

**BEFORE**  
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The Cincinnati Gas & Electric Company To 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.	) ) ) ) ) ) ) ) ) ) )	Case No. 03-93-EL-ATA
In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Modify Current Accounting Procedures for Certain Costs Associated with The Midwest Independent Transmission System Operator.	) ) ) ) ) ) )	Case No. 03-2079-EL-AAM
In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Modify Current Accounting 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.	) ) ) ) ) ) ) ) ) )	Case No. 03-2081-EL-AAM Case No. 03-2080-EL-ATA
In the Matter of the Application of Duke Energy Ohio, Inc. to Modify Its Fuel and Economy Purchased Power Component of Its Market-Based Standard Service Offer.	) ) ) ) ) )	Case No. 06-1068-EL-UNC
In the Matter of the Application of the Cincinnati Gas & Electric Company to Modify Its Fuel and Economy Purchased Power Component of Its Market-Based Standard Service Offer.	) ) ) ) ) )	Case No. 05-725-EL-UNC
In the Matter of the Application of Duke Energy Ohio, Inc. to Adjust and Set its System Reliability Tracker.	) ) )	Case No. 06-1069-EL-UNC

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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. )

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**MOTION TO STAY DUKE ENERGY'S RATE INCREASES,  
MOTION TO RENDER ALL RATE INCREASES AFTER THE MARKET  
DEVELOPMENT PERIOD  
SUBJECT TO REFUND ON AN ONGOING BASIS,  
AND  
MEMORANDA CONTRA DUKE ENERGY OHIO'S MOTIONS TO EXTEND  
THE ANNUALLY ADJUSTED COMPONENT, TO RECONCILE THE  
ANNUALLY ADJUSTED COMPONENT THROUGH A TRUE-UP, AND TO  
IMPLEMENT THE 2007 SYSTEM RELIABILITY TRACKER SUBJECT TO  
TRUE-UP  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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December 12, 2006

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THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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Pursuant to Ohio Adm. Code 4901-1-12, the Office of the Ohio Consumer's Counsel ("OCC") moves to stay all rate increases in the riders and trackers that resulted from approval by the Public Utilities Commission of Ohio ("PUCO" or "Commission") in the first four case designations in the caption shown above (collectively, the "*Post-MDP Service Case*"). Also pursuant to Ohio Adm. Code 4901-1-12, the OCC moves to render all rate increases for the post market development period ("MDP") for Duke Energy Ohio, Inc. ("Duke Energy" or "Company," including its predecessor entity, the Cincinnati Gas & Electric Company), on an ongoing basis, subject to refund and subject to appropriate interest charges. This pleading is prompted by the Ohio Supreme Court's remand of the *Post-MDP Service Case* to the Commission. In order to prevent irreparable harm to Duke Energy's residential customers, the OCC requests that the

Commission grant the 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,” and along with the Motion to Stay, “Motions”).

Pursuant to Ohio Adm. Code 4901-1-12(B) and (C), in response to Duke Energy filings in Case No. 06-1085-EL-UNC on December 5, 2006, the OCC also submits its Memoranda Contra Duke Energy Ohio’s Motions to Extend the Annually Adjusted Component and to Reconcile the Annually Adjusted Component Through a True-Up (“Motion to Extend AAC” and Motion for AAC True-Up”). As stated in Duke’s Motion to Extend AAC, the OCC objected to an expedited ruling that would permit issuance of a ruling on Duke’s Motion to Extend AAC without the filing of opposing arguments.<sup>1</sup>

Pursuant to Ohio Adm. Code 4901-1-12(B), the OCC also submits its Memoranda Contra Duke Energy Ohio’s Motion to Implement the 2007 System Reliability Tracker Subject to True-Up (“Motion for SRT True-Up,” and collectively with Duke Energy’s other two motions, “Duke Motions”) that responds to a motion filed on December 6, 2006 in Case Nos. 05-724-EL-UNC and 06-1069-EL-UNC.

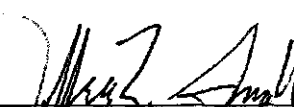
The reasons for granting OCC’s Motions and for denying the Duke Motions are further set forth in the attached memoranda.

