

FILE

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

DUKE ENERGY OHIO'S REPLY BRIEF

RECEIVED
APR 27 2007
DOCKETING DIVISION
Public Utilities Commission of Ohio

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 ANJ Date Processed 4/27/07

TABLE OF CONTENTS:

Page Number

INTRODUCTION:	3
LAW AND ARGUMENT:	6
I. THE COMMISSION SHOULD MAINTAIN THE COURSE ESTABLISHED BY ITS NOVEMBER 23, 2004, ENTRY ON REHEARING.	6
A. <i>The record evidence fully supports DE-Ohio's MBSSO.</i>	7
B. <i>Special interests are attempting to support their positions through a gross distortion of the facts.</i>	12
II. PURE COST-BASED PRICE SETTING INCONSISTENT WITH OHIO LAW.	22
III. [REDACTED]	29
A. [REDACTED]	32
B. <i>It is irrelevant whether the May 19, 2004, Stipulation had broad based support because the Commission rejected the Stipulation.</i>	42
C. <i>The Stipulation did not change the burden of proof required of DE-Ohio and is therefore, not relevant.</i>	51
D. [REDACTED]	53
E. [REDACTED]	56
F. <i>The Commission should keep all proprietary information confidential</i>	63
IV. SUGGESTED FINDINGS OF LAW AND FACT	66
CONCLUSION:	69

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

DUKE ENERGY OHIO'S REPLY BRIEF

INTRODUCTION:

On June 22, 1999, the 123rd Ohio General Assembly passed Amended Substitute Senate Bill No. 3 (SB 3). SB 3 reflected the General Assembly's plan to restructure retail electric service and its consequences are still felt today. In an effort to mitigate potential rate shock and balance the interests of all stakeholders, the Public Utilities Commission of Ohio (Commission) requested that Duke Energy Ohio (DE-Ohio) file a rate stabilization plan (RSP) market based standard service offer (MBSSO) to provide (1) rate certainty for consumers; (2) financial stability for the utility; and (3) the further development of competitive retail electric service markets.¹ In approving a market price

¹ *In re DE-Ohio MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Entry at 3, 5) (December 9, 2003).

for DE-Ohio in November 2004, this Commission successfully achieved a fair balance of these opposing interests. As stakeholders continue to deal with these matters, this Commission must not lose sight of its goals.

Many Parties to these proceedings, and in particular the Ohio Consumers' Counsel (OCC), Ohio Partners for Affordable Energy (OPAE), and the Ohio Marketers' Group (OMG), are attempting to divert the Commission's attention from its goals. The positions taken by these parties are unsupportable because they ignore Ohio law, fail to consider the facts and evidence of record in these proceedings, are based in large part, upon mere inference and innuendo, and reflect a complete lack of understanding of the risks faced by utilities in the competitive retail electric market. If these special interest groups are successful in their crusade to impose their own regulatory scheme, it would seriously undermine the competitive retail electric market in Ohio and result in adverse impacts for all stakeholders. This is particularly true with respect to the positions advocated by the OCC. DE-Ohio submits that such a result is not intended by either the Legislature, or this Commission.

Sorting fact from fiction in the various initial briefs submitted in these proceedings, the following is indisputable:

1. In its November 23, 2004, Entry on Rehearing, this Commission approved a market price for DE-Ohio to charge consumers, namely DE-Ohio's MBSSO;²
2. DE-Ohio has a market price which has been unequivocally affirmed by the Ohio Supreme Court;³
3. DE-Ohio's implemented MBSSO is in the form of an RSP, expressly designed to further the Commission's three goals, as discussed above;
4. DE-Ohio's implemented MBSSO market price was within the range of market prices supported in the record evidence in Case No. 03-93-EL-ATA *et al.*, at the hearing ending June 1, 2004;⁴
5. DE-Ohio's MBSSO price ordered by the Commission in its November 2004, Entry on Rehearing, was lower than the RSP MBSSO price first proposed by the Company on January 26, 2004, and lower than the RSP MBSSO price supported by the Company's direct testimony submitted in April 2004;⁵

² *In re DE-Ohio MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Entry on Rehearing) (November 23, 2004).

³ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 310, 856 N.E.2d 213, (2006); "We hold that the commission's finding that *CG & E's standard service offer was market based is supported by sufficient probative evidence.*" *Id.* *Emphasis Added.*

⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Rose Second Supplemental Testimony at 6-11) (February 28, 2007).

⁵ *Id.*

6. The Commission-approved MBSSO pricing structure results in a market price that falls between the price agreed to by the Parties to the May 19, 2004, Stipulation and the price set forth in the Commission's September 29, 2004, Opinion and Order (Opinion and Order); and
7. The Commission's Opinion and Order did not approve the Stipulation agreed to by the signatory Parties, and thus there was no approved Stipulation in these proceedings.⁶

As discussed further below, this Commission should remain focused on its three goals, find that the misguided allegations raised by the opposing intervenors lack credibility, and recognize and affirm the merit and evidentiary support for DE-Ohio's MBSSO as established in the Commission's November 23, 2004, Entry on Rehearing.

LAW AND ARGUMENT:

I. The Commission should maintain the course established by its November 23, 2004, Entry on Rehearing.

The Commission has successfully navigated a course that allows consumers to maintain relatively low and stable market prices while prices skyrocket in states that have implemented retail prices based upon wholesale bid processes. At the same time, the Commission's

⁶ See e.g. *In re DE-Ohio MBSSO*, Case No. 03-93-El-ATA, *et al.* (OCC's Memorandum Contra CG&E's Application for Rehearing at fn 3.) (November 8, 2004); "CG&E's nomenclature regarding "reinstating" the Stipulation is misplaced,... The Commission never adopted the Stipulation, so there is nothing to reinstate." See also, *In re DE-Ohio MBSSO*, Case No. 03-93-El-ATA, *et al.* (Staff's Remand Merit Brief on Remand at 15) (April 16, 2007); "No party ever recommended the final outcome in the case. No one agreed. There was no Stipulation."

approach maintained the financial health of utilities while permitting competitive retail electric service (CRES) providers an opportunity to maintain a market position. This accomplishment is substantial given the inherent conflict in the goals of stable consumer prices, financial stability for utilities, and development of the competitive retail electric service market. DE-Ohio asserts that the Commission should maintain its course and recognize that the record evidence overwhelmingly supports its prior decision establishing DE-Ohio's MBSSO.

A. The record evidence fully supports DE-Ohio's MBSSO.

From the outset of this remand proceeding, DE-Ohio has correctly and consistently demonstrated that the Ohio Supreme Court clearly delineated the scope of the Commission's review on remand. With respect to the MBSSO pricing structure approved by this Commission in its November 23, 2004, Entry on Rehearing, the Court held that the Commission must "thoroughly explain its conclusion that the modifications on rehearing are reasonable and identify the evidence it considered to support its findings."⁷ The Commission was to support its conclusion and was not directed to start afresh.

DE-Ohio, both through its testimony filed in the above-styled remand proceedings, and in its Initial Merit Brief, demonstrated that the existing record evidence supported the Commission's modifications on rehearing. Accordingly, DE-Ohio will not recite the evidence present in

⁷ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 309, 856 N.E.2d 213, 225 (2006).

the record that supports its MBSSO pricing structure again, but will simply summarize the points already made on brief, which address each position asserted by the special interests of the various intervenors.

In its Initial Post-Remand Brief, OCC first argues that DE-Ohio's MBSSO is unreasonable.⁸ OCC alleges that the final MBSSO price is poorly-defined, duplicative, and contains what OCC maintains are "quantitatively uncertain estimates of costs or risks."⁹ OCC's claims are wrong. Although the Commission-approved RSP-MBSSO resulted in a repositioning of the components and a total price lower than was initially proposed or supported at hearing, the various risk and cost factors considered and justified by DE-Ohio in establishing an acceptable market price did not change throughout the duration of the proceeding.

DE-Ohio's witness Steffen, through his Direct, Supplemental, and Second Supplemental Testimony filed in these proceedings, and on cross-examination in the initial proceeding, addressed and supported the various costs and risks facing DE-Ohio, as well as the price DE-Ohio was willing to charge as compensation for those factors.¹⁰

⁸ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC's Remand Merit Brief at 13.) (April 13, 2007).

