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**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the	:	Case Nos.	03-93-EL-ATA
Consolidated Duke Energy Ohio, Inc.	:		03-2079-EL-AAM
Rate Stabilization Plan Remand and	:		03-2081-EL-AAM
Rider Adjustment Cases	:		03-2080-EL-ATA
	:		05-725-EL-UNC
	:		06-1069-EL-UNC
	:		05-724-EL-UNC
	:		06-1068-EL-UNC
	:		06-1085-EL-UNC

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**DUKE ENERGY RETAIL SALE'S MOTION FOR PROTECTIVE ORDER**

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Pursuant to O.A.C. 4901-1-24(A) Duke Energy Retail Sales (DERS) moves the honorable Public Utilities Commission of Ohio (Commission) for a protective order prohibiting the Ohio Consumers' Counsel (OCC) from publicly disclosing confidential material gathered through discovery in these proceedings. DERS and OCC signed a Protective Agreement (a copy of which is attached as Exhibit A) which limits the manner in which OCC may use that material. By notice (attached as Exhibit B), OCC has indicated that it intends to use the "Protected Materials in these proceedings in such a manner not provided for within the Protective Agreement."<sup>1</sup> (Emphasis added). After proper notice under the terms of the Protective Agreement, DERS has seven days to seek protection from

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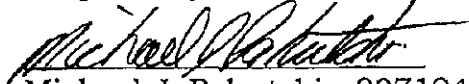
<sup>1</sup> *In re DE-Ohio's MBSSO, Case No. 03-93-EL-ATA et. al. (OCC's Letter) (February 23, 2007).*

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an administrative agency or court of competent jurisdiction. Accordingly, DERS respectfully submits the above titled Motion.

The protected materials provide by DERS represents over 1200 pages of documents that include or relate to confidential commercial contracts, business operations and include depositions in these proceedings, introducing and discussing such protected materials. For the reasons set forth in the attached Memorandum in Support, DERS respectfully requests the Commission grant this Motion for Protective Order and prohibit the public disclosure of the protected materials.

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**MEMORANDUM IN SUPPORT**

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**INTRODUCTION:**

As part of these proceedings OCC sought discovery from DERS and Cinergy Corp. (Cinergy). The requested information consisted of confidential commercial contracts, terminated commercial contracts, business analysis, internal correspondence, financial analysis, business operations, and other related but sensitive and trade secret information necessitating a Protective Agreement between those entities and OCC. During discussions leading to Protective Agreements, OCC essentially threatened DERS with action before the Commission if DERS refused to sign an agreement similar to the protective agreement negotiated with DE-Ohio. That position, attached to this pleading as Exhibit C, was based upon the Commission's actions in Case No. 05-376-EL-UNC, wherein AEP, a party to that matter, was ordered to provide confidential information pursuant to a protective agreement similar to the one negotiated by DE-Ohio.<sup>2</sup>

DERS and Cinergy entered into the requested Protective Agreement and have provided all materials under the understanding that OCC would abide by the terms of the Protective Agreement and protect the

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<sup>2</sup> *In re AEP's IGCC*, Case No. 05-376-EL-UNC (Entry at 3) (July 21, 2005); OCC's e-mail dated January 8, 2007.

confidential nature of specified material. On Friday, February 23, 2007, OCC issued a letter to DERS, DE-Ohio, and Cinergy providing notice that OCC intended to publicly use all of the protected material in these proceedings, consisting primarily of confidential commercial contracts, for no reason other than to make the material public. OCC did not describe a public use of the protected materials or why such use was necessary. In other words, OCC has offered no reason or basis for why the status of the materials should change. Moreover, OCC did not identify with any specificity which of the over 1200 pages of documents provided by DERS, that OCC intends to thrust into the public eye.

DERS is a competitive retail electric service (CRES) provider operating exclusively in a competitive market. Release of the terms and conditions of its contracts, and terminated contracts, not to mention its confidential business analysis, operational decisions, customer information, into the public and to competitors will not only harm its business interests but will interfere with competition. This is particularly true if DERS is the only CRES provider that is required to release its contracts to competitors. And, if such documents are made public in this or any other proceeding, their disclosure generally serves to discourage participation in the market place.

