

FILE

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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
03-2081-EL-AAM
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 OHIO'S MOTION FOR PROTECTIVE ORDER

Pursuant to O.A.C. 4901-1-24(A) Duke Energy Ohio (DE-Ohio) 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. Despite signing Protective Agreements¹ with DE-Ohio, OCC has noticed DE-Ohio under Protective Agreements, of its intent to use "Protected Materials in these proceedings in such a manner not provided for within the Protective Agreement."² Specifically, OCC has indicated its unreasonable intent to include "all documents provided by Duke Energy [sic DE-Ohio] under the Protective Agreement."³

¹ Exhibit A, Protective Agreements.

² *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (OCC's Letter) (February 23, 2007). Attached as Exhibit B.

³ *Id.*

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business technician And Date Processed 3/2/07

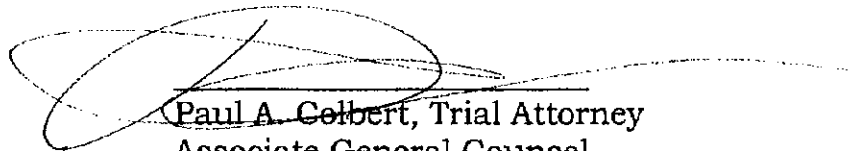
OCC is in breach of its protective agreement with DE-Ohio because it has failed to specifically identify the materials it wishes to use and to negotiate a resolution of its disagreement with DE-Ohio regarding the release of protected material. Over the course of discovery in the initial MBSSO proceeding, the Remanded MBSSO proceeding, and the now consolidated Rider adjustment cases, DE-Ohio has provided OCC with thousands of pages of confidential and proprietary trade secret documents pursuant to Protective Agreements. Not only has OCC failed to identify with any specificity which documents OCC wishes to use, it has failed to indicate the manner in which OCC intends to use them.

The protected materials provided by DE-Ohio pursuant to the Protective Agreements include but are not limited to confidential business analysis, financial analysis, internal business procedures, responses to data requests, and interrogatories, confidential internal correspondence, specific customer information including load consumption levels, and load characteristics, as well as in-depth discussions of the aforementioned items during sealed depositions which occurred as part of overly broad discovery in the above styled proceedings. Additionally, OCC appears wish to make public confidential commercial contracts of DE-Ohio's affiliates and material ancillary to such contracts, including deposition transcripts, discovered by OCC during these proceedings.

Moreover, OCC has refused to discuss the scope of the information it wishes to use or the manner it wishes to use it as contemplated by the Protective Agreements. Clearly OCC is simply attempting to make DE-Ohio's confidential and proprietary trade secret information public solely for the sake of making it public in a deliberate and oppressive effort to harass DE-Ohio and its affiliates.

For the reasons set forth in the attached Memorandum in Support DE-Ohio respectfully requests the Commission grant this Motion for Protective Order and prohibit the public disclosure of any of the protected material during the pendency of these proceedings.

Respectfully Submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Paul A. Colbert', is written over a horizontal line.

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MEMORANDUM IN SUPPORT

INTRODUCTION:

Early in these proceedings, in 2004, as well as more recently in several of the now consolidated Rider adjustment cases, Duke Energy Ohio (DE-Ohio) negotiated Protective Agreements with the Ohio Consumers' Counsel (OCC). The Protective Agreements are uniquely situated to OCC at its insistence because OCC refused to sign the traditional agreement that it had used for many years, and that is still used by all other parties to proceedings, to maintain the confidentiality of material. OCC desired a unique agreement because of an unrelated instance where OCC allegedly failed to make a report, prepared by an expert hired by OCC, public. That report had to do with First Energy's transition plan case.

Historically, the negotiation process of the Protective Agreement currently used by DE-Ohio and OCC has been a tumultuous affair. During the negotiation process, the OCC sought and received the participation of the administrative office of the Ohio Attorney General. Those discussions resulted in an agreement that OCC could sign permitting it to protect agreed upon material subsequent to a review of confidential material by its counsel at DE-Ohio's offices. OCC could protect material agreed to be confidential and the parties could litigate

the remainder through a motion for protective order before the Public Utilities Commission of Ohio (Commission). Despite the agreement of the Attorney General and OCC, represented by its Counsel Mr. Small, OCC backed out of that agreement because it decided that politically it could not enter any agreement that hinted that it might refuse to make any information public.

Therefore, after assurances that OCC would not abuse a more lenient protective agreement by the release of confidential information during cases, DE-Ohio agreed to evolving versions of the protective agreement ultimately used in these proceedings. In recent times, as similar agreements were used in other proceedings, including DE-Ohio's last distribution rate case and the merger proceedings leading to the creation of Duke Energy Corporation, it became clear that OCC intended to make public confidential information at its discretion. This process costs all parties, and the Commission resources and time.

