

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

43
RECEIVED-DOCKETING DIV
2007 AUG 20 11:17
PUCO

In the Matter of the Application of Duke)
Energy Ohio, Inc. for an Increase in Gas) Case No. 07-589-GA-AIR
Rates.)

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Approval of an) Case No. 07-590-GA-ALT
Alternative Rate Plan for its Gas)
Distribution Service.)

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Approval to Change) Case No. 07-591-GA-AAM
Accounting Methods.)

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

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

Larry S. Sauer, Counsel of Record
Joseph P. Serio
Michael E. Idzkowski
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 (Telephone)
sauer@occ.state.oh.us
serio@occ.state.oh.us
idzkowski@occ.state.oh.us

August 30, 2007

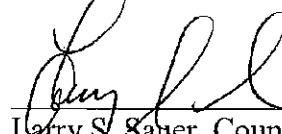
PUCO

RECEIVED-DOCKETING DIV
2007 AUG 30 PM 5:18

This is to certify that the images appearing are an
accurate and complete reproduction of a case file
document delivered in the regular course of business.
Technician Ann Date Processed 8/31/07

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



Larry S. Sauer, Counsel of Record

Joseph P. Serio

Michael E. Idzkowski

Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

(614) 466-8574 (Telephone)

sauer@occ.state.oh.us

serio@occ.state.oh.us

idzkowski@occ.state.oh.us

TABLE OF CONTENTS

	<u>PAGE</u>
I. INTRODUCTION	1
II. THE APPLICABLE LAWS AND BURDEN OF PROOF	2
III. MOTION TO COMPEL	7
IV. CONCLUSION.....	13
CERTIFICATE OF SERVICE	14
EXHIBIT 1 – AFFIDAVIT OF LARRY S. SAUER	
EXHIBIT 2 – PROTECTIVE AGREEMENT	

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)	
Energy Ohio, Inc. for an Increase in Gas)	Case No. 07-589-GA-AIR
Rates.)	

In the Matter of the Application of Duke)	
Energy Ohio, Inc. for Approval of an)	Case No. 07-590-GA-ALT
Alternative Rate Plan for its Gas)	
Distribution Service.)	

In the Matter of the Application of Duke)	
Energy Ohio, Inc. for Approval to Change)	Case No. 07-591-GA-AAM
Accounting Methods.)	

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

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. ("DE-Ohio" or the "Company"), moves the Public Utilities Commission of Ohio ("Commission" or "PUCO") to compel DE-Ohio to respond to OCC's discovery requests. DE-Ohio'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 DE-Ohio to enter the Protective Agreement that OCC offered to DE-Ohio 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.

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)	
Energy Ohio, Inc. for an Increase in Gas)	Case No. 07-589-GA-AIR
Rates.)	

In the Matter of the Application of Duke)	
Energy Ohio, Inc. for Approval of an)	Case No. 07-590-GA-ALT
Alternative Rate Plan for its Gas)	
Distribution Service.)	

In the Matter of the Application of Duke)	
Energy Ohio, Inc. for Approval to Change)	Case No. 07-591-GA-AAM
Accounting Methods.)	

MEMORANDUM IN SUPPORT

I. INTRODUCTION

These cases present issues related to a proposed distribution rate increase and complex alternative regulation proposals that will affect 380,000 residential consumers in southern Ohio. Furthermore, these cases have progressed since the Company's July 18, 2007 application on a timeline that will not permit adequate preparation, as contemplated by R.C. 4903.082 and Ohio Adm. Code 4901-1-16, in the absence of the Company's cooperation in the discovery process.

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.¹ Through counsel, DE-Ohio has stated that it refuses to sign OCC's proposed protective agreement (which the parties have repeatedly

¹ OCC today is filing a similar Motion to Compel in Case No. 07-723-EL-UNC.

signed in other cases in recent years). OCC cannot accept either of DE-Ohio's proposals -- a Joint Motion for a Protective Order which is patently biased against OCC, or DE-Ohio'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 DE-Ohio'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 similar to a protective agreement that DE-Ohio and OCC signed in the past² and that the PUCO just a few weeks ago accepted for purposes of resolving this sort of issue in another case.³

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

² *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).

³ *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 I 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).

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.

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.”⁴ 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.”⁵ 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,⁶ 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

⁴ *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”).

⁵ *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.

