

IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel, ) Case No. 08-0367  
 ) Second Appeal from the Public  
Appellant, ) Utilities Commission of Ohio  
 ) Case Nos. 03-93-EL-ATA, 03-2079-  
v. ) EL-AAM, 03-2081-EL-AAM,  
 ) 03-2080-EL-ATA  
The Public Utilities Commission )  
of Ohio, )  
 )  
Appellee. )

---

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

---

Janine L. Migden-Ostrander  
(Reg. No. 0002310)  
Consumers' Counsel

Nancy H. Rogers  
(Reg. No. 0002375)  
Attorney General of Ohio

Jeffrey L. Small, Counsel of Record  
(Reg. No. 0061488)  
Ann M. Hotz  
(Reg. No. 0053070)  
Assistant Consumers' Counsel

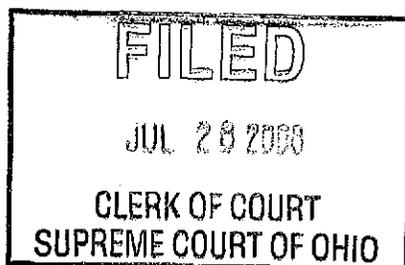
Duane W. Luckey  
(Reg. No. 0023557)  
Section Chief  
Thomas W. McNamee, Counsel of Record  
Counsel of Record  
(Reg. No. 0017352)  
Sarah J. Parrot  
(Reg. No. 0082197)  
Assistant Attorneys General

10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
(614) 466-8574 (T)  
(614) 466-9475 (F)  
[small@occ.state.oh.us](mailto:small@occ.state.oh.us)  
[hotz@occ.state.oh.us](mailto:hotz@occ.state.oh.us)

180 East Broad Street  
Columbus, Ohio 43215-3793  
(614) 644-8698 (T)  
(614) 644-8764 (F)  
[duane.luckey@puc.state.oh.us](mailto:duane.luckey@puc.state.oh.us)  
[thomas.mcnamee@puc.state.oh.us](mailto:thomas.mcnamee@puc.state.oh.us)  
[sarah.parrot@puc.state.oh.us](mailto:sarah.parrot@puc.state.oh.us)

*Attorneys for Appellant,  
Office of the Ohio Consumers' Counsel*

*Attorneys for Appellee,  
Public Utilities Commission of Ohio*



Paul A. Colbert, Counsel of Record  
(Reg. No. 0058582)  
Associate General Counsel  
Duke Energy Ohio, Inc.  
155 East Broad Street, 21<sup>st</sup> Floor  
Columbus, Ohio 43215  
(614) 221-7551 (T)  
(614) 221-7556 (F)  
[paul.colbert@duke-energy.com](mailto:paul.colbert@duke-energy.com)

Rocco D'Ascenzo  
(Reg. No. 0077651)  
Counsel  
139 East Fourth Street, 29 At. II  
Cincinnati, Ohio 43215  
(513) 419-1852 (T)  
(513) 419-1846 (F)  
[rocco.d'ascenzo@duke-energy.com](mailto:rocco.d'ascenzo@duke-energy.com)

*Attorneys for Intervening Appellee,  
Duke Energy Ohio, Inc.*

Michael D. Dortch, Counsel of Record  
(Reg. No. 0043897)  
Kravitz, Brown & Dortch, LLC  
65 East State Street, Suite 200  
Columbus, Ohio 43215  
(614) 464-2000 (T)  
(614) 464-2002 (F)  
[mdortch@kravitzllc.com](mailto:mdortch@kravitzllc.com)

*Attorney for Intervening Appellee,  
Duke Energy Retail Sales, LLC*

**TABLE OF CONTENTS**

	<b>Page</b>
I. INTRODUCTION.....	1
II. ARGUMENT .....	2
III. CONCLUSION.....	3
CERTIFICATE OF SERVICE .....	4

**ATTACHMENT**

**REPLY BRIEF AND REPLY APPENDIX (Public Version)**

## I. INTRODUCTION

This is the second appeal of the above-captioned cases before the Public Utilities Commission of Ohio (“PUCO” or “Commission”). The applicant in the cases below is Duke Energy Ohio, Inc. (“Duke Energy” or “Company,” formerly known as “CG&E”). The first appeal resulted in this Court’s decision in November 2006 that remanded the case to the Commission for further consideration. *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 by the Office of the Ohio Consumers’ Counsel (“OCC”) in this appeal of the PUCO’s remand order relates to the failure of the PUCO to make public the information that was withheld from public view.<sup>1</sup>

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 on Remand. The Order on Remand stated that confidential treatment would be provided regarding “customer 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

---

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

<sup>2</sup> *In re Duke Energy Post-MDP Service Case*, Case No. 03-93-EL-ATA, e al., Order on Remand at 15 (attached to OCC Notice of Appeal filed February 19, 2008).

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 with respect to which the counterparties have made claims regarding confidentiality.

The OCC's submissions on May 19, 2008 -- the OCC's Merit Brief, Appendix, and Supplement -- all contained 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's Reply Brief and Reply Appendix also contain such material. The OCC submits this Motion to Seal regarding its Reply Brief and Reply Appendix (one document) contemporaneously with the filing of the Reply Brief and Reply Appendix under seal. The OCC requests appropriate treatment for sealing of these filings pending resolution of this case regarding the extent to which Ohio's law regarding trade secrets applies to the record in the cases below.

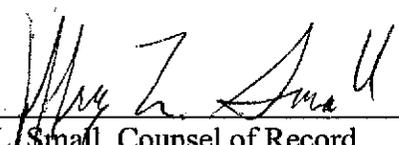
The OCC realizes the difficulties presented by the presentation of a case that involves a dispute regarding the confidential treatment of documents before the Court (itself a public office). To assist the Court in this process, including preparation by members of the Court and its staff for deliberations in this appeal (including oral argument), the OCC attaches to this Motion to Seal redacted versions of the OCC's Reply Brief and Reply Appendix. 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 that the information should be released to the public domain and that the PUCO's decision to the contrary should be reversed.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER  
OHIO CONSUMERS' COUNSEL

By: 

Jeffrey L. Small, Counsel of Record

Ann M. Hotz

Attorneys for Appellant

Office of the Ohio Consumers' Counsel

**Office of the Ohio Consumers' Counsel**

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

(614) 466-8574 (telephone)

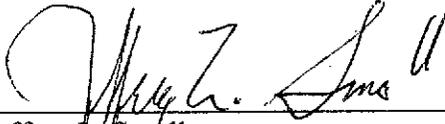
(614) 466-9475 (facsimile)

[small@occ.state.oh.us](mailto:small@occ.state.oh.us)

[hotz@occ.state.oh.us](mailto:hotz@occ.state.oh.us)

**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 28<sup>th</sup> day of July 2008.

  
\_\_\_\_\_  
Jeffrey L. Small  
Counsel for Appellant,  
Office of the Ohio Consumers' Counsel

**PARTIES OF RECORD**

Thomas W. McNamee  
Duane W. Luckey  
Sarah J. Parrot  
Assistant Attorneys General  
Public Utilities Section  
180 East Broad Street, 9th Floor  
Columbus, OH 43215

*Attorneys for Appellee  
Public Utilities Commission of Ohio*

Paul Colbert  
Rocco D'Ascenzo  
Duke Energy Ohio, Inc.  
155 East Broad Street, 21<sup>st</sup> Floor  
Columbus, Ohio 43215

*Attorneys for Intervening Appellee  
Duke Energy Ohio, Inc.*

Michael D. Dortch  
Kravitz, Brown & Dortch, LLC  
65 East State Street, Suite 200  
Columbus, Ohio 43215

*Attorney for Intervening Appellee,  
Duke Energy Retail Sales, LLC*

IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel,	)	Case No. 08-0367
	)	Second Appeal from the Public
Appellant,	)	Utilities Commission of Ohio
	)	Case Nos. 03-93-EL-ATA, 03-2079-
v.	)	EL-AAM, 03-2081-EL-AAM,
	)	03-2080-EL-ATA
The Public Utilities Commission	)	
of Ohio,	)	
	)	
Appellee.	)	

---

REPLY BRIEF AND REPLY APPENDIX  
BY  
APPELLANT,  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL  
(PUBLIC VERSION)

---

Janine L. Migden-Ostrander  
(Reg. No. 0002310)  
Consumers' Counsel

Nancy H. Rogers  
(Reg. No. 0002375)  
Attorney General of Ohio

Jeffrey L. Small, Counsel of Record  
(Reg. No. 0061488)  
Ann M. Hotz  
(Reg. No. 0053070)  
Assistant Consumers' Counsel

