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February 14, 2007

Renee Jenkins  
Chief, Docketing Division  
Public Utilities Commission of Ohio  
180 E. Broad Street, 13<sup>th</sup> Floor  
Columbus, Ohio 43215

Via Courier

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

Dear Ms. Jenkins:

Enclosed please find an original and fifteen copies of the following three pleadings:

- 1) Cinergy Corp.'s Reply to the Ohio Marketers Group's February 9, 2007 Response to Cinergy Corp.'s Motion *in Limine*;
- 2) Reply of Duke Energy Retail Sales to OMG's Memorandum in Response to Motions *in Limine*; and,
- 3) Reply of Duke Energy Ohio, Inc., to OMG's Memorandum in Response to Motions Motion *in Limine*.

Please accept the original and fifteen copies of each pleading for the Commission's file, and return the remaining copy to me via the individual who delivers the same to you. You may call me if you have any questions concerning this filing.

Thank you.

Very truly yours,

*Michael D. Dortch, LLC*  
Michael D. Dortch

MD:kw  
Enclosures

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**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**CINERGY CORP.'S  
REPLY TO THE OHIO MARKETERS GROUP'S  
FEBRUARY 9, 2007 RESPONSE TO  
CINERGY CORP.'S MOTION IN LIMINE**

**I. INTRODUCTION**

On the basis that the Motions in limine filed February 2, 2007 by Cinergy Corp. ("Cinergy"), Duke Energy Ohio ("DE-Ohio"), and Duke Energy Retail Sales ("DERS") are "premature," The Ohio Marketers Group ("OMG") opposes those motions. Cinergy asserts that the issue raised within its motion, and those of its affiliates, is ripe for determination at this time. Moreover, Cinergy asserts that a ruling upon its motion will signal this Commission's determination of the proper scope of these proceedings, thereby permitting all parties directly concerned with the merits to focus their efforts on issues properly before this Commission, and not upon issues some parties simply wish were before this Commission. Finally, this Commission's determination of the issue raised by these motions may permit Cinergy and DERS to conclude their participation in these matters.

OMG acknowledges that the issue raised by the motions filed by Cinergy, DE-Ohio, and DERS 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." *OMG Motion*, p. 2. OMG then asserts that the Attorney Examiner "must first hear from the parties seeking to admit the produced contracts as to why they believe it is relevant." *Id.*

Cinergy takes no issue with either statement by OMG. Cinergy asserts only that the single "produced contract" to which it is a party (the "Cinergy Contract") has no relevance to these proceedings, and it filed its motion in limine precisely so that OMG and any others who intend to place the Cinergy Contract into the record would come forward and either demonstrate to this Commission – or fail to demonstrate to this Commission – whether the Cinergy Contract has any relevance whatsoever to these proceedings.

OMG, however, then makes an additional statement with which Cinergy disagrees completely, but which emphasizes in one sentence why it is appropriate for Cinergy to seek a ruling on the admissibility of the "contracts and side bar agreements" at this time. OMG asserts that "[i]t is unreasonable to make the intervenors defend the relevance of particular documents *in advance of the close of discovery<sup>1</sup> and the filing of testimony.*" *Id.* Thus, OMG reveals that it would first file "documents" together with testimony regarding the documents into the record, and then argue whether the documents should be stricken or not.

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<sup>1</sup> Discovery in this matter closes February 22, 2007. Cinergy is of course satisfied if the attorney examiner determines the relevancy of the Cinergy Contract on or after that date, but in advance of the date of hearings in this matter.

Despite the protection of agreements between Cinergy and parties to the proceeding, and even with the additional protection that might be afforded by protective Orders issued by this Commission, such a course of action inevitably increases the number of copies of the Cinergy Contract that are beyond Cinergy's control, and thus creates additional risks that information contained within the Cinergy Contract will be revealed to others. In the absence of any relevance to the Cinergy Contract, it is simply unfair to expose Cinergy (and the counterparty to the Cinergy Contract) to even marginal increased risks.

## II. ARGUMENT

The Ohio Supreme Court remanded this matter to this Commission for two very limited purposes. The Court concluded that this Commission erred in two respects when it approved certain components of CG&E's MBSSO:

- The Court was concerned that this Commission failed, in its Orders on Rehearing, to cite to record evidence to support the changes this Commission Ordered to a stipulation filed May 19, 2004 by the Cincinnati Gas & Electric Company ("CG&E") and certain intervening parties.
- After concluding that the Ohio Consumers' Counsel ("OCC") had demonstrated that contracts between CG&E and other parties to the proceeding which OCC had sought during discovery *might* have relevance to the issue whether the May 19, 2004 stipulation was the product of serious bargaining between knowledgeable parties, the Court directed this Commission on remand to permit OCC to have that discovery.