During these now consolidated proceedings, OCC served discovery upon DE-Ohio's affiliates, Duke Energy Retail Sales (DERS) and Cinergy Corp. (Cinergy), thereby necessitating Protective Agreements with those entities as well. DE-Ohio, DERS, and Cinergy have fully cooperated with OCC and provided all materials requested pursuant to the understanding that OCC would protect the confidential nature of specified material.

By letter dated February 23, 2007, OCC sent notice to Counsel for DE-Ohio, DERS, and Cinergy stating that OCC intended to publicly use

all of the protected material provided pursuant to the Protective Agreement.⁴ OCC did not specify a purpose to the public release of protected materials other than to make the material public. OCC did not describe a public use of the protected materials in these proceedings that it could not complete with the materials remaining confidential. More significantly, OCC failed to identify with any specificity, which documents, of the thousands of pages of documents provided by DE-Ohio, and now DERS, and Cinergy pursuant to their Protective Agreements, OCC wishes to use.

DE-Ohio agrees that governmental action should occur under the scrutiny of the public eye. That does not mean however, that confidential proprietary and trade secret information, including but not limited to confidential business analysis, financial analysis, internal business procedures, responses to data requests, and interrogatories, confidential internal correspondence, not to mention unrelated affiliate commercial contacts, entered among consenting parties, should be forced into the public realm to the detriment of the signatories. It is common practice for such information to be treated as confidential, including commercial contracts. The Commission has regularly permitted such contracts and price information to remain confidential.⁵ The Commission should not permit OCC to abuse its process to make

⁴ Exhibit A. These letters were sent vial overnight delivery with signature required. Accordingly, Counsel for DERS, DE-Ohio and Cinergy did not receive notice until Monday February 26, 2007.

⁵ *In re North Coast Gas*, Case No. 06-1100-PL-AEC (Entry at 2) (February 7, 2007).

information public that would not otherwise be public, particularly, as in these proceedings, where the information requested is irrelevant to the case and could not have influenced the outcome of the proceedings.

ARGUMENT:

Ignoring the extensive discovery which occurred during the initial MBSSO proceeding for a moment, since the Court's Remand Order, the OCC requested and has been permitted robust discovery of confidential and proprietary information. All of this information was provided by DE-Ohio pursuant to a Protective Agreement.

Additionally, OCC sought discovery of confidential commercial contracts entered by DERS and Cinergy. The DERS and Cinergy contracts did not involve DE-Ohio. The Commission could not have considered the DERS and Cinergy contracts in the original litigation in these cases because neither OCC, nor any other Party, requested discovery of such contracts. OCC had requested only contracts between DE-Ohio and Parties to the proceedings.⁶ The Commission agreed to permit discovery over the objections of DE-Ohio, DERS, and Cinergy. Over 1200 pages of information and documents including but not limited to confidential commercial contracts, internal correspondence, analysis, financial transactions and related documents from DERS and Cinergy were also provided pursuant to a Protective Agreement, even though both

⁶ *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA *et. al.* (Requests for Production of Documents Seventh Set at 3) (May 18, 2004).

were non-parties to these proceedings until their recent Motions to Intervene.

Through discovery OCC now knows 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 and made the appropriate public filings, 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, except for the contract between DE-Ohio and the City of Cincinnati, OCC knows that DE-Ohio had nothing to do with the negotiation or administration of the contracts other than the administration DE-Ohio must provide to all competitive retail electric service (CRES) providers 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 DE-Ohio, DERs, Cinergy, and other Parties, of its intent to place all confidential discovered documents in the case in the public domain in these proceedings.⁷ OCC did not specify particular documents except to

⁷ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (OCC's Letter) (February 23, 2007).

give an example of its intent,⁸ did not specify particular pages or passages of any document,⁹ and did not specify any public use of any document that it could not achieve under seal in the presentation of its case.¹⁰ Since May 13, 2004, when DE-Ohio first entered a Protective Agreement with OCC in relation to the MBSSO,¹¹ thousands of pages of confidential material have been transmitted to OCC. DE-Ohio has no way to identify the information that OCC wishes to use. Despite DE-Ohio's best efforts, and the requirement that OCC negotiate a resolution in its Protective Agreement, OCC has refused to discuss the matter with DE-Ohio and its affiliates.

DE-Ohio, DERS, and Cinergy, attempted to negotiate a compromise with OCC and requested that OCC identify those documents, parts of documents, and the public use it intends so that we could reach a compromise and redact any appropriate information if necessary.¹² OCC refused to discuss the matter. Under these conditions the Commission should instruct OCC to maintain protected material as confidential. If OCC identifies specific material DE-Ohio will make appropriate arguments and motions for protective treatment of the documents identified.

Under Ohio law, the term:

⁸ *Id.*
⁹ *Id.*
¹⁰ *Id.*
¹¹ Exhibit A.
¹² Exhibit C.

'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.¹³

Trade secret information, such as that at issue here, is entitled to protection under Ohio's trade secrets act,¹⁴ R.C. §1333.61, Ohio's public records act,¹⁵ and under the federal Trade Secrets and Freedom of Information acts.¹⁶ The information that OCC seeks to make public is trade secret information maintained by DE-Ohio and counterparties in a confidential manner.

