FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the	:		
Consolidated Duke Energy Ohio, Inc.	:	Case Nos.	03-0093-EL-ATA
Rate Stabilization Plan Remand and	:		03-2079-EL-AAM
Rider Adjustment Cases	:		03-2080-EL-AAM
	:		03-2081-EL-ATA
	:		05-0724-EL-UNC
	:		05-0725-EL-UNC
	:		06-1068-EL-UNC
	:		06-1069-EL-UNC
	:		06-1085-EL-UNC

OCC

DUKE ENERGY-OHIO, INC., DUKE ENERGY RETAIL SALES, LLC, AND CINERGY CORP.'S JOINT MEMORANDUM CONTRA TO THE APPLICATION FOR REHEARING OF THE OFFICE OF OHIO CONSUMERS' COUNSEL

I. Introduction

On July 7, 2008, the Ohio Consumers' Counsel (OCC) filed an Application for Rehearing of the June 4, 2008, Entry (June Entry), issued by the Public Utilities Commission of Ohio (Commission), which incorporated the Commission's May 28, 2008, Entry (May Entry). Duke Energy Ohio, Inc. (DE-Ohio), Duke Energy Retail Sales, LLC (DERS), and Cinergy Corp. (Cinergy, and collectively with DE-Ohio and DERS, the Duke Entities) and Industrial Energy Users-Ohio (IEU-Ohio) have also filed Applications for Rehearing in this matter.

In the May Entry, the Commission informed the parties that it had prepared its own version of redactions to the various documents that are the subject of an ongoing dispute about the protection of confidential information. The Commission further stated its intent to place its version of the redacted documents in the public record in its current form unless it grants one or more of the above Applications for Rehearing.

In its Application for Rehearing, OCC requests that the Commission "unredact" information that the Commission indicated should be redacted and, in limited instances, redact

information that was not redacted. OCC offers various justifications for its requests. The Duke Entities agree with OCC in those limited instances in which OCC acknowledges additional redactions are appropriate. OCC's justifications of many of its proposed "unredactions", however, are largely without merit. The Duke Entities therefore respectfully request that the Commission deny OCC's Application for Rehearing in its entirety, except for OCC's requests for additional redactions.

In addition, the Duke Entities also provide an Attachment, submitted under seal, in which they discuss, point-by-point, why OCC's specific requests to unredact redacted material should not be granted, and which is incorporated by reference herein. This attachment is submitted under seal in order to permit the Duke Entities to discuss confidential information as necessary in order to effectively respond to OCC's specific requests for "unredactions."

II. Law and Argument

A. The Commission's Order on Remand is not an exhaustive list of all confidential information that is entitled to protection.

OCC argues that the Commission has impermissibly redacted information which is not within the scope of the Commission's Order on Remand of October 24, 2007 ("Order on Remand"). OCC contends that only an order from the Ohio Supreme Court can vary the scope of the categories of protected information listed in the Order on Remand.

OCC's argument ignores a fundamental point. Permitting information to be redacted that does not obviously fit into one of the eight categories of trade secrets detailed in the Order on Remand is not an attempt to modify the Order on Remand. Instead, it simply recognizes that the Order to Remand's list was never intended to be an exhaustive list of all the items that could be considered trade secrets or otherwise confidential under Ohio law.[1] (*See* Order on Remand, at

[1] Even if the Commission were to find that the Order on Remand did provide an exhaustive list of confidential information categories, OCC provides no authority to support its proposition that only the Ohio Supreme Court can

15.) Indeed, there are other materials and information not related to the options contracts, which are the primary focus of OCC's attention, that are obviously trade secrets on their own merit. For example, Cinergy Corp. produced documents in which projections of the financial impact of the rate stabilization plan are contained, and the effect of those projections upon the corporation's earnings per share are calculated. Such information is plainly a trade secret. Moreover, witnesses were later asked questions regarding those projections. The witnesses responses are equally confidential.

Documents that include this information, such as the line items related to the financial impact of the competitive retail electric services (CRES) agreements, are not a discussion of the agreements themselves, nor even directly related to those agreements. Nor is information regarding the total market-based standard service offer impact on the corporation a discussion of the agreements or directly related thereto. These types of information nonetheless plainly satisfy the trade secrets tests in their own right. Therefore, such information is protected from disclosure under Ohio's Trade Secrets Act. The Attachment to this Memorandum Contra briefly identifies and explains why additional items that OCC requests to be unredacted are protected from disclosure under Ohio law.

