

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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PUCO

Consolidated Duke Energy Ohio, Inc. Rate)	Case Nos. 03-93-EL-ATA
Stabilization Plan Remand and Rider)	03-2079-EL-AAM
Adjustment Cases)	03-2080-EL-ATA
)	03-2081-EL-AAM
)	05-724-EL-UNC
)	05-725-EL-UNC
)	06-1068-EL-UNC
)	06-1069-EL-UNC
)	06-1085-EL-UNC

**MEMORANDUM CONTRA MOTIONS OF DUKE ENERGY, OHIO, INC., DUKE
ENERGY RETAIL SALES, CINERGY CORP., OHIO HOSPITAL ASSOCIATION,
AND KROGER FOR PROTECTIVE ORDERS
AND
MOTION FOR PREHEARING CONFERENCE
AND
REQUEST FOR EXPEDITED RULING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC") hereby responds to motions for protective orders filed in this case by parties that wish to keep certain information out of the public domain. In this Memorandum, OCC will explain why the information should be made public.

The OCC also moves, pursuant to Ohio Adm. Code 4901-1-12(A) and 4901-1-26, for a prehearing conference in these cases. The prehearing conference is important for a number of reasons, and particularly to deal with matters that arise in the above-captioned cases due to the presence of documents that one or more parties consider confidential that will figure prominently in a case that involves multiple witnesses and parties. The OCC requests an expedited ruling, pursuant to Ohio Adm. Code 4901-1-12(C). All parties were

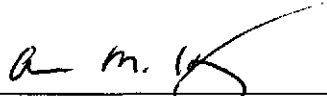
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notified electronically regarding the OCC's request, but this filing is made before affirmative responses were obtained from all parties.

The reasons supporting the OCC's Motion for Prehearing Conference are contained in the following Memorandum in Support.

Respectfully submitted,

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**ARGUMENT AND
MEMORANDUM IN SUPPORT**

I. INTRODUCTION

On February 23, 2007, the Office of the Ohio Consumers' Counsel provided notice to three Duke-affiliated companies and two other parties -- Duke Energy Ohio, Inc. ("Duke Energy Ohio," also a reference to its predecessor, the Cincinnati Gas and Electric Company), Duke Energy Retail Sales, LLC ("DERS"), Cinergy Corp. ("Cinergy"), the Ohio Hospital Association ("OHA"), and Kroger Co. ("Kroger," collectively with the other movants, "Movants") -- that they should either allow certain documents (that they want to protect against disclosure) to become available in the public domain or they should fulfill their responsibility under law and rule to prove to the PUCO that the documents they believe to be confidential are in fact deserving of such secrecy from the public. The OCC provided this notice pursuant to its rights to do so under paragraph nine of the various protective agreements.

Other documents have recently been filed in the above-captioned cases, and one letter in particular distracts from the main issue presented in the Motions. In response to the OCC's aforementioned notices to the five parties that seek confidential treatment of documents, the Industrial Energy Users - Ohio ("IEU-Ohio") filed a letter on March 2, 2007. OCC will respond herein to that letter, as well.

II. PROCEDURAL HISTORY

On January 10, 2003, Duke Energy Ohio (i.e. as the Cincinnati Gas and Electric Company) filed an application ("January 2003 Application") containing proposals to provide a competitive market option standard service offer ("CMO") and to establish an alternative competitive bidding process for the period after the market development period (i.e. post-MDP) for non-residential customers.¹

On December 9, 2003, the Commission issued an entry that, among other matters, consolidated various pending matters regarding Duke Energy Ohio and requested that Duke Energy Ohio file a "rate stabilization plan"² ("RSP") in keeping with the Commission's policy statements regarding the post-MDP pricing of generation service by other utilities in Ohio. On January 26, 2004, Duke Energy Ohio filed another application ("January 2004 Application") in the consolidated cases. The January 2004 Application proposed that the Commission approve either the CMO approach contained in the January 2003 Application, "consistent with the language and intent of R.C. Chapter

¹ January 2003 Application at 1.

² Entry, page 5 (December 9, 2004).