⁹ *Id.*

¹⁰ See *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Steffen's Testimony at 3-27) (April 15, 2004); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Steffen's Supplemental Testimony) (May 20, 2004); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Steffen's Second Supplemental Testimony) (February 28, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* Tr. VI. at 99, 102 (May 26, 2004).

For example, in Mr. Steffen's Direct Testimony, filed on April 15, 2004, he fully explained and supported the RSP-MBSSO pricing structure proposed by the Company in its January 26, 2004, filing, as well as several modifications made subsequently to enhance the competitive market.¹¹ The calculations and mathematical support for these pricing components were attached to Mr. Steffen's testimony and are part of the evidentiary record.¹²

Additionally, DE-Ohio witness Mr. Rose compared the price-to-compare component of the MBSSO price to three different market prices: (1) the price DE-Ohio would have offered pursuant to its January 10, 2003, application; (2) the MBSSO price offered by other Ohio electric distribution utilities; and (3) the actual prices offered by CRES providers in the market.¹³ OCC has only criticized the comparison to DE-Ohio's competitive market option price.¹⁴ The remainder of Mr. Rose's market price comparisons proving DE-Ohio's MBSSO is a market price remain uncontroverted on the record. Mr. Steffen's Supplemental Testimony supported several changes made to the Company's RSP-MBSSO pricing formula, which were the result of discussions and negotiations with all Parties, including Staff, OCC, various industrial and commercial

¹¹ See *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Steffen's Testimony at 3-27) (April 15, 2004).

¹² *Id.* at JPS-1 – 11.

¹³ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, (Rose Direct Testimony at 45-47) (April 19, 2004).

¹⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, (OCC's Remand Merit Brief at 26-28) (April 13, 2007).

consumer groups, CRES providers, and residential consumer groups.¹⁵ Significantly, Staff supported the modifications made to the RSP-MBSSO contained in the Stipulation.¹⁶

Throughout his Direct Testimony and on cross-examination, Mr. Steffen discussed at length the various costs and risks, including the commitment of first call generation capacity, DE-Ohio faced in offering a stabilized market price in a competitive retail electric market over four years.¹⁷ The RSP-MBSSO price in total, not through any particular underlying component, represented the compensation for those factors.¹⁸

The record evidence clearly demonstrated that the implemented MBSSO was set at a market price in 2004.¹⁹ The Commission confirmed this conclusion when it established the final price-to-compare, which was higher than the initial stipulated price-to-compare.²⁰ The same is true today. As evidenced by DE-Ohio's witness Judah Rose in his Second Supplemental Testimony, DE-Ohio's implemented MBSSO price

¹⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Steffen's Supplemental Testimony at 4-11) (May 20, 2004).

¹⁶ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Cahaan Supplemental Testimony at 1-4) (May 24 2004)

¹⁷ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* Tr. VI. at 52-53, 59-60, 94-99, 102, 126-127 (May 26, 2004).

¹⁸ *Id.* at 54.

¹⁹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA (Opinion and Order at 24) (September 29, 2004),

²⁰ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA (Entry on Rehearing at 14) (November 23, 2004). The final price-to-compare included the addition of emission allowances which were previously in the POLR component of the MBSSO, resulting in the overall higher price-to-compare.

is still in the range, although much lower, of acceptable and reasonable market prices.²¹

Clearly, the evidence supporting the reasonableness of DE-Ohio's MBSSO structure was not only present in the existing evidentiary record of the initial 03-93-EL-ATA, *et al.*, MBSSO proceedings, but it was abundant. In the Second Supplemental Testimonies of John P. Steffen and Judah Rose, DE-Ohio thoroughly explained this evidence as well as evidence showing that if the MBSSO were reset today, the market price would rise.²² The Commission's Staff agrees as evidenced by its prefiled testimony.²³ In its Initial Merit Brief, DE-Ohio further demonstrated the record evidence supporting the reasonableness of its MBSSO and contrasted it to the dubious positions taken by the OCC and other special interests.²⁴ Once again, the Staff agrees with DE-Ohio's assessment.²⁵

Accordingly, this Commission should affirm DE-Ohio's implemented MBSSO based upon the wealth of evidentiary support present in the record of these consolidated cases.

²¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* Rose Second Supplemental Testimony at 11) (February 28, 2007).

²² See *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Steffen's Second Supplemental Testimony) (February 28, 2007); and (Rose Second Supplemental Testimony) (February 28, 2007).

²³ See *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Cahaan's Testimony at 13) (March 9, 2007).

²⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (DE-Ohio's Remand Merit Brief at 14-23.) (April 13, 2007).

²⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Staff's Remand Merit Brief at 3) (April 13, 2007).

B. Special interests are attempting to support their positions through a gross distortion of the facts.

The intervening special interests are making much ado about the various formulaic components that arrive at DE-Ohio's approved MBSSO price. Specifically, they assert that the infrastructure maintenance fund (IMF) in relation to the system reliability tracker (SRT) and "little g" of the implemented MBSSO, are an unsupportable fiction that results in double cost recovery for DE-Ohio. These special interests also incorrectly assume that the only evidence DE-Ohio presented in the record was in support of the stipulation. These Parties support their conclusions by distorting the facts presented in the initial MBSSO proceeding, by completely ignoring the purpose of the Commission requested RSP-MBSSO, and by improperly advocating that traditional cost-based regulated rate-making is still applicable. The specious arguments raised by the special interests are not only misleading and harmful to consumers, but are contrary to law. In light of this, DE-Ohio believes a brief historical review is appropriate.

It is all too convenient to forget that the term "RSP" is simply the name of a pricing mechanism, i.e. formula, used by the Commission and DE-Ohio to arrive at the total MBSSO price which DE-Ohio is willing and able to accept in the competitive retail electric service market in exchange for the provision of competitive generation service. As Mr. Steffen explained numerous times on cross-examination, and in his Second Supplemental Testimony, the RSP-MBSSO price as proposed,

designed, modified and eventually implemented was a "total package" price.²⁶ The approved MBSSO, like the previous RSP-MBSSO formulas addressed in these proceedings, contained a 100% bypassable price-to-compare and charges with varying degrees of avoidability comprising compensation for DE-Ohio's statutory Provider of Last Resort (POLR) obligation. Together, the price-to-compare and POLR comprise DE-Ohio's total market price for competitive retail electric service.

In his Second Supplemental Testimony, Mr. Steffen discussed the various MBSSO proposals and the differences in detail.²⁷ It is indisputable that throughout the duration of these proceedings, each version of DE-Ohio's RSP-MBSSO pricing formula included a price-to-compare and compensation for POLR services.²⁸ Additionally, the support used to arrive at a relatively stable and reasonable market price for consumers that furthered the competitive market, as well as provided the necessary compensation for DE-Ohio to remain financially healthy, was consistent throughout these proceedings.²⁹ This evidence was presented in the Company's January 26, 2004, RSP MBSSO application, as well as through the direct testimony of company witnesses John P. Steffen, Judah Rose, John C. Procario, James Rogers, James Ziolkowski, William Greene and Richard G. Stevie, filed in the proceedings on or

²⁶ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* Tr. VI. at 99, 102 (May 26, 2004).

²⁷ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Steffen's Second Supplemental Testimony at 7-18) (February 28, 2007).

²⁸ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (Steffen's Direct Testimony at 4) (April 15, 2004).

²⁹ *Id.* at JPS 1-11.

about April 15, 2004, before the Stipulation was even formulated and submitted into the record.³⁰

In the approved MBSSO, there were changes to underlying terms of some components, but not the overarching formula (Total MBSSO = price-to-compare + POLR charges), ultimately used to arrive at the total market price. The net result of those changes in the approved MBSSO was; 1) an overall lower total price for consumers; 2) increased avoidability of certain components; 3) an enhanced competitive market through an increased price-to-compare; and 4) the restructuring of certain components of the total price.

