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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 )		03-2080-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

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**INDUSTRIAL ENERGY USERS-OHIO'S REPLY TO  
MEMORANDUM CONTRA MOTIONS OF DUKE ENERGY, OHIO, INC., DUKE  
ENERGY RETAIL SALES, CINERGY CORP., OHIO HOSPITAL ASSOCIATION, AND  
KROGER FOR PROTECTIVE ORDERS BY THE OFFICE OF THE OHIO  
CONSUMERS' COUNSEL**

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March 15, 2007

Attorneys for Industrial Energy Users-Ohio

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On February 23, 2007, the Office of the Ohio Consumers' Counsel ("OCC") sent letters to, among others, Duke Energy Ohio ("Duke"), Duke Energy Retail Services ("DERS"), and Cinergy (collectively referred to as "Duke Companies"), indicating its intention to make public certain documents that it received pursuant to discovery requests in Case Nos. 03-93-EL-ATA *et al.*, that OCC obtained pursuant to protective agreements with those parties. Some of the documents at issue contain information regarding IEU-Ohio's members such as (but not limited to) name, account numbers and other sensitive information such as the price and supply of electricity. The release of any such information would jeopardize IEU-Ohio's members' business position in negotiations with other parties and their ability to compete in the global market. It was for this reason, among others that OCC was only provided the information after signing protective agreements with the parties that possessed the information. On March 2,

2007, each of the parties with whom OCC had executed protective agreements filed Motions for Protective Orders at the Public Utilities Commission of Ohio ("Commission") urging the Commission to grant a protective order to keep the documents at issue from public disclosure and to keep all such information confidential.<sup>1</sup> On March 2, 2007 IEU-Ohio filed a letter urging the Commission to take action to block OCC's proposed release of confidential protected information. On Tuesday, March 13, 2007, OCC filed its Memo Contra the Motions for Protective Order generally asserting that it wishes to put this information into the public domain in "favor of holding a public proceeding."<sup>2</sup> IEU-Ohio urges the Commission to reject OCC's request and to ensure that all such information remain protected as authorized and required by law. In light of OCC's conduct, IEU-Ohio also urges the Commission to take additional action to address OCC's existing violation of the protective agreements.

State law recognizes the need to protect information that is confidential in nature, as is the information that the OCC seeks to make public in this proceeding. Sections 4901.12 and 4905.07, Revised Code ("R.C.")<sup>3</sup>, indicate that, pursuant to Section

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<sup>1</sup> Ohio Hospital Association Motion for Protective Order to Prevent Public Disclosure and Memorandum in Support, Case Nos. 03-93-EL-ATA et al. (March 2, 2007), Duke Energy Retail Sale's Motion for Protective Order and Memorandum in Support, Case Nos. 03-93-EL-ATA et al. (March 2, 2007), Duke Energy Ohio's Motion for Protective Order and Memorandum in Support, Case Nos. 03-93-EL-ATA et al. (March 2, 2007), Cinergy Corp.'s Motion for Protective Order and Memorandum in Support, Case Nos. 03-93-EL-ATA et al. (March 2 2007), and Response to OCC's Notice and Motion for Protective Order and Memorandum in Support of the Kroger Company, Case Nos. 03-93-EL-ATA et al. (March 2, 2007).

<sup>2</sup> Memo Contra of the Ohio Consumers' Counsel at 8 (March 13, 2007).

<sup>3</sup> Section 4901.12, R.C., provides: "Except as otherwise provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX [49] of the Revised Code, all proceedings of the public utilities commission and all documents and records in its possession are public records."

Section 4905.07, R.C., provides: "Except as provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX [49] of the Revised Code, all facts and information in the possession of the public utilities commission shall be public, and all reports, records, files, books, accounts, papers, and memorandums of every nature in its possession shall be open to inspection by interested parties or their attorneys."

