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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

**DUKE ENERGY OHIO'S MEMORANDUM CONTRA THE APPLICATION
FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS'
COUNSEL**

INTRODUCTION:

On February 1, 2007, the Ohio Consumers' Counsel (OCC) filed an Application for Rehearing that charges the Public Utilities Commission of Ohio (Commission) with violating due process as prescribed by the Ohio Supreme Court in the Remand Order by prematurely determining that alleged side agreements should be considered relative only to "the seriousness of bargaining that led to the stipulation adopted in the opinion and order."¹ The charge is incredible because the Commission has, over the objections of DE-Ohio, granted the OCC much more due process than the Court and applicable statutes require.

¹ *DE-Ohio MBSSO Remand*, Case No. 03-93-EL-ATA *et. al.* (OCC's Application for Rehearing) (February 1, 2007); *DE-Ohio MBSSO Remand*, Case No. 03-93-EL-ATA *et. al.* (Entry at 3) (January 2, 2007).

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As discussed in prior pleadings, the Court remanded to the Commission on two procedural issues: (1) The Commission must support its November 23, 2004, Entry on Rehearing with reasoning and “evidence it considered to support its findings;”² and (2) The Commission must compel disclosure “of the requested information” alleged side agreements through discovery to determine if the parties engaged in serious bargaining regarding the Stipulation submitted for the Commission’s consideration in these cases.³ Nowhere in its Remand order did the Court overturn any substantive portion of the Commission’s November 23, 2004, Entry on Rehearing or promise any extraordinary due process to any party, including OCC.

The Court’s Remand order did not promise a hearing. It did not order that the Commission permit additional discovery, only the discovery that had been previously requested relative to side agreements.⁴ And finally, the Court did not order the Commission to admit any additional evidence, including alleged side agreements, into the record. In fact, the Court left the issue of admissibility expressly with the Commission holding that “[u]pon disclosure, the commission may, if

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

³ *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 111 Ohio St. 3d 300, 320-323, 856 N.E.2d 213, 234-236 (2006).

⁴ *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 111 Ohio St. 3d 300, 323, 856 N.E.2d 213, 236 (2006).

necessary, decide any issues pertaining to the admissibility of that information.”⁵

On remand, procedurally, these cases are in the discovery process. No Party, including OCC, has sought admission of any new evidence, including testimony, which has not yet been filed. Neither the Commission, nor the Attorney Examiners, has denied admission of any evidence offered for any purpose, including the alleged side agreements. Despite Duke Energy Ohio’s (DE-Ohio) requests to limit the scope of the remand process, the Commission has not done so. There is simply no basis for OCC’s Application for Rehearing and it should be denied.

ARGUMENT:

- I. The real purpose of OCC’s Application for Rehearing is to relitigate the issue of a competitive bid process that it lost before the Commission and the Court. The Competitive Bid Process is not properly at issue in these proceedings and the Commission should not permit OCC to use an Application for Rehearing as a vehicle to relitigate DE-Ohio’s approved Competitive Bid Process.**

The OCC reveals the real purpose of its Application for Rehearing when it states that the side agreements “may also be important regarding whether Duke Energy should be provided a waiver under Ohio Adm. Code 4901:1-35-02(C).”⁶ Ohio Administrative Code Section 4901:1-35-02(C) permits an electric distribution utility, such as DE-Ohio, to waive the requirements of O.A.C. Chapter 4901:1-35 if there is substantial

⁵ *Id.*

⁶ *DE-Ohio MBSSO Remand*, Case No. 03-93-EL-ATA *et. al.* (OCC’s Application for Rehearing) (February 1, 2007).

support among stakeholders for an alternative Competitive Bid Process (CBP).⁷ The Commission, expressly affirmed by the Court, upheld DE-Ohio's CBP as consistent with statute.⁸ Neither the Commission nor the Court relied upon the O.A.C. provision referred to by OCC and it is not at issue before the Commission.⁹ OCC raised this argument before the Court and it was rejected by the Court.¹⁰

The Commission and the Court rejected OCC's argument because they found that:

CG&E's [sic DE-Ohio's] *price to compare*, as part of the standard service offer, *was market based*, and OCC has offered no evidence to contradict that finding. Various customer groups were parties to the stipulation and approved the price to compare and the method by which the price to compare would be tested to ensure that it remains market based. CG&E's [sic DE-Ohio's] rate stabilization plan *provides for a reasonable means of customer participation*. Finally, *there appears to be significant competition in CG&E's [sic DE-Ohio's] service area* through the presence of five competitive electric retail service providers.¹¹

Where, as in these proceedings, the Commission determines that customers have the same options in the competitive retail electric service market as would be provided by a CBP, it is not necessary for an electric

⁷ OHIO ADMIN. CODE ANN. § 4901:1-35-02(C) (Baldwin 2007).

