BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Consolidated Duke Energy Ohio, Inc., Rate Stabilization Plan Remand and Rider Adjustment Cases	)	Case Nos. 03-93-EL-ATA
	)	03-2079-EL-AAM
	)	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
In the Matter of the Application of Duke Energy Ohio to Modify Its Market-Based Standard Service Offer.	)	Case No. 06-986-EL-UNC

MEMORANDUM CONTRA MOTIONS TO INTERVENE BY DUKE ENERGY RETAIL SALES AND CINERGY CORP.
AND
MEMORANDUM CONTRA MOTIONS IN LIMINE BY DUKE ENERGY, DUKE ENERGY RETAIL SALES, AND CINERGY CORP.
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

Jeffrey L. Small, Trial Attorney
Ann M. Hotz,
Larry S. Sauer
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-8574 (Telephone)
614-466-9475 (Facsimile)
small@occ.state.oh.us
hotz@occ.state.oh.us
sauer@occ.state.oh.us

February 13, 2007

TABLE OF CONTENTS

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Consolidated Duke Energy Ohio, Inc., Rate Stabilization Plan Remand and Rider Adjustment Cases	)	Case Nos. 03-93-EL-ATA
	)	03-2079-EL-AAM
	)	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
In the Matter of the Application of Duke Energy Ohio to Modify Its Market-Based Standard Service Offer.	)	Case No. 06-986-EL-UNC
	)	

MEMORANDUM CONTRA MOTIONS TO INTERVENE BY DUKE ENERGY RETAIL SALES AND CINERGY CORP.
AND
MEMORANDUM CONTRA MOTIONS IN LIMINE BY DUKE ENERGY, DUKE ENERGY RETAIL SALES, AND CINERGY CORP.
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. SUMMARY

This case is a remand as a result of the decision of the Supreme Court of Ohio to reverse the order of the Public Utilities Commission of Ohio ("Commission" or "PUCO"), in an appeal by the Office of the Ohio Consumers' Counsel ("OCC").[1] On February 2, 2007, Duke Energy Ohio, Inc. ("Duke Energy" or the "Company"), Duke Energy Retail Sales, LLC ("DERS"), and Cinergy Corp. ("Cinergy," collectively with Duke Energy and DERS, the "Duke-affiliated companies") filed motions in *limine*. On

[1] Ohio Consumers' Counsel v. Public Util. Comm., 111 Ohio St.3d 300, 2006-Ohio-5789 at ¶28 ("Consumers' Counsel 2006").

February 2, 2007, DERS and Cinergy filed motions to intervene. OCC represents residential utility consumers in this case.

Pursuant to Ohio Adm. Code 4901-1-12(B), the OCC submits its memorandum contra ("Memo Contra") the motions *in limine* and the motions to intervene. Motions *in limine* are inappropriate in the context of a proceeding before the Public Utilities Commission of Ohio ("PUCO" or "Commission") that will not have a jury. Also, the motions *in limine* submitted by the Duke-affiliated companies would be inappropriate even in a court setting where a jury trial is contemplated. Also, the motions *in limine* submitted by DERS and Cinergy contradict statements contained within their motions to intervene, and those motions should also be denied.

The PUCO Staff filed a Memorandum in Response to Motions *in Limine* on February 7, 2007. Without further comment below, the OCC notes that the PUCO Staff "Response" opposed the motions *in limine*: "Staff does not suggest that the motions *in limine* should be granted now. It is possible that there are arguments or factors of which the Staff is currently unaware."[2] The PUCO Staff acknowledges that "[a]pparently there are agreements between an affiliate of Duke Energy Ohio and some of the signatories to the stipulation submitted in this case on May 19, 2004. Staff has no such agreement."[3]

In the interests of the 600,000 residential customers of Duke Energy and pursuant to Court's remand, the PUCO should deny the five motions submitted by the Duke-affiliated companies, for the reasons further set forth in this Memorandum in Support.

---

[2] PUCO Staff Memorandum in Response to Motions *in Limine* at 3 (February 7, 2007).

[3] Id. at 2. The PUCO Staff has had access to the information gathered by the OCC, and the OCC hopes that the Staff will take a more active interest in the matter.