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

¹³ Ohio Rev. Code Ann. § 1333.61(D) (Baldwin 2007).

¹⁴ *Id.*

¹⁵ 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.)

¹⁶ 18 U.S.C. § 1905 (2007); 5 U.S.C. 552(b)(4) (2007).

on specified terms and conditions;...*A trade secret or other confidential research, development, commercial, or other information not be disclosed or be disclosed only in a designated way....*"¹⁷ Therefore, the Commission has express authority to order OCC not to disclose confidential information received by it during the discovery process.¹⁸

The Commission has often afforded confidential treatment to commercial contracts between parties in competitive markets.¹⁹ 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."²⁰ DE-Ohio asserts that all of the information it has marked as confidential in these proceedings relates to the DE-Ohio, DERS, or Cinergy contracts and the matters ancillary thereto.

Further, DE-Ohio must:

*[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.*²¹

In addition to the Protected Material described above, a significant amount of information obtained by OCC through discovery from DE-Ohio witnesses relates to DERS information held by DE-Ohio or its affiliated

¹⁷ OHIO ADMIN. CODE ANN. § 4901-1-24 (Baldwin 2007) (emphasis added).

¹⁸ *Id.*

¹⁹ *In re North Coast Gas*, Case No. 06-1100-PL-AEC (Entry at 2) (February 7, 2007).

²⁰ *Id.*

²¹ OHIO ADMIN. CODE ANN. § 4901:1-20-16(G)(4)(d) (Baldwin 2007) (emphasis added).

service company. DERS is a certified CRES provider. OCC should not be permitted to arbitrarily disclose information that by O.A.C. rule may not otherwise be disclosed.

II. Prior to a Commission determination regarding disclosure of confidential information OCC should specifically identify the information to be released and its relevancy to these proceedings.

OCC seems intent on presenting confidential information regarding DE-Ohio, 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. Further, despite the confidential nature of such information, OCC insists that the protected material be made public.²²

Not only is DE-Ohio prohibited from disclosing the information, as discussed above, but DE-Ohio historically protects its proprietary business information and maintains such information in a confidential manner. DE-Ohio has not had the opportunity to file such information under seal since it is not using any of the discovered information in the case because it is irrelevant to the issue in these proceedings, the affirmation of the Commission's November 23, 2004, Entry on Rehearing. Moreover, it is impossible, oppressive and unreasonably burdensome to require DE-Ohio (or any of its affiliates) to file all confidential information provided to OCC under various Protective Agreements since 2004. The Commission should not permit OCC to make such information public

²² *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (OCC's Letter) (February 23, 2007).

absent identification of the specific information OCC needs to use during these proceedings so that DE-Ohio may make a proper motion for such information to remain under seal. OCC's letter fails to specifically identify the information it intends to use publicly in these proceedings and given the thousands of pages of confidential material DE-Ohio is incapable of identifying the protected material independently.

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

Paragraph nine of the 03-93-EL-ATA Protective Agreement²³ signed by OCC states that prior to the use of protected material in a manner not intended under the Protective Agreement:

OCC shall first notify counsel for CG&E [sic DE-Ohio], *specifically identifying each of the protective materials* and indicating the proposed manner of their use. *Negotiations shall then be undertaken* by counsel for CG&E [sic DE-Ohio] and OCC in order to reach an agreement on the use of the protected materials and on the form in which the protected materials will be used."²⁴

Thus, the 03-93-EL-ATA Protective Agreement prohibits a broad identification of materials and instead, requires OCC to identify each protective material it intends to release and it requires OCC to negotiate a settlement with DE-Ohio prior to providing notice of its intent to release material.²⁵ OCC however has done neither.

First, OCC's Notice to DE-Ohio states that:

²³ Exhibit A.

²⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (DE-Ohio, OCC Protective Agreement at 3) (May 13, 2004).

²⁵ *Id.*

The specific Protected Materials the OCC intends to use in a manner not provided for in the Protective Agreement include all documents provided by Duke Energy under the Protective Agreement and the transcripts of the depositions (e.g. that of Don Wathen who appeared upon notice to Duke Energy and Greg Ficke who appeared subject to the OCC's subpoena) in which such documents were discussed or will be discussed as the above captioned cases proceed.²⁶

OCC provides no specificity regarding the documents to which it refers, nor any specific page references regarding the deposition transcripts. Thousands of pages of documents have been provided, and thousands of pages of transcripts created, during discovery. Pursuant to its Protective Agreement OCC has failed to specifically identify each Protected Material it intends to utilize. DE-Ohio believes that identification means page and line numbers, not simply entire documents.

Second, in conflict with the protective agreement, OCC did not attempt to negotiate a resolution of the issue with DE-Ohio, it simply provided notice of its intent to release. As stated in the attached affidavit,²⁷ counsel for the Duke Energy Corporation affiliated companies attempted to contact OCC and to negotiate the scope and manner of the use of the information OCC wishes to thrust into the public.²⁸ These

²⁶ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (OCC's Letter) (February 23, 2007).

