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**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The )  
Cincinnati Gas & Electric Company to )  
Modify its Non-Residential Generation )  
Rates to Provide for Market-Based )  
Standard Service Offer Pricing and to )  
Establish a Pilot Alternative )  
Competitively-Bid Service Rate Option )  
Subsequent to Market Development )  
Period )

Case No. 03-93-EL-ATA

In the Matter of the Application of The )  
Cincinnati Gas & Electric Company for )  
Authority to Modify Current Accounting )  
Procedures for Certain Costs Associated )  
With The Midwest Independent )  
Transmission System Operator )

Case No. 03-2079-EL-AAM

In the Matter of the Application of The )  
Cincinnati Gas & Electric Company for )  
Authority to Modify Current Accounting )  
Procedures for Capital Investment in its )  
Electric Transmission And Distribution )  
System And to Establish a Capital )  
Investment Reliability Rider to be )  
Effective After the Market Development )  
Period )

Case No. 03-2081-EL-AAM  
Case No. 03-2080-EL-ATA

In the Matter of the Application of 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

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

Case No. 05-724-EL-UNC

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In the Matter of the Application of Duke )  
Energy Ohio, Inc., to Adjust and Set the )  
Annually Adjusted Component )

Case No. 06-1085-EL-UNC

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**DUKE ENERGY OHIO'S REPLY TO THE OHIO CONSUMERS'  
COUNSEL'S MEMORANDUM CONTRA TO DUKE ENERGY OHIO'S  
MOTION FOR CLARIFICATION**

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Duke Energy Ohio (DE-Ohio) asserts that neither the Court's remand order, nor due process, requires a hearing or additional discovery in these proceedings before the Public Utilities Commission of Ohio (Commission). The Ohio Consumers' Counsel (OCC) asserts differently because it interprets the Court's remand order and the Attorney Examiner's November 29, 2006, Entry in conflict with DE-Ohio's interpretation of those orders. For the reasons more fully discussed below DE-Ohio does not believe that OCC can reasonably support its interpretation; however, the conflict itself is reason enough for the Commission to clarify the scope of its proposed hearing and discovery in these proceedings.

**ARGUMENT:**

**I. The OCC's history of the proceeding and description of the Court's remand order is inaccurate.**

DE-Ohio will address the inaccuracies set forth in OCC's "History of Related Proceedings" as they appear in OCC's Memorandum Contra.<sup>1</sup> OCC's inaccurate assertions inappropriately attempt to broaden the scope of the proceedings and cast unfounded aspersions on the Commission and DE-Ohio. DE-Ohio asserts that the Commission should

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<sup>1</sup> OCC's Memorandum Contra at 1-4.

not permit OCC's inaccuracies to influence the Commission's decisions in these proceedings.

First, OCC asserts that the Commission denied its Motion "to compel discovery of agreements between *Duke Energy and other entities*."<sup>2</sup> In so asserting, OCC misrepresents its own discovery request in the original case to establish DE-Ohio's market-based standard service offer (MBSSO). Simply reading the Court's order, including the basis for its discovery remand, reveals why OCC must resort to a fictional account of its own previous discovery request. The Court's remand order clearly clearly affirms the Commission in all substantive respects, orders the Commission to state its reasoning and cite to record evidence, and orders disclosure through discovery of side agreements as previously requested by OCC.

Specifically, in its "Request for Production of Documents Seventh Set" issued May 18, 2004, OCC asked that The Cincinnati Gas & Electric Company, the predecessor company to DE-Ohio, "provide copies of all agreements *between CG&E and a party* to these consolidated cases (and all agreements *between CG&E and an entity that was at any time a party* to these consolidated cases) that were entered into on or after January 26, 2004."<sup>3</sup> At hearing on May 20, 2004, OCC repeated the identical

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<sup>2</sup> *Id.* at 2 (emphasis added).

<sup>3</sup> *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA *et. al.* (Requests for Production of Documents Seventh Set at 3) (May 18, 2004) (emphasis added).

request.<sup>4</sup> In other words, the only request ever made by OCC prior to the Court's order on remand was for agreements between DE-Ohio and parties to the proceedings. Pursuant to the Court's remand order and the Attorney Examiners November 29, 2006, Entry, DE-Ohio has complied with that request.

