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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of )  
Duke Energy Ohio, Inc. To Modify Its )  
Market-Based Standard Service Offer. )

Case No. 06-986-EL-UNC

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MEMORANDUM CONTRA MOTION TO INTERVENE OF  
DUKE ENERGY RETAIL SALES  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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**I. INTRODUCTION**

On August 2, 2006, Duke Energy Ohio, Inc. ("Duke Energy," or the "Company") filed an application ("Application") with the Public Utilities Commission of Ohio ("PUCO" or "Commission") for authority to modify its standard service offer by proposing new rates for the two-year period beginning January 1, 2009.<sup>1</sup> The Company proposes to increase the standard service offer rates that were approved by the Commission during 2005, in Case No. 03-93-EL-ATA, et al. (the "*Post-MDP Service Case*"), and that consumers now pay.<sup>2</sup>

On July 16, 2007, Duke Energy Retail Sales ("DERS") moved to intervene in the case.<sup>3</sup> DERS' role in the *Post-MDP Service Case* and in that case on remand from the

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<sup>1</sup> Application at 3.

<sup>2</sup> Application at 1.

<sup>3</sup> DERS failed to properly serve the OCC with the Motion to Intervene by means of transmittal to the OCC's designated "counsel of record," pursuant to Ohio Adm. Code 4901-1-05(B). DERS made a similar mistake in the *Post-MDP Remand Case* where it also failed to properly serve the OCC with its Motion to Intervene. *Post-MDP Remand Case*, OCC Memorandum Contra DERS' Motion to Intervene at 7 (February 13, 2007).

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Supreme Court of Ohio (“*Post-MDP Remand Case*”<sup>4</sup>) was contested by the OCC at different points during the case on remand. DERS is affiliated with Duke Energy and has repeatedly demonstrated that its interests are *identical* to that of Duke Energy. Pursuant to Ohio Adm. Code 4901-1-12(B), the OCC submits its memorandum contra (“Memo Contra”) DERS’ Motion to Intervene (“Motion”). DERS should not be granted party status that would permit this Duke-affiliated company to engage in duplicative pre-hearing, hearing (e.g. tag-team cross-examination), and post-hearing activities.

## **II. HISTORY OF RELATED CASES**

### **A. The *Post-MDP Service* and *Post-MDP Remand* Cases**

In its *Post-MDP Service Case*, Duke Energy submitted proposals regarding generation pricing for retail electric customers of Duke Energy. The OCC appealed the Commission’s decision in the *Post-MDP Service Case*. On November 22, 2006, the Ohio Supreme Court remanded the case to the Commission. Two reasons for the remand were the lack of evidentiary support for the PUCO’s decision and the PUCO’s treatment of the OCC’s efforts to investigate the presence of side deals that should have been considered in the *Post-MDP Service Case*.

On November 29, 2006, the Attorney Examiner issued an Entry in the resulting *Post-MDP Remand Case*.<sup>5</sup> The OCC engaged in extensive discovery in the *Post-MDP Remand Case*, including depositions of DERS representatives who were employees of DERS’ affiliated corporations. The OCC investigated allegations that DERS was

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<sup>4</sup> The *Post-MDP Service Case* and *Post-MDP Remand Case* are not separate cases, but the separate designations, based on timeframes, is convenient for reference purposes.

<sup>5</sup> *Post-MDP Remand Case*, Entry at 2 (November 29, 2006).

involved in side deals with Duke Energy's retail customers in connection with the *Post-MDP Service Case*. The depositions were taken over the objections of DERS and Duke Energy, both of whom submitted motions to quash the OCC's subpoenas.<sup>6</sup>

A motion to intervene was filed by DERS in the *Post-MDP Remand Case* on February 2, 2007. DERS filed a Motion *in Limine* on that same date. Duke Energy and another affiliate of Duke Energy similarly each filed a Motion *in Limine*. In their motions the Duke affiliates, acting in concert, sought an early determination that the OCC could not enter into evidence the information that the OCC gained regarding agreements by DERS with customers of Duke Energy.