4928,” or an “ERRSP” plan containing rates for generation service proposed by Duke Energy Ohio that included non-bypassable charges.³

The hearing was delayed in connection with the filing of a stipulation on May 19, 2004 (“Stipulation”) in these cases that described another plan of service (“ERRSP Stipulation Plan”). The parties who did not execute the Stipulation, including the OCC, were permitted a very short period during which they could inquire into the Stipulation by means of discovery. The OCC sought copies of all side-agreements between Duke Energy Ohio and other parties to the Post-MDP Service Case, and the Company refused to provide copies of such agreements. The first witness appeared at hearing on May 20, 2004 (based on pre-filed testimony not related to the Stipulation). The OCC began the hearing on May 20, 2004 with an oral Motion to Compel Discovery of the side-agreements. The Motion to Compel Discovery was denied.⁴

The Commission’s Order in the Post-MDP Service Case was issued on September 29, 2004. Several parties, including Duke Energy Ohio and the OCC, filed applications for rehearing on October 29, 2004. Duke Energy Ohio asked the PUCO to either i) approve its original CMO proposal; ii) approve the Stipulation that Duke Energy Ohio proposed at the hearing (i.e. unaltered by the PUCO); or iii) approve a new rate plan (“New Proposal”) having an array of new and different charges that had not been investigated or been subject to a hearing.

Duke Energy Ohio’s New Proposal was built on the four conditions placed by the Commission on the Stipulation and introduced new charges and modified previously

³ January 2004 Application at 8.

⁴ Tr. Vol. II at 8, line 4 through 15, line 2.

proposed charges. In the First Entry on Rehearing, the PUCO adopted (in principal part) the New Proposal. The Commission provided for certain Duke Energy Ohio filings before some of the rate increases provided for in the New Proposal could be placed into effect. The above-captioned cases reflect the existence of these filings.

The OCC submitted its second application for rehearing, which was denied in a Second Entry on Rehearing dated January 19, 2005. The Commission's last action was an "Order on Rehearing" (Appx. 92.), dated April 13, 2005, that addressed complaints by certain marketers regarding the willingness of Duke Energy Ohio to accept notices regarding contractually binding service to end users of electricity.

The OCC filed a Notice of Appeal on May 23, 2005. After argument before the Supreme Court of Ohio, the Court issued an opinion on November 22, 2006. The Court decided that the PUCO erred by failing to compel the disclosure of side agreements and erred by failing to properly support its decision that determined rates and rate procedures for the post-MDP.⁵ The Court remanded the case for additional consideration by the Commission.

On November 29, 2006, the Attorney Examiner issued an Entry in the above-captioned cases that provided for a "hearing . . . to obtain the record evidence required by the court" and ordered that a prehearing conference be held on December 14, 2006.⁶ The above-captioned cases were consolidated ("Post-MDP Remand Case"). A procedural Entry was issued on February 1, 2007 that, among other matters, set a hearing date for March 19, 2007. In their responses to OCC's discovery, the Movants marked as

⁵ *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 at ¶95 ("Consumers' Counsel 2006").

⁶ November Entry at 3, ¶(7).

confidential (and subject to protective agreements) most everything that is of interest with regard to the heretofore secret side agreements.

Movants now seek a hearing that would essentially be closed to public scrutiny. To that purpose they filed five motions for protection on March 2, 2007.⁷

III. A PRE-HEARING CONFERENCE SHOULD BE HELD.

These proceedings are complex even without the added burden presented by many documents over which parties seek protection and the closure of the hearing room. For example, the hearing was bifurcated to deal first with issues on remand from the Supreme Court of Ohio and next with issues raised by various filings by Duke Energy Ohio regarding proposed riders and trackers.⁸ However, due dates for all testimony were contained in a single schedule. The separation of witnesses between the two portions of the hearings is not entirely clear.

Another matter that should be discussed at a prehearing conference is the order of witnesses.. The Attorney Examiners have issued subpoenas for three witnesses from the Cincinnati area (upon motions by the OCC) and their appearances should be discussed to minimize the amount of time each witness is required to spend in Columbus at the hearing. Alternatively, counsel for Duke Energy Ohio and Kroger contacted the OCC to request that the OCC use deposition transcripts in lieu of the live appearances of these three witnesses, a matter that should be dealt with in the presence of other parties.

⁷ Kroger's Motion for Protection contains a certificate of service that incorrectly states that the pleading was served electronically. Electronic service is required pursuant to the instructions of the Attorney Examiners under the expedited procedure also ordered for pleadings in these proceedings. Hard copies of Kroger's Motion for Protection were received by the OCC in the mail on March 5, 2007 (but never transmitted by Kroger to the OCC's trial counsel).

