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December 3, 2007

VIA MESSENGER DELIVERY

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

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 ("Cinergy's") and Duke Energy Retail Sales, LLC's ("DERS") Memorandum Contra The Application for Rehearing filed by the Office of Ohio Consumers' Counsel.

Please accept the original and fourteen copies of this document for filing in the above identified matters. I would appreciate the return of a time stamped copy 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	:	
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-AAM
	:	03-2081-EL-ATA
	:	05-724-EL-UNC
	:	05-725-EL-UNC
	:	06-1068-EL-UNC
	:	06-1069-EL-UNC
	:	06-1085-EL-UNC

**CINERGY CORP.'S  
AND DUKE ENERGY RETAIL SALES, LLC'S  
MEMORANDUM CONTRA TO THE  
APPLICATION FOR REHEARING OF  
THE OFFICE OF OHIO CONSUMERS' COUNSEL**

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## **I. INTRODUCTION**

### **A. The Scope of This Commission's Remand Order.**

This Commission's October 24, 2007, Order on Remand in this proceeding (the "Remand Order") is substantively remarkable for this Commission's evaluation of a Market Based Standard Service Offer ("MBSSO") proposal, as subsequently modified by its sponsor, Duke Energy Ohio, Inc., ("DE-Ohio"). For the reasons expressed in its Remand Order, this Commission Ordered still additional modifications to DE-Ohio's modified MBSSO proposal and, as part of DE-Ohio's rate stabilization plan ("RSP"), approved an MBSSO now substantially modified from any proposed by the parties during the course of these proceedings.

In order to reach the substance of this case, the Commission also addressed two issues entirely and obviously ancillary to the substantive issue. First, the Commission rejected what has ultimately proven to have been a controversial proposed stipulation, ardently supported by some parties and vehemently decried by others. Second, the Commission determined that certain documents produced during discovery contain protectable trade secret information – a seemingly unremarkable decision nonetheless disputed with peculiar fervor by the Office of Consumers' Counsel ("OCC").

### **B. The Limited Role Cinergy and DERS Have Played In These Proceedings.**

As non-utilities, Cinergy Corp. ("Cinergy") and Duke Energy Retail Sales, LLC ("DERS") normally have no direct interest in the proceedings of this Commission. In this case, however, Cinergy and DERS sought intervention in order to ensure the confidential protection of certain proprietary, trade secret, information each was compelled to produce during litigation between DE-Ohio and the other parties to this proceeding. As this Commission is aware, numerous, lengthy, and detailed briefs arguing in favor of protecting, or in favor of disclosing, information belonging to DERS, Cinergy, and others have been submitted for this Commission's

review. *See, eg.*, the various Motions for Protective Orders, Memos Contra and Replies of all parties. DERS and Cinergy will simply rely upon their prior arguments and avoid repeating arguments herein that have already been brought to the attention of this Commission.

After initially intervening for this limited purpose, Cinergy and DERS subsequently were compelled to seek an expanded role in these proceedings after OCC demonstrated, the first morning of the "Phase I" remand hearing, that it was determined to argue that DE-Ohio was unlawfully discriminating amongst its customers, and that Cinergy and/or DERS were instruments used to accomplish this discrimination in violation of this Commission's corporate separation rules. DERS, Cinergy, and others opposed the interjection of this "red-herring" issue into this proceeding as well as this use of their documents, arguing, first, that the alleged discrimination and alleged regulatory violations OCC wished to raise were entirely irrelevant to the issues on remand; and second, that this Commission had specifically adopted procedures which permit such allegations to be addressed – procedures which have certain substantive and procedural requirements to which the parties contend they are entitled. Again, numerous, lengthy, and detailed briefs arguing the parties' positions were submitted. Again, DERS and Cinergy will simply adopt their April 13, 2007, and April 27, 2007, Merit and Reply Briefs in order to avoid repeating themselves.

DERS and Cinergy fully support the position of their corporate affiliate, DE-Ohio in this matter. Beyond this statement, however, DERS and Cinergy will forego the temptation to address arguments directed to the substantive ruling of this Commission – a ruling that does not impact DERS or Cinergy directly and which are better addressed by DE-Ohio. Therefore, these comments are quite limited. DERS and Cinergy herein address only the present posture of these two ancillary issues, which was the subject of improper assertions by OCC in its Application for Rehearing.

## II. LAW AND ARGUMENT

### A. OCC's Assertion That This Commission's Decision With Regard To Confidential Information Is Erroneous Ignores The Authority of This Commission, Ohio Trade Secrets Law, And The Facts.

OCC continues to argue that this Commission is required to place confidential, trade secret information belonging to Cinergy, DERS and others in the public record. As virtually everyone in the State of Ohio is aware, the predecessor of the current OCC was forced to resign from that office amid fierce public criticism of his failure to preserve an expert's report. It is understandable that the current holder of the office, and members of her staff, do not wish those events to reoccur. Nonetheless, OCC's new-found zeal for "the public's" right to examine information ignores the fact that a substantial difference exists between information that came into existence solely because of the expenditure of public funds, and trade secret information that belongs to private parties. Trade secret information belonging to private parties is protected by law, even when such information is disclosed to public entities, such as OCC or this Commission. Ohio Rev. Code §1331.61(D).

