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September 12, 2008

VIA MESSENGER DELIVERY

Ms. Renee Jenkins
Chief, Docketing Division
Public Utilities Commission of Ohio
180 E. Broad Street, 13th Floor
Columbus, Ohio 43215

RECEIVED-DOCKETING DIV
2008 SEP 12 PM 3:39
PUCO

Re: In The Matter of: The Consolidated Duke Energy Ohio, Inc.
Rate Stabilization Plan Remand and Rider Adjustment Cases
Case Nos. 03-93-EL-ATA, 03-2079-EL-AAM, 03-2080-EL-ATA,
03-2081-EL-AAM, 05-724-EL-UNC, 05-725-EL-UNC,
06-1068-EL-UNC, 06-1069-EL-UNC & 06-1085-EL-UNC

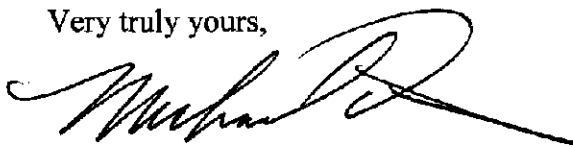
Dear Ms. Jenkins:

Enclosed please find an original and fifteen copies of the Memorandum Contra OCC's September 2, 2008 Application for Rehearing submitted on behalf of Duke Energy Ohio, Inc., Cinergy Corp. and Duke Energy Retail Sales, LLC.

Please accept the original and fifteen copies of this document for filing in the above identified matters. I would appreciate the return of a time stamped copy via the individual who delivers the same to you.

As always, please call me if you have any questions concerning this filing. Thank you.

Very truly yours,



Michael D. Dortch

Enclosures

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the	:	Case Nos.	03-0093-EL-ATA
Consolidated Duke Energy Ohio, Inc.	:		03-2079-EL-AAM
Rate Stabilization Plan Remand and	:		03-2080-EL-AAM
Rider Adjustment Cases	:		03-2081-EL-ATA
	:		05-0724-EL-UNC
	:		05-0725-EL-UNC
	:		06-1068-EL-UNC
	:		06-1069-EL-UNC
	:		06-1085-EL-UNC

**DUKE ENERGY OHIO, INC., DUKE ENERGY RETAIL SALES, LLC, AND
CINERGY CORP.'S JOINT MEMORANDUM CONTRA TO THE SEPTEMBER 2, 2008
APPLICATION FOR REHEARING OF
THE OFFICE OF OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

On September 2, 2008, the Ohio Consumers' Counsel (OCC) filed yet another brief attacking this Commission's efforts to protect confidential information from public disclosure. This time,¹ OCC seizes upon an event that occurred in a different forum, after this Commission

¹ The Commission's first "final" entry in this matter was issued October 24, 2007 when the Commission found in its Order on Remand that certain information was properly protected by law. OCC filed an Application for Rehearing on November 23, 2007 claiming that the Commission's decision protected "nearly every word" of every document in dispute. The Commission denied OCC's Application for Rehearing in its December 19, 2007 Entry on Rehearing.

OCC next challenged this Commission's protection of information by challenging the Duke Entities' efforts to comply with the October 24, 2007 Order on Remand. Without having been directed to do so by this Commission, OCC filed its own preferred version of redacted documents on January 23, 2007, and insisted that the Commission accept OCC's version of those documents *rather than the version submitted by the Duke Entities* in compliance with this Commission's Order on Remand. The Duke Entities responded on February 13, 2008, and warned the Commission at that time that OCC had shifted tactics and was now insisting upon a right to challenge every redaction on a word-by-word basis. The Duke Entities asked the Commission to reject such an approach and to instead rely upon the good faith of the parties. (See Duke Energy-Ohio, Inc.'s, Cinergy Corp.'s and Duke Energy Retail Sales, LLC's Memorandum in Response to the January 23, 2008 Motions filed by the Office of Ohio Consumers Counsel.)

On February 18, 2008 – only five days after the Duke Entities responded to OCC – OCC appealed to the Ohio Supreme Court. Despite the pendency of that appeal, this Commission addressed OCC's January 23, 2008 Motions on May 28, 2008 (Entry reissued June 4, 2008.) In that entry, the Commission revealed that it had itself prepared versions of the redacted materials, directed the parties to review those redactions, and to file applications for rehearing to address any issues of error in the Commission's redactions. The parties complied with these instructions on July 17, 2008. On July 31, 2008 the Commission issued an Entry on Rehearing in which it addressed the disputes regarding the redacted materials on a redaction by redaction basis.

issued its Entry on Rehearing, to again demand that the Commission "unredact" information that this Commission has expressly determined – over and over – is properly protected from public disclosure. On this occasion, OCC pursues two separate arguments. First, it argues that the Commission should simply change its decision to protect certain customer names² of Cinergy Solutions, Inc. (Cinergy Solutions), an affiliate of Duke Energy Ohio (DE-Ohio) and Duke Energy Retail Sales (DERS).

