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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the	:	
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
	:	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 OHIO'S REPLY TO THE OHIO CONSUMERS' COUNSEL'S MEMORANDUM CONTRA DUKE ENERGY OHIO'S, DUKE ENERGY RETAIL SALES' AND CINERGY CORP.'S MOTIONS IN LIMINE AND DUKE ENERGY RETAIL SALES' AND CINERGY CORP.'S MOTIONS TO INTERVENE

INTRODUCTION:

The Ohio Consumers' Counsel (OCC) opposes Duke Energy Ohio's (DE-Ohio), Duke Energy Retail Sales' (DERS), and Cinergy Corp.'s (Cinergy) Motions in Limine before the Public Utilities Commission of Ohio for two inapposite reasons. First, OCC argues that it is inappropriate for the Commission to consider any Motion in Limine because there are no jury trials before the Commission.¹ OCC completely misses the point that a Motion in Limine is to protect the moving party from insertion into litigation information that is irrelevant,

¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA et. al. (OCC's Memorandum Contra at 7-9) (February 13, 2007).

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inadmissible, and prejudicial, it is not limited in application to protection of a jury. Second, OCC is improperly alleging that the contracts at issue in the Motions in Limine may be illegal because they may represent an improper refund to DE-Ohio consumers.²

Regarding the Motions to Intervene, OCC argues that DERS and Cinergy should be denied due process because DE-Ohio can properly defend their interest in maintaining confidential treatment of their contracts, any other participation by DERS is inappropriately broad, and DE-Ohio, DERS, and Cinergy are unfairly double and triple teaming OCC.³ DE-Ohio, despite OCC's contention to the contrary, is not DERS or Cinergy. They are separate legal entities. DE-Ohio does not represent the interests of its affiliates. OCC has suggested that it may assert inappropriate conduct as a result of the contracts.⁴ Principles of due process and fundamental fairness require that the Commission permit DERS and Cinergy to participate and defend themselves against such accusations. For these reasons, as more fully explained below, DE-Ohio asks that the Commission grant its Motion in Limine and DERS's and Cinergy's Motions to Intervene.

² *Id.* at 9-12.

³ *Id.* at 12-18.

⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (OCC's Application for Rehearing at 7-12) (February 1, 2007).

ARGUMENT:

I. The Commission has the authority to grant a Motion in Limine.

OCC first alleges that there are no circumstances under which it is proper for the Commission to grant a Motion in Limine because such motions are used only in jury proceedings where the lay jury may not be able to distinguish irrelevant and prejudicial evidence from relevant evidence.⁵ OCC cites Commission precedent that denies a Motion in Limine for that reason because the attorney examiners can make such distinctions.⁶

DE-Ohio admits that the Commission has denied previous Motions in Limine because its attorney examiners are better able to judge the weight of irrelevant and prejudicial evidence better than a jury might. However, DE-Ohio fundamentally disagrees with the proposition that the superior judgment of the Commission's attorney examiners means that there is no circumstance under which it may be appropriate for the Commission to grant a Motion in Limine. There are other compelling circumstances, which make Motions in Limine highly appropriate.

In fact, the Commission agrees with DE-Ohio on this point. In Case No. 88-359-EL-UNC, the Commission considered the propriety of Motions in Limine filed by the Montgomery County before the

⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (OCC's Memorandum Contra at 7-9) (February 13, 2007).

⁶ *Id.* at 8 (citing *In re Service to Medco*, Case No. 95-458-EL-UNC, Entry at 2 (August 31, 1999)).

Commission and stated that it was “not willing to find that the type of motions filed by Montgomery County is never appropriate in Commission proceedings. In some cases judicial economy may be served by a motion which, while not properly termed a motion in limine, would procedurally have much the same appearance.”⁷ DE-Ohio submits that, when the purposes of Motions in Limine are fully understood, the present case presents such circumstances.

There are two main purposes of a Motion in Limine: (1) To protect the moving party from the use at hearing of irrelevant, inadmissible, and prejudicial information; and (2) To call to the courts or administrative agency’s attention certain evidentiary issues it may be called to rule upon.⁸ In this instance DE-Ohio asserts that the DERS and Cinergy contracts are irrelevant, inadmissible and prejudicial to DE-Ohio, and it has become abundantly clear that the Commission must rule upon this issue at some point in these proceedings.