Duane W. Luckey  
(Reg. No. 0023557)  
Section Chief  
Thomas W. McNamee, Counsel of Record  
Counsel of Record  
(Reg. No. 0017352)  
Sarah J. Parrot  
(Reg. No. 0082197)  
Assistant Attorneys General

10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
(614) 466-8574 (T)  
(614) 466-9475 (F)  
[small@occ.state.oh.us](mailto:small@occ.state.oh.us)  
[hotz@occ.state.oh.us](mailto:hotz@occ.state.oh.us)

180 East Broad Street  
Columbus, Ohio 43215-3793  
(614) 644-8698 (T)  
(614) 644-8764 (F)  
[duane.luckey@puc.state.oh.us](mailto:duane.luckey@puc.state.oh.us)  
[thomas.mcnamee@puc.state.oh.us](mailto:thomas.mcnamee@puc.state.oh.us)  
[sarah.parrot@puc.state.oh.us](mailto:sarah.parrot@puc.state.oh.us)

*Attorneys for Appellant,  
Office of the Ohio Consumers' Counsel*

*Attorneys for Appellee,  
Public Utilities Commission of Ohio*

Paul A. Colbert, Counsel of Record  
(Reg. No. 0058582)  
Associate General Counsel  
Duke Energy Ohio, Inc.  
155 East Broad Street, 21<sup>st</sup> Floor  
Columbus, Ohio 43215  
(614) 221-7551 (T)  
(614) 221-7556 (F)  
[paul.colbert@duke-energy.com](mailto:paul.colbert@duke-energy.com)

Rocco D'Ascenzo  
(Reg. No. 0077651)  
Counsel  
139 East Fourth Street, 29 At. II  
Cincinnati, Ohio 43215  
(513) 419-1852 (T)  
(513) 419-1846 (F)  
[rocco.d'ascenzo@duke-energy.com](mailto:rocco.d'ascenzo@duke-energy.com)

*Attorneys for Intervening Appellee,  
Duke Energy Ohio, Inc.*

Michael D. Dortch, Counsel of Record  
(Reg. No. 0043897)  
Kravitz, Brown & Dortch, LLC  
65 East State Street, Suite 200  
Columbus, Ohio 43215  
(614) 464-2000 (T)  
(614) 464-2002 (F)  
[mdortch@kravitzllc.com](mailto:mdortch@kravitzllc.com)

*Attorney for Intervening Appellee,  
Duke Energy Retail Sales, LLC*

**TABLE OF CONTENTS**

	<b>Page</b>
I. INTRODUCTION.....	1
II. ARGUMENT .....	1
Proposition of Law No. 1:.....	1
The Commission’s Remand Order Is Unreasonable And Unlawful Because It Fails To Prohibit Pricing And Price Elements In Side Agreements That Violate Ohio Statutes And Rules.....	1
A. The PUCO did Not Deliberate on the Issues Raised by the OCC. ....	1
B. PUCO Statements Contradict its Argument that the OCC’s Issues Should Not be Considered.....	3
C. The Court did Not Instruct the PUCO to Limit the Scope of the Proceedings on Remand. ....	4
D. The OCC Alleged Violations of Statutes and Rules by Duke Energy .....	6
Proposition of Law No. 2:.....	9
The Commission’s Remand Order Is Unreasonable And Unlawful Because The Commission Failed, As A Quasi-Judicial Decision-Maker, To “Permit A Full Hearing Upon All Subjects Pertinent To The Issue(s), And To Base [Its] Conclusion Upon Competent Evidence” In Violation Of R.C. 4903.09 And Case Law. <i>City of Bucyrus v. State Dept. of Health</i> (1929), 120 Ohio St. 426, 430.....	9
A. The Remand Order Fails to Eliminate Capacity Charges that are Simply Surcharges that the Company Requested for Customers to Pay, Without Any Evidentiary Basis for Why Consumers Should Pay Them. ....	9
1. The IMF is, as the Court suspected, a surcharge.....	9
2. The PUCO’s explanation of the IMF in terms of risk does not support the IMF charge. ....	12
B. The Remand Order Fails to Consider the Needs of the Competitive Market for the Bypassability of All Standard Service Offer Components Based Upon the Record. ....	13

**TABLE OF CONTENTS - cont.**

	<b>Page</b>
Proposition of Law No. 3:.....	15
The Commission’s Remand Order Is Unreasonable And Unlawful Because It Withholds Information From Public Scrutiny By Designating The Contents Of Documents “Trade Secret” Without Legal Justification.....	15
A.    Appellee PUCO Mischaracterizes the OCC’s Legal Argument. ....	15
B.    The OCC Fully, and Correctly, Explained its Disagreement Regarding Information that Should Not be Withheld from the Public as “Trade Secret.”.....	17
III.    CONCLUSION.....	20

## TABLE OF AUTHORITIES

Page

### Cases

<i>City of Bucyrus v. State Dept. of Health</i> (1929), 120 Ohio St. 426 .....	9
<i>LeRoux's Billye Supper Club v. Ma</i> (1991), 77 Ohio App.3d 417 .....	7
<i>Ohio Consumers' Counsel v. Public Util. Comm.</i> , 111 Ohio St.3d 300, 2006-Ohio-5789.....	passim
<i>Sanderson Farms, Inc. v. Gasbarro</i> , 2004-Ohio-1460 .....	7

### Entries and Orders of the Public Utilities Commission of Ohio

<i>In the Matter of the Application of The Cincinnati Gas &amp; Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period, PUCO Case No. 03-93-EL-ATA, Entry (May 28, 2008) .....</i>	17
<i>In the Matter of the Application of The Cincinnati Gas &amp; Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period, Case Nos. 03-93-EL-ATA, et al., Order on Remand (October 24, 2007) .....</i>	passim
<i>In the Matter of the Application of The Cincinnati Gas &amp; Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period, Case Nos. 03-93-EL-ATA, et al., Opinion and Order (September 29, 2004).....</i>	4

**TABLE OF AUTHORITIES cont'd.**

**Page**

**Statutes**

R.C. 149.43 .....	16
R.C. 4901.12 .....	15
R.C. 4903.09 .....	9,13,15
R.C. 4905.07 .....	15
R.C. 4928.14 .....	3,4

**REPLY APPENDIX (R. APPX.)**  
**TABLE OF CONTENTS**

**Page**

*In the Matter of the Application of The Cincinnati Gas & Electric Company  
to Modify its Nonresidential Generation Rates to Provide for Market-Based  
Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid  
Service Rate Option Subsequent to the Market Development Period*  
PUCO Case No. 03-93-EL-ATA,  
Entry (May 28, 2008) .....1

*In the Matter of the Application of The Cincinnati Gas & Electric Company  
to Modify its Nonresidential Generation Rates to Provide for Market-Based  
Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid  
Service Rate Option Subsequent to the Market Development Period*  
PUCO Case No. 03-93-EL-ATA,  
OCC Initial Post-Remand Brief, Hearing Phase I (pages 63-65) (April 13, 2007).....8

## I. INTRODUCTION

In its Order on Remand dated October 24, 2007 (“Remand Order”) (Appx. 9.), the Public Utilities Commission of Ohio (“PUCO” or “Commission”) considered a rate plan proposed by Duke Energy Ohio, Inc. (“Duke Energy” or “Company,” formerly known as “CG&E”).<sup>1</sup> The PUCO disappointingly brushed aside the important legal implications of the record developed by the Office of the Ohio Consumers’ Counsel (“OCC”). The PUCO also ordered redactions that unlawfully conceal from the public the important information regarding side deals and the involvement of Duke Energy’s affiliates in the rate plan filed by Duke Energy.<sup>2</sup>

The OCC herein replies to the Merit Briefs filed by the Appellee PUCO, Intervening Appellee Duke Energy, and two affiliates of Duke Energy (Cinergy Corp.<sup>3</sup> and Duke Energy Retail Sales (“DERS”)).

## II. ARGUMENT

### **Proposition of Law No. 1:**

**The Commission’s Remand Order Is Unreasonable And Unlawful Because It Fails To Prohibit Pricing And Price Elements In Side Agreements That Violate Ohio Statutes And Rules.**

#### **A. The PUCO did Not Deliberate on the Issues Raised by the OCC.**

The PUCO’s Merit Brief admits that the Commission severely limited its consideration of evidence presented by the OCC, but confuses matters in other places. The PUCO Merit Brief, for example, states that the Commission “considered the side agreements with respect to their impact on the parties’ bargaining” but the “Commission further stated that ancillary issues, raised

---

<sup>1</sup> An earlier appeal resulted in this Court’s decision in November 2006 that remanded the case to the Commission for further consideration. *Ohio Consumers’ Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 (“*Consumers’ Counsel 2006*”).

