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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

REPLY TO DUKE ENERGY OHIO INC.'S MEMORANDUM CONTRA TO MOTION TO COMPEL DISCOVERY BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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I. INTRODUCTION

On August 30, 2007, given OCC's protracted and fruitless efforts to negotiate with DE-Ohio a protective agreement that balances DE-Ohio's claimed interest in confidentiality with the public's right to know about government regulation and after DE-Ohio rejected a protective agreement that DE-Ohio itself had negotiated and signed multiple times before, the Office of the Ohio Consumers' Counsel ("OCC") found it necessary to file a Motion to Compel Discovery ("Motion") pursuant to Ohio Adm. Code 4901-1-12 and 4901-1-23 in the above-captioned cases. On September 17, 2007, DE-Ohio filed a Memorandum Contra ("Memo Contra") to OCC's Motion. OCC hereby files its Reply to DE-Ohio's Memo Contra, pursuant to Ohio Adm. Code 4901-1-12.[1]

[1] Pursuant to Ohio Adm. Code 4901-1-12(B)(2), the OCC has seven (7) days to Reply to DP&L's Memo Contra. Because the OCC was served DP&L's Memo Contra by mail, an additional three days is added to the prescribed period of time pursuant to Ohio Adm. Code 4901-1-07(B).

OCC proposed two protective agreement options to DE-Ohio before turning to the Public Utilities Commission of Ohio ("Commission" or "PUCO") for assistance. The first option was a protective agreement that essentially duplicated the protective agreements DE-Ohio has executed in the past with OCC. DE-Ohio initially negotiated the form of the agreement with OCC a few years ago.[2] The second option was a protective agreement the PUCO recently approved that was entered into by OCC and Embarq.[3] Ironically, the latter protective agreement that DE-Ohio rejected, and that the PUCO accepted in the Embarq case, was itself based on the original negotiated agreement of a few years ago between OCC and DE-Ohio. DE-Ohio refused both reasonable options. OCC requests that the Commission reject DE-Ohio's arguments and grant OCC's Motion to adopt the form of the protective agreement in the Embarq case and that OCC attached to its Motion.

In order to resolve the discovery dispute now and allow OCC to overcome the delay that DE-Ohio has interposed in the discovery process that is intended by Ohio Adm. Code 4901-1-16 to progress without the need for PUCO involvement, the Commission should order DE-Ohio to abide by the terms of the protective agreement attached to OCC's Motion.

II. THE MOTION TO COMPEL DISCOVERY SHOULD BE GRANTED.

A. The Company Should Not Be Permitted To Hold Discovery Information Hostage To Force Acceptance Of Its Unique Approach To Public Records.

DE-Ohio refuses to enter into OCC's proposed protective agreements, because it argues that the information DE-Ohio would provide in discovery does not constitute a record

[2] Motion at 2.

[3] *In re Embarq Application for Approval of an Alternative Form of Regulation of Basic Local Exchange Service*, Case No. 07-760-TP-BLS, Entry at 2 (August 10, 2007) ("*Embarq Case*").

pursuant to Ohio's public records law[4] and because it insists that OCC not be given the opportunity to challenge the Company's designation of information that it considers confidential.[5] DE-Ohio refuses to comply with discovery requests until the OCC agrees to the Company's latest legal theory regarding the protection of information, and until OCC agrees that the Company is judge and jury when it comes to determining the information that should be deemed confidential and withheld from the public in PUCO cases. DE-Ohio forgets its place in these proceedings as an advocate and not as the final decision-maker regarding the protection of documents. The protective agreements offered by OCC appropriately place the PUCO and the courts in key roles regarding the protection of case information, as appropriate under Ohio law.[6]

DE-Ohio does not provide the OCC with any comfort when it argues that OCC does not need to concern itself over the inclusion of provisions regarding compliance with Ohio's public records law since the information provided by the Company cannot, in DE-Ohio's self-serving opinion, constitute a "record" pursuant to R.C. 149.011.[7] DE-Ohio does not

[4] Memo Contra at 2-3.

[5] Id. at 4-8.

[6] See, e.g., OCC Motion, Exhibit 2 ("Protective Agreement") at ¶¶1, 9-11, 13-14, and 16 (August 30, 2007).

