

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the application of Duke Energy Ohio To Modify Its Market-Based Standard Service Offer)))	Case No. 06-986-EL-UNC
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 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 and 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 Component)

**OBJECTIONS AND MOTION TO QUASH THE TWO SUBPOENA DUCES
TECUM FILED BY THE OCC AND FOR PROTECTIVE ORDER PROHIBITING
DISCOVERY REQUESTS TO DERS**

Duke Energy Retail Sales LLC (DERS), pursuant to Ohio Administrative Code (OAC) 4901-1-25(C), and by its counsel, respectfully requests that the Public Utilities Commission of Ohio (Commission) quash the two *subpoena duces tecum* (Subpoenas) filed by the OCC on December 13 and 18 respectively, purporting to compel Charles R. Whitlock, President of DERS to appear for oral examination on January 3, 2007, and DERS to provide a witness and certain documents for OCC's inspection and examination. The Subpoenas should be quashed for the following reasons:

- 1) The subpoenas are outside the jurisdictional scope of the Commission;
- 2) The subpoenas were not properly served;
- 3) The subpoenas are unduly burdensome and oppressive as they

- a. seek information that is not within DERS' control as DERS has no information "regarding all cases related to Duke Energy Ohio,

Inc.'s standard service offer charges"¹ and does not control information that may be in the possession of other affiliates and entities;

- b. are not limited in scope and, as such, are unduly burdensome and oppressive;
 - c. seek information which is confidential and a proprietary trade secret without adequate and necessary protection; and
 - d. are made for an improper purpose, mainly to facilitate discovery of confidential agreements in connection with a recently filed civil proceeding by an ex-employee of Duke Energy Shared Services Inc.
- In that regard, DERS as a non-party to the above-captioned proceedings will be unfairly prejudiced and affected in its defense of the allegations raised in that unrelated proceeding if forced to produce certain requested information here.

Further, the Commission should issue a Protective Order pursuant to OAC 4901-1-24 to prevent OCC from seeking discovery of the above-described information through one of DERS' affiliates.

The Subpoenas seek to compel the testimony of Mr. Whitlock and another witness on January 3, 2007, just after the holiday season. Given anticipated holiday schedules of all involved, DERS respectfully requests that the Commission issue a ruling on this Motion on or before December 28, 2006.

¹ Subpoena (December 13, 2006) at 3.

Based on the foregoing and the arguments set forth in the accompanying Memorandum in Support as well as arguments raised by Duke Energy Ohio, Inc. (DE-Ohio) in a separate motion filed simultaneously herewith, the Commission should issue an order quashing OCC's Subpoenas.

Additionally, for the same reasons stated above and in the accompanying memorandum in support, DERS objects to the production of documents OCC has requested pursuant to the Subpoenas.

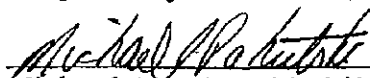
In the event the Commission overrules this Motion to Quash, DERS requests that 1) the Commission waive the requirement of 4901-1-24(B);² 2) the Commission limit the requested information to that within DERS' possession; 3) the Commission require OCC to enter into a confidentiality agreement with DERS whereby any information that is produced and made available pursuant to either subpoena or the discovery requests to DE-Ohio, which seek information from DERS,³ be placed under seal and limited to use in these proceedings by the OCC; 4) that any deposition of Charles Whitlock or other DERS witness be conducted under seal in the presence of OCC and counsel for DERS and DE-Ohio only; and 5) that the transcript of such deposition if filed, be filed under seal and used only for purposes of the above-

² 4901-1-24(B) provides in part: "[n]o motion for a protective order shall be filed under paragraph (A) of this rule until the person or party seeking the order has exhausted all other reasonable means of resolving any differences with the party seeking discovery. A motion for a protective order filed pursuant to paragraph (A) of this rule shall be accompanied by... (3) An affidavit of counsel, or of the person seeking a protective order if such person is not represented by counsel, setting forth the efforts which have been made to resolve any differences with the party seeking discovery." Ohio Admin. Code 4901-1-24(B)(3). Given the short time frame for response, the lack of proper service, and the approaching holiday schedules, DERS anticipates that reaching an agreeable solution to the confidentiality of the agreements and the requested documents, with OCC prior to January 3, 2007 is problematic.

³ See Duke Energy Ohio's Motion for Protective Order.

captioned proceedings by the OCC. Additionally, if the Commission denies this Motion to quash in whole or in part, DERS respectfully requests that the Commission condition the denial upon the OCC's advancement of costs to produce two witnesses to appear in Columbus and for the copying of documents to comply with the requests.

