

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.)	

**MEMORANDUM CONTRA MOTION TO DISMISS
BY
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THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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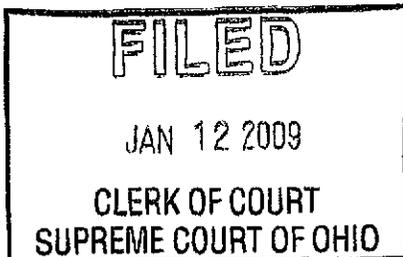
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I. INTRODUCTION

The Public Utilities Commission of Ohio (“PUCO” or “Commission”) seeks to avoid additional scrutiny of its order on remand (“Remand Order”¹) in the case below as the result of this second appeal of the above-captioned PUCO cases by the Office of the Ohio Consumers’ Counsel (“OCC”) regarding the standard service offer (“SSO”) for customers of Duke Energy Ohio, Inc. (“Duke Energy” or “Company,” formerly known as “CG&E” and including the former entity). The Commission’s arguments that the OCC’s second appeal is moot are deceptively stated, and are also poorly supported by any statements of changed factual circumstances that might render the OCC’s appeal moot.

The Commission’s desire to avoid additional scrutiny by the Court is not surprising under the unusual circumstances where the OCC has been compelled to appeal the PUCO’s failure to consider the OCC’s arguments -- arguments on issues fundamental to the underlying application submitted by Duke Energy -- in a *second* appeal. The first appeal resulted in this Court’s decision in November 2006 to remand the case to the Commission for further consideration.² This second appeal, in part, contains the OCC’s arguments that the Commission refused to consider the OCC’s arguments that are rooted in the statutory language contained in R.C. Chapter 4928 under which Duke Energy filed its application. That essential statutory language remains unaltered by electric regulatory legislation enacted during 2008. This second appeal also contains the OCC’s efforts to enforce the unaltered statutory requirements regarding transparency and public accountability in Commission decision-making. The Commission’s Motion to

¹ *In re Post-MDP Remand Case*, Case Nos. 03-93-EL-AIR, et al., Order on Remand (October 24, 2007) (OCC Appx. 9-53.) (“Remand Order”).

² *Ohio Consumers’ Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006 Ohio 5789 (“*Consumers’ Counsel 2006*”).

Dismiss should be denied as yet another effort on the part of the PUCO to deflect attention from the Commission's violation of Ohio law.

The Commission's arguments in this case continue the Commission's ongoing trend towards avoiding review. Justice Pfeifer has recognized this trend in several of his dissenting opinions: "This seemingly inconsequential case raises important questions about the apparent intent of the [commission] to avoid meaningful review of its activities. It is difficult to decipher the commission's motivations on the sparse facts of this case, but it is less difficult to decipher the path it took to avoid review by this court."³; "This holding feeds into what increasingly appears to be the commission's belief that its decisions are not reviewable. Herein, the commission dismisses the idea that it has accountability of its orders, right or wrong, by arguing that it cannot 'unring the bell.' I view the institutional arrogance of the commission to be a continuing problem and one that could be dealt with by addressing the legitimate issues raised by parties in cases like these."⁴

II. HISTORY OF THE CASE AND APPLICABLE LAW

A. History of the Case

The OCC incorporates herein the contents of its Statement of Facts contained in its Merit Brief and Reply Brief, and provides supplemental facts that are important to this pleading. This

³ *State ex rel. Consumers' Counsel v. Public Util. Comm.*, 102 Ohio St.3d 301, 2004 Ohio 2894, ¶24, 809 N.E.2d 1146 (Pfeifer, J., dissenting)

⁴ *Cincinnati Gas & Elec. Co. v. Public Util. Comm.*, 103 Ohio St.3d 398, 2004 Ohio 5466, ¶31, 816 N.E.2d 238 (Pfeifer, J., dissenting) (citing Justice Pfeifer's dissent in *Consumers' Counsel*, 102 Ohio St.3d 301, 2004 Ohio 2894 at P24). See also *State ex rel. Cincinnati Bell Tele. Co. v. Public Util. Comm.*, 105 Ohio St.3d 177, 2005 Ohio 1150, ¶30, 824 N.E.2d 68 ("The commission's recent practice of refusing to transmit a transcript of proceedings on appeal when it believes that the appeal is either not from a final appealable order or is untimely has evidently spawned other recently filed mandamus actions seeking to compel the commission to file transcripts in appeals to this court from commission orders." (Citations omitted.)).

Court's earlier decision regarding the OCC's first appeal (i.e. "*Consumers' Counsel 2006*"⁵) was issued on November 22, 2006. Discovery proceeded, a hearing was held, and the matters on remand were fully briefed by April 27, 2007. The Remand Order was issued on October 24, 2007,⁶ six months after the completion of briefing of the matters on remand. The Commission took six months to take the simple expedient of rejecting the stipulation submitted in May 2004⁷ and reinstating the results from the original order issued in 2004.⁸ The Remand Order was issued without any meaningful consideration of the OCC's arguments.⁹ The Commission did not consider the OCC's arguments -- i.e. those based upon documents showing and discussing side deals that were revealed as the result of this Court's earlier decision in *Consumers' Counsel 2006*.

The Commission continues to cloak its decision behind a wall of secrecy that violates Ohio law regarding the transparency required for PUCO proceedings. Some crumbling of that wall occurred as the result of private litigants in court cases rather than through any decision by the PUCO to alter the course of secrecy set out in the Remand Order.

As noted in the OCC's List of Additional Authority filed on November 6, 2008, the noteworthy event subsequent to the filing of briefs in this case was a decision by the Court of Common Pleas for Hamilton, Ohio that released to the public *some* of the side-agreements that

⁵ *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St. 3d 300, 2006 Ohio 5789.

⁶ Remand Order (OCC Appx. 9.).

⁷ Remand Order at 27 (OCC Appx. 35.) ("expressly reject the stipulation").

⁸ OCC Merit Brief at 23 ("reinstated").

⁹ *Id.* at 24-25, citing Remand Order at 20 (Appx. 28.) ("ancillary"). Thereafter, the Commission again refused to consider the OCC's arguments that Duke Energy Retail Sales ("DERS"), the entity used by Duke Energy to settle its rate plan case, should not be re-certified because of (in part) DERS' failure to follow the Commission's corporate separation requirements. *In re Certification of DERS*, Case No. 04-1323-EL-CRS, Order at 5, ¶(8) (December 3, 2008) (OCC M. Contra Appx. 5.) ("collateral attack on the renewal application").

the PUCO has provided to the public only in severely redacted form.¹⁰ As the result of the court's release of documents in Hamilton County, the Commission released largely unredacted versions of those same side-agreements. Regarding the remainder of the side-agreements and associated documents such as the discussion of the side-agreements in transcripts, the Commission has not wavered from its Remand Order pronouncement that the PUCO's documents for the case below should remain redacted. These redactions mean continued secrecy for the information most important to public understanding of the issues before the PUCO -- the "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."¹¹ The release of documents by the court in Hamilton County strongly argues *for the further release* of the documents that the PUCO refuses to release in unredacted form, *not for dismissal* of the OCC's action.

An event upon which the PUCO heavily depends in its Motion to Dismiss is the enactment of Sub. S.B. 221, which became law on July 31, 2008. The provisions of R.C. Chapter 4928 (explored in greater detail below) altered Ohio's regulation of electric generation rates by codifying the two means by which customer rates are determined (as examined in appeals to this Court) -- the market rate option and pricing by Commission-approved rate plans.¹²

¹⁰ OCC List of Additional Authority (November 6, 2008), citing *Deeds v. Duke Energy*, Case No. A0701671, Entry (Hamilton County C.P., August 14, 2008). The OCC's pleading attached a hand written entry as well as a typed version that was issued by the Hamilton County court to release documents in its files, documents that included a few contracts that had only been released by the PUCO at that time in heavily redacted form.

¹¹ Remand Order at 15 (OCC Appx. 23.), also quoted by PUCO Motion to Dismiss at 6.

¹² See, e.g., *Consumers' Counsel 2006* at ¶¶49-56 (market approach) and ¶¶37-48 (administrative approach).

Sub. S.B. 221 also contains energy efficiency and alternative energy requirements. However, the key portion of R.C. Chapter 4928 that is relevant to the OCC's appeal, R.C. 4928.14(A) (OCC Appx. 160.),¹³ remains intact in all ways relevant to the OCC's appeal. The other anti-discrimination statutes relied upon by the OCC in the instant appeal also remain intact. On these factual matters, the PUCO's Motion to Dismiss does not state otherwise.

B. The Mootness Doctrine

The seminal case on the mootness doctrine under Ohio law is *Miner v. Witt* (1910), 82 Ohio St. 237, which states in its syllabus:

It is not the duty of the court to answer moot questions, and when, pending proceeding in error in this court, an event occurs, without the fault of either party, which renders it impossible for the court to grant any relief, it will dismiss the petition in error.

The mootness doctrine applies, therefore, only if an event occurs that is "without the fault of either party." This element of the mootness doctrine concentrates parties' efforts on resolving disputes by means of court process rather than self-help actions.

An exception to the above-stated doctrine is also well established in the courts. The OCC's List of Additional Authorities cited *In re Appeal of Suspension of Huffer from Circleville High School* (1989), 47 Ohio St.3d 12, which relied upon the exception of "capable of repetition, yet evading review" under such circumstances that the period for court review of a challenged action exceeded the duration of the impact of that action. The particular circumstances of the case involved the challenged discipline of a student and court review of the resulting challenge that

¹³ The importance of this provision was recognized in the first appeal. *Consumers' Counsel 2006* at ¶38.

exceeded the remaining time that the student remained in school. The PUCO's Motion to Dismiss recognizes this exception to the mootness doctrine.¹⁴

III. ARGUMENT

A. **The Commission's Failure to Prohibit Unlawful Pricing that Resulted from Duke Energy's Anti-Competitive Activities and the Commission's Failure to Base Its Decision Upon Competent Evidence Remain Active Issues Before this Court.**

1. **The Exception to the Mootness Doctrine for Issues Capable of Repetition Yet Evading Review is Applicable to this Appeal.**

In its Motion to Dismiss, the PUCO acknowledges the exception to the mootness doctrine that is applicable even if the Court does not permit a financial remedy for the high electricity prices that resulted from the case below (or remand makes such remedy impossible). As quoted by the PUCO itself:¹⁵

Moreover, an exception to the mootness doctrine arises when the claims raised are capable of repetition, yet evading review. This exception applies when the challenged action is *too short in duration* to be fully litigated before its cessation or expiration, and there is a reasonable expectation that the same complaining party will be subject to the same action again.