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<sup>1</sup> Motion to Extend AAC at 1.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF OCC'S MOTIONS  
AND  
MEMORANDA CONTRA DUKE ENERGY'S MOTIONS**

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**I. HISTORY OF RELATED PROCEEDINGS**

Duke Energy filed an application on January 10, 2003 to modify its non-residential generation rates to provide for market-based standard service offer pricing and to establish an alternative competitively-bid service rate applicable to service after the end of the MDP. On January 26, 2004, Duke Energy submitted proposed rates for generation service, and included proposed rates for residential customers. A *Post-MDP Service Case* proceeded on a consolidated basis. On May 19, 2004, Duke Energy and certain other parties filed a Stipulation and Recommendation in the *Post-MDP Service Case* that adjusted the Company's proposal. The OCC opposed Commission adoption of the Partial Stipulation.

The Commission commenced a hearing that ended on May 28, 2004. During the hearing, an OCC motion to compel the discovery of agreements between Duke Energy and other entities was denied. Following a period for comment, the Commission issued its Order on September 29, 2004 that adopted the Stipulation and Recommendation with

some modifications based on the limitations of Ohio law and Duke Energy accountability for increasing rates.

Several parties, including Duke Energy and the OCC, filed applications for rehearing on October 29, 2004. Duke Energy asked the PUCO to either i) approve its original proposal; ii) approve the Stipulation and Recommendation that the Company supported at hearing (i.e. unaltered by the PUCO); or iii) approve a new proposal having an array of new charges that would not be subject to investigations or hearings. Duke Energy Application for Rehearing at 2 (October 29, 2004). Duke Energy's new proposal was built on the first four conditions placed by the Commission on the terms of the Stipulation and Recommendation, mainly recognizing legal requirements, and introduced new charges and modified previously proposed charges.

In the First Entry on Rehearing, the PUCO adopted (in principal part) Duke Energy's new proposal. The Commission provided for certain Duke Energy filings and verifications before the rate increases provided for in the new proposal could be placed into effect. The Commission provided that rates would be adjusted by means of various riders and trackers, some of which would be updated quarterly. The required filings gave rise to the cases shown in the above caption that are additional to those that were part of the *Post-MDP Service Case*.

The OCC submitted its second application for rehearing, which was denied in a Second Entry on Rehearing dated January 19, 2005. The case was subsequently appealed by the OCC to the Ohio Supreme Court. On November 22, 2006, the Supreme Court issued its opinion in the appeal, ruling that the PUCO failed to compel the discovery of Duke Energy's side agreements and failed to properly support its decision that

determined rates and rate procedures for the period following Duke Energy's market development period.<sup>2</sup> The Court remanded the case for additional consideration by the Commission.

On November 29, 2006, the Commission issued an Entry ("November Entry") in the above-captioned cases<sup>3</sup> that states:

Adjustments to certain riders established through the RSP case are currently pending before the Commission. Specifically, the fuel and economy purchased power component (FPP) is being considered in Case No. 05-725, the system reliability tracker component (SRT) is being considered in Case Nos. 06-1069 and 05-724, and the annually adjusted component (AAC) is being considered in Case No. 06-1085, all as captioned above.

\* \* \*

[A] prehearing conference should be scheduled to discuss the procedure for the hearing in the remanded RSP case [i.e. the *Post-MDP Service Case*], as well as the FPP, SRT, and AAC proceedings. For purposes of discussion, the examiner proposes that a single hearing be held in all of these proceedings. . . .<sup>4</sup>

The November Entry also suspended further development of cases that involve the FPP, SRT, and AAC charges that stem from the results of the Post-MDP Case.<sup>5</sup>

Noting the November Entry, Duke Energy filed its Motion to Extend AAC on December 5, 2006. The Duke Motion noted that the Commission previously required that "DE-Ohio must apply for approval of an AAC market price effective January 1,

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<sup>2</sup> *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 at ¶95 ("*Consumers' Counsel 2006*").

<sup>3</sup> The Commission's November Entry did not include Case No. 06-1068-EL-UNC regarding proposed FPP rate increases for 2007. The instant pleading adds Case No. 06-1068-EL-UNC because of the FPP's importance to the Company's standard service offer that is partly the subject of the November Entry.

<sup>4</sup> Entry at 2-3.

<sup>5</sup> The November Entry also ordered Duke to "disclose to OCC the information requested in discovery with regard to side agreements." November Entry at 4.