²⁷ Exhibit C.

²⁸ Exhibit B.

attempts were in vain. The Commission should not permit OCC to release confidential material in breach of its agreement.

IV. The Commission should require OCC to adhere to a process that permits the exchange of information without the threat by OCC to release confidential information that is not to be used in litigation.

Several years ago, after the resignation of the prior Consumers' Counsel, OCC determined it could not sign a standard confidentiality agreement. Ultimately, the attached agreement was negotiated between DE-Ohio and OCC. DE-Ohio agreed to the Protective Agreement in the spirit of compromise to facilitate the exchange of information. Unfortunately, OCC has used the agreement to release confidential information to the public at its discretion whether the information is used during litigation or not.

For example, in DE-Ohio's merger proceeding OCC sought the release of confidential documents it obtained during informal discovery. The Commission suspended formal discovery in the merger case and there was never a hearing. Even under such circumstances DE-Ohio found itself defending the confidentiality of documents that it was under no obligation to provide to OCC and the Commission was forced to spend its time adjudicating a dispute regarding documents that were never used in the proceeding before the Commission.²⁹

This process has been repeated in recent cases not involving DE-Ohio where OCC refuses to sign agreements that will actually keep

²⁹ *In re Cinergy, Duke Power Merger*, Case No. 05-732-EL-MER *et. al.* (Entry) (March 20, 2006).

documents confidential until the Commission permits it to enter an agreement that allows it to make documents public. Case No. 05-376-EL-UNC ordering AEP to provide confidential information pursuant to a protective agreement similar to the one negotiated by DE-Ohio is an example of such a case.³⁰

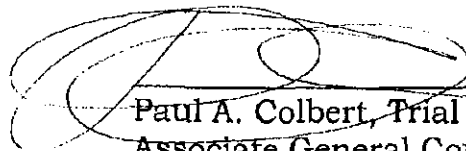
Under these circumstances DE-Ohio will no longer be able to sign protective agreements with OCC because such agreements protect nothing. Instead, DE-Ohio will be forced to seek protection from the Commission prior to the provision of documents to OCC. Pursuant to O.A.C. 4901-1-24(A)(7) the Commission has the authority to require OCC to engage in a reasonable process where it maintains the confidentiality of protected materials during the discovery phase of a case, identifies protected material it wishes to use during litigation, and the owner of the protected material has an opportunity to seek a protective order from the Commission prior to public disclosure. There should be no dispute regarding unused material. Unused material should remain confidential. DE-Ohio requests the Commission to institute such a process in these, and future, cases.

³⁰ *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.

CONCLUSION:

For the reasons more thoroughly discussed above DE-Ohio asserts that the Commission should grant this Motion for protective Order and require OCC to maintain as confidential the protected materials.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Paul A. Colbert", is written over a horizontal line. The signature is stylized with loops and a long horizontal stroke extending to the right.

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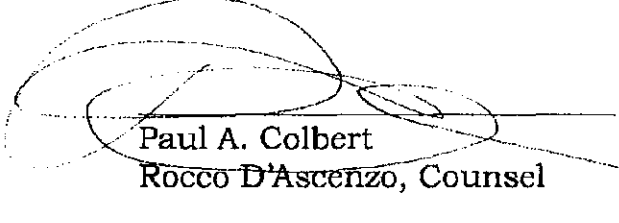
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CERTIFICATE OF SERVICE

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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RICHARDS INDUSTRIES VALVE GROUP
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CINCINNATI OH 45209
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Fax: 513-871-0105

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

PROTECTIVE AGREEMENT

This Protective Agreement ("Agreement") is entered into by and between Duke Energy Ohio, Inc. ("Duke" 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 at this time 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 Duke'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, which 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. This Proceeding shall mean the above-captioned cases, including any appeals and other cases related thereto.

3. Protected Materials shall mean documents and information furnished subject to the terms of this Agreement and so designated by Duke by conspicuously marking each document or written response as confidential. 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 this proceeding shall be provided to OCC for use by OCC in conjunction with this and related proceedings (including appeals). Nothing in this paragraph 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 the OCC's counsel of record in this proceeding and other attorneys, paralegals, economists, statisticians, accountants, consultants, or other persons employed or retained by OCC and engaged in this proceeding.