To save the time of the Commission, Parties, and interested stakeholders to these proceedings, it makes sense to determine the admissibility of the DERS and Cinergy contracts sooner rather than later. A determination in advance of hearing will save time, expense and

⁷ *In re Montgomery County Sale to DP&L*, Case No. 88-359-EL-UNC (Entry at 3) (July 6, 1988) (In the Montgomery County Case, the Commission denied the Motions in Limine finding that the Motions neither protected evidence from a jury nor furthered judicial economy).

⁸ *In Re Montgomery County Sale to DP&L*, Case No. 88-359-EL-UNC (Entry at 2) (July 6, 1988).

permit the Parties to determine their litigation strategy in regard to the contracts.

For example, such a determination will provide all Parties, including DE-Ohio and the OCC, much needed guidance regarding the extent of and subject of necessary testimony to be filed. As the Commission is well aware, the deadlines for the filing of testimony are rapidly approaching. If the Commission determines that the contracts are not admissible, DE-Ohio and its affiliates will not need to expend resources (either its own, other parties' or the Commission's) putting on evidence regarding the contracts.

If the Commission admits the contracts into evidence, OCC will likely expend time and resources on arguments that are entirely tangential to the relevant issues. In the interest of judicial economy, it is imperative that the Commission make some decision regarding the use of the agreements sooner rather than later. If the Commission decides not to make any determination in advance of the hearing, all parties will prepare for the range of arguments (relevant or irrelevant) that may be advanced. The hearing is likely to be substantially longer as Parties argue the contracts and their relevance. The need for additional rebuttal testimony may arise. At present, no foundation has been laid that would support the relevancy or admissibility of any such agreements. DE-Ohio asserts that none exists.

It is accepted that Motions in Limine may be considered in non-jury proceedings, most commonly in bankruptcy proceedings.⁹ Further, such motions have been used in circumstances similar to this case where evidence and arguments were considered by the Court through a Motion in Limine where the opposing party failed to plead facts that warranted consideration of the evidence.¹⁰ In *Riley*, the Internal Revenue Service (IRS) failed to plead that certain tax liabilities of debtor's were not dischargeable under 11 USC § 523(a)(7).¹¹ When the IRS attempted to offer evidence regarding the discharge of debt pursuant to 11 USC § 523(a)(7) debtors filed a Motion in Limine.¹² The Court fully considered the Motion in Limine but permitted the IRS to submit evidence regarding the nature of debt and arguments regarding the ability to discharge such debt in a bankruptcy case.¹³ Ultimately, the Court denied the Motion in Limine.¹⁴

These cases before the Commission are similar in that, like the IRS, OCC failed to seek any contracts from DE-Ohio affiliates in these proceedings prior to remand. The only discovery previously requested by OCC was 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

⁹ *The Motion in Limine in Bankruptcy Litigation*, American Bankruptcy Institute Journal by Perry Cockerell (March 2005).

¹⁰ *Riley v. Internal Revenue Service*, 202 B.R. 169, (1996).

¹¹ *Id.* at 172.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 178.

consolidated cases) that were entered into on or after January 26, 2004.”¹⁵ At hearing on May 20, 2004, OCC repeated the same identical request.¹⁶

Had the Commission granted OCC’s discovery request, OCC would not have received any DERS or Cinergy contracts. It would have received only the DE-Ohio contract with The City of Cincinnati. Indeed none of the so called option contracts had been negotiated or signed before the Commission’s November 23, 2004, Entry on Rehearing. Under these circumstances, the Commission should require OCC, like the IRS, to submit evidence demonstrating the relevancy of the contracts to these proceedings. DE-Ohio, DERS, and Cinergy should have an opportunity to respond and, after an *in camera* review of the contracts and the evidence proffered by the Parties, the Commission can decide the Motions in Limine. Before the Commission permits the admission of the contracts, OCC, like the IRS, must demonstrate the relevancy of the contracts given that they could not have had any impact on the original proceeding, particularly given that the Commission rejected the Stipulation.

If the Commission grants such a process that is typical of a Motion in Limine in a non-jury proceeding, DE-Ohio is confident that OCC cannot show relevancy. Neither DE-Ohio employees, nor Duke Energy

¹⁵ *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).

¹⁶ *Id.* at TR. II at 8 (May 20, 2004).