[7] Memo Contra at 2-3.

have good reason to refuse to enter into a protective agreement simply because that agreement deals with contingencies that never arise.[8]

DE-Ohio's refusal to enter into a protective agreement is ultimately based upon its insistence that the OCC rely upon the Company's legal theory to refuse all potential requests by the public for documents.[9] OCC will address DE-Ohio's legal theory because the Company included it as one of its major arguments. But the PUCO should not be misled by this exchange into any perception that DE-Ohio's bravado about the public records law could be acceptable conduct for an Ohio public agency such as OCC. As the PUCO recognized in the *Embarq Case*, a state agency such as OCC must exercise its independent judgment in response to each public records request that it receives.[10]

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[8] A public records request connected with DE-Ohio's post-MDP service plans is not a remote possibility. The Company recently urged the PUCO to refuse the release of information requested by a member of the public based upon DE-Ohio's theory that the PUCO's "organization, functions, policies, decisions, procedures, operations, or other activities" are not documented by information that the PUCO received in testimony of record. *In re Post-MDP Remand Case*, Case No. 03-93-EL-ATA, et. al., DE-Ohio's Memorandum Opposing Modification of Protective Order at 3-4 (August 16, 2007) ("*Post-MDP Remand Case*") (quotation from R.C. 149.011, also quoted in DE-Ohio's Memorandum Opposing Modification of Protective Order at 3). The Entry that invited comment upon the public records request contemplated the redaction of some or all information in certain documents based upon the a determination that the information constituted "records" pursuant to Ohio's Public Records Act. Id., Entry at 2 (August 8, 2007).

[9] DE-Ohio notes an earlier controversy involving public records requests made of OCC during the administration of an earlier Consumers' Counsel. Memo Contra at 7. DE-Ohio states that "with the involvement of the Attorney General's Office, OCC and DE-Ohio agreed upon an alternative procedure . . ." and that "OCC withdrew from that agreement before it was implemented." Id. The "involvement of the Attorney General's Office" was *as counsel for OCC*. DE-Ohio is not privy to the privileged communications between the OCC and the Attorney General's Office at that time (nor up to this time), and any implication that the Attorney General's Office in any way endorsed, seperately, an alternative procedure that was never implemented must be rejected. The assistant attorney general, assigned to the OCC, explored various means by which the OCC could obtain documents *while meeting OCC's obligations under Ohio's Public Records Act*. DE-Ohio's recognition of these events also recognizes that the Attorney General's most informed assistants on the subject believe that OCC must approach the subject of public records requests with great sensitivity rather than dismiss the subject (as apparently proposed by DE-Ohio).

[10] *Embarq Case*, Case No. 07-760-TP-BLS, Entry at 5-6 (August 10, 2007)

DE-Ohio relies upon the R.C. 149.011 definition of "records":

> "Records" includes any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the Revised Code, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, *which serves to document the* organization, functions, policies, *decisions*, procedures, operations, or other activities of the office.[11]

Noting the emphasis placed by DE-Ohio in the foregoing quote, the Company's legal theory appears to be that a document provided to the OCC by the Company could never serve to document any OCC "decisions." This legal analysis appears to dismiss, for example, that the OCC might incorporate a DE-Ohio document into its testimony where the document might document the decisions of OCC. Furthermore, DE-Ohio may not reasonably emphasize certain words in the definition provided in R.C. 149.011 and disregard other words.[12] The definition of "record" is broad, as shown by the inclusion of "other activities in the office," which would have to be evaluated regarding any particular public records request.

Conceivably a public records request directed to OCC could be directed at ascertaining the effectiveness with which the office has carried out its legislative mandate.[13] If a member of the public desired to assess OCC's effectiveness in a particular proceeding, the information that OCC gained through discovery could be crucial for performing such an evaluation. This point is most relevant when

[11] Memo Contra at 2 (emphasis sic).

[12] *Weaver v. Edwin Shaw Hospital*, 104 Ohio St.3d 390, 393, 2004 Ohio 6549, ¶12 ("it is well settled that none of the language employed therein should be disregarded . . . .").

