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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of)
Duke Energy Retail Sales, LLC for) Case No. 04-1323-EL-CRS
certification as a Retail Generation)
Providers and Power Marketers of Retail)
Electric Supplier in Ohio.)

**MOTION TO STRIKE DUKE ENERGY RETAIL SALES' MEMORANDUM
CONTRA OCC'S MOTIONS AND, IN THE ALTERNATIVE,
REPLY TO DERS' MEMORANDUM CONTRA
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Pursuant to Ohio Adm. Code 4901-1-12(A), the Office of the Ohio Consumers' Counsel ("OCC") moves to strike the Memorandum Contra filed by Duke Energy Retail Sales, LLC ("DERS") on September 26, 2008. By Attorney Examiner Entry issued on September 18, 2008 ("Entry"), DERS was provided an opportunity to file its memorandum contra "no later than seven days from the date of this entry."¹ The Memorandum Contra was filed eight days after the date of the Entry, provided to the OCC after business hours on a Friday, which is highly prejudicial to OCC.

The same Attorney Examiner Entry provided that "[i]f DERS files such a memorandum contra, OCC may also file a reply" and that "[s]uch reply must be filed no later than four days from the date when the memorandum contra is filed."² The delivery of the Memorandum Contra by DERS, by design or effect, essentially leaves OCC with a

¹ Entry at 2, ¶ (6).

² Id.

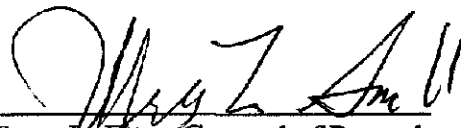
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single day to formulate a responsive pleading to the Memorandum Contra. With that single day, and during a period of intensive activity in a number of cases before the Commission in multiple industries, affecting millions of consumers, OCC makes a few, vital points that reveal fundamental weaknesses in DERS' arguments. OCC's primary request is that the Public Utilities Commission of Ohio ("Commission" or "PUCO") grant OCC's Motion to Strike DERS's untimely Memorandum Contra. OCC's Reply is offered, however, as an alternative in case the PUCO considers DERS' Memorandum Contra.

The reasons for granting OCC's motions are further set forth in the attached Memorandum in Support.

Respectfully submitted,

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CONSUMERS' COUNSEL

A handwritten signature in black ink, appearing to read "Terry L. Etter", is written over a horizontal line.

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

A. Procedural History of this Case

On August 23, 2008, DERS (including its predecessor organization, Cinergy Retail Sales, LLC) filed an Application seeking to renew its certification as a competitive electric retail service ("CRES") provider for residential and business service.³ On September 15, 2008, OCC filed a Motion to Intervene, Motion to Suspend the Application, and Motion to Deny the Application, or in the Alternative, to Set the Matter for Hearing ("Motions").

On September 18, 2008, the Attorney Examiner issued an Entry. The Entry stated that "good cause exists to suspend the 30-day automatic approval process for DERS' renewal application for certification...."⁴ The Entry noted the 90-day period for Commission action following a suspension, and found that "an expedited motion process

³ The Application was filed pursuant to Ohio Adm. Code 4901:1-24-09 which, among other things, provides for automatic approval of an application if the Commission does not act on it within 30 days after the application is filed.

⁴ Entry at 1, ¶ (4).

should be followed.”⁵ The Entry stated that any memoranda contra must be filed within seven days from the date of the Entry and that any reply must be filed within four days after a memorandum contra was filed, and that Ohio Adm. Code 4901-1-07(B) regarding additional days for service by mail will not apply.⁶ The Entry did not, however, require that pleadings be transmitted electronically or that parties accept electronic service.

The Entry made special provisions (meaning more time for DERS) for any memorandum contra to OCC’s Motions. Despite the fact that the Entry was released three days after OCC’s Motions were filed, the Entry provided that DERS may file a memorandum contra OCC’s motion “no later than seven days from the date of this entry.”⁷ The Entry provided that OCC’s reply would be due four days later, on the same expedited schedule provided for any other reply in the above-captioned docket.