⁸ *DE-Ohio MBSSO Remand*, Case No. 03-93-EL-ATA *et. al.* (Opinion and Order at 28) (September 29, 2004); *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 313, 856 N.E.2d 213, 228 (2006).

⁹ *Id.*

¹⁰ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 313, 856 N.E.2d 213, 228 (2006).

¹¹ *Id.* (emphasis added).

distribution utility to offer a CBP.¹² Under the circumstances of these cases O.A.C. Chapter 4901:1-35 is inapplicable. The Commission and the Court agree; the Commission should not permit OCC to relitigate this issue.

The CBP issue was fully litigated before the Commission in these cases. The OCC was a party to, and fully participated in, that litigation. The Commission, affirmed by the Court, properly held that DE-Ohio's CBP is consistent with statute and its rules.

The doctrine of *res judicata* prohibits the OCC from relitigating the facts underlying the adoption of its CBP. "*Res judicata* is a legal doctrine applied in order to bar a litigant from resurrecting a cause of action once it has already been decided by a court or other judicial body of competent jurisdiction."¹³ The Commission has long recognized *res judicata* as necessary to prevent improper, repetitive litigation.¹⁴ The Court agrees that enforcement of the doctrine of *res judicata* is necessary to bring finality to the decisions of administrative agencies such as the Commission.¹⁵

In DE-Ohio's MBSSO Case, DE-Ohio's CBP process was vigorously litigated by OCC. The Commission determined that the adopted process

¹² Ohio Rev. Code Ann. § 4928.14 (Baldwin 2007).

¹³ *Ruth I. Wellman v. AT&T*, Case No. 99-770-TP-CSS (Entry at 1-2) (January 20, 2000).

¹⁴ *Ruth I. Wellman v. AT&T*, Case No. 99-770-TP-CSS (Entry) (January 20, 2000); *In re Cleveland Electric Illuminating Company*, Case No. 89-498-EL-COI (January 24, 1991); *In re Columbia Gas of Ohio*, Case No. 90-17-GA-GCR (January 9, 1991).

¹⁵ *Superior's Brand Meats v. Lindley*, 62 Ohio St. 2d 133, 135, 403 N.E.2d 996, 999 (1980).

“fulfills the statutory requirements for a competitive bidding process.¹⁶ The doctrine of *res judicata* prohibits OCC from new attacks on DE-Ohio’s CBP on remand.

OCC alleges that the revelation of alleged side agreements might be important to the Commission’s determination of the CBP issue. OCC’s argument is a canard. The Commission and the Court ruled that DE-Ohio did not need a CBP because customers had substantially the same options in the competitive retail electric market.¹⁷ The Commission made that factual finding, affirmed by the Court, because DE-Ohio had substantial switching in all customer classes and competitive retail electric service (CRES) providers offering prices in all customer classes.¹⁸ Under such factual circumstances a review of the O.A.C. rules was not necessary as the statutory requirements of R.C. 4928.14 were fulfilled. Nothing in alleged side agreements could alter the factual findings.

Further, the Commission did not adopt DE-Ohio’s Stipulation, or ultimately the Alternative Proposal. Although the Commission consistently described its orders as modifications of the Stipulation the changes made by the Commission in its Opinion and Order, and later in its Entry on Rehearing, were so substantial as to deprive DE-Ohio of any revenue certainty and did not represent a market price acceptable to DE-

¹⁶ *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA *et. al.* (Opinion and Order at 28) (September 29, 2004).

¹⁷ *DE-Ohio MBSSO Remand*, Case No. 03-93-EL-ATA *et. al.* (Opinion and Order at 28) (September 29, 2004); *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 111 Ohio St. 3d 300, 313, 856 N.E.2d 213, 228 (2006).

