

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 and 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 Component)

**DUKE ENERGY RETAIL SALES MEMORANDUM CONTRA TO THE OHIO
CONSUMERS' COUNSEL'S MOTION TO STRIKE DUKE ENERGY RETAIL
SALES MOTION TO QUASH THE TWO SUBPOENA DUCES TECUM FILED BY
THE OCC AND MOTION TO INTERVENE ON A LIMITED BASIS**

The Ohio Consumers' Counsel OCC asserts that Duke Energy Retail Sales LLC (DERS) is not entitled to any due process to protect itself from the unlawful, unreasonable, and irrelevant discovery requests of OCC. OCC asserts that DERS is not entitled to due process in these cases despite the fact that OCC also asserts it is entitled to unfettered discovery and a full new evidentiary hearing in this case without any legal support for such a hearing from the Court's Remand Order or statute. The basis for OCC's assertion is that as a non-party to these proceedings DERS is not permitted to file a Motion to Quash pursuant to O.A.C. 4901-1-25(C). Such an assertion is inconsistent with the Public Utilities Commission of Ohio's (Commission) precedent, Court precedent, and the applicable rules.

In the event that the Commission determines that DERS is not permitted to advance its motion to Quash as a nonparty, DERS moves this honorable Commission for leave to intervene in these cases for the limited purpose of

protecting the confidential material sought by OCC through discovery. No other Party may adequately protect DERS's interests. DERS's Motion for Limited Intervention is more thoroughly supported in the Memorandum in Support below. Upon submission of its Motion for Limited Intervention DERS also resubmits, and incorporates by reference, its Motion to Quash originally filed December 20, 2006.

Finally, DERS notes that OCC failed to object to its Motion for Protective Order Prohibiting Discovery Requests to DERS. Because OCC failed to object and is out of time to file a Memorandum Contra, DERS asserts the Commission should grant its Motion for Protective Order Prohibiting Discovery Requests in its entirety. DERS's Motion is uncontroverted in these proceedings.

ARGUMENT:

I. The applicable rules, Commission precedent, and Court precedent support permitting DERS to file a Motion to Quash.

It is axiomatic that the Commission is "a creature of statute, has and can exercise only the authority conferred upon it by the General Assembly."¹ Therefore, the Commission has no authority, including authority to establish procedural due process, absent an authorizing statute. In this instance there is no such authorizing statute. In fact, the legislature expressly divested the Commission of due process authority through R.C. 4928.05, which states in pertinent part:

On and after the starting date of competitive retail electric service, *a competitive retail electric service*

¹ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 85 Ohio St. 3d 87, 88, 706 N.E.2d 1255, 1256 (1999).

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., 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...²

All of the statutes governing due process of proceedings before the Commission are set forth in R.C. Chapter 4903. All of the procedural rules set forth in O.A.C. 4901-1, regarding competitive retail electric service, including the Market-Based Standard Service Offer (MBSSO) at issue in these proceedings, are authorized by the statutes removed from the Commission's jurisdiction pursuant to R.C. 4928.05.³

DERS realizes that the Commission may take a different view and this may be a matter of first impression for the Court, if DERS must take an appeal. DERS also knows that R.C. 4928.06 states that "*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.*"⁴ DERS would, on appeal, argue that R.C. 4928.05 is the "except as otherwise provided" set forth in R.C. 4928.06.⁵

DERS submits however that the jurisdictional argument is avoidable because OCC, while correctly quoting O.A.C. 4901-1-25(C), which states that in addition to the Commission and various members of the legal Staff, a party may file a Motion to Quash, OCC fails to state that the rule is permissive, not

² Ohio Rev. Code Ann. § 4928.05 (Baldwin 2006) (emphasis added).

³ *Id.*

⁴ Ohio Rev. Code Ann. § 4928.06 (Baldwin 2006) (emphasis added).

