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Date: August 17, 2007

To: Mr. Alan R. Schriber, Chairman
Public Utilities Commission of Ohio

Fax Number: (614) 752-8351

From: Stanley M. Chesley and Paul DeMarco

Re: Public Records Request of July 26, 207

Number of pages: 5 (including cover sheet)

Message/Comments:

Please see accompanying correspondence.

If you have trouble receiving this fax, please contact Christopher D. Stock or Judy Fisk at (614) 223-0000

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FOR IMMEDIATE ATTENTION
VIA FACSIMILE (614) 752-8351

Mr. Alan R. Schriber, Chairman
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215-3793

Re: Waite, Schneider, Bayless & Chesley's Public Records Request (July 26, 2007)

Dear Chairman Schriber:

In light of the parties' memoranda responding to your August 8, 2007 entry, this letter shall serve to clarify Waite, Schneider, Bayless & Chesley's position with respect to its July 26, 2007, public records request.

I. The Appropriate Standard.

Regrettably, the parties opposing disclosure of the requested side agreements both misstate and ignore key aspects of Ohio's public records law. The Ohio Revised Code is clear: "Except as provided in section 149.43 of the Revised Code...all proceedings of the public utilities commission *and all documents* and records in its possession are public records." R.C. 4901.12 (emphasis added). Moreover, R.C. 4905.07 provides that "[a]ll facts and information in the possession of the public utilities commission shall be public, and all reports, records, files, books, accounts, papers, and memorandums of every nature in its possession shall be open to inspection by interested parties or their attorneys."

In other words, the Revised Code's default rule is that, unless the Public Records Act specifically exempts a document, everything in the PUCO's possession is open to public scrutiny. As such, Duke Energy Ohio's ("Duke's") repeated attempts to somehow characterize these side agreements as "not records" is utterly irrelevant. Not even Duke can dispute the side agreements constitute *documents* in the PUCO's possession. As such, the requested side agreements are subject to public scrutiny absent any operative exception.

The question, therefore, is whether R.C. 149.43 exempts these side agreements from a public records request, which, as the following discussion illustrates, Duke has failed to demonstrate.[1]

II. The Opposing Parties' Failure to Demonstrate the Side Agreements Constitute Trade Secrets.[2]

Although the parties opposing disclosure claim that the requested side agreements constitute trade secrets, they have failed to meet their burden under *State ex rel. Besser v. Ohio State University*, 89 Ohio St.3d 396, 398 (2000), which states that "[a]n entity claiming trade secret status bears the burden to identify and demonstrate that the material is included in categories of protected information under the statute" pursuant to a six-factor analysis. *Id.* at 399-400; O.A.C. 4901-1-27(B)(7)(e). Failing to support their claims under the *Besser* analysis, the parties opposing disclosure provide nothing more than conclusory assertions as to why these side agreements must be labeled trade secrets. *See also* OCC Memorandum, at 6 (August 16, 2007) (noting that the *Besser* factors "were not carefully analyzed in the various motions for protection that were submitted regarding documents that are now subject to a public records request").

Duke argues that the Protective Order prohibits disclosure on the ground that the requested side agreements are "trade secrets," but the Commission has never explicitly designated them as such. Indeed, the transcript page the opposing parties cite to support their claim simply states "[t]he various motions for protective orders will be granted at this time for a period of 18 months from today on the condition that the granting of those protective orders may be modified by the Commission if it deems appropriate to do so in light of the actions it takes." *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA et al., at Tr. 9 (March 19, 2007).

With this statement, the Attorney Examiner provided no guidance as to her rationale for granting the protective order. While it is possible she granted the protective order on the basis that these side agreements constitute trade secrets, it is equally possible that she granted the protective order to prevent the OCC from reneging on the protective agreement it ostensibly entered into with Duke *et al.* to keep certain documents shrouded from the public view—a central argument supporting Duke's motion for a protective order. Duke Protective Order, at 1-2 (March 2, 2007) (claiming that "OCC is in breach of its protective agreement with DE-OHIO" and asking the Commission to "prohibit the public disclosure of any of the *protected material* during the pendency of these proceedings"). This public records request is not subject to any protective agreements between the parties; and, therefore, to the extent the Attorney Examiner's

[1] Industrial Energy Users-Ohio ("IEU-Ohio") spends the majority of its brief discussing why these side agreements are neither relevant nor admissible in the Consolidated Cases, but the question of whether the side agreements are relevant or admissible in the administrative hearing context is simply immaterial to this public records request.