The exception to the mootness doctrine applies in the event the Court does not permit a financial remedy in the instant case. The "reasonable expectation" that the OCC will encounter the same problems is clear, and is particularly evident from the fact that this is the OCC's second appeal of a single underlying case before the PUCO.

The PUCO's argument against the application of this exception to the mootness doctrine in the instant case is all the more incredible because it is the PUCO itself that has *caused* the

¹⁴ PUCO Motion to Dismiss at 4-5.

¹⁵ *Id.*, citing *State ex rel. Dispatch Printing Co. v. Loudon* (2001), 91 Ohio St. 3d 61, 64 (quoting *State ex rel. Calvary v. Upper Arlington* (2000), 89 Ohio St. 3d 229, 231) (emphasis by OCC).

lengthy delay that prevents timely review of its actions. As stated in *Consumers' Counsel 2006*, the Commission unlawfully denied the OCC its discovery rights in 2004.¹⁶ On remand the Commission refused to consider the OCC's arguments -- based upon the discovery made possible by this Court -- regarding discriminatory pricing that was accomplished through the anti-competitive activities of the Duke-affiliated companies. In light of the PUCO's failure to consider the OCC's substantive arguments on remand, six months is an inordinate amount of time to simply reinstate the results from a case that the Commission previously heard and decided. The Commission has steadfastly refused to consider the OCC's arguments that are fundamental to Duke Energy's rate plan proposal, and now seeks to complete its litigation-by-attrition by seeking to dismiss the OCC's second appeal.

The PUCO has refused to consider OCC's arguments, and now argues in its Motion to Dismiss that the "General Assembly has completely restructured this [rate setting] statutory mechanism" such that the issues raised by the OCC on appeal cannot arise again.¹⁷ The PUCO's Merit Brief discusses the scope of the case below in terms of the statutory mechanism for setting rates for generation service:¹⁸

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

¹⁶ *Consumers' Counsel 2006* at ¶¶86 and 95.

¹⁷ PUCO Motion to Dismiss at 5. The PUCO acknowledges that the issue raised in its Motion to Dismiss regarding the change in statutes was the topic of oral argument on November 18, 2008. *Id.* The PUCO's dissatisfaction with the results of the oral argument is not a valid basis for the submission of a motion to dismiss the OCC's appeal.

¹⁸ PUCO Merit Brief at 35 (emphasis added).

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*.

The OCC's appeal 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.¹⁹ As stated at the oral argument, this fundamental element of pricing electric generation service was *retained* in the adjustments to Ohio's regulatory regime over generation service. Therefore, the issues raised by the OCC in this appeal are likely to be repeated, to the detriment of residential customers, if not resolved by the Court in this appeal.

The PUCO's Motion to Dismiss fails to provide any detailed comparison of the provisions of R.C. Chapter 4928 that are relevant to this appeal both before and after enactment of Sub. S.B. 221. The Sub. S.B. 221 replacement for the statutory provision stated above and quoted by the Commission as "[t]he purpose of the proceedings,"²⁰ is as follows (showing additions in capital letters and deletions as strike-outs):²¹

~~After its market development period~~ BEGINNING JANUARY 1, 2009, 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

The issue of whether the Remand Order lets stand discrimination in favor of a few large customers, achieved by Duke Energy's violation of the Commission's corporate separation rules,²² remains after enactment of the adjustments to R.C. Chapter 4928. The PUCO's Motion

¹⁹ The OCC based its legal argument, in part, on violation of R.C. 4928.14(A) (OCC Appx. 160.), the same provision that the PUCO quotes. OCC Merit Brief at 29.

²⁰ PUCO Merit Brief at 35.

²¹ R.C. 4928.14(A) (OCC M. Contra Appx. 31.) (emphasis added).

²² OCC Merit Brief at 25-36.

to Dismiss fails to recognize this key purpose and requirement of its proceedings, both under earlier Ohio law and under *existing* Ohio law. Under these circumstances, it is all the more important for this Court to deny the PUCO's Motion to Dismiss and to reverse the Remand Order.

2. A Financial Remedy Should Result from the OCC's Appeal.

The Motion to Dismiss does not recognize important changes to Ohio law that have a bearing on the issue of financial remedies. The important changes result from the appearance of R.C. Chapter 4928 in 1999, a chapter that retains many of its important features following enactment of Sub. S.B. 221.

The PUCO states that a refund cannot result from this case because "that option has been foreclosed by the General Assembly."²³ The seminal case against a refund opportunity in such appeals is cited by the PUCO: *Keco Industries v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254 ("*Keco*"). The *Keco* decision relied upon three statutory provisions: R.C. 4903.12 (OCC M. Contra Appx. 26.), R.C. 4903.16 (OCC M. Contra Appx. 27.), and R.C. 4905.32 (OCC M. Contra Appx. 28.).²⁴ The first statute, R.C. 4903.12, is inapplicable to the instant case because it addresses the requirement that cases within the Commission's jurisdiction be considered only by the Supreme Court of Ohio and not any other court. R.C. 4903.16 is a "stay" provision, which was also cited in the OCC's Motion to Stay that was submitted in the instant appeal.²⁵ The third statute, R.C. 4905.32, is wholly inapplicable to this case and is outside the statutes governing proceedings under R.C. Chapter 4928.

²³ PUCO Motion to Dismiss at 8.

²⁴ *Keco* at 256-257.

²⁵ The OCC also submitted a Motion to Stay to the PUCO, which was denied.

The inapplicability of R.C. 4905.32 (M. Contra Appx. 28.) to the case below and this appeal, and therefore the inapplicability of *Keco*'s limitations on a financial remedy in this appeal, is readily discernable from R.C. 4928.05(A)(1) (OCC M. Contra Appx. 29(A).):²⁶

On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric utility or electric services company shall *not be subject to supervision and regulation . . . by the public utilities commission under Chapters 4901. to 4909. . . . except . . . 4905.10 . . . , division (B) of . . . 4905.33, and sections 4905.35 and 4933.81 to 4928.90*

The italicized words in the statute quoted above include R.C. Chapter 4905, and the stated exceptions do not include R.C. 4905.32 (OCC M. Contra Appx. 28.).²⁷ Therefore, R.C. 4905.32 is inapplicable.

The statutory basis for the PUCO's arguments is ten years out of date.²⁸ The issue of financial remedies, in the form of refunds to customers, remains before this Court in the instant appeal.

²⁶ Emphasis added. The appendix to this pleading shows R.C. 4928.05 under the law applicable at the time of the case before the PUCO and as amended by Sub. S.B. 221. The provisions contained in R.C. 4928.05(A)(1) that are applicable to the instant argument (quoted) did not change.

²⁷ Had R.C. 4905.32 been applicable to the case before the PUCO, Duke Energy most certainly would have violated the statute that states: "No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge" R.C. 4905.32 is another anti-discrimination statute, which applies after the introduction of R.C. Chapter 4928 to the provision of distribution service.

²⁸ *Keco* was decided in 1957 and addressed a regulatory environment where the PUCO conducted cost of service regulation of both distribution and generation service. As stated, that statutory framework changed in 1999 with the passage of Sub. S.B. 3. The PUCO's decisions under this new framework have oftentimes authorized charges related to generation functions of such sort duration that appeal to this Court cannot provide financial remedies unless refunds are possible. See, e.g., *Industrial Energy Users v. Public Util. Comm.*, 117 Ohio St.3d 486, 487, 2008 Ohio 990 ("*IEU*"). In *IEU*, the Court declined to address the refund issue "[i]n view of [the] remand of the matter to the commission." *Id.* at ¶36.

B. The Commission’s Remand Order Has Not Been Superseded and the PUCO’s Unlawful Withholding of Information Remains a Vital Issue Before this Court.

The Commission quotes from the Remand Order regarding the information from the case below that the PUCO ordered withheld from the public, but fails to support (e.g. quote from any subsequent order) its claim that the Remand Order was “superseded” regarding the categories of information that have been withheld.²⁹ The PUCO violated Ohio law as well as the Commission’s own precedent when it shielded significant provisions in side agreements from entering the public domain.³⁰ Agreements purged of “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” were rendered incomprehensible in the Remand Order.³¹ The Commission states that it was time-consuming to “apply[] the categories of potential confidentiality to the record in the case,”³² but does not state that the determination of the information that it withheld from the public as stated in the Remand Order changed in any respect.

²⁹ PUCO Motion to Dismiss at 5, caption to argument II.

³⁰ R.C. 4901.12 (OCC Appx. 153.) 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 (Ohio’s public records law, OCC Appx. 144.). R.C. 4905.07 (OCC Appx. 155.) 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” Ohio Adm. Code 4901-1-24(D) (OCC Appx. 140.) requires of the PUCO that “[a]ny order issued under this paragraph shall minimize the amount of information protected from public disclosure.”

³¹ Remand Order at 15 (OCC Appx. 23.), also quoted by PUCO Motion to Dismiss at 6.

³² PUCO Motion to Dismiss at 6. The PUCO does not explain its use of the word “potential,” and this word is not contained in the Remand Order or in any of the subsequent entries cited by the PUCO. PUCO Motion to Dismiss at 7.

The Remand Order was issued on October 24, 2007, and the Entry on Rehearing was issued on December 19, 2007.³³ The Entry on Rehearing rejected the OCC's arguments that the information ordered withheld in the Remand Order was not trade secret, and the OCC initiated the instant appeal. Subsequent to that point, the review undertaken by the Commission (and mentioned in the PUCO's Motion to Dismiss³⁴) was compliance in nature and not superseding. The Commission admits that its subsequent activities regarding redaction of documents involved its "application" of the decision in the Remand Order.³⁵ The Commission's task was complicated not only by the size of the record, but also because the Duke-affiliated companies repeatedly attempted to argue outside the bounds stated in the Remand Order. An example includes Duke Energy's argument that the names of its employees should be among the information redacted in documents released to the public.³⁶ That argument was rejected by the Commission as non-compliant with the Remand Order.³⁷ The mootness doctrine does not render the OCC's appeal meaningless because the party favored in the Remand Order failed for much of

³³ *In re Post-MDP Remand Case*, Case Nos. 03-93-EL-AIR, et al., Entry on Rehearing (December 19, 2007) (OCC Appx. 54.) ("Entry on Rehearing").

