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April 13, 2007

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

Via Courier

Re: In The Matter of: The Consolided 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 Cinergy Corp's ("Cinergy's") and Duke Energy Retail Sales, LLC's ("DERS'") Merit Brief – **Public Version**.

Also enclosed is an envelope containing the original and three copies of the **Confidential Version** of this document, which Cinergy and DERS are submitting under seal.

Please accept the original and fifteen copies of the public version of this document for filing in the above identified matters. Please also accept the original and two copies of the confidential version of this document for filing. I would appreciate the return of a time stamped copy of each version of Cinergy Corp.'s Reply 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

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

THE MERIT BRIEF OF CINERGY CORP. AND DUKE ENERGY RETAIL SALES, LLC

PUBLIC VERSION

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DUKE ENERGY RETAIL SALES, LLC

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I. INTRODUCTION

Cinergy Corp ("Cinergy") and Duke Energy Retail Sales, LLC ("DERS") find themselves in an unusual position in these proceedings. Neither was a party to these proceedings when the issues now before this Commission were determined. Neither company has any interest in these proceedings other than an interest in preserving certain confidential business information that each was compelled to produce. Yet, both find themselves forced to address unsupported accusations of improprieties by the Office of Consumers Counsel ("OCC") based on the existence of commercial agreements between Cinergy/DERS and third parties that have no relevance to the issues remaining following the Supreme Court of Ohio's decision on remand. OCC has apparently determined that such allegations represent its only opportunity to discredit decisions made by this Commission ***that have been affirmed by the Supreme Court of Ohio on direct appeal.***

In pursuing this strategy, OCC has lost sight of the fact that the additional discovery that it was permitted was not from Cinergy and DERS, but from CG&E. OCC has also lost sight of the only issue that prompted the Ohio Supreme Court to permit it further discovery in the first place: Whether ***a single agreement*** to which OCC was denied access through discovery had any relevance to the bargaining that occurred among capable, knowledgeable representatives of parties to a stipulation submitted to this Commission which, for its own reasons, the Commission declined to adopt.

II. PROCEDURAL BACKGROUND

A. CG&E's Initial Application Addressing the End of its Market Development Period.

The Cincinnati Gas & Electric Company[1] ("CG&E") initiated PUCO Case No. 03-93-EL-ATA on January 10, 2003, by filing an application to modify its non-residential generation rates to provide for a market-based standard service offer ("MBSSO") to its customers and to establish a competitive bid service rate option ("CBP"), all as contemplated by Am. Sub. S.B. 3. CG&E's filing was intended to conform to the statutory process by which market based pricing was to be made available to its customers at the end of the market development period described within Am. Sub. S.B. 3 and within Orders issued by this Commission in CG&E's electric transition plan case, Case No. 99-1658-EL-ETP. Numerous parties intervened in Case No. 03-93-EL-ATA *et al.*, and comments were filed in March and April, 2003, regarding CG&E's proposals. As described within its application, CG&E indicated its intention to divest itself of all generation assets.

On December 17, 2003, nearly a year after CG&E filed its application in Case No. 03-93-EL-ATA *et al.*, this Commission issued its Finding and Order in case number 01-2164-EL-ORD. In that docket, the Commission adopted rules 4901:1-35-01 *et seq.* (hereafter "Rule 35") which contain the Commission's regulations regarding the conduct of the competitive bid process and the terms that would control electric utilities' market-priced standard service offers to the public. Thus, nearly a year **after** CG&E proposed

[1] CG&E's name was changed to DE-Ohio, of course, following this Commission's approval of the merger between Cinergy Corp. and Duke Energy in Case No. 05-732-EL-MER. In this brief, Cinergy and DERS will refer to this entity as CG&E prior to the merger, and as DE-Ohio post merger.

the manner in which it would "go to market," the Commission formalized the rules that would govern the process of "going to market."

B. The Commission's Request to CG&E for an RSP Proposal.

This Commission is of course constrained by those provisions of Am. Sub. S.B. 3 that terminated the Commission's jurisdiction to regulate the price of the generation portion of electric service. Although without legal authority to prescribe rates, this Commission chose to act upon its concern that the markets for electric generation service were not developed to the extent that the Commission felt the General Assembly believed would be the case when it enacted Am. Sub. S.B. 3.

With legitimate concerns and legal constraints upon its ability to address those concerns,[2] this Commission issued an entry dated December 9, 2003, that, among other things, asked CG&E to **voluntarily** file a plan that would protect its customers against the same sort of substantial price increases in electric generation costs that have occurred in other states that have "gone to market." Specifically, the Commission asked CG&E to propose a rate stabilization plan ("RSP") that would satisfy three different, and in many ways, inconsistent goals: (1) provide rate certainty for consumers, (2) provide financial stability for the utility, and (3) provide for the further development of competitive markets.

