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Via Courier

Renee Jenkins
Chief, Docketing Division
Public Utilities Commission of Ohio
180 E. Broad Street, 13th Floor
Columbus, Ohio 43215

RECEIVED-DOCKETING DIV
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PUCO

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

Dear Ms. Jenkins:

Enclosed please find an original and fifteen copies of the following document:

Cinergy Corp.'s Reply to OCC's Memo Contra Cinergy Corp.'s Motion to Intervene and Motion in Limine.

Please accept the original and fourteen copies of each document for the Commission's file, and return the remaining copy to me via the individual who delivers the same to you. You may call me if you have any questions concerning this filing.

As always, your consideration is greatly appreciated. Thank you.

Very truly yours,


Michael D. Dortch

Enclosures

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**REPLY TO
THE OHIO CONSUMERS' COUNSEL'S FEBRUARY 13, 2007
MEMORANDUM CONTRA
CINERGY CORP.'S MOTION TO INTERVENE
AND MOTION IN LIMINE**

I. INTRODUCTION

On February 2, 2007, Cinergy Corp. ("Cinergy"), pursuant to O.A.C. Section 4901-1-11, filed a Motion to Intervene in this matter for the limited purpose of protecting its interests regarding confidential information that belongs to it. On February 13, 2007, the Ohio Consumer's Counsel ("OCC") filed a Memorandum Contra Cinergy's Motion to Intervene. Cinergy respectfully asserts that OCC's Memorandum Contra fails to address the fact that Cinergy is entitled to intervene as evidenced by Cinergy's satisfaction of the elements for intervention provided within O.A.C. Section 4901-1-11. Instead, the OCC attacks Cinergy's assertion that it intends to intervene only for the limited purpose of protecting itself and its interests, and instead impugns the company's integrity, motivation and legality of its conduct in

entering contracts.¹ Cinergy contends that the OCC's arguments are inapposite and that it mischaracterizes Cinergy's request for limited intervention. Further, OCC focuses its Memorandum Contra primarily on the merits of Cinergy's Motion in Limine filed February 2, 2007, while failing to provide reasons to the Commission why Cinergy should be precluded from intervening in a limited manner in this matter.

Regarding OCC's Memorandum Contra Cinergy's Motion in Limine, Cinergy asserts that due to the irrelevance of the contract at issue in this case, the Commission should exclude it and related documents from introduction into the record. The OCC has failed to show that this information is relevant to the matter at hand. Cinergy incorporates by reference the factual background of this case as provided in its Motion to Intervene and Motion in Limine.

II. CINERGY'S MOTION TO INTERVENE SHOULD BE GRANTED.

A. The applicable standard for Intervention.

Pursuant to O.A.C. Section 4901-1-11(A), upon timely motion, any person must be permitted to intervene in a proceeding upon a showing that: . . .

(2) The person has a real and substantial interest in the proceeding, and the person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, unless the person's interest is adequately represented by existing parties.

Further, pursuant to O.A.C. 4901-1-11(B), the Commission must consider the following factors in considering a request to intervene:

(1) The nature of the person's interest; (2) The extent to which the person's interest is represented by existing parties; (3) The person's potential contribution to a just and expeditious resolution of the issues involved in the proceeding; and (4) Whether granting the requested intervention would unduly delay the proceeding or unjustly prejudice any existing party.

¹ See OCC's Memo Contra at 9-10.

B. Cinergy satisfies the standards set forth in O.A.C. 4901-1-11 and should be permitted to intervene in this matter.

As it stated in its Motion to Intervene, Cinergy seeks to intervene in this matter for the limited purpose of protecting its interests including, but not limited to, certain confidential information that belongs to Cinergy Corp., including without limitation, a contract between itself and another entity. Cinergy's interest is both real and substantial; it is a party to a confidential contract that it was compelled to produce to OCC. OCC has made perfectly obvious, particularly in its Memorandum Contra, that it will seek to admit that contract into evidence in this matter and use it for purposes that may impede Cinergy's ability to enter into future transactions that Cinergy concludes are in its interests and the interests of members of the public it serves. It is for this purpose that Cinergy wishes to intervene and protect its substantial interests. Contrary to OCC's position, Cinergy's Motion to Intervene for limited purposes is anything but "misleading."

