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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) Case No. 03-93-EL-ATA
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, INC.'S, CINERGY CORP.'S
AND DUKE ENERGY RETAIL SALES, LLC'S
MEMORANDUM IN RESPONSE TO THE JANUARY 23, 2008
MOTIONS FILED BY
THE OFFICE OF OHIO CONSUMERS' COUNSEL

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I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") demands that this Commission and the parties to this case permit it to indulge, over and over and over again, in its own peculiar obsession for the public disclosure of information that is the private property of others and **protected by federal and state law** from further disclosure. It is indisputable that in this case this Commission thoroughly considered every one of OCC's arguments concerning this subject. It is also indisputable that this Commission concluded in its October 24, 2007 Order on Remand¹ that OCC's demands for full – even if unlawful – disclosure of such information is improper and misguided.

Having lost one battle regarding confidential information, the OCC now signals an intent to continue the fight on a word-by-word basis. This Commission should not permit OCC to continue wasting the resources of this Commission and of the parties to this proceeding.

This Commission's Order on Remand reflects a careful analysis of the nature of confidential trade secret information, a correct analysis of the law of trade secrets, and this Commission's own *in camera* review of a number of the documents in dispute in this proceedings. As this Commission concluded:

We agree with the parties seeking protective treatment that certain portions of the material in question have actual or potential independent economic value derived from their not being generally known or ascertainable by others, who might derive economic value from their disclosure or use. Specifically, we find that the following information has actual or potential independent economic value from its being not generally known or ascertainable: customer names, account numbers, customer social security or employer identification numbers, contract termination dates or other termination provisions, financial consideration in each contract, price of generation referenced in each contract, volume of generation covered by each contract, and terms under which any options may be exercisable.²

¹ In the Matter of the Consolidated Duke Energy Ohio, Inc. Rate Stabilization Plan Remand and Rider Adjustment Cases, Case Nos. 03-93-EL-ATA, 03-2079-EL-AAM, 03-2080-EL-ATA, 03-2081-EL-ATA, Order on Remand, pp. 10-17 (hereafter, "Order on Remand.")

² Order on Remand, p. 15.

The Commission then evaluated the parties' own efforts to protect the information they asked this Commission to also protect, concluding that the parties advocating confidential treatment had indeed ". . . sought, at all junctures, to keep this information confidential. . . ." ³ Finally, the Commission carefully considered the competing public policy issues raised by the interplay between Title 49 of the Revised Code and Ohio's Trade Secret Act⁴ and expressly concluded that the "*maintenance of this trade secret information as confidential is consistent with the purposes of Title 49.*"⁵

The Commission then expressly tasked Duke Energy-Ohio, Inc., Duke Energy Retail Sales, LLC, and Cinergy Corp. (referred to hereafter collectively as the "'Duke Entities'"), to work with other parties to the contracts to protect all confidential trade secret information contained in the attachments to Ms. Hixon's testimony in a manner intended to permit the documents to be filed in the public record while preserving the trade secrets of the parties to those documents:

In order to accomplish this task, Duke shall work with the parties to the side agreements to prepare a redacted version of the confidential information attached to the prefiled testimony of Ms. Hixon and will file that redacted version within 45 days of the date of this order on remand. Each party will then be required to redact all other sealed documents that such party filed with the Commission.⁶

The Duke Entities complied with this Commission Order, filing redacted versions of the documents attached as exhibits to Ms. Hixon's testimony on December 7, 2007.

Even before redacted versions of the documents could be filed, however, the OCC demonstrated its continued disdain for Ohio's trade secrets laws. Simply repeating arguments already considered and rejected by the Hearing Examiners and then finally by this Commission itself, OCC stridently argued yet again that this Commission's ruling authorized the Duke

³ Order on Remand, pp. 16-17.

⁴ Ohio Revised Code section 1331.61

⁵ Order on Remand, p. 17 (emphasis supplied).