On September 26, 2008 at 4:28 p.m., eight days following the Entry that set DERS’ deadline at seven days, DERS filed its Memorandum Contra. DERS’ Memorandum Contra recites that it was aware that the “Entry shorten[ed] the response period provided for by this Commission’s rules to seven (7) days,” but makes no mention that its pleading is filed out of time and provides no explanation for the late filing. The certificate of service states that it was served upon unspecified “parties” by U.S. Mail.⁸ Counsel for DERS electronically transmitted a copy of the Memorandum Contra to OCC’s counsel, which was received at 5:32 p.m. on Friday, September 26. OCC’s counsel had left their offices before the arrival of the e-mail.

⁵ Id. at 1-2, ¶ (5), citing Ohio Adm. Code 4901:1-24-06(A)(2)(b).

⁶ Id. at 2, ¶ (6).

⁷ Id.

⁸ Memorandum Contra at 20.

B. DERS' Arguments Go Far Afield.

The pleading that DERS filed pours out a stream of vile accusations that are directed at OCC rather than at the issues raised by the Motions. OCC's efforts to provide choices for the electric customers of the electric utilities regulated by the PUCO are well known by both the Duke-affiliated companies and the Commission. Both Duke Energy Ohio, Inc. ("Duke Energy") and the Commission argued during the first appeal of the PUCO's Order in Case Nos. 03-93-EL-ATA, et al. (the "*Rate Plan Case*") that the competitive market had developed despite limited offers to residential customers based upon offers to non-residential customers.⁹ Similarly, DERS' negative effect on the overall competitive market for generation service impacts the choices available to residential customers.

DERS argues that OCC failed to state good cause for suspension of certification.¹⁰ The September 18, 2008 Entry already states that OCC has provided good cause to suspend the Renewal Application.¹¹ The remaining issue is the action the Commission should take under that suspension.

II. OCC'S MOTION TO STRIKE

The Memorandum Contra was filed out of time – without DERS seeking permission to file out of time, without excuse and without even any mention that it was filed out of time – and should be stricken. The Memorandum Contra recites the fact

⁹ *Office of the Ohio Consumers' Counsel v. Public Util. Comm.*, S.Ct. Case No. 05-0956, Duke Energy Merit Brief at 14 (August 8, 2005) ("there exists a competitive market evidence by substantial switching to CRES providers") and PUCO Merit Brief at 17 (August 5, 2005) ("every non-residential class had exceeded the twenty percent shopping criterion of the statute").

¹⁰ Memorandum Contra at 5.

¹¹ Entry at 1, ¶ (4).

DERS had seven days to respond to OCC's Motions, and then violates the timing requirement stated in the Attorney Examiner's Entry.¹² The Memorandum Contra should therefore be stricken.

The Memorandum Contra was also filed and served in a manner that was highly prejudicial to OCC. Knowing that electronic service was not ordered in the Entry, OCC checked for both an electronic courtesy copy of the Memorandum Contra on September 25, 2008 (i.e., the due date for any memorandum contra) and checked telephonically with the Commission's Docketing Division late on September 25 and early on September 26 to obtain a copy of any memorandum contra filed by DERS. Instead of a timely filing, DERS filed its Memorandum Contra late in the day on Friday, September 26 – guaranteeing that it would not be available from Docketing until sometime on September 29 – and provided an electronic copy of the pleading to OCC's counsel over an hour later and which OCC received after normal business hours. DERS' actions essentially provided OCC with a single day after September 29 (i.e., until four days after service of the Memorandum Contra) to file a reply.

DERS' troubling history of pleading practice, along with that of its affiliates, is known by OCC as well as to the Commission in cases having expedited pleading schedules.¹³ DERS' late submission of its Memorandum Contra and its manner of service, which was highly prejudicial to OCC in this expedited proceeding, should not be excused by the Commission. The Commission should grant OCC's Motion to Strike.

