

**FILE**

**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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RECEIVED-DOCKETING DIV.  
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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 Service Offer Pricing and to	)	Case No. 03-93-EL-ATA
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	)	
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. 03-2081-EL-AAM
Electric Transmission And Distribution	)	Case No. 03-2080-EL-ATA
System And to Establish a Capital	)	
Investment Reliability Rider to be	)	
Effective After the Market Development	)	
Period	)	

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

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**Introduction**

The Ohio Consumers' Counsel (OCC), on March 3, 2008, filed its Motion to Strike Duke Energy's Memorandum Contra Motion to Stay the Commission's Order on Remand (Motion). OCC's Motion is comprised of

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various, oft repeated arguments, some of which are directed at the timeliness of Duke Energy Ohio, Inc.'s (DE-Ohio) pleading and some of which reiterate its reasons for seeking a Stay in this matter.

### **Discussion**

OCC's original motion was filed on February 19, 2008 and under the Public Utilities Commission's Rules of Practice, a memorandum contra would have been required fifteen days thereafter or March 5, 2008.

On December 14, 2006, during a prehearing conference, the attorney examiner, directed that memorandum contras should be served and filed within seven days of the filing of a motion.<sup>1</sup> The purpose of this expedited procedure was to keep the case "moving."<sup>2</sup> The hearing in the Remand was concluded in the spring of 2007 and on October 24, 2007, the Commission issued its Order on Remand and on November 20, 2007 its Opinion regarding the various rider cases consolidated in these proceedings.<sup>3</sup> From these two Orders, between November 21, 2007 and December 20, 2007, many Parties, including OCC, filed Applications for Rehearing. The Commission's final Entry addressing the various Applications for Rehearing was issued on January 16, 2008.<sup>4</sup>

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<sup>1</sup> *In re Remand of DE-Ohio's MBSSO*, Case No. 03-93-EL-UNC *et al.*, (Prehearing Conference TR at 40) (December 14, 2006).

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

<sup>3</sup> *Id.* (Opinion on Remand)(October 24, 2007); (Opinion)(November 20, 2007).

<sup>4</sup> *Id.* (Entry at 13)(January 16, 2008).

Since the Commission has entered a final appealable order in this matter, there is no need to keep it moving. It was expected that there was no longer a need to expedite filings in this docket. Thus, DE-Ohio's Memorandum Contra Motion to Stay (Memo Contra) was in compliance with Rule 4901-1-12, Ohio Administrative Code. DE-Ohio's delay was inadvertent and not prejudicial to any party.

Although OCC seeks to have DE-Ohio's Memorandum Contra stricken because it was filed out of time, OCC does not, in its Motion, state that it has been or will be prejudiced in any way as a result, nor could it do so. By virtue of the Motion itself, OCC has been heard and has in fact responded to DE-Ohio's Memo Contra. Indeed, the only party who could be prejudiced by the delay in filing here is DE-Ohio in that ordinarily, a delay in the docket means a delay in the implementation of market based rates. In this instance, since the docket has evolved and the Commission's Order has been appealed, there is no prejudice.

The Commission has often permitted motions and memos contra to be accepted into the record notwithstanding the timeliness of the filing. See for example, *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC, Entry at 4 (January 25, 2008). See further, *In re Ormet v. South Central Power Company*, Case No. 05-1057-EL-CSS, Supplemental Opinion and Order at 11 (November 8, 2006), granting OCC intervention although its motion for intervention was filed out of time.

**Conclusion**

For all of these reasons, DE-Ohio respectfully requests that the Commission reject OCC's argument and deny its Motion to Strike.

Respectfully submitted,

Handwritten signature of Paul A. Colbert, with the initials "ETHW" written at the end.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically on the following parties this 5th day of March, 2008.

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