BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the	:		
Consolidated Duke Energy Ohio,	:	Case Nos.	03-93-EL-ATA
Inc. Rate Stabilization Plan Remand	:		03-2079-EL-AAM
and Rider Adjustment Cases	:		03-2081-EL-AAM
	:		03-2080-EL-ATA

DUKE ENERGY OHIO'S MEMORANDUM CONTRA THE OHIO CONSUMERS' COUNSEL'S MOTION TO STRIKE

ARGUMENT:

The Ohio Consumers' Counsel (OCC) argues that the Public Utilities Commission of Ohio (Commission) should strike unspecified portions of Duke Energy Ohio's (DE-Ohio) Memorandum Contra OCC's Application for Rehearing in these cases.[1] The Commission should deny OCC's Motion because: (1) OCC failed to identify the specific language it seeks to strike; (2) OCC's Motion fails to comply with Ohio Civil Procedure Rule 12(F) governing Motions to Strike;[2] and (3) DE-Ohio is entitled to site relevant authority that is not record evidence.

I. OCC failed to identify the specific language it seeks to strike.

OCC does not identify specific language that it seeks to strike. Instead, OCC refers to "arguments on pages 14, 17, and 18... Arguments

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1 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (OCC's Memorandum in Support of Motion to Strike at 17-18) (December 3, 2007).

2 Ohio R. Civ. Pro. 12(F) (West 2007).

based upon footnotes 33, 35, 36, and 37...."[3] DE-Ohio's Application for Rehearing at Page 14 begins with an incomplete paragraph; OCC does not state whether it seeks to strike the entire paragraph, none of the paragraph, or an unidentified portion of the paragraph. In fact, it fails to specify any particular portion of page 14.

OCC's Motion has the same failure regarding pages 17 and 18. Both pages contain two partial paragraphs. The only complete paragraph is on page 18. OCC does not identify the allegedly offending language. Absent a specific identification of language OCC seeks to strike its Motion its vague and incapable of response by DE-Ohio. For this reason the Commission should deny OCC's Motion to Strike.

II. OCC's Motion to Strike does not comply with Ohio Rule of Civil Procedure 12(F).

While the Commission is not bound by the Ohio Rules of Civil Procedure, pursuant to R.C. 4903.22 it should generally follow the rules in its proceedings.[4] That section requires the Commission, subject to appropriate discretion, to adhere to the Rules of Civil Procedure and Evidence.[5] In the Court's remand order to the Commission in these proceedings, the Court, citing R.C. 4903.22, held that "*Without limiting the commission's discretion the Rules of Civil Procedure should be used*

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[3] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (OCC's Memorandum in Support of Motion to Strike at 17) (December 3, 2007).

[4] Ohio Rev. Code Ann. § 4903.22 (Baldwin 2007).

[5] *Id.*

wherever practicable."[6] While the Court's holding concerned discovery, the same dictum is applicable to OCC's Motion to Strike.

Ohio Rule of Civil Procedure 12(F) permits a Motion to Strike where the movant may seek to strike "from any pleading an insufficient claim or defense or any redundant, immaterial, impertinent or scandalous matter."[7] The Court has affirmed the rule holding that:

> The determination of a motion to strike is vested within the broad discretion of the court. *State ex rel. Mora v. Wilkinson,* 105 Ohio St.3d 272, 2005 Ohio 1509, 824 N.E.2d 1000, P 9-10. Civ.R. 12(F) allows a court to strike any pleading or material determined to be *insufficient, redundant, immaterial, impertinent, or scandalous.*[8]

OCC's Motion to Strike failed to argue that DE-Ohio's pleading was in any way "insufficient, redundant, immaterial, impertinent or scandalous."[9] The only argument made by OCC is that the allegedly offensive passages constitute new information not contained in the record evidence presented at hearing.[10] OCC's argument seems to concede that DE-Ohio's pleading is material to these cases. DE-Ohio agrees and believes that it is worthy of the Commission's consideration.

DE-Ohio readily admits that some information set forth in the passages complained of by OCC is not record evidence. DE-Ohio never

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6 *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 320, 856 N.E.2d 213, 233-234 (2006) (emphasis added).

7 Ohio R. Civ. Pro. 12(F) (West 2007).

8 *State Ex. Rel. Morgan v. City of New Lexington*, 112 Ohio St. 3d 33, 38, 857 N.E.2d 1208, 1214-1215 (2006) (emphasis added).