⁸ Entry at 2 (February 1, 2007).

These cases also present difficulties regarding the treatment of confidentiality claims regardless of the outcome for the Motions and the OCC's Memorandum Contra. One issue arose during the deposition of John Deeds on February 8, 2007. Restricted in its questioning regarding information gained during discovery, the OCC limited its cross-examination to more fully examining the claims contained in Mr. Deed's Complaint. Information was thereby provided to the OCC outside the terms of any protective agreement, and did not obtain any protected status under such agreements. Duke Energy Ohio stated at the deposition that the deposition transcript acquired protected status under its protective agreement with the OCC.⁹ Duke Energy Ohio's position finds no support within the terms of the protective agreements. "Protected Materials" are not created in a vacuum, but in the context of "documents and information furnished subject to the terms of th[e] Agreement and so designated by [the providing party] by conspicuously marking each document or written response as confidential."¹⁰ The result advocated by Duke Energy Ohio would conclude that an agreement intended to free the flow of information *from Duke Energy Ohio* could be transformed into a special restriction on only parties that signed protective agreements¹¹ regarding information obtained from someone other than Duke Energy Ohio.

⁹ Trial counsel for Duke Energy Ohio stated at the deposition of Greg Ficke on February 20, 2007 that Duke Energy Ohio was reconsidering its position.

¹⁰ See, e.g., DERS Motion for Protective Order, Attachment A at ¶3.

¹¹ For example, a party such as the Ohio Partners for Affordable Energy ("OPAE") that has not executed a protective agreement with any of the Duke-affiliated companies could have subpoenaed Mr. Deeds and obtained documents from Mr. Deeds. According to Duke Energy Ohio's argument, the information obtained would not be subject to any restriction. The result advocated by Duke Energy Ohio (that would restrict only the OCC and not OPAE) is ridiculous. The Duke-affiliated companies lost control of information regarding their side agreements before the OCC knew of their existence.

IEU-Ohio was not represented at the deposition of Mr. Deeds. Its innuendo that the OCC has engaged in some impropriety regarding contact with Mr. Deeds is based on pretense and disregard for facts. IEU-Ohio Letter at 1-2 (March 2, 2007).

The same holds true regarding documents obtained as the result of the subpoena duces tecum served upon John Deeds.¹²

Loose claims by Duke-affiliated companies regarding the confidential treatment of documents have been a continuing problem for the OCC. Documents provided by the Duke-affiliated companies have in some instances (aside from the discussion of John Deeds) been obtained from other sources and thereby have lost their protected status under the protective agreements.¹³ The Duke-affiliated companies themselves have released discussions of documents as part of discovery without any claim to confidentiality.¹⁴ Siding with caution, many parties may not receive unredacted versions of the OCC's testimony even though any claim to the confidential status of some documents (and thereby to discussions of those documents) is tenuous.

Without conceding any result regarding the Motions and the OCC's Memorandum Contra, maintaining the confidentiality claimed by various parties would be restrictive and cumbersome at the hearing. For instance, OCC testimony is organized by subject matter and the flow of exposition: it is not organized by the source of the information used. A constantly shifting attendance by counsel for various parties might result if no other arrangement or instruction is provided. The OCC should be able to cross examine a

¹² The documents were not part of the subject matter for the deposition other than brief questioning by Duke Energy Ohio regarding whether documents had been provided to the OCC.

¹³ See, e.g., DERS Motion for Protective Order, Attachment A at ¶3 ("Protected Materials" shall not include any information or documents contained in the public files of an administrative agency or court or otherwise in the public domain.").

¹⁴ As an example, the OCC was provided with multiple responses to the OCC's fifth set of discovery to Duke Energy Ohio that discuss [REDACTED]. The versions conflict regarding their claim, or lack thereof, regarding confidentiality.

customer witness using documents obtained from a Duke-affiliated company. Duke Energy should not be able to exclude parties from the hearing room (and maybe even from briefing the case) by requiring parties to submit to unreasonably restrictive protective agreements. These situations can be dealt with at a prehearing conference using limiting instructions. The aim should be to include counsel for parties in the proceedings to the extent possible.

For the foregoing reasons, a prehearing conference should be conducted for these proceedings.