Second, OCC argues that the following pages should be "unredacted" *in toto*:

- Commission Bates No. 215–217
- Commission Bates No. 248
- Commission Bates No. 249
- Commission Bates Nos. 323–641
- Commission Bates No. 1769–1772
- Commission Bates No. 1776
- Commission Bates No. 1929 (fn. 122)
- Commission Bates No. 1932 (fn. 132)
- Commission Bates No. 2078–2079
- Commission Bates No. 2085 (fn. 94, 96)
- Commission Bates No. 2934
- Commission Bates No. 3344³

The Commission should reject both of OCC's arguments.

² OCC references the customer names contained in Commission Bates Nos. 2318, 2372, 2437, and 2535 on page 5 of its Application for rehearing regarding this matter.

³ OCC identifies Commission Bates No. 323–641 within the text found on page 8 and in footnote 16 on page 6 of its Application for Rehearing. OCC refers to a subset of these Bates numbers (Commission Bates Nos. 354–368) in footnote 18, on page 7 of its Application. The Bates numbers of all other items are identified in footnotes 19 and 20, on page 8 of OCC's Application for Rehearing.

II. LAW AND ARGUMENT

A. The Customers Names Identified in Commission Bates Nos. 2318, 2372, 2437, and 2535 Must Be Kept Confidential

OCC first argues that the names of certain Cinergy Solutions' customers, which the Commission found in its July 31, 2008 Entry on Rehearing were properly redacted in documents the Commission Bates numbered 2318, 2372, 2437, and 2535, should be unredacted. OCC contends that these particular customer names are not trade secrets because Cinergy Solutions has itself disclosed the names of these and other customers.

First, the Duke Entities must again point out that the customers at issue are customers of Cinergy Solutions, not customers of any of the Duke Entities before this Commission. Although it is an affiliate of DE-Ohio and DERS, Cinergy Solutions is not a party to these proceedings. Therefore, it has no ability to defend the confidentiality of its trade secrets against OCC's attacks. If the Commission decides to grant OCC's application for rehearing regarding the customer names found on these Bates numbered pages, it should first inform Cinergy Solutions that it intends to consider OCC's arguments and permit Cinergy Solutions an opportunity to decide whether to intervene in these proceedings for purposes of protecting its information. Otherwise, the State will have devalued Cinergy Solutions' property interest in its trade secrets without ever having provided it any notice or opportunity for a hearing.

Second, the document OCC now attaches to its Application for Rehearing demonstrates only that Cinergy Solutions has provided service – of an unknown nature, at an unknown time, for unknown purposes – to a large number of customers. Revealing this information in the context of the particular document OCC submitted to this Commission does not mean that Cinergy Solutions is precluded from asserting, in other contexts, that the names of its customers should be treated as confidential information. None of the public documents, for example, disclose the name of any customer in connection with the same kinds of information contained in

Commission Bates Nos. 2318, 2372, 2437, and 2535 — that is, which customers Cinergy Solutions views as "marquee" customers or which customers are linked to Cinergy Solutions' Projected EBITDA Cogeneration percentages or its Targeted Industrial Market Potentials.

In short, even though the customers names contained in Commission Bates Nos. 2318, 2372, 2437, and 2535 may be some subset of the customer names listed within OCC's attachment to its Application for Rehearing, by "unredacting" the customer names in Commission Bates Nos. 2318, 2372, 2437, and 2535, the Commission will for the first time reveal to the public the link between the EBITDA Cogeneration percentage and Targeted Industrial Market Potential figures and the limited subset of "marquee" customers. The Commission should therefore reject OCC's request to unredact the customer names contained in Commission Bates Nos. 2318, 2372, 2437, and 2535.

B. The Remainder of OCC's Arguments Are All Based Upon Changed Circumstances Which This Commission Should Conclude OCC is Procedurally Barred From Raising.

Applications for Rehearing are expressly the subject of Ohio Rev. Code section 4903.10. Pursuant to that code section, an application for rehearing "...shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." OCC does not even contend in its Application for Rehearing that this is the case. Instead, OCC merely uses a ruling by an Ohio Court issued after this Commission's Entry to collaterally attack the Entry on Rehearing.