9 *Id.*

10 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (OCC's Memorandum in Support of Motion to Strike at 17) (December 3, 2007).

asserted that it was record evidence. DE-Ohio does assert that the information and citations represent appropriate advisory authority or information upon which DE-Ohio, and the Commission, may properly rely.

III. DE-Ohio is entitled to site relevant authority that is not record evidence.

OCC improperly alleges that DE-Ohio cannot base its arguments upon cited material contained in footnotes 33, 35, 36, and 37 because the citations are not record evidence.[11] OCC does not cite any authority for its proposition because there is no such authority. Neither the rules of evidence, nor the civil rules of procedure prohibit citation to authority outside the record evidence. Indeed, if one could site only evidence there could be no citation to case precedent, which, clearly is not record evidence.

The *Bluebook*, the commonly used legal pleading citation authority contains explicit rules for citation to electronic administrative and secondary authority.[12] The *Bluebook* permits citation to internet materials, such as the DE-Ohio citations complained of, including administrative and secondary material.[13]

In these proceedings DE-Ohio's citations to the Pennsylvania, New Jersey, and Massachusetts (PJM) Regional Transmission Organization

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[11] *Id.*

[12] *The Bluebook A Uniform System of Citation*, Seventeenth Addition at 129-141 (The Harvard law Review Association, Garnett House) (2001).

[13] *Id.* at 131-132.

(RTO) and the Midwest Independent System Operator (MISO) qualify as properly cited authorities. Because both PJM and MISO are quasi governmental authorities authorized by the Federal Regulatory Energy Commission (FERC) that promulgate rules to which DE-Ohio must adhere; DE-Ohio believes these are administrative citations. Even if the Commission disagrees, however, it is proper to site to PJM and MISO as secondary sources.[14]

Although the information referenced by the citations is advisory and not record evidence, the Commission is entitled to consider the information and give it whatever weight the Commission may accord it. DE-Ohio asserts that the information is important because it goes to the issue of reliability. If no party is designating capacity to serve specified customer load it is possible, if not likely, that curtailment will affect reliability, to the detriment of customers. DE-Ohio is simply arguing that the Commission's should amend its Opinion and Order to make certain that there is sufficient designated capacity.

OCC seems similarly offended by other material related to the affect on DE-Ohio of the Commission's Opinion and Order. First, it complains that DE-Ohio should have put on evidence regarding its losses.[15] DE-Ohio submitted substantial evidence regarding the need of the Infrastructure Maintenance Fund (IMF) price to maintain dedicated

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[14] *Id.*

[15] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (OCC's Memorandum in Support of Motion to Strike at 17) (December 3, 2007).

capacity.[16] OCC recommended that the Commission discontinue the IMF or make it entirely avoidable. DE-Ohio could not have guessed that the Commission would order that the IMF become avoidable for specified non-residential customers.

All of the non-residential customers in the case supported the continuation of the IMF. Under such circumstances it is reasonable that DE-Ohio inform the Commission about the affect of its Order on customers and DE-Ohio. There is certainly no prohibition against the presentation of such information. Because the Application for Rehearing is a request by a party for the Commission to amend its Order, and not a re-litigation of the case with parties, it would be odd if the party requesting rehearing could not describe to the Commission the effect of its Order.

Similarly, OCC objects to DE-Ohio's listing of competitive suppliers that defaulted.[17] DE-Ohio never claimed that either it, or customers lost money as a result of the defaults. Thus far there has been no such financial loss. DE-Ohio's point is that defaults do happen and pursuant to the Commission's Order, if there is a future default, there may be no capacity available to serve customers. All of the defaults are public and most, if not all resulted in cases before the Commission.[18] DE-Ohio's

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[16] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (Steffen's Second Supplemental Testimony at JPS-SS1) (March 9, 2007).

[17] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (OCC's Memorandum in Support of Motion to Strike at 18) (December 3, 2007).

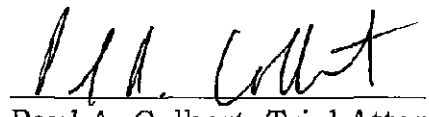
[18] *In re Titan Energy, Inc.*, 00-69001-WHD, 00-69000 (Bankr. 2000); *In re Enron Corp.*, 298 B.R. 513 (Bankr. 2003); *In re NewPower Customer Assignment*, 02-1666-GA-UNC (October 17, 2002); *The*

citations are proper and the Commission should deny OCC's Motion to Strike.

CONCLUSION:

For the reasons more thoroughly discussed above DE-Ohio respectfully requests that the Commission deny OCC's Motion to Strike.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically on the following parties this 18th day of December 2007.

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