The only agreement between DE-Ohio and any party to the proceeding is the City of Cincinnati agreement provided to the Parties through discovery. OCC tries to revise history by pretending that it requested agreements between affiliates of DE-Ohio. OCC does this through the use of the name Duke Energy throughout its Memorandum Contra, instead of DE-Ohio. OCC is using its inaccurate description of its own discovery request to goad the Commission into requiring DE-Ohio to disclose alleged agreements between its affiliates, none of whom were, or have been at any time, parties to these cases, and other entities that were not parties to these cases. The Commission should clarify that the intent of the November 29, 2006, Entry was simply that DE-Ohio respond to OCC's original discovery request in these proceedings and deny OCC permission to engage in brand new discovery for irrelevant agreements between non-parties.

Second, OCC asserts that the Commission "adopted the Stipulation and Recommendation with modifications *based upon the limitations of Ohio law and requirements concerning the Commission's*

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<sup>4</sup> *Id.* at TR. II at 8 (May 20, 2004).

*review of future rate increases.*<sup>5</sup> OCC's language implies that the Commission found some legal restrictions regarding any portion of the Stipulation and that it determined the subject matter of the Stipulation was regulated rates rather than market prices. Nothing could be further than the truth. The Commission's Opinion and Order amended the Stipulation based upon three guiding principles enunciated by the Commission to provide price certainty for consumers, revenue certainty for DE-Ohio, and continued development of the competitive retail electric market.<sup>6</sup> No language in the Commission's Opinion and Order or the Court's remand order suggests that any portion of any proposal offered by DE-Ohio, including the Stipulation and Alternative proposal, is in conflict with any portion of the law. In fact, the Court rejected OCC's arguments on these points. Further, the Commission has done nothing to suggest that DE-Ohio's MBSSO is a regulated rate instead of a market price, or that the Commission's jurisdictional authority over competitive retail electric services is as broad as its authority over traditional cost-based distribution rates. OCC's review is simply a distortion of the history of these cases.

Third, OCC alleges that DE-Ohio presented a "*new proposal*" in its Application for Rehearing and the Commission adopted a version of the

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<sup>5</sup> OCC's Memorandum Contra at 2 (emphasis added).

<sup>6</sup> *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA *et. al.* (Opinion and Order at 15) (September 29, 2004).

*“new proposal”* in its November 23, 2004, Entry on Rehearing.<sup>7</sup> This is simply not true. The Alternative Proposal offered by DE-Ohio and approved by the Commission and the Court was not new and was never described as new. It was identical to the Stipulation in every respect but four: DE-Ohio received a slightly lower market price; recovery of emission allowances were transferred from the Annually Adjusted Component (AAC) of the provider of last resort (POLR) to the Fuel and Purchased Power (FPP) tracker of the price to compare; and the Reserve Capacity price included in the AAC was divided in two and became the System Reliability Tracker (SRT) and the Infrastructure Maintenance Fund (IMF). Although the SRT and IMF are not specifically named in the evidence of record, there is substantial record evidence supporting the purpose of each and the market price charged.

The fact that the Alternative Proposal was not new and had been fully litigated is central to the Court’s remand order and the need for the Attorney Examiner to clarify its November 29, 2006, Entry. OCC’s allegation is that it had no opportunity to litigate the Alternative Proposal that OCC calls the new proposal. OCC had every opportunity to litigate all elements of the Alternative Proposal. The Commission adopted the Alternative Proposal, with some modification, over OCC’s objection. The Court did not criticize the Commission for failing to hold a hearing and

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<sup>7</sup> OCC’s Memorandum Contra at 2 (emphasis added).

did not say that OCC, or any other Party, should have additional opportunity to argue for a different market price or market price formula.

The Court held that “[t]he Commission’s reasoning and the factual basis supporting the modifications on rehearing must be discernible from its orders.”<sup>8</sup> The Court then ordered the Commission “to thoroughly explain its conclusion that the modifications on rehearing are reasonable and identify *the evidence it considered* to support its finding.”<sup>9</sup> Nothing in the Court’s order suggests that the Commission should collect and consider new evidence to support its first rehearing entry.