[13] See e.g. R.C. 4911.02(B)(2)(c), "[OCC] may institute, intervene in, or otherwise participate in proceedings in both state and federal courts and administrative agencies on behalf of the residential consumers concerning review of decisions rendered by, or failure to act by, the public utilities commission."

considering the information that OCC receives through discovery, and which has been attached to OCC's testimony. That testimony, including its attachments, could potentially be considered a "record" by a requesting person.[14]

The determination of what constitutes a public record is highly fact specific, and DE-Ohio unreasonably relies upon a single case for the blanket proposition that there is no "record" at issue in its dealings with OCC. The Company argues that the release of information gained by OCC during discovery would not provide insight into OCC operations.[15]

In *McCleary,* the Court found that the information that parents provided to a recreation and parks department such as names, home addresses, family information, emergency contact information, and medical history of participating children in a photo identification program was not a "record."[16] If OCC utilized information, however, to create record evidence in a proceeding before the Commission, then that information could serve to document OCC's operations and decisions. In contrast, the information sought in *McCleary* regarding the photo identification program did not document any decision-making by the recreation and parks department that was named as a defendant. Here again, DE-Ohio's argument that information provided through discovery, in all instances, would not provide insight into OCC operations is offered for self-serving purposes and should not be relied upon by the Commission.

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[14] *The State ex rel. The Plain Dealer et al. v. Ohio Dept. of Insurance,* 80 Ohio St. 3d 513, 518, 1997 Ohio 75. ("The Ohio Public Records Act is intended to be liberally construed . . .").

[15] Memo Contra at 3, citing *McCleary v. Roberts,* 88 Ohio St. 3d 365 (April 12, 2000).

[16] *McCleary v. Roberts at 367.*

It is key to understand (as the PUCO understood in the *Embarq Case)* that OCC, a state agency, cannot substitute DE-Ohio's judgment for OCC's own judgment about the Ohio public records law. And the PUCO has no authority under Ohio's public records law to order a state agency such as OCC to proceed in a way other than how OCC, in its independent judgment, believes it should proceed.

The line between record and non-record, for public records law purposes, is not as bright as DE-Ohio suggests. By way of an example, the Commission received a public records request on July 26, 2007 in another proceeding that involves DE-Ohio.[17] The Commission sought guidance from interested parties, stating:

> To assist with the determination of the appropriate response to the public records request, parties may file memoranda discussing why the Commission should or should not modify the protective order granted by the examiners from the bench as it relates to all protected information. Specifically, parties should address appropriate confidential treatment of (a) document titles, (b) identification of persons or entities, (c) dates, (d) payments, (e) quantities and load information, (f) account numbers, (g) other customer identification, and (h) other terms and conditions. Parties should support their responses, citing and applying all relevant law.[18]

To date, there have been nine pleadings filed with the Commission by interested parties offering differing positions for the Commission to consider regarding an appropriate response to the public records request.[19] The Commission and its designated

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[17] *Post-MDP Remand Case*, Case No. 03-93-EL-ATA, et al. Entry at 2 (August 8, 2007).

[18] Id.

[19] Pleadings have been filed by Ohio Partners for Affordable Energy ("OPAE") (August 16, 2007); Industrial Energy Users-Ohio ("IEU-Ohio") (August 16, 2007); OCC (August 16, 2007); DE-Ohio (August 16, 2007); Duke Energy Retail Sales, LLC ("DERS") (August 16, 2007); The Ohio Hospital Association ("OHA") (August 16, 2007); Party Making the Public Records Request (August 20, 2007); DERS Reply to the Party Making the Public Records Request (August 29, 2007); DE-Ohio Reply to Party Making the Public Records Request (August 30, 2007).

representatives do not appear to have decided the issue. DE-Ohio would have the Commission believe that there are no substantive issues for OCC to reconcile if confronted with a public records request that involves information that DE-Ohio considers confidential. The Commission -- as a public entity that is also subject to public records requests -- should not be sanguine regarding the application of DE-Ohio's legal theory that would result in blanket denials of such requests.

DE-Ohio has not challenged the provision in OCC's proposed protective agreement that establishes the procedures in the event OCC receives a public records request.[20] OCC's protective agreement establishes reasonable notice provisions and deadlines for the Company to take necessary action to protect confidential information from release that the Company deems to be trade secret. Indeed, the protective agreement OCC offered (that is essentially what DE-Ohio signed multiple times before and that essentially is what other utilities sign with OCC), has within its terms the expressed opportunity for DE-Ohio itself to make its case to a court on the points in its Memorandum Contra. As a public agency, OCC has no control over the timing and nature of a public records request, but in the face of a public records request, OCC's proposed protective agreement appropriately provides for such an eventuality.