Again, it is worth remembering that this Commission asked CG&E to submit an RSP proposal a week before the Commission issued Rule 35 regulating the manner in which electric utilities were to conduct their CBP processes and providing for the utilities' market-based, standard service offers to customers. Thus, the Commission plainly

[2] Indeed, Cinergy and DERS share the Commission's concern that market based prices may result, at least in the short term, in an increase to all consumers in the cost of electric power within Ohio.

contemplated that CG&E would submit a plan that would differ dramatically from the Commission's CBP and standard service offer rules, contained within Rule 35, at the time that it made its request to CG&E.

CG&E complied on January 26, 2004, and filed an RSP that differed significantly from the original plan that CG&E had filed in preparation for the end of its market development period. Among the key differences between the original application and the RSP, CG&E indicated that if it was to accept responsibility for stabilizing market rates, it would need to retain control of its generation assets.

Additional parties intervened, comments were filed on the RSP proposal, and CG&E, Staff, and others filed testimony regarding the RSP. Evidentiary hearings began May 17, 2004.

C. The Proposed Stipulation.

Hearings regarding CG&E's RSP proposal were continued when, on May 19, 2004, CG&E filed a stipulation that modified its RSP proposal. CG&E, the Commission's Staff, and ten intervening entities or interest groups – First Energy Solutions ("FES"), Dominion Retail ("Dominion"), Green Mountain Energy, Kroger, Cognis Corp., People Working Cooperatively ("PWC"), Communities United for Action ("CUFA"), IEU-Ohio, the Ohio Energy Group ("OEG"), and the Ohio Hospital Association ("OHA") – each executed the stipulation and agreed to support this Commission's adoption of their stipulation. CG&E filed supplemental testimony on May 20, 2004, in support of the stipulation. Staff witness Richard Cahaan submitted supplemental testimony in support of the stipulation on May 24, 2004.

Without necessarily indicating disagreement with the stipulation, a number of intervenors chose not to execute the stipulation. Two intervenors, however, the Ohio Consumer's Counsel ("OCC") and Ohio Marketers' Group ("OMG") actively opposed terms within the stipulation. Seeking evidence in support of its opposition, OCC moved on May 20, 2004, for an order compelling the production of any agreements **between CG&E and any party to the proceedings.**[3] OCC's motion to compel was denied by the Hearing Examiners. OCC and OMG then filed testimony in opposition to the stipulation on May 26, 2004, and hearings resumed on May 26 and May 27, 2004.

D. The Commission's Rejection of the Proposed Stipulation.

On September 29, 2004, the Commission issued an Opinion and Order in which it offered to "approve" the stipulation, but only with material modifications to its terms. However, as filed by the parties, the stipulation provided that all parties were released from any obligations thereunder if the Commission failed to approve the stipulation *without* material modification. Thus, the Commission's action effectively invalidated the stipulation and the parties believed that it ceased to exist upon issuance of the Commission's Opinion and Order.

E. CG&E's Response to the Commission's Rejection of the Proposed Stipulation.

On October 29, 2004, CG&E and others, including OCC, filed applications for rehearing in response to the Commission's September 29, 2004, Opinion and Order. In its application for rehearing, CG&E disagreed with the proposed modifications and renewed its request that the Commission either (1) approve its original RSP proposal and allow it to implement its MBSSO and CBP proposals or (2) approve the RSP as modified

[3] An agreement dated February 5, 2004 (as subsequently amended), between CG&E and the City of Cincinnati, Ohio was the only agreement responsive to the discovery request.

by the stipulation or (3) approve a third and new option in which CG&E proposed to reduce its total recovery by breaking certain proposed charges into different component elements, by proposing that some (but not all) such components remain non-bypassable, and by changing the percentages of customers that might bypass components. CG&E also asked the Commission to approve its retention of generation assets that CG&E had previously indicated would be divested by December 31, 2004.

F. **The Commission's November 24, 2004, Entry on Rehearing.**

On November 24, 2004, the Commission rejected CG&E's request that it be authorized to "go to market" as proposed in its application. The Commission also rejected CG&E's request that the Commission approve the RSP, as modified by the stipulation. Finally, the Commission rejected CG&E's compromise proposal. The Commission then offered to accept only certain components of the alternative proposal in CG&E's October 29, 2004, Application for Rehearing, and rejected certain others. With respect to even those components that it was willing to accept, the Commission required that CG&E justify those components through later filings before they would become effective.

Without Commission approval, CG&E could not conduct the CBP or offer MBSSO pricing to customers. Without Commission approval, CG&E's continued ownership and operation of generation assets after December 31, 2004, would constitute a technical violation of Orders issued in CG&E's ETP case. CG&E therefore yielded to the Commission and subsequently amended its tariffs to implement an RSP on the terms outlined in the Commission's November 24, 2004, Entry on Rehearing, despite its dissatisfaction with the Commission's Entry, which would reduce CG&E's revenues by

approximately 32 Million dollars as measured against CG&E's RSP proposal. That foregone revenue is directly reflected in prices significantly beneath the level CG&E believed appropriate considering the market risks that appeared to exist at the end of 2004.