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 as Exhibit A prior to any access. OCC shall treat all Protected Materials, copies thereof, information contained therein, and writings made therefrom 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 this proceeding, 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 the proceedings herein 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 who is in possession of said Protected Materials and is bound by a protective order or a similar protective agreement with Duke 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 such a manner, other than in a manner provided for herein, that might require disclosure of such material, OCC shall first give notice to Duke, specifically identifying each of the Protected Materials that could be disclosed in the public domain. OCC will serve said notice on Duke, to the attention of Duke's designated counsel at the office designated by Duke, by one of the following four methods: (1) hand-delivering the notice to any Duke or Cinergy personnel at the designated office 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 Duke's designated counsel in person at any location. OCC will also mail a copy of the notice to the designated paralegal or Duke's second designated address; however, the notice is effective upon delivery of the notice per one of the four above-described methods regardless of notice to the designated paralegal or second address. Duke shall designate its counsel, paralegal, and address for receipt of notice by providing such designation, in writing, to OCC's trial attorney in the proceeding at the time this Agreement is executed. Duke may amend its designated counsel, paralegal and address upon providing such designation, in writing, to OCC's trial attorney in the proceeding by hand delivery or first class mail and with a confirming e-mail to OCC's trial attorney. Duke 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 demonstrating the reasons for maintaining the confidentiality of the Protected Materials. The affidavits for the motion shall set forth facts delineating that the documents or information designated as Protected Materials have been maintained in a confidential manner and the precise nature and justification for the injury that would result from the disclosure of such information. If Duke does not file such a motion within seven calendar days of Duke'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 Duke, 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 the 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 Duke the requisite seven (7) calendar days advance notice prior to the commencement of the hearing, 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 Duke 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 and other Authorized Representatives of OCC. 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 paragraph 9 or paragraph 11 of this Agreement, the burden shall be upon Duke 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 Duke notice if OCC receives a public records request for Protected Materials. Duke will have seven 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 Duke does not provide OCC with said written response within the seven 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 Duke provides OCC with said written response and OCC decides that the Protected Materials should be released, then OCC will give notice to Duke that OCC intends to release the Protected Materials in question. OCC may, however, give the notice referenced in the preceding sentence to Duke 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. Duke will have seven calendar days after its receipt of OCC's notice (of an intent to release Protected Materials) to file a pleading before an administrative agency or court of

competent jurisdiction to prevent disclosure of the Protected Materials in question. If Duke does not file at the administrative agency or court of competent jurisdiction within seven 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 Duke does file with an administrative agency or court of competent jurisdiction to prevent disclosure of Protected Materials, then, OCC shall maintain the confidentiality of such materials until the administrative agency or court make a determination regarding disclosure. Notice in this paragraph will be effected in the same manner as the notice in paragraph 9 of this agreement. If, in connection with OCC's non-disclosure of Protected Materials, an administrative agency or 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 Duke 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, the OCC shall certify in writing to Duke that all copies of the Protected Materials have been returned or disposed of pursuant to the records retention schedules unless introduced into the record under seal. OCC may keep one copy of each document designated as Protected Material that was offered into the record 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 Duke's determination regarding any material identified as confidential by Duke and

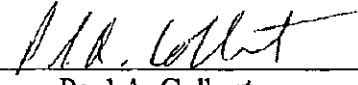
to pursue those remedies that may be available to OCC before an administrative agency or court of competent jurisdiction.

14. By entering into this Protective Agreement, Duke 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 Duke before the Commission or court.

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 parties.

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

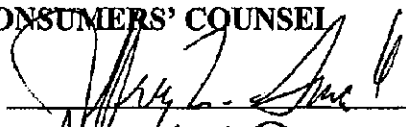
DUKE ENERGY OHIO, Inc.

By: 
Paul A. Colbert

Title: ASSOCIATE GENERAL COUNSEL
Senior Counsel

Date: 10-3-06

**OFFICE OF THE OHIO
CONSUMERS' COUNSEL**

By: 
Title: Assistant Consumers Counsel

Date: 10-3-06

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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 October 3, 2006, 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 the proceeding as defined in paragraph two of the Protective Agreement. I acknowledge that a violation of this Certificate constitutes a breach of obligations to the Company hereby assumed.

Name: _____

Company: _____

Address: _____

Telephone: _____

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Regulation of the Fuel)	
And Economy Purchased Power)	
Component of the Cincinnati Gas &)	Case No. 05-806-EL-UNC
Electric Company's 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.)	

PROTECTIVE AGREEMENT

This Protective Agreement ("Agreement") is entered into by and between The Cincinnati Gas & Electric Company ("CG&E" 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 at this time 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 CG&E'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, which 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. This Proceeding shall mean the above-captioned cases, including any appeals and other cases related thereto.

3. Protected Materials shall mean documents and information furnished subject to the terms of this Agreement and so designated by CG&E by conspicuously marking each document or written response as confidential. 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 this proceeding shall be provided to OCC for use by OCC in conjunction with this and related proceedings (including appeals). Nothing in this paragraph 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 the OCC's counsel of record in this proceeding and other attorneys, paralegals, economists, statisticians, accountants, consultants, or other persons employed or retained by OCC and engaged in this proceeding.

