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March 2, 2007

Via Courier

Renee Jenkins
Chief, Docketing Division
Public Utilities Commission of Ohio
180 E. Broad Street, 13th Floor
Columbus, Ohio 43215

PUCO

2007 MAR -2 PM 4: 36

RECEIVED-DOCKETING DIV

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

Dear Ms. Jenkins:

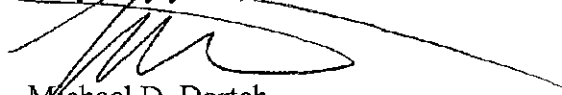
Enclosed please find an original and fifteen copies of the following document:

Cinergy Corp.'s Motion For Protective Order and Memorandum in Support

Please accept the original and fourteen copies of each document for the Commission's file, and return the remaining copy to me via the individual who delivers the same to you. You may call me if you have any questions concerning this filing.

As always, your consideration is greatly appreciated. Thank you.

Very truly yours,



Michael D. Dortch

Enclosures

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FILE

RECEIVED-DOCKETING DIV
2007 MAR -2 PM 4:36

PUCO

**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
	:		05-724-EL-UNC05
	:		05-725-EL-UNC
	:		06-1068-EL-UNC
	:		06-1069-EL-UNC
	:		06-1085-EL-UNC

**CINERGY CORP.'S
MOTION FOR PROTECTIVE ORDER**

Cinergy Corp., by and through its attorneys, respectfully moves this Honorable Commission pursuant to OAC section 4901-1-24(A)(7) and (8) for the entry of a protective Order that will restrict use by the Ohio Consumers' Counsel of all documents containing confidential, proprietary information belonging to Cinergy Corp., together with any and all materials and information derived from those documents. The basis for this motion is set forth in the accompanying memorandum in support, which is incorporated by reference herein.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Sometime in early January, 2007, the Ohio Consumers' Counsel ("OCC") informed counsel that it would issue a subpoena to Cinergy Corp. ("Cinergy"), at the time a non-party to these proceedings, seeking any agreements between Cinergy and customers of Duke Energy Ohio f/k/a Cincinnati Gas & Electric Co. On February 5, 2007, such a subpoena was in fact issued to Cinergy.

In response to OCC's discovery demands, Cinergy Corp. moved to intervene in these proceedings for the limited purpose of protecting information belonging to it, and at the same time filed a motion in limine asking the attorney examiner to determine in advance of hearings in these matters that the sole agreement to which it is a party and which was responsive to OCC's subpoena is entirely irrelevant to the matters before this Commission in these proceedings.¹

In order to facilitate discovery in this matter Cinergy voluntarily entered into a protective agreement with the OCC on January 17, 2007 (the "Agreement", attached hereto as Exhibit A). Through the Agreement, Cinergy agreed to produce documents and information to OCC that Cinergy believes to be confidential and proprietary business information belonging to Cinergy. In return, and even though OCC expressly did not agree that materials that might be produced to it were entitled to any protection, OCC agreed to:

- (1) restrict access to materials designated as "protected materials" by Cinergy,
- (2) limit the use of those materials to "these and related proceedings, including appeal,"
- (3) submit to this Commission under seal all materials either acknowledged to be confidential or determined to be confidential
- (4) to conduct witness examinations regarding confidential materials under seal or *in camera*,
- (5) inform Cinergy of OCC's receipt of any process that might result in OCC being compelled to reveal protected materials to others, and
- (6) expressly notify Cinergy if OCC decided to dispute the confidentiality of any protected materials provided to it or "include, utilize or refer to any Protected

¹ The attorney examiner denied Cinergy's Motion in Limine by Entry issued February 27, 2007, thereby preserving issues of the relevance and admissibility of Cinergy's documents until hearings in these matters. For the reasons discussed herein, Cinergy files this Motion solely in order to maintain the status quo pending hearings in this matter.

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. . ."

Agreement, ¶9.

OCC later issued a subpoena to Cinergy Corp. seeking additional documents and a deposition of Cinergy itself through a Rule 4901-1-21(F) representative. Subject to the Agreement, Cinergy responded to OCC's subpoena by producing responsive documents and by producing Mr. Timothy Duff as a representative of Cinergy Corp for deposition by OCC.

On February 23, 2007, OCC issued a letter to Cinergy in which OCC notified Cinergy that ". . .OCC believes that the pending proceedings require treatment of the Cinergy-provided information in the public domain." OCC then goes on to assert an intent to file *all* materials Cinergy provided to OCC in the public record. (See Letter dated February 23, 2007 from Ohio Consumers' Counsel to counsel to Cinergy, attached as Exhibit B.)