There is no purpose to be served in conducting a new hearing in this matter. In fact, to the extent a hearing results in *any* Commission action other than a reinforcement of its original Entry on Rehearing by explaining its reasoning and citing to the record evidence it considered to support its findings, the Commission should expect an appeal from DE-Ohio because the Commission lacks authority to amend a market price absent an application by the electric distribution utility. If however, the Commission cites to existing evidence in the new Entry contemplated by the Court’s remand order, DE-Ohio is confident that the record will permit the Commission’s entry to survive any appeal OCC may bring because it will be in lockstep with the Court’s order and the record evidence is more than sufficient to pass the manifest weight of the

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<sup>8</sup> *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 111 Ohio St. 3d 300, 309, 856 N.E.2d 213, 225 (2006).

<sup>9</sup> *Id.* (emphasis added).



evidence standard applied by the Court to the Commission's factual findings. The Commission should reject OCC's contention that there was anything new in the Alternative Proposal and clarify the Attorney Examiner's Entry to permit the Parties to cite the record evidence through briefs and answer any questions the Commission may have through oral argument.

Finally, OCC incorrectly asserts that a procedural schedule has been set with a hearing date of March 19, 2007, and that DE-Ohio must answer discovery when "it locates the information."<sup>10</sup> OCC's assertion is at best incomplete. The transcript of the December 14, 2006, prehearing conference reflects that the Attorney Examiners agreed to rule upon DE-Ohio's Motion for Clarification including the scope of the hearing and discovery on December 27, 28, or 29, 2006.<sup>11</sup> It is true that if the Attorney Examiners decide to have a full evidentiary hearing various dates were discussed, but nothing is set until the Attorney Examiners rule on the scope of the proceeding and discovery. OCC's inaccurate description is simply another example of OCC attempting to force an unnecessary and unlawful reexamination of DE-Ohio's market price. The Commission should not accept OCC's premises.

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<sup>10</sup> OCC's Memorandum Contra at 4 (emphasis added).

<sup>11</sup> TR. December 14, 2006, at 39, 65-66.

**II. DE-Ohio is not required to file an Interlocutory Appeal to clarify an Attorney Examiner Entry.**

The OCC argues that the Commission should deny DE-Ohio's Motion for Clarification because it should have filed an Interlocutory Appeal.<sup>12</sup> OCC alleges that a Motion for Clarification is improper because the Attorney Examiner's November 29, 2006, Entry clearly intends an evidentiary hearing with the intent of reexamining DE-Ohio's MBSSO.<sup>13</sup> OCC is simply wrong.

While it is true that the Entry discusses a hearing and obtaining evidence it does not discuss the nature of the evidence the Commission needs to obtain, what is meant by the word "obtain," the scope of the hearing relative to DE-Ohio's MBSSO and the Court's remand order, and the scope of discovery in light of the Court's remand order. Surely the Attorney Examiners intend to be consistent with the Court's remand order. The Court's remand is clear in that the Court wants to know what evidence the Commission considered, not what new evidence may be available.<sup>14</sup>

Ironically, even if the Commission collects new evidence, the OCC may renew its appeal to the Court on the basis that there was insufficient evidence to support the Commission's *original* decision and

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<sup>12</sup> OCC's Memorandum Contra at 5-8.

<sup>13</sup> *Id.* at 6.

<sup>14</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 309, 856 N.E.2d 213, 225 (2006).

that such original decision should be voided pending a new hearing. DE-Ohio objects strenuously to handing OCC such an appeal when the record evidence so strongly supports the Commission's first Entry on Rehearing. DE-Ohio stands ready to provide the Commission through brief, the existing record evidence supporting the Commission's November 23, 2004, Entry on Rehearing. DE-Ohio asserts that an Entry issued by the Commission citing factual record evidence will withstand an appeal and put an end to these cases so that all stakeholders can focus on the development of appropriate market prices for the period beginning January 1, 2009.

