

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

PUCO

2008 JUL -7 PM 4:36

RECEIVED - DOCKETING DIV

**APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT OF
INDUSTRIAL ENERGY USERS-OHIO**

Samuel C. Randazzo, Counsel of Record
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

July 7, 2008

Attorneys for Industrial Energy Users-Ohio

{C25861:}

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 AMN Date Processed 7/7/08

**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.)

APPLICATION FOR REHEARING

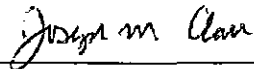
Pursuant to Section 4903.10, Revised Code ("R.C.") and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."), Industrial Energy Users-Ohio ("IEU-Ohio") hereby submits its Application for Rehearing and Memorandum in Support of the Public Utilities Commission of Ohio's ("Commission") June 4, 2008 Entry in this proceeding under the following points of error:

- (1) The Commission erred by failing to redact customer names from its version of the redacted confidential documents in this proceeding.

The failure to redact directly contradicts Ohio's trade secrets law as well as the Commission's own orders in this case.

- (2) The Commission erred, in violation of Ohio's trade secrets law, when it did not find that employees' names may be protected when disclosure of an employee's name would make it possible to identify a customer.

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

lmcAlister@mwncmh.com

dneilsen@mwncmh.com

jclark@mwncmh.com

**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.)

MEMORANDUM IN SUPPORT

I. INTRODUCTION

This case, involving Duke Energy-Ohio's ("DE-Ohio") rate stabilization plan ("RSP"), was remanded to the Commission by the Ohio Supreme Court ("Court") on November 22, 2006.¹ The Court directed the Commission to provide additional record evidence and sufficient reasoning to support certain findings within the Commission's Opinion and Order and Entry on Rehearing approving Duke's RSP. The Court also

¹ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789.

instructed the Commission to compel disclosure of side agreements connected to the Stipulation and Recommendation (“Stipulation”) filed with the Commission on May 19, 2004 in order for the Commission to determine whether serious bargaining took place between the parties to the Stipulation, which is the first of the Commission’s three-prong test for evaluating stipulations.

On remand, the Attorney Examiners issued an Entry bifurcating the proceeding to separately consider the Court’s remand of the RSP case (“Phase I”) and the issues relating to the costs and management of certain defined components of the RSP previously approved by the Commission (“Phase II”).² On October 24, 2007, the Commission issued its Order on Remand with respect to the Phase I portion of the proceeding in which it, among other things, admitted into the evidentiary record all of the side agreements produced on remand while also finding that certain portions of those side agreements are trade secrets and therefore subject to the Commission’s rules for protective orders.³ The Commission found that customer names, account numbers, customer social security numbers or employer identification numbers, contract termination dates or other termination provisions, financial consideration, and price and volume of generation covered by each contract should be redacted from the public versions of the documents on file with the Commission inasmuch as that information qualifies as a trade secret pursuant to Ohio law.⁴

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

² Entry at 2 (February 1, 2007).

³ Order on Remand (October 24, 2007).

⁴ *Id.* at 15.

Remand.⁵ 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, 2007.⁶ Additionally, the Commission required all parties to file redacted versions of their sealed documents within 60 days.⁷ On December 20, 2007, the Attorney Examiner ("AE") granted OCC's 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.⁸

In accordance with the AE's Entry, OCC filed redacted versions of its confidential documents at the Commission on January 23, 2008. DE-Ohio and others also filed redacted copies of confidential documents they submitted during the proceeding. OCC filed all of its redacted documents under seal and filed a Motion asking the Commission to find that DE-Ohio had redacted too much information from its December 7, 2007 filing.⁹ OCC's Motion further asked the Commission to accept its redactions of the sealed documents and to order the Commission's docketing division to publicly file its version of the redacted documents as well as an unredacted copy of its Motion.¹⁰

⁵ *Id.* at 17.

⁶ *Id.*

⁷ *Id.*

⁸ Entry at 2 (December 20, 2007).

