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**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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<br>Case No. 03-2080-EL-ATA |

# REPLY TO MEMORANDA CONTRA OCC MOTION TO ACCEPT REDACTIONS BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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**REPLY TO MEMORANDA CONTRA OCC MOTION TO ACCEPT REDACTIONS**
**BY**
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## I. INTRODUCTION

James Madison, who is credited with authoring the Bill of Rights for this great nation, wrote nearly 200 years ago that information is good for government and the people served by it:

> A popular government without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power which knowledge gives.[1]

In 2008 a group of some of Ohio's largest industrial corporations known as the "Industrial Energy Users,"[2] wrote in defense of secret transactions and characterized the efforts of a government office, the Office of the Ohio Consumers' Counsel's effots ("OCC"), to introduce transparency into public regulation by another government office, the Public Utilities Commission of Ohio ("PUCO"), as "denigrat[ing]":

> For the reasons expressed above, we urge the Commission to reject OCC's latest attempt to use false allegations of secret transactions and conduct not in the public interest to denigrate the Commission and the parties that participate in Commission proceedings.[3]

OCC recommends that the PUCO choose Madison's approach.

On October 24, 2007, the Public Utilities Commission of Ohio ("Commission" or "PUCO") issued the Order on Remand in the above-captioned cases where it was the Office of the Ohio Consumers' Counsel's ("OCC") position that the public record should contain various information that the Commission had accepted as confidential. In the Order on Remand, the Commission stated:

> [P]ursuant to our ruling on this [confidentiality] issue, those documents must now be redacted to keep confidential only those matters we have ruled to be trade secrets. 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 pre-filed testimony of Ms. Hixon and will file that redacted version within 45 days of the date of this order on

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[1] Writings of James Madison 103 (G. Hunt ed. 1910), cited by "2006 Ohio Sunshine Laws Update," Jim Petro, Attorney General at 2.

[2] Industrial Energy Users-Ohio lists its members at: http://www.ieu-ohio.org/public/about_ieu-ohio/members/.

[3] IEU Memo Contra (January 25, 2008) at 5.

> remand. Each party will then be required to redact all other sealed documents that such party filed with the Commission. Redacted versions of all documents filed in these proceedings shall be docketed no later than 60 days after the date of this order on remand.[4]

In the Order on Remand, the Commission identified only eight items that it believed met the two-prong test of "trade secret" under R.C. 1333.61(D). Accordingly, the Commission ordered:

> That, regarding side agreements and documents discussing such side agreements [sic], customer names, account numbers, and customer social security or employer identification numbers, contract termination date or termination provisions, financial consideration for each contract, price or generation referenced in each contract, and volume of generation covered by each contract shall all be deemed trade secret information and shall be maintained on a confidential basis under protective orders for a period of eighteen months from March 19, 2007.[5]

At an earlier point in the Order on Remand, the Commission also ordered that "terms under which any options may be exercisable" be redacted.[6]

In essence, the PUCO was requiring the re-filing of documents filed earlier in the case, with the intention that more information had to be disclosed in the public domain. On December 7, 2007 and in response to the Order on Remand, Duke re-filed side agreements with less information redacted than before so as to reveal more information in the public domain.

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[4] Order on Remand at 17 (October 24, 2007).

[5] Id. at 44.

[6] Id. at 15.

On December 13, 2007, OCC filed a Motion for Extension to request thirty additional days to provide the new redactions (i.e. fewer redactions than before, and more publicly available information) requested by the Commission. On December 20, 2007, the Commission granted OCC's Motion for Extension, thereby making the OCC's redactions due January 23, 2008.[7]

On January 23, 2008, the OCC filed (under seal) redacted documents intended to disclose information deemed by the PUCO to be appropriate for the Commission's public files. The OCC moved for acceptance of its redactions ("OCC Motion to Accept") that responded to the Commission's Order on Remand. Also on January 23, 2008, the Duke-affiliated companies (Duke Energy Ohio, Duke Energy Retail Sales, and Cinergy Corp., collectively "Duke") jointly filed new redactions of documents in the Commission's public files. The docketed documents included pleadings that were originally submitted by these companies, and also new redactions by Duke of testimony submitted by the OCC and deposition transcripts that were originally submitted to the PUCO by the OCC.[8]

On January 25, 2008, the Industrial Energy Users – Ohio ("IEU") filed their Memorandum Contra OCC's Motions ("IEU Memo Contra"). By Attorney Examiner Entry dated January 30, 2008, the OCC was provided the opportunity to reply to all memoranda contra in a single pleading. On February 13, 2008, Duke filed a Memorandum in Response ("Duke Memo in Response") to the OCC's Motion to Accept and IEU filed a Supplemental

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[7] Entry at 2 (December 20, 2007).