DE-Ohio mischaracterizes the dispute over the discovery information. The Company states: "The information OCC seeks through discovery is clearly confidential in nature and still OCC will not agree to its protection."[21] OCC has been ready and willing to execute the protective agreements that OCC has proposed to DE-Ohio, that

[20] Motion at Exhibit 2 ¶13.

[21] Memo Contra at 4.

would protect the information without waiving rights to obtain a PUCO ruling later -- if needed. Again, one of the proposed protective agreements is substantively the same as the protective agreement that DE-Ohio and OCC signed many times in the past.[22] The other is a very similar protective agreement modeled after the one that the PUCO recently accepted for purposes of resolving this sort of discovery dispute in the *Embarq Case*—and that is what OCC is proposing the PUCO adopt here.[23] OCC is being prejudiced by DE-Ohio's refusal to respond to discovery in a timely manner—and the PUCO's discovery rule and protective agreement rule do not contemplate that a party would suffer this delay.[24]

The issue DE-Ohio is most troubled over is not whether OCC will agree to protect DE-Ohio confidential information, but whether OCC will agree not to challenge DE-Ohio's determination of confidentiality (i.e. before even seeing responses to the OCC's first set of discovery). Pursuant to the proposed protective agreement, OCC is entitled to challenge DE-Ohio's determination regarding the confidential nature of information provided to OCC.

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[22] *In re Setting Duke Energy's Annually Adjusted Component,* Case No. 06-1085-EL-UNC, Protective Agreement (executed October 3, 2006); *In re Application of Duke Energy-Ohio Inc. to Modify its Certified Supplier Tariff,* Case No. 06-723-EL-ATA, Protective Agreement (executed October 3, 2006); *In re Modification of DE-Ohio's Market-Based Standard Service Offer,* Case No. 06-986-EL-UNC, Protective Agreement (executed October 3, 2006); *In re DE-Ohio's Fuel and Economy Purchased Power Component,* Case No. 05-806-EL-UNC, et al., Protective Agreement (executed November 15, 2005); *Post-MDP Remand Case,* Case No. 03-93-EL-ATA, et al., Protective Agreement (executed May 13, 2004);; *In re DE-Ohio Post-MDP Service Remand Case,* Case No. 03-93-EL-ATA, et al., Protective Agreement (executed by DE-Ohio Affiliate Cinergy on 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 on January 9, 2007); *In re Application of DE-Ohio for an Increase in Rates,* Case No. 01-1228-GA-AIR, et al., Protective Agreement (executed February 7, 2006); *In re DE-Ohio Application to Modify its System Reliability Tracker Component,* Case No. 05-724-EL-UNC, Protective Agreement (executed June 17, 2005); *In re DE-Ohio's Purchased Gas Adjustment Clause,* Case No. 05-218-GA-GCR, Protective Agreement (executed February 8, 2006).

[23] *Embarq Case,* Case No. 07-760-TP-BLS, Entry at 2 (August 10, 2007).

[24] Motion to Compel at 6-7, See also Ohio Adm. Code 4901-1-23 and Ohio Adm. Code 4901-1-24.

Paragraph 9 of the proposed protective agreement includes a notice provision and deadlines for DE-Ohio to take necessary action to protect its confidential materials, and states:

> 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. * * * 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.

Reasonable parties sometimes disagree during the course of litigation, but the Company seeks the first and last word on this subject of confidentiality rather than permit any presentation to a decision-maker having jurisdiction over the matter. It is DE-Ohio's position that: "[t]here is simply no reason why OCC, like every other party, cannot agree to maintain the confidentiality of *properly marked information* during the discovery and hearing process."[25] Disagreements should be expected regarding what constitutes "properly marked information," and OCC proposes a process by which such disputes are decided by someone other than DE-Ohio itself.[26]

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[25] Memo Contra at 8. (Emphasis added).

[26] DE-Ohio's placement of itself as the final arbiter of what is "properly marked information" is an invitation for abuse. The presence of a process by which challenges to the Company's designations can be undertaken provides some incentive for the Company to not abuse the use of its "CONFIDENTIAL TRADE SECRET INFORMATION" stamp. A carefully constructed protective agreement can reduce the sources of conflict between parties.

