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

PUBLIC VERSION

Michael D. Dortch (0043897)
KRAVITZ, BROWN & DORTCH, LLC
145 East Rich Street
Columbus, Ohio 43215
Tel: 614-464-2000
Fax: 614-464-2002
E-mail: mdortch@kravitzllc.com

Attorneys for
CINERGY CORP. and
DUKE ENERGY RETAIL SALES, LLC

I. INTRODUCTION

Cinergy Corp. ("Cinergy") and Duke Energy Retail Sales, LLC ("DERS") fully endorse the position taken within the Initial Brief on Remand Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio. As staff indicates, it is indeed important in this proceeding that one's eye remain on the ball.

The "ball," for purposes of this phase of the proceeding, was defined on November 22, 2006, by the Supreme Court of Ohio. The Court remanded this case to the Public Utilities Commission of Ohio ("Commission") for further consideration of two issues. Neither of the issues identified by the Court was related, in any way, to Cinergy or DERS. Neither issue involved Cinergy or DERS. Neither issue concerned Cinergy or DERS.

One of the two issues involved a narrow legal question: Whether the State of Ohio recognizes a "settlement privilege." The Ohio Consumers' Counsel ("OCC") had demanded that The Cincinnati Gas & Electric Company, n/k/a Duke Energy Ohio ("DE-Ohio"), produce copies of all agreements between DE-Ohio and the signatories to a stipulation filed in this case. DE-Ohio objected to providing OCC with this discovery on several bases, including a claim of settlement privilege. OCC then moved to compel production. Based upon Commission precedent, the hearing examiner denied OCC's discovery demand, and this Commission later approved that decision.

On appeal, the Supreme Court of Ohio disagreed with opinions expressed by both this Commission and the United States Court of Appeals for the Sixth Circuit regarding the existence of a settlement privilege and declined to recognize such a privilege. Because OCC claimed that the existence and terms of the agreements it had asked to be

produced ***could*** be relevant to the "genuineness of the bargaining" between DE-Ohio and the parties to the stipulation presented to the Commission on May 19, 2004, the Supreme Court ordered this Commission to compel disclosure of the information subject to OCC's discovery request. The Court then concluded that following production of the requested information to OCC, the Commission ". . . may, if necessary, decide any issues pertaining to admissibility of that information." *Ohio Consumers' Counsel v. Pub. Util. Comm'n.*, 111 Ohio St. 3d 300, 2006-Ohio-5789, at ¶ 94.

The "ball" then returned to the Commission's court. One week after the Supreme Court of Ohio issued its opinion, the attorney examiner ordered DE-Ohio to disclose to OCC "the information requested with regard to side agreements." Finding and Entry, Nov. 29, 2006. DE-Ohio complied by producing a copy of the one and only agreement responsive to OCC's discovery request – an agreement between DE-Ohio and the City of Cincinnati. On December 7, 2006, DE-Ohio filed notice that it had complied with the attorney examiner's order.

OCC then fumbled the "ball" after it learned that the response to its discovery demands provided no support for the arguments it hoped to make. Ignoring the scope of the Supreme Court of Ohio's remand, OCC issued a subpoena duces tecum to Mr. Charles Whitlock, the president of DERS. OCC demanded that Mr. Whitlock submit to deposition, and that he produce copies of all agreements between DERS or any affiliate of DERS and any customer of DE-Ohio.

DERS moved to quash OCC's subpoena. The hearing examiner, however, ordered DERS to produce copies of all agreements between DERS and any party to this

case. OCC subsequently issued a subpoena duces tecum to Cinergy. The subpoena to Cinergy was identical in scope to that with which DERS had been ordered to comply.

Cinergy and DERS complied with OCC's subpoenas, producing a total of thirty-three contractual arrangements to OCC. Both were then forced to seek and obtain limited intervention in this case in order to protect their confidential business relationships and trade secret information from being publicly disclosed. After OCC accused both DERS and Cinergy of numerous violations of Ohio law, both were forced to seek and obtain full intervention in this matter in order to explain and defend the agreements that they had produced.