In a desperate attempt to support its factually inaccurate position, OCC incorrectly asserts that the IMF has no factual basis and that the SRT is the lone survivor of the Company's POLR reserve margin charge litigated in the initial MBSSO proceeding.³¹ OCC's position relies upon the misguided assumption that the reserve margin component of the Company's variable POLR charge, was intended to be a pure cost recovery mechanism to provide reserve capacity for switched load. These assertions are wrong.

As more fully explained below, the reserve margin portion of the initially proposed variable POLR component was part of the total POLR

³⁰ See *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (Application) (January 26, 2004); *Id.* (Steffen's Direct Testimony) (April 15, 2004); (Rose's Direct Testimony)(April 15, 2004); (John C. Procaro)(April 15, 2004); (James Rogers)(April 15, 2004); (William Greene)(April 15, 2004); and Richard Stevie)(April 15, 2004).

³¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, (OCC's Remand Merit Brief at 17) (April 13, 2007).

price, not a singular cost recovery mechanism. It was not a cost tracker. Similarly, the resulting IMF and the SRT are also part of DE-Ohio's total implemented POLR market price to the extent they are unavoidable. The lineage of these two charges, the IMF and SRT, are clear when one actually looks at the initial evidence and purpose of the reserve margin presented at the initial MBSSO proceeding.

Unnecessary controversy surrounds the establishment of the IMF and SRT in the approved MBSSO pricing formula. While the initials IMF and SRT do not appear in the evidentiary record prior to the Company's Application for Rehearing, contrary to the accusations in OCC's initial Merit Brief and as echoed in OMG's initial Merit Brief, the underlying justification for those price components, underlying obligations and related risk compensation, was fully litigated in the initial MBSSO proceeding.

The POLR charge as initially proposed and as later modified in the May 19, 2004, Stipulation, was comprised of a fixed component and as well as a variable component that was subject to a cumulative annual adjustment capped at 10% of "little g."³² The initial POLR was 100% unavoidable, meaning all consumers, regardless of switching status, were to pay the entire POLR. The fixed component was the rate

³² *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (Steffen's Direct Testimony at 3) (April 15, 2004). The cap was cumulative such that it was 10% in year one, limited to a total of 20% over the initial baseline for year 2, 30% over the initial baseline for year 3 etc, regardless of the prior year's actual percentage increase.

stabilization charge (RSC) and was set at 15% of “little g”.³³ As explained on direct and as clarified on cross-examination in the 2004 proceeding, the total POLR charge including the fixed RSC was compensation for various risks associated with providing POLR service.³⁴ The RSC remained constant throughout this proceeding and was implemented exactly as initially proposed.

As the name implies, the variable component of the POLR charge was adjustable but subject to a cumulative 10% annual cap.³⁵ This variable component, as initially proposed, was also part of the total price to compensate DE-Ohio for homeland security, tax adjustment changes, environmental compliance (including EAs) and a price for the reserve capacity to meet 117% of DE-Ohio’s total load.³⁶ The basis for the market price for the 17% reserve margin was an estimate based upon data from a widely accepted industry source, of the levelized annual cost per kilowatt-year of constructing a peaking unit, including a reasonable return.³⁷ This mechanism, as part of the total POLR charge was 100% non-bypassable.

Again, the initially proposed reservation charge was a fixed price calculation with a cumulative 10% annual cap on increases in the POLR

³³ *Id.* at 4.

³⁴ *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA *et al.* (Steffen’s Direct Testimony at 11) (April 15, 2004). *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA, *et al.* Tr. VI. at 59, 99 (May 26, 2004).

³⁵ *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA *et al.* (Steffen’s Direct Testimony at 3) (April 15, 2004).

³⁶ *Id.* at 12-16.

³⁷ *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA *et al.* (Steffen’s Direct Testimony at 15) (April 15, 2004). *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA, *et al.* Tr. VI. at 102 (May 26, 2004).

charge. DE-Ohio considered and supported it as part of the total compensation package for providing POLR service, taking into account the various POLR obligation risks and the first call dedication of the Company's generation fleet for POLR consumers.³⁸ If the actual costs of providing the 17% reserve margin for all load exceeded the market price charged by the Company, or increased by more than cumulative 10% per annum, consumers reaped the benefit. If the annual costs were less than the market price, DE-Ohio benefited. In any event, DE-Ohio assumed 100% of this risk. In other words, this initial reserve margin POLR charge was not a direct pass through of costs, for purchasing reserve capacity to cover consumers who switched to a CRES provider. Accordingly, it is through this originally proposed reservation charge that the IMF and the SRT were born.

In its Application for Rehearing, DE-Ohio adjusted the reserve margin calculation and essentially divided it into two distinct components, the IMF and the SRT. DE-Ohio proposed the creation of an IMF from the original POLR charge to "compensate [DE-Ohio] *for committing its generation capacity to serve market based standard service offer customers through December 31, 2008.*"³⁹ In its November 23, 2004, Entry on Rehearing, the Commission approved an IMF charge "equal to 4% of little g during 2005 and 2006, and equal to 6% of "little g" during

³⁸ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* Tr. VI. at 52-53, 54 (May 26, 2004).

³⁹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA (Application for Rehearing at 13) (October 29, 2004).

2007 and 2008.⁴⁰ The IMF became a non-bypassable piece of DE-Ohio's POLR component of its MBSSO to compensate DE-Ohio, in part, for its POLR obligation.⁴¹ All consumers in DE-Ohio's certified territory benefit by having first call on DE-Ohio's physical generating capacity at a price certain.

Even with all of the record evidence supporting the IMF, OMG argues that, because POLR costs are non-by-passable, they constitute a, "monopoly service" subject to the R.C. 4909.15 ratemaking formula, and that DE-Ohio has not met its burden to cost justify the IMF on a cost basis.⁴² While DE-Ohio certainly could justify the first call dedication of its capacity to consumers on a cost basis, such a demonstration is not required.⁴³

Revised Code Section 4928.14 clearly states that competitive retail electric service provided by an electric utility shall be market-based, not cost-based.⁴⁴ It is undisputed that the competitive retail electric service that a utility has the statutory obligation to provide pursuant to R.C. 4928.14 includes POLR service such as the IMF.⁴⁵ The Court has also found that the POLR charge is part of the market-based standard service

⁴⁰ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA et al., (Entry on Rehearing at 8) (November 23, 2004), citing *In re DP&L's RSP and First Energy's RSP*.

⁴¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA et al., (November 23, 2004) (Entry on Rehearing at 8).

⁴² *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, et al (OMG's Remand Merit Brief at 21-24) (April 13, 2007).

⁴³ Ohio Rev. Code Ann. § 4928.14 (Baldwin 2007).

⁴⁴ *Id.*

⁴⁵ *Constellation v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530, 539, 820 N.E.2d 885, 893 (2004); *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 315-316, 856 N.E.2d 213, 230-231 (2006).

offer.⁴⁶ DE-Ohio has consistently argued that market-based pricing is not the same as cost-based regulation.

In Constellation, the Court referred to “costs incurred by DP&L for risks....”⁴⁷ Costs incurred for risks refer to economic costs, such as the opportunity costs bourn by DE-Ohio in these proceedings because it is foregoing its opportunity to sell its capacity at first call in the competitive retail electric market.⁴⁸ The Court agreed in its Remand Order holding that “the Commission found that these components were part of CG&E’s competitive electric generation charges and were not charges on a distribution or transmission service under R.C. 4928.15. ‘Due deference should be given to statutory interpretations by an agency that has accumulated substantial expertise’....”⁴⁹

The IMF pricing mechanism: is not a regulated rate; is part of DE-Ohio’s market price; compensates DE-Ohio for its risks associated with the provision of POLR service, is the first call commitment of its generating capacity; is reasonable; and is fully supported. DE-Ohio’s IMF is consistent with the Commission’s previously stated goals for Rate

⁴⁶ *Id.*

⁴⁷ *Constellation v. Pub. Util. Comm’n*, 104 Ohio St. 3d 530, 539, 820 N.E.2d 885, 893 (2004) (emphasis added).

⁴⁸ OCC, OMG, and OPAE appear confused that the opportunity cost is associated with the lost opportunity to sell into the wholesale market. That is incorrect, DE-Ohio asserts an apples to apples comparison is the lost opportunity in the competitive retail market versus the retail market, not retail versus the wholesale market.

