

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of the)
Cincinnati Gas & Electric Company to)
Modify its Nonresidential Generation)
Rates to Provide for Market-Based)
Standard Service Offer Pricing and to)
Establish an Alternative Competitive)
Bid Service Rate Option Subsequent)
to the 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. 03-2080-EL-ATA
Case No. 03-2081-EL-AAM

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 Market Price)

Case No. 05-724-EL-UNC

In the Matter of the Application of Duke)
Energy Ohio, Inc. to Modify its Quarterly)
Fuel and Economy Purchase Power)
Component of its Market-Based)
Standard Service Offer)

Case No. 06-1068-EL-UNC

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In the Matter of the Application of Duke)
Energy Ohio, Inc. to Adjust and Set its)
Adjust and Set its System Reliability)
Tracker)

Case No. 06-1069-EL-UNC

In the Matter of the Application of Duke)
Energy Ohio, Inc. to Adjust and Set the)
Annually Adjusted Component of its)
Market-Based Standard Service Offer.)

Case No. 06-1085-EL-UNC

**MEMORANDUM IN SUPPORT OF MOTION TO
QUASH AND MOTION FOR PROTECTIVE ORDER
OF INDUSTRIAL ENERGY USERS-OHIO**

Industrial Energy Users-Ohio ("IEU-Ohio") is a party to the above-captioned cases that were consolidated by the Attorney Examiner at the prehearing conference on December 14, 2006, for a single hearing before the Public Utilities Commission of Ohio ("Commission"). IEU-Ohio supports the Motion to Quash filed by Duke Energy Retail Sales LLC ("DERS") and the Motion for Protective Order filed by Duke Energy Ohio, Inc. ("Duke") for the reasons set forth below.

IEU-Ohio was a signatory party to the stipulation filed on May 19, 2004, in the Cincinnati Gas & Electric Company's [now Duke Energy Ohio, Inc. ("Duke")] rate stabilization plan ("RSP") in Case Nos. 03-93-EL-ATA, 03-1079-EL-AAM, 03-1080-EL-ATA, and 03-1081-EL-AAM (hereinafter "Stipulation"). As the Office of the Ohio Consumers' Counsel ("OCC") has pointed out in its last several pleadings,¹ in Duke's RSP case, the Commission denied OCC's motion to compel discovery of side agreements between Duke and other parties, and, adopted the Stipulation with

¹ See, for example, Memorandum Contra Duke Energy Ohio's Motion for Clarification by the Office of the Ohio Consumers' Counsel at 2 filed on December 20, 2006.

revisions. However, as a result of the Commission's modifications to the Stipulation, among other reasons, Duke filed an application for rehearing that made a "new proposal" which the Commission adopted in its First Entry on Rehearing. *Id.* The Commission's adoption of Duke's "new proposal" superceded the stipulation to which IEU-Ohio was a party.

Subsequently, on appeal to the Ohio Supreme Court, OCC argued that "the existence of side agreements could be relevant to a determination that the stipulation was not the product of serious bargaining. OCC suggests that if CG&E and one or more of the signatory parties agreed to a side financial arrangement or some other consideration to sign the stipulation, that information would be relevant to the commission's determination of whether all parties engaged in 'serious bargaining.'" *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 at 29. The Court agreed with OCC's argument and held that the Commission "erred in denying discovery of side agreements requested by OCC as relevant to the first test of reasonableness: whether the settlement is a product of serious bargaining among capable, knowledgeable parties." *Id.* at 28. The Court remanded the proceeding to the Commission. The Attorney Examiner directed Duke to "disclose to OCC the information requested with regard to side agreements." November 19, 2006 Entry.

Rule 4901-1-16(B), Ohio Administrative Code provides that "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."