2007, and each year thereafter.”<sup>6</sup> The Duke Motion seeks approval of tariffs that would continue the existing AAC charge in 2007.<sup>7</sup> Duke Energy also filed its Motion for AAC True-Up on December 5, 2006 in which Duke Energy seeks “to reconcile the AAC to January 1, 2007, through a true-up....”<sup>8</sup> Duke Energy filed its Motion for SRT True-Up on December 6, 2006.

**II. THE COMMISSION SHOULD STAY ALL RATE INCREASES THAT RESULTED FROM THE REMANDED *POST-MDP SERVICE CASE* TO PREVENT RESIDENTIAL CUSTOMERS FROM SUFFERING IRREPARABLE HARM.**

**A. Irreparable Harm will be Suffered by Residential Customers in the Absence of Action by the Commission.**

Duke Energy’s residential customers will be irreparably harmed by the continued implementation of the post-MDP rate increases while this case is pending before the Commission on remand from the Ohio Supreme Court. The injury to Duke Energy ratepayers is irreparable unless the OCC’s Motion is granted because there likely is no mechanism, under Ohio law, that will permit the retroactive refund of overpayments by customers where such payments are not made subject to refund.<sup>9</sup> As noted by the Ohio Supreme Court:

Where the charges collected by the carrier were based upon rates which had theretofore been established or approved by

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<sup>6</sup> Duke Motion at 3 (December 5, 2006), citing *Post-MDP Service Case*, Entry on Rehearing at 9 (November 23, 2004). The Commission’s Entry on Rehearing refers back to the proposal contained in Duke Energy’s Application for Rehearing.

<sup>7</sup> Duke Motion at 1.

<sup>8</sup> Motion for AAC True-Up at 5.

<sup>9</sup> See, e.g., *Lucas County Commissioners v. Public Util. Comm.*, 80 Ohio St.3d 344 (1997); *Keco Indus. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254 (1957), ¶ 2 of syllabus.

the public authority, the fact that such rates are subsequently reduced affords no right of action for damages or for the recovery of the difference between the old and new rates upon the ground that the prior rate was unreasonable.<sup>10</sup>

Without rendering increased rates subject to refund, the continued implementation of the post-MDP rate increases will cause Duke Energy's residential customers to suffer irreparable harm in the event that the increased rates are not re-instituted after a record is established and new post-MDP rates are set on remand.

**B. The Commission Should Not Cede Review of Duke's Standard Service Offer Rates.**

The November Entry recognizes that adjustments to the FPP, SRT, and AAC charges that stem from the *Post-MDP Service Case* are under review, and that action regarding those reviews should be adjusted pending the hearing required by the remand ordered in *Consumers' Counsel 2006*. The November Entry stayed the current procedural schedules in cases that involve the FPP, SRT, and AAC.<sup>11</sup> The Commission's proposed approach to hearing the case on remand and related cases on a consolidated basis is consistent with not increasing rates, and establishing Duke Energy's market based standard service offer in a consolidated case. The Commission stated in the entry in which the PUCO initially approved standard service rates in the *Post-MDP Service Case* that "[i]t is not in the public interest to cede [the Commission's] review."<sup>12</sup> Rates should not increase without that review, and that review should include all proposed

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<sup>10</sup> *Keco Industries, Inc. v. Cincinnati and Suburban Bell Tel. Co.*, (1957) 166 Ohio St. 254, 258, citing 9 Am. Jur. 542, Sec. 175.

<sup>11</sup> November Entry at 3.

<sup>12</sup> *Post-MDP Service Case*, Entry on Rehearing at 10 (November 23, 2004).

changes from current standard service offer rates in light of the remand in *Consumers' Counsel 2006*.<sup>13</sup>

### 1. Fuel and Purchased Power

The FPP rate is the subject of Case No. 05-725-EL-UNC and Case No. 06-1068-EL-UNC that are pending before the Commission, and Case No. 06-1068-EL-UNC contains a filing to increase the FPP charge that should not be permitted. The 06-1068-EL-UNC docket was not mentioned in the November Entry. However, on December 1, 2006, Duke Energy used the latter docket to propose a first quarter 2007 FPP rate that would increase the existing rate for residential customers by 67.1 percent over the fourth quarter 2006 charge.<sup>14</sup> Previous quarterly rates have been implemented without a Commission order or entry. Under circumstances of the combined review contemplated by the November Entry, the increased FPP charge for the first quarter of 2007 would be inappropriate.

