter alia*, restricts the ability of a party to challenge the protected status of “allegedly confidential information \* \* \*.”<sup>19</sup> Instead the Commission should follow its usual processes for protective agreements and orders and instruct Duke to sign the agreement proposed by OCC. This action would be consistent with the PUCO’s decision in a recent telephone case involving Embarq where the PUCO concurred with OCC’s arguments in a dispute between OCC and Embarq over language in a protective agreement.<sup>20</sup> Consistent with the PUCO’s ruling in the Embarq case, OCC’s proposed protective agreement is more than adequate for meeting the reasonable information protection needs of DE-Ohio.

OCC proposed two alternative protective agreements to Duke. Both OCC’s proposals are substantively the same as the Protective Agreement Duke has signed with OCC, as recently as January 2007, and many times before in other Commission proceedings.<sup>21</sup> The other OCC proposal is the one that the PUCO approved between OCC and Embarq in Case 07-760-TP-BLS.

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<sup>19</sup> See Ohio Adm. Code 4901-1-24(D)(3).

<sup>20</sup> *In the Matter of the Application of United Telephone Company of Ohio d/b/a Embarq for Approval of an Alternative Form of Regulation of Basic Local Exchange Service And Other Tier 1 Services Pursuant to Ohio Administrative Code Chapter 4901:1-4, Ohio Administrative Code*, Case No. 07-760-TP-BLS, Entry at 2 (August 10, 2007). (“Upon review of all the relevant pleadings, the attorney examiner finds merit in OCC’s arguments concerning the impropriety of the disputed language in paragraph 14 of the proposed protective agreement submitted by Embarq on July 31, 2007. The attorney examiner now finds, based on OCC’s most recently submitted arguments, and despite his earlier recommendation – which he now specifically rescinds – that the language that he had earlier recommended should, in fact, not be included in the final protective agreement between Embarq and OCC in this case. For the reasons articulated by OCC in its memorandum contra, it seems clear that including such language would, among other things contravene the Ohio public records law and potentially purport to limit the lawful exercise of OCC’s judgement in response to a future public records request. The attorney examiner is also persuaded by OCC’s arguments that the submitted agreement, when considered with the disputed language in paragraph 14 excluded, is adequate for protecting the CLEC-related information whose confidentiality is at stake in this matter. Accordingly, the attorney examiner directs OCC and Embarq to conclude their negotiations and recommends that they execute an agreement identical, in all respects, to that submitted with Embarq’s July 31<sup>st</sup> motion for protective order, save that it now exclude the disputed language in paragraph 14.”

<sup>21</sup> See Footnote 1.

The basic form of the protective agreements offered by the OCC was developed several years ago after extensive negotiation with public utilities. The development also included research and consultation with the Attorney General's office regarding the requirements imposed upon state agencies by the Ohio public records law.

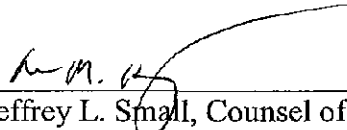
The Protective Agreement approved in the Embarq case was actually developed by OCC, in substantial respects, from what OCC and Duke (then Cinergy) originally negotiated some years ago. Given that it is an updated version of the earlier documents and that the PUCO approved it in the recent case involving Embarq, it is this document that the PUCO should either order into effect or order Duke to sign with OCC. OCC has attached this Protective Agreement to this Motion.

#### **IV. CONCLUSION**

Duke's application in this case is complex and OCC should have ample opportunity to investigate issues expeditiously without the interruption of Duke's refusal to enter a reasonable protective agreement. The efficiency of the resources of the OCC, other parties, and the Commission should be served and not wasted under these circumstances. Indeed, it is the PUCO's expectation, under Ohio Adm. Code 4901-1-24(B), that parties resolve such agreements without PUCO involvement. The OCC's Motion to Compel should be granted to provide for a timely and efficient procedure in these cases. The OCC remains willing to execute the attached protective agreement, which the PUCO recently approved in the Embarq case. Consistent with the PUCO's ruling in the Embarq case, OCC's proposed protective agreement is more than adequate for meeting the reasonable information protection needs of DE-Ohio, and the PUCO should so order.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER  
CONSUMERS' COUNSEL



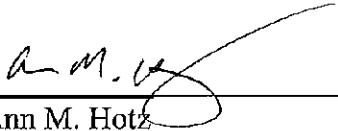
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## **CERTIFICATE OF SERVICE**

It is hereby certified that a true copy of the foregoing *Motion to Compel Discovery by The Office of the Ohio Consumers' Counsel*, was served via first class mail, postage pre-paid this 30 day of August, 2007.

  
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Public Utilities Commission of Ohio  
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Columbus, OH 43215

David C. Rinebolt  
Colleen L. Mooney  
Ohio Partners for Affordable Energy  
P.O. Box 1793  
Findlay, OH 45839

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's Review    )  
and Adjustment of the Fuel and Purchased    )  
Power and the System Reliability Tracker    ) Case No. 07-723-EL-UNC  
Components of Duke Energy Ohio, Inc.,       )  
and Related Matters.                            )

---

**AFFIDAVIT OF  
LARRY S. SAUER**

---

I, Larry S. Sauer, counsel for the Office of the Ohio Consumers' Counsel, was asked by Jeffrey L. Small, counsel of record in the above-captioned case, to negotiate an acceptable protective agreement in this case, and being first duly sworn, deposes and says:

1. OCC has served discovery aimed at preparing the OCC's case for hearing, including sets of interrogatories and requests for the production of documents on Duke Energy Ohio, Inc. ("DE-Ohio" or "the Company");
2. On August 14, 2007, OCC received no responses from DE-Ohio to the first set of the OCC's discovery and stated that the Company would not provide any of the discovery responses without the execution of a protective agreement by and between the Company and the OCC (see Attachment 1);

