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March 15, 2007

Ms. Renee Jenkins  
Chief, Docketing Division  
Public Utilities Commission of Ohio  
180 E. Broad Street, 13<sup>th</sup> Floor  
Columbus, Ohio 43215

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**Via Courier**

Re: In The Matter of: The Consolidated Duke Energy Ohio, Inc.  
Rate Stabilization Plan Remand and Rider Adjustment Cases  
Case Nos. 03-93-EL-ATA, 03-2079-EL-AAM, 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

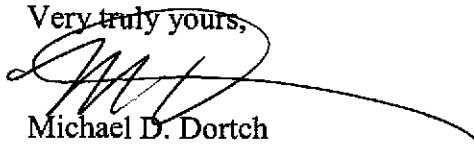
Dear Ms. Jenkins:

Enclosed please find an original and fifteen copies of Cinergy Corp's Reply to OCC's Memorandum Contra Cinergy Corp.'s Motion for Protective Order – **Public Version**. Also enclosed is an envelope containing the original and three copies of the **Confidential Version** of this document, which Cinergy Corp is submitting under seal.

Please accept the original and fifteen copies of the public version of this document for filing in the above identified matters. Please also accept the original and two copies of the confidential version of this document for filing. I would appreciate the return of a time stamped copy of each version of Cinergy Corp.'s Reply via the individual who delivers the same to you.

As always, please call me if you have any questions concerning this filing. Thank you.

Very truly yours,



Michael D. Dortch

Enclosures

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**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**CINERGY CORP.'S REPLY TO  
OCC'S MEMORANDUM CONTRA  
CINERGY CORP.'S MOTION FOR PROTECTIVE ORDER**

**PUBLIC VERSION**

*The Memorandum Contra Motions of Duke Energy Ohio, Inc., Duke Energy Retail Sales, Cinergy Corp., Ohio Hospital Association and Kroger for Protective Orders, and Motion for Prehearing Conference and Request for Expedited Ruling by the Office of the Ohio Consumers' Counsel, filed March 13, 2007 in the above-captioned cases by the Ohio Consumers' Counsel ("OCC") (hereafter referred to as "OCC's Memo Contra"), is indicative of the manner in which OCC has pursued its goals in this matter. Cinergy Corp. ("Cinergy") submits that this Commission should grant OCC's Motion for a Prehearing Conference. The Commission should, however, also remain mindful of the gamesmanship in which OCC has engaged throughout these proceedings as it evaluates the credibility of any representation made by OCC at such a conference or during hearings on the merits.*

**I. OCC'S MOTION FOR A PREHEARING CONFERENCE, WHICH SIMPLY ECHOS SIMILAR REQUESTS FROM CINERGY AND OTHERS, SHOULD BE GRANTED.**

OCC reveals that its adamant opposition to all efforts by Duke Energy Ohio, Inc., ("DE-Ohio"), Duke Energy Retail Sales ("DERS"), Cinergy Corp. ("Cinergy") and other parties to these proceedings to obtain pre-hearing rulings regarding the admissibility of evidence and the protection of information belonging to those parties has been nothing but a sham, cynically engaged in for no apparent purpose except to maintain all parties' focus upon protecting their confidential business information from unlawful disclosure, and thus to distract them, to greater or lesser degree, from the substantive merits of these cases.

Cinergy finds it simply incredible that – after OCC repeatedly opposed the efforts of Cinergy, DE-Ohio, DERS, and others to obtain early rulings regarding the matters OCC now admits require attention prior to hearing – OCC would at the last conceivable moment pivot 180 degrees, and on the eve of the hearing, blithely demand that this Commission conduct a pre-hearing conference to address the identical issues Cinergy and others have been asking to be heard and determined – over OCC's determined opposition – for months.

Cinergy also cannot ignore, and therefore asks the Commission to note as well, that OCC filed its Motion for a Prehearing Conference within days of the beginning of this Commission's hearing and in conjunction with its Memoranda Contra Protective Agreements sought by Cinergy and affiliated entities *after* OCC first sought and received an extension of time in which to oppose the motions. No legitimate purpose exists for

this tactic which has severely – and successfully – abridged the response time available to Cinergy and others.