On a general basis, confidential commercial contracts and related materials should be not be forced into the public realm to the detriment of the signatories where there is no need for such disclosure, particularly

where those materials can still be considered by the Commission, while under seal. The Commission recognizes the need to keep commercial terms, pricing, pricing structures and the like confidential in that it has regularly permitted such contracts and price information to remain confidential.<sup>3</sup>

The Commission should not permit OCC to abuse its process to make information public that would not otherwise be public, particularly, as in these proceedings, where the information is irrelevant to the case and could not have influenced the outcome of the proceedings.

**ARGUMENT:**

Since the Remand, the OCC has requested discovery of confidential commercial contracts entered by DERS and Cinergy. Additionally, OCC has requested production of other sensitive confidential, trade secret documents including but not limited to internal correspondence, business analysis, financial analysis, journal entries, accounting procedures, operational procedures, and business transactions with specific customers and confidential customer information. OCC sought this information from DERS and Cinergy even though both were non-parties to these proceedings (until their recent limited Motions to Intervene) and their contracts did not involve DE-Ohio. OCC is aware that the Commission could not have considered the DERS and Cinergy contracts in the original litigation since neither OCC nor any other Party

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<sup>3</sup> *In re North Coast Gas*, Case No. 06-1100-PL-AEC (Entry at 2) (February 7, 2007).

requested discovery of such contracts. Thus, the Commission was not asked to and did not rule on their discoverability, and the Supreme Court's decision does not direct itself to these contracts. Nonetheless, the Commission agreed to permit discovery over the objections of DERS, and Cinergy.

Through discovery OCC should also know that almost all of the effective contracts were negotiated and signed after the Commission issued its November 23, 2004, Entry on Rehearing. Because DERS complied with its certification requirements, OCC is also aware that the transactions represent an aggregate payment by DERS to counterparties of approximately twenty million dollars per year, important economic development dollars to southwestern Ohio. Finally, OCC knows that DE-Ohio had nothing to do with the negotiation or administration of the DERS contracts other than the administration DE-Ohio must provide to all CRES providers, including DERS, pursuant to its tariffs. Therefore, OCC knows that the confidential commercial contracts are now, and were during 2004, irrelevant to the Commission's consideration of DE-Ohio's MBSSO and the Commission's November 23, 2004, Entry on Rehearing.

Despite all of this OCC has, for no apparent reason, notified DERS, DE-Ohio, Cinergy, and other Parties, of its intent to place all confidential discovered documents in the case in the public domain.<sup>4</sup> OCC did not

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<sup>4</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (OCC's Letter) (February 23, 2007).

specify particular documents except to give an example of its intent,<sup>5</sup> did not specify particular pages or passages of any document,<sup>6</sup> and did not specify any public use of any document that it could not achieve under seal in the presentation of its case.<sup>7</sup>

DERS, DE-Ohio, and Cinergy, through DE-Ohio's counsel, attempted to negotiate a compromise with OCC and requested that OCC identify those documents, parts of documents, and the public use it intends. OCC refused to engage in any effort to get clarity around the issues. (Exhibit D). Under these conditions the Commission should instruct OCC to maintain protected material as confidential. If OCC identifies specific material it wishes to make public, DERS will make appropriate arguments and motions for protective treatment of the specific documents identified. In its recent Entry, the Attorney Examiner granted DERS and Cinergy limited intervention for the specific purpose of protecting its confidential material.<sup>8</sup>

**I. The Commission has the authority to order OCC to maintain protected material as confidential.**

Ohio Administrative Code Section 4901-1-24(A) permits the Commission to issue a protective order that "[D]iscovery may be had only on specified terms and conditions;...*A trade secret or other confidential*

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

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

<sup>8</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (Entry at 5) (February 28, 2007).

