

**FILE**

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

RECEIVED-DOCKETING DIV  
2006 DEC 28 PH 4: 09  
**PUCO**

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

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 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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**MOTION TO STRIKE THE MOTION TO QUASH SUBPOENAS FILED BY  
NON-PARTY DUKE ENERGY RETAIL SALES, LLC, MEMORANDUM  
CONTRA DUKE ENERGY OHIO'S  
MOTION FOR PROTECTIVE ORDER, AND MOTION TO STRIKE  
INDUSTRIAL ENERGY USERS - OHIO'S MEMORANDUM IN SUPPORT OF  
MOTON TO QUASH AND MOTION FOR PROTECTIVE ORDER  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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Pursuant to Ohio Adm. Code 4901-1-12(A), the Office of the Ohio Consumers' Counsel ("OCC") moves to strike the Objections and Motion to Quash and for a Protective Order Prohibiting Discovery Requests to DERS ("Motion to Quash") filed by Duke Energy Retail Sales, LLC ("DERS") on December 20, 2006.<sup>1</sup> DERS is not a party to the above-captioned consolidated cases and has made no attempt to obtain the standing that would permit it to submit pleadings. DERS lacks standing, and may not submit motions in these cases.

Pursuant to Ohio Adm. Code 4901-1-12(B), the OCC submits its Memorandum Contra Motion for Protective Order ("Memo Contra" the "Motion for Protective Order") that was submitted on December 20, 2006 by Duke Energy Ohio, Inc. ("Duke Energy" or "Company," including its predecessor entity, the Cincinnati Gas & Electric Company), a

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<sup>1</sup> Pursuant to Ohio Adm. Code 4901-1-12, the legal director granted the OCC a 48-hour extension to file this pleading in connection with trial counsel's family emergency.

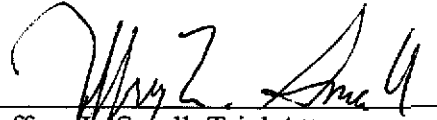
company affiliated with DERS. Duke Energy restates much of DERS' argument as part of its continuing effort to prevent the OCC from developing its case to present the Public Utilities Commission of Ohio ("PUCO" or "Commission") with evidence as part of a substantive hearing that has been set for March 19, 2007, on remand from the Supreme Court of Ohio.

Finally, pursuant to Ohio Adm. Code 4901-1-12(A), the OCC moves to strike the Memorandum in Support of Motion to Quash and Motion for Protective Order of Industrial Energy Users - Ohio ("IEU Memorandum" by "IEU") on December 21, 2006. The Commission's rules do not permit such a pleading.

The OCC files this pleading on behalf of the 600,000 residential customers of Duke Energy. The reasons for granting the OCC's motions and for denying Duke Energy's Motion to Quash are further set forth in the attached Memorandum in Support.

Respectfully submitted,

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Consumers' Counsel

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

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**MEMORANDA IN SUPPORT OF MOTIONS TO STRIKE AND  
CONTRA DUKE ENERGY OHIO'S  
MOTION FOR PROTECTION  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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This proceeding includes the remand of OCC's appeal to the Supreme Court of Ohio in which the Court found that the PUCO erred in two basic respects. In its Motion for Protection, as in its other repetitive advocacy in this remand,<sup>2</sup> 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 for Protection.

**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*

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<sup>2</sup> In its Motion for Protection, Duke Energy makes essentially the same argument against the Commission holding a substantive proceeding that the Company made in its Memorandum Contra OCC Motion to Stay Rate Increases, its Motion for Clarification that improperly contested the Attorney Examiner's November 29, 2006 Entry that ordered a hearing to obtain record evidence, its Reply to the OCC's Memorandum Contra to Duke Energy's Motion for Clarification, and its persistent and repetitive oral arguments that occupied a large portion of a prehearing conference held on December 14, 2006. The repetitiveness of the argument is worse under circumstances where DERS -- an affiliate of Duke Energy that may be a mere shell corporation created to perform acts from which Duke Energy seeks to distance itself -- has improperly submitted its own motion that repeats the Company's argument.