3. On July 25, 2007, the OCC entered into discussions with counsel for DE-Ohio regarding an appropriate protective agreement for receipt of the discovery, and transmitted a protective agreement that had been agreeable to DE-Ohio in prior cases;
4. On August 2, 2007, DE-Ohio's counsel stated he was unwilling to execute the protective agreement offered by OCC, but instead proposed the parties execute a Joint Motion for a Protective Order, or in the alternative, execute an alternative protective agreement;
5. On August 20, 2007, OCC provided DE-Ohio an explanation for the reasons why DE-Ohio's Joint Motion for a Protective Order and its desired protective agreement were unacceptable resolutions for OCC;
6. On August 20, 2007, OCC then transmitted a protective agreement, in response to DE-Ohio's August 2, 2007 offering, that incorporated some of DE-Ohio's changes to OCC's originally proposed protective agreement;
7. On August 24, 2007, OCC sent DE-Ohio an additional alternative for a protective agreement that it also could consider for signing which was a protective agreement that the PUCO had recently approved in a telephone case resolving a dispute involving OCC and Embarq. This protective agreement is attached to the OCC's Motion to Compel in the above-captioned cases. OCC asked that DE-Ohio respond no later than August 27, 2007 to either of the two protective agreement options that OCC had provided (on August 20, 2007 and August 24, 2007).

8. On August 30, 2007, and having not heard further from DE-Ohio on this matter, OCC's counsel sent an e-mail to DE-Ohio's counsel to inquire about DE-Ohio's decision on either of the two alternative protective agreement options OCC had proposed, and to advise that OCC would be filing a motion to compel.
9. OCC has exhausted all other reasonable means of resolving the differences with DE-Ohio and is at an impasse regarding DE-Ohio's transmittal of discovery responses that the OCC seeks in order to prepare the OCC's case for hearing. (See Attachment 2, OCC's electronic communications with DE-Ohio.)

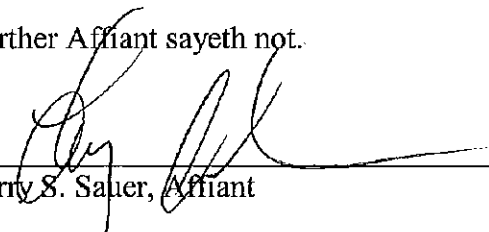
STATE OF OHIO

COUNTY OF FRANKLIN

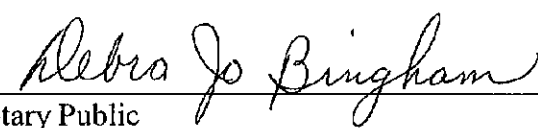
The undersigned, being of lawful age and duly sworn on oath, hereby certifies, deposes and stated the following:

I have caused to be prepared the attached written affidavit for OCC in the above referenced docket. This affidavit is true and correct to the best of my knowledge, information, and belief.

Further Affiant sayeth not.

  
\_\_\_\_\_  
Larry S. Sauer, Affiant

Subscribed and sworn to before me this 30th day of August, 2007.

  
\_\_\_\_\_  
Notary Public



Debra Jo Bingham, Notary Public  
Union County, State of Ohio  
My Commission Expires June 13, 2010

**From:** "Colbert, Paul" <Paul.Colbert@Cinergy.COM>  
**To:** "ANN HOTZ" <HOTZ@occ.state.oh.us>, "Schafer, Anita" <Anita.Schafer@Cinergy.COM>, "Sauer, Larry" <sauer@occ.state.oh.us>, "Small, Jeffery" <small@occ.state.oh.us>  
**Date:** 8/14/2007 8:25:46 AM  
**Subject:** RE: Responses to OCC's 1st Set of Discovery, FPP, SRT 07-723

Ann, the answers to the FPP and SRT questions that you sent are confidential and we do not have a protective agreement with you yet. Larry sent a proposed agreement that we redlined and sent back along with an alternative proposal. We have not yet heard a response from OCC. We will send the answers as soon as we work out an agreement to protect confidential information. Please check with Larry and Jeff. We are available to discuss the matter at OCC's convenience. Thank you.

-----Original Message-----

**From:** ANN HOTZ [mailto:HOTZ@occ.state.oh.us]  
**Sent:** Monday, August 13, 2007 5:01 PM  
**To:** Colbert, Paul; Schafer, Anita  
**Subject:** Responses to OCC's 1st Set of Discovery, FPP, SRT 07-723

Paul, Responses to OCC's first set of Discovery in the FPP and the SRT case are due today. We sent it out on July 19th and today is the 23rd day. Will you please let me know as soon as possible when we will receive the responses. A copy of the discovery requests is attached. Thanks. Ann

**CONFIDENTIALITY NOTICE:** This communication is intended only for the person or entity to which it is addressed and may contain confidential and/or privileged material. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender at (614) 466-8574 and destroy all copies of this communication.



**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's Review and )  
Adjustment of the Fuel and Purchased Power ) Case No. 07-723-EL-UNC  
and the System Reliability Tracker Components )  
of Duke Energy Ohio, Inc., and Related Matters. )

**THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S  
INTERROGATORIES AND  
REQUESTS FOR PRODUCTION OF DOCUMENTS  
PROPOUNDED UPON DUKE ENERGY,  
FIRST SET  
(DATED JULY 19, 2007)**

The Office of the Ohio Consumers' Counsel in the above-captioned proceedings before the Public Utilities Commission of Ohio submits the following Interrogatories and Requests for Production of Documents pursuant to Sections 4901-1-19, 4901-1-20 and 4901-1-22 of the Ohio Adm. Code for response from Duke Energy within 20 days, and no later than any shorter period required by the Public Utilities Commission of Ohio or its authorized representative. An electronic response should be provided to the extent possible to the Office of the Ohio Consumers' Counsel at the following addresses:

**Jeffrey L. Small**  
**Ann M. Hotz**  
 Assistant Consumers' Counsel  
 10 West Broad Street, Suite 1800  
 Columbus, Ohio 43215-3485  
 (614) 466-8574 (T)  
[small@occ.state.oh.us](mailto:small@occ.state.oh.us)  
[hotz@occ.state.oh.us](mailto:hotz@occ.state.oh.us)

Additionally, the Duke Energy must follow the instructions provided herein in responding to the inquiries. Definitions are provided that are used in the Office of the Ohio Consumers' Counsel's discovery.