B. The Company Misstates The Events Upon Which It Bases Its New Position.

DE-Ohio confuses two issues: the release of confidential information, and challenges to Company designations that limit the public disclosure of case information.[27] The confusion is a result of DE-Ohio's position that only its determinations count regarding what information should be held confidential. As argued previously, OCC should have the ability to challenge DE-Ohio's determination of confidential information, and have such a challenge (if it occurs) heard by an independent arbiter. Contrary to DE-Ohio's argument, the exercise of a right to challenge DE-Ohio's determination of the confidential nature of information does not constitute the release of information. Indeed, it is DE-Ohio that has the burden, under Ohio Adm. Code 4901-1-27(B)(7)(e), to prove to the PUCO that information is confidential -- a burden that DE-Ohio seeks to avoid.

DE-Ohio's position that OCC should agree to protect any and all information that DE-Ohio deems confidential runs counter to Ohio law. A public entity cannot enter into an enforceable promise of confidentiality with respect to public records.[28] In this regard, the Supreme Court of Ohio has noted that a government agency's "promises of confidentiality do not alter the public nature" of documents.[29] In the recent *Embarq Case* before the Commission, a similar dispute surrounding OCC's ability to agree to the desired protection

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[27] Memo Contra at 7 ("In other words, the current mechanism is flawed and OCC does what suits it at a given moment. Some examples include *attempts* to make confidential information concerning certain generation assets public in DE-Ohio's merger case, [and] *attempting* to make all of the confidential commercial contracts in the remand case public . . . .") (Emphasis added). DE-Ohio faults OCC for following the terms of the protective agreements when OCC challenged Company designations.

[28] *State ex rel. Gannett Satellite Information Network, d.b.a. The Cincinnati Enquirer v. Shirley,* 78 Ohio St. 3d 400, 403 (1997), citing *State ex rel. Sun Newspapers v. Westlake Bd. of Education,* 76 Ohio App. 3d 170, 173 (1991).

[29] Id.

of certain confidential information was decided in OCC's favor. The attorney examiner's decision in that case recognized OCC's lawful right to exercise independent judgment in the event of future public records requests.[30]

DE-Ohio has incorrectly portrayed OCC as a bad actor while ignoring the Company's center role in disputes regarding the protection of documents. For example, the Company did not diligently act to protect information in the *Post-MDP Remand Case* (i.e. 03-93-EL-ATA, et al.) when clear legal means were available to protect DE-Ohio's information. Instead, DE-Ohio opted for brinkmanship tactics, repeatedly attempting to prevent OCC from making any case on remand of that case from the Supreme Court of Ohio. That strategy included a Motion for Clarification directed at halting a hearing ordered by the attorney examiner,[31] a Motion for Protective Order that sought to preclude OCC from conducting any discovery,[32] a Motion in Limine to prevent OCC from presenting evidence at the hearing,[33] and numerous motions to strike the testimony presented by OCC. Seeking

[30] *Embarq Case*, Case No. 07-760-TP-BLS, Entry at 5-6 (August 10, 2007) ("the attorney examiner finds merit in OCC's arguments concerning the impropriety of the disputed language . . . . * * * 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.").

[31] *Post-MDP Remand Case*, DE-Ohio Motion for Clarification (December 13, 2006).

[32] DE-Ohio also supported Duke Energy Retail Sale's ("DERS' ") efforts to quash a subpoena of a DERS witness that included the claim that the Commission lacked the authority to subpoena a DERS employee in the State of Ohio.

[33] *Post-MDP Remand Case*, DE-Ohio Motion in Limine (December 20, 2006).

to entirely prevent OCC from making its case, DE-Ohio's strategy did not include diligent attention to the protection of information that came to light during discovery.[34]

During the *Post-MDP Remand Case*, neither DE-Ohio nor its affiliated companies argued by motion as provided for in the Commission's rules[35] in favor of limitations regarding the use of information obtained from Deponent Deeds. Instead, counsel for the Duke-affiliated companies simply attended the deposition and disrupted OCC's inquiries to argue that nearly everything said was subject to a protective agreement that was executed by the OCC and one or another of the Duke-affiliated companies.[36] The protective agreements entered into with the Duke-affiliated companies only apply to information provided by the Duke affiliate that provided it to OCC.[37] Forsaking legal means and legal arguments,[38] the

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[34] An example is presented, as recorded in the transcript of the *Post-MDP Remand Case*, of apparent lapses in the efforts of the Duke affiliates to protect controversial information and OCC's efforts to deal responsibly with DE-Ohio claims of confidentiality regardless of the merits of those claims. *Post MDP Remand Case*, Tr. Remand Vol. I at 26-33. The response at the time from counsel for DERS was one of appreciation. Id. at 30-31.