G. The Supreme Court of Ohio's Remand to this Commission.

Unlike CG&E, OCC was unwilling to accept the result imposed by the Commission. After the Commission overruled several additional applications for rehearing, OCC appealed to the Ohio Supreme Court on May 23, 2005. On November 22, 2006, the Ohio Supreme Court issued its opinion in this matter as *Ohio Consumers Counsel v. PUCO,* 2006-Ohio-5789. Significantly, ***the Court upheld the Commission's action against every substantive argument raised as error by the OCC*** – including CG&E's retention of its generating assets.

The Court found merit, nonetheless, regarding two assignments of error raised by OCC regarding purely procedural issues. The Court remanded the case to this Commission with an instruction that the Commission support its modifications to the RSP by reference to the evidentiary record. In addition, apparently accepting the Commission's "approval" of the stipulation at face value, the Court held that OCC should receive those agreements between CG&E and other parties to the proceedings that it had requested in discovery, finding that those agreements could be relevant to the narrow issue of whether the stipulation resulted from "serious bargaining among capable, knowledgeable parties" – the first element of the three-part test this Commission employs in deciding whether or not to approve a stipulation by some, but not all, parties.

H. The Unnecessary and Unfair Involvement of Cinergy Corp and Duke Energy Retail Sales, LLC in the Post-Remand Discovery Process.

In December 2006, CG&E complied with the Supreme Court of Ohio's opinion and provided OCC with the single contract responsive to OCC's May, 2004 motion to compel by producing a February, 2004, contract between CG&E and the City of Cincinnati, Ohio. While the City had appeared in the RSP case and was aware of the stipulation, it ultimately chose to withdraw – without supporting the stipulation.

Recognizing at last that it's "victory" before the Supreme Court of Ohio was a hollow one because the only agreement responsive to its discovery request was obviously and entirely irrelevant to the issue identified by the Supreme Court, and notwithstanding that it had not sought any other discovery in 2004, OCC sought to expand discovery based on allegations made in a separate lawsuit filed in federal court. As a result, on December 13, and December 18, 2006, OCC demanded that agreements between DERS (an entity formed by Cinergy to compete in the Ohio market as a competitive retail electric service provider) or *any* corporate affiliate of DERS with *any* customer of CG&E be produced. DERS objected to that request and moved to quash the subpoena.

On January 2, 2007, the attorney examiner correctly concluded that OCC's discovery request was too broad. Nonetheless, and even though the mandate of the Ohio Supreme Court had already been satisfied, the attorney examiner granted OCC a limited expansion of its discovery. OCC was permitted to discover any agreements between DERS and any party to the RSP case. After obtaining this expanded discovery, OCC served a similar subpoena duces tecum upon Cinergy.

When they received subpoenas compelling them to produce commercial contracts to which they are parties, Cinergy and DERS moved, and were granted the right, to

intervene to protect their commercial agreements from public disclosure. Cinergy and DERS asked the Commission for the protection to which their agreements are legally entitled pursuant to Ohio's Trade Secrets Act, Ohio Revised Code § 1333.61(D), the federal Trade Secrets Act, 18 U.S.C. § 1905, and this Commission's rules, O.A.C. § 4901-1-24.