At this point in time, at least from the perspective of Cinergy and DERS, the "ball" appears to have been largely forgotten. Instead, mischaracterizing the agreements produced to them, OCC and others demand an investigation of DE-Ohio, DERS, and Cinergy. Cinergy and DERS urge the Commission to stop this abuse of DE-Ohio, DERS, Cinergy, and the agreements that DERS and Cinergy have been compelled to produce. The Commission should recognize and find that the agreements are valid commercial contracts that are irrelevant to the outcome of these proceedings. Further, the Commission should Order all parties to protect and preserve the confidentiality of the information DERS and Cinergy have produced.

II. LAW AND ARGUMENT

A. The Contracts Are Valid, Enforceable Agreements Between Commercial Parties, Each of Whom Is Performing Its Obligations.

Two drastically opposing points of view regarding the agreements produced by Cinergy and DERS are presented in this case. In one view – the view held by the parties who negotiated the terms of the various agreements and who are required to perform

those terms – the agreements are unremarkable commercial transactions entered into for legitimate business purposes. As a result of this proceeding, the agreements have been presented to this Commission and explained, in full. After its own examination of the contracts, Staff properly accepts this view as the correct one, and this Commission should issue an opinion stating that it is satisfied with the explanation of the agreements offered by Cinergy and DERS.

In the other view – expressed by the OCC, the Ohio Marketers Group ("OMG") and Ohio Partners for Affordable Energy ("OPAE") – these agreements somehow suggest a conspiracy to violate Ohio law.[1] In this view, each of the agreements is a sham transaction entered into by DE-Ohio through its affiliates, DERS and Cinergy, solely in order to purchase support for DE-Ohio's proposed RSP. This second view strains credulity. Moreover, this second view requires this Commission to overlook ***one fact*** that is fundamentally inconsistent with the view that OCC, OMG and OPAE are attempting to support. That ***one fact*** is determinative and concerns the parties' entry into and performance of [redacted]

DERS and Cinergy have explained these contracts to this Commission. They have explained how the agreements were negotiated, when they were negotiated, and why they were negotiated. They have explained that all of the agreements (excepting the agreement to which Cinergy is a party, which has also been explained in full) are based on DERS' marketing strategy and publicly available information. They have shown that the parties to these agreements are performing under the terms of the agreements. They

[1] *See* Initial Post Remand Brief, Hearing Phase I, By The Office of the Ohio Consumers' Counsel, ("OCC's Merit Brief") pp. 59-64; Initial Post Hearing Brief of the Ohio Marketers Group ("OMG's Merit Brief"), pp. 17-21; Ohio Partners for Affordable Energy's Initial Brief (OPAE's Merit Brief"), pp. 12-14. OPAE's view may be separate from that of OCC and OMG, as OPAE also appears to contend that any agreements of any kind, including the stipulation, violate Ohio law because the Commission and the parties are acting to avoid the restructuring legislation.

have demonstrated that the economic benefits and detriments of the agreements inure to DERS and Cinergy, and not to DE-Ohio. The explanation provided by DERS and Cinergy is therefore fully supported by the evidence.

OCC, OMG and OPAE's view is based upon an unsupported assertion that all the agreements are designed so that "Duke/CG&E get its consideration – the right to charge the RSP rates it wants."[2] The RSP price supported in the stipulation was ***NOT*** approved by this Commission, however. Moreover, the RSP price proposed by DE-Ohio on reconsideration was ***NOT*** approved by this Commission. Therefore, it is without question that DE-Ohio did ***NOT*** receive the "consideration" OCC, OMG and OPAE contend that it bargained for.

Because it unquestionably did not receive "its" consideration, DE-Ohio unquestionably had no legal obligation to perform "its" contracts. DERS and Cinergy are nonetheless spending, in the aggregate, in excess of $20,000,000 annually to perform their agreements. It is no answer to contend that the [redacted] were negotiated because the earlier agreements had been nullified. If the view espoused by OCC, OMG and OPAE were correct, DERS' and Cinergy's obligation to perform the contracts ended when "DE-Ohio" did not receive that for which it had bargained.

The concept of "consideration" is of course an essential and very specific one in the law of contracts:

> The essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration.

[2] OMG's Merit Brief, p. 12.

Kostelnick v. Helper, 96 Ohio St. 3d 1, 2002-Ohio-2985, at ¶ 19.