OCC's argument boils down to its recommendation that DE-Ohio file an Interlocutory Appeal rather than a Motion for Clarification. DE-Ohio appreciates OCC's recommendation regarding how DE-Ohio should litigate this case. There is no compelling reason however, why DE-Ohio must file an Interlocutory Appeal from an Attorney Examiner's Entry that raises as many questions as this does. Ohio Administrative Code Section 4901-1-12 does not limit the types of Motions that a Party may file.<sup>15</sup> Motions for Clarification have a long history at the Commission and there is nothing improper about such a Motion.

Recently, the Commission promulgated rules intended to discourage motions for clarification.<sup>16</sup> The Commission is concerned that

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<sup>15</sup> OHIO ADMIN. CODE ANN. § 4901-1-12 (Baldwin 2006).

<sup>16</sup> *In re Rule Review*, Case No. 06-685-AU-ORD (Finding and Order) (December 6, 2006).

Motions for Clarification are improper where they require changes to a Commission order rather than a clarification to permit a case to proceed.<sup>17</sup> In the instant proceedings DE-Ohio is not seeking a change to a Commission order but simply a clarification of the Attorney Examiners Entry to permit the proceedings to move forward given the issues raised by the Entry.

For example, DE-Ohio retains the burden of proof to show that its Application is just and reasonable in these proceedings.<sup>18</sup> DE-Ohio asserts that it has met its burden of proof through the existing record evidence. DE-Ohio therefore, may not put on additional witnesses. On the other hand if DE-Ohio must support a new market price proposal it will need to examine current market conditions raising the probability that it would seek substantially higher market prices given the increase in costs since the original litigation. DE-Ohio has no desire to relitigate its MBSSO, but if it must, DE-Ohio will seek to go to unfettered market pricing. To determine its litigation position DE-Ohio must understand the scope of the proposed hearing and discovery. A Motion for Clarification is the proper vehicle to discern the answers to DE-Ohio's inquiry.

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<sup>17</sup> *Id.* at ¶ 59.

<sup>18</sup> Ohio Rev. Code Ann. § 4909.18 (Baldwin 2006).

**III. Nothing in the Court's order requires, or permits, an additional evidentiary hearing or discovery except for side agreements previously requested by OCC.**

The OCC, having failed to cite language in the Court's remand case to support its contention that a hearing and additional discovery is necessary, now cites the Court's language but ignores its plain meaning in a tortured effort to support its position. For example, OCC quotes the Court correctly holding that "the Commission made several modifications on rehearing without any *reference* to record evidence and without thoroughly *explaining* its reasons."<sup>19</sup> OCC argues that the Court's language means that there is not sufficient record evidence and there must be an evidentiary hearing and additional discovery.<sup>20</sup> But the quoted language does not say record evidence does not exist to support the Commission's first Entry on Rehearing; it says simply and plainly that the Commission did not reference the record or explain its reasons.

DE-Ohio attempted, on brief, to convince the Court that record evidence and reasoning existed to support all aspects of the Commission's first Entry on Rehearing and the Court agreed that "this may be true" but held "that would not excuse the Commission from its statutory obligation to justify its orders."<sup>21</sup> The Court ordered the

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<sup>19</sup> OCC's Memorandum Contra at 10; *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 309, 856 N.E.2d 213, 225 (2006) (emphasis added).

<sup>20</sup> OCC's Memorandum Contra at 10.

<sup>21</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 308, 856 N.E.2d 213, 224 (2006).

Commission to “thoroughly explain its conclusion that the modifications on rehearing are reasonable and identify evidence it considered to support its finding.”<sup>22</sup> DE-Ohio asserts that the Commission should do exactly what the Court ordered, explain its reasoning and identify the record evidence to support its November 23, 2004, Entry on Rehearing. The record has ample evidence to support every aspect of the Commission’s Entry on Rehearing including the IMF.

The OCC also correctly quotes the Court’s holding stating that the Commission must “compel disclosure of the *requested* information.”<sup>23</sup> OCC however, twists the Court’s language to insist that it should be permitted to discover alleged agreements that were never requested, agreements between Duke Energy Retail Sales, LLC (DERS), never a Party to these cases, and its customers who may or may not have been Parties to these proceedings. OCC knows very well that it requested only agreements between DE-Ohio and Parties to Case No. 03-93-EL-ATA *et. al.*, not any other agreements, and OCC has already been provided the one agreement that is responsive to its request. There is no basis, in the Court’s remand order or elsewhere, for OCC to expand discovery to any other agreements.