Cinergy obviously does not object to a pre-hearing conference that Cinergy, DE-Ohio and DERS have each requested several times during the course of this proceeding. Cinergy does object, however, to the brazen manner in which OCC has manipulated these proceedings, this Commission, its attorney examiners, and the parties.

Cinergy also objects to the fact that OCC alone has created the necessity for a pre-hearing conference in this matter. OCC first entered into protective agreements with Cinergy and other parties that it is now obvious OCC never intended to honor. Then, in breach of those agreements, (which require that OCC specifically indicate the information contained in thousands and thousands of pages produced to it during discovery that it believes is unavoidably public), OCC informed the parties that it intended to place *all documents and information provided to OCC* in the public record, thus prompting the motions for protective orders filed by Cinergy and others.

OCC now concedes in its Memo Contra those motions – without apology or even acknowledgement of its concession – that it violated the terms of its protective agreements when it issued the blanket notices in which it refuses to recognize any claims by any party that any information revealed to OCC is entitled to protection under Ohio law. OCC's concession consists of its grudging identification – at last – of specific documents that it asserts are not entitled to protection from disclosure under Ohio law.

Cinergy maintains that even OCC's grudging identification of these documents and information is not made in good faith. Instead, Cinergy asserts that OCC's position regarding the confidential information belonging to others, like its last moment

maneuvers, are motivated by reasons of OCC's perception of good politics, not its perception of good public policy.

As it relates to Cinergy, OCC's concession consists of its statement that it "desires to end any claim to confidentiality" regarding two documents that OCC has submitted to this Commission under seal, attached as exhibits 5 and 11 to the Confidential Testimony of OCC Witness Hixon. (OCC's Memo Contra at 20.) OCC has no basis for its position regarding these two contracts, as the only *evidence* regarding Cinergy's motivations for entering into the two contracts (hereafter referred to as the "Cinergy Contracts") plainly reveals that Cinergy entered into those agreements for legitimate business purposes that exist separate and apart from these proceedings.

Cinergy will on this occasion pick up the gauntlet thrown down by OCC.<sup>1</sup> Cinergy will demonstrate, first, that even if the Cinergy Contracts are admitted into evidence and thereby become "public records" of this Commission, this Commission is statutorily required to protect both from public disclosure under Ohio law. Second, Cinergy will show that neither document should be admitted into evidence in these proceedings in the first place, as neither is relevant to any issue before this Commission.

## **II. OHIO'S PUBLIC POLICY MANDATES THAT THIS COMMISSION PROTECT FROM PUBLIC DISCLOSURE TRADE SECRET INFORMATION BELONGING TO CINERGY.**

Ohio's trade secret law is not nearly as convoluted as OCC would have this Commission and others believe. Under Ohio law, the term "Trade secret" describes *all* information, in whatever form and however derived, that satisfies the following two statutory criteria:

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<sup>1</sup> Cinergy intends as well to thoroughly reevaluate internal policies that allow it to voluntarily produce confidential information to the OCC in light of OCC's cavalier treatment of such information.

- (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."

R.C. § 1333.61(D).

In order to give effect to the "bare bones" language of the statute, the courts of Ohio frequently rely upon six factors when evaluating claims of trade secrecy:

1. The extent to which the information is known outside the business;
2. The extent to which it is known to those inside the business;
3. The precautions taken by the holder of the trade secret to preserve its secrecy;
4. The value to the holder in having the information;
5. The amount of effort or money expended to obtain or develop the information; and
6. The amount of time and expense it would take for others to duplicate the information.

*Cf. Pyromatics, Inc. v. Petruziello*, 7 Ohio App. 3d 131, 134-135 (Cuyahoga Cty 1983).

This Commission, of course, frequently recognizes that the contracts of even regulated entities must at times be protected from needless public disclosure. *Elyria Tel. Co.*, Case NO. 89-965-TP-AEC (Finding and Order, Sept. 21, 1989); *Ohio Bell Tel. Co.*, Case No. 890718-TP-ATA (Finding and Order, May 31, 1989); *Columbia Gas of Ohio, Inc.*, Case No 90-17-GA-GCR (Entry, Aug. 17, 1990).