³⁴ PUCO Motion to Dismiss at 7, citing unattached entries dating from May to November 2008.

³⁵ PUCO Motion to Dismiss at 6 ("Commission had to make the application unilaterally").

³⁶ *Post-MDP Remand Case*, Entry at 5, ¶(12) (May 28, 2008) ("names of employees") (OCC M. Contra Appx. 23.). The Duke-affiliated companies' arguments for additional redactions were varied, including the ridiculous demands that Ohio's Trade Secret Law requires the redaction of the names of customers who publicly intervened in one or more of the above-captioned cases, the names of signatory parties to a publicly filed stipulation, and even the names of customer-parties identified on a publicly available certificate of service.

³⁷ *Post-MDP Remand Case*, Entry at 5, ¶(12) (May 28, 2008) (OCC M. Contra Appx. 23.).

a year to provide meaningful assistance to the PUCO such that the redactions comply with the Remand Order.³⁸

The Commission also notes that additional information regarding the side-agreements in the case below was revealed “through a common pleas court action.”³⁹ During 2008, a wrongful discharge case was prosecuted by John Deeds, a former employee of the Duke-affiliated company that provides professional services to the affiliates, that involved Mr. Deeds allegations that his discharge was connected with his objections to carrying out the terms of the side-agreements at issue in the instant appeal.⁴⁰ The Hamilton County court released some of the side agreements, as stated in the OCC’s List of Additional Authority filed on November 6, 2008. The Commission recognized this release in an entry, stating that Ohio’s Trade Secrets Law cannot be interpreted to require withholding information from public display in the PUCO’s docketing system when that information has been released to the public elsewhere.⁴¹

The conflict between the determination in the Remand Order and the court’s Entry in the Hamilton County Court of Common Pleas regarding identical documents did not spur any decision or process by the Commission to change or consider a change in its determination on remand about the appropriateness of withholding many categories of information from the public. The PUCO’s partial release of some of the documents at issue in this appeal does not render the OCC’s appeal moot regarding the remainder of the documents. This sequence of

³⁸ The mootness doctrine also does not apply to situations involving “self help” by a party, which appears to be the thrust of the argument in the Motion to Dismiss. However, the Commission’s entries never altered the PUCO’s original determination regarding trade secret protection as stated in the Remand Order.

³⁹ PUCO Motion to Dismiss at 6.

⁴⁰ *Deeds v. Duke Energy*, Case No. A0701671, Complaint at 6, ¶23.(Hamilton County C.P., February 21, 2007) (OCC M. Contra Appx. 37.).

⁴¹ *Post-MDP Remand Case*, Entry at 4, ¶10 (October 1, 2008) (OCC M. Contra Appx. 12.).

events in Hamilton County during 2008 only has the impact of supporting the OCC's appeal. The determination by the Hamilton County court provides additional authority that the PUCO has unlawfully withheld information from the public under Ohio law.

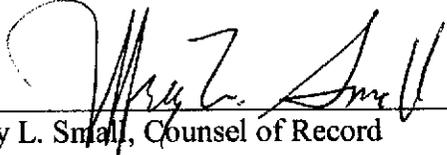
IV. CONCLUSION

Two topics of fundamental importance to residential customers were covered by the remand from the Court: whether evidence of side financial arrangements should affect the outcome of these cases and whether there is evidence to support the Commission's decision regarding increased rates that were proposed by Duke Energy in its Application for Rehearing filed in 2004. The Remand Order does not lawfully resolve either of these matters. The Remand Order complicated the PUCO's legal infirmities in the case below when it unlawfully withheld from the public important information regarding the manner in which the PUCO conducted the case. After refusing to consider the OCC's arguments for approximately five years, the PUCO seeks to brush aside opposition to its procedures and decisions by means of a Motion to Dismiss. The Court should summarily reject the PUCO's latest arguments and proceed to issue its decision.

This Court should deny the PUCO's Motion to Dismiss. Thereafter, 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,

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke)
 Energy Retail Sales, LLC, for Certification as) Case No. 04-1323-EL-CRS
 a Competitive Retail Electric Service)
 Provider in Ohio.)

ENTRY

The Commission finds:

- (1) On August 23, 2008, Duke Energy Retail Sales, LLC, (DERS or applicant) filed an application for renewal of its certificate allowing it to provide competitive retail electric service (CRES) in Ohio (Renewal Application). DERS seeks a renewal of the certification that was issued to DERS, f.k.a. Cinergy Retail Sales, LLC, on October 7, 2004 (Certificate No. 04-124[1]), and its renewal certificate that was issued on October 3, 2006 (Certificate No. 04-124[2]).
- (2) On September 15, 2008, the Office of the Ohio Consumers' Counsel (OCC) moved to intervene in the proceeding and to suspend and deny DERS' renewal application or, in the alternative, to set the matter for hearing. OCC makes numerous allegations regarding DERS' compliance with the Commission's rules and its activities in Ohio's competitive retail electric market.
- (3) Citing Section 4928.08(D), Revised Code, OCC opines that the Commission may suspend, rescind, or conditionally rescind certification if a CRES provider has engaged in anticompetitive or unfair, deceptive, or unconscionable acts or practices. OCC alleges that DERS has violated various Commission's rules, including Rule 4901:1-20-16, O.A.C. (corporate separation standards), and has acted to undermine the competitive market for electric generation service. Based on its assertions, OCC contends that the existence of separate operations between Duke Energy Ohio, Inc. (Duke) and DERS is impossible (OCC Motion at 7, 8, referencing Motion Attachments). Specifically, OCC asserts that the record in Case No. 03-93-EL-ATA, et al., (03-93) *In the Matter of Consolidated Duke Energy Ohio, Inc., Rate Stabilization Plan Remand and Rider Adjustment Cases*, reflects that DERS is simply a shell corporation that does not act independently from its affiliated companies, including Duke,

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which provides distribution and generation services to customers in the Cincinnati and surrounding areas (OCC Motion at 4 citing 03-93, Order on Remand at 26, 27 [October 24, 2007]).

In support of its allegations, OCC submits that the record in 03-93 demonstrates that DERS has no employees, no customers, and that DERS' balance sheet for 2005-2007 reflects continued increasing accounts payable as a result of option premium expenses to Duke Energy customers in the absence of any operating revenues (*Id.* at 4-6, citing DERS Renewal Application, Ex. C-3). OCC opines that DERS has no financial, technical, and managerial capabilities other than those obtained from its affiliated operations (OCC Reply at 7, September 30, 2008). OCC states that, although the issues of corporate separation violations and affiliate interactions were previously raised in its Supreme Court appeal in *Office of the Ohio Consumers' Counsel v. Public Util. Comm.*, S.Ct. Case No. 05-0956 (sic), they were not considered in the Commission's Order on Remand in 03-93 (*Id.* at 5 citing, Order on Remand at 20, [October 24, 2007]).

OCC highlights that Rule 4901:1-20-16(G)(4)(j), Ohio Administrative Code (O.A.C.), requires that "[s]hared representatives or shared employees of the electric utility and affiliated competitive supplier shall clearly disclose upon whose behalf the representations to the public are being made" (*Id.* at 7, 8). OCC states that, while DERS may have acknowledged the requirement to comply with this rule, the record in 03-93 reflects otherwise (*Id.* at 8). Finally, OCC states that DERS' option contracts violate the Section 4928.02(G), Revised Code, prohibition on anticompetitive subsidies (*Id.* at 9, 10).

- (4) Pursuant to Section 4928.08, Revised Code, and Rules 4901:1-24-06(A) and 4901:1-24-09(C), O.A.C., DERS' renewal certification application is subject to a 30-day automatic approval process. Additionally, Rule 4901:1-24-06(A)(1), O.A.C., provides that, upon good cause shown, the Commission or an attorney examiner may suspend consideration of a certification application.
- (5) Pursuant to the attorney examiner Entry of September 18, 2008, the 30-day automatic approval process for DERS' renewal application for certification was suspended in order for the Commission and its staff to further review this matter and the allegations raised by OCC. Additionally, in light of the finite suspension period, the

Commission established an expedited pleading process for the purpose of responding to any pending motions.

- (6) On September 16, 2008, DERS filed its memorandum contra OCC's motion of September 15, 2008. DERS avers that OCC's motion for intervention should be denied due to the fact that there is no allegation that any customer of DERS has ever contended that it was somehow deceived by DERS or that its arrangement with DERS was commercially unfair or unconscionable (DERS Memorandum Contra at 16). DERS states that there is no need for a hearing and that the Commission should immediately recertify DERS as a CRES provider in Ohio. In support of its position, DERS opines that it is well qualified with respect to its technical, financial, and managerial operations for the purposes of providing CRES services in Ohio and that OCC raises no credible argument to the contrary (*Id.* at 2). For example, DERS notes that nothing has changed with respect to the applicant's continued reliance on its affiliate, Duke Energy Business Services LLC, in regard to all managerial and technical aspects of energy supply (*Id.* at 4, 5).

In response to OCC's concerns regarding DERS' deepening accounts payable to its affiliates and the large option premium expenses to Duke's customers, DERS asserts it has the full financial support of its ultimate parent, Duke Energy Corporation, which is easily capable of bearing the financial burden associated with its decision to establish a subsidiary to compete in the Ohio market for retail electric service (*Id.* at 3, 12, 13). DERS submits that corporate parents typically fund start-up subsidiaries (*Id.* at 4). DERS notes that at the time of its initial recertification in 2006, the Commission did not express concern over that fact that the applicant had reported similar losses due to the option premium payments at that time (*Id.*).

