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February 14, 2007

Renee Jenkins
Chief, Docketing Division
Public Utilities Commission of Ohio
180 E. Broad Street, 13th 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

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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)	

**REPLY OF DUKE ENERGY RETAIL SALES TO OMG'S MEMORANDUM IN
RESPONSE TO MOTIONS IN LIMINE**

Now comes Duke Energy Retail Sales, LLC (DERS) by and through counsel, and hereby respectfully submits its Reply to the Memorandum in Response to Motions in Limine (Memo Contra) submitted by the Ohio Marketers Group (OMG). DERS 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.¹ DERS received the electronic service of OMG's Memo Contra after 6:00 pm on Friday February 9, 2007. DERS 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. Accordingly, DERS is filing its response within three days of its first day of business upon discovery of OMG's Memo Contra.

DERS requests that the Commission disregard OMG's Memo Contra and grant the Motions in Limine (Motions) filed by DERS, Cinergy Corporation (Cinergy) and Duke Energy Ohio, Inc (DE-Ohio).

¹ See Entry, February 1, 2007 at 3

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OMG opposes the Motions on two basic grounds. OMG first 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 and that the Court ordered that agreements, which are the subject of the Motions, be disclosed.² Second, OMG argues that the Motions are premature at this time because discovery is currently open.

OMG’s Memorandum Contra mischaracterizes the Ohio Supreme Court’s decision in two respects. First, and contrary to OMG’s claim, the Court did not state there was no evidentiary support for certain of DE-Ohio’s pricing components. The Court merely stated that the Commission didn’t adequately cite to the evidentiary record in its November 23, 2004, Entry on Rehearing.³ Therefore, OMG is mischaracterizing the Court’s Opinion to bolster its argument that the Commission should not grant DERS’s Motion in Limine. Nothing about DERS’s contracts with counterparties is relevant to the decision required of the Commission by the Court on remand.

Second, OMG also misconstrues the Court’s opinion with regard to the alleged side agreements. The Court stated that the Commission should have permitted the discovery of alleged side agreements between DE-Ohio and the signatory parties to the Stipulation entered into in the initial MBSSO proceeding.⁴ The Supreme Court expressly stated that the existence of any such agreements could be relevant, if at all, as to whether a stipulation was the product of serious bargaining between knowledgeable parties.⁵ The Court explicitly stated that following disclosure, the admissibility of such agreements was for the Commission’s determination.⁶

² See *OMG’s Memorandum*, at 1.

³ *Ohio Consumers’ Counsel v. Pub. Util. Comm’n.*, 111 Ohio St. 3d 300, 2006-Ohio-5789 (2006) at 307.

⁴ *Id.* at 321.

⁵ *Id.*

⁶ *Id.* at 323.

The agreements, which are the subject of the various Motions, are commercial contracts between DERS and counterparties. All of these agreements were entered into after, in some cases nearly a year after, the Stipulation in DE-Ohio's MBSSO case was filed in the initial MBSSO proceeding. Regardless of any alleged relationship between the contracts and the Stipulation, which there is not, the fact is that the Commission did not approve the Stipulation as filed. Moreover, the Commission did not approve the alternative proposal contained in DE-Ohio's Application for Rehearing. The Commission made significant and substantial changes to each. Accordingly, the agreements have absolutely no relationship or relevancy to DE-Ohio's MBSSO as set by the Commission.

Additionally, OMG's argument incorrectly assumes that DERS's contracts would have been discovered in the original proceeding and subject to evidentiary rulings. The record demonstrates the contrary. No party requested DERS's contracts. The only request for alleged side agreements was made by the Ohio Consumers' Counsel (OCC). 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."⁷ At hearing on May 20, 2004, OCC repeated the identical request.⁸

Had the Commission ordered DE-Ohio to respond to OCC's request, none of the DERS contracts would have been produced in the case. 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 contracts are not "side agreements" between DE Ohio and parties to the proceedings that could have affected the

⁷ *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).

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

outcome of these proceedings during the original litigation. Similarly, the contracts are standard confidential commercial contracts that are irrelevant to the current proceeding just as they were irrelevant to the original proceeding. The Commission should grant DERS's, DE-Ohio's, and Cinergy Corp.'s Motions in Limine.

OMG's second basis for its opposition to the Companies' Motions is that discovery in the proceeding is currently ongoing and that any ruling on the admissibility or relevancy of evidence is premature at this time. The deadline for written discovery, as set by the Commission in its February 1, 2007 Entry is February 22, 2007. The fact that discovery is ongoing is precisely why the Commission should, once and for all, determine the relevancy of these documents.

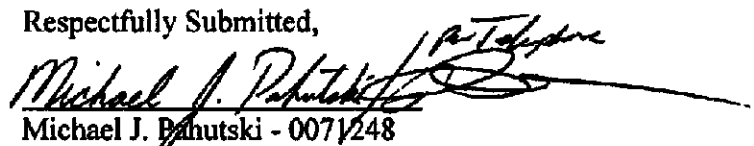
The various parties are in the process of preparing their respective cases. DERS was not a party to the initial MBSSO proceeding of DE-Ohio and now finds itself defending the propriety of its commercial and business decisions. Through its Application for Rehearing filed on February 1, 2007, the OCC stated its intention to place the propriety of the various side agreements at direct issue in this case. Accordingly, the admissibility of these agreements and their relevancy to the case is ripe for the Commission to review. Such a determination is consistent with the Supreme Court's decision in *Ohio Consumers' Counsel v. Pub. Util. Comm'n.*, 111 Ohio St. 3d 300 (2006). DERS and its affiliates, Cinergy Corp., and DE-Ohio are merely asking this Commission to do precisely what the Court has ordered, determine the relevancy of the various agreements provided during discovery. All Parties have an opportunity to argue the relevancy of the contracts, as OMG has done. Further, by the time all pleadings on the Motions in Limine have been filed and the Commission rules, written discovery will have ended. There is simply no reason to delay a decision on the relevancy of the DERS and Cinergy

Corp., contracts. To properly prepare their cases, all Parties need to know if the Commission will consider the contracts.

Conclusion:

For the foregoing reasons as well as those stated in its Motion in Limine, DERS respectfully submits that the Commission should overrule OMG's Memo Contra and decide the relevancy of the various option contracts and agreements at issue.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

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

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