

FILE

10

KRAVITZ, BROWN & DORTCH, LLC

Attorneys at Law

65 East State Street - Suite 200
Columbus, Ohio 43215-4277
614.464.2000
fax 614.464.2002

mdortch@kravitzllc.com

Janet Kravitz
Paula Brown
Michael D. Dortch
Richard R. Parsons

Max Kravitz (1946-2007)

Of Counsel:
William H. Bluth*

* Also Admitted in NY

January 12, 2009

VIA MESSENGER DELIVERY

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

PUCO

2009 JAN 12 PM 4:47

RECEIVED-DOCKETING DIV

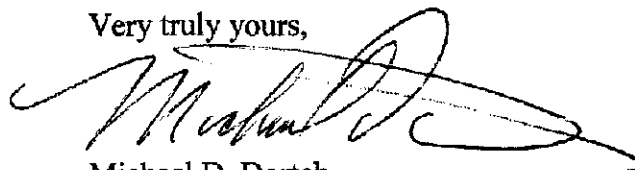
Subject: In the Matter of the Application of Duke Energy Retail Sales, LLC
For Recertification as a Retail Generation Provider and Power Marketer
Case No. 04-1323-EL-CRS

Dear Ms. Jenkins:

Enclosed please find an original and twelve copies of Duke Energy Retail Sales, LLC's Memorandum Contra the Ohio Consumers' Counsel's Application for Rehearing in the above captioned matter.

Please accept the original and eleven copies of this document for the Commission's files, and after file-stamping the remaining copy, return it to me via the individual who delivers the documents to you. You may call me if you have any questions concerning this filing. As always, your attention is appreciated.

Very truly yours,



Michael D. Dortch

cc (w/enc.): Kimberly W. Bojko, Esq. (via messenger delivery)
Terry L. Etter, Esq.
Jeffrey L. Small, Esq.
Ann M. Hotz, Esq.

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 SM Date Processed JAN 13 2009

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

RECEIVED-DOCKETING DIV
2009 JAN 12 PM 4:47
PUCO

In the Matter of the Renewal Application of :
Duke Energy Retail Sales, LLC for : Case No. 04-1323-EL-CRS
Certification as a Retail Generation :
Provider and Power Marketer :

**DUKE ENERGY RETAIL SALES, LLC'S
MEMORANDUM CONTRA
THE OHIO CONSUMERS' COUNSEL'S
APPLICATION FOR REHEARING**

I. INTRODUCTION

The Office of the Ohio Consumers Counsel (OCC) continues to pursue a completely meritless crusade against Duke Energy Retail Sales, LLC (DERS), a certificated¹ provider of competitive retail electric services (CRES) within the State of Ohio. Assignment of Error No. 2 within OCC's recent Application for Rehearing does nothing more than repeat allegations that OCC has raised before and raised most recently in its September 26, 2008, Memo Contra OCC's *Motion to Suspend Application and Motion to Deny the Application or in the alternative, Motion to set the Matter for Hearing* (OCC's Motions).² This Commission has repeatedly informed OCC that a process exists through which OCC may pursue its allegations, if it chooses to do so. OCC refuses to heed this Commission's instruction, but insists upon raising these allegations collaterally, in other cases involving DERS.

¹ DERS possesses Renewal Certificate¹ No. 04-124 (3). This certificate was first issued to DERS on October 7, 2004. It was subsequently renewed by this Commission on October 3, 2006, and again on December 4, 2008.

² OCC first raised these same arguments in Duke Energy Ohio, Inc.'s (DE-Ohio's) Rate Stabilization Plan case. *In the Matter of the Consolidated Duke Energy Ohio, Inc. Rate Stabilization Plan Remand and Rider Adjustment Cases*, Case Nos. 03-0093-EL-ATA, 03-2079-EL-AAM, 03-2080-EL-AAM, 03-2081-EL-ATA, 05-0724-EL-UNC, 05-0725-EL-UNC, 06-1068-EL-UNC, 06-1069-EL-UNC, and 06-1085-EL-UNC (hereafter, the RSP Case).

OCC's Assignment of Error No. 1 consists principally of an improper collateral attack on the certification rules of this Commission. The Commission's certification rules were well-drafted for the express purpose of implementing Ohio's statutory energy designs. The rules were first submitted to members of the public – including OCC – for comment, were revised based upon those comments, and were then submitted to and approved by the General Assembly's Joint Committee on Agency Rule Review. There is no question regarding the validity of this Commission's rules, nor is there any question whether the Commission properly applied those rules.

The Commission has repeatedly instructed OCC that it may, if it wishes, pursue its complaints regarding DERS' contracts through this Commission's complaint processes. The Commission has repeatedly pointed out that the complainant would bear the burden of proof in such a proceeding, and repeatedly, albeit implicitly, indicated that it will not permit OCC to shift the complainant's burden to others by allowing OCC to drag its allegations into proceedings in which the issues OCC wishes to discuss are at most ancillary and at worst entirely irrelevant. The Commission should similarly now direct OCC to address any dissatisfaction OCC may have with the Commission's rules in the future within an appropriate rules review proceeding.