⁵ Ohio Rev. Code Ann. §§ 4928.05, 4928.06 (Baldwin 2006).

restrictive, and that Commission precedent, Court precedent, other rules, and the application of fairness and reasonableness, demand that a person subject to Subpoena have sufficient procedural rights to protect its interest.

A. Ohio Administrative Code Section 4901-1-25(C) is permissive, not restrictive.

The OCC asserts that DERS is not a party to these cases and therefore O.A.C. 4901-1-25(C) does not permit it to file a Motion to Quash OCC's Subpoenas. This is a novel interpretation that is simply incorrect. Specifically, O.A.C. 4901-1-25 states: "[t]he commission, the legal director, the deputy legal director, or the attorney examiner may, upon their own motion or upon motion of any party, quash a subpoena if it is unreasonable or oppressive...."⁶ Nothing in the rules language states or implies that the ability to file a Motion to Quash is exclusively vested in the Commission, its legal Staff, or a party, simply that those persons may file such a motion.

Ohio Administrative Code Section 4901-1-12 is instructive. It does not restrict who may file a motion or the subject matter of a motion.⁷ Ohio Administrative Code Section 4901-1-12 simply says that motions shall be made in writing with no reference as to who may, or may not, file a motion. In these cases for example, assuming O.A.C. Chapter 4901-1 to be applicable without conceding the issue, nothing prevents DERS from filing its Motion to Quash pursuant to O.A.C. 4901-1-12.

⁶ OHIO ADMIN. CODE ANN. § 4901-1-25 (Baldwin 2006).

⁷ OHIO ADMIN. CODE ANN. § 4901-1-12 (Baldwin 2006).

B. Commission precedent supports the ability of a subpoenaed nonparty to file a motion to quash.

The question of whether to strike a nonparty's motion to quash appears to be a matter of first impression before the Commission. The Commission has however, consistently permitted nonparties to file motions to quash.⁸ In *Enron v. FirstEnergy* the Commission denied the Motion to Quash of IEU-Ohio, a nonparty like DERS in the instant cases, because the Commission found the information sought was relevant to the proceeding.⁹ In *In re MB Operating Company* the Commission also denied the Motion to Quash of the nonparty, Northeast Ohio Operating Company, Inc. The Commission agreed with the nonparty however, that the requested information may harm it by putting Northeast Ohio Operating Company, Inc., at a competitive disadvantage.¹⁰ The nonparty argued that not all of the information was relevant and it should be protected by permitting an independent party to review the information and determine what information was discoverable.¹¹ The Commission agreed and ordered Northeast Ohio Operating Company, Inc., and East Ohio gas Company, the party that issued the subpoena, to each choose an independent reviewer to protect the competitive interest of the nonparty.¹²

⁸ *Enron v. FirstEnergy*, Case No. 01-393-EL-CSS (Opinion) (July 19, 2001); *In re MB Operating Company*, Case No. 86-1084-GA-COI (Opinion) (June 25, 1992).

⁹ *Enron v. FirstEnergy*, Case No. 01-393-EL-CSS (Opinion) (July 19, 2001).

¹⁰ *In re MB Operating Company*, Case No. 86-1084-GA-COI (Opinion at 6-7) (June 25, 1992).

¹¹ *Id.*

¹² *Id.*

DERS is in the same position as Northeast Ohio Operating Company, Inc., in *In re MB Operating Company*. OCC has requested discovery of confidential agreements that represent trade secrets of DERS and its customers. The contracts represent trade secrets to DERS because they represent a type of agreement that may be unique to the competitive retail electric market, would reveal DERS's pricing of the product it transacted with customers, and the price at which it may serve specified load, all information that DERS's competitors could use against it in the marketplace. Similarly, the information is a trade secret to DERS's customers because it reveals the price at which they would sell the product in the specified contracts. Like Northeast Ohio Operating Company DERS has suggested an independent party, the Attorney Examiners in these cases, review the contracts *In Camera* to determine if they are relevant to these cases. DERS believes that the Attorney Examiners will determine they are irrelevant and not likely to lead to the discovery of admissible evidence because they represent arms length transactions between consenting counterparties most of whom were never a party to any of these proceedings.