The August 14, 2008, Order issued by Judge Ruehlman in *Deeds v. Duke Energy Ohio*⁴ does not affect the lawfulness of the Entry on Rehearing. OCC's observation is correct that Judge Ruehlman required the public disclosure of some of the "side agreements" that are the subject of this litigation. Judge Ruehlman's Order, however, does not change the fact that when

⁴ Hamilton County Court of Common Pleas Case No. A0701671.

the Commission issued its Entry on Rehearing, the agreements contained trade secrets and other confidential information entitled to protection. Thus, the Commission was presented with a set of facts and issued a determination based upon those facts, having fully taken into account the parties' arguments. The Commission's Entry on Rehearing was therefore both lawful and reasonable. To allow new events to be interjected into these proceedings at this late stage will only undermine the finality of Commission orders and encourage parties to repeatedly litigate matters in multiple forums if possible, in the hope of negating Commission decisions through collateral challenges.

Indeed, if this Commission grants OCC's Application for Rehearing it will be faced with continued demands that it hit a constantly moving target, even **after** it issues its final determination regarding those documents. This is an impossible task and is a waste of this Commission's time. OCC's desire for still another assessment of the confidential nature of the subject documents is pointless, and neither the Commission, nor the Duke Entities, nor the parties to the option contracts should be required to revisit these issues over and over, again and again, unless and until the party demanding that review demonstrate that it will suffer at least some prejudice in the absence of such a review. In this case, OCC has *never* been able to claim such prejudice, as it has always had access to the confidential information – subject to appropriate agreements and orders – that it repeatedly has demanded this Commission permit it to reveal. The Commission should decline to consider OCC's arguments regarding Judge Ruehlman's Order on the basis that they are not properly before Commission.

C. Much of the Information OCC Requests to Be Disclosed Is Exempt from Disclosure as Trade Secrets, Even Considering the Documents Disclosed by the Hamilton County Court

Even if the Commission decides to address OCC's arguments, OCC's demand for "unredactions" is overbroad. The Commission should not address OCC's arguments given the

dearth of evidence in the record of what, precisely, Judge Ruehlman ordered released. To that end, however, the Duke Entities will address OCC's specific requests for "unredactions" by Commission's Bates Stamp Number.

- **Commission Bates Nos. 323–641**

These three hundred plus pages comprise the 33 different contracts OCC introduced into evidence in this matter. The Duke Entities will refer to these 33 contracts from time to time hereafter categorically as:

- (i) The Original Direct Serve Contracts
- (ii) The November Direct Serve Contracts and
- (iii) The Option Contracts.

The Duke Entities concede that as a result of Judge Ruehlman's Order in *Deeds*, all the Original Direct Serve Contracts and all the November Direct Serve Contracts were, indeed, revealed to the public.

OCC's Application for Rehearing is deliberately imprecise in describing to the Commission the public disclosure of the Option Contracts, however. OCC states only that "OCC counsel confirmed that the Cincinnati Enquirer obtained copies of more than one of the Option Contracts, including pages 354–368 of the Commission's numbered documents."⁵ While this statement is literally true, DE–Ohio has concluded after examining the record in the *Deeds* case that only two of the Option Contracts have actually been disclosed to the public as a result of Judge Ruehlman's Order. Those two Option Contracts are the agreement between DERS and

⁵ OCC's Application for Rehearing, fn. 18, p. 7.

Marathon/Ashland Petroleum(Marathon)⁶ and the agreement between DERS and General Motors (GM).⁷ The remaining Option Agreements have not been publicly disclosed.⁸

As this Commission knows, the Option Agreements contain the economic terms of agreements DERS was willing to strike in order to obtain customers, details regarding the terms of service, the loads to be served, and similar critical information. The Option Contracts also disclose DERS' concern for price points that it recognized as presenting risk, "strike" prices revealing the degree of risk DERS is willing to accept and the direction it believed the market would move, and similar economic terms which reveal assumptions and conditions upon which DERS was prepared to undertake service. Such information is confidential business information and trade secrets protected under law. Such information has not been disclosed to the public, despite Judge Ruehlman's decision in *Deeds*, because they were never made part of the *Deeds* record.

- **Commission Bates No. 215-217**

OCC requests that these Bates-numbered pages, containing a portion of Ms. Hixon's testimony, should be unredacted because of their reference to the side agreements disclosed in the *Deeds* case. However, the redacted portions of these pages refer only to Option Contracts, not the direct contracts. As discussed above, the names of customers that entered into Option Contracts, except for Marathon and GM have still never been disclosed to the public. Therefore, only the fact that Marathon and GM are Option Contract customers of DERS is actually confirmed by information in the public domain. The identity of other Option Contract customers discussed in these pages remains the subject of speculation, and thus a trade secret.

