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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Cincinnati Gas & Electric Company To Modify its Non-Residential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish a Pilot Alternative Competitively-Bid Service Rate Option Subsequent to Market Development Period.	)	Case No. 03-93-EL-ATA
In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Modify Current Accounting Procedures for Certain Costs Associated with The Midwest Independent Transmission System Operator.	)	Case No. 03-2079-EL-AAM
In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Modify Current Accounting Procedures for Capital Investment in its Electric Transmission and Distribution System And to Establish a Capital Investment Reliability Rider to be Effective After the Market Development Period.	)	Case No. 03-2081-EL-AAM Case No. 03-2080-EL-ATA

MEMORANDUM CONTRA APPLICATIONS FOR REHEARING
AND
MOTION TO STRIKE PORTIONS OF DUKE ENERGY'S APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Office of the Ohio Consumers' Counsel ("OCC") hereby respectfully moves, pursuant Ohio Administrative Code 4901-1-12, to strike portions of the Application for Rehearing submitted by Duke Energy Ohio, Inc. ("Duke Energy" or the "Company") on November 23, 2007. The Company's Application for Rehearing impermissibly alleges facts

that are not found in the record of the above-captioned cases and makes arguments based upon those alleged facts. Matters outside the record have not been subject to the greater scrutiny given to matters that are part of the record, and any consideration of the new allegations would be prejudicial to the OCC's case.

The reasons supporting the OCC's Motion to Strike are provided in the attached memorandum.

Respectfully submitted,

JANINE MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

Jeffrey L. Small, Counsel of Record
Ann M. Hotz
Larry S. Sauer
Assistant Consumers' Counsel

OHIO CONSUMERS' COUNSEL
10 West Broad Street, Suite 1800
Columbus, Ohio 43215
(614) 466-8574 (T)
(614) 466-9475 (F)
small@occ.state.oh.us
hotz@occ.state.oh.us
sauer@occ.state.oh.us

TABLE OF CONTENTS

PAGE

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MEMORANDUM CONTRA APPLICATIONS FOR REHEARING
AND
MEMORANDUM IN SUPPORT OF MOTION TO STRIKE

I. INTRODUCTION AND HISTORY OF THE CASE ON REMAND

The Supreme Court of Ohio ("Court") issued its opinion on November 22, 2006. The Court held that the PUCO erred by failing to properly support modifications to post market development period ("post-MDP") rates in the PUCO's November Entry on

Rehearing and erred by failing to compel the disclosure of side agreements.[1] The Court remanded the case for additional consideration by the Commission.

On February 2, 2007, these cases following remand (hereinafter, "*Post-MDP Remand Case*" as distinguished from the earlier portion, herein "*Post-MDP Service Case*"[2]) was set for hearing in two phases, the first of which would address the framework for post-MDP rates. The hearing on the first phase was conducted in three days, beginning on March 19, 2007. The case was briefed in April 2007. The Remand Order in the above-captioned cases was issued on October 24, 2007.

The Remand Order reinstated all of the Commission's previous standard service offer determinations regarding residential customers that were set before these cases were appealed.[3] On November 21 and 23, 2007, applications for rehearing were filed by several parties in the above-captioned cases regarding the PUCO's Order dated October 24, 2007 ("Remand Order"). These parties include Duke Energy and the Industrial Energy Users - Ohio, Inc. ("IEU"). The OCC responds to these two applications for rehearing in this Memorandum Contra.

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[1] *Consumers' Counsel 2006* at ¶95.

[2] Only one case exists, with a single record. However, separate designations of portions of the case, i.e. before and after the appeal to the Court, aids clarity.

[3] The generation component charges that resulted from the *Post-MDP Service Case* were listed in OCC-sponsored testimony. OCC Remand Ex. 2(A) at 53 (Hixon).

