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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 Modify Its Fuel and Economy Purchased 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 ) Case No. 06-1069-EL-UNC  
System Reliability Tracker. )

In the Matter of the Application of Duke )  
Energy Ohio, Inc., to Adjust and Set its ) Case No. 05-724-EL-UNC  
System Reliability Tracker and Market )  
Price. )

In the Matter of the Application of Duke )  
Energy Ohio, Inc., to Adjust and Set the ) Case No. 06-1085-EL-UNC  
Annually Adjusted Component )

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**DUKE ENERGY RETAIL SALES MOTION IN LIMINE TO EXCLUDE  
IRRELEVANT CONTRACTS AND RELATED DOCUMENTS FROM  
THESE PROCEEDINGS**

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Duke Energy Retail Sales (DERS) respectfully moves the honorable Public Utilities Commission of Ohio (Commission), in advance of the hearing in this proceeding tentatively scheduled for March 19, 2007, to exclude from introduction into the record certain confidential contracts and related documents provided to Parties through discovery. The documents in question are not relevant to these proceedings and their admission would be unduly prejudicial to DERS and its counterparties, all non-residential consumers in Duke Energy Ohio's (DE-Ohio) certified territory.

DERS has intervened in these proceedings to protect its interests for discovery purposes only. DERS is a party to a number of contracts that it has provided, under compulsion, through discovery and is seeking to protect its own interests by this motion. Support for DERS' Motion in Limine is set forth in the attached Memorandum in Support. DERS also adopts, incorporates, and supports the Motions in Limine and Memorandum in Support filed by DE-Ohio and Cinergy Corp.

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## MEMORANDUM IN SUPPORT

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### RELEVANT FACTUAL HISTORY

On January 10, 2003, Duke Energy Ohio (DE-Ohio) filed its application before the Public Utilities Commission of Ohio (Commission) to establish its market-based standard service offer (MBSSO).<sup>1</sup> Various Parties, including the Ohio Consumers' Counsel (OCC), intervened in these proceedings and participated in the discovery process. In its "Request for Production of Documents Seventh Set" issued May 18, 2004, OCC asked DE-Ohio to "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>2</sup> At hearing on May 20, 2004, OCC repeated its discovery request.<sup>3</sup>

As part of the Commission's November 23, 2004, Entry on Rehearing, the Commission denied OCC's request to discover side agreements because it held that such agreements are privileged and

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<sup>1</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. Al.* (Application) (January 10, 2003). DE-Ohio was formerly known as The Cincinnati Gas & Electric Company.

<sup>2</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (Requests for Production of Documents Seventh Set at 3) (May 18, 2004) (emphasis added).

<sup>3</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* at TR. II at 8 (May 20, 2004).

irrelevant to the Commission's consideration of stipulations, which on their face, must be evaluated by, and acceptable to, the Commission.<sup>4</sup> Subsequently, OCC appealed the Commission's Entry on Rehearing and the Ohio Supreme Court remanded to the Commission, including an order that the Commission "compel disclosure of the requested information. Upon disclosure, the commission may, if necessary, decide any issues pertaining to the admissibility of that information."<sup>5</sup>

After the Court's remand order the Commission decided that it was necessary to hold an additional evidentiary hearing.<sup>6</sup> As part of the hearing process the Commission ordered DE-Ohio to "disclose to OCC the information requested in discovery with regard to side agreements."<sup>7</sup> In response to the discovery order DE-Ohio provided Parties, including OCC, with the only agreement it entered with a Party to these proceedings. Based simply upon allegations made by an ex-employee of a DERS and DE-Ohio affiliate in an unrelated law suit, OCC issued a subpoena to DERS seeking agreements between DERS and Parties to these proceedings.<sup>8</sup> On January 2, 2007, DERS, under compulsion to do so, responded to OCC's subpoena and provided confidential contracts to

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<sup>4</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (Entry on Rehearing at 16-17) (November 23, 2004).

<sup>5</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 323, 856 N.E.2d 213, 236 (2006).

<sup>6</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (Entry at 3) (November 29, 2006).

<sup>7</sup> *Id.* At 4.

<sup>8</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (Motion for Subpoena Dueces Tecum) (December 12, 2006); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (Motion for Subpoena Dueces Tecum) (December 18, 2006).

OCC and other Parties pursuant to protective agreements. Those contracts were between DERS and Parties to these proceedings or counterparties that are members of organizations that are Parties to these proceedings. Subsequently DERS supplemented its response with contracts between it and one additional Party.

At this time, OCC has all contracts between DERS and any of its counterparties that reference any component of DE-Ohio's MBSSO. DERS believes that under these circumstances it is appropriate to determine the admissibility of the discovered contracts and any related documents thereto. DERS also adopts, incorporates and supports the Motions in Limine and Memorandum in Support filed by DE-Ohio and Cinergy Corp.

