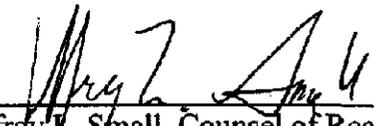


should also be held in abeyance until after the Commission is able to consider any arguments presented in responsive pleadings, pursuant to Ohio Adm. Code 4901-1-12, after the Company provides the information that is the subject of its Motion for Protection and provides proper notice of its pleading.

The reasons for granting the OCC's Motion to Hold Ruling in Abeyance are further set forth in the attached Memorandum in Support. The OCC also submits its Memorandum Contra Motion for Protective Order in this combined filing.

Respectfully submitted,

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**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's Review)
and Adjustment of the Fuel and Purchased) Case No. 07-723-EL-UNC
Power and the System Reliability Tracker)
Components of Duke Energy Ohio, Inc.,)
and Related Matters.)

In the Matter of the Application of Duke)
Energy Ohio, Inc. to Adjust and Set its) Case No. 07-975-EL-UNC
2008 System Reliability Tracker.)

**MEMORANDUM IN SUPPORT AND
MEMORANDUM CONTRA MOTION FOR PROTECTION**

I. INTRODUCTION AND STATEMENT OF FACTS

Pursuant to the Commission's November 23, 2004 Entry on Rehearing in *In re Duke Energy's Post-MDP Service Plan*, Case Nos. 03-93-EL-ATA, et al., Duke Energy's plan was approved to establish a "fuel and purchased power" (or "FPP") component of the Company's standard service generation rate, as well as a "system reliability tracker" (or "SRT") for the following year. In a recent action regarding the FPP in Case No. 07-723-EL-UNC ("Case 07-723"), the Commission directed its Staff to issue a request for proposal to perform audits of the FPP and SRT for the July 1, 2006 through June 30, 2007 as well as the July 1, 2007 through December 31, 2008 time periods in order to assist in its annual review of the FPP and SRT. The OCC moved to intervene in Case 07-723 on July 11, 2007.

On September 4, 2007, Duke Energy filed its Application that initiated Case No. 07-975-EL-UNC (“Case 07-975”) concerning the SRT rate for 2008.¹ On that same date, Duke Energy filed a single Motion for Protection (“Motion”) in both Case 07-723 and Case 07-975. Duke Energy explains in its Motion that it seeks a Commission determination that its filings contain confidential, trade secret information.²

Duke Energy did not serve the OCC with its Motion in Case 07-723, and its Motion does not contain a certificate of service stating that any other party to Case 07-723 was served. Furthermore, as revealed in pleadings in Case 07-723 -- the OCC’s Motion to Compel filed on August 30, 2007 and Duke Energy’s Memorandum Contra Motion to Compel filed on September 17, 2007-- the OCC has no reason to believe that Duke Energy will release to the OCC the information that is the subject of its Motion for Protection without an order by the Commission.

II. MOTION TO HOLD RULING IN ABEYANCE

Duke Energy failed to serve its Motion in Case 07-723 pursuant to Ohio Adm. Code 4901-1-05. That rule requires the following:

All pleadings or papers filed with the commission subsequent to the original filing or commission entry initiating the proceeding shall be served upon all parties, no later than the date of filing. Such pleadings or other papers shall contain a certificate of service.

The Commission initiated Case 07-723 on June 20, 2007, and a Company application followed. The OCC moved to intervene on July 26, 2007, a motion that was the Company did not appose. Duke Energy failed to serve its Motion as required by the

¹ The OCC moved to intervene in Case 07-975 on September 18, 2007.

² See, e.g., Motion at 3.

Commission's rules. Its failure to attach a certificate of service also violates Ohio Adm. Code 4901-1-05, and further suggests that the Motion was not served on any party.

The failure to serve further complicates the matter complained of in the OCC's Motion to Compel. Duke Energy refuses to provide the OCC with information that it alone has determined deserves confidential treatment, and the Company has failed to provide notice to the OCC regarding its efforts to obtain such a determination from the Commission.³ The Commission's rules were promulgated to prevent such actions.

Duke Energy's actions prejudice the OCC in its efforts to evaluate the merits of the Motion for Protection. The actions of Duke Energy deny the OCC the details of the subject matter covered by the Company's Motion for Protection. Under such circumstances, a ruling on the Motion for Protection should be held in abeyance until such time as Duke Energy provides the entire information over which it seeks confidential treatment to the OCC, and until such time that Duke Energy provides proper notice to all parties regarding the Motion for Protection pursuant to the Commission's rules (whichever period is longer). The ruling should also be held in abeyance until after the Commission is able to consider any arguments presented in responsive pleadings, pursuant to Ohio Adm. Code 4901-1-12, after the Company provides the information and properly notifies parties regarding its requests.