⁴⁹ *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 111 Ohio St. 3d 300, 316, 856 N.E.2d 213, 231 (2006) (emphasis added).

Stabilization Plans in that the IMF provides revenue certainty for DE-Ohio and price certainty for consumers.⁵⁰

The SRT was created as a variable mechanism subject to an annual review and true-up, which permitted the direct pass through of reserve capacity costs for 15% of DE-Ohio's peak load.⁵¹ This is entirely different from what was previously proposed by the Company in its initial POLR reserve margin price, which, as previously discussed, included the 117% of all load plus a reasonable return on costs as compensation for the Company's first call physical generation capacity commitment to its Ohio consumers.⁵² The SRT as implemented is 100% avoidable to non-residential consumers who meet certain conditions. The SRT's avoidability is completely opposite to the IMF and their linear ancestor, the reserve margin POLR charge, which are not bypassable.

Together, the company's IMF and SRT components of the Company's final POLR charge represent the return on and of investment in the physical capacity the Company previously proposed in the variable POLR charge for reserve margin.⁵³ This was thoroughly addressed in DE-Ohio's Initial Merit Brief filed in these Remand Proceedings.⁵⁴

⁵⁰ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Opinion and Order at 15) (September 29, 2004).

⁵¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (Entry on Rehearing at 10) (November 23, 2004).

⁵² See Direct Testimony of John P. Steffen; TR. IV at 102.

⁵³ *In re De-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (Stipulation at JPS-2) (May 20, 2004).

⁵⁴ *In re De-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (DE-Ohio's Remand Merit Brief at 17-23) (April 13, 2007).

To support its position that the existence of the IMF is not justified, the OCC relies entirely upon the testimony of its witness Neil Talbot and completely ignores the testimony of DE-Ohio's witness Mr. Steffen who fully explained the IMF in his Second Supplemental Testimony.⁵⁵ Tellingly, and in order not to undercut its unsupportable claims, OCC elected not to cross-examine Mr. Steffen on this subject in the recently concluded proceeding. As more fully addressed in the Company's Initial brief, the weight that the Commission should afford Mr. Talbot's testimony is readily apparent.⁵⁶ OCC, like its witness Mr. Talbot, failed to do the simple math and historical research necessary to verify the risks and costs contained in the initial variable POLR reserve margin, which eventually became the IMF and SRT.

In the initial 2004 MBSSO proceeding, Mr. Steffen explained in his Direct Testimony and further discussed on cross-examination, the many risks DE-Ohio faced in providing the POLR service.⁵⁷ This safety net of a POLR obligation requires DE-Ohio to stand ready to catch those customers who either fall, or are ejected, from the service of a CRES provider. The RSP-MBSSO price as a whole represented DE-Ohio's willingness to provide a market price for consumers who wished to continue to take service from DE-Ohio as well as compensation for the

⁵⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Talbot's Prepared Testimony at 47-48) (March 9, 2007).

⁵⁶ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (DE-Ohio's Remand Merit Brief at 19-23) (April 13, 2007).

⁵⁷ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (Steffen's Direct Testimony at 11) (April 15, 2004). *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* Tr. VI. at 59, 99 (May 26, 2004).

safety net of POLR service for all consumers, including those customers who decided to switch to a CRES provider.⁵⁸ This fact did not change in the approved MBSSO. Ultimately, the evidence of record shows that the market price of the IMF and SRT is less than the market price of the reserve capacity proposed in the Stipulation.⁵⁹

II. Pure cost-based price setting inconsistent with Ohio law.

Throughout its Initial Merit Brief, OCC pleads that the Commission should return to cost-based rate making and establish a new MBSSO market price. OCC's request is unsupportable under the law. As recognized by the Commission Staff, OCC's recommendation that the Commission return to cost-based regulation to determine a market price is not only illegal but also irresponsible.⁶⁰ DE-Ohio completely agrees. OCC's recommendation completely undermines the integrity of the competitive market, is an insult to the Commission's three goals for RSP-MBSSO market prices, and most importantly, is against the law.

In Ohio's deregulated retail electric service environment, the Commission must determine if a market-based standard service offer is just and reasonable in response to a filing made by an electric distribution utility pursuant to R. C. 4909.18.⁶¹ The standard by which

⁵⁸ *Id.* at 99, 102.

⁵⁹ *In re De-Ohio's MBSSO*, Case No. 03-93-EL-ATA et al., (DE-Ohio's Remand Merit Brief at 17-23) (April 16, 2007).

⁶⁰ *In re De-Ohio's MBSSO*, Case No. 03-93-EL-ATA et al., (Staff's Remand Merit Brief at 6) (April 16, 2007).

⁶¹ Ohio Rev. Code Ann. §§ 4928.14, 4909.18 (Baldwin 2007).

the Commission must determine if the market-based standard service offer is just and reasonable is set forth in R. C. 4928.05, which states:

On and after the starting date of competitive retail electric service, *a competitive retail electric service supplied by an electric utility... shall not be subject to supervision and regulation... by the public utilities commission* under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, *except* section 4905.10, *division (B) of 4905.33, and sections 4905.35 and 4933.81 to 4933.90....*⁶²

Therefore, Revised Code Section 4928.05, by law, divests the Commission of its ability to engage “traditional regulated rate making” over the market price of any “competitive retail electric service,” including the MBSSO at issue in this case.

In other words, traditional cost of service ratemaking statutes such as those contained in 4909.15, are no longer applicable to unbundled generation. More importantly, there is no statutory mathematical equation to determine a market price. Although the Commission is afforded a great deal of discretion in permitting formulas for determining a market price offered by a utility, the Commission’s actual authority over denying a market price is limited to that which is contained in R. C. 4905.33(B) and R. C. 4905.35.⁶³ These exceptions prohibit utilities from

⁶² Ohio Rev. Code Ann. § 4928.05 (Baldwin 2007) (emphasis added).

⁶³ *Id.* The remainder of the exceptions set forth in R.C. 4928.05 are inapplicable to the case at hand. Specifically, R.C. 4905.10 addresses the Commission’s authority and ability to assess annual fees to utilities for Commission expenses, the public utilities fund, transfer of funds and commissioner’s salaries. *See* Ohio Rev. Code Ann. § 4905.10 (Baldwin 2007). Additionally, the exceptions set forth in R.C. §§4933.81 to 4933.90 pertain to the setting of service territories for electric companies. *See* Ohio Rev. Code Ann. §§ 4933.81, 4933.82, 4933.83, 4933.84, 4933.85, 4933.86, 4933.87, 4933.88, 4933.89, 4933.90 (Baldwin 2007).

pricing below cost for destroying competition and from discriminatory pricing.⁶⁴ Clearly, cost of service ratemaking is no longer provided for under Ohio law and OCC's recommendation is unsupportable. Both the Commission and the Court agree.⁶⁵

Specifically, in its November 23, 2004 Entry on Rehearing, this Commission recognized that cost-based rate making is no longer provided for under Ohio law stating, "[s]ection 4928.14, Revised Code, provides that competitive retail electric services, including a firm supply of electric generation service, *shall be provided to consumers at market-based rates, rather than establishing such charges through traditional rate-based approach under Section 4909.18, Revised Code.*"⁶⁶

Further, before the Supreme Court of Ohio, OCC argued that DE-Ohio's MBSSO is discriminatory pursuant to R.C. 4905.32 through 4905.35.⁶⁷ The Court cited R.C. 4928.05 to frame the basis of the Commission's, and the Court's determination and ultimately, as the basis for rejecting OCC's argument.⁶⁸

It is truly ironic that OCC's position on Remand, which advocates a return to cost-based ratemaking, has completely changed from its

⁶⁴ Ohio Rev. Code Ann. §§ 4905.33(B), 4905.35 (Baldwin 2007).

⁶⁵ *In re De-Ohio's MBSSO*, Case No. 03-93-EL-ATA et al., (Entry on Rehearing at 17) (November 23, 2004); *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 314, 856 N.E.2d 213, 229 (2006).

