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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM OPPOSING THE  
MODIFICATION OF THE PROTECTIVE ORDER GRANTED ON MARCH 19, 2007 IN  
RESPONSE TO PUBLIC RECORDS REQUEST AND RENEWING OBJECTIONS TO  
ADMISSIBILITY

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On August 8, 2007, the Attorney Examiner issued an Entry stating that on July 27, 2007 a public records request was made at the Public Utilities Commission of Ohio ("Commission") for information pertaining to the above-captioned proceeding regarding:

- (a) "Any and all documents, from January 1, 2003 to the present, in PUCO's possession related to any and all 'Option Agreements,' between Cinergy Retail Services, LLC ('CRS') and any other firm or business entity, arising out of, or in connection with, the rate increase CG&E requested in 2003."
- (b) "Any and all records, from January 1, 2003 to the present, of any communications between PUCO (and/or any PUCO employees) and CG&E, Cinergy, CRS, Duke Energy (and/or their personnel, employees or agents) or any other entity concerning any and all 'Option Agreements,' between CRS and any other firm or business entity, arising out of, or in connection with, the rate increase CG&E requested in 2003."
- (c) "Any and all documents, from January 1, 2003 to the present, related to any 'Option Payments' made by CRS to

any other firm or business entity in connection with any of the 'Option Agreements' referenced in Items [(a) and (b)]."

Entry at 2. The Entry recognizes that on March 19, 2007, the Attorney Examiners granted motions for orders protecting the confidentiality of certain documents, which may be responsive to the public records request of July 27, 2007, and noted also that the grant of the protective order was conditioned on the ability of the Commission to modify the ruling if deemed appropriate. *Id.* at 1-2. Thus, as a result of the public records request, the Entry suggests that "parties may file memoranda discussing why the Commission should or should not modify the protective order granted by the examiners from the bench as it relates to all protected information." *Id.* at 2. Industrial Energy Users-Ohio ("IEU-Ohio"), a party in each of the above-referenced cases, hereby submits its Memorandum urging the Commission to not alter the March 19, 2007 protective order.

Unfortunately, the issue of whether the information sought by the recent public records request should be confidential is not new. Throughout the remand phase in this proceeding, the Office of the Ohio Consumers' Counsel ("OCC") repeatedly attempted to make public the same information at issue in the July 27, 2007 public records request in an effort to distract all parties and the Commission from the more important substantive issues in the cases. IEU-Ohio and several other parties in these proceedings objected to OCC's pursuit with motions to quash, motions for protective orders, memorandums, letters to the Commission and other various pleadings.<sup>1</sup>

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<sup>1</sup> See, *Objections and Motion to Quash the Two Subpoena Duces Tecum Filed by the OCC and For Protective Order Prohibiting Discovery Requests to DERS* (December 20, 2006), *Motion for Protective Order and Memorandum in Support of the Motion to Quash Filed By Duke Energy Retail Sales LLC* (December 20, 2006), *Memorandum in Support of Motion to Quash and Motion for Protective Order of Industrial Energy Users-Ohio* (December 21, 2007), *Duke Energy Ohio's Reply to the Ohio Consumers'*

Although the Attorney Examiners granted the protective treatment for the information at issue and despite the arguments of IEU-Ohio and others, the Attorney Examiners also permitted the information to be used during the evidentiary hearing. The Attorney Examiners deferred ruling on the objections to such use and ultimate admissibility, leaving the question for the Commission at a later time. Tr. Vol. I at 9 (March 19, 2007). The Commission has yet to issue a ruling on the question of admissibility and the public records request has initiated yet another round of pleadings on issues that the Commission could have and should have avoided many months ago. Had the Commission ruled that the information now sought in a public records request was not relevant and not admissible as requested by IEU-Ohio and other parties, the confidential materials would not be part of the public record.