Respectfully Submitted,



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MEMORANDUM IN SUPPORT

I. THE COMMISSION LACKS JURISDICTION TO ISSUE THESE SUBPOENAS OR TO COMPEL DISCOVERY FROM DERS

The Commission, "as a creature of statute, has and can exercise only the authority conferred upon it by the General Assembly."⁴ Therefore, unless a statute grants the Commission authority, the Commission has no power. The Commission is vested with subpoena power through general statutes R.C. 4903.03 and 4903.04, which set forth the Commission's power to examine records and compel witnesses respectively.⁵

DERS, formerly Cinergy Retails Sales LLC, is an electric services company as the term is defined in R.C. 4928.01, and a competitive retail electric service (CRES) provider certified by the Commission pursuant to R.C. 4928.08. The above-captioned cases, address DE-Ohio's market based standard service offer (MBSSO), a competitive retail electric service as defined by R. C. 4928.03, as opposed to a non-competitive service subject to traditional rate-making statutes.⁶ The Commission's jurisdiction over competitive retail electric service is defined by a special statute, namely R.C. 4928.05 which, in pertinent part, states:

On and after the starting date of competitive retail electric service, *a competitive retail electric service supplied by an electric utility or electric services company shall not be subject to supervision and*

⁴ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 85 Ohio St. 3d 87, 88, 706 N.E.2d 1255, 1256 (1999).

⁵ Ohio Rev. Code Ann. §§4903.03, 4903.04 (Baldwin 2006).

⁶ Ohio Rev. Code Ann. § 4928.03 (Baldwin 2006).

*regulation... by the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963., of the Revised Code, except section 4905.10, division (B) of 4905.33, and sections 4905.35 and 4933.81 to 4933.90....*⁷

Therefore, the Commission's authority over competitive retail electric services is limited by the express intent of the General Assembly. In particular, R.C. 4928.05 divests the Commission of much of its jurisdiction and power in its review and approval over competitive retail electric services. This divestiture includes the power to examine books and compel witness testimony under R.C. 4903.03 and 4903.04.

As a CRES, DERS is required to consent to the jurisdiction of the Commission to the extent the Commission is vested with authority to act. R.C. 4928.09 addresses the requirement that an electric services company must consent to jurisdiction and service of process in Ohio. Specifically, R.C. 4928.09 provides:

No person shall operate in this state as an electric utility, an electric services company, or a billing and collection agent on and after the starting date of competitive retail electric service unless that person first does both of the following:

(a) Consents irrevocably to the jurisdiction of the courts of this state and service of process in this state, including, without limitation, service of summonses and subpoenas, for any civil or criminal proceeding arising out of or relating to such operation, by providing that irrevocable consent in accordance with division (A)(4) of this section;

(b) Designates an agent authorized to receive that

⁷ Ohio Rev. Code Ann. § 4928.05 (Baldwin 2006), (emphasis added).

service of process in this state, by filing with the commission a document designating that agent.⁸

Further, R.C. 4928.09(C)(3) provides in relevant part that “Divisions (A) and B of this section do not apply to ... [a] foreign corporation licensed to transact business under the laws of this state that has appointed a designated agent pursuant to section 1703.041 of the Ohio Revised Code.”⁹ DERS is a Delaware Limited Liability Company (LLC) authorized to do business in Ohio. DERS has met the requirements of R.C. 4928.09 by filing with the Commission its requisite 4928.08 Application and by designating a statutory agent pursuant to R.C. 1703.041. Because the Commission is a creature of statute, having no more power than that which is statutorily given, DERS may be deemed to have consented to the Commission’s jurisdiction in such matters solely to the extent that the Commission has authority over such matters.

The Commission’s jurisdiction over DERS is limited to what is set forth in R.C. Chapter 4928 and specifically R.C. 4928.16 and R.C. 4928.18, which address complaints involving competitive retail electric services offered by CRES providers¹⁰ and its jurisdiction over an electric utility’s corporate separation plan respectively.¹¹ None of the cases in the consolidated captions above are the result of a complaint filed against DERS (or DE-Ohio for that matter). These proceedings address the establishment of DE-Ohio’s MBSSO and the subsequent updates to its pricing components. Accordingly, since

⁸ Ohio Rev. Code Ann. § 4928.09 (Baldwin 2006).

⁹ Ohio Rev. Code Ann. § 4928.09 (Baldwin 2006).

