

**FILE**

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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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

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**INDUSTRIAL ENERGY USERS-OHIO'S SUPPLEMENTAL 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**

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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  
dneilsen@mwncmh.com  
lmcalister@mwncmh.com  
jclark@mwncmh.com

**Attorneys for Industrial Energy Users-Ohio**

**February 13, 2008**

(C25032:3)

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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 Nonresidential Generation )	
Rates to Provide for Market-Based )	Case No. 03-93-EL-ATA
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**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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> Additionally, the Commission required all parties to file redacted versions of their sealed documents within 60 days.<sup>4</sup> 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.<sup>5</sup>

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).<sup>6</sup> 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

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<sup>1</sup> Order on Remand at 17 (October 24, 2007).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

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

<sup>5</sup> Entry at 2 (December 20, 2007).

<sup>6</sup> 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 in agreements with customers; names and contents of documents that identify entities other than "customers"; and nearly all dates (not just contract termination dates).<sup>7</sup> 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.<sup>8</sup>

IEU-Ohio filed its Memorandum Contra to OCC's Motion on January 25, 2008, setting forth its rationale for why the Commission should deny OCC's Motion. Additionally, IEU-Ohio reserved the right to supplement its Memorandum Contra up to and through the deadline for filing memoranda contra to OCC's Motion. On January 28, 2008, OCC filed a Motion for an Extension of Time and Request for Expedited Ruling for an extension of five-days to file its reply to IEU-Ohio's Memorandum Contra, which was subsequently granted by AE Entry.<sup>9</sup> OCC, DE-Ohio, Duke Energy Retail Sales ("DERS"), and Cinergy Corp. then filed a Joint Motion ("Joint Motion") for Extensions of Time and Request for Expedited Ruling, asking for an extension of time for all parties to file memoranda contra to OCC's Motion to February 13, 2008, and for OCC to be granted until February 28, 2008 to file a single

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<sup>7</sup> *Id.*, Memorandum in Support at 6-7.

<sup>8</sup> *Id.*, Memorandum in Support at 8.

<sup>9</sup> Entry at 2 (January 29, 2008).

reply to all memoranda contra OCC's Motion.<sup>10</sup> The Joint Motion was granted on January 30, 2008.<sup>11</sup>

IEU-Ohio hereby respectfully submits its Supplemental Memorandum Contra to OCC's Motion. IEU-Ohio also hereby fully incorporates by reference its Memorandum Contra filed on January 25, 2008.

## **II. ARGUMENT**

At the outset, it is important to identify what is not contested at this juncture of a proceeding that is now more than four-years old. Contrary to public statements by some parties, there are no "secret" side agreements and there is no settlement before the Commission that requires the Commission to determine if the settlement was negotiated seriously by capable parties. OCC, at least for the time being, has relented on its campaign to establish standard service offer ("SSO") prices by means of an auction and to obtain a Commission order to mandate divestiture of generating assets. The Commission has approved an RSP for DE-Ohio based on the directives from the Ohio Supreme Court and the evidence of record. The duration of this proceeding leaves the RSP with a few more months of life before the Commission and interested parties will have the opportunity to bring their attention and skills to the challenges that are part of Ohio's future.

In its Order on Remand, the Commission protected from public review "customer names, account numbers, customer social security or employer identification numbers,

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<sup>10</sup> Joint Motion for Extensions of Time and Request for Expedited Ruling by Duke Energy-Ohio, Duke Energy Retail Sales, LLC, Cinergy Corp. and the Office of the Ohio Consumers' Counsel (January 29, 2008).

<sup>11</sup> Entry at 3 (January 30, 2008).

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.”<sup>12</sup> The Commission also required each party to file redactions consistent with its Order on Remand. OCC’s redactions fail to follow the Commission’s Order on Remand and OCC’s Motion should be denied.

In particular, OCC’s version of the redactions fails to respect the confidential nature of the financial consideration contained in each agreement.<sup>13</sup> OCC’s version of the redacted documents leaves unprotected numerous descriptions of the financial consideration contained within the agreements. This problem is especially pervasive in OCC’s redactions to deposition transcripts and its own briefs in this proceeding.<sup>14</sup> This confidential information deserves a consistent level of protection from public disclosure, regardless of whether it is found in the agreements themselves or in discovery, briefs, or any other document in which financial consideration is discussed.

The Commission found this information to be a trade secret because it has actual or potential independent economic value from not being generally known or ascertainable by others who might derive economic value from the information’s

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<sup>12</sup> Order on Remand at 15 (October 24, 2007).

<sup>13</sup> While a review of OCC’s version of the document redactions reveals that OCC took care to redact the confidential information properly, an effort which is appreciated by IEU-Ohio, the redactions take the form of an overly narrow interpretation of the Order on Remand and should be rejected. In an effort to reduce the number of confidential documents in this proceeding, IEU-Ohio has purposely endeavored to be broad enough in its descriptions so as to avoid the necessity of filing both confidential and public versions of its Supplemental Memorandum Contra. IEU-Ohio will promptly respond to any Commission request for greater specificity.