[35] "All motions, unless made at a public hearing or transcribed prehearing conference . . . shall be in writing and shall be accompanied by a memorandum in support." Ohio Adm. Code 4901-1-12(A). DE-Ohio's only submission was the Motion to Quash which sought to deny OCC all information that was available to Mr. Deeds.

[36] The argument was transcribed, but not recorded in any filed document related to the *Post-MDP Remand Case*. The attorney examiners, however, heard the arguments first hand during a telephone conversation.

[37] See, e.g., Duke Energy Retail Sales Motion for Protective Order, Attached Protective Agreement at ¶3 (December 20, 2006) ("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."). The Protective Agreement states that "Protected Materials . . . will be provided to OCC. . . ." The Protective Agreement, in connection with documents, only applies to information furnished by Duke Energy Retail Sales ("DERS") to OCC that is marked by DERS prior to transmittal. Information provided by John Deeds, oral and in document form, does not fit this description. Trial counsel for DE-Ohio later stated that the Duke-affiliated companies were reconsidering their position on the matter.

[38] Other public denunciations of OCC during this period also missed the mark. For instance, IEU-Ohio filed a letter in which it assailed OCC for the release of customer information, citing Ohio Adm. Code 4901:1-10-24. *Post-MDP Remand Case*, 03-93-EL-ATA, et al., IEU-Ohio Letter to the PUCO at 2 (March 2, 2007). Leaving aside the conflict between that rule and discovery rights, Ohio Adm. Code 4901:1-10-24 applies to the release of information *by an electric distribution utility*. If any information was improperly released pursuant to the Commission's rules, the party at fault was DE-Ohio.

Company resorts to false accusations regarding OCC's "release[ ] [of] protected material in violation of the protective agreements" in order to deny OCC the information that it needs to make its case.[39]

The protective agreement proposed by OCC will work efficiently when parties thereto are cooperative. The Duke-Cinergy merger case[40] provides and example where the actions of the Duke affiliated companies greatly complicated the treatment of information that the companies considered confidential. In the *DE-Ohio Merger Case*, OCC exercised its right under the protective agreement to seek disclosure of alleged proprietary documents by notifying DE-Ohio in writing of its challenge to the confidential treatment of the documents.[41] OCC's notice set forth very specific statements that it intended to use in its filed comments to the Commission.[42] In response DE-Ohio filed fifteen Motions for Protection,[43] where a single Motion would have sufficed, and sought broad protection for the documents in controversy that did not recognize OCC's diligent efforts to reach a reasonable result. [44]

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[39] Memo Contra at 8.

[40] *In re Cinergy Corp. and Duke Energy Merger Case*, Case No. 05-732-EL-MER ("*DE-Ohio Merger Case*").

[41] Id. OCC Memo Contra at 2-3 December 12, 2005)..

[42] Id.

[43] Id. Eleven Joint Motions for Protection (November 23, 2005), and Four Joint Motions for Protection (December 5, 2005).

[44] Id. Entry at 3 (May 11, 2006). (Despite DE-Ohio's efforts to protect information that was a public record in Indiana, the PUCO held: "[i]nformation that is already public here or in any other forum will not be granted protective treatment.").

C. Discovery Should Be Compelled Subject Only To Conditions Consistent With Ohio Law.

The Company has proposed three options for resolving OCC's Motion, one of which DE-Ohio itself rejected.[45] The first of the remaining two options is that DE-Ohio and OCC should agree to a protective agreement that will protect DE-Ohio's confidential information from disclosure to the public by OCC.[46] Entering a protective agreement is an approach that OCC has proposed and to which it is agreeable. However, a reasonable protective agreement should be executed that conforms with OCC's obligations under Ohio law.[47]

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.[48] 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 for both of these protective agreements was developed several years ago after extensive consultation with OCC's counsel that assigned by the Attorney General and after negotiation with public utilities.

The Protective Agreement approved in the *Embarq Case* was developed by OCC, in substantial respects, based upon the OCC's agreements with DE-Ohio (then Cinergy)

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[45] Memo Contra at 12 ("DE-Ohio states that option number two [DE-Ohio can file a Motion for Protective Order for every piece of confidential material that OCC requests before it turns material over to OCC so that the Commission can rule upon the confidentiality of the material prior to its determination of relevancy to these cases] would be a waste of all stakeholders time and resources.").