II. HISTORY OF RELATED PROCEEDINGS

Duke Energy and several other parties filed applications for rehearing on October 29, 2004 in the first four cases in the caption above that were consolidated (*Post-MDP Service Case*). Duke Energy asked the PUCO to either i) approve the Company's first proposal to implement a "competitive market option," ii) approve the stipulation filed on May 19, 2004 (i.e. unaltered by the PUCO); or iii) approve a proposal introduced in the Company's Application for Rehearing ("New Proposal") that contained an array of new charges that had not been subject to an investigation or hearing.[4]

Duke Energy's New Proposal was built on the first four conditions placed by the Commission on the 03-93 Stipulation and introduced new charges and modified previously proposed charges. The New Proposal introduced an "infrastructure maintenance fund" ("IMF") as a new non-bypassable charge based upon percentages of "little g," created a "system reliability tracker" ("SRT") for the "purchase [of] power to cover peak and reserve capacity requirements," changed the bypassability of certain charges, changed the percentage increases associated with the "annually adjusted component" ("AAC"), and introduced a "fuel and economy purchased power" ("FPP") rate "related to the recovery of fuel, economy purchased power and emission allowances."[5] CG&E did not provide any numbers to support its New Proposal.

---

[4] Duke Energy Application for Rehearing at 2 (October 29, 2004).

[5] Id. at 12-13 and FPP Attachment 3 at 1.

In the First Entry on Rehearing, the PUCO adopted (in principal part) the New Proposal. The Commission provided for certain CG&E filings and verifications before the rate increases provided for in the New Proposal could be placed into effect.[6]

On November 22, 2006, the Ohio Supreme Court remanded the *Post-MDP Service Case*. A principal reason for the remand was the lack of evidentiary support for the PUCO's decision in the *Post-MDP Service Case*:

> The portion of the commission's first rehearing entry approving CG&E's alternative proposal is devoid of evidentiary support. There are no citations to the record supporting the commission's modifications on rehearing. In addition, the commission did not sufficiently set forth its reasoning for the changes on rehearing.[7]

Another principal reason for the remand involves the PUCO's treatment of the OCC's efforts to investigate the presence of side deals that should have been considered in the *Post-MDP Service Case*.

> 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.[8]

On the subject of privilege, the Ohio Supreme Court "declined to recognize a settlement privilege"[9] and noted in support that "Evid.R. 408 provides that evidence of settlement

---

[6] A number of the cases mentioned in the above-stated case caption reflect these filings.

[7] *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 at ¶28 ("*Consumers' Counsel 2006*").

[8] Id. at ¶86.

[9] Id. at ¶89.

may be used for *several purposes at trial*, making it clear that discovery of settlement terms and agreements is not always impermissible."[10]

On December 7, 2006, a complaint for wrongful termination was filed by a former employee of a company affiliated with Duke Energy, John Deeds ("Deeds Complaint").[11] The Deeds Complaint alleges that side agreements were used in a discriminatory and predatory manner to win approval of the Company's plan in the *Post-MDP Service Case.*[12] The Deeds Complaint alleges that an affiliate of Duke Energy makes payments to major commercial and industrial customers based upon charges that these customers pay to Duke Energy.[13] The rebated charges, as outlined in the Deeds Complaint, are the rate increases that were requested by Duke Energy and approved by the PUCO in 2004.[14]

On November 29, 2006, the Attorney Examiner issued an Entry, stating "that a hearing should be held in the remanded RSP case, in order to obtain the record evidence required by the court."[15] DE-Ohio submitted a pleading on December 13, 2006, under the guise of a "Motion for Clarification," in which it argued that the words used in the

---

[10] Id. at ¶92 (emphasis added).

[11] *Deeds v. Duke Energy Corporation et al.*, United States District Court, Southern District of Ohio (Western Division), Case No. 1:06CV835, Complaint (December 7, 2006) ("Deeds Complaint"). The Deeds Complaint is attached to a letter docketed in this case by the OCC on December 13, 2006.

[12] Deeds Complaint at ¶7.