⁶ *Id.*

Entities and others to shield "*nearly every word*"⁷ of every document in dispute. OCC argued yet again that a decision by this Commission to protect trade secret information is contrary to Ohio law and the duty of this Commission.⁸ OCC argued yet again that the parties urging this Commission to protect their information had failed to carry their burden of proving that such information was in fact "trade secrets,"⁹ and – yet again – that the protection of the parties' trade secrets protected "illegality."¹⁰ OCC even argued – again – that the parties had themselves been lax in protecting the information, seizing upon an obviously inadvertent failure to designate a single page of a document as confidential.¹¹ Finally, OCC claimed, again, that if purged of the sorts of trade secret information expressly identified by this Commission, the agreements would be rendered meaningless, apparently arguing that Ohio's public records act "trumps" Ohio's trade secrets act.¹² This Commission properly denied OCC's arguments on rehearing, stating only: "This matter was fully discussed in the order on remand."¹³

II. LAW AND ARGUMENT

A. OCC's Interpretation Of This Commission's Entry Is Patently Erroneous.

Through its latest fusillade,¹⁴ OCC insists that it, rather than the entities to whom the information belongs, should determine in the first instance what should and what should not be disclosed to the public. OCC's proposal is obviously unworkable. The Commission can always consider, as it chooses, whether those to whom the information belongs have redacted too much.

⁷ OCC's Nov. 27, 2007 Application for Rehearing, p. 32, emphasis supplied.

⁸ OCC's Application for Rehearing, pp. 30-32.

⁹ OCC's Application for Rehearing, pp. 33-34.

¹⁰ OCC's Application for Rehearing, p. 36.

¹¹ Id.

¹² OCC's Application for Rehearing, p. 32.

¹³ In the Matter of the Consolidated Duke Energy Ohio, Inc. Rate Stabilization Plan Remand and Rider Adjustment Cases, Case Nos. 03-93-EL-ATA, 03-2079-EL-AAM, 03-2080-EL-ATA, 03-2081-EL-ATA, Entry on Rehearing, p. 9 (hereafter, "Entry on Rehearing.")

¹⁴ OCC's Jan. 23, 2008, Motion for Protective Order Pending Commission Granting OCC's Motion for Approval of Redactions and Motion for Approval of Such Redactions (hereafter, "OCC's Motion")

The Commission cannot, however, protect such information if it decides OCC has filed documents redacting too little.

Specifically, OCC claims that the redacted material submitted by the Duke Entities far exceeds the scope of the materials identified for redactions by this Commission, and that, "[w]hatever the reasons for the additional redactions, the parties have not closely followed the PUCO's application of Ohio law regarding trade secrets."¹⁵

In support of this latest attempt to obtain full – even if unlawful – disclosure of information which belongs to others, OCC seizes upon the list of items this Commission identified for redaction and argues, in effect, that this Commission's list of eight items is both exclusive and exhaustive. Thus, according to the OCC, *only*:

- customer names
- account numbers
- customer social security or employer identification numbers,
- contract termination dates or other termination provisions,
- the financial consideration in each contract,
- the price of generation referenced in each contract,
- the volume of generation covered by each contract, or
- the terms under which any options may be exercisable¹⁶

are to be protected from disclosure, and *not one word* beyond these eight categories of information constitutes a trade secret that may be redacted, no matter how sensitive the topic or what the particular word, phrase, sentence or paragraph might reveal about the business operations of the entities seeking to protect that information from disclosure.

Neither the Duke Entities nor apparently any other party to this proceeding – save of course OCC – understands this Commission's directions to be as literal as OCC insists this Commission intended those directions to be. Nor is such a literal definition of the term trade

¹⁵OCC's Motion, p. 5-6.

¹⁶Order on Remand, pp. 15 and 44.

secret reasonable or consistent with the accepted view that definitions of trade secrets must inherently be both broad and flexible. As a federal court¹⁷ addressing the subject stated:

The concept of trade secrets is a chimerical, unanalyzed concept which arises as a secondary consequence of the primary precept that the law expects everyone to adhere to the rudimentary requirements of good faith. *DuPont Powder Co. v. Masland*, (1917) 244 U.S. 100. Almost any type of knowledge or information used in the conduct of business is amenable to being characterized as a trade secret. *Smith v. Dravo Corp.*, (7th Cir. 1953), 203 F.2d 369.

OCC's attempt to interpret this Commission's Order to further its own purposes reflects OCC's continued determination to oppose every assertion of trade secret rather than exercise its own judgment, in good faith, regarding such claims. Further, OCC's "interpretation" is obviously far too restrictive. Consider the existence in this case, for example, of a hypothetical side-agreement between DERS and OCC.¹⁸ It would obviously serve no purpose to redact OCC's name from the hypothetical document if an OCC telephone number or its address at "10 West Broad Street, 18th Floor" may not similarly be redacted from provisions describing how any notice made necessary by the agreements is to be provided to the parties. This Commission did not, however, expressly authorize the redaction of telephone numbers or addresses. Parties evaluating this Commission's Order on Remand in good faith, however, did not need such an instruction.