**ARGUMENT:**

The purpose of a motion in limine:

[I]s to avoid the injection into the trial, of matters which are irrelevant, inadmissible and prejudicial . . . . It also serves the useful purpose of raising and pointing out before trial, certain evidentiary rulings that the court may be called upon to make . . . . It is not a ruling on evidence. It adds a procedural step prior to the offer of evidence.<sup>9</sup>

Typically, "the primary reason for imposing a blanket, prehearing exclusion of evidence and arguments is to ensure that a jury is shielded from potentially prejudicial information that is ultimately determined not

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<sup>9</sup> *In Re Montgomery County Sale to DP&L*, Case No. 88-359-EL-UNC (Entry at 2) (July 6, 1988).

to be relevant to the case."<sup>10</sup> While this Motion seeks to exclude irrelevant, prejudicial and inadmissible evidence and to bring to the Attorney Examiners' attention evidentiary rulings they may be called upon to make, there is no jury trial and the nature of the prejudice to DERS and consumers is not typical. The nature of the prejudice is no less serious however, and is due serious consideration by the Commission.

There are three reasons why the Commission should prohibit OCC's inquiry into the discovered contracts and any attendant documents and exclude those items as inadmissible in these proceedings. First, the documents are irrelevant to these proceedings because the Commission rejected the very Stipulation OCC now alleges the contracts affected. Thus, these documents are not linked to the market price established by the Commission in its November 23, 2004, Entry on Rehearing. DERS will consent to a confidential *in camera* review by the Attorney Examiners to establish this fact.

Second, the only purpose for which these documents could be offered would be to show that the parties to the agreements reached a compromise during settlement negotiations, which is not only commonplace in any proceeding, but also fundamental to the adversarial process. Even if such conduct were impermissible DERS was not a party to the case and did not participate in settlement negotiations. Further,

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<sup>10</sup> CEI v. AEP, Case No. 95-458-EL-UNC (Entry at 3-4) (August 31, 1999).

the in camera review suggested above will reveal that DERS entered all of the effective contracts after the issuance of the Commission's November 23, 2004, Entry on Rehearing and without any obligation to enter the contracts at all. Further, it will reveal that DE-Ohio is not a party to the contracts.

Third, even if the contracts and other documents are probative their prejudicial effect outweighs any probative value.

- I. The contracts are inadmissible because they are irrelevant to these proceedings.<sup>11</sup>**
- A. The contracts are irrelevant to any consideration on remand because the Commission did not adopt the Stipulation or DE-Ohio's alternative proposal.**

No irrelevant evidence is admissible in any proceeding.<sup>12</sup> OCC cannot establish that either the agreements or documents relating to them have any bearing on the November 23, 2004, Entry on Rehearing adopted by the Commission. The Ohio Supreme Court's Remand ordered the Commission to permit discovery of "side agreements" only to determine if such agreements were relevant to whether there was serious bargaining among capable knowledgeable parties associated with a stipulation adopted by the Commission.<sup>13</sup>

The plain fact however, is that the Commission rejected the Stipulation submitted by DE-Ohio and other Parties to these

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<sup>11</sup> OHIO R. EVID. 401, 402 (Baldwin 2007).

<sup>12</sup> OHIO R. EVID. 402 (Baldwin 2007).

<sup>13</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 319, 856 N.E.2d 213, 233 (2006) (emphasis added).



proceedings.<sup>14</sup> Nor are the contracts and documents related thereto made relevant by the fact that the Commission fashioned its MBSSO from parts of a Stipulation, parts of DE-Ohio's alternative proposal, and other factors including its review of the: (1) reasonableness of DE-Ohio expenditures relative to the Fuel and Purchased Power (FPP) tracker, the System Reliability Tracker (SRT), and the Annually Adjusted Component (AAC); (2) Commission-established baselines applicable to the FPP, SRT, and AAC; and (3) a higher level of avoidability for the SRT and a lower price charged to returning consumers.<sup>15</sup> OCC has no evidence that anyone presented either a Stipulation or alternative proposal that included the above terms and conditions. Absent such an offer, any settlement agreements between the Parties that were unrelated to the Commission's order have no bearing on these proceedings.

In point of fact, the Supreme Court's remand order is expressly limited to delineation by the Commission of a basis for its November 23, 2004, Entry on Rehearing ordering DE-Ohio to adopt a specified MBSSO, which is substantially different from the filed Stipulation or the Alternative Proposal made by DE-Ohio in its Application for Rehearing.<sup>16</sup>

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<sup>14</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (Opinion and Order at 37-38) (September 29, 2004).

<sup>15</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (Entry on Rehearing at 9-19) (November 23, 2004).

<sup>16</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 856 N.E.2d 213 (2006).