OCC also relies upon its theory that the Order on Remand provided an exhaustive list of categories of confidential information to assert that the Duke Entities' contract price and financial consideration information, created by reference to information that is publicly available, is not entitled to protection. Again, OCC's view is overly simplistic. The mere fact that a price or other financial consideration in a contract is developed and determined by reference to publicly available information does not mean that it is, itself, public. The option contracts could have used the price of pork bellies, corn futures or OCC's operating budget (all publicly available

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modify the Commission's Order on Remand. To the contrary, if the Commission so chooses it has the power to modify its own orders. *See* R.C. §§ 4905.04, 4905.05–.06.

items) as the basis of the price contained therein. The specific terms of the contracts and the use of that information to determine a final price would still be confidential.

For example, OCC makes the argument in several instances that the utility tariffs are public and that as a result, discussions surrounding those tariffs as it relates to the development of a contract price or financial consideration should also be public. OCC is wrong. The context of the proprietary information is just as important to determining its confidential information as the information is itself. If DERS' competitors were to learn of the precise factors that DERS looked to in setting its contract prices, DERS would be put at an obvious disadvantage. While DERS' competitors might not be able to arrive at DERS' precise contract prices, they could much more accurately predict those prices knowing what publically available information DERS used and how it used that information to arrive at prices.

Therefore, the Commission should reject OCC's Application for Rehearing regarding its requests for disclosure of price, financial consideration, and related information. Again, the lack of merit to OCC's specific requests in this regard are briefly discussed, request-by-request, in the sealed Attachment to this Memorandum Contra.

B. The Commission's entries are not unreasonable or unlawful simply because some of the pages in its redactions are out of order.

The Duke Entities will not address the merits of OCC's insistence that the Commission reorder the pages of its redactions. The Duke Entities believe that anyone reading the documents can easily reorder the few pages in the Commission's redactions that may be out of order.

C. The Commission's redactions are not unreasonable or unlawful because the Commission's redactions do not ignore the fundamental public nature of the Commission's documents. It is the Commission's duty to protect documents which contain trade secrets from public disclosure under Title 49.

OCC next asserts that additional information must be disclosed because it is appropriate to minimize the amount of information protected from public disclosure in some circumstances.

OCC, however, ignores the fact that Title 49 requires the Commission to encourage "competition, diversity, and flexible regulatory treatment of the electric industry," while "specifically requiring the Commission to 'take such measures as it considers necessary to protect the confidentiality' of CRES suppliers' information." (Order on Remand at 17 (citing R.C. §§ 4928.08 & 4928.06(F).) Thus, while the law does indeed mandate disclosure of *public* information, that mandate is expressly subject to this Commission's duty to protect CRES suppliers' trade secrets and confidential information. Such information, no matter how it came into the possession of the Commission, was never "public" in the first place.

Furthermore, OCC's first request for the "unredaction" of confidential material under its "preference for disclosure" theory is a recapitulation of an argument that OCC has previously litigated and lost—that is, whether the Duke Entities failed to prove that the information referenced in their Motion for Protection of May 6, 2004 was entitled to protection. As this Commission previously determined that OCC's arguments in this regard were without merit, (*see* Commission Entry (May 14, 2004)), the Commission's Bates pages 2139–2829 should remain redacted.

OCC also argues under its "preference of disclosure" theory that some of the Commission's redactions should be unredacted because the referenced information has lost its value to the Duke Entities as it has become outdated. As detailed on a request-by-request basis in the Attachment to this Memorandum Contra, OCC's arguments regarding the "outdated" nature of the subject information are without merit. Information which contains financial forecasts for years into the future, including the present year, not to mention competitive market positions should remain confidential regardless of the date the information was created. To disclose such information not only places the CRES providers in a harmful position, but will likely have a detrimental impact on all customers, including residential customers represented by

the OCC. Competitors and vendors of DE-Ohio and DERS could use the CRES providers' competitive market positions to affect prices and place the Duke Entities at a disadvantage in negotiations. This information should remain redacted.

