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March 2, 2007

Alan R. Schriber, Chairman
Public Utilities Commission of Ohio
180 East Broad Street, 12th Floor
Columbus, OH 43215

Re: *Consolidated Duke Energy Ohio, Inc., Rate Stabilization Plan Remand
and Rider Adjustment Cases, Case Nos. 03-93-EL-ATA, et al.*

Dear Chairman Schriber:

This letter is occasioned by my understanding that the Office of Consumers' Counsel ("OCC") is about to embark on a plan to place confidential information in the public record of this proceeding. The plan has been enabled, in part, by what we believe are erroneous and unfortunate rulings regarding the scope and nature of OCC's rights to engage in discovery in this phase of this case.

We previously explained our views regarding the scope and nature of OCC's discovery rights in a pleading filed on December 21, 2006 but they appear to have been either ignored or rejected without explanation. I mention this history because of the opportunity that these rulings have provided OCC to take confidential information it obtained by the force of the Commission's directions and place that confidential information in the public domain. We believe that a portion of the protected materials may include agreements to which one or more members of the Industrial Energy Users-Ohio ("IEU-Ohio") are parties. We suspect, based on a pattern of OCC's behavior, that the placement of this information in the public domain will be accompanied by its efforts to cast other stakeholders, including IEU-Ohio or its members, and the Commission in a bad light through press releases and other actions. Based on information that has been provided by OCC during discovery, it also appears that OCC has engaged in providing information it has obtained from or through its participation in

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regulatory proceedings before the Commission to a private litigant or has otherwise provided assistance to such private litigant who commenced a civil action against Duke Energy Corporation and Duke Energy Retail Sales, LLC ("DERS") in Federal District Court.¹

It is our understanding that OCC has notified counsel for Duke Energy-Ohio, Inc. ("DE-Ohio"), DERS, and Cinergy Corp. ("Cinergy") that OCC desires to treat protected information it has obtained through discovery in a manner that is not consistent with the terms and conditions of a Protective Agreement which OCC executed to secure the information. OCC has not bothered to notify us directly regarding its intentions. It is our understanding that the action OCC intends to take would potentially and publicly disclose customer names, account numbers, customer locations, prices and other sensitive information. It is our understanding that OCC has rejected efforts to redact sensitive information from the protected materials so that any public release will not violate fundamental privacy rights. Of course, even if this type of information were not confidential and subject to the provisions of a Protective Agreement, Section 4901:1-10-24 of the Ohio Administrative Code would operate to preclude an electric distribution utility ("EDU") and others from making this information public without the customer's express written consent.

Throughout this proceeding, OCC has attacked the Commission's rate stabilization plan objectives and urged the Commission to establish standard service offer prices through an auction process while requiring the EDU to divest generating assets.² In other words, OCC's litigation position would have Ohio citizens confronting the rate shock, dysfunction and reliability risks that have created a crisis in Maryland, Illinois and other states that failed to act in the best interests of customers.

Given the disaster that OCC's litigation position would work on Ohio's effort to "turn around" its economy, it is no wonder that parties to this litigation have sought (through whatever means) to settle their issues and secure price and service outcomes that are consistent with the Commission's rate stabilization plan objectives. In multi-party litigation, side agreements are a common and accepted means of making sure that one litigant does not have the ability to impose nonsensical and unreasonable results on other parties or to exercise a veto over the rights of individual parties to resolve their disputes. Having failed in

¹ *Deeds v. Duke Energy Corporation, et al.*, United States District Court, Southern District of Ohio (Western Division), Case No. 1:06CV855, Complaint (December 7, 2006).


² *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Non-Residential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish a Pilot Alternative Competitively-Bid Service Rate Option Subsequent to Market Development Period*, Case Nos. 03-93-EL-ATA, *et al.*, Post-Hearing Merit Brief of the Office of the Ohio Consumers' Counsel at 7 (June 22, 2004).

its central effort to inflict rate shock and chaos on Ohio, OCC has now made the existence of side agreements the chief enemy. And so, the insanity embedded in OCC's campaign to hurt customers and the Ohio economy continues and the Commission has not seen fit to constrain OCC's opportunity to carry on.

The Ohio Supreme Court decision that produced this remand included a ruling that said that OCC was entitled to obtain responses to discovery regarding the existence of side agreements as that existence may relate to the application of the first prong of the Commission's three-prong test as applied to its evaluation of settlements. The litigation torture that has since ensued as a result of the discovery-related decisions that have been made by the Commission has grown more severe and prolonged even though the rate stabilization plan ultimately adopted by the Commission in these proceedings came about as a result of the Commission's rejection of the settlement that was submitted. As things now stand, there is no settlement agreement to which the Commission can apply any prong of the three-prong test. Yet, somehow, OCC has been permitted to persist in its campaign to make the existence of side agreements the primary focus of the remand proceeding.

Based on the understandings described above, the immediate purpose of this letter is to alert the Commission to OCC's plans to put sensitive, private and confidential information into the public record. In this regard, we urge the Commission to immediately direct OCC to cease and desist from any efforts to make any protected information public or to take actions which will increase the risk that such information will become public. The larger purpose of this letter is to urge the Commission to proactively manage this phase of the proceeding with full appreciation of the harm that OCC seeks to impose on Ohio's consumers and its economy. It is time for OCC's opportunity to litigate in favor of nonsense to receive a swift and well-earned disconnection notice.

Respectfully submitted,



Samuel C. Randazzo

SCR:dsr

cc: PUCO Commissioners
Attorney Examiners
Parties of Record