⁶⁶ *In re De-Ohio's MBSSO*, Case No. 03-93-EL-ATA et al., (Entry on Rehearing at 17) (November 23, 2004). *Emphasis added.*

⁶⁷ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 313, 856 N.E.2d 213, 228 (2006).

⁶⁸ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 314, 856 N.E.2d 213, 229 (2006).

position in the initial MBSSO proceeding, which proposed the determination of market prices through a competitive bid. However, given the recent developments in other deregulated states that have seen electricity prices rise upwards of 65% through wholesale auctions, OCC's opportunistic about-face is not surprising.⁶⁹ As pointed out by Staff, the Commission "does not need to examine the experience of other states to recognize the irresponsibility of moving to a competitive bid under current conditions in Ohio."⁷⁰ Hindsight is always 20/20. Just as OCC's position in 2004 was irresponsible, similarly, its new position for a return to cost-based rate making is as well.

OCC, like its expert Mr. Talbot has no idea what market price would result from its cost-based proposal. It does not know the resulting market price because Mr. Talbot performed no analysis.⁷¹ Mr. Talbot does not know the consequences of the transfer of generating units to Duke Energy Kentucky. Mr. Talbot does not know the market price consequence of including DE-Ohio's legacy Duke Energy North America plants in rate base. Mr. Talbot is willing to simply permit the "chips to fall where they may."⁷² OCC's proposal is irresponsible because the OCC does not know if prices will rise or fall under its proposal. It simply advocates lower prices on faith without any analysis.

⁶⁹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* DE-Ohio Remand Exhibit 4 at page 2.

⁷⁰ *Id.* at 8.

⁷¹ *In re. De-Ohio's MBSSO*, Case no. 03-93-EL-ATA *et al.*, (DE-Ohio's Remand Merit Brief at 19-23) (April 13, 2007).

⁷² *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* Tr. II. at 95 (March 20, 2007).

Next, OCC's recommendation would require the Commission to completely abandon the three goals, which for three years, have been the guiding principle for establishing RSP-MBSSOs throughout the state and afforded DE-Ohio's consumers stable prices while allowing a measure of revenue certainty to the Company. Although DE-Ohio questions how a pure cost-based rate could in any way constitute a proxy for a market price, if OCC is correct and its proposal would result in a lower market price, a return to a pure cost-based rate that is 100% bypassable would likely destroy opportunities to develop the competitive retail electric service market because CRES providers have difficulty competing with the current and higher price to compare. Such a result would also erode the financial stability of Ohio's utilities.

On the other hand, if OCC is wrong and market prices increase under their proposal, consumers will assume the burden of higher prices. Further, there is no guarantee that prices will increase sufficiently to stimulate competition, as OCC has done no such market analysis. Regardless of the outcome, OCC's proposal is ill advised and detrimental to all stakeholders.

If DE-Ohio's price is limited to actual cost recovery, as long as market prices stay above DE-Ohio's costs, CRES suppliers will be unable to gain any market share. Under this approach, DE-Ohio would no longer maintain a planning reserve for switched load and returning consumers would be faced with paying for electricity at spot prices,

assuming there are adequate supplies in the market to serve these customers. If, however, market prices fell below DE-Ohio's costs, the Company would not be able to adjust its price downward and would be forced out of the market. As discussed above, by law, a utility may not price its competitive retail electric services below costs to destroy competition.⁷³ Therefore, it would be impossible to provide any firm generation price or POLR service and consumers would be left without reliable service options if a CRES provider defaults.

Second, DE-Ohio's last full rate case which included generation was in the early 1990's.⁷⁴ Much has changed since that case. For example, in the last three years alone, DE-Ohio transferred all or part of three generating stations to its subsidiary Duke Energy Kentucky⁷⁵ and acquired several new gas fired generating stations sometimes referred to as the DENA assets.⁷⁶ Also, virtually all of the Company's major environmental compliance equipment has been added to DE-Ohio's books in the years after the Company's 1992 full rate case. If an accurate and purely cost-based generation rate base is to be established, as proposed by OCC, those factors, as well as many others, must be taken into account.

⁷³ Ohio Rev. Code Ann. §§ 4905.33(B), 4905.35 (Baldwin 2007).

⁷⁴ *In re CG&E's Application to Increase its Rates*, Case No. 92-1462-EL-AIR et al., (Opinion and Order) (August 26, 1993).

⁷⁵ *See In re ULH&P's Application to Acquire Generating Assets*, KYPSC Case No. 2003-00252 (Order) (June 17, 2005).

⁷⁶ *In re the Merger of Cinergy Corp and Duke Energy*, Case No. 05-732-EL-MER et al (Opinion and Order)(December 21, 2005).

Similarly, OMG's argument that POLR related charges, such as the IMF, must be cost-based is also unsupportable.⁷⁷ The POLR obligation is, by statute, a competitive retail electric service, not a non-competitive regulated service.⁷⁸ Revised Code Section 4928.14 imposes the POLR obligation upon an electric utility.⁷⁹ It does so by requiring electric utilities to maintain an "offer of all *competitive retail electric services* necessary to maintain essential electric service to consumers..." and by requiring electric utilities to provide default service for customers of CRES providers.⁸⁰ This obligation is placed on electric utilities alone.⁸¹

A CRES provider other than an electric utility does not have a statutory POLR obligation and does not have the costs associated with the provision of that service. Further, because the POLR component of the market-based standard service offer is the provision of "a firm supply of electric generation service," it is a competitive retail electric service pursuant to R. C. 4928.03.⁸² The Commission and the Court agree that electric utilities have a statutory POLR obligation pursuant to R. C. 4928.14, and that DE-Ohio must provide that POLR service to consumers at a market price.⁸³

⁷⁷ *In re De-Ohio's MBSSO*, Case No. 03-93-EL-ATA et al., (OMG's Remand Merit Brief at 22) (April 16, 2007).

⁷⁸ Ohio Rev. Code Ann. §§ 4928.14, 4928.03 (Baldwin 2007), App. at 154, CG&E's App. at 1.

⁷⁹ Ohio Rev. Code Ann. § 4928.14 (Baldwin 2007), App. at 154.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Ohio Rev. Code Ann. § 4928.03 (Baldwin 2007).

⁸³ *Constellation v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530, 539, 820 N.E.2d 885, 893 (2004) (discussing the RSS, provider of last resort, component of DP&L's market-based standard service offer).

The Commission should ignore the various distractions presented in these Remand proceedings and should not lose sight of the simple fact that its RSP initiatives have been a success. The Commission has successfully shielded consumers from the volatile wholesale market, afforded utilities some degree of revenue certainty and encouraged competition. By establishing DE-Ohio's MBSSO in 2004, the Commission permitted a total price that for the first 25% of residential consumer load, is over 96% bypassable.⁸⁴ DE-Ohio respectfully requests that the Commission affirm its November 23, 2004, Entry on Rehearing and DE-Ohio's MBSSO.

[REDACTED]

DE-Ohio entered into a contract with the City of Cincinnati on June 14, 2004, almost a month after the May 19, 2004, Stipulation was filed with the Commission and two weeks after the close of evidence at the original hearing in these proceedings.⁸⁵ DE-Ohio was not a party to any other contract with any Party to these proceedings [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁸⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (TR. II at 88) (March 20, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (DE-Ohio Remand Exhibit 17) (March 20, 2007).

⁸⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (OCC Remand Exhibit 6) (March 20, 2007).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Their arguments also ignore the statutory requirements for

⁸⁶ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (Hixon's Prepared Testimony at BEH 2-12, 17) (March 9, 2007).

⁸⁷ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Ficke's Deposition Transcript at 74-77) (February 20, 2007).

setting DE-Ohio's market price and the rules regarding code of conduct and corporate separation.

DE-Ohio submits that the Commission should accept the testimony of DE-Ohio witness John P. Steffen, OCC's subpoenaed witnesses Greg C. Ficke, James E. Ziolkowski, and Denis George, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The truth is that all consumers in DE-Ohio's certified territory enjoy relatively low market prices. If market prices were reset today they would be higher, just as prices have skyrocketed in every jurisdiction that has recently set market prices by any methodology. And, in the case of residential consumers, they would lose the subsidy that residential consumers receive from non-residential consumers, thus causing even greater increases for residential consumers.⁸⁸

[REDACTED]

[REDACTED] DE-Ohio's only contract is a public contract with the City of Cincinnati entered after the submission of the Stipulation on May 19, 2004. The

⁸⁸

See Infra pp. 54-55.

