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**MOTION FOR PROTECTIVE ORDER TO PREVENT PUBLIC DISCLOSURE**

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Ohio Hospital Association (“OHA”), pursuant to Ohio Administrative Code (“O.A.C.”) Rule 4901-1-24(D) moves the Public Utilities Commission of Ohio (“Commission”) for a protective order to shield proprietary information from public disclosure by the Office of the Ohio Consumers’ Counsel (“OCC”) and keep confidential the subject OHA member agreements with Duke Energy Ohio (“DE-Ohio”) that are subject to a Protective Agreement (“Agreement”) executed by the OCC. The reasons underlying this motion are detailed in the attached Memorandum in Support, as well as the attached Affidavit in support of Richard L. Sites.

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**MEMORANDUM IN SUPPORT OF  
MOTION FOR PROTECTIVE ORDER TO PREVENT PUBLIC DISCLOSURE**

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On January 19, 2007 the OHA entered into an Agreement (a copy is attached hereto as Attachment A) with the OCC, wherein OCC agreed to keep confidential agreements between OHA and DE-Ohio. On February 23, 2007, OCC issued a letter of notice (“Notice”) to the OHA indicating the OCC’s intent to release in the public domain *all* of the information provided by OHA under the Agreement without any acknowledgement or regard for the protections provided by Ohio law for such information, and without any regard to the relevance of the information to the issues in this case. A copy of the Notice is attached hereto as Attachment B. In its Notice, OCC states that it “signed the Protective Agreement in order to obtain prompt access to the information that OHA would not otherwise allow. . . .” (Notice at p. 1). It is abundantly clear

from this letter that OCC never held any intention of maintaining the confidentiality of the information provided pursuant to its agreement with the OHA given its “belief” that the pending proceedings require that it unilaterally make public the subject confidential information. (Notice at p. 1).

Ohio Administrative Code (“O.A.C.”) Rule 4901-1-24(D) provides that the Commission or certain designated Staff may issue an order which is necessary to protect the confidentiality of information contained in documents filed with the Commission’s Docketing Division to the extent that state or federal law prohibits the release of the information and where non-disclosure of the information is not inconsistent with the purposes of Ohio Revised Code (“R.C.”) Chapter 4928. O.A.C. Rule 4901-1-27(B)(7)(e) grants the attorney examiner the authority to prevent public disclosures of trade secrets and proprietary business information. Moreover, R.C. Section 4928.06(F) specifically permits the Commission to grant confidentiality to competitive information. Therefore, state law recognizes the need to protect certain types of information relating to competitive retail electric services, which are the subject of this motion. The documents at issue are with DE-Ohio’s unregulated CRES provider, Duke Energy Retail Sales, LLC (“DERS”).

R. C. Sections 4901.12 and 4905.07 were amended in order to facilitate the protection of trade secrets in the Commission’s possession. Am. Sub. H. B. 476, effective September 17, 1996. By referencing R. C. Section 149.43, the Commission-specific statutes now incorporate the provision of that statute that excepts from the definition of “public record” records the release of which is prohibited by state or federal law. R.C. Section 149.43(A)(1)(v). In turn, state law prohibits the release of information meeting the definition of a trade secret. R.C. Sections 1333.61(D) and 1333.62. The amended statutes also reference the purposes of R.C. Title 49.

The Ohio Supreme Court has clarified that the “state or federal law” exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State*, 89 Ohio St. 3d 396, 399 (2000). R.C. Section 4928.06 (F) specifically states that “the Commission shall take such measures as it considers necessary to protect the confidentiality of any such information [necessary to effect competition].” The protection of trade secret information from public disclosure is consistent with the purposes of R.C. Chapter 4928 because the Commission and its Staff have access to the information, but at the same time the information is protected from other competitors entering the electric retail market. Thus the protection of trade secret information as requested by the OHA will not impair the Commission’s regulatory responsibilities.

Even before the enactment of R.C. Chapter 4928, the need to protect the designated information from public disclosure was clear, and there is compelling legal authority supporting the requested protective order. While the Commission has often expressed its preference for open proceedings, the Commission also long ago recognized its statutory obligations with regard to trade secrets:

The Commission is of the opinion that the “public records” statute must also be read *in pari materia* with Section 1333.31, Revised Code (“trade secrets” statute). The latter statute must be interpreted as evincing the recognition, on the part of the General Assembly, of the value of trade secret information.

*In re: General Telephone Co.*, Case No. 81-383-TP-AIR (Entry, February 17, 1982.) Likewise, the Commission has facilitated the protection of trade secrets in its rules (O.A.C. Rule 4901-1-24(A)(7)).

The definition of a “trade secret” is set forth in the Uniform Trade Secrets Act:

“Trade secret” means 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.