### **DEFINITIONS**

As used herein the following definitions apply:

1. "Document" or "Documentation" when used herein, is used in its customary broad sense, and means all originals of any nature whatsoever, identical copies, and all non-identical copies thereof, pertaining to any medium upon which intelligence or information is recorded in your possession, custody, or control regardless of where located; including any kind of printed, recorded, written, graphic, or photographic matter and things similar to any of the foregoing, regardless of their author or origin. The term specifically includes, without limiting the generality of the following: punchcards, printout sheets, movie film, slides, PowerPoint slides, phonograph records, photographs, memoranda, ledgers, work sheets, books, magazines, notebooks, diaries, calendars, appointment books, registers, charts, tables, papers, agreements, contracts, purchase orders, checks and drafts, acknowledgments, invoices, authorizations, budgets, analyses, projections, transcripts, minutes of meetings of any kind, telegrams, drafts, instructions, announcements, schedules, price lists, electronic copies, reports, studies, statistics, forecasts, decisions, and orders, intra-office and inter-office communications, correspondence, financial data, summaries or records of conversations or interviews, statements, returns, diaries, workpapers, maps, graphs, sketches, summaries or reports of investigations or negotiations, opinions or reports of consultants, brochures, bulletins, pamphlets,

articles, advertisements, circulars, press releases, graphic records or representations or publications of any kind (including microfilm, videotape and records, however produced or reproduced), electronic (including e-mail), mechanical and electrical records of any kind and computer produced interpretations thereof (including, without limitation, tapes, tape cassettes, disks and records), other data compilations (including, source codes, object codes, program documentation, computer programs, computer printouts, cards, tapes, disks and recordings used in automated data processing together with the programming instructions and other material necessary to translate, understand or use the same), all drafts, prints, issues, alterations, modifications, changes, amendments, and mechanical or electric sound recordings and transcripts to the foregoing. A request for discovery concerning documents addressing, relating or referring to, or discussing a specified matter encompasses documents having a factual, contextual, or logical nexus to the matter, as well as documents making explicit or implicit reference thereto in the body of the documents. Originals and duplicates of the same document need not be separately identified or produced; however, drafts of a document or documents differing from one another by initials, interlineations, notations, erasures, file stamps, and the like shall be deemed to be distinct documents requiring separate identification or production. Copies of documents shall be legible.

2. "Communication" shall mean any transmission of information by oral, graphic, written, pictorial, or otherwise perceptible means, including, but not limited to, telephone conversations, letters, telegrams, and personal conversations. A request seeking the identity of a communication addressing, relating or referring to, or

discussing a specified matter encompasses documents having factual, contextual, or logical nexus to the matter, as well as communications in which explicit or implicit reference is made to the matter in the course of the communication.

3. The “substance” of a communication or act includes the essence, purport or meaning of the same, as well as the exact words or actions involved.
4. “And” or “Or” shall be construed conjunctively or disjunctively as necessary to make any request inclusive rather than exclusive.
5. “You,” and “Your,” or “Yourself” refer to the party requested to produce documents and any present or former director, officer, agent, contractor, consultant, advisor, employee, partner, or joint venturer of such party.
6. Each singular shall be construed to include its plural, and vice versa, so as to make the request inclusive rather than exclusive.
7. Words expressing the masculine gender shall be deemed to express the feminine and neuter genders; those expressing the past tense shall be deemed to express the present tense; and vice versa.
8. “Person” includes any firm, corporation, joint venture, association, entity, or group of natural individuals, unless the context clearly indicates that only a natural individual is referred to in the discovery request.
9. “Identify,” or “the identity of,” or “identified” means as follows:
  - A. When used in reference to an individual, to state his full name and present or last known position and business affiliation, and his position and business affiliation at the time in question;

- B. When used in reference to a commercial or governmental entity, to state its full name, type of entity (e.g., corporation, partnership, single proprietorship), and its present or last known address;
  - C. When used in reference to a document, to state the date, author, title, type of document (e.g., letter, memorandum, photograph, tape recording, etc.), general subject matter of the document, and its present or last known location and custodian;
  - D. When used in reference to a communication, to state the type of communication (i.e., letter, personal conversation, etc.), the date thereof, and the parties thereto and the parties thereto and, in the case of a conversation, to state the substance, place, and approximate time thereof, and identity of other persons in the presence of each party thereto;
  - E. When used in reference to an act, to state the substance of the act, the date, time, and place of performance, and the identity of the actor and all other persons present.
  - F. When used in reference to a place, to state the name of the location and provide the name of a contact person at the location (including that person's telephone number), state the address, and state a defining physical location (for example: a room number, file cabinet, and/or file designation).
10. The terms "PUCO" and "Commission" refer to the Public Utilities Commission of Ohio, including its Commissioners, personnel (including Persons working for the PUCO Staff as well as in the Public Utilities Section of the Ohio Attorney General's Office), and offices.

11. The term "e.g." connotes illustration by example, not limitation.
12. "OCC" means the Office of the Ohio Consumers' Counsel.
13. "DE-Ohio" means Duke Energy Ohio, Inc. (including predecessor organizations).
14. "Application" means the filing (in its entirety) made by DE-Ohio in PUCO Case No. 07-723-EL-UNC.
15. "Audit Period 1" means July 1, 2006 through June 30, 2007.
16. "Audit Period 2" means July 1, 2007 through December 31, 2008.
17. "Audit Periods" means July 1, 2006 through December 31, 2008.
18. "SRT" means the System Reliability Tracker.
19. "DENA Midwest Assets" means the generating plants formerly owned by Duke Energy North America that became plants owned by DE-Ohio.
20. "MISO" means the Midwest Independent System Operator, a regional transmission organization.
21. "PJM" means the Pennsylvania-New Jersey-Maryland regional transmission organization.