¹² Id. at 1-2.

¹³ *Rate Plan Case*, OCC Letter (February 6, 2007). More recently, Duke Energy Ohio, Inc. failed to serve OCC with a Notice of Appeal as required by S.Ct.Prac.R. XIV(2)(A)(2). *In re Duke Energy Rate Plan Case*, Case Nos. 03-93-EL-ATA, et al., Notice of Appeal (February 2, 2008).

III. REPLY: DERS' MEMORANDUM CONTRA MISCHARACTERIZES THE RESULTS OF THE RATE PLAN CASE THAT INVOLVED ITS AFFILIATED COMPANY, AND ARGUES FOR COMMISSION REVIEW THAT IS OVERLY NARROW.

A. DERS Mischaracterizes the Results from the Rate Plan Case That Documented Activities Conducted in DERS' Name.

DERS argues that OCC suffers from mere “frustration,” and OCC’s Motions lack merit because they have been previously discredited.¹⁴ DERS incorrectly states that OCC previously raised its “allegations ... and proved utterly unable to support [them] in prior proceedings before this Commission.”¹⁵ The “prior proceedings” is a reference to the *Rate Plan Case* that is cited in OCC’s Motions. The Order on Remand in the *Rate Plan Case* states:

It should be noted that the side agreement issue is relevant to these cases, according to the court’s opinion, only with regard to the serious bargaining prong of the Commission’s analysis of stipulations....

* * *

[W]e are limiting our deliberation and order to those remanded issues. Ancillary issues raised by parties in the remand phase and not considered in this order on remand, such as potential corporate separation violations and affiliate interactions, will be denied.¹⁶

The Commission has *not considered* the record in the *Rate Plan Case* regarding “corporate separation violations and affiliate interactions,” but should consider those matters in the instant proceeding as argued in OCC’s Motions. To date, DERS has avoided a PUCO review of corporate separation, based on complete facts, in the five-year pendency of the *Rate Plan Case* and now has the temerity to suggest extending the lack of review to yet another case, its certificate case no less.

¹⁴ Memorandum Contra at 18.

¹⁵ Id. at 2.

¹⁶ *Rate Plan Case*, Order on Remand at 20 (October 24, 2007).

Indeed, OCC's Motions are consistent with an approach implied in a pleading by DERS' affiliate, Duke Energy. In opposition to OCC's appeal in the *Rate Plan Case*, Duke Energy stated in its Merit Brief that certificate cases are forums for OCC intervention and proposals:

The Commission certified DERS in Case No. 04-1323-EL-CRS on October 7, 2004, and recertified it on October 3, 2006, in the same case docket. * * * Appellants [OCC and OP&E] did not intervene in Case No. 04-1323-EL-CRS, and did not challenge the Commission's approval of DERS's {sic} status. Thus, despite Appellants' protestations to the contrary, the evidence shows that DERS is an ongoing concern utilizing service-company employees and with its own business plan.¹⁷

Of course, OCC did not learn about the improper conduct conducted in the name of DERS until after the re-certification took place in 2006.¹⁸ Informed by the record in the *Rate Plan Case*, which was developed through discovery during 2007, OCC's Motions take the course of action suggested by Duke Energy's July 22, 2008 Merit Brief. The Commission should carefully consider the record at its disposal in the *Rate Plan Case* as well as by subsequent revelations, and deny DERS' Renewal Application based on facts.

B. DERS' Narrow View of the Certification Process Would Trivialize Commission Review.

DERS takes the narrow view that its Application may only be suspended if the Commission finds that the applicant is unable to demonstrate "financial, technical, and managerial capability to actually provide the [CRES] services...."¹⁹ This view, based

¹⁷ *Office of the Ohio Consumers' Counsel v. Public Util. Comm.*, S.Ct. Case No. 08-0466, Duke Energy Merit Brief at 12 (July 22, 2008) (citations omitted).