Similarly, and as another hypothetical example, the Duke Entities might redact all eight items of expressly identified information from such a hypothetical contract between OCC and one of the Duke Entities, but even the disclosure of such terms might be less damaging to the Duke Entities' legitimate business processes if the Duke entities are not also permitted to redact information contained in an email exchanged between employees of one of the Duke Entities that

¹⁷ *Vekamaf Holland B.V. v. Pepe Benders, Inc.*(D. Minn.) 1981 WL 40557.

¹⁸ The Duke Entities posit OCC for purposes of this hypothetical agreement as it is the one party to this case which the world knows is certainly not a party to a side agreement in this case, and the existence of side agreements between OCC and one or more Duke Entities in other cases is irrelevant to the discussion.

contains a discussion of the business reasons considered by the particular entity as it evaluated entering into such a contract. This hypothetical email may or may not contain specific terms of price or volume, and it may not identify the consideration exchanged for the contract or even the counterparty to the agreement. Even so, such a communication would certainly contain considerable information about the business concerns of the contracting parties that could be of remarkable value to strangers to the agreement. According to OCC, however, this Commission has ruled that because such an email contains no word that falls within the eight described categories, it contains no trade secret information and thus no information that is protectable.

Any rational examination of this Commission's Order on Remand clearly reveals that the Commission intended its list as a guideline to the parties regarding the types of information it recognized to be trade secret information, and not as a final and definitive catalog of what will be considered trade secret information in proceedings before this Commission, to the exclusion of everything else. During this Commission's discussion of the dispute regarding trade secret information, for example, it cited with approval to OHA's description of such information as that which allows the contracting parties to run their businesses more economically and to compete more effectively.¹⁹

Similarly, the Commission expressly stated that it found DERS' discussion of trade secret information particularly helpful to it.²⁰ This Commission's *own summary* of DERS' discussion expressly included DERS' concern not only over such items as customer identities, pricing terms, and termination provisions, but also over information that could reveal DERS' marketing strategies, pricing constructs, market analyses, and foresight into customer service issues and the energy market, generally.²¹ The eight specifically identified categories to which OCC points

¹⁹ Order on Remand, p. 14.

²⁰ *Id.*

²¹ Order on Remand, p. 13.

obviously do not expressly include "marketing strategies," "business analyses," "the energy market," or similar information relied upon to support "operational decisions"²² – all of which this Commission nonetheless *expressly* recognized constitutes trade secret information. OCC's attempt to "interpret" this Commission's Orders in a manner that defeats this Commission's purpose should be rejected.

B. OCC's Specific Complaints Regarding Duke's Redactions Reveal OCC's Tactics Are Evolving Toward Contesting Redactions On A Word-by-Word Basis.

The Duke Entities believe it will be enormously unproductive and wasteful of resources to permit OCC to engage in its latest tactic of challenging every redaction on a word-by-word basis. Nonetheless, the Duke Entities identify each of OCC's four specific complaints regarding the "excessive" nature of the redactions by category below and provide a very brief discussion of the rationale for redacting the disputed material.

- OCC complains that the Duke Entities redacted not only the termination dates of contracts as this Commission expressly directed, but also the beginning and the effective dates of certain contracts.²³

In response, the Duke Entities submit that contract starting and effective dates, like termination dates, can constitute trade secret information in that such dates have obvious economic significance to the contracting parties. Furthermore, the Duke Entities submit that the starting and effective dates of these various contracts have obvious additional significance in the context of this case, because the identification of a date in connection with one contract may also reveal information regarding decisions to terminate, nullify, or otherwise treat as void other agreements between the contracting parties.

²² Id.

²³ OCC's Motion, p. 7, the text associated with footnote 19, and the competing redacted documents bates stamped 333 and 347.

- OCC complains that the Duke Entities redacted not only the names of particular customers as expressly authorized by this Commission, but also such "additional" information as the name of a trade group to which the customer is known to belong, and/or the name of individuals who signed a contract on behalf of a customer.²⁴

In response, the Duke Entities submit that such information justifies protection in that it provides obvious clues tending to suggest the name of particular customers of one or more of the Duke Entities – information expressly recognized to be a trade secret by this Commission.

- OCC complains that the Duke Entities redacted the entirety of Ms. Hixon's "attachment 7."

