

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The)
Cincinnati Gas & Electric Company To) Case No. 03-93-EL-ATA
Modify its Non-Residential Generation)
Rates to Provide for Market-Based)
Standard Service Offer Pricing and to)
Establish a Pilot Alternative)
Competitively-Bid Service Rate Option)
Subsequent to Market Development)
Period.)

In the Matter of the Application of The)
Cincinnati Gas & Electric Company for) Case No. 03-2079-EL-AAM
Authority to Modify Current Accounting)
Procedures for Certain Costs Associated)
with The Midwest Independent)
Transmission System Operator.)

In the Matter of the Application of The)
Cincinnati Gas & Electric Company for) Case No. 03-2081-EL-AAM
Authority to Modify Current Accounting) Case No. 03-2080-EL-ATA
Procedures for Capital Investment in its)
Electric Transmission and Distribution)
System And to Establish a Capital)
Investment Reliability Rider to be)
Effective After the Market Development)
Period.)

In the Matter of the Application of Duke)
Energy Ohio, Inc. to Modify Its Fuel and) Case No. 06-1068-EL-UNC
Economy Purchased Power Component)
of Its Market-Based Standard Service)
Offer.)

In the Matter of the Application of the)
Cincinnati Gas & Electric Company to) Case No. 05-725-EL-UNC
Modify Its Fuel and Economy Purchased)
Power Component of Its Market-Based)
Standard Service Offer.)

In the Matter of the Application of Duke)
Energy Ohio, Inc. to Adjust and Set its) Case No. 06-1069-EL-UNC
System Reliability Tracker.)

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In the Matter of the Application of Duke)
Energy Ohio, Inc. to Adjust and Set its) Case No. 05-724-EL-UNC
System Reliability Tracker Market Price.)

In the Matter of the Application of Duke)
Energy Ohio, Inc. To Adjust and Set the) Case No. 06-1085-EL-UNC
Annually Adjusted Standard Service)
Offer.)

**REPLY TO DUKE ENERGY'S MEMORANDUM CONTRA MOTION TO STAY
DUKE ENERGY'S RATE INCREASES AND
MOTION TO RENDER ALL RATE INCREASES AFTER THE MARKET
DEVELOPMENT PERIOD
SUBJECT TO REFUND ON AN ONGOING BASIS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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Pursuant to Ohio Adm. Code 4901-1-12(B)(2), the Office of the Ohio Consumers' Counsel ("OCC") replies to the memorandum contra ("Memo Contra") filed by Duke Energy Ohio, Inc. ("Duke Energy" or "Company," including its predecessor entity, the Cincinnati Gas & Electric Company) on December 15, 2006. The Memo Contra was submitted in response to OCC's Motion to Stay All Rate Increases ("Motion to Stay") and Motion to Render All Rate Increases After the Market Development Period Subject to Refund on an Ongoing Basis ("Motion Regarding Refunds") (collectively, "Motions"). The OCC files this Reply on behalf of the 650,000 residential customers of Duke Energy.¹

This proceeding includes the remand of OCC's appeal to the Supreme Court of Ohio in which the Court found that the Public Utilities Commission of Ohio ("PUCO" or "Commission") erred in two basic respects. In its Memo Contra, as in its other advocacy in this remand, Duke Energy would have the PUCO repeat the same errors that led to the need for a remand proceeding by essentially nullifying the Court's holdings that OCC should be given access to side agreements and that there be an opportunity for the OCC to

¹ In this Reply, OCC will provide the PUCO with law and facts, and not dwell in the snide domain that is the foundation of the Duke pleading (e.g., insults such as OCC "purports" to represent residential customers). Memo Contra at 3.

develop the record with respect to Duke Energy's rate plan. The PUCO should not be misled by Duke Energy's arguments, and should grant OCC's Motions.

I. SUPPLEMENTAL HISTORY OF RELATED PROCEEDINGS

On December 12, 2006, the OCC filed a Motion to Stay to seek a stay of all rate increases in the riders and trackers that resulted from approval by the Commission in the first four case designations in the caption shown above (collectively, the "*Post-MDP Service Case*"). The stay would protect customers against Duke Energy's proposals for rate increases during the remand of OCC's appeal in the Ohio Supreme Court. The OCC also filed a Motion Regarding Refunds to render all rate increases for the post market development period ("MDP") for Duke Energy, on an ongoing basis, subject to refund (to customers) and subject to appropriate interest charges so that customers would not lose the time value of their money. Duke Energy's Memo Contra also contained a reply to the memoranda contra filed by the OCC in connection with Duke Energy's motions regarding the treatment of the AAC and the SRT.²