*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>3</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>4</sup> "that f[ound] 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."<sup>5</sup> On December 13, 2006, Duke Energy submitted a Motion for Clarification, seeking confirmation that the "hearing proposed by the November 29, 2006, Entry is limited to briefs and/or oral argument."<sup>6</sup> The OCC opposed Duke Energy's Motion for Clarification, in part based upon the plain language of the November Entry that clearly contemplated an evidentiary hearing and also based upon the Company's

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

<sup>4</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>5</sup> November Entry at 3, ¶(7).

<sup>6</sup> Motion for Clarification at 3.



failure to properly file an interlocutory appeal under the Commission's rules regarding the *Attorney Examiner's November Entry*.<sup>7</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, determinations were made regarding the above-captioned cases. These cases were officially consolidated and electronic service of pleadings was ordered.<sup>8</sup> 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.

On December 20, 2006, DERS filed its Motion to Quash the subpoenas issued by the hearing examiners on December 13 and 18, 2006. The second of those subpoenas was properly served upon the statutory agent for DERS in Cleveland on December 22, 2006.<sup>9</sup> The subpoena requires the attendance of a DERS representative for cross-examination on January 3, 2007, and also requires the DERS representative to bring with him/her copies of agreements between DERS and customers of Duke Energy. These agreements, according to a complaint filed in federal court by a former employee of the Duke affiliated companies ("Deeds Complaint"), may contain provisions for kickback

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<sup>7</sup> OCC Reply to Duke Energy's Memorandum Contra Motion to Stay Rate Increases at 3-6 and OCC Memo Contra Motion for Clarification at 5-11 (December 20, 2006).

<sup>8</sup> The consolidation had previously been stated only in the form of a proposal. *November Entry* at 3.

<sup>9</sup> The two subpoenas are essentially the same. The main difference is the person upon which the subpoena was to be served. The OCC served DERS's statutory agent, CT Corporation in Cleveland, on December 22, 2006, and communicated that fact to counsel for Duke Energy.

payments for certain charges approved in the original *Post-MDP Service Case*.<sup>10</sup> The Deeds Complaint supports arguments that side agreements may have been used in a discriminatory and predatory manner toward winning approval of the Company's proposals that resulted in substantial rate increases for more than half a million residential customers.<sup>11</sup>

On December 20, 2006, Duke Energy also filed its Motion for Protection in which it argued that it should not be subject to discovery that would permit new evidence to be presented in the proceeding on remand. IEU's Memorandum was filed on December 21, 2006.

Finally, December 20, 2006 was also the date on which the PUCO issued its Entry regarding the standard service offer generation prices while this proceeding remains pending.

## **II. ARGUMENT IN SUPPORT OF THE OCC'S MOTIONS TO STRIKE**

### **1. DERS Is Not a Party and May Not Submit its Pleadings.**

DERS is not a party to these proceedings and is not entitled to submit motions on any subject. On December 20, 2006, DERS submitted a motion entitled "Objections and Motion to Quash the Two Subpoena Duces Tecum Filed by the OCC and for Protective Order Prohibiting Discovery Requests to DERS." Only parties may submit motions, and DERS' filing improperly bypasses the essential process provided for by statute. R.C.

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<sup>10</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>11</sup> *Id.* at ¶¶7-8.

4903.221(A) states that “[a]ny . . . person who may be adversely affected by a public utilities commission proceeding may intervene in such proceeding, provided . . . [t]hat such . . . person files a motion to intervene with the commission.” Factors that the Commission must consider regarding such a motion to intervene are stated in R.C. 4903.221(B), which are also the essential contents of Ohio Adm. Code 4901-1-11(B). DERS is not a party to these cases, and has not made any attempt to become a party to this proceeding for any purpose. Therefore, DERS’ motions should be stricken.

