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PUCO

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The )  
Cincinnati Gas & Electric Company To ) Case No. 03-93-EL-ATA  
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. )

In the Matter of the Application of The )  
Cincinnati Gas & Electric Company for ) Case No. 03-2079-EL-AAM  
Authority to Modify Current Accounting )  
Procedures for Certain Costs Associated )  
with The Midwest Independent )  
Transmission System Operator. )

In the Matter of the Application of The )  
Cincinnati Gas & Electric Company for ) Case No. 03-2081-EL-AAM  
Authority to Modify Current Accounting ) Case No. 03-2080-EL-ATA  
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. )

In the Matter of the Application of Duke )  
Energy Ohio, Inc. to Modify Its Fuel and ) Case No. 06-1068-EL-UNC  
Economy Purchased Power Component )  
of Its Market-Based Standard Service )  
Offer. )

In the Matter of the Application of the )  
Cincinnati Gas & Electric Company to ) Case No. 05-725-EL-UNC  
Modify Its Fuel and Economy Purchased )  
Power Component of Its Market-Based )  
Standard Service Offer. )

In the Matter of the Application of Duke )  
Energy Ohio, Inc. to Adjust and Set its ) Case No. 06-1069-EL-UNC  
System Reliability Tracker. )

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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. )

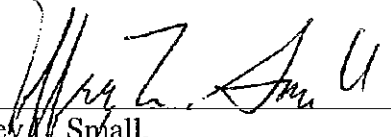
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**MEMORANDUM CONTRA DUKE ENERGY OHIO'S  
MOTION FOR CLARIFICATION  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**MEMORANDUM CONTRA DUKE ENERGY OHIO'S  
MOTION FOR CLARIFICATION  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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Pursuant to Ohio Adm. Code 4901-1-12(B), the Office of the Ohio Consumers' Counsel ("OCC") submits this memorandum contra ("Memo Contra") to the Motion for Clarification ("Motion") filed by Duke Energy Ohio, Inc. ("Duke Energy" or "Company," including its predecessor entity, the Cincinnati Gas & Electric Company) on December 13, 2006. The OCC files this Memorandum Contra on behalf of the 650,000 residential customers of Duke Energy.

This proceeding includes the remand of OCC's appeal to the Supreme Court of Ohio in which the Court found that the Public Utilities Commission of Ohio ("PUCO" or "Commission") erred in two basic respects. In its Motion for Clarification, as in its other advocacy in this remand, Duke Energy would have the PUCO repeat the same errors that led to the need for a remand proceeding by essentially nullifying the Court's holdings that OCC should be given access to side agreements and that there be an opportunity for the OCC to develop a record with respect to Duke Energy's rate plan. The PUCO should not be misled by Duke Energy's arguments, and should deny Duke Energy's Motion.

**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*, which included the first four cases in the caption above, 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, the PUCO denied the OCC's motion to compel the discovery of agreements between Duke Energy and other entities. Following a period for comment, the Commission issued its Order on September 29, 2004 adopted the Stipulation and Recommendation with some modifications based on the limitations of Ohio law and requirements concerning the Commission's review of future rate increases.

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 ordered 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 Court issued its opinion in the appeal, deciding that the PUCO erred by failing to compel the disclosure of side agreements and erred by failing to properly support its decision that determined rates and rate procedures for the period following Duke Energy's market development period.<sup>1</sup> The Court remanded the case for additional consideration by the Commission.

On November 29, 2006, the Attorney Examiner issued an Entry ("November Entry") in the above-captioned cases<sup>2</sup> that states:

In addition, the examiner finds that a hearing should be held in the remanded RSP case [i.e. *Post-MDP Service Case*], in order to obtain the record evidence required by the court. At this time, a prehearing conference should be scheduled to discuss the procedure for the hearing in the remanded RSP case, as well as the FPP, RST, and AAC proceedings [shown in the caption above]. For purposes of discussion, the examiner proposes that a single hearing be held in all of these proceedings and that testimony by Duke be filed first, followed by a review period and subsequent testimony by intervenors and staff.<sup>3</sup>

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<sup>1</sup> *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 at ¶95 ("Consumers' Counsel 2006").

<sup>2</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, a result determined by the Attorney Examiner during the prehearing conference conducted on December 14, 2006.

