

**FILE**

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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**PUCO**

In the Matter of the Application of The	)	
Cincinnati Gas & Electric Company To	)	
Modify its Non-Residential Generation	)	Case No. 03-93-EL-ATA
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.	)	

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.	)	

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**MOTION TO STRIKE DUKE ENERGY'S MEMORANDUM CONTRA MOTION  
TO STAY THE COMMISSION'S ORDER ON REMAND  
AND  
REPLY TO DUKE ENERGY'S MEMORANDUM CONTRA MOTION TO STAY  
THE COMMISSION'S ORDER ON REMAND  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential consumers of Duke Energy Ohio, Inc. ("Company" or "Duke Energy," including its predecessor, The Cincinnati Gas and Electric Company) and pursuant to Ohio Adm.

Code 4901-1-12, moves to strike the Company's Memorandum Contra Motion to Stay

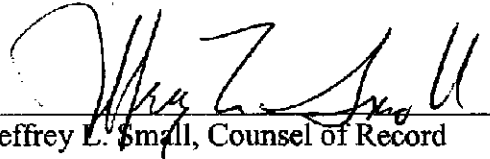
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("Memo Contra") filed on February 29, 2008. The Memo Contra was not timely filed and should not be considered. The OCC also files this Reply to Duke Energy's Memo Contra.

The OCC requests that the Commission strike the Memo Contra and grant the OCC's Motion for Stay as an unopposed motion. The reasons for granting OCC's Motion are further set forth in the attached Memorandum in Support.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER  
CONSUMERS' COUNSEL

A handwritten signature in dark ink, appearing to read "Jeffrey L. Small", is written over a horizontal line.

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THE COMMISSION'S ORDER ON REMAND**

**BY**

**THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**I. INTRODUCTION AND STATEMENT OF FACTS**

The OCC, on behalf of the residential consumers of Duke Energy, moved on February 15, 2008 to stay the implementation of the October 24, 2007 Order on Remand

regarding the Infrastructure Maintenance Fund (“IMF”) charge that was approved (and upheld in the December 19, 2007 Entry on Rehearing) in the above-captioned cases. The OCC asked the Public Utilities Commission of Ohio (“PUCO” or “Commission”) to stay its Order on Remand pending final resolution of matters to be addressed by the Supreme Court of Ohio in the appeal that the OCC filed on February 19, 2008.

On February 29, 2008, Duke Energy submitted its Memo Contra. This pleading supports the OCC’s instant Motion to Strike and responds to the Memo Contra.

## **II. ARGUMENT**

### **A. Duke Energy’s Memo Contra Was Submitted Out of Time**

The requirements regarding both the timing of pleadings and the associated electronic service requirements in the above-captioned cases were set on February 18, 2004. In an Entry dated February 1, 2007, the Attorney Examiner reminded parties (after remand of these cases by the Supreme Court of Ohio) that the timetable for pleadings is seven days for memoranda contra and three days for replies.<sup>1</sup> This timetable was again the subject of recent comment in an Entry dated January 29, 2008.<sup>2</sup> The Memo Contra was filed and served on February 29, 2008, fourteen days after the OCC’s filing and electronic service of its Motion for Stay. The Memo Contra was served late on a Friday that limited to just one business day the OCC’s response time. Nonetheless, the OCC complies with the PUCO’s timeline for a reply. The Memo Contra should be stricken because it was filed seven days out of time.

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<sup>1</sup> Entry at 3, ¶(8) (February 1, 2007).

<sup>2</sup> Entry at 2, ¶(8) (January 29, 2008).

Duke Energy has failed to abide by the requirements for expedited treatment of pleadings on numerous occasions.<sup>3</sup> Duke Energy's latest failure to provide a timely memorandum contra to the OCC's Motion for Stay should not be excused. The Memo Contra should be stricken and ignored as the result of the Company's latest failure to abide by the expedited pleading requirements set out in these cases.

**B. Duke Energy's Memo Contra Does Not Recognize the OCC's Arguments<sup>4</sup>**

The principal argument set out in Duke Energy's Memo Contra depends upon the Company's application of a four-factor test that has been used by courts to determine whether a stay should be granted.<sup>5</sup> The Company's argument is essentially the same that it has used throughout these proceedings on remand: "the Court required only that the Commission provide evidence on its reasoning in support of its decision."<sup>6</sup> The Court's decision was not so limited, as has been argued over and over again in these proceedings.

Duke Energy claims that the OCC's Motion to Stay does not address the strength of the OCC's case.<sup>7</sup> The OCC makes its case in over two pages devoted to this topic in the Motion to Stay, and Duke Energy elsewhere recognizes the OCC's presentation of its

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<sup>3</sup> See, e.g., OCC Letter (September 24, 2007).

<sup>4</sup> Duke Energy served its Memo Contra seven days late, at 4:54 p.m. on a Friday afternoon. Such service of a pleading places the OCC at a distinct disadvantage, another reason that Duke Energy's Memo Contra should be stricken. In the event the Commission considers Duke Energy's arguments, the OCC briefly replies to the Company's most fundamental arguments. Arguments such as the Company's extremely strained claim that the OCC is somehow estopped because it did not seek a stay in 2004 of the Commission's approval of an IMF charge issued in the 2007 Order on Remand just attempt to obfuscate the real issue. Memo Contra at 8.