⁹ 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).

¹⁰ *Id.*

On May 28, 2008, the Commission issued an Entry settling the redaction dispute and specifically addressed the differing viewpoints of the parties.¹¹ In addition to resolving the dispute, the Commission also noted its staff had compiled a version of the redactions that was consistent with the Commission's decision. The Commission explained that its version of the redactions would be provided in an electronic format and announced that its version of the redactions would be released into the public domain unless an application for rehearing was filed.¹² Specific instructions for how to identify documents and information in the applications for rehearing was also provided. A technology-related delay in providing the Commission's version of the redacted confidential documents led the Commission to release a subsequent Entry readopting the findings in its May 28, 2008 Entry while also amending the date on which it would publicly release the documents.¹³

IEU-Ohio respectfully submits its Application for Rehearing in accordance with the May 28, 2008 and June 4, 2008 Entries. Consistent with the Commission's Order on Remand and its subsequent Entries defining what information should be shielded from public disclosure, IEU-Ohio reviewed the Commission's version of the redacted confidential documents and in good faith attempted to ensure that customer names and other trade secrets related to IEU-Ohio members are not revealed in said documents. However, any failure by IEU-Ohio to identify an instance of an unredacted customer name or other trade secret is an inadvertent oversight caused by the risk of human error attendant to reviewing such a large number of documents and should not be construed

¹¹ Entry (May 28, 2008).

¹² *Id.* at 5.

¹³ Entry (June 4, 2008).

as a concession by IEU that such information should be released into the public domain.

II. ARGUMENT

A. The Commission erred when it failed to redact customer names¹⁴ from its version of the redacted confidential documents in this proceeding. The failure to redact directly contradicts Ohio's trade secrets laws as well as the Commission's own orders in this case.

The Commission's version of the redacted confidential documents is inconsistent with its Order on Remand and the subsequent Entries related to the redaction of confidential information. Specifically, the Commission's version fails to redact portions of the confidential documents that would reveal customer names. These customer names are protected throughout the rest of the Commission's version of the redacted confidential documents. IEU-Ohio believes all of the instances where customer names are left unprotected are simply the result of inadvertent human error that occurs as the result of attempting to redact information from such a large number of documents. However, the Commission's version of the redactions reveals customer identities in the following locations¹⁵:

- Bate Stamp #122 – The definitions of “contract price” and “firm” reveal the customer's identity.
- Bate Stamp # 124 – The customer's identity is revealed in the second word of the first line of the page and the ninth word of the third line.

¹⁴ Customer names include both the spelled out version of the customer's name and any acronym for the customer used within the document.

¹⁵ 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 Application for Rehearing. IEU-Ohio will promptly respond to a request for greater specificity from any party or the Commission.

- Bate Stamp # 354-371 – The customer's identity is left unprotected throughout a significant portion of this document. The omission appears to be unintentional inasmuch as this particular customer's name is given protective treatment throughout the other redacted confidential documents as well as some locations within this same document. Specifically, the customer's name should be redacted in the following locations:
 - Bate Stamp # 354
 - (a) title of the agreement
 - (b) first paragraph, third line
 - (c) first "Whereas" in the first line
 - (d) third "Whereas" in the first line
 - Bate Stamp # 355
 - (a) definition of "contract price" (first line)
 - (b) definition of "firm" (second line)
 - (c) two locations in the definition of "full requirements energy" (first and second lines)
 - (d) three locations, including the defined word itself, in the definition of "(customer's name) maximum demand"
 - (e) definition of "transmission providers" (second line)
 - Bate Stamp # 356
 - Clause 2.1 (lines 1, 4, and 5)
 - Clause 2.2 (lines 1, 3, and 4)
 - Clause 3.1 (first line)
 - Clause 3.1(a) (lines 1, 4, and 6)
 - Bate Stamp # 357
 - Clause 3.1(b) (first and third lines at top of page)
 - Clause 3.1(d) (sixth line)
 - Clause 3.1(e) (second and fourth lines)
 - Clause 5.1 (first line)