Shared Services employees on behalf of DE-Ohio, improperly performed work for DERS or Cinergy. Similarly, DE-Ohio bills and collects all of its approved regulated rates and deregulated market prices from all consumers, including the counterparties to the contracts. DE-Ohio has no financial obligation to its affiliates regarding the contracts. Finally, DE-Ohio has not taken any action requested by DERS or Cinergy in connection with the contracts. Simply stated DE-Ohio has no interest in the contracts of its affiliates and OCC cannot demonstrate otherwise. Therefore, the Motion's in Limine are properly before the Commission and should be granted.

II. If the Commission does not grant the Motions in Limine DE-Ohio, DERS, Cinergy, and consumers, will be harmed.

DE-Ohio is providing a competitive retail electric service to consumers in its certified territory, MBSSO service. DERS is a competitor in DE-Ohio's service territory. DE-Ohio, DERS, and consumers must all enter contracts in various combinations to participate in the competitive retail electric service market. If DERS cannot enter contracts because the benefits and detriments of such contracts are ascribed to DE-Ohio, DERS will not be able to conduct business in DE-Ohio's certified territory. DERS will be placed in the untenable position where, unlike any other CRES provider, it cannot guarantee to consumers that its contracts will remain confidential.

DE-Ohio may need to seek contracts for supplies and services from businesses outside of its certified territory because contracts with its

consumers are considered discounts or refunds. DE-Ohio and its affiliates enter thousands of contracts, like the contracts in question here, with consumers for many things, from soap to cleaning services, to copying machines. If all of these contracts are viewed as discounts to DE-Ohio's regulated rates and deregulated market prices DE-Ohio will need to find new sources for its supplies and services.

Additionally, consumers will have fewer suppliers to choose from since DERS will not be able to pursue business in DE-Ohio's certified territory. The contracts with DERS and Cinergy that represent millions of dollars to the Cincinnati economy will be difficult to maintain and replicate. This is not an abandonment of DE-Ohio's commitment to the Cincinnati area, it is simply the reality if the Commission determines the contracts are improper in the context of DE-Ohio's MBSSO. DE-Ohio has acted properly and responsibly in every respect. DE-Ohio, its affiliates, and consumers should not be punished as a result of OCC's baseless allegations.

An *in camera* review of the contracts, offered by DE-Ohio, DERS, and Cinergy, and suggested by Staff, is a reasonable alternative to resolve the Motions in Limine. DE-Ohio only requests that if the Commission permits OCC to offer evidence at the *in camera* review, other than the contracts themselves, that DE-Ohio and its affiliates have an opportunity to review and respond to such evidence so the Commission has all of the information it requires to make a determination regarding

the admissibility of the alleged side agreements. The Court's remand order required discovery, but left admissibility (or any other process) entirely to the discretion of the Commission.

III. OCC's implication of collusion is unfounded as DE-Ohio has acted no differently than OCC, or any other Party.

OCC asks the Commission to deny DE-Ohio's Motion in Limine so it can introduce evidence concerning collusion between DE-Ohio, DERS, and Cinergy. It implies such conduct from the Deeds case and DE-Ohio's arguments to maintain the confidentiality of various contracts and agreements. There is nothing impermissible about confidentiality in appropriate circumstances such as settlement discussions and commercial contracts. DE-Ohio's conduct is not out of the ordinary and is not in conflict with statute, rule, or Commission orders regarding the conduct of proceedings.

OCC alleges that it comes to the table with clean hands because it conducts its business in public. This is simply not true. First, OCC has entered into confidential side agreements and kept information from the public.¹⁷ It entered a confidential contract with DP&L that has been the subject of litigation before the Commission and the Court.¹⁸ OCC apparently accepted one of DERS's confidential contracts from the attorney in the Deeds case,¹⁹ OCC signed a public settlement of its

¹⁷ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 110 Ohio St. 3d 394, 397, 853 N.E.2d 1153, 1157 (2006).

¹⁸ *Id.*

¹⁹ *re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (OCC's Discovery Response AT June 22, 2006, E-Mail) (February 1, 2007).

appeal regarding the merger between Duke Power and Cinergy but would not include the Commission as part of the settlement discussion even though DE-Ohio suggested that the Commission should participate and the Commission was party to the appeal. Finally, OCC has held settlement discussions in these proceedings, excluding some parties from participation, and requiring participating parties to maintain the substance discussed as confidential. The point is not to allege wrongdoing on the part of OCC, but to demonstrate that OCC participates in these cases like everyone else and its allegations and innuendo to the contrary should be ignored.

