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Office of the Ohio Consumers' Counsel

Your Residential Utility Advocate

Janine L. Migden-Ostrander
Consumers' Counsel

December 13, 2006

Ms. Renee Jenkins
Director, Docketing Division
Pubic Utilities Commission of Ohio
180 East Broad Street, 13th Floor
Columbus, Ohio 43215-3793

Re: Remand; Duke Energy Ohio, Case Nos. 03-93-EL-ATA, 03-2079-EL-AAM, 03-2081-EL-AAM, and 03-2080-EL-ATA

Dear Ms. Jenkins:

I write on behalf of the Office of the Ohio Consumers' Counsel ("OCC") in response to a letter filed in the above-captioned docket by Duke Energy Ohio, Inc. ("Duke Energy") on December 7, 2006. In the letter, Duke Energy recites a short history of Case No. 03-93-EL-ATA[1] that resulted in a decision by the Public Utilities Commission of Ohio ("Commission" or "PUCO") that the Office of the Ohio Consumers' Counsel ("OCC") appealed to the Ohio Supreme Court. As stated in Duke Energy's letter, the Ohio Supreme Court instructed the Commission, in a decision rendered on November 22, 2006, to compel disclosure of side agreements that the Commission previously allowed Duke Energy to keep from OCC. *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789. The OCC believes that Duke Energy has failed to meet its obligation to disclose side agreements under the dictates of the Supreme Court's decision.

The PUCO, in paragraph 9 of its Entry dated November 29, 2006, required that side agreements be turned over to OCC. Duke Energy, in the fourth and fifth paragraphs of its letter, responded to the rulings of the Ohio Supreme Court and the PUCO by stating that it will disclose one agreement[2] to OCC, and will not disclose other agreements between Duke Energy affiliates and customers. Duke Energy explained in its letter that:

> Duke is aware that certain of its affiliates, none of whom are parties to Case No. 03-93-EL-ATA *et. al.*, entered into agreements with certain customers, or prospective customers, those agreements are confidential business transactions

[1] Case No. 03-93-EL-ATA was one of four cases, those shown in the caption to this letter, that were heard on a consolidated basis.

[2] Duke Energy's apparent effort to serve the OCC by U.S. Mail on December 7, 2006 failed, and the agreement (with the City of Cincinnati as party) was provided by e-mail transmission on December 11, 2006.

> with counter parties who–for the most part–were not parties to these proceedings, and who are not regulated by the Commission. Duke Energy Ohio views any such agreements as outside of the scope of this proceeding and specifically outside the scope of the OCC's document request.

The OCC believes that Duke Energy has failed to meet its obligation to disclose under the dictates of the Court and the PUCO, and has failed to grasp the significance of the Court's decision.

Duke Energy's nondisclosure in light of the rulings by the Court and the PUCO is all the more disconcerting considering the averments about the side agreements contained in a Complaint filed against Duke Energy last week by a former Duke Energy employee. The Complaint was filed by John Deeds on December 7, 2006 (the same day Duke Energy chose to docket its letter) in federal district court against Duke Energy and its marketing affiliate, Duke Energy Retail Sales LLC ("DERS").[3] Duke Energy's vague language in its filed letter regarding parties to the agreements being "not regulated by the Commission" is patently untrue with regard to DERS. Furthermore, Mr. Deeds claims in his Complaint that Duke Energy used DERS agreements with customers to circumvent the requirement that Duke Energy properly charge its customers for electric service and that DERS was used as a veil to conceal agreements that were sought in connection with the litigation before the PUCO.[4] The information in the Complaint suggests that, far from Duke Energy's claim in its letter that the affiliate agreements are "outside the scope" of this case, the agreements that Duke Energy is withholding from OCC should be placed *under a microscope* in this case.

Duke also attempts to circumvent the rulings by the Ohio Supreme Court and this Commission by depending upon its claim that the entities with whom Duke's affiliate contracted were not intervenors in the case. The agreements mentioned in Mr. Deed's Complaint include members of the Industrial Energy Users ("IEU") and the Ohio Energy Group ("OEG"),[5] each of which represents a group of industrial customers. Duke Energy's attempt to use the distinction between groups and their members is an ill-conceived attempt to evade the mandate of the Supreme Court. The parties to these transactions should not be permitted to hide and conceal relevant information to which the public is entitled.

