

**FILE**

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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In the Matter of the Application of Duke )  
Energy Ohio, Inc. to Establish its Fuel and ) Case No. 09-974-EL-FAC  
Economy Purchased Power Component of its )  
Market-Based Standard Service Offer for )  
2009. )

In the Matter of the Application of Duke )  
Energy Ohio, Inc. to Establish its System )  
Reliability Tracker of its Market-Based ) Case No. 09-975-EL-RDR  
Standard Service Offer for 2009. )

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**DUKE ENERGY OHIO, INC.'S  
MOTION FOR PROTECTIVE ORDER TO PROTECT THE  
CONFIDENTIALITY OF INFORMATION CONTAINED IN THE DIRECT  
TESTIMONY OF JOSEPH A. MILLER JR.**

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Duke Energy Ohio, Inc. (Duke Energy Ohio or the Company) hereby moves the Public Utilities Commission of Ohio (Commission) for leave to file under seal certain information contained in the Direct Testimony of Joseph A. Miller Jr. in Support of the Company's Application to Approve the Fuel Economy Purchased Power Component of its Market-Based Standard Service Offer in the above-styled proceedings. Specifically, Duke Energy Ohio requests that this Commission issue an Order declaring the following Attachments to Joseph A. Miller Jr.'s Testimony to be confidential:

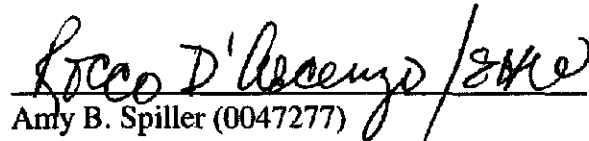
1. Attachment JAM-1 Zimmer BB 280 LP Blading Inspection and Repair Presentation dated June 15, 2007;
2. Attachment JAM-2 Zimmer LP Turbine Rotor Long Term Reliability Options; and
3. Attachment JAM-3 Confidential and Proprietary Contract of Siemens.

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The aforementioned attachments, collectively (Confidential Material) set forth confidential and proprietary trade secret information including, but not limited to proprietary trade secret information, including recommendations for repairs, pricing sheet, time tables for manufacturing and delivery, and lead times for manufacturing of one of Duke Energy Ohio's vendors, Siemens Power Generation, Inc (Siemens). In the attached Memorandum in Support, Duke Energy Ohio explains the reasons why confidential treatment of this information contained in the attachments to testimony as part of the Application is necessary and appropriate.

Respectfully submitted,

A handwritten signature in cursive script, reading "Rocco D'Ascenzo", followed by a diagonal slash and the initials "RME".

Amy B. Spiller (0047277)

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## **MEMORANDUM IN SUPPORT**

### **I. INTRODUCTION**

On September 9, 2009, the Commission established the above-styled proceedings for the annual review of Duke Energy Ohio's Price-to-Compare Fuel and Purchased Power Rider (Rider PTC-FPP) and System-Resource-Adjustment System Reliability Tracker (Rider SRA-SRT) for the twelve month period ending December 31, 2009. On March 2, 2010, Duke Energy Ohio filed its Application and Direct Testimony in these proceedings. On August 27, 2010, Duke Energy Ohio filed additional testimony in these proceedings. The purpose of said filings was to seek approval of the Company's adjustments to its PTC-FPP and SRA-SRT Riders for the twelve month period ending December 31, 2009.

### **LAW AND ARGUMENT**

Duke Energy Ohio is a "public utility" as defined by R. C. 4905.02 and 4905.03; and an "electric distribution company," an "electric light company," an "electric supplier," and an "electric utility" as defined by R. C. 4928.01.

Generally speaking, the Ohio Public Records Act requires the disclosure of information that is maintained by any public office.<sup>1</sup> But this Act is not without exception. Relevant to this motion is R.C. 1333.61, *et seq.*, which serves to preclude public access to and dissemination of trade secret information.<sup>2</sup> As the Ohio Supreme Court has instructed, the following factors are relevant to determining whether information constitutes trade secrets under R.C. 1333.61(D):

- (1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, *i.e.*, by the

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<sup>1</sup> R.C. 149.43.