On December 14, 2006, a prehearing conference was held at the offices of the PUCO as provided for in the Commission's Entry dated November 29, 2006 ("November Entry"). The November Entry stated:

[A] hearing should be held in the remanded RSP case, in order to obtain the record evidence required by the court. At this time, a

² The Commission's rules do not permit a responsive pleading to a reply. Ohio Adm. Code 4901-1-12. Therefore, the OCC will not present arguments counter to those located in Sections IV and V of Duke Energy's December 15, 2006 pleading, which are improper and should be stricken. However, OCC notes that its Motion to Stay refrained from using dollar values for the SRT since Duke Energy considers such values confidential. OCC Motions at 6. Nonetheless, in its Memo Contra, Duke Energy uses a figure of \$8.7 million for its "forecasted 2007 SRT price." Memo Contra at 21. This information is under consideration in a pending case, and was filed under seal. *In re SRT Rates*, Case No. 06-1069-EL-UNC, Wathen Testimony (November 1, 2006). Duke Energy should not be permitted to hamstring the OCC with its claims of confidentiality and then opportunistically reveal the information in its own arguments.

prehearing conference should be scheduled to discuss the procedure for the hearing in the remanded RSP case, as well as the FPP, SRT, and AAC proceedings.³

The prehearing conference was transcribed. Duke Energy argued extensively against a hearing in the remand of the *Post-MDP Service Case*, an argument to which the Company also devotes a large portion of its Memo Contra. However, Duke Energy did not file an interlocutory appeal regarding the ordered hearing.

Other determinations were made in the prehearing conference, which was transcribed. The above-captioned cases were officially consolidated.⁴ Due dates were established for various pleadings, including this Reply. A procedural schedule was established that set dates for the filing of testimony and for the cut-off of discovery. March 19, 2006 was set as the hearing date. The OCC moved to enforce the provision of the November Entry that ordered Duke Energy to “disclose to OCC the information requested in discovery with regard to side agreements.”⁵ The OCC’s motion remains pending while Duke Energy locates the information that is the subject of the motion. On December 15, 2006, Duke Energy filed its Memo Contra. The due date stated at the prehearing conference provided the OCC with one business day to respond to the Memo Contra.

³ November Entry at 3. The “remanded RSP case” refers to remand of the appeal to the Supreme Court of Ohio in the *Post-MDP Service Case*. *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 (“*Consumers’ Counsel 2006*”).

⁴ The consolidation had previously been stated only in the form of a proposal. November Entry at 3.

⁵ Entry at 4.

II. ARGUMENT

A. The Commission Should Conduct a Substantive Hearing Regarding Appropriate Generation Prices Before Additional Rate Increases Burden Customers.

Duke Energy has created a strained reading of the opinion in *Consumers' Counsel 2006* that results in odd conclusions and requests for procedures that are not judicial or quasi-judicial. The Company encourages the PUCO to move forward with a pricing plan based on the framework that existed prior to the Supreme Court's remand and that will result in significant price increases in the absence of "record evidence and sufficient reasoning."⁶

Instead of recommending the holding of the hearing to produce the record that the Court said was lacking from the PUCO's original resolution of this matter, Duke Energy states that the Commission should permit merely briefs and perhaps oral argument based on the existing record (that the Court found to be inadequate),⁷ even though the *Post-MDP Service Case* already was extensively briefed before the Commission and the Supreme Court of Ohio, and oral argument was conducted at the Court on the matters that Duke Energy seeks to rehash. The Court resolved -- in favor of OCC's position -- the issue of whether the PUCO's modifications on rehearing were supported by record evidence, and the Court was aided in that resolution by review of the entire record in the *Post-MDP Service Case* that neither the Commission or Duke Energy could reconcile to the requirements in the law. The Court concluded "the commission

⁶ *Consumers' Counsel 2006* at P95. The rate increases are described in the OCC's pleading dated December 12, 2006.

⁷ Memo Contra at 8.

made several modifications on rehearing without any reference to record evidence and without thoroughly explaining its reasons.”⁸ Duke Energy supports a “tail chasing” approach that would allow for re-argument of what the Court already decided and would delay the final determination of appropriate standard service offer generation rates for the Company’s customers. Meanwhile, the Company reaps the rewards of ever-higher rates.

Duke Energy is apparently unable to find any support in the Court’s opinion in *Consumers’ Counsel 2006* for OCC’s position that evidence not previously adduced against the Company’s plans should be heard on remand. The Company’s position against a hearing and the taking of further evidence does not make sense. For example, the Court ruled that the PUCO and Duke Energy were wrong to deny the OCC access to Duke Energy’s side agreements.

