

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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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 Service)	Case No. 03-93-EL-ATA
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)	
Procedures for Certain Costs Associated)	Case No. 03-2079-EL-AAM
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)	Case No. 03-2080-EL-ATA
System And to Establish a Capital)	
Investment Reliability Rider to be)	
Effective After the Market Development)	
Period)	

**DUKE ENERGY OHIO'S
MOTION FOR CONTINUATION OF THE PROTECTIVE ORDER**

By this motion, DE-Ohio seeks a continuation of the Order issued on May 13, 2004 and on May 2, 2006, determining that this information is proprietary and should be treated as confidential. DE-Ohio requests that the Commission continue the Order issued on May 2, 2006, to indicate that this data, filed under seal, should be maintained at the Commission in a separate file which has restricted access. Finally, DE-Ohio requests that

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the Commission issue an Order governing the access to the data by any other person; specifically, access to the data should be limited to parties agreeing to comply with the Order and prohibiting any person who has access to the data from revealing it to any other person, except as provided in the Order.

Respectfully submitted,

A handwritten signature in cursive script, reading "Paul A. Colbert", written over a horizontal line.

Paul A. Colbert

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MEMORANDUM IN SUPPORT

Certain information in this above-captioned case was granted protection by the Entry dated May 13, 2004 and May 2, 2006. This information contained projected market pricing information dating from 2003. This information should remain confidential as it would provide a competitive advantage to competitive retail and wholesale electric service providers. The confidential price projections might permit a competitor to replicate or estimate DE-Ohio's price forecasts. Such an ability would give a competitive advantage to alternative providers and would damage DE-Ohio's ability to operate in the competitive market.

APPLICABLE LAW AND REGULATION

The Commission and its Staff are prohibited from revealing any information gathered within the scope of its investigation and regarded by the utility as confidential. Ohio Revised Code 4901.16 provides:

Except in his report to the public utilities commission or when called on to testify in any court or proceeding of the public utilities commission, no employee or agent referred to in section 4905.13 of the Revised Code shall divulge any information acquired by him in respect to the transaction, property, or business of any public utility, while acting or claiming to act as such employee or agent. Whoever violates this section shall be disqualified from acting as agent, or agent in any other capacity under the appointment or employment of the commission.¹

DE-Ohio hereby maintains that the data contained in the Envelope previously filed under seal must be protected under Revised Code Section 4901.16 as it was gathered as part of an investigation and was not released in testimony or any report released in these cases. The Commission's Rules of Practice also provide that the Commission, the legal director, the deputy legal director, or the attorney examiner:

¹ Ohio Rev. Code Ann. § 4901.16 (Baldwin 2006).

may issue any order which is necessary to protect the confidentiality of information contained in the document, to the extent that state or federal law prohibits release of the information, including where the information is deemed by the commission, the legal director, or the attorney examiner assigned to the case to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purposes of title 49 of the revised code.²

Ohio Admin. Code § 4901-1-24(D). It is pursuant to this regulation that DE-Ohio is making its motion.

- I. **Records of non-governmental businesses are not “Records” pursuant to R.C. 149.011 “created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office” and therefore such records are not “Public Records” under R.C. 149.43.³**

Under R.C. 149.43, records become “Public Records” subject to a Public Records Request when they are “created or received by or [come] under the jurisdiction of any public office of the state or its political subdivisions, [and serve] to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.” Upon submission to the Commission as exhibits and acceptance as evidence, the confidential information came under the Commission’s jurisdiction. None of the information requested, however, was created or received by the Commission “to document the organization, functions, policies, decisions, procedures, operations, or other activities” of the Commission.⁴ Therefore, although under the Commission’s jurisdiction, none of the information came under its jurisdiction for any of the enumerated purposes.

² Ohio Admin. Code Ann. § 4901-1-24(D)

³ Ohio Rev. Code Ann. § 149.011 (Baldwin 2007).

⁴ Ohio Rev. Code Ann. § 149.011 (Baldwin 2007).

