FILE

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 Service Offer Pricing and to Establish a Pilot Alternative Competitively-Bid Service Rate Option Subsequent to Market Development Period	)	Case No. 03-93-EL-ATA
In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Modify Current Accounting Procedures for Certain Costs Associated With The Midwest Independent Transmission System Operator	)	Case No. 03-2079-EL-AAM
In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Modify Current Accounting Procedures for Capital Investment in its Electric Transmission And Distribution System And to Establish a Capital Investment Reliability Rider to be Effective After the Market Development Period	)	Case No. 03-2081-EL-AAM Case No. 03-2080-EL-ATA

DUKE ENERGY OHIO'S REPLY TO THE OHIO CONSUMERS' COUNSEL'S MEMORANDUM CONTRA DUKE ENERGY OHIO'S MOTION FOR CONTINUATION OF THE PROTECTIVE ORDER

On September 17, 2007, Duke Energy Ohio, Inc., (DE-Ohio) filed its motion for continuation of the Public Utilities Commission of Ohio's (Commission) protective order last issued on May 2, 2006.[1] The information that DE-Ohio sought, and still seeks, to protect is related to its market-based standard service offer (MBSSO) charges, which in

[1] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (Entry) (May 2, 2006).

its current form, are in effect until December 31, 2008. If the information were made public at this time, it would have a detrimental effect on competition, as it would give competitive suppliers keen insight into how DE-Ohio continues to view the competitive market, meet its load and generation requirements, and how the Company evaluates risks including potential revenue loss due to load switching at various levels.

Although the Office of the Ohio Consumers' Counsel (OCC) contested DE-Ohio's original motion for a protective order, it did not dispute that the information DE-Ohio sought to protect was a trade secret.[2] Similarly, OCC did not contest either DE-Ohio's May 2, 2006, Motion for Protective Order or the 2006 Entry extending protective treatment of the confidential information for an additional eighteen-month period.[3]

The information, which DE-Ohio maintains is still confidential, was first described in DE-Ohio's May 5, 2004, Motion for Protection and supporting Affidavit (Motion and Affidavit).[4] The Motion and Affidavit fully explained how the information qualifies for the trade secret exclusion under Ohio Public Record's Act.[5] Specifically, the confidential information is described as consisting of "various types of financial projections and purchase power costs—projected financial information prepared for credit ratings agencies and bond rating agencies; internal projections of lost revenue to customer switching; and internal projections of revenues."[6] The Affidavit details the value of this information in that public release would "enable others to gain an unfair advantage over [DE-Ohio]... for items such as fuel costs, or could subject [DE-Ohio] to

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2 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (Entry at 2) (May 13, 2004). Rather, OCC's opposition was based upon access to the information since DE-Ohio and OCC were not able to come to terms on a Protective Agreement.

3 *Id.*

4 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (Motion for Protection at 6) (Mar 5, 2004).

5 *Id.* at 5-6.

6 *Id.*

possible sanctions as forward looking statements under *Apple Computer Sec Litigation*, 889 F.2d 1109, 1113 (9th Cir. 1989) and related cases."[7]

The Commission recognized the proprietary and confidential nature of this information, and granted DE-Ohio's initial request. The Commission itself described the information as relating "to the Provider of Last Resort (POLR) charges proposed in [DE-Ohio's] electric reliability and rate stabilization plan (ERRSP)."[8] Due to changes to DE-Ohio's MBSSO made by the Commission in its orders in these proceedings, including avoidability, the information relates to both DE-Ohio's price to compare and its provider of last resort charges. As evidenced by the Commission's May 2, 2006 Entry, the reasons set forth in the Motion and Affidavit, and as articulated in the Commission's May 13, 2004 Entry, were sufficient to warrant continued confidential treatment of the information for an additional 18 months. The same holds true today.

The reasons supporting DE-Ohio's claim to the confidential and trade secret nature of this information have not changed with time. DE-Ohio used the protected information to support the various MBSSO pricing structures presented during the course of the MBSSO proceeding in 2004. This same information supports the method ultimately approved by the Commission in its November 23, 2004, Entry on Rehearing setting DE-Ohio's market price methodology through December 31, 2008. This same methodology constitutes DE-Ohio's current MBSSO pricing structure and remains in effect until at least December 31, 2008. Releasing the information at this time will allow competitors to capitalize on this information for the remainder of the current MBSSO structure and potentially beyond. The confidential trade secret information, if released,

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7 *Id.*

8 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (Entry at 2) (May 13, 2004).

may permit competitive retail and wholesale electric service providers to replicate DE-Ohio's price forecasts and therefore its market strategy. Release of the trade secret information would provide competitors with access to DE-Ohio's capacity and energy purchase strategy in the market placing DE-Ohio at a competitive disadvantage to the detriment of all customers including those represented by OCC. Additionally, the forecast model is designed by, and proprietary to, DE-Ohio. Release of this trade secret information may permit others to replicate DE-Ohio's forecast model depriving DE-Ohio of the value associated with the model. Accordingly, this information maintains its value today, and should remain confidential. As plainly stated in its motion to continue protective treatment, the Commission should maintain confidential treatment.