Under Duke Energy’s concept, the Court’s ruling would have no practical purpose under the Company’s claim that the side agreements cannot be used as part of a hearing in the remanded case. In the original case, Duke Energy (with the Commission’s authorization) denied the OCC access to the side agreements and denied the OCC progress as part of progression of discovery (such as further written requests and depositions) on the side agreements. On remand, turning over the side agreements is the initial part of the progressive discovery that follows upon access to the side agreements.

⁸ *Consumers’ Counsel 2006* at ¶35.

The scope of discovery should be “liberally construed.”⁹ This discovery leads to use of evidence during the remand hearing.

A statement that new evidence should be heard on remand is found in Duke Energy’s Memo Contra itself:

Second, regarding the discovery of alleged side agreements, the Court decided it {sic} “remand this matter to the Commission and order that it compel disclosure *of the requested information*.” The Court left matters of confidentiality and admissibility entirely to the Commission.

Nowhere in the Court’s opinion is the case remanded for rehearing. No new evidence is being requested.¹⁰

The fact that the Court allowed the PUCO to address matters of *admissibility* of the side agreements underscores the Court’s expectation that there will be a remand hearing where evidence not yet heard in the case can be adduced. There is absolutely no reason for the Court to allow the Commission to address matters of the admissibility of side agreements if the OCC is not permitted to present new evidence where admissibility could be an issue. The Company continues: “Only if the Commission is not satisfied with the existing record evidence should additional evidence be obtained and a hearing be held for the limited purpose of supporting the Commission’s Entry on Rehearing.”¹¹ Without citation to legal authority, Duke Energy incredibly concludes that the Court

⁹ *Consumers’ Counsel 2006* at ¶83, applying Civ.R. 26(B)(1); see also R.C. 4903.082 and Ohio Adm. Code 4901-1-16.

¹⁰ Memo Contra at 5-6 (emphasis sic, citations omitted).

¹¹ Id at 8. The Commission has already stated that it is “not satisfied with the existing record evidence.” Acting against the position argued by Duke Energy, the Commission set the matter for hearing in the November Entry. The Company failed to file an interlocutory appeal pursuant to Ohio Adm. Code 4901-1-15 within the required five-day period. Duke Energy was recently told that it “cannot avoid the strictures of Rule 49901-1-15.” *In re CG&E Distribution Rate Case*, Case No. 05-59-EL-AIR, Entry at 2 (November 3, 2005).

instructed the PUCO to conduct quasi-judicial procedures that permit only one side of a controversy to be heard.

Duke Energy cites a case involving the East Ohio Gas Company for the proposition that no hearing on remand is required when the Court finds that the PUCO violated R.C. 4903.09.¹² The factual basis in that case is fundamentally different than the remand of the *Post-MDP Service Case*. As has been made clear, the OCC certainly does not agree in this case that the remand order is satisfied without an evidentiary hearing.

Duke Energy accuses the OCC of delay because, as a State of Ohio agency, it must comply with certain requirements before the OCC may engage the services of an outside consultant.¹³ The greatest cause of delay so far has been Duke Energy's failure to comply with the requirement of the Court and the Commission that side agreements be turned over to the OCC. The opinion in *Consumers' Counsel 2006* was issued on November 22, 2006. Following numerous contacts by the OCC, the Company's first transmittal of any type of agreement to the OCC occurred on December 11, 2006. That transmittal and the letter docketed on December 7, 2006 both confirm that the Company is withholding side agreements. In addition, the OCC has conducted discovery on the matter of the non-disclosed side agreements. The OCC moved to enforce the requirements of the PUCO's November 2006 Entry (in which the PUCO ordered that the side agreements were to be provided to OCC) at the prehearing conference on December

¹² Memo Contra at 7. The case was appealed by the OCC. *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87.

¹³ Memo Contra at 8.

14, 2006. The contents of a complaint (“Deeds Complaint”)¹⁴ by a former Duke Energy employee (or employee of an affiliated company) is attached to the OCC’s docketed letter dated December 13, 2006. The Deeds Complaint supports the argument that Duke Energy has erected a corporate shell that has been used, in part, to prevent discovery, disclosure, and the awareness of side agreements.