Seemingly blinded by its zeal on this issue, OCC repeats, on rehearing, arguments this Commission considered fully, but rejected. In fact, despite the detailed analysis and specific instruction provided by this Commission, OCC continues to repeat its over-exaggerated Pre-Remand Order claims that "*nearly every word* in the disputed documents has been shielded from entering the public domain as the result of the Remand Order." OCC's App. For Rehearing, p. 32 (emphasis in original.) OCC demonstrates that its arguments are not based upon credible, reasoned positions on the issue of trade secrets, but instead upon public appearance. It's arguments should simply be ignored.

**1. The Legal Standard Applicable To This Commission's Rulings Regarding Trade Secret Information.**

It is well established that administrative agencies have broad discretion to fashion their own rules of procedure, including rules applicable to discovery. *See, LTV Steel Co. v. Industrial Commission* (Franklin App., 2000), 140 Ohio App.3d 680, 692. This Commission's procedural rules, properly promulgated through the JCARR process, clearly and unambiguously allow it to control the conduct of discovery, as well as to protect information from unnecessary disclosure when warranted under Ohio law. OAC § 4901:1-24(A) and (D).

This Commission, much like a trial court vested with similar authority, necessarily has inherent discretion in the manner in which it exercises its authority. *Cf. Svoboda v. Clear Channel Communications, Inc.* (Lucas App.), 2003-Ohio-6201 , 2003 WL 22739622, ¶18. It must consider the interests of the parties seeking and resisting disclosure. Its determination of the issue is subject to an abuse of discretion standard on review. An abuse of discretion connotes much more than an error of law or judgment; it implies that the decision was arbitrary, unreasonable, or unconscionable. Absent an abuse of discretion, an appellate court will not substitute its judgment for that of the administrative agency. *Twenty Two Fifty, Inc. v. Ohio Liquor Control Comm.* (Franklin App.), 2007-Ohio-946, 2007 WL 662461.

Under Ohio law, the term 'trade secret' means information, including . . . 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.

Ohio Revised Code § 1333.61(D). Trade secret information is entitled to protection under Ohio's trade secrets act, R.C. § 1333.61, and under the federal Trade Secrets Act, 18 U.S.C. § 1905, and



Freedom of Information Act, 5 U.S.C. § 552(b)(4). Furthermore, Ohio's "public records act," R.C. § 149.011, expressly exempts "trade secrets" that are revealed to an agency from public disclosure requirements.

**2. The Commission's Rulings Regarding the Protection of Information In This Case.**

Regarding Cinergy's and DERS' claims, joined in by several parties, that information contained within their contracts constitutes trade secrets, this Commission held:

We agree with the parties seeking protective treatment that certain portions of the material in question have actual or potential independent economic value derived from their not being generally known or ascertainable by others, who might derive economic value from their disclosure or use. Specifically, we find that the following information has actual or potential independent economic value from its being not generally known or ascertainable: . . .

Remand Order, p. 15. This Commission then provided a detailed list of specific items of information it found to be protected from public disclosure.

This Commission went on to conclude that the parties advocating for the protection of this information had sought, at all junctures, to keep this information confidential and had treated the documents in question as proprietary, confidential business information. Remand Order, p. 16-17.

Finally, this Commission expressly considered whether confidential treatment of the information was consistent with the interplay between Title 49 of the Ohio Revised Code and the trade secret laws of this State, particularly Section 1333.61(D). On that score, the Commission concluded:

Based on our *in camera* review of the documents in question, we believe that [documents and transcripts containing information at issue] can be redacted to shield the trade secret information while, at the same time, disclosing all information that we have not found to be a trade secret.

Remand Order, p. 17.

Based upon its review of the documents and upon this thoughtful and detailed analysis of the law concerning trade secrets, this Commission then Ordered the Duke Energy entities to prepare redacted versions of the documents submitted with the testimony of a witness sponsored by the Ohio Consumers' Counsel, and further Ordered all other parties to conform all copies of those documents that they may have submitted into evidence to the redacted copies produced by DE-Ohio. Remand Order, p. 17.

On this record, there is simply no reason to grant rehearing to OCC on this issue. The Commission has exercised its discretion, complied with the law, and determined as a matter of fact that certain information within the documents produced by DERS and Cinergy warrants protection from public disclosure.

**B. The Commission's Ruling Concerning OCC's Misdirected Allegations Of Impropriety Complies With The Mandate Of The Supreme Court of Ohio, Firmly Establishes A Proper Scope To These Proceedings, And Is Within This Commission's Authority**

Regarding the misguided allegations of regulatory improprieties that prompted DERS and Cinergy to seek expanded intervention, this Commission ruled:

We are limiting our deliberation and order to [] remanded issues. Ancillary issues raised by parties in the remand phase and not considered in this order on remand, such as potential corporate separation violations and affiliate interactions, will be denied.

Remand Order, p. 20.