DERS does not meet the specific requirements set in the Commission’s rules regarding a motion to quash. Ohio Adm. Code 4901-1-25(C) provides that the “commission, the legal director, the deputy legal director, or the attorney examiner may, upon their own motion or upon motion of *any party*, quash a subpoena if it is unreasonable or oppressive . . . .” DERS is not a party, and may not submit a motion to quash. Its Motion to Quash is improper, abusive, and should be summarily stricken.<sup>12</sup>

**2. The Commission’s Rules Do Not Permit IEU’s Memorandum.**

IEU may not submit a memorandum in support of Duke Energy’s motions under the Commission’s rules. Ohio Adm. Code 4901-1-12(B) provides for the filing of a memorandum contra by a party within fifteen days and a reply memorandum within seven days. The only memorandum in support provided for under the Commission’s rules, pursuant to Ohio Adm. Code 4901-1-12(A), is one required to be filed that

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<sup>12</sup> Memoranda contra and replies are provided for pursuant to Ohio Adm. Code 4901-1-12. However, DERS is not a party, and any responsive pleading to the OCC’s Motion to Strike would be inappropriate. In the event that DERS submits a memorandum contra, the OCC may decide not to reply (and may decide not to again move to strike the improper pleading) but should be understood to oppose the DERS pleading as improper.

accompanies the moving party's motion. The IEU Memorandum does not comply with the Commission's rules and should be stricken.

While improper, IEU's entry into the dispute between the OCC and the Duke affiliated corporations is understandable based upon the allegations contained in the Deeds Complaint:

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

8. Between the original filing date of CG&E's Rate Stabilization Plan and 2005, CG&E faced significant opposition to the proposed rate increases; in fact, originally the companies that ultimately became counterparts to the Option Agreements vehemently opposed CG&E's Rates Stabilization Plan by way of their *membership in the Ohio Energy Group ("OEG") and the Industrial Energy Users ("IEU")*. However, in mid to late 2004, the IEU and OEG suddenly and unequivocally changed their stances supporting CG&E's Rate Stabilization Plan.<sup>13</sup>

These allegations -- from a source internal to the Duke affiliated corporations at the time of the original *Post-MDP Service Case* -- claim IEU involvement in negotiations that may have undermined the competitive market while raising prices for some customers. The alleged favoritism shown for IEU's members could violate (among other law) the prohibition contained in R.C. 4905.32 against a utility "refund[ing] or remit[ing] directly

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<sup>13</sup> Deeds Complaint at ¶¶7-8 (December 7, 2006) (emphasis added).

or indirectly, any rates . . . except such as are specified in such schedule and regularly and uniformly extended to all persons . . . .” The IEU Memorandum is not guided by procedural or substantive law. The IEU Memorandum may be motivated by a desire to protect secret agreements that (according to the Deeds Complaint) potentially involve IEU members and the Duke affiliated corporations in concerning arrangements connected with the *MDP Extension Case* that the Ohio Supreme Court appropriately remanded to the Commission.

### **III. ARGUMENT AGAINST DUKE ENERGY’S MOTION FOR PROTECTION**

#### **A. The Commission Should Conduct a Substantive Hearing Regarding Appropriate Generation Prices.**

##### **1. The Commission Set the Matter for Hearing.**

Duke Energy’s Motion for Protection repeats the Company’s previously filed, 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.<sup>14</sup> The OCC incorporates herein its previous arguments regarding the need for an evidentiary hearing.<sup>15</sup> The Company again 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>16</sup>

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<sup>14</sup> Duke Energy Motion for Protection at 5-6.

<sup>15</sup> These OCC arguments appear in the OCC’s Memorandum Contra Motion for Clarification filed on December 20, 2006.

<sup>16</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 based upon an “evidentiary record [that] is closed”<sup>17</sup> despite an existing record that the Court found to be inadequate. 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>18</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*. A full and proper hearing will ultimately result in the resolution of this proceeding in a timely and efficient manner.

Duke Energy argues, without support, that “[u]nless and until the Commission determines that there is an evidentiary deficiency, the focus instead, should be on the evidence already introduced.”<sup>19</sup> Duke Energy’s Motion for Clarification, filed on December 13, 2006 previously argued with the plain language of the November Entry “that f[ound] 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.”<sup>20</sup> While that

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<sup>17</sup> *Motion for Protection at 5*. Duke Energy seemingly appoints itself the decision-maker in this proceeding: “[N]o new evidence can, or should, be submitted and all discovery requests by OCC . . . should be quashed.” *Id.* at 8.

