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March 1, 2007

Public Utilities Commission of Ohio
PUCO Docketing
180 E. Broad Street, 10th Floor
Columbus, Ohio 43215

In re: Case No. 06-986-EL-UNC, 03-93-EL-ATA, et. al.

Dear Sir/Madam:

Please find enclosed an original and twenty (20) copies of the Response of the Kroger Co. to OCC's Motion for Protective Order and Affidavit of Michael L. Kurtz to filed in the above-referenced matter.

Copies have been served on all parties on the attached certificate of service. Please place this document of file.

Respectfully yours,


Michael L. Kurtz, Esq.
Kurt J. Boehm, Esq.
BOEHM, KURTZ & LOWRY

MLKkew
Encl.

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CERTIFICATE OF SERVICE

I hereby certify that true copy of the foregoing was served by electronic mail (when available) and regular U.S. mail, this 1st day of March, 2007 to the following:

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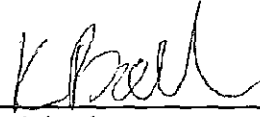
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**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In The Matter Of The Application Of Duke Energy Ohio To Modify Its Market-Based Standard Service Offer	: Case No. 06-986-EL-UNC
In The Matter Of The Application Of The Cincinnati Gas & Electric Company To Modify Its Non-Residential Generation Rates To Provide For Market-Based Standard Service Offer Pricing And To Establish An Alternative Competitively Bid Service Rate Option Subsequent To Market Development Period	: Case No. 03-93-EL-ATA
In The Matter Of The Application Of Cincinnati Gas & Electric Company For Authority To Modify Current Accounting Procedures For Certain Costs Associated With The Midwest Independent Transmission System Operator	: Case No. 03-2079-EL-AAM
In The Matter Of The Application Of Cincinnati Gas & Electric Company For Authority To Modify Current Accounting Procedures For Capital Investment In Its Electric Transmission And Distribution System And To Establish A Capital Investment Reliability Rider To Be Effective After The Market Development Period	: Case No. 03-2081-EL-AAM Case No. 03-2080-EL-ATA
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 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 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 Its System Reliability Tracker Market Price	: Case No. 05-724-EL-UNC
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

**RESPONSE TO OCC'S NOTICE AND
MOTION FOR PROTECTIVE ORDER
OF KROGER CO.**

In response to the Office of Ohio Consumer Counsel's ("OCC") request to treat certain Kroger-provided information as "in the public domain," the Kroger Co. ("Kroger"), by its counsel requests that the Commission deny the request of the OCC and hereby Moves for a Protective Order pursuant to OAC 4901-1-24. Kroger attaches a Memorandum in Support, a copy of OCC discovery, and an Affidavit of Counsel attesting that Kroger counsel has exhausted all reasonable means of resolving this issue.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

On February 5, 2007 the OCC filed a Notice to take the deposition of a representative of Kroger. That notice states that the OCC seeks to question Kroger with respect to any agreements for electric service between Kroger and Duke Energy, Inc., its predecessor companies or its affiliates companies (referenced herein collectively as "Duke Energy") entered into since January 1, 2000. On February 8, 2007, Kroger filed a Motion to Limit Scope of OCC Deposition in order to prevent production of these agreements. Kroger withdrew this Motion on February 21, 2007 after reaching an agreement with counsel for OCC that the agreements requested by OCC as well as agreements between Kroger and its CRES provider, Constellation NewEnergy, would be produced at the deposition of Kroger representative Denis George pursuant to a Protective Agreement (attached) which is signed by counsel for the OCC and Kroger. In other words, in an effort to cooperate with OCC, Kroger provided more documents that OCC actually requested.

Paragraph 9 of that Protective Agreement states in part that:

"If OCC desires to include, utilize, or refer to any Protective Materials in these Proceedings in such a manner, other than in a manner provided for herein, that might require disclosure of such material in these Proceedings, OCC shall first give notice to Kroger, specifically identifying each of the Protected Materials that could be disclosed in the public domain.... After service of OCC's notice, Kroger shall file with an

administrative agency or court of competent jurisdiction, not later than seven (7) calendar days after receipt of OCC's notice, a motion and affidavits that address each of the identified Protected Materials (whether submitted in separate pleadings or collectively in a single pleading) demonstrating the reasons for maintaining the confidentiality of the Protective Materials... The affidavits for the motion shall set forth facts delineating that the documents or information designated as Protected Materials have been maintained in a confidential manner and the nature and justification for the injury that would result from the disclosure of such information."