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

release is prohibited by state or federal law.”⁷ R.C. 149.43 prohibits the PUCO and other 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.⁸

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

⁷ R.C. 149.43(A)(1)(v).

⁸ *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 5-6 (August 10, 2007).

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

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.¹¹

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

⁹ 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).

¹⁰ 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).

¹¹ *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."¹² The Company partially answered the OCC's second set of discovery -- which was transmitted to DE-Ohio on August 1, 2007. However, on the date DE-Ohio's responses were due, August 21, 2007, DE-Ohio refused to substantively respond to several OCC discovery requests regarding the Company's federal income taxes and test year pension expenses because DE-Ohio and OCC had not entered into an acceptable protective agreement. The specific OCC interrogatories and the Company's responses are as follows:

OCC POD-02-013: Please provide a copy of the Company's most recent federal income tax return or the Company's portions of any consolidated return.

Response: "* * *. Subject to an acceptable confidentiality agreement, OCC can review the federal income tax return information at our office * * *."

OCC-POD-02-015: Please provide copies of any studies and/or analyses supporting test year pension expense.

Response: "This information will be provided after the parties enter into a Confidentiality Agreement."¹³

¹² Ohio Adm. Code 4901-1-16.

¹³ DE-Ohio subsequently supplemented its response to OCC POD-02-015 on August 27, 2007.

OCC-POD-02-016: Please provide a copy of the Company's most recent pension actuarial study.

Response: "See Response to OCC-POD-02-015"

The OCC's inquiry is relevant to the matter of the distribution rate case. These are but only two areas of OCC's investigation of DE-Ohio's application that will undoubtedly cross into areas of claimed confidential information in the future, and a final resolution to this impasse must be reached, in a timely manner in order to permit OCC to thoroughly and adequately prepare for participation in these Commission proceedings, as guaranteed by law and rule.¹⁴

While DE-Ohio 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 DE-Ohio will even file for the protective arrangement that is needed for OCC to obtain its discovery.) In this regard, the negotiations between OCC and DE-Ohio regarding the terms under which an exchange of protected/confidential information could be possible have reached an impasse.¹⁵

¹⁴ R.C. 4903.082 and Ohio Adm. Code 4901-1-16.

¹⁵ See Exhibit 1, Affidavit of Larry S. Sauer, Attachment 2 (electronic correspondence between OCC and DE-Ohio is attached) (August 30, 2007).

DE-Ohio has refused to sign OCC's proposed protective agreement that is substantively similar to the protective agreement signed by other utilities¹⁶ including DE-Ohio.¹⁷ Instead, DE-Ohio has proposed two alternative documents (a joint motion for a protective order and a protective agreement) representing DE-Ohio's proposed resolution of the current dispute between OCC and DE-Ohio. OCC cannot agree to either of DE-Ohio's two proposed approaches and requests the Commission to instruct DE-Ohio to accept OCC's desired protective agreement that is based on what was painstakingly negotiated between DE-Ohio and OCC in other cases and that is in similar form to agreements executed between OCC and other public utilities.

OCC cannot agree to DE-Ohio's proposal for the following reasons: 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 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

¹⁶ *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).

¹⁷ See Footnote 1.

records legal requirements, and the ability to address overly broad designations by the Company, etc. Furthermore, the fact, as raised by DE-Ohio, that Ohio Partners for Affordable Energy (“OPAE”) entered an agreement with DE-Ohio similar to DE-Ohio’s proposal,¹⁸ and that agreement was approved by the Commission,¹⁹ 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 requirements by which OCC is obligated.

Second, DE-Ohio’s proposed protective agreement contains numerous weaknesses and retreats from the careful crafting of previous agreements. 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. 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), a separate agreement can be negotiated at that time. DE-Ohio’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 DE-Ohio 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

¹⁸ *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 DE-Ohio and Ohio Partners for Affordable Energy (August 2, 2007).

¹⁹ *Id.* Entry at 2 (August 15, 2007).

protective agreement that OCC proposes, OCC could not release DE-Ohio'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 DE-Ohio that OCC proposes to disclose the information, which would allow DE-Ohio to seek a ruling from the Commission or other body of competent jurisdiction as to whether the information deserves protection. DE-Ohio'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 DE-Ohio's approach could be given to information that should in fact be part of the public record.