¹⁸ *Id.*

Ohio. DE-Ohio consistently represented that the Commission rejected the Stipulation and the Alternative Proposal it made on rehearing. In the absence of a Stipulation, the alleged side agreements are not relevant to O.A.C. 4901:1-35-02(C) or any other issue in the case as the Commission independently formulated its orders.

Had the Commission not amended its market price to be acceptable to DE-Ohio, DE-Ohio would have maintained its appeal of the Commission's CBP rules that improperly attempt to determine the MBSSO offered by an electric distribution utility. In the event that the Commission determines to apply those rules to DE-Ohio, DE-Ohio would be forced to resurrect its appeal of the rules. DE-Ohio does not believe such a contest is in the best interest of any stakeholders including DE-Ohio and the Commission.

II. OCC's reliance on Ohio Rule of Evidence to seek admission of alleged side agreements is misplaced because Rule 408 is inapplicable to these proceedings.

OCC relies upon Rule of Evidence 408, as referenced by the Court, for the proposition that the Court intends that the Commission consider alleged side agreements concerning issues other than whether there was serious bargaining among knowledgeable Parties.¹⁹ OCC's reliance is misplaced for two reasons.

First, the Court was discussing the application of *Goodyear v. Chiles Power Supply* in relation to a settlement privilege and concluded

¹⁹ *DE-Ohio MBSSO Remand*, Case No. 03-93-EL-ATA *et. al.* (OCC's Application for Rehearing at 7) (February 1, 2007).

that there is no absolute settlement privilege but ruled only on the discovery of alleged side agreements, not on the admissibility of such agreements.²⁰ Second, even if alleged side agreements are presumed to be relevant, Evidence Rule 408 limits the exceptions under which compromise information may be admissible.²¹ There is simply nothing in the Court's Remand Order that suggests, let alone commands, the Commission to admit into evidence, the alleged side agreements for any purpose.

The Court's discussion of the issue regarding OCC's ability to discover side agreements is instructive. Initially the Court concluded that:

*If there were special considerations, in the form of side agreements among the signatory parties, one or more parties may have gained an unfair advantage in the bargaining process. Therefore, we hold that the commission erred in denying discovery of this information based on lack of relevancy.*²²

The Court did not conclude there were "special considerations" or that any unfair advantage was gained by any party, it merely determined that the Commission erred in denying discovery of "agreements among signatory parties."²³

²⁰ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 322-323, 856 N.E.2d 213, 235-236 (2006).

²¹ OHIO R. EVID. 408 (Thompson West 2007).

²² *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 321, 856 N.E.2d 213, 235 (2006) (emphasis added).

²³ *Id.*

Next the Court discussed DE-Ohio's and the Commission's argument that its decision in *Constellation v. Pub. Util. Comm'n* and the Commission's reliance upon *Goodyear v. Chiles Power Supply* was dispositive to the issue of discovery of alleged side agreements.²⁴ The Court determined that the *Goodyear* settlement privilege is: (1) not applicable to Ohio discovery practice; (2) grounded solely in federal law; (3) Ohio settlement privilege is grounded in statute and common law and DE-Ohio and the Commission failed to cite such law; (4) that Ohio Rule of Evidence 408 permits settlement evidence to be used for several purposes; and concludes (5) that *Goodyear* would not preclude discovery of alleged "*contracts negotiated between CG&E [sic DE-Ohio] and the signatory parties to prevent or conclude further litigation.*"²⁵

Not only did the Court avoid any direct discussion of admissibility, but the Court did not imply that any side agreements existed or that such contracts resulted in improper advantage to any party. The only discussion of admissibility by the Court was to expressly hold that the Commission "may, if necessary, decide any issues pertaining to admissibility of that information."²⁶

Regarding OCC's reliance upon the five lines of the twenty three page decision that mentioned Ohio Rule of Evidence 408, OCC fails to mention that before Rule 408 is applicable information must be relevant,

²⁴ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 321-323, 856 N.E.2d 213, 235-236 (2006).

²⁵ *Id.* (emphasis added).

