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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

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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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**FILE**

**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**REPLY OF DUKE ENERGY OHIO, INC., TO OMG'S MEMORANDUM IN  
RESPONSE TO MOTIONS MOTIONS IN LIMINE**

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Now comes Duke Energy Ohio, Inc (DE-Ohio) and hereby respectfully submits its Reply to the Memorandum in Response to Motions in Limine (Memo Contra) filed by Ohio Marketers Group (OMG) on February 9, 2007. DE-Ohio respectfully requests this Commission grant the Motions in Limine (Motions) filed by DE-Ohio, Duke Energy Retail Sales LLC (DERS), and Cinergy Corp (Cinergy) (collectively referred to as Companies).

Although DE-Ohio is aware of the Commission's recent Entry in this proceeding, which calls for Reply Memoranda to be filed within three days of a Memorandum Contra,<sup>1</sup> DE-Ohio received the electronic service of OMG's Memo Contra after 6:00 pm on Friday February 9, 2007. DE-Ohio was closed for business at that time and accordingly, counsel did not receive OMG's Memorandum Contra until start of business on Monday, February 12, 2007.

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<sup>1</sup> See Entry, February 1, 2007 at 3

DE-Ohio contacted counsel for OMG and requested additional time to respond. Counsel for OMG stated no objection to an extension and agreed to DE-Ohio filing its response within three days of its first day of business upon discovery of OMG's Memo Contra.

The basic premise of OMG's Memo Contra is flawed in several respects. First, OMG misconstrues the opinion of the Ohio Supreme Court in its Remand to the Commission. OMG incorrectly states that the Ohio Supreme Court found that there was "no support for the purpose or numeric setting" of several of DE-Ohio's MBSSO pricing components. This is not true. Contrary to OMG's claim, the Court did not state there was no evidentiary support for DE-Ohio's system reliability tracker (SRT), infra-structure maintenance fund (IMF), and annually adjusted component (AAC). The Court merely stated that the Commission didn't adequately cite to the evidentiary record in its November 23, 2004, Entry on Rehearing.<sup>2</sup> The Court made no determination as to the actual existence or non-existence of evidence supporting those market prices. The evidence is, in fact, in the record.

For example, OMG points to the establishment of DE-Ohio's IMF and SRT as support for its position that there was no evidentiary support for several of DE-Ohio's charges.<sup>3</sup> Although the name of the mechanisms is not found in the record prior to DE-Ohio's Application for Rehearing, the record evidence contains the market price approved for both mechanisms. The SRT

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<sup>2</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm'n.*, 111 Ohio St. 3d 300, 2006-Ohio-5789 (2006) at 307.

<sup>3</sup> OMG's Memo Contra at 2 and 3.

and IMF prices and compensation were embedded in the variable annual adjusted POLR component of each permutation of DE-Ohio's "rate stabilized" MBSSO price. Specifically, the pricing components include actual reserve capacity costs and compensation for first call on DE-Ohio's generating assets. These underlying pricing components were supported in direct and supplemental testimony, as well as at the hearing.

Second, OMG's allegation that the Stipulation that was reached in the initial MBSSO may have taken a different approach if the Commission had allowed discovery of side agreements is incorrect. OMG had a full and unrestricted ability to present its case before the Commission. OMG was not a party to the Stipulation presented to the Commission. OMG rigorously cross-examined DE-Ohio's witnesses about its proposed MBSSO market price structure, as well as the Stipulation, which was filed in the case, and the underlying pricing components of the MBSSO. The Commission is right to assume that OMG represented its interests fully and zealously on the merits.

The inquiry, with respect to side agreements, at issue before the Commission and considered by the Court, was a request by the OCC that DE-Ohio, "provide copies of all agreements *between [DE-Ohio] and a party* to these consolidated cases (and all agreements *between [DE-Ohio] and an entity that was at any time a party* to these consolidated cases) that were entered into on or after January 26, 2004."<sup>4</sup> At hearing on May 20, 2004, OCC repeated the

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<sup>4</sup> *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).

same identical request.<sup>5</sup> The Commission denied the OCC's request for discovery of alleged side agreements holding that "*side agreements, being information related to the negotiation of a proposed stipulation, are privileged and therefore not discoverable.*"<sup>6</sup>

Had the Commission ordered DE-Ohio to respond to OCC's request the only contract OCC, and all other Parties, would have discovered was a contract between DE-Ohio and the City of Cincinnati. That contract was a public document that was already available to the Parties because it was publicly approved by the City Council.

None of the DERS option contracts would have been available in the case. Irrespective of the fact that DERS's agreements were not relevant to the establishment of DE-Ohio's MBSSO, DERS was not a party to the MBSSO proceeding and the request was not applicable to any DERS agreements. The only agreement DE-Ohio had was with the City of Cincinnati, who was not a party of to the Stipulation filed before the Commission.

It is disingenuous for OMG to argue that DERS's contracts might have changed the prior litigation in some manner when, based upon the record then existing, the contracts would never have been considered. DERS's option contracts are not "side agreements" that could have affected the outcome of these proceedings during the original litigation. Similarly, the contracts are

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<sup>5</sup> *Id.* at TR. II at 8 (May 20, 2004).

<sup>6</sup> *In re CG&E's MBSSO*, Case No. 03-93-EL-ATA (Entry on Rehearing at 16) (November 23, 2004), App. at 68, Rec. at ICN 229 at 16 (emphasis added).

standard confidential commercial contracts that are irrelevant to the current proceeding just as they were irrelevant to the original proceeding.

Moreover, the stipulation that was reached in the MBSSO proceeding was not adopted as filed. It was rejected by the Commission. Therefore, there is no stipulation in the case, of which the existence or non-existence of any agreements would have any bearing.

Lastly, OMG argues that the Commission should deny the Companies' Motions because discovery is currently ongoing and that the parties are preparing their respective cases for hearing.<sup>7</sup> The fact that the parties are preparing their respective cases is precisely why the Commission should rule on the admissibility and relevancy of the agreements. DE-Ohio has the burden of proof in the remand proceeding and given the necessarily compressed time frame, DE-Ohio needs to know the extent of testimony and evidence it must present. DE-Ohio maintains that the agreements had no bearing on the setting of its MBSSO. Given the direction by the Court, regarding the relevancy of side agreements to the bargaining power of the parties to a stipulation, and the fact that in the present matter the stipulated pricing structure was not approved, clearly the existence of any agreements is irrelevant. Accordingly, in the interest of judicial economy, the Commission should overrule OMG's Memo Contra and grant the Motions to determine the relevancy of the various agreements.

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<sup>7</sup> OMG Memo Contra at 2.

**CONCLUSION:**

For the foregoing reasons, DE-Ohio respectfully requests this Commission grant the Motions filed by the Companies.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "P. Colbert", is written over a horizontal line. The signature is somewhat stylized and loops back.

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served electronically on the following parties this 14th day of February 2007.



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