<sup>18</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.

<sup>19</sup> *Motion for Protection at 5*.

<sup>20</sup> November Entry at 3, ¶(7).

statement seems to clearly find “an evidentiary deficiency,” the Attorney Examiner confirmed that fact at the prehearing conference held on December 14, 2006: “So for today we were going to assume that we are going forward and have an evidentiary hearing where we collect fresh evidence as I think it *stated in the [November] [E]ntry* that we did put out.”<sup>21</sup> Duke Energy did not seek an interlocutory appeal of the Attorney Examiner’s ruling, pursuant to Ohio Adm. Code 4901-1-15, which was required for Duke Energy to properly contest the Attorney Examiner’s ruling.<sup>22</sup>

**2. The Commission Has Largely Addressed Duke Energy’s Concerns Regarding “Fairness” While this Case is Pending.**

Duke Energy’s argument that it is “unfairly” harmed regarding its standard service offer rates has largely been addressed by the Commission in its Entry dated December 20, 2006.<sup>23</sup> The pleadings were extensive regarding pricing while the case remains on remand, including the treatment of various riders that are also the subject of the instant, consolidated cases. The arguments do not need to be repeated in this pleading.

Duke Energy’s argument that it is being treated unfairly because the Commission has acted in this proceeding “without an application by DE-Ohio” is contradicted by Ohio law, the circumstances of this proceeding, and by the Company’s own pleadings.<sup>24</sup> Ohio law requires every electric distribution company in Ohio to file with the Commission, pursuant to R.C. 4809.18, “a market-based standard service offer of all competitive retail

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<sup>21</sup> Tr. at 14 (December 14, 2006).

<sup>22</sup> OCC Memorandum Contra Motion for Clarification at 5-8 (December 20, 2006).

<sup>23</sup> Motion for Protection at 12.

<sup>24</sup> Id.

electric services necessary to maintain essential electric service.”<sup>25</sup> The circumstances of the case are readily apparent in the pleadings by all the parties: the applications filed by Duke Energy were the subject of the Commission’s original proceeding that is now on remand from the Ohio Supreme Court.<sup>26</sup> Finally, Duke Energy submitted a pleading on December 26, 2006 in this proceeding that states: “DE-Ohio [i.e. Duke Energy] retains the burden of proof to show that its Application is just and reasonable in these proceedings.”<sup>27</sup> Everything, and everyone (including Duke Energy), points to the existence of an application before the Commission. The Duke Energy standard service offers should be reviewed as required by *Consumers’ Counsel 2006*.

**B. The Commission Should Continue Discovery.**

**1. Discovery is Important to this Proceeding.**

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.

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<sup>25</sup> R.C. 4928.14(A).

<sup>26</sup> See, e.g., Motion for Protection at 4.

<sup>27</sup> Duke Energy’s Reply to OCC’s Memorandum Contra to Duke Energy Ohio’s Motion for Clarification at 12 (December 26, 2006).



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>28</sup> It is the height of arrogance, under these circumstances, for Duke Energy to state that the Court’s decision does “not [permit] new evidence” on remand.”<sup>29</sup>

The scope of discovery should be “liberally construed.”<sup>30</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>31</sup> Progressive discovery will likely enable the OCC to provide, among other matters, 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.

The decision in *Consumers’ Counsel 2006* contains statements that contemplate another evidentiary hearing, one that should be accompanied by discovery as provided by Ohio law. 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>32</sup> As in the first hearing, Duke Energy has declared that all matters

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<sup>28</sup> *Consumers’ Counsel 2006* at ¶27 (emphasis added).

<sup>29</sup> Motion for Protection at 10.

<sup>30</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>31</sup> Ohio Adm. Code 49901-1-16(A).