IV. THE MOTIONS FOR PROTECTION SHOULD BE DENIED IN FAVOR OF HOLDING A PUBLIC PROCEEDING.

A. The Law Regarding Claims of Confidentiality

The Movants seek to engage the OCC in a debate over public policy in which legal authority favors the OCC -- which is to say the law favors the public's interest in the conducting of open proceedings by their government. All of the protective agreements at issue state that "the burden shall be upon [the party seeking confidential treatment]... to show that any materials labeled as Protected Materials pursuant to this Agreement are confidential and deserving of protection from disclosure."¹⁵

Ohio Adm. Code 4901-1-27(B)(7)(e) requires that "[t]he party requesting such protection shall have the burden of establishing that such protection is required." The reason for this burden upon Movants is that the OCC supports "the inherent, fundamental policy of R.C. 149.43 ... to promote open government, not restrict it."¹⁶

¹⁵ See, e.g., DERS Motion for Protection, Exhibit A (Protective Agreement) at ¶10.

¹⁶ *Besser v. Ohio State University* (August 9, 2000), 89 Ohio St. 3d 396, 396.

R.C. 149.43 is Ohio's public records law that has been addressed in numerous proceedings before the Commission. R.C. 4901.12 requires that "all proceedings of the public utilities commission and all documents and records in its possession are public records," except as provided in the exceptions under R.C. 149.43. The Commission has noted that R.C. 4901.12 and R.C. 4905.07 "provide a strong presumption in favor of disclosure, which the party claiming protective status must overcome."¹⁷

Ohio Admin. Code 4901-1-24(D) requires of the PUCO that "[a]ny order issued under this paragraph shall minimize the amount of information protected from public disclosure." 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, Revised 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].¹⁸

The Commission's Entry in the above-quoted case is as informative for its details as it is for the cited legal authority. Faced with demands for "wholesale removal of the document from

¹⁷ *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, *Opinion and Order* at 5 (October 18, 1990).

¹⁸ *In re MxEnergy, Inc.*, Case No. 02-1773-GA-CRS *et al.*, Entry at (3) (September 7, 2004) (notations in original).

public scrutiny,”¹⁹ 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....”²⁰

The Commission has also used a balancing approach in its review of motions for protective orders. For instance, the PUCO has noted “it is necessary to strike a balance between competing interests. On the one hand, there is the applicant’s interest in keeping certain business information from the eyes and ears of its competitors. On the other hand, there is the Commission’s own interest in deciding this case through a fair and open process, being careful to establish a record which allows for public scrutiny of the basis for the Commission’s decision.”²¹

The Ohio Supreme Court has addressed the test for protection from disclosure under R.C. 149.43 as the “state or federal law” exemption.

We have also adopted the following factors in analyzing a trade secret claim:

(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

¹⁹ *Id.* at 3.

²⁰ *Id.*

²¹ *In the Matter of the Application of Rapid Transmit Technology Inc. for Certificate of Public Convenience and Necessity to Provide Local Telecommunications Service in the State of Ohio*, Case No. 99-890-TP-ACE, Entry at 2-3 (October 1, 1999); *see also In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR at 7 (October 18, 1990) (holding that “any interest which the joint applicants might have in maintaining the confidentiality of this information [fair market value and net book value of assets proposed to be transferred] is outweighed by the public’s interest in disclosure.”)

(6) the amount of time and expense it would take for others to acquire and duplicate the information.’²²

The analysis of these factors regarding the documents in question is missing from all of the Motions except for some broad, summary statements.²³

The Commission requires specificity from those that seek to keep information from the public record. Ohio Admin. Code 4901-1-24(D)(3) requires movants for confidentiality to file a pleading “setting forth the specific basis of the motion, including a detailed discussion of the need for protection from disclosure....” The specificity required by law, and supported by the terms of both the Protective Agreement and the Protective Attachment,²⁴ is missing from the Motions. Movants have failed to meet their burden under the terms of the protective agreements and under Ohio law.

B. The Motions and the Documents

In its notices of February 23, 2007, the OCC advised the Movants that they should either allow **all** the documents for which they claimed confidentiality to become available to the public domain or they should proceed with their responsibility under law and rule to try to convince the Commission that **all** of the documents are deserving of remaining secret from the public scrutiny. The OCC is hereby modifying its notices to limit the issue now before the PUCO to the documents that are attached to the testimony of OCC Witness Beth

²² *Besser* at 399-400.