[13] Id. The Deeds Complaint alleges that a Duke Energy affiliate made approximately $20 million in "Option Payments" to Duke Energy customers. Deeds Complaint at ¶9. "Option Payments" are confirmed by information contained in the Commission's records. See Duke Energy Retail Sales Memorandum Contra OCC Motion to Strike DERS Motion to Quash Subpoena at 9 ("Option Premium Expense during 2005 of $13,768,812, and during 2006 of $22,247,000.") (January 2, 2007), citing *In re DERS Certification*, Case No. 04-1323-EL-CRS, Part 5of 5, Exhibit C-3 at 34-35 and 55 (August 24, 2006) that shows payments by a Duke Energy affiliate that receives no revenues.

[14] Id. at ¶7.

[15] Entry at 2 (November 29, 2006).

entry issued on November 29, 2006 – "*hearing* . . . in order to *obtain the record evidence*" must have been intended to be limited to "briefs and/or oral argument."[16] The OCC argued that the plain language of the Entry clearly contemplated an evidentiary hearing[17] and that Duke Energy's pleading should not have been considered because the pleading should have been filed as an interlocutory appeal pursuant to Ohio Adm. Code 4901-1-15.[18]

In the January Entry (dated January 3, 2007), the Commission addressed Duke Energy's Motion for Clarification despite the absence of any certification to the PUCO pursuant to Ohio Adm. Code 4901-1-15. The Commission stated:

> [I]n light of the Supreme Court's opinion, it is appropriate to hold a hearing in these consolidated proceedings. We will not, as requested by DE-Ohio, grant a motion to "clarify" that the hearing should be limited to the filing of briefs and/or oral argument citing evidence already of record. That ruling was correct.[19]

The OCC is engaged in the discovery phase in these cases, and cannot be certain about the full extent of its use of side agreements at hearing. At this stage in these proceedings, the Commission should remain open to how the side agreements may be used at the hearing.

The OCC's discovery activities include an oral motion to compel discovery related to Duke Energy's side agreements at the prehearing conference conducted on December 14, 2006 as well as motions for subpoena directed towards obtaining

---

[16] Duke Energy Motion for Clarification at 3 (December 13, 2006).

[17] OCC Memorandum Contra Duke Energy Motion for Clarification at 6 (December 20, 2006).

[18] Id. at 6.

[19] Entry at 2 (January 3, 2007).

statements and documents from DERS and Cinergy. On December 20, 2006, Duke Energy and DERS filed motions to quash the subpoena directed towards DERS. Those motions were denied, in principal part, by Attorney Examiner Entry dated January 2, 2007. The deposition of Charles Whitlock, president of DERS, took place on January 9, 2007.

Motions to intervene were filed by DERS and Cinergy on February 2, 2007, and motions *in limine* were filed by Duke Energy, DERS, and Cinergy on that same date. The motions *in limine* seek an early determination that the OCC will not be able to enter into evidence the information that the OCC has gained regarding agreements by DERS and Cinergy with customers of Duke Energy. Due to the failure of the Duke-affiliated companies to properly serve the pleadings on the OCC, the Attorney Examiners informed the parties to the case that the OCC deadline to submit responsive pleadings is February 13, 2007.

III. ARGUMENT

A. The Motions *in Limine* Are Inappropriate and Should be Denied.

1. The *Motions in Limine* are Inappropriate for a Proceeding Before the Public Utilities Commission of Ohio.

The motions *in limine* posed by the Duke-affiliated companies are not proper for a proceeding before the Commission. The proper purpose for such a motion has been examined by the Ohio Supreme Court:

> Our inquiry commences with an examination of the purpose and effect of a motion *in limine*. A "motion *in limine*" is defined in Black's Law Dictionary . . . as "[a] written motion which is usually made before or after the beginning of a *jury trial* for a protective order against prejudicial questions and statements * * * to avoid

> injection into trial of matters which are irrelevant, inadmissible and prejudicial . . . .[20]

The Court's emphasis on prejudice before a *jury* continued:

> The function of the motion as a precautionary instruction to avoid error, prejudice, and possibly a mistrial by prohibiting opposing counsel from raising or making reference to an evidentiary issue until the trial court is better able to rule upon its admissibility *outside the presence of a jury* once the trial has commenced.[21]

These proceedings do not involve a jury, and therefore the purpose for a motion *in limine* is not served by the motions submitted by the Duke-affiliated companies. DERS' Motion in Limine states this purpose, and yet ignores the rule of law that it cites.[22]