As IEU-Ohio has previously explained, the information which is the object of the public records request is not material or relevant to the issues in the remand phase of these cases. The Ohio Supreme Court decision that produced the remand proceeding included a ruling that said the OCC was entitled to obtain responses to discovery

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*Counsel's Memorandum Contra to Duke Energy Ohio's Motion for Protective Order (January 2, 2007), Duke Energy Ohio's Motion in Limine to Exclude Irrelevant Contracts and Related Documents from these Proceedings (February 2, 2007), Duke Energy Retail Sales' Motion in Limine to Exclude Irrelevant Contracts and Related Documents from these Proceedings (February 2, 2007), Cinergy Corp.'s Motion in Limine to Exclude Irrelevant Contracts and Related Documents from these Proceedings (February 2, 2007), Duke Energy Ohio's Motion for Protective Order and Memorandum in Support (March 2, 2007) Cinergy Corp.'s Motion for Protective Order and Memorandum in Support (March 2, 2007), Ohio Hospital Association Motion for Protective Order to Prevent Public Disclosure and Memorandum in Support (March 2, 2007), Duke Energy Retail Sales' Motion for Protective Order and Memorandum in Support (March 2, 2007), Letter to the Commission by Industrial Energy Users-Ohio (March 2, 2007), Duke Energy Ohio's Reply to the Ohio Consumers' Counsel's Memorandum Contra the Motions for Protective Order of Duke Energy Ohio, Duke Energy Retail Sales, Cinergy Corp. and Kroger, and Memorandum Contra the Motion for a Prehearing Conference (March 15, 2007), Cinergy Corp.'s Reply to OCC's Memorandum Contra Cinergy Corp.'s Motion for Protective Order (March 15, 2007), Duke Energy Retail Sales' Reply to the Ohio Consumers' Counsel's Memorandum Contra the Motions for Protective Order of Duke Energy Ohio, Duke Energy Retail Sales, Cinergy Corp. and Kroger, and Memorandum Contra the Motion for a Prehearing Conference (March 15, 2007), and Industrial Energy Users-Ohio's Reply to Memorandum Contra Motions of Duke Energy Ohio, Inc., Duke Energy Retail Sales, Cinergy Corp., Ohio Hospital Association and Kroger for Protective Orders by the Office of the Ohio Consumers' Counsel (March 15, 2007).*

regarding the existence of side agreements as that existence may relate to the application of the first prong of the Commission's three-prong test as applied to its evaluation of settlements. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 at 28. However, the rate stabilization plan ultimately adopted by the Commission came about as a result of the Commission's rejection of the stipulation presented to the Commission. As there was no stipulation in place, OCC's discovery request, no matter how liberally construed, is neither relevant to the subject matter of this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. The Commission should rule that the information is not relevant or material and put an end to this nonsense.

In the event the Commission is unwilling or unable to rule that the requested information is not admissible, IEU-Ohio continues to object to the admissibility of any such information and the release of any information that is customer-specific, proprietary, or constitutes a trade secret or is otherwise protected by law and protective treatment, regardless of any public records requests, now or in the future. The August 8, 2007 Entry asked parties to address the appropriate treatment specifically of: (a) document titles; (b) identification of persons or entities; (c) dates; (d) payments; (e) quantities and load information; (f) account numbers; (g) other customer identification; and (h) other terms and conditions. Entry at 2. While no information that is customer-specific, proprietary, or that constitutes a trade secret or is otherwise protected by law should be released for any reason, IEU-Ohio strongly objects to the release of the type

of specific information identified above for the reasons discussed previously<sup>2</sup> and herein.

State law recognizes the need to protect information that is confidential in nature, such as the information that is the subject of the July 27, 2007 public records request. Section 149.43(A)(1)(v), Revised Code ("R.C."), states that a public record does not include any record whose release is prohibited by state or federal law. Section 1333.62, R.C. and Rule 4901-1-14(D) Ohio Administrative Code ("O.A.C."), prohibit the release of trade secrets, which Section 1333.61(D), R.C., defines as:

...information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, **financial information, or listing of names, addresses, or telephone numbers, 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), R.C. (emphasis added). Thus, trade secrets are **not** public records that may be subject to public record requests.