Regarding OCC's allegations pertaining to DERS' violation of the corporate separation standards of Rule 4901:1-20-16, O.A.C., the applicant notes that, pursuant to Section 13(b) of the Public Utilities Holding Company Act of 1935 (PUHCA), its affiliates obtained Securities and Exchange Commission "approval of a corporate structure in which a single service company was authorized to provide numerous and varied services to multiple affiliates, subject to certain legal limitations, including an appropriate accounting of costs among the affiliated consumers of those services" (*Id.* at 8). Therefore, DERS represents that its affiliates entered into the

appropriate service agreements making services (e.g., executive services, legal and accounting services, construction and maintenance supervision, and materials management) available amongst those affiliates, subject to appropriate accounting for such services (*Id.* at 8). DERS points out that the predecessor to its affiliate Duke obtained approval for its corporate separation plans, including its shared services relationship and that the Commission again approved the shared services arrangement when it considered the merger between Cinergy Corporation and Duke Energy Holding Corp. (*Id.*, citing *In the Matter of the Cincinnati Gas & Electric Company's Electric Transition Plan Case*, Case No. 99-1658-EL-ETP, Entry and Order at 45, 46 [August 31, 2000]; *In the Matter of the Joint Application of Cinergy Corp., on Behalf of The Cincinnati Gas & Electric Company, and Duke Energy Holding Corp. for Consent and Approval of a Change of Control of the Cincinnati Gas & Electric Company*, Case No. 05-732-EL-MER, Finding and Order at 14 [December 21, 2005]).

DERS asserts that OCC failed to allege specific facts that actually demonstrate a violation of specific provisions of Rule 4901:1-20-16, O.A.C., specific provisions of any of the shared services agreements, or specific provisions of a code of conduct (*Id.* at 9). DERS highlights the fact that OCC, itself, has previously recognized that DERS' predecessor did not violate the Commission's corporate separation regulations (*Id.* at 14). In regard to OCC's allegation that the applicant currently has no employees, DERS responds that the number of individuals employed by DERS is unrelated to the legality of its operations. Rather, DERS states that it functions through its officers and directors and through its approved shared services agreements.

Relative to OCC's contention that DERS has no customers, the applicant responds that it has approximately two dozen large commercial and industrial customers with whom it has contracts, although it acknowledges that it has no customers to whom it is currently providing electric power. Specifically, DERS represents that it has negotiated with its customers option agreements, which give DERS the right to provide power to its customers when DERS determines that the market conditions permit it to do so profitably (*Id.* at 11, 12). DERS points out that none of the costs of DERS' contracts are reflected in Duke's rates and none of the expenses related to those contracts have ever been borne by Duke's residential ratepayers (*Id.* at 13). Further, DERS contends that it has

no market power and is incapable of undermining the competitive market inasmuch as it does not own or operate either a transmission or distribution system. Therefore, DERS concludes that it is not a public utility (*Id.* at 15).

In responding to OCC's representation that it is prepared to introduce new evidence in support of its allegations, DERS questions the validity of OCC's new information. Specifically, DERS considers the new information to be nothing more than two newspaper articles containing information that was previously known to the Commission (*Id.* at 16, 17).

- (7) In regard to OCC's motion for intervention, the Commission determines that OCC has a real and substantial interest in this proceeding and that it is so situated that disposition of this proceeding may impair its ability to protect that interest. Therefore, OCC's motion for intervention is granted at this time.
- (8) Upon a review of the renewal application sworn to by the president of DERS and the arguments presented, the Commission finds that the request for recertification should be granted. In reaching this determination, the Commission focuses its attention on the criteria in Rules 4901:1-24-06 and 4901:1-24-09, O.A.C. In particular, the Commission notes that the relevant criteria focus on the applicant's managerial, financial, and technical capabilities of performing the service it intends to provide. DERS' application satisfies all of the requisite criteria for the purpose of recertification. Specifically, the record reflects that DERS will be receiving administrative and managerial services from Duke Energy Business Services, LLC which will allow DERS to leverage the knowledge, skill, and expertise of employees who have been providing services to the Duke Energy Corporation family of companies. Additionally, as discussed above, DERS has the full financial support of its ultimate parent, Duke Energy Corporation (DERS Recertification application at Exs. B-2 and C-4).

OCC's collateral attack on the renewal application is denied. OCC's arguments are primarily based or premised on a lack of corporate separation. For example, OCC argues that DERS is a shell corporation that does not act independently from its affiliated companies, one of which is Duke Energy Ohio, Inc. OCC also asserts a lack of independence between DERS and its affiliates and alleges DERS' noncompliance with the Commission's corporate

separation rules (OCC Motion to Suspend at 2, 4, 7, 8). OCC expressly contends that DERS has violated the corporate separation standard in Rule 4901:1-20-16, O.A.C., a rule adopted under Section 4928.17, Revised Code (*Id.* at 1, 7-8).

Despite its many allegations and arguments about corporate separation, OCC has not used or mentioned the existing complaint process in Sections 4905.26 and 4928.18, Revised Code, to address corporate separation violations concerning an electric utility or its affiliate. In 1999, the General Assembly established that the Commission has jurisdiction under Section 4905.26 of the Revised Code, upon complaint of any person or upon complaint or initiative of the Commission, to determine whether an electric utility or its affiliate has violated any provision of Section 4928.17, Revised Code, or an order issued or rule adopted under that section. The Commission has a broad range of remedies under Section 4928.18 of the Revised Code, in addition to any remedies otherwise provided by law, to address violations of law, orders, and rules adopted under Section 4928.17, Revised Code. Under this process, the complainant would bear the burden of proof.

While OCC previously raised the issue of corporate separation violations in 03-93, the Commission, in that proceeding, stated that its consideration was limited to issues remanded for further consideration and that ancillary issues raised by the parties in the remand phase (e.g., potential corporate separation violations and affiliate interactions) were denied (See 03-93, Order on Remand at 20; Entry on Rehearing at 8, December 19, 2007).

Finally, with respect to OCC's reliance on the two newspaper articles attached to its motion to suspend, the Commission finds that these attachments are nothing more than hearsay and shall not be considered.

- (9) On September 30, 2008, OCC filed a motion to strike DERS' September 26, 2008 memorandum contra. In support of its motion, OCC contends that the attorney examiner's Entry of September 18, 2008, provided an opportunity for DERS to file its memorandum contra no later than seven days from the date of the entry; however, DERS filed its memorandum contra eight days from the date of the entry without seeking leave for late filing. OCC points out that, while its reply memorandum was due four days following the filing of the memorandum contra, DERS' memorandum contra was

not filed until late on Friday evening, September 26, 2008. As a result, OCC asserts that it did not become aware of the filing until three days later on the following Monday. Therefore, OCC avers that its ability to properly prepare its memorandum contra was adversely affected, leaving it with only one day prior to the filing due date to complete its memorandum contra (OCC Memorandum in Support, September 30, 2008, at 1-4). OCC calls attention to the fact that DERS did not properly request an extension of time, as required by Rule 4901-1-13, O.A.C. (OCC Reply, October 3, 2008, at 3).

- (10) On October 1, 2008, DERS filed a memorandum contra OCC's motion to strike. DERS' counsel explained that, due to inadvertent error, he miscalculated the seven-day response time (DERS Memorandum Contra, October 1, 2008, at 3). DERS requests that this error be excused, or that in the alternative, leave to file one day late be granted. In support of its request, DERS states that granting the pending motion will not prejudice OCC in any way as it already has responded to DERS' motion (*Id.*). DERS also asserts that, consistent with the attorney examiner's Entry of September 18, 2008, OCC received four days advanced notice for the purpose of preparing its reply memorandum (*Id.*). Finally, DERS contends that had OCC's counsel merely advised DERS of the error regarding the filing date and requested additional time in which to submit a reply, DERS would have supported such a request before the Commission (*Id.*).
- (11) With respect to OCC's motion to strike DERS' memorandum contra, the Commission finds that the motion should be denied and that DERS should be granted an extension of time in order for its September 26, 2008, memorandum contra to be considered as timely filed. In reaching this determination, the Commission notes that, while OCC is correct that DERS did not comply with the time frames set forth in the attorney examiner's Entry of September 18, 2008, the memorandum contra was only one day late and OCC did file its substantive reply to DERS' memorandum contra. To the extent that OCC required additional time in light of DERS' delay, it should have made such a request to the Commission so that it could be properly considered.

It is, therefore,

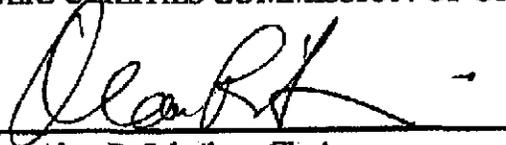
ORDERED, That OCC is granted intervention in accordance with Finding (7). It is, further,

ORDERED, That DERS' renewal application for certification as a competitive retail electric service provider in Ohio is granted in accordance with Finding (8). It is, further,

ORDERED, That OCC's motion to strike is denied in accordance with Finding (11). It is, further,

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

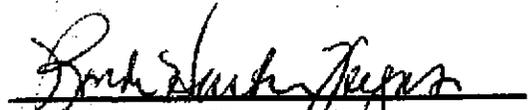
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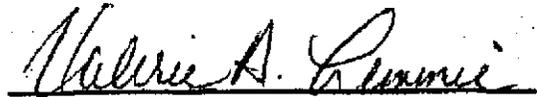
Alan R. Schriber, Chairman



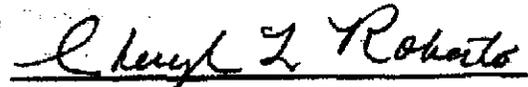
Paul A. Centolella



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Valerie A. Lemmie

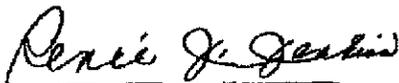


Cheryl L. Roberto

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DEC 03 2008



Renee J. Jenkins
Secretary

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

SECOND ENTRY ON REHEARING

The Commission finds:

- (1) On July 31, 2008, the Commission issued an entry on rehearing (July entry on rehearing) concerning the redaction of trade secret information from numerous documents filed in these cases.
- (2) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission, within 30 days of the entry of the order upon the Commission's journal. Section 1.14, Revised Code, provides that, when the last day of a period within which an act may be done falls on a legal holiday, that act may be done on the next succeeding day that is not Sunday or a legal holiday. That same section also provides that, when a public office in which such an act is to be performed is closed to the public for the entire day that constitutes the last day for doing the act, such act may be performed on the next succeeding day that is not a Sunday or a legal holiday.
- (3) On August 30, 2008, the Commission's office was closed for the entire day. August 31, 2008, was a Sunday. September 1, 2008, was a legal holiday. On September 2, 2008, the office of the Ohio Consumers' Counsel (OCC) filed an application for rehearing of the Commission's July entry on rehearing. On September 12, 2008, Duke Energy Ohio, Inc. (Duke); Duke Energy Retail Sales, LLC (DERS); and Cinergy Corp. (jointly, the Duke entities) filed a memorandum contra the application for rehearing. In summary, OCC submits that the entry on rehearing incorrectly addressed the

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redaction of certain customer names and, in addition, that the release of certain information in a separate forum requires that numerous pages of information that were previously determined to be trade secrets now be made public. The Duke entities disagree.