¹⁰ Ohio Rev. Code Ann. § 4928.16 (Baldwin 2006).

¹¹ Ohio Rev. Code Ann. § 4928.18 (Baldwin 2006).

Subpoenas were issued in cases involving the establishment of an electric utility's pricing for a competitive retail electric service and not a complaint regarding a competitive retail electric service, the Commission has limited authority under R.C. 4928.05. Therefore, the Subpoenas filed by the OCC are outside of the Commission's statutorily conferred authority and should be quashed.

II. THE SUBPOENAS WERE NOT PROPERLY SERVED

Notwithstanding that the Subpoenas exceed the scope of the Commission's jurisdiction, this Commission should quash the Subpoenas, which at the time of the filing of this Motion, were not properly served upon DERS. As discussed above, DERS is a foreign limited liability company with its principal place of business in Cincinnati, Ohio. Pursuant to R.C. 1703.041, it has authorized, as its statutory agent, CT Corporate System, which may accept service of process on behalf of DERS. To date, DERS's statutory agent has not been served the Subpoenas issued by the OCC.

Pursuant to OAC 4901-1-25(B);

Arranging for service of a signed subpoena is the responsibility of the person requesting the subpoena. A subpoena may be served by a sheriff, deputy sheriff, or any other person who is not less than eighteen years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy to such person, or by reading it to him or her in person, or by leaving a copy at his or her place of residence. A subpoena may be served at any place within this state. The person serving the subpoena shall file a return thereof with the docketing division.¹²

¹² Ohio Admin. Code 4901-1-25(B)

The Subpoenas at issue require (1) "Duke Energy Retail Sales, LLC ("DERS") by its attorney or statutory agent... to make available Mr. Charles R. Whitlock to appear for oral examination..."¹³ and (2) request DERS to make available a "witness to appear for oral examination on January 3, 2007 at the offices of the OCC."¹⁴ DERS is only aware of the OCC's two filed Motions for *Subpoena duces tecum* because counsel for DE-Ohio informed counsel for DERS that such motions were filed by the OCC. This does not constitute service under either the Commission's rules or the Ohio Rules of Civil Procedure. The OCC has not fulfilled its responsibility in properly arranging for service on DERS by serving its registered agent, CT Corporate System. Therefore, the Commission should quash the Subpoenas. Even if served now, DERS continues to request that the Subpoenas be quashed as their service just short of the Christmas and New Year holiday weekends, will not provide it with a reasonable time to respond assuming, arguendo, that the remaining reasons herein are not a sufficient basis to quash.

III. THE SUBPOENA SHOULD BE QUASHED AS BEING OPPRESSIVE AND UNDULY BURDENSOME

A. OCC's Subpoenas Request Information That Is Not Within The Possession or Control of DERS.

DERS Objects to the production of documents contained in the Subpoenas for the reasons set forth above and as further explained below. Pursuant to OAC 4901-1-25(C), the Commission may quash a subpoena if it is unreasonable or oppressive. The subject Subpoenas are both unreasonable and oppressive

¹³ Subpoena, (December 13, 2006) at 3.

¹⁴ Motion for *Subpoena duces tecum*, (December 18, 2006).

because they require DERS to acquire and provide information that is outside of its possession and control. Specifically, the December 13, 2006 subpoena requests Mr. Whitlock to provide 1) "all documents containing any and all agreements between each and every affiliate company and customers of Duke Energy," and 2) "all documents containing correspondence related to those agreements, including email and other forms of correspondence with, by way of example only, Duke Energy customers, and representatives of companies affiliated with DERS."

Similarly, the OCC Motion for *Subpoena Duces Tecum* filed on December 18, 2006 seeks i) "all documents (all forms, including hard copies of information stored on electronic media) as well as any and all agreements of an affiliate company of DERS and customers of Duke Energy,"¹⁵ and ii) "all documents (all forms, including hard copies of information stored on electronic media) containing correspondence related to these agreements with (by way of example only) Duke Energy customers, and representatives of companies affiliated with DERS."¹⁶

All of the above-captioned proceedings involve DE-Ohio's MBSSO and the various pricing components of that MBSSO. DE-Ohio and DERS are separate and independent companies that happen to be owned by the same ultimate parent company, Duke Energy Corporation. DERS is not, nor does it expect to be, a party to the above captioned proceedings and as such, does not have information regarding "all cases related to Duke Energy Ohio Inc.'s standard

¹⁵ Motion for Subpoena, (December 13, 2006).