<sup>2</sup> Remand Order at 42 (Appx. 50.).

<sup>3</sup> Cinergy Corp. improperly joined in submitting a brief as an intervening appellee without submitting a motion to intervene. The lack of separate corporate identities is evident.

after the Court's remand of the case to the Commission, would not be considered in its order on remand."<sup>4</sup> The matters that the PUCO considered "ancillary" were the violations of statutes and Commission rules regarding discriminatory pricing, corporate separation, and the improper [REDACTED] that the OCC raised in its first proposition of law.<sup>5</sup>

Confusion may result, however, from other PUCO arguments and arguments by Duke Energy. The PUCO Merit Brief states (without citation) that "[d]espite OCC's claim that the Commission did not consider other uses of the evidence, the Commission did in fact contemplate each of the issues raised by OCC" and Duke Energy argues that the PUCO "considered the old and the new evidence *de novo*."<sup>6</sup> This argument is contradicted by the PUCO's Remand Order:

It should also be noted that these proceedings are being considered only with regard to issues remanded to us for further consideration. Therefore, *we are limiting our deliberation* and order to those remanded issues. Ancillary issues raised by parties in the remand phase and not considered in this order on remand, such as potential corporate separation violations and affiliate interactions, will be denied.<sup>7</sup>

The PUCO Merit Brief also states that "[b]ecause the Commission reasonably determined that the evidence introduced by OCC was not relevant to its consideration of any issue other than whether the parties engaged in serious bargaining, the Commission should be affirmed."<sup>8</sup> The Remand Order, as shown by the quote from it in the preceding paragraph, did not determine that the OCC's evidence failed to be relevant regarding consideration of discriminatory pricing, corporate separation, and the [REDACTED]. The Commission stated in the Remand Order that it *did not deliberate on those matters*.

---

<sup>4</sup> PUCO Merit Brief at 34-35, citing Remand Order at 20 and 24-27 (October 24, 2007) (Appx. 28. and 32-35.).

<sup>5</sup> OCC Merit Brief at 25-37.

<sup>6</sup> PUCO Merit Brief at 34; Duke Energy Merit Brief at 2.

<sup>7</sup> Remand Order at 20 (Appx. 28.) (emphasis added).

<sup>8</sup> PUCO Merit Brief at 34.

**B. PUCO Statements Contradict its Argument that the OCC's Issues Should Not be Considered.**

The PUCO's overview of its proceedings is instructive for defining the proper scope for these cases, stated in its Merit Brief as follows:

The purpose of the proceedings has always been to establish Duke's RSP, which was filed at the request of the Commission in order to stabilize prices following the termination of the MDP. The proceedings are governed by R.C. 4928.14, which provides:

After its market development period, an electric distribution utility in this state shall provide consumers, on a *comparable and non-discriminatory* basis within its certified territory, a market-based standard service offer of all competitive retail electric services . . . .

Ohio Rev. Code Ann. § 4928.14(A) (Anderson 2008), App[x]. at 22. OCC, however, attempts to alter the course of these proceedings by raising issues that have *no relation to the RSP*.<sup>9</sup>

The OCC's first proposition of law addresses the failure of the Commission to assure, after consideration of the record as supplemented on remand, a comparable and non-discriminatory standard service offer.<sup>10</sup> The Remand Order lets stand discrimination in favor of a few large customers, discrimination based on [REDACTED] that is specifically prohibited by the Revised Code, and the violation of the Commission's corporate separation rules.<sup>11</sup> The Commission should not have dismissed these issues as "ancillary" since they address the purpose of the PUCO proceedings as admitted by the PUCO's Merit Brief.

The Remand Order proceeds by "expressly reject[ing] the [2004] [S]tipulation" based upon the "inevitable conclusion that there is a sufficient basis to question whether the parties

---

<sup>9</sup> PUCO Merit Brief at 35 (emphasis added).

<sup>10</sup> The OCC based its legal argument, in part, on violation of R.C. 4928.14(A) (Appx. 160.), the same provision that the PUCO quotes. OCC Merit Brief at 29. DERS mischaracterizes the proper scope of the proceeding, stating that "neither discrimination nor corporate separation violations was {sic} ever the subject matter of the proceeding." DERS Merit Brief at 23.

<sup>11</sup> OCC Merit Brief at 25-36.

engaged in serious bargaining,”<sup>12</sup> and stated that Duke Energy’s rate plan should therefore be broadly re-evaluated:

The court’s directive is no longer expressly applicable, as we have now found that the [2004] [S]tipulation should not have been adopted. \* \* \* Without a stipulation to consider, we are compelled to consider Duke’s RSP application, as filed in January 26, 2004, and subsequently modified by Duke prior to the initial hearing in these proceedings. We will review the reasonableness of the RSP application in light of the record evidence developed both in the initial hearing and in the hearing on remand . . . .<sup>13</sup>

This statement regarding the scope of the PUCO’s deliberations is consistent with its responsibility to evaluate rate proposals submitted pursuant to R.C. 4928.14 (Appx. 160.). However, this statement contradicts the Commission’s argument that the PUCO properly limited deliberations on the issues raised by the OCC based upon the record evidence developed in the hearing on remand.<sup>14</sup>

**C. The Court did Not Instruct the PUCO to Limit the Scope of the Proceedings on Remand.**

The Commission incorrectly lays its limited consideration of issues at the feet of this Court and this Court’s decision in *Consumers’ Counsel 2006*. The PUCO argues:

The Court made absolutely no mention of other potential uses for this type of evidence [i.e. related to the side deals]. Rather, the court recognized the Commission’s past practice of determining that side agreements are irrelevant.<sup>15</sup>

---

<sup>12</sup> Remand Order at 27 (Appx. 35.).

<sup>13</sup> Remand Order at 28 (Appx. 36.) (citations and footnotes omitted). See also Duke Energy Merit Brief at 19.

<sup>14</sup> The OCC also raised matters of discrimination, corporate separation, and the [REDACTED] in its evidence, its pleadings, briefs, and its Application for Rehearing as matters vital to the “competitiveness” issue that makes up one of the Commission’s three tests for the advisability of approving an electric distribution utility’s rate plan. See, e.g., *Post-MDP Service Case*, Case No. 03-93-EL-ATA, et al., Order at 15 (September 29, 2004) (Appx. 85).

<sup>15</sup> PUCO Merit Brief at 33, citing *Consumers’ Counsel 2006*, 111 Ohio St. 3d 300, 323; 856 N.E.2d 213, 236. Duke Energy admits that the Court did not “limit[ ] the Commission’s consideration.” Duke Energy Brief at 18.

*Consumers' Counsel 2006* did not limit the PUCO's inquiries as argued by the PUCO, and the Court has not determined that side agreements are irrelevant for the purposes used by OCC.

The possible evidentiary relevance of side agreements to the issue of the "serious bargaining" test of stipulations does not exclude the possible relevance on other issues. The OCC's seventh proposition of law in the earlier appeal stated that the Commission erred when it did not permit the discovery of side agreements, and this Court accepted that proposition.<sup>16</sup> The OCC argued, in part, that its discovery request was reasonably calculated to lead to the discovery of admissible evidence and that such a discovery request might also result in the identification of important witnesses as well as insights into concerns such as discrimination.<sup>17</sup> The Court held that the PUCO improperly barred side agreements and mentioned *one* possible use for such information -- the test of settlement agreements.<sup>18</sup> To clear the PUCO's proposed hurdle for consideration of the OCC's evidence on other issues, the OCC would have had to identify for the Court all the uses that the OCC would make of the discovery information that the *OCC had never seen* because the PUCO had *denied access*, and the Court would have had to explicitly state that each one of those uses was appropriate for the PUCO's further deliberations. The Court's decision cannot be reasonably construed as demanding such *a priori* specificity from the OCC and the Court.

Furthermore, the Commission has not "recognized the Commission's past practice of determining that side agreements are irrelevant" for all purposes or under the particular

---

<sup>16</sup> *Consumers' Counsel 2006* at ¶95

<sup>17</sup> Case No. 2005-0946, OCC Merit Brief at 33-34. The OCC's arguments were supported by the record, as expanded during 2007.