- (4) OCC asserts that the Commission's July entry on rehearing is "unreasonable and unlawful because the Commission redacted portions of filed information that is available to the public and therefore cannot possibly be considered 'trade secret' information." (Application for rehearing at 1.) OCC separates its concerns into a discussion of the names of certain customers of one or more of the Duke entities that are described as "marquee customers" and a discussion related to the release of certain information by the Court of Common Pleas for Hamilton County, Ohio.
- (5) With regard to the marquee customers, OCC points to four specific pages on which the names can be found. OCC claims that the "Duke affiliates that actually engage in commercial activities *advertise* their activities and achievements rather than conceal their existence." OCC goes on to explain that the documents attached to the application for rehearing are copies of internet pages that "provide examples that show how the Duke affiliated companies release information about their 'marquee customers' to the public." (Application for rehearing at 5-6.)
- (6) In response to this argument, the Duke entities clarify the situation, stating that the customers in question are customers of Cinergy Solutions, Inc., (CSI) an affiliate of Duke and DERS. According to Duke, CSI is not a party to these proceedings and therefore is not in a position to defend the confidentiality of its information. Further, release of the customers' names, according to Duke, would reveal which customers are linked to certain CSI cogeneration percentages and target industrial market potentials.
- (7) Duke's arguments are persuasive on this issue. The pages in question are clearly designated as information concerning CSI, a Duke affiliate that is not a party to these proceedings. The "marquee customers" are customers of CSI, not the Duke affiliates that are parties. As the information attached to OCC's application for rehearing does not clearly reflect the public disclosure of the specific CSI "marquee customers," we will maintain their names as confidential.

- (8) With regard to the release of certain information in another proceeding, OCC points out that some of the side agreements at issue in these proceedings were released by the Hamilton County Court of Common Pleas, as of August 14, 2008, in *Deeds v. Duke Energy Ohio*, Case No. A 0701671 (Deeds). OCC contends that the Commission should release all information that was made public in the Deeds case. According to OCC, that court released all of the information in its possession, including "more than one of the option agreements." (Application for rehearing at 7.) Therefore, OCC declares, the Commission should release to the public pages 323 through 641 of the Commission's Bates-stamped pages. OCC identifies information on certain pages within its filings that it believes should be released on the ground that the underlying information is now public. OCC also argues that the Commission should reevaluate the record for analogous changes in the filings of other parties. (Application for rehearing at 8-9.)
- (9) Duke, in response, first suggests that OCC is not arguing that the entry on rehearing was unreasonable or unlawful but, rather, is collaterally attacking the entry on the basis of the Deeds ruling. Duke contends that the entry was lawful and reasonable when it was issued and that, therefore, new events should not be interjected into these proceedings to undermine the finality of the order. (Memorandum contra at 4-5.)
- (10) With regard to Duke's contention that the subsequent release of documents should not impact the Commission's determination that certain information is a trade secret, the Commission first notes that Duke cited no statutes, rules, or precedent to support its position. The Commission is bound by Rule 4901-1-24, Ohio Administrative Code (O.A.C.), which allows us to protect the confidentiality of information contained in a filed document, "to the extent that state or federal law prohibits release of the information, including where the information is deemed . . . to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code." Ohio law defines a trade secret as "information . . . that satisfies both of the following: (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Section 1333.61(D), Revised Code. The Ohio

Supreme Court has adopted the following six factors to be used in analyzing a claim that information is a trade secret under that section:

- (a) The extent to which the information is known outside the business.
- (b) The extent to which it is known to those inside the business, i.e., by the employees.
- (c) The precautions taken by the holder of the trade secret to guard the secrecy of the information.
- (d) The savings effected and the value to the holder in having the information as against competitors.
- (e) The amount of effort or money expended in obtaining and developing the information.
- (f) The amount of time and expense it would take for others to acquire and duplicate the information.

State ex rel. The Plain Dealer v. Ohio Dept. of Ins., 80 Ohio St.3d 513, 524-525 (1997). Where information that may previously have met the trade secret test has now been released to the public, we will not maintain a protective order prohibiting its release. However, from a procedural standpoint, a suggestion that a protective order be modified due to the release of information in another forum, subsequent to the initial grant of the protective order, would be more appropriately handled through the filing of a motion. Thus, while we will consider modification of the protective order through the vehicle of OCC's application for rehearing, any additional modifications to the protective order, due to any subsequent releases, should be addressed by motion.

- (11) Duke's next argument goes to the question of precisely which information should be released in light of the Deeds release. In that discussion, Duke concedes that, as a result of the Deeds order, "all the Original Direct Serve Contracts and all the November Direct Serve Contracts were, indeed, revealed to the public." With regard to the option contracts, Duke suggests that OCC was "deliberately imprecise" in stating that the release included "more than one" of the option contracts. Duke asserts that exactly two such contracts

were released: one with Marathon/Ashland Petroleum and one with General Motors. (Memorandum contra at 6-7.) Therefore, Duke disagrees with OCC's proposed wholesale release of all side agreements.

- (12) The Commission agrees that information that has been released to the public must similarly be released in these proceedings. However, we will not release more than was, according to Duke, released in the Deeds case. Therefore, the Commission has reviewed all of the redaction modifications specifically proposed by OCC, together with Duke's responses to those proposals. In addition, the Commission has reviewed all previously proposed redactions and is proposing to release any information that clearly stems from, or discusses, contracts that are now public information.
- (13) The following chart addresses the specific redaction modifications proposed by OCC, thereby granting or denying rehearing on each ground. Additional changes to the redactions, in other documents, being proposed by the Commission in response to OCC's assertion that a review of all confidential documents was necessary, are not included in this chart. However, as with previous entries, the Commission has prepared a computer disk that shows all changed pages (as well as the reverse side of any page, where the page had information on two sides). Parties should also note that this disk includes pages 2318, 2373, 2437, and 2535, which the Commission determined should be redacted in the first entry on rehearing but were omitted from the disk that was a part of that entry.

Pages	OCC's rationale	Duke's response	Grant or deny	Commission rationale
215-217	Reference to option agreement.	The names of option contract customers other than Marathon and GM have not been disclosed.	Grant in part.	Only references to Marathon or GM contracts will be released.
248	Customer	Fourteen	Grant.	Although these customer

	names.	customers are option contract customers whose names were not released.		names may or may not also be the names of option contract customers, in this location the list is an exhibit to a contract that has, according to Duke, been released.
249	Customer names.	Customers are option contract customers whose names were not released.	Grant.	This is the first page of a contract that has, according to Duke, been released.
250-255	Customer names.	No response.	Grant in part.	Pages 250-254 are part of a contract that, according to Duke, has been released. It appears that page 255 is not a part of the agreement that appears at pages 249-254. It appears to discuss an option agreement and, therefore, will not be released.
256-261	Customer names.	No response.	Grant.	Pages 256-261 are part of contract that, according to Duke, has been released.
282-288	Customer names.	No response.	Grant.	Pages 282-288 are part of contract that, according to Duke, has been released.
289-295	Customer names.	No response.	Grant.	Pages 289-295 are part of contract that, according to Duke, has been released.
323-641	All side agreements should be public.	Not all side agreements were released in Deeds case.	Deny in part.	Only side agreements that Duke concedes were released in Deeds case will be released in full. Each of such agreements will be released every time it appears in the

				documents,
1769-1772	References to option agreements.	Of the option contract customers referenced, only Marathon has been revealed. Quote from Ziolkowski is public.	Deny in part.	Only references to Marathon, as well as the Ziolkowski email quote, will be released.
1775-1776	References to option agreements.	No response as to 1775. References on 1776 are public.	Grant.	This information was released in the Deeds case.
1780	References to option agreements.	No response.	Grant in part.	The information on this page that references option information that, according to Duke, has been released will be made public.
1929	References option agreement.	This information references the name of an option contract customer that has not been revealed.	Deny.	The name of the customer in this option contract has not been released and will not, therefore, be made public.
1932	References option contract.	Only the name of Marathon should be released on this page.	Grant.	The only option contract name on this page is Marathon.

2078-2079	References option contract.	Information references names of option contract customers that have not been released, as well as pricing methodology.	Deny in part.	The name of one option contract customer that has not been revealed will be retained as confidential. In addition, the names of the only two customers who did not have option contracts will be maintained as confidential in order not to divulge the identities of the option contract customer list.
2085	References option contracts.	Marathon's name has been revealed but the other name on the page is an option contract customer whose name has not been revealed.	Grant in part.	Although Duke states, in the memorandum contra, that the customer named on this page (other than Marathon) is an option contract customer, that is contrary to the testimony on page 213. However, as noted previously, disclosure of the names of the two customers who do not have option contracts would tend to reveal the option contract customer list. Therefore, the customer name on this page other than Marathon will not be released.
2934	References option contracts.	Of the information on this page, only Marathon's contract has been revealed.	Grant in part.	Only Marathon's information will be released as the other information is still confidential.
3344	References option contracts.	Of the information on this page, only	Grant in part.	Only Marathon's information will be released as the other information is still

		Marathon's contract has been revealed.		confidential.
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- (14) The revised version of the Commission-redacted documents will be filed publicly in these dockets on November 14, 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 revised redactions. Parties will note that this disk includes every page on which any alteration of the redactions has been made. In addition, where a change was made on only one side of a two-sided document, an image of the unchanged side is also included.
- (15) 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.
- (16) If any party, after reviewing the Commission's revised 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 again been arranged on the disk in chronological order. A table of contents, referencing Commission page numbers, has been prepared and will be included on the disk. 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, as will assignments of error that relate to matters not determined in this entry on rehearing.