III. The Word-by-Word Redaction Process Employed In This Case Is Inherently Fraught With Error.

The Duke Entities are not unsympathetic toward the Commission's competing obligations under R.C. § 143.43 and R.C. § 1331.61. Even so, the most recent filings in these proceedings emphasize that word-by-word redactions of protectable information from documents submitted to this Commission is an inherently inefficient – if not an unworkable – means of protecting the confidential contents of those documents. It is likely that many hundreds of hours or more have been expended in preparing the competing versions of the redacted documents. Even so, three different actors – the Duke Entities, OCC, and the Commission – have arrived at three different results. The Duke Entities cannot help but point out that these different results all concern information that the Duke Entities strongly believe is information that belongs to it (and those with which they do business), alone.

More important, all three entities who have attempted redactions, while attempting to maintain properly protected information, have obviously missed important information that all seem to acknowledge should be protected through the redaction process, such as the names of customers. Notwithstanding the considerable monetary expenditure of the parties and of Ohio's taxpayers in preparing the redactions, still additional review, and still additional redactions, are likely to be necessary due to simple human error. Furthermore, even after the Commission has ruled on these latest Applications for Rehearing, it is almost inevitable that additional mistakes in the parties' redactions will be uncovered and potentially disclosed to the public before they can be remedied. Additional litigation, and thus additional expense to the parties and to taxpayers, will presumably follow.

Given the above observations in the context of the unique circumstances of this case, the Duke Entities respectfully suggest that the Commission may wish to open a docket in which to explore alternative means to the processes employed in this case, in order to avoid similar expenditures of time and money in future litigated cases.

For example, the Duke Entities respectfully point out that there is no requirement in the Revised Code or in the Commission's rules that a word-by-word redaction process necessarily be followed when such a process is unduly costly or unduly burdensome. Thus, the Commission may wish to recognize that while a word-by-word redaction process may be appropriate in certain cases involving limited materials and/or limited claims for protection, other cases, such as this one, do not lend themselves to similar treatment due to the voluminous nature of the information and documents at issue.

In addition, the Commission may wish to consider adopting procedures that protect this Commission and the parties themselves against inadvertent disclosures of protectable information. Ohio's Public Records Act ("PRA") does not mandate the general public disclosure of confidential information following an unauthorized, or even the merely inadvertent, disclosure of such information, particularly when the general public has not exhibited an actual awareness of the disclosed information. For example, Ohio's Eleventh District Court of Appeals has found that the exempt status of confidential information under the PRA is not waived when the information is released to the public without authorization from the holder of the information. *State ex rel. Lundgren v. LaTourette* (Ohio Ct. App. 11th Dist. 1993), 85 Ohio App. 3d 809, 811–13.

Similarly, federal courts have addressed the legal effect of inadvertent disclosure of information that the Freedom of Information Act ("FOIA") exempts from disclosure. *See id.* at 761 (noting that FOIA is analogous to Ohio's PRA). Those courts have found that inadvertent

disclosure to the public does not necessarily waive a document's status as exempt from disclosure.

In *Public Citizen Health Research Group*, for example, the FDA inadvertently released a table containing two drug companies' trade secrets to the plaintiff, which had requested disclosure of the information under FOIA. 953 F. Supp. at 401–02. The plaintiff then included the table as an exhibit to two pleadings it filed with the court. *Id.* at 402. Three months after the initial disclosure of the table containing its trade secrets, the interested drug companies intervened and filed for a protective order. *Id.* Notwithstanding the table's disclosure in its public docket, the court held that the table maintained its exempt status under FOIA. *Id.* at 405–06. The court found it very important that the table was inadvertently, rather than intentionally, disclosed. *Id.* at 404; *see also Florida House of Representatives v. United States Dept. of Commerce* (11th Cir. 1992), 961 F.2d 941, 946 ("[i]f documents are exempt from disclosure under the FOIA, the fact that they were involuntarily disclosed by means other than the FOIA [e.g., court-ordered discovery; forced disclosure to the Congress] should not lead to a finding of waiver").

The court also rejected the plaintiff's argument in that case that the court was without power to seal documents that had already been revealed to the public. *Public Citizen Health Research Group*, 953 F. Supp. at 405. In rejecting the argument, the court noted the rule that "the decision as to access [to judicial records] is one best left to the sound discretion of the trial court." *Id.* (quoting United *States v. Hubbard* (D.C. Cir. 1980), 650 F.2d 293, 316–17). Finally, the court found that while the drug companies did not act immediately to request a protective order for their trade secrets, their inaction did not constitute a waiver because there was no evidence that the confidential character of the table had been breached by another party or that the public had taken advantage of their access to the confidential document. *Id.* at 405–06.