The side agreements that were the subject of debate before the Court have the potential to see the light of day in federal court, where Duke Energy is now a defendant. The issue for the Commission is whether the light will be shed on Duke Energy activities in cases

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[3] The Complaint is attached to this letter.
[4] Attached Complaint, ¶13 ("PUCO litigation").
[5] Id., ¶¶7-8.

that deal with huge sums of money charged to Ohio's retail electric customers. In response to the Court's ruling and in fulfillment of the PUCO's November Entry, the Commission should let the light of day shine in this case. Duke Energy should be required to fully disclose all side agreements.

Very truly yours,

Jeffrey L. Small,
Assistant Consumers' Counsel

Attachment
Cc: Parties of Record

Randolph H. Freking (#0009158)
Elizabeth S. Loring (#0076542)
Trial Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN DEEDS 4507 Ravenwood Ct. Cincinnati, OH 45244 Plaintiff, v. **DUKE ENERGY CORPORATION** c/o Duke Energy Ohio, Inc. 139 East Fourth Street Cincinnati, OH 45201 and **DUKE ENERGY RETAIL SALES, LLC** 139 East Fourth Street Cincinnati, OH 45201 Defendants.	CASE NO. 1:06 CV 835 (Judge J. DLOTT) **COMPLAINT FOR UNLAWFUL RETALIATORY EMPLOYMENT TERMINATION IN VIOLATION OF OHIO PUBLIC POLICY AND OHIO WHISTLEBLOWER LAW** **JURY DEMAND ENDORSED**

NATURE OF ACTION

Plaintiff brings this action because he was abruptly terminated after questioning Defendants regarding certain agreements that Plaintiff believed, and continues to believe, are "sham transactions" designed to allow Defendant Duke Energy Corporation, formerly Cinergy Corporation, to push a significant rate increase through the Public Utilities Commission of Ohio ("PUCO") by providing a kickback to large industrial users that is equivalent, or nearly so, to the amount of the rate increase for those particular users in violation of Ohio law. Plaintiff believes that Defendants "bought" the cooperation of major users to allow it to gain approval of its proposed increases. Plaintiff was advised by superiors not to put his concerns in writing because it would cause "big trouble," since Defendants had successfully refused to make public these agreements in connection with the administrative litigation over the proposed rate increase. The Ohio Supreme Court recently upheld most of the approved rate

increases, but questioned the PUCO's failure to force Defendants to turn over these side agreements. In effect, Plaintiff believes Defendants defrauded the PUCO and the Ohio Supreme Court by entering into unlawful, private agreements with certain large industrial users, and unlawfully terminated him in violation of Ohio public policy after he questioned the lawfulness of the side agreement. In 2005 alone, Defendants paid out $20,000,000 as part of this scheme.

PARTIES

1. Plaintiff John Deeds is a citizen and resident of the State of Ohio.

2. Defendant Duke Energy Corporation is a foreign corporation doing business in Hamilton County, Ohio. Defendant is an employer within the meaning of state law.

3. Defendant Duke Energy Retail Services, Inc. is a foreign corporation doing business in Hamilton County, Ohio. Defendant is an employer within the meaning of state law.

NATURE OF CAUSE OF ACTION

4. This action is filed by Plaintiff John Deeds, who began working for Defendants as a Customer Service Clerk in 1990. During Plaintiff's nearly sixteen-year tenure with Defendants, Plaintiff completed his Bachelor's Degree, he obtained a Masters Degree, and he achieved the position of a director while successfully creating over twenty million dollars of value for Defendants. Plaintiff brings this action because he was terminated for reporting possible unlawful business practices conducted by Defendants.[1]

5. In January 2004, Cinergy Corp. created Cinergy Retail Sales, LLC ("CRS")[2], which is an unregulated competitive retail electric service provider. Although created as a competitive service provider, CRS does not offer electric services and had neither revenue nor sales as of Plaintiff's

[1] Most of the transactions outlined in this Complaint took place during the merger and acquisition between Cinergy Corp. and Duke Energy Corp, which was announced May 9, 2005. Therefore, although this Complaint will refer to Cinergy, through the merger, the corporation is currently owned and succeeded by Duke Energy Corp. Duke Energy Corp. also participated in Plaintiff's termination.

[2] Currently Duke Energy Retail Sales, LLC.

termination date of May 1, 2006. Personnel doing business for CRS are employed by Cinergy, and both CRS and Cinergy operate at 139 East Fourth Street. CRS's primary function is to process transactions on behalf of Cinergy. Therefore, CRS is an alter ego of Cinergy.

6. On January 26, 2004, Cincinnati Gas & Electric ("CG&E")[3] applied to the Public Utilities Commission of Ohio ("PUCO") to authorize a rate increase CG&E's "Rate Stablization Plan."