⁶ Bates No. 354-371, which was introduced as an exhibit to the depositions of Messrs. Cecil and Deeds, taken within the *Deeds* case.

⁷ Bates No. 372-387.

⁸ The Cincinnati Enquirer article OCC attaches to its Application for Rehearing is apparently based upon an assumption that everyone of the entities that entered into Direct Serve Contracts also later entered into Option Contracts with DERS.

Moreover, the redacted material in Bates No. 216 refers to the specific methodology by which DERS calculated the specific price it was willing to pay a specific Option Contract customer. This information was not disclosed in the *Deeds* case and remains a protectable trade secret. The Duke Entities concede, however, that the material from Bates No. 217 regarding Marathon's Option Contract appears to have been publicly disclosed in the *Deeds* case.

Finally, the identity of the specific customer of one of the Duke Entities as disclosed on Bates No. 216 was not disclosed as even a direct contract customer of DERS in the *Deeds* case. Therefore, this customer name remains a trade secret and the redaction of that name from the Original Direct Serve Agreement, from the November Direct Serve Agreement, and the Option Contract should remain in place.

In sum, the Commission should at most permit the "unredaction" of only the references within these Bates-numbered pages to GM and Marathon as Option Contract customers, and the terms of Marathon's Option Contract.

- **Commission Bates No. 248**

The information on the page Bates numbered 248 should remain redacted as the individual names of the 14 customers referenced as option contract customers on this page have never been publicly revealed.

- **Commission Bates No. 249**

The information on Bates-numbered page 249 should remain redacted as the identity of these entities as Option Contract customers of DERS has never been publicly revealed even though a number of assumptions regarding the identity of these customers have been published.

- **Commission Bates No. 1769–1772**

Except for the reference to Marathon as an Option Contract customer, the information on Bates No. 1769 – 1770 should remain redacted as, again, the names of these Option Contract customers have never been revealed.

The Duke Entities concede, however, that the Ziolkowski email quoted on Bates No. 1772 has previously been disclosed to the public.

- **Commission Bates No. 1776**

The references to Marathon's Option Contract on this Bates page were disclosed to the public as a result of Judge Ruehlman's decision.

- **Commission Bates No. 1929 (fn. 122)**

The information on this Bates page should not be unredacted as it references the name of an Option Contract customer which has not been previously disclosed, as well as some of the methodology used to calculate DERS' option pricing.

- **Commission Bates No. 1932 (fn. 132)**

Marathon's Option Contract was disclosed to the public as a result of the *Deeds* case. However, no other customer name on this Bates numbered page should be unredacted as it has not been previously disclosed as an Option Contract customer.

- **Commission Bates No. 2078–2079**

The information on this Bates page should not be unredacted as it references the names of Option Contract customers that have not yet been expressly disclosed, as well as some of the methodology used to calculate the pricing of their options by DERS.

- **Commission Bates No. 2085 (fn. 94, 96)**

Marathon has been previously disclosed to the public as an Option Contract customer. However, the references to the other Option Contract customer name on this Bates page should not be unredacted as it has not been previously disclosed to the public.

- **Commission Bates No. 2934**

The reference to Marathon's Option Contract on this Bates page has been previously disclosed to the public. However, the remaining information on this Bates page remains a trade secret as it reference the names of Option Contract customers which have not been previously disclosed, as well as some of the methodology used to calculate their discounts.

- **Commission Bates No. 3344**

The reference to Marathon's Option Contract on this Bates page has been previously disclosed to the public. However, the remaining information on this Bates page remains a trade secret as the names of these Option Contract customers have not been previously disclosed to the public, nor has the methodology used to calculate the price DERS agreed to pay in return for its option.

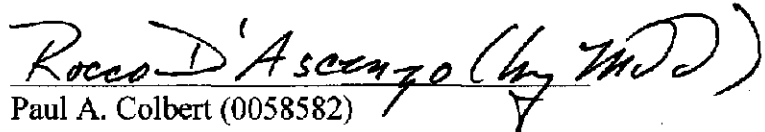
III. CONCLUSION

For the foregoing reasons, the Duke Entities respectfully request that this Commission deny OCC's Application for Rehearing. In the alternative, the Duke Entities respectfully request that the Commission unredact only that material which they have identified as being disclosed to the public in the preceding section of this Memorandum Contra.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically upon parties, their counsel, and others through use of the following email addresses this 2 day of September, 2008.

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