In short, nothing about confidential information is remarkable in this proceeding except OCC's posture regarding such information. OCC does not assert that Cinergy's information does not meet the statutory test. OCC does not assert that Cinergy's information fails even one of the factors employed by the Courts. In fact, OCC does not

even assert that it has a good faith basis upon which to contest Cinergy's assertion that the Cinergy Contracts are its confidential business information.

OCC instead asserts that a different public policy trumps the protection of trade secrets. OCC claims that Ohio's public records act *requires* disclosure of the information belonging to Cinergy, as if this somehow justifies OCC's disavowal of its obligation to respect good faith claims of confidentiality. Indeed, OCC then points to this Commission's rules and to the protective "agreement" between itself and Cinergy and asserts on the basis thereof that it need have no basis to demand that Cinergy demonstrate that any information claimed to be a trade secret is in fact a trade secret.

OCC's public policy arguments are unavailing. Ohio's Trade Secret Act expresses a public policy choice to protect private information of economic significance to the owner of that information. Ohio's Public Records Act, R.C. § 149.011, expressly recognizes this policy, and directs state agencies to protect privately owned confidential information that happens to come into the agency's possession. Even assuming that, as OCC contends, the Cinergy Contracts were entered into for no other reason than to settle litigation before this Commission – a proposition that OCC knows is false and that Cinergy will demonstrate to be false herein – it is nonetheless still the public policy of the State of Ohio to protect that information. Moreover, it is the public policy of this State to encourage settlement of disputes. *White v. Brocaw* (1863), 14 Ohio St. 339, 346 ("If there is one thing which the law favors above another, it is the prevention of litigation, by the compromise and settlement of controversies."). OCC's "public policy" position is therefore both ridiculous and needlessly wasteful of resources, particularly where as here OCC asserts that it may ignore claims of confidentiality concerning the discovery

provided by entities such as DE-Ohio and DERS, which have produced volumes of records to OCC.

Turning to the two Cinergy Contracts: In the first instance, Cinergy's documents and information do not constitute a "public record" unless and until they are admitted into evidence. Section 149.43(A)(1) of the Ohio Revised Code, in relevant part, defines "public record" as "*records kept by any public office . . .*" According to Ohio Chief Justice Thomas Moyer:

[T]he definition of a 'public record' must be read in conjunction with the term 'record.' Section 149.011(G) defines 'record' to include '*any document . . . created or received by or coming under the jurisdiction of any public office . . . which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.*' Thus, to the extent that an item does not serve to document the activities of a public office, it is not a public record.

Moyer, J., Interpreting Ohio's Sunshine Laws: A Judicial Perspective, 59 N.Y.U. ANN. SURV. AM. L. 247 (2003) (emphasis added). Thus, unless the records are admitted into evidence, the issue of public disclosure does not even arise.

This Commission should not be distracted by OCC's assertions that R.C. §149.011, Ohio's Public Records Act, makes it the duty of this Commission to place the Cinergy Contracts in the public record. Of course, it is true that that public records should be open for public review. Even so, R.C. § 149.011 expressly protects trade secrets contained within public records from public disclosure. OCC's belief that otherwise protected information ceases to deserve protection whenever OCC succeeds in entering that document into the record of proceedings before this Commission is simply absurd.



Finally, OCC tries to portray the Cinergy Contracts as existing in a vacuum that is related solely to proceedings before this Commission. The Cinergy Contracts actually demonstrate, however, why trade secrets deserve protection even in a public forum such as this Commission because Cinergy's interests in entering into the Cinergy Contracts (let alone the interests of the counterparty to those Contracts) reach well beyond the narrow issues affecting Cinergy's utility affiliate, CG&E, that are the subject of the cases before this Commission. As a result, the Cinergy Contracts serve as a means of demonstrating the wide range of economic benefits Cinergy pursues for the benefit of itself, its shareholders, the entire inter-related corporate structure that was Cinergy and that is now Duke Energy, and the community in which Cinergy is a corporate member. OCC, of course, is aware of these other interests. It simply finds them inconvenient to its purposes and so it refuses to acknowledge them. This Commission should not permit it to do so any longer.