When a party to a contract fails to receive the consideration to which it is entitled under the contract, its obligation to perform that contract inevitably ceases. For example, if a party is not paid its consideration due to breach of the contract, the non-breaching party's performance is excused. *Garofolo v. Chicago Title Ins. Co.* (Cuyahoga County 1995), 104 Ohio App. 3d 95, 108.

Similarly, when the contract lacks consideration, and/or when the anticipated consideration fails, the performance of all parties is excused. 3 *Williston on Contracts* § 7:11 (4th ed.), 71 Ohio Jur. 3d, *Negotiable Instruments* § 191 (2006). Finally, as would be the case here regarding both the "Pre-Order" and "Pre-rehearing" agreements, the parties might expressly negotiate an end to their obligations if the bargained for consideration is not delivered. In *all cases*, however, a party is entitled to receive its consideration. When that consideration is denied to a party, the contract that addresses that consideration is unenforceable against that party.

The parties' negotiation of the [redacted] and their performance of those agreements reveal that the parties to those agreements ***are*** receiving the consideration for which they bargained. Therefore, the consideration supporting the contracts must, necessarily, consist of something ***other than*** that which OCC, OMG and OPAE insist is the true consideration for these contracts. The alternative offered by OCC, OPAE and OMG is logically inconsistent with the ongoing performance of the agreements by the parties, and thus is inconsistent with the evidence before this Commission.

Because the [redacted] themselves are inconsistent with their theory, the OCC, OPAE, and OMG rely upon other, at best equivocal, evidence to support their position. They argue, for example, that Mr. Ficke's presence during negotiations of certain agreements demonstrates DE-Ohio's involvement in those negotiations, despite the fact that when reviewed without a predetermined bias, Mr. Ficke's testimony clearly indicates that no DE-Ohio personnel were involved in those negotiations and that his own role during negotiations was limited and involved his position as a vice president of Cinergy, not his position as an officer of DE-Ohio.[3] Similarly, OCC and OMG point to an e-mail in which Mr. James Ziolkowski – an employee of Cinergy Services who the evidence shows had no role in negotiating the agreements and who had never even seen most of the agreements – speculates regarding the origin and intent of the agreements as "proof" that the agreements are shams.

OCC, OPAE and OMG also ignore other evidence inconvenient to their view. They ignore the fact that all but three agreements[4] were negotiated and entered into *after* the stipulation was filed. They ignore the fact that the only agreements that became effective were all negotiated and entered into *months* after the stipulation was submitted, and in fact, *months* after the stipulation was rejected by this Commission. They ignore the fact that the income and loss associated with the agreements is reflected on DERS' books, not DE-Ohio's. They even ignore OCC's own witness, who confirms that she

[3] *See* The Merit Brief of Cinergy Corp. and Duke Energy Retail Sales, pp. 20-22.

[4] Those three agreements are the [redacted] and a February 2004 agreement between the City of Cincinnati and DE-Ohio, subsequently amended (after the stipulation was filed) in July 2004. The Commission should note that the City did not intervene in the case until April, withdrew approximately six weeks before the amendment was executed, and withdrew without signing the stipulation in any event.

possesses nothing to even suggest that DE-Ohio is attempting to recover in rates any of the [redacted] payments:

> Q. In any of your discovery, in any of your investigation, in any of your anything have you uncovered the attempt of the utility to try to recover in rates any of the [redacted] payments or any of the amounts at issue here?
> A. In the review and discovery I have done I have not found that.

Transcript of Hearing Vol. III, March 21, 2007 (hereafter "Hixon Cross"), p. 136.)

The Commission should not be fooled by these transparent efforts to 'spin' the evidence and to ignore other evidence. In the end, OCC, OPAE and OMG cannot explain the existence of the [redacted] through their theory. DE-Ohio's proposed RSP was rejected by this Commission. DE-Ohio's alternative proposal was rejected by this Commission. DE-Ohio did not receive the consideration for which it had bargained under the theory espoused by OCC and OMG, and as a result its obligations were at an end. There could be no reason for DERS to enter into the [redacted] if OCC, OPAE and OMG are correct.