Federal courts have also interpreted portions of other state's public records acts, which are analogous to Ohio's PRA. The United States Court of Appeals for the Tenth Circuit, for example, has analyzed what constitutes "reasonable efforts" to maintain secrecy of a trade secret under Colorado law. *Gates Rubber Co. v. Bando Chemical Indus. Ltd.*, (10th Cir. 1993), 9 F.3d 823, 849. In that case, the plaintiff inadvertently disclosed its trade secrets at a permanent injunction hearing. *Id.* The Tenth Circuit found that the disclosure of the trade secrets at the public hearing did not waive their exempt status. *Id.* To determine waiver, the court looked exclusively at the holder's efforts to maintain the secrecy of the trade secrets. *See id.* The court found that the trade secret holder's efforts to maintain secrecy were adequate even though it did not move to seal the disclosed trade secrets until an appeal of the matter had been taken. *Id.* at 849. The court rejected the argument that the delay in seeking to protect the secrets constituted waiver because there was "no evidence that a competitor had access to or learned of the [trade secrets] during the period after the hearing and before the record was sealed." *Id.* The court concluded that "absent a showing that the [trade secrets] were published outside the court records, . . . [the holder's] inadvertent and inconsequential disclosure of the [trade secrets] at trial and delay in sealing the record, are inadequate to deprive the [trade secrets] of their status as trade secrets." *Id.*

In this case, certain confidential information was inadvertently disclosed by the Duke Entities, just as was the FOIA exempt information in *Florida House of Representatives*, *Public Citizen Health Research Group*, and *Gates Rubber Co.* Still more confidential information was disclosed by OCC and others, through what the Duke Entities will accept on this occasion was human error and inadvertence. The Duke Entities respectfully submit that this Commission should consider whether other approaches should be undertaken to address this issue.

Finally, the Duke Entities respectfully submit that this Commission should be suspect, at the least, of any demand for the public disclosure of information raised by any party that has, itself, already obtained unfettered access to the subject information during the relevant litigation pursuant to appropriate protective agreements or Orders, as has OCC in this case. Such demands strongly suggest that demands for "public disclosure" are motivated by political considerations alone and not by any legitimate needs for access to information.

IV. Conclusion

For the foregoing reasons, the Duke Entities respectfully request that this Commission grant in part and deny in part OCC's Application for Rehearing, as detailed above and in the Attachment to this Memorandum Contra.

Respectfully submitted,

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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 email addresses this 17th day of July 2007.

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PUCO Page #	Line #	Comments
58	18	The PUCO's redactions are correct. The referenced terms include financial consideration consistent with the PUCO Order of Remand. Simply because the financial consideration is in the [redacted] does not result in the pricing term becoming public.
215		The PUCO's redactions are correct. The OCC's description is incorrect. Customers are named in the chart.
218	12	Redact consistent with DE-Ohio redactions submitted in November 2007.
219	1 through 4	Redact consistent with DE-Ohio redactions submitted in November 2007.
312		The PUCO's redactions are correct. The information in "bubbles" reveal financial consideration. The "bubbles" are tracked changes between contracts during negotiations. This shows the price and consideration negotiated between the Parties to the contracts. Release would provide insight into how price was determined.
641		The PUCO's redactions are correct. The OCC's chart, however, has a typo indicating an incorrect category for its recommended change. It should be category "C" rather than "B".
647		Duke does not oppose OCC's suggestion to release the employee name and phone number on the top of the page because it was already released. The remainder of the PUCO's redactions are correct.
649 through 662		Duke agrees with OCC's re-collation, but disagrees with OCC's redactions. Redact consistent with DE-Ohio redactions submitted in November 2007.
654		The PUCO's redactions are correct. The document is a projection of the impacts of the RSP on earnings through 2008. Such information meets the test of a trade secret and remains relevant.
685		The PUCO's redactions are correct. The text is a discussion of a Party to a contract and the Party provides contracts later used as attachments to the OCC's testimony. Thus by inference it is possible to identify the party. The paragraph on the bottom of the page discusses a contract and releases the name elsewhere in the section which would then identify the party to a contract.
707 through 748		Duke agrees with the OCC's redactions, but notes that the OCC failed to find all of the Party names that need to be redacted. (See: P.721, L24; P.723, L16; P.730, L19; P.731, L20)
749	6 through 7	The PUCO's redactions are correct. The referenced terms include financial consideration consistent with the PUCO Order of Remand. Simply because the financial consideration is in the [redacted] does not result in the pricing term becoming public.
751 through 762		Duke agrees with the OCC's redactions, but notes that the OCC failed to find all of the Party names that need to be redacted. (See: P.752,L20; P.757, L1)