¹⁶ Motion for Subpoena (December 18, 2006).

service offer charges" as called for in the Subpoenas. Further, DERS has no documents between DERS affiliates and customers of Duke Energy¹⁷ in its possession. Nor is it authorized by any affiliate to obtain access to documents containing or relating to any and all agreements between each and every affiliate company and customers of Duke Energy.

DERS is but one of many subsidiaries of Duke Energy Corporation. It maintains separate books, records, contracts and accounts and in accordance with OAC 4901:1-20-16(D) and (G)(1)(c), functions independently. It is therefore inappropriate to require DERS to provide any agreements, contracts, or correspondence between a DERS affiliate and individual consumers of DE-Ohio. Each of DERS' affiliates is separate and independent company. Each maintains its own books and records independently from its affiliates. OCC is simply attempting to circumvent the independent identities of separate companies through discovery to DERS. OCC's requests are asking this Commission to compel DERS to violate Duke Energy Corporation's corporate structure and formalities and acquire proprietary information about all of DERS' individual affiliated companies. The laws governing corporate structure, and individual corporate identity, were enacted to avoid the exact sort of affiliate merging of interests that OCC's requests are seeking to compel.

¹⁷ Although the *Subpoena duces tecum* filed by the Commission on December 13, 2006 is silent on the definition of "Duke Energy", for the purposes of this Motion and Memorandum, DERS assumes the Commission's use of the term Duke Energy in the subpoena to mean Duke Energy Ohio, Inc, as it was defined in OCC's Motion for Subpoena and Memorandum in Support.

Accordingly, OCC's Subpoenas are oppressive and unreasonable and should be quashed.

B. OCC's Subpoenas are Unreasonably Broad in Scope

In addition to improperly requiring DERS to supply the requested affiliate information, the Subpoenas are also unduly burdensome in that they are unreasonably broad in scope. DERS has dozens of affiliates in numerous states any of which could have contracts, agreements, and correspondence with DE-Ohio consumers. Indeed, DERS expects that its affiliates, including DE-Ohio, have hundreds of contracts and agreements with consumers in DE-Ohio's service territory. Any non-residential consumer in DE-Ohio's service territory that sells any product or service to a DERS affiliate by way of a contract would be covered by these requests. It would be extremely burdensome and expensive to identify the probable and limitless contracts between DERS affiliates and DE-Ohio consumers, many (if not all) of which are unlikely to even remotely relate to the subject of the above-captioned cases.

Even limiting the scope of this request to DERS affiliates located solely within Ohio's borders makes this request oppressive and irrelevant. Such documents, contracts and agreements are likely to include such items as leases of office space and equipment, repair and service agreements, delivery agreements, purchase agreements for office supplies, vehicle leases and sales contracts, catering agreements, agreements regarding preferred travel arrangement services, hotel pricing agreements, etc.

OCC's requests, as they pertain to this information are overly broad. They are not reasonably calculated to lead to the discovery of relevant and admissible evidence and should be quashed.

C. OCC's Subpoenas are Unreasonable and Oppressive in that they Seek to Compel Production of Confidential and Proprietary Trade Secret Information without Adequate and Necessary Protection.

Any agreements between DERS and its counter-parties are proprietary and constitute trade secret information under Ohio law. R.C. 1333.61(D) defines a trade secret as follows:

"Trade secret" means 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.

DERS' agreements with third parties are proprietary, confidential, and trade secret, as that term is used in R. C. 1333.61 because the agreements give insight into DERS' view of the competitive retail electric market, its business strategies and the value it places on obtaining load. Disclosure of these agreements would be unreasonable and oppressive because it would provide DERS' competitors access to sensitive and confidential information that could be used to the detriment of DERS and customers. Competitors would gain insight into DERS' market strategy with respect to hedges and strike prices

under which DERS would serve load, which in turn could allow the those competitors to under-cut DERS' pricing or perhaps to price their products higher than they otherwise would, seeing DERS' pricing as a ceiling and the price to beat. The public disclosure of these agreements could also jeopardize DERS business positions in negotiations with prospective customers and suppliers.

These agreements also contain confidentiality clauses between the parties. Only the respective individual customers, DERS and Duke Energy Corporation officials with a legitimate business need to know and need to act upon the information know the terms of the individual agreements.

It is unreasonable and oppressive to compel the discovery of these agreements in that it would cause irreparable damage to DERS' ability to negotiate contracts and conduct its business in a competitive market place. Accordingly, the Commission should quash OCC's Subpoenas.