*research, development, commercial, or other information not be disclosed*  
or be disclosed only in a designated way...."<sup>9</sup>

Under Ohio law, the term:

"Trade secret" means information, including . . .  
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.<sup>10</sup>

Trade secret information, such as that at issue here, is entitled to  
protection under Ohio's trade secrets act,<sup>11</sup> R.C. §1333.61, Ohio's "public  
records act,<sup>12</sup>" and under the federal Trade Secrets and Freedom of  
Information acts.<sup>13</sup> The information that OCC seeks to make public is  
trade secret information maintained by DERS and counterparties in a  
confidential manner. Therefore, the Commission has express authority

<sup>9</sup> OHIO ADMIN. CODE ANN. § 4901-1-24 (Baldwin 2007) (emphasis added).

<sup>10</sup> Ohio Rev. Code Ann. § 1333.61(D) (Baldwin 2007).

<sup>11</sup> *Id.*

<sup>12</sup> Ohio Rev. Code Ann. § 149.011 (Baldwin 2007); Cinergy's documents and information do not even qualify as a "public record" unless and until admitted into evidence. Section 149.43(A)(1) of the Ohio Revised Code, in relevant part, defines "public record" as "*records kept by any public office . . .*" According to Chief Justice Thomas Moyer, "[T]he definition of a 'public record' must be read in conjunction with the term 'record.' Section 149.011(G) defines 'record' to include 'any document . . . created or received by or coming under the jurisdiction of any public office . . . which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.' Thus, *to the extent that an item does not serve to document the activities of a public office, it is not a public record.*" Moyer, J., Interpreting Ohio's Sunshine Laws: A Judicial Perspective, 59 N.Y.U. ANN. SURV. AM. L. 247 (2003)(Emphasis supplied.)

<sup>13</sup> 18 U.S.C. § 1905 (2007); 5 U.S.C. 552(b)(4) (2007).



to order OCC to maintain the confidentiality of information it received by it during the discovery process.<sup>14</sup>

The Commission has often afforded confidential treatment to commercial contracts between parties in competitive markets.<sup>15</sup> When it recently granted a protective order regarding terms in a competitive contract in *North Coast*, the Commission held “we understand that negotiated price and quantity terms can be sensitive information in a competitive environment.”<sup>16</sup> All of the information that DERS provided falls into the category of sensitive information in a competitive environment.

Additionally, almost all of the information obtained by OCC through discovery from DE-Ohio witnesses relates to DERS information held by DE-Ohio or its affiliated service company. Notably, DE-OHIO is mandated to:

*[T]reat as confidential all information obtained from a competitive supplier of retail electric service, both affiliated and nonaffiliated, and shall not release such information unless a competitive supplier provides authorization to do so.<sup>17</sup>*

OCC should not be permitted to arbitrarily disclose DERS information that by O.A.C. rule DE-Ohio may not otherwise disclose.

**II. Prior to a Commission determination regarding disclosure of confidential information OCC should specifically identify the**

<sup>14</sup>

*Id.*

<sup>15</sup>

*In re North Coast Gas*, Case No. 06-1100-PL-AEC (Entry at 2) (February 7, 2007).

<sup>16</sup>

*Id.*

<sup>17</sup>

OHIO ADMIN. CODE ANN. § 4901:1-20-16(G)(4)(d) (Baldwin 2007) (emphasis added).

**information to be released and its relevancy to these proceedings.**

OCC seems intent on presenting confidential information regarding DERS and Cinergy transactions during the hearing ordered by the Commission regarding DE-Ohio's MBSSO price ordered by the Commission on November 23, 2004, and that it be done so publicly.<sup>18</sup>

Not only is DE-Ohio prohibited from disclosing such information, as discussed above, but DERS has not had the opportunity to file such information under seal since it is not presenting an affirmative case. The Commission should not permit OCC to make such information public absent identification of the specific information it needs to use and explains why it is necessary to change the status quo in order to use that material.

