

FILE

**BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO**

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In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set Its System Reliability Tracker Market Price. )

Case No. 05-724-~~EL-UNC~~ PUCO

In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify Its Fuel and Economy Purchased Power Component of its Market-Based Standard Service Offer. )

Case No. 05-725-EL-UNC

In the Matter of the Application of Duke Energy Ohio, Inc., to Modify its Fuel and Economy Purchased Power Component of Its Market-Based Standard Service Offer. )

Case No. 06-1068-EL-UNC

In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set Its System Reliability Tracker. )

Case No. 06-1069-EL-UNC

In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set the Annually Adjusted Component of Its Market-Based Standard Service Offer. )

Case No. 06-1085-EL-UNC

**COMMENTS ON DUKE ENERGY OHIO INC.'S NOTICE AS TO  
CONFIDENTIAL PROTECTION  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

**I. INTRODUCTION**

The Office of the Ohio Consumers' Counsel ("OCC") files these comments regarding Duke Energy Ohio Inc.'s ("Duke") Notice as provided for by the Entry issued in these dockets on November 6, 2007. Pursuant to the Entry, Duke filed a notice on November 13, 2007 listing the portions of the record it believes should still be treated as a trade secret and kept confidential from public disclosure under a protective order. OCC files these comments in response to that Notice.

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**II. THE COMMISSION SHOULD CONTINUE TO PROTECT ONLY THE REDACTED PORTIONS OF THE DUKE REMAND RIDER EXHIBIT NOS. 1, 2, 3; COMMISSION ORDERED REMAND RIDER EXHIBIT NO. 1; AND JOINT REMAND RIDER EXHIBIT NO. 1.**

These comments address the subject that was previously raised in the above-captioned cases with regard to the confidential treatment of documents.<sup>1</sup> R.C. 4901.12 requires:

[A]ll proceedings of the public utilities commission and all documents and records in its possession are public records.

The only documents that may not be released to the public that are held by the PUCO are specifically identified under R.C. 149.43(A)(1), a provision in the Ohio public records law.

R.C. 4905.07 also addresses the public nature of the Commission's documents:

Except as provided in section 149.43 of the Revised Code . . . , all facts and information in the possession of the public utilities commission shall be public . . . ."

The Ohio Supreme Court has identified the purpose of that section:

[T]he inherent, fundamental policy of R.C. 149.43 [Ohio's public records law] . . . to promote open government, not restrict it.<sup>2</sup>

Moreover, a governmental body, such as the PUCO, that does not want to release records to the public has the burden of proving that the records are excepted from disclosure by R.C. 149.43(A)(1).<sup>3</sup> Previously, the Commission stated that in proceedings before the PUCO R.C. 4901.12 and R.C. 4905.07:

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<sup>1</sup> See, e.g., OCC Memorandum Contra Motions for Protections (March 13, 2007).

<sup>2</sup> *Besser v. Ohio State University* (August 9, 2000), 89 Ohio St. 3d 396, 396.

<sup>3</sup> *State ex rel. National Broadcasting Co. v. Cleveland* (1988), 38 Ohio St. 3d 79.

Provide a strong presumption in favor of disclosure, which the party claiming protective status must overcome.”<sup>4</sup>

The Commission’s rules also address the matter of public disclosure of documents that have been submitted to the PUCO. Ohio Adm. Code 4901-1-24(D) requires of the PUCO that:

Any order issued under this paragraph shall minimize the amount of information protected from public disclosure.

Additionally, Ohio Adm. Code 4901-1-27(B)(7)(e) requires that:

The party requesting such protection shall have the burden of establishing that such protection is required.

In its Notice, Duke requested that the “Confidential Unredacted” testimony, the “Confidential Report of the Financial and Management/ Performance Audit,” and the “Confidential Unredacted Stipulation” be protected.<sup>5</sup> The repeated use of the words “Confidential Unredacted” in Duke’s Notice may be simply a wording error since information considered confidential by Duke was “redacted” (not “unredacted”) as part of the proceedings. This problematic wording Duke’s request, however, could be interpreted to mean that Duke is now seeking the protection of portions of testimony and a stipulation that were not redacted. The outcome of such a ruling would be contrary to law and is unreasonable because the unredacted portions of all documents submitted as part of the above-captioned proceedings have already been made public and cannot now be protected.

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<sup>4</sup> *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, Opinion and Order at 5 (October 18, 1990).

<sup>5</sup> Notice of Duke Energy Ohio, Inc., As to Which Portions of the Record of the April 10, 2007 Hearing in the Above Captioned Cases Should Continue to Be Treated As Trade Secret and Kept Confidential Pursuant to Protective Order at 3 (November 13, 2004) (“Notice”).

The unredacted portions of the exhibits, the audit report, and the stipulation should remain unredacted and available to the public.

**III. THE COMMISSION SHOULD CONTINUE TO PROTECT ONLY THE REDACTED PORTIONS OF THE TRANSCRIPT THAT IDENTIFY THE REDACTED PORTIONS OF DUKE REMAND RIDER EXHIBIT NOS. 1, 2, 3; COMMISSION ORDERED REMAND RIDER EXHIBIT NO. 1; AND JOINT REMAND RIDER EXHIBIT NO. 1.**

In addition to requesting protection of portions of exhibits, the audit report, and a stipulation, Duke requests that several sections of the April 10, 2007 transcript be protected.<sup>6</sup> The Commission is responsible for scrutinizing Duke's request to comply with Ohio law as stated above. Accordingly, the Commission should reject Duke's request that lines 6-22 on page 77 of the April 10, 2007 transcript remain confidential.<sup>7</sup> This request is excessive and does not "minimize" confidential treatment as required by Ohio Adm. Code 4901-1-24(D). Lines 9-22 on page 77 should not remain confidential because they do not reveal any specific information about Duke.

Duke alleges that its request for protection relates only to confidential trade secrets.<sup>8</sup> None of lines 9-22 reveal any specific information about Duke, and therefore cannot disclose confidential trade secrets under R.C. 149.43. Redaction of those lines is not "essential to prevent disclosure of the allegedly confidential information" as required under R.C. 149.43. Duke's Request regarding these lines, as well as any other instances that do not reveal information about Duke's trade secrets, should be part of the

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<sup>6</sup> Id. at 2-3.

<sup>7</sup> Id. at 2.

<sup>8</sup> Id.

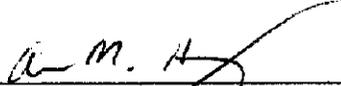
proceeding that is open to the public pursuant to R.C. 4905.07, R.C. 4901.12, and Ohio Adm. Code 49901-1-24.

#### **IV. CONCLUSION**

As provided for under the Ohio Administrative Code, the Commission should limit its protection to only those portions of the exhibits, audit report, and stipulation that were already redacted on the record rather than now protecting portions of the documents that were unredacted. (While this first point states the obvious, it is not obvious what Duke is requesting given the wording of its filing.) Also, the Commission should not provide protection of documents or portions of documents that do not reveal specific information about Duke nor are “essential to prevent disclosure of the allegedly confidential information.”

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER  
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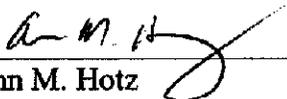
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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the Comments to Duke Energy Ohio Inc.'s Notice as to Confidential Protection by the Office of the Ohio Consumers' Counsel has been served via First Class U.S. Postal Service mail as well as electronic service, as stated below, this 16<sup>th</sup> day of November 2007.

  
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