II. MEMORANDUM CONTRA APPLICATIONS FOR REHEARING

A. IEU's Application for Rehearing Should be Denied.

1. The Stipulation remained in effect.

IEU's first assignment of error centers on the Remand Order's holding that the Court determined that the Stipulation continues to be relevant.[4] The Court's decision that remanded these cases to the Commission for further determinations stated that "[n]one of the signatory parties exercised its option to void the [Stipulation] agreement . . . ."[5] According to IEU, "prior to the remand proceeding, only the Commission acted as if the Stipulation remained viable . . . ."[6] The Commission defended its original orders and entries before the Court based upon the existence of a stipulation, and prevailed. The Remand Order stated that this "conclusion is, therefore, not for this Commission to overturn." This matter, having been decided by the Court, should not be open to further debate.

2. Admission of the side agreements involved neither prejudicial nor needless presentation of cumulative evidence.

IEU states that the Commission should "look for guidance on evidentiary issues . . . [in] the Ohio Rules of Evidence," but criticizes the Commission's handling of

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[4] IEU Application for Rehearing at 9, citing Remand Order at 22 (November 21, 2007).

[5] *Consumers' Counsel 2006* at ¶46. IEU does not appear cognizant of the parties to the Stipulation. It alleges that the Ohio Marketers Group was a signatory. The Stipulation states otherwise. Stipulation (Original Joint Ex. 1) (May 19, 2004), confirmed in the Remand Order at 5.

[6] IEU Application for Rehearing at 7 (November 21, 2007). IEU curiously argues that "Stipulation specifically states that it is 'expressly conditioned upon its adoption by the Commission, in its entirety and without modification.' " Id. at 9. As a signatory to the Stipulation, IEU should know the entirety of its terms. The Stipulation also provides parties with an opportunity to dispute any changes made by the Commission in "an application for rehearing." Stipulation (Original Joint Ex. 1) at 3 (May 19, 2004). If a party was unhappy with the result, a party had the opportunity to "terminate and withdraw from the Stipulation by filing a notice with the Commission within 30 days of the Commission's order on rehearing." Id. IEU took no action.

procedure in these cases without any attention to the purposes behind those rules. IEU claims that admitting the side agreements into evidence was prejudicial to parties to those agreements,[7] and that admission of all the side agreements was needlessly cumulative.[8] The theme that lies behind IEU's arguments is not the application of Evid. R. 403, but the desire by IEU for even more secrecy in Commission rate-setting than was exhibited in these cases.

IEU's claim that admitting the side agreements was unduly "prejudicial" does not actually claim any unfair effect of the evidence on the *results* stated in the Remand Order, which is the purpose of a determination that the presentation is prejudicial to a party. Evid. R. 403 is an exception to the general rule in Ohio that relevant evidence should be admitted.[9] The rule states, in pertinent part:

> Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

The side agreements are relevant to the issue of the treatment of the Stipulation, as stated by the Court, and also are relevant to the "competitiveness" issues raised by the OCC and that have been a vital part of all the "rate stabilization plans" considered by the Commission. The presentation of the side agreements greatly clarified these issues, and the ultimate decision-makers (i.e., the Commissioners) were not exposed to any prejudicial testimony that unfairly swayed their opinions in favor of the OCC's views. The Commissioners, in fact, were not present in the hearing room as would be the case

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[7] IEU Application for Rehearing at 12.

[8] Id. at 13.

[9] *Davis v. Immediate Medical Servs.* (1997), 80 Ohio St. 3d 10, 15.

for jurors. If any party has suffered prejudice from the handling of the side agreements, it is OCC and not IEU.

IEU actually complains that the PUCO's procedures increased the "risk of having the sensitive *information available to the public* and the other parties to the proceeding . . . ."[10] IEU's concern is not an evidentiary matter, but one relating to procedures for handling information that was appropriately presented and admitted into the record at hearing. IEU's argues that it is entitled to greater secrecy regarding electricity rate-setting, a view that is not justified in a regulatory rate-setting environment that is inherently a public process.[11] Electricity rates are generally published and accessible to others (including competitors). IEU does not explain why parties to side agreements should be entitled to hide away information regarding their electricity arrangements while these parties are permitted to view the publicly available rates and terms of service that are applicable to entities not favored by side agreements.