<sup>3</sup> November Entry at 3, ¶(7).

Fourteen days later, on December 13, 2006, Duke Energy submitted its Motion for Clarification. The Company stated that it sought confirmation that the “hearing proposed by the November 29, 2006, Entry is limited to briefs and/or oral argument.”<sup>4</sup>

On December 14, 2006, a prehearing conference was held at the offices of the PUCO as provided for in the November Entry. The prehearing conference was transcribed. Duke Energy argued extensively against a hearing in the remand of the *Post-MDP Service Case*. However, Duke Energy did not file an interlocutory appeal regarding the hearing that was ordered in the November Entry.

Other determinations were made in the prehearing conference. The above-captioned cases were officially consolidated.<sup>5</sup> Due dates were established for various pleadings, including this Memorandum Contra. A procedural schedule was established that set dates for the filing of testimony and permitted discovery. March 19, 2006 was set as the hearing date. The OCC moved to enforce the provision of the November Entry that ordered Duke Energy to “disclose to OCC the information requested in discovery with regard to side agreements.”<sup>6</sup> The OCC’s motion remains pending while Duke Energy locates the information that is the subject of the motion.

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<sup>4</sup> Motion at 3.

<sup>5</sup> The consolidation had previously been stated only in the form of a proposal. November Entry at 3.

<sup>6</sup> November Entry at 4.

## II. ARGUMENT

### A. Duke Energy's Motion Should be Denied Because it Failed to Properly Seek Appropriate Relief by Means of an Interlocutory Appeal.

Duke Energy's Motion seeks the reversal of the Attorney Examiner's November Entry after it failed to pursue an interlocutory appeal. The November Entry stated that "the examiner finds that a hearing should be held in the remanded RSP case, in order to obtain the record evidence required by the court."<sup>7</sup> Duke Energy seeks reversal, in the guise of needed "clarification," and states that the decision to hold a "hearing" to "obtain the record evidence" must have been intended to limit the case to "briefs and/or oral argument."<sup>8</sup> The November Entry was clear that the Commission intends to hold an evidentiary hearing at which a record would be made that contains additional evidence, and Duke Energy's Motion should be rejected as having been improperly submitted.

Acting against the position argued by Duke Energy in its Motion, the matters before the Commission on remand for the *Post-MDP Service Case* were set for hearing in the Attorney Examiner's November Entry. Pursuant to Ohio Adm. Code 4901-1-15:

Any party who is adversely affected thereby may take an immediate interlocutory appeal to the commission from any *ruling issued under rule 4901-1-14* [regarding a procedural ruling by the legal director, deputy legal director, or the attorney examiner] of the Administrative Code or any *oral ruling issued during a public hearing or prehearing conference* . . . .

\* \* \*

Except as provided in paragraph (A) of this rule [regarding motions to compel discovery, motions to intervene, refusals to quash a subpoena, and forced production of documents or testimony over an objection based on privilege], no party may take

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<sup>7</sup> November Entry at 3, ¶(7).

<sup>8</sup> Motion at 3.



an interlocutory appeal from any ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference *unless the appeal is certified to the commission* by the legal director, deputy legal director, attorney examiner or presiding hearing officer.

\* \* \*

Any party wishing to take an interlocutory appeal from any ruling *must file an application for review with the commission within five days* after the ruling is issued.<sup>9</sup>

The November Entry contained a procedural ruling regarding the need for an evidentiary hearing, and Duke Energy failed to take any action within the five-day period required under Ohio Adm. Code 4901-1-15.

The November Entry ruling regarding an evidentiary hearing does not require “clarification” -- a “hearing” to “obtain the record evidence” was clear. At the time the November Entry was issued, the Attorney Examiner did not order a single hearing but did clearly state the nature of the hearings that would be held: “*testimony*” would be filed “by Duke . . . followed by a review period and subsequent *testimony* by intervenors and staff.”<sup>10</sup> The plain language of the November Entry states that the purpose of the hearing is to obtain evidence: hence, an “evidentiary hearing” was clearly contemplated.<sup>11</sup> Even in the absence of the clarifying term “record evidence” and the reference to testimony, the term “hearing” is used within the Commission’s rules to contemplate an evidentiary hearing at which testimony is heard (e.g. “oaths,” “present evidence,” “examine witnesses,” “sworn or unsworn testimony”; all parts of Ohio Adm. Code 4901-1-27

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<sup>9</sup> Ohio Adm. Code 49901-1-15 (parts of (A) through (C), emphasis added).