The DERS [redacted] therefore would not even exist if in fact they merely document "sham transactions" in which DE-Ohio was paying parties to this Commission's decisions for a particular desired outcome. The fact that they do exist demonstrates that DERS was pursuing customer contracts from which it fully expected to profit, and from which (despite market conditions that have to date prevented it from taking advantage of its investment) it still hopes to derive a profit. DERS entered into those contracts *after* the stipulation and the alternative proposal had been rejected and its performance of those agreements is

inconsistent with the theories of OCC and OMG. Similarly, Cinergy's performance of its "pre-rehearing agreement" cannot be explained in the view of OCC and OMG. Again, if OCC and OMG are correct, Cinergy has no legal obligation requiring its performance – and yet it is performing its agreement.

B. The Contracts Deserve The Protection Of Law.

Under Ohio law, the term "'Trade secret' means information, including . . . business information or plans, financial information, or listing of names, addresses, or telephone numbers that satisfies both of the following:

(1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

(2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Ohio Revised Code § 1333.61(D). Trade secret information is entitled to protection under Ohio's trade secrets act, R.C. § 1333.61, Ohio's "public records act," R.C. § 149.011, and under the federal Trade Secrets Act, 18 U.S.C. § 1905, and Freedom of Information Act, 5 U.S.C. § 552(b)(4).

Cinergy and DERS have maintained and continue to maintain that the contract, related documents, and information derived there-from are not public records at all. In this case, the hearing examiner accepted the contracts into evidence conditionally, pending this Commission's final disposition of the issue of their admissibility. (Transcript of Hearing Vol. I, March 19, 2007, p. 9.) Cinergy's documents and information do not even qualify as a "public record" unless and until this Commission admits them into evidence. Section 149.43(A)(1) of the Ohio Revised Code, in relevant

part, defines "public record" as "*records* kept by any public office . . . ." According to Chief Justice Thomas Moyer:

> [T]he definition of a 'public record' must be read in conjunction with the term 'record.' Section 149.011(G) defines 'record' to include 'any document . . . created or received by or coming under the jurisdiction of any public office . . . which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.' Thus, ***to the extent that an item does not serve to document the activities of a public office, it is not a public record."***

Moyer, J., *Interpreting Ohio's Sunshine Laws: A Judicial Perspective*, 59 N.Y.U. ANN. SURV. AM. L. 247 (2003) (Emphasis supplied).

To the extent that this Commission admits the agreements into evidence in these proceedings and they thereby become public records, the DERS and Cinergy contracts remain entitled to protection under Ohio and federal law. The contract that Cinergy seeks to protect contains the terms of an economic development assistance agreement between Cinergy and another corporate citizens of Ohio. The sensitive information contained therein includes information regarding the nature of the service purchased by the counterparty, the specific Cinergy subsidiary which is to provide electric service to the counterparty, the level and duration of Cinergy's assistance to the counterparty, the amount of load that the counterparty may add to the Duke Energy-Ohio system subject to the agreement, and the terms upon which either party may end the agreement.

The contracts that DERS seek to protect contain the economic terms of agreements that 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 [redacted]

[redacted] Such information is plainly protected as confidential business information and trade secrets under law.

C. The Agreements Are Irrelevant To These Proceedings.

This case is not an appropriate vehicle for a generalized inquiry into the business practices of entities related by corporate affiliation to DE-Ohio, as OCC and others demand – and yet the agreements were offered into evidence for no other purpose. This case is ultimately about the Commission's balance of three competing goals: rate certainty for consumers, financial stability for DE-Ohio, and the continuing development of a competitive market for electric services within the DE-Ohio service territory. Within that structure, this Commission was compelled to consider and approve the reasonableness of the market-based standard service offer prices charged by DE-Ohio for service to DE-Ohio customers.

The agreements are irrelevant to the Commission's attempt to balance these three competing goals. They are irrelevant to its evaluation of DE-Ohio's prices. The Commission considered a stipulation submitted by some, but less than all, parties. That stipulation was, as DERS and Cinergy have demonstrated, exactly what it appears to be: an agreement in which DE-Ohio agreed to modify its proposed RSP in a manner benefiting the signatories to the stipulation, and certain parties to these proceedings agreed to support DE-Ohio's proposed RSP, as so modified.

First, this Commission should not forget that the stipulation enjoyed a broad level of support. As the Commission noted in its discussion, the stipulation was supported by:

> knowledgeable and capable stakeholders from every type of participant in the CRES market, including [DE-Ohio], two residential CRES providers,

> one commercial and industrial CRES provider, three organizations representing commercial and industrial customers, a commercial consumer, an industrial consumer, and two organizations representing residential consumer interests. Further, these parties are represented by counsel with experience in utility matters.