²⁶ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 323, 856 N.E.2d 213, 236 (2006).

because Ohio Rule of Evidence 402 prohibits the admission of irrelevant evidence, and the types of compromise evidence admissible under Rule 408.²⁷ As shown in OCC's quote of Ohio Rule of Evidence 408, admissible compromise evidence consists of evidence "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.*"²⁸ OCC's Application for Rehearing does not seek admission of alleged side agreements for any such purpose.

OCC has not alleged bias of any witness in these proceedings. The only party that has attempted to delay the proceedings is OCC, ostensibly, to hire an expert. There is no criminal investigation or prosecution at issue in these proceedings. Ohio Rule of Evidence 408 is simply inapplicable to these cases and OCC's reliance thereon is misplaced.

For that matter, OCC's attempts to gain admission of the discovered contracts is also inconsistent with the Court's remand order. The Court repeatedly referred to agreements between DE-Ohio and signatory Parties to the Stipulation.²⁹ The Court specifically ordered discovery of "requested information."³⁰ The only information requested of DE-Ohio by OCC in discovery was in its Request for Production of

²⁷ OHIO R. EVID. 402, 408 (Thompson West 2007).

²⁸ OHIO R. EVID. 408 (Thompson West 2007).

²⁹ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 318-323, 856 N.E.2d 213, 232-236 (2006).

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

Documents, Seventh Set, issued May 18, 2004. OCC asked that 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.”³¹ At hearing on May 20, 2004, OCC repeated the identical request.³²

OCC, in discovery since the remand, has requested contracts between *affiliates* of DE-Ohio, Duke Energy Retail Sales (DERS) and Cinergy Corp. (Cinergy), and signatories to the Stipulation or *affiliates of signatories* to the Stipulation. Over the objections of DE-Ohio and DERS the Commission ordered that DERS provide such information to OCC. None of the discovered confidential contracts are between DE-Ohio and parties to these cases or the Stipulation and therefore, they are well beyond the Court’s remand order. Nothing in OCC’s argument reasonably compels the Commission to permit broad premature admission of any contract. DE-Ohio requests that the Commission require OCC to lay a proper foundation and show relevancy before it determine the admissibility of any contract.

DE-Ohio also believes that it is time for the Commission to discuss and determine the scope of the proceeding as it stated it would in its

³¹ *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).

³² *Id.* at TR. 11 at 8 (May 20, 2004).

January 2, 2007, Entry.³³ DE-Ohio asserts that it is inappropriate to relitigate this entire case where the Court affirmed the Commission's November 23, 2004, Entry on Rehearing, in all substantive respects, but remanded to the Commission on two procedural issues. DE-Ohio will provide witnesses who will detail the existing record evidence so that the Commission may issue an Entry stating its reasoning and the record evidence in support of its November 23, 2004, Entry on Rehearing. DE-Ohio has already complied fully with the Court's and the Commission's discovery order by providing the one contract it entered with a Party to these proceedings to OCC in discovery. OCC has not shown that a broader scope to these proceedings is necessary or proper.

To the contrary, OCC has made unfounded allegations regarding the conduct of DE-Ohio, DE-Ohio's affiliates have been forced to file Motions to Intervene to defend themselves, counterparties to the contracts with DE-Ohio affiliates, and the Commission and its Staff (the OCC continues to seek discovery demonstrating that the Commission had knowledge of the discovered contracts). OCC seeks only to lower market prices without reasonable support. DE-Ohio will put on evidence supporting the Commission's MBSSO. DE-Ohio, even though it believes the process is unnecessary, does not object to OCC putting on evidence to the contrary. Information unrelated to the MBSSO and the

³³ *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA *et. al.* (Entry at 2) (January 2, 2007).

components thereof is irrelevant to these cases and should be excluded. That includes the exclusion of alleged side agreements.

III. OCC's reliance on the Deeds complaint is inappropriate as it is based upon unproven allegations in a case where DERS has had no opportunity to defend itself and in which DE-Ohio is not a party.

OCC asserts that 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...."³⁴ The Deeds complaint makes unfounded accusations in an effort to extract money from Duke Energy Corp. and DERS because a disgruntled ex-employee did not retain employment post merger. Duke Energy Corp., and DERS will vigorously defend themselves.

