

RECEIVED-DOCKETING DIV
2008 JAN 25 PM 4:32
PUCO

FILE **BEFORE**
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of the)
Cincinnati Gas & Electric Company to)
Modify its Nonresidential Generation)
Rates to Provide for Market-Based)
Standard Service Offer Pricing and to)
Establish an Alternative Competitive)
Bid Service Rate Option Subsequent)
to the 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. 03-2080-EL-ATA
Case No. 03-2081-EL-AAM

**INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA THE MOTION FOR PROTECTIVE
ORDER PENDING COMMISSION GRANTING OCC'S MOTION FOR APPROVAL OF REDACTIONS
AND MOTION FOR APPROVAL OF SUCH REDACTIONS, FILED IN COMPLIANCE WITH
COMMISSION'S OCTOBER 24, 2007 ORDER AND DECEMBER 20, 2007 ENTRY BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Samuel C. Randazzo, Trial Attorney
Daniel J. Neilsen
Lisa G. McAlister
Joseph M. Clark
MCNEES WALLACE & NURICK LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215
(614) 469-8000 (T)
(614) 469-4653 (F)
sam@mwncmh.com
dneilsen@mwncmh.com
lmcAlister@mwncmh.com
jclark@mwncmh.com

January 25, 2008

Attorneys for Industrial Energy Users-Ohio

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business technician JM Date Processed 1/25/2008

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the)
Cincinnati Gas & Electric Company to)
Modify its Nonresidential Generation)
Rates to Provide for Market-Based) Case No. 03-93-EL-ATA
Standard Service Offer Pricing and to)
Establish an Alternative Competitive)
Bid Service Rate Option Subsequent)
to the Market Development Period)

In the Matter of the Application of the)
Cincinnati Gas & Electric Company for)
Authority to Modify Current Accounting)
Procedures for Certain Costs Associated) Case No. 03-2079-EL-AAM
with the Midwest Independent)
Transmission System Operator)

In the Matter of the Application of the)
Cincinnati Gas & Electric Company for)
Authority to Modify Current Accounting)
Procedures for Capital Investment in its) Case No. 03-2080-EL-ATA
Electric Transmission and Distribution) Case No. 03-2081-EL-AAM
System and to Establish a Capital)
Investment Reliability Rider to be)
Effective after the Market Development)
Period)

**INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA THE MOTION FOR PROTECTIVE
ORDER PENDING COMMISSION GRANTING OCC'S MOTION FOR APPROVAL OF REDACTIONS
AND MOTION FOR APPROVAL OF SUCH REDACTIONS, FILED IN COMPLIANCE WITH
COMMISSION'S OCTOBER 24, 2007 ORDER AND DECEMBER 20, 2007 ENTRY BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

On October 24, 2007, the Public Utilities Commission of Ohio ("Commission") issued its Order on Remand with respect to Phase I of the Duke Energy Ohio ("DE-Ohio") rate stabilization plan ("RSP") remand proceeding. In its Order on Remand, the Commission, among other things, admitted into the evidentiary record all side agreements produced on remand while also finding that certain portions of those side

agreements filed under seal are trade secrets and therefore subject to the Commission's rules for protective orders.¹ The Commission also required all parties that filed confidential information in the remand proceeding to file redacted documents that are in compliance with its Order on Remand.² Specifically, DE-Ohio was required to file redacted versions of the confidential information attached to the testimony of Ohio Consumers' Counsel ("OCC") witness Beth Hixon ("Hixon") within 45 days, which it did on December 7, 2007.³ Additionally, the Commission required all parties to file redacted versions of their sealed documents within 60 days.⁴ On December 20, 2007, the Attorney Examiner ("AE") granted an OCC motion for an extension of the deadline to file redacted versions of sealed documents, granting all parties until January 23, 2008 to file the redacted documents.⁵

In accordance with the AE's Entry, OCC filed redacted versions of its confidential documents at the Commission on January 23, 2008. OCC filed all of its redacted documents under seal and also filed a Motion asking the Commission to find that DE-Ohio had redacted too much information from its December 7, 2007 filing and to approve OCC's version of the redactions (in all of its documents).⁶ Specifically, OCC argues that DE-Ohio erred when it redacted from the Hixon exhibits: all names of personnel associated with the DE-Ohio affiliated companies; the presence of DE-Ohio

¹ Order on Remand at 17 (October 24, 2007).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Entry at 2 (December 20, 2007).