I. Cinergy and DERS' Responses to OCC's Subpoena.

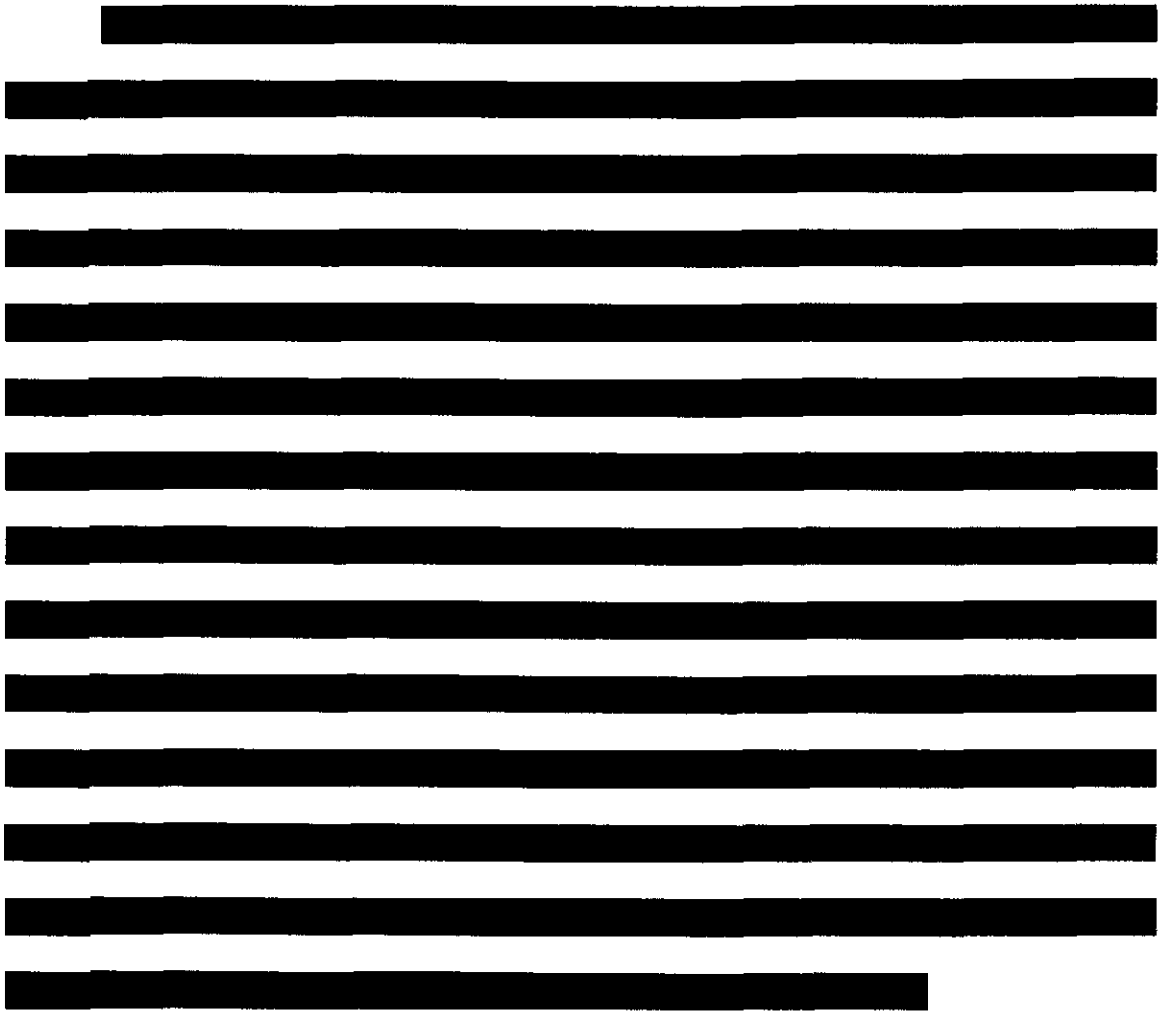
In response to the subpoenas from OCC, Cinergy produced two agreements and DERS produced a total of thirty-one agreements to OCC. Had OCC issued its ***2007*** subpoenas to Cinergy and DERS in 2004 and had OCC's ***2007*** discovery demands upon DERS and Cinergy been granted at the time OCC moved to compel production from CG&E on May 20, 2004, Cinergy would have had ***no*** agreements to produce and DERS would have produced ***two*** agreements [redacted] Thus, the ***only*** agreements produced to OCC by Cinergy and ***twenty-nine*** of the thirty-one agreements produced to OCC by DERS in 2007, would not have been produced to OCC in response to its May 20, 2004, motion to compel for the simple reason that they did not exist until *after* the date of the stipulation, OCC's discovery request, and the evidentiary hearing held during 2004.[4]

[4] The next closest agreement in time to the date of the stipulation is an agreement between DERS and [redacted]

III. FACTS: THE CONTRACTS PRODUCED BY DERS AND BY CINERGY.

A. Contracts in which DERS Agreed to Provide Service to its Customers.

Not surprisingly, the DERS agreements concern DERS' efforts to secure customers for itself. Each DERS agreement reflects DERS' economic decisions based upon publicly available information regarding the status of the PUCO's RSP case and the likely market for electric generation service in Ohio. Any CRES monitoring the case could have used the same information, including the nature of the opposition to CG&E's RSP, in the same way that DERS used that information.



[redacted]

In both cases, of course, CG&E's proposals were matters of public record, the opposition of the intervenors was similarly public record, and any CRES pursuing market share could have offered prices based upon the same publicly available information used by DERS to create a pricing mechanism attractive to the load CRESes would logically most want to serve.

B. The DERS [redacted] Agreements.

[redacted]

[redacted]

C. The Kroger Agreements.

[redacted]

D. The Cinergy Agreements.

[redacted]

[5] Mr. Ficke is now a retired consultant to DE-Ohio.