The issue of a motion *in limine* has previously been addressed in the context of a motion before the Commission. Cleveland Electric Illuminating ("CEI") argued that "based on the discovery conduced . . . , it appear[ed] the respondents and intervenors w[ould] attempt to introduce evidence that [would be] irrelevant to any claim or defense at issue in this case."[23] The attorney examiner provided the analysis appropriate to a proceeding before the PUCO:

> As the respondents and intervenors assert, 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 to be relevant to the case. In this proceeding, there is no such concern because a jury is not involved in this administrative hearing/decision process. Therefore, no valid reason exists for making an exclusionary ruling. * * * Motions to strike testimony

---

[20] *State of Ohio v. Grubb* (1986), 28 Ohio St. 3d 199, 200 (citations omitted, emphasis on "jury trial" added).

[21] Id. at 201, quoting *State v. Spahr* (1976), 47 Ohio App.2d 221, syllabus ¶1 (emphasis added).

[22] DERS' Motion in Limine at 6-7 (February 2, 2007).

[23] *In re Service to Medco*, PUCO Case 95-458-EL-UNC, Entry at 2 (August 31, 1999).

> and objections to cross-examination questions will be addressed on a case-by-case basis.[24]

The Commission should not make exclusionary rulings before the hearing.[25] The motions *in limine* filed by Duke Energy, DERS, and Cinergy should be denied on legal grounds.

2. The Duke Affiliated Companies Failed to Adequately Support their Motions *in Limine.*

The motions *in limine* also contain an odd assortment of additional arguments. DERS' quote of case law that supports such motions only where there is a jury trial is mentioned above.[26] DERS also takes an extremely limited view of the relevant evidence in these proceedings, a view addressed in previous OCC pleadings.[27]

Cinergy appears to assert that transactions are inhibited when they are brought before deliberative tribunals.[28] By extension, Cinergy's argument implies that Ohio should not concern itself with contracts whose legality -- including the violation of statutes regarding the provision of electric service -- is questioned, and no inquiry into contracts should be undertaken by the Commission or reviewed by any court. Such an odd approach would likely result in the collapse of commercial activity in Ohio.

Duke Energy asserts that the Commission cannot question the activities of the Duke-affiliated companies after they reached deals with entities if those entities pay Duke Energy's standard service offer rates. The Company ignores the prohibition contained in

---

[24] Id. at 2-3.

[25] The OCC elaborates upon this matter in its Application for Rehearing filed on February 1, 2007.

[26] DERS Motion in Limine at 7 (February 2, 2007).

[27] See, e.g., OCC Memorandum Contra Duke Energy Motion for Clarification (December 20, 2006).

[28] Cinergy Motion in Limine at 5 (February 2, 2007) ("public interest to encourage contracts").

the Revised Code that prohibits a "refund . . . directly or *indirectly*."[29] Duke Energy also hints at economic blackmail, threatening to withdraw support for activities in Cincinnati if the Commission conducts a fair hearing in these proceedings.[30] Duke Energy's "commitments," stated in its recent merger case, appear to be shallow.[31] The Commission should intensify its review of the assertions made by Duke Energy.[32]

Duke Energy also resorted to apparently accusing the OCC of engaging in a secret deal – with, of course, that proponent of secret deals, Duke Energy. The referenced matter related to the settlement of OCC's appeal of the Duke-Cinergy merger.[33] Duke Energy did not mention in its motion that its proposals to OCC in advance of the settlement agreement included that the settlement would not be public -- a proposal that OCC rejected out of hand. In this regard, Duke Energy further did not mention in its motion another pertinent fact -- that in OCC's filing with the Court to dismiss the appeal after the settlement was reached, OCC specifically referenced the public nature of the settlement agreement with the words "upon an agreement (*in the public domain*)."[34]

The three motions *in limine* continue the repetitive history of the Duke affiliates' pleadings in these cases since the remand by the Ohio Supreme Court aimed at preventing a substantive hearing. Duke Energy's initial efforts included a Motion for Clarification that sought to "clarify" an Attorney Examiners' Entry issued on November

---

[29] R.C. 4905.32 (emphasis added).

[30] Duke Energy Motion in Limine at 7 (February 2, 2007).