R.C. Section 1333.61(D). This definition clearly reflects the state policy favoring the protection of trade secrets such as the information, which is the subject of this motion.

Courts of other jurisdictions have held that not only does a public utilities commission have the authority to protect the trade secrets of a public utility, the trade secrets statute creates a duty to protect them. *New York Tel. Co. v. Pub. Serv. Comm. N.Y.*, 56 N.Y. 2d 213 (1982). Indeed, for the Commission to do otherwise would be to negate the protections the Ohio General Assembly has granted to all businesses, including public utilities, through the Uniform Trade Secrets Act. This Commission has previously carried out its obligations in this regard in numerous proceedings. *See, e.g., Elyria Tel. Co.*, Case No. 89-965-TP-AEC (Finding and Order, September 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. 90-1 7-GA-GCR (Entry, August 17, 1990); *In the Matter of the Application of Volunteer Energy Service, Inc. for Certification as a Retail Natural Gas Supplier*, Case No. 02-1786-GA-CRS (January 8, 2007).

In *Pyromatics, Inc. v. Petruziello*, 7 Ohio App. 3d 131, 134-135 (Cuyahoga County 1983), the Court of Appeals, citing *Koch Engineering Co. v. Faulconer*, 210 U.S.P.Q. 854, 861 (Kansas 1980), has delineated factors to be considered in recognizing a trade secret:

(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.

First, the designated information meets each of the above-noted criteria. The OHA and its Affected Members consider and have treated the information as confidential and/or proprietary. In the ordinary course of their business that information is kept as confidential and/or proprietary by the OHA and its Affected Members, is treated as such by their employees, and is not disclosed to anyone outside of the OHA and its Affected Members except pursuant to confidentiality agreements, or in the context regulatory proceedings where protection is granted. Accordingly, that information constitutes trade secret information under Ohio law warranting protection from public disclosure.

Second, the information derives independent economic value from not being known to persons (e.g., competitors) who can use it to their own financial advantage. Courts commonly treat financial records, such as revenue statements or earnings, as trade secrets, especially when parties are in direct competition with each other. *See Valco Cincinnati, Inc. v. N&D Machinery Service, Inc.*, 24 Ohio St. 3d 41 (1986) (court defines trade secret as including business plans and financial information); *Brittain v. The Stroh Brewery Co.*, 136 F.R.D. 408 (M.D.N.C. 1991) (net profits are trade secrets); *Coca-Cola-Bottling Co. v. Coca-Cola Co.*, 107 F.R.D. 288 (D.Del. 1985) (court finds that disclosure of trade secret is even more damaging where there is intense competition); *Fischer v. Sciotto*, No. 95 APEO4-490, 1995 Ohio App. LEXIS 4783 (Franklin County October 24, 1995) (court held that sales projections and profit and loss statements are proprietary especially where parties were in direct competition). This Commission has concurred with these results, finding that purely private financial books can be a trade secret. *See, e.g., In re Filing of Annual Reports by Regulated Public Utilities*, No. 89-360-AU-ORD, 1989 PUC LEXIS

541 (June 15, 1989) (Commission found that company income statements and balance sheets are trade secrets as to its competitors).

The non-disclosure sought here by the OHA and its Affected Members is consistent with the purposes of R.C. Chapter 4928 as declared by the Ohio General Assembly as it specifically relates to competitive services. In R.C. Section 4928.02, the Ohio legislature specifically provided that:

It is the policy of [Ohio] to:

...

(C) Ensure diversity of electric supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers ...; [and]

(F) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment[.]

R.C. Section 4928.02. Through this enactment, the Ohio legislature has thus declared its policy favoring diversity and competition in Ohio's electric industry. The Commission's protection of the confidential and proprietary information contained in this request is not inconsistent with, but rather is necessary to encourage and effectuate, those purposes as well.

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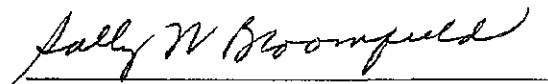
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WHEREFORE, the Ohio Hospital Association requests that the designated information be protected from public disclosure.

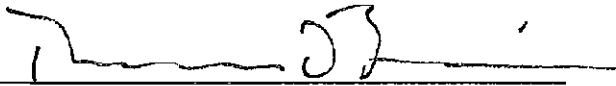


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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Motion to Protective Order was served upon the parties of record listed below this 2nd day of March 2007 *via* electronic mail.