<sup>18</sup> *Consumers' Counsel* at ¶86.

circumstances in the cases below.<sup>19</sup> The cases cited by the PUCO all evaluated the appropriate use of side agreements as evidence under circumstances where the Commission evaluated the merits of stipulations. In the present case, however, the Commission rejected a stipulation and purported to render a decision based upon the record in the case. The precedent cited by the PUCO is, therefore, inapplicable to the present case.<sup>20</sup>

The Commission attempts to justify its refusal to deliberate on the OCC's issues based upon an incorrect reading of *Consumers' Counsel 2006* and other decisions. The Court should reject the Commission's arguments.

**D. The OCC Alleged Violations of Statutes and Rules by Duke Energy Based Upon Ohio Law.**

The PUCO Merit Brief fundamentally misstates the OCC's arguments on appeal. The PUCO states that "OCC does not contend that the RSP itself is discriminatory or in violation of any statute or rule."<sup>21</sup> The rate plan's violation of statutes and rules is an essential part of the OCC's appeal, as is the essence of the OCC's first proposition of law.<sup>22</sup> The PUCO argues from the premise that the side deals that involve Cinergy Corp. and DERS are not part of Duke Energy's rate plan even though it reached the "inevitable conclusion that there is a sufficient

---

<sup>19</sup> PUCO Merit Brief at 32.

<sup>20</sup> Remand Order at 28 (Appx. 36.).

<sup>21</sup> PUCO Merit Brief at 38. Duke Energy disagrees, arguing that the OCC "ask[ed] the Commission to find specific [corporate separation] conduct violations by DE-Ohio and its affiliates," but "[o]nly in its Application for Rehearing." Duke Energy Merit Brief at 21. All the allegations of corporate separation violations, including citations to the rules, are located in the OCC's briefs. See, e.g., OCC Initial Post-Hearing Remand Brief at 63-65 (April 13, 2007) (R. Appx. 8.). Discrimination exists against those not favored by side agreements, including all residential customers. OCC Merit Brief at 29, contradicting assertions that the OCC has not identified harm to residential customers. DERS Merit Brief at 22.

<sup>22</sup> The Duke affiliates rely on the unwillingness of one OCC witness to draw a legal conclusion regarding the existence of corporate separation violations. Duke Energy Merit Brief at 20-21,

basis to question whether the parties engaged in serious bargaining” because Duke Energy’s affiliates were closely tied to the bargaining process concerning approval of the rate plan.<sup>23</sup>

Under the circumstances revealed in the testimony of OCC Witness Hixon, as extensively reviewed in the OCC Merit Brief, the Court should “pierce the corporate veil” and attribute the Cinergy Corp. and DERS agreements to Duke Energy Ohio. The “alter ego doctrine” supports such a result, and requires that the entities ““are fundamentally indistinguishable.””<sup>24</sup> To begin with, the Cinergy and DERS side agreements [REDACTED] [REDACTED].<sup>25</sup> Documented negotiations that state that they concerned Duke Energy’s rate plan resulted in side agreements that [REDACTED].<sup>26</sup> DERS states its “full support of the position of DE-Ohio” regarding rate plan proposals -- different than the opposition stated by non-affiliated Competitive Retail Electric Service (“CRES”) providers<sup>27</sup> -- and a mystery in the presence of large financial losses under the existing rate plan. The explanation is that a boundary between Duke Energy and DERS does not exist.

Additionally, the [REDACTED] [REDACTED].<sup>28</sup> [REDACTED]

---

DERS Merit Brief at 26. The OCC’s legal case, relying upon the *entire record*, is not limited to the statements of a particular (non-attorney) witness.

<sup>23</sup> Remand Order at 27 (Appx. 35.).

<sup>24</sup> See, e.g., *Sanderson Farms, Inc. v. Gasbarro*, 2004-Ohio-1460 at ¶26, quoting *LeRoux’s Billye Supper Club v. Ma* (1991), 77 Ohio App.3d 417, 422-423.

<sup>25</sup> [REDACTED]

<sup>26</sup> OCC Merit Brief at 12. The matter is further discussed below regarding release of the side agreements to the public.

<sup>27</sup> DERS Merit Brief at 28. Contrast, Remand Order at 37 (OMG and Dominion) (Supp. 45.).

<sup>28</sup> OCC Merit Brief at 9-11.

[REDACTED]<sup>29</sup> The side agreements with Duke Energy affiliates contain numerous [REDACTED].  
[REDACTED]<sup>30</sup> The [REDACTED] agreement, contrary to the argument by Duke Energy, required that customer to [REDACTED].<sup>31</sup> The representatives of the affiliated companies did not identify which entity they represented (themselves violations of the PUCO's corporate separation rules).<sup>32</sup> This matter is documented by such evidence as counselor [REDACTED].  
[REDACTED]  
[REDACTED]<sup>33</sup> This matter is also documented by testimony regarding [REDACTED].  
[REDACTED]  
[REDACTED]<sup>34</sup> The activities of Cinergy Corp. and DERS are attributable to Duke Energy since the three corporations are "fundamentally indistinguishable." The side agreements should be attributed to Duke Energy Ohio.

---

<sup>29</sup> Id. at 9, Duke Energy Merit Brief at 15 ("admits that employees . . .") and 26.

<sup>30</sup> Id. at 12-13.

<sup>31</sup> Id. at 18, citing [REDACTED] Duke Energy incorrectly argued that no agreement "prohibits a customer from switching ... from DE-Ohio"). Duke Energy Merit Brief at 25.

<sup>32</sup> OCC Merit Brief at 34.

<sup>33</sup> Id. [REDACTED]

<sup>34</sup> OCC Merit Brief at 34, contradicting Duke Energy Merit Brief at 25-26 ("all signatories").

**Proposition of Law No. 2:**

**The Commission's Remand Order Is Unreasonable And Unlawful Because The Commission Failed, As A Quasi-Judicial Decision-Maker, To "Permit A Full Hearing Upon All Subjects Pertinent To The Issues(s), And To Base [Its] Conclusion Upon Competent Evidence" In Violation Of R.C. 4903.09 And Case Law. *City of Bucyrus v. State Dept. of Health* (1929), 120 Ohio St. 426, 430.**

**A. The Remand Order Fails to Eliminate Capacity Charges that are Simply Surcharges that the Company Requested for Customers to Pay, Without Any Evidentiary Basis for Why Consumers Should Pay Them.**

**1. The IMF is, as the Court suspected, a surcharge.**

In *Consumers' Counsel 2006*, the Court was concerned that "the infrastructure-maintenance fund may be some type of surcharge and not a cost component." *Consumers' Counsel 2006* at ¶30. The Court was correct. The PUCO Merit Brief presents a lengthy recital of the contents of the Remand Order rather than argument based on the record in support for the Commission's approval of an IMF charge.<sup>35</sup>

The IMF was first proposed in the Company's Application for Rehearing filed after the November 2004 Order was issued, an important feature of the record not mentioned in the PUCO Merit Brief. According to Duke Energy, the IMF's ancestry is clear -- it is one of two successor charges to the Reserve Margin portion in the original "annually adjusted component" charge in Duke Energy's Stipulation Plan that was the subject of the Commission's hearing in May 2004.<sup>36</sup> The ancestry claimed by Duke Energy for the IMF is incorrect: the sole successor to the charge for the Reserve Margin under the Stipulation Plan is the SRT (i.e. the System Reliability Tracker). The evidence demonstrates that the IMF comes from thin air -- i.e., a new surcharge

---

<sup>35</sup> PUCO Merit Brief at 7-26.