The OCC served Kroger with the Notice (attached) contemplated in the above excerpt from Paragraph 9 of the Protective Agreement on February 24, 2007. The OCC stated that it hereby gives Kroger notice that:

"[T]he OCC 'desires to include, utilize, and/or refer to Protected Materials in these Proceedings in such a manner not provided for within the Protective Agreement.' The specific Protected Materials the OCC intends to use in a manner not provided for in the Agreement include all documents provided by Kroger under the Protective Agreement and the transcripts of the deposition of Denis George in which such documents were discussed as well as depositions at which such documents will be discussed as the above-captioned cases proceed... The OCC believes that the pending proceeding requires treatment of the Kroger-provided information in the public domain."

The OCC requests that all contracts provided to it by Kroger pursuant to the Protective Agreement, referred to as the "Protected Materials" as well as the transcript of OCC's February 20, 2007 deposition of Kroger representative Denis George, which contains an extensive discussion of these agreements and is currently under seal, be considered "*in the public domain.*" The Protected Materials are a series of agreements entered into by Kroger for the purchase of retail electric generation services from its CRES provider Constellation New Energy and Duke Energy as the wholesale electric generation service provider. These agreements contain highly sensitive information concerning pricing and other terms the public disclosure of which would place Kroger at a competitive disadvantage in the retail grocery market. These agreements remain in effect today and reveal the current prices and terms of Kroger's current purchase of competitive retail electric services. Kroger respectfully requests that the Commission find that the Protected Materials be admitted into evidence under seal.

II. ARGUMENT

1. It Is The Policy Of The Commission To Protect Trade Secrets From Public Disclosure.

OAC 4901-1-24 states that:

"Upon motion of any party or person from whom discovery is sought, the commission, the legal director, the deputy legal director, or the attorney examiner assigned to the case may issue any order which is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Such a protective order may provide that... (7) A trade secret or other confidential research, development, commercial, or other information not be disclosed or be disclosed only in a designated way..."

This Commission has long recognized the need to protect trade secret information from public disclosure. This Commission has issued protective orders in numerous proceedings to maintain the confidentiality of competitively sensitive and proprietary information. *See, e.g., Elyria Tel. Co.*, Case No. 89-965-TP-AEC (Finding and Order, Sept. 21, 1989); *Ohio Bell Tel. Co.*, Case No. 89-718-TP-ATA (Finding and Order, May 31, 1989); *Columbia Gas of Ohio, Inc.*, Case No. 90-17-GA-GCR (Entry, Aug. 17, 1990).

Other Commission rules also acknowledge the need to maintain the confidentiality of trade secret information. OAC 4901-1-27(B)(7)(e) allows the Commission to place material in camera and thus shield it from the public's access, to prevent public disclosure of trade secrets, proprietary business information, or confidential research, development, or commercial materials and information. That Section states that the presiding hearing officer may take such actions as are necessary to:

"Prevent public disclosure of trade secrets, proprietary business information, or confidential research, development, or commercial materials and information. The presiding hearing officer may, upon motion of any party, direct that a portion of the hearing be conducted in camera and that the corresponding portion of the record be sealed to prevent public disclosure of trade secrets, proprietary business information, or

confidential research, development, or commercial materials and information. The party requesting such protection shall have the burden of establishing that such protection is required.”

Ohio Rev. Code § 1333.61(D) defines the term “trade secret” in the Uniform Trade Secrets Act and states the following:

“Trade secret” mean 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.

The Protected Materials at issue here meet this definition of a “trade secret” because 1) the Protected Materials are “business information or plans” or “financial information” that derive “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” and 2) Kroger has made these documents “the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”

The documents at issue contain term and pricing information concerning Kroger’s purchase of competitive retail electric service. The disclosure of this information to Kroger’s competitors in the retail grocery and produce business would cause severe disadvantage to Kroger. Kroger competes with other grocery retailers for all manner of goods and services needed to operate its stores, factories, warehouses and offices and the provision of competitive retail electric service is no exception. The disclosure of the price and other terms which Kroger purchases electric services would provide its

competitors with a bogey to target in their own negotiations for competitive retail electric services and reveal information concerning Kroger's operation costs.