DE-Ohio's recently filed Motion for Continuance of the Protective Order filed September 7, 2007, sets forth the legal reasons supporting the confidential nature of the information. For the sake of brevity, DE-Ohio will not restate these arguments but respectfully incorporates them as if rewritten herein.

Furthermore, the information currently on file under seal and thereby afforded confidential treatment in the above caption proceedings constitutes trade secret information in accordance with Ohio's Uniform Trade Secret Act and relevant jurisprudence.

The definition of Trade Secret contained in R.C. 1333.61(D) is as follows:

> "Trade secret" means information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any 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.[9]

In analyzing a trade secret claim, the Ohio Supreme Court has adopted the following factors as relevant to determining whether a document constitutes a trade secret:

> (1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, i.e., by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information.[10]

As explained above, the information that DE-Ohio seeks continued protection qualifies as trade secret information for precisely the same reasons articulated in the Company's initial Motion and Affidavit and its follow-up Motion for Continuance of Protective Order filed in May 2006.

The value of this information is apparent and has not changed over time. This confidential trade secret information was developed at great expense and through the

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9 Ohio Rev. Code Ann. § 133361(D) (Baldwin 2007).

10 *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St. 3d 396, *732 N.E.2d 373* (2000).

diligent efforts of highly trained individuals spending immeasurable hours of time analyzing various market scenarios, risk tolerances, system requirements, and pricing structures. Competitors could not duplicate this information absent disclosure of Company's trade secrets. The information constitutes business plans and financial information regarding the Company and its activities, projections and forecasts in the competitive retail and wholesale markets for electric service. The information is not generally known and not readily ascertainable by other persons, namely, competitive suppliers, who can obtain economic value from its disclosure.

The information has independent economic value in that it contains DE-Ohio's support for it market-pricing structure approved in 2004 and currently in effect. DE-Ohio has not only taken reasonable steps to protect the information, but the Company has undergone significant efforts to continue to maintain the confidential and proprietary status of the trade secret information. Only employees with a legitimate need to know, have access to the information. DE-Ohio filed under seal the disputed information in support of its case in these proceedings. The Commission has twice granted DE-Ohio's requests to protect this information. Furthermore, while DE-Ohio has provided the information to Parties in these proceedings through discovery, it has only done so through the vehicle of negotiated Protective Agreements.

Despite the OCC's arguments to the contrary, DE-Ohio is not asking the Commission to do anything novel in this instance. DE-Ohio is merely requesting that the Commission recognize and continue to protect information that the Commission has already agreed is confidential on two prior occasions.

The majority of the trade secret information at issue consists of information provided in discovery, and under a Protective Agreement with OCC and other Parties. Most of this trade secret information was not admitted into evidence, and consequently, was not relied upon by the Commission in its decisions. Therefore, by definition, it cannot constitute a record.[11] The transfer of confidential information to the Commission under seal and provided under protective agreements, does not make the information a record. If the document cannot constitute a record, then, by definition, it cannot be a public record. A confidential document does not transform into a public record simply because it is provided through discovery, especially when it is obtained pursuant to either a Court order or a Protective Agreement. OCC's position results in the absurd conclusion that a private entity has no right to protect its proprietary information unless such information qualifies as a trade secret.[12] The legislature did not intend such a ridiculous result.

To the extent confidential information is provided to the Commission, filed under seal during a proceeding, is admitted into evidence and is used by the Commission in reaching its decision, then DE-Ohio would agree that such information would constitute a record under R.C. 149.011. However, such a record does not necessarily constitute a public record. A record may be afforded protection as a trade secret, or for other reasons not applicable to these cases, and therefore, remain excluded from disclosure as a public record providing it meets the standard set forth in R.C. 1333.61(D).

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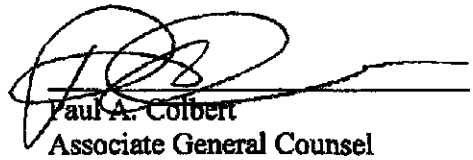
11 Ohio Rev. Code Ann. § 149.011 (Baldwin 2007).

12 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (Memorandum Contra at 6) (October 5, 2007).

Even if the Commission does not agree with this position, however, all of the information continues to qualify as a trade secret as fully explained above.

OCC's *Memorandum Contra* is simply another instance in which OCC is merely seeking to disclose a utility's trade secret information to the public for the sake of making it public. DE-Ohio requests that the Commission overrule OCC's objection and continue the Order issued on May 2, 2006 for an additional 18-month period, and 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 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,



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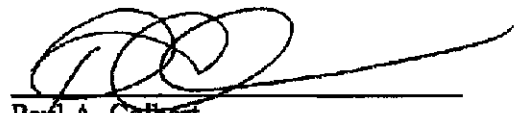
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply of Duke Energy Ohio was electronically served on the following parties this 9th day of October 2007.



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