### 2. System Reliability Tracker

The SRT rate is the subject of Case No. 05-724-EL-UNC and Case No. 06-1069-EL-UNC, pending cases that were both mentioned by the November Entry. On December 1, 2006, Duke Energy proposed an increased rate for first quarter 2007 in the form of new SRT charges (Case No. 05-724-EL-UNC). However, the appropriateness of a 2007 SRT rate -- and its permitted components -- are the subject of Case 06-1069-EL-

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<sup>13</sup> The Commission's review should be extensive. Underscoring this point, the agreements apparently entered into by Duke Energy and its affiliates with regard to the last plan proposed by Duke Energy in the *Post-MDP Service Case* is the subject of a complaint filed in the United States District Court for the Southern District of Ohio that alleges various violations of regulatory and employment law. *Deeds v. Duke Energy Corp.*, Case No. 1:06CV835, Complaint (December 7, 2006).

<sup>14</sup> *In re Duke Energy FPP Rate for First Quarter 2007*, Case No. 06-1068-EL-UNC, Schedule 1, Page 1 of 8 ("1.2405" compared to tariffed 0.7424).

UNC whose hearing was indefinitely continued in the November Entry.<sup>15</sup> The institution of an SRT charge for 2007 is inappropriate absent a hearing and Commission review of Duke Energy's pending application for renewed imposition of a SRT charge. The SRT charge is all the more inappropriate pending review of the standard service rates on remand from *Consumers' Counsel 2006*.

### 3. Infrastructure Maintenance Fund

The Infrastructure Maintenance Fund ("IMF") was approved for an increase in 2007 from four to six percent of "little g" legacy generation rates as the result of the *Post-MDP Service Case*.<sup>16</sup> The IMF is not the subject of a pending case before the PUCO, but the Ohio Supreme Court's opinion in *Consumers' Counsel 2006* emphasized that the charge was approved "without reference to record evidence and without explanation."<sup>17</sup> Duke Energy should not be permitted to increase the IMF charge for January 2007 until the Company's market based standard service offer is reviewed.

#### C. Precedent Supports a Stay.

The OCC requests that the Commission grant its Motion for Stay pending the PUCO's decision and implementation of rates in the case remanded by the Ohio Supreme Court that followed the *Post-MDP Service Case*. The stay on increases will provide clarity regarding the permissibility of the charges proposed by Duke Energy.

A request to stay an entire proceeding pending an appeal -- not merely rate increases that were not upheld and were remanded by the Ohio Supreme Court as

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<sup>15</sup> November Entry at 3.

<sup>16</sup> *Post-MDP Service Case*, Entry on Rehearing at 8 (November 23, 2004).

<sup>17</sup> *Consumers' Counsel 2006* at ¶29.

presented under present circumstances -- has previously been granted by the Commission pending the results of an appeal. In *In re COI of Ameritech Relative to Minimum Telephone Service Standards*, Case No. 99-938-TP-COI, the Commission granted Ameritech's June 26, 2002, motion to stay portions of the June 20, 2002 Entry on Rehearing.<sup>18</sup> Ameritech Ohio 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.<sup>19</sup> Having the *Post-MDP Service Case* actually on remand from the Ohio Supreme Court, the Commission should take similar action in the above-captioned cases and stay the increases that stem from the *Post-MDP Service Case*.

The Commission has also stayed proceedings on its own volition under circumstances where additional review was contemplated. In *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., the Commission implemented a stay pending clarity from the Federal Energy Regulatory Commission ("FERC"). In that case, the Commission stated:

The Commission recognizes through its participation in several FERC dockets that there remains many unresolved issues \* \* \*. Therefore, we believe that all further activity, including discovery, \* \* \* should be stayed until more clarity is achieved regarding matters pending at FERC and elsewhere.<sup>20</sup>

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

<sup>19</sup> *Id.* at 5.

<sup>20</sup> *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).



There are more compelling reasons for the Commission granting a stay to rate increases in this case. The Ohio Supreme Court has ordered the Commission to reconsider certain aspects of its decision in the *Post-MDP Service Case*. Therefore, the Commission should stay any rate increases while the PUCO considers the above-captioned cases on a consolidated basis.