DE-Ohio's position is supported by the Ohio Supreme Court's decision in *State Ex. Rel. Besser v. Ohio State University*, 87 Ohio St. 3d 535, 721 N.E.2d 1044 (2000). In an Opinion permitting The Ohio State University, a public governmental entity, to maintain confidential trade secrets in the face of a Public Records request, the Court held:

[W]e must presume that the General Assembly intended that trade secrets *retain their confidential nature*. See *State ex rel. Stinay v. Sodders* (1997), 80 Ohio St. 3d 224, 231-232, 685 N.E.2d 754, 760. *A contrary holding would afford no protection for an entity's trade secrets that are created or come into the possession of an Ohio public office and would render the remedies in R.C. 1333.61 through 1333.69 meaningless when a request for these records is made under R.C. 149.43. "We must also construe statutes to avoid unreasonable or absurd results."* *State ex rel. Cincinnati Post v. Cincinnati* (1996), 76 Ohio St. 3d 540, 543-544, 668 N.E.2d 903, 906; R.C. 1.47(C).⁵

As in the *Besser* case, DE-Ohio's provision of trade secrets and other confidential information to the Commission through the regulatory process deserves protection. Absent the transfer to the Commission the documents at issue do not constitute "Records" pursuant to R.C. 149.011 or "Public Records" under R.C. 149.43. Likewise, transfer of the documents to the Commission through the regulatory process, pursuant to a valid protective order, does not change the nature of the documents such that the confidential information becomes "Public Record" in the hands of the Commission. Any other interpretation would produce the absurd and unintended result that private entities cannot protect confidential information when such information is subject to discovery, even where the entity subject to discovery is not a party to the case.

⁵ *State Ex. Rel. Besser v. Ohio State University*, 87 Ohio St. 3d 535, 540, 721 N.E.2d 1044, 1048-1049 (2000) (emphasis added).

The information did not lose its character as private commercial confidential documents and become a public record under R.C. 149.43 because they were the subject of a discovery request. Importantly, DE-Ohio has consistently maintained their confidentiality and, in fact, properly moved the Commission to maintain the information as confidential. The Attorney Examiners granted that motion in an Order issued on May 13, 2004 and on May 2, 2006 that remains as appropriate now as it did when first granted. The Commission should protect its ability to obtain and protect confidential information and interpret the information obtained through discovery in these proceedings in the same manner as the *Besser* Court and reject the Public Records request at issue.

II. Because the exhibits, testimony, and pleadings are not R.C. 149.011 "Records" or R.C. 149.43 "Public Records," the Commission is not under any obligation to make such records public upon request.

In order to conduct its business the Commission must rely upon all stakeholders, including utilities, competitive providers, and consumers, to provide it with information. Some of that information, including the information at issue in this instance, is confidential in nature. If properly transferred to the Commission pursuant to the requirements of O.A.C. 4901-1-24, the confidential information of a private entity does not become "Record" or "Public Record" and the Commission maintains the authority to protect such information under seal.

If the Commission determines that it must adopt a standard to review such information for possible release DE-Ohio recommends that the Commission adopt the standard set forth by the Court in *Dann v. Taft* where the Court held that when a public record is not at issue a requester must demonstrate a particularized need for the information and the Commission:

May find a particularized need when disclosure is sought by a uniquely qualified representative of the general public who demonstrates that disclosure of particular information to it will serve the public interest. Particularized need, however, does not exist when privileged information can be obtained elsewhere. Whether a requester's asserted need is sufficient is a matter of law.⁶

WHEREFORE, for the reasons stated herein, DE-Ohio requests that the Commission:

Grant continued confidential treatment to the previously filed information submitted previously under seal.

Dated at Cincinnati, Ohio, this 17th day of September, 2007.

DUKE ENERGY OHIO



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⁶ *State Ex Rel. Dann v. Taft*, 109 Ohio St. 3d 364, 378-379, 848 N.E.2d 472, 486-487 (2006) (emphasis added)

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion of Duke Energy Ohio was served on the following parties this 17th day of September, 2007 by regular U. S. Mail.


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