**III. The OCC has violated the protective agreement to which it is a signatory.**

Paragraph nine of the DE-Ohio Protective Agreement signed by OCC states that "OCC shall first give notice to Duke Energy Retail Sales, *specifically identifying each of the protective materials* that could be disclosed in the public domain."<sup>19</sup> Thus the protective agreement prohibits a broad identification of materials, and instead, requires OCC

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<sup>18</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (OCC's Letter) (February 23, 2007).

<sup>19</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (DE-Ohio, OCC Protective Agreement at 4) (December ---, 2006).

to identify each protective material it intends to release.<sup>20</sup> OCC's Notice to DERS states that:

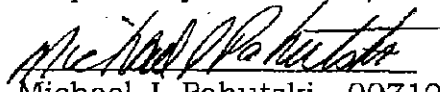
The specific Protected Materials the OCC intends to use in a manner not provided for in the Protective Agreement include all documents provided by DERS under the Protective Agreement and the transcripts of the depositions (e.g. that of Charles Whitlock who appeared for DERS under OCC's subpoena and of Duke Energy as well as Cinergy deponents) in which such documents were discussed or will be discussed as the above captioned cases proceed.<sup>21</sup>

DERS and Cinergy have provided over 1200 pages of documents, and hundreds of pages of transcripts created, during discovery. The Protective Agreement requires OCC to identify with specificity (i.e. passage and/ or page number that portion of the transcript and by Bates number) that document OCC needs to use. It does not contemplate OCC simply identify all the documents, let alone by ambiguous reference. The Commission should not permit OCC to release confidential material in breach of its agreement.

**CONCLUSION:**

For the reasons more thoroughly discussed above DERS asserts that the Commission should grant its Motion for Protective Order.

Respectfully Submitted,

  
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Assistant General Counsel

<sup>20</sup> *Id.*

<sup>21</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (OCC's Letter) (February 23, 2007). Emphasis added.

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served electronically on the following parties this 2nd day of March 2007.

  
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**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 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 Duke Energy Retail Sales, LLC (“DERS” 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 DERS by conspicuously marking each document or written response as confidential or by counsel for DERS (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 DERS 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 DERS, specifically identifying each of the Protected Materials that could be disclosed in the public domain. OCC will serve said notice on DERS, 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 DERS 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. OCC will also e-mail a copy of the notice to the Company's paralegal, Anita Schafer, at address Anita.Schafer@Duke-Energy.com; the notice is effective upon delivery of the notice per one of the four above-described methods and sending notice to the designated paralegal. DERS 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, DERS 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 DERS 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 DERS, 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 DERS 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 DERS 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 DERS 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 DERS notice if OCC receives a public records request for Protected Materials. DERS 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 DERS 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 DERS provides OCC with said written response and OCC decides that the Protected Materials should be released, then OCC will give notice to DERS that OCC intends to release the Protected Materials in question.

OCC may, however, give the notice referenced in the preceding sentence to DERS 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. DERS 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 DERS 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 DERS 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 DERS 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 DERS 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 DERS 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, DERS 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 DERS 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

**DUKE ENERGY RETAIL  
SALES, LLC**

By: Michael R. Ricketts

Title: ASST. GENERAL COUNSEL

Date: 1-09-07

**OFFICE OF THE OHIO  
CONSUMERS' COUNSEL**

By: Mary L. Smith

Title: Assistant Consumers' Counsel

Date: 1-9-07

**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 Company 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 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 The 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 ) 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: \_\_\_\_\_

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 Pahutski, Esq.  
Duke Energy Retail Sales, LLC  
139 E. Fourth St., 25 AT II  
P.O. Box 960  
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 Duke Energy Retail Sales, LLC ("DERS") notice, pursuant to Paragraph 9 of the Protective Agreement between the OCC and DERS and last executed on January 9, 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 DERS under the Protective Agreement and the transcripts of the depositions (e.g. that of Charles Whitlock who appeared for DERS under OCC's subpoena and of Duke Energy as well as Cinergy deponents) 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 DERS would not otherwise allow, with the right under Paragraph 9 for OCC to initiate the process that exists under law and rule for DERS 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.