[redacted]

III. LAW AND ARGUMENT

OCC – an entity created and charged by law exclusively with the representation of residential customers of Ohio utilities – produced one witness to testify regarding the contracts produced to OCC by Cinergy and DERS. That witness, Beth Hixon, neither qualified to render legal opinions nor offering any direct factual testimony, was presented

[6] Mr. Ficke was later asked questions in which he identified Tri Gen, a/k/a Cinergy Solutions as the specific Cinergy affiliates concerned with potential development of cogeneration. (Ficke Depo. at 76.)
[7] Increased unemployment in the Cincinnati area has both direct and indirect effects on demand for still other Cinergy-provided services, including electric power provided by CG&E.

to advocate OCC's position that the Commission should investigate DERS and Cinergy for reasons that are not clear:

- Ms. Hixon does not suggest – in fact, Ms. Hixon does not even discuss – any impact any DERS or Cinergy contract has upon the price paid by residential consumers. For that matter, Ms. Hixon does not suggest that ***any*** of the contracts impact ***any*** price paid by ***any*** customer to CG&E.
- Ms. Hixon acknowledged that she has conducted no studies which suggest ***any*** way in which ***anyone***, in ***any*** rate group, might suffer an injury as a result of contracts that Cinergy or DERS produced and she acknowledged that she is unaware of ***any*** such studies. (Hixon Testimony, pp. 125-130.)
- Ms. Hixon also testified that she conducted no studies and is unaware of any that demonstrate that the DERS contracts were entered into at prices that were unreasonable in relation to the late 2004 – early 2005 market conditions. (Hixon Testimony, p. 118.)
- Ms. Hixon was also unwilling to testify that DERS, Cinergy or CG&E have violated this Commission's corporate separation rules. (Hixon Testimony, pp. 64-66, Transcript of Hearing Vol. III, March 21, 2007 (hereafter "Hixon Cross"), pp. 142-143.)

Nonetheless, OCC insists, based entirely upon Ms. Hixon's testimony, that this Commission investigate Cinergy and DERS to determine whether they violated the corporate separation rules of this Commission, OAC § 4901:1-20-16.

[redacted]

[redacted]

A. The Cinergy and DERS Agreements Had No Effect on the Outcome Of CG&E's RSP Case.

The Ohio Supreme Court remanded this matter to this Commission for two purposes, only the second of which is relevant to DERS and Cinergy. The Court held that OCC should have received the discovery it requested in 2004 (not that which it requested in 2007), and that the Commission should determine whether any agreements produced in response to that discovery were relevant to the issue of whether any stipulation approved by the Commission was the product of "significant bargaining among capable, knowledgeable parties." Ms. Hixon does not address these points in her testimony because first, discovery in 2004 would have yielded only one agreement between CG&E and another party and that party did not support the stipulation, and second, because no stipulation was ever accepted by the Commission.

Instead, OCC seeks to recast the entire focus of the Supreme Court's opinion by advocating that the Commission engage in an investigation based on "common threads" between the agreements. (Hixon Testimony, p. 45.) Ms. Hixon asserts that the net effect of her "threads" is to insulate large customers of CG&E from the rate increases proposed in the stipulation, which she then posits must mean that the company's stipulation did not have substantial support of CG&E's customers. (Hixon Testimony, p. 59.)

First, and most obvious, the record in this matter shows that CG&E's proposals were never accepted by this Commission – the support of CG&E customers for CG&E's proposals therefore is ultimately irrelevant. OCC recognizes, of course, that the stipulation was rendered irrelevant by the Commission's Entries of September and November 2004. In fact, OCC itself has argued that this Commission rejected the stipulation. *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (OCC's Memorandum Contra CG&E's Application for Rehearing at 3 n. 3, Nov. 8, 2004). OCC is now judicially estopped from asserting otherwise *Fish v. Bd. of Commissioners of Lake County* (1968), 13 Ohio St. 2d 99, 102; *State v. Nunez* (Ohio App. 2d Dist. 2007), 2007-Ohio-1054, 2007 WL 756517. at ¶ 6.

Second, the record in this matter shows that all customers that received service from CG&E pay the same Commission-approved price for that service. While it is the case that [redacted]

B. Neither Cinergy nor DERS Have Violated the Corporate Separation Rules of This Commission.

Prior to the hearings on remand, Cinergy and DERS repeatedly asked that those intimating violations of the corporate separation rules be directed to pursue their allegations properly using the complaint processes applicable to the corporate separation

rules. Both Cinergy and DERS also objected to the introduction of their contracts into evidence in these proceedings when OCC sought to introduce them not to address the issues on remand but instead to support its vague allusions of misconduct.

1. Ms. Hixon's "Common Thread" Analysis Reveals Nothing but Commercial Contracts that Contain Terms One Would Anticipate.