[2] In connection with this letter's assertions, we incorporate by reference the OCC's contention that the requested side agreements do not constitute "trade secrets" sufficient to exempt them from disclosure under the Public Records Act. *See* OCC Memorandum, at 7-9 (August 16, 2007).

rationale for granting the protective order is based on the parties' underlying protective agreements, that order cannot circumvent the presumption in favor of disclosure.

As the Supreme Court of Ohio has stated, "the precept guiding our analysis is that the inherent, fundamental policy of R.C. 149.43 is to promote open government, not restrict it." *Besser*, 89 Ohio St.3d at 398. "Consistent with this policy," the Supreme Court noted, "exceptions to disclosure must be strictly construed against the public records custodian, and the custodian bears the burden to establish the applicability of an exception." *Id.* (internal citations omitted). Because the Attorney Examiner's ruling does not explain the basis for granting the protective order, the law requires the PUCO to resolve any doubt as to the protective order's reach in favor of disclosing the side agreements. Accordingly, the parties opposing disclosure have not met their burden of demonstrating that R.C. 149.43(v) would prohibit their public release.[3]

When examining all the evidence, therefore, the parties have failed to establish that the side agreements sought constitute trade secrets. As a result, no public records exception exists to prevent disclosure of the requested documents and R.C. 4901.12 requires the PUCO to produce the requested side agreements.

III. Even if the PUCO Decided the Requested Side Agreements Somehow Constituted Trade Secrets, Allright Parking *and its Progeny Still Require Disclosure.*

The Supreme Court has held that, in the context of a public records request, if a court has concluded through an *in camera* review that the requested documents contain trade secrets, the court must then determine whether those documents were submitted in connection with the administrative body's decision or if the documents are ancillary to the administrative body's decision. *State ex rel. Allright Parking v. City of Cleveland*, 63 Ohio St.3d 772, 776 (1992); *State ex rel. Seballos v. SERS*, 70 Ohio St.3d 667, 670-671 (1994). If the documents have been submitted in connection with the administrative body's decision, "then the trade secret exception to disclosure does not apply, and the documents must be made available for inspection and copying," regardless of whether they have been previously declared "trade secrets." *Id.*

In this case, the Supreme Court already has ruled that the side agreements Duke *et al.* have submitted to the PUCO are "relevant to the commission's determination of whether all parties engaged in 'serious bargaining.'" *OCC v. PUCO*, 2006-Ohio-5789, ¶ 84. Accordingly, *Allright Parking* dictates the outcome here: regardless of the Commission's determination with respect to the parties "trade secrets" claims, the Public Records Act requires the PUCO to

[3] Here too, one of the parties, in this case Duke Energy Retail Sales ("DERS"), attempts to obfuscate the issue. DERS cites *Adams v. Metallica, Inc.*, 143 Ohio App.3d 482, 489 (C.A.1 2001) for the proposition that since the requested side agreements are in the PUCO's possession as a result of discovery, they should be excluded from disclosure. *Metallica*, however, strongly supports disclosure: "The Civil Rules clearly contemplate that discovery documents on file with the court shall not be sealed from the public absent 'good cause shown' thus creating a presumption in favor of public access to such materials." As a result, DERS, like its brethren Duke and IEU-Ohio, has failed to cite to any case law to support its argument for exempting the side agreements from disclosure.

disclose the requested side agreements because they were submitted in connection with the PUCO's Rate Stabilization Plan determination. *Allright Parking*, 70 Ohio St.3d at 671.

IV. Conclusion.

Perhaps recognizing the law is against them, the parties opposing the public records request resort to arguing, in essence, that disclosing the side agreements will unfairly prejudice them and/or put them at a competitive disadvantage. *See, e.g.*, Duke's Memorandum, at 6; IEU-Ohio's Memorandum, at 6. The Supreme Court, however, has indicated that democracies function best in the light of day; and, as long as the information sought is not excepted under R.C. 149.43, public records requests should be granted freely. Since the parties opposing disclosure have failed to meet their burden of demonstrating that the requested side agreements should be excepted, the PUCO should adhere to the Public Records Act and provide the requested side agreements.

I appreciate your timely attention to this matter; and, as always, should you have any questions, please feel free to contact me.

Very truly yours,

Stanley M. Chesley

Paul DeMarco
Waite, Schneider, Bayless & Chesley Co., L.P.A.

cc: Lauren Lubow, Principal Attorney General, Constitutional Offices Section
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