

**FILE**

**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

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**INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA THE OHIO  
CONSUMERS' COUNSEL'S APPLICATION FOR REHEARING**

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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

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**Attorneys for Industrial Energy Users-Ohio**

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**I. INTRODUCTION**

This case, involving Duke Energy-Ohio's ("Duke") rate stabilization plan ("RSP"), was remanded to the Public Utilities Commission of Ohio ("Commission") by the Ohio Supreme Court ("Court") in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 on November 22, 2006. The Court directed the Commission to provide additional record evidence and sufficient reasoning to support certain findings within the Commission's Opinion and Order and Entry on Rehearing approving Duke's current RSP, and to compel disclosure of side agreements connected to the Stipulation and Recommendation ("Stipulation") filed with the Commission on May<sup>19</sup>, 2004 in order for the Commission to determine whether serious bargaining took place between the parties to the Stipulation.<sup>1</sup>

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<sup>1</sup> The Commission's three-prong test in evaluating stipulations requires an examination of: 1) whether serious bargaining occurred among capable, knowledgeable parties; 2) whether the settlement, as a package, benefits ratepayers and is in the public interest; and 3) whether the settlement violates any important regulatory principal or practice.

On remand, the Attorney Examiners issued an Entry bifurcating the proceeding to separately consider the Court's remand of the RSP case ("Phase I") and the issues relating to the costs and management of certain defined components of the RSP previously approved by the Commission ("Phase II").<sup>2</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 Attorney Examiners' procedural schedule, initial briefs and reply briefs were filed by several of the parties on April 13 and 24, 2007, respectively.

On October 24, 2007, the Commission issued its Order on Remand with respect to the Phase I portion of the proceeding in which it, among other things, admitted into the evidentiary record all of the side agreements produced on remand while also finding that certain portions of those side agreements are trade secrets and, thus, subject to the Commission's rules for protective orders.<sup>3</sup> In addition, the Commission found that "the existence of side agreements, in which several of the signatory parties agreed to support the stipulation, raises serious doubts about the integrity and openness of the negotiation process related to that stipulation," and therefore the Commission concluded that it should reject the Stipulation.<sup>4</sup>

Applications for Rehearing of the Commission's Order on Remand were filed by Industrial Energy Users-Ohio ("IEU-Ohio") on November 21, 2007 and the Ohio Consumers' Counsel ("OCC"), Duke, and Ohio Partners for Affordable Energy ("OPAЕ")

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

<sup>3</sup> Order on Remand at 17 (October 24, 2007)

<sup>4</sup> *Id.*

on November 23, 2007. IEU-Ohio hereby files its Memorandum Contra OCC's Application for Rehearing with respect to the issues regarding the use, effect, and confidential treatment of any side agreements and other documents produced on discovery during the remand proceeding.

## II. ARGUMENT

### A. **OCC's insistence that the Commission expand the directive of the Ohio Supreme Court's Opinion with respect to the use of side agreements and other discovery produced on remand should be rejected.**

In rejecting arguments made by the Commission and other interveners who claimed that the side agreements could not be discovered based on a settlement privilege, the Court stated that "Evid. R. 408 provides that evidence of settlement may be used for several purposes at trial, making it clear that discovery of settlement terms and agreements is not always impermissible."<sup>5</sup> OCC asserts that the Court's reference to Evid. R. 408 demonstrates that the Court did not limit the Commission to only the evaluation of the serious bargaining prong and that the Commission should have expanded the scope of the proceeding to other matters outside of the evaluation of the Stipulation.<sup>6</sup> In fact, OCC states that the Commission's "Remand Order fails to consider all legally permitted uses of the discovery that was required by the Court in the decision to remand the case" and argues that the Commission erred by limiting its consideration of such evidence to considering only the serious bargaining prong of the Commission's evaluation of stipulations.<sup>7</sup> OCC's insistence that the Commission expand the Court's

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<sup>5</sup> *Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300 at ¶192 (2006).

<sup>6</sup> *Id.* at 17-19.

<sup>7</sup> OCC Application for Rehearing at 17.

Opinion to consider issues far beyond the directive of the Court should be rejected inasmuch as the Court's Opinion was explicit, clear and narrow with respect to the use of side agreements. The Court's reference to Evid. R. 408 was not a direction to the Commission that the case be remanded to consider every possible use of the discovery on remand, but rather it was the Court's explanation that the settlement privilege is not absolute and has certain exceptions.