For the reasons stated above, DE-Ohio'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 DE-Ohio that, *inter alia*, restricts the ability of a party to challenge the protected status of "allegedly confidential information * * * ." ²⁰ Instead the Commission should follow its usual processes for protective agreements and orders and instruct DE-Ohio 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

²⁰ See Ohio Adm. Code 4901-1-24(D)(3).

between OCC and Embarq over language in a protective agreement.²¹

OCC proposed two alternative protective agreements to DE-Ohio. One of OCC's proposals is substantively the same as the Protective Agreement DE-Ohio has signed with OCC, as recently as January 2007, and many times before in other Commission proceedings.²² The other OCC proposal is the one that the PUCO recently approved between OCC and Embarq in Case 07-760-TP-BLS. 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 DE-Ohio (then Cinergy) originally negotiated some years ago. Given that it is an updated version of the earlier document and that the PUCO approved it in the recent case involving Embarq, it is this document

²¹ *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 5-6(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 judgment 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 31st motion for protective order, save that it shall now exclude the disputed language in paragraph 14.").

²² See Footnote 1.

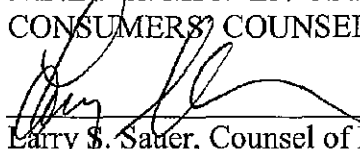
that the PUCO should either order into effect or order DE-Ohio to sign with OCC. OCC has attached this Protective Agreement to this Motion.

IV. CONCLUSION

DE-Ohio's applications in these cases are complex and OCC should have ample opportunity to investigate issues expeditiously without interruption by DE-Ohio's refusal to enter a reasonable protective agreement. The resources of the OCC, other parties, and the Commission should not be 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.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



Larry S. Sauer, Counsel of Record

Joseph P. Serio

Michael E. Idzkowski

Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

(614) 466-8574 (Telephone)

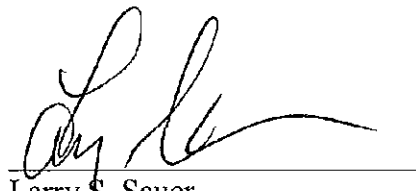
sauer@occ.state.oh.us

serio@occ.state.oh.us

idzkowski@occ.state.oh.us

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing *Motion to Compel Duke to Respond to Discovery* was served via first class U.S. mail, postage pre-paid, this 30th day of August, 2007.


Larry S. Sauer

Paul A. Colbert
John Finnigan
Associate General Counsel
Duke Energy Ohio
139 Fourth Street, Room 25 ATII
Cincinnati, Ohio 45202

Thomas Lindgren
William Wright
Attorney General's Office
Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, Ohio 43215

David F. Boehm
Michael L. Kurtz
Kyrt J. Boehm
Boehm, Kutz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202-4454

David C. Rinebolt
Ohio Partners for Affordable Energy
231 West Lime Street
P.O. Box 1793
Findlay, Ohio 45839-1793

John M. Dosker
General Counsel
Stand Energy Corporation
1077 Celestial Street, Suite 110
Cincinnati, Ohio 45202-1629

Sally W. Bloomfield
Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4219

John W. Bentine
Mark S. Yurick
Chester, Willcox & Saxbe LLP
65 East State Street, Suite 1000
Columbus, Ohio 43215-4213

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
Energy Ohio, Inc. for an Increase in Gas) Case No. 07-589-GA-AIR
Rates.)

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Approval of an) Case No. 07-590-GA-ALT
Alternative Rate Plan for its Gas)
Distribution Service.)

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Approval to Change) Case No. 07-591-GA-AAM
Accounting Methods.)

**AFFIDAVIT OF
LARRY S. SAUER**

I, Larry S. Sauer, counsel of record for the Office of the Ohio Consumers' Counsel ("OCC") in the above-captioned cases, being first duly sworn, depose and say:

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 21, 2007, OCC received responses from DE-Ohio to an early set of the OCC's discovery that stated that the Company would not provide some 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.)