On February 8, 2007, OCC obtained a subpoena from this Commission in which OCC demanded that Gregory Ficke, former President of CG&E and Vice President of Cinergy Corp., appear for deposition. On February 20, 2007, OCC deposed Mr. Ficke for approximately five and one half hours. During that deposition, OCC questioned Mr. Ficke regarding many topics, including the Cinergy Contracts, which OCC introduced as exhibits 15 and 16 to Mr. Ficke's deposition.

In response to OCC's questions, Mr. Ficke ~~stated that the interests of~~

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~~\_\_\_\_\_~~

~~\_\_\_\_\_~~

[REDACTED] Mr.

[REDACTED]

[REDACTED] Now the [REDACTED] were these documents entered into,  
[REDACTED]  
[REDACTED]  
[REDACTED] support the supposition that [REDACTED]

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[REDACTED]

Cinergy maintains that the Cinergy Contracts, related documents, and information derived by OCC therefrom are confidential business information that belongs to Cinergy and of course to the counterparty to the Cinergy Contracts. Mr. Ficke's responses to OCC's questions should leave no doubt in the minds of members of this Commission that the economic significance of those contracts to Cinergy and to the counterparty to the Cinergy Contracts is undeniable.

Furthermore, and although OCC has not even indicated that it challenges this fact, Cinergy takes reasonable steps to protect its information from disclosure to those who have no need to know the information – even within Cinergy and companies affiliated with Cinergy. Thus, even if admitted into evidence in these proceedings – and Cinergy will next demonstrate that they should not be admitted into evidence in these proceedings – the Cinergy Contracts undisputedly meet the test of R.C. § 1331.61(D) and are entitled to the protection of law afforded confidential information pursuant to that statute.

### **III. THE CINERGY CONTRACTS ARE NOT PROPERLY ADMISSIBLE INTO EVIDENCE BECAUSE THEY ARE IRRELEVANT.**

Relevance is of course the initial touchstone of all evidentiary determinations. Relevant evidence is admissible. Irrelevant evidence is not admissible. Ohio R. Evid.

402. Evidence is "relevant" if it has:

any tendency to make the existence of any fact *that is of consequence to the determination of the action* more probable or less probable than it would be without the evidence.

Ohio R. Evid. 401 (emphasis added).

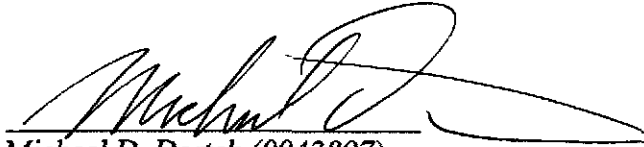
OCC now joins Cinergy in seeking a pre-hearing conference at which to determine the use it may make of the Cinergy Contracts. This Commission should, therefore, demand that OCC explain *the* fundamental issue that the Duke entities have attempted to raise since this matter was remanded to this Commission by the Ohio Supreme Court – the relevance of the documents that OCC insists upon referring to as "side agreements" to *this Commission's determinations* of the issues within the underlying RSP case.

This Commission, the Commission staff, OCC, and all parties to the RSP case all know that the Cinergy Contracts have no relevance to the matters determined by this Commission because this Commission forged its own solutions to the RSP case. OCC posits that the agreements are relevant to the legitimacy of the bargaining between parties to the stipulation proposed to this Commission. This Commission, however, *rejected* the stipulation proposed by the parties. Without regard to the relevance of the Cinergy Contracts to the stipulation, it is undeniable that the stipulation is itself irrelevant to the Commission's solution. Similarly, OCC will posit that the Cinergy Contracts are relevant



Rehearing issued November 23, 2004. As a result, the Cinergy Contracts are properly excluded from evidence in these proceedings.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Michael D. Dortch", with a long horizontal flourish extending to the right.

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### CERTIFICATE OF SERVICE

I certify that a copy of the public version of the foregoing was served electronically upon parties, their counsel, and others through use of the following email addresses this 15<sup>th</sup> day of March, 2007, and that a confidential version of the foregoing was served by the same means upon representatives of OCC and OMG based upon their execution of confidentiality agreements with Cinergy in this matter.

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