D. OCC's Subpoenas are Unreasonable and Oppressive in that They will Unfairly Prejudice and Affect the Legal Strategy of DERS and Duke Energy Corp., in Defending against the Allegations raised in Another Unrelated Civil Proceeding.

OAC 4901-1-16(B) sets forth the scope of discovery in proceedings before the Commission, providing in relevant part, "any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible

evidence.”¹⁸ The information requested in the Subpoenas is irrelevant to the subject of the proceedings and are not reasonably calculated to lead to the discovery of admissible evidence.

OCC's Subpoenas and request to depose Charles Whitlock and an unnamed DERS official are attempts to delve into unrelated issues in an unrelated litigation involving an ex-employee of DERS' affiliate Duke Energy Shared Services, Inc (DESS). OCC's Motion in support of its Subpoenas states that OCC intends to question Mr. Whitlock and a DERS witness on issues surrounding the claim filed by John Deeds in the United States District Court Southern District of Ohio Western Division (Deeds Matter).¹⁹ On their face therefore, the subpoenas appear to be issued for an improper purpose, outside of the Commission's jurisdiction.

OCC's Subpoena is especially oppressive in that it will force DERS to defend itself and respond to discovery inquiries in a case in which DERS has not been served to date. Disclosure here, for reasons unrelated to the DE-Ohio MBSSO, will unfairly influence DERS' legal strategy and ability to properly defend itself in the Deeds Matter.

At any event, the option agreements at issue in the Deeds Matter are legitimate business transactions between DERS and third parties.

E. OCC' Subpoenas are Oppressive and Unreasonable in that they Seek Information that is Not Reasonably Calculated to Lead to the Discovery of Admissible Evidence.

¹⁸ Ohio Admin. Code 4901-1-16 (B) (Anderson 2006).

¹⁹ OCC Motion at 3.

Parts (i) and (iv) of OCC's December 13, 2006 Subpoena seek the production of "all documents containing any and all agreements between DERS and customers of Duke Energy related to the sale or possible sale of electric power or energy;"²⁰ and "all documents in the possession and control of DERS pertaining to the aforementioned agreements," respectively.²¹ Similarly, parts i.) and iv.) of the December 18, 2006 Subpoena requests a DERS witness to provide "all documents (all forms, including hard copies of information stored on electronic media) containing agreements as well as any and all agreements between DERS and customers of Duke Energy"²² and "all documents (all forms, including hard copies of information stored on electronic media) in the possession and control of DERS pertaining to the aforementioned agreements," for the period of time between December 15, 2003 and January 3, 2007.

OCC claims it is issuing these subpoenas in connection with the Ohio Supreme Court's recent ruling in *Ohio Consumers' Counsel v. Public Util. Comm.*²³ That decision, however, addressed discovery of side agreements between DE-Ohio and the parties to a stipulation in DE-Ohio's MBSSO case and did not address third party contracts between a non-regulated entity and its customers.

DERS understands that this Commission has not ruled that it is permitting new discovery or evidence regarding its approval of DE-Ohio's MBSSO in the remanded 03-93-EL-ATA cases. Absent a Commission decision permitting the re-litigation of the propriety of DE-Ohio's entire MBSSO and holding an

²⁰ See Subpoena.

²¹ *Id.*

²² Motion for Subpoena, (December 18, 2006) at 3.

²³ 11 Ohio St.3d 300, 2006-Ohio-5789.

entirely new and full evidentiary hearing, it would appear that OCC's Subpoenas are premature and inappropriate.

F. Assistance to the Commission

At the Commission's request and only if it will assist the Commission in making a ruling regarding certain aspects of this Motion to Quash, DERS is willing to make the option agreements referenced in the Subpoenas available to the Commission for an *in camera* review. By this review, the Commission can determine that the agreements between DERS and third parties have nothing to do with the above-captioned matters, are inadmissible, and therefore, are not the proper subject of discovery.

DERS proposes the following methods for the *in camera* review, in order of DERS' preference:

- 1) DERS will make the option agreements available for the Commission's *in camera* inspection and review at the Columbus, Ohio office of Duke Energy Corporation; or
- 2) DERS will temporarily provide, but will not file, copies of the agreements to the Commission for its *in camera* inspection, subject to confidential trade secret protection, at a specific time and place at the Commission's discretion. Counsel for DERS will wait while the Commission reviews the agreements to determine their relevancy to the above captioned proceedings, and once the Commission is through reviewing the agreements, DERS will retain possession.