<sup>10</sup> November Entry at 3, ¶(7) (emphasis added).

<sup>11</sup> Use of “plain language” is an accepted rule of interpretation. Voluminous case law supports this rule, as well as the Ohio Revised Code, regarding statutory interpretation. See R.C. 1.42.; see, e.g., *State ex. rel. Choices for South-Western City Schools. v. Anthony Jr.* (2005), 108 Ohio St.3d 1. The rule is also used to interpret documents. See, e.g., *Miller v. Marrocco* (1986), 28 Ohio St.3d 438, 439. The rule is no less useful in the interpretation of the November Entry.

concerning “Hearings”). An evidentiary hearing is plainly not “limited to briefs and/or oral argument,” but includes taking evidence before briefs are filed.<sup>12</sup>

Duke Energy states that it seeks clarification regarding the term “obtain” in the November Entry’s expression that the Commission will “obtain the record evidence.” Again, the plain language of “obtain” eliminates the possibility that the November Entry could limit the case on remand to “briefs and/or oral argument.”<sup>13</sup> “Obtain” means “[t]o get hold of by effort; to get possession of; to procure; to acquire, in any way.”<sup>14</sup> Duke Energy’s claim that the opinion of the Ohio Supreme Court “presupposes that there already is evidence of record to support the Commission’s decision” is not supported by the opinion in *Consumers’ Counsel 2006*,<sup>15</sup> as examined more fully below. Limiting the remand to yet another round of argument by counsel for Duke Energy and the OCC would not increase the amount of evidence that the Commission has in its “possession.” Duke Energy’s effort to seek “clarification” is a transparent attempt to seek reversal of the Attorney Examiner’s procedural ruling as well as to nullify the Court’s directive to the Commission. The public is entitled to close scrutiny of the Company’s proposals to raise rates.

Under similar circumstances in a recent case, the Attorney Examiner recently decided the matter when Duke Energy improperly contested her procedural ruling. In an Entry issued on October 14, 2005, the Attorney Examiner set a procedural schedule for the Company’s distribution rate case. Duke Energy filed a motion that requested the

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<sup>12</sup> Motion at 3.

<sup>13</sup> Id.

<sup>14</sup> Black’s Law Dictionary 1078 (6<sup>th</sup> ed. 1990).

<sup>15</sup> Motion at 3.

modification of the procedural schedule. Duke Energy's motion in that case was denied by the Attorney Examiner:

The motion asks for reconsideration of the substance of any entry that was issued ten days before the motion was filed. CG&E cannot avoid the strictures of Rule 4901-1-15, Ohio Administrative Code (O.A.C.), by calling its filing a motion rather than an interlocutory appeal.<sup>16</sup>

Duke Energy apparently learned to call its motion something other than a "Motion for Reconsideration," but the same Commission rule applies regardless of the name given to an improperly submitted motion. Duke Energy failed to file the proper pleading, which was an interlocutory appeal, under the PUCO's rules. The PUCO should deny Duke Energy's Motion.

**B. The Commission Should Conduct a Substantive Hearing Regarding Appropriate Generation Prices Following a Period for Discovery.**

**1. The Commission Should Conduct a Substantive Hearing.**

Duke Energy has created a strained reading of the opinion in *Consumers' Counsel 2006* that results in odd conclusions and requests for procedures that are not judicial or quasi-judicial. The Company encourages the PUCO to move forward with a pricing plan based on the framework that existed prior to the Ohio Supreme Court's remand and that will result in significant price increases in the absence of "record evidence and sufficient reasoning."<sup>17</sup>

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<sup>16</sup> *In re CG&E Distribution Rate Case*, Case No. 05-59-EL-AIR, Entry at 2 (November 3, 2005).

<sup>17</sup> *Consumers' Counsel 2006* at ¶95. The rate increases are described in the OCC's pleading dated December 12, 2006.

