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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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 RETAIL SALE'S MEMORANDUM CONTRA THE
APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO
CONSUMERS' COUNSEL**

The Ohio Consumers' Counsel (OCC) filed an Application for Rehearing from the January, 2, 2007, Entry issued by the Public Utilities Commission of Ohio (Commission). In that Entry the Commission ruled in OCC's favor and denied the Motion's of Duke Energy Ohio (DE-Ohio) and Duke Energy Retail Sales (DERS) to clarify the scope of these proceedings. Not satisfied with the Commission's Entry OCC now seeks a Commission ruling permitting broad admissibility of alleged side agreements.

First, DERS would note that the Commission has not made any determinations regarding the admissibility of any evidence in these proceedings because no party has offered any evidence or sought its admission. OCC's request for a more expansive use of side agreements is premature. Second, regarding the issue of admissibility the Court expressly

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left the Commission with discretion to determine admissibility.¹ DERS has previously argued the OCC does not have a right to due process beyond that granted by the Court in its Remand order. DERS will not repeat those arguments here.

DERS will point out that any determination regarding the OCC's use of alleged side agreements is premature before OCC lays a proper foundation for relevancy. OCC's original discovery request in these proceedings was for contracts between DE-Ohio and parties to the proceedings.² DERS is not DE-Ohio, was not a party to the proceedings prior to the Remand order, and properly entered confidential commercial contracts for consideration with counterparties. It is standard practice that commercial contracts remain confidential because of the harm that may accrue to the contracting parties if competitors learn the terms and conditions of such contracts, and therefore, their relative position in the competitive market. It would violate DERS's due process rights to permit the use of any alleged agreement prior to any showing of relevancy.

It is a matter of public record that DERS's contracts put approximately \$20 million annually into the southwest Ohio economy.³ Permitting OCC to use DERS's contracts to accuse DE-Ohio of impropriety regarding its market price would discourage, if not end, the ability of DERS

¹ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 323, 856 N.E.2d 213, 236 (2006).

² *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).

³ *In re DERS Certification*, Case No. 04-1323-EL-CRS (DERS Financial Statements) (August 24, 2006).

to enter such contracts to the detriment of DERS, its counterparties, and the economy of southwestern Ohio.

The Commission did nothing wrong by referring to the Court's remand order concerning the purpose for discovery of alleged side agreements in these proceedings. The Commission should not permit OCC to dictate the procedure in these cases to its own benefit and the detriment of all other stakeholders. Ultimately, it is the Commission's order, determined to be reasonable by the Court, which is under attack by OCC. The Commission should conduct a process that is fair for all parties and deny OCC's Application for Rehearing.

CONCLUSION:

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

Respectfully Submitted,



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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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