<sup>36</sup> Company Remand Ex. 3 at 26 ("The IMF was previously embedded in the reserve margin component of the Stipulated AAC price of \$52,898,560.") (Supp. 730.).

was inserted as suspected by the Court -- that is explained by Duke Energy as the added amount that the Company is “willing to accept.”<sup>37</sup>

The Commission Order, in contrast to the PUCO Merit Brief, recognizes the ancestry of the IMF charge:

The modifications to the stipulation, proposed by Duke [Energy] on rehearing, moved the cost of the reserve margin into two newly designated components: the SRT and the . . . IMF . . . \* \* \* The modifications, [Duke Energy Witness] Steffen explained, “carved out several of the underlying cost and pricing factors previously embedded elsewhere in the Stipulated AAC, and included them as separately named POLR components or trackers. These carved out components became the IMF and the SRT.” (Duke Rem. Ex. 3, at 16.) [Steffen] testified, . . . “In contrast to the fixed reserve margin amount proposed in the Stipulated AAC, the SRT is a mechanism of pure cost recovery of maintaining necessary capacity reserves (15% planning reserve for switched and non-switched load), and is subject to an annual review and true-up. (Duke Rem. Ex. 3, at 22.) It was noted, by many parties, that this actual-cost method of calculating the cost of reserves resulted in a much lower charge than the peaker unit cost methodology that had been proposed in Duke’s application and in the stipulation. (See, for example, OCC Rem. Brief at 18-20; OCC Rem. Ex. 1, at 31-32, 46, 48.)<sup>38</sup>

The result in the Remand Order that “the collection of costs of maintaining a reserve margin is appropriate for collection through a [non-bypassable SRT] POLR rider”<sup>39</sup> recognizes the revised, lower cost of providing the reserve margin. The nonbypassable IMF charge proposed by Duke Energy sought to deny customers any benefit resulting from record evidence that Duke’s original reserve margin charge was too high. The PUCO’s approval of the IMF surcharge remains unsupported.

As pointed out in the PUCO Merit Brief, Duke Energy’s proposed Rate Stabilization Charge (“RSC”) was a carve out from “little g” (generation) charges that customers must pay in

---

<sup>37</sup> Company Remand Ex. 3 at 25 (Supp. 729.).

<sup>38</sup> Remand Order at 32 (Appx. 40.).

<sup>39</sup> Remand Order at 32 (Appx. 40.).

the form of total “little g” charges (i.e. but not as a separate charge).<sup>40</sup> The Company stated that “[l]ittle g and the IMF represent compensation for the Company’s *existing* capacity.”<sup>41</sup> The Company also stated that “[t]he RSC is the Company charge for providing a stable market price over a prolonged period of time.”<sup>42</sup> This is essentially the same description given to the IMF charge in the PUCO Merit Brief, which states that the IMF charge compensates Duke Energy because “it has agreed to provide power at a constrained price over a period of years.”<sup>43</sup> OCC Witness Talbot concluded that “the basis for the IMF charge seems to be similar, if not identical, to that of the RSC charge.”<sup>44</sup> Mr. Talbot stated that “[t]here appears to be over-charging for existing capacity to the extent that little g and the RSC and the IMF are all recovering the costs or risks of existing capacity”<sup>45</sup> and that “[t]here is no assurance that these charges are not duplicative.”<sup>46</sup> The Commission apparently removed the remaining aspect of nonbypassability stemming from the RSC charge<sup>47</sup> to justify the imposition of a separate nonbypassable charge (i.e. the IMF). The IMF, however, has no separate basis in the record.

---

<sup>40</sup> Remand Order at 35 (Appx. 43.) (“also conclude that the generation charge should be increased from 8 percent of little g to 100 percent of little g”).

<sup>41</sup> OCC Remand Ex. 1, NHT Attachment 6 (quoted and analyzed in OCC Remand Ex. 1 at 42) (emphasis added) (Supp. 589.).

<sup>42</sup> Id., NHT Attachment 12 (quoted and analyzed in OCC Remand Ex. 1 at 53) (Supp. 602.).

<sup>43</sup> PUCO Merit Brief at 13.

<sup>44</sup> OCC Remand Ex. 1 at 38 (Supp. 536.).

<sup>45</sup> Id. at 42 (Supp. 540.).

<sup>46</sup> Id.

<sup>47</sup> The RSC approved in 2004 was bypassable for the first 25% of switched residential load and the first 50% of non-residential load. OCC Remand Ex. 2(A) at 33 (Supp. 36.). These break points are well above actual switching levels, so the change made in the Remand Order (i.e. essentially to the 100% break point, resulting in bypassability for all load) has no importance.

**2. The PUCO's explanation of the IMF in terms of risk does not support the IMF charge.**

The Commission's justification for the IMF charge was also stated in terms of risk undertaken by Duke Energy:

While the company could have simply moved to a straight market price for its power, it offered to sell its power within the constraints of this plan instead. To the extent that there is a gulf between the stabilized price available under the plan and the day-to-day, hour-by-hour fluctuations in the market price for power, the company is exposed to a large price risk.<sup>48</sup>

"Fluctuations" go up and down, and this explanation does not justify an additional charge. As OCC Witness Talbot explained,

The Company cannot show what level of risk it is taking on. [I]t cannot even claim that it is taking on any net risk at all and on the face of it[, the] [sic] standard service offer reduces risk. And the Company has not justified its claims in terms of any quantitative risk analysis."<sup>49</sup>

Absent the standard service offer, the Company would be selling the electricity from its generating units into the fluctuating market. With the standard service offer, however, Duke Energy has a relatively assured market for the output of its generating plants and therefore, as OCC Witness Talbot explained, the Company has a less exposed position -- i.e., one with *reduced* risk.<sup>50</sup>

The definition of the risks or costs for which the IMF is supposed to compensate the Company suffers from another serious problem pointed out above: the IMF duplicates costs and supposedly compensates for risks that are covered by other components of Duke Energy's standard service offer. Analysis of the IMF -- on a stand-alone basis and even more so in

---

<sup>48</sup> PUCO Merit Brief at 13-14, citing Remand Order at 36-38 (Appx. 44-46.).

<sup>49</sup> OCC Remand Ex. 1 at 39 (Supp. 537.).

<sup>50</sup> Id. at 38, 41, and 53 (Supp. 536, 539, and 551.).

combination with the RSC, the SRT, and “little g” -- reveals that the PUCO’s decision to allow Duke Energy to charge customers the IMF has no reasonable basis or rationale.

The IMF is, as conjectured by this Court, “some type of surcharge and not a cost component.”<sup>51</sup> The IMF charge continues to be unsupported by the record -- in violation of R.C. 4903.09 (Appx. 154.) -- and should be removed.

**B. The Remand Order Fails to Consider the Needs of the Competitive Market for the Bypassability of All Standard Service Offer Components Based Upon the Record.**

An important feature of Duke Energy's standard service offer, as reestablished in the Remand Order, is that two of its six components (i.e. SRT and IMF) are payable to Duke Energy by residential customers even if they switch to a CRES provider (i.e. “nonbypassable” or “unavoidable”). The PUCO argues that the “rate stabilization plan is pro-competitive,”<sup>52</sup> but the arguments are again not based upon the record or are contradicted by the Remand Order as well as in the PUCO Merit Brief itself.

The Commission argues, at least in one location in its Merit Brief, that the “presence or absence of an unavoidable charge is competitively irrelevant.”<sup>53</sup> A simple hypothetical illustrates the fallacy of that argument. Suppose the entire generation charge is nonbypassable; the result would be that a customer could never be made financially better off by switching to a CRES provider, even if the CRES provider offered generation service for free!

---

<sup>51</sup> *Consumers’ Counsel 2006* at ¶30.

<sup>52</sup> PUCO Merit Brief at 22.

<sup>53</sup> PUCO Merit Brief at 22.

Testimony regarding the anti-competitive effect of even small nonbypassable charges was offered by OCC Witness Talbot.<sup>54</sup> The Court recently stated that “the commission should carefully consider what [non-bypassable] costs it is attributing as costs incurred as part of an electric-distribution utility’s POLR obligations.”<sup>55</sup> The PUCO Merit Brief itself announces that the Remand Order was pro-competitive when it rejected a nonbypassable carve out (i.e. the RSC) from “little g.”<sup>56</sup> Only that portion of the PUCO Merit Brief on the subject of competition argues, without reference to the record or any citation whatsoever, that nonbypassable charges are competitively irrelevant.

The PUCO Merit Brief also suffers from a fundamental problem that is present in its Remand Order: it ignores an important and sizable portion of the record. The Commission argues that the collapse of switching statistics since the introduction of Duke Energy’s rate plan results from “[c]ustomers . . . recognizing a good deal and acting on it.”<sup>57</sup> The record reflects, however, such high prices that Duke Energy, using its affiliates, is willing to spend no less than [REDACTED] to remove opposition of the plan by selected customers.<sup>58</sup>

---

<sup>54</sup> Tr. Vol. II at 84-85 (2007) (Supp. 787-788.). See also OCC Remand Ex. 1 at 62-63 (Supp. 560-561.).

<sup>55</sup> *Ohio Consumers’ Counsel v. Public Util. Comm.*, 2007-Ohio-4276 at ¶26.