OCC's notice provides a "trigger" under the Agreement. Within seven (7) days of OCC's notice, Cinergy must seek an appropriate protective agreement from this Commission or from a Court of competent jurisdiction or it will have waived any claim that a document or information derived from a document is entitled to the protection afforded by law.

Cinergy has approached OCC in an effort to resolve the issues raised by OCC's notice without the necessity of involving this Commission. Cinergy was rebuffed. (See affidavit of Mr. Paul Colbert, attached as Exhibit C.) As a result, Cinergy respectfully requests, pending appropriate evidentiary rulings during hearings in this matter, that this Commission protect from public disclosure its contract with another corporate entity in . . .

the Cincinnati area, together with all materials derived therefrom, together with that portion of the deposition of Mr. Duff that was conducted under seal, together with all exhibits introduced under seal during Mr. Duff's deposition.

II. LAW AND ARGUMENT

The protection of confidential information is in the normal course a matter that can be addressed by agreements between counsel without the need to involve the tribunal. As this Commission is aware, however, the prior Ohio Consumers' Counsel resigned following intense media criticism surrounding the destruction of certain documents² within the possession of the Office of Consumers' Counsel. Apparently due to an acute concern with public perception of the manner in which her office maintains documents in its possession, the current Consumers' Counsel has since her appointment approved the pursuit of – or at least condoned the pursuit of – a disgraceful and wasteful campaign in which OCC adamantly refuses, under any circumstances, to recognize any claim by any entity that information relevant to proceedings before this Commission may be confidential or proprietary and legitimately subject to protection under Ohio or federal law.³

As a result, valuable resources of this Commission, of parties to proceedings before this Commission, of non-parties to Commission proceedings that own information

² Unlike information that is owned by private entities as in this and similar proceedings, the documents OCC destroyed were reports written by experts hired by OCC at taxpayer expense. This fundamental distinction seems to have escaped the OCC.

³ This Commission may wish to review the recent case of *In the Matter of Cols. Southern Power Co. and Ohio Power Co. for Authority to Recover Costs Associated with the Construction and Operation of an IGCC Generating Facility*, Case No. 05-376-EL-UNC as one example of OCC's truculence. In that case, General Electric, GE Energy, Bechtel Corporation, and Bechtel Power Corporation, entities whose business is entirely beyond the jurisdiction of this Commission, were forced to intervene in a proceeding before this Commission solely to fight an expensive and protracted battle with OCC over the issue of whether proprietary technical and financial information concerning a novel combustion process was protected by law.

relevant to this Commission's proceedings, and even of the OCC itself are being expended over and over in battles before this Commission regarding the proper protection to be afforded information produced to OCC during discovery. These battles are exasperated by the OCC's refusal, by and large, to negotiate the terms of protective agreements in good faith, and its insistence that parties instead simply enter into form protective "agreements" presented by OCC.

In this case, OCC is apparently prepared to extend its campaign through a breach of its protective agreement with Cinergy. It has informed Cinergy that it intends to place *all* materials it has received from Cinergy in the public record, thereby refusing to specifically identify the materials it will use at hearing. OCC refuses to attempt to negotiate a resolution to its disagreement with Cinergy regarding the release of protected material.

The contract which Cinergy seeks to protect contains the terms of an economic development assistance agreement between Cinergy and another corporate citizen of Ohio. The sensitive information contained therein includes information regarding the nature of the service purchased by the counterparty, the specific Cinergy subsidiary which is to provide electric service to the counterparty, the level and duration of Cinergy's assistance to the counterparty, the amount of load the counterparty may add to the Duke Energy-Ohio system subject to the agreement, and the terms upon which either party may end the agreement.

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."

Ohio Revised Code section 1333.61(D). Trade secret information is entitled to protection under Ohio's trade secrets act, R.C. §1333.61, Ohio's "public records act"⁴, R.C. §149.011, and under the federal Trade Secrets, 18 U.S.C. §1905, and Freedom of Information acts 5 U.S.C. §552(b)(4).

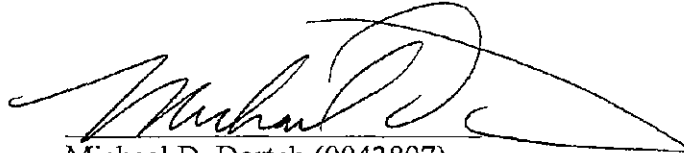
Cinergy has maintained and continues to maintain that the contract, related documents, and information derived by OCC therefrom are not public records at all. To the extent that they are introduced and accepted as evidence in these proceedings and thereby become public records, information within those documents remains entitled to protection under Ohio law.