¹⁸ The Supreme Court issued its decision in *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 ("*Consumers' Counsel 2006*") on November 22, 2006. That decision led to OCC's discovery activities during 2007 that built the record cited in several instances in OCC's Motions.

¹⁹ Memorandum Contra at 2.

upon Ohio Adm. Code 4901:1-24-04, is part of the evaluation that the PUCO must conduct, but DERS ignores other provisions cited by OCC's Motions.

Based on DERS' credentials, the corporation has no financial, technical, and managerial capabilities other than those obtained from its affiliated operations. DERS is coy, stating that it "*sometimes operate[s] through 'shared services' personnel.*"²⁰ Actions taken in DERS' name are *always* conducted by and through the activities of its corporate affiliates because DERS has no employees.²¹ The manner in which shared personnel interact with one another and with the public is the subject of the Commission's corporate separation rules.

As stated in OCC's Motions, the Commission may approve an application for certification if the applicant is willing to "comply with all applicable commission rules and orders adopted pursuant to Chapter 4928. of the Revised Code."²² DERS argues that its efforts to satisfy regulatory authorities -- at first the Securities and Exchange Commission and later the PUCO -- in initial filings regarding corporate separation rules should suffice to provide DERS with a safe harbor against any and all claims of misconduct.²³ OCC's Motions depend upon a *factual record of actions taken in DERS' name* by shared services personnel in violation of the Commission's corporate separation rules.

An example illustrates the problem with DERS' argument. Ohio Adm. Code 4901:1-20-16(G)(4)(j) required that "[s]hared representatives or shared employees of the

²⁰ Id. at 13 (emphasis added).

²¹ OCC Motions at 4. The Memorandum Contra makes repeated references to shared services personnel, and makes no attempt to contradict OCC's representation in this regard.

²² Ohio Adm. Code 4901:1-24-06(C)(2), cited in OCC's Motions at 7.

²³ Memorandum Contra at 7-9.

electric utility and affiliated competitive supplier shall clearly disclose upon whose behalf their representations to the public are being made.” The record in the *Rate Plan Case* demonstrates *actual violation* of this requirement, regardless of the safeguards that DERS promised regulatory authorities.²⁴ DERS’ argument that the PUCO should show dependence entirely on DERS’ earlier promises to follow corporate separation requirements trivializes the Commission’s role in the certification process. The actual conduct of shared services personnel should be considered in this proceeding.

According to R.C. 4928.08(D), as cited in OCC’s Motions, the “commission may suspend, rescind, or conditionally rescind ... certification” if a CRES “has engaged in anticompetitive or unfair, deceptive, or unconscionable acts or practices.”²⁵ Incredibly, DERS argues that, “[b]y definition, any contract that DERS enters into with a customer necessarily promotes the competitive market for electric generation services.”²⁶ DERS therefore argues that *no behavior on its part* could violate R.C. 4928.08(D), raising the question of why the General Assembly enacted the statute. The market power that DERS claims it does not have and cannot abuse²⁷ is the market power of its affiliate (Duke Energy, a monopoly distribution provider) whose operations are not separate from those of DERS.²⁸

The Memorandum Contra is filled with false claims of certainty regarding its arguments. For instance, DERS states that “it is *certain* that DERS’ contracts are those

²⁴ See, e.g., OCC’s Motions at 8, citing OCC’s Initial Post-Remand Brief at 64-65 (April 13, 2007).

²⁵ OCC Motions at 3.

²⁶ Memorandum Contra at 15.

²⁷ Id.

²⁸ *Rate Plan Case*, OCC Initial Post-Hearing Brief, Phase I at 42-44 and 49-50 (April 13, 2007).

of a CRES provider.”²⁹ The contracts executed in DERS’ name that are part of the record in the *Rate Plan Case* were part of settlement agreements or the progeny of settlement agreements in connection with the activities of its affiliate, Duke Energy. Even Duke Energy, DERS’ affiliate, questioned whether DERS’ activities were actually CRES related:

Because DE-Ohio [i.e., Duke Energy] is aware that DERS is not supplying generation service to any load in its service territory it is questionable that the DERS agreements represent competitive retail electric service.³⁰

DERS’ claim to conducting legitimate, CRES-related activities is apparently not a clear event to its affiliate.