[8] The Company's submissions on January 23, 2008 also included a newly redacted version of the OCC's Motion for Subpoena Duce Tecum and Memorandum in Support that were originally submitted by the OCC on February 5, 2007. Duke's new redaction of that pleading is appropriate.

Memorandum Contra ("IEU Supplemental Memo Contra") to the OCC Motion to Accept. The OCC herein replies to Duke's memorandum contra and IEU's two memoranda contra.

## II. OHIO LAW REGARDING PUBLIC RECORDS

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. R.C. 149.43 is Ohio's public records law. R.C. 4905.07 states that, "[e]xcept as provided in section 149.43 of the Revised Code . . . , all facts and information in the possession of the public utilities commission shall be public . . . ." 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."[9]

Ohio Adm. 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."[10] 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, Revise Code) and as consistent with the purposes of Title 49 of the Revised Code. Ohio pubic records law is intended to be liberally construed to 'ensure that governmental records be

[9] *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).

[10] Emphasis added.

> 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].[11]

Faced with demands for "wholesale removal of the document from public scrutiny,"[12] the Commission reviewed several documents in the above-cited telephone case and determined in each circumstance how documents could be redacted "without rendering the remaining document incomprehensible or of little meaning...."[13]

Ohio Adm. Code 4901-1-27 (B)(7)(e) places the "burden of establishing that such protection is required" squarely on the party seeking to prevent public disclosure of information. That subsection of the Rule also states that the Commission shall:

> take such actions as are necessary to * * * prevent public disclosure of trade secrets, proprietary business information, or confidential research, development, or commercial materials and information. The presiding hearing officer may, upon motion of any party, direct that a portion of the hearing be conducted *in camera* and that the corresponding portion of the record be sealed to prevent public disclosure of trade secrets, proprietary business information, or confidential research, development, or commercial materials and information.
>
> * * * The commission or the presiding hearing officer shall issue a ruling prior to the closing of the case regarding the amount of time that any sealed portion of the hearing record shall remain sealed.

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

[12] Id. at 3.

[13] Id.

The Order on Remand states that the Commission conducted such an *in camera* review in this case.[14]

The legal obligation to follow Ohio law regarding the public nature of the documents in the Commission's possession is the responsibility of the PUCO. The OCC, as a public entity, must meet its own obligations regarding the treatment of documents. As a party to these proceedings, however, the OCC seeks to aid the Commission in performing its obligations under Ohio law. In that regard and consistent with the Commission's rulings, the OCC undertook a substantial review to provide new redactions to documents that were previously submitted in these cases with the intention of including more information in the public record.[15] The decision rests with the PUCO to make any needed adjustments to the redaction efforts performed by the OCC and other parties for purposes of providing the public with more extensive information regarding the Commission's case work and decisions.

## III. REPLY TO THE DUKE MEMORANDUM IN RESPONSE

### A. The PUCO's Order on Remand Set the Procedure for Providing New Redactions and Resolved Which Materials Are Protected. Duke Should Not Be Permitted To Re-Litigate the Issue Through Its Arguments Against the Commission's Decision, Especially Considering that Duke Failed to File the Lawful Pleading, an Application for Rehearing, to Seek a Change in the Order on Remand.

[14] Order on Remand at 17. ("Based on our *in camera* review of the documents in question, we believe that they can be redacted to shield the trade secret information while, at the same time, disclosing all information that we have not found to be a trade secret, without rendering the documents incomprehensible or of little meaning").

[15] As OCC has argued before, more information should be placed in the public record. However, the OCC has limited its proposed redactions at this point to providing the redactions that are consistent with the Commission's Order on Remand.