Regardless of the Commission's ultimate determination of DERS's Motion to Quash it is clear that Commission precedent permits consideration of the Motion by the Commission. OCC's argument to the contrary is without merit.

C. Ohio Rule of Civil Procedure 45 supports the proposition that a nonparty may file a Motion to Quash when served with a subpoena.

The Ohio Rule of Civil Procedure 45 is, arguably, the only potentially applicable rule given the Commission's lack of jurisdiction previously

discussed. Rule 45 permits a nonparty served with a subpoena to file objections and a Motion to Quash.¹³ Pursuant to Rule 45, objections filed by DERS relieve DERS of the obligation to respond to OCC's subpoena absent a Motion to Compel and the Commission's order to compel.¹⁴ Because OCC did not contest DERS's objection, DERS is not under an obligation to appear in response to the subpoenas absent an order to compel and OCC is out of time to contest to DERS's objections.

Also pursuant to Rule 45, DERS may file a Motion to Quash that the Commission:

/S/hall quash or modify the subpoena, or order appearance or production only under specified conditions, if the subpoena does any of the following:

- (a) Fails to allow reasonable time to comply;
- (b) *Requires disclosure of privileged or otherwise protected matter and no exception or waiver applies;*
- (c) Requires disclosure of a fact known or opinion held by an expert not retained or specially employed by any party in anticipation of litigation or preparation for trial as described by Civ. R. 26(B)(4), if the fact or opinion does not describe specific events or occurrences in dispute and results from study by that expert that was not made at the request of any party;
- (d) *Subjects a person to undue burden.*¹⁵

The contracts sought by OCC are protected trade secrets to which no exception applies. DERS has maintained their confidentiality and, as previously discussed, disclosure will place DERS and its customers at a competitive disadvantage.

¹³ OHIO R. CIV. PRO. 45 (Thompson-West 2006).

¹⁴ *Id.*

¹⁵ *Id.*

Further, production places an undue burden on DERS. DERS is in litigation with an ex-employee who has made inaccurate public accusations and disclosed confidential contracts and identified confidential counterparties. Forced participation in these proceedings may make public information that may compromise DERS in the above referenced litigation. It places the Commission in a position where its decisions could affect litigation wholly unrelated to the Commission's jurisdiction and expertise. Also, confidentiality clauses in the requested contracts require DERS and the counterparties to seek to maintain the contracts as confidential in a situation where the contracts are irrelevant to the proceedings before the Commission and the information that may arguably be relevant is publicly available to OCC.

The information is irrelevant because it is between DERS, a nonparty, and, with three exceptions, other nonparties to these proceedings. Also, OCC has failed to examine the public information concerning the DERS contracts that is available to it. If, as OCC alleges, it wants to know the payments made by DERS to customers to determine what effect such payments may have had on DE-Ohio's MBSSO price, such aggregate payments are public and on file at the Commission as part of DERS's annual report.¹⁶ The public record indicates Option Premium Expense during 2005 of \$13,768,812, and during 2006 of \$22,247,000.¹⁷

¹⁶ *In re DERS Certification*, Case No. 04-1323-EL-CRS (Renewal Application at Part 5 of 5, Exhibit C-3, page 34-35 of 55) (August 24, 2006).

¹⁷ *Id.*

There is no transaction between DE-Ohio and DERS, and hence no connection between any DERS contract and DE-Ohio's MBSSO market price that was independently approved by the Commission. Even assuming, *arguendo*, that OCC's allegation that the DERS contracts are a mechanism to flow dollars to DE-Ohio customers in exchange for support to the Stipulation, there is no connection between these contracts and the DE-Ohio's MBSSO market price. Further, the Court remand order simply suggests that side agreements may be related to the first prong of the test for partial stipulations, whether serious bargaining among capable knowledgeable parties occurred.¹⁸ All that the DERS contracts could show is that there was serious negotiation among capable knowledgeable parties. There is no requirement that all parties to a settlement receive the same benefit or detriment. There is no purpose to discovery of specific contracts and furthermore, discovery would subject DERS to undue burden. Under these circumstances the Commission should deny OCC's Motion to Strike and grant DERS's motion to Quash.