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

**PROTECTIVE AGREEMENT**

This Protective Agreement (“Agreement”) is entered into by and between Ohio Hospital Association (“OHA” or “Association”) 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 Association’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 OHA by conspicuously marking each document or written response as confidential or by counsel for OHA (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 OHA 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 OHA, specifically identifying each of the Protected Materials that could be disclosed in the public domain. OCC will serve said notice on OHA, to the attention of any of the Association's counsel identified in filings in these Proceedings, by one of the following four methods: (1) hand-delivering the notice to any OHA personnel at the office designated in the Association'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

Association's designated counsel in person at any location. OCC will also e-mail a copy of the notice to the Association's paralegal if one is so designated by the Association by notice to all the OCC's attorneys of record in these Proceedings; however, the notice is effective upon delivery of the notice per one of the four above-described methods regardless of transmittal to the designated paralegal. OHA may amend its designated counsel, paralegal 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, OHA 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 OHA does not file such a motion within seven (7) calendar days of the Association'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 OHA, 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 OHA 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 OHA 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 OHA 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 OHA notice if OCC receives a public records request for Protected Materials. OHA 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 OHA 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 OHA provides OCC with said written response and OCC decides that the Protected Materials should be released, then OCC will give notice to OHA that OCC intends to release the Protected Materials in question.

OCC may, however, give the notice referenced in the preceding sentence to OHA 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. OHA 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 OHA 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 OHA 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 OHA 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 OHA 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 Association's determination regarding any material identified as confidential by OHA 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, OHA 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 OHA 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

**OHIO HOSPITAL  
ASSOCIATION**

By: *Falley D Bloomquist*

Title: \_\_\_\_\_

Date: *1/19/07*

**OFFICE OF THE OHIO  
CONSUMERS' COUNSEL**

By: *[Signature]*

Title: *ASSISTANT Consumers' Counsel*

Date: *1/19/07*

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

Association: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_



Office of the Ohio Consumers' Counsel

Janine L. Migden-Ostrander  
Consumers' Counsel

ATTACHMENT B

*Your Residential Utility Advocate*

February 23, 2007

(via overnight delivery, signature required)

Richard Sites, Esq.  
155 E. Broad Street, 15<sup>th</sup> Floor  
Columbus, OH 45215

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 Ohio Hospital Association ("OHA") notice, pursuant to Paragraph 9 of the Protective Agreement between the OCC and the OHA and last executed on January 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 the OHA under the Protective Agreement and the transcripts of the depositions (e.g. that of Greg Ficke who was deposed for Duke Energy as its former President) in which such documents were discussed or 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 the OHA would not otherwise allow, with the right under Paragraph 9 for OCC to initiate the process that exists under law and rule for OHA 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.

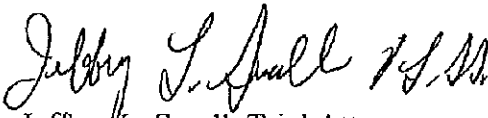
The OCC believes that the pending proceedings require treatment of the OHA-provided information in the public domain. The presumption under Ohio law is that PUCO proceedings are to be conducted in the public light. R.C. 4901.12; R.C. 4905.07. In these cases, the material subject to the Protective Agreement 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.

Richard Sites, Esq.  
February 23, 2007  
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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 the OHA 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 The )  
Cincinnati Gas & Electric Company to Modify )  
its Nonresidential Generation Rates to Provide )  
for Market-Based Standard Service Offer ) Case No. 03-93-EL-ATA  
Pricing and to Establish an Alternative )  
Competitive-Bid Service Rate Option )  
Subsequent to the Market Development Period. )

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

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

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

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

In the Matter of the Application of Duke )  
Energy Ohio, Inc., to Modify its Fuel and ) Case No. 06-1068-EL-UNC  
Economy Purchased 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 System ) Case No. 06-1069-EL-UNC  
Reliability Tracker. )

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**AFFIDAVIT  
OF  
RICHARD L. SITES  
IN SUPPORT OF  
MOTION FOR PROTECTIVE ORDER TO PREVENT PUBLIC DISCLOSURE**

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STATE OF OHIO            )  
                                  )        ss:  
COUNTY OF FRANKLIN    )

Richard L. Sites, being first duly sworn on oath, deposes and states as follows in support of the Motion to Protect (Prevent Public Disclosure) (“Motion”) of Ohio Hospital Association (“OHA”) in response to the Notice from the Office of Ohio Consumers’ Counsel (“OCC”) dated February 23, 2007.

1. Position of Affiant:

I am employed by OHA as its general counsel. I am familiar with the operations of the OHA and with the internal procedures and security concerning the protection of confidential information and agreements (together, “Agreements”) that are the subject of the request for disclosure by the Ohio Office of the Consumers’ Counsel (“OCC”). I have knowledge of the matters set forth below. My position as general counsel includes the authority of OHA to support OHA’s Motion.