OCC, OPAE, and OMG, rely solely upon the testimony of OCC witness Beth E. Hixon [REDACTED]

First, the

Id. at 30.

91 *Id.* at 48.

⁹² *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St.3d 300, 320-323, 856 N.E.2d 213, 234-236 (2006).

Commission did not adopt the Stipulation and therefore, neither it, nor the parties that supported it, could have influenced the Commission's decision in these proceedings. DE-Ohio, Staff, and OCC all agree that the Commission did not adopt the Stipulation.⁹³

Second, OCC's original discovery request for agreements with Parties, only encompassed the City of Cincinnati agreement from DE-Ohio, and [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁹³ *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, footnote 3) (November 8, 2004).

⁹⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Requests for Production of Documents Seventh Set at 3) (May 18, 2004); *Id.* at TR. II at 8 (May 20, 2004); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at BEH Attachments 2, 3) (March 9, 2007).

⁹⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Requests for Production of Documents Seventh Set at 3) (May 18, 2004); *Id.* at TR. II at 8 (May 20, 2004); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at BEH Attachments 4) (March 9, 2007).

Id. at 13-14, 32.
In re DE-Ohio's MBSSO, Case No. 03-93-EL-ATA, *et al.* (TR. III at 32-35) (March 21, 2007).
 Ohio Rev. Code Ann. § 4928.03 (Baldwin 2007).

[REDACTED]

[REDACTED]

103

[REDACTED]

¹⁰⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Ficke's Deposition Transcript at 73-77) (February 20, 2007).

¹⁰⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at 27) (March 9, 2007).

¹⁰⁶ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (TR. III at 60) (March 21, 2007).

¹⁰⁷ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at BEH-Attachments 2-12) (March 9, 2007); *In re DE-Ohio Distribution Rate Case*, Case No. 04-680-EL-AIR (Application) (May 7, 2004).

100% 99% 98% 97% 96% 95% 94% 93% 92% 91% 90% 89% 88% 87% 86% 85% 84% 83% 82% 81% 80% 79% 78% 77% 76% 75% 74% 73% 72% 71% 70% 69% 68% 67% 66% 65% 64% 63% 62% 61% 60% 59% 58% 57% 56% 55% 54% 53% 52% 51% 50% 49% 48% 47% 46% 45% 44% 43% 42% 41% 40% 39% 38% 37% 36% 35% 34% 33% 32% 31% 30% 29% 28% 27% 26% 25% 24% 23% 22% 21% 20% 19% 18% 17% 16% 15% 14% 13% 12% 11% 10% 9% 8% 7% 6% 5% 4% 3% 2% 1% 0%

[illegible]

1. *Journal of Management Studies*, 1997, 34, 1, 1-14.

[illegible]

[illegible][illegible]

¹⁰⁸ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Ficke's Deposition Transcript at 29, 51-52) (February 20, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (Whitlock's Deposition Transcript at 106-107) (January 11, 2007).

¹⁰⁹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC's Remand Merit Brief at 55) (April 13, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OMG's Remand Merit Brief at 19-20) (April 13, 2007).

110 *Id.*

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

As a minor matter, OCC misreferences the [REDACTED] set forth in footnote 230 as coming from OCC Remand Exhibit 4 when it is really from OCC Remand Exhibit 5.¹¹⁶ Conversely, in the same footnote,

¹¹¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at 55) (March 9, 2007).

¹¹² *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC's Remand Merit Brief at 54-55) (April 13, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OMG's Remand Merit Brief at 19-20) (April 13, 2007).

¹¹³ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (TR. III at 118-132) (March 21, 2007).

¹¹⁴ *Id.* at 130-131.

¹¹⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Remand Ex. 4, 5).

¹¹⁶ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Remand Ex. 5 at 7).

the 986,620 MWh is referenced as coming from OCC Remand Exhibit 5 when in fact it is really found in OCC Remand Exhibit 4.¹¹⁷

In further misrepresenting its own exhibits, [REDACTED] into [REDACTED] into one month of data from Exhibit 4, which has only monthly data, as indicated in its heading, thereby overstating expected switched load at June 30, 2006, by approximately three times. Correcting that simple adjustment, to use a single month's data in both the numerator and denominator, would show expected switched non-residential load at June 30, 2006, at about 7%, or approximately equivalent to the non-residential switched load that exists today.¹¹⁸ OCC however, makes additional errors regarding its interpretation of OCC Remand Exhibit 5.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] It shows that many of those customers, for [REDACTED] have never purchased generation from a CRES provider [REDACTED]

[REDACTED]¹²⁰ [REDACTED]
[REDACTED]

¹¹⁷ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Remand Ex. 4 at 1, 5 at 7) (69,162.552 divided into 986,620).

¹¹⁸ *Id.*

¹¹⁹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Remand Ex. 5).

¹²⁰ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Remand Ex. 5); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at BEH 2-12, 17) (March 9, 2007) (Compare customers listed in contracts to those listed on OCC Remind Exhibit 5).

[REDACTED]

[REDACTED] The [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

When the proper math is done OCC Remand Exhibits 4 and 5 combined with the testimony of DE-Ohio witness Bill Greene, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

OCC and OMG rely heavily upon [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹²¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Remand Ex. 4 at 1, 5 at 7); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Green's Direct Testimony at 4)

¹²² *Id.*

¹²³ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC's Remand Merit Brief at 56-58) (April 13, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OMG's Remand Merit Brief at 14-15) (April 13, 2007).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹²⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Ziolkowski's Deposition Transcript at 34-42, 48-50) (February 13, 2007).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

B. It is irrelevant whether the May 19, 2004, Stipulation had broad-based support because the Commission rejected the Stipulation.

OCC, OMG, and OPAE continue to assert that the May 19, 2004, Stipulation submitted by many, but not all, of the Parties, should be disregarded [REDACTED]

[REDACTED]

[REDACTED] Their assertion is simply irrelevant as the Commission rejected the Stipulation and issued its own order in these cases ultimately establishing its own MBSSO in its November 23, 2004, Entry on Rehearing.¹²⁵

DE-Ohio, Staff, and OCC all agree that the Commission rejected the Stipulation.¹²⁶ OCC expressly stated that “[t]he Commission *never adopted the Stipulation....*”¹²⁷ Dominion Retail also understood the Commission rejected the Stipulation and thus, needed to reinstate the Stipulation for it to survive stating “Dominion Retail respectfully requests

¹²⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Entry on Rehearing) (November 23, 2004).

¹²⁶ *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, footnote 3) (November 8, 2004); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Staff's Remand Merit Brief at 14) (April 13, 2007).

¹²⁷ *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, footnote 3) (November 8, 2004) (emphasis added).

that, if the Commission does not reinstate the Stipulation on rehearing, the Commission modify CG&E's alternative proposal...."¹²⁸ Further, Dominion Retail's comments also reveal, correctly, that there was no settlement regarding the Alternative Proposal. Thus, once the Commission rejected the Stipulation, there was never a reinstatement of the Stipulation for any Party to consider, [REDACTED]
[REDACTED]

It is improper pursuant to the doctrine of *res judicata*, and disingenuous, for OCC, OPAE, OMG, or Dominion Retail to argue that the Stipulation, or the bargaining that resulted in the Stipulation, is relevant to the Commission's determination in these proceedings when OCC expressly argued, and OPAE and OMG had the opportunity to oppose OCC's argument in these proceedings, that the Commission did not adopt the Stipulation.

To make the matter clear, in its Application for rehearing DE-Ohio gave the notice set forth in the Stipulation, that it was no longer acceptable to DE-Ohio as modified by the Commission.¹²⁹ DE-Ohio stated that "[i]f the Commission declines to reinstate the Stipulation or adopt the Alternative Proposal, CG&E objects to the Commission's Order because the modifications to the Stipulation proposed by the Commission in its Order effectively reject the Stipulation and any market

¹²⁸ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Dominion Retail Response to DE-Ohio's Application for Rehearing) (November 8, 2004).

