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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of The)
Kroger Co. and Duke Energy Ohio, Inc.)
For Energy Efficiency Projects.)

Case No. 10-3134-EL-EEC

PUCO

MOTION TO AMEND APPLICATION
AND
MOTION FOR PROTECTIVE ORDER

On December 30, 2010, Duke Energy Ohio, Inc. (Duke Energy Ohio) and The Kroger Co. (Kroger) jointly submitted an application for approval of an incentive arrangement for energy efficiency projects completed in 2007 pursuant to Ohio Revised Code 4928.66 and Ohio Administrative Code 4901:1-39-05. The projects included specified retrofits which enabled Kroger to opt-out of Duke Energy Ohio's 2007 energy efficiency rider. As noted in the application, Kroger has already received incentive payments for the same retrofits from other Ohio utilities.

At the time of the Application in this docket, the Parties did not have specific cost data to incorporate into the application and therefore the Parties sought a waiver of the Public Utilities Commission of Ohio (Commission) automatic approval procedure. The motion for that waiver was granted by an Entry dated February 18, 2011. The Entry ordered that the automatic approval process established under the pilot program in Case No. 10-834-EL-EEC be suspended for this application.

The data omitted from the original Application is now available and is submitted with this motion as an Amended Application. Accordingly, the Parties respectfully request that the suspension previously ordered, be lifted, and that this Application be approved within sixty days

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of its filing with the Commission, per the automatic approval process established for this purpose.

Attached to the Amended Application, is Duke Energy Ohio's Self-Direct Rebate Offer Letter (the Agreement). This letter contains the terms of the Agreement between the Parties and is provided here under seal as it contains trade secret information as defined in Section 1333.61 (D), Ohio Revised Code. In particular, as this Agreement sets forth the terms between the Parties with respect to individual energy efficiency measures and the amount of rebate proposed by the Company, and it is therefore highly sensitive. This information is competitive in the electric utility arena, the disclosure of this information would give competitors access to competitively sensitive and confidential information. The information is kept confidential by the Company and is not shared with third parties. It derives independent economic value from being unique to Duke Energy Ohio and not known to or readily ascertainable by others who might obtain economic value from its disclosure or sale.

The document has been selectively redacted to protect only those portions of the Agreement that would be particularly sensitive if known outside of the relationship between the Parties. Ohio Administrative Code Section 4901-1-24(D) allows Duke Energy Ohio and Kroger to seek leave of the Commission to file information that Duke Energy Ohio and Kroger consider to be proprietary trade secret information, or otherwise confidential, in a redacted and non-redacted form under seal.¹ This rule also establishes a procedure for presenting to the Commission that information which is confidential, and therefore should be protected.²

¹OHIO ADMIN. CODE § 4901-1-24 (Anderson 2007)

² *Id.*

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.³

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.⁴

The confidential material described above, if disclosed, would enable other entities within the Duke Energy Ohio service area to ascertain the terms under which the Company negotiates for its energy efficiency. If this information were to be made public, Duke Energy Ohio would be placed at a competitive disadvantage. With the information contained in the document, a competitor could take actions that, in the absence of this information, it would not otherwise take.

The information for which Duke Energy Ohio is seeking confidential treatment is not

³ Ohio Rev. Code Ann. § 1333.61(D) (Baldwin 2007).

⁴ *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St. 3d 396, 732 N.E.2d 373 (2000).

known outside of Duke Energy Ohio, and it is not disseminated within Duke Energy Ohio except to those employees with a legitimate business need to know and act upon the information.

The public interest will be served by granting this motion. By protecting the confidentiality of the agreement, the Commission will prevent undue harm to Duke Energy Ohio and its ratepayers, as well as ensuring a sound competitive marketplace.

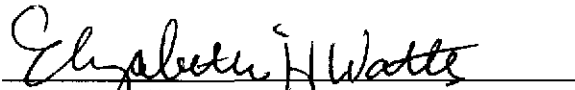
Duke Energy Ohio considers the redacted confidential material to be proprietary, confidential, and trade secret, as that term is used in R. C. 1333.61. In addition, this information should be treated as confidential pursuant to R. C. 4901.16. The redacted version of the document includes the confidential material blacked out for the public.

WHEREFORE, Duke Energy Ohio and Kroger respectfully request that the Commission, grant this motion for approval of the amended application and for a protective order to protect the confidential terms of the agreement.

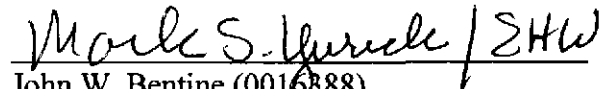
Respectfully submitted,

Duke Energy Ohio, Inc.

The Kroger Company



Amy B. Spiller (0047277)
Deputy General Counsel
Elizabeth H. Watts (0031092)
Associate General Counsel
Duke Energy Business Services, Inc.
Room 2500, Atrium II
P.O. Box 960
Cincinnati, Ohio 45201-0960
(513) 419-1810
Email: amy.spiller@duke-energy.com
Email: elizabeth.watts@duke-energy.com



John W. Bentine (0016888)
Direct: (614) 334-6121
Email: jbentine@cwsllaw.com
Mark S. Yurick (0039176)
Attorney of Record
Direct: (614) 334-7197
Email: myurick@cwsllaw.com
Chester Willcox & Saxbe, LLP
65 East State Street, Suite 1000
Columbus, Ohio 43215