### 1. The Order on remand set the procedure for post-decision filings.

The Duke Memo in Response is long on finger-pointing and short on argument regarding compliance with the Commission's Order on Remand that is the issue -- and the only issue at this point -- regarding additional efforts to redact documents. Duke states:

> 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. The Commission cannot, however, protect such information if it decides OCC has filed documents redacting too little.[16]

Regarding the faux blame placed on the OCC for "insisting" on its preferred procedure, it must be understood that the *Commission's Order on Remand stated* that "[e]ach party . . . [is] required to redact all other [i.e. other than attachments to the testimony of Ms. Hixon] documents filed in these proceedings . . . ."[17] The OCC simply complied with the Order on Remand when OCC filed on January 23, 2007. The OCC filed under seal, recognizing that Duke might argue (as it did) that the Commission should "decide OCC has filed documents redacting too little."[18]

Duke complains about OCC's filing that was made under seal (with considerable effort by OCC) to extend to Duke the courtesy of document protection until the PUCO rules. Duke would also have complained had OCC not filed under seal. The constant in this case is that Duke will complain about most anything that would introduce more transparency for

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[16] Duke Memo in Response at 5.

[17] Order on Remand at 17.

[18] Id.

the public regarding the side deals, but Duke's continuing state of agitation is not dispositive of the legal issues that control at this point.

The Duke Memo in Response lists the eight items the Commission identified as trade secret information subject to a protective order: customer names; account numbers; customer social security or employer identification numbers; contract termination dates or other termination provisions; financial consideration in each contract; the price of generation in each contract; the volume of generation covered by each contract; and the terms under which any option may be exercisable.[19] That would have been a good place to stop.

Unfortunately, Duke treats the PUCO's Order on Remand as a starting point to continue pre-Order arguments about protection of information. That is wrong. The PUCO, as the regulatory authority, concluded that part of the proceeding for Duke and others, as parties.

Duke continues to request protection for items that are not remotely related to the items the Commission identified as protected: effective dates of contracts; trade group parties to the case; the entirety of attachment 7 to Ms. Hixon's testimony (an e-mail); and the identities of the employees of the Duke-affiliated companies, most of whom are already identified in the public docket in this case. By Order of the PUCO, Duke and the other parties are done with litigation of the protection issue, but Duke seems not to have gotten the message. As will be explained below, that message is in Ohio law.

[19] Duke Memo in Response at 5.

**2. Duke forewent its opportunity to modify the Commission's list of items that are protected by failing to file an application for rehearing pursuant to R.C. 4903.10 within thirty days after the order on remand that determined which materials would be protected.**

If Duke was not satisfied with the Commission's decision about which items are to be redacted, Duke's only opportunity for reconsideration was to file an application for rehearing of the Order on Remand. That is the way the law works. R.C. 4903.10 provides:

> After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission.

Therefore, Duke would have had to file an application for rehearing on or before November 24, 2007, in order for Duke to contest the Commission's determination about what items could be protected. Duke did not. Now, the Duke Memo in Response impermissibly attempts to modify the Commission's Order on Remand. It's too late for Duke, under Ohio law. OCC, on the other hand, applied for rehearing and has appealed the PUCO's order on remand with regard to the issue of public information. Given the workings of R.C. 4903.10, the PUCO lacks even the jurisdiction to entertain arguments about changing its Order to further limit the disclosure of information to the public.

Ironically, in the very same October 24, 2007 Order on Remand, the Commission rebuffed another Duke attempt to re-litigate an issue after failing to file the proper pleading under PUCO Rule, which was an interlocutory appeal of an Attorney Examiner's Entry. In the PUCO's Order on Remand, the Commission stated that it had responded to Duke's "motion for clarification" and OCC's memo contra to that motion for clarification by

"refusing to 'clarify' the Examiner's ruling but confirming that the hearing would include the presentation of testimony and the introduction of evidence."[20]

Similarly, in Duke's last distribution rate case, Duke attempted by a later motion (instead of a timely interlocutory appeal) to modify a procedural schedule that had been set by the Attorney Examiner.[21] The Attorney Examiner denied the motion:

> The motion asks for reconsideration of the substance of any entry that was issued ten days before the motion was filed. CG&E cannot avoid the strictures of Rule 4901-1-15, Ohio Administrative Code (O.A.C.), by calling its filing a motion rather than an interlocutory appeal.[22]

What Duke attempts here is the same as what Duke tried in the rate case when it disregarded the rule for contesting an Examiner's ruling. Here, Duke is disregarding Ohio law that requires an application for rehearing -- an application for rehearing that Duke failed to file. Duke is done. Accordingly, the Commission should reject Duke's arguments that would require the Commission to modify its order outside the application for rehearing procedure.