The documents and information regarding the customer information that the July 27, 2007 public records request seeks to receive are comprised of competitively sensitive and highly proprietary business financial information falling within the statutory characterization of a trade secret as defined by Section 1333.61(D), R.C. Clearly, any documentation disclosing customer names, account numbers, and the price and supply

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<sup>2</sup> IEU-Ohio hereby incorporates by reference its prior pleadings on this subject.

of electricity contain proprietary data and are confidential. IEU-Ohio asserts that this information is not generally known by the public and is held in confidence in the normal course of business. Public disclosure of this information would jeopardize IEU-Ohio's members' ability to effectively negotiate resolutions of contentious proceedings and the ability to compete. Therefore, IEU-Ohio urges the Commission to deny the public records request to make any such documentation public given the highly confidential and proprietary nature of the contents of the information and to ensure the continued non-disclosure of these proprietary materials.

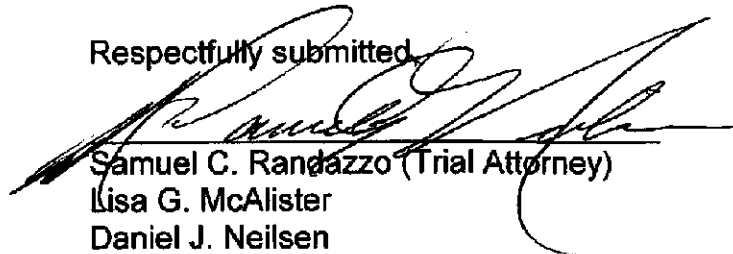
In addition, as pointed out in IEU-Ohio's letter dated March 2, 2007 to Chairman Schriber in this proceeding, even if the information sought to be made public were not a confidential trade secret and subject to the provisions of a protective order, Rule 4901:1-10-24, O.A.C, would operate to preclude an electric distribution utility ("EDU") and others from making this information public without the customer's express written consent, inasmuch as the material contains customer names, account numbers, customer locations, prices and other sensitive information. None of IEU-Ohio's members have provided consent to release any of the information as it pertains to them. As such, given the nature of the information at issue, there is simply no authority for the Commission to grant the July 27, 2007 public records request—or any other future requests for the same information—as it relates to any information, documents, or other materials that includes customer-specific information.

Finally, it is worth reiterating that the mere fact that this information is in the Commission's control is problematic, continues to distract from the substantive issues in the remand proceeding and forces parties to spend resources that could be better used

to address, among other things, the retail electric price and reliability issues associated with Ohio's overall energy restructuring problems. As a result of the continued campaign to make protected and confidential information public, IEU-Ohio urges the Commission to rule that the information is not relevant, not admissible, and to require all parties to these proceedings, including the Commission and its Staff, to return all protected or confidential information to the party from whom they received the information and require each party who is not subject to a protective agreement and who received protected or confidential information to verify to the Commission that they have destroyed such information and have not taken and shall not take any action that may, directly or indirectly, cause such information to be available to the public. These actions are required by the Commission to protect the integrity of its proceedings.

For the reasons explained above, IEU-Ohio urges the Commission to deny the July 27, 2007 public records request and to grant all other relief requested by IEU-Ohio throughout these proceedings regarding the use, admissibility, and protection of all such information.

Respectfully submitted,



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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM OPPOSING THE MODIFICATION OF THE PROTECTIVE ORDER GRANTED ON MARCH 19, 2007 IN RESPONSE TO PUBLIC RECORDS REQUEST AND RENEWING OBJECTIONS TO ADMISSIBILITY** was served upon the following individuals this 16<sup>th</sup> day of August 2007 via electronic transmission.



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