2. Description of Specific Information for Which Confidential Status Was Requested:

OCC is requesting to place in the public record confidential Agreements between OHA and Cinergy Retail Sales, LLC, now known as Duke Energy Retail Sales, LLC, (“DERS”) and certain OHA members who have executed Agreements with DERS (“Affected Members”). These Agreements have already been disclosed to OCC pursuant to a protective agreement executed between OCC and OHA on January 19, 2007. In its request to make public disclosure



of these Agreements OCC, after entering into a protective agreement with OHA, now asserts that no confidential information given to OCC for use in this proceeding of the Public Utilities Commission of Ohio (“Commission”) can, based upon OCC’s interpretation of the statutes, be subject to seal. The admission of this position reflects blatant bad faith by OCC because, based upon its request, OCC never intended to abide by the protective agreement entered into between OCC and OHA on January 19, 2007.

3. Facts Supporting Confidential Treatment:

The Agreements that OCC has are those that OHA and certain of its members (“Affected Members”) negotiated in private and agreed to keep confidential. As I use the term “confidential” I mean that these Agreements have been shared only with those persons in OHA’s organization and in the Affected Members’ organizations who have a need to know as well as OHA’s consultant. Even those OHA members who have not executed Agreements with DERS have not been given access to these Agreements.

Under no circumstance do OHA or the Affected Members make them available outside OHA or even to another OHA member. The information has never been made public. OHA and the affected OHA members consider the Agreements highly confidential, proprietary, and/or competitively sensitive. Knowledge of, and access to, the agreements themselves has been limited to me and certain select OHA employees. The e-mail materials are kept secure on my computer in a location on my computer that can be accessed only by me. In fact, I believe that no one at OHA has seen the agreements other than me.

The public disclosure of the information would allow non-OHA members to obtain such information for use to their competitive advantage and to the detriment of OHA and the Affected Members. Further, the Agreements also constitute trade secrets under Ohio law and accordingly

are protected from public disclosure pursuant to the Uniform Trade Secrets Act, Ohio Revised Code (“R.C.”) Sections 1333.61-.62 and by reference, R.C. Sections 4901.12 and 4905.07.

4. The Value of the Information:

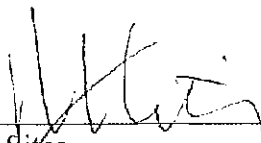
The information contained in the Agreements is extremely valuable to OHA and the Affected Members. It provides them with the means to conduct their operations on a more economic basis. OHA and its Affected Members do not wish their competitors to have access to the Agreements (and secure the information accordingly) because the OHA and the Affected Members have expended significant funds and valuable personnel time to negotiate these Agreements. These Agreements are extremely valuable to OHA and Affected Members and if made public would provide others with access to this information contained in the Agreements at no cost (rather than expending the significant funds, time and expertise to arrive at the arrangements negotiated in the Agreements) and negate the value of these Agreements to OHA and its Affected Members.

5. Number of People Who Have Knowledge of the Information:

The information contained in the Agreements for which OHA and its Affected Members are seeking confidential treatment is known only by a very limited number of employees of OHA and its Affected Members who were engaged in the negotiation of the Agreements or those who have a need to know the contents of the Agreements in order to verify that the terms of the Agreements have been met. OHA and its Affected Members maintain internal practices to prevent disclosure of the information contained in the Agreements as well as the Agreements themselves to third parties. This information is not available to the public and is not known outside OHA and the Affected Members and their personnel who have a need to know.

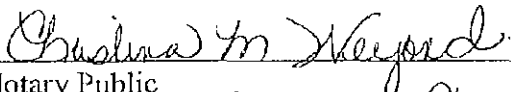
The information contained in Agreements has not been publicly disclosed to any government agency or other third party other than as the subject of a confidentiality agreement made necessary by the Commission proceedings listed in the caption of the cases for which this affidavit has been executed. Therefore, disclosure of these Agreements without confidential treatment would result in the public disclosure of such information for the first time and would cause irreparable damage to the efforts of OHA and its Affected Members to safeguard these Agreements.

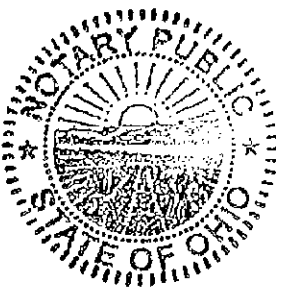
For these reasons, the OHA and its Affected Members respectfully request confidential treatment of the Agreements.



Richard L. Sites  
General Counsel, Ohio Hospital Association

Subscribed and sworn to before me  
this 2nd day of March, 2007.

  
Notary Public  
My Commission: July 6 2009



CHRISTINA M. WEYAND  
Notary Public, State of Ohio  
My Commission Expires  
7-6-09