<sup>56</sup> PUCO Merit Brief at 10 (“change is significant in that it is a strong incentive, promoting competition”). As stated above, the RSC approved in 2004 was bypassable for the first 25% of switched residential load and the first 50% of non-residential load. OCC Remand Ex. 2(A) at 33 (Supp. 36.). These break points are well above actual switching levels, so the change made in the Remand Order (i.e. essentially to the 100% break point, resulting in bypassability for all load) has no importance.

<sup>57</sup> PUCO Merit Brief at 25.

<sup>58</sup> OCC Merit Brief at 22-23, citing [REDACTED]. Also OCC Remand Ex. 2(A), Attachment 22 at 4 (Supp. 490.). The dollar value does not include [REDACTED].

**Proposition of Law No. 3:**

**The Commission's Remand Order Is Unreasonable And Unlawful Because It Withholds Information From Public Scrutiny By Designating The Contents Of Documents "Trade Secret" Without Legal Justification.**

**A. Appellee PUCO Mischaracterizes the OCC's Legal Argument.**

The PUCO's Remand Order contains a fundamental conflict between the Commission's conclusion that the side deals involve sensitive competitive information and the "inevitable conclusion that there is a sufficient basis to question whether the parties engaged in serious bargaining" regarding the 2004 Stipulation.<sup>59</sup> The latter PUCO position can only be consistent with the result that the side deals should be attributed to Duke Energy and are really settlement agreements or the result of settlement agreements. Instead of attempting to explain this conflict, however, the PUCO chooses to mischaracterize the OCC's case against the PUCO's unlawful withholding of information from the public by first creating and then striking down straw men using case law that is irrelevant to the OCC's arguments.

The cases requiring the "prejudicial effect" demanded by the PUCO, *Elyria Foundry and Tongren*,<sup>60</sup> are only applicable to a claim that the PUCO failed to explain its decision according to R.C. 4903.09 (Appx. 154.). In contrast, the OCC alleges that the PUCO violated R.C. 4901.12 (Appx. 153.)<sup>61</sup> and R.C. 4905.07 (Appx. 155.).<sup>62</sup> As stated in the OCC Merit Brief,<sup>63</sup> these statutes show that rate-setting in a regulatory environment is inherently a public process that should produce rates that are published, accessible, and transparent to others.

---

<sup>59</sup> Remand Order at 27 (Appx. 35.).

<sup>60</sup> PUCO Brief at 39.

<sup>61</sup> R.C. 4901.12 (Appx. 153.) states that "all proceedings of the public utilities commission and all documents and records in its possession are public records." See OCC Merit Brief at 45.

<sup>62</sup> R.C. 4905.07 (Appx. 155.) states that "all facts and information in the possession of the public utilities commission shall be public . . . ." See OCC Merit Brief at 45.

<sup>63</sup> OCC Merit Brief at 49.

A few of the many purposes for a public rate-setting process are illustrated by the cases below. The examination by the public helps thwart discrimination because, for example, the competitors of [REDACTED] and the other favored customers would be encouraged to become involved in the regulatory process if the side deals were better understood. Greater customer involvement would make the selective, behind the scenes deal making more difficult. The discussion with the public is the task undertaken, among other entities, by the OCC as a public agency that communicates with its residential constituency as well as other entities such as the General Assembly and the Governor. Recent experience demonstrates the difficulty: discussions preceding enactment of Sub. S.B. 221 regarding the need for a transparent regulatory process before the PUCO could not include frank debate about the side dealing in these Duke Energy rate plan cases because the PUCO branded much of the information “trade secret.”<sup>64</sup>

The PUCO misleadingly faults the OCC for failure to make a proper public records request and/or a mandamus action according to R.C. 149.43 (Appx. 144.) and this Court’s original jurisdiction.<sup>65</sup> The PUCO Brief itself recognizes that the OCC has access to the documents at issue -- most were presented to the PUCO by the OCC -- so that the OCC has no need for either a public records request or a mandamus action.<sup>66</sup>

The PUCO also misleads this Court by its statement that “OCC’s arguments are . . . premature”<sup>67</sup> because the PUCO has not yet released the information that it promised to release in the October 2007 Remand Order.<sup>68</sup> The PUCO has stated that it will release additional

---

<sup>64</sup> Other problems are self evident. For example, the OCC’s required treatment of the information in the cases below prevents the flow of information between OCC staff members.

<sup>65</sup> PUCO Brief at 40.

<sup>66</sup> PUCO Merit Brief at 40.

<sup>67</sup> Id. at 44.

<sup>68</sup> Id. at 45.

information, consistent with and guided by the “trade secret” designations stated in the Remand Order.<sup>69</sup> It is the decision in the Remand Order regarding information designated “trade secret” that is at issue in this appeal.<sup>70</sup> The PUCO’s subsequent activities to release *other portions* of the side deals and related discussions does not render “premature” the OCC’s appeal of the PUCO’s *unaltered decision* to withhold crucial portions of the record from the public.

**B. The OCC Fully, and Correctly, Explained its Disagreement Regarding Information that Should Not be Withheld from the Public as “Trade Secret.”**

Contrary to the PUCO’s assertion, the OCC clearly explained “why it disagrees with the Commission’s conclusion that certain, specified information satisfies the ‘trade secret’ definition.”<sup>71</sup> The core of the argument in the OCC Merit Brief is as follows:

The conclusion that the information involves sensitive competitive information is fundamentally at odds with the Commission’s “inevitable conclusion that there is a sufficient basis to question whether the parties engaged in serious bargaining” regarding the 2004 Stipulation. [Citing Remand Order at 27 (Appx. 35.)]. There would be no basis for such a conclusion if the Commission found that the agreements were simply legitimate competitive arrangements. They are not: the side agreements are settlement agreements and their progeny, and are not competitively sensitive CRES agreements.<sup>72</sup>

Agreements reached to settle the cases in 2004, and the echoes of those agreements executed soon afterward and made part of the record in 2007, document the means by which rates were set in the cases before the PUCO. The agreements also document the rates actually paid by some electric customers in a manner not completely told by the filed tariffs that contain the rates paid

---

<sup>69</sup> Entry at 4, ¶(10) (May 28, 2008) (“follow the general instructions delineated in the [O]rder on [R]emand”) (OCC R. Appx. 1.). DERS’ historical account of the redaction process is both highly inaccurate (see, e.g. Entry (May 28, 2008), R. Appx. 1.) and irrelevant. DERS Merit Brief at 33.

<sup>70</sup> Remand Order at 15 (Appx. 23.).

<sup>71</sup> PUCO Merit Brief at 44.

<sup>72</sup> OCC Merit Brief at 47.

by all residential and most (i.e. with the exception of customers who received special deals) commercial and industrial electric customers.

The PUCO Merit Brief itself does not explain the Commission's "trade secret" designations other than to state that the designations were determined after the Commission's "own *in camera* inspection of all the materials in question."<sup>73</sup> The Commission leaves the Court (and the public) with two conflicting stories regarding the "trade secret" designations in the Remand Order. First, the Remand Order agrees with the cumulative arguments of certain parties (the Duke affiliates and their side agreement counterparties) who sought to conceal information from the public.<sup>74</sup> Second, and in agreement with the OCC's arguments, the Commission reached the "inevitable conclusion that there is a sufficient basis to question whether the parties engaged in serious bargaining" regarding the 2004 Stipulation.<sup>75</sup> That "inevitable conclusion" could only be reached if the negotiation of the side agreements was inexorably linked to the Duke Energy negotiations in the cases before the PUCO and not part of legitimate competitive arrangements. The PUCO's "inevitable conclusion" is a Commission admission that the decision in the Remand Order to restrict access to details of the rate-setting agreements is not based upon any legitimate finding that "trade secret" information lies within the side deals.

The PUCO refuses to acknowledge that its determination that the 2004 negotiations were tainted by the presence of side agreements can only be consistent with the conclusion that the side agreements were settlement documents (and follow-up agreements to those settlements) and not competitively sensitive CRES contracts. The PUCO states:

---

<sup>73</sup> PUCO Merit Brief at 44.

<sup>74</sup> Remand Order at 13 (Appx. 21.). The OCC Merit Brief debunks these arguments based on the record, including admissions by knowledgeable employees within the Duke-affiliated companies that the side agreements are actually settlement agreements. OCC Merit Brief at 47.

OCC misses the point of the entire redaction exercise. The Commission did not order the redaction of the agreements on the basis of the *identities of the parties* to the agreements; rather, it ordered redactions based on the type of information contained within the agreements . . . .<sup>76</sup>

The identities of the parties, the record reveals, is tremendously important to the appropriate treatment of the documents.

