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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Consolidated Duke Energy, Ohio, Inc.,)	Case Nos. 03-93-EL-ATA
Rate Stabilization Plan Remand, and)	03-2079-EL-AAM
Rider Adjustment Cases)	03-2080-EL-ATA
Procedures for Capital Investment in its)	03-2081-EL-AAM
Electric Transmission And Distribution)	05-724-EL-UNC
System And to Establish a Capital)	05-725-EL-UNC
Investment Reliability Rider to be)	06-1068-EL-UNC
Effective After the Market Development)	06-1069-EL-UNC
Period)	05-1085 -EL-UNC

06-1085

MEMORANDUM IN RESPONSE TO MOTIONS *IN LIMINE*
BY THE OHIO MARKETERS GROUP

Pursuant to the Entries of February 18, 2004 and February 1, 2007, Constellation NewEnergy, Inc., Strategic Energy LLC, and WPS Energy Services, Inc. (hereinafter "Ohio Marketers Group" or "OMG") submit this Memorandum Contra to the February 2, 2007 Motions *In Limine* which were filed in this case by Duke Energy Ohio, Duke Energy Retail Sales, and Cinergy Corporation as well as the Commission Staff's Memorandum in Response filed on February 7, 2007. The Ohio Marketers Group participated in the Rate Stabilization Proceeding ("RSP") in Case No. 03-93-EL-ATA and by virtue of the Supreme Court remand of the RSP remain parties of record in the consolidated matter at bar.

The Supreme Court of Ohio, in the appeal of the RSP, found no support for the purpose or numeric setting of the rate stabilization charge, annually adjusted component, infrastructure charge or system reliability tracker. Further, the High Court stated:

"We remand this matter to the Commission and order that it compel disclosure of the requested information". Ohio Consumers' Counsel v. Pub. Util. Com., 111 Ohio St. 3d,

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323, 2006-Ohio-5789. The requested information includes certain customer agreements and side bar arrangements. The Ohio Marketers Group understands that some or all of the requested customer agreements and side bar arrangements have been produced or are the subject of discovery. The issue brought before the Attorney Examiner by Duke Energy Ohio, Duke Energy Retail Sales, and Cinergy Corporation in their motions *in limine*¹ is whether at this stage in the proceedings the Attorney Examiner could or should rule on the admissibility into evidence of these customer contracts and side bar arrangements.

The members of the Ohio Marketers Group believe that the granting of any such motions *in limine* is premature at this time. The deadline for discovery established by the Attorney Examiner is February 22, 2007 and the deadline for testimony by intervenors is February 28, 2008. Thus, parties such as the OMG are still within their allotted time to gather evidence, prepare their case and determine what documents or other evidence is suitable for submission into the record. OMG for one is not ready to do so at this time. Before the Attorney Examiner can determine whether the information required to be produced by the Supreme Court is relevant, she must hear from the parties seeking to admit the produced contracts as to why they believe it is relevant. It is unreasonable to make the intervenors defend the relevance of particular documents in advance of the close of discovery and the filing of testimony.

The Commission Staff, while not taking a position on the admissibility of side bar arrangements and customers agreements, posit the question of whether the fact that the matter at bar focuses on the second and third rehearing orders (which came after the stipulation in Case No. 03-93-EL-ATA was filed) renders the stipulation and hence the

¹ A blanket, pre-hearing exclusion of evidence and arguments

side bar agreements that underlie that stipulation moot. The quick answer is no, for the Stipulation may have taken a different approach if the discovery in the 03-93-EL-ATA case was served. Further, as noted above, one of the grounds for reversal in Consumers' Counsel, supra, was that the Commission failed to comply with the requirements of Section 4903.09 when, on rehearing, it modified its September 29 Opinion and Order and introduced the infrastructure maintenance fund. To determine whether this tracker is just and reasonable and set at the correct levels, it is necessary to know whom, if anyone is not paying this supposedly non-bypassable charge. This is true whether the customers are receiving discounts which have not been approved under Section 4905.31, Revised Code by the utility or an unregulated subsidiary of the utility is reimbursing certain standard service customers of the utility. Finally, if the logic of the Staff's argument was correct, then the Supreme Court would be requiring a vain act in making the utility turn over documents that would be barred from use in considering the remand.

The High Court required in its remand that the Commission thoroughly explain its conclusions that the modifications on rehearing were reasonable. The Commission would not be fulfilling that mandate if it announced before the cases were prepared that it would not consider as evidence side bar agreements that had impermissible discounts – regardless of the mechanism.

In closing, it is important to note that the contracts in question are all subject to confidentially agreements. Further, that no one has yet moved to admit any such contract into evidence, let alone to do so other than under seal. Thus the motions in limine simply do not present any good reason to prematurely rule on the admissibility of the customer contracts.

WHEREFORE, the Ohio Marketers Group respectfully requests that the Commission not grant the Motions *In Limine* at this time until all of the evidence has been presented to it.

Respectfully submitted,

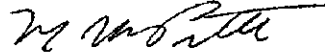


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Response to Motions *In Limine* of The Ohio Marketers Group was served either by email or regular U.S. mail, postage prepaid, this 9th day of February, 2007



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