

FILE

7

RECEIVED-DOCKETING DIV  
2007 APR 27 PM 4:14  
PUCO

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

---

REPLY BRIEF OF  
INDUSTRIAL ENERGY USERS-OHIO

---

Samuel C. Randazzo, Trial Attorney  
Daniel J. Neilsen  
Lisa G. McAlister  
Joseph M. Clark  
MCNEES WALLACE & NURICK LLC  
21 East State Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 469-8000 (T)  
(614) 469-4653 (F)  
sam@mwncmh.com  
lmcAlister@mwncmh.com  
dneilsen@mwncmh.com  
jclark@mwncmh.com

April 27, 2007

Attorneys for Industrial Energy Users-Ohio

{C23078:4}

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business  
Technician AW Date Processed 4/27/07

**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

---

**REPLY BRIEF OF  
INDUSTRIAL ENERGY USERS-OHIO**

---

**I. INTRODUCTION**

This case, involving Duke Energy-Ohio's ("DE-Ohio") rate stabilization plan ("RSP"), was remanded to the Public Utilities Commission of Ohio ("Commission") by the Ohio Supreme Court in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 on November 22, 2006. The Supreme Court's remand directed the Commission to provide additional record evidence and sufficient reasoning to support the Commission's Opinion and Order and Entry on Rehearing approving Duke's current RSP as well as directed the Commission to compel responses to certain discovery requests made by the Office of the Ohio Consumers' Counsel ("OCC") during the discovery phase in the initial proceeding. Subsequently, the Attorney Examiners issued an Entry bifurcating the proceeding to consider first the Ohio Supreme Court's remand of the RSP case ("Phase I") and, second, the issues relating to the costs and

management of certain defined components of the RSP previously approved by the Commission.<sup>1</sup>

The evidentiary hearing for the Phase I portion of this proceeding commenced on March 19, 2007 and concluded on March 21, 2007. Pursuant to the procedural schedule established by the Attorney Examiners on March 21, 2007 and as amended on April 19, 2007 at the conclusion of the Phase II portion of the evidentiary hearing, initial briefs were filed by DE-Ohio, jointly by Duke Energy Retail Sales ("DERS") and Cinergy Corp., Ohio Energy Group ("OEG"), Commission Staff ("Staff"), Ohio Partners for Affordable Energy ("OPAE"), the Ohio Marketers Group ("OMG") and the OCC on April 13, 2007. Industrial Energy Users-Ohio ("IEU-Ohio") and Dominion Retail Inc. both declined to file initial briefs but reserved the right to file reply briefs. After reviewing the arguments set forth in the initial briefs by all of the parties, IEU-Ohio hereby submits its Reply Brief for the Commission's consideration.

## **II. ARGUMENT**

IEU-Ohio generally supports the arguments of DE-Ohio, DERS, Cinergy Corp., OEG and Staff (collectively referred to as the "RSP Supporters"). Specifically, IEU-Ohio agrees that the record evidence demonstrates that the Commission justifiably approved the RSP now in effect in its November 23, 2004 Entry on Rehearing. IEU-Ohio also agrees that the Commission-approved RSP protects customers from the harm of a dysfunctional competitive market. The additional evidence introduced in the remand

---

<sup>1</sup> Entry at 2 (February 1, 2007).

proceeding further improves the record and supports the Commission's justification for approving the RSP in the initial proceeding.<sup>2</sup>

IEU-Ohio also agrees with the RSP Supporters' argument that nothing produced in response to OCC's discovery requests is relevant or admissible and all agreements or references thereto should remain confidential. 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 Stipulation and Recommendation filed on May 19, 2004 was rejected by the Commission and, thus, was never in effect.<sup>3</sup> Consequently, as things now stand, there is no settlement agreement to which the Commission can apply any prong of the three-prong test. In fact, OCC itself asserted in a November 8, 2004 Memorandum Contra Application for Rehearing that the Stipulation was never approved.<sup>4</sup> Consequently, the Commission should strike any substantive

---

<sup>2</sup> DE-Ohio Remand Exhibit 3 at 18-27.

<sup>3</sup> Merit Brief of OEG [on Remand] at 7; Merit Brief of Cinergy Corp. and DERS [on Remand] at 5-7; Staff Initial Brief on Remand at 2 and 13-16; DE-Ohio's Merit Brief [on Remand] at 2 and 42.

<sup>4</sup> *Memorandum Contra of the Office of the Ohio Consumers' Counsel to the Cincinnati Gas & Electric Company's Application for Rehearing* at 3 n.3 (November 8, 2004).