The Protected Materials at issue also meet the second prong of the definition of trade secrets because Kroger has made these documents "*the subject of efforts that are reasonable under the circumstances to maintain its secrecy.*" Kroger has treated the documents that are subject to this Motion as proprietary, confidential business information. These documents are exclusively available to Kroger management and counsel. Kroger has, in the ordinary course of business, either stamped this information as "Confidential Proprietary Trade Secret," or treated them as such. These documents are regarded as proprietary and confidential by Kroger employees and counsel, and have only been disclosed to Kroger employees and counsel other than subject to the Protective Agreement executed by the OCC.

2. The Commission Has Held That When A Contract That Contains Sensitive Competitive Information Is In Effect At The Time Protective Treatment Is Sought, Protective Treatment Of The Contract Should Be Granted.

The documents at issue relate to a contract for competitive retail electric service that is purchased by Kroger at the present time. The Commission has held that when a contract that contains competitively sensitive information is in effect at the time protective treatment of the contract is sought, that protective treatment should be granted. In an Entry dated April 19, 1999, in Re Application of Ameritech Advanced Data Services of Ohio, Case No. 97-13141-CT-ZAC, the Commission granted a motion to extend the time limit of a protective order on the grounds that the contract continued to be in effect. The Commission held that the confidential protection should expire when the contract expires. The Commission stated:

"On March 2, 1999, AADS filed a motion for an extension of the protective order continuing the confidential treatment of the essential terms and conditions of that

contract. In its motion, AADS states that, the contract [sic] with ODC is still in effect and the information that was redacted when it was filed continues to be the competitively sensitive trade secret information of AADS. AADS also claims that the need for protecting the designated information continues today because the contract is still in effect and other providers of similar services could unfairly benefit from the public disclosure of AADS' information.

Upon review, the attorney examiner concludes that AADS' request is well taken and should be granted. Staff has recommended that the decision whether to grant or extend protective treatment of such contracts should be based on whether there is any direct, not emerging competition, for a like kind of service. Where it is determined that direct competition exists, those portions of the contract which are considered sensitive due to such competition can be protected. In this case, the attorney examiner finds that direct competition exists for AADS' services to ODC. Therefore, the protective treatment initially granted those portions of the contract in this case should be extended for an additional period of 18 months or until such time as the contract expires, which ever occurs first. Further, pursuant to Rule 4901-1-24 (D) (4), Ohio Administrative Code, nothing prohibits the Commission from rescinding the protective order during the eighteen-month period. Accordingly, the information under seal in this docket should remain under seal for another period of 18 months from the date of this entry or until such time as the contract expires, which ever occurs first." (Id. p. 1-2)

The documents in question here represent a chain of negotiations between Kroger, its CRES provider Constellation New Energy and its wholesale provider Duke Energy, which continue to be in effect today. Commission precedent indicates that contracts that have not yet expired are especially deserving of protection from public disclosure.

3. No Party Will Be Prejudiced By The Treatment Of The Documents In Question As Confidential, Protected Material.

A determination by the Commission that the documents in question will remain confidential and protected will not prejudice or disadvantage the OCC, the Commission or any other party to this action. Kroger has freely provided these documents to the OCC on the condition that the OCC sign the Protective Agreement. OCC is able to review and put these agreements to use in this proceeding as evidence pursuant to the terms of that Protective Agreement. The OCC has nothing to gain by

disclosing these competitively sensitive materials to the public. As discussed above, Kroger has much to lose by the disclosure of these materials. Whatever benefit the OCC believes there is in public disclosure of these materials is outweighed by the extreme detriment to Kroger.

For the foregoing reasons, Kroger requests that the Commission deny the OCC's request to void the Protective Agreement between Kroger and the OCC executed on February 19, 2007 by disclosing the Protected Materials "in the public-domain," and that the Commission grant Kroger's Motion for Protective Order pursuant to OAC 4901-1-24.

Respectfully submitted,



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COUNSEL FOR THE KROGER CO.

March 1, 2007

17
06-10-07

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
Duke Energy Ohio To Modify Its	)	Case No. 06-986-EL-UNC
Market-Based Standard Service Offer.)	

In the Matter of the Application of)	
The Cincinnati Gas & Electric Company)	
To Modify its Non-Residential Generation)	
Rates to Provide for Market-Based Standard	)	Case No. 03-93-EL-ATA
Service Offer Pricing and to Establish a Pilot)	
Alternative Competitively-Bid Service Rate)	
Option Subsequent to Market Development)	
Period.)	