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 as Exhibit A prior to any access. OCC shall treat all Protected Materials, copies thereof, information contained therein, and writings made therefrom 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 this proceeding, 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 the proceedings herein 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 who is in possession of said Protected Materials and is bound by a protective order or a similar protective agreement with CG&E 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 such a manner, other than in a manner provided for herein, that might require disclosure of such material, OCC shall first give notice to CG&E, specifically identifying each of the Protected Materials that could be disclosed in the public domain. OCC will serve said notice on CG&E, to the attention of CG&E's designated counsel at the office designated by CG&E/Cinergy, by one of the following four methods: (1) hand-delivering the notice to any CG&E or Cinergy personnel at the designated office 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 CG&E's designated counsel in person at any location. OCC will also mail a copy of the notice to the designated paralegal at CG&E's second designated address; however, the notice is effective upon delivery of the notice per one of the four above-described methods regardless of notice to the designated paralegal. CG&E shall designate its counsel, paralegal, and address for receipt of notice by providing such designation, in writing, to OCC's

trial attorney in the proceeding at the time this Agreement is executed. CG&E may amend its designated counsel, paralegal and address upon providing such designation, in writing, to OCC's trial attorney in the proceeding by hand delivery or first class mail and with a confirming e-mail to OCC's trial attorney. CG&E 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 with respect to each of the identified Protected Materials demonstrating the reasons for maintaining the confidentiality of the Protected Materials. The affidavits for the motion shall set forth facts delineating that the documents or information designated as Protected Materials have been maintained in a confidential manner and the precise nature and justification for the injury that would result from the disclosure of such information. If CG&E does not file such a motion within seven calendar days of CG&E'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 CG&E, 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 the hearing transcript that contains Protected Materials shall be sealed and shall itself be subject to this Agreement.

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hearing, 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 CG&E the requisite seven (7) calendar days advance notice of intent to utilize Protected Materials prior to 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 and other Authorized Representatives of OCC. 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 paragraph 9 or paragraph 11 of this Agreement, the burden shall be upon CG&E 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 CG&E notice if OCC receives a public records request for Protected Materials. CG&E will have seven 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 CG&E does not provide OCC with said written response within the seven 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 CG&E provides OCC with said written response and OCC decides that the Protected Materials

should be released, then OCC will give notice to CG&E that OCC intends to release the Protected Materials in question. OCC may, however, give the notice referenced in the preceding sentence to CG&E 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. CG&E will have seven calendar days after its receipt of OCC's notice (of an intent to release Protected Materials) to file a pleading before an administrative agency or court of competent jurisdiction to prevent disclosure of the Protected Materials in question. If CG&E does not file at the administrative agency or court of competent jurisdiction within seven 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 CG&E does file with an administrative agency or court of competent jurisdiction to prevent disclosure of Protected Materials, then OCC shall maintain the confidentiality of such materials until the administrative agency or court makes a determination regarding disclosure. Notice in this paragraph will be effected in the same manner as the notice in paragraph 9 of this agreement. If, in connection with OCC's non-disclosure of Protected Materials, an administrative agency or 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 CG&E 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, the OCC shall certify in writing to CG&E that all copies of the Protected Materials have been returned or disposed of pursuant to the records retention schedule unless introduced into the record under seal. OCC may keep one copy of each

document designated as Protected Material that was offered into the record 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.

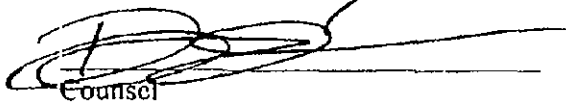
13. By entering into this Protective Agreement, OCC does not waive any right that it may have to dispute CG&E's determination regarding any material identified as confidential by CG&E and to pursue those remedies that may be available to OCC before an administrative agency or court of competent jurisdiction.

14. By entering into this Protective Agreement, CG&E 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 CG&E before the Commission or court.

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 parties.

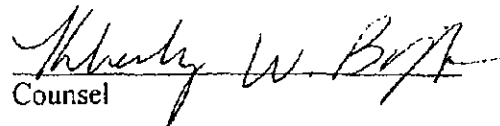
16. This Agreement shall be governed by and construed in accordance with the laws of the State of Ohio.

CG&E
BY:

Paul A. Colburn

Counsel

11/15/05
Date

OCC
BY:

Henry W. Boff

Counsel

10/31/05
Date

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
The Cincinnati Gas & Electric Company to)	
Modify its System Reliability Tracker	)	Case No. 05-724-EL-UNC
Component of its Market-Based Standard)	
Service Offer.)	

PROTECTIVE AGREEMENT

This Protective Agreement (Agreement) is entered into by and between The Cincinnati Gas & Electric Company (CG&E 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 at this time 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 CG&E's obligation to produce (including the manner of production) any requested material.