Opinion and Order, Sept. 29, 2004, p. 12. Even if the support of parties to every alleged "side agreement" is discounted entirely and thus the support of three organizations representing commercial and industrial customers, a commercial consumer, and an industrial consumer is unfairly ignored, the stipulation would *still* have had the support of the affected utility, three residential and industrial CRES providers, and two interest group organizations representing residential consumers. Furthermore, while operating under the hypothetical that the support of parties to alleged "side agreements" should be ignored, it is also true that *no one with a legitimate claim to represent the commercial and industrial constituencies opposed the stipulation.* Thus, no broad opposition to the stipulation occurred.

The Cinergy and DERS agreements obviously have no relevance to the merits of the stipulation itself. As this Commission noted in its Entry on Rehearing in this matter:

> Even if . . . not privileged, information relating to side agreements is not relevant to the determination of this matter. As stated in the *Dayton* opinion, "the Commission would note that no agreement among the signatory parties to the stipulation can change the terms of the stipulation. Either the terms of the stipulation are, on their face, beneficial to the ratepayers and the public or they are not. Even if there were side agreements among the signatory parties, those agreements would not change the public benefit or detriment of the stipulation.

Entry on Rehearing, Nov. 23, 2004, ¶ 14. Thus, the stipulation remains what it was – an agreement by some, but less than all parties, to support an outcome ***that this Commission did not endorse and thus did not approve.*** Because the stipulation was not approved by

this Commission, the support of the parties to the stipulation is, in the end, itself irrelevant.

Had the Commission imposed the result contemplated within the stipulation, any agreement between DE-Ohio and parties to the stipulation might conceivably then have had some significance to the issue of whether all parties engaged in "serious bargaining" under the three-prong test approved in *Consumers' Counsel v. PUCO* (1992), 64 Ohio St. 3d 123, 1125. The evidence in this case unequivocally, however, demonstrates that not one signatory to the stipulation entered into any such "side agreement" with CG&E. At most, OCC argues that the City of Cincinnati withdrew from the case based upon the existence of an alleged "side agreement." That agreement, however, was negotiated months before the stipulation, was amended after the close of the evidentiary hearing in the proceeding, and was a matter of public record as it required approval by the city council of the City of Cincinnati.

Unable to attack the motives of the signatories to the stipulation with evidence of agreements that do not exist, the OCC, OPAE, and OMG have tried to manufacture "DE-Ohio agreements" out of the Cinergy and DERS agreements. As discussed above, those arguments are illogical in the face of the evidence that the parties to those agreements are performing their obligations despite the fact that DE-Ohio did not receive the supposed consideration that it was "intended" to receive.

D. The Agreements Do Not Violate Ohio Law.

OMG and OCC also assert that the agreements violate various provisions of Ohio law. OMG asserts that the [redacted] are a "thinly veiled" utility service discount agreement, that the [redacted]

[redacted] violate R.C. § 4928.17(A) (the corporate separation statute), and finally that the [redacted] violate Ohio public policy as expressed within § 4928.02(G). OCC complains that the [redacted] provide for reimbursement of the RTC in violation of R.C. § 4928.37, that the "side agreements" are "discriminatory," and that each of the following corporate separation regulations has been violated:

4901:1-20-16(G)(1)(c):	"Electric utilities and their affiliates that provide services to customers within the electric utility's service territory shall function independently of each other. . . ."
4901:1-20-16(G)(4)(h):	"Employees of the electric utility or persons representing the electric utility shall not indicate a preference for an affiliated supplier."
4901:1-20-16(G)(4)(j):	"Shared representatives or shared employees of the electric utility shall clearly disclose upon whose behalf their representations to the public are being made."

Cinergy and DERS reiterate that these allegations are without merit, and in all events this proceeding is not a proper vehicle for their consideration. R.C. § 4928.16 expressly provides this Commission with jurisdiction to hear the complaint "of any person" regarding the obligations of any electric utility or any electric services company, and that section, and the rules adopted thereunder, describe the processes and procedures applicable to such a proceeding. Cinergy, DERS, and for that matter DE-Ohio are entitled to the burden of proof applicable in complaint proceedings, as well as the processes available under that section should OCC, OMG or anyone else desire to pursue

a complaint. Nonetheless, because OMG and OCC have chosen to raise those allegations within this proceeding, Cinergy and DERS are compelled to respond.