**INSTRUCTIONS FOR ANSWERING**

1. All information is to be divulged which is in your possession or control, or within the possession or control of your attorney, agents, or other representatives of yours or your attorney.
2. Where an interrogatory calls for an answer in more than one part, each part should be separate in the answer so that the answer is clearly understandable.
3. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections are to be signed by the attorney making them.
4. If any answer requires more space than provided, continue the answer on the reverse side of the page or on an added page.
5. Your organization(s) is requested to produce responsive materials and information within its physical control or custody, as well as that physically controlled or possessed by any other person acting or purporting to act on your behalf, whether as an officer, director, employee, agent, independent contractor, attorney, consultant, witness, or otherwise.
6. Where these requests seek quantitative or computational information (e.g., models, analyses, databases, and formulas) stored by your organization(s) or its consultants in computer-readable form, in addition to providing hard copy (if an electronic response is not otherwise provided as requested), you are requested to produce such computer-readable information, in order of preference:
  - A. Microsoft Excel worksheet files on compact disk;

- B. other Microsoft Windows or Excel compatible worksheet or database diskette files;
  - C. ASCII text diskette files; and
  - D. such other magnetic media files as your organization(s) may use.
7. Conversion from the units of measurement used by your organization(s) in the ordinary course of business need not be made in your response; e.g., data requested in kWh may be provided in mWh or gWh as long as the unit measure is made clear.
8. Unless otherwise indicated, the following requests shall require you to furnish information and tangible materials pertaining to, in existence, or in effect for the whole or any part of the period from January 1, 2000 through and including the date of your response.
9. Responses must be complete when made, and must be supplemented with subsequently acquired information at the time such information is available.
10. In the event that a claim of privilege is invoked as the reason for not responding to discovery, the nature of the information with respect to which privilege is claimed shall be set forth in responses together with the type of privilege claimed and a statement of all circumstances upon which the respondent to discovery will rely to support such a claim of privilege (i.e. provide a privilege log). Respondent to the discovery must a) identify (see definition) the individual, entity, act, communication, and/or document that is the subject of the withheld information based upon the privilege claim, b) identify all persons to whom the information has already been revealed, and c) provide the basis upon which the information is being withheld and the reason that the information is not provided in discovery.



**INTERROGATORIES**

INT-1. Regarding capacity involved in calculations covering the SRT:

- (a) How does DE-Ohio calculate the total load for its SRT calculations (hereafter, "SRT Load") (include an explanation of whether the load for DE-Ohio customers who shop for their generation supply are included in the calculations)?

**RESPONSE:**

- (b) For the total load described in response to OCC INT-1(a), what was the daily peak load for each day of Audit Period 1 (i.e. July 1, 2006 through June 30, 2007 as elsewhere defined) and for the historical portion of Audit Period 2?

**RESPONSE:**

INT-2. For each day listed in response to OCC INT-1(b), how much generating capacity did DE-Ohio own (including the portion of jointly owned generating units owned by the Company) to cover the SRT Load?

**RESPONSE:**

INT-3. For each day listed in response to OCC INT-1(b), how much additional generation capacity did DE-Ohio have available to it from generators not owned by the Company to cover the SRT Load?

**RESPONSE:**

INT-4. How much capacity, by plant, is owned by DE-Ohio (i.e. identify the plant and list its capacity, including de-ratings and the circumstances under which the plant(s) are de-rated)?

**RESPONSE:**

INT-5. From which generating units has DE-Ohio purchased capacity during the Audit Periods (i.e. identify the units)?

**RESPONSE:**

INT-6. For each generating unit owned by DE-Ohio (including jointly owned units), what were the planned outages for these units during the Audit Periods (i.e. by unit, reason for outage, as well as date and time for outages)?

**RESPONSE:**

INT-7. For each generating unit owned by DE-Ohio (including jointly owned units), what were the unplanned outages for these units during the Audit Periods (i.e. by unit, reason for outage, as well as date and time for outages)?

**RESPONSE:**

INT-8. Regarding the use of the DENA Midwest Assets to meet capacity requirements for the SRT Load:

(a) When were the DENA Midwest Assets used (i.e. by unit, by time period in days and hours)?

**RESPONSE:**

- (b) How many megawatts were used to provide capacity for the SRT Load?

**RESPONSE:**

- (c) What price did DE-Ohio charge as part of its SRT calculations?

**RESPONSE:**

INT-9 Regarding the DENA Midwest Assets during the Audit Periods:

- (a) What sales of capacity (i.e. megawatts) were made from the DENA Midwest Assets that were made into MISO (i.e. by unit, quantity, price per megawatt hour, date and hours)?

**RESPONSE:**

- (b) During the hours the DENA Midwest Assets generation was being sold into MISO, what were the days and hours when DE-Ohio was also (i.e. simultaneously) purchasing megawatts from MISO and what were the amounts of those purchases?

**RESPONSE:**

- (c) What sales of capacity (i.e. megawatts) were made from the DENA Midwest Assets that were made into PJM (i.e. by unit, quantity, price per megawatt hour, date and hours)?

**RESPONSE:**

- (d) What agreements has DE-Ohio entered into regarding the sales of capacity off the DENA Midwest Assets to one or more counterparties (i.e. identify the agreements, and include the DENA Midwest Asset unit involved, the contract quantity, contract price per megawatt, the time period covered by the agreement, and the identity of the counterparty)?

**RESPONSE:**

- (e) How could units that are part of the DENA Midwest Assets, other than those located at the Vermillion site, have been used to meet the requirements of the SRT Load (i.e. what transactions would be required to utilize the units)?

**RESPONSE:**

INT-10 Regarding use of the DENA Midwest Assets, other than those located at the Vermillion site, for use to meet the requirements of the SRT Load:

- (a) What changes could be made that would permit the use of the non-Vermillion units to meet the capacity requirements of the SRT Load?

**RESPONSE:**

- (b) What steps has DE-Ohio taken that would permit the use of the non-Vermillion units to meet the capacity requirements of the SRT Load?

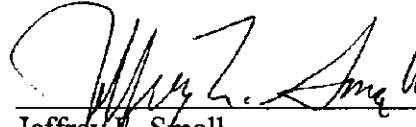
**RESPONSE:**

**REQUESTS FOR PRODUCTION OF DOCUMENTS**

- RPD-1. Please provide a copy of all of DE-Ohio's capacity purchase contracts that were applicable for days included within the Audit Periods.
- RPD-2. Please provide a copy of all of DE-Ohio's capacity sales contracts that were applicable for days included within the Audit Periods that involved the DENA Midwest Assets.
- RPD-3. Please provide a copy of all documents regarding the steps taken by DE-Ohio that are responsive to OCC INT-10(b) (including, but not limited to, correspondence with PJM and MISO and all studies related thereto).