In the Matter of the Application of The)	
Cincinnati Gas & Electric Company for)	
Authority to Modify Current Accounting	)	Case No. 03-2079-EL-AAM
Procedures for Certain Costs Associated)	
with The Midwest Independent Transmission)	
System Operator.)	

In the Matter of the Application of The)	
Cincinnati Gas & Electric Company for)	
Authority to Modify Current Accounting	)	Case No. 03-2081-EL-AAM
Procedures for Capital Investment in its	)	Case No. 03-2080-EL-ATA
Electric Transmission and Distribution)	
System And to Establish a Capital)	
Investment Reliability Rider to be Effective)	
After the Market Development Period.)	

In the Matter of the Application of)	
Duke Energy Ohio, Inc. to Modify Its)	
Fuel and Economy Purchased	)	Case No. 06-1068-EL-UNC
Power Component of Its Market-Based)	
Standard Service Offer.)	

In the Matter of the Application of the)	
Cincinnati Gas & Electric Company to)	
Modify Its Fuel and Economy Purchased	)	Case No. 05-725-EL-UNC
Power Component of Its Market-Based)	
Standard Service Offer.)	

In the Matter of the Application of)	
Duke Energy Ohio, Inc. to Adjust and Set its	)	Case No. 06-1069-EL-UNC
System Reliability Tracker.)	
 In the Matter of the Application of Duke)	
Energy Ohio, Inc. to Adjust and Set its	)	Case No. 05-724-EL-UNC
System Reliability Tracker Market Price.)	
 In the Matter of the Application of)	
Duke Energy Ohio, Inc.	)	Case No. 06-1085-EL-UNC
To Adjust and Set the Annually Adjusted)	
Standard Service Offer.)	

PROTECTIVE AGREEMENT

This Protective Agreement ("Agreement") is entered into by and between The Kroger Co. ("Kroger" or "Company") and the Office of the Ohio Consumers' Counsel ("OCC") (collectively, "the Parties"). This Agreement is designed to facilitate and expedite the exchange of information in the discovery process in this proceeding, as this "Proceeding" is defined herein. It reflects agreement by the Parties 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 or any resolution of the Company's obligation to produce (including the manner of production) any requested material.

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 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. "Proceedings" shall mean the above-captioned cases, including any appeals and other cases before the Public Utilities Commission of Ohio and related appeals.

3. "Protected Materials" shall mean documents and information furnished subject to the terms of this Agreement and so designated by Kroger by conspicuously marking each document or written response as confidential or by counsel for Kroger (as identified in the pleadings in these Proceedings or by an amendment in identified counsel as provided for in Section 9) orally notifying OCC's counsel, on the deposition record, prior to a response to a question posed at a deposition that the response is considered "Protected Materials." "Protected Materials" shall not include any information or documents contained in the public files of an administrative agency or court or otherwise in the public domain.

4. Protected Materials provided in the context of these Proceedings shall be provided to OCC for use by OCC in conjunction with these and related Proceedings (including appeals). Nothing in this Agreement is intended to preclude the use of any portion of the Protected Materials that becomes part of the public record or enters into the public domain.

5. As used in this Agreement, the term "Authorized Representative" shall include OCC's counsel of record in these Proceedings and other attorneys, paralegals, economists, statisticians, accountants, consultants, or other persons employed or retained by OCC and engaged in these Proceedings.

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 shall treat all Protected Materials, copies thereof, information contained therein, and writings made therefrom (including, without limitation, Protected Materials comprised of portions of transcripts), as proprietary and confidential, and shall 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. In the event that any OCC Authorized Representative ceases to be engaged in these Proceedings, access to such materials by such person shall be terminated immediately and such person shall promptly return any Protected Materials in his or her possession to another Authorized Representative of OCC and if there shall be no such Authorized Representative, such person shall treat such Protected Materials in the manner set forth in Section 12 hereof as if these Proceedings had been concluded. Any person who has agreed to the foregoing Non-Disclosure Certificate shall continue to be bound by the provisions of this Agreement even if no longer so engaged.

8. 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 Kroger with respect to the Protected Materials that may be disclosed by OCC.