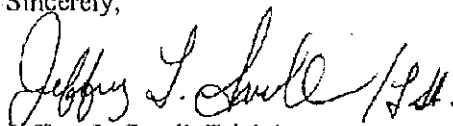
The OCC believes that the pending proceedings require treatment of the DERS-provided information in the public domain. The presumption under Ohio law is that PUCO proceedings are to be conducted in the public light. R.C. 4901.12; R.C. 4905.07. In these cases, the material subject to the Protective Agreement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

Thank you for your attention to this matter.

Sincerely,



Jeffrey L. Small, Trial Attorney  
Assistant Consumers' Counsel

Cc: [Anita.Schafer@Duke-Energy.com](mailto:Anita.Schafer@Duke-Energy.com) (electronic notice)

**D'Ascenzo, Rocco**

**From:** Colbert, Paul  
**Sent:** Friday, March 02, 2007 1:14 PM  
**To:** D'Ascenzo, Rocco  
**Subject:** FW: FW: Prot Agr DERS (transmittal 1-6-06).doc

**Attachments:** Prot Agr DERS \_transmittal back to DERS 1-8-07\_.pdf



Prot Agr DERS  
 \_transmittal...

-----Original Message-----

**From:** JEFF SMALL [mailto:SMALL@occ.state.oh.us]  
**Sent:** Monday, January 08, 2007 3:17 PM  
**To:** Pahutski, Michael  
**Cc:** Colbert, Paul  
**Subject:** Re: FW: Prot Agr DERS (transmittal 1-6-06).doc

The process from Tuesday to this Wednesday was never intended to raise a new round of negotiations over an acceptable protective agreement. The terms of the protective agreements have been worked out by Duke counsel (Paul Colbert) and the OCC's Legal Director over an extended period of time. We agreed last week that an agreement, "substantially in the same form," was reasonable. Since that time, the Duke-DERS has been attempting to improve upon those lengthy negotiations in violation of our telephonic agreement. The negotiations have been one-sided, and we too have changes that we would like to make in the agreement if that was appropriate at this time.

With the above as the historical setting, I attach an agreement that is the same as previous agreements with Duke except for a few changes to meet the requests of DERS. Paragraph 3 and 6 have been expanded to specifically recognize that a deposition is contemplated and that there will be a transcript. Paragraph 9 has been changed to add a condition on the OCC's proper notice (i.e. regarding transmission to a paralegal). Finally, the word "specifically" has been deleted from paragraph 9 (although the OCC is free to argue that affidavits are insufficient in detail to provide confidential treatment to documents). Also, a parenthetical has been added to paragraph 9 to give DERS additional comfort (although there was never a requirement that the party seeking protection would have to do so in separate pleadings for each identified document, just that each item had to be addressed).

The changes have been one directional, and the matter of broadly opening negotiations regarding the protective agreement was settled last week in our call to the Attorney Examiner. If DERS does not show on Wednesday because it will not enter into the attached agreement (or if DERS shows but refuses to respond to inquiries and to turn over documents), I will adjourn the deposition and seek sanctions. You might reflect upon the result when AEP challenged the extent of protection given by an agreement in Case No. 05-376-BL-UNC. In that case, a protective agreement more favorable to the OCC in its terms was ordered to be used to deal with information from AEP and also its outside vendors.

Jeff Small  
 Assistant Consumers' Counsel

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COMMUNICATION AND ALL COPIES OF THIS COMMUNICATION. THANK YOU.

>>> "Pahutski, Michael" <Michael.Pahutski@Cinergy.COM> 1/8/2007 11:17 AM >>>

Jeff, please see our comments on the attached. Please call me should you wish to discuss.

Regards,

Michael Pahutski  
Asst. General Counsel  
Duke Energy Shared Services, Inc.  
(513) 287-1309

**Confidentiality Notice**

This message is being sent by or on behalf of a lawyer. It is intended exclusively for the individual or entity to which it is addressed.