D. Court precedent supports the ability of a nonparty to file a motion to quash.

The Court has determined that a nonparty may file a motion to quash and denial of the motion constitutes a final appealable order where a substantial right is abrogated and the nonparty has no other remedy.¹⁹ In *Foor v. Huntington* the Court held that "[a]n order overruling a motion to quash a

¹⁸ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St.3d 300, 320, 856 N.E.2d 213, 234 (2006).

¹⁹ *Foor, v. Huntington National Bank*, 27 Ohio App. 3d 76, 499 N.E.2d 1297 (1986); *Bell v. Mt. Sinai Medical Center*, 67 Ohio St. 3d 60, 616 N.E.2d 181 (1993).

subpoena duces tecum issued to a nonparty witness is appealable since the nonparty witness has no recourse other than to appeal from the order overruling the motion to quash."²⁰ The *Foor* Court further decided that the ability of a nonparty to appeal a denial of a motion to quash depended upon the existence of a R.C. 2505.02 special proceeding affecting a substantial right.²¹

The Ohio Supreme Court has affirmed that a nonparty has the right to appeal from a denial of a motion to quash.²² The Court in *Bell v. Mt. Sinai Medical Center* echoed the decision of the *Foor* Court but determined that to prevail on the issue of whether the special proceeding affects a substantial right the appellant must "demonstrate that in the absence of immediate review of the order they will be denied effective relief in the future."²³ Ultimately, the Court held that an *In Camera* review did not affect a substantial right but the decision of the *In Camera* review would affect a substantial right.²⁴

In these cases before the Commission there is no question that the cases represent a special proceeding because the proceedings are purely statutory in nature and could not have arisen in common law.²⁵ Further, DERS has no avenue for relief absent a Commission determination granting its Motion to Quash. Therefore, OCC's *Subpoena Duces Tecum* affects DERS's substantial

²⁰ *Foor, v. Huntington National Bank*, 27 Ohio App. 3d 76, 499 N.E.2d 1297 (1986) (syllabus) (emphasis added).

²¹ *Foor, v. Huntington National Bank*, 27 Ohio App. 3d 76, 78, 499 N.E.2d 1297, 1300 (1986).

²² *Bell v. Mt. Sinai Medical Center*, 67 Ohio St. 3d 60, 616 N.E.2d 181, (1993).

²³ *Bell v. Mt. Sinai Medical Center*, 67 Ohio St. 3d 60, 63, 616 N.E.2d 181, 183 (1993).

²⁴ *Bell v. Mt. Sinai Medical Center*, 67 Ohio St. 3d 60, 64, 616 N.E.2d 181, 183 (1993).

²⁵ *Bell v. Mt. Sinai Medical Center*, 67 Ohio St. 3d 60, 63, 616 N.E.2d 181, 183 (1993).

right pursuant to R.C. 2505.02. The Commission can avoid an appeal by DERS if it grants its Motion to Quash or decides to inspect the contracts *In Camera*.

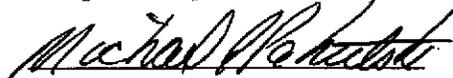
II. OCC's Motion to Strike DERS's Motion to Quash violates fundamental principles of due process.

Despite the fact that nothing in the Court's Remand Order requires the Commission to hold another evidentiary hearing, OCC insists that the Commission should hold a hearing and permit it to put on any evidence it desires without restriction.²⁶ While DERS disagrees with OCC's interpretation of the Court's Remand Order, it is disingenuous of OCC to take the position that it is entitled to due process through an evidentiary hearing but DERS is not entitled to due process by filing a Motion to Quash.