II. LAW AND ARGUMENT:

A. OCC's Assignment of Error No. 2, In Which OCC Presents its Substantive Arguments, Raises No Argument Not Considered By This Commission In Its Entry Granting Recertification to DERS, Provides No Basis Upon Which Rehearing Should Be Granted To OCC, And Is Without Merit, In Any Event.

In its September 26, 2008, Memo Contra OCC's Motions, DERS pointed out that OCC had almost entirely ignored³ the principal statutory criteria for certification, and that the record

³ OCC did claim that DERS lacked the financing necessary to support CRES operations, a claim obviously and completely refuted within DERS' application.

evidence before this Commission was more than adequate to show that DERS possesses the requisite financial, technical, and managerial expertise to support its application for renewal, as required by Ohio Revised Code §4928.08(D) and by Ohio Admin Code §4901:1-24-06 and 4901:1-24-09.⁴ This Commission agreed with DERS in its December 3, 2008 Entry, finding that DERS had demonstrated it met the specific criteria applicable to certification. The Commission therefore renewed DERS' certificate.⁵ OCC raises nothing new in its Application for Rehearing regarding application of the substantive criteria. As a result, DERS will not further address issues of its financial, technical, and managerial expertise herein.

OCC's opposition to DERS' recertification was not based upon any substantive criteria for certification, in any event. Instead, OCC opposed DERS' recertification based solely upon OCC's allegations that the Duke Energy family of entities, including DERS, had ignored the corporate separation provisions of Ohio law in order to impede the development of competitive markets. OCC "supported" this charge by arguing that DERS has neither (1) customers nor (2) employees, (3) that DERS lacked the legal authority to enter into CRES contracts at the time DERS' contracts were formed, and finally (4) that DE-Ohio was the true beneficiary of DERS' contracts.

DERS fully addressed each of OCC's specific charges in its Memo Contra. In doing so, DERS demonstrated that:

- DERS entered into contracts with its customers in anticipation of its certification.

It violated no statute of this State, rule of this Commission, provision of

⁴ DERS Memo Contra OCC's Motions, pp. 2-5, and pp. 12-13.

⁵ *In the Matter of the Application of Duke Energy Retail Sales, LLC for Certification as a Competitive Retail Electric Service Provider in Ohio*, Case No. 04-1323-EL-CRS, Entry December 3, 2008, ¶8.

applicable service agreement, or applicable provision of DE-Ohio's Code of Conduct in doing so.⁶

- DERS actually had approximately two dozen customers, although that fact is legally irrelevant to any issue that has been placed before this Commission.⁷
- DERS acted through its officers and directors, with technical and managerial support purchased from its service company affiliate, as needed, pursuant to certain shared services agreements previously approved by this Commission. Those agreements compel DERS to pay the fully embedded costs of that support upon which it calls.⁸ DERS has, as a result, no need for payroll employees – a fact that is again completely irrelevant to any issue before this Commission.
- The contracts to which DERS was a party were performed by DERS, and the expense of those contracts was borne by DERS (and ultimately its shareholders). Not one cent was borne by DE-Ohio, or by any Ohio rate payer. Similarly, the benefits of those contracts would inure to DERS and its shareholders rather than DE-Ohio or Ohio's rate payers.⁹ It should be noted, in addition, that all those contracts have now expired by their terms.

In short, DERS demonstrated that whenever OCC is compelled to make its allegations specific it cannot then support those allegation with evidence demonstrating unlawful conduct. OCC's oft-repeated charges that DERS and/or DE-Ohio have violated applicable corporate separation standards are therefore revealed as nothing more than mean-spirited insinuations of wrong-doing, lacking all substance. DERS has in fact acted at all times in conformity with

⁶ DERS Memo Contra OCC's Motions, p. 10.

⁷ Id. p. 11-12.

⁸ Id. p. 11.

⁹ Id. p. 13.

shared services agreements submitted to and approved by both this Commission and by the Securities and Exchange Commission, and with the DE-Ohio corporate separation plan and Code of Conduct that were submitted to and approved by this Commission.¹⁰ OCC cannot and in fact does not support that a hearing is necessary in order for OCC to inform this Commission of its repeated complaints regarding DERS' conduct.

B. OCC's Complaints About This Commission's Entry and Its Procedures Are Similarly Without Merit.

OCC's Application for Rehearing also suggests that OCC is once more about to shift its tactics, hoping to open still another front in its war on DERS and the Duke entities. In addition to allegations that OCC cannot support based upon the applicable standards, OCC now attempts to argue that the applicable standards are inadequate and that DERS' conduct should therefore be measured by standards that are not law, but which OCC believes should be law.