Whether the Cinergy Contract is relevant or irrelevant is to be measured against these findings of error.

Cinergy's position has been stated with clarity. The Cinergy Contract is *not* among any agreements which this Commission was directed to allow OCC access, for the simple, undeniable, reason that OCC did not seek the Cinergy Contract in discovery until

January, 2007. As a result, the Cinergy contract can have no relevance to the second error identified by the Court. The Cinergy Contract is *not* within the record through which this Commission might support its Orders on Rehearing, and thus it obviously has no relevance to the first of the errors identified by the Ohio Supreme Court. Cinergy notes, furthermore, that the Cinergy Contract would *not* be in the record even if the Commission had granted OCC's Motion to Compel in 2004, if for no other reason than because OCC did not seek the Cinergy Contract at that time. Again, therefore, the Cinergy Contract has no relevance to these proceedings.

Irrelevant evidence is, of course, inadmissible evidence. Ohio R. Evid. 401. Cinergy's Motion in Limine is an appropriate mechanism to seek a pre-hearing ruling concerning the admissibility of this "evidence."

OMG's response to Cinergy's argument does not withstand examination. Cinergy's motion in limine is not directed toward the admissibility of as yet undiscovered (and non-existent) contracts. Cinergy's motion questions the admissibility of the Cinergy Contract alone. Thus, it is appropriate to demand that OMG (and others) examine the Cinergy Contract and explain its relevance to this Commission prior to the hearing.

OMG's claim that the Commission should simply allow parties to file the Cinergy Contract in the record together with testimony regarding the Cinergy Contract and justify doing so at a later time is inappropriate. As Cinergy explained above, neither it nor the other party to the Cinergy Contract should be exposed to the risks inherent with OMG's recommended approach, or to the increased costs of delay inherent in OMG's approach. For example, OMG's recommended approach requires Cinergy to attend and participate in hearings in which it has no other interest. In addition OMG's approach will consume

valuable hearing time while issues of admissibility are addressed, and require that valuable hearing time be wasted while the hearing room is first cleared of individuals without protective agreements (including OMG) with Cinergy each and every time that the Cinergy Contract is raised and then delayed again while those excluded from that portion of the hearing are permitted to reassemble.

Substantively, OMG discloses that it may eventually assert two bases for admission of the Cinergy Contract. First, OMG suggests that a "different stipulation" may have been entered into if the discovery had been permitted. *OMG Memo*, p. 3. Again, Cinergy points out that the Cinergy Contract was not subject to the discovery sought in 2004 by OCC, and thus this argument is not within the scope of remand. Furthermore, this argument is foreclosed by the record. No other stipulation<sup>2</sup> has relevance, because none was ever offered.

Second, OCC asserts that in order to determine whether the Infrastructure Maintenance Fund (IMF) component of the MBSSO is just and reasonable and set at an appropriate rate it is necessary to know whether all DE-Ohio customers are paying this component to DE-Ohio. *Id.* In response, Cinergy again asserts that this is not within the scope of this proceeding on remand from the Ohio Supreme Court. Even so, Cinergy asserts that the time is ripe for the attorney examiner to examine the Cinergy Contract and satisfy herself that DE-Ohio is in fact receiving the full IMF component of the MBSSO. Once the attorney examiner is satisfied that this is true, however, Cinergy's Motion in limine should be granted by this Honorable Commission.

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<sup>2</sup> Cinergy adopts by reference the argument of its affiliate, DE-Ohio, that this Commission's Orders on Rehearing so completely modified the MBSSO that was contemplated by the parties to the stipulation that the May, 2004 stipulation itself has no relevance to the MBSSO which this Commission ultimately approved. Even so, Cinergy finds it remarkable that OMG now asserts that the Cinergy Contract is relevant to still *another* stipulation which somehow has significance *because* it never existed.

### III. CONCLUSION

For the foregoing reasons, Cinergy Corp. respectfully requests that this Honorable Commission grant its Motion in Limine and exclude the admission of the Cinergy Contract into evidence in these proceedings.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'MD', with a long horizontal line extending to the right.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically upon parties, their counsel, and others through use of the following email addresses this 12<sup>th</sup> day of February 2007.

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