1. The Agreements Are Not Discriminatory.

Initially, OCC obviously does not even have standing to complain of "discrimination" in the context of which it raises this allegation. OCC represents residential consumers of this State. Its allegations plainly surround "discrimination" among members of the commercial and industrial consumer classes. OCC has no authority to represent industrial or commercial consumers of utility services. In the absence of standing – injury in fact – the Supreme Court of Ohio will not reverse an order of this Commission. The party seeking to reverse an order of this Commission must demonstrate that the order has a prejudicial effect as applied to that party. *Holladay Corp. v. Pub. Util. Comm'n.* (1980), 61 Ohio St. 2d 235.

Second, the only agreements that have been performed are the November 2004 agreement between Cinergy and [redacted] Only those agreements, therefore, could possibly support a claim of "discrimination" in any event. As the Court stated in *Lehigh Val. R. Co. v. Rainey*, 112 F. 487 (E.D. Pa. 1902) (interpreting the Interstate Commerce Act) only discrimination in fact is actionable. A mere offer to discriminate, never carried into effect, results in no actual harm upon which claims can be maintained. *Id.*

Third, OCC, OMG and OPAE have introduced no evidence, of any nature whatsoever, that DE-Ohio ever charged one customer more (or less) than a similarly-situated customer. In fact, the evidence demonstrates that DE-Ohio charges each of its customers, and collects from each of its customers, exactly the price that this

Commission approved in its November 29, 2004 Entry on Rehearing – no more, no less. Thus, OMG's allegation of a "thinly veiled" utility discount has no merit. Only by deliberately confusing the obligations of DERS, Cinergy and DE-Ohio are OCC, OMG, and OPAE able to manufacture evidence that even appears to fit their allegations.

Fourth, OCC and OMG have come forward with no evidence, of any nature whatsoever, that DERS has refused to negotiate similar, appropriate agreements with any entity, representing any constituency, that has approached it seeking the provision of service by DERS. To the extent that OCC and OMG might be pointing to the differences in prices among the contracts themselves, those differences are explained simply by the nature of the loads to be served. Thus, it is unclear against whom DERS might have discriminated.

Fifth, OCC and OMG rely upon an outdated definition of the term "discrimination" to support their allegation. Historically, of course, the term had a very specific meaning for purposes of utility law, connoting an *unreasonable* and *unjust* difference in a rate or in terms of service as applied to similarly situated customers. *AK Steel Corp. v. Pub. Util. Comm'n.* (2002), 95 Ohio St. 3d 81, 2002-Ohio-1735; *Allnet Communications Serv. Inc. v. Pub. Util. Comm'n.* (1994), 70 Ohio St. 3d 202.

The specific "discrimination" of which OMG and OCC wish to complain involves a difference between the prices charged by DERS and DE-Ohio. A CRES that hopes to compete in the sale of a commodity with an established provider of that commodity has little choice, however, but to compete on the basis of price. Even OCC's Ms. Hixon was forced to concede that a lower price "might" be one factor influencing a customer's decision. Hixon Cross, pp. 30-32.

OMG and OCC insist, however, that the difference is not between prices charged by DERS and DE-Ohio, but in prices charged by DE-Ohio. Even if true, and this allegation most certainly is not, OCC and OMG ignore the change in substantive law that occurred through Am. Sub. S.B. 3.

> On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric utility [i.e. DE-Ohio] or electric services company [i.e. DERS] shall not be subject to supervision and regulation by the public utilities commission . . .except sections 4905.10, division (B) of 4905.33, and sections 4905.35 and 4933.81 to 4933.90.

R.C. § 4928.05(A)(1).

Unlike OCC and OMG, the Ohio General Assembly recognized that price differences – decried as "discrimination" by OMG and OCC – are an ordinary part of competitive markets. In recognition that different prices might be established through negotiation among different parties, the Ohio General Assembly chose to terminate this Commission's jurisdiction under R.C. § 4905.33(A) at the beginning of competitive electric service. Section 4905.33(A), of course, provides as follows:

> No public utility shall directly or indirectly, or by any special rate, rebate, drawback, or other device or method, charge, demand, collect, or receive from any person, firm, or corporation a greater or lesser compensation for any services rendered, or to be rendered . . . than it charges, demands, collects, or receives from any person, firm, or corporation for doing a like and contemporaneous service under substantially the same circumstances and conditions.