OCC begins this assault by stating that "[t]his is the second case in which *the Commission has failed to meet an obligation* to hear the case regarding unlawful conduct involving DERS."¹¹ The Commission will note that OCC fails to articulate a simple, plain source for this "obligation" in support of this statement. Instead, OCC presents a somewhat tortuous argument across numerous pages¹² through which OCC apparently intended to demonstrate – for what purpose is unclear – that this Commission's recertification rules either do, or should, incorporate every state policy goal embodied within §4928.02, the consent-to-jurisdiction provision of R.C. §4928.09, the minimum service requirements of R.C. §4928.10 and, indeed, every word found within Chapter 4928.¹³ When it concludes this diatribe, OCC

¹⁰ DERS Memo Contra OCC's Motions, pp. 7-9.

¹¹ OCC's Motions, p. 2.

¹² OCC's Application for Rehearing, pp. 4-10.

¹³ DERS, of course, expects to comply with all applicable provisions of Chapter 4928, not merely the provisions of §§4928.02, .09, and .10.

then simply declares that either the Commission's Order or the Commission's rules are necessarily deficient since the Commission did not find it necessary to proceed to an evidentiary hearing regarding corporate separation violations (as well, presumably, as the consent-to-jurisdiction provision, the policy goals, and the minimum service requirements – all of which OCC raised as grounds for denying certification to DERS for the first time in its Application for Rehearing).¹⁴

Ohio law and the rules of this Commission are clear, however. Just as in the RSP case to which OCC alludes, OCC seized an opportunity to make its concern regarding DERS' contracts known to this Commission. The Commission duly suspended DERS' application pursuant to Ohio Admin. Code §4901:1-24-06(A)(1) upon receipt of OCC's Motions. Then, consistent with Ohio Admin. Code §4901:1-24-06(A)(2)(b), the Commission permitted DERS an opportunity to furnish additional information.¹⁵ DERS responded – yet again – to OCC's allegations in its Memo Contra. Ohio Admin. Code §4901:1-24-06(A)(2)(c) then expressly provides that the matter *may* be set for hearing at *this Commission's discretion*.¹⁶

Thus, OCC is plainly incorrect in asserting that a hearing is mandated in this proceeding. A hearing is to be held only if this Commission concludes it is necessary and appropriate, not because OCC demands it. This Commission was made aware – in fact, the Commission was particularly well-informed because OCC introduced its "evidence" and argued its case within the RSP Case – of the nature of DERS actions and of the "spin" OCC insists is properly placed upon those actions. The Commission simply determined, based upon its knowledge of OCC's allegations and upon DERS' response, that it need not indulge OCC with an evidentiary hearing in this proceeding. Instead, the Commission once again expressly directed OCC to pursue its

¹⁴ OCC's Application for Rehearing, p. 9.

¹⁵ Ohio Admin. Code §4901:1-24-06(A)(2)(a).

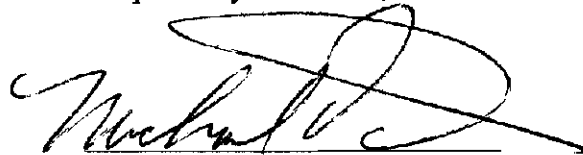
¹⁶ Ohio Admin. Code §4901:1-24-06(A)(2)(c).

allegations, if it chose, through the complaint process available to OCC under Ohio law. The Commission's Entry is neither unreasonable nor unlawful in this regard, and OCC's application for rehearing should be denied.

III. CONCLUSION

OCC once again complains to this Commission that certain contracts by and between DERS and its customers (all of which, by their own terms, are now expired) are unlawful. OCC's repeated attacks on DERS and the Duke Energy entities suggest that OCC will only be satisfied with a finding by this Commission that DERS should not be permitted to transact business within the State of Ohio. If this is indeed OCC's goal, it is of course inconsistent with the State policies encouraging competitive retail electric service, embodied within Ohio Revised Code section 4928.02. OCC's Application for Rehearing should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael D. Dortch", is written over a horizontal line.

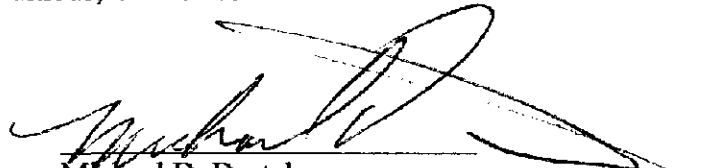
Michael D. Dortch (0043897)
KRAVITZ, BROWN & DORTCH, LLC
65 East State Street
Suite 200
Columbus, Ohio 43215
Phone: 614-464-2000
Fax: 614-464-2002
mdortch@kravitzllc.com

Attorneys for
DUKE ENERGY RETAIL SALES, LLC

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon the parties by depositing the same in the United States Mail, postage prepaid, addressed as follows, on this 12th day of January, 2009.

Jeffrey L. Small, Esq.
Terry L. Etter, Esq.
Ann M. Hotz, Esq.
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street
Suite 1800
Columbus, OH 43215


Michael D. Dortch

etter@occ.state.oh.us
small@occ.state.oh.us
hotz@occ.state.oh.us