

**IN THE SUPREME COURT OF OHIO**

The Office of the Ohio Consumers' Counsel,) Case No. 08-0466  
)  
Appellant, et al., )  
)  
v. ) Appeal from the Public  
) Utilities Commission of Ohio  
) Case Nos. 06-1068-EL-UNC, 05-  
The Public Utilities Commission ) 725-EL-UNC, 06-1069-EL-UNC,  
of Ohio, ) 05-724-EL-UNC. 06-1085-EL-UNC  
)  
Appellee. )

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**MOTION TO SEAL CONTENTS OF MERIT BRIEF AND ASSOCIATED FILINGS  
PENDING RESOLUTION OF CONFIDENTIALITY ISSUES ON APPEAL  
BY  
APPELLANT,  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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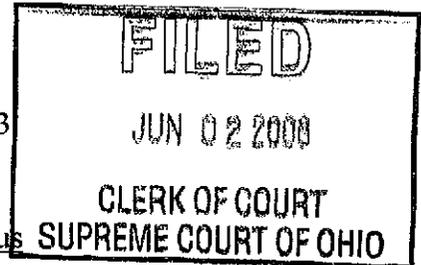
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Volume II – Attachment 3 of 3

## I. Introduction

This case is the appeal of the above-captioned cases before the Public Utilities Commission of Ohio (“PUCO” or “Commission”) which is closely associated with the appeal in S.Ct. Case No. 08-0367 (“*Remand Appeal*”). Among other matters, this appeal and the *Remand Appeal* share a common record.

The applicant in the cases below is Duke Energy Ohio, Inc. (“Duke Energy” or “Company,” formerly known as “CG&E”). This appeal resulted from a Commission order in cases consolidated with other PUCO cases that were reversed (in part) and remanded from the Supreme Court of Ohio in November 2006. *Ohio Consumers’ Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 (“*Consumers’ Counsel 2006*”). The subsequent history on remand involved discovery by the Office of the Ohio Consumers’ Counsel (“OCC” or “Appellant”) and the presentation of extensive evidence regarding side agreements that were made available to OCC only after the Court ruled that the PUCO had erred in denying OCC access to the information. One of the propositions of law in the *Remand Appeal* relates to the failure of the PUCO to make public the matters that were withheld from public view.<sup>1</sup> The instant appeal also involved the testimony of a Commission-appointed auditor and associated exhibits, some of which were considered confidential in the cases below (a status that is not the subject of the *Remand Appeal* or the instant appeal).

Significant provisions in the documents submitted as part of the record were shielded from entering the public domain as the result of the PUCO’s order in the *Remand Appeal*. That Order on Remand stated that confidential treatment would be provided regarding “customer

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<sup>1</sup> *Remand Appeal*, OCC Notice of Appeal at 3, ¶C (“withholds information from the public”) (February 19, 2008).

names, . . . contract termination dates or other termination provisions, financial consideration in each contract, price of generation referenced in each contract, volume of generation covered by each contract, and terms under which any options may be exercisable.”<sup>2</sup> The contracts at issue also involve affiliates of Duke Energy as well as parties to the cases below (and members of organizations that were parties). The discussion of these matters in documents such as briefs and applications for rehearing was the subject of Commission instructions to file under seal and provide redacted versions for the public docket.

## **II. Argument**

The Supreme Court’s rules are instructive regarding the treatment of documents filed with the Court:

Documents filed with the Supreme Court shall be treated as public records unless they have been sealed pursuant to a court order or are the subject of a motion to seal pending in the Supreme Court.

Sup.Ct.Prac.R. XIV(1)(B). Portions of the record in the cases below were sealed, as stated above, by the PUCO. Also, the OCC entered into protective agreements with Duke Energy, two of its affiliates, and two other parties as part of the discovery process in order to speed the discovery process. Those agreements provide that the OCC will make filings in these cases (including any appeal to the Supreme Court) under seal if documents are used over which the counterparties have made claims regarding confidentiality.

The OCC’s Merit Brief, its Appendix, and its Supplement all contain documents or descriptions of documents that are subject to, at least in part, the order of the PUCO regarding the sealed portion of the record. The OCC submits this Motion to Seal regarding its Merit Brief and

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<sup>2</sup> *In re Duke Energy Post-MDP Service Case*, Case No. 03-93-EL-ATA, et al., Order on Remand at 15 (OCC Supp. 66.).

these associated filings contemporaneously with the filing of those documents under seal. The OCC requests appropriate treatment for sealing of these filings pending resolution of the *Remand Appeal* regarding the extent to which Ohio's law regarding trade secrets applies to the record that the instant appeal and the *Remand Appeal* share.

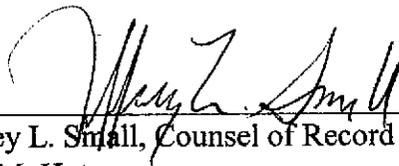
The OCC realizes the difficulties presented by the presentation of a case that is connected with a dispute regarding the confidential treatment of documents before the Court (itself a public office). To assist the Court in this process, including preparation by members of the Court and its staff for deliberations in this appeal (including oral argument), the OCC attaches to this Motion to Seal redacted versions of the OCC's Merit Brief, Appendix, and the second volume of the OCC's Supplement. The first volume of the OCC's Supplement contains the same documents as the first volume of the supplement filed by the OCC's Remand Appeal, and is therefore not attached to this Motion to Seal. The redacted versions show the degree to which information has been released to the public as part of the PUCO's Docketing Information System as of the date of this filing.

### **III. Conclusion**

For the foregoing reasons, and pursuant to the Court's rules of practice, the OCC requests that its Motion to Seal be granted subject to any later decision by the Court in the *Remand Appeal* that the information should be released to the public domain and that the PUCO's decision to the contrary should be reversed.

Respectfully submitted,

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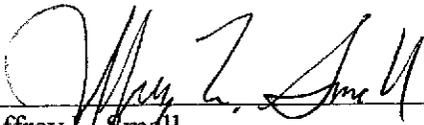
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion to Seal by the Office of the Ohio Consumers' Counsel was served upon the below-listed counsel by regular U.S. Mail, prepaid, this 2<sup>nd</sup> day of June 2008.

  
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