### **III. THE COMMISSION SHOULD DENY THE DUKE ENERGY MOTIONS**

#### **A. The Commission Should Deny Duke Energy's Motion to Extend AAC.**

Duke Energy's Motion to Extend AAC fails to recognize the Company's burden of proof regarding its proposed AAC charges. In the Motion to Extend AAC, Duke recognizes that it must gain Commission approval before placing AAC charges into effect in 2007.<sup>21</sup> In the proceeding that is currently pending (Case No. 06-1085-EL-UNC), the Company bears the burden of proof. At the hearing in that case, according to statute, "the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility."<sup>22</sup>

Duke's Motion seeks immediate approval of charges whose level will be scrutinized by the Commission for the first time in Case No. 06-1085-EL-UNC. The Company's only argument is that the AAC charge was an "integral part of DE-Ohio's MBSSO," the same standard service offer that must be reconsidered on remand from the Ohio Supreme Court. Duke Energy's effort to support this argument rests upon the bald,

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<sup>21</sup> Duke Motion to Extend AAC at 3 (December 5, 2006).

<sup>22</sup> R.C. 4909.18.

untested assertion that “[u]ltimately consumers will suffer” if an AAC charge is not imposed as proposed by the Company.<sup>23</sup> These matters have not been addressed at hearing, and the Company has certainly not met its burden at this juncture of the proceeding.

Duke Energy’s Motion to Extend AAC seeks an unsupported and inappropriate AAC charge without mentioning the Company’s overall level of charges for its standard service offer. Duke Energy seemingly expects increases in its FPP, SRT, and IMF charges (as stated above) while the case proceeds on remand from the Ohio Supreme Court, but proposes to set the AAC for residential customers at 6 percent of “little g” legacy generation rates without having justified such a level at a hearing.<sup>24</sup> Leaving aside that the OCC objects to the AAC charge itself, the OCC’s pre-filed testimony in Case No. 06-1085-EL-UNC protests both the Company’s proposed increase to its AAC charge as well as the level that was charged in 2006 pursuant to the results of the *Post-MDP Service Case*.<sup>25</sup> The Company should not be permitted to raise some portions of its standard service offer rates while imposing an AAC charge that Duke Energy has not justified at a hearing.

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<sup>23</sup> Duke Motion to Extend AAC at 4-5.

<sup>24</sup> Duke Motion to Extend AAC, Attached Proposed Tariffs (i.e. identical to those set in the *Post-MDP Service Case*, Entry on Rehearing at 9 (November 23, 2004).

<sup>25</sup> *In re Duke Energy’s Proposed AAC Rate Increases*, Case No. 06-1085-EL-UNC, Haugh Pre-filed Testimony at 8 (November 28, 2006).

**B. The Commission Should Deny Duke Energy's Motions Regarding True-Ups.**

**1. Annually Adjusted Component**

The Commission should not, at this preliminary stage following remand of the *Post-MDP Service Case*, approve Duke Energy's Motion for AAC True-Up. Duke Energy presumes, without support at this preliminary stage, that the Company's standard service offer proposals and their implementation in the cases dealing with various riders and trackers will be entirely vindicated upon reconsideration of the *Post-MDP Service Case*.

The Commission's orders and entries in the *Post-MDP Service Case* itself do not permit the true-up proposed by Duke Energy. In its Motion to Extend AAC, the Company acknowledges that the approved procedure is different than that proposed in Duke's motion: "DE-Ohio must apply for approval of an AAC market price effective January 1, 2007, and each year thereafter."<sup>26</sup> Once again the Company's only argument is that the AAC adjustments were "integral components of DE-Ohio's MBSSO," the same standard service offer that must be reconsidered on remand from the Ohio Supreme Court.<sup>27</sup> Once again, Duke Energy's effort to support this argument rests upon the bald, untested assertion that "[u]ltimately consumers will suffer" if an AAC charge is not imposed as proposed by the Company.<sup>28</sup> These matters should be addressed at a hearing of the *Post-MDP Service Case* on remand.

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<sup>26</sup> See footnote 6, *supra*.

<sup>27</sup> Duke Motion for AAC True-Up at 4.

<sup>28</sup> *Id.* at 5.