R.C. § 4905.33(A). The "discrimination" of which OCC and OMG complain is squarely within this section, and obviously occurred well after the beginning of competitive electric service in the State of Ohio – and in fact after the end of the market development period applicable to commercial and industrial classes within the DE-Ohio service territory. Am Sub. S.B. 3 compels DE-Ohio to offer a market based standard service

offer to all customers – which it does. It is no longer prohibited, however, from negotiating other prices with customers when it finds such other prices advantageous.[5]

OCC points to R.C. § 4905.35 and R.C. § 4928.14 to argue that "discrimination" remains unlawful.[6] Cinergy and DERS agree.[7] It is nonetheless the case that the *meaning* of the term discrimination was changed by Am. Sub. S.B. 3 and that the *specific acts* of which OCC and OMG complain are no longer a violation of law.

2. The Companies Have Observed The Corporate Separation Requirements of Ohio Law.

OCC and OMG also complain of various alleged technical violations of the corporate separation requirements.[8] OCC protests, for example, that OAC § 4901:1-20-16(G)(4)(j) mandates that "shared" representatives of the electric utility disclose upon whose behalf their representations to the public are made. They assert that Mr. Colbert's inattention to his title on signature blocks within certain agreements and Mr. Ficke's presence at a meeting with Kroger risk confusion.[9] They also assert that an e-mail chain between OHA and Mr. Colbert demonstrates confusion as to the parties to that agreement, because the title of the email erroneously refers to an agreement between OHA and CG&E rather than OHA and DERS.[10]

Of course, none of the counterparties to the agreements that Mr. Colbert signed are here complaining that they were confused regarding with whom they were dealing. Neither the OHA nor Kroger complain that they did not understand with whom they were

[5] In this case, however, there is no evidence that DE-Ohio has entered into such contracts, unless the obligations of DERS and Cinergy are misconstrued.
[6] OCC Merit Brief pp. 60-61.
[7] DERS and Cinergy acknowledge that it might be "discriminatory, " for example, if DE-Ohio refused to provide necessary facilities or arrangements to one customer that it was supplying to another. These are not the allegations confronting this Commission, however.
[8] OMG Merit Brief, pp. 20-21; OCC's Merit Brief, pp. 31, 49-50, 64-65.
[9] OCC Merit Brief, pp. 40-41.
[10] OCC Merit Brief, p. 42.

dealing, that they were misled in that regard, nor do they claim that they were the victim of some "bait and switch" tactic during negotiations.

Similarly, OCC and OMG complain that employees of the electric utility or persons representing the electric utility are not to indicate a preference for an affiliated supplier pursuant to § 4901:1-20-16(G)(4)(h).[11] Again, no one that is a party to the agreements stands before this Commission claiming that such a preference was indicated. Instead, OCC asks this Commission to infer such a preference merely because DERS succeeded in reaching agreements with customers.

Finally, OCC and OMG contend that § 4901:1-20-16(G)(1)(c) requires electric utilities and their affiliates to operate independently of each other and claim that the evidence indicates that the companies acted in concert with each other.[12] Absent from their allegations, however, is any evidence that suggests that DE-Ohio made economic decisions for DERS, or conversely that DERS (or Cinergy) made economic decisions for DE-Ohio. In the absence of such evidence, their allegations fail.

3. The Remaining Complaints Are Equally Without Merit.

OCC continues to complain that the agreement between DERS and Marathon Ashland turns the RTC into a bypassable charge.[13] The simple fact that DERS agreed to provide service to Marathon Ashland at a price based upon a discount measured by the RTC does not render the RTC bypassable. As the evidence shows, DE-Ohio continues to collect the full RTC from Marathon Ashland.

Furthermore, Ohio law expressly authorizes payment of the RTC by one entity on behalf of another. R.C. § 4928.37(A)(4) states:

---

[11] OCC Merit Brief, p. 64.
[12] OCC Merit Brief, p. 64, OMG Merit Brief, p. 20-21.
[13] OCC Merit Brief, p. 61-62, 66-67.