The Court limited the scope of the remand proceeding with respect to the use of side agreements when it specifically stated, "the existence of side agreements between [Duke Energy Ohio] and the signatory parties entered into around the time of the stipulation could be relevant to ensuring the integrity and openness of the negotiation process....The Commission cannot rely merely on the terms of the stipulation but, rather, must determine whether there exists sufficient evidence that the stipulation was the product of serious bargaining."<sup>8</sup> Thus, the Court's Opinion specifically limited to the Commission's review of the side agreements for the purpose of analyzing the first prong of the Commission's three-prong test in evaluating stipulations. The Court further explained that the Commission may, upon disclosure and if necessary, decide any issues pertaining to admissibility of that information.<sup>9</sup> Thus, the Court's direction was sufficiently limited and the Commission rightfully adhered to that limitation in its Order on Remand. For these reasons, the Commission should deny OCC's Application for Rehearing asking the Commission to expand the scope of the Court's directive with respect to the use of side agreements made available during the discovery process on remand.

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<sup>8</sup> *Id.* at ¶¶85 and 86.

<sup>9</sup> *Id.* at 94.

**B. OCC's arguments alleging discriminatory pricing should be denied inasmuch as the argument relies on side agreements that are associated with a stipulation which has now been rejected and because the argument is beyond the scope of this proceeding.**

OCC also alleges that "the Commission's Remand Order is unreasonable and unlawful because it fails to prohibit the pricing and price elements in side agreements that violate Ohio statutes and rules..."<sup>10</sup> OCC's reliance on this argument is based on the terms of the confidential side agreements associated with the May 19, 2004 Stipulation, which was rejected by the Commission's Order on Remand.<sup>11</sup> As explained above, pursuant to the Court's Opinion, the Commission, on remand, reviewed the side agreements to determine whether serious bargaining occurred among the signatory parties to the Stipulation. The Commission found that it had a sufficient basis to question whether there was serious bargaining and, therefore, the Commission rejected the Stipulation.<sup>12</sup> Thereafter, the Commission considered and modified Duke's RSP based on Duke's original Application filed on January 26, 2004. At that point, any side agreements to the rejected Stipulation lost any relevance they may have had inasmuch as the Commission's rejection of the Stipulation nullified any alleged influence the side agreements had on the approved RSP.<sup>13</sup> The RSP terms approved by the Commission in its Order on Remand were shaped entirely by the Commission's review of Duke's January 26, 2004 Application and its consideration of its impacts and benefits on all

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<sup>10</sup> OCC Application for Rehearing at 17.

<sup>11</sup> *Id.*

<sup>12</sup> Order on Remand at 27.

<sup>13</sup> In any event, the issue of special contracts between customers and suppliers was discussed during the evidentiary hearing and OCC Witness Hixon acknowledged that she did not uncover any utility or affiliate wrongdoing with respect to the rates of the utility and recovery of costs associated with any side agreements at issue during her investigation of the discovery. See Rem. Tr. III at 135-137.

parties.<sup>14</sup> Whether agreements between parties who are not subject to the Commission's jurisdiction constitute discriminatory pricing is an issue outside the scope of this proceeding inasmuch as such agreements are not relevant to the approved RSP.

Accordingly, OCC's arguments regarding discriminatory pricing should be rejected inasmuch as they rely on side agreements not relevant to the approved RSP and because they are beyond the scope of this proceeding.

**C. The Commission should reject OCC's Application for Rehearing arguing that the Commission's Remand Order unreasonably and unlawfully withholds information from public scrutiny by designating the contents of certain documents "trade secret."**

As IEU-Ohio asserted throughout this proceeding and in its Application for Rehearing, the confidentiality of side agreements has been argued *ad nauseam* and OCC raises no new arguments here. Accordingly, OCC's argument that the Commission unreasonably and unlawfully withheld information from public scrutiny should be rejected. Nonetheless, IEU-Ohio briefly addresses OCC's continued attempt to place confidential information into the public domain.

The Commission thoroughly examined both the arguments made and the side agreements themselves and held that certain information within various documents produced on discovery be considered trade secret. Nevertheless, OCC, for reasons not germane to any issue related to the approved RSP, argues that the Commission erred by not making the confidential information public.

The Commission explained that Rule 4901-1-24, Ohio Administrative Code, "allows the Commission to protect the confidentiality of information contained in a filed document, 'to the extent that state or federal law prohibits its release of the information,

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<sup>14</sup> Order on Remand at 29-41.

including where the information is deemed...to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code."<sup>15</sup> The Commission then went on to find that certain information within the documents at issue are trade secrets, and as such should be protected from public disclosure pursuant to the Commission's rules and Ohio law.<sup>16</sup>

OCC argues that the Commission violated its precedent and Ohio law because it failed to minimize the amount of information protected from public disclosure and that the redaction of certain information from the documents render them incomprehensible.<sup>17</sup> IEU-Ohio disagrees with OCC's interpretation of the applicable law and Commission precedent that seems to suggest that if an entire document contains confidential information, then the Commission should give the public some taste of the confidential information so that the document in question makes sense to the reader. If a document is rendered incomprehensible because certain protected information is not disclosed, then so be it. The law requires, as the Commission acknowledged, "that the term 'public records' excludes information that, under state or federal law, may not be released."<sup>18</sup>

OCC also argues that the parties to the proceeding who moved that the documents receive protective treatment did not set forth the specific basis for the protection, as required by Rule 4901-1-24(D)(3), Ohio Administrative Code.<sup>19</sup> In support

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 15–17.