Duke Energy states that the Post-MDP Service Case on remand should be “limited to briefs and/or oral argument”<sup>18</sup> regarding the existing record (that the Court found to be inadequate) based upon the “principle of judicial economy and efficiency.”<sup>19</sup> The *Post-MDP Service Case* has been extensively briefed before the Commission and the Ohio Supreme Court, including oral argument on the matters that Duke Energy seeks to rehash. The Court resolved -- in favor of OCC’s position -- the issue of whether the PUCO’s modifications on rehearing were supported by record evidence. The Court arrived at its resolution of the appeal having access to the entire record in the *Post-MDP Service Case*,<sup>20</sup> and was guided by the extensive briefs filed by the Commission and Duke Energy as well as by oral argument by these same parties to the appeal in *Consumers’ Counsel 2006*. Judicial economy and efficiency support moving forward with the evidentiary hearing provided for in the November Entry instead of requiring additional argument by counsel on matters that have already been decided by the Court. Judicial economy is only served by a full and proper hearing: to do less than required by the Court would ultimately result in lost time and effort as well as the need for additional proceedings.

In *Consumers Counsel 2006*, the Court was not convinced by appellees that the record in the *Post-MDP Service Case* could be reconciled with the requirements in the

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<sup>18</sup> Motion at 3.

<sup>19</sup> *Id.* at 6.

<sup>20</sup> The record in such appeals “consist[s] of the original papers and exhibits to those papers; the transcript of proceedings and exhibits, along with an electronic version of the transcript, if available; and certified copies of the journal entries and the docket prepared by the clerk of the court or other custodian of the original papers.” S.Ct. Prac. R. V, Sec. 1. Thus, the Ohio Supreme Court had access to the earlier arguments submitted to the PUCO as well as those submitted to the Court itself.

law. The Court concluded that “the commission made several modifications on rehearing without any reference to record evidence and without thoroughly explaining its reasons.”<sup>21</sup> It is the height of arrogance, under these circumstances, for Duke Energy to state that the Court’s decision “presupposes that there already is evidence of record to support the Commission’s decision.”<sup>22</sup> Duke Energy supports a “tail chasing” approach that would allow for re-argument of what the Court already decided and would delay the final determination of appropriate standard service offer generation rates for the Company’s customers. Meanwhile, the Company reaps the rewards of ever-higher rates.

Duke Energy is apparently unable to find any support in the Court’s opinion in *Consumers’ Counsel 2006* for the OCC’s position that evidence not previously adduced against the Company’s proposal should be heard on remand. The Company’s position against a hearing and the taking of further evidence does not make sense, and would “turn the Supreme Court’s order on its head.”<sup>23</sup> For example, the Court ruled that the PUCO and Duke Energy were wrong to deny the OCC access to Duke Energy’s side agreements, and “order[ed] that [the PUCO] compel disclosure of the requested information.”<sup>24</sup> Under Duke Energy’s concept, the Court’s ruling would have no practical purpose under the Company’s claim that the side agreements cannot be used as part of a hearing in the remanded case.

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<sup>21</sup> *Consumers’ Counsel 2006* at ¶35.

<sup>22</sup> Motion at 3.

<sup>23</sup> Id. at 6.

<sup>24</sup> *Consumers’ Counsel 2006* at ¶94.

## 2. The Commission Should Continue Discovery.

On remand, turning over the side agreements should be the initial part of the progressive discovery that follows upon access to the side agreements and permits inquiry into the “Infrastructure Maintenance Fund” and other charges that make up a Company proposal that was first introduced in Duke Energy’s Application for Rehearing. In the original case, Duke Energy (with the Commission’s authorization) denied the OCC access to the side agreements and inhibited OCC development of its case as part of the normal progression of discovery (such as further written requests and depositions) based upon initial responses to OCC’s discovery requests about the side agreements. Also, Duke Energy introduced important portions of its final proposal in its Application for Rehearing, and the Court agreed with the OCC that the PUCO “approved on rehearing certain charges and made other modifications to its order *without record evidence* and without setting forth any basis for the decision.”<sup>25</sup>

The scope of discovery should be “liberally construed.”<sup>26</sup> R.C. 4903.082 states that “[a]ll parties and intervenors shall be granted ample rights of discovery.” The Commission’s rules encourage discovery “to facilitate thorough and adequate preparation for participation in commission proceedings.”<sup>27</sup> Progressive discovery will likely enable the OCC to provide additional evidence regarding both the manner with which Duke Energy elicited support for its proposals and the consequences of the Company’s favored rate plan.