The OCC Merit Brief cited statements by key Duke Energy personnel -- its president at the time of the *Post-MDP Service Case* (Gregory Ficke) and a rate supervisor responsible for answering rate-related questions (James Ziolkowski) -- to document that DERS' and Cinergy Corp.'s agreements were settlement documents connected with Duke Energy's rate plan proposal.<sup>77</sup> Duke Energy attempts to dismiss the knowledge of its rate supervisor, but his testimony states that he was aware of the early settlement agreements that involved the Duke Energy's affiliated companies.<sup>78</sup> The side agreements contain [REDACTED], a result that could *not* be reached in negotiations that involved a truly independent, competitive provider of generation service.<sup>79</sup> Documented negotiations regarding Duke Energy's rate plan resulted in side agreements that [REDACTED].<sup>80</sup> Any agreement that involved another CRES provider is missing all of these attributes.

---

<sup>75</sup> Remand Order at 27 (Appx. 35.).

<sup>76</sup> PUCO Merit Brief at 44, footnote 20 (emphasis added).

<sup>77</sup> OCC Merit Brief at 17 [REDACTED]

[REDACTED] and at 22 (James Ziolkowski explained that "CG&E [Duke Energy's predecessor] negotiated special conditions with interveners" that "called for Cinergy to form a 'CRES'").

<sup>78</sup> Duke Energy Merit Brief at 17, quoting examination of James Ziolkowski.

<sup>79</sup> OCC Merit Brief at 12 and 16.

<sup>80</sup> OCC Merit Brief at 12. [REDACTED]

Thus, *the PUCO misses the point*: the lack of corporate separation between the Duke-affiliated companies permitted the development of a discriminatory set of rate plan rates that do not involve the supply of competitive services. The documents that describe those rate plan rates should be revealed to the public.

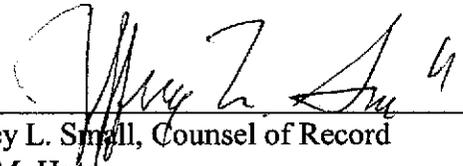
For these reasons and those stated in the OCC Merit Brief, the Remand Order incorrectly shielded from public view large amounts of information. The Court should reverse the Commission's decision to permit public scrutiny of the information.

### III. CONCLUSION

As the result of the foregoing, this Court should reverse, vacate, or modify the PUCO's decision and remand this case to the PUCO with instructions to correct the Commission's errors.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER  
OHIO CONSUMERS' COUNSEL

By: 

Jeffrey L. Small, Counsel of Record  
Ann M. Hotz

Attorneys for Appellant  
Office of the Ohio Consumers' Counsel

**Office of the Ohio Consumers' Counsel**  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
(614) 466-8574 (telephone)  
(614) 466-9475 (facsimile)  
[small@occ.state.oh.us](mailto:small@occ.state.oh.us)  
[hotz@occ.state.oh.us](mailto:hotz@occ.state.oh.us)

**IN THE SUPREME COURT OF OHIO**

The Office of the Ohio Consumers' Counsel,	)	Case No. 08-0367
	)	Second Appeal from the Public
Appellant,	)	Utilities Commission of Ohio
	)	Case Nos. 03-93-EL-ATA, 03-2079-
v.	)	EL-AAM, 03-2081-EL-AAM,
	)	03-2080-EL-ATA
The Public Utilities Commission	)	
of Ohio,	)	
	)	
Appellee.	)	

---

**REPLY APPENDIX  
BY  
APPELLANT,  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL  
(PUBLIC VERSION)**

---

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY

The Commission finds:

- (1) On November 22, 2006, the Supreme Court of Ohio issued its decision in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 300, 2006-Ohio-5789, remanding certain issues to the Commission for further consideration in Cases 03-93-EL-ATA, 03-2079-EL-AAM, 03-2081-EL-AAM, AND 03-2080-EL-ATA. The additional, above-captioned cases were subsequently consolidated with the remanded proceedings.
- (2) In the course of the Commission's remand proceedings, certain information, including side agreements between parties to these proceedings, was obtained through discovery and was sought, by several of the parties to the proceedings, to be maintained as confidential. Thus, with regard to those side agreements and certain other information, numerous motions for protective orders were filed by various parties.
- (3) On October 24, 2007, the Commission issued its order on remand in these consolidated proceedings. In our order, we discussed the motions for protective orders at great length, ultimately finding that certain of the information in the documents in question is within the definition of a trade secret and should, therefore, be the subject of a protective order:

It is clear to us, from our review of the information, that at least certain portions of the documents would indeed meet this portion of the definition of trade secrets. We

000001

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business  
Technician \_\_\_\_\_ Date Processed 5/28/07

agree with the parties seeking protective treatment that certain portions of the material in question have actual or potential independent economic value derived from their not being generally known or ascertainable by others, who might derive economic value from their disclosure or use. Specifically, we find that the following information has actual or potential independent economic value from its being not generally known or ascertainable: customer names, account numbers, customer social security or employer identification numbers, 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.

Order on Remand at 15.

- (4) As a part of that order, the Commission directed Duke Energy Ohio, Inc., (Duke) to work with the parties to the side agreements to prepare and file "a redacted version of the confidential information attached to the prefiled testimony of Ms. Hixon . . ." After that filing, each other party to the proceedings was to redact and file all other sealed documents that such party had previously filed with the Commission. Order on remand at 17. All redactions were to be limited to that information found by the Commission to be trade secret as outlined above in finding (3).
- (5) On December 7, 2007, Duke filed its newly redacted documents. On January 23, 2008, Duke and its affiliates filed new redactions of the other documents that they had filed under seal, as did the office of the Ohio Consumers' Counsel (OCC). No other party filed the required new redactions. Following OCC's filing, various parties disputed OCC's assertions that Duke's redactions had failed to follow Commission directives. In addition, on February 13 and 14, 2008, Duke filed new versions of its proposed redactions of a number of documents previously included in its filings.
- (6) In addition to the sealed documents discussed above, certain other documents have been maintained under seal pursuant to an attorney examiner entry issued on May 13, 2004. That protective order was

000002

continued by entry of May 2, 2006. On September 17, 2007, Duke moved, once again, to continue the protective order. Duke asserts that the documents covered by its motion are still proprietary and that they are not actually "records" under the applicable definition. OCC filed a memorandum contra Duke's motion, on October 5, 2007, arguing that the motion was not properly supported and disagreeing with Duke's definitional argument. Duke replied on October 9, 2007, providing additional support for its need for continued confidentiality and restating its argument that documents provided to the Commission, but not used by the Commission in reaching its decision, are not public records.

- (7) Duke asserts, with regard to the definition of "records" in Section 149.011, Revised Code, that the documents in question are not records because they were not received by the Commission "to document the organization, functions, policies, decision, procedures, operation, or other activities" of the Commission. Duke contends that a decision of the Supreme Court of Ohio supports this analysis through its finding that proprietary documents retain their confidential nature when they come into the possession of a public office. *State ex. Rel. Besser v. Ohio State University*, 87 Ohio St.3d 535 (2000).
- (8) We disagree with Duke's reasoning. It is certainly true that confidential documents retain that nature even when they come into the possession of the Commission, as held by the court. However, that conclusion does not support a holding that documents that are filed with the Commission are not "records" simply because they did not form the basis of a Commission opinion. Duke made the determination, in 2004, that it wished to file these documents, which were responses to discovery requests. Such a filing was not required by Commission rules. Duke's motion for a protective order referenced a dispute between Duke and OCC concerning the handling of confidential documents. Duke's filing was intended to use the Commission's protective order as a part of the resolution of that dispute. In granting the requested protective order, the attorney examiner also resolved the dispute concerning terms of the parties' confidentiality agreement. Thus, even if Duke's argument regarding the definition of "records" in Section 149.011, Revised Code, is correct, which we are not here determining, it would not result in a conclusion that these documents did not document the decisions of

000003

the Commission. They did document the background of the examiner's granting of a protective order.