⁶ Motion for Protective Order Pending Commission Granting OCC's Motion for Approval of Redactions and Motion for Approval of Such Redactions, Filed in Compliance with Commission's October 24, 2007 Order and December 20, 2007 Entry by the Office of the Ohio Consumers' Counsel (Public Version) (January 23, 2008) (hereinafter "Motion").

lead counsel and other counsel; other personnel who are mentioned in documents that are not agreements with customers; names and contents of documents that identify entities other than "customers"; and nearly all dates (not just contract termination dates).⁷ Thus, OCC filed its own "corrections" of the Hixon testimony exhibits that it claims are properly redacted. OCC also asks the Commission to accept the redactions of its sealed documents by ordering the Commission's docketing division to publicly file its redacted documents as well as its Motion in an unredacted form.⁸

IEU-Ohio hereby respectfully submits its Memorandum Contra to OCC's Motion.

II. ARGUMENT

Questions regarding the treatment of confidential and proprietary information have overwhelmed the core issues in this proceeding, which began on January 1, 2003 as a result of an application in Case No. 03-93-EL-ATA.⁹ During the course of this proceeding, certain parties, including OCC, fought against the use of RSPs and urged the Commission to mandate generating asset divestiture. Having failed, thankfully, to succeed on its main mission, OCC seized on side agreements to rationalize its contribution to the public interest.

⁷ *Id.*, Memorandum in Support at 6-8.

⁸ *Id.*

⁹ A lot of changes have occurred since January 1, 2003. After the case was initiated, Ms. Migden-Ostrander intervened in the case on behalf of Energy America LLC, a subsidiary of Centrica. The intervention request stated Centrica purchased its Canadian subsidiary, Direct Energy, in 2000 and purchased its United States subsidiary, Energy America LLS, in 2001. Both Direct Energy and Energy America were engaged in the retail sales of electricity and natural gas. In its intervention request, Energy America asserted that the utility's application would negatively affect Energy America's ability to participate in the competitive bidding process proposed by the utility. See <http://dis.puc.state.oh.us/TiffToPDF/QWMHY1LFLDMX20T5.pdf> and <http://www.centrica.com/>. After Ms. Migden-Ostrander was appointed Consumers' Counsel, she assumed her current role in the proceeding.

Each party to a proceeding is entitled to frame issues and, if relevant, present them for resolution to the Commission. We say nothing here about the right of OCC to press its campaign. However, we do urge the Commission to consider what can be gained and lost by further acceding to OCC's demands.

Contrary to the impressions created by OCC and others, the Commission, OCC and any other party that executed a protective agreement had full access to any documents obtained during the discovery process, including any side agreements as well as full access to all documents put into record evidence which the Commission reviewed during this lengthy proceeding. Any suggestion that OCC's current campaign is designed to produce "secret" information is a false one. Such suggestions can only serve to erode public confidence in the regulatory process and cast a negative light on the Commission as well as other parties that have worked hard in Commission proceedings to help the Commission avoid the "rate shock" consequences that OCC's auction and divestiture ideas have produced in other states like Illinois and Maryland.

We also believe that as the Commission considers OCC's claims regarding what should or should not remain in the sealed portion of the public record it might be helpful to identify what OCC is doing "secretly" with information it obtains in Commission proceeding. OCC has wrapped itself in a public-access-to-information flag but there is much more going on than OCC cares to let the public in on.

During the course of this proceeding, OCC distributed information which was subject to protective agreements to parties who had not executed protective agreements.¹⁰ But much more importantly, the admission made by OCC during the

¹⁰ Letter from Duke Energy Ohio (March 7, 2007).

discovery phase of this lengthy proceeding¹¹ shows that OCC has been communicating with counsel for private litigants, including the attorney that filed a complaint in federal court against Duke Energy International, Inc. on January 16, 2008. Pursuant to Rule 4901-1-22(D), Ohio Administrative Code, and for the limited purpose of the Commission's consideration of OCC's Motion, IEU-Ohio asks the Commission, the legal director, the deputy legal director or the Attorney Examiner to rule that the fact of OCC's communications with Attorney Freking is conclusively established against OCC. OCC's discovery responses appear to have been served on all parties of record and no party can claim surprise or prejudice as a result of this request given the limited purpose of IEU-Ohio's request. Also, Rule 4901-1-22(D), Ohio Administrative Code, permits any party other than OCC to seek to rebut this admitted fact.

For the reasons expressed above, we urge the Commission to reject OCC's latest attempt to use false allegations of secret transactions and conduct not in the public interest to denigrate the Commission and the parties that participate in Commission proceedings. We continue to urge the Commission to block efforts to release customer names and account numbers that, if released, will increase the opportunity for identity theft. We also believe that the Commission should rule on the latest phase of OCC's campaign with appreciation for OCC's past violation of protective