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11. OCC will promptly give CG&E notice if OCC receives a public records request for Protected Materials. CG&E will have seven 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 CG&E does not provide OCC with said written response within the seven 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 CG&E provides OCC with said written response and OCC decides that the Protected Materials should be released, then OCC will give notice to CG&E that OCC intends to release the Protected Materials in question. OCC may, however, give the notice referenced in the preceding

sentence to CG&E 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. CG&E will have seven calendar days after its receipt of OCC's notice (of an intent to release Protected Materials) to file a pleading before an administrative agency or court of competent jurisdiction to prevent disclosure of the Protected Materials in question. If CG&E does not file at the administrative agency or court of competent jurisdiction within seven 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 CG&E does file with an administrative agency or court of competent jurisdiction to prevent disclosure of Protected Materials, then OCC shall maintain the confidentiality of such materials until the administrative agency or court makes a determination regarding disclosure. Notice in this paragraph will be effected in the same manner as the notice in paragraph 9 of this agreement. If, in connection with OCC's non-disclosure of Protected Materials, an administrative agency or 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 CG&E will pay such awarded fees to the third party that was awarded the fees so that OCC and OCC's employee and official 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, the OCC shall certify in writing to CG&E that all copies of the Protected Materials have been returned or disposed of pursuant to the records retention schedule unless introduced into the record under seal. OCC may keep one copy of each document designated as Protected Material that was offered into the record 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 CG&E's determination regarding any material identified as confidential by CG&E 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, CG&E 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 CG&E before the Commission or court.

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 parties.

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

CG&E
BY:


Counsel

6/12/05
Date

OCC
BY:

a m. 105
Counsel

6/14/05
Date

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
The Cincinnati Gas & Electric Company to)	
Modify its System Reliability Tracker	)	Case No. 05-724-EL-ATA
Component of its Market-Based 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 _____ 2005, 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 writings, 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 as defined in paragraph two and paragraph four of the Protective Agreement. I acknowledge that a violation of this Certificate constitutes a breach of obligations to the Company hereby assumed.

Name: _____

Company: _____

Address: _____

Telephone: _____

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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)	
Procedures for Capital Investment in its	)	Case No. 03-2081-EL-AAM
Electric Transmission and Distribution System	)	Case No. 03-2080-EL-ATA
And to Establish a Capital Investment Reliability)	
Rider to be Effective After the Market)	
Development Period)	

PROTECTIVE AGREEMENT

This Protective Agreement (" Agreement") is entered into by and between The Cincinnati Gas & Electric Company ("CG&E") and 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 CG&E and OCC at this time 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 CG&E'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 which will allow their use for the purposes of this proceeding while protecting such data from voluntary disclosure to non-participants, all without a

prior ruling by the Public Utilities Commission of Ohio ("Commission") regarding whether the information is deserving of protection.

2. "This Proceeding" shall mean the proceeding upon the application for approval of the Company's filings before the Commission under the above-captioned cases.

3. "Protected materials" shall mean documents and information furnished subject to the terms of this Agreement and so designated by CG&E by conspicuously marking each document or written response as confidential. Protected materials shall not include any information or documents contained in the public files of the Commission or any other state or federal agency and shall not include documents or information which at, or prior to, commencement of these proceedings, is or was in the public domain, or which enters into the public domain as a result of publication by CG&E.

4. "Protected materials" provided in the context of this proceeding shall be provided to OCC for use by OCC solely in conjunction with this proceeding. Nothing in this paragraph is intended to preclude the use of any portion of the confidential information that becomes part of the public record.

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

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 as Exhibit A prior to any access. OCC shall treat all protected materials, copies thereof, information contained therein, and notes made therefrom as proprietary and confidential, and shall safeguard such protected materials, copies thereof, information contained therein, and

notes made therefrom so as to prevent voluntary disclosure to any persons other than OCC's Authorized Representatives.

7. In the event that any OCC's Authorized Representative ceases to be engaged in this proceeding, 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, then such person shall treat such protected materials in the manner set forth in Section 12 hereof as if the proceedings herein 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 make copies of the protected materials or notes regarding its contents but agrees not to voluntarily disclose said copies or notes to any individual or entity who has not executed a Non-Disclosure Certificate.

9. If OCC desires to include, utilize, or refer to any protected materials in such a manner, other than in a manner provided for herein, that might require disclosure of such material, OCC shall first notify counsel for CG&E, specifically identifying each of the protected materials and indicating the proposed manner of their use. Negotiations shall then be undertaken by counsel for CG&E and OCC in order to reach agreement on the use of the protected materials and on the form in which the protected materials will be used.

If CG&E is unwilling to waive objection to said use of such protected materials, CG&E shall provide to the Commission, not later than five (5) business days after the receipt of OCC's notification, a motion and affidavits with respect to each of the identified protected materials demonstrating the reasons for maintaining the confidentiality of the protected materials. The affidavits shall set forth facts delineating that the documents or information designated as protected materials have been maintained in a confidential manner and the precise nature and justification for

the injury that would result from the disclosure of such information. All objections and arguments related to the protected materials shall be conducted *in camera* by the Commission, closed to all parties except CG&E and counsel for CG&E and counsel and other Authorized Representatives of OCC. Until such time as the Commission decides on the proposed use of the protective material, that portion of the hearing transcript that refers to such protected materials shall be temporarily sealed and shall itself be subject to this Agreement.