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[20] Order on Remand at 12.

[21] *In re CG&E Distribution Rate Case, Case No. 05-59-EL-AIR, Entry at 2 (October 14, 2005).*

[22] Id. Entry at 2 (November 3, 2005).

### B. The Commission Should Reject Duke's Proposals For Additional Redactions That Do Not Comply With The Order On Remand As Duke's Requests Do Not Meet the Criteria For Trade Secrets As Set Forth Under R.C. 1333.61.[23]

In its Memorandum in Response, Duke continues to attempt to expand the amount of information that will remain confidential by arguing that the Commission's list of the items to be redacted was not meant to be interpreted literally to limit the amount of information to be protected.[24] The Duke Memorandum in Response presents three perspectives of essentially a single argument that the items listed by the Commission for continued protection are meant to be interpreted broadly rather than literally. The first section of the Memorandum in Response states that the Commission intended the items to be interpreted "broadly and flexibly."[25] The second section states that OCC was wrong in not interpreting the items "broadly and flexibly,"[26] and the third section states that Duke complied in good faith by interpreting the items "broadly and flexibly."[27] The arguments in the Duke Memorandum in Response are contrary to the requirements of the Order on Remand as well as the law regarding trade secrets that the Commission relied upon in the Order on Remand.

The Commission has recognized that R.C. 4901.12 and R.C. 4905.07 create a heavy burden for Duke to meet in order to redact because those laws "provide a strong

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[23] As presented in the preceding section, Duke's failure to file an application for rehearing is dispositive of its arguments for expanding the scope of information to be protected. OCC does not waive that argument by addressing here the other aspects of Duke's position that are contrary to law.

[24] Duke Memo in Response at 5.

[25] Id. at 4-8.

[26] Id. 8-10.

[27] Id. 10-11.

presumption in favor of disclosure, which the party claiming protective status must overcome."[28] Ohio Adm. Code 4901-1-24(D) reflects that fact, stating: "Any order issued under this paragraph shall *minimize* the amount of information protected from public disclosure."[29] Therefore, in order to minimize protection under 4901-1-24(D), redactions must be made on a word-by-word basis. With those laws and that rule in mind, the Commission identified eight specific items that Duke could redact. Duke has not complied with the Order on Remand when it redacted more broadly than is provided for in the eight items listed in the Order on Remand.

Through non-compliant redactions beyond the eight items the Commission found to be protected information, Duke has redacted information that cannot be justified as trade secret information. Duke essentially ignores not only the requirements of the Order on Remand, but also the trade secret criteria established under R.C. 1333.61 in its arguments. And Duke fails its burden of proof under Ohio Adm. Code 4901-1-27(B)(7)(e).

**1. The names of Duke employees provide no independent economic value to Duke or its competitors and are not reasonably kept secret under the circumstances.**

Duke explains that it redacted the names of Duke's employees because:

> 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 which have agendas other

[28] *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); Ohio Adm. Code 4901-1-27(B)(7)(e).

[29] Emphasis added.

> than the best interest of the Duke Entities, its customers, and its community.[30]

Neither the law nor the Commission has recognized Duke's justification for redacting the names as legitimate under the definition of "trade secrets." Duke's argument goes even further, apparently attacking the statutory right of parties in Commission proceedings to ample discovery and attacking the use of such discovery in publicly open proceedings.

The Commission relied upon R.C. 1333.61(D) to determine the items that should be redacted. That provision lists two factors that must be essential to information that the Commission can protect as a trade secret. First, the information must derive independent economic value. Second, the information must be the subject of efforts to maintain its secrecy that are reasonable under the circumstances.

The names of the company employees do not qualify as trade secrets under those factors. First, Duke has not identified the independent economic value from keeping the names of its employees secret because there is no such reasonable economic value. Nor would Duke be able to identify the economic value that Duke's competitors could obtain from the use of Duke's employees names. Therefore, the names of Duke's employees do not meet the first factor of independent economic value that must be met under R.C. 1333.61(D)(1).

Second, it is not reasonable for Duke to take the effort to protect these names in this proceeding. Most of the names of the employees are known to the public. Duke does not have a policy of telling its employees that they are not permitted to tell anyone that they are employed by Duke. Accordingly, the names of Duke's employees do not meet the second

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[30] Dukes' Memorandum in Response at 9-10.

factor that it is reasonable to take the effort to protect these names that must be met under R.C. 1333.61(D)(2).