IEU's claim that admitting the side agreements was needlessly cumulative goes so far as to argue that the side agreements should have been reviewed *in camera* "without admitting them into the record."[12] Thus, IEU's argument does not address the delay that might be caused at hearing[13] by repetitive introductions of evidence. Again, IEU argues

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[10] Id. at 12-13 (emphasis added).

[11] See, e.g., OCC Application for Rehearing at 36 (November 23, 2007), citing R.C. 4901.12 and 4905.07. IEU argues that "none of the information within the agreements will ever . . . lose its status as trade secrets . . . ." IEU Application for Rehearing at 13. That argument, unsupported by any facts on the record or any argument by IEU based upon such facts, flies in the face of the Commission's rule and precedent that limits confidential treatment of documents to eighteen month periods based on the presumption that nothing remains trade secret forever. See Ohio Adm. Code 4901-1-24(F).

[12] IEU Application for Rehearing at 13. IEU implicitly refers to Evid. R. 403(B).

[13] Delay caused at hearing, if appropriate, is not susceptible to cure in response to an application for rehearing submitted more than six months later.

for greater secrecy in electric rate-setting that conflicts with the public nature of Commission proceedings as well as the prohibition against discriminatory treatment of customers.[14]

IEU's view that the side agreements should be entirely excluded from the record is particularly inappropriate in this remand from the decision in *Consumers' Counsel 2006*. One reason that the Commission's original decision was reversed by the Court is that the "commission failed to comply with *R.C. 4903.09* by not providing record evidence and sufficient reasoning when it modified its order on rehearing."[15] Rather than repeating its error in the original hearing, the Commission appropriately admitted the side agreements into the record of these cases. The Commission, however, failed to adjust its determinations on a range of issues presented by rate plans based upon the important information contained in the side agreements.

3. Side agreements entered into evidence should be released to the public domain (with a minor exception), and Ohio Adm. Code 4901:1-10-24 is inapplicable to the contents of the remand order.

IEU incorrectly applies Ohio Adm. Code 4901:1-10-24 to the issue of whether information contained in the side agreements should be released to the public. In violation of Ohio law as well as Commission precedent, as argued in the OCC's Application for Rehearing and elsewhere in the OCC's pleadings, nearly every word in the side agreements has been shielded from entering the public domain as the result of the Remand Order. According to Ohio Adm. Code 4901:1-10-24(E), upon which IEU relies:

> An EDU shall only disclose a customer's account number without the customer's written consent [for specified purposes] * * * or

[14] See, e.g., OCC Application for Rehearing at 21-27 (November 23, 2007).

[15] *Consumers' Counsel 2006* at ¶95.

> pursuant to court order [and] shall only disclose a customer's social security number without the customer's written consent [for specified purposes] * * * or as ordered by the commission, other governmental agency or pursuant to court order.

Despite its successes in maintaining the secrecy of the side agreements, IEU argues that Ohio Adm. Code 4901:1-10-24 "precludes an electric distribution utility . . . and others from making sensitive consumer information public without the customer's express written consent."[16] IEU's broad pronouncement is, however, not supported by the terms of Ohio Adm. Code 4901:1-10-24.

IEU is apparently not satisfied that the Remand Order requires that the side agreements be purged of "customer names, account numbers, customer social security or employer identification numbers, contract termination dates or other termination provisions, financial consideration in each contract, price of generation referenced in each contract, volume of generation covered by each contract, and terms under which any options may be exercisable."[17] The release by entities other than the electric distribution utility ("EDU"), such as the Commission and competitive retail electric suppliers, is not the subject of Ohio Adm. Code 4901:1-10-24 (quoted above).

IEU's concern about information released by the EDU (Duke Energy in this instance), however, further illustrates the OCC's argument that the Duke-affiliated companies have improperly mixed their businesses.[18] IEU does not distinguish between the information provided by Duke Energy, which was only a small portion of the

[16] IEU Application for Rehearing at 14.

[17] Remand Order at 15.

[18] See, e.g., OCC Initial Post-Remand Brief, Phase I at 38-44 and OCC Application for Rehearing at 28 (November 23, 2007).

documentation of side agreements entered into the record,[19] and the information that was provided during discovery by Duke Energy's affiliates. IEU does not make the distinction because the Duke-affiliated companies failed to make the distinction in their dealings with customers.