<sup>32</sup> *Consumers’ Counsel 2006* at ¶94 (emphasis added).

inquired into by the OCC are “irrelevant . . . and not reasonably calculated to lead to the discovery of relevant or admissible evidence.”<sup>33</sup> Duke Energy states that “DERS did not take part in any negotiations or settlement discussions related to any of the above captioned cases.”<sup>34</sup> That statement appears to be refuted by the allegations contained in the Deeds Complaint.<sup>35</sup> The OCC’s current discovery efforts to obtain agreements and to cross-examine a representative of DERS are designed to test such assertions. Indeed, the Deeds Complaint states that DERS expended approximately \$40 million without a source of revenue.<sup>36</sup> Based on the Deeds Complaint, DERS appears to be the alter ego of Duke Energy (i.e. performing acts on paper to disguise Duke Energy’s involvement). Therefore, the agreements with DERS should have been provided to the OCC in the original proceeding.

The Ohio Supreme Court determined that the PUCO improperly barred side agreements as part of a “settlement privilege,”<sup>37</sup> and specifically mentioned one relevant use of such information at trial regarding the test of settlement agreements.<sup>38</sup> The Commission’s Second Entry on Rehearing depended upon the stipulation filed in this case in May 2004.<sup>39</sup> However, *Consumers’ Counsel 2006* also supports the use of

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<sup>33</sup> Motion for Protection at 9.

<sup>34</sup> *Id.*

<sup>35</sup> Deeds Complaint at ¶¶7-8 (December 7, 2006).

<sup>36</sup> Deeds Complaint at 2 and 12.

<sup>37</sup> *Consumers’ Counsel 2006* at ¶89.

<sup>38</sup> *Id.* at ¶86.

<sup>39</sup> *Id.* at ¶46.

settlement agreements under Evid. R. 408 for “several purposes.”<sup>40</sup> The agreements could be used to test the credibility of witnesses and their anticompetitive effect could have an important effect on the “competitiveness prong” of the Commission’s three part test regarding “rate stabilization plans.”<sup>41</sup> Duke Energy implicitly admits one possible use of additional discovery, stating that “OCC has not alleged [that DERS is subsidized by Duke Energy] . . . , and the Commission has not found such a transaction through audit.”<sup>42</sup> From the Deeds Complaint and the arguments herein, the DERS transactions need to be explored further regarding the Duke Energy rate plan with respect to, among other things, subsidies, the violation of R.C. 4905.32, and the effect they may have had on competitive conditions.<sup>43</sup>

## **2. Duke Energy’s Motion for Protection Failed to Follow the Commission’s Rules.**

Duke Energy’s counsel seeks to eliminate an element of the Commission’s discovery rules by taking a discovery dispute to the Attorney Examiners as a first course

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<sup>40</sup> Id. at ¶92. Evid. R. 408 states that settlement proposals and agreements are “not admissible to prove liability for or invalidity of the claim or its amount.” The OCC never suggested using settlement agreements for such a purpose in the *Post-MDP Service Case*. “This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.” Id. The list is not exhaustive.

<sup>41</sup> The competitiveness of “five competitive electric retail service providers,” relied upon by the Ohio Supreme Court (*Consumers’ Counsel 2006* at ¶56) is seriously undermined by the revelations in the Deeds Complaint. One of those “providers,” DERS, was apparently no more than a conduit for kickbacks that drew customers away from the competitive retail market. Deeds Complaint at ¶¶7-8 (December 7, 2006).

<sup>42</sup> Motion for Protection at 10.

<sup>43</sup> See, e.g., Motion for Protection at RP3 and RP6 (attachments) that begin the inquiry into affiliate transactions. The attachments to the Motion for Protection appear to contain preliminary responses that provide no substantive information. The preliminary responses show the apparent intent to not respond to the inquiries. One preliminary response is obviously not forthcoming: the response to a request for production seeking copies of agreements between Duke Energy and former parties in Case 03-93-EL-ATA states that there are “none.” Motion for Protection at RP7. The response should at least state that agreements exist with the City of Cincinnati. Motion for Protection at 6.

of action. The “affidavit of counsel . . . setting forth the efforts which have been made to resolve any differences with the party seeking discovery,” required pursuant to Ohio Adm. Code 4901-1-24, contains no more than a summary statement that it was “apparent [from the prehearing conference] that no reasonable agreement regarding the scope of discovery was possible.”<sup>44</sup> The discussion that took place in that instance revolved around Duke Energy’s willingness to turn over certain agreements between Duke Energy and the City of Cincinnati, a matter that was resolved by the Attorney Examiners in favor of the OCC.