9. If OCC desires to include, utilize, or refer to any Protected Materials in these Proceedings in such a manner, other than in a manner provided for herein, that might require disclosure of such material in these Proceedings, OCC shall first give notice to Kroger, specifically identifying each of the Protected Materials that could be disclosed in the public domain. OCC will serve said notice on Kroger, to the attention of any of the Company's counsel identified in filings in these Proceedings, by one of the following four methods: (1) hand-delivering the notice to any Kroger personnel at the office designated in the Company's filings in these Proceedings with an opportunity for said personnel to indicate receipt by signature, or (2) mailing the notice by United States mail, using Certified Mail with Return Receipt, or (3) sending the notice by an overnight delivery service with signature required for delivery, or (4) hand-delivering the notice to the

Company's designated counsel in person at any location. Kroger may amend its designated counsel and address upon providing such designation, in writing, to OCC's trial attorney in these Proceedings by hand delivery or first class United States mail and with a confirming e-mail to all of OCC's attorneys of record in these Proceedings. After service of OCC's notice, Kroger shall file with an administrative agency or court of competent jurisdiction, not later than seven (7) calendar days after the receipt of OCC's notice, a motion and affidavits that address each of the identified Protected Materials (whether submitted in separate pleadings or collectively in a single pleading) demonstrating the reasons for maintaining the confidentiality of the Protected Materials. During the time period (not to exceed seven (7) days) referenced in the preceding sentence, the OCC will not place the Protected Materials into the public domain; however, OCC retains the right to file Protected Materials under seal at any time. The affidavits for the motion shall set forth facts delineating that the documents or information designated as Protected Materials have been maintained in a confidential manner and the nature and justification for the injury that would result from the disclosure of such information. If Kroger does not file such a motion within seven (7) calendar days of the Company's receipt of OCC's notice, then the Protected Materials shall be deemed non-confidential and not subject to this Agreement.

Arguments that would disclose Protected Materials will be conducted *in camera* by the administrative agency or court of competent jurisdiction closed to parties except Kroger, OCC, their counsel, and others authorized by the administrative agency or court of competent jurisdiction to be present. Until such time as the administrative agency or court of competent jurisdiction decides on the proposed use of the Protected Materials, that portion of any hearing transcript that contains Protected Materials shall be sealed and shall itself be subject to this Agreement.

Any portions of the Protected Materials that the administrative agency or court of competent jurisdiction has deemed to be protected that ultimately are admitted into evidence shall be filed in sealed, confidential envelopes or other appropriate containers sealed from the public record. In the event that OCC's utilization of the Protected Materials does not provide Kroger the requisite seven (7) calendar days advance notice prior to the commencement of any hearing in these Proceedings, OCC shall file such Protected Materials under seal for consideration by the administrative agency or court of competent jurisdiction until such time as the Parties or the administrative agency or court of competent jurisdiction decides otherwise. OCC shall, however, endeavor to provide Kroger the requisite seven (7) calendar days advance notice of intent to utilize Protected Materials prior the commencement of the hearing, and shall in any case provide as much notice as possible.

Examination of a witness that would disclose Protected Materials that the administrative agency or court of competent jurisdiction has deemed to be protected shall be conducted *in camera*, closed to all parties except counsel for the Parties, other Authorized Representatives of OCC, and persons designated by the administrative agency or court of competent jurisdiction. Transcripts of the closed hearing shall be stored in sealed envelopes or other appropriate containers sealed pursuant to the order of the administrative agency or court of competent jurisdiction.

10. It is expressly understood that upon a filing made in accordance with provision 9 or provision 11 of this Agreement, the burden shall be upon Kroger to show that any materials labeled as Protected Materials pursuant to this Agreement are confidential and deserving of protection from disclosure.

11. OCC will promptly give Kroger notice if OCC receives a public records request for Protected Materials. Kroger will have seven (7) calendar days after receipt of OCC's notice to deliver to OCC a written response that addresses the merits of whether OCC should release the

Protected Materials as public records. If Kroger does not provide OCC with said written response within the seven (7) calendar days, then the Protected Materials subject to the public records request can be deemed by OCC to be non-confidential and in the public domain. If Kroger provides OCC with said written response and OCC decides that the Protected Materials should be released, then OCC will give notice to Kroger that OCC intends to release the Protected Materials in question.

OCC may, however, give the notice referenced in the preceding sentence to Kroger at any time after receipt of a public records request if OCC decides that Protected Materials should be released in response to the public records request. Kroger will have seven (7) calendar days after its receipt of OCC's notice (of an intent to release Protected Materials) to file a pleading before a court or administrative agency of competent jurisdiction to prevent disclosure of the Protected Materials in question. If Kroger does not file at the court or administrative agency of competent jurisdiction within seven (7) calendar days to prevent OCC from disclosing the Protected Materials, then such Protected Materials can be deemed by OCC to be non-confidential and in the public domain. If Kroger does file with a court or administrative agency of competent jurisdiction to prevent disclosure of Protected Materials, then OCC shall maintain the confidentiality of such materials until the court or administrative agency makes a determination regarding disclosure.