<sup>5</sup> Memo Contra at 3-4, citing *In re Intrastate Access Charge Investigation*, Case No. 00-127-TP-COI, Entry on Rehearing at 5 (February 20, 2003).

<sup>6</sup> Memo Contra at 4. The Company has repeatedly argued that no evidentiary hearing was required on remand. See, e.g., Duke Energy Motion for Clarification (December 13, 2006). The argument was rejected. Entry at 2, ¶(6) (January 3, 2007).

<sup>7</sup> Id. at 4.

substantive argument.<sup>8</sup> Also, Duke Energy's Memo Contra does not recognize that the Order on Remand shifted the basis upon which the Infrastructure Maintenance Fund ("IMF") charge is levied, again raising the issue of the soundness of the charge. Indeed, the Company has appealed the Commission's Order on Remand and has itself challenged the basis upon which the PUCO based the imposition of the IMF.

Duke Energy initially claims that the OCC's Motion to Stay "does not address . . . whether residential customers will suffer irreparable harm."<sup>9</sup> Duke Energy contradicts itself when it cites the OCC's Motion to Stay and recognizes that the OCC's arguments regarding irreparable harm are contained on pages 8-10 of the Motion to Stay.<sup>10</sup> Thereafter, the Company's Memo Contra states that the OCC's argument is based upon irreparable harm since "no refund may be available to residential customers."<sup>11</sup> No counter argument is offered by the Company.

Duke Energy claims that discontinuation of the IMF could place the Company in a situation where it "may not be able to meet financial commitments."<sup>12</sup> Duke offers nothing from the record to support this allegation. The record, as summarized in the OCC's Motion to Stay, supports the result that the IMF is a surcharge that duplicates other capacity charges that are already assessed in charges to customers.<sup>13</sup> Therefore, there is no evidence to support the allegation that Duke Energy will be unable to meet

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<sup>8</sup> Id. at 10 ("OCC relies upon the opinions of its witness. . .").

<sup>9</sup> Memo Contra at 5.

<sup>10</sup> Memo Contra at 5, footnote 12, citing Motion to Stay at 8-10.

<sup>11</sup> Id. at 5.

<sup>12</sup> Id.

<sup>13</sup> Motion to Stay at 6.

any financial commitments and no evidence to show that customers would suffer if the Commission stayed the imposition of the IMF charge.

Finally, Duke Energy asserts that the Motion to Stay should be rejected, in the “public interest,” because “the Commission and the Court have sustained DE-Ohio’s MBSSO price, including the component parts, with only minor changes. . . .”<sup>14</sup> In *Ohio Consumers’ Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 (“*Consumers’ Counsel 2006*”), the Court was concerned that “the infrastructure-maintenance fund may be some type of surcharge and not a cost component.”<sup>15</sup> Duke Energy again fails to recognize the Company’s own appeal of the treatment given the IMF in the Order on Remand.<sup>16</sup> Even the Entry on Rehearing recognizes that the Order on Remand does not adopt either the OCC’s testimony regarding the IMF charge *or the Company’s arguments*:

We would not first that, in various portion of its application for rehearing, Duke refers to the IMF as a rider that would help to cover the costs of capacity. As repeatedly indicated by Duke, it is the system reliability tracker (SRT) that ensures that Duke is financially able to purchase sufficient capacity to serve its customers.<sup>17</sup>

The basis of the IMF -- i.e. its basis on the record as required by R.C. 4903.09 -- is therefore tenuous because it is not based upon the presentation of evidence by the two parties that submitted testimony regarding the IMF charge at the hearing.

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<sup>14</sup> Memo Contra at 6.

<sup>15</sup> *Consumers’ Counsel 2006* at ¶30.

<sup>16</sup> Duke Energy Notice of Appeal at 3 (February 15, 2008).

<sup>17</sup> Entry on Remand at 3, ¶(8).

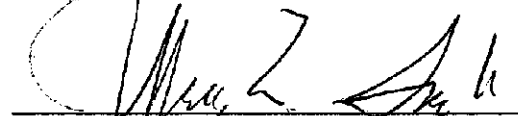
### III. CONCLUSION

Duke Energy has been informed numerous times that its pleadings do not meet the expedited pleading requirements set out in these cases in 2004 that were restated by Attorney Examiner entries dated February 1, 2007 and January 29, 2008. Here again, Duke Energy's Memo Contra was not timely filed. Duke Energy's Memo Contra should be stricken and ignored. Accordingly, OCC's Motion for Stay should be granted as an unopposed motion.

Furthermore, even if the Commission considers Duke's Memo Contra, OCC's Motion for Stay should be granted because Duke fails to offer sound arguments to deny the OCC's Motion for Stay. The OCC respectfully requests that the Commission grant its Motion for Stay filed on February 15, 2008, staying the implementation of the October 24, 2007 Order on Remand regarding the IMF charge that was approved in the above-captioned cases.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER  
CONSUMERS' COUNSEL



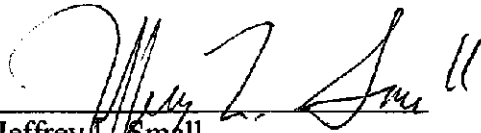
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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motion to Strike Memorandum Contra Motion for Stay and Reply to Memorandum Contra Motion for Stay has been served upon the below-named persons via electronic transmittal this 3<sup>rd</sup> day of March 2008.

  
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Assistant Consumers' Counsel

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