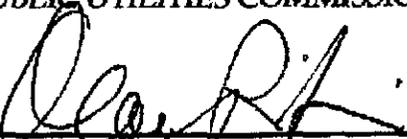
It is, therefore,

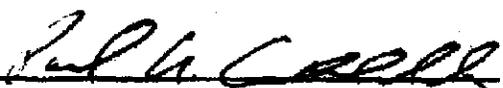
ORDERED, That the application for rehearing by OCC be granted in part and denied in part, as set forth herein. It is, further,

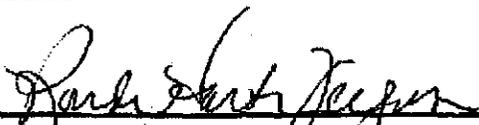
ORDERED, That the parties comply with the requirements of this entry. It is, further,

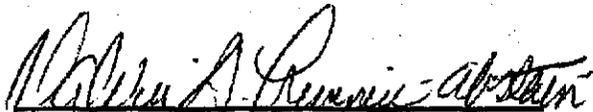
ORDERED, That a copy of this entry be served upon all parties of record in these proceedings.

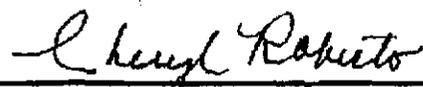
THE PUBLIC UTILITIES COMMISSION OF OHIO


Alan R. Schriber, Chairman


Paul A. Centolella


Ronda Hartman Fergus


Valerie A. Lemmie


Cheryl L. Roberto

JWK;geb

Entered in the Journal

OCT 01 2008



Renee J. Jenkins
Secretary

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

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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

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

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,

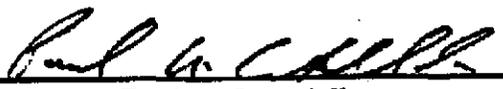
ORDERED, That the motions for protective orders be granted in part and denied in part. It is, further,

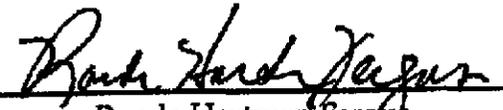
ORDERED, That the parties comply with the requirements of this entry. It is, further,

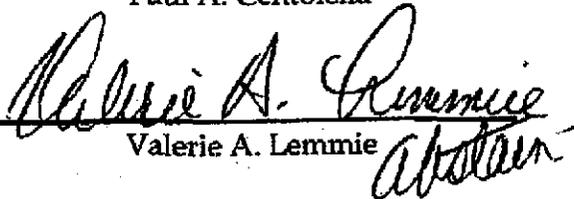
ORDERED, That a copy of this entry be served upon all parties of record in these proceedings.

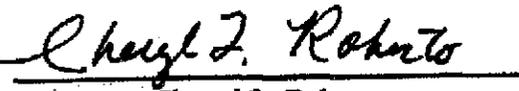
THE PUBLIC UTILITIES COMMISSION OF OHIO


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

4903.12 Jurisdiction.

No court other than the supreme court shall have power to review, suspend, or delay any order made by the public utilities commission, or enjoin, restrain, or interfere with the commission or any public utilities commissioner in the performance of official duties. A writ of mandamus shall not be issued against the commission or any commissioner by any court other than the supreme court.

Effective Date: 10-01-1953

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4903.16 Stay of execution.

A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained.

Effective Date: 10-01-1953

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4905.32 Schedule rate collected.

No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time.

No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service.

Effective Date: 10-01-1953

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ies and for the retail electric services they provide that are declared competitive pursuant to that division, provided the classifications, procedures, terms, or conditions are reasonable and do not confer any undue economic, competitive, or market advantage or preference upon any electric utility.

HISTORY: 148 v S 3. Eff 7-6-99; 10-5-99.†

† The effective date of SB 3, as it applies to this section, is unclear. See Ohio Constitution Art. II, §§ 1c and 1d.

Cross-References to Related Sections

Commission to ensure effectuation of state policy; rules; abuses of market power, RC § 4928.06.

(effective until 7-31-08)

§ 4928.05 Extent of exemption from municipal and state supervision and regulation.

(A)(1) On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric utility or electric services company shall not be subject to supervision and regulation by a municipal corporation under Chapter 743. of the Revised Code or by the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except section 4905.10, division (B) of 4905.33, and sections 4905.35 and 4933.81 to 4933.90; except sections 4905.06, 4935.03, 4963.40, and 4963.41 of the Revised Code only to the extent related to service reliability and public safety; and except as otherwise provided in this chapter. The commission's authority to enforce those excepted provisions with respect to a competitive retail electric service shall be such authority as is provided for their enforcement under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter.

On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric cooperative shall not be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except as otherwise expressly provided in sections 4928.01 to 4928.10 and 4928.16 of the Revised Code.

(2) On and after the starting date of competitive retail electric service, a noncompetitive retail electric service supplied by an electric utility shall be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter, to the extent that authority is not preempted by federal law. The commission's authority to enforce those provisions with respect to a noncompetitive retail electric service shall be the authority provided under those chapters and this chapter, to the extent the authority is not preempted by federal law.

The commission shall exercise its jurisdiction with respect to the delivery of electricity by an electric utility in this state on or after the starting date of competitive retail electric service so as to ensure that no aspect of the delivery of electricity by the utility to consumers in

this state that consists of a noncompetitive retail electric service is unregulated.

On and after that starting date, a noncompetitive retail electric service supplied by an electric cooperative shall not be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except sections 4933.81 to 4933.90 and 4935.03 of the Revised Code. The commission's authority to enforce those excepted sections with respect to a noncompetitive retail electric service of an electric cooperative shall be such authority as is provided for their enforcement under Chapters 4933. and 4935. of the Revised Code.

(B) Nothing in this chapter affects the authority of the commission under Title XLIX [49] of the Revised Code to regulate an electric light company in this state or an electric service supplied in this state prior to the starting date of competitive retail electric service.

HISTORY: 148 v S 3. Eff 7-6-99; 10-5-99.†

† The effective date of SB 3, as it applies to this section, is unclear. See Ohio Constitution Art. II, §§ 1c and 1d.

§ 4928.06 Commission to ensure effectuation of state policy; rules; abuses of market power.

(A) Beginning on the starting date of competitive retail electric service, the public utilities commission shall ensure that the policy specified in section 4928.02 of the Revised Code is effectuated. To the extent necessary, the commission shall adopt rules to carry out this chapter. Initial rules necessary for the commencement of the competitive retail electric service under this chapter shall be adopted within one hundred eighty days after the effective date of this section. Except as otherwise provided in this chapter, the proceedings and orders of the commission under the chapter shall be subject to and governed by Chapter 4903. of the Revised Code.

(B) If the commission determines, on or after the starting date of competitive retail electric service, that there is a decline or loss of effective competition with respect to a competitive retail electric service of an electric utility, which service was declared competitive by commission order issued pursuant to division (A) of section 4928.04 of the Revised Code, the commission shall ensure that that service is provided at compensatory, fair, and nondiscriminatory prices and terms and conditions.

(C) In addition to its authority under section 4928.04 of the Revised Code and divisions (A) and (B) of this section, the commission, on an ongoing basis, shall monitor and evaluate the provision of retail electric service in this state for the purpose of discerning any noncompetitive retail electric service that should be available on a competitive basis on or after the starting date of competitive retail electric service pursuant to a declaration in the Revised Code, and for the purpose of discerning any competitive retail electric service that is no longer subject to effective competition on or after that date. Upon such evaluation, the commission periodically shall report its findings and any recommendations

4928.05 Extent of exemptions. (effective 7-31-08)

(A)(1) On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric utility or electric services company shall not be subject to supervision and regulation by a municipal corporation under Chapter 743. of the Revised Code or by the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except sections 4905.10 and 4905.31, division (B) of section 4905.33, and sections 4905.35 and 4933.81 to 4933.90; except sections 4905.06, 4935.03, 4963.40, and 4963.41 of the Revised Code only to the extent related to service reliability and public safety; and except as otherwise provided in this chapter. The commission's authority to enforce those excepted provisions with respect to a competitive retail electric service shall be such authority as is provided for their enforcement under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter. Nothing in this division shall be construed to limit the commission's authority under sections 4928.141 to 4928.144 of the Revised Code.

On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric cooperative shall not be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except as otherwise expressly provided in sections 4928.01 to 4928.10 and 4928.16 of the Revised Code.

(2) On and after the starting date of competitive retail electric service, a noncompetitive retail electric service supplied by an electric utility shall be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter, to the extent that authority is not preempted by federal law. The commission's authority to enforce those provisions with respect to a noncompetitive retail electric service shall be the authority provided under those chapters and this chapter, to the extent the authority is not preempted by federal law. Notwithstanding Chapters 4905. and 4909. of the Revised Code, commission authority under this chapter shall include the authority to provide for the recovery, through a reconcilable rider on an electric distribution utility's distribution rates, of all transmission and transmission-related costs, including ancillary and congestion costs, imposed on or charged to the utility by the federal energy regulatory commission or a regional transmission organization, independent transmission operator, or similar organization approved by the federal energy regulatory commission.

The commission shall exercise its jurisdiction with respect to the delivery of electricity by an electric utility in this state on or after the starting date of competitive retail electric service so as to ensure that no aspect of the delivery of electricity by the utility to consumers in this state that consists of a noncompetitive retail electric service is unregulated.

On and after that starting date, a noncompetitive retail electric service supplied by an electric cooperative shall not be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except sections 4933.81 to 4933.90 and 4935.03 of the Revised Code. The commission's authority to enforce those excepted sections with respect to a noncompetitive retail electric service of an electric cooperative shall be such authority as is provided for their enforcement under Chapters 4933. and 4935. of the Revised Code.

(B) Nothing in this chapter affects the authority of the commission under Title XLIX of the Revised Code to regulate an electric light company in this state or an electric service supplied in this state prior

to the starting date of competitive retail electric service.

Effective Date: 10-05-1999; 2008 SB221 07-31-2008

4928.141 Distribution utility to provide standard service offer.

(A) Beginning January 1, 2009, an electric distribution utility shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. To that end, the electric distribution utility shall apply to the public utilities commission to establish the standard service offer in accordance with section 4928.142 or 4928.143 of the Revised Code and, at its discretion, may apply simultaneously under both sections, except that the utility's first standard service offer application at minimum shall include a filing under section 4928.143 of the Revised Code. Only a standard service offer authorized in accordance with section 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section; and that standard service offer shall serve as the utility's default standard service offer for the purpose of section 4928.14 of the Revised Code. Notwithstanding the foregoing provision, the rate plan of an electric distribution utility shall continue for the purpose of the utility's compliance with this division until a standard service offer is first authorized under section 4928.142 or 4928.143 of the Revised Code, and, as applicable, pursuant to division (D) of section 4928.143 of the Revised Code, any rate plan that extends beyond December 31, 2008, shall continue to be in effect for the subject electric distribution utility for the duration of the plan's term. A standard service offer under section 4928.142 or 4928.143 of the Revised Code shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan.