**CERTIFICATE OF SERVICE**

It is hereby certified that a true copy of the foregoing *Ohio Consumers' Counsel's Interrogatories and Requests for Production of Documents Propounded Upon Duke Energy, First Set*, was served upon the persons listed below by regular U.S. Mail (also electronically upon Duke Energy) this 19<sup>th</sup> day of July 2007.

  
Jeffrey L. Small  
Assistant Consumers' Counsel

**PERSONS SERVED**

Paul A. Colbert  
Duke Energy Ohio, Inc.  
139 East Fourth Street  
P.O. Box 960  
Cincinnati, OH 45201-0960

Samuel C. Randazzo  
Lisa G. McAlister  
Daniel J. Neilsen  
Joseph M. Clark  
McNees Wallace & Nurick LLC  
21 East State Street, 17<sup>th</sup> Floor  
Columbus, OH 43215-4228

David F. Boehm  
Michael L. Kurtz  
Boehm, Kurtz & Lowry  
36 East Seventh Street, Suite 1510  
Cincinnati, OH 45202

Duane Luckey  
Attorney General's Office  
Public Utilities Commission of Ohio  
180 East Broad Street, 9<sup>th</sup> Floor  
Columbus, OH 43215



Attachment 2

Page 1 of 9

**From:** LARRY SAUER  
**To:** john.finnigan@duke-energy.com; paul.colbert@duke-energy.com  
**Date:** 7/25/2007 1:57:57 PM  
**Subject:** Protective Agreements

Paul and John,

Attached are OCC's proposed Protective Agreements for DE-Ohio's FPP/SRT Case, Case No 07-723-EL-UNC, and DE-Ohio's Gas Distribution Rate Case, Case No. 07-589-GA-AIR, et al. If you have any questions or concerns please let me know. Thanks!

CONFIDENTIAL NOTICE:

THIS COMMUNICATION IS INTENDED ONLY FOR THE PERSON OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN CONFIDENTIAL AND/OR PRIVILEGED LEGAL, GOVERNMENTAL MATERIAL. ANY UNAUTHORIZED REVIEW, USE, DISCLOSURE OR DISTRIBUTION IS PROHIBITED. IF YOU ARE NOT, OR BELIEVE YOU ARE NOT, THE INTENDED RECIPIENT OF THIS COMMUNICATION, DO NOT READ IT. PLEASE REPLY TO THE SENDER ONLY, AND STATE THAT YOU HAVE RECEIVED THIS MESSAGE. THEN IMMEDIATELY DELETE THIS COMMUNICATION AND ALL COPIES OF THIS COMMUNICATION. THANK YOU.

Larry S. Sauer  
Assistant Consumers' Counsel  
10 West Broad Street  
Suite 1800  
Columbus, Ohio 43215-3485  
(614) 466-1312

**From:** "Colbert, Paul" <Paul.Colbert@Cinergy.COM>  
**To:** "Sauer, Larry" <sauer@occ.state.oh.us>, "Small, Jeffery" <small@occ.state.oh.us>  
**Date:** 8/2/2007 1:56:00 PM  
**Subject:** Protective Agreements

Larry and Jeff, thank you for sending OCC's proposed protective agreements in the Gas Rate Case and FPP/SRT Case. DE-Ohio cannot agree to the agreements as proposed because the agreements do not resolve issues concerning the protection of confidential material. Indeed, by its terms the agreements specify a procedure by which OCC may use the documents in non-conformance with the agreements, i.e. make any protected materials public. That procedure is, of course, precisely what the agreement is meant to avoid, continuous disputes regarding what is confidential and what is not. At the same time DE-Ohio is sensitive to OCC's need to be responsive to public records requests. To that end I have attached two documents representing an attempt to resolve our differences regarding confidential material. The first document is a redlined protective agreement that DE-Ohio can sign. It does not permit OCC to use documents in a non-conforming way but does permit OCC to obtain and use confidential material in the proceeding for which it is intended and permits OCC to respond reasonably to public records requests. If OCC and DE-Ohio cannot agree on a protective agreement, the second document is a proposed joint motion to the Commission seeking confidential treatment for documents appropriately marked so that we can engage in an appropriate exchange of protected material. DE-Ohio is agreeable to either option. Please contact me if you have questions and let me know OCC's position. Thank you.

**CC:** "Finnigan, John" <John.Finnigan@Cinergy.COM>, "Schafer, Anita" <Anita.Schafer@Cinergy.COM>

**From:** "Colbert, Paul" <Paul.Colbert@Cinergy.COM>  
**To:** "ANN HOTZ" <HOTZ@occ.state.oh.us>, "Schafer, Anita" <Anita.Schafer@Cinergy.COM>, "Sauer, Larry" <sauer@occ.state.oh.us>, "Small, Jeffery" <small@occ.state.oh.us>  
**Date:** 8/14/2007 8:25:46 AM  
**Subject:** RE: Responses to OCC's 1st Set of Discovery, FPP, SRT 07-723

Ann, the answers to the FPP and SRT questions that you sent are confidential and we do not have a protective agreement with you yet. Larry sent a proposed agreement that we redlined and sent back along with an alternative proposal. We have not yet heard a response from OCC. We will send the answers as soon as we work out an agreement to protect confidential information. Please check with Larry and Jeff. We are available to discuss the matter at OCC's convenience. Thank you.

-----Original Message-----

**From:** ANN HOTZ [mailto:HOTZ@occ.state.oh.us]  
**Sent:** Monday, August 13, 2007 5:01 PM  
**To:** Colbert, Paul; Schafer, Anita  
**Subject:** Responses to OCC's 1st Set of Discovery, FPP, SRT 07-723

Paul, Responses to OCC's first set of Discovery in the FPP and the SRT case are due today. We sent it out on July 19th and today is the 23rd day. Will you please let me know as soon as possible when we will receive the responses. A copy of the discovery requests is attached. Thanks. Ann

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**From:** LARRY SAUER  
**To:** john.finnigan@duke-energy.com; paul.colbert@duke-energy.com  
**Date:** 8/20/2007 11:07:09 AM  
**Subject:** Protective Agreements

Paul,

Thank you for sending OCC two draft documents (a motion and a protective agreement) representing DE-Ohio's proposed alternatives for resolution of the current Protective Agreement dispute between our respective clients. OCC cannot agree to either of DE-Ohio's two proposed approaches and recommends the former approach that was painstakingly negotiated between CG&E and OCC and that in similar form is executed between OCC and others.