Moreover, the Court’s reasoning for ordering disclosure of the requested agreements is limited. The only reason for disclosure given by

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<sup>22</sup> *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 111 Ohio St. 3d 300, 309, 856 N.E.2d 213, 225 (2006).

<sup>23</sup> OCC’s Memorandum Contra at 10; *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 111 Ohio St. 3d 300, 323, 856 N.E.2d 213, 236 (2006) (emphasis added).

the Court is to permit the Commission an opportunity to assess the relevance of alleged agreements to the first prong of the test applied by the Commission to adopt or reject Stipulations signed by fewer than all of the Parties to a case.<sup>24</sup> That prong is whether there was serious bargaining among knowledgeable parties.<sup>25</sup> DE-Ohio has provided OCC with the only agreement between DE-Ohio and a Party to the underlying case. There can be no relevance to determine the nature of the bargaining for a settlement in Case No. 03-93-EL-ATA *et. al.*, where the agreement does not involve a party. There is nothing in the Court's remand order that suggests that OCC should be permitted to discover contracts between non-parties.

Next, OCC quotes the Court explaining OCC's allegation on brief that the Commission "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>26</sup> Unfortunately for OCC that is not what the Court said. In the next two sentences the Court stated "We agree. The portion of the Commission's first rehearing entry approving CG&E's alternative proposal is devoid of evidentiary support."<sup>27</sup> While the Court's words, as opposed to OCC's argument, certainly represent harsh criticism of the Commission's failure to cite record evidence in

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<sup>24</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 320-321, 856 N.E.2d 213, 234 (2006).

<sup>25</sup> *Id.*

<sup>26</sup> OCC's Memorandum Contra at 11; *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 307, 856 N.E.2d 213, 223 (2006).

<sup>27</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 307, 856 N.E.2d 213, 223 (2006).

support of its decision, they in no way imply that record evidence does not exist. It is simply a criticism that, in the Court's opinion, the Commission issued an insufficiently drafted document. DE-Ohio believes the Commission should simply cite the record evidence to comply with the Court's remand order.

Finally, OCC points to the only language from the Court's order that even conceivably supports OCC's fiction that the Court intended the Commission to hold an additional evidentiary hearing upon remand, namely the following language from the Court's order regarding side agreements: "[u]pon disclosure, the Commission may, if necessary, decide any issues pertaining to admissibility of that information."<sup>28</sup> OCC argues that the Court would not have addressed the issue of admissibility absent an expectation of an additional evidentiary hearing.<sup>29</sup>

Once again OCC has twisted the Court's words to suit its own purpose. The Court is clearly discussing side agreements already requested by OCC.<sup>30</sup> We know that is what the Court meant because the Court said that the Commission is ordered "to compel disclosure of the *requested* information."<sup>31</sup> As previously discussed, the only information OCC has requested in these cases is information relative to alleged side

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<sup>28</sup> OCC's Memorandum Contra at 12; *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 323, 856 N.E.2d 213, 236 (2006).

<sup>29</sup> OCC's Memorandum Contra at 12.

<sup>30</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 323, 856 N.E.2d 213, 236 (2006).

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



agreements between DE-Ohio and Parties to Case No. 03-93-EL-ATA *et. al.*<sup>32</sup>

What does the Court want the Commission to do with the information regarding side agreements? The Court wants the Commission to decide whether such agreements are relevant to the first prong of the test to determine whether partial Stipulations are just and reasonable.<sup>33</sup> DE-Ohio has provided the requested information, a contract between DE-Ohio and the City of Cincinnati, to OCC and the other Parties to the cases. If OCC believes that agreement is relevant to the Commission's consideration on remand, OCC is free to seek its admission into the record. The Commission, pursuant to the Court's order is free to consider its admissibility. DE-Ohio may oppose admissibility on the grounds that the agreement is irrelevant. Nothing in that process or the Court's remand order however, requires additional discovery or an evidentiary hearing. The Commission should grant DE-Ohio's Motion for Clarification and adopt a process that allows the Parties to cite the record evidence supporting the Commission's November 23, 2004, Entry on Rehearing.