III. MEMORANDUM CONTRA MOTION FOR PROTECTION

The Motion for Protection must satisfy the requirements of Ohio Adm. Code 4901-1-24(D) and other applicable Ohio law. Ohio Adm. Code 4901-1-24(D)(1)

³ Lead counsel for the OCC discovered the Motion while reviewing the PUCO's docket card regarding pleadings connected with the OCC's Motion to Compel.

provides that “[a]ll documents submitted pursuant to paragraph (D) of this rule should be filed with only such information redacted as is essential to prevent disclosure of the allegedly confidential information.” The Commission stated in a 2004 case:

The Commission has emphasized, in *In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, Entry issued November 23, 2003, that:

[a]ll proceedings at the Commission and all documents and records in its possession are public records, except as provided in Ohio’s public records law (Section 149.43, Revise Code) and as consistent with the purposes of Title 49 of the Revised Code. Ohio public records law is intended to be liberally construed to ‘ensure that governmental records be open and made available to the public ... subject to only a few very limited exceptions.’ *State ex. rel. Williams v. Cleveland* (1992), 64 Ohio St. 3d 544, 549, [other citations omitted].⁴

Faced with demands for “wholesale removal of the document from public scrutiny,”⁵ the Commission reviewed several documents and determined in each case how documents could be redacted “without rendering the remaining document incomprehensible or of little meaning....”⁶

The circumstances do not permit the OCC to conclude at this juncture whether Duke Energy has fully complied with the above-stated requirement regarding minimizing the information redacted. The Company, however, has shown itself to be insensitive to the requirements of Ohio Adm. Code 4901-1-24(D)(1) in recent filings. For example, an Entry in PUCO Case No. 03-93-EL-ATA, et al., requested that parties evaluate the detailed treatment of documents (e.g. titles, identities, dates, payments, quantities and

⁴ *In re MxEnergy, Inc.*, Case No. 02-1773-GA-CRS et al., Entry at (3) (September 7, 2004) (notations in original).

⁵ *Id.* at 3.

⁶ *Id.*

load information) accumulated by the Commission in that case for purposes of deciding whether some information should be released in response to a public records request.⁷

Duke Energy's response stated that it "object[ed] to the release . . . of *any information* covered by the protective order"⁸ Duke Energy's position -- apparently based upon Company objectives regardless of Ohio law that requires the individualized evaluation of documents -- suggests that Duke Energy's redactions in connection with the Motion for Protection should be subjected to close scrutiny by the Commission following a period for parties such as the OCC to submit memoranda.

In its recent submission in PUCO Case No. 03-93-EL-ATA, et al., Duke Energy stated that it was "concerned about the Commission's ability to maintain confidential information as confidential and, if it cannot, the chilling effect such a development will have on the exchange of information between all stakeholders"⁹ Duke Energy's categorical statement does not show any recognition of the competing objective to conduct the public's business before the public. Duke Energy has unreasonably restricted access to information in the above-captioned cases, including the information required pursuant to the service requirements for pleadings. The Commission should not grant the Motion for Protection without providing interested parties such as the OCC the opportunity for more detailed scrutiny of the Company's filings under seal in order to

⁷ *In re Duke Energy's Post-MDP Service Plan*, Case Nos. 03-93-EL-ATA, et al., Entry at 2 (August 8, 2007).

⁸ *Id.*, Duke Energy's Memorandum Opposing Modification of the Protective Order at 1 (August 16, 2007) (emphasis added).

⁹ *Id.* at 2. The statement that the Commission should "maintain confidential information as confidential" begs the question of what constitutes confidential information. That was the determination about which the Entry dated August 8, 2007 sought comment. Duke Energy's response reflects its apparent view that it, as a holder of much information that is important to case decisions but also as self-interested party, should determine which documents should be deemed confidential. The Company's view finds no support under Ohio law.

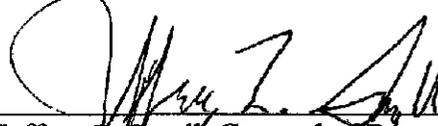
determine if the materials alleged by Duke as confidential in fact warrant protection.

IV. CONCLUSION

The Commission should not rule on the Motion for Protection until such time as Duke Energy provides the entire information over which it seeks confidential treatment to the OCC, and until such time that Duke Energy properly serves its pleading on all parties. The Commission should thereafter make its determination, but only after providing the OCC and any other interested party an opportunity to comment upon the Motion for Protection. The Commission's determination should consider the objective of assuring the public concerning the means by which utility rates are determined.

Respectfully submitted,

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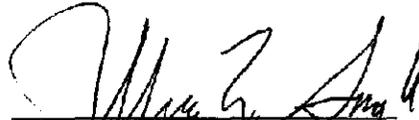
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing The Office of the Ohio Consumers' Counsel's *Motion to Hold Ruling in Abeyance* has been served upon the below-stated counsel, via regular U.S. Mail, postage prepaid, this 19th day of September, 2007.


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