7. In 2004, CRS entered into Option Agreements with certain major commercial and industrial customers. The Option Agreements provide that CRS will pay the companies the equivalent of certain defined charges paid to CG&E. The outlined charges represent the rate increases requested by CG&E and approved by the PUCO in 2004.[4] In effect, CRS agreed to pay certain members of the IEU the exact amount of the rate increase these companies paid to CG&E - a company owned by Cinergy Corp. Because the contracts were created by CRS, an unregulated affiliate of Cinergy, the Agreements were not made public. Discovery of these agreements during the PUCO litigation was refused by Defendants, and Defendants denied knowledge of such agreements during the Oral Argument before the Ohio Supreme Court early in 2006.

8. Between the original filing date of CG&E's Rate Stabilization Plan and 2005, CG&E faced significant opposition to the proposed rate increases; in fact, originally the companies that ultimately became counterparts to the Option Agreements vehemently opposed CG&E's Rate Stabilization Plan by way of their membership in the Ohio Energy Group ("OEG") and the Industrial Energy Users ("IEU"). However, in mid to late 2004, the IEU and OEG suddenly and unequivocally changed their stances supporting CG&E's Rate Stabilization Plan.

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[3] Currently Duke Energy Ohio, Inc.

[4] The rate increases were the subject of the Ohio Supreme Court Case No. 05-0946. The Court issued a decision and questioned the PUCO's refusal to order the production by Defendant of certain "side agreements." Plaintiff believes these Option Agreements referenced in this paragraph are some of the side agreements.

9. In 2005 alone, although CRS did not supply any electric services, CRS paid out approximately $20,000,000 (twenty million dollars) in Option Payments to the companies.

10. Once Plaintiff was assigned the responsibility of processing the Option Payments, he consistently expressed concern for the legitimacy of the transactions conducted between CRS and the companies. In August, 2005, Plaintiff contacted Timothy Duff, who reported directly to Jim Gainer, Vice President of Regulatory and Legislative Strategy who also was one of the originators of the Option Agreements. Plaintiff questioned the origin of the Option Payments. In September, 2005 Plaintiff e-mailed Duff regarding his exact duties in processing the checks.

11. On January 10, 2006, Plaintiff again contacted Duff inquiring whether the Option Agreements were public, or whether they "ha[d] not seen the light of day...."

12. In a February e-mail to Duff, Plaintiff reported that he thought the Option Payments might be "sham transactions."

13. After receiving Plaintiff's e-mail, Duff commanded that Plaintiff call him "ASAP." During the conversation with Duff, Duff admonished Plaintiff not to put such concerns in writing, that CRS had successfully avoided a subpoena in the past, and that Plaintiff's e-mail would cause "big trouble" internally. The subpoena in the past referred to the PUCO litigation.

14. After it became clear to Plaintiff that Defendants did not condone reporting possible illegal transactions, Plaintiff refused to sign off on the Payments and did not inquire further into the situation . The Managing Director of Commercial Asset Management and the Vice President of and General Counsel of the Commercial Business Unit signed off on the Agreements after Plaintiff refused.

15. Duff further demanded that Plaintiff process the transactions immediately "because the option checks need[ed] to be received by the IEU member customers by Wednesday [February 15, 2006]." Less than three months after this last report, Plaintiff was terminated.

16. Ohio law prohibits public utilities from granting reduced rates to consumers or from extending a privilege to some consumers without extending the same to all consumers.

17. Ohio law prohibits a public utility from directly or indirectly remitting "any rate, rental, toll or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified...and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service."[5]

18. By paying certain companies an amount equal to the rate increase charged by CG&E, Defendants essentially offered a reduced rate to certain energy consumers without extending the offer to all energy consumers.

19. In the interest of furthering competition in the newly formed competitive retail electric service market, Ohio statutorily deters the formation of anticompetitive subsidies of noncompetitive retail electric service providers, such as Cinergy. Moreover, Ohio ensures that electric retail consumers are protected against "unreasonable sales practices, market deficiencies, and market power."[6] Cinergy defied this policy when it utilized CRS because the two companies combined form a monopolistic energy source creating a market deficiency and imbalanced market power.

20. The utilization of CRS and the transactions conducted by it, led Plaintiff to question its legality; an action which ultimately led to his termination.

21. By terminating Plaintiff and deterring him from reporting his concerns, Defendants created a corporate culture that favors turning a blind eye to possible illegal transactions.

22. Defendants violated Ohio law by granting a privilege or reduced rate to certain, powerful, corporate customers, while failing to offer the same or similar privilege to all other consumers.

