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**VIA OVERNIGHT DELIVERY**

February 29, 2012

Docketing Division  
Public Utilities Commission of Ohio  
180 East Broad Street  
Columbus, Ohio 43215

Re: Case No. 11-974-EL-FAC  
11-975-EL-RDR

Dear Docketing Division:


Enclosed please find for filing an original and twelve copies of the *Application to Approve the Fuel Economy Purchased Power Component and the System Reliability Tracker Component; Duke Energy Ohio, Inc.'s Motion for Protective Order; Direct Testimony of Gregory H. Cecil and Direct Testimony of William Don Wathen, Jr.*

We are also enclosing an envelope containing the confidential material to be filed under seal as referenced in the Motion.

Please file-stamp and return two copies of each of the above in the envelope provided.

Should you have any questions, please contact me at (513) 287-4337.

Very truly yours,



Dianne Kuhnell  
Senior Paralegal

Enclosures

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.  
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**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. 11-974-EL-FAC  
 Economy Purchased Power Component of its )  
 Market-Based Standard Service Office for )  
 2011. )

In the Matter of the Application of Duke Energy)  
 Ohio, Inc. to Establish its System Reliability ) Case No. 11-975-EL-RDR  
 Tracker of its Market-Based Standard Service )  
 Offer for 2011. )

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**DUKE ENERGY OHIO, INC.'S**  
**MOTION FOR PROTECTIVE ORDER TO PROTECT THE**  
**CONFIDENTIALITY OF INFORMATION CONTAINED IN ATTACHMENT**  
**WDW-2 IN THE ABOVE-CAPTIONED CASE**

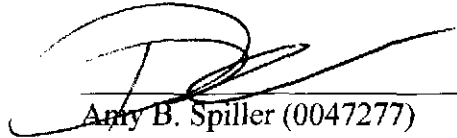
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Duke Energy Ohio, Inc. (Duke Energy Ohio or the Company) hereby moves the Public Utilities Commission of Ohio (Commission) for leave to file under seal certain information contained in its Application to Approve the Fuel Economy Purchased Power Component of its Market-Based Standard Service Offer in Case No. 11-974-EL-FAC and its System Reliability Tracker in Case No. 11-975-EL-RDR. Specifically, Duke Energy Ohio requests that this Commission issue an Order declaring the following document to be confidential:

Attachment WDW-2 to the testimony of William Don Wathen, Jr. The aforementioned attachment (Confidential Material) set forth confidential and proprietary trade secret information including, but not limited to accounting adjustments and market capacity positions. In the attached Memorandum in Support, Duke Energy Ohio explains

the reasons why confidential treatment of this information contained in the attachment WDW-2 to testimony as part of the Application is necessary.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Amy B. Spiller", is written over a horizontal line.

Amy B. Spiller (0047277)

Deputy General Counsel

Rocco D'Ascenzo (0077651)

Associate General Counsel

Elizabeth H. Watts (0031092)

Associate General Counsel

Jeanne W. Kingery (0012172)

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## **MEMORANDUM IN SUPPORT**

### **I. INTRODUCTION**

Duke Energy Ohio is an Ohio corporation with its principal office in Cincinnati, Ohio and is engaged in the business of supplying electric transmission, distribution, and generation service in Adams, Brown, Butler, Clinton, Clermont, Hamilton, Montgomery, and Warren Counties in Southwestern Ohio to approximately 499,000 consumers, and supplying electric transmission and distribution service to approximately 188,000 consumers that receive generation service from competitive retail electric service (CRES) providers.

On January 7, 2011, 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, 2011. Contemporaneously with this Motion, Duke Energy Ohio is filing its application and supporting testimony to approve the 2010 rider adjustments.

### **II. 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," "electric light company," "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

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

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 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 its Application submitted relative to the captioned matter. The confidential information is reflected in the testimony attachment WDW-2 of William Don Wathen Jr. This

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<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).

<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).

information includes, but is not limited to, data describing the Company's accounting adjustments.

In support of the application in the above-styled proceeding, Duke Energy Ohio filed testimony of William Don Wathen Jr.. Attachment WDW-2 to the aforementioned testimony contain highly confidential trade secret information. Specifically, Attachment WDW-2 to Mr. Wathen's testimony presents the Company's data supporting the Rider SRA-SRT quarterly filings, including estimates of power and capacity costs, allocations and reconciliations by retail rate group. This data (WDW-2) includes confidential and proprietary trade secret information regarding the Company's existing capacity position, forecasted demand for native load consumers, and supply requirements necessary for the provision of an appropriate reserve margin in the competitive retail and wholesale electric markets.

The confidential trade secret information contained in Attachment WDW-2, if publicly disclosed, would give Duke Energy Ohio's and Duke Energy Midwest Commercial Generation's competitors access to competitively sensitive, confidential information, which in turn could allow the competitors to make offers to sell capacity and wholesale power 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, competitors would be able to determine the Company's capacity and fuel positions, thereby placing the Company at a competitive disadvantage in terms of supplying pricing and procuring needed resources.

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>

Duke Energy Ohio is filing a redacted version of the Confidential Material (Attachments WDW-2) as attachment to the testimony of William Don Wathen Jr, in its filing 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).

The Confidential Material described above, if disclosed, would enable competitors in the wholesale power market to ascertain the manner in which Duke Energy Ohio plans, manages and operates its generating facilities, the cost associated therewith, and would enable competitors to ascertain market positions (long and short) with respect to the Company's electric generation capabilities. Further, the competitively sensitive information will provide power marketing competitors with knowledge that will allow them to potentially manipulate the marketplace so as to unnecessarily cause consumers to pay more for electricity than they otherwise would.

For example, the capacity position information contained in Attachments WDW-2 would grant competitors a distinct advantage in that they would be able to anticipate the types of instruments Duke Energy Ohio has and will utilize.

With the information contained in Attachments WDW-2, a competitor 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 Duke Energy Ohio

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

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

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 consumers to pay higher prices for power.

The information for which Duke Energy Ohio is seeking confidential treatment is not known outside of Duke Energy Ohio, 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.

The public interest will be served by granting this Motion. By protecting the confidentiality of the Duke Energy Ohio's existing capacity position, forecasted demand for native load consumers, and supply requirements necessary for an adequate reserve margin, the Commission will prevent undue harm to Duke Energy Ohio and its ratepayers, as well as ensuring a sound competitive marketplace.

Duke Energy Ohio considers the Confidential Material identified herein to be proprietary, confidential, and trade secrets, as those terms are used in R. C. 1333.61. In addition, this information should be treated as confidential pursuant to R. C. 4901.16. The redacted version of Attachments WDW-2 does not include the Confidential Material. Three unredacted versions of Attachments WDW-2 under seal are included with this filing as Exhibit A.



### III. CONCLUSION

For the foregoing reasons, the Commission, pursuant to Ohio Admin. Code Section 4901-1-24(D), should grant Duke Energy Ohio's Motion for Protective Order to Protect the Confidentiality of Information Contained in Attachment WDW-2 attached to and supporting Duke Energy Ohio's Application in the above-styled proceedings by making a determination that the Confidential Material is confidential, proprietary and a trade secret under R. C. 4901.16 and 1333.61.

Respectfully submitted,



Amy B. Spiller (0047277)

Deputy General Counsel

Rocco D'Ascenzo (0077651)

Associate General Counsel

Elizabeth H. Watts (0031092)

Associate General Counsel

Jeanne W. Kingery (0012172)

Associate General Counsel

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served on the following parties this 29th day of February, 2012, via overnight delivery.

  
Rocco O. D'Ascenzo

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