

FILE

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

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**DUKE ENERGY RETAIL SALES' REPLY TO THE OHIO CONSUMERS'  
COUNSEL'S MEMORANDUM CONTRA DUKE ENERGY RETAIL SALES'  
MOTIONS IN LIMINE AND TO INTERVENE**

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**ARGUMENT:**

**I. The Commission should grant DERS's Motion in Limine.**

The Ohio Consumers' Counsel (OCC) opposes Duke Energy Retail Sales' (DERS) Motion in Limine filed with the Public Utilities Commission of Ohio (Commission) in the above captioned cases (Proceedings) for reasons similar to those it expressed in opposition to DE Ohio and Cinergy Corp's motions. For that reason, DERS adopts and incorporates the Reply filed by DE-Ohio in response to OCC's Memo Contra and will not repeat the arguments made there.

OCC claims it may, and should be permitted to, introduce DERS commercial documents and contracts because of allegations made in a

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complaint filed by John Deeds on December 7, 2006 against DERS and Duke Energy Corp. Apparently, OCC contends the DERS documents are relevant in some undefined way to DE-Ohio's MBSSO remand case.<sup>1</sup>

It is unfair and prejudicial to DERS (and for that matter, to DE-Ohio) to use unsubstantiated allegations as the fulcrum to leverage into evidence documents and contracts between a non-regulated CRES provider and its customers, particularly where DERS has not had any opportunity to engage in discovery and defend against the allegations in the civil proceeding. In fact, that complaint is currently subject to dismissal in federal court.

Until the OCC offers some connection between the DERS contracts and DE Ohio's MBSSO case, Deeds' allegations certainly should not carry the day. For example, Mr. Deeds alleges the DERS contracts may be illegal because they are not in the public domain.<sup>2</sup> First, it is unclear what is meant by the public domain, but DERS is under no statutory or regulatory obligation to file its commercial contracts with anyone or to disclose their existence to anyone. In fact, DERS is not aware of any other competitive retail electric service (CRES) provider that makes its contracts public.

Second, DERS was not a party to the initial Proceedings, and there was no discovery request to DERS in the initial Proceedings. Therefore,

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<sup>1</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (OCC's Memorandum Contra at 13, 17) (February 13, 2007).

<sup>2</sup> *Id.* at 3-4.

DERS was under no compulsion, by virtue of an administrative proceeding, to disclose the documents. Third, DERS, as it is required to do, filed its annual financial disclosures that put its aggregate payments under certain option contracts in the public domain with the Commission. In short, Deeds' self-serving allegation does nothing to make these documents more or less relevant.

It is public record that the Commission, in these cases, permitted the intervening CRES providers to avoid turning over contracts and market price offers to DE-Ohio, with limited exceptions, and required all parties to provide information under confidentiality agreements.<sup>3</sup> Ultimately, DE-Ohio stipulated to the discovery of limited pricing information from CRES providers.<sup>4</sup> All of the CRES provider individual pricing information was not admitted into the record. DERS is simply asking for the same treatment as other CRES providers have received in these cases.

Instead, OCC jumps on the Deeds bandwagon and alleges that the DERS transactions are improper for a number of reasons. First, it argues that simply because the DERS contracts have remained confidential and DERS has vigorously defended the confidentiality of the documents, the contracts must be improper. Second, OCC implies that DERS and DE-Ohio have engaged in collusion, in part because the affiliates have filed pleadings at the same time and have supported each

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<sup>3</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (Entry at 4) (May 13, 2004).

<sup>4</sup> *Id.* at 2.

other. These arguments should be rejected as nonsense. DERS must, and is entitled to, protect its commercial transactions from disclosure and in fact, parties would be heard to argue that DERS waived its right to protect the documents if it did not vigorously defend against disclosure. Likewise, simply because different parties have interests that align and adopt each other's positions, does not create any inference except perhaps that the OCC is wrong in its arguments. Finally, OCC argues, based only on Deeds' allegations, unsubstantiated with any evidence either in testimony from Deeds or from anyone else that DERS contracts are a "sham."

DERS entered into confidential commercial contracts with counterparties that conferred a mutual benefit. DERS received an option to serve – a right but not an obligation – at an advantageous strike price and the customer received an option payment in return for agreeing to bind itself to DERS.

There is not one shred of evidence that DERS obligated DE-Ohio financially through its contracts, that DE-Ohio consumers paid less than their full market price approved by the Commission, or that either the third-party or DERS received anything less than what they bargained. Moreover, there is not one bit of evidence that the DERS contracts affected or could affect any DE-Ohio Stipulation or Alternative Proposal filed with the Commission since none were pending at the time the contracts were executed. A quick glance at the execution date of the

contracts will show that they were entered into after the Commission amended and substantially altered DE-Ohio's proposals.

**II. The Commission should grant DERS's limited Motion to Intervene as DERS has a substantive interest.**

Although OCC alleges collusion between DE-Ohio and DERS, it seeks to exclude DERS from these Proceedings even for the limited purpose of allowing DERS to defend itself if DERS documents and contracts are admitted. If OCC is permitted to sustain its allegations through the presentation of evidence related to DERS's contracts in these Proceedings and to make arguments of the nature described above, DERS must be able to defend itself and show why such allegations are without merit. For example, only those involved with DERS can testify about the option contract strike price and accounting for option payments. While DE-Ohio can present one side of the state of affairs, DERS must be permitted to present the other if the OCC is going to hurl accusations at both based on third party allegations.

As the Commission is aware, DERS does not believe its contracts are relevant to these Proceedings. OCC did not seek DERS's contracts in its original discovery and therefore, the contracts would not have been before the Commission for consideration regarding the Commission's November 23, 2004, Entry on Rehearing. The Commission rejected the Stipulation submitted in the case by DE-Ohio and other parties. And, the Court did not require the Commission to order discovery of contracts entered into by DE-Ohio's affiliates. Even were all of the above not true,

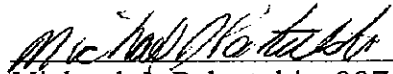
OCC has made no showing that DERS's contracts are relevant to the Commission's determination of the cases on November 23, 2004, because OCC has failed to demonstrate any connection between the DERS contracts and DE-Ohio that could affect market prices in any way.

If the Commission denies DERS's Motion in Limine, DERS must have the opportunity to defend the propriety of its contracts, and its actions as a CRES provider. If DERS is not permitted to defend itself, its ability to compete in the competitive retail electric service market may be damaged. Further, its customers may be harmed because DERS may not be able to enter similar contracts in the future. Indeed, it is unclear what contracts DERS may enter without objection if every contract below the market price offered by DE-Ohio is deemed a refund to a DE-Ohio consumer. For these reasons, DERS respectfully requests the Commission grant its limited Motion to Intervene.

**CONCLUSION:**

For the reasons more thoroughly discussed above DERS 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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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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