First, Duke's proposed "Joint Motion to the Commission Seeking Confidential Treatment for Documents Appropriately Marked" leaves unresolved the matters that have been resolved in the numerous protective agreements executed between DE-Ohio and OCC. These unresolved matters include the means by which confidential information is designated, the availability of information to OCC's in-house personnel, the treatment of documents by a public agency under Ohio's records retention and public records legal requirements, and the ability to address overly broad designations by the Company, etc. Furthermore, the fact that Ohio Partners for Affordable Energy (OPAE) entered an agreement with DE-Ohio similar to DE-Ohio's proposal to OCC is of little consequence because OPAE is not a public agency and does not face the same public records request issues faced by OCC.

Second, the DE-Ohio proposed protective agreement contains numerous weaknesses and retreats from the careful crafting of previous agreements. Further, the proposal complicates the effort to reach an agreement by needlessly attempting to make the obligations reciprocal in nature. If the circumstance were to arise where OCC would need to provide trade secret information to the Company (an event that seems extremely remote, if not impossible), a separate agreement can be negotiated at that time. Paragraph 3 of DE-Ohio's proposal provides an example of inserted language that is difficult to interpret, and appears intended to create a grey area between otherwise public documents under previous agreements and documents protected under the proposed agreement. The draft does not resolve issues concerning the protection of the Company's information, but creates new issues.

Therefore, I offer the attached red-lined version of the Protective Agreement for your consideration to be used in the Gas Distribution Rate Case (07-589-GA-AIR) and the FPP/SRT Case (07-723-EL-UNC). The proposed Protective Agreement adopts language proposed by DE-Ohio in provision 1, and is otherwise substantively the same as the Protective Agreement DE-Ohio signed with OCC in October, 2006 in Case 06-986-EL-UNC.

I look forward to DE-Ohio's response. Thank you.

**CONFIDENTIAL NOTICE:**

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Larry S. Sauer  
Assistant Consumers' Counsel  
10 West Broad Street  
Suite 1800  
Columbus, Ohio 43215-3485  
(614) 466-1312

**CC:** HOTZ, ANN; SMALL, JEFF

**From:** LARRY SAUER  
**To:** john.finnigan@duke-energy.com; paul.colbert@duke-energy.com  
**Date:** 8/24/2007 4:59:27 PM  
**Subject:** Protective Agreements

Paul,

In light of the Commission's ruling that OCC recently received in the Embarq case (Case No. 07-760-TP-BLS) regarding protective agreements, I offer for Duke's consideration and signature in the DE-Ohio distribution rate case (Case No. 07-589-GA-AIR) and the DE-Ohio FPP/SRT case (Case No. 07-723-EL-UNC) the same protective agreement ultimately approved by the Commission in the Embarq case. I would appreciate hearing from Duke on Monday whether Duke will agree to this proposal or OCC's earlier proposal. If you have any questions, please advise.

Thank you.

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Assistant Consumers' Counsel  
10 West Broad Street  
Suite 1800  
Columbus, Ohio 43215-3485  
(614) 466-1312

**CC:** HOTZ, ANN; SMALL, JEFF

**From:** "Colbert, Paul" <Paul.Colbert@Cinergy.COM>  
**To:** "LARRY SAUER" <SAUER@occ.state.oh.us>, "Finnigan, John" <John.Finnigan@Cinergy.COM>  
**Date:** 8/24/2007 5:06:22 PM  
**Subject:** RE: Protective Agreements

I will try to get back to you Monday but it may be Tuesday. Monday is filled and I am not certain I can get feedback from all of the required clients Monday. I will do my best. Thank you.

-----Original Message-----

From: LARRY SAUER [mailto:SAUER@occ.state.oh.us]  
Sent: Friday, August 24, 2007 4:59 PM  
To: Finnigan, John; Colbert, Paul  
Cc: ANN HOTZ; JEFF SMALL  
Subject: Protective Agreements

Paul,

In light of the Commission's ruling that OCC recently received in the Embarq case (Case No. 07-760-TP-BLS) regarding protective agreements, I offer for Duke's consideration and signature in the DE-Ohio distribution rate case (Case No. 07-589-GA-AIR) and the DE-Ohio FPP/SRT case (Case No. 07-723-EL-UNC) the same protective agreement ultimately approved by the Commission in the Embarq case. I would appreciate hearing from Duke on Monday whether Duke will agree to this proposal or OCC's earlier proposal. If you have any questions, please advise.

Thank you.

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Assistant Consumers' Counsel  
10 West Broad Street  
Suite 1800  
Columbus, Ohio 43215-3485  
(614) 466-1312

**CC:** "ANN HOTZ" <HOTZ@occ.state.oh.us>, "JEFF SMALL" <SMALL@occ.state.oh.us>

**From:** LARRY SAUER  
**To:** paul.colbert@duke-energy.com  
**Date:** 8/30/2007 11:33:56 AM  
**Subject:** Protective Agreements

Paul,

I can only presume from your silence that DE-Ohio is unwilling to execute either of the protective agreements which I previously sent to you (August 20 and August 24, 2007). Therefore, OCC will be filing a Motion to Compel later today in both the DE-Ohio gas distribution rate case (Case No. 07-589-GA-AIR), and the DE-Ohio FPP/SRT case (Case No. 07-723-EL-UNC). OCC remains willing to discuss with DE-Ohio a reasonable resolution to the protective agreement issue; however, OCC must seek a resolution from the Commission in order to get past the present impasse. If you have questions please feel free to contact me.

Thank you.