²³ See, e.g., Ohio Hospital Association Motion for Protective Order at 4-5, which does not apply the test to any actual document or type of document. Revelations in connection with the wrongful discharge action by former employee John Deeds in connection with “option agreements” renders the efforts of the Duke-affiliated companies to limit dissemination of information regarding its side agreements within the limits of the organization is suspect, as does the apparent lack of precautions taken to guard the secrecy of the information. .

²⁴ DERS Motion for Protection, Attachment A at 5, ¶9 (“nature and justification for the injury”).

Hixon. The OCC conditions its narrowing of the scope of the documents at issue upon the recognition of this modification of the notices, with full reservation of the OCC's rights (under paragraph nine of the protective agreements) to give notice to the Movants in the future with regard to any documents not attached to Witness Hixon's testimony. The OCC anticipates that any further exercise (if any) of its notice rights will be limited and related to potential cross-examination and rebuttal or surrebuttal testimony. Duke Energy - Ohio's counsel and the OCC last week agreed that any narrowing of the OCC's notice regarding the documents would not preclude the OCC, under the circumstances just described, from giving further notice later. The PUCO should recognize the OCC's rights in any ruling in these proceedings.

1. Attachments to the Testimony of OCC Witness Hixon

The arguments fundamentally presented by the Duke-affiliated companies state that the OCC failed to provide specificity regarding the documents that it seeks to introduce into the public domain during these proceedings²⁵ and that the documents contain confidential agreements that involve Duke Energy affiliates.²⁶ The protective agreements signed with all Movants contain the same language regarding notification of counsel in order to identify the protected materials that are the subject of notice by the OCC. The purpose served by that portion of each of the protective agreements is to provide the party producing the documents fair notice regarding the OCC's intent regarding the treatment of documents. While the

²⁵ See, e.g., Duke Energy Ohio Motion for Protection at 13-14; DERS Motion for Protection at 10-11; Cinergy Motion for Protection at 3. The identification of material by "page and line numbers" (Duke Energy Motion for Protection at 14) is an impractical result in any proceeding, let alone the present proceeding with its expedited schedule that Duke Energy Ohio has advocated is too long. The purpose of protective agreements is practicality within the confines of litigation.

²⁶ See, e.g., Duke Energy Ohio Motion for Protection at 7; DERS Motion for Protection at 4; Cinergy Motion for Protection at 5.

OCC's original notices were broad, they provided the required, clear notification regarding the OCC's intent. Movants do not complain that any misunderstanding existed.

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2. Additional Explanation of Documents Presented to the OCC

a. Documents Provided by Duke Energy Ohio

For clarity, the documents obtained from Duke Energy Ohio over which the OCC currently seeks to end any claim to confidentiality are Attachments 20 and 23 to the testimony of OCC Witness Hixon.

43 [REDACTED]

44 [REDACTED]

b. Documents Provided by Cinergy

For clarity, the documents obtained from Cinergy over which the OCC currently seeks to end any claim to confidentiality are Attachments 5 and 11 to the testimony of OCC Witness Hixon.

c. Documents Provided by OHA

For clarity, all documents obtained from OHA that were attached to the testimony of OCC Witness Hixon (i.e. Attachments 7 and 13) were provided without any distinction between information that OHA considers confidential and information that OHA does not consider confidential.

d. Documents Provided by Kroger

For clarity, the documents obtained from Kroger that were attached to the testimony of OCC Witness Hixon (i.e. Attachment 24) were provided to the OCC before the execution of a protective agreement, and were simply stamped "CONFIDENTIAL" by Kroger. Later documents that contain the "term and pricing information" that are the subject of Kroger's Motion for Protective Order.⁴⁵ The "documents at issue," according to Kroger's Motion,⁴⁶ were provided later and separately under a protected status.

Kroger argues that it is provided generation by a CRES provider and that agreements regarding that arrangement and related to that arrangement should not be subject to public scrutiny.⁴⁷ [REDACTED]

[REDACTED]

⁴⁵ Kroger Motion for Protective Order at 5.

⁴⁶ Id.

⁴⁷ Kroger Motion for Protective Order at 3 and 5.