²⁶ OCC's Argument Against DE-Ohio's Motion for Protection at 9.

DERS is competing in the competitive markets, not in the protected environment of regulation. DERS is solely responsible for its position in the competitive market place. The Commission has not exposed the contract terms of any other competitive retail electric service provider. The contracts contain confidential business processes, prices, and load information that would harm DERS and its customers, if made public. Public information regarding the aggregate cost of the contracts to DERS is available to OCC. DERS respectfully requests that the Commission grant it due process and consider, and ultimately grant, its Motion to Quash.

Respectfully Submitted,



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**DUKE ENERGY RETAIL SALES MEMORANDUM IN SUPPORT OF ITS
MOTION TO INTERVENE ON A LIMITED BASIS**

Duke Energy Retail Sales (DERS) has not been a party to any of the cases at issue in these proceedings. DERS is in an unfortunate situation because it would not ordinarily seek to intervene in these proceedings. Unexpectedly, DERS finds itself the subject of malicious prosecution by the Ohio Consumers' Counsel (OCC) in front of the Public Utilities Commission of Ohio. Despite the fact that OCC has no evidence of wrongdoing on the part of DERS, OCC persists in seeking confidential proprietary trade secret information from DERS that is irrelevant to the proceedings before the Commission, is not likely to lead to the discovery of admissible evidence, and that is beyond the discovery originally requested by OCC and required to be disclosed by DE-Ohio by the Court's Remand Order.

Further, OCC now asserts that DERS has no due process rights to defend against OCC's unfounded accusations and requests. Under such circumstances it is necessary for DERS to seek intervention in these cases for the limited purpose of defending its rights. OCC asserts that DERS is the alter ego of DE-Ohio and therefore, the Commission should permit discovery into DERS's agreements.²⁷ Contrary to this unfounded assertion, DERS is an independent competitive retail electric service provider, and accordingly must

²⁷ OCC's Argument Against DE-Ohio's Motion for Protection at 13.

assert its rights as an independent entity. DE-Ohio cannot represent DERS. DE-Ohio does not have the same interests as DERS. Further, DERS's appears to be indispensable to these proceedings to the extent that the Commission agrees with OCC.

DERS's participation will not delay these proceedings, indeed its participation may resolve issues associated with information it is alleged to possess. DERS can contribute to the just and expeditious resolution of issues concerning its agreements with customers although its interest in these proceedings is limited to that information. DERS does not concede that O.A.C. 4901-1-11 is applicable to it pursuant to the restrictive jurisdiction over competitive retail electric service set forth in R.C. 4928.05. Further, if the Commission denies OCC's motion to Strike DERS's Motion to Quash, DERS need not intervene in these proceedings.

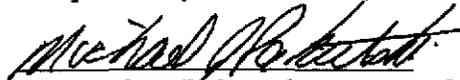
OCC's sole reason for seeking agreements from DERS is the baseless lawsuit filed by an ex-employee of DERS, John Deeds. DERS reminds all stakeholders that a filed lawsuit is not evidence of wrongdoing. No determination has been made in the Deeds litigation, nor will any finding occur for some time. DERS will vigorously defend itself against Mr. Deeds. Otherwise, the only comment DERS will make that is relevant to these proceedings is that the allegation of sham transactions is simply false. DERS gained substantial rights from customers in exchange for Option Expense Payments that have already been disclosed to the Commission in Case No. 04-1323-EL-CRS. It has entered such transactions before and after DE-Ohio's

Market-Based Standard Service Offer case and will continue to make independent business decisions.

The Deeds litigation is therefore, not relevant to the instant proceedings and the Commission should not take it into account. It is completely inappropriate to pursue issues related to the Deeds suit prior to its conclusion.

DERS hereby incorporates by reference its Motion to Quash filed December 20, 2006, and simultaneously files this Motion to Intervene on a Limited Basis. DERS respectfully asks the Commission to grant its Motions.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically on the following parties this 2nd day of January 2007.



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