Duke's employees names do not trigger the trade secret factors under R.C. 1333.61, and should not be redacted.[31] This law underlies the Order on Remand that did not provide protection to the names of those employed by the Duke-affiliated companies.

**2. Names of trade organizations provide no independent economic value to Duke or its competitors and are not reasonably kept secret under the circumstances.**

Duke explains the reason that it believes the names of trade groups to this proceeding should be redacted along with the names of customers represented by the trade groups is that providing the names of the trade group parties "provides obvious clues tending to suggest the name of particular customers of one or more of the Duke Entities."[32] If the argument has any basis, then the public's access to the names of the trade groups reveals the same information and is already public.

Again Duke is asking the Commission to protect information not only beyond the information that the Commission said that it would protect, but also beyond what is considered a trade secret. First, Duke did not demonstrate that the trade groups whose names Duke is attempting to redact have so few members that it would be easy for competitors to figure out which of the members were customers in a protected contracts and which customers were parties to which contracts. Therefore, it is hard to imagine what independent economic value competitors would gain from knowing the trade groups names

[31] Along these lines, the OCC mistakenly redacted a person's name on page 21, 23, 45 and 46 of the Deposition of Gregory C. Ficke. On the same document OCC should have redacted the last word on page 20, line 22. Fortunately OCC filed these under seal.

[32] Duke Memo in Response at 9.

as would be required under R.C. 1333.61(D)(1) for the names to qualify as trade secret information.

Second, and most obviously, the names of the trade groups are not the subject of reasonable efforts to maintain confidentiality under the circumstances of these cases as required under R.C. 1333.61(D)(2). The names of trade groups that represent customers are widely known. This would be especially true if trade groups are already mentioned in the public record. Accordingly, the names of the trade groups do not meet the requirements under R.C. 1333.61(D) that would permit Duke to redact them as trade secrets.

### 3. Duke was unable to meet its burden of proof to show how dates other than termination dates in the contracts provide independent economic value to Duke or its competitors and are secret under the circumstances.

Instead of redacting just the termination dates in the contracts, Duke redacted almost every date that was included in a contract. For example, Duke redacted the starting dates of contracts.[33] Duke argues that the starting dates of contracts "have obvious economic significance to the contracting parties."[34] However, Duke does not describe how that economic significance translates to "independent economic value" to themselves or their competitors.

Duke's other justification for redacting starting dates is based upon "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." Again Duke fails to articulate this "obvious significance."

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[33] See the effective date of the Agreement that was filed under BEH Attachment 2 on page 347.

[34] Duke Memo in Response at 8.

It appears that the redaction of dates within contracts was more of a time saving tactic than a deliberate consideration as to whether the date actually revealed valuable information. For example, Duke redacted dates related to contingencies[35] or dates relating to the ETP and RSP periods[36] rather than the beginning or termination date of contracts. Duke's redaction of dates in contracts exceeded the requirements stated in the Order on Remand as well as the arguments submitted in the Duke Memo in Response. The economic value associated with the dates was not actually considered when they were redacted by Duke.

Moreover, many of the dates Duke redacted in contracts were dates that have significance outside of the contract, and do not of themselves reveal information that is known only to parties to the contracts and to these cases. Therefore, the dates do not meet the second necessary criteria of trade secrets that the information must be the "subject of efforts to maintain its secrecy that are reasonable under the circumstances."

**4. Generic references to portions of agreements that provide no specific confidential information provide no independent economic value to Duke or its competitors and are not reasonably kept secret under the circumstances.**

In its rush to redact, Duke also appeared to rely on the practice of deleting not just specific incidences of one of the protected items, such as a description of the terms of an option, but also redacted generic references to the item in a contract (e.g. the word "option" in the contract).[37] Mere references to "options" or phrases including the word "option" does

[35] Id. at 348.

[36] Id. at 349, paragraphs 6 and 7.

[37] Id. at 333, first full sentence.

not reveal "terms under which any options may be exercisable"[38] that the Commission stated should be redacted. In this regard, the PUCO should note the open reference is to such terms in the Duke Energy Retail Sales Memorandum Contra of January 2, 2007, page 9.

