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Of Counsel:
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August 28, 2007

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

Re: Waite, Schneider, Bayless & Chesley Public Records Request (July 26, 2007): *In the Matter of the Consolidated Duke Energy Ohio, Inc., Rider Adjustment Cases:* 03-2079-EL-AAM 03-93-EL-ATA; 03-2080-EL-AAM; 03-2081-EL-ATA; 05-724-EL-UNC; 05-725-EL-UNC; 06-1068-EL-UNC; 06-1069-EL-UNC; 06-1085-EL-UNC

Dear Ms. Jenkins:

Enclosed please find a copy of the correspondence that was mailed to Mr. Alan Schriber at the Public Utilities Commission with regard to the above-referenced matter.

Thank you.

Very truly yours,

Michael D. Dortch

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MD:kw
Enclosure

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August 28, 2007

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

RE: Waite, Schneider, Bayless & Chesley Public Records Request (July 26, 2007): *In the Matter of the Consolidated Duke Energy Ohio, Inc., Rider Adjustment Cases*: 03-2079-EL-AAM 03-93-EL-ATA; 03-2080-EL-AAM; 03-2081-EL-ATA; 05-724-EL-UNC; 05-725-EL-UNC; 06-1068-EL-UNC; 06-1069-EL-UNC; 06-1085-EL-UNC

Dear Chairman Schriber:

Duke Energy Retail Sales, LLC ("DERS") has reviewed the arguments posited by Messrs. Chesley and DeMarco (collectively, "Mr. Chesley") in their letter to you dated August 17, 2007. Since these arguments were presented in letter form, DERS chooses to respond in similar fashion. DERS is aware that you docketed Mr. Chesley's letter, and DERS will therefore file a copy of its response in each of the dockets indicated in the subject line above.

DERS respectfully submits that Mr. Chesley ignores several points that are critical to the determination of whether DERS' confidential commercial contracts are subject to disclosure pursuant to Ohio's Public Records Act (the "Act"). As the following makes clear, the DERS contracts that were submitted to the Public Utilities Commission of Ohio (the "Commission" or the "PUCO") under a protective order, and which have unfairly been referred to as "side agreements," are not subject to Ohio's Act.

First, Mr. Chesley criticizes several parties, particularly IEU Ohio, because they analyzed whether the contracts are relevant and admissible in the Consolidated Cases. Mr. Chesley contends that the relevancy and admissibility of the contracts is unrelated to whether the Commission need disclose the documents pursuant to the Act. In fact, the opposite is the case. The relevancy and admissibility of the contracts is determinative of whether the contracts are, in fact, "public records" as defined by the Act.

As the Act specifically states, and as the Ohio Supreme Court has emphasized, materials which are not used to "document the organization, functions, policies, decisions, procedures, operations, or other activities of the [public] office" are not public records. R.C. § 143.011(G); *see also State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St. 3d 160, 166–67, 2005-Ohio-4384, ¶ 29. Indeed, "simply because an item is received and kept by a public office does not transform it into a record under R.C. 149.011(G)." *Id.* Thus, if the information contained in the contracts is never used by the PUCO to analyze the merits in the Consolidated Cases, then the information will never have "serve[d] to document the activities of a public office." *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 98 Ohio St. 3d 145, 149, 2002-Ohio-7117, ¶ 9.

In *State ex rel. Beacon Journal Publishing Co.*, the Ohio Supreme Court held that responses to juror questionnaires were not "records" within the meaning of the Act because "the trial court . . . did not use the requested information in rendering its decision . . . ." *Id.* at ¶ 12. Just as the trial court in *State ex rel. Beacon Journal Publishing Co.* did not consider juror questionnaires in reaching its decisions, the PUCO has yet to consider the contracts in reaching its decision in the Consolidated Cases. Therefore, because the contracts are not "records" within the meaning of the Act, they cannot be "public records" subject to disclosure. *See id.* at ¶¶ 12–13. Indeed, disclosing information that the agency has not even yet decided has relevance to its decision on the merits "would reveal little or nothing about . . . [the] agenc[y] or [its] activities." *State ex rel. Dispatch Printing Co.*, 106 Ohio St. 3d at 165, 2005-Ohio-4384, ¶ 27.