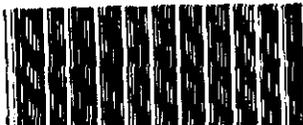
(B) The commission shall set the time for hearing of a filing under section 4928.142 or 4928.143 of the Revised Code, send written notice of the hearing to the electric distribution utility, and publish notice in a newspaper of general circulation in each county in the utility's certified territory. The commission shall adopt rules regarding filings under those sections.

Effective Date: 2008 SB221 07-31-2008

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FILED

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Randolph H. Freking (#0009158)
Elizabeth S. Loring (#0076542)
Trial Attorneys for Plaintiff

COURT OF COMMON PLEAS OF
HAMILTON COUNTY, OHIO
GREGORY HAMILTON
CLERK OF COURT
HAM. CNTY. OH

JOHN DEEDS
4507 Ravenwood Ct.
Cincinnati, OH 45244

Plaintiff,

v.

**DUKE ENERGY/
DUKE ENERGY, OHIO, Inc.,**
139 East Fourth Street
Cincinnati, OH 45201

and

**DUKE ENERGY RETAIL SALES, LLC/
CINERGY CAPITAL TRADING, INC.**
139 East Fourth Street
Cincinnati, OH 45201

Defendants.

CASE NO. A0701671

(Judge _____)

**COMPLAINT FOR UNLAWFUL
RETALIATORY EMPLOYMENT
TERMINATION IN VIOLATION
OF OHIO PUBLIC POLICY AND
OHIO WHISTLEBLOWER LAW**

JURY DEMAND ENDORSED	
ORIG. COMP. PARTIES, SUMMONS	
<input checked="" type="checkbox"/> CERT MAIL	<input type="checkbox"/> SHERIFF <input type="checkbox"/> WAVE
<input type="checkbox"/> PROCESS SERVER	<input type="checkbox"/> NONE
CLERKS FEES _____	TIC _____
SECURITY FOR COST _____	
DEPOSITED BY _____	76542
FILING CODE _____	H705

NATURE OF ACTION

Plaintiff brings this action because he was abruptly terminated after questioning Defendants regarding certain agreements that Plaintiff believed, and continues to believe, are "sham transactions" designed to allow Defendant Duke Energy Corporation, formerly Cinergy Corporation, to push a significant rate increase through the Public Utilities Commission of Ohio ("PUCO") by providing a kickback to large industrial users that is equivalent, or nearly so, to the amount of the rate increase for those particular users in violation of Ohio law. Plaintiff believes that Defendants "bought" the cooperation of major users to allow it to gain approval of its proposed increases. Plaintiff was advised by superiors not to put his concerns in writing because it would cause "big trouble," since Defendants had successfully refused to make public these

agreements in connection with the administrative litigation over the proposed rate increase. The Ohio Supreme Court recently upheld most of the approved rate increases, but questioned the PUCO's failure to force Defendants to turn over these side agreements. In effect, Plaintiff believes Defendants defrauded the PUCO and the Ohio Supreme Court by entering into unlawful, private agreements with certain large industrial users, and unlawfully terminated him in violation of Ohio public policy after he questioned the lawfulness of the side agreement. In 2005 alone, Defendants paid out \$20,000,000 as part of this scheme.

PARTIES

1. Plaintiff John Deeds is a citizen and resident of the State of Ohio and was employed by Defendants in Hamilton County, Ohio.
2. Defendant Duke Energy is a foreign corporation doing business in Hamilton County, Ohio. Defendant is an employer within the meaning of state law.
3. Defendant Duke Energy, Ohio, Inc. is an Ohio corporation located in, residing in, and doing business in Hamilton County, Ohio. Defendant is an employer within the meaning of state law.
4. Defendant Duke Energy Retail Services, LLC is a Delaware limited liability company located in, residing in, and doing business in Hamilton County, Ohio. Defendant is an employer within the meaning of state law.
5. Defendant Cinergy Capital & Trading, Inc. is an Indiana corporation doing business in Hamilton County, Ohio. Defendant is an employer within the meaning of state law.

NATURE OF CAUSE OF ACTION

6. This action is filed by Plaintiff John Deeds, who began working for Defendants as a Customer Service Clerk in 1990. During Plaintiff's nearly sixteen-year tenure with Defendants, Plaintiff completed his Bachelor's Degree, he obtained a Masters Degree, and he achieved the position of a director while successfully creating over twenty million dollars of

value for Defendants. Plaintiff brings this action because he was terminated for reporting possible unlawful business practices conducted by Defendants.¹

7. In January 2004, Cinergy Corp. created Cinergy Retail Sales, LLC ("CRS")², which is an unregulated competitive retail electric service provider. Although created as a competitive service provider, CRS does not offer electric services and had neither revenue nor sales as of Plaintiff's termination date of May 1, 2006. Personnel doing business for CRS are employed by Cinergy, and both CRS and Cinergy operate at 139 East Fourth Street. CRS's primary function is to process transactions on behalf of Cinergy. Therefore, CRS is an alter ego of Cinergy.

8. On January 26, 2004, Cincinnati Gas & Electric ("CG&E")³ applied to the Public Utilities Commission of Ohio ("PUCO") to authorize a rate increase CG&E's "Rate Stabilization Plan."

9. In 2004, CRS entered into Option Agreements with certain major commercial and industrial customers. The Option Agreements provide that CRS will pay the companies the equivalent of certain defined charges paid to CG&E. The outlined charges represent the rate increases requested by CG&E and approved by the PUCO in 2004.⁴ In effect, CRS agreed to pay certain members of the IEU the exact amount of the rate increase these companies paid to CG&E - a company owned by Cinergy Corp. Because the contracts were created by CRS, an

¹ Most of the transactions outlined in this Complaint took place during the merger and acquisition between Cinergy Corp. and Duke Energy Corp, which was announced May 9, 2005. Therefore, although this Complaint will refer to Cinergy, through the merger, the corporation is currently owned and succeeded by Duke Energy Corp. Duke Energy Corp. also participated in Plaintiff's termination.

² Currently Duke Energy Retail Sales, LLC.

³ Currently Duke Energy Ohio, Inc.

⁴ The rate increases were the subject of the Ohio Supreme Court Case No. 05-0946. The Court issued a decision and questioned the PUCO's refusal to order the production by Defendant of certain "side agreements." Plaintiff believes these Option Agreements referenced in this paragraph are some of the side agreements.

unregulated affiliate of Cinergy, the Agreements were not made public. Discovery of these agreements during the PUCO litigation was refused by Defendants, and Defendants denied knowledge of such agreements during the Oral Argument before the Ohio Supreme Court early in 2006.

10. Between the original filing date of CG&E's Rate Stabilization Plan and 2005, CG&E faced significant opposition to the proposed rate increases; in fact, originally the companies that ultimately became counterparts to the Option Agreements vehemently opposed CG&E's Rate Stabilization Plan by way of their membership in the Ohio Energy Group ("OEG") and the Industrial Energy Users ("IEU"). However, in mid to late 2004, the IEU and OEG suddenly and unequivocally changed their stances supporting CG&E's Rate Stabilization Plan.

11. In 2005 alone, although CRS did not supply any electric services, CRS paid out approximately \$20,000,000 (twenty million dollars) in Option Payments to the companies.

12. Once Plaintiff was assigned the responsibility of processing the Option Payments, he consistently expressed concern for the legitimacy of the transactions conducted between CRS and the companies. In August, 2005, Plaintiff contacted Timothy Duff, who reported directly to Jim Gainer, Vice President of Regulatory and Legislative Strategy who also was one of the originators of the Option Agreements. Plaintiff questioned the origin of the Option Payments. In September, 2005 Plaintiff e-mailed Duff regarding his exact duties in processing the checks.

13. On January 10, 2006, Plaintiff again contacted Duff inquiring whether the Option Agreements were public, or whether they "ha[d] not seen the light of day...."

14. In a February e-mail to Duff, Plaintiff reported that he thought the Option Payments might be "sham transactions."

15. After receiving Plaintiff's e-mail, Duff commanded that Plaintiff call him "ASAP." During the conversation with Duff, Duff admonished Plaintiff not to put such concerns

in writing, that CRS had successfully avoided a subpoena in the past, and that Plaintiff's e-mail would cause "big trouble" internally. The subpoena in the past referred to the PUCO litigation.

16. After it became clear to Plaintiff that Defendants did not condone reporting possible illegal transactions, Plaintiff refused to sign off on the Payments and did not inquire further into the situation. The Managing Director of Commercial Asset Management and the Vice President of and General Counsel of the Commercial Business Unit signed off on the Agreements after Plaintiff refused.

17. Duff further demanded that Plaintiff process the transactions immediately "because the option checks need[ed] to be received by the IEU member customers by Wednesday [February 15, 2006]." Less than three months after this last report, Plaintiff was terminated.

18. Ohio law prohibits public utilities from granting reduced rates to consumers or from extending a privilege to some consumers without extending the same to all consumers.

19. Ohio law prohibits a public utility from directly or indirectly remitting "any rate, rental, toll or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified...and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service."⁵

20. By paying certain companies an amount equal to the rate increase charged by CG&E, Defendants essentially offered a reduced rate to certain energy consumers without extending the offer to all energy consumers.

21. In the interest of furthering competition in the newly formed competitive retail electric service market, Ohio statutorily deters the formation of anticompetitive subsidies of noncompetitive retail electric service providers, such as Cinergy. Moreover, Ohio ensures that

⁵ See Revised Code §4905.32

electric retail consumers are protected against "unreasonable sales practices, market deficiencies, and market power."⁶ Cinergy defied this policy when it utilized CRS because the two companies combined form a monopolistic energy source creating a market deficiency and imbalanced market power.

22. The utilization of CRS and the transactions conducted by it, led Plaintiff to question its legality; an action which ultimately led to his termination.