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<sup>32</sup> *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA *et. al.* (Requests for Production of Documents Seventh Set at 3) (May 18, 2004).

<sup>33</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 320-321, 856 N.E.2d 213, 234-235 (2006).

**IV. Even assuming everything OCC alleges to be true there is nothing wrong with side agreements and no Party in Case No. 03-93-EL-ATA et. al. had an unfair advantage during negotiations to resolve the case.**

The basis of OCC's allegations relative to the side agreements is that somehow side agreements accrue to the detriment of residential consumers. The allegation is baseless and cannot be true. The MBSSO represents a market price, not regulated rates, charged by DE-Ohio to all consumers that choose to purchase competitive retail electric service (CRES) from it rather than alternative CRES providers.<sup>34</sup> The Commission approved a price to all consumers with no hidden charges and no ability by DE-Ohio to transfer costs or prices among consumer classes. Therefore, there can be no subsidy of non-residential consumers by residential consumers. Similarly, because the Commission approved a market price for all consumers there is nothing in side agreements that could have influenced the price.

OCC assumes there is something wrong with side agreements. There is not. Any party to any case is free to enter into agreements with any other parties for its benefit. Any other process would deter settlements in favor of complex and expensive litigation. The Court and

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<sup>34</sup> Ohio Rev. Code Ann. § 4928.14 (Baldwin 2006).

the Commission have consistently held that partial settlements, like the alleged settlement in this case,<sup>35</sup> are entitled to serious consideration.<sup>36</sup>

Further, OCC regularly participates in, and implements, side agreements. DE-Ohio and OCC recently entered a side agreement to resolve differences between them concerning the merger between Cinergy Corp., and Duke Power Corp., resulting in the existence of Duke Energy. The result of that side agreement was that OCC dismissed its appeal of the merger and DE-Ohio contributed \$1.25 million toward weatherization programs and applied for a green power option for Ohio consumers.

Similarly, OCC has entered into confidential side agreements.<sup>37</sup> OCC has attempted to appeal the Commission's approval of a partial settlement because the settlement conflicted with the confidential side agreement it signed with The Dayton Power and Light Company.<sup>38</sup> It is duplicitous for OCC to try to have it both ways, object to the existence of side agreements and their influence on settlements when it disagrees with the settlement and enter into side agreements when such agreements benefit OCC. OCC even goes so far as to attempt to use its side agreements to derail settlements with which it disagrees.

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<sup>35</sup> DE-Ohio continues to assert that there is no settlement in this case due to the substantial changes made by the Commission to the Stipulation submitted by the Parties. Those changes cause DE-Ohio to file its Application for Rehearing in the first instance.

<sup>36</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 64 Ohio St. 3d 123, 125-126, 592 N.E.2d 1370, 1373 (1992).

<sup>37</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 110 Ohio St. 3d 394, 397, 853 N.E.2d 1153, 1157 (1992).

<sup>38</sup> *Id.*

DE-Ohio suggests that it is time to state that side agreements, whether known or unknown to the Commission, have no bearing on the Commission's determination in any particular case. The Commission should encourage participation by all parties in settlement discussions. In these cases, OCC has all of the agreements between DE-Ohio and Parties to the applicable case. OCC is entitled to no more. It is not entitled to additional discovery or an additional hearing. The Commission should grant DE-Ohio's Motion for Clarification.

**CONCLUSION:**

For the reasons more thoroughly discussed above DE-Ohio respectfully requests that the Commission grant its Motion for Clarification and adopt a procedural schedule that permits the Parties to brief the record evidence so the Commission may cite record evidence in support of its November 23, 2004, Entry on Rehearing, determine that no new discovery is necessary in these cases, and only if the Commission determines that it needs additional evidence conduct an evidentiary hearing. DE-Ohio believes there is ample evidence of record, the Court's remand order does not require additional discovery or an evidentiary hearing, and the attempt by OCC to obtain side agreements entered by non-Parties is an irrelevant canard designed to delay the case to the detriment of all stakeholders including residential consumers.

Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served electronically on the following parties this 26th day of December 2006.



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