

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

Consolidated Duke Energy Ohio, Inc., Rate)	Case Nos. 03-93-EL-ATA
Stabilization Plan Remand and Rider)	03-2079-EL-AAM
Adjustment Cases)	03-2081-EL-AAM
)	03-2080-EL-ATA
)	05-724-EL-UNC
)	05-725-EL-UNC
)	06-1068-EL-UNC
)	06-1069-EL-UNC
)	06-1085-EL-UNC

ENTRY

The attorney examiner finds:

- (1) In *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, *et al.* (RSP case), this Commission authorized Duke Energy Ohio (DE-Ohio)¹ to establish a rate stabilization plan and, as a part of that plan, to recover various costs through identified riders. The Commission's entry on rehearing, *inter alia*, modified or created various riders, as part of the rate stabilization plan.
- (2) On appeal of that Commission decision, the Ohio Supreme Court remanded the proceedings to the Commission, requesting, *inter alia*, that the Commission provide additional record evidence and sufficient reasoning to support the modification of its opinion and order on rehearing. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 (*Consumers' Counsel*).
- (3) On November 29, 2006, the attorney examiner issued an entry, finding "that a hearing should be held in the remanded RSP case, in order to obtain the record evidence required by the court."

¹ DE-Ohio was formerly known as the Cincinnati Gas & Electric Company. In this entry, it will be referred to as DE-Ohio, regardless of its name at the time being discussed. Case names, however, will not be modified.

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- (4) On December 13 and 18, 2006, the Office of the Ohio Consumers' Counsel (OCC) filed motions for subpoena duces tecum, ordering the appearance of a witness representing Duke Energy Retail Sales, LLC (DERS), an affiliate of DE-Ohio, and the provision of, *inter alia*, agreements between customers of DE-Ohio and DERS or its affiliates.
- (5) On December 20, 2006, DERS filed objections and a motion to quash the subpoenas, as well as a motion for a protective order prohibiting discovery requests to DERS. Also on that date, DE-Ohio filed a motion for a protective order and a memorandum in support of the DERS motion to quash. On December 21, 2006, Industrial Energy Users-Ohio (IEU-Ohio) filed a memorandum in support of the DERS motion to quash and the DE-Ohio motion for a protective order.
- (6) On December 28, 2006,² OCC filed a responsive pleading, including a memorandum contra the DE-Ohio motion for a protective order and motions to strike the filings by DERS and IEU-Ohio.
- (7) The examiner will first address the motion by OCC to strike the supportive memorandum filed by IEU-Ohio. While OCC is correct that the Commission's procedural rules do not provide for the filing of memoranda in support of motions by other parties, those rules also do not prohibit such filings. Therefore, the examiner will not grant the motion to strike.
- (8) The next issue is DE-Ohio's motion for a protective order. DE-Ohio requests that the Commission prohibit all discovery in cases related to the remand of the RSP case, as it does not believe that any additional record evidence is required. The examiner has already issued an entry finding that a hearing should be held in the remanded RSP case, in order to obtain the record evidence required by the court. No interlocutory appeal of that ruling was filed by any party. The examiner finds that it is inappropriate to prohibit discovery in preparation for a hearing. Therefore, the motion by DE-Ohio for a protective order will be denied.
- (9) The final issue is the motion by DERS to quash the subpoenas, and the associated motion by OCC to strike that motion. OCC argues that the motion to quash should be stricken as it was filed by an entity that is not a party to the proceedings. OCC cites the

² Pursuant to Rule 4901-1-12, Ohio Administrative Code (O.A.C.), the legal director granted OCC a two-day extension of time to file its responsive pleading.

procedural rule, which provides for a "motion of any party . . ." Rule 4901-1-25(C), O.A.C. Although OCC is technically correct that the relevant rule uses the term "party" in its provision for motions to quash, the examiner does not believe that such language is intended to prohibit the filing of a motion to quash by anyone other than a party. As noted earlier, the rules are permissive, not prohibitive. An analogy can be made to the filing of a motion for a protective order by a person other than the one who filed a document. In that circumstance, this Commission has allowed a non-filing person to file a motion for a protective order, even though such filing is not strictly within the language of the rules. The Commission has stated that such requests should be considered based on the circumstances of each case, noting that persons who did not file the documents in question might nevertheless be harmed by the disclosure of information contained in them. *In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Electric Distribution Rates*, Case Nos. 05-59-EL-AIR, et al., Entry (August 10, 2005). In this case, we find it appropriate that the person subject to a subpoena be permitted to file a pleading objecting to the subpoena. In addition, the examiner finds that the wording in the rule is, in this circumstance, more appropriately interpreted as meaning that the examiner may quash a subpoena upon the motion of an affected person. Therefore, the examiner will deny the motion to strike the motion to quash.