This,

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EXHIBIT D

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

Consolidated Duke Energy Ohio, Inc.,	)	Case Nos.	03-93-EL-ATA
Rate Stabilization Plan Remand, and	)		03-2079-EL-AAM
Rider Adjustment Cases	)		03-2081-EL-AAM
	)		03-2080-EL-ATA
	)		05-725-EL-UNC
	)		06-1069-EL-UNC
	)		05-724-EL-UNC
	)		06-1085-EL-UNC
	)		06-1068-EL-UNC

AFFIDAVIT  
OF  
PAUL A. COLBERT

COMES NOW Paul A. Colbert, being duly sworn, deposes and says:

1. My name is Paul A. Colbert. I am employed by Duke Energy Shared Services Inc., as Counsel for Duke Energy Corporation and its affiliated companies.
2. I am the designated trial attorney for Duke Energy Ohio, Inc (DE-Ohio) in the above proceedings.
3. This Affidavit is being filed with the Public Utilities Commission of Ohio ("PUCO" or "Commission") in support of Motions for a Protective Order and Memoranda in Support filed by DE-Ohio, Duke Energy Retail Sales, LLC (DERS) and Cinergy Corp.
4. On behalf of The Companies, I am requesting this Commission grant a Protective Order to The Companies to prevent the unreasonable and unfettered disclosure of thousands of pages of proprietary and trade secret information provided to Office of the Ohio Consumers' Counsel (OCC) through Protective Agreements in the above captioned consolidated proceedings.
5. On or about Monday, February 26, 2007, Counsels for DE-Ohio, DERS, and Cinergy Corp., (collectively The Companies) received notice of the OCC's intent to use and make public confidential and proprietary information (Protected Material) provided by the Companies, to OCC, pursuant to a Protective Agreement during discovery of the above captioned proceedings.

6. The Protected Material provided to OCC pursuant to The Companies' respective Protective Agreements, and over the course of all of the above captioned proceedings, encompass thousands of pages of confidential material, including but not limited to, analysis, internal correspondence, confidential commercial contracts, terminated contracts, responses to data requests, responses to interrogatories, discussion of confidential business operations occurring during portions of sealed depositions, and specific customer account and load information.
7. The notices provided by OCC purport to make public "all documents" provided by The Companies pursuant to the respective Protective Agreements. Each notice fails to define with any specificity which of the thousands of pages of Protected Materials and information provided under the Protective Agreement OCC intends to use or in what manner OCC wishes to use the information.
8. On Tuesday, February 27, 2007, on behalf of The Companies, I telephoned Mr. Small of OCC to discuss what The Companies perceive as an unreasonable attempt to circumvent the protection of confidential and proprietary information provided during discovery through the respective Protective Agreements. I also attempted to discuss with specificity, which documents and information of the thousands of pages of Protected Materials OCC truly wishes to use, the scope of the use, and attempt to negotiate a settlement with respect to the use and disclosure of that information on behalf of The Companies.
9. Throughout Tuesday afternoon February 27, 2007 and through Wednesday February 28, 2007, I engaged in email correspondence with Mr. Small, carbon copying Mr. Sauer, and Ms. Hotz of the OCC, in continuance of my attempt to discern which documents OCC truly intends to use and the anticipated scope of use. Mr. Small indicated an absolute unwillingness to identify specific documents provided by The Companies, or negotiate any compromise with respect to the public use of any document or portion of document by the OCC.
10. Attached is a true and accurate copy of the email correspondence, evidencing my attempts to reach a compromise and OCC's unwillingness to negotiate or resolve any controversy with respect to the Protected Material.

FURTHER AFFIANT SAITH NOT.