B. Commission Precedent Supports the OCC’s Motions

1. OCC’s Motion to Stay is Supported by Legal Authority.

In arguing on the elements for the PUCO to grant a stay, Duke Energy exaggerates the likely success of its litigation position in the above-captioned cases. The Company states that “the Court ha[s] affirmed all aspects of DE-Ohio’s [plan].”¹⁵ Duke Energy’s exaggeration of its own position is addressed above.¹⁶ The Court’s opinion in *Consumers’ Counsel 2006* cannot be reconciled with the Company’s extreme position that no hearing needs to be conducted and that parties who oppose Duke Energy’s plans may not be heard. Duke Energy’s position was already rejected in the November Entry that set the matters on remand for hearing, a decision that the Company did not appeal. The Company’s position has also been weakened as the result of a “whistleblower” lawsuit in federal court.¹⁷ The Complaint in that case contains allegations from a former Duke Energy employee (or an affiliated company) that supports arguments that side

¹⁴ *Deeds v. Duke Energy Corporation, et al.*, United States District Court, Southern District of Ohio (Western Division), Case No. 1:06CV835, Complaint at ¶7 (December 7, 2006).

¹⁵ Memo Contra at 14.

¹⁶ Duke Energy’s argument that the Commission “[lacks] authority to grant a stay” is also addressed above. Memo Contra at 15.

¹⁷ Deeds Complaint (December 7, 2006). A copy of the Deeds Complaint is attached to a letter docketed by the OCC on December 13, 2006.

agreements have been used in a discriminatory and predatory manner to win approval of the Company's plan in *the Post-MDP Service Case*.¹⁸

In order to draw a sharp contrast when none exists, Duke Energy also minimizes the controversies that existed in past cases in which the Commission issued a stay. Duke Energy's analysis of the precedent cited by the OCC for a stay of rate increases reflects Duke Energy's backward-looking view rather than the circumstances at the time stays were granted. The OCC's Motion for Stay cited cases that involved Ameritech and AEP's operating companies (Columbus Southern Power and Ohio Power Companies). Duke Energy states that there was "an almost certain likelihood that application of the applicable issues would change upon a determination by the Court or administrative agency."¹⁹ Litigated issues are rarely so crystal clear.

In the case that involved Ameritech, the Commission granted Ameritech's June 26, 2002 motion to stay portions of the June 20, 2002 Entry on Rehearing.²⁰ Ameritech contended that it would challenge the marketing provisions of the Commission's orders on appeal, and believed that it was inappropriate to begin the process of changing current practices until the company's concerns were addressed through judicial review.²¹ The case was contentious, as evidenced by numerous pleadings, and an argument based upon the results of a possible challenge at the Supreme Court of Ohio does not provide an

¹⁸ Id. at 3.

¹⁹ Memo Contra at 14.

²⁰ *In re COI of Ameritech Relative to Minimum Telephone Service Standards*, Case No. 99-938-TP-COI, Entry at 8 (July 18, 2002).

²¹ Id. at 5.

“almost certain” result in favor of the party who requested the stay.²² Nonetheless, a stay was granted.

In the case that involved AEP, the Commission stayed the proceedings under circumstances where the OCC and other parties questioned, among other matters, AEP’s failure to join the Midwest Independent System Operator. The Commission noted pending matters at FERC and elsewhere regarding AEP’s attempt to join other regional transmission organizations (“RTO”).²³ FERC’s eventual approval of AEP’s plan to join the PJM RTO was not an “almost certain” result favoring AEP,²⁴ especially when FERC rejected AEP’s efforts to participate in the failed Alliance RTO.²⁵ The stay was issued under uncertain circumstances for the party that viewed a stay more favorably (e.g., AEP).

The cases cited in the OCC’s Motion to Stay support Commission action in this case to stay rate increases to protect consumers.

2. OCC’s Motion Regarding Refund is Supported by Legal Authority

Duke Energy’s Memo Contra did not confront the legal authority that supports the OCC’s Motion Regarding Refund. Duke Energy addressed the OCC’s arguments

²² Memo Contra at 14.

²³ *In re Commission’s Review of Columbus Southern Power Company’s and Ohio Power Company’s Independent Transmission Plan*, Case No. 02-1586-EL-CSS, et al., Entry at 4 (February 20, 2003).

²⁴ Memo Contra at 14.

²⁵ *In re Commission’s Review of Columbus Southern Power Company’s and Ohio Power Company’s Independent Transmission Plan*, Case No. 02-1586-EL-CSS, et al., Entry at 4 (February 20, 2003).

indirectly by claiming that Duke Energy's rates are low and "[a]djustments to [Duke Energy's] MBSSO components do not constitute a rate increase."²⁶

The OCC's discussion of rate increases in its Motions was largely practical: Duke Energy proposes increases in its FPP, SRT, IMF, and AAC charges for 2007, but does not propose any decrease in rates for components of the Company's standard service generation rate.²⁷ The situation is threatening under circumstances where competitive options are declining and the Company's standard service offer rate components will be reviewed by the Commission on remand of the *Post-MDP Service Case*.