By Entry dated February 28, 2007, DERS was awarded a limited right to participate in the *Post-MDP Remand Case* for the purpose of protecting information. Immediately upon commencement of the hearing in the *Post-MDP Remand Case*, DERS conducted itself as if it had been granted the full right to participate as a party to that case.<sup>7</sup> Over the objection of the OCC, DERS was permitted to participate in the *Post-MDP Remand Case* without the limitations previously stated in the Entry dated February 28, 2007.<sup>8</sup>

#### **B. The Present Proceeding**

DERS' Motion in the above-captioned case, filed on July 16, 2007, again raises the issue regarding its appropriate role in a proceeding that involves a plan submitted by

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<sup>6</sup> *Post-MDP Remand Case*, Motion to Quash DERS and Memorandum in Support of DERS Motion to Quash by Duke Energy (December 20, 2006).

<sup>7</sup> *Post-MDP Remand Case*, Tr. Vol. III at 13-16 (March 21, 2007).

<sup>8</sup> *Id.* at 17.

its affiliated company. However, the Commission's approach to DERS' intervention should be guided by DERS' conduct during the *Post-MDP Remand Case*.

Partly as the result of the hearing in the *Post-MDP Remand Case*, the Commission is in an advantageous position to judge the inaccuracies stated in DERS' Motion to Intervene. As a factual matter, DERS does *not* "currently market[ ] services it provides to large commercial and industrial consumers of electric power within the State of Ohio."<sup>9</sup> As demonstrated in the *Post-MDP Remand Case*, DERS does *not* "supply many, if not all, the same service provided by its affiliate, D[uke]E[nergy]-Ohio."<sup>10</sup> DERS does not "compete with D[uke]E[nergy]-Ohio," but operates with a singleness of purpose with Duke Energy Ohio and other Duke-affiliated companies.<sup>11</sup>

### **III. ARGUMENT: DERS' Motion Misstates the Commission's Rules and Does Not Satisfy the Commission's Criteria for Party Status.**

In addition to misstating factual matters, DERS also misstates the Commission's rules regarding intervention.<sup>12</sup> Ohio Adm. Code 4901-1-11(B) states that, "in deciding whether to permit intervention . . . , the commission . . . shall consider" the following:

- (1) The nature and extent of the prospective intervenor's interest;
- (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;
- (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings;

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<sup>9</sup> Motion at 2. An extensive demonstration to the contrary is documented in the OCC's pleadings in the *Post-MDP Remand Case*. E.g., *Post-MDP Remand Case*, OCC Initial Post-Remand Brief, Hearing Phase I at 40 (April 13, 2007).

<sup>10</sup> Motion at 3.

<sup>11</sup> E.g., *Post-MDP Remand Case*, OCC Initial Post-Remand Brief, Hearing Phase I at 38 (April 13, 2007).

<sup>12</sup> Motion at 2-3.

- (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.
- (5) The extent to which the person's interest is represented by existing parties.

DERS makes little effort to apply these criteria to its circumstances, and (as stated above) misrepresents its factual situation in its brief argument. DERS fails the above-stated test for prospective intervenors, and its Motion should be denied.

First, regarding the "nature and extent" of DERS' interest, DERS misstates its interest in Ohio and therefore in the case. DERS claims that its position is "unique" as a marketer that "compete[s] against its regulated affiliate."<sup>13</sup> The evidence in the *Post-MDP Remand Case*, however, demonstrates that DERS' claim that it competes by providing the same services as Duke Energy is mistaken. The lesson learned from the *Post MDP Remand Case* is that the Duke-affiliated companies mix their business dealings.<sup>14</sup>

Second, DERS makes no statement regarding its "legal position advanced." In the *Post-MDP Remand Case*, DERS took no legal position that at any time deviated from that of its affiliate, Duke Energy. DERS cannot be expected to contribute anything to the legal discourse in this case.

Third, regarding whether the "intervention . . . will unduly prolong or delay the proceedings," DERS' participation in the *Post-MDP Remand Case* was largely devoted to delaying and obstructing the OCC's efforts to carry out discovery and make its case.

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<sup>13</sup> Id. at 3.

<sup>14</sup> *Post-MDP Remand Case*, OCC Initial Post-Remand Brief, Hearing Phase I at 38-44 (April 13, 2007).