<sup>2</sup> *See, State, ex rel. The Plain Dealer v. Ohio Department of Insurance*, 1997 Ohio 75, 80 Ohio St.3d 513, 524. *See also, State ex rel. Perrea v. Cincinnati Public Schools*, 2009 Ohio 4762, ¶ 33 (trade secrets are not public records).

employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information.<sup>3</sup>

As the Supreme Court further confirmed, "documents...that are determined to be trade secrets are not public records and are exempt from disclosure."<sup>4</sup>

The Commission's Rules of Practice are consistent with the proposition that trade secret information is exempt from disclosure. Indeed, said rules empower the Commission, its legal director, deputy legal director, or attorney examiner to:

[I]ssue any order which is necessary to protect the confidentiality of information contained in the document, to the extent that state or federal law prohibits release of the information, including where the information is deemed by the commission, the legal director, or the attorney examiner assigned to the case to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purposes of title 49 of the revised code.<sup>5</sup>

Duke Energy Ohio respectfully requests that the Commission grant its Motion for Protective Order to Protect the Confidentiality of Information Contained in the Direct Testimony of Joseph A. Miller Jr., filed contemporaneously with the Motion. The Confidential Information is reflected in the following testimony attachments: JAM-1, JAM-2, and JAM-3, of Joseph A. Miller, Jr.

Attachments JAM-1, JAM-2, and JAM-3, to the aforementioned testimony, contain highly confidential trade secret information. Specifically, Attachments JAM-1 and JAM-2 contain proprietary information from Siemens presented to Duke Energy Ohio. Attachment JAM-1 is the proprietary analysis performed by Siemens regarding the

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<sup>3</sup> *Id.*, at 524-525.

<sup>4</sup> *Id.*, at 524.

<sup>5</sup> Ohio Admin. Code Ann. 4901-1-24(D) (Baldwin 2006).

inspection and repair recommendations for the Zimmer Turbine. This document describes Siemens' recommendations for repairs, including its analysis for limiting factors for operation of the turbine. This analysis represents Siemens' proprietary analysis, opinions, and recommendations. Release of this information could harm both Siemens and Duke Energy Ohio. If released, Siemens' competitors could gain insight into how it evaluates turbines including calculations for determining extent of damage including crack growth rates. JAM-2 includes Siemens's proprietary analysis and recommendations for changes to the Zimmer turbine design. This document includes Siemens' recommendations for work, timetable for providing services, cost sheet for various services, duration of performing various stages of work as well as deliverability and order lead times. If publicly released, this information could be used by Siemens' competitors to manipulate their prices and put Siemens at a competitive disadvantage. The release of this information could ultimately harm Duke Energy Ohio in that other vendors may not wish to perform work for Duke Energy Ohio if there is a risk that their information would be released publicly for their competitors. Further, to the extent Duke Energy Ohio seeks competing bids or proposals from other vendors going forward, the process would be undermined in that other vendors would know Siemens pricing and essentially have a ceiling to bid against thereby preventing Duke Energy Ohio from getting the best possible price. Similarly, the Confidential Information contained in JAM-3 presents the executed contract between Duke Energy and Siemens for the disc replacement. The contract sets forth the pricing terms thereby showing what Duke Energy Ohio is willing to pay for this type of service. Again, if other vendors had ready access to this information, Duke Energy Ohio could be prevented from getting the best possible price for similar services going forward as this

contract would be used as a ceiling for bidding. The contract itself contains a statement describing the terms as proprietary to Siemens.