Second, Mr. Chesley asserts that the Ohio Supreme Court has already held that the "side agreements" are relevant to the Commission's determination of the merits of the Consolidated Cases. Mr. Chesley's observation reflects his unfamiliarity with this case, and is simply not accurate. The Supreme Court found only that **DE-Ohio's** "side agreements" "**might** be relevant to deciding whether negotiations between DE-Ohio and parties to its RSP case were fairly conducted." *Ohio Consumers' Counsel v. Pub. Util. Comm'n of Ohio*, 111 Ohio St. 3d 300, 321, 2006-Ohio-5789, ¶ 86 (emphasis added). Specifically, after a discussion of the agreements OCC sought in discovery from DE-Ohio, OCC's suspicions regarding those agreements, and the possible relationship between DE-Ohio's agreements and the stipulation to which DE-Ohio was a party, the Court held that "**the Commission** must determine whether there exists sufficient evidence that the stipulation was the product of serious bargaining." (Emphasis supplied.) The Court concluded its analysis regarding the DE-Ohio agreements with the following language:

> Any such concessions or inducements apart from the terms agreed to in the stipulation ***might be relevant*** to deciding whether negotiations were fairly conducted. The existence of concessions or inducements would seem particularly relevant in the context of open settlement discussions involving multiple parties, such as those that purportedly occurred here. If there were special considerations, in the form of side agreements among the signatory parties, one or more parties ***may*** have gained an unfair advantage in the bargaining process. Therefore we hold that the commission erred in denying discovery of this information based on lack of relevancy." (Emphasis supplied.)

Thus, the Court certainly did not find DERS' agreements of any relevance whatsoever. In fact, DERS' agreements were not even before the Court. Instead, the Court merely held that this Commission erred by ruling that agreements to which DE-Ohio is a party are irrelevant without first examining those agreements. The question of the ultimate relevance of DE-Ohio's agreements was expressly left to the Commission. *See id.* at ¶ 94. Given that the underlying dispute is between the OCC and DE-Ohio, and involves this Commission's approval of DE-Ohio's RSP proposal, it should be clear that **DERS'** contracts have even less relevance to the resolution of the Consolidated Cases.

Finally, even should this Commission *eventually* determine that DERS' contracts have some relevance to the DE-Ohio stipulation entered into by the parties in DE-Ohio's RSP case, public policy still requires that DERS' contracts not be released pursuant to a public records request because this Commission is obligated to protect the trade secrets of those who appear before it, including even the entities it regulates, let alone entities that it does not regulate. The purpose of the Act is "to expose government activity to public scrutiny," *State ex rel. Dispatch Printing Co.*, 106 Ohio St. 3d at 165, 2005-Ohio-4384, ¶ 27 (quoting *United States Dept. of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 497 (1994)), not to disclose the confidential information and trade secrets of private actors who are involved in administrative proceedings.

In short, the policy of open government is only one of the policies of this State for which the Commission bears responsibility. The policy of open government is necessarily tempered by competing public policies. This is especially true where the information requested contains trade secrets. *See State ex rel. Besser v. Ohio State Univ.* (2000), 87 Ohio St. 3d 535, 539–40. Indeed, "a contrary [find]ing would afford no protection for an entity's trade secrets that are created or come into the possession of an Ohio public office . . . ." *Id.*

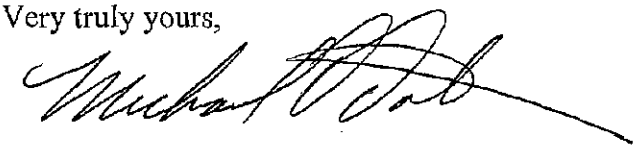
In this case, the information within DERS' agreements, (e.g., the identity of customers, prices, price formulas, and communications regarding the same) is the very essence of "trade secret" information. As such, the information contained in the agreements, and communications regarding those agreements, is valuable to DERS and to DERS' customers, and would have tremendous value to DERS' competitors. Thus, even assuming the disclosure of DERS' contracts would promote the public policy of open government, it would devastate the public policy reflected in government's duty to protect proprietary information.

This case has enormous significance. If the Commission determines that it is unable or unwilling to protect the proprietary information of both regulated and unregulated entities that appear before this Commission, it will soon find such entities reluctant to participate in this Commission's processes and unwilling to provide this Commission with information except when compelled. At the extreme, some entities may choose not to do business in Ohio rather than risk the public disclosure of proprietary information. It is critical that the Commission not adopt policies that unduly frustrate the competitive landscape in Ohio. The PUCO should not

disclose DERS' confidential, proprietary contracts, or any information or communications regarding those contracts.

It is DERS' hope that this matter can finally be concluded, and DERS is confident that the PUCO will demonstrate that it will not allow its office to be a vehicle of unfair competition.

Very truly yours,



Michael D. Dortch

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