

## BEFORE

## THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY

The attorney examiner finds:

- (1) In *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify Its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Case No. 03-93-EL-ATA *et al.* (RSP Case), the Commission authorized Duke Energy Ohio (Duke)<sup>1</sup> to establish a rate stabilization plan and, as a part of that plan, to recover various costs through identified riders.
- (2) On appeal of the Commission decision in the RSP Case, the Supreme Court of Ohio remanded the proceedings to the Commission, requesting, *inter alia*, that the Commission provide additional record evidence and sufficient reasoning to support the modification of its opinion and order on rehearing. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789.
- (3) On November 29, 2006, the attorney examiner issued an entry, finding "that a hearing should be held in the remanded RSP Case, in order to obtain the record evidence required by the court."

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<sup>1</sup> Duke was formerly known as the Cincinnati Gas & Electric Company. In this entry, it will be referred to as Duke, regardless of its name at the time being discussed. Case names, however, will not be modified.

- (4) On January 3, 2007, the Commission found that, at the hearing, evidence may be considered "relating to relevant side agreements and how such side agreements may have impacted the seriousness of the bargaining that led to the stipulation adopted in the opinion and order."
- (5) On February 1, 2007, the Office of the Ohio Consumers' Counsel (OCC) filed an application for rehearing of the Commission's January 3, 2007, entry. In summary, OCC submits that the entry was unreasonable and unlawful because it prematurely deals with admissibility of evidence before such evidence is presented at a hearing.
- (6) On February 2, 2007, Duke Energy Retail Sales LLC (DERS) and Cinergy Corp. (Cinergy) each filed a motion to intervene for the limited purpose of protecting certain confidential information, arguing that, without intervention, they would be unable to prevent public disclosure of confidential information, since their interests are not represented by any current party to the proceedings. On February 13, 2007, OCC filed a memorandum contra those motions to intervene. OCC asserts that the intervention rights sought by DERS and Cinergy are overbroad and duplicative. The attorney examiner finds that intervention by DERS and Cinergy for the limited purpose of protecting their confidential information is reasonable and authorized by statute. The motions to intervene will be granted.
- (7) On February 12, 2007, memoranda contra the application for rehearing were filed by Duke and DERS.
- (8) On February 2, 2007, Duke, DERS, and Cinergy all filed motions *in limine*, seeking "to exclude irrelevant contracts and related documents from these proceedings." DERS asserts that the side agreements should be excluded for three reasons. First, DERS contends that the Commission rejected the stipulation that OCC alleges is affected by the side agreements. Second, DERS points out that it was not a party to any settlement negotiations and, therefore, any agreements with DERS could not be relevant to negotiation of the stipulation. Third, it suggests that the prejudicial effect of admission of any side agreements would outweigh any probative value. Duke adopts the arguments of DERS and also argues that the side agreements are irrelevant in the absence of a nexus with Duke or consumers and that

admission of the contracts would cause prejudice and undue harm to Duke and the communities it serves. Cinergy adopts the arguments of DERS and Duke, and suggests that it is in the public interest to encourage such contracts.

- (9) On February 7, 2007, staff of the Commission filed a memorandum in response. Staff states that it sees no relevance to the agreements, but suggests that, while the motions *in limine* should not be granted now, an *in camera* review of the side agreements prior to the hearing would be beneficial.
- (10) On February 9, 2007, the Ohio Marketers Group (OMG) filed a memorandum in response to the motions *in limine*. OMG believes that it would be premature to grant such motions prior to the completion of discovery. OMG also notes that staff had questioned whether the stipulation and the side agreements are moot in light of the current focus on the subsequent Commission orders. It responds that the side agreements are not moot and points out that the stipulation might have taken a different approach if the discovery in the underlying proceeding had been compelled. OMG also maintains that, if staff's reasoning were correct, the Supreme Court would have required "a vain act in making the utility turn over documents that would be barred from use in considering the remand."
- (11) On February 13, 2007, OCC filed a memorandum contra the motions *in limine*. According to OCC, in reliance on *In re Service to Medco*, Case No. 95-458-EL-UNC, Entry (August 31, 1999), motions *in limine* seeking the exclusion of evidence prior to a hearing are proper in jury trials but not in Commission hearings where no jury is present. OCC also disputes the substantive arguments raised by Duke, DERS, and Cinergy.
- (12) On February 14 and 16, 2007, Duke, DERS, and Cinergy all filed replies to OMG's memorandum in response and OCC's memorandum contra.
- (13) The Supreme Court of Ohio, in its remand of these proceedings, held that the Commission "abused its discretion when it denied discovery regarding alleged side agreements." The court explained that "concessions or inducements apart from the terms agreed to in the stipulation might be relevant to deciding whether negotiations were fairly conducted. . . . If there were special considerations, in the form of side agreements among

the signatory parties, one or more parties may have gained an unfair advantage in the bargaining process."

- (14) In the Commission's January 3, 2007, entry, the Commission complied with the Supreme Court of Ohio's remand by directing that evidence relating to the seriousness of the bargaining that led to the stipulation would be considered on remand. The court specifically stated that, in determining whether the stipulation was the product of serious bargaining, "the commission cannot rely merely on the terms of the stipulation but, rather, must determine whether there exists sufficient evidence that the stipulation was the product of serious bargaining. Any . . . concessions or inducements apart from the terms agreed to in the stipulation might be relevant to deciding whether negotiations were fairly conducted." Thus, the Commission found that any relevant side agreements may be admissible for this purpose.
- (15) The Commission, in its entry, did not impose any limitation on the ordinary procedures for seeking admission of any relevant evidence, including side agreements. Therefore, the attorney examiner finds that the January 3, 2007, entry does not preclude the admission of relevant side agreements for purposes other than the question of the seriousness of bargaining.
- (16) In the face of the directive from the Supreme Court of Ohio that the Commission consider whether side agreements may have impacted the bargaining process, and pursuant to the directive set forth in the Commission's January 3, 2007, entry, the attorney examiner will not, prior to the hearing, exclude any side agreements from the proceedings. As stated above, parties seeking admission of documents at the hearing should make appropriate motions at the hearing. Similarly, although certain of the parties requested that the issues of relevance and admissibility be determined in advance of the hearing, the attorney examiner finds that such a procedure would not comport with the Supreme Court of Ohio's remand and might unnecessarily prejudice the rights of other parties. Accordingly, the motions *in limine* will be denied.

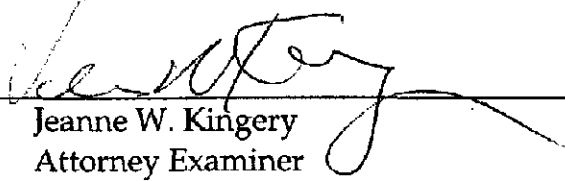
It is, therefore,

ORDERED, That the motions to intervene for the limited purpose of protecting confidential information, by DERS and Cinergy, be granted. It is, further,

ORDERED, That the motions *in limine* by Duke, DERS, and Cinergy be denied. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record in these proceedings.

THE PUBLIC UTILITIES COMMISSION OF OHIO

By:   
Jeanne W. Kingery  
Attorney Examiner

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Entered in the Journal

FEB 28 2007



Renee J. Jenkins  
Secretary