## 2. System Reliability Tracker

The Commission should not approve Duke Energy's proposed new SRT charges and should not grant Duke Energy's Motion for SRT True-Up. The Motion for SRT True-Up proposes to charge rates in 2007 that are the same as those submitted by Duke Energy on December 1, 2006 in Case No. 05-724-EL-UNC. Duke Energy's projected SRT costs for 2007 are significantly above those actually incurred during 2006.<sup>29</sup> The 2006 experience, where Duke Energy's projected SRT costs vastly exceeded actual costs, may have only been partly corrected in the Company's projections for 2007. This would have been a matter examined in the hearing that has been indefinitely continued.<sup>30</sup>

The more reasonable approach to the SRT is to charge a rate consistent with the actual 2006 experience -- i.e. a rate that reflects only the expiration of the credits that were applied in the last part of 2006 that corrected for Duke Energy's large over forecasting of SRT costs. Duke Energy's proposal in its Motion for SRT True-Up to increase the SRT charges above the 2006 actual experience should be denied.

## **IV. THE COMMISSION SHOULD RENDER ALL INCREASED RATES AFTER THE MARKET DEVELOPMENT PERIOD SUBJECT TO REFUND ON AN ONGOING BASIS.**

The Commission should prevent harm from occurring by ordering, on an ongoing basis, Duke Energy to collect all existing rate increases that were approved in the *Post-MDP Service Case* subject to refund and subject to appropriate interest charges. Such an

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<sup>29</sup> The numerical support is provided by the testimony of Duke Energy Wathen's testimony dated June 1, 2005 and November 1, 2006.

<sup>30</sup> November Entry at 3.

order should be issued for the period ending at the time the Commission approves and puts into effect rates that replace those that were approved in the *Post-MDP Service Case*.

The practice of collecting rates subject to refund is not foreign to Commission policies and practices. The Commission has used this approach to permit it to explore the reasonableness of rates in light of events that occurred after the issuance of its orders. For instance, the Commission granted rehearing and ordered rates to be collected subject to refund in a rate case filed by the Columbus & Southern Ohio Electric Company.<sup>31</sup> In that rate case, one week after the issuance of the PUCO's rate order, the Nuclear Regulatory Commission issued an Order that suspended construction at the Zimmer Nuclear Power Plant ("Zimmer"). The original Opinion and Order included a rate base allowance for construction work in progress ("CWIP") for Zimmer.<sup>32</sup>

In its order setting the rehearing, the Commission approved the Company's filed tariffs but expressly found the portion of the increase granted in the Opinion and Order attributable to Zimmer CWIP "should be made subject to refund, pending a rehearing on the CWIP issue."<sup>33</sup> A rehearing was held and the Commission ordered that all of the Zimmer costs should be excluded from CWIP. The Commission ordered the Company to file tariffs reducing the total revenue requirements by approximately \$13 million.<sup>34</sup> The Company appealed and sought a stay of the Commission's Order on Rehearing from the

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<sup>31</sup>*In the Matter of the Application of Columbus & Southern Ohio Electric Company for Authority to Amend and Increase Certain of its Rates and Charges for Electric Service, Amend Certain Terms and Conditions of Service and Revise its Depreciation Accrual Rates and Reserves*, Case No. 83-1058-EL-AIR, Entry (November 17, 1982).

<sup>32</sup> *Id.*, Opinion and Order at 8-14 (November 5, 1982).

<sup>33</sup> *Id.*, Entry at 1 (November 17, 1982).

<sup>34</sup> *Id.*, Order on Rehearing (March 16, 1983).

Ohio Supreme Court. The Supreme Court granted the stay but subsequently affirmed the Commission's denial of a CWIP allowance.<sup>35</sup> Refunds of the revenues attributable to Zimmer -- collected from customers, subject to refund, since the issuance of the Entry on Rehearing -- were ordered by the Commission with interest.<sup>36</sup>

Another example where the Commission has collected rates subject to refund involved the Ohio Utilities Company.<sup>37</sup> After a rate order was issued,<sup>38</sup> legislation was enacted that changed Ohio's ratemaking formula. The Commission opened an investigation to determine if the previously established rates were still reasonable in light of the new law.<sup>39</sup> The Commission determined that the rates were excessive, taking into account the new law, and ordered the Company to withdraw its tariffs and file new lower rates consistent with the PUCO's findings.<sup>40</sup> The Company sought a stay of the

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<sup>35</sup> *Columbus & Southern Ohio Electric Co. v. Public Util. Comm.*, (1984) 10 Ohio St.3d 12.