<sup>14</sup> See, for example, Confidential Excerpts from the Deposition of James F. Ziolkowski at 48, lines 9-20; Confidential Excerpts from the Deposition of Charles R. Whitlock at 128, lines 3-20; Reply Post-Remand Brief, Hearing Phase I by The Office of the Ohio Consumers’ Counsel at 28-29; Application for Rehearing by The Office of the Ohio Consumers’ Counsel at 24-25 (bottom of page 24 running over to page 25).

disclosure or use.<sup>15</sup> OCC's proposed redactions are doubly troublesome inasmuch as they would make generally known confidential information while simultaneously enhancing the ability of competitors to ascertain the identities as well as the contract terms of the customers whom executed commercial arrangements with DE-Ohio. OCC's efforts to reveal confidential information and damage the competitive business positions of customers should be rejected.

As IEU-Ohio brought to the Commission's attention in its January 25, 2008 Memorandum Contra, OCC's conduct with regards to its efforts surrounding confidential information and its narrow interpretation of the Commission's Order on Remand are substantially motivated by a desire to aid private litigants in a class action lawsuit filed in federal court against Duke Energy International, Inc. OCC's contact with Attorney Freking demonstrates the extent and degree to which OCC seeks to help the private litigants.<sup>16</sup> IEU-Ohio continues to urge the Commission to rule on OCC's Motion with an appreciation for OCC's past violation of protective agreements<sup>17</sup> and with full appreciation for the work that OCC has undertaken to support litigation for the benefit of private litigants. IEU-Ohio also urges the Commission to exercise its discretion in favor of objections to OCC's version of the protected information based on the status of this proceeding and the issues which have now been resolved by the Commission.

Finally, the Ohio Supreme Court ("Court") determined that discovery of the side agreements was appropriate in order to determine whether the existence of side

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<sup>15</sup> Order on Remand at 15 (October 24, 2007).

<sup>16</sup> See 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 at 14 (February 1, 2007). (Attached as Appendix A)

<sup>17</sup> Letter from DE-Ohio (March 7, 2007).

agreements between DE-Ohio and the signatory parties entered into around the time of the May 19, 2004 Stipulation and Recommendation ("May 19, 2004 Stipulation") could be relevant to ensuring the first prong of the Commission's test for evaluating stipulations was met.<sup>18</sup> However, in its Order on Remand, the Commission rejected the May 19, 2004 Stipulation that formed the basis upon which the Court required the Commission to permit discovery of the side agreements. The Commission should broadly safeguard from public disclosure the trade secrets contained within the side agreements inasmuch as the side agreements associated with the May 19, 2004 Stipulation necessarily lost all significance once the May 19, 2004 Stipulation was rejected. This position is further supported by the fact that the side agreements had no identified bearing on the RSP ultimately adopted by the Commission.<sup>19</sup> Revelation of this information advances no public interest, including that of knowing the bases for the Commission's decisions.

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<sup>18</sup> *Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 at ¶ 85.

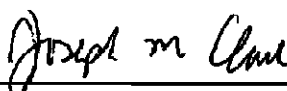
<sup>19</sup> The Commission is required to state the bases for its decisions and the Order on Remand makes no mention of any impact that the side agreements had on the RSP crafted after the Commission rejected the May 19, 2004 Stipulation. See Section 4903.09, Revised Code.



### 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, deny OCC's Motion, and reject OCC's proposed redactions.

Respectfully submitted,



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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

dneilsen@mwncmh.com

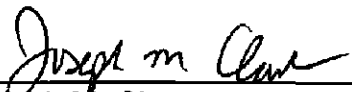
lmcalister@mwncmh.com

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 SUPPLEMENTAL 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 13th day of February 2008 via electronic transmission.

  
\_\_\_\_\_  
Joseph M. Clark

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@msgslaw.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  
mhpetricoff@vssp.com  
smhoward@vssp.com  
Terry.Harvill@constellation.com  
jfinnigan@Cinergy.com

## 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.	)	
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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.	)	

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**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**

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**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

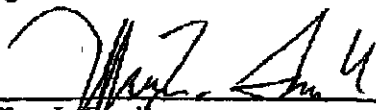
19. Provide any documents exchanged with person(s) identified in Interrogatory 18 above.

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

**PREPARED BY:** Counsel



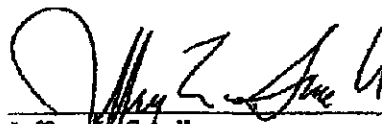
The objections provided are those of the undersigned counsel.

  
\_\_\_\_\_  
Jeffrey L. Schall  
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 according to the e-mail distribution list (provided by the Attorney Examiner) this 1<sup>st</sup> day of February 2007.

  
\_\_\_\_\_  
Jeffrey L. Schall