Duke Energy recognizes that "customers [have been] returning to [Duke Energy] from competitive retail electric service (CRES) providers."²⁸ Duke Energy attributes the return to the inability of its competitors to "beat its price."²⁹ The Deeds Complaint supports another explanation. In the Deeds Complaint, it is alleged that Duke Energy has undercut its competitors by using Duke Energy Retail Sales, LLC ("DERS,"³⁰ along with its predecessor Cinergy Retail Sales, or "CRS"), a corporate affiliate that does not provide electricity to customers,³¹ to "kickback" charges that were determined in the *Post-MDP Service Case*.³² The charges prevented an uproar over increased rates during the *Post-*

²⁶ Memo Contra at 11.

²⁷ The rate increases are described in the OCC's pleading dated December 12, 2006.

²⁸ Memo Contra at 13.

²⁹ Id.

³⁰ John Deeds identifies DERS and its corporate links. Deeds Complaint at 2.

³¹ Deeds Complaint at ¶9.

³² The "kickbacks" are apparently called "Option Payments." See, e.g., Deeds Complaint at ¶40.

MDP Service Case and thereafter.³³ Based on averments in the Deeds Complaint, the lack of competition for Duke Energy could be a result of predatory pricing by Duke Energy that may have stripped marketers of their customers and driven down shopping rates. The Commission should investigate the allegations stated in the Deeds Complaint, and facilitate the discovery process so that parties such as the OCC can develop their cases.

Duke Energy questions the ability of the Commission -- by means of the *Post-MDP Service Case* remand or the above-captioned cases that include the Company's planned increases in its riders -- to deal with the Company's submissions as proposals to increase rates under Ohio's statutes.³⁴ The OCC argued for procedural protections in its appeal of the *Post-MDP Service Case*. The OCC's legal theory was not rejected by the Court, but the application of that theory in the context of an appeal of the *Post-MDP Service Case* was rejected. The Court determined:

The notice, investigation, and hearing requirements of R.C. 4909.19 are not triggered because they apply only upon application for a rate increase pursuant to R.C. 4909.18, which we have determined did not occur.³⁵

The Court observed the absence of an increase pursuant to R.C. 4909.18 because the PUCO did not determine that a rate increase would result from the *Post-MDP Service Case* and because the "market-based standard service offer . . . rate had not yet been implemented" before the Company's final plan went into effect.³⁶

³³ Deeds Complaint at ¶8.

³⁴ Memo Contra at 11.

³⁵ *Consumers' Counsel 2006* at ¶18.

³⁶ *Id.*

Neither of the above-stated problems prevents the application of statutory protections associated with rate increases in the above-captioned cases. The Company's proposals either increase its standard service offer rate or make no change in the offer.³⁷ Furthermore, the new standard service offer rates have been implemented for all rate classes since January 1, 2006. The statutory protections stated in R.C. 4909.18, R.C. 4909.19, and related statutes now apply to Duke Energy's proposals. Adjustments to Duke Energy's standard service offer rate components now constitute a "rate increase" for Ohio's statutory purposes. The processes set out in the statutes for rate increases should be applied.

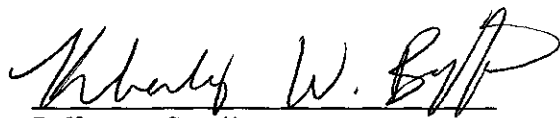
III. CONCLUSION

The OCC respectfully requests that the Commission grant its Motions. In the interests of Duke Energy's 650,000 residential customers, the Commission should stay all rate increases in the Company's standard service offer. The increases in rates that resulted from the *Post-MDP Service Case* should be subject to refund to customers and subject to appropriate interest charges to be paid to customers for the time value of their money, on an ongoing basis, pending the Commission's reconsideration of the results on remand for the *Post-MDP Service Case*.

³⁷ The rate increases are described in the OCC's pleading dated December 12, 2006.

Respectfully submitted,

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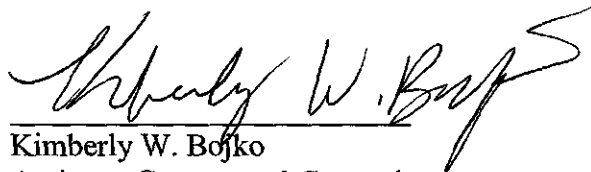
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Office of the Ohio Consumers' Counsel's Reply Memorandum was served electronically on the persons listed on the electronic service list, provided by the Hearing Examiner, this 18th day of December 2006.

A handwritten signature in black ink, appearing to read "Kimberly W. Bojko", written over a horizontal line.

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