In its Application for Rehearing, OCC contends that through this statement this Commission improperly limited OCC's use of the evidence it obtained in discovery from Cinergy and DERS, argues that it did not offer those documents into evidence merely to allow this Commission to evaluate the first prong of this Commission's test for the adoption of stipulations and, finally, asserts that this limitation fails to comply with the Supreme Court of Ohio's decision

in *Ohio Consumers Counsel v. PUCO* 111 Ohio St. 3d 300, 2006-Ohio-5789. See *OCC's App. For Rehearing*, pp. 17-21. OCC then expends seventeen pages in its Application for Rehearing simply repeating arguments that it already made to this Commission. *Id.* pp. 21-38.

**1. This Commission Has Complied With The Mandate Of The Ohio Supreme Court.**

First, this Commission clearly complied with the Ohio Supreme Court's Order on remand. As relevant to the issue of so-called "side agreements, the Court in *Consumers Counsel*, 111 Ohio St. 3d 300, 2006-Ohio-5789, first discussed its recent decision in *Constellation NewEnergy, Inc. v. PUCO*, 104 Ohio St. 3d 530, 2004-Ohio-6767, a case in which the Court expressly rejected arguments that so-called "side agreements" have relevance to the last two prongs of this Commission's test of settlements: whether a particular settlement benefits ratepayers and the public interest, and whether a particular settlement violates any important regulatory principles. The Court noted that the issue of whether "side agreements" could have relevance to the first prong of this Commission's test of settlements – whether a settlement is the product of serious bargaining among capable, knowledgeable parties – had not been considered in *Constellation*. The Court then concluded that "side agreements" might have such relevance. *Consumers Counsel*, 111 Ohio St. 3d 300, 2006-Ohio-5789, ¶81. Based upon that conclusion the Court held:

We remand this matter to the commission and order that it compel disclosure of the requested information. Upon disclosure, *the commission* may, if necessary, decide any issues pertaining to admissibility of that information.

*Id.* ¶94 (emphasis supplied.)

On remand, this Commission did much more than Ordered by the Supreme Court. It granted OCC the discovery OCC had sought from DE-Ohio, and it then granted OCC additional discovery from DERS and Cinergy. It permitted OCC to introduce the evidence it had collected

at hearing. It permitted OCC to argue for an expansion of these proceedings based upon that evidence. It evaluated the evidence produced by OCC, and concluded, based upon that evidence:

[W]e now reach the inevitable conclusion that there is a sufficient basis to question whether the parties engaged in serious bargaining and, therefore, that we should not have adopted the stipulation. We now expressly reject the stipulation on such grounds.

Remand Order, p. 27.

This Commission then evaluated for itself the reasonableness of DE-Ohio's proposal, ordering changes that this Commission decided are reasonable. This Commission's actions are plainly consistent with the Orders of the Supreme Court.

**2. This Commission's Ruling Restores These Proceedings to Their Proper Scope and is Within This Commission's Authority.**

Throughout the proceedings, OCC has continuously sought to interject matters unnecessary to the determination of the issues properly within the scope of this case – the creation of a Rate Stabilization Plan. OCC's Application for Rehearing simply argues yet again that the scope of these proceedings should be expanded. This Commission, however, is alone in charge of the proceedings before it.

In *State ex rel Columbus Gas & Fuel Co. v. PUCO* (1930), 122 Ohio St. 473, a gas company sought a writ of mandamus from the Ohio Supreme Court compelling this Commission to hear its rate case. The Commission had just vacated a hearing date in the matter, and stayed the case until after a decision was issued in a different case, then pending before the United States Court of Appeals for the Sixth Circuit. Apparently, certain elements of the controversy were raised in both the case before this Commission and the case before the Court of Appeals.

The Ohio Supreme Court expressly disagreed with this Commission regarding the decision to delay the proceeding before this Commission. Nonetheless, the writ was denied. The Court held:

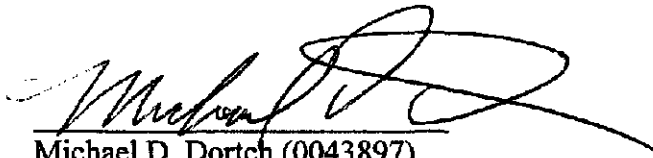
It is the duty of the commission to hear matters pending before the commission without unreasonable delay and with due regard to the rights and interests of all litigants. . . . [Even so,] The public utilities commission is invested with a discretion as to its order of business, and there is such a wide latitude of that discretion that this court may not lawfully interfere with it, except in extreme cases.

*Id.* at 475. Similarly, this Commission has determined that the issues raised by OCC are "ancillary" and need not be addressed in this case. This Commission's determination is undoubtedly within its discretion and will not be overturned on appeal.

### III. CONCLUSION

Cinergy and DERS submit that this Commission's decisions on both points is undoubtedly correct, and that OCC's Application for Rehearing is properly denied.

Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served electronically upon parties, their counsel, and others through use of the following e-mail addresses this 3d day of December, 2007.

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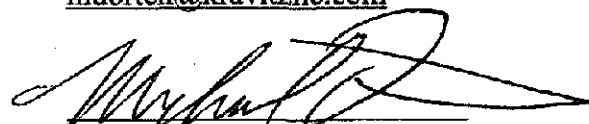
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