Cinergy has asked that it be permitted to present its case to this Commission in advance of hearing. Through its attorney examiner's entry, this Commission has denied Cinergy's request, and Cinergy accepts the Commission's decision. However, Cinergy should not be required to accept OCC's misuse of information provided in confidence to

⁴ 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.)

OCC. This Commission should enter Orders directing OCC to determine what documents and information it intends to make use of, to identify those documents and that information to Cinergy, and to allow Cinergy to be heard at hearing on the relevance, admissibility, and protection to be afforded its information.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Michael D. Dortch", written over a horizontal line.

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Attorneys for
CINERGY CORP.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically upon parties, their counsel, and others through use of the following email addresses this 2^d day of March, 2007.

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Michael D. Dortch

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.)

EXHIBIT
A

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 Cinergy Corp. ("Cinergy" 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 Cinergy by conspicuously marking each document or written response as confidential or by counsel for Cinergy (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 Cinergy 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 Cinergy, specifically identifying each of the Protected Materials that could be disclosed in the public domain. OCC will serve said notice on Cinergy, to the attention of the Company's counsel identified by counsel's execution of this Agreement, by one of the following four methods: (1) hand-delivering the notice to any Cinergy 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. Cinergy 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, Cinergy 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 Cinergy 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 Cinergy, 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 Cinergy 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 Cinergy 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 Cinergy 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 Cinergy notice if OCC receives a public records request for Protected Materials. Cinergy 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 Cinergy 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 Cinergy provides OCC with said written response and OCC decides that the Protected Materials should be released, then OCC will give notice to Cinergy that OCC intends to release the Protected Materials in question.

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

CINERGY CORP.

OFFICE OF THE OHIO
CONSUMERS' COUNSEL

By: [Signature]

By: [Signature]

Title: ASSOCIATE GENERAL COUNSEL

Title: Assistant Consumers Counsel

Date: 1-17-07

Date: 1-17-07



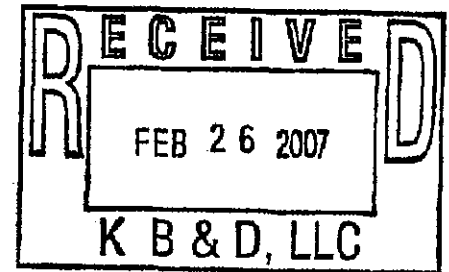
Office of the Ohio Consumers' Counsel

Your Residential Utility Advocate

Janine L. Migden-Ostrander
Consumers' Counsel

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

Michael Dortch, Esq.
Kravitz, Brown & Dortch
145 E. Rich Street
Columbus, OH 45215

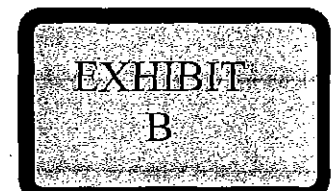


RE: Duke Remand Cases 03-93-EL-ATA, et al.
Notice Under Protective Agreement

Dear Counsel:

The Office of the Ohio Consumers' Counsel ("OCC") hereby gives Cinergy Corp. ("Cinergy") notice, pursuant to Paragraph 9 of the Protective Agreement between the OCC and Cinergy and last executed on January 17, 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 Cinergy under the Protective Agreement and the transcripts of the depositions (e.g. that of Timothy Duff who appeared for Cinergy under the OCC's subpoena) 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 Cinergy would not otherwise allow, with the right under Paragraph 9 for OCC to initiate the process that exists under law and rule for Cinergy 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 Cinergy-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.

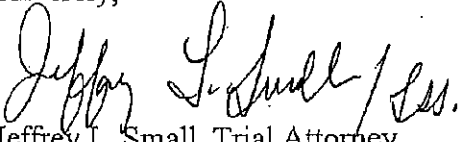


Michael Dortch, Esq.
February 23, 2007
Page Two

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 Cinergy 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 (electronic notice)

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 2nd 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

CONFIDENTIALITY NOTICE:

THIS COMMUNICATION IS INTENDED ONLY FOR THE PERSON OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN CONFIDENTIAL AND/OR PRIVILEGED LEGAL, GOVERNMENTAL MATERIAL. ANY UNAUTHORIZED REVIEW, USE, DISCLOSURE OR DISTRIBUTION IS PROHIBITED. IF YOU ARE NOT, OR BELIEVE YOU ARE NOT, THE INTENDED RECIPIENT OF THIS COMMUNICATION, DO NOT READ IT. PLEASE REPLY TO THE SENDER ONLY, AND STATE THAT YOU HAVE RECEIVED THIS MESSAGE. THEN IMMEDIATELY DELETE THIS COMMUNICATION AND ALL COPIES OF THIS COMMUNICATION. THANK YOU.

>>> "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.oh.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

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