Moreover, under R.C. 1333.61(D)(1) Duke cannot reasonably claim that the mere mention of the word "option" in a contract or even the indication that one unknown party entered into an option agreement with Duke has independent economic value to the party or Duke. Without knowing the customer in a contract and what the terms of an option are, knowing that a contract contains the word "option" has no value to the parties of the contract or to their competitors.

**5. References to provisions of Duke's rate stabilization plan have no independent value to Duke or its competitors, nor are they reasonably kept secret under the circumstances.**

Some of Duke's redactions appeared to have been made by individuals not familiar with the case because the redactions deal with the subject matter of the case rather than confidential information. Some of the redacted materials were provisions of the rate stabilization plan such as redactions of phrases that describe the Commission's acceptance and modification of a regulatory mechanism that was never considered confidential.[39] Not only could Duke never identify these phrases as having independent value to either it or its competitors as required under R.C. 1333.61(D)(1), but Duke could not reasonably take efforts to protect these phrases under the circumstances of these cases.

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[38] Order on Remand at 44.

[39] See Confidential Excerpts from the Deposition of Charles R. Whitlock, page 112.

### C. Duke Redacted Information that Was Previously Released to the Public, and Information Redacted by the OCC or Previously by Duke Is Now Public as the Result of the Public Filing by Duke.

Duke's filing on January 23, 2007 redacted information that was previously (and appropriately) part of the Commission's public files, and redaction of this information can no longer prevent release to the public. For example, Duke redacted page 6 of the testimony of OCC Witness Hixon (Ex. 2(A)) which identifies the parties to the stipulation dated May 19, 2004. Duke redacted the acronym "OMG" on page 7 of that same exhibit, perhaps mistaking the "Ohio Marketing Group" for a customer name or designation. Duke's version of page 71 of OCC Ex. 2(A) redacted the names of parties mentioned in the Commission's Entry on Rehearing dated November 23, 2004. Such information has been part of the Commission's public files for years and cannot (and should not) be redacted.[40]

Duke's filing on January 23, 2007 did not redact information that the OCC redacted as part of its filing on that same date, or did not redact information that Duke previously included in its redactions. Such information, regardless of whether it should have been redacted according to the Order on Remand, is in the public domain and renders previous efforts to redact the information useless. For example, the termination provision on pages 14 of OCC Ex. 2(A) was redacted by the OCC but not by Duke. Duke's newly redacted version of OCC Ex. 2(A) reveals not under redaction that "Mr. Colbert" executed agreements on behalf of "The Cincinnati Gas & Electric Company," a disclosure that is consistent with the Order on Remand but not with Duke's efforts in December to conceal

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[40] On January 23, 2007, the OCC redacted the words "Cognis, Kroger" from page 6. These are names of parties to the publicly available stipulation dated May 19, 2004, and were mistakenly redacted. The OCC mistakenly redacted the names of parties who supported Duke's "Alternative Proposal" on page 71 of OCC Exhibit 2(A) that are also named in the Commission's Entry on Rehearing dated November 23, 2004. The OCC mistakenly redacted the name of a Duke employee on pages ii and 63 of OCC Exhibit 2(A).

the names of its employees who were involved in agreements.[41] Similarly, Mr. Ziolkowski is identified on page 54 of Duke's redaction of OCC Ex. 2(A) as the author of Attachment 21 to that exhibit, rendering the redaction of that information on December 7, 2007 useless. Because Duke has already made this information public it cannot choose to redact it now. This information is now in the Commission's public files.

## IV. REPLY TO THE IEU MEMORANDA CONTRA

### A. The IEU Memo Contra Should be Ignored.

#### 1. IEU exerted no effort to assist in the proper redaction of documents in its Memo Contra, and its arguments in that document should be ignored.

IEU's Memo Contra, unfortunately, barely addresses the subject matter of the OCC's Motions -- which is to say IEU is not responsive to the Order on Remand. IEU's Memo Contra presents an unfocused, stream-of consciousness tirade[42] that reveals more about IEU than anything related to the PUCO's intention that more information about these cases should be made public. The issue at hand is the implementation of the Commission's Order on Remand regarding the extent to which information should be

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[41] See OCC Motion to Accept at 6-7 (January 23, 2008) ("names of personnel associated with the Duke-affiliated companies").