*Paul A. Colbert*  
Paul A. Colbert

STATE OF OHIO            )  
                                  ) SS:  
COUNTY OF HAMILTON )

Subscribed and sworn to before me this 2<sup>nd</sup> day of March, 2007

*Matik Tompkins*  
Notary Public

My Commission Expires: 08-29-2010



MATIK TOMPKINS  
Notary Public, State of Ohio  
My Commission Expires Aug. 29, 2010

**D'Ascenzo, Rocco**

---

**From:** Colbert, Paul  
**Sent:** Thursday, March 01, 2007 3:55 PM  
**To:** D'Ascenzo, Rocco  
**Subject:** FW: Voicemail Messages

-----Original Message-----

**From:** Colbert, Paul  
**Sent:** Wednesday, February 28, 2007 8:13 AM  
**To:** JEFF SMALL  
**Cc:** ANN HOTZ; LARRY SAUER; Bruce Weston (weston@occ.state.oh.us)  
**Subject:** RE: Voicemail Messages

I am just trying to reach a compromise. I do not know why you feel the need to respond in an insulting and nasty manner. Regarding the case, I think you are likely to win the procedural issues as the AEs appear determined to provide more due process than required in order to build an appeal proof order. I think your chances of winning the case itself is low and the Commission is likely to affirm its November 23, 2004 Entry. So I think OCC is going through this for very little if anything. That is particularly true since, if market prices were set almost by any method, including your wholesale auction proposals, they would undoubtedly go up to the detriment of your client. If you wish to discuss the issue of whether documents should be public in a reasonable manner in an attempt to compromise I am at your disposal. Thank you.

-----Original Message-----

**From:** JEFF SMALL [mailto:small@occ.state.oh.us]  
**Sent:** Tuesday, February 27, 2007 7:59 PM  
**To:** Colbert, Paul  
**Cc:** ANN HOTZ; LARRY SAUER  
**Subject:** RE: Voicemail Messages

Knowing how much you believe in "judicial efficiency," it must be very difficult for you to observe me representing my client and the AEs also playing their designated roles without each of us taking instructions from you regarding how we should perform our tasks.

Jeff

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>>> "Colbert, Paul" <Paul.Colbert@Cinergy.COM> 2/27/07 4:34 PM >>>

You may want to check or involve someone who has authority.  
Thank you.

-----Original Message-----

**From:** JEFF SMALL [mailto:SMALL@occ.state.oh.us]  
**Sent:** Tuesday, February 27, 2007 4:30 PM  
**To:** Colbert, Paul  
**Cc:** ANN HOTZ; LARRY SAUER  
**Subject:** RE: Voicemail Messages

The terms contained in the notification letters are not matters over which I have authority to compromise.

Jeff

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THEN

IMMEDIATELY DELETE THIS COMMUNICATION AND ALL COPIES OF THIS COMMUNICATION. THANK YOU.

>>> "Colbert, Paul" <Paul.Colbert@Cinergy.COM> 2/27/2007 4:11 PM >>>

I will inform Mr. Barker that his deposition is not necessary.

Regarding the letters I was trying to determine if there is a compromise position that we can both live with. As I discussed with Larry, your letters do not indicate which documents, or what part of any document, you intend to use in the presentation of your case. The letters also do not state what use you can put the documents to publicly that you cannot perform with the documents under the protective agreements. If you are simply attempting to make them public for the sake of making the documents public we may not be able to agree. If you have a purpose in mind we may be able to find a compromise through release and redaction of specified material. Thank you.

-----Original Message-----

From: JEFF SMALL [mailto:SMALL@occ.state.ch.us]  
Sent: Tuesday, February 27, 2007 1:38 PM  
To: Colbert, Paul  
Cc: ANN HOTZ; LARRY SAUER  
Subject: Voicemail Messages

This e-mail responds to your voicemail messages regarding 1) the deposition of Jason Barker and 2) the notice letters transmitted by the OCC pursuant to the protective agreements between the OCC and Duke Energy/Cinergy/DERS.

Regarding the deposition, the OCC has decided that it will cancel the deposition of Mr. Barker. The OCC will inform the parties. I understand that Mr. Barker contacted you regarding your participation as counsel at the deposition. Therefore, please inform Mr. Barker regarding the cancellation.

Regarding the letters, your message on Monday addressed the OCC's ability to present its evidence under seal in the 03-93 proceedings. The notices transmitted to you and to counsel for the other Duke affiliates are clear that the OCC does not want to proceed on that basis regarding any of the material that the affiliated companies have marked as part of the discovery process (including transcripts from the depositions).

Jeff

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THEN

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