[46] Id.

[47] Motion at 9-10.

[48] See footnote 16.

that was negotiated 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 that the PUCO should either order into effect or order DE-Ohio to sign with OCC. OCC attached this Protective Agreement to its Motion.[49]

DE-Ohio's desired protective agreement (never presented to the PUCO) would not be appropriate for OCC, which is a state agency, for reasons explained in OCC's Motion.[50] Instead, the Commission should follow its usual processes for protective agreements and orders and instruct DE-Ohio to sign the agreement proposed by OCC.[51] Such an order would be consistent with the PUCO's decision in a recent telephone case that involved Embarq. In that telephone case, the PUCO concurred with OCC's arguments in a dispute between OCC and Embarq over language in a protective agreement.[52] This action would also be consistent with DE-Ohio's third option.[53]

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[49] Motion at Exhibit 2.

[50] Motion at 9-10.

[51] *Embarq Case*, Case No. 07-760-TP-BLS, Entry at 5-6 (August 10, 2007) ("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. * * * 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.").

[52] *Embarq Case*, Case No. 07-760-TP-BLS, Entry at 5-6 (August 10, 2007) ("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.").

[53] Memo Contra at 11 (Option three: "the Commission may issue an order that protects DE-Ohio's confidential material.").

The Company has met the OCC's discovery requests with delay for too long. Even when DE-Ohio's counsel made a promise to respond to OCC regarding the protective agreement by a certain date, the Company did not adhere to the deadline.[54] The protective agreements proposed by OCC have been used successfully in many cases, including many that involved DE-Ohio. DE-Ohio seeks a resolution to its impasse with OCC that does not recognize Ohio law, and the Company does so without submitting any proposal of its own. The Commission should order DE-Ohio to execute the protective agreement proposed by OCC as it has recently done in another proceeding.[55] In the alternative, the Commission should compel DE-Ohio to provide OCC the requested discovery under the terms of protective agreement proposed by OCC.

III. CONCLUSION

OCC requests that PUCO reject DE-Ohio's arguments and grant OCC's Motion. DE-Ohio should be compelled to provide the information sought by OCC in discovery.

The information released to OCC should receive appropriate treatment. The Commission should order the parties to the discovery dispute to abide by the terms of the protective agreement that OCC proposed on its Motion. The Commission's rules contemplate

[54] On August 31, 2007, in response to OCC's filing of the Motion, Mr. Colbert stated in an email regarding Protective Agreements: "I am sorry for the delay in getting you an answer but am assured by my client that you will have an answer today." The answer was received instead on September 17, 2007 when DE-Ohio filed its Memo Contra. See also, Motion, Attachment 2 at "page 6 of 9." Mr. Colbert sent an e-mail, on August 24, 2007, stating: "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." A response from the Company regarding proposed protective agreements was not received as promised; therefore, OCC decided to go forward with the Motion that was filed on August 30, 2007.

[55] *Embarq Case*, Case No. 07-760-TP-BLS, Entry at 5-6 (August 10, 2007) ("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.").

parties resolving discovery disputes without the need for Commission involvement.[56] However, DE-Ohio's actions, in this case, shows a certain lack of appreciation for the fact that the proposed protective agreement has been negotiated, sometimes with much time expended, between various utilities, and ultimately with PUCO approval.[57]

Respectfully submitted,

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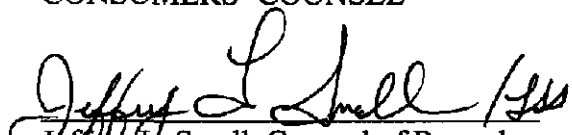

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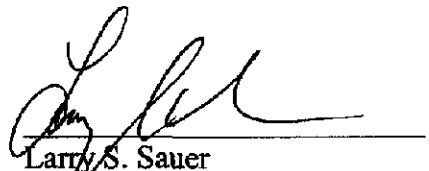
[56] Ohio Adm. Code 4901-1-23 and Ohio Adm. Code 4901-1-24.

[57] *Embarq Case*, Case No. 07-760-TP-BLS, Entry (August 10, 2007).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Office of the Ohio Consumers' Counsel's Reply to DE-Ohio's Memo Contra to OCC's Motion to Compel Discovery* was served on the persons listed below, via first class U.S. Mail, prepaid, this 27th day of September 2007.



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