The leap by Duke Energy’s counsel from that discussion to seeking protection from *all discovery* is not a matter of failing to reach a “reasonable agreement” with the OCC.<sup>45</sup> The result that Duke Energy implicitly blames on the OCC is caused by Duke Energy’s steadfast and unreasonable insistence that no hearing should be held in this proceeding.

Some attention is paid in the filings to the treatment of information that is turned over to the OCC.<sup>46</sup> The OCC seeks documents related to electricity provided to customers in the certified service territory of Duke Energy, including the terms of service and payments made or received by those customers, as well as communications regarding such electric service and the interrelationship (including financial) between the Duke affiliated corporations. The OCC and Duke Energy have protective agreements in each of the above-captioned cases (the likely reason that Duke Energy does not address the

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<sup>44</sup> Motion for Protection, Affidavit of Paul A. Colbert at ¶7.

<sup>45</sup> Id. at ¶7.

<sup>46</sup> IEU Memorandum at 4 (“should be protected”), DERS Motion to Quash at 4.

issue).<sup>47</sup> However, the OCC has not received any contacts regarding the handling of the information that it seeks other than by means of pleadings.<sup>48</sup>

The treatment of the information proposed by DERS -- inspection by only PUCO personnel and persons affiliated with the Duke corporations, ruling out any change in possession even to PUCO personnel -- is unreasonable, non-judicial, and against the nature of the Attorney Examiner's statements at the prehearing conference that the OCC would be permitted to formulate its own case out of discoverable material.<sup>49</sup> Duke Energy, having already led this honorable Commission to the difficult position of reversible error regarding the protection of secret deals, would now lead the PUCO even farther down a path that fails to comply with the ruling of the Ohio Supreme Court.<sup>50</sup> Duke Energy's path is lined with primrose, and should not be traveled. Discovery should proceed, the secret deals should be disgorged, and this matter should proceed to resolution in the public light.

### **C. The Subpoenas Are Proper for this Proceeding.**

Duke Energy confuses the role played by a respondent to a complaint with that played by a person with knowledge sought as part of a proceeding (i.e. roles played by a "defendant" and a witness). The Company reaches the peculiar result that the

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<sup>47</sup> OCC reserves its rights, including under statute, PUCO rules and protective agreements, to address any claims that the secret deals should be kept from the public light.

<sup>48</sup> OCC counsel contacted Duke Energy's counsel in order to follow-up on arrangements for the notice of deposition and subpoena. OCC did not receive a phone call or an e-mail to deal with specifics about the deposition scheduled on January 3, 2007.

<sup>49</sup> Tr. at 55-57 (December 14, 2006). The specifics of the discussions are not revealed in this pleading since documents were discussed as part of the transcript.

<sup>50</sup> IEU is also not shy about sending the Commission down the same path as before, where it proposes: "the Commission [should] preemptively find that side agreements are neither relevant, admissible, nor reasonably calculated to lead to the discovery of admissible evidence." IEU Memorandum at 5.

Commission may not subpoena a DERS representative as a witness. The Commission's rules regarding subpoenas state:

The . . . attorney examiner assigned to the case may issue subpoenas, upon [his/her] own motion or upon motion of any party. A subpoena shall command the person to whom it is directed to attend and give *testimony* at the time and place specified therein. A subpoena may also *command such person to produce the books, papers, documents, or other tangible things* described therein.

\* \* \*

A subpoena may require a person . . . to attend and give *testimony* at a deposition, and to *produce designated books, papers, documents, or other tangible things* . . . .<sup>51</sup>

Duke Energy's contention that the subpoena power of the Commission does not extend to DERS -- i.e. as an "unregulated entity subject to the Commission's jurisdiction for certification and complain purposes only" -- misses the point that the subpoena does not make DERS an applicant or a respondent but requires *testimony* and the *production of documents*.