Notice in this provision 11 will be affected in the same manner as the notice in provision 9 of this Agreement. If, in connection with OCC's non-disclosure of Protected Materials, a court awards attorney's fees that OCC or any employee or official of OCC would have to pay pursuant to Ohio law regarding public records, then Kroger will pay such awarded fees to the third party that was awarded the fees so that OCC and OCC's employees and officials are held harmless.

12. Once the OCC has complied with its records retention schedule(s) pertaining to the retention of the Protected Materials and the OCC determines that it has no further legal obligation to

retain the Protected Materials. OCC shall certify in writing to Kroger that all copies of the Protected Materials have been returned or disposed of pursuant to the records retention schedule(s) unless the Protected Materials have been properly released to the public domain or have been 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 maintain that copy under secure conditions as provided in this Agreement.

13. 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 Kroger and to pursue those remedies that may be available to OCC before an administrative agency or court of competent jurisdiction.

14. By entering into this Protective Agreement, Kroger does not waive any right it may have to object to the discovery of confidential material on other grounds and to pursue those remedies that may be available to Kroger before an administrative agency or court of competent jurisdiction.

15. 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 shall be valid, unless in writing signed by both the Parties.

16. This Agreement shall be governed by and construed in accordance with the laws of the
State of Ohio

THE KROGER COMPANY

By: *Michael Kent*

Title: *Attorney*

Date: *2/19/07*

OFFICE OF THE OHIO
CONSUMERS' COUNSEL

By: *Wendy L. Anderson*

Title: *Assistant Consumers' Counsel*

Date: *2-19-07*

Exhibit A

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)	
Duke Energy Ohio To Modify Its	)	Case No. 06-986-EL-UNC
Market-Based Standard Service Offer.)	

In the Matter of the Application of)	
The Cincinnati Gas & Electric Company)	
To Modify its Non-Residential Generation)	
Rates to Provide for Market-Based Standard	)	Case No. 03-93-EL-ATA
Service Offer Pricing and to Establish a Pilot)	
Alternative Competitively-Bid Service Rate)	
Option Subsequent to Market Development)	
Period.)	

In the Matter of the Application of The)	
Cincinnati Gas & Electric Company for)	
Authority to Modify Current Accounting	)	Case No. 03-2079-EL-AAM
Procedures for Certain Costs Associated)	
with The Midwest Independent Transmission)	
System Operator.)	

In the Matter of the Application of The)	
Cincinnati Gas & Electric Company for)	
Authority to Modify Current Accounting	)	Case No. 03-2081-EL-AAM
Procedures for Capital Investment in its	)	Case No. 03-2080-EL-ATA
Electric Transmission and Distribution)	
System And to Establish a Capital)	
Investment Reliability Rider to be Effective)	
After the Market Development Period.)	

In the Matter of the Application of)	
Duke Energy Ohio, Inc. to Modify Its)	
Fuel and Economy Purchased	)	Case No. 06-1068-EL-UNC
Power Component of Its Market-Based)	
Standard Service Offer.)	

In the Matter of the Application of the)	
Cincinnati Gas & Electric Company to)	
Modify Its Fuel and Economy Purchased	)	Case No. 05-725-EL-UNC
Power Component of Its Market-Based)	
Standard Service Offer.)	

In the Matter of the Application of)
Duke Energy Ohio, Inc. to Adjust and Set its) Case No. 06-1069-EL-UNC
System Reliability Tracker.)

In the Matter of the Application of Duke)
Energy Ohio, Inc. to Adjust and Set its) Case No. 05-724-EL-UNC
System Reliability Tracker Market Price.)

In the Matter of the Application of)
Duke Energy Ohio, Inc.) Case No. 06-1085-EL-UNC
To Adjust and Set the Annually Adjusted)
Standard Service Offer.)

NON-DISCLOSURE CERTIFICATE

I certify my understanding that Protected Materials are provided to me pursuant to the terms and restrictions of the Protective Agreement, last executed February __, 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 notes, 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 these Proceedings as defined in provision 2 of the Protective Agreement.