OCC has deposed Mr. Deeds under subpoena. Part of the transcript is, by agreement, under seal. Without revealing any confidential information, DE-Ohio represents that OCC now knows that Mr. Deeds has represented that DE-Ohio was not involved in any DERS contract, that Mr. Deeds underwent Code of Conduct and Corporate Separation training, and that Mr. Deeds objects to the contracts because they were not in the public domain even though it is common to maintain commercial contracts in a confidential manner and DERS publicly filed its financial statements, including the aggregate contract revenues, expenses, assets and liabilities, with the Commission. In other

³⁴ *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA *et. al.* (OCC's Application for Rehearing at 9-10) (February 1, 2007).

words, OCC found that Mr. Deeds does not know of any misconduct involving DE-Ohio or its affiliates. It is improper and unconscionable for OCC to continue to make allegations based upon unsupported allegations of an ex-employee that have not been tested in court.

If the OCC wants to call Mr. Deeds as a witness, DE-Ohio is happy to cross examine him. Otherwise, OCC should cease reliance upon the unfounded allegations in a complaint unrelated to these proceedings.

IV. Contrary to OCC's assertion *Bucyrus v. State Dept. of Health* stands for the proposition that an administrative agency should strictly follow the rules of evidence used in court to provide a fair hearing process including the proper exclusion of irrelevant evidence.³⁵

OCC also relies on *Bucyrus v. State Department of Health* for the proposition that the Commission should permit a full hearing and remain open to the admission of all evidence.³⁶ OCC seriously misinterprets the case, although it is relevant to these proceedings. *Bucyrus* admonishes the Department of Health for holding a hearing during which it did not strictly adhere to the rules of evidence.³⁷

The Court admonishes the Department of Health and states that the Department should hold hearings where its conclusions are based "upon competent evidence."³⁸ The Court first criticizes the Department of Health for allowing a newspaper article into evidence improperly.³⁹

³⁵ *Bucyrus v. Dept. of Health*, 120 Ohio St. 426, 430-431, 166 N.E. 370, --- (1929).

³⁶ *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA *et. al.* (OCC's Application for Rehearing at 11) (February 1, 2007).

³⁷ *Bucyrus v. Dept. of Health*, 120 Ohio St. 426, 430-431, 166 N.E. 370, --- (1929).

³⁸ *Id.*

³⁹ *Id.*

The Court's admonition is relevant to the instant proceedings where the Commission is permitting discovery of information well beyond the dictates of the civil rules of procedure and the Court's remand order. Admission of the discovered contracts would similarly be in conflict with the Ohio Rules of Evidence and would deprive DE-Ohio, its affiliates, and counterparties to the contracts, of due process thereby harming all concerned. Finally, the Court criticized Bucyrus for failing to introduce evidence and conduct cross examination and said the City could not blame anyone else for its failures in the case.⁴⁰ In these proceedings OCC cannot blame anyone else for its failure to present sufficient evidence to the Commission to support its idea of a market price.

The lesson to be learned from *Bucyrus* is that the Commission should be cautious in the exercise of discretion deviating from the rules of civil procedure and the rules of evidence. While it is a legitimate governmental goal to practice open government and present as much information as possible to the public, placing proprietary confidential information in the public domain may cause more harm than good and may thwart attempts to reach a reasoned and supported decision. That is particularly true in these proceedings where DE-Ohio is transitioning from a fully regulated environment to a commercial deregulated environment.

⁴⁰ *Id.*

In competitive markets it is common and necessary for market participants to maintain confidential proprietary information, including contracts with market participants. DE-Ohio's affiliates have done no more and no less. The Commission should deny OCC's Application for Rehearing as the Commission has not made any improper ruling regarding admissibility. DE-Ohio respectfully requests that the Commission properly limit the scope of these proceedings and limit the admissibility of irrelevant evidence, such as the alleged side agreements.

CONCLUSION:

For the reasons more thoroughly discussed above DE-Ohio asserts that the Commission should deny OCC's Application for Rehearing in its entirety.

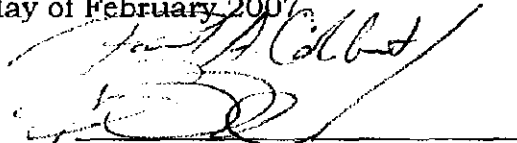
Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Paul A. Colbert', is written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically on the following parties this 12th day of February 2007.


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