DERS claims that OCC “has never maintained ... that any customer of DERS has ever suggested that it was somehow deceived by DERS.”³¹ Such an allegation was made and supported by OCC in the *Rate Plan Case*, directly tied to the failure of shared employees to disclose the entity they represent.³²

DERS also claims that OCC cannot contend that “any competitor of DERS has ever alleged that DERS’ actions are in any way anticompetitive.”³³ Independent CRES providers participated in the *Rate Plan Case*. The Ohio Marketers Group (“OMG”), a collection of marketers jointly represented in the *Rate Plan Case*, stated in their Initial Post-Hearing Brief that the “option contracts [of DERS] violate Section 4928.02(G),

²⁹ Memorandum Contra at 15 (emphasis sic).

³⁰ *Rate Plan Case*, Duke Energy Motion for Protection at 11 (December 20, 2006).

³¹ Memorandum Contra at 16.

³² *Rate Plan Case*, OCC Initial Post-Hearing Brief, Phase I at 53-54 (April 13, 2007).

³³ Memorandum Contra at 16.

Revised Code.”³⁴ That Section stated Ohio policy to “ensure effective competition in the provision of retail electric service by avoiding *anticompetitive* subsidies....”³⁵ In its Reply Brief, Dominion Retail stated that it “endorse[d] the positions on the remand issues set forth in the initial brief of the Ohio Marketer’s [sic] Group....”³⁶ DERS participated in the *Rate Plan Case*, and it should be aware of the statements by the independent CRES providers that contradict DERS’ arguments.

IV. CONCLUSION

DERS’ Memorandum Contra was submitted out of time, without excuse or respect for the PUCO’s ruling on time periods. DERS’ actions by design or effect prejudiced OCC’s case. DERS and its affiliated companies also have a less than distinguished history regarding filing and serving their pleadings on OCC. The Memorandum Contra should be stricken.

DERS’ Memorandum Contra is filled with absolute statements that it has not, and could not under any circumstances, be engaged in activities that violate the Commission’s rules or hurt the competitive market. OCC’s Motions speak volumes to the contrary, and cite to records and information that is documented and available to the Commission. The facts in OCC’s Motions show DERS’ failure to direct its attention to real issues that are documented in Commission records. DERS’ Memorandum Contra

³⁴ *Rate Plan Case*, OMG Initial Post-Hearing Brief at 19 (April 13, 2007).

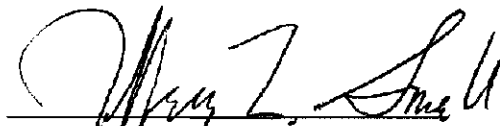
³⁵ Emphasis added.

³⁶ *Rate Plan Case*, Dominion Retail Reply Brief at 2 (April 24, 2007). Dominion Retail also stated that the “consideration for these transactions had nothing whatever to do with attracting customers to competitive retail service * * * [and] was, pure and simple, customer support for the DE-Ohio position..., a position which ... would certainly seem to be directly contrary to its self-interest as a CRES provider.” *Id.*

should be stricken, but in any event it adds nothing against the facts and regulations that support the denial of DERS' Renewal Application.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

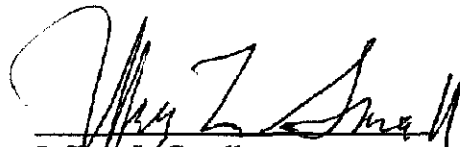


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Strike by the Office of the Ohio Consumers' Counsel was sent by First Class United States Mail, postage prepaid, to the persons listed below (and a courtesy copy, electronically, to DERS counsel) this 30th day of September 2008.



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