Name: _____

Company: _____

Address: _____

Telephone: _____



Office of the Ohio Consumers' Counsel

Your Residential Utility Advocate

Janine L. Migden-Ostrander
Consumers' Counsel

February 23, 2007
(via overnight delivery, signature required)

Michael Kurtz, Esq.
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 2110
Cincinnati, OH 45202

RE: Duke Remand Cases 03-93-EL-ATA, et al.
Notice Under Protective Agreement

Dear Counsel:

The Office of the Ohio Consumers' Counsel ("OCC") hereby gives The Kroger Company ("Kroger") notice, pursuant to Paragraph 9 of the Protective Agreement between the OCC and Kroger and last executed on February 19, 2007, that the OCC "desires to include, utilize, and/or refer to Protected Materials in these Proceedings in such a manner not provided for within the Protective Agreement." The specific Protected Materials the OCC intends to use in a manner not provided for in the Protective Agreement include all documents provided by Kroger under the Protective Agreement and the transcripts of the deposition of Denis George in which such documents were discussed as well as depositions at which such documents will be discussed as the above-captioned cases proceed. The OCC signed the Protective Agreement in order to obtain prompt access to the information that Kroger would not otherwise allow, with the right under Paragraph 9 for OCC to initiate the process that exists under law and rule for Kroger to have to prove its claim, if it can, to the Public Utilities Commission of Ohio ("PUCO" or "Commission") that the documents in question should not be released to the public domain.

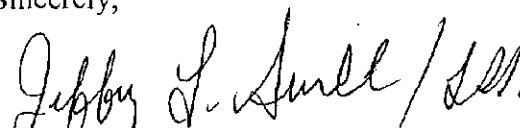
The OCC believes that the pending proceedings require treatment of the Kroger-provided information in the public domain. The presumption under Ohio law is that PUCO proceedings are to be conducted in the public light. R.C. 4901.12; R.C. 4905.07. In these cases, the material subject to the Protective Agreement should be made public for the PUCO to "file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." R.C. 4903.09. In the Supreme Court of Ohio's remand to the Commission, the Court held that in order to meet the requirements of R.C. 4903.09, "the PUCO's order must show, in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion." *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St. 3d 300, 2006-Ohio-5789 at ¶23, quoting *MCI Telecommunications Corp. v. Public. Util. Comm.* (1987), 32 Ohio St.3d 306, 312.

Michael Kurtz, Esq.
February 23, 2007
Page Two

In the original proceedings of these cases, the PUCO granted Duke Energy Ohio's (at that time, Cincinnati Gas & Electric's) request to keep side agreements secret and inaccessible to the OCC, and thereby to exclude the side agreements from the evidence that the PUCO would consider in deciding these cases involving many millions of dollars of rate increases for residential consumers. In its decision of November 22, 2006, the Supreme Court of Ohio ruled that the PUCO erred in denying OCC access to the side agreements and remanded the case back to the PUCO. *Id.* at ¶95. As the Court stated, a central issue that the PUCO must reconsider in this case is whether the appealed decision is reasonable within the context of possible "special considerations, in the form of side agreements among the signatory parties" and whether "one or more parties may have gained an unfair advantage in the bargaining process." *Id.* at ¶86. In order for the Commission to properly answer and address the Court's determinations for remand under the law of Ohio, the information provided by Kroger must be made public.

Thank you for your attention to this matter.

Sincerely,


Jeffrey L. Small, Trial Attorney
Assistant Consumers' Counsel

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In The Matter Of The Application Of Duke Energy Ohio To Modify Its Market-Based Standard Service Offer	:	Case No. 06-986-EL-UNC
	:	
	:	
In The Matter Of The Application Of The Cincinnati Gas & Electric Company To Modify Its Non-Residential Generation Rates To Provide For Market-Based Standard Service Offer Pricing And To Establish An Alternative Competitively Bid Service Rate Option Subsequent To Market Development Period	:	Case No. 03-93-EL-ATA
	:	
	:	
In The Matter Of The Application Of Cincinnati Gas & Electric Company For Authority To Modify Current Accounting Procedures For Certain Costs Associated With The Midwest Independent Transmission System Operator	:	Case No. 03-2079-EL-AAM
	:	
	:	
In The Matter Of The Application Of Cincinnati Gas & Electric Company For Authority To Modify Current Accounting Procedures For Capital Investment In Its Electric Transmission And Distribution System And To Establish A Capital Investment Reliability Rider To Be Effective After The Market Development Period	:	Case No. 03-2081-EL-AAM
	:	Case No. 03-2080-EL-ATA
	:	
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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 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 Adjust And Set Its System Reliability Tracker	:	
	:	
	:	
In The Matter Of The Application Of Duke Energy Ohio, Inc. To Adjust And Set Its System Reliability Tracker Market Price	:	Case No. 06-1069-EL-UNC
	:	
	:	
In The Matter Of The Application Of Duke Energy Ohio, Inc. To Adjust And Set The Annually Adjusted Standard Service Offer	:	Case No. 05-724-EL-UNC
	:	
	:	
	:	Case No. 06-1085-EL-UNC
	:	
	:	