IV. The contracts cannot be improper refunds pursuant to R.C. 4905.32.

Finally, OCC argues that the Commission should permit it to introduce the contracts into evidence for the purpose of establishing their illegality as an improper refund pursuant to R.C. 4905.32.²⁰ OCC and Staff know OCC's argument is without merit. First, OCC has deposed numerous witnesses as part of its unfettered discovery in these proceedings. Staff has attended at least one of those depositions. In response to OCC's questions, including the deposition attended by Staff, it is clear that the DERS contracts have valid consideration. If the depositions are not enough, OCC has the contracts. It is difficult to see how there can be any argument that the contracts represent an indirect

²⁰ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (OCC's Memorandum Contra at 9-10) (February 13, 2007).

refund of DE-Ohio's market prices by DERS if DERS receives consideration.

Second, OCC bases its argument on R.C. 4905.32, which is inapplicable to competitive retail electric service.²¹ Revised Code Section 4928.05 states that:

[A] competitive retail electric service supplied by an electric utility...shall not be subject to supervision and regulation...by the Public Utilities Commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except Section 4905.10, Division (B) of 4905.33, and Sections 4905.35 and 4933.81 to 4933.90;²²

Thus, R.C. 4928.05 expressly states that R.C. 4905.32, the statute cited by OCC, is not applicable to the MBSSO, the competitive retail electric service provided by DE-Ohio at issue in these proceedings. Similarly, R.C. 4905.33(A) is inapplicable and R.C. 4905.35 applies only to a Public Utility and does not contain the indirect language of R.C. 4905.32. In other words there is no statutory prohibition against refunds for competitive retail electric service.

DE-Ohio is not providing any refunds but even if it were doing so there would be no wrong doing. In fact, R.C. 4928.37 expressly authorizes payments of a consumers transition charges by a third party as long as the payment is consistent with R.C. 4905.33 and 4905.35,

²¹ Ohio Rev. Code Ann. § 4928.05 (Baldwin 2007).

²² *Id.*

which it is.²³ While the statutes are silent in regard to a refund of MBSSO prices, there is no statutory prohibition.

V. It is inconsistent of OCC to oppose DERS's and Cinergy's Motions to Intervene given its due process stance in this case.

It is ironic that OCC is arguing to deprive DERS and Cinergy of their due process rights to defend themselves in these proceedings while at the same time it argues that the Commission must hold an evidentiary hearing, that it must be permitted to discover contracts of non-party affiliates of DE-Ohio, and that it must be permitted to admit those contracts into record evidence for any purpose it wishes - all in the name of due process. The Court's remand order did not require the Commission grant OCC any of the requested due process.

DERS and Cinergy are not seeking to enter the case and argue the level of DE-Ohio's MBSSO. They apparently have no interest they wish to litigate regarding the MBSSO price or they would have intervened long ago. DERS and Cinergy have an interest in protecting their contracts, regarding both confidentiality and against inaccurate representations of the contracts and inaccurate portrayals of their conduct surrounding the contracts. DERS and Cinergy should be permitted to participate in the limited manner they seek.

OCC complains that DERS and Cinergy are double and triple teaming OCC.²⁴ OCC's complaint is not a reason to keep DERS and

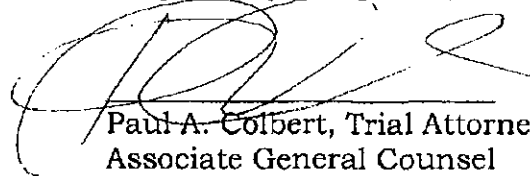
²³ Ohio Rev. Code Ann. § 4928.37 (Baldwin 2007).

Cinergy out of these cases. OCC is an experienced party in litigation before the Commission in cases involving many parties. If the Commission decides to admit DERS's and Cinergy's contracts the Commission should approve the Motions to Intervene of those entities to defend their rights *vis a vis* the contracts. The Commission should approve the Motions to Intervene.

CONCLUSION:

For the reasons more thoroughly discussed above DE-Ohio asserts that the Commission should grant its Motion in Limine and DERS's and Cinergy's Motions to Intervene.

Respectfully Submitted,

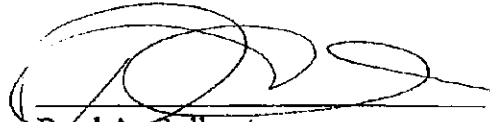


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²⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (OCC's Memorandum Contra at 11-18) (February 13, 2007).

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically on the following parties this 16th day of February 2007.



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