- 3) DERS will file the documents under seal with an accompanying Motion for Protection for the Commission's *in camera* review.

If, after an *in camera* inspection, the Commission determines, that these agreements are relevant and admissible in the above captioned proceedings, DERS will file the agreements, in the above docket, under seal and subject to reasonable protections from public disclosure. DERS will also permit inspection by the parties to this proceeding only, pursuant to an executed confidentiality agreement with DERS.

IV. ALTERNATIVE REQUEST FOR PROTECTIVE ORDER

For all the reasons explained in this memorandum, OCC's Subpoenas should be quashed. If the Commission denies DERS' Motion to Quash, however, then DERS respectfully requests that the Commission view this as a Motion for a Protective Order pursuant to OAC 4901-1-24(A). DERS respectfully requests that the Commission waive the OAC 4901-1-24(B) requirement that DERS' counsel exhaust all reasonable means to settle the discovery dispute and file an accompanying affidavit.²⁴ Given the short time frame for response, the lack of proper service, the approaching holiday schedules, and the divergent interests of the DERS and OCC, DERS anticipates that reaching an agreeable solution to the confidentiality of the agreements and the requested documents, with OCC prior to January 3, 2007 is problematic.

As explained above, the information sought by OCC is confidential, proprietary and trade secret information. Such information, therefore, should

²⁴ Ohio Admin. Code 4901-1-24 (B) (Anderson 2006).

only be produced pursuant to a protective order and a confidentiality agreement between OCC and DERS. Such a protective order and confidentiality agreement would limit information produced pursuant to either subpoena or discovery requests to DE-Ohio, for use by OCC in the above-captioned proceeding only. DERS further requests that any deposition of Charles Whitlock, and any other DERS witness, be conducted under seal in the presence of OCC and counsel for DERS and DE-Ohio only. Further, DERS requests that the transcript of such deposition(s) be given confidential treatment, and if filed, be filed under seal and used only for purposes of the above-captioned proceedings and only by the OCC.

Additionally, DERS has been notified by counsel of DE-Ohio that OCC has recently served discovery requests upon DE-Ohio, which seek the production of the same information described in this motion, and that is subject to the Subpoena requests. DERS supports DE-Ohio in its Motion for Protective Order.

Although DERS is not a party to the above captioned proceedings, as a person from whom discovery is being sought pursuant to OAC 4901-1-24(1),(4),(5) and (7) DERS respectfully requests this Commission issue a Protective Order that discovery not be had, or in the alternative, that certain matters not be inquired into, discovery be limited, and that any discovery provided be done pursuant to a confidentiality agreement.

DERS understands that a number of the discovery requests sent to its affiliate DE-Ohio, specifically address the recently filed litigation involving John

Deeds. DE-Ohio is not a party to that proceeding and that proceeding is not before the Commission. Requiring DE-Ohio or any other DERS affiliate to provide information related to the claim, DERS' defense, or the circumstances involved in that case, interferes with DERS' rights to due process and a fair hearing on the merits. DERS has not been properly served in the Deeds Matter and should not be forced to defend its interests before the Commission, let alone prior to the commencement of the civil matter. Therefore, the Commission should not permit OCC to inquire into these matters.

Lastly, if the Commission denies DERS' Motion to Quash, given that DERS is a non-party to the above captioned proceedings, it is only reasonable that pursuant to OAC 4901-1-25(C), the Commission condition the denial upon OCC's advancement of the reasonable costs for DERS to produce Mr. Whitlock and any other witness, as well as the copies of documents, agreements etc. The depositions are scheduled to occur on January 3, 2007 at OCC's offices in Columbus Ohio. Neither Mr. Whitlock nor any other likely DERS witness to be produced in response to the Subpoenas resides in Columbus, Ohio or Franklin County, where both the OCC's offices and the Commission are located. Both witnesses live in and around the greater Cincinnati, Northern Kentucky metropolitan areas. Accordingly, it is only reasonable that the OCC be required to compensate in advance the witnesses for their mileage and DERS for any copying expenses to be incurred.

V. CONCLUSION

For the foregoing reasons, DERS objects to the production of documents contained in OCC's Subpoenas and DERS respectfully moves this Commission to immediately quash the *subpoenas duces tecum* and any discovery requests sent to a DERS affiliate, which purport to request the same type of information from DERS. In the alternative, DERS requests this Commission issue appropriate protective orders as outlined above.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion to Quash was served electronically on the following parties this 20th day of December 2006.



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