Furthermore, Ohio Adm. Code 4901:1-1-10-24 only applies to the release of account and social security numbers, which are withheld from public view pursuant to the Remand Order. Therefore, Ohio Adm. Code 4901:1-10-24(E) is inapplicable in all other instances, including the release of all of the information ordered by the Commission in the Remand Order.

While not applicable to Commission action, the Commission may choose to support the policy behind Ohio Adm. Code 4901:1-10-24 under the circumstances of these cases by protecting account and social security numbers from public release for an indefinite period of time, subject to Commission or court order to the contrary. While Ohio Adm. Code 4901:1-10-24 also does not apply to the OCC, the OCC redacted all identification numbers on documents that were part of OCC Witness Hixon's testimony before distributing the testimony to counsel for various parties.[20] The OCC does not object to the Commission withholding the account and social security numbers located on side deals from general public access until and unless otherwise ordered by the Commission or a court.

Ohio Adm. Code 4901:1-1-10-24, cited by IEU in its Application for Rehearing, is inapplicable to the subject of the degree to which the Commission should withhold

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[19] See, e.g., OCC Remand Ex. 2(A) attachments, and also Remand Tr. Vol. I at 14, lines 19-21 (March 19, 2007).

[20] Remand Tr. Vol. I at 12-21 (March 19, 2007).

information from the public. The Commission should, therefore, reject IEU's third assignment of error.

4. The side agreements were appropriately admitted into evidence.

IEU's forth assignment of error argues for the unprecedented procedure of "unadmitting" evidence that was admitted by the Attorney Examiners at the hearing. The evidence at issue is composed of side agreements other than those entered into "around the time of the stipulation."[21] The Commission correctly interpreted these agreements as "renegotiations of side agreements," and stated that they "could still be relevant to the consideration of a stipulation, where it appears to the Commission that such a side agreement may have documented an understanding that had previously been reached."[22] These side agreements were properly admitted into evidence, but their use was incorrectly limited to simply the consideration of the Stipulation.

The Commission's determination that the later-in-time side agreements should "form no part of the basis for [the] opinion"[23] seems to have sprung from an incorrect and unnecessarily limited interpretation of the decision by the Court. The Remand Order limits consideration of evidence presented by the OCC in a manner that does not abide by the Court's directive in its remand. The Remand Order states:

> It should be noted that the side agreement issue is relevant to these cases, according to the court's opinion, only with regard to the serious bargaining prong of the Commission's analysis of stipulations . . . .
>
> * * *

[21] Remand Order at 26, quoting from *Consumers' Counsel 2006* at ¶85.

[22] Remand Order at 26, footnote 9.

[23] Remand Order at 26.

> It should also be noted that these proceedings are being considered only with regard to issues remanded to us for further consideration. Therefore, we are limiting our deliberation and order to those 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.[24]

The side agreements and related documents were admitted into the record, but they were presented by the OCC regarding a broader range of issues than the "serious bargaining prong" mentioned in the Remand Order. The limitation is artificial, being unreasonably imposed for purposes of issuing the Remand Order and is not based upon the decision of the Court in *Consumers' Counsel 2006*.

The Remand Order departs from the remand decision when it limits the decision by the Court to holding that the Commission "erred in denying discovery under the first criterion [for the consideration of stipulations]."[25] The Ohio Supreme Court determined that the PUCO improperly barred side agreements as part of a "settlement privilege,"[26] and specifically mentioned *one* relevant use of such information at trial regarding the test of settlement agreements.[27] With that example in hand (and only one was required), the Court determined that the OCC's right to discovery was improperly denied. The Court did not reject the OCC's argument or limit the PUCO's inquiries, but left further development of the argument to further deliberations "consistent with th[e] decision." *Consumers' Counsel 2006* at ¶94-95.

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[24] Remand Order at 20.

[25] Remand Order at 19.

[26] *Consumers' Counsel 2006* at ¶89.

[27] Id. at ¶86.