768		The PUCO's redactions are correct. Price and financial consideration are confidential under the PUCO Remand Order. These redactions are pricing terms in the contracts. Release as suggested would divulge portions of the financial consideration.
769		The PUCO's redactions are correct. Price and financial consideration are confidential under the PUCO Remand Order. These redactions are pricing terms in the contracts. Release as suggested would divulge portions of the financial consideration.
904	12	The PUCO's redactions (on line 12) are correct. Duke agrees with the OCC that lines 13 and 14 can be released.
943		The PUCO's redactions are correct. The material describes the financial impact of the MBSSO on Cinergy Corp. shares.
991		The PUCO's redactions are correct. The information in "bubbles" reveal financial consideration. The "bubbles" are tracked changes between contracts during negotiations. This shows the price and consideration negotiated between the Parties to the contracts. Release would provide insight into how price was determined.
1044 through 1050		Duke agrees with the OCC's redactions but must clarify that the customer names should be redacted starting on page 1044 through 1050. The OCC's chart omits the dash between the numbers.
1091		The PUCO's redactions are correct. The information includes customer generation levels and load factors. Releasing this information would put Duke at a competitive disadvantage. This information is confidential by Ohio Adm. Code 4901-1-20-16 (G)(4)(a).
1093		The PUCO's redactions are correct. The information includes customer generation levels and load factors. Releasing this information would put Duke at a competitive disadvantage. This information is confidential by Ohio Adm. Code 4901-1-20-16 (G)(4)(a).
1095 through 1106		The PUCO's redactions are correct. The material describes the financial impact of the MBSSO on Cinergy Corp. shares.
1107 through 1108		The information includes customer generation levels and load factors. Releasing this information would put Duke at a competitive disadvantage. This information is confidential by Ohio Adm. Code 4901-1-20-16 (G)(4)(a).
1110		The information includes customer generation levels and load factors. Releasing this information would put Duke at a competitive disadvantage. This information is confidential by Ohio Adm. Code 4901-1-20-16 (G)(4)(a).
1614		Duke agrees with OCC's proposal but notes that line 23 should remain redacted per the PUCO's Remand Order.
1772		The PUCO's redactions are correct. The redactions are consistent with DE-Ohio redactions submitted in November 2007 and January 2008.
1749		Duke agrees with the OCC's redactions but wishes to clarify, that while the attachment numbers released in the footnotes are correct, the remainder of the information in the footnote should remain redacted.

1982		The PUCO's redactions are correct. Footnote 133 identifies a Party to a contract.
2078		Duke agrees with the OCC's redactions but the OCC's chart missed a customer's name in the footnote.
2129 through 2829		The PUCO's redactions are correct. The information was submitted under seal with an appropriate motion for confidential protection on May 6, 2004. The motion and the accompanying affidavit set forth the reasons why the information should be treated as confidential. The PUCO considered the OCC's arguments and granted DE-Ohio's Motion. The information remains sensitive and confidential.
2835		The document includes revenue requirements and recovery of POLR costs through 2008.
2958		The PUCO's redactions are correct. The information listed discusses pricing terms and consideration in the contract.
3071 through 3113		The PUCO's redactions are correct. The information continues to be sensitive because competitors could discover Dukes' capacity needs, costs, and other information that is still relevant to today's business operations and modeling.
3114 through 3116		The PUCO's redactions are correct. The information continues to be sensitive because competitors could discover Dukes' capacity needs, costs, and other information that is still relevant to today's business operations and modeling.
3120		The PUCO's redactions are correct. The information continues to be sensitive because competitors could discover Dukes' capacity needs, costs, and other information that is still relevant to today's business operations and modeling.