[31] See, e.g. *In re Duke-Cinergy Merger*, Case No. 05-732-EL-MER, et al., Joint Application at 15 ("Corporate Citizenship").

[33] Duke Energy Motion in Limine at 7 (February 2, 2007).

[34] In re OCC Appeal of Duke-Cinergy Appeal, S.Ct. Case No. 06-701, Motion for Order of Dismissal at 1 (May 9, 2006) (emphasis added).

29, 2006. According to Duke Energy, the Entry's statement that a "hearing should be held . . . in order to obtain the record evidence" could not be interpreted to mean that an "evidentiary hearing" would be conducted. Duke Energy insisted that its arguments -- arguments that did not prevent the Ohio Supreme Court from ordering a remand to the Commission -- would obviate the need for a hearing and would presumably carry the day in any second appeal. The Commission ordered an evidentiary hearing.

Next, Duke Energy and its affiliate, DERS, "double-teamed" the OCC by filing motions aimed at preventing the OCC from obtaining information from DERS by means of subpoena.[35] The documents requested by the OCC included agreements that are partly the subject of a wrongful discharge action by a former employee of another of Duke Energy's affiliates. The wrongful discharge action in federal court alleges that Duke Energy engaged in discriminatory and predatory conduct to remove opposition to the Company's rate plan that was proposed in the *Post-MDP Service Case*.[36] Duke Energy and DERS insisted that the inquiries were irrelevant and not required by the Ohio Supreme Court's remand to the Commission. The OCC's discovery activities, subject to some limitation regarding documents not in the possession of DERS, were not quashed.[37]

Most recently, Duke Energy and its affiliates DERS and Cinergy, "triple-teamed" the OCC by filing motions *in limine* that seek to prevent the OCC from mentioning side agreements in the OCC's presentation of the information gained during discovery. Duke Energy, DERS, and Cinergy again insist that the OCC's inquiries into deals struck in

---

[35] DERS Motion to Quash (December 20, 2006); Duke Energy Motion for Protective Order and Memorandum in Support of Motion to Quash (December 20, 2006).

[36] Deeds Complaint at 1 ("NATURE OF ACTION") and ¶8 (December 7, 2006).

[37] Entry at 4 (January 2, 2007).

connection with the *Post-MDP Service Case* are irrelevant to these proceedings. The Duke-affiliated companies also insist that the Commission can make this determination without the companies providing descriptions of the agreements. The mere existence of Cinergy's Motion *in Limine* is fascinating in itself: never before has the public record been graced by a recognition that at least one deal exists that involves Cinergy in addition to those that involve DERS.[38] The motions *in limine* submitted by the Duke-affiliated companies appear fearful that the Commission will take interest in their dealings, and that such regulatory oversight will work to the disadvantage of the Duke-affiliated companies. The Commission should deny these most recent efforts to prevent a substantive hearing from taking place in these proceedings, and keep an open mind regarding the admissibility of testimony. Moreover, the sheer numbers of the Duke affiliates' filings, whether in duplicate or triplicate for each pleading, should not sway the Commission.

B. The Motions to Intervene Should be Denied.

The Commission's rules should be applied in these proceedings to eliminate duplicative presentations by affiliated companies that have advocated with a singleness of purpose. Although DERS and Cinergy state that they seek "limited" intervention, their immediate action was to file motions *in limine* that seek to prevent the OCC from making a substantive presentation of testimony at the hearing in these proceedings. A truly limited intervention for the purpose of preventing trade secret information from release to

[38] The Cinergy Motion in Limine demonstrates an advantage regarding pleadings that the Duke-affiliated companies have gained over the OCC. The revelation of an agreement that involves Cinergy would have been a matter that, if taken up by the OCC, would have been subject to a protective agreement and filed only under seal. The Duke-affiliated companies remain unilaterally free to publicly use at any time information that they claim is confidential, when they perceive it is to their advantage.

the public -- a legal position not conceded by the OCC – has not been the reality of the advocacy of the Duke-affiliated companies.