- (10) Having determined that the motion to quash will not be stricken, it is now appropriate to consider the bases for such motion. DERS requests that the subpoenas be quashed on the grounds that they are outside the jurisdiction of the Commission, that they were not properly served, and that they are unduly burdensome and oppressive. The first two bases can be addressed simply. DERS attempts to argue that, because the Commission has only limited jurisdiction over DERS, the Commission has no power to issue subpoenas directed at DERS. This is incorrect. The Commission's subpoena power, found in Section 4901.18, Revised Code, and Rule 4901-1-21(F) and 4901-1-25, O.A.C., is not limited to subpoenas directed at entities over which the Commission has general supervisory jurisdiction. With regard to proper service, the examiner notes that OCC filed two motions for subpoenas, the second of which properly served CT Corporation, the agent for service of process on DERS. OCC pointed out this fact in its December 28, 2006, filing and, also, stated that it had communicated

that fact to counsel for DE-Ohio. The examiner will not quash the subpoenas on either of these two bases.

- (11) With regard to its third basis, that the subpoenas are oppressive and unduly burdensome, DERS makes several assertions.
 - (a) First, DERS argues that the subpoenas request affiliate information that is not within its possession or control. The examiner agrees that the subpoenas should have been drafted to request only documents that are in the possession and control of DERS. Indeed, the final category of requested documents in the subpoenas is so limited.
 - (b) It also argues that the subpoenas are unreasonable broad, as they request information relating to agreements with all DE-Ohio customers. The examiner agrees that the subpoenas are overly broad in requesting copies of agreements with "customers" of DE-Ohio. In order to be relevant to these proceedings, the subpoenas will be limited such that each reference to "customers of" DE-Ohio will mean customers of DE-Ohio who are either current or past parties to these consolidated proceedings or affiliates or members of such current or past parties.
 - (c) DERS submits that the subpoenas are unreasonable as they seek confidential information without adequate protection. The examiner will not quash the subpoenas on this ground. DERS makes no statement that it has endeavored to arrange a satisfactory confidentiality agreement with OCC. Such arrangements are generally forthcoming.
 - (d) DERS asserts that the subpoenas are unreasonable, as they will impact the strategy of DERS and DE-Ohio in an unrelated civil proceeding. As the legal strategies of DERS or DE-Ohio in a civil proceeding are not relevant to these Commission proceedings, the examiner will not quash on this ground.
- (12) The motion to quash will, therefore, be granted in part and denied in part. Similarly, the motion for a protective order prohibiting the discovery of this information from an affiliate of DERS will be denied.

It is, therefore,

ORDERED, That the motion to strike the filing by IEU-Ohio be denied. It is, further,

ORDERED, That the motion by DE-Ohio for a protective order be denied. It is, further,

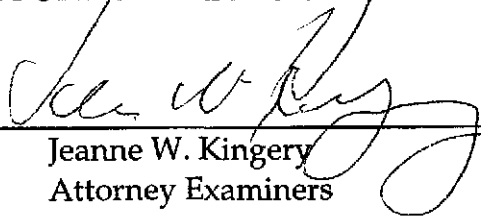
ORDERED, That the motion to strike the motion to quash be denied. It is, further,

ORDERED, That the motion to quash be granted in part and denied in part. It is further,

ORDERED, That the motion by DERS for a protective order be denied. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record in these proceedings.

THE PUBLIC UTILITIES COMMISSION OF OHIO



By: Jeanne W. Kingery
Attorney Examiners

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Entered in the Journal

JAN 02 2007



Renee J. Jenkins
Secretary