23. Defendants disregarded Ohio corporate policy by utilizing CRS, an unregulated alter ego of Cinergy Corp to quell opposition to its Rate Stabilization Plan.

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[5] *See* Revised Code §4905.32

[6] *See* Revised Code §4928.02

24. Defendants violated Ohio public policy by deterring Plaintiff from reporting possible illegal transactions in writing.

25. Defendants violated Ohio public policy by terminating Plaintiff in retaliation for expressing his reasonable concerns for the legality of conduct undertaken by CRS.

26. Defendants violated Ohio's Whistleblower statute by deterring Plaintiff from putting his reasonable concerns regarding the legality of Defendants' transactions in writing.

27. Defendants violated Ohio's Whistleblower statute by terminating Plaintiff in retaliation for reporting a possible violation of a state statute based on his reasonable belief that the violation was a criminal offense or an improper solicitation.

JURISDICTION AND VENUE

28. This Court has subject matter jurisdiction over the claims asserted in this Complaint.

29. Venue is proper in Hamilton County because Defendants' activities giving rise to Plaintiff's claim for relief occurred in this County.

PLAINTIFF'S BACKGROUND

30. Plaintiff John Deeds was born September 20, 1963. Plaintiff attended Louisiana Monroe on a full basketball scholarship. Plaintiff finished his Bachelors Degree in Business Management at the University of Cincinnati in 1992. While working for Defendants, Plaintiff received his Masters in Business Administration in Finance from the University of Cincinnati.

31. Plaintiff began working for Cinergy Corp. on or about July 2, 1990 as a Customer Service Clerk.

PLAINTIFF'S OUTSTANDING CAREER WITH DEFENDANTS

32. Although his career spanned nearly 16 years, Plaintiff achieved incredible success in a short period of time.

33. Plaintiff began his career as a Customer Service Clerk, which was his position for four years while he was finishing his Bachelor's Degree.

34. Following earning his Bachelors Degree and while working toward his Masters, Plaintiff's career began to take off. By May 1997, Plaintiff was a Project Finance Manager for Cinergy Business Solutions.

35. In December 1998, Plaintiff was promoted to Manager of Pricing and Structuring. Soon after, Plaintiff received another promotion to the position of Manager of Project Development. While his time in Project Development was short, Plaintiff performed the lead role in the successful development of a gas fired electric peaking facility in the Midwest. During this time period, Plaintiff earned substantial salary and bonuses per year.

36. In April 2000, Plaintiff became the Director of Power Origination. The position entailed creating and closing long term transactions with geographically diverse customers. Plaintiff held this position until August 2005, and during this time, Plaintiff created considerable economic value for Defendants.

37. As an example of Plaintiff's success as the Director of Power Origination, Plaintiff originated, negotiated and closed transactions with ALCOA, ALCAN Aluminum, AK Steel, Sunoco and Carolina Power & Light, among several others. During this time period, Plaintiff earned substantial bonuses, which were based on a percentage of the value he created for Defendants.

38. In August, 2005, Plaintiff became the Director of Regulatory Initiatives in the Northeast Division. While in this position, Plaintiff represented Defendants on several wholesale electric pool market committees and acted as Defendants' voice, lobbying for Defendants' interests. Plaintiff received a very positive performance review during this time period.

39. Throughout all of the aforementioned time periods, Plaintiff received high commendations and praise for his work from Defendants. It took him only ten years to work his way from a Customer Service Clerk to a Director position. During his rise in the company, Plaintiff earned performance-based bonuses nearly every year, which at times were many times greater than his base salary.

DEFENDANTS UNLAWFULLY TERMINATED PLAINTIFF

40. While in the position of Director of Regulatory Initiatives, Plaintiff was responsible for processing the payments to the companies who signed Option Agreements with Defendants. Shortly after taking over the new position, Plaintiff contacted Timothy Duff, who reported to Jim Gainer, Vice President of Regulatory and Legislative Strategy. Plaintiff inquired about the origin of the Option Payments. When Plaintiff further probed into what his specific duties were in relation to processing the Payments, Duff instructed Plaintiff to sign his name and make sure that his employee number was correct.

41. Plaintiff questioned another Director of Regulatory Initiatives who had worked in the area before, and was aware of the existence of the Options Agreement and Option Payments. Plaintiff was told falsely that the Option Agreement and Option Payment were made public and complied with regulations.

42. Still concerned about the large amounts Defendants were paying out, Plaintiff contacted Timothy Duff and asked whether the Payments were public. Plaintiff specifically inquired whether the Payments "ha[d] not seen the light of day...." Duff informed Plaintiff that the Option Agreements were not public, and Duff agreed to show Plaintiff one of the original Agreements.