The OCC makes much of the fact that Cinergy contemporaneously filed a Motion in Limine with its Motion to Intervene in an effort to seek a determination of the admissibility of alleged "side agreements" in this case. Apparently, OCC contends that such a request renders Cinergy's participation in this matter far beyond "limited." This is not the case. Cinergy has explicitly represented to this Commission that its interest in this proceeding begins and ends with the protection from public disclosure of its confidential business decisions, including contracts.

OCC avers "[t]hat issue is addressed by a protective agreement between Cinergy and the OCC in which, *inter alia*, the rights reserved to OCC, a public agency, include the right to initiate a process for the PUCO rule on the claims of confidentiality." The meaning of OCC's statement is unclear. Although a protective agreement does in fact exist, OCC itself anticipates seeking a ruling concerning Cinergy's claims of confidentiality. Thus, Cinergy's participation is essential. If the OCC wishes to stipulate that the contract at issue will be subjected to no further

disclosure because OCC does not intend to seek its admission into evidence and if OCC will also stipulate that OCC will not continue to allege any wrongdoing by Cinergy, then Cinergy will happily withdraw its Motion to Intervene. In the more likely event that the OCC does not wish to so stipulate, it becomes clear that Cinergy has a rightful place in this matter.

OCC further contends that Duke Energy, DERS, and Cinergy are merely trying to operate with "one mind" to complicate these proceedings. This is simply untrue. While Duke Energy, DERS, and Cinergy are affiliated, each has a substantial, individual, stake in preventing the further disclosure of its confidential agreements, and none has any legal interest in the contracts of the others. OCC attempts to exclude participation by the very entity with the affected interest.

The OCC cites R.C. § 4903.221 and argues that Cinergy's intervention will "unduly prolong or delay the proceedings" and that Cinergy will not significantly contribute to the full development and equitable resolution of the factual issues of this case. The OCC is incorrect. Cinergy's limited intervention is for one purpose. To ensure its confidential agreement is not abused. Any "delay" in the proceedings created by this single issue would certainly be brief, and would certainly not be undue. Cinergy's interest in this matter is great. Disclosure of its confidential agreements may adversely affect its business interests and its ability to serve the public. It should be granted the right to protect those interests.

Finally, the OCC argues that the combined Motions of the affiliates will result in "cumulative evidence." This concern is misplaced. Cinergy, and each of its affiliates, has asked to be heard only upon the contracts to which they are parties.

III. CINERGY'S MOTION IN LIMINE SHOULD BE GRANTED.

In its Memorandum Contra, OCC argues that Cinergy's Motion in Limine is inappropriate in a proceeding before the PUCO. OCC's assertion is incorrect, and fails to acknowledge that OCC itself has filed with the PUCO a number of Motions in Limine throughout the years. *See,*

e.g. In re Joint Application of Bell Atlantic Corp. and GTE Corp., PUCO Case No. 98-1398-TP-AMT (OCC's Motion in Limine) (June 11, 1999). In fact, even a cursory search of the PUCO database indicates that Motions in Limine have been a part of PUCO procedure for decades. Such motions have been filed for a variety of reasons and granted by the Commission on numerous occasions. While OCC has succeeded in locating one Entry in which the Commission decided that that a Motion in Limine was inappropriate in that particular case, it fails to disclose that such motions have been ruled proper in numerous others.

Furthermore, OCC's argument that motions in limine are only appropriate in jury proceedings is incorrect. Motions in limine are used to protect the moving party from irrelevant, inadmissible, and prejudicial evidence. *In re Montgomery County Sale to DP&L*, PUCO Case No. 88-359-EL-UNC (Entry at 2) (July 6, 1988). Indeed, a jury will not be involved in this case; however, potential undue prejudice to Cinergy is very much a reality in these proceedings.