Examples of such behavior were DERS' Motion to Quash Subpoena in connection with the OCC's planned deposition of DERS President Whitlock,<sup>15</sup> its effort to prevent the OCC from making inquiries during the course of that deposition that were clearly within the scope of the subpoena that the Attorney Examiner refused to quash,<sup>16</sup> DERS' Motion *in Limine* that sought to prevent the OCC from presenting evidence at hearing,<sup>17</sup> and its Motion to Strike the testimony submitted by a key OCC's witness.<sup>18</sup> The above-captioned case is closely related to the *Post-MDP Service and Remand Cases*, and DERS' activity in those cases supports a Commission determination that DERS' intervention will unduly prolong and delay this proceeding.

Fourth, DERS cannot be expected to contribute to the "full development and equitable resolution of the factual issues" in this case. As stated above, DERS' Motion has already misstated the facts surrounding its own circumstances in Ohio. As a further matter, DERS misstated its own dealings with other parties in its post-hearing briefing of the *Post-MDP Remand Case*.<sup>19</sup> DERS' misstatements are important since they are again made regarding DERS' own circumstances, circumstances that were material to the controversial side deals that were at issue in the *Post-MDP Remand Case*.

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<sup>15</sup> *Post-MDP Remand Case*, Motion to Quash DERS and Memorandum in Support of DERS Motion to Quash by Duke Energy (December 20, 2006).

<sup>16</sup> *Post-MDP Remand Case*, Entry at 5 (January 2, 2007). The Attorney Examiners instructed DERS to respond to the OCC's questions as part of a telephone call conducted during the deposition of DERS President Whitlock. *Post-MDP Remand Case*, OMG Ex.4 at 34 (Whitlock).

<sup>17</sup> *Post-MDP Remand Case*, Motions *in Limine* by DERS, Cinergy, and Duke Energy (February 2, 2007).

<sup>18</sup> *Post-MDP Remand Case*, Duke Energy Motion to Strike, Tr. Vol. III at 12, 18-23, and DERS Motion to Strike, Tr. Vol. III at 13, 23-26 (March 21, 2007).

<sup>19</sup> *Post-MDP Remand Case*, OCC Reply Post-Remand Brief, Hearing Phase I at 9-10 (April 27, 2007).

Fifth, DERS' interest "is represented by [an] existing part[y]": its affiliate, Duke Energy. As demonstrated in the *Post-MDP Remand Case*, these Duke-affiliated companies present their arguments with a single corporate "mind."<sup>20</sup> The interests advocated by DERS have been essentially indistinguishable from the interests advocated by Duke Energy, the public utility.

The pleadings in the *Post-MDP Service Case* bear testimony to the identical voice used by the Duke-affiliated companies.<sup>21</sup> A Motion to Quash was filed by DERS on December 20, 2006, to prevent the OCC from obtaining information regarding side deals, and Duke Energy filed a Motion for Protective Order and Memorandum in Support of the DERS Motion to Quash that same day.<sup>22</sup> The OCC dealt with Duke Energy's trial counsel regarding execution of protective agreements with both DERS and Duke Energy.<sup>23</sup> In a telephone conference regarding the date of the deposition to be taken of DERS' president, Duke Energy's trial counsel represented both Duke Energy and DERS (in addition to the representation DERS already had in the conversation) in a call to the Attorney Examiners.<sup>24</sup> Motions *in limine* were filed by DERS and Duke Energy within

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<sup>20</sup> In a court case related to the OCC's arguments in the *Post-MDP Remand Case*, John Deeds refers to Cinergy Retail Services, predecessor to DERS, as the "alter ego of Cinergy [Corp.]" that created CRS. *Deeds v. Duke Energy Corporation et al.*, United States District Court, Southern District of Ohio (Western Division), Case No. 1:06CV835, Complaint at ¶5 (December 7, 2006). The Deeds Complaint was attached to a letter docketed by the OCC in the *Post-MDP Remand Case* on December 13, 2006.

<sup>21</sup> E.g., *Post-MDP Remand Case*, OCC Memorandum Contra DERS' Motion to Intervene at 1-19 (February 13, 2007).

<sup>22</sup> *Id.* at 1-2.

<sup>23</sup> *Id.* at 17.