1. DERS and Cinergy Should Not Be Granted the Broad Intervention Rights that They Seek.

The DERS and Cinergy motions to intervene misleadingly claim that they support "limited" intervention.[39] Neither motion fully explains the "limited" nature of their intervention. Presumably DERS and Cinergy use that term in an effort to shield them from the normal *responsibilities* of full parties to these cases. The *rights* requested by DERS and Cinergy, as shown in their first actions upon the filing of their motions to intervene -- i.e. filing motions *in limine* -- are expansive. DERS and Cinergy argue in their motions *in limine* about the admissibility of evidence that the OCC may introduce in these proceedings, which is a broad role in this proceeding.

The DERS Motion to Intervene provides bare bones from which the OCC, and ultimately the Commission, must divine its "limited" purpose. DERS states that it "has already suffered harm because counterparties with divergent contract terms and conditions have seen the various contracts" and "[f]urther exposure and inaccurate public descriptions of the contracts may harm DERS."[40]

The setting of rates for 600,000 customers is a public process before a public agency, the PUCO. The broad secrecy that DERS seeks to advance by intervention in these cases is at cross-purposes to that public function. Regarding the "public descriptions" of contracts that is DERS' concern, it should be noted that the most poignant public descriptions are contained within the Deeds Complaint—filed in a

[39] DERS Motion to Intervene at 2 (February 2, 2007); Cinergy Motion to Intervene at 2 (February 2, 2007).

[40] DERS Motion to Intervene at 5 (February 2, 2006).

separate case before a court of law. Moreover, DERS makes vague reference to the alleged "harm" it supposedly has suffered; however, the PUCO, pursuant to the Court's remand, has the task of considering harm to customers including residential and others as a result of side deals and related matters.

The revelation of the manner in which negotiations were handled in the *Post-MDP Service Case* is exactly what the Ohio Supreme Court intended when it stated its concern that "[i]f 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."[41] DERS' disagreement with the result in *Consumers' Counsel 2006* and with the Attorney Examiners' decision denying (in principal part) DERS' Motion to Quash Subpoena[42] does not support the award of broad intervention rights to DERS and especially not without the attendant obligations of a party.

The Cinergy Motion also mentions "public disclosure and inaccurate description" of information in its possession.[43] To the extent Cinergy seeks to address the testimony of the OCC or others regarding information provided to others in the course of this case, perhaps even in its own testimony, Cinergy has requested broad rights. The requested intervention does not appear to be the more narrow issue of whether information provided by Cinergy should remain secret from public view.[44] That issue is addressed by

---

[41] *Consumers' Counsel 2006* at ¶86.

[42] Entry at 4 (January 2, 2007).

[43] Cinergy Motion to Intervene at 3 (February 2, 2007).

[44] Cinergy states elsewhere that it seeks "limited status before this Commission in order to protect this confidential business contract from public disclosure." Id. at 4. That limited purpose is contradicted by Cinergy's submission of its *Motion in Limine* that addresses the broader issue of whether the OCC may present information to the Commission and make it part of the evidentiary record in these proceedings.

a protective agreement between Cinergy and the OCC in which, *inter alia*, the rights reserved to OCC, a public agency, include the right to initiate a process for the PUCO to rule on the claims of confidentiality."[45]

Cinergy also misstates its situation regarding the protections afforded to its information. Cinergy states that "[n]either DERS nor DE-Ohio . . . have standing to move for a protective order limiting producing of Cinergy's property."[46] The Attorney Examiner's Entry on January 2, 2007 stated that party status is not needed to move for such a protective order.[47] Cinergy's statement that Duke Energy does not have standing "for a motion in limine holding that the agreement is irrelevant"[48] is also incorrect. As defined in Black's Law Dictionary, quoted above in *State of Ohio v. Grubb* (1986), 28 Ohio St. 3d 199, 200, such a motion "is usually made before or after the beginning of a jury trial for a protective order against prejudicial questions and statements * * * to avoid injection into trial of matters which are irrelevant, inadmissible and prejudicial." Contrary to Cinergy's averment, a property stake in a document is not a precondition to a

[45] Id. at 5. Counsel for Cinergy also represented GE/Bechtel in a case that involved AEP's proposal to develop an integrated gasification combined-cycle generating plant. See *In re AEP IGCC Proposal*, Case No. 05-376-EL-UNC, GE/Bechtel Motion to Intervene (July 22, 2005). GE/Bechtel sought limited intervention because the attorney examiner in that case ordered the production of documents in which GE/Bechtel had a proprietary interest and no protective agreement existed between GE/Bechtel and the OCC. GE/Bechtel did not interfere with the OCC's presentation of evidence. Also, a protective agreement has been executed between Cinergy and the OCC that is essentially the same as the DERS-OCC protective agreement.