Moreover, Cinergy cannot allow OCC's attempt to contort the PUCO Staff's position, expressed in Staff's February 7, 2007 Memorandum in Response to the Motions in Limine, to pass without remark. OCC claims that the "Staff does not suggest that the motions in limine should be granted now." OCC fails to acknowledge, however, that Staff encouraged an *in camera* review of the contracts and a determination of their relevance. OCC also fails to acknowledge the Staff's own open skepticism concerning the relevance of these agreements:

It appears to the staff that the existence of these agreements could allow someone to argue either that the motives of those signing the 2004 stipulation are in question or some corporate separation issue. ***Neither argument is related to the matter before the Commission currently.***

It must be remembered that that the purpose of the proceedings now before the Commission is to allow the Commission to pass on a company proposal to establish its market based standard service offer in compliance with R.C. 4928.14. Only information which is pertinent to that proposal is relevant in this proceeding.

An examination of the two possible arguments reveals that neither makes any difference with regard to the currently pending matter.

(Staff's Memo in Response to Motions In Limine, p.2.) (Emphasis Supplied.)

OCC not only mischaracterizes Staff's position, but it also mischaracterizes Cinergy's position. OCC asserts that "Cinergy *appears* to assert that transactions are inhibited when they are brought before deliberative tribunals." "By *extension*, Cinergy's argument implies that Ohio should not concern itself with contracts whose legality . . . is questioned, and no inquiry into contracts should be undertaken by the Commission or reviewed by any court."

This is not the position taken by Cinergy, of course. Despite the fact that Cinergy has stated its position over and over, OCC somehow continues to miss the point. Cinergy's position, once again, is that a certain contract that it produced to OCC in response to a subpoena from OCC, and any testimony related to that contract, *are irrelevant to these proceedings*.

Cinergy has fully articulated sound reasoning for filing its Motion in Limine. Cinergy is a signatory to one contract between itself and a party to these proceedings. That contract did not affect the Commission's November 23, 2004 Entry on Rehearing because the Commission did not adopt the submitted stipulation. Moreover, the contract at issue is *not* among any agreements that the Commission was directed to allow OCC to access. OCC did not seek the contract in discovery until January 2007. Thus, the contract is irrelevant to the second issue identified by the Supreme Court of Ohio. (Whether this Commission should have allowed OCC certain discovery.) The contract is not within the record through which this Commission might support its Orders on Rehearing, and thus it obviously has no relevance to the first of the errors identified by the Court (this Commission's lack of citation to record evidence). As a result, the Cinergy contract can have no relevance to errors identified by the Supreme Court of Ohio.

It is therefore appropriate to determine, now, whether the discovered contracts or related

testimony will be admitted into evidence during these proceedings. Determination of this issue will allow parties concerned with the merits of this case to focus on *relevant* issues. Indeed, determination of this issue may allow Cinergy and DERS to cease participation in this case, thus reducing the likelihood of "complication of the issues" that OCC purports to fear. Thus, the PUCO has the opportunity to save the time and efforts of all parties interested in this matter.

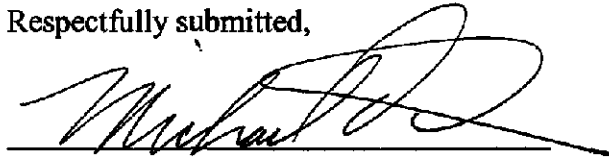
For the reasons discussed herein, Cinergy's Motion in Limine is properly before this Commission. The contract at issue is of no relevance to these proceedings, and Cinergy's Motion in Limine to exclude the contract from these proceedings should be granted.

IV. CONCLUSION

For the foregoing reasons, this Commission should GRANT Cinergy's Motion to Intervene for the limited purpose of protecting from disclosure any confidential information or agreements that are the exclusive property of Cinergy. Cinergy's interests in this matter are real and substantial and those interests are not adequately protected by other parties to these proceedings.

Further, this Commission should GRANT Cinergy's Motion in Limine. The confidential contract entered into by Cinergy and its counterparty and related documents and testimony are irrelevant to this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically on the following parties this 16th day of February 2007.

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