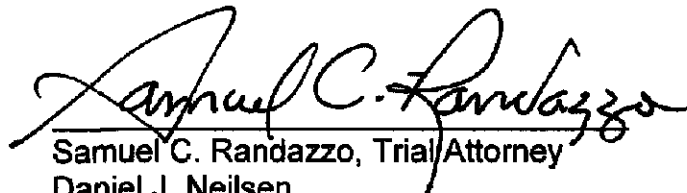
¹¹ See OCC's February 1, 2007 discovery responses to DE-Ohio's First Set of Interrogatories and Requests for Production of Documents which is attached hereto as Appendix A. OCC's response to interrogatory 19 admits that such communications with Attorney Freking occurred. The numerous copies of e-mail messages which OCC supplied following this admission show that OCC was coordinating and cooperating with such Attorney Freking in conjunction with a wrongful termination action as well as a to-be-filed class action suit. The copies of e-mail messages going back to 2006 and furnished by OCC in response to DE-Ohio's request for documents following interrogatory 19 show the nature and extent of the communications between OCC and Attorney Freking.

agreements and with full appreciation for the work that OCC has undertaken to support litigation for the benefit of private litigants.

III. CONCLUSION

For the reasons described above, IEU-Ohio urges the Commission to accept DE-Ohio's version of the redactions to the Hixon testimony exhibits, reject OCC's proposed redactions, and order OCC to file redacted documents that follow the Commission's Order on Remand. Finally, IEU-Ohio reserves the right to supplement this document up to and through the deadline for filing Memoranda Contra OCC's Motion.

Respectfully submitted,



Samuel C. Randazzo, Trial Attorney
Daniel J. Neilsen
Lisa G. McAlister
Joseph M. Clark
McNEES WALLACE & NURICK LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215
(614) 469-8000 (T)
(614) 469-4653 (F)
sam@mwncmh.com
dneilsen@mwncmh.com
lmcAlister@mwncmh.com
jclark@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

APPENDIX A

**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)	Case No. 03-93-EL-ATA
Service Offer Pricing and to Establish a Pilot)	
Alternative Competitively-Bid Service Rate)	
Option Subsequent to Market Development)	
Period.)	
In the Matter of the Application of The)	
Cincinnati Gas & Electric Company for)	
Authority to Modify Current Accounting)	Case No. 03-2079-EL-AAM
Procedures for Certain Costs Associated)	
with The Midwest Independent Transmission)	
System Operator.)	
In the Matter of the Application of The)	
Cincinnati Gas & Electric Company for)	
Authority to Modify Current Accounting)	Case No. 03-2081-EL-AAM
Procedures for Capital Investment in its)	Case No. 03-2080-EL-ATA
Electric Transmission and Distribution)	
System And to Establish a Capital)	
Investment Reliability Rider to be Effective)	
After the Market Development Period.)	
In the Matter of the Application of)	
Duke Energy Ohio, Inc. to Modify Its)	
Fuel and Economy Purchased)	Case No. 06-1068-EL-UNC
Power Component of Its Market-Based)	
Standard Service Offer.)	
In the Matter of the Application of the)	
Cincinnati Gas & Electric Company to)	
Modify Its Fuel and Economy Purchased)	Case No. 05-725-EL-UNC
Power Component of Its Market-Based)	
Standard Service Offer.)	

In the Matter of the Application of)
Duke Energy Ohio, Inc. to Adjust and Set its) Case No. 06-1069-EL-UNC
System Reliability Tracker.)

In the Matter of the Application of Duke)
Energy Ohio, Inc. to Adjust and Set its) Case No. 05-724-EL-UNC
System Reliability Tracker Market Price.)

In the Matter of the Application of)
Duke Energy Ohio, Inc.) Case No. 06-1085-EL-UNC
To Adjust and Set the Annually Adjusted)
Standard Service Offer.)

**RESPONSE TO DUKE ENERGY OHIO, INC.'S FIRST SET OF
INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS
(FOLLOWING REMAND)
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

GENERAL OBJECTIONS

1. The Office of the Ohio Consumers' Counsel ("OCC") objects to and declines to respond to each and every discovery request to the extent that it is harassing, unduly burdensome, oppressive, or overbroad, including undefined or irrelevant time periods. See Ohio Adm. Code 4901-1-16(B) and 4901-1-24(A). The function of interrogatories is to pose simple questions relating to a particular subject that may be answered by a brief categorical statement. See *Stai v. The Kroger Co.*, Case No. 82AP-816, 1983 Ohio App. LEXIS 15659 (Ohio Ct. App. June 30, 1985). Duke Energy Ohio, Inc. ("Duke Energy") seeks detailed and comprehensive statements amounting to lengthy discussions that address Ohio's restructuring legislation. Such broadly drafted discovery requests are contrary to the purpose and scope of the Public Utilities Commission of Ohio's ("Commission") Rules of Practice, which are designed to confine discovery and

exchange of information to counsel within their professional responsibilities to the general public. See Ohio Adm. Code 4901-1-16 and 4901-1-19. See also, *Armco Steel*, 27 Ohio Misc. at 79.