[46] Cinergy Motion to Intervene at 5 (February 2, 2007).

[47] Entry at 3 (January 2, 2007).

[48] Cinergy Motion to Intervene at 5 (February 2, 2007).

party objecting to the introduction of material into evidence. Duke Energy is able, and has shown more than a willingness, to object to the OCC's intended use of documents.[49]

2. The Interests That DERS and Cinergy Have Advocated Are Duplicative of That Advocated by Duke Energy.

The DERS and Cinergy motions to intervene contain truncated versions of the test located in the Ohio Administrative Code regarding intervention. The Commission's rules state that a movant must show:

> [A](2) The person has a real and substantial interest in the proceeding, and the person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, *unless the persons' interest is adequately represented by existing parties*.
> (B) In deciding whether to permit intervention under paragraph (A)(2) of his rule, the . . . attorney examiner assigned to the case may consider:
> (1) The nature of the person's interest;
> (2) *the extent to which the person's interest is represented by existing parties*;
> (3) The person's potential contribution to a just and expeditious resolution of the issues involved in the proceeding; and
> (4) whether granting the requested intervention would unduly delay the proceeding or unjustly prejudice any existing party.[50]

Duke Energy, DERS, and Cinergy all desire to prevent the OCC from introducing evidence on the subject of the existence and use—or misuse—of side agreements to gain support for Duke Energy's proposals in the *Post-MDP Service Case*. Indeed, these Duke-affiliated companies present their arguments with a single corporate "mind."[51] The

---

[49] Ironically, Duke Energy again showed this willingness on February 2, 2007. It stated that the Company "incorporates, adopts, and supports the Motion in Limine filed by Duke Energy Retail Sales and Cinergy Corp." Duke Energy Motion in Limine at 3 (February 2, 2007).

[50] Ohio Adm. Code 4901-1-11 (emphasis added).

[51] John Deeds refers to Cinergy Retail Services, predecessor to DERS, as the "alter ego of Cinergy [Corp.]" that created CRS. Deeds Complaint at ¶5 (December 7, 2006).

interests advocated by DERS and Cinergy have been essentially indistinguishable from the interests advocated by Duke Energy, the public utility.

The pleadings in these proceedings alone bear testimony to the identical voice used by the Duke-affiliated companies. A Motion to Quash was filed by DERS on December 20, 2006, to prevent the OCC from obtaining information regarding side deals, and Duke Energy filed a Motion for Protective Order and Memorandum in Support of the DERS Motion to Quash that same day. The OCC has dealt with Duke Energy's trial counsel regarding execution of protective agreements with all three Duke-affiliated companies. In a telephone conference regarding the date of the deposition taken of DERS' president, Duke Energy's trial counsel took over representation of DERS from its counsel and concluded the conversation representing DERS in a call to the Attorney Examiners.[52] Three motions *in limine* were filed within minutes of one another by Duke Energy, DERS, and Cinergy on February 2, 2007.[53] The Deeds Complaint asserts that the Duke-affiliated companies have mixed their business dealings.[54]

DERS and Cinergy are contributing nothing in this case other than the opportunity for the Duke-affiliated companies to confront the OCC (and the Commission) with multiple pleadings containing a single message. The result, as evidenced by the size and extent of the instant pleading that must address five motions, is prejudice to the OCC that

[52] Duke Energy's trial counsel also interjected himself in the final stages of developing a protective agreement between DERS and the OCC, posing additional changes the night before the deposition took place.

[53] All the pleadings filed on February 2, 2007 by the Duke-affiliated companies made the identical mistake of failing to serve the OCC with the pleadings.

[54] See, e.g. Deeds Complaint at 1.

is not contemplated by the aforementioned PUCO rule on intervention or by Ohio law. The General Assembly provided that the Commission should consider whether, regarding motions for intervention, "the prospective intervenor will unduly prolong or delay the proceedings" and "the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues."[55] DERS and Cinergy are not showing how they will meet these considerations.