AFFIDAVIT OF MICHAEL L. KURTZ

STATE OF OHIO)
) SS:
COUNTY OF HAMILTON)

COMES NOW Affiant, Michael L. Kurtz, being first duly cautioned and sworn, and states as follows:

1. My name is Michael L. Kurtz, and I am counsel for the Kroger Co. ("Kroger") in the above-captioned proceeding before the Public Utilities Commission of Ohio.

2. On February 5, 2007 the Office of Ohio Consumers' Counsel (OCC) filed a Notice to take the deposition of a representative of the Kroger Co. That Notice states that the OCC seeks to question Kroger deponent(s) with respect to any agreements for electric service and any other agreements between Kroger and Duke Energy, Inc., Duke Energy's predecessors or Duke Energy's affiliates that were entered into on or after January 1, 2000 (referenced herein as the "Agreements").

3. OCC's Notice also requested production of the Agreements at the time of the deposition.

4. I viewed discovery relating to all agreements between Kroger and Duke entered into since January 1, 2000 as well beyond the scope of this remand proceeding. I also viewed these documents as competitively sensitive trade secrets. Therefore shortly after receiving OCC's Notice, I telephoned OCC counsel Jeffrey L. Small in an effort to resolve this issue. Mr. Small did not agree to any amendment of OCC's request for production of these documents.

5. On February 9, 2007 I filed a Motion to Limit Scope of OCC Deposition and Memorandum in Support requesting that the Commission limit the scope of the OCC's discovery.

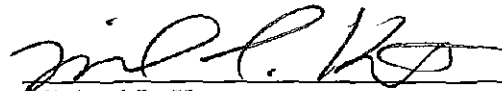
6. On February 15, 2007 the OCC filed a Memorandum Contra Kroger's Motion to Limit Scope of Deposition by The Office of The Ohio Consumers Counsel. After receiving OCC's Memorandum Contra Kroger again telephoned Mr. Small in attempt to resolve this issue.

7. On February 16, 2007 Kroger attorney Kurt Boehm spoke with Mr. Small and they reached an agreement that Kroger would produce any documents sought in OCC's February 5, 2007 Notice as well as agreements between Kroger and its CRES provider and/or Cinergy Services, Inc. (marked as George Exhibit A) if the OCC agreed to execute a Protective Agreement.

8. Paragraph 9 of that Protective Agreement states in part that:

"If OCC desires to include, utilize, or refer to any Protective Materials in these Proceedings in such a manner, other than in a manner provided for herein, that might require disclosure of such material in these Proceedings, OCC shall first give notice to Kroger, specifically identifying each of the Protected Materials that could be disclosed in the public domain.... After service of OCC's notice, Kroger shall file with an administrative agency or court of competent jurisdiction, not later than seven (7) calendar days after receipt of OCC's notice, a motion and affidavits that address each of the identified Protected Materials (whether submitted in separate pleadings or collectively in a single pleading) demonstrating the reasons for maintaining the confidentiality of the Protective Materials... The affidavits for the motion shall set forth facts delineating that the documents or information designated as Protected Materials have been maintained in a confidential manner and the nature and justification for the injury that would result from the disclosure of such information."

9. On February 24, 2007, the OCC served Kroger with the Notice contemplated in the above excerpt from Paragraph 9 of the Protective Agreement indicating its intent to place the Protected Materials "in the public domain." This Notice states that the OCC believes that the Protected Materials should not be marked as confidential.


Michael L. Kurtz

Sworn to before me and subscribed in my presence, this ____ day of March 2007.


Notary Public

DAVID F. BOEHM, Attorney at Law
Notary Public, State of OHIO
My Comm. Expiration
date: Section 147.03 O.R.C.