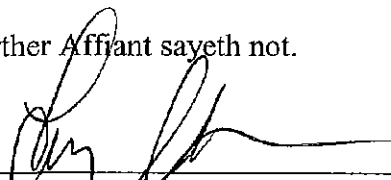
STATE OF OHIO

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



Bonnie Morava
Notary Public, State of Ohio
My Commission Expires 08-18-2011

From: "Finnigan, John" <John.Finnigan@Cinergy.COM>
To: "SAUER@occ.state.oh.us" <'SAUER@occ.state.oh.us'>, "mkurtz@bkllawfirm.com" <'mkurtz@bkllawfirm.com'>, "dboehm@bkllawfirm.com" <'dboehm@bkllawfirm.com'>, "jdosker@stand-energy.com" <'jdosker@stand-energy.com'>, "drinebolt@aol.com" <'drinebolt@aol.com'>, "cmooney2@columbus.rr.com" <'cmooney2@columbus.rr.com'>, "William.Wright@puc.state.oh.us" <'William.Wright@puc.state.oh.us'>, <jbentine@cwslaw.com>
Date: 8/21/2007 5:22:27 PM
Subject: DE-Ohio 2007 Gas Rate Case - PUCO Case Nos. 07-589-GA-AIR; 07-590-GA-ALT; 07-591-GA-AAM - 2nd set of Responses to OCC Interrogatories and Request for Production of Documents

SENT ON BEHALF OF JOHN FINNIGAN

*If you are unable to open or view the attachments, please contact
Barbara Lubrecht (513)287-3648.*

Thank you.

CC: "Finnigan, John" <John.Finnigan@Cinergy.COM>, "Kuhnell, Dianne" <Dianne.Kuhnell@Cinergy.COM>

**Ohio Consumers' Counsel
Second Set Production of Documents
Duke Energy Ohio, Inc.
PUCO Case No. 07-589-GA-AIR
PUCO Case No. 07-590-GA-ALT
PUCO Case No. 07-591-GA-AAM
Date Received: August 1, 2007
Response Due: August 21, 2007**

OCC-POD-02-013

REQUEST:

13. Please provide a copy of the Company's most recent federal income tax return or the Company's portions of any consolidated return.

RESPONSE:

The Company requested and was granted confidential treatment of its federal income tax information in this case. Subject to an acceptable confidentiality agreement, OCC can review the federal income tax return information at our office at a mutually agreeable date and time. Please contact Dianne Kuhnell (513-287-3402) to make arrangements.

WITNESS RESPONSIBLE: Keith G. Butler

**Ohio Consumers' Counsel
Second Set Production of Documents
Duke Energy Ohio, Inc.
PUCO Case No. 07-589-GA-AIR
PUCO Case No. 07-590-GA-ALT
PUCO Case No. 07-591-GA-AAM
Date Received: August 1, 2007
Response Due: August 21, 2007**

OCC-POD-02-015

REQUEST:

15. Please provide copies of any studies and/or analyses supporting test year pension expense.

RESPONSE:

CONFIDENTIAL AND PROPRIETARY TRADE SECRET

This information will be provided after the parties enter into a Confidentiality Agreement.

WITNESS RESPONSIBLE:

L. Gwen Pate

**Ohio Consumers' Counsel
Second Set Production of Documents
Duke Energy Ohio, Inc.
PUCO Case No. 07-589-GA-AIR
PUCO Case No. 07-590-GA-ALT
PUCO Case No. 07-591-GA-AAM
Date Received: August 1, 2007
Response Due: August 21, 2007**

OCC-POD-02-016

REQUEST:

16. Please provide a copy of the Company's most recent pension actuarial study.

RESPONSE:

See response to OCC-POD-02-015.

WITNESS RESPONSIBLE: L. Gwen Pate

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

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.

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 gray 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:

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

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.

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

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.

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

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.

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

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.

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

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 Application of Duke)
Energy Ohio, Inc. for an Increase in Gas) Case No. 07-589-GA-AIR
Rates.)

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Approval of an) Case No. 07-590-GA-ALT
Alternative Rate Plan for its Gas)
Distribution Service.)

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Approval to Change) Case No. 07-591-GA-AAM
Accounting Methods.)

PROTECTIVE AGREEMENT

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 Application of Duke)	
Energy Ohio, Inc. for an Increase in Gas)	Case No. 07-589-GA-AIR
Rates.)	

In the Matter of the Application of Duke)	
Energy Ohio, Inc. for Approval of an)	Case No. 07-590-GA-ALT
Alternative Rate Plan for its Gas)	
Distribution Service.)	

In the Matter of the Application of Duke)	
Energy Ohio, Inc. for Approval to Change)	Case No. 07-591-GA-AAM
Accounting Methods.)	

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: _____