The PUCO has a rule, Ohio Adm. Code 4901-1-27(B)(7), that is intended, in addition to the rules for preventing inappropriate interventions, to limit the duplicativeness of advocacy that the Duke affiliates are practicing here. Ohio Adm. Code 4901-1-27(B)(7)(b) allows the PUCO to prevent the presentation of "cumulative evidence." Ohio Adm. Code 4901-1-27(B)(7)(c) allows the PUCO to prevent "argumentative, repetitious, cumulative, or irrelevant cross-examination." Ohio Adm. Code 4901-1-27(B) notes that these restrictions on duplication (among other actions) are "without limitation." Therefore and in the event the PUCO grants intervention, the PUCO should limit the interventions to preclude the presentation of repetitive and cumulative arguments – such as the arguments of the Duke affiliates that to date have been like-minded and of a single purpose against OCC's advocacy on behalf of residential consumers.

For these reasons, the motions to intervene by these affiliates of Duke Energy should be denied or, if granted, should be limited consistent with OCC's arguments.

[55] R.C. 4903.221(B).

IV. CONCLUSION

The Commission should deny the motions *in limine*. Such motions are inappropriate in the context of administrative proceedings that are conducted without the assistance of juries. The Commission, through the attorney examiners assigned to this case, should remain open, at this time before the hearing has even commenced, to the scope of testimony, and should consider that evidence on a case-by-case basis as it is presented at the hearing.

The Commission should deny the motions of DERS and Cinergy to intervene. The interventions and the motions *in limine* filed by DERS and Cinergy demonstrate that the proposed interventions are not limited as claimed. DERS and Cinergy have been advocating the same interest as that advocated by Duke Energy in these proceedings. At a minimum and in the event the Commission grants intervention, the Commission should consolidate the Duke companies' like-minded advocacy consistent with the reasons OCC has explained above. The interests of Ohio's residential utility consumers should be fully heard in this case, notwithstanding duplicate and triplicate arguments to the contrary by the three Duke affiliates.

RESPECTFULLY SUBMITTED,

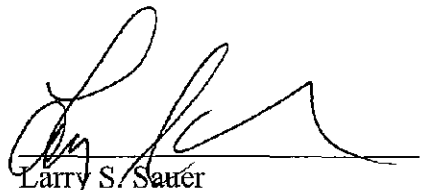
JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

Jeffrey L. Small, Trial Attorney
Ann M. Hotz,
Larry S. Sauer
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-8574 (Telephone)
614-466-9475 (Facsimile)
small@occ.state.oh.us
hotz@occ.state.oh.us
sauer@occ.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Office of the Ohio Consumers' Counsel's public version of its Memorandum Contra Motions *in Limine* and Motions to Intervene was served electronically on the persons listed on the electronic service list shown below (as supplemented for this pleading), provided by the Attorney Examiner, this 13th day of February 2007.



Larry S. Sauer
Assistant Consumers' Counsel

paul.colbert@duke-energy.com
rocco.d'ascenzo@duke-energy.com
anita.schafer@duke-energy.com

cmooney2@columbus.rr.com
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com
sam@mwncmh.com
dnilsen@mwncmh.com
lmcalister@mwncmh.com
jbowser@mwncmh.com
drinebolt@aol.com
WTTPMLC@aol.com
schwartz@evainc.com
rsmithla@aol.com
barthroyer@aol.com
sbloomfield@bricker.com

TOBrien@Bricker.com
dane.stinson@baileycavalieri.com
korkosza@firstenergycorp.com
JKubacki@strategicenergy.com
mchristensen@columbuslaw.org
tschneider@mgsglaw.com
shawn.leyden@pseg.com
ricks@ohanet.org
cgoodman@energymarketers.com
nmorgan@lascinti.org
eagleenergy@fuse.net
Stephen.Reilly@puc.state.oh.us

Thomas.McNamee@puc.state.oh.us
Werner.Margard@puc.state.oh.us
Anne.Hammerstein@puc.state.oh.us

Scott.Farkas@puc.state.oh.us
Jeanne.Kingery@puc.state.oh.us

michael.pahutski@duke-enegy.com
ariane.johnson@duke-energy.com
mdortch@kravitzllc.com