149.43, R.C., information and records that is otherwise protected from public release is not a public record.<sup>4</sup> Moreover, Section 1333.62, R.C. and Rule 4901-1-14(D) O.A.C., prohibit the release of trade secrets, which Section 1333.61(D), R.C., defines as:

**"...information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:**

**(1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.**

**(2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.**

Section 1333.61(D), R.C. (emphasis added).

The documents and information regarding IEU-Ohio's members that OCC seeks to have made public are comprised of competitively sensitive and highly proprietary business financial information falling within the statutory characterization of a trade secret as defined by Section 1333.61(D), R.C. Clearly, any documentation disclosing customer names, account numbers, and the price and supply of electricity contain proprietary data and are confidential. IEU-Ohio asserts that this information is not generally known by the public and is held in confidence in the normal course of business. Public disclosure of this information would jeopardize IEU-Ohio's members' ability to effectively negotiate resolutions of contentious proceedings and the ability to compete. Therefore, IEU-Ohio urges the Commission to deny OCC's request to make any such documentation public given the highly confidential and proprietary nature of

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<sup>4</sup> Section 149.43(A)(1)(v), R.C., provides in part: "Public record' does not mean records the release of which is prohibited by state or federal law."

the contents of the information and to ensure the continued non-disclosure of these proprietary materials.

As pointed out in IEU-Ohio's letter dated March 2, 2007 to Chairman Schriber in this proceeding, even if the information sought to be made public were not a confidential trade secret and subject to the provisions of a Protective Agreement, Rule 4901:1-10-24, Ohio Administrative Code ("O.A.C"), would operate to preclude an electric distribution utility ("EDU") and others from making this information public without the customer's express written consent, inasmuch as the material contains customer names, account numbers, customer locations, prices and other sensitive information.

Finally, even if the information at issue is considered relevant or otherwise admissible in this proceeding (which IEU-Ohio argues that it is not) it should still remain confidential and not subject to public disclosure inasmuch as the prejudice to the parties outweighs the probative value. Making the documents and information at issue public will only harm the business positions of the parties whose information is involved by jeopardizing their ability to compete in a global market as well as chill the parties in Commission proceedings from responding to discovery requests for sensitive information, thereby frustrating the Commission's intent to "minimize commission intervention in the discovery process." Rule 4901-1-16, O.A.C. OCC gains nothing by putting the information and documents at issue into the public domain.

OCC has already demonstrated its inability to protect the information it has received in this proceeding pursuant to the subject protective agreements. As pointed out in a letter from Duke to the OCC, "At 5:27 pm on March 5, 2007, the Office of the Ohio Consumers' Counsel (OCC) sent by e-mail, a number of documents that comprise

protected materials pursuant to a protective agreement signed by Duke Energy Ohio (DE-Ohio) and OCC.” Despite whether the release was inadvertent or intentional, the fact of the matter is that OCC breached the agreement and, as such, put the parties whose information was meant to be protected in a vulnerable business position.

If the documents and information are considered relevant or otherwise admissible in this proceeding—and they are not – there is absolutely no good reason to put the protected information and documents in the public domain. If there is any conceivable legitimate use of the protected information and documents at this point (and there is none), it can only be to demonstrate that certain parties who signed a stipulation and recommendation which OCC agrees was not adopted by the Commission<sup>5</sup> also had agreements with DE-Ohio or an affiliate of DE-Ohio. The name, account number, pricing provisions and other details that may be derived from the protected information and documents have absolutely no connection to the subject of this hearing. These details should not have been discoverable by OCC in the first place but the Commission must not make matters worse by permitting these details to be placed in the evidentiary record of this proceeding.