Throughout these proceedings, the OCC has raised matters of the illegal conduct of the Duke-affiliated companies as matters vital to the "competitiveness" issue that makes up one of the Commission's three tests for the advisability of approving an electric distribution utility's rate plan.[28] The Court stated in *Consumers' Counsel 2006* that it "recognize[s] the commission's duty and authority to enforce the competition-encouraging statutory scheme of S.B. 3 . . . ."[29] The matters raised by the OCC on remand were vital to the furtherance of that statutory scheme, and the Commission has no legal basis for limiting the use of evidence regarding side agreements to simply the matter of "serious bargaining" with respect to the 2004 Stipulation.

With the foregoing in mind, the Commission should evaluate the expanded record on remand and base its decision regarding the advisability and the legality of the Company's proposals and conduct on that expanded record. The Commission did not improperly admit the later-in-time side agreements as IEU suggests; it improperly limited their use.

B. Duke Energy's Application for Rehearing Should be Denied.

Duke Energy states six assignments of error,[30] but does not follow up on those assignments of error with specific arguments in support of each. As a consequence, this

[28] See, e.g., OCC Application for Rehearing at 16-30 (November 23, 2007). The Commission has included a provision in previous orders specifically stating that the Commission's approval is not a "state action" such that a petitioner may not use the PUCO's order to help insulate it from the application of state and federal laws that prohibit the restraint of trade. See, e.g., *In re Joint Petition of CG&E and Ohio Power Regarding the Transfer of Utility Assets*, Case No. 05-1429-EL-ATR, Order at 6-7. (March 20, 2006). The Commission should include such a statement in its Entry on Rehearing.

[29] *Consumers' Counsel 2006* at ¶44.

[30] Duke Energy Application for Rehearing at 2 (November 23, 2007).

portion of the OCC's Memorandum Contra will address the general themes contained in the Company's Application for Rehearing rather than specific assignments.

1. The Company may not choose whether it will comply with the Commission's orders.

As an overarching concern regarding Duke Energy's arguments, the Company repeats its theme from the Application for Rehearing[31] it filed in the *Post-MDP Service Case* that it may *choose* whether to obey the Commission's orders. It may not.

In 2004, the Company argued that, "absent the consent of CG&E," the Commission may not "set the competitive retail electric service price that CG&E may offer consumers through its MBSSO."[32] The Commission previously rejected CG&E's argument in the context of the Commission's promulgation of competitive bidding rules.[33] In 2007, Duke Energy states: "If the Commission grants DE-Ohio's Rehearing request, DE-Ohio *agrees* that all switched load may bypass little g, including the RSC and the AAC."[34] The bypassability of "little g, including the RSC and the AAC" is *ordered* in the Remand Order. Duke Energy's implication is that an Entry on Rehearing that does not adopt the Company's changes may be disobeyed, and generation pricing could be instituted by utility fiat.

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[31] Company Application for Rehearing (October 29, 2004).

[32] Id. at 23.

[33] "[A]lthough the provisions of MBSSO and CBP provide for generation service, it is incorrect to state that these service offerings are not subject to the Commission's jurisdiction. Section 4928.14(A), Revised Code, specifically provides for MBSSO tariffs to be filed with the Commission under Section 4909.18, Revised Code, and Section 4928.14(B), Revised Code, requires the adoption of rules for the provision of CBP." *In re Promulgation of Rules Pursuant to Section 4928.14, Revised Code*, Case No. 01-2164-EL-ORD, Entry on Rehearing at 2 (February 4, 2004).

[34] Duke Energy Application for Rehearing at 20 (November 23, 2007) (emphasis added). Similarly, the Company states that it "agrees to permit the RSC and AAC to be avoidable by all switched load if such customers are permitted to return to POLR service at the standard MBSSO price . . . . " Duke Energy Application for Rehearing at 10 (November 23, 2007).