[42] IEU accuses the OCC of improperly distributing protected information, communicating with counsel for private litigants, and submitting materials on January 23, 2008 to falsely accuse others of entering into secret deals. IEU's Memo Contra at 4-5 and IEU's Supplemental Memo Conta at 6. The OCC has previously addressed IEU's false claim that the OCC distributed protected information. See, e.g., OCC Memorandum Contra Motions for Protection and Motion for Prehearing Conference at 7 (March 9, 2007). One of the attorneys involved in the "complaint in federal court against Duke Energy" (IEU's Memo Contra at 5) is also counsel for John Deeds, the whistleblower (i.e. plaintiff for wrongful discharge) who was deposed by the OCC under subpoena in these cases. OCC Motion for Subpoena *Duces Tecum* (January 26, 2007). IEU does not further explain its third accusation that the OCC "submitted materials on January 23, 2008 to falsely accuse others . . . ." The OCC's new redactions were submitted on January 23, 2008 under seal to prevent this sort of unfounded accusation.

available or unavailable to the public. The OCC's Motions responded to the Commission's Order on Remand in a responsible manner -- i.e. under seal such that parties could examine the OCC's redactions before any information was released to the public and could comment (if necessary) on the merits of the issue.

IEU ignores the care that the OCC has shown[43] and the mammoth task that the OCC undertook in dealing with information contained in nearly 1,500 pages of exhibits and pleadings that were re-submitted on January 23, 2008 in the wake of other parties' prior assertions that major portions of the record in this case should not be available to the public. Instead, IEU provided an ill-conceived diatribe against a state office.

IEU's pleading appears concerned about developments in Cincinnati regarding a federal anti-trust action and the attendant publicity.[44] The Cincinnati Inquirer has extensively quoted OCC Ex. 2(A), Attachment 21--a memorandum written by an employee of Duke and not a document that OCC created. That document was released to the public docket, largely unredacted, by Duke Energy Ohio (not OCC) in its filing on December 7, 2007. The identity of the person drafting the memorandum was released by Duke on January 23, 2008 when the companies' version of OCC Witness Hixon's testimony was filed (i.e. page 54-55). Nonetheless, the IEU Memo Contra broadly attacks the OCC's redactions that were filed under seal and unquestioningly "urges the Commission to accept DE-Ohio's version of the redactions."[45]

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[43] IEU also ignores the effort voluntarily exerted by the OCC during the hearing to hand-redact customer identification numbers to facilitate the hearing process (Remand Tr. Vol. I at 12-21; March 19, 2007) and the OCC's argument that the PUCO can treat customer identification numbers differently than other information. OCC Memo Contra IEU Application for Rehearing at 8 (December 3, 2007) ("OCC does not object").

[44] IEU Memo Contra at 5.

[45] Id. at 6.

The OCC is dedicated to representing the interests of residential customers of regulated utilities in Ohio, and the large corporations that comprise the Industrial Energy Users should address their advocacy towards the important public issues presented by these cases rather than attack the imagined motivations of OCC and its representatives.

IEU theatrically accuses the OCC of "seiz[ing] . . . side agreements to rationalize [the OCC's] contribution to the public interest."[46] The Chairman of the PUCO recently stated at a legislative hearing regarding S.B. 221 that the OCC's appeal of the issue regarding access to side deals was helpful for obtaining the Supreme Court of Ohio's guidance regarding the PUCO's proper treatment of the issue.[47] IEU's missives regarding Ohio's consumer advocacy office are off-topic and impertinent (e.g. IEU's accusation that the OCC made "false allegations of secret transactions and conduct not in the public interest to denigrate the Commission and the parties that participate in Commission proceedings").[48]

The OCC proceeded on January 23, 2008 to comply with the Order on Remand by filing its Motion to Accept, and IEU thereafter had an opportunity to address the substance of the redactions that the OCC submitted that would respond to the Commission's Order on Remand. IEU did not, however, provide a single example of an OCC redaction that did not follow the Commission's Order on Remand. The Commission should grant the OCC's Motion for Acceptance and release the OCC's submissions to the public docket to provide a more open and transparent process for the

[46] IEU's Memo Contra at 3.

[47] Chairman Schriber's comments before the House Public Utilities Committee (January 16, 2008).

[48] Id. at 5.

public -- which, after all, was the intent of the PUCO's Order on Remand that instructed parties to file revisions to their previous filings that were submitted under seal.