The complete fallaciousness of Duke Energy's argument is especially highlighted by Ohio Adm. Code 4901-1-21(F). This rule allows for the unconstrained issuance of subpoenas, stating: "A party may in the [deposition] notice and in a subpoena name a corporation, partnership, association, government agency, or municipal corporation and designate with reasonable particularity the matters on which examination is requested." It was never contemplated in this or any rule that the PUCO's subpoena power is connected to an issue of whether the subpoena recipient is regulated by the PUCO. Indeed, the Ohio General Assembly, in R. C 4901.18, wrote no such limitation into the law allowing for the PUCO's issuance of subpoenas.

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<sup>51</sup> Ohio Adm. Code 4901-1-25(A) and (D).

The subpoenas requested from the Commission and properly served upon DERS compel, pursuant to the Commission's rules, the *testimony* of a DERS representative and *documents*. Duke incorrectly focuses on the Commission's jurisdiction over DERS in certification proceedings or as a respondent for "complaint purposes."<sup>52</sup> Duke Energy completely misconstrues the procedural nature of a subpoena, and its argument must fail. The Commission properly issued the subpoenas through its representatives, its hearing examiners, under the PUCO's jurisdiction over these proceedings.

Duke Energy's misguided argument regarding the PUCO's ability to issue subpoenas partly explains the OCC's interest in the agreements and argues for the continuation of discovery. Duke Energy states:

Because DE-Ohio [or, Duke Energy] is aware that DERS is not supplying generation service to any load in its service territory it is questionable that the DERS agreements represent competitive retail electric service.<sup>53</sup>

The allegations contained in the Deeds Complaint support a potential view that DERS is a mere shell corporation created to violate the prohibition contained in R.C. 4905.32 against a utility refunding rate collections,<sup>54</sup> and that illegal subsidies related to this remanded case have been used for those purposes.<sup>55</sup> Under these circumstances, it would

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<sup>52</sup> Motion for Protection at 11 (citing R.C. 4928.16 and 4928.18 in footnote 12). The close correspondence between arguments by the Duke affiliated corporations is illustrated by the identical argument by DERS. Motion to Quash at 8.

<sup>53</sup> Motion for Protection at 11.

<sup>54</sup> Deeds Complaint at ¶¶7-8 (December 7, 2006).

<sup>55</sup> R.C. 4928.02(G) addresses "anticompetitive subsidies." Duke Energy admits that "DERS is not supplying generation service to any load in its service territory." Motion for Protection at 11. A former employee of the Duke affiliated companies alleges that DERS is made and estimated \$40 million in unlawful payments. Deeds Complaint at 12. The combined statements suggest a subsidy from Duke Energy to DERS that may have destroyed the competitive market in Duke Energy's distribution service territory.

appear very possible that DERS is an alter ego of Duke Energy, including for purposes directly related to this remand and OCC should be entitled to “pierce the corporate veil” and inquire about DERS activities in discovery directed towards Duke Energy.<sup>56</sup>

Regardless of whether DERS is the alter ego of Duke Energy or the corporate veil in this case is pierced, subpoenas may be issued and their contents enforced against corporate affiliates that are not a party to a case.

Under the scope of discovery as defined in Civ.R. 26(B), a party is not required to pierce the corporate veil in order to serve a corporate entity with discovery requests. Rather, the pertinent question is whether the requested information is relevant to the subject matter involved in the pending litigation.<sup>57</sup>

The scope of discovery is substantially the same under the Civil Rules and the Ohio Administrative Code.<sup>58</sup> The subpoenas were properly issued in this proceeding, and the OCC is entitled to enforcement of the one subpoena that it actually served.

Duke Energy also “objects to OCC’s attempt to to {sic} consolidate Case No. 06-986-EL-UNC into these proceedings by including it in the caption in its discovery requests without the order of the Attorney Examiner or the Commission.”<sup>59</sup> The OCC cannot, of course, consolidate proceedings before the Commission. Discovery, on the other hand, is left in the hands of the parties unless a dispute arises that cannot be

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<sup>56</sup> The alter ego doctrine, which asks if control over a corporation is complete such that it has no separate mind, is explained in numerous cases. See, e.g., *Sanderson Farms, Inc. v. Gasbarro*, 2004 Ohio 1460.