Nonetheless, OCC succeeded in injecting the agreements into these proceedings. OCC relies solely upon Ms. Hixon to explain its actions. Ms. Hixon, in turn, asks this Commission to view with suspicion what she refers to as the four "common threads" that run through all the agreements. Ms. Hixon's "common threads" are:

- The contracts deal with the purchase of power from DERS;
- The contracts contain what Ms. Hixon describes as the "reimbursement" of various rate elements;
- The contracts provide that DERS' customers will support the CG&E stipulation; and
- The contracts provide that the agreements will be terminated in the event the Commission fails to approve the stipulation.

In response to each of Ms. Hixon's "common threads," DERS and Cinergy can only respond: "Well of course." DERS was formed for the specific purpose of operating a CRES business. Necessarily, it seeks to sell generation services to customers. It is not surprising, nor does it indicate a nefarious purpose, that DERS would enter into contracts in which it agrees to sell power to customers. Thus, Ms. Hixon's first thread is meaningless.

Ms. Hixon's statement of her second "common thread" is somewhat misleading. DERS does not "reimburse" its customers under the contracts. Viewed in their correct context, and as Ms. Hixon herself admits, the structure of the DERS contracts, generally,

provide for specific discounts applied to a baseline determined by DE-Ohio's rates. Ms. Hixon admits that in the abstract there is nothing wrong with such a structure and that it may be reasonable to adopt such a structure. (Hixon Cross, pp. 32-34.) Ms. Hixon apparently objects that the level of discounts is determined through relationships to various components of DE-Ohio's RSP. However, as discussed above, DERS' pricing structure is based upon publicly available information and reflects nothing more than the application of sound marketing principles.

Ms. Hixon is somewhat less than clear why she believes her third "common thread" should concern this Commission. Both the "Pre-Order contracts" and "the Pre-Rehearing contracts" – to borrow Ms. Hixon's terminology – are based upon the parties' understanding of the economic consequences that would result from this Commission's anticipated approval of CG&E's prices, and a desire to secure economic benefits out of those consequences. As a result, the parties naturally would support an outcome that would secure them the anticipated economic benefit.

It is equally difficult to understand Ms. Hixon's concern with her fourth "common thread," which is related to the fact that the contracts all contain language nullifying the contracts in the event this Commission chose not to approve the stipulation (or later, the alternative proposal by CG&E). Failure by this Commission to approve the stipulation (or the alternative) would obviously change the economic equations upon which the parties had based their agreements. Because the parties recognized the potential that this Commission might not act in accord with their expectations, they sought to protect themselves against such an event. Ms. Hixon's "common threads", therefore, are merely

logical economic terms, are in no way remarkable, and certainly do not justify OCC's demands for an investigation.

2. CG&E Did Not Negotiate DERS' Agreements.

Although not described as one of her "common threads," Ms. Hixon expresses a fifth concern in that she claims that CG&E was directly involved in the negotiation of the DERS agreements, asserting that CG&E (1) was represented in those negotiations by its President, Mr. Greg Ficke, and (2) that CG&E bound itself to various actions in those agreements. Ms. Hixon bases her claim that CG&E negotiated DERS' agreements on the statement that Mr. Greg Ficke, the former president of CG&E admitted in his deposition that he was involved in the negotiation process on behalf of CG&E. (Hixon Testimony, p. 28.)

This is emphatically *not* the testimony of Mr. Ficke, who was both CG&E's president and a Cinergy Vice President at the time in question. Excerpts from Mr. Ficke's deposition, quoted at considerable length below, reveal that Ms. Hixon has distorted Mr. Ficke's testimony and her interpretation of his testimony ignores its context entirely:

> Q. Who in the CG&E and affiliated companies negotiated these agreements?
> A. There were a number of lawyers involved. There were representatives from Cinergy Retail Sales that were involved.
>
> Q. And who would that be?
> A. From the Legal department would be Paul Colbert, Jim Gainer. From Cinergy Retail Sales, Jason Barker, Jack Farley, Uma . . . Nanjundan. . . . Chuck Whitlock. There were a number of people that I recall being involved from time to time.
>
> Q. And that was with the negotiations.
> A. Either with the – and it depends how you define "negotiations." I mean, there's a lot of preparation for negotiations which a lot of people are involved in. They aren't all involved in sitting across

the table if that that's how you're defining "negotiations." I was more defining people that were involved with the process.

(Ficke Depo., pp. 29-31.)

Q. A little while ago you mentioned who were several individuals that were involved in negotiating agreements between CRS and other parties in the May time frame. Was there a CG&E representative involved in that process considering all the provisions in this, for instance, Exhibit 5 that relate to Cincinnati Gas & Electric Company.

A. I was involved in it.

Q. Okay. Anybody else besides you? You were involved in the negotiations of these agreements, is that correct?

A. I was involved in the preparations of information, reviewing information, ***those sorts of things in my role as a vice president of Cinergy Corp.*** I guess if you're asking for someone involved in the negotiations who is exclusively a CG&E employee, you know like maybe some of the workers on the coal pile at some of these stations, they're CG&E employees, they only work for a CG&E plant, I don't think there was anybody involved in the negotiations that was like that.