### B. The IEU Supplemental Memo Contra Inaccurately States that the OCC's Version of the Redactions Fails To Protect Confidential Financial Consideration.

IEU addressed only one substantive issue with regard to the propriety of OCC's redactions in its Memo Contra and its Supplemental Memo Contra. IEU argues that OCC improperly did not redact confidential information regarding the "nature" of financial consideration in contracts that was addressed in certain documents.[49] The Commission did not identify the "nature" of financial consideration or anything general at all about financial consideration to be trade secret information requiring protection. In fact, the Commission specified that only the "financial consideration for *each contract*"[50] was to be redacted. If IEU thought that the Commission should have included the "nature" of financial consideration to be trade secret information that should be protected, IEU should have filed an application for rehearing. Like Duke, however, it did not. Under R.C. 4903.10, IEU forewent its right to request that the Commission should expand the list of items it would treat as protected trade secrets.

The specific information IEU complains about in the Deposition of James F. Ziolkowski at 48, lines 9-20, does not have independent economic value to the parties to the contract or their competitors because the only references to the "nature of financial consideration" include items that are already publicly known. Also any references to the "nature of financial consideration" in those documents are not associated with any

[49] IEU Supp. Memo Contra at 5.

[50] Order on Remand at 17 and 44 (October 24, 2007) (emphasis added).

particular parties or any particular contract. Any competitor looking at that information would not have sufficient context to know to whom the references apply and therefore under R.C. 1333.61(D)(1) cannot have independent economic value to the parties' competitors. Under these circumstances, neither Duke nor IEU can ask the Commission to protect this information under R.C. 1333.61(D)(2).

IEU also complains that OCC did not redact information from the Deposition of Charles R. Whitlock at 128, lines 3-20. This information is not remotely related to items the Commission has determined to be protected. This information does not address any customer contract, let alone the "nature of financial consideration" in a customer contract. Therefore the information could not provide independent economic value to the customers or Duke or to the customers' or Duke's competitors.

IEU complained that OCC did not redact information from OCC's Reply Post-Remand Brief, Hearing Phase I, at 28-29 and from OCC's Application for Rehearing on pages 24-25. Again, IEU complains that OCC did not redact information relating to the "nature of financial consideration" in contracts. This information could not possibly be of independent economic value (as contemplated under R.C. 1333.61(D)(2)) to Duke, Duke's customers or their competitors because no customers are mentioned and most of the references are either vague, generic contract terms or references to publicly known Ohio restructuring terms. Again under R.C. 1333.61(D)(2) the information on these pages is not reasonably subject to protection because they do not identify any customers.

Accordingly, none of IEU's complaints about OCC's failure to redact are with merit because the materials that IEU wants redacted are not within the scope of protected materials the Commission identified in the Order on Remand. IEU did not file an

application for rehearing to expand that scope so its complaints at this time are untimely and in violation of R.C. 4903.10. Nor does the related information meet the requirements for trade secrets as defined under R.C. 1333.61(D).

## V. CONCLUSION

Both Duke in its Memo in Response and IEU-Ohio in its Supplemental Memo Contra inappropriately ask the Commission to modify its decision regarding what items constitute trade secrets and should be protected. Neither party filed an application for rehearing under R.C. 4903.10, and both parties are therefore precluded from now asking the Commission to modify its decision. The expansion of information that Duke seeks to withhold from the public violates the requirements of the Order on Remand, and is not supported by the criteria for trade secrets under R.C. 1333.61(D). Duke's arguments and the reliance of IEU on Duke's post-decision pleadings, made without the support of any timely filed application for rehearing, should be rejected.

Finally, the IEU-Ohio Memo Contra failed to address the substance of the question at issue. It is a spurious pleading and should be ignored.

OCC's Motion for Acceptance should be granted, as further described in this Reply.

Respectfully submitted,

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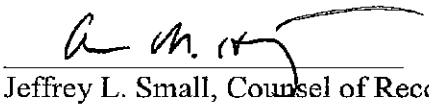

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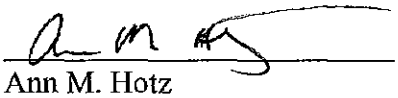
## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply to Memoranda Contra Motion for Acceptance* by the Office of the Ohio Consumers' Counsel was served electronically on this 28th day of February 2008.



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