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Larry S. Sauer  
Assistant Consumers' Counsel  
10 West Broad Street  
Suite 1800  
Columbus, Ohio 43215-3485  
(614) 466-1312

**CC:** HOTZ, ANN; Idzkowski, Mike; john.finnigan@duke-energy.com; SERIO, JOE;  
SMALL, JEFF

**From:** "Colbert, Paul" <Paul.Colbert@Cinergy.COM>  
**To:** "LARRY SAUER" <SAUER@occ.state.oh.us>  
**Date:** 8/30/2007 11:37:58 AM  
**Subject:** RE: Protective Agreements

You may of course take any action you deem appropriate. I have raised the issue with my client and given the events of the last several days do not have an answer for you. I am trying to get you an answer and will respond as soon as I am able. Thank you.

-----Original Message-----

From: LARRY SAUER [mailto:SAUER@occ.state.oh.us]  
Sent: Thursday, August 30, 2007 11:34 AM  
To: Colbert, Paul  
Cc: Finnigan, John; ANN HOTZ; Mike Idzkowski; JOE SERIO; JEFF SMALL  
Subject: Protective Agreements

Paul,

I can only presume from your silence that DE-Ohio is unwilling to execute either of the protective agreements which I previously sent to you (August 20 and August 24, 2007). Therefore, OCC will be filing a Motion to Compel later today in both the DE-Ohio gas distribution rate case (Case No. 07-589-GA-AIR), and the DE-Ohio FPP/SRT case (Case No. 07-723-EL-UNC). OCC remains willing to discuss with DE-Ohio a reasonable resolution to the protective agreement issue; however, OCC must seek a resolution from the Commission in order to get past the present impasse. If you have questions please feel free to contact me.

Thank you.

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Assistant Consumers' Counsel  
10 West Broad Street  
Suite 1800  
Columbus, Ohio 43215-3485  
(614) 466-1312

**CC:** "Finnigan, John" <John.Finnigan@Cinergy.COM>, "ANN HOTZ" <HOTZ@occ.state.oh.us>, "Mike Idzkowski" <idzkowski@occ.state.oh.us>, "JOE SERIO"



<SERIO@occ.state.oh.us>, "JEFF SMALL" <SMALL@occ.state.oh.us>

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's Review    )  
and Adjustment of the Fuel and Purchased    )  
Power and the System Reliability Tracker    ) Case No. 07-723-EL-UNC  
Components of Duke Energy Ohio, Inc.,       )  
and Related Matters.                               )

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**PROTECTIVE AGREEMENT**

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This Protective Agreement ("Agreement") is entered into by and between Duke Energy Ohio, Inc. ("DE-Ohio" or "the Company") and the Office of the Ohio Consumers' Counsel ("OCC") (collectively, "the Parties"). This Agreement is designed to facilitate and expedite the exchange with OCC of information in the discovery process in this proceeding, as "this Proceeding" is defined herein. It reflects agreement between the Company and OCC as to the manner in which "Protected Materials," as defined herein, are to be treated. This Agreement is not intended to constitute any resolution of the merits concerning the confidentiality of any of the Protected Materials.

1. The purpose of this Agreement is to permit prompt access to and review of such Protected Materials in a controlled manner that will allow their use for the purposes of this Proceeding while protecting such data from disclosure to non-participants, without a prior ruling by an administrative agency or court of competent jurisdiction regarding whether the information deserves protection.

2. "Proceeding" as used throughout this document shall mean the above-captioned case, including any appeals therefrom and remands.

3. "Protected Materials" means documents and information furnished subject to the terms of this Agreement and so designated by the Company by conspicuously marking each document or written response as confidential. Protected Materials do not include any information or documents contained in the public files of any state or federal administrative agency or court and do not include documents or information which at, or prior to, commencement of this Proceeding, is or was otherwise in the public domain, or which enters into the public domain as a result of publication by the Company.

4. Protected Materials provided in the context of this Proceeding will be provided to OCC or, upon mutual agreement of the Parties, reasonable access to the Protected Materials may be provided to OCC for use by OCC in conjunction with this Proceeding. Nothing in this Agreement precludes the use of any portion of the Protected Materials that properly becomes part of the public record or enters into the public domain. Nothing in this Agreement precludes OCC in this proceeding from filing Protected Materials under seal or otherwise using Protected Materials in ways, such as in camera proceedings, that do not disclose Protected Materials.

5. As used in this Agreement, the term "Authorized Representative" includes OCC's counsel of record in this Proceeding and other attorneys, paralegals, economists, statisticians, accountants, consultants, or other persons employed or retained by OCC and engaged in this Proceeding.

6. Access to Protected Materials is permitted to OCC's Authorized Representatives who are either a signatory to this Agreement or who have executed a Non-Disclosure Certificate in the form attached hereto as Exhibit A prior to any access. OCC must treat all Protected Materials, copies thereof, information contained therein, and writings made therefrom as proprietary and confidential, and will safeguard such Protected Materials, copies thereof, information contained therein, and writings made therefrom so as to prevent voluntary disclosure to any persons other than OCC's Authorized Representatives.

7. If any OCC Authorized Representative ceases to be engaged in this Proceeding, access to any Protected Materials by such person will be terminated immediately and such person must promptly return Protected Materials in his or her possession to another Authorized Representative of OCC and if there is no such Authorized Representative, such person must treat such Protected Materials in the manner set forth in Section 12 hereof as if this Proceeding herein had been concluded. Any person who has agreed to the foregoing Non-Disclosure Certificate will continue to be bound by the provisions of this Agreement even if no longer so engaged.

8. In this Proceeding, OCC may disclose Protected Materials or OCC writings regarding their contents to any individual or entity that is in possession of said Protected Materials and is bound by a protective order or a similar protective agreement with the Company with respect to the Protected Materials that may be disclosed by OCC.