- Bate Stamp # 359
 - Clause 7.1 (second line of the first paragraph as well as the first and fifth lines of the second paragraph)
- Bate Stamp # 362
 - Clause 9.2 (first, fourth, fifth, and sixth lines)
- Bate Stamp # 363
 - Clause 9.7 (second line)
- Bate Stamp # 364
 - Customer name above the signature line
- Bate Stamp # 365
 - Customer name above the signature line
- Bate Stamp # 366
 - Customer name after "Customer Group:"
- Bate Stamp # 367
 - Customer name after "Customer Group:"
- Bate Stamp # 369
 - Customer name after "Customer Group:"
 - Sentence above the text box with the customer's name
- Bate Stamp # 647 – The right column (at top) should redact the unprotected portion of the customer's name underneath the "Option Payment for" line.
- Bate Stamp # 648 – The second line of the grid title should redact the acronym for the customer's name.

- Bate Stamp # 1097 – The top left of the grid should exclude the “Sum of BKWH” number inasmuch as that number shows the volume of generation covered by a contract, which is a trade secret pursuant to the Order on Remand.
- Bate Stamp # 2078 – Footnote 73 reveals a customer’s name.

The Commission should grant rehearing in order to protect customer names, as delineated in the bullet point list above. Doing so would be consistent with the Commission’s Order on Remand, its subsequent Entries regarding the redactions of confidential documents in this proceeding, the Commission’s own version of the redacted documents, and Ohio’s trade secrets laws.

B. The Commission erred when it did not find that employees’ names may be protected when disclosure of an employee’s name would make it possible to identify a customer.

The Commission specifically found that employee’s names are not trade secrets.¹⁶ However, the Commission did find that the names of attorneys are trade secrets if an attorney’s name makes it possible to identify a customer.¹⁷ The Commission did not include this same preventative caveat for employees’ names.

Employees’ names, like attorney names, can automatically reveal a customer’s identity. Just as certain counsel has become synonymous with particular customers, the names of employees of customers can similarly reveal a customer’s identity. IEU-Ohio has identified instances where an employee’s name (either printed or signature) is left unprotected in the Commission’s version of the redacted documents and that revelation could possibly identify the customer, especially to those familiar with

¹⁶ Entry at 5 (May 28, 2008).

¹⁷ *Id.*

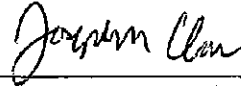
the Ohio electric industry or Commission proceedings. Further, the power of Internet search engines might permit someone to discover the relationship between the employee's name and a customer.

As such, IEU-Ohio urges the Commission to redact employees' names (via cursive signature) on Bate Stamps 364 and 365 as well as the employee's printed name underneath "Enclose Invoice with Customer Check" in the right-hand column of Bate Stamp 647. The Commission should incorporate the same caveat for employees' names as attorney names inasmuch as such a minor modification of its orders would be in line with its protection of customers' names throughout this proceeding as well as Ohio's trade secrets laws. It would be unfortunate and harmful to the companies' operations if the disclosure of an employee's name would allow a non-party to this proceeding to identify a customer's name, use that information for its own purposes, and therefore negate the good-faith redaction efforts of the parties and the Commission in this proceeding.

III. CONCLUSION

For the reasons set forth above, IEU-Ohio respectfully requests that the Commission grant rehearing for the purposes discussed herein.

Respectfully submitted,



Samuel C. Randazzo (Counsel of Record)

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

lmcAlister@mwncmh.com

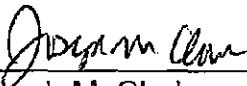
dneilsen@mwncmh.com

jclark@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT OF INDUSTRIAL ENERGY USERS-OHIO* was served upon the following individuals this 7th day of July 2007 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@evainc.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@mgsclaw.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