¹²⁹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (DE-Ohio's Application for Rehearing at 6) (October 29, 2004).

price acceptable to CG&E for rate stabilization service requested by the Commission.”¹³⁰ Thus, even if there were disagreement over the Commission’s rejection of the Stipulation there can be no disagreement over DE-Ohio’s rejection of the Commission’s Opinion and Order and withdrawal from the Stipulation. There was no Stipulation of any kind submitted by any Party on rehearing.

Even if the Commission had not rejected the Stipulation, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] the Stipulation had broad support from a variety of stakeholders. As a predicate to this discussion it should be noted that the signatories to the Stipulation [REDACTED]

[REDACTED] DE-Ohio, Staff, First Energy Solutions, Dominion Retail, Green Mountain Energy, People Working Cooperatively, and Communities United for Action.¹³¹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹³⁰ *Id.* at 5-6.

¹³¹ *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Stipulation) (May 19, 2004); *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Hixon Prepared testimony at BEH 2-12, 17) (March 9, 2007).

¹³² *Id.*

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Therefore, contrary to the assertions of OCC, OMG, and OPAE, even if the Commission accepts their argument that it should consider the Stipulation [REDACTED]

[REDACTED] the supporters include stakeholders from every consumer group. People Working Cooperatively and Citizens United for Action are residential advocacy and service groups that have large active constituencies in DE-Ohio's certified territory. Additionally, each is a non-residential customer in its own right. People Working Cooperatively runs an industrial center providing energy efficiency services for contractors that provide services to residential customers. First Energy Solutions, Dominion Retail, and Green Mountain are all CRES providers that sell generation service to all consumer groups. First Energy Solutions and Dominion still provide service to customers, Dominion Retail exclusively to residential customers, in DE-Ohio's certified territory. Of course the support of DE-Ohio and Staff should also be

¹³³ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Stipulation) (May 19, 2004); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Hixon Prepared testimony at BEH 2-12, 17) (March 9, 2007); [REDACTED]

¹³⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Stipulation) (May 19, 2004); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Hixon Prepared testimony at BEH 2-12, 17) (March 9, 2007).

considered. [REDACTED] the Stipulation enjoyed wide support.

Further, DE-Ohio asserts that all of the signatories deserve consideration. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹³⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Hixon Prepared testimony at BEH 6, 12) (March 9, 2007).

¹³⁶ *Id.* at BEH 4, 5.

[REDACTED]

[REDACTED]

To bolster support for its contention that the Commission should not consider the Stipulation OCC cites *Time Warner Axs v. Pub. Util. Comm'n*.¹³⁸ OCC ignores, of course, the Court's recent holding in *Constellation v. Pub. Util. Comm'n* regarding the *Time Warner* footnote.¹³⁹ In rejecting Constellation's claim that the electric distribution utility violated the standard set by the Court in the *Time Warner* footnote the Court held:

Assuming for the sake of argument that such an exclusion occurred, it was not directed at an "entire customer class," which was the factual predicate in the *Time Warner* footnote. As the Commission observes, "Since representatives on behalf of DP&L residential, commercial, and industrial customers all participated in the settlement process and signed the Stipulation, no entire customer class was excluded. The factual predicate upon which the *Time Warner* admonition was premised is simply not presented in this case."¹⁴⁰

These cases are identical to *Constellation*. In these cases settlement discussions were held with all Parties and all customer classes. No Parties were excluded, in fact DE-Ohio held individual settlement discussions with OCC, OMG, and OPAE at various times and all Parties made settlement offers. Ultimately, Parties from every customer class

¹³⁷ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (George's Deposition Transcript at 21-22, 46-49) (February 20, 2007).

¹³⁸ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC's Remand Merit Brief at 67) (April 13, 2007).

¹³⁹ *Constellation v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530, 535, 820 N.E.2d 885, 890 (2004).

¹⁴⁰ *Id.* (emphasis added).

signed the Stipulation. *Time Warner* is simply not applicable to the facts present in these cases.

OCC and OPAC argue, however, that the Stipulation is relevant

[REDACTED]

[REDACTED] First, DE-Ohio held discussions with all Parties. It invited all Parties to such discussions and all Parties, including OCC and OPAC, received the Stipulation prior to its filing at the Commission. Both OCC and OPAC complain that they were not included in settlement discussions between the September 29, 2004, Opinion and Order and the November 23, 2004, Entry on Rehearing.¹⁴²

DE-Ohio did not conduct any settlement discussions with any Party during the period between the Commission's Opinion and Order and its Entry on Rehearing. DE-Ohio was busy attempting to formulate an Application for Rehearing that might result in an MBSSO acceptable to the Commission and DE-Ohio. There was no time for further negotiation.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁴¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC's Remand Merit Brief at 68) (April 13, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OPAC's Remand Merit Brief at 9) (April 13, 2007).

¹⁴² *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC's Remand Merit Brief at 50-51) (April 13, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OPAC's Remand Merit Brief at 9-10) (April 13, 2007).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Finally, as discussed in DE-Ohio's merit brief, there is nothing wrong with confidential discussions with one or more Parties to the exclusion of other Parties in any case. Confidential settlement discussions resulting in agreements not brought to the Commission for approval are routinely engaged in by OCC and it is disingenuous for OCC to complain when it engages in the same conduct.¹⁴³ DE-Ohio is aware of, and the record evidence shows, at least four such agreements negotiated and entered by OCC.¹⁴⁴ OCC made confidential settlement offers to the other parties in these proceedings that have not been revealed to this day.¹⁴⁵

[REDACTED]

settlement discussions with DE-Ohio, was not offered a settlement, and did not sign the Stipulation because it violated Ohio law, is incorrect.¹⁴⁶ On May 10, 2004, OPAC approached DE-Ohio with a settlement offer.¹⁴⁷

¹⁴³ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (DE-Ohio Remand Ex. 20-23) (March 21, 2007).

¹⁴⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (DE-Ohio Remand Ex. 20-23) (March 21, 2007); *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 110 Ohio St. 3d 394, 399, 853 N.E.2d 1153, 1159 (2006).

¹⁴⁵ *Id.*

¹⁴⁶ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (OPAC's Remand Merit Brief at 9-10, 13) (March 21, 2007)

¹⁴⁷ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (OPAC Settlement Offer) (July 16, 2004).

OPAE's settlement offer was filed with the Commission under seal and the Commission granted confidentiality for an eighteen-month period that expired in 2006.¹⁴⁸ OPAE's settlement offer is therefore, now public record. OPAE's settlement proposal to DE-Ohio begins as follows:

Ohio Partners for Affordable Energy ("OPAE") and Citizens United for Action ("CUFA") jointly make the following settlement offer to Cincinnati Gas & Electric Company ("CGE"). In return for an agreement on the following issues, OPAE and CUFA are willing to withdraw from the case or reach another disposition mutually agreeable to both parties.

Our Proposal is as follows:

1. ***The company will provide OPAE with 1.345 million per year through 2008...***¹⁴⁹

Thus, OPAE had no qualms about entering secret negotiations with DE-Ohio to the exclusion of almost all Parties, including OCC. It had no qualms about settlement through withdrawal or a side agreement not filed before the Commission, and it had no qualms about legal issues impeding settlement.¹⁵⁰ OPAE was willing to settle if DE-Ohio was willing to give it control of money.

DE-Ohio did not settle with OPAE because the Duke Energy Community Partnership (DECP) administers energy efficiency and weatherization contracts in DE-Ohio's certified territory. Both the Staff

¹⁴⁸ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (Entry) (September 28, 2004)

¹⁴⁹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (OPAE Settlement Offer) (July 16, 2004).

¹⁵⁰ *Id.*

and OCC are members of the DECP board. In fact, as a result of the settlement with OCC regarding OCC's appeal of the Commission's order in the Duke Energy Corporation merger with Cinergy Corp., DE-Ohio set aside \$250,000 for an OPAE member, the Cincinnati/Hamilton County Community Action Agency (CHCCAA), for an energy efficiency contract and CHCCAA has not spent even a single dollar and will likely forfeit the money to a contractor chosen next month by DECP.¹⁵¹

Apparently, OPAE and OCC wish to apply a double standard where it is acceptable for OPAE and OCC to engage in "secret" settlement discussions and enter "secret" settlements but unacceptable for any other party to entertain confidential negotiations. If anything, the presumption should run the other way for a public agency such as the OCC and a non-profit organization such as OPAE. In any event, OCC's and OPAE's concerns are misplaced and should be dismissed.