- (9) The Commission has completed an exhaustive review of all newly proposed redactions and, where parties did not file new redactions, the redactions originally proposed. The Commission's review also included the documents covered by the May 13, 2004, protective order and all other documents filed under seal in these consolidated cases. With regard to Duke's motion to extend the protective order that was first granted on May 13, 2004, we find that only a limited portion of the information in those documents remains a trade secret. With regard to documents filed under seal since the remand of these proceedings, many of the redactions proposed by the parties do not comply with our order regarding the categories of information that would be deemed a trade secret. Parties should understand that their actions caused the expenditure of substantial additional hours of work by numerous Commission employees. Should such behavior be repeated, the Commission may consider the imposition of civil forfeitures under Section 4905.54, Revised Code.
- (10) We have created a new, Commission-redacted version of each document that was filed under seal in these consolidated proceedings. The redactions prepared by the Commission follow the general instructions delineated in the order on remand, with some important exceptions. Information that is or already has been made public cannot be treated as a trade secret under Section 1333.61, Revised Code. Thus, in a situation in which information might have fallen within the categories outlined in the order on remand but was released in a public filing by one of the parties, we will not protect that information where it clearly appears in other places in the same document or in other documents.
- (11) In addition, we note, in this regard, that an e-mail, outlining the nature and certain details of the side agreements, was filed publicly by Duke and that such filing was discussed in a Cincinnati newspaper. As a result of that public release, the termination dates of the side agreements, the fact that the side agreements provide for the refund of riders, and the fact that the options agreements are full requirement contracts can no longer be considered trade secret information and, therefore, will not be treated as confidential. In addition, that e-mail referenced the level of financial impact to

Duke's affiliate that resulted from the option agreements. That information is, therefore, also no longer confidential.

- (12) We would also point out that some of the proposed redactions sought to treat, as trade secrets, categories and information that our order on remand did not allow to be so treated. We find that, under the circumstances in these proceedings, names of trade groups, names of employees, and names of attorneys (unless the attorney name makes it possible to identify a customer) are not trade secrets. In addition, we find that, in these circumstances, items such as the payment of legal fees should not be treated as trade secrets. These items would not fall within the definition of a trade secret in Section 1333.61(D), Revised Code, as we discussed in our order on remand.
- (13) Based on our analysis of the motions for protective orders, as discussed in the order on remand, and on our comprehensive review of the documents themselves, the motions for protective orders are granted in part and denied in part.
- (14) The Commission-redacted documents will be filed publicly in these dockets on July 1, 2008, unless an application for rehearing is filed under Section 4903.10, Revised Code. Parties to these proceedings may contact the attorney examiners in order to receive an electronic copy (on a computer disk) of the documents, with highlighting to indicate the Commission's proposed redactions, which computer disk should be available no later than Friday, May 30, 2008. The parties should understand that this copy of the information must be treated under the same confidentiality restrictions that apply to any previous copies or versions of the information that they have previously obtained, regardless of the medium in which, or the party from whom, such information was conveyed. Therefore, the disks, and the information thereon, are not to be copied or transmitted in any way to any other person or entity. As has been the case through the remand process with regard to those parties who have not entered into confidentiality agreements with Duke or its affiliates relating to this information, such information is also not to be shared by any counsel with his or her client or with any other person or entity.
- (15) If any party, after reviewing the Commission's redactions, chooses to file an application for rehearing, each asserted error should be specifically referenced and explained. For this purpose, the

Commission-redacted documents have been arranged on the disk in chronological order and all of the pages have been consecutively numbered at the top of the page. A table of contents, referencing Commission page numbers, has been prepared. Assignments of error should refer to such Commission page numbers and the specific text on such pages. Parties should not expect the Commission to locate additional similar instances of asserted errors. Assignments of error that do not use Commission page numbers or that are general in nature will be denied.

- (15) Rule 4901-1-24(F), Ohio Administrative Code, provides that, "[u]nless otherwise ordered, any order prohibiting public disclosure . . . shall automatically expire eighteen months after the date of its issuance, and such information may then be included in the public record of the proceeding. A party wishing to extend a protective order beyond eighteen months shall file an appropriate motion at least forty-five days in advance of the expiration date of the existing order. The motion shall include a detailed discussion of the need for continued protection from disclosure."
- (16) Although the information in question has been held in the confidential files of the Commission for some time, pending review, such information has now been fully reviewed. The Commission finds that it is appropriate in these particular circumstances to grant a protective order for a period lasting through January 1, 2011. Accordingly, on January 2, 2011, the Commission's docketing division shall release the information to the public. Any party seeking to extend the protection should file an appropriate motion, pursuant to the cited rule, setting forth in particularity what information should still be deemed to be a trade secret and why. Such a motion shall refer to the information in question based on the Commission page number, for reference purposes.

It is, therefore,

ORDERED, That the motions for protective orders be granted in part and denied in part. It is, further,

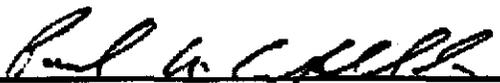
ORDERED, That the parties comply with the requirements of this entry. It is, further,

000006

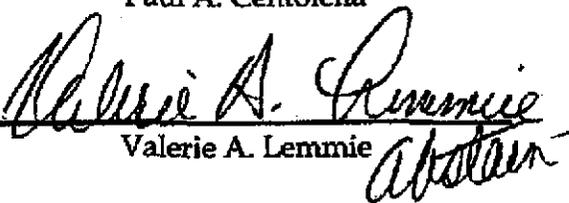
ORDERED, That a copy of this entry be served upon all parties of record in these proceedings.

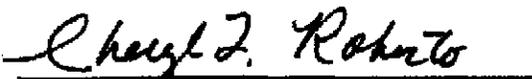
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Alan R. Schriber, Chairman

  
Paul A. Centolella

  
Ronda Hartman Fergus

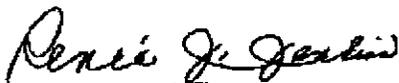
  
Valerie A. Lemmie

  
Cheryl L. Roberto

SEF/JWK:geb

Entered in the Journal

MAY 28 2008



Renee J. Jenkins  
Secretary

000007

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

---

**(PUBLIC VERSION)**

**INITIAL POST-REMAND BRIEF, HEARING PHASE I,  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

---

Janine L. Migden-Ostrander  
Consumers' Counsel

Jeffrey L. Small, Trial Attorney  
Ann M. Hotz  
Larry S. Sauer  
Assistant Consumers' Counsel

**Office Of The Ohio Consumers' Counsel**  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
Telephone: 614-466-8574  
Fax: 614-466-9475  
E-mail: [small@occ.state.oh.us](mailto:small@occ.state.oh.us)  
[hotz@occ.state.oh.us](mailto:hotz@occ.state.oh.us)  
[sauer@occ.state.oh.us](mailto:sauer@occ.state.oh.us)

Dated: April 13, 2007

**000008**

[REDACTED]

239

[REDACTED]

[REDACTED]

240

[REDACTED]

[REDACTED]

[REDACTED]

239 [REDACTED]

240 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

241 [REDACTED]

242 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>243</sup>

[REDACTED]

**c. Duke Energy Ohio's standard service offer price components should be bypassable.**

An important feature of Duke Energy Ohio's standard service offer is that four of its six price components are not fully bypassable by customers who switch to CRES providers. Only the tariff generation rate (i.e. 85 percent of "little g") and the FPP are fully bypassable.<sup>244</sup> In spite of the fact that all the standard service offer charges are generation-related, the IMF, the AAC, the RSC and the SRT are not fully bypassable.

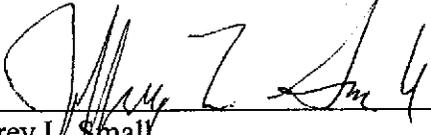
[REDACTED]

<sup>243</sup> [REDACTED]

<sup>244</sup> [REDACTED]

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Reply Brief and Reply Appendix (Public Version Attachment) by the Office of the Ohio Consumers' Counsel was served upon the below-listed counsel by regular U.S. Mail, prepaid, this 28<sup>th</sup> day of July 2008.

  
\_\_\_\_\_  
Jeffrey L. Small  
Counsel for Appellant,  
Office of the Ohio Consumers' Counsel

**PARTIES OF RECORD**

Thomas W. McNamee  
Duane W. Luckey  
Sarah J. Parrot  
Assistant Attorneys General  
Public Utilities Section  
180 East Broad Street, 9th Floor  
Columbus, OH 43215

*Attorneys for Appellee  
Public Utilities Commission of Ohio*

Michael D. Dortch  
Kravitz, Brown & Dortch, LLC  
65 East State Street, Suite 200  
Columbus, Ohio 43215

*Attorney for Intervening Appellee,  
Duke Energy Retail Sales, LLC*

Paul Colbert  
Rocco D'Ascenzo  
Duke Energy Ohio, Inc.  
155 East Broad Street, 21<sup>st</sup> Floor  
Columbus, Ohio 43215

*Attorneys for Intervening Appellee  
Duke Energy Ohio, Inc.*