The Court held that OCC's discovery request is **only** relevant as to the first test of the reasonableness of a stipulation: whether the settlement is a product of serious bargaining among capable, knowledgeable parties. As there is no stipulation in place (because it was superceded by Duke's Commission-approved "new proposal"), OCC's erstwhile discovery request, no matter how liberally construed, is neither relevant to the subject matter of this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. Thus, OCC's litigation behavior seems to be very paradoxical. On one hand, OCC has acknowledged that the current RSP is a product of a new proposal submitted by Duke after the Commission modified the Stipulation, thus, effectively nullifying the Stipulation. And on the other hand, OCC is demanding customer agreements that the Court has determined are only relevant to the extent that they address whether there were good faith negotiations undertaken to produce the mooted Stipulation. As things presently stand, no "side agreement" sought by OCC can logically have anything to do with the current plan before the Commission as a result of the Court's remand. Accordingly, IEU-Ohio supports DERS' Motion to Quash.

In the event that the Commission finds, irrespective of the fact that there is no stipulation that has anything to do with the current RSP, that Duke must still turn over any "side agreements," IEU-Ohio respectfully requests that the Commission issue a preemptive ruling to the effect that nothing produced may be used by OCC in this or any other proceeding unless and until OCC can demonstrate that it is relevant to issues before the Commission as a result of the Court's remand. Moreover, given the nature of the agreements that OCC seeks, IEU-Ohio respectfully requests that the Commission issue a ruling that any agreements produced should be protected against any and all

public disclosure, including any implied disclosure through the press releases that seem to accompany OCC's litigation efforts. Any agreements that may exist may include customer-specific information that may be regarded by the customer as competitively sensitive. For this reason, IEU-Ohio supports Duke's Motion for Protective Order.

For the reasons discussed herein, IEU-Ohio respectfully requests that the Commission preemptively find that side agreements are neither relevant, admissible, nor reasonably calculated to lead to the discovery of admissible evidence related to the issues before the Commission on remand and quash OCC's subpoenas. In the alternative, IEU-Ohio requests that the Commission find that nothing produced may be used by OCC unless and until OCC can demonstrate that it is relevant to the current RSP and take such action as may be necessary to prevent OCC from disclosing any agreements to the public.

While the Court has found that discovery of side agreements may be appropriate for purposes of testing a settlement based on one of the Commission criteria, the original settlement has long since ceased to have any significance. As a result, OCC's preoccupation with side agreements amounts to an effort to make other parties and the Commission chase ghosts. IEU-Ohio respectfully suggests that OCC, the Commission and other stakeholders have bigger and more important questions on their plates.

Respectfully submitted,



Samuel C. Randazzo, Trial Attorney

Lisa G. McAlister

Daniel J. Neilsen

Joseph M. Clark

McNEES WALLACE & NURICK LLC

21 East State Street, 17th Floor

Columbus, OH 43215-4228

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

sam@mwncmh.com

lmcalister@mwncmh.com

dneilsen@mwncmh.com

jclark@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Quash and Motion for Protective Order of the Industrial Energy Users-Ohio was served upon the following individuals this 21 day of December, 2006 via electronic transmission.


Lisa G. McAlister

Jeanne.Kingery@puc.state.oh.us
paul.colbert@duke-energy.com
rocco.d'ascenzo@duke-energy.com
anita.schafer@duke-energy.com
small@occ.state.oh.us
bojko@occ.state.oh.us
hotz@occ.state.oh.us
sauer@occ.state.oh.us
cmooney2@columbus.rr.com
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com
Thomas.mcnamee@puc.state.oh.us
werner.margard@puc.state.oh.us
anne.hammerstein@puc.state.oh.us
Stephen.Reilly@puc.state.oh.us
scott.farkas@puc.state.oh.us
drinebolt@aol.com
WTPMLC@aol.com
schwartz@evainc.com
rsmithla@aol.com
barthroyer@aol.com
sbloomfield@bricker.com
tobrien@bricker.com
dane.stinson@baileycavalieri.com
JKubacki@strategicenergy.com
korkosza@firstenergycorp.com
mchristensen@columbuslaw.org
tschneider@msgslaw.com
shawn.leyden@pseq.com
ricks@ohanet.org
cgoodman@energymarketers.com
nmorgan@lascinti.org
eagleenergy@fuse.net
Michael.Pahutski@Cinergy.com