**B. Even if DE-Ohio's Stipulation or alternative proposal had been adopted by the Commission, the contracts in question remain irrelevant because there is no evidence that any counterparty to the agreements is paying anything other than the Commission approved MBSSO price and the settlements are neither nefarious nor inappropriate.**

The OCC has the burden of proving relevance in introducing evidence.<sup>17</sup> If the Commission determines that the discovered contracts may be relevant, the OCC is still required to tie the contracts to DE-Ohio and its MBSSO before the contracts, or related information, is admissible.

There is no evidence that DE-Ohio is paying any of the costs, or might receive any of the revenues associated with any of the DERS contracts. While, DE-Ohio entered into a contract with the City of Cincinnati, the City of Cincinnati, like all counterparties to the DERS contracts, is paying DE-Ohio the full MBSSO market price approved by the Commission. Further, all of the effective DERS contracts were negotiated and signed after the Commission issued its November 23, 2004, Entry on Rehearing, and without any obligation on the part of DERS to enter the contracts. All of the information relative to the contracts is that shareholders, not DE-Ohio or consumers, either pay all costs associated with the contracts or will receive all of the benefits associated with the contracts. Absent a nexus between the contracts and

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<sup>17</sup> *In Re Montgomery County Sale to DP&L*, Case No. 88-359-EL-UNC (Entry at 2) (July 6, 1988).

DE-Ohio or consumers, the contracts are irrelevant to these proceedings and the Commission should not permit OCC to introduce them as evidence.

Further, confidential agreements among parties have been recognized in many Commission proceedings and neither the Court nor the Commission has ever overturned such agreements. Absent violation of a statute, rule, or important regulatory principle there is simply nothing about such contracts that is relevant to these proceedings. Under these circumstances the contracts are not relevant to these cases and the Commission should grant this Motion in Limine to deny admission of the contracts and maintain their confidential status.

**II. Admission of the contracts to these proceedings would prejudice DERS and cause it undue harm.**

DERS will suffer harm, in these cases and elsewhere, if the contracts or attendant documents are admitted into evidence. DERS did not participate in the settlement discussions to resolve these cases and entered the contracts on its own and at its own risk. With one exception, DE-Ohio is not a Party to the contracts, and does not possess the information necessary to defend allegations related to the contracts except to the extent that such information has been discovered by OCC. Absent a ruling in advance of the filing of testimony for the hearing, DERS does not have an opportunity to adequately prepare for hearing. Due to this uncertain procedural position, DERS has filed a contemporaneous Motion to Intervene for the limited purpose of

defending the contracts so that it may prepare to defend itself from OCC's allegations.

One of the responsibilities vested in the Commission is to provide the public with accurate information regarding utility prices, regulated or unregulated. The Commission has the expertise to weed the inaccurate information from the accurate and the relevant information from the irrelevant. This is crucial to the formation of public opinion and its effect on the Commission and utilities. It affects the stakeholders interested in a case, the number of complaints filed against a utility, the utilities' customer satisfaction ratings, the utilities financial condition, and the ability of DERS to market its products and services and compete in the competitive retail electric market.

When inaccurate and irrelevant information is admitted into Commission cases, it causes additional expense and time of all stakeholders. The affected party must defend itself against the erroneous evidence. The parties must brief all issues, relevant or not. The Attorney Examiners are left with a large confusing record that requires them to sift through the inaccuracies to divine the evidence critical to the resolution of the case. Due process does not require that all evidence be admitted but that the proper information be admitted. That is the very purpose of the rules of evidence and civil procedure. While the Commission has discretion regarding the rules of procedure

used in its cases it should not abandon the principles upon which due process is founded.

Other Parties beside DERS will be harmed if the contracts are admitted into evidence. DERS entered the contracts in part, because they contain confidentiality clauses. The confidentiality clauses are necessary to protect its products and pricing from discovery by others. The counterparties to the contracts, consumers in DE-Ohio's certified territory, also want to protect their pricing and product information from their competitors.

Revised Code Chapter 4928 was enacted to permit market pricing of competitive retail electric service necessitating private negotiation among market participants. Such negotiations and contracts occur in all functioning markets and result in contracts tailored to the needs of each market participant. Admission of the contracts and related documents into evidence is inconsistent with the intent of the restructuring legislation and the Commission's goal of developing the competitive retail electric market.

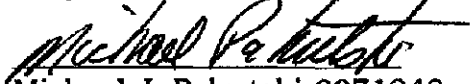
DERS and the counterparties have already suffered harm through the discovery process as those with confidentiality agreements have seen the financial and structural terms of contracts that were unique to other counter-parties. In spite of DERS' best efforts the discovery process will affect its competitive positions. The Commission can and should limit any further deleterious effects on DERS' competitive market position and

that of each its customers, absent a showing by OCC that the information is relevant.

### **CONCLUSION**

For the reasons set forth above, DERS asks that the Commission approve this Motion in Limine as well as the Motions in Limine and Memorandum in Support filed by DE-Ohio and Cinergy Corp.

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 2nd day of February 2007.

  
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