<sup>36</sup> *In the Matter of Columbus & Southern Ohio Electric Co.*, Case No. 81-1058-EL-AIR, Order on Rehearing at 3 (May 1, 1984).

<sup>37</sup> *In the Matter of the Commission's Investigation of the Current Rates, Revenues, Rate Base, and Rate of Return of the Ohio Utilities Company*, Case No. 77-1073-WS-COI, Entry at 2 (June 7, 1978).

<sup>38</sup> *In the Matter of the Ohio Utilities Co. Application for an Increase in Rates*, Case No. 79-529-WS-AIR, Opinion and Order (January 18, 1977).

<sup>39</sup> *In the Matter of the Commission's Investigation of the Current Rates, Revenues, Rate Base, and Rate of Return of the Ohio Utilities Company*, Case No. 77-1073-WS-COI, Entry (September 7, 1977).

<sup>40</sup> *In the Matter of the Commission's Investigation of the Current Rates, Revenues, Rate Base, and Rate of Return of the Ohio Utilities Company*, Case No. 77-1073-WS-COI, Opinion and Order (May 18, 1978).

Commission's order, pending further review, which was granted under circumstances where the utility was required to collect rates subject to refund.<sup>41</sup>

In circumstances relating to the above-captioned cases, the Ohio Supreme Court determined that the rates approved in the *Post-MDP Service Case* were not properly considered, and remanded that case to the PUCO for further consideration. The Commission should not permit Duke Energy to proceed with the Company's charges from the *Post-MDP Service Case* -- charges that could irreparably harm residential customers -- unless all increases above those in effect during the MDP are rendered subject to refund on an ongoing basis. Only in this way can Duke Energy's customers receive protection from the collection of rates while the Commission considers these cases on remand.

## V. CONCLUSION

The OCC respectfully requests that the Commission grant its Motions. In the interests of Duke Energy's approximately 600,000 residential customers, the Commission should stay all rate increases in the Company's standard service offer. To protect customers from irreparable harm, the increases in rates that resulted from the *Post-MDP Service Case* should be subject to refund and subject to appropriate interest charges, on an ongoing basis, pending the Commission's reconsideration of the results on remand for the *Post-MDP Service Case*. Furthermore, the Commission should deny the Duke

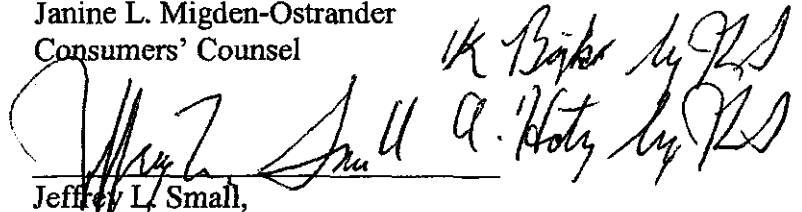
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<sup>41</sup> In the Matter of the Commission's Investigation of the Current Rates, Revenues, Rate Base, and Rate of Return of the Ohio Utilities Company, Case No. 77-1073-WS-COI, Entry (June 7, 1978). The utility was also required to file an "undertaking" consisting of a promise to refund any amount collected for service rendered after the date of the Entry by a method later determined by the Commission (either cash refund or as a credit to future bills). The undertaking was required to be under oath by an officer of the company and was to include a promise to include interest. The amount ordered for refund was the amount collected for service in excess of those rates ultimately determined to be lawful. *Id.*

Energy Motions that would implement, without a hearing, an AAC charge for customers to pay in 2007 and institute an increase in the SRT charge that customers are paying.

Respectfully submitted,

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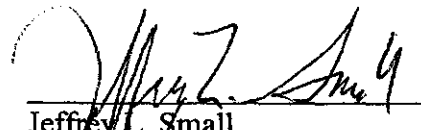
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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the Office of the Ohio Consumers' Counsel's *Motion to Stay and Motion Regarding Refunds and Memoranda Contra* were served on the persons stated below via First Class U.S. Mail, postage prepaid, this 12th day of December 2006.

  
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