<sup>24</sup> *Id.* Duke Energy's trial counsel also participated in the final stages of developing a protective agreement between DERS and the OCC the night before the deposition took place. *Id.*

minutes of one another on February 2, 2007.<sup>25</sup> Finally, DERS did not deviate from Duke Energy's positions in its briefing of the *Post-MDP Service Case*.

The OCC was not the only party to the *Post-MDP Remand Case* to note the curious dealings between supporters of Duke Energy's proposals, including the role of DERS. For example, Dominion Retail stated in its Post-MDP Remand Reply Brief:

Dominion Retail finds O[hio]E[nergy]G[roup]'s reference to the "Duke companies" rather curious. If, as these affiliated companies (i.e., DE-Ohio, Cinergy, and DERS) maintain, they are actually separate entities, why would OEG expect Cinergy and DERS to support DE-Ohio witness Steffen . . . ? If these are separate entities, Cinergy, which is not a certified CRES provider, clearly would have no stake in the outcome. On the other hand, DERS, despite the fact that it has no sales force, no customers, no revenues, and has never served the first end-user customer is, at least nominally, a CRES provider, which should lead one to expect that it would side with every other marketer participating in this proceeding in opposing the provision of the RSP that makes the IMF charge non-bypassable.<sup>26</sup>

DERS' arguments in support of Duke Energy's positions in the *Post-MDP Remand Case* strongly contrasted with the positions of the true marketers of competitive retail electric service who were involved in that case.<sup>27</sup>

Ohio Adm. Code 4901-1-27(B)(7), in addition to the rules for preventing inappropriate interventions, provides for the limitation of the sort of duplicative advocacy that the Duke-affiliated companies practice. Ohio Adm. Code 4901-1-27(B)(7)(b) allows the PUCO to prevent the presentation of "cumulative evidence." Ohio Adm. Code 4901-1-27(B)(7)(c) allows the PUCO to prevent "argumentative, repetitious, cumulative, or

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<sup>25</sup> Id. All the pleadings filed on February 2, 2007 by the Duke-affiliated companies made the identical mistake of failing to serve the OCC with the pleadings. Id.

<sup>26</sup> *Post-MDP Remand Case*, Dominion Retail Post-MDP Remand Reply Brief at footnote 5 (April 24, 2007).

<sup>27</sup> *Post-MDP Remand Case*, Reply Brief of Cinergy Corp. and DERS (April 27, 2007).

irrelevant cross-examination.” Ohio Adm. Code 4901-1-27(B) notes that these restrictions on duplication (among other actions) are “without limitation.” Therefore and in the event the PUCO grants intervention (which it should not), the PUCO should limit the interventions to preclude the presentation of the types of repetitive and cumulative arguments that were made in the *Post-MDP Remand Case* with the single purpose of preventing the OCC from presenting its case on behalf of residential consumers.

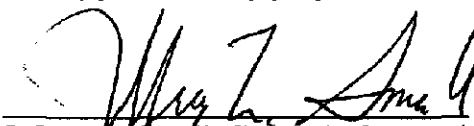
For the above-stated reasons, DERS’ Motion should be denied. If granted, arguing in the alternative, DERS’ rights as a party should be limited consistent with the OCC’s arguments.

#### **IV. CONCLUSION**

The Commission should deny DERS’ Motion. DERS demonstrated in the *Post-MDP Remand Case* that it adds nothing but duplication of Duke Energy’s positions. At a minimum, in the event the Commission grants intervention, the Commission should greatly limit DERS’ like-minded advocacy with Duke Energy consistent with the reasons provided by the OCC with regard to the Commission’s rules. The interests of Ohio’s residential utility consumers should be fully heard in this case, and the Commission should not permit DERS to introduce duplicative and obstructionist positions designed to limit the OCC’s representation of those residential utility consumers.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Jeffrey L. Small", is written over a horizontal line.

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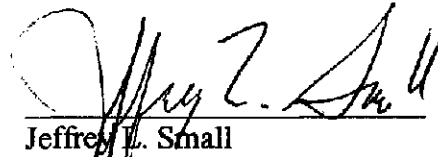
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Office of the Ohio Consumers' Counsel's Memorandum Contra DERS' Motion to Intervene was served on the persons listed below, via first class U.S. Mail, prepaid, this 3<sup>rd</sup> day of August 2007.



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