23. By terminating Plaintiff and deterring him from reporting his concerns, Defendants created a corporate culture that favors turning a blind eye to possible illegal transactions.

24. Defendants violated Ohio law by granting a privilege or reduced rate to certain, powerful, corporate customers, while failing to offer the same or similar privilege to all other consumers.

25. Defendants disregarded Ohio corporate policy by utilizing CRS, an unregulated alter ego of Cinergy Corp to quell opposition to its Rate Stabilization Plan.

26. Defendants violated Ohio public policy by deterring Plaintiff from reporting possible illegal transactions in writing.

27. Defendants violated Ohio public policy by terminating Plaintiff in retaliation for expressing his reasonable concerns for the legality of conduct undertaken by CRS.

28. Defendants violated Ohio's Whistleblower statute by deterring Plaintiff from putting his reasonable concerns regarding the legality of Defendants' transactions in writing.

29. Defendants violated Ohio's Whistleblower statute by terminating Plaintiff in retaliation for reporting a possible violation of a state statute based on his reasonable belief that the violation was a criminal offense or an improper solicitation.

⁶ See Revised Code §4928.02

JURISDICTION AND VENUE

30. This Court has subject matter jurisdiction over the claims asserted in this Complaint because they are premised on Ohio common and statutory law.

31. Venue is proper in Hamilton County because some Defendants reside in Hamilton County and Defendants' activities giving rise to Plaintiff's claims for relief occurred in this County.

PLAINTIFF'S BACKGROUND

32. Plaintiff John Deeds was born September 20, 1963. Plaintiff attended Louisiana Monroe on a full basketball scholarship. Plaintiff finished his Bachelors Degree in Business Management at the University of Cincinnati in 1992. While working for Defendants, Plaintiff received his Masters in Business Administration in Finance from the University of Cincinnati.

33. Plaintiff began working for Cinergy Corp. on or about July 2, 1990 as a Customer Service Clerk.

PLAINTIFF'S OUTSTANDING CAREER WITH DEFENDANTS

34. Although his career spanned nearly 16 years, Plaintiff achieved incredible success in a short period of time.

35. Plaintiff began his career as a Customer Service Clerk, which was his position for four years while he was finishing his Bachelor's Degree.

36. Following earning his Bachelors Degree and while working toward his Masters, Plaintiff's career began to take off. By May 1997, Plaintiff was a Project Finance Manager for Cinergy Business Solutions.

37. In December 1998, Plaintiff was promoted to Manager of Pricing and Structuring. Soon after, Plaintiff received another promotion to the position of Manager of Project Development. While his time in Project Development was short, Plaintiff performed the lead

role in the successful development of a gas fired electric peaking facility in the Midwest. During this time period, Plaintiff earned substantial salary and bonuses per year.

38. In April 2000, Plaintiff became the Director of Power Origination. The position entailed creating and closing long term transactions with geographically diverse customers. Plaintiff held this position until August 2005, and during this time, Plaintiff created considerable economic value for Defendants.

39. As an example of Plaintiff's success as the Director of Power Origination, Plaintiff originated, negotiated and closed transactions with ALCOA, ALCAN Aluminum, AK Steel, Sunoco and Carolina Power & Light, among several others. During this time period, Plaintiff earned substantial bonuses, which were based on a percentage of the value he created for Defendants.

40. In August, 2005, Plaintiff became the Director of Regulatory Initiatives in the Northeast Division. While in this position, Plaintiff represented Defendants on several wholesale electric pool market committees and acted as Defendants' voice, lobbying for Defendants' interests. Plaintiff received a very positive performance review during this time period.

41. Throughout all of the aforementioned time periods, Plaintiff received high commendations and praise for his work from Defendants. It took him only ten years to work his way from a Customer Service Clerk to a Director position. During his rise in the company, Plaintiff earned performance-based bonuses nearly every year, which at times were many times greater than his base salary.

DEFENDANTS UNLAWFULLY TERMINATED PLAINTIFF

42. While in the position of Director of Regulatory Initiatives, Plaintiff was responsible for processing the payments to the companies who signed Option Agreements with

Defendants. Shortly after taking over the new position, Plaintiff contacted Timothy Duff, who reported to Jim Gainer, Vice President of Regulatory and Legislative Strategy. Plaintiff inquired about the origin of the Option Payments. When Plaintiff further probed into what his specific duties were in relation to processing the Payments, Duff instructed Plaintiff to sign his name and make sure that his employee number was correct.

43. Plaintiff questioned another Director of Regulatory Initiatives who had worked in the area before, and was aware of the existence of the Options Agreement and Option Payments. Plaintiff was told falsely that the Option Agreement and Option Payment were made public and complied with regulations.

44. Still concerned about the large amounts Defendants were paying out, Plaintiff contacted Timothy Duff and asked whether the Payments were public. Plaintiff specifically inquired whether the Payments "ha[d] not seen the light of day...." Duff informed Plaintiff that the Option Agreements were not public, and Duff agreed to show Plaintiff one of the original Agreements.

45. After discovering the nature of the transactions conducted by CRS and that the Option Agreements were not public, and after reading one of the Option Agreements, Plaintiff was concerned both for Defendants and for his own liability.

46. In February, when Plaintiff was asked to sign off on large quarterly Option Payments, he reported to Duff that he did not feel comfortable processing them and expressed concerns for the legality of the transactions. After commanding that Plaintiff call him "ASAP," Duff angrily informed Plaintiff that it was not Cinergy's policy to put these types of concerns in writing and that Plaintiff should never put such concerns in an e-mail. Duff further instructed Plaintiff to process the transactions immediately.

47. After it became clear to Plaintiff that Defendants did not condone reporting possible illegal transactions, Plaintiff refused to sign off on the Option Payment requests. All Option Payment requests which exceeded \$100,000 had always been signed by others since \$100,000 was Plaintiff's monetary authority limit. These payments were signed initially by the Vice President of Trading and subsequently by the Managing Director of Commercial Asset Management. The Managing Director of Commercial Asset Management and the Vice President and General Counsel of the Commercial Business Unit signed off on the Option Payment requests which were less than \$100,000 after Plaintiff refused.

48. Shortly thereafter, Defendants decided to terminate Plaintiff when Duke Energy succeeded Cinergy Corp.

**DEFENDANTS' UNLAWFUL CONDUCT
ADVERSELY AFFECTS ALL CITIZENS OF OHIO**

49. Defendants created a corporate culture that favors turning a blind eye to possible illegal transactions. As a large employer of tri-state citizens, Defendants have an obligation to prevent events such as these from taking place.

50. As members of a highly regulated industry, Defendants have an obligation to the public and the government to ensure that Defendants do not participate in actions that violate state statutes.

51. By not offering the same or similar option contracts to all companies operating in Ohio that utilize CG&E's electric services, Defendants unfairly disadvantaged these businesses, including state and federal government offices, hospitals and other business that pay substantial amounts in energy costs.

52. As a publicly traded corporation, and a subsidiary thereof, Defendants have a fiduciary duty to their shareholders to abide by the law.

COUNT I

(Ohio Public Policy Wrongful Discharge Tort)

53. Plaintiff realleges the foregoing paragraphs as if fully rewritten herein.

54. There are clear public policies expressed in Ohio law which prohibit employers from retaliating against an employee for raising reasonable concerns of statutory violations.

55. Retaliating against or preventing an employee from exercising his rights under Ohio law would jeopardize clearly established public policies.

56. Defendants maliciously and willfully retaliated against Plaintiff by terminating him and deterring Plaintiff from engaging in the protected activity of reporting possible illegal transactions conducted by Defendants. As a direct and consequential result of Defendants' retaliation, which violates clear established public policies, Plaintiff has suffered injuries for which he is entitled to recovery.

COUNT II

(Whistleblower Violation - O.R.C. § 4113.52(B))

57. Plaintiff realleges the foregoing paragraphs as if fully rewritten herein.

58. Ohio prohibits employers from taking disciplinary or retaliatory action against an employee who reports a violation of any state or federal statute, or any ordinance or regulation that the employee reasonably believes is a criminal offense, felony, or an improper solicitation for a contribution.

59. Terminating an employee for reporting unlawful conduct undertaken by the employer violates Ohio's Whistleblower statute.

60. Defendants' above-described actions violate this statute.

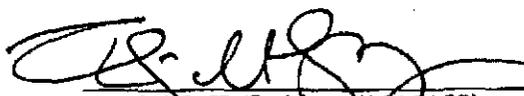
61. Defendants' actions constitute a breach of public policy and are willful, wanton and malicious in nature

62. As a direct result of Defendants' unlawful conduct, Plaintiff has suffered substantial damages. Plaintiff is entitled to judgment.

WHEREFORE, Plaintiff demands judgment against Defendants as follows:

- (a) That Defendants be enjoined from further unlawful conduct as described in the Complaint;
- (b) That Plaintiff be awarded all lost pay and benefits up until the time of trial ("backpay");
- (c) That Plaintiff be awarded all lost pay and benefits from the time of trial until a reasonable time in the future ("frontpay");
- (d) That Plaintiff be awarded reasonable compensatory damages;
- (e) That Plaintiff be awarded reasonable punitive damages in an amount at least equivalent to the payments made that were deemed unlawful, estimated to be \$40 million to date;
- (f) That Plaintiff be awarded reasonable attorneys' fees and costs; and
- (g) That Plaintiff be awarded all other legal and equitable relief to which he may be entitled.

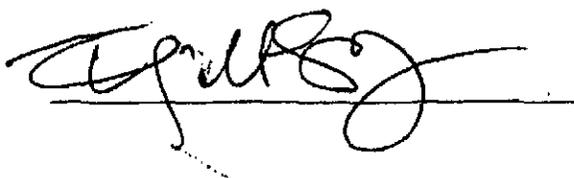
Respectfully submitted,



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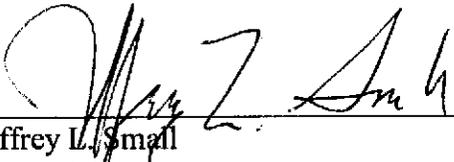
JURY DEMAND

Plaintiff hereby demands a trial by jury.



CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra Motion to Dismiss by the Office of the Ohio Consumers' Counsel was served upon the below-listed counsel by regular U.S. Mail, prepaid, this 12th day of January 2008.



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