9. If OCC desires to include, utilize, refer, or copy any Protected Materials in such a manner, other than in a manner provided for herein, that might require disclosure of such material, then OCC must first give notice (as provided in Paragraph 12) to the

Company, specifically identifying each of the Protected Materials that could be disclosed in the public domain. The Company will have five business days after service of OCC's notice to file with an administrative agency or court of competent jurisdiction, a motion and affidavits with respect to each of the identified Protected Materials demonstrating the reasons for maintaining the confidentiality of the Protected Materials. The affidavits for the motion must set forth facts delineating that the documents or information designated as Protected Materials have been maintained in a confidential manner and the precise nature and justification for the injury that would result from the disclosure of such information. If the Company does not file such a motion within five business days of OCC's service of the notice, then the Protected Materials will be deemed non-confidential and not subject to this Agreement. The Parties agree to seek in camera proceedings by the administrative agency or court of competent jurisdiction for the portion of arguments that would disclose Protected Materials. Such in camera proceedings will be open only to the Parties, their counsel, other OCC Authorized Representatives, and others authorized by the administrative agency or court of competent jurisdiction to be present; however, characterizations of the Protected Materials that do not disclose the Protected Materials may be used in public. Until the administrative agency or court of competent jurisdiction decides on the proposed use of the Protected Materials, that portion of the hearing transcript that contains Protected Materials will be sealed and will itself be subject to this Agreement.

10. Any portion of the Protected Materials that the administrative agency or court of competent jurisdiction has deemed to be protected and that is filed in this Proceeding will be filed in sealed confidential envelopes or other appropriate containers

sealed from the public record. If OCC's utilization of the Protected Materials does not provide the Company the requisite five business days advance notice, OCC must file such Protected Materials under seal for consideration by the administrative agency or court of competent jurisdiction until the Parties or the administrative agency or court of competent jurisdiction decides otherwise. OCC may file Protected Materials under seal in this proceeding whether or not OCC seeks a ruling that the Protected Materials should be in the public domain.

11. The Parties agree to seek in camera examination of a witness for the portion of the examination that would disclose Protected Materials that the administrative agency or court of competent jurisdiction has deemed to be protected. Such in camera examination will be open only to counsel for the Parties, other Authorized Representatives of OCC, and others authorized by the administrative agency or court of competent jurisdiction to be present. Transcripts of the closed hearing will be stored in sealed envelopes or other appropriate containers sealed pursuant to the order of the administrative agency or court of competent jurisdiction.

12. It is expressly understood that upon a filing made in accordance with paragraph 9 or paragraph 11 of this Agreement, the burden will be upon the Company to show that any materials labeled as Protected Materials pursuant to this Agreement are confidential and deserving of protection from disclosure.

13. OCC will promptly give the Company notice (as provided in Paragraph 12) if OCC receives a public records request for Protected Materials. The Company will have five business days after service of OCC's notice to file a pleading before a court of competent jurisdiction to prevent disclosure of the Protected Materials in question. If the

Company files such a pleading, OCC will continue to protect the Protected Materials as required by this agreement pending an order of the court. If the Company does not file at a court of competent jurisdiction within five business days of service of OCC's notice, then such Protected Materials can be deemed by OCC to be non-confidential and not subject to this Agreement. Alternatively, the Company may provide notice to OCC that the Protected Materials may be disclosed in response to the public records request.

14. If, under Ohio's Public Records Law, a court awards a relator or person or party attorney's fees or statutory damages in connection with OCC's non-disclosure or delayed disclosure of Protected Materials, then the Company will pay such awarded fees and/or statutory damages to the relator or person or party so that the State of Ohio, OCC and OCC's employees and officials are held harmless.

15. All notices required by paragraphs 9 and 11 must be served by the Parties on each other by one of the following methods: (1) sending the notice to such counsel of record herein via e-mail; (2) hand-delivering the notice to such counsel in person at any location; or (3) sending the notice by an overnight delivery service to such counsel. If any person or entity files an action seeking the public release by OCC of the Protected Materials, OCC must notify the Company's counsel designated in this case promptly via telephone or e-mail in the manner set forth above of such action in order that the Company may take steps to protect its interests.

16. Once OCC has complied with its records retention schedule(s) pertaining to the retention of the Protected Materials and OCC determines that it has no further legal obligation to retain the Protected Materials and this Proceeding (including all appeals and remands) is concluded, OCC must return or securely dispose of (e.g., by shredding) all

copies of the Protected Materials unless the Protected Materials have been released into the public domain or filed with an administrative agency or Court under seal. OCC may keep one copy of each document designated as Protected Material that was filed under seal and one copy of all testimony, cross-examination, transcripts, briefs and work product pertaining to such information and shall safeguard that copy as provided in this Agreement.

17. By entering into this Protective Agreement, OCC does not waive any right that it may have to dispute the Company's determination regarding any material identified as confidential by the Company and to pursue those remedies that may be available to OCC before an administrative agency or court of competent jurisdiction.

18. By entering into this Protective Agreement, the Company does not waive any right it may have to object to the discovery of confidential material on grounds other than confidentiality and to pursue those remedies that may be available to the Company before an administrative agency or court of competent jurisdiction.

19. This Agreement represents the entire understanding of the parties with respect to Protected Materials and supersedes all other understandings, written or oral, with respect to the Protected Materials. No amendment, modification, or waiver of any provision of this Agreement is valid, unless in writing signed by both parties. Nothing in this Agreement will be construed as a waiver of sovereign immunity by OCC.

20. This Agreement will be governed by and construed in accordance with the laws of the State of Ohio.

21. This Agreement may be executed in two counterparts, each of which will be deemed an original, but both of which together will constitute one and the same



instrument. The exchange of copies of this Agreement and of signature pages by facsimile transmission constitutes effective execution and delivery of this Agreement as to the parties and may be used in lieu of the original Agreement for all purposes.

Duke Energy Ohio, Inc.

Office of the Ohio Consumers' Counsel

BY:

BY:

---

Counsel

---

Counsel

Date

Date

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's Review    )  
and Adjustment of the Fuel and Purchased    )  
Power and the System Reliability Tracker    ) Case No. 07-723-EL-UNC  
Components of Duke Energy Ohio, Inc.,       )  
and Related Matters.                            )

I certify my understanding that protected materials may be provided to me, but only pursuant to the terms and restrictions of the Protective Agreement, last executed \_\_\_\_\_ 2007, and certify that I have been given a copy of and have read the Protective Agreement, and that I agree to be bound by it. I understand that the contents of protected materials, and any writings, memoranda, or any other form of information regarding or derived from protected materials shall not be voluntarily disclosed to anyone other than in accordance with the Protective Agreement and shall be used only for the purposes of this Proceeding as defined in paragraph two of the Protective Agreement.

Name: \_\_\_\_\_

Company: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_

Date: \_\_\_\_\_