The OCC's appeal of the "*Post-MDP Service Case*" challenged the Commission's authority to determine standard service offer rates for generation service without relying upon actual markets to set rates.[35] The Court, however, deferred to the Commission's determinations regarding the establishment and modification of rates,[36] a matter that the Commission stressed by stating that "the governing statute allows for flexibility in the determination of such [market-based standard service offer] charges . . . ."[37]

The decision regarding the Commission's subject matter authority to approve and impose generation rates upon customers also decided the Commission's subject matter authority regarding these same rates without the requirement that Duke Energy Ohio provide generation service at "voluntary" rates.[38] The determination of rates that customers *must pay* in these recent proceedings is the same subject matter as the rates that Duke Energy Ohio *must charge* for its standard service offer. The result in *Consumers' Counsel 2006* does not rely upon Duke Energy Ohio being a volunteer under its statutory obligation to "offer . . . all competitive retail electric services necessary to maintain essential electric service to consumers" and "file[ ] [such offer] with the public utilities commission under section 4909.18 of the Revised Code."[39]

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[35] OCC Notice of Appeal, Propositions of Law 1 and 2 (March 18, 2005 in Appeal 05-518; May 23, 2005 in Appeal 05-946).

[36] *Consumers' Counsel 2006* at ¶44 and ¶56.

[37] Entry on Rehearing at 18, ¶20 (November 23, 2004).

[38] Duke Energy Ohio previously stated its intention to charge customers according to its proposal submitted to the Commission on January 10, 2003, but asked the Commission to "acknowledge these statutory rights." Duke Energy Ohio Application for Rehearing at 30 (October 29, 2004). Duke Energy President Meyer was asked at the recent hearing whether the Company would not comply with the Commission's order on remand regarding standard service pricing. She responded that "the company may seek rehearing and provide alternatives." Tr. Vol. I at 45-46 (2007).

[39] R.C. 4928.14(A).

2. The Commission must ignore Duke Energy's arguments based upon matters outside the record.

The Company sprinkles its Application for Rehearing with many out-of-record figures and citations to references that are not contained in the record. As stated above, the Commission must comply with the requirements stated in R.C. 4903.09 that requires the Commission compile "a complete record of all of the proceedings . . . and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." In *Consumers' Counsel 2006*, the Court stated that the "commission failed to comply with *R.C. 4903.09* by not providing record evidence and sufficient reasoning when it modified its order on rehearing."[40] That case followed upon *Tongren v. PUCO* in which the Court reversed a decision "[b]ecause the lack of a record stymies the complaining party's effort in demonstrating prejudice and prevents this court from conducting an effective review . . . ."[41] The Commission must rely upon the record as the basis for its decision.[42]

The Company bases its arguments upon a flurry of out-of-record references that should be ignored. These include three "Miscellaneous" citations for web sites that are listed in the Company's Table of Authority and incorporated into arguments on pages 14, 17, and 18.[43]

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[40] *Consumers' Counsel 2006* at ¶95.

[41] *Tongren v. Public Util. Comm.* (1999), 85 Ohio St. 3d 87, 93.

[42] See, e.g., *In re AEP Application to Increase its Generation Rates*, Case No. 07-63-EL-UNC, Order at 5 (October 3, 2007) ("it was raised . . . so late in this proceeding").

[43] Duke Energy Application for Rehearing at iv (November 23, 2007).

Additionally, Duke Energy refers to undocumented (i.e. not based upon the record) losses on page 14 of its Application for Rehearing. The Company alleges that it could be "without the funds" needed to provide reliable service under the Remand Rider. Duke Energy had the opportunity to present its financial situation as part of the record since the Commission has stated that the financial stability of the utility is an element to consider in rate plans.[44] The Company is required to base its arguments on the record it created. The claims regarding the default of competitive suppliers of natural gas and electricity show the biases that result from use of the Company's undocumented claims. The OCC believes that the Company suffered no losses due to the defaults listed by the Company. A record was created on that subject in the "Minimum Stay" proceeding at the PUCO.[45] The Commission should not address matters outside the record of these cases, and it should ignore Duke Energy's efforts to go outside the record in a manner that is prejudicial to the cases of other parties.