2. OCC objects to each and every Interrogatory and Request for Production of Documents to the extent that they call for responses that lie outside the scope of this proceeding and not reasonably calculated to lead to the discovery of admissible evidence. See Ohio Adm. Code 4901-1-16(B). The rules of discovery require, among other matters, that matters inquired into must be relevant to the subject matter of the proceeding, and must appear to be "reasonably calculated to lead to the discovery of admissible evidence." Ohio Adm. Code 4901-1-16(B). Duke Energy's interrogatories are therefore unduly burdensome, oppressive, and objectionable.

3. OCC objects to and declines to respond to each and every Interrogatory and Request for the Production of Documents to the extent that it seeks information that is privileged by statute or common law, including privileged communications between attorney and client, attorney work product, or trial preparation materials. See Ohio Adm. Code 4901-1-16(B).

4. To the extent that Duke Energy's interrogatories seek relevant information which may be derived from the business records of OCC or from an examination or inspection of such records and the burden of deriving the answer is the same for the Company as it is for OCC, OCC may specify the records from which the answer may be derived or ascertained and afford the Company the opportunity to examine or inspect such records. See Ohio Adm. Code 4901-1-19(D).

5. OCC objects to and declines to respond to each and every discovery request to the extent that it calls for information that is not in OCC's current possession, custody, or control or could be more easily obtained through third parties or other sources. See Ohio Adm. Code 4901-1-19(C) and 4901-1-20(D). OCC also objects to and declines to respond to each and every discovery request that seeks information that is already on file with the Commission. To the extent that each and every discovery request seeks information available in pre-filed testimony, pre-hearing data submissions and other documents that OCC has filed with the Commission in the pending or previous proceedings, OCC objects and declines to respond to it. See Ohio Adm. Code 4901-1-16(G).

6. The production of any documents by OCC does not and shall not constitute any admission concerning a document, its content or the evidentiary sufficiency of the document, including but not limited to authentication, best evidence, relevancy or hearsay.

7. OCC objects to each and every request to the extent that it is vague or ambiguous or contains terms or phrases that are undefined and subject to varying interpretation or meaning, and may, therefore, make responses misleading or incorrect.

All responses of the OCC to the Interrogatories and Requests for Production of Documents are made subject to, and without waiving, the above stated general objections.

18. Identify any person that OCC has communicated with regarding the Deeds case marked Case No. 1:06CV835 whose complaint was attached to OCC's second set of Discovery.

RESPONSE: Communications have occurred with Randy Freking, attorney for John Deeds, and may have been part of conversations with counsel at a deposition conducted of Charles Whitlock on January 9, 2007 (attended by Duke Energy counsel).

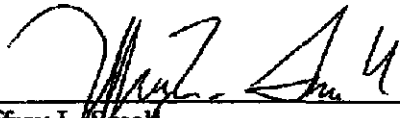
PREPARED BY: Counsel

19. Provide any documents exchanged with person(s) identified in Interrogatory 18 above.

RESPONSE: See General Objection Nos. 2 and 3. Nonetheless, without waiving these objections, see the attached materials.

PREPARED BY: Counsel

The objections provided are those of the undersigned counsel.

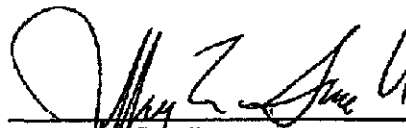


Jeffrey L. Small
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-4385
(614) 466-8574 (Telephone)
(614) 466-9475 (Facsimile)

CERTIFICATE OF SERVICE

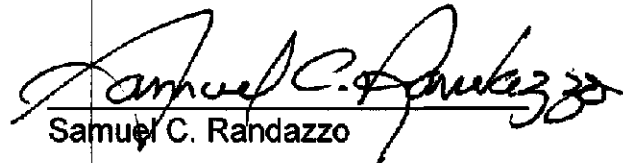
It is hereby certified that a true copy of the foregoing *Ohio Consumers' Counsel's Response to Interrogatories and Requests for Production of Documents Propounded By Duke Energy, First Set (Following Remand)*, was served electronically accordingly to the e-mail distribution list (provided by the Attorney Examiner) this 1st day of February 2007.



Jeffrey L. Small

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA THE MOTION FOR PROTECTIVE ORDER PENDING COMMISSION GRANTING OCC'S MOTION FOR APPROVAL OF REDACTIONS AND MOTION FOR APPROVAL OF SUCH REDACTIONS, FILED IN COMPLIANCE WITH COMMISSION'S OCTOBER 24, 2007 ORDER AND DECEMBER 20, 2007 ENTRY BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL* was served upon the following individuals this 25th day of January 2008 via electronic transmission.


Samuel C. Randazzo

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@mgsglaw.com
shawn.leyden@pseg.com
ricks@ohanet.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
smihoward@vssp.com
Tery.Harvill@constellation.com
jfinnigan@Cinergy.com