> Nothing prevents payment of all or part of the transition charge by another party on a customer's behalf if that payment does not contravene sections 4905.33 to 4905.35 of the Revised Code or this chapter.

OCC and OMG contend that DERS' payment to Marathon Ashland calculated with reference to the RTC contravenes the non-discrimination section of R.C. § 4905.35. Again, however, the "discrimination" of which OCC complains is a form of price competition that is not illegal, but which in fact is encouraged under Ohio law.

Finally, OMG and OCC assert that the DERS contracts constitute an anti-competitive subsidy.[14] There is absolutely no evidence, however, to show that DERS is subsidizing DE-Ohio, or that DE-Ohio is subsidizing DERS. In fact, OCC's own witness acknowledges this to be true.[15] To the extent that OMG and OCC are complaining that the prices paid by *customers* are "subsidized," their argument is nonsense. The prices that the customers pay are simply that which the customers agreed to pay in a competitive market.

III. CONCLUSION

The allegations of OCC, OPAE and OMG simply do not hold water. Those allegations require this Commission to ignore the fact that DERS and Cinergy are legally distinct entities from DE-Ohio, and from each other. Those allegations require this Commission to ignore the ongoing performance of parties to commercial agreements in favor of a theory that negates the enforceability of those agreements. Similar to Mr. Talbot's argument that the Commission impose a "cost-based" "market" price, the allegations require this Commission to ignore substantive changes in law in favor of enforcing a regulatory scheme that no longer exists. The allegations of OCC, OMG and

[14]OMG Merit Brief, pp. 17 and 19.
[15] Hixon Cross pp. 136.

OPAE invite this Commission to engage in a broad inquiry into the practices of DE-Ohio and its affiliates at the behest of parties that can show no injury from the allegations. The Commission should give no credence to these ill-conceived notions. It should reaffirm its prior Orders in this matter, and it should hold that no "side" agreements exist, and that the agreements produced by Cinergy and DERS are nothing but reasonable commercial transactions fully explained by the parties thereto.

Respectfully Submitted,

Michael D. Dortch (0043897)
KRAVITZ, BROWN & DORTCH, LLC
145 East Rich Street
Columbus, Ohio 43215
Tel: 614-464-2000
Fax: 614-464-2002
E-mail: mdortch@kravitzllc.com

Attorneys for
CINERGY CORP and
DUKE ENERGY RETAIL SALES, LLC

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 e-mail addresses this 27th day of April 2007.

Staff of the PUCO
Anne.Hammerstein@puc.state.oh.us
Stephen.Reilly@puc.state.oh.us
Scott.Farkas@puc.state.oh.us
Thomas.McNamee@puc.state.oh.us
Werner.Margard@puc.state.oh.us

Bailey, Cavalieri
dane.stinson@baileycavalieri.com

Bricker & Eckler, LLP
sbloomfield@bricker.com
TOBrien@bricker.com;

Duke Energy
anita.schafer@duke-energy.com
paul.colbert@duke-energy.com
michael.pahutski@duke-energy.com

First Energy
korkosza@firstenergycorp.com

Eagle Energy
eagleenergy@fuse.net;

IEU-Ohio
dneilsen@mwncmh.com;
jbowser@mwncmh.com;
lmcalister@mwncmh.com;
sam@mwncmh.com;

Ohio Consumers Counsel
bingham@occ.state.oh.us
HOTZ@occ.state.oh.us
SAUER@occ.state.oh.us
SMALL@occ.state.oh.us

BarthRoyer@aol.com;
ricks@ohanet.org;
shawn.leyden@pseg.com
mchristensen@columbuslaw.org;
cmooney2@columbus.rr.com
rsmithla@aol.com
nmorgan@lascinti.org
schwartz@evainc.com
WTTPMLC@aol.com
cgoodman@energymarketers.com;

Boehm Kurtz & Lowry, LLP
dboehm@bkllawfirm.com;
mkurtz@bkllawfirm.com;

Duke Energy Retail Services
rocco.d'ascenzo@duke-energy.com

Cognis Corp
tschneider@mgsglaw.com

Strategic Energy
JKubacki@strategicenergy.com

Cinergy Corp.
mdortch@kravitzllc.com

Michael D. Dortch