3. The IMF should be eliminated.

The OCC's Application for Rehearing takes a more fundamental approach to the issue presented by Duke Energy regarding the bypassability of the "Infrastructure Maintenance Fund" (or "IMF") charge.[46] The IMF is a surcharge, without any basis in the record of these cases, as suspected by the Court in *Consumers' Counsel 2006*.[47] The IMF charge was unsupported by the record at the conclusion of the *Post-MDP Service*

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[44] See, e.g., *In re MDP Extension for DP&L*, Case No. 02-2779-EL-ATA, Order at 29 (September 2, 2003).

[45] *In re Consideration of Minimum Stay Provisions*, Case No. 00-813-EL-EDI (March 21, 2002). Briefs were filed on July 9 2002.

[46] See, e.g., Duke Energy Application for Rehearing at 10 (November 23, 2007) ("IMF should be unavoidable").

[47] *Consumers' Counsel 2006* at ¶30.

Case, and it continues to be unsupported by the record -- in violation of R.C. 4903.09 and case law that requires a decision upon competent evidence[48] -- as the result of the Remand Order. The OCC's support on this issue is stated in its pleadings, including the OCC's Application for Rehearing.[49] The IMF should be eliminated, which would obviate any need to decide upon its bypassability.

The definition of the risks or costs for which the IMF is supposed to compensate the Company suffers from a serious problem: the IMF duplicates costs and compensates for risks that are covered by other components of Duke Energy Ohio's standard service offer.[50] These components are those that relate to capacity, the SRT, the RSC, and also "little g."[51] Furthermore, the record in these cases shows that the Company's experience with the "transfer between DE-Ohio and competitive retail electric service providers"[52] has largely been a one-way flow towards the Company as the result of Duke Energy's anti-competitive activities associated with settling these cases.[53] Duke Energy should not be permitted to engage in risk-encouraging behavior and also add charges using the justification of increased risk.

The Company's Application for Rehearing further undermines Duke Energy's argument for its IMF charge. The IMF was a new charge in the Company's Application

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[48] R.C. 4903.09 requires that the Commission "shall file . . . finding of fact and written opinions setting forth the reasons prompting the decision arrived at, based upon said findings of fact." See also, *City of Bucyrus v. State Dept. of Health*, 120 Ohio St. 426, 430.

[49] OCC Application for Rehearing at 9-14 (November 23, 2007).

[50] OCC Initial Post-Remand Brief, Phase I at 22 (April 13, 2007).

[51] Id.

[52] Duke Energy Application for Rehearing at 18 (November 23, 2007).

[53] OCC Initial Post-Remand Brief, Phase I at 59-65 (April 13, 2007).

for Rehearing. The Company's justification for the IMF charge was stated as follows: "[It] is compensation for its opportunity cost associated with committing its assets at first call to MBSSO load."[54] The Company apparently has not been "committing its assets" since Duke Energy considers it "important that DE-Ohio be permitted to sell and obtain generating assets . . . ."[55] In addition to the OCC's earlier arguments, therefore, the IMF should be eliminated since customers should not be charged for a commitment that the Company admits it has not made.

III. MEMORANDUM IN SUPPORT OF MOTION TO STRIKE

As presented in the preceding subsection (B)(2) of the OCC's argument (incorporated in this Memorandum in Support), the Company inserts numerous references to matters that are not in the record of these cases. The Commission must rely upon the record as the basis for its decision, and Commission precedent supports consideration of only those matters that were raised during the hearing process.[56]

The Company's citations to web sites noted in the "Miscellaneous" section of Duke Energy's "Table of Authorities," incorporated into arguments on pages 14, 17, and 18,[57] extend outside the record. Arguments based upon footnotes 33, 35, 36, and 37 do not find any support in the record. Duke Energy also refers to undocumented (i.e. not based upon the record) losses on page 14 of its Application for Rehearing. The Company

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[54] DE-Ohio's response to OCC-INT-04-RI67, made part of the testimony submitted by OCC Witness Talbot. OCC Remand Ex. 1, Attachment NHT-5. See also, Duke Energy Application for Rehearing at 14 (November 23, 2007).

[55] Application for Rehearing at 21 (November 23, 2007).