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<sup>25</sup> *Consumers’ Counsel 2006* at ¶27 (emphasis added).

<sup>26</sup> *Consumers’ Counsel 2006* at ¶83, applying Civ.R. 26(B)(1); see also R.C. 4903.082 and Ohio Adm. Code 4901-1-16.

<sup>27</sup> Ohio Adm. Code 49901-1-16(A).

The decision in *Consumers' Counsel 2006* contains other clear statements that contemplate an evidentiary hearing on remand. The Court stated that "[u]pon disclosure [of the side agreements], the commission may, if necessary, decide any issues pertaining to admissibility of that information."<sup>28</sup> The fact that the Court addressed the PUCO's rulings on the *admissibility* of the side agreements underscores the Court's expectation that there will be a remand hearing where evidence not yet heard in the case can be adduced. There is absolutely no reason for the Court to allow the Commission to address matters of the admissibility of side agreements if the OCC is not permitted to present new evidence where admissibility could be an issue. The Company continues: "DE-Ohio respectfully submits that is unnecessary -- indeed inappropriate -- to reargue the case, create more evidence, or do anything other than support the Commission's Entry on Rehearing with record evidence."<sup>29</sup> Without citation to legal authority, Duke Energy incredibly concludes that the Court instructed the PUCO to conduct quasi-judicial procedures that permit only one side of a controversy to be heard. It is Duke that is rearguing the appeal that the Court already decided.

The Court's opinion in *Consumers' Counsel 2006* cannot be reconciled with the Company's extreme position that no hearing needs to be conducted and that parties who oppose Duke Energy's plans may not be heard. Duke Energy's position was already rejected in the November Entry that set the matters on remand for hearing, a decision that the Company did not appeal to the full Commission. The Company's position has also

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<sup>28</sup> *Consumers' Counsel 2006* at ¶94.

<sup>29</sup> Motion at 5.

been weakened as the result of a “whistleblower” lawsuit filed in federal court.<sup>30</sup> The Complaint in that case contains allegations from a former Duke Energy employee (or employee of an affiliated company) supporting arguments that side agreements have been used in a discriminatory and predatory manner to win approval of the Company’s plan in the *Post-MDP Service Case*.<sup>31</sup> Duke Energy’s Motion should be denied, and the Commission should move forward with a substantive hearing at which parties are permitted to present evidence regarding appropriate generation prices.

### III. CONCLUSION

The OCC respectfully requests that the Commission deny Duke Energy’s Motion. The Motion should be denied based upon its non-compliance with the Commission’s rules regarding the interlocutory appeal of procedural schedules set by the Attorney Examiner. The Motion should also be denied based upon the conflict between Duke Energy’s desired procedural outcome -- no evidentiary hearing -- and the opinion in *Consumers’ Counsel 2006*.

In the interests of Duke Energy’s 650,000 residential customers, the Commission should conduct the substantive hearing that its Attorney Examiner already announced and at which parties are permitted to present evidence. Such a hearing should progress after a period for discovery.

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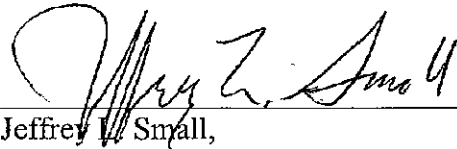
<sup>30</sup> *Deeds v. Duke Energy Corporation, et al.*, United States District Court, Southern District of Ohio (Western Division), Case No. 1:06CV835, Complaint at ¶7 (December 7, 2006). The Complaint is attached to a letter docketed in this case by the OCC on December 13, 2006.

<sup>31</sup> *Id.* at 3.



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A handwritten signature in black ink, appearing to read "Jeffrey W. Small", written over a horizontal line.

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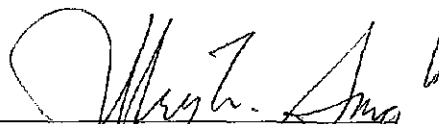
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Office of the Ohio Consumers' Counsel's Memorandum Contra Duke Energy's Motion for Clarification was served electronically on the persons listed on the electronic service list, provided by the Attorney Examiner, this 20<sup>th</sup> day of December 2006.

  
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