<sup>57</sup> *Schluter v. PSL Motors, Inc.*, 2000 Ohio App. Lexis 3099 at 7 (June 29, 2000), citing *Freeman v. Cleveland Clinic Found.* (1998), 127 Ohio App.3d 378, 388, 713 N.E.2d 33.

<sup>58</sup> Compare with Ohio Adm. Code 4901-1-16(B).

<sup>59</sup> Motion for Protection at 3. Duke Energy’s Motion for Protection argues that OCC’s inclusion of the 06-986-EL-UNC is inappropriate. This argument is convenient only for the moment and is the opposite of the Company’s claim at the prehearing conference that the OCC had incorrectly excluded the 03-93-EL-ATA caption from its discovery. That claim was disproved by the discovery attached to the Motion for Protection. Tr. at 37 (December 14, 2006).



resolved between counsel. The instant proceeding and Case No. 06-986-EL-UNC are closely connected since the latter case deals with Duke Energy's proposal to extend its rate plan for an additional two years. The cases are both pending, and the OCC is proceeding with both cases as efficiently as possible. Duke Energy does not explain the difficulty presented by the OCC's efforts to combine discovery activities in the two proceedings. After having falsely accused the OCC of delay,<sup>60</sup> it is disingenuous for Duke Energy to argue that the OCC should conduct its discovery by duplicating many of its related discovery activities.

### **III. CONCLUSION**

This honorable Commission is rapidly approaching a moment of truth in this case both in its role as a public institution and in its administration of justice as a quasi-judicial authority for Ohioans. Duke Energy (the regulated electric utility with a private interest) and others seem determined to lead the Commission (the Ohio agency with a public interest) to that moment down a slippery slope of expediency and self-interest that are at odds with the ruling of the Supreme Court of Ohio and have the appearance and potential reality of involving the Commission in the cloaking of secret agreements that may implicate the reasonableness or lawfulness of the rate stabilization plan for Duke Energy and may undermine the attainment of the objectives of the Ohio General Assembly in Senate Bill 3.

The OCC respectfully requests that the Commission deny Duke Energy's Motion for Protection. The Motion for Protection states another of Duke Energy's attempts to prevent a substantive hearing from taking place in this proceeding that conflicts with both

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<sup>60</sup> See, e.g., Tr. at 70 (December 14, 2006).

the opinion of the Supreme Court of Ohio in *Consumers' Counsel 2006* as well as the Attorney Examiner's orders.

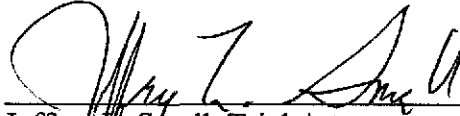
The OCC also respectfully requests that the Commission strike the filings submitted by DERS and IEU in connection with the issuance of subpoenas and discovery in this proceeding. These pleadings by DERS and IEU fail to comply with the Commission's rules regarding the submission of motions and responsive pleadings to motions.

In the interests of Duke Energy's 600,000 residential customers, the OCC supports the Commission's existing intention for a substantive hearing as announced by the PUCO's Attorney Examiners in this proceeding. The OCC should be permitted to present evidence at such a substantive hearing, and the OCC must be able to obtain information needed for the development of its case. Therefore, the examination set for January 3, 2006 should proceed as scheduled and the Commission should permit continued discovery.

Duke Energy and its affiliate are beckoning the Commission to follow them down a primrose path of private interest. Instead, this Commission, the public institution, should choose the course that leads to law, rule and the public light, by requiring that discovery be answered, that secret deals be disgorged and that this remand proceed to public hearing.

Respectfully submitted,

Janine L. Migden-Ostrander  
Consumers' Counsel

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

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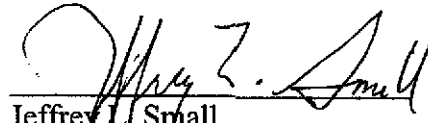
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Office of the Ohio Consumers' Counsel's *Motion to Strike and Memorandum Contra Motion for Protection* were served electronically pursuant to the service list set by the Attorney Examiner, this 28 th day of December 2006.

  
Jeffrey L. Small  
Assistant Consumers' Counsel