[56] See, e.g., *In re AEP Application to Increase its Generation Rates*, Case No. 07-63-EL-UNC, Order at 5 (October 3, 2007) ("it was raised . . . so late in this proceeding").

[57] Duke Energy Application for Rehearing at iv (November 23, 2007).

alleges that it could be "without the funds" needed to provide reliable service under the Remand Rider. Duke Energy had the opportunity to present its financial situation as part of the record since the Commission has stated that the financial stability of the utility is an element to consider in rate plans.[58] The claims regarding the default of competitive suppliers of natural gas and electricity, made on page 17 of the Company's Application for Rehearing are also not contained within the record of these cases. The inclusion of each of these items is prejudicial to the OCC, not appropriate for consideration by the PUCO, and should be stricken.

The Company is required to base its arguments on the record, and prejudice results from permitting Duke Energy to insert new matters into these cases. Repeating the example provided above, the OCC believes that the Company suffered no losses due to the default of competitive suppliers that is discussed on page 17 of Duke Energy's Application for Rehearing. A record was created on that subject in the "Minimum Stay" proceeding at the PUCO, and Duke Energy made no effort to present any portion of its evidence in that proceeding as part of the above-captioned cases.[59] The Commission should not address matters outside the record of these cases, and it should strike the material Duke Energy attempts to insert into these cases that are outside the record.

IV. CONCLUSION

For the reasons stated herein, the OCC respectfully requests that the Commission deny the applications for rehearing submitted by Duke Energy and IEU. The Company

[58] See, e.g., *In re MDP Extension for DP&L*, Case No. 02-2779-EL-ATA, Order at 29 (September 2, 2003).

[59] *In re Consideration of Minimum Stay Provisions*, Case No. 00-813-EL-EDI (March 21, 2002). Briefs were filed on July 9 2002.

did not provide the additional evidence on remand in 2007 to support the level of its standard service charges to customers. The competition that was intended under electric restructuring legislation has been seriously undermined by the side agreements. The dealings that helped settle the *Post-MDP Service Case* must cease in order to promote reasonable rates for all customers and to encourage competition that could provide benefits for consumers.

In addition to denying the applications for rehearing submitted by Duke Energy and IEU, the PUCO should strike impermissible non-record portions of the Company's Application for Rehearing as well as abrogate and modify the Remand Order pursuant to R.C. 4903.10 and consistent with the claims of error in the OCC's Application for Rehearing.

Respectfully submitted,

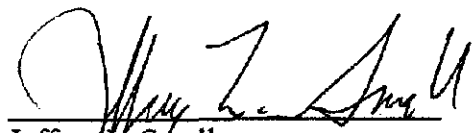
JANINE MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

Jeffrey L. Small, Counsel of Record
Ann M. Hotz
Larry S. Sauer
Assistant Consumers' Counsel

OHIO CONSUMERS' COUNSEL
10 West Broad Street, Suite 1800
Columbus, Ohio 43215
(614) 466-8574 (T)
(614) 466-9475 (F)
small@occ.state.oh.us
hotz@occ.state.oh.us
sauer@occ.state.oh.us

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Memorandum Contra Applications for Rehearing and Motion to Strike by the Office of the Ohio Consumers' Counsel* has been served upon the below-named persons via electronic transmittal this 3rd day of December 2007.



Jeffrey L. Small
Assistant Consumers' Counsel

cmooney2@columbus.rr.com
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com
sam@mwncmh.com
dneilsen@mwncmh.com
jclark@mwncmh.com
barthroyer@aol.com
mhpetricoff@vssp.com
mchristensen@columbuslaw.org
paul.colbert@duke-energy.com
rocco.d'ascenzo@duke-energy.com
mdortch@kravitzllc.com
Thomas.McNamee@puc.state.oh.us
ricks@ohanet.org
anita.schafer@duke-energy.com

WTTPMLC@aol.com
tschneider@mgsglaw.com
cgoodman@energymarketers.com
sbloomfield@bricker.com
TOBrien@Bricker.com
dane.stinson@baileycavalieri.com
korkosza@firstenergycorp.com
Scott.Farkas@puc.state.oh.us
Jeanne.Kingery@puc.state.oh.us