Contrary to OMG's argument in its Reply Brief, the fact that a plan was implemented does not demonstrate that the Commission approved the May 19, 2004 Stipulation. Rather, DE-Ohio accepted an RSP that it voluntarily agreed to in lieu of implementing market-based rates. See [DE-Ohio's] Application for Rehearing at 2 (October 29, 2004) (where DE-Ohio indicated that it had a statutory right to implement its previously-filed market-based standard service offer); and [DE-Ohio's] Filing in Response to the Request of the Public Utilities Commission of Ohio to File a Rate Stabilization Plan at 22 (January 26, 2004) (where DE-Ohio stated that "if either the Commission does not issue an order and entry on rehearing in its entirety without modification by July 1, 2004, or [DE-Ohio] does not docket a written acceptance of the Commission's modification, [DE-Ohio] gives notice of its intent to end the market development period and commence charging market-based standard service offer rates....") In fact, the Commission has held that it "can not mandate the filing of a RSP." See *In the Matter of the Application for Approval of a Standard Service Offer and Competitive Bidding Process for Monongahela Power Company*, PUCO Case No. 04-1047-EL-ATA, Finding at Order at 4 (April 6, 2005).

discussion of any such agreements as irrelevant and deny admissibility of the same.<sup>5</sup>

Even if there was anything relevant to the matter at issue in this remand proceeding in the agreements that OCC obtained, IEU-Ohio supports the arguments of the RSP Supporters that OCC failed to prove how any such agreements affected the seriousness of the Stipulation bargaining process.<sup>6</sup> Moreover, if the Commission determines that the agreements OCC obtained are relevant – which IEU-Ohio asserts they are not – all such agreements should maintain the confidential status and protected treatment granted by the Attorney Examiners<sup>7</sup> for the reasons already set forth by IEU-Ohio in its *Reply to Memorandum Contra Motions of Duke Energy-Ohio, Inc., Duke Energy Retail Sales, Cinergy Corp., Ohio Hospital Association and Kroger Motions for Protective Orders By the Office of the Ohio Consumers' Counsel* ("IEU-Ohio Reply to OCC") on March 15, 2007, hereby incorporated by reference. OCC has not provided any reasons to overcome or even address the legal and public policy arguments against the release of confidential business information.

### III. CONCLUSION

IEU-Ohio joins the arguments of the RSP Supporters as set forth above and urges the Commission to find that: 1) the record contains sufficient evidence to justify its approval of the RSP; 2) the agreements obtained by OCC during discovery to challenge the "serious bargaining" prong for evaluating stipulations are irrelevant and

---

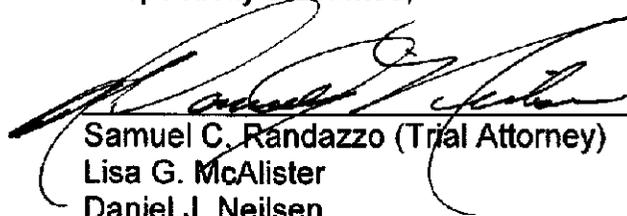
<sup>5</sup> Tr. Vol. III page 12, line 7 through page 18, line 2.

<sup>6</sup> Merit Brief of OEG [on Remand] at 7; Merit Brief of Cinergy Corp. and DERS [on Remand] at 15 and 16-17; and DE-Ohio's Merit Brief [on Remand] at 6.

<sup>7</sup> Tr. Vol. I at page 9, line 14 through page 10, line 1.

inadmissible; and, 3) even if the agreements are relevant and admissible they should remain protected from public disclosure.

Respectfully submitted,



Samuel C. Randazzo (Trial Attorney)

Lisa G. McAlister

Daniel J. Neilsen

Joseph M. Clark

McNees Wallace & Nurick LLC

21 East State Street, 17<sup>th</sup> Floor

Columbus, Ohio 43215

(614) 469-8000 (T)

(614) 469-4653 (F)

sam@mwncmh.com

lmcAlister@mwncmh.com

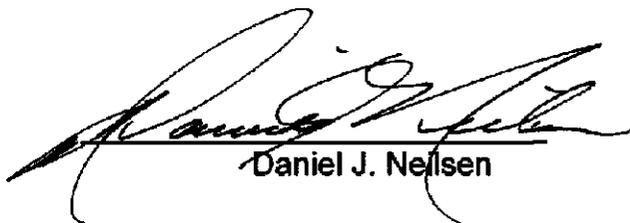
dneilsen@mwncmh.com

jclark@mwncmh.com

**Attorneys for Industrial Energy Users-Ohio**

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *REPLY BRIEF OF INDUSTRIAL ENERGY USERS-OHIO* was served upon the following parties of record this 27<sup>th</sup> day of April 2007, via electronic transmission.



Daniel J. Neilsen

Jeanne.Kingery@puc.state.oh.us  
Scott.Farkas@puc.state.oh.us  
paul.colbert@duke-energy.com  
rocco.d'ascenzo@duke-energy.com  
anita.schafer@duke-energy.com  
small@occ.state.oh.us  
hotz@occ.state.oh.us  
sauer@occ.state.oh.us  
cmooney2@columbus.rr.com  
dboehm@bkllawfirm.com  
mkurtz@bkllawfirm.com  
Thomas.mcnamee@puc.state.oh.us  
werner.margard@puc.state.oh.us  
Stephen.Reilly@puc.state.oh.us  
drinebolt@aol.com  
WTPMLC@aol.com  
schwartz@evainc.com  
rsmithla@aol.com  
barthroyer@aol.com  
sbloomfield@bricker.com  
tobrien@bricker.com  
dane.stinson@baileycavalieri.com  
JKubacki@strategicenergy.com  
korkosza@firstenergycorp.com  
mchristensen@columbuslaw.org  
tschneider@mgsglaw.com  
shawn.leyden@pseg.com  
ricks@ohanet.org  
cgoodman@energymarketers.com  
nmorgan@lascinti.org  
eagleenergy@fuse.net  
ariane.johnson@duke-energy.com  
mdortch@kravitzllc.com  
mhpetricoff@vssp.com  
jfinnigan@Cinergy.com