Any portions of the protected materials that the Commission has deemed to be protected that ultimately are admitted into evidence shall be filed in sealed, confidential envelopes or other appropriate containers endorsed to the effect that they are sealed from the public record pursuant to O.A.C. 4901-1-24(d). In the event that OCC's utilization of the protected materials does not provide CG&E the requisite five (5) business days advance notice prior to the commencement of the hearing, OCC shall file such protected materials under seal for consideration by the Commission until such time as the Parties or the Commission decide otherwise. OCC shall, however, endeavor to provide CG&E the requisite five (5) business days advance notice of intent to utilize protected materials prior to the commencement of the hearing and shall in any case provide as much notice as possible.

Examination of a witness concerning the protected materials that the Commission has deemed to be protected shall be conducted *in camera*, closed to all parties except CG&E and counsel for CG&E and counsel and other Authorized Representatives of OCC. Transcripts of the closed hearing shall be stored in sealed envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to the Commission's order.

10. It is expressly understood that upon motion or application made in accordance with paragraph 9 of this Agreement the burden shall be upon CG&E to show that any materials labeled as protected pursuant to this Agreement should be considered confidential.

11. In the event that any person seeks any protected materials by a public records

request, the OCC will immediately give notice to counsel for CG&E of the identity of the requested protected materials so that CG&E will have an opportunity, within a reasonable period of time, to demonstrate to the OCC which portions of the requested protected materials constitute trade secrets or are otherwise exempt from disclosure under any other exemptions provided by the public records law. If OCC agrees as to the exempt status of any of the requested protected materials, OCC will protect those materials unless otherwise ordered by the Court. If OCC disagrees as to the exempt status of any of the requested protected materials, prior to release of said materials OCC will give notice to counsel for CG&E identifying those materials or portions thereof so that CG&E may seek any appropriate legal action CG&E deem necessary, including injunctive relief, to prevent disclosure of those materials. Upon notification to OCC by CG&E that CG&E will be pursuing legal action to protect said materials, the OCC will wait a reasonable period of time for such action to be initiated. If no such action is initiated, the OCC may disclose the records requested.

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, the OCC shall certify in writing to CG&E that all copies of the protected materials have been returned or disposed of pursuant to the records retention schedule unless introduced into the record under seal. OCC may keep one copy of each document designated as protected material that was offered into the record 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 CG&E's determination regarding any material identified as confidential by CG&E and to pursue those remedies that may be available to OCC before the Commission.

14. By entering into this Protective Agreement, CG&E does not waive any right they may have to object to the discovery of confidential material on other grounds and to pursue those remedies that may be available to CG&E before the Commission.

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 parties.

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

CG&E
BY:

John J. Konecny
Counsel

5/13/04
Date

OCC
BY:

Jeffrey L. Small
Counsel

5-13-04
Date

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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)	
Procedures for Capital Investment in its	)	Case No. 03-2081-EL-AAM
Electric Transmission and Distribution System	)	Case No. 03-2080-EL-ATA
And to Establish a Capital Investment Reliability)	
Rider to be Effective After the Market)	
Development Period)	

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 May 13, 2004, 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 the "proceeding" as defined in paragraph two of the Protective Agreement. I

acknowledge that a violation of this Certificate constitutes a breach of obligations to the Company hereby assumed.

Name:

John L. D. [Signature]

Randall G. [Signature]
Federal [Signature]

Henry [Signature]
Stall

Company:

Ohio Consumers' Counsel

Address:

10 W. Broad Street

Telephone:

614-466-8574



Office of the Ohio Consumers' Counsel

Your Residential Utility Advocate

Janine L. Migden-Ostrander
Consumers' Counsel

February 23, 2007

(via overnight delivery, signature required)

Paul Colbert, Esq.
Duke Energy Ohio, Inc.
139 East Fourth Street
Cincinnati, OH 45201

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 Ohio, Inc. ("Duke Energy") notice -- pursuant to Paragraph 9 of all the protective agreements executed between the OCC and Duke Energy both before and after the remand from the Ohio Supreme Court regarding the 03-93-EL-ATA case and cases at any point consolidated with that case -- 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 Duke Energy under the Protective Agreement and the transcripts of the depositions (e.g. that of Don Wathen who appeared upon notice to Duke Energy and Greg Ficke who appeared subject to 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 agreements in order to obtain prompt access to the information that Duke Energy would not otherwise allow, with the right under Paragraph 9 for OCC to initiate the process that exists under law and rule for Duke Energy 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.

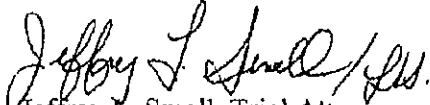
The OCC believes that the pending proceedings require treatment of the Duke Energy-provided information in the public domain. The presumption under Ohio law is that PUCO proceedings are to be conducted in the public light. R.C. 4901.12; R.C. 4905.07. In these cases, the material subject to the Protective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

Paul Colbert, 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 Duke Energy 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 loan 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.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

CONFIDENTIALITY NOTICE:

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THEN

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