Q. So the only people who would be in some way connected with CG&E would be you as President and also legal counsel that represented more than one corporation.

A. Yeah, and there were a number of Cinergy Services folks that did work for a number of the affiliates. And Legal is a good example of that, being Cinergy Services and doing work for a number of different affiliates.

Q. Mr. Barker and Mr. Farley and Ms. Nanjundan and Mr. Whitlock are all examples of that?

A. I don't know what their classification is, but I would not be surprised if they were Cinergy Services employees.

Q. Were you referring to anybody besides that group of Cinergy Services, Inc. employees that would have been involved in the process of negotiating those agreements?

A. No, although I just – I don't mean for that to be an exhaustive list.

. . .

(Ficke Depo., pp. 35-37 (emphasis supplied).)

Q. . . . Mr. Steffan's name appears on this; can you tell me what his role was in the process?

A. Jack was Vice President of Rates, Cinergy Corp.

. . .

Q. Do you know what his role in negotiations of the agreements with parties at this particular point in time?

A. I should have mentioned him in that group of names that I mentioned before, so either preparing information, attending meetings, problem solving, any of those functions it would have been typical for Jack Steffan to participate in.

(Ficke Depo., pp. 46-47.)

Q. What was your involvement, either directly or in the background, with the [redacted] agreements . . . ?

A. I reviewed draft of the documents, probably provided comments, explained at a high level what the contents of the agreements were. So generally involved in the negotiations with the support of a number of the people we've talked about.

(Ficke Depo., p. 77.)

Thus, Mr. Ficke's testimony does not support Ms. Hixon's statement. Instead, Mr. Ficke identifies himself as virtually the only person associated with CG&E that could even be said to be involved in the negotiations, and he makes it clear that his involvement resulted principally from his role as a Cinergy Vice President, not as President of CG&E. Moreover, Mr. Ficke makes it clear that in even that capacity, his involvement was indirect and principally involved providing and reviewing information. Mr. Ficke certainly does not suggest that he *ever*, in *any way*, was involved in making an economic decision on behalf of DERS.

3. CG&E Is Not Legally Bound by DERS Agreements.

Finally, Ms. Hixon suggests that this Commission should be troubled by provisions within the DERS and Cinergy agreements which she states "binds" CG&E to some action. Again, Ms. Hixon is not a lawyer and it is improper for her to express any

opinion regarding the legal effect of an agreement made by one entity upon another entity not party to that agreement. Moreover, Mr. Ficke's testimony again refutes her suggestion.

During his deposition, Mr. Ficke was asked to explain contract terms that refer to CG&E. Mr. Ficke's response was clear:

> Q. And were you aware that there were commitments made in agreements such as that shown in Exhibit 2 regarding the manner in which CG&E would submit its next distribution rate case?
> A. I think I was generally aware of it, and I think at the time I did ask our Rate department whether these were things that we were going to do anyway, something to that effect. Is this really any – does it really cause us any problem? Is it something we were going to do anyway? And I believe that that was the case. It wasn't something binding us in any way because it was what we were going to do in any event.
>
> Q. So do you believe that CG&E fulfilled the, for lack of a better word, dictates of that paragraph 5?
> A. I don't think this could dictate what we did or didn't do. My belief is that this is how we were approaching the case in any event.

(Ficke Depo., pp. 28-29.)

Mr. Ficke's response cannot be more clear. He was not concerned by the fact that a simple statement of fact was being included in the agreement, nor did he view the statement as in any way binding upon CG&E. Ms. Hixon's concern is without merit. The inclusion of a statement of fact regarding DE-Ohio's plans does not legally bind DE-Ohio.

C. The Cinergy and DERS Contracts Do Not Constitute Unlawful Discrimination by DE-Ohio Among Its Large Commercial and Industrial Customers.

The one allegation of wrongdoing that Ms. Hixon does appear prepared to actually support is her allegation that the agreements represent DE-Ohio's

"discrimination" in favor of certain customers. Neither the evidence nor the law, however, supports Ms. Hixon's analysis.

Initially, the contracts are those of DERS and Cinergy, not DE-Ohio. DERS and Cinergy are unregulated commercial entities entitled to enter into any agreements they choose, with any party they choose, without the necessity of justifying those agreements or seeking approval of those agreements from anyone other than their own respective boards of directors. In short, neither has an obligation to serve, and neither has an obligation to deal with customers on a non-discriminatory basis. Both are free to strike deals on whatever economic terms they can obtain.