In response, the Duke Entities state that attachment 7 cannot be redacted in a fashion that preserves any material, intelligible information regarding that document. Attachment 7 consists of an email between parties negotiating settlement together with an attachment. The email and its attachment contain specific details regarding the terms upon which settlement is being discussed including financial terms. The email and its attachment also discloses which of the counterparties proposed at least one of the terms and why, conditions upon the effectiveness of the agreement, and reasons why agreement or disagreement to the proposed terms could not immediately be communicated.²⁵

- OCC complains that the Duke Entities redacted the names of individual executives, employees, and attorneys representing the Duke Entities from Ms. Hixon's "attachments 2, 17, and 21."²⁶

In response, the Duke Entities assert that it has an interest in assuring its employees, executives, and attorneys that each may perform their assigned work responsibilities without concern as to how their decisions may appear to those who do not possess the same information they do, or

²⁴ OCC's Motion, p. 7, the text associated with footnotes 18, and the competing redacted documents bates stamped 330 and 341.

²⁵ OCC's Motion, p. 7, the text associated with footnote 17, and Exhibit 7, which consists of three pages lacking bates stamp numbers.

²⁶ OCC's Motion, p. 7, the text associated with footnotes 15 and 16, and attachments 2, 17 and 21.

which have agendas other than the best interest of the Duke Entities, its customers, and its community. Furthermore, the Duke Entities assert that its protection of the identity of the various individuals does not change, conceal, or render incomprehensible any material information contained in those documents or implicate any legitimate concern of the public. Moreover, the Duke Entities assert that the executives, employees, and attorneys of the Duke Entities, in their individual capacities, possess rights of privacy that the Duke Entities should be permitted to assert on their behalf in the absence of any demonstration by any member of the public of a particularized need for information regarding those individuals.

C. The Duke Entities Have Attempted In Good Faith To Comply With This Commission's Orders Regarding Redaction.

Together with this Memorandum in Opposition, the Duke Entities are submitting, under seal, three copies of the specific documents that are the subject of OCC's complaints.

Unredacted copies of those documents, highlighted to show the differences in the redacted materials, are submitted as Exhibits 1 through 4. The specific documents as redacted by the Duke Entities are submitted as Exhibits 5 through 8. The specific documents as redacted by OCC are submitted as Exhibits 9 through 12.

The Duke Entities respectfully request that this Commission examine the four specific examples of redactions identified by OCC in its Motion and find that the redactions submitted by the Duke Entities represent a good faith effort to comply with this Commission's Order on Remand by those Ordered by this Commission to perform the redactions. The Duke Entities further request that this Commission find that the redactions they have submitted satisfy the competing goals of the public disclosure of information, while at the same time reasonably preserving confidential information from disclosure.

D. This Commission Should Deny OCC's Motion Seeking "Approval" of OCC's "Corrections" To Duke's Redactions.

This Commission should most certainly deny OCC's Motion for "Approval" of OCC's redactions of the documents at issue in this case. OCC cannot be permitted to be the arbiter of what is and what is not confidential. OCC's irrational hostility to claims of confidentiality is well documented. As a result, OCC cannot be relied upon to exercise the proper discretion necessary to protect information belonging to others, let alone the proper care and diligence necessary. For example, a close examination of even those documents that OCC attempted to redact from the copies it submitted to this Commission with its Motion for Approval permits information regarding contracting parties to be discerned.²⁷

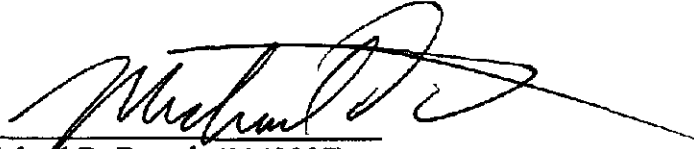
III. CONCLUSION

As this Commission undoubtedly recognizes, the exchange of confidential information and trade secrets during litigation between parties presumes at least rudimentary good faith amongst the parties and the exercise of careful judgment by the litigants. Unhappily, the OCC has demonstrated, over and over, that it has decided that it will achieve some political advantage (or escape some political criticism) by refusing to accept the responsibility of exercising any judgment whatsoever. Instead, OCC continues to obdurately insist that no grounds exist to recognize any claim, asserted by any party, that any information admitted into evidence in this Commission's proceeding is protected by federal or state law from further disclosure.

²⁷ While the Duke Entities vigorously disagree with the policies of the OCC regarding confidential information, it does not maintain that the OCC's failure to verify that each and every redaction was completely illegible is the result of that flawed policy, or of ill-will, or indeed of anything other than the inherent opportunity for human error that exists when so many documents must be examined in detail so many times.

This Commission should deny OCC's Motion.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Michael D. Dortch", with a long horizontal flourish extending to the right.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically upon parties, their counsel, and others through use of the following e-mail addresses this 13th day of February, 2007.

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