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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the 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 to Adjust and Set its System Reliability Tracker Market Price.	Case No. 05-724-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 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 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 the Annually Adjusted Component of its Market Based Standard Service Offer.	Case No. 06-1085-EL-UNC

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REPLY TO OCC MEMORANDUM CONTRA OHA'S MOTION FOR PROTECTIVE ORDER TO PREVENT PUBLIC DISCLOSURE

Ohio Hospital Association ("OHA") hereby replies to the Office of the Ohio Consumers' Counsel's ("OCC") Memorandum Contra Motions of Duke Energy Ohio, Inc., Duke Energy Retail Sales, Cinergy Corp., Ohio Hospital Association, and Kroger for Protective Orders ("Memo Contra") filed on March 13, 2007. The OHA again urges the Public Utilities Commission of Ohio ("Commission") to grant a protective order to shield proprietary information from public disclosure by the OCC and keep confidential the subject OHA member agreements with Duke Energy Retail Sales LLC ("DERS") that are subject to a Protective Agreement ("Agreement") executed by the OCC on January 19, 2007.

It bears repeating that in the Agreement, OCC agreed to keep confidential agreements between OHA and DERS. However, barely a month later on February 23, 2007, OCC issued a letter of notice ("Notice") to the OHA indicating the OCC's intent to release in the public domain *all* of the information provided by OHA under the Agreement without any acknowledgement or regard for the protections provided by Ohio law for such information, and without any regard to the relevance of the information to the issues in this case. Indeed, the OCC is not arguing that the information is not entitled to protection under Ohio Revised Code Section ("R.C.") 149.43(A)(1)(v) and R.C. 1333.61(D) and 1333.62, rather the OCC is saying that it is simply putting the parties to their burden of proof to show that the protected information is entitled to that protection. OCC Memo Contra at p. 11. The apparent basis for OCC's tactic is its flippant comment that "the law favors the public's interest in the conducting of open proceedings by their government." OCC Memo Contra at p. 8.

The OCC never does explain how the public release of the protected material will further the public interest beyond the simple, abstract notion of "openness" for its own sake. To its dubious credit, the OCC explains its sandbagging in its Notice, where OCC states that it "signed the Protective Agreement in order to obtain prompt access to the information that OHA would not otherwise allow...." It is abundantly clear from the Notice and its subsequent actions that OCC never held any intention of maintaining the confidentiality of the information provided pursuant to its agreement with the OHA given its "belief" that the pending proceedings require that it unilaterally make public the subject confidential information. The admission of this position reflects blatant bad faith by OCC because, based upon its request, OCC never intended to abide by the Agreement.

But the OCC is forced to concede that the *law* in Ohio is that trade secrets are *not* public records, subject to the OCC's statement regarding open proceedings. So the OCC is left to its only recourse but to put the parties to their burden of proof for establishing that the information at issue is entitled to trade secret status. The OCC easily and forthrightly could have announced its intentions months earlier and the current exchange of pleadings could have been made at a time other than the eve of hearings. At a minimum, the OCC could have expressed its intentions at the time it signed the protective agreements with the parties – a simple "oh, by the way, we intend to put this information in our public testimony when we file it and you will only have seven calendar days to file for protection" would have sufficed.

It is telling that OCC did not respond to OHA's arguments underscoring OCC's bad faith and the Commission should take that factor into serious consideration in deciding this issue. Further, the OCC's gamesmanship has put the OHA in the extremely unfair and awkward position of having to defend against the public release of its confidential information contained

in testimony not provided to the OHA. The OCC served the fully redacted testimony of Beth Hixon on the OHA, ignoring the fact the OHA has every right to view the testimony of Ms. Hixon that pertains to the OHA's protected information. The OCC has *no justification* for serving testimony in this manner. Even after making a request for an unredacted copy of Ms. Hixon's testimony, the OCC has not provided the OHA with copy. This omission, aside from being improper as a matter of procedure, is highly unfair to the OHA because the OHA even assess how far out of the realm of relevancy the OCC's use of its protected information might be. The OHA should have been given the opportunity now to argue that the OCC is in violation of OAC 4901-1-24(D) through the gratuitous usage of protected materials in its testimony. The OCC, like many of the other parties to this case, has extensive experience dealing with protected materials in the context of litigated proceedings before the Commission. The OCC cannot claim that it does not understand the judicis use of confidential material. It is the common practice among litigants before the Commission to work cooperatively in drafting confidential testimony so as to reduce to an absolute minimum, or eliminate altogether, protected materials from testimony. Instead, as Ms. Hixon's redacted testimony clearly illustrates, the OCC is choosing to ignore the Commission's rules for tactical purposes. The OCC should not be rewarded for its gamesmanship at the expense of the time and effort of the examiners and the other parties to this case. OCC makes a general argument that the public records law is supported by a policy to promote open government. OHA does not deny this point. However, the OCC conveniently ignores the other side of the coin, that the law of this state is to protect trade secrets, a matter of public policy far more on point to the information at issue than whatever vague, unexplained notions of "open government" the OCC is attempting to further. OCC essentially first argues that the trade secret statutory exception to the open records statute is trivial and that the policy

supporting open records trumps the trade secret law. In fact, when trade secrets are involved, the Commission has a statutory duty to protect them. The Commission's own rules, Ohio Administrative Code ("O.A.C.") Rule 4901-1-24(D) and Rule 4901-1-27(B)(7)(e) underscore its interpretation that the trade secrets law is an exception to the open records law and takes precedence over Section 149.43.