<sup>17</sup> OCC Application for Rehearing at 32.

<sup>18</sup> Order on Remand at 11 citing Section 149.43, Revised Code.

<sup>19</sup> OCC Application for Rehearing at 33.



of this claim, OCC asserts that “a remarkable feature of the motions by the Duke-affiliated companies and other parties was that they all failed to address the individual contents of the documents that these parties sought to conceal from the public” and therefore failed to meet their burden under Ohio law.<sup>20</sup> Surely, the Commission’s rules and Ohio law do not require parties to publicly and explicitly describe the information for which it seeks protective treatment. Such an interpretation would render the Commission’s rules and Ohio law meaningless. Moreover, as acknowledged by the Commission’s Order on Remand at pages 10 through 17, the parties moving for protective treatment of the documents sufficiently described the specific basis for their requests on numerous occasions throughout the proceeding, and any argument by OCC to the contrary is simply wrong.

OCC also argues that the “Remand Order incorrectly states that ‘the parties advocating confidential treatment have sought, at all junctures, to keep this information confidential....’” Contrary to this assertion, it is clear from the record that the information contained in the confidential documents produced during discovery is regarded by the affected parties as confidential and that no such party has done anything to compromise that treatment except the OCC.<sup>21</sup> As such, the Commission should deny OCC’s Application for Rehearing on this issue.

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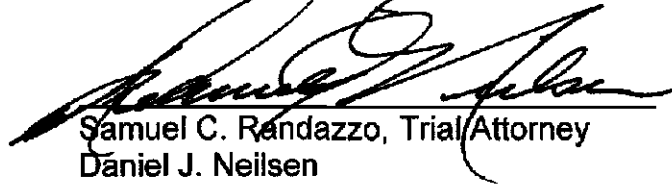
<sup>20</sup> *Id.* at 33-34.

<sup>21</sup> As explained by IEU-Ohio in a reply to OCC’s Memo Contra Motions for Protective Order, OCC itself failed to protect confidential information when it sent confidential discovery to parties to this proceeding without protective agreements, thereby putting confidential information into the public domain. See Industrial Energy Users-Ohio’s Reply to Memorandum Contra Motions of Duke Energy Ohio, Inc., Duke Energy Retail Sales, Cinergy Corp., Ohio Hospital Association and Kroger for Protective Orders by the Office of the Ohio Consumers’ Counsel at 4-5 (March 15, 2007).

### III. CONCLUSION

For the reasons described above, IEU-Ohio urges the Commission to deny OCC's Application for Rehearing.

Respectfully submitted,



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

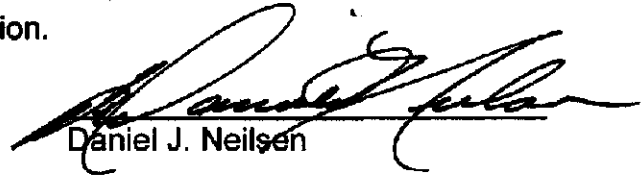
dneilsen@mwncmh.com

jclark@mwncmh.com

**Attorneys for Industrial Energy Users-Ohio**

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA THE OHIO CONSUMERS' COUNSEL'S APPLICATION FOR REHEARING* was served upon the following individuals this 3<sup>rd</sup> day of December 2007 via electronic transmission.

  
Daniel J. Neilsen

Jeanne.Kingery@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@bklawfirm.com  
mkurtz@bklawfirm.com  
Thomas.mcnamee@puc.state.oh.us  
werner.margard@puc.state.oh.us  
Stephen.Reilly@puc.state.oh.us  
scott.farkas@puc.state.oh.us  
drinebolt@aol.com  
WTPMLC@aol.com  
schwartz@evanic.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@mgsclaw.com  
shawn.leyden@pseg.com  
ricks@ohonet.org  
cgoodman@energymarketers.com  
nmorgan@lascinti.org  
eagleenergy@fuse.net  
Michael.Pahutski@Cinergy.com  
ariane.johnson@duke-energy.com  
mdortch@kravitzllc.com  
mhpeticoff@vssp.com  
smhoward@vssp.com  
Terry.Harvill@constellation.com  
jfinnigan@Cinergy.com