[REDACTED]

[REDACTED]

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V. IEU-Ohio's Letter

On March 2, 2007, IEU-Ohio filed a vituperative letter against PUCO procedural rulings, electric restructuring, and the OCC. At least three of the seven paragraphs in IEU-Ohio's rant contain expressions of frustration about PUCO rulings that for most parties would be funneled to an application for rehearing or to an interlocutory appeal. It is easier to define what the letter is not; it is not a motion for protection of documents. Whatever the letter is, it has been filed, sent to PUCO Commissioners and Attorney Examiners, and the OCC will therefore briefly address the letter.

In its letter, IEU-Ohio attacks the OCC for its "plan" to make confidential documents public. Under Ohio Adm. Code 4901-1-27(B)(7)(e), the plan of the PUCO provides that those seeking to secure secrecy from public scrutiny must bear "the burden of

establishing that such protection is required.” Those bearing that burden, including Duke Energy Ohio and its two affiliates, now have the opportunity under Ohio law and rule to overcome the presumption that proceedings before the public’s government will be open. As matters now stand, IEU-Ohio was able to make its public harangue cloaked by the present protection afforded documents in this proceeding that also constrains the OCC from a full public response.

IEU-Ohio mischaracterizes the OCC’s position in the Post-MDP Service Case as seeking divestiture of the utility’s generating assets, referencing page 7 of OCC’s brief filed on June 22, 2004. The OCC’s brief referenced “corporate separation,” not divestiture, and recommended the transfer to an “electric [sic, exempt] wholesale generator” -- a status that Cinergy itself could have created under federal law. In fact, the OCC addressed the very sorts of concerns about the need for corporate separation that IEU-Ohio itself has addressed before the PUCO.⁴⁸

IEU-Ohio’s letter -- written and filed a full week before OCC filed its testimony to recommend reductions in rates for residential consumers -- characterized OCC’s position as harmful and contributing to deregulatory “dysfunction.” Of course, IEU-Ohio and its counsel make no reference in the letter to their role in actively supporting the electricity deregulation that is now Ohio law and about which they now complain. IEU-Ohio’s counsel, as reported in one publication, was characterized as a “true believer” in deregulation and a “deregulation advocate.”⁴⁹ In another edition, IEU-Ohio’s counsel was

⁴⁸ *In re Electric Transition Plan Rulemaking*, Case No. 99-1141-EL-ORD, Comments of Coalition for Choice in Electricity at 28-33, 104 (October 13, 1999) (in which IEU-Ohio joined with others to comment extensively on the need for corporate separation).

⁴⁹ “Future Is Rosy For Ohio Deregulation As Senate Chief Gives It Top Billing,” *Industrial Energy Bulletin*, Volume 25, Issue 51, p. 1 (December 25, 1998) (available on LEXIS).

described as someone who championed the cause of customer choice and who considered Senate Bill 3 to be "a work product that's capable of producing a 10, on a 1 to 10 scale."⁵⁰

Finally, what seems to a motivating factor for IEU-Ohio's letter -- that there should be no more process in this case, public or otherwise -- was rejected by the highest court in this state, the Supreme Court of Ohio, in the appeal of Case No. 03-93-EL-ATA, et al., and is *not at issue* as the result of the OCC's February 23, 2007 notices. The Court remanded this case to resolve flaws that IEU-Ohio now defends, and there is no further consideration due IEU-Ohio in this regard.

VI. CONCLUSION

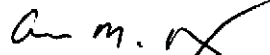
The Motions fail to meet the requirements under law for continued protection of the documents that were provided to the OCC during discovery. The Motions submitted by Movants should be denied with regard to the information described in this Memorandum Contra that should be released to the public domain, and they are rendered moot with regard to the information that the OCC will continue to hold protected as described above, subject to OCC's reservation of rights to give notice if appropriate under paragraph nine of the protective agreements.

The OCC's Motion for Prehearing Conference should be granted to deal with many complicating factors that are present in the instant proceedings.

⁵⁰ "Ohio Users Like Restructuring Bill, Readied for Signature of Gov. Taft," Industrial Energy Bulletin, p.2 (June 25, 1999) (available on LEXIS).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the OCC's Redacted Memorandum Contra Motions for Protection and Motion for Prehearing Conference was served electronically on the persons listed on the electronic service list as shown below (as supplemented for this pleading), provided by the Attorney Examiner, this 13th day of March 2007.


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