The confidential trade secret information contained in Attachments JAM-1, JAM-2, JAM-3, if publicly disclosed, would give Duke Energy Ohio's competitors access to competitively sensitive, confidential information, which in turn could allow potential future vendors to make offers to provide similar services at higher prices than the competitors might offer in the absence of such information and to the detriment of Duke Energy Ohio and its customers. Further, vendors would be able to determine what the Company has paid for these services in the past, thereby placing the Company at a competitive disadvantage in terms of pricing and procuring needed resources. Disclosure of this information would enable competitors in the wholesale power market to ascertain the manner in which Duke Energy Ohio plans, manages and operates their generating facilities, and the cost associated therewith. With the information contained in Attachments JAM-1, JAM-2 and JAM-3 a future vendor could take actions that, in the absence of this information, it would not otherwise take. Such actions might include adjusting its prices, either to win contracts on which Siemens may also be bidding – business the competitors otherwise would not be in a position to win, or to set its prices artificially high to take advantage of an overall short market, the latter action obviously forcing Duke Energy Ohio to pay more.

Ohio Administrative Code Section 4901-1-24(D) allows Duke Energy Ohio to seek leave of the Commission to file information Duke Energy Ohio considers to be proprietary trade secret information, or otherwise confidential, in a redacted and non-redacted form

under seal.<sup>6</sup> This rule also establishes a procedure for presenting to the Commission that information which is confidential, and therefore should be protected.<sup>7</sup>

The information for which Duke Energy Ohio is seeking confidential treatment is not known outside of Duke Energy Ohio or Siemens, and it is not disseminated within Duke Energy Ohio except to those employees with a legitimate business need to know and act upon the information.

Duke Energy Ohio is filing a redacted version of the Confidential Material (Attachments JAM-1, JAM-2, and JAM-3) as attachments to the testimony of Joseph A. Miller, Jr. in its filings concurrently with this Motion. Duke Energy Ohio has marked as confidential, trade secret, or proprietary, each redacted page of the Confidential Material pursuant to OAC 4901-1-24(D)(2).

Duke Energy Ohio considers the Confidential Material identified herein to be proprietary, confidential, and trade secret, as those terms are used in R. C. 1333.61. The redacted versions of Attachments JAM-1, JAM-2, and JAM-3 do not include the Confidential Material. Three unredacted versions of Attachments JAM-1, JAM-2, and JAM-3 under seal are included with this filing as Exhibit A.

The public interest will be served by granting this Motion. By protecting the confidentiality of Attachments JAM-1, JAM-2, and JAM-3, the Commission will prevent undue harm to Duke Energy Ohio and its ratepayers, as well as ensuring a sound competitive marketplace.

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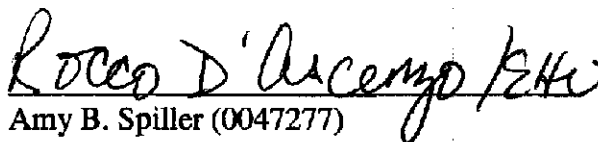
<sup>6</sup> OHIO ADMIN. CODE Rule 4901-1-24 (Anderson 2003)

<sup>7</sup> *Id.*

## II. CONCLUSION:

For the foregoing reasons, the Commission, pursuant to Ohio Admin. Code Rule 4901-1-24(D), should grant Duke Energy Ohio's Motion for Protective Order to Protect the Confidentiality of Information Contained in Attachments JAM-1, JAM-2 and JAM-3 in the above-styled proceedings by making a determination that the Confidential Material is confidential, proprietary and a trade secret under R. C. 1333.61.

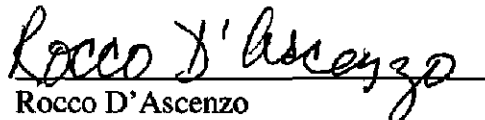
Respectfully submitted,

Handwritten signature of Rocco D'Ascenzo in black ink, written over a horizontal line.

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Duke Energy Ohio's Motion for Protective Order was served on the following parties this 27<sup>th</sup> day of August, 2010, by personal or overnight delivery.

Handwritten signature of Rocco D'Ascenzo in black ink, written over a horizontal line.

Rocco D'Ascenzo



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