It appears that several parties to this proceeding find themselves in a fight as a result of OCC’s attempts to make confidential information public in part because of the Commission’s effort to bend over backwards in response to OCC’s discovery-related quest for “side agreements”. If OCC has demonstrated anything through its actions, it has demonstrated a proclivity for not respecting the license it has obtained from the Commission. But, the Ohio Supreme Court decision that produced this remand

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<sup>5</sup> *Memorandum Contra of the Office of the Ohio Consumers’ Counsel to the Cincinnati Gas & Electric Company’s Application for Rehearing at 5 fn 3, Case No. 03-93-EL-ATA et al., (November 8, 2004) (hereinafter Nov. 8, 2004 Application for Rehearing.)*

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 over-the-top litigation that OCC has undertaken since is, however, now in reference to a rate stabilization plan that came about as a result of the Commission's rejection of a settlement. In fact, OCC challenged the Commission's action because the Commission adopted a "New Proposal"<sup>6</sup> not the stipulation.<sup>7</sup> As things now stand, there is no settlement agreement to which the Commission can apply any prong of the three-prong test.

In view of OCC's intentional campaign to make protected and confidential information public and its actions (inadvertent or otherwise) to distribute this information to members of the public who have not signed protective agreements, IEU-Ohio urges the Commission to: (1) reconsider and grant the motions in *limine* that were filed in this proceeding on February 2, 2007; (2) require OCC and all other parties to this proceeding to return all protected or confidential information to the party from whom they received the information; and (3) require each party who is not subject to a protective agreement and who received protected or confidential information to verify to the Commission that they have destroyed such information and have not taken and shall not take any action that may, directly or indirectly, cause such information to be

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<sup>6</sup> Second Application for Rehearing by the Office of Consumers' Counsel at 4-7 (December 27, 2004).

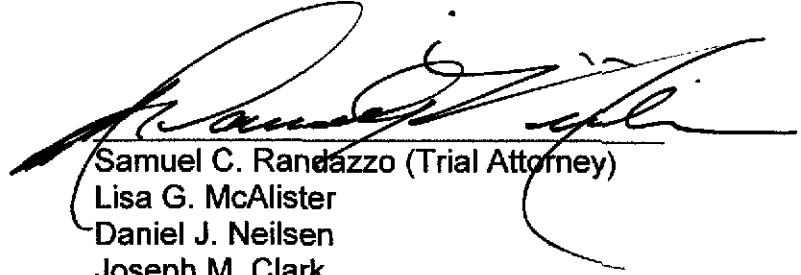
<sup>7</sup> In footnote 3 of OCC's November 8, 2004 Memorandum Contra to Cincinnati Gas & Electric Company's Application for Rehearing, OCC said:

CG&E's nomenclature regarding "reinstating" the Stipulation is misplaced. E.g. November 8, 2004 Application for Rehearing at 5. **The Commission never adopted the Stipulation, so there is nothing to "reinstate".** (emphasis added)

available to the public. These actions are required by the Commission to protect the integrity of its proceedings.

For the reasons explained above, IEU-Ohio urges the Commission to grant the relief requested herein.

Respectfully submitted,



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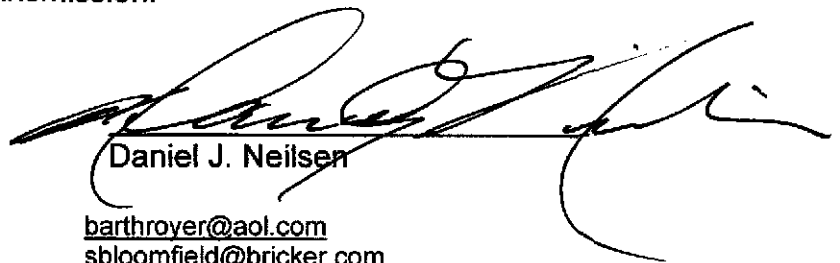
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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *INDUSTRIAL ENERGY USERS-OHIO'S REPLY TO MEMORANDUM CONTRA MOTIONS OF DUKE ENERGY, OHIO, INC., DUKE ENERGY RETAIL SALES', CINERGY CORP., OHIO HOSPITAL ASSOCIATION, AND KROGER FOR PROTECTIVE ORDERS BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL* was served upon the following individuals this 15<sup>th</sup> day of March 2007 via electronic transmission.



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