Next, OCC makes the general statement that all of the movants for a protective order, including OHA, make "broad, summary statements" in support of their trade secret arguments. OCC Memo Contra at 11. OHA vehemently disagrees with this characterization. Furthermore, OCC's comment that OHA did not apply the trade secret test to all the documents it supplied to OCC pursuant to the confidentiality agreement is patently disingenuous. All of the documentation applies to the procurement and price of a significant cost component of the affected OHA members, and like any such component, that information is highly confidential. The confidential material OHA provided OCC consisting of agreements and e-mails pertaining to those agreements are all trade secrets.

OHA filed an affidavit of its general counsel that addressed the specifics of the criteria to support a protective order for the trade secret material that it provided OCC under the confidentiality agreement. Mr. Sites' affidavit cited the manner in which the OHA protected the confidential materials, the fact that only select staff even had access to them, the fact of the time and expense OHA had incurred in arriving at the confidential agreements, the competitive harm that would occur should those confidential documents be made public, etc. In short, Mr. Sites expressly supported all the material that OHA provided OCC pursuant to the confidentiality agreement. OHA has met its burden of proof. OCC had the burden to persuade the Commission

that OHA's proof was somehow inadequate. The OCC's Memo Contra did not even address any of the facts in OHA's affidavit. The OCC's Memo Contra fails as a matter of law.

It must be emphasized that the information to be protected pertains to agreements with Duke Energy Ohio, Inc.'s ("DE-Ohio") unregulated CRES provider, DERS. The subject matter of the agreements between OHA and its members and DERS concerns the supply of electricity, a service that has been declared by law of Ohio to be fully competitive. Revised Code Section 4928.06(F) specifically permits the Commission to grant confidentiality to competitive information. The OCC has not, and cannot, point to any countervailing statutory authority that is on point to the protected material at issue. Contrary to OCC's unsupported assertions, Ohio public policy and law specifically recognizes the need to protect certain types of information relating to competitive retail electric services, which are the subject of this controversy. The protection of trade secret information from public disclosure is consistent with the purposes of R.C. Chapter 4928 because the Commission and its staff have access to the information, but at the same time the information is protected from other competitors entering the electric retail market. Thus the protection of trade secret information as requested by the OHA will not impair the Commission's regulatory responsibilities, while OCC's attempt to interfere with the OHA's and its members' lawful contractual relationships would compromise the Commission's regulatory responsibilities.

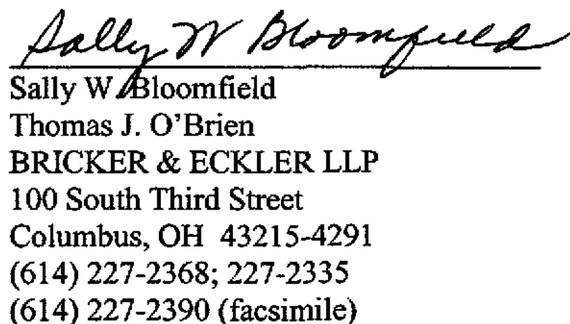
Moreover, as argued in OHA's Motion for Protective Order, OCC ignores the fact that R.C. 4901.12 and 4905.07 were amended in order to facilitate the protection of trade secrets in the Commission's possession. Am. Sub. H. B. 476, effective September 17, 1996. By referencing R.C. 149.43, the Commission-specific statutes now incorporate the provision of that statute that excepts from the definition of "public record" those records prohibited by state or

federal law to be released. R.C. 149.43(A)(1)(v). In turn, state law prohibits the release of information meeting the definition of a trade secret. R.C. 1333.61(D) and 1333.62.

The Commission has many times granted confidential treatment to contracts over which it has specific jurisdiction over telephone contracts involving regulated services, unlike the services provided under the agreements at issue here. *See, e.g.*, Case No. 07-931-TP-CTR, *In the Matter of the Spreadsheet Detailing Those Individual Customer Contracts Executed By AT&T Ohio for the Weeks Of January 2, 2007 Through January 5, 2007and an Affidavit Concerning the Associated Cost Studies for Those Contracts*. The instant case is far stronger than the telephone cases because statutory policy supports the electric competitive industry and the trade secret protections needed to encourage competitive electric suppliers.

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

WHEREFORE, the Ohio Hospital Association urges the Commission to express its disdain towards OCC's blatant gamesmanship in this proceeding and overrule OCC's Memo Contra and grant OHA's motion to protect that designated information from public disclosure.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply to OCC Memorandum Contra OHA's Motion for Protective Order was served upon the parties of record listed below this 14th day of March 2007 *via* electronic mail.

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