Applying Ms. Hixon's allegation to CG&E – a regulated entity to which the concept of "discrimination" might properly be applied – is equally unavailing. There is no evidence in the record to even suggest that any customer of DE-Ohio pays DE-Ohio anything other than the tariffed rates approved by this Commission. No evidence suggests that DE-Ohio receives any more than the revenues it is authorized by this Commission to receive. No evidence suggests that DE-Ohio receives any less than the revenues which this Commission authorized it to receive. Furthermore, no evidence suggests that any residential customer pays anything more than it otherwise would pay for retail electric generation.

D. OCC's "Miscellaneous" Intimations Regarding the Agreements Are Equally Without Merit.

Finally, Ms. Hixon's testimony contains a number of statements in an attempt to support insinuations of improper discrimination or violations of the corporate separation rules. These slightly more specific insinuations of wrongdoing demonstrate the lack of legal substance to Ms. Hixon's concerns.

For example, Ms. Hixon asserts that one of her concerns with the agreements is that the net effect of the agreements allows some customers to avoid paying DE-Ohio the RTC this Commission approved in CG&E's ETP case. Ms. Hixon stated that she had been advised that the avoidance of the RTC in this manner was unlawful. (Hixon testimony, p. 69.) Of course, Ms. Hixon, who is not a lawyer, was forced to admit on cross examination that she was unaware that that Am. Sub. S. B. 3 expressly permits third parties to pay the RTC charges of others. (Hixon Cross, p. 135.); *see also* R.C. § 4928.37.

Similarly, Ms. Hixon professes concern that the Agreements somehow will influence this Commission's decision to grant waivers of this Commission's rules to DE-Ohio. Ms. Hixon ignores the fact that CG&E did not exactly "request" waivers to this Commission's rules. Instead, *this Commission* asked CG&E to propose an RSP. This Commission was obviously aware when it did so that any such filing by CG&E would not conform to Rule 35 of this Commission's rules.

Similarly, Ms. Hixon complains that none of CG&E's filings conformed to those portions of Rule 35 which govern standard service offers and CBP processes. (Hixon Testimony, pp. 57-58.) Again, Ms. Hixon fails to acknowledge that CG&E filed its original application a full year before this Commission adopted Rule 35, or – again – that the week before this Commission adopted Rule 35 the Commission asked CG&E to submit an RSP that it knew would inevitability not conform to Rule 35.

Ms. Hixon also complains that CG&E "excluded" OCC from negotiations regarding the stipulation. (Hixon Testimony, p. 56.) As the record shows, however, this statement is simply not true. First, the evidence demonstrates that CG&E conducted

extensive negotiations with all parties to these proceedings that cared to engage in such negotiations. (Supplemental Testimony of Richard C. Cahaan filed May 24, 2004, Staff Exhibit 2, pp. 1-2.) Even if it had not done so, however, there is no requirement of law that compels CG&E to negotiate with all parties, or indeed with any parties to a litigated case. Furthermore, there is no requirement of law that compels all parties to a case to agree to a particular stipulation in order for that stipulation to be submitted to this Commission for its consideration.

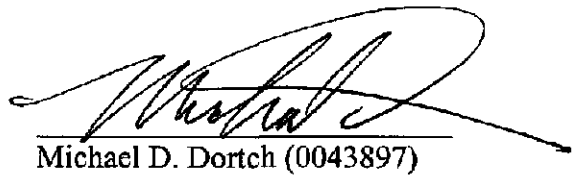
To the extent that OCC complains that at least some negotiations occurred outside its presence, however, it should be remembered that record evidence also demonstrates that OCC itself negotiated with parties to the proceeding while "excluding" CG&E from participation in those negotiations. (*See* DE-Ohio, Remand Exhibit 22.) Moreover, the record demonstrates that OCC regularly enters into confidential settlement agreements with parties that are not filed with this Commission. For example, the record shows that CG&E paid $750,000 to OCC and the Ohio Department of Development as part of the resolution of CG&E's ETP case in the year 2000, and yet the settlement agreement in which it agreed to do so was not filed with this Commission. OCC, of course, supported the stipulation filed with this Commission in that matter. Similarly, the record shows that OCC entered into a secret agreement with Dayton Power & Light Co. ("DP&L") in DP&L's ETP case that was not filed with this Commission in conjunction with the stipulation. This agreement became public knowledge only when OCC later demanded that this Commission enforce that agreement, of which this Commission had no prior knowledge.

To be clear, neither DERS nor Cinergy accuse OCC of engaging in illegal or even improper conduct. Except as it may be constrained by Ohio's open records laws, OCC is entitled to negotiate with others, publicly or privately. DERS and Cinergy will point out, however, that OCC's attempts to describe the process through which the parties to the RSP negotiated the stipulation as something improper or illegal is incredibly duplicitous, given OCC's willingness to engage in the same conduct.

V. CONCLUSION.

For the foregoing reasons, this Commission should ignore OCC's red herring arguments and issue an entry determining that it is satisfied that the Cinergy and DERS contracts are beyond the jurisdiction of this Commission.

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 13th day of April 2007.

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