43. After discovering the nature of the transactions conducted by CRS and that the Option Agreements were not public, and after reading one of the Option Agreements, Plaintiff was concerned both for Defendants and for his own liability.

44. In February, when Plaintiff was asked to sign off on large quarterly Option Payments, he reported to Duff that he did not feel comfortable processing them and expressed concerns for the legality of the transactions. After commanding that Plaintiff call him "ASAP," Duff angrily informed Plaintiff that it was not Cinergy's policy to put these types of concerns in writing and that Plaintiff should never put such concerns in an e-mail. Duff further instructed Plaintiff to process the transactions immediately.

45. After it became clear to Plaintiff that Defendants did not condone reporting possible illegal transactions, Plaintiff refused to sign off on the Option Payment requests. All Option Payment requests which exceeded $100,000 had always been signed by others since $100,000 was Plaintiff's monetary authority limit. These payments were signed initially by the Vice President of Trading and subsequently by the Managing Director of Commercial Asset Management. The Managing Director of Commercial Asset Management and the Vice President and General Counsel of the Commercial Business Unit signed off on the Option Payment requests which were less than $100,000 after Plaintiff refused.

46. Shortly thereafter, Defendants decided to terminate Plaintiff when Duke Energy succeeded Cinergy Corp.

DEFENDANTS' UNLAWFUL CONDUCT ADVERSELY AFFECTS ALL CITIZENS OF OHIO

47. Defendants created a corporate culture that favors turning a blind eye to possible illegal transactions. As a large employer of tri-state citizens, Defendants have an obligation to prevent events such as these from taking place.

48. As members of a highly regulated industry, Defendants have an obligation to the public and the government to ensure that Defendants do not participate in actions that violate state statutes.

49. By not offering the same or similar option contracts to all companies operating in Ohio that utilize CG&E's electric services, Defendants unfairly disadvantaged these businesses, including state and federal government offices, hospitals and other business that pay substantial amounts in energy costs.

50. As a publicly traded corporation, and a subsidiary thereof, Defendants have a fiduciary duty to their shareholders to abide by the law.

COUNT I

(Ohio Public Policy Wrongful Discharge Tort)

51. Plaintiff realleges the foregoing paragraphs as if fully rewritten herein.

52. There are clear public policies expressed in Ohio law which prohibit employers from retaliating against an employee for raising reasonable concerns of statutory violations.

53. Retaliating against or preventing an employee from exercising his rights under Ohio law would jeopardize clearly established public policies.

54. Defendants maliciously and willfully retaliated against Plaintiff by terminating him and deterring Plaintiff from engaging in the protected activity of reporting possible illegal transactions

conducted by Defendants. As a direct and consequential result of Defendants' retaliation, which violates clear established public policies, Plaintiff has suffered injuries for which he is entitled to recovery.

COUNT II

(Whistleblower Violation - O.R.C. § 4113.52(B))

55. Plaintiff realleges the foregoing paragraphs as if fully rewritten herein.

56. Ohio prohibits employers from taking disciplinary or retaliatory action against an employee who reports a violation of any state or federal statute, or any ordinance or regulation that the employee reasonably believes is a criminal offense, felony, or an improper solicitation for a contribution.

57. Terminating an employee for reporting unlawful conduct undertaken by the employer violates Ohio's Whistleblower statute.

58. Defendants' above-described actions violate this statute.

59. Defendants' actions constitute a breach of public policy and are willful, wanton and malicious in nature

60. As a direct result of Defendants' unlawful conduct, Plaintiff has suffered substantial damages. Plaintiff is entitled to judgment.

WHEREFORE, Plaintiff demands judgment against Defendants as follows:

(a) That Defendants be enjoined from further unlawful conduct as described in the Complaint;

(b) That Plaintiff be awarded all lost pay and benefits up until the time of trial ("backpay");

(c) That Plaintiff be awarded all lost pay and benefits from the time of trial until a reasonable time in the future ("frontpay");

(d) That Plaintiff be awarded reasonable compensatory damages;

(e) That Plaintiff be awarded reasonable punitive damages in an amount at least equivalent to the payments made that were deemed unlawful, estimated to be $40 million to date;

(f) That Plaintiff be awarded reasonable attorneys' fees and costs; and

(g) That Plaintiff be awarded all other legal and equitable relief to which he may be entitled.

Respectfully submitted,

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JURY DEMAND

Plaintiff hereby demands a trial by jury.