C. The Stipulation did not change the burden of proof required of DE-Ohio and is therefore not relevant.¹⁵²

OMG makes an argument unique to these proceedings, but incorrect, that the presentation of the Stipulation to the Commission changed the burden of proof in these cases such that DE-Ohio need not prove its Application and the Stipulation are lawful and reasonable and all that it need show is that the Stipulation, taken as a whole, is

¹⁵¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (DE-Ohio Remand Ex. 22) (March 21, 2007).

¹⁵² *In re Dominion East Ohio's Application to Restructure its Commodity Service*, Case No. 05-474-GA-ATA (Opinion and Order at 13) (May 26, 2006).

reasonable pursuant to the traditional three prong test.¹⁵³ OMG alleges that the change in the burden of proof makes the Stipulation relevant throughout the proceeding because the Commission used the wrong criteria to determine the proper MBSSO ultimately ordered on November 23, 2004.¹⁵⁴

OMG is incorrect because the Commission has always been clear that a Stipulation does not alter the burden of proof.¹⁵⁵ In *Dominion* the Commission held “the Commission would note in the first instance that the Stipulation does not change the burden of proof....”¹⁵⁶ The Commission has consistently followed this doctrine requiring the applicant to satisfy the burden of proof in cases before the Commission.¹⁵⁷

More importantly, this is not an issue before the Commission on remand. The Commission held that the record evidence demonstrated that DE-Ohio’s MBSSO is a market price.¹⁵⁸ The Court affirmed the Commission’s order stating that no Party had refuted the evidence relied upon by the Commission.¹⁵⁹ The Commission and the Court also held

¹⁵³ *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA *et al.* (OMG’s Remand Merit Brief at 6) (April 13, 2007).

¹⁵⁴ *Id.* at 6-8.

¹⁵⁵ *In re Dominion East Ohio’s Application to Restructure its Commodity Service*, Case No. 05-474-GA-ATA (Opinion and Order at 13) (May 26, 2006).

¹⁵⁶ *Id.*

¹⁵⁷ *Ormet v. Ohio Power Company*, Case No. 05-1057-EL-CSS (Opinion and Order at 4) (June 14, 2006); *In re Vectren Decoupling Application*, Case No. 05-1444-GA-UNC (Opinion and Order at 10) (September 13, 2006).

¹⁵⁸ *In re CG&E’s MBSSO*, Case No. 03-93-EL-ATA (Opinion and Order at 24) (September 29, 2004).

¹⁵⁹ *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 111 Ohio St.3d 300, 310-311, 856 N.E.2d 213, 226 (2006).

that DE-Ohio's MBSSO is not discriminatory.¹⁶⁰ The findings of the Commission and the Court fulfill the statutory standard for the burden of proof in this case, that the MBSSO is just and reasonable because it is not discriminatory or priced below cost for the purpose of destroying competition.¹⁶¹ The Court's affirmation of the Commission's order means this is not an issue for consideration on remand.

[REDACTED]

The entire idea of moving from a regulated to a non-regulated generation market is to allow market forces to operate in order to provide lower long-term prices for consumers. In this instance, all consumers

¹⁶⁰ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St.3d 300, 313-316, 856 N.E.2d 213, 228-229 (2006).

¹⁶¹ Ohio Rev. Code Ann. § 4928.05 (Baldwin 2007).

¹⁶² *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (OCC's Remand Merit Brief at 59-62) (April 13, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (OMG's Remand Merit Brief at 26) (April 13, 2007).

pay DE-Ohio's MBSSO price. That is undisputed on the record. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

It certainly does not mean that DE-Ohio's MBSSO represents a high market price. The Commission asked DE-Ohio to agree to an RSP-MBSSO that would limit DE-Ohio's ability to adjust its market price, which limits its ability to compete with CRES providers.¹⁶⁵ The evidence shows that DE-Ohio's MBSSO is a market price, the Court affirmed the Commission's finding, and that issue is not before the Commission on remand.¹⁶⁶ [REDACTED]

[REDACTED]

[REDACTED]

¹⁶³ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Hixon Prepared testimony at BEH 17) (March 9, 2007).

¹⁶⁴ *Id.* at BEH 11.

¹⁶⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Entry at 5) (December 9, 2003).

¹⁶⁶ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St.3d 300, 310-311, 856 N.E.2d 213, 226 (2006).

[REDACTED]

[REDACTED]

The evidence shows that DE-Ohio unbundled its generation prices based upon its cost of service study in its 1992 rate case that included subsidies of the residential class by the non-residential consumers.¹⁶⁸ The evidence also shows that non-residential consumers are paying the RTC that residential consumers do not pay at all during 2009 and 2010.¹⁶⁹ A simple check of the RTC approved by the Commission will confirm the [REDACTED]

[REDACTED]

[REDACTED]

If subsidies are eliminated residential market prices will increase.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁶⁷ *In re DE-Ohio's Transition Plan*, Case No. 99-1658-EL-ETP (Opinion and Order at 7-8, 21-22) (August 31, 2000).

¹⁶⁸ *Id.* at 21-22.

¹⁶⁹ *Id.* at 7-8.

¹⁷⁰ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Hixon Prepared testimony at BEH 5, 11, 17) (March 9, 2007).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] To arrive at such

conclusions OCC and OMG ignore the facts and law applicable to these

cases.

First [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁷¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC's Remand Merit Brief at BEH 65, 71) (April 13, 2007).

¹⁷² *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OMG's Remand Merit Brief at 19-20) (April 13, 2007).

¹⁷³ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC's Remand Merit Brief at 63-71) (April 13, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OMG's Remand Merit Brief at 19-21) (April 13, 2007).

[REDACTED]

¹⁷⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC's Remand Merit Brief at 56-59) (April 13, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OMG's Remand Merit Brief at 14-17) (April 13, 2007).

¹⁷⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Ficke's Deposition Transcript at 35-36) (February 20, 2007).

¹⁷⁶ *Id.* (emphasis added).

¹⁷⁷ *Id.* at 77.

¹⁷⁸ *Id.* at 74-76.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁷⁹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC's Remand Merit Brief at 64) (April 13, 2007).

¹⁸⁰ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (George's Deposition Transcript at 21-22, 46-49) (February 20, 2007).

¹⁸¹ *Id.* at 21.

¹⁸² *Id.* at 21-22.

OCC and OMG also misinterpret the law regarding subsidies, corporate separation, and code of conduct. OMG states flatly that DE-Ohio has violated R.C. 4928.02(G).¹⁸⁵ Revised Code Section 4928.02(G) prohibits anticompetitive subsidies flowing from a non competitive retail electric service to a competitive retail electric service or *vice versa*.¹⁸⁶ It represents state policy but does not set any standard regarding subsidies. As previously discussed the Commission has permitted substantial subsidies flowing from non-residential consumers to residential consumers.

Before a violation of R.C. 4928.02(G) can be shown however, at the very least, the complainant must demonstrate that there is some transfer of funds from one entity to the other. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Commission's rules make the necessity of an offending transaction clear.¹⁸⁷ Ohio Administrative Code Section 4901:1-20-16 defines affiliates as including the internal merchant function of a

¹⁸⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OMG's Remand Merit Brief at 19) (April 13, 2007).

¹⁸⁶ Ohio Rev. Code Ann. § 4928.02(G) (Baldwin 2007).

¹⁸⁷ OHIO ADMIN. CODE ANN. § 4901:1-20-16 (Baldwin 2007).

[REDACTED]

Finally, OCC suggests the Commission should open an investigation to require DE-Ohio to show cause why it is not in violation of O.A.C. 4901:1-20-16.¹⁹⁵ DE-Ohio asserts that there is no evidence to suggest that it has violated any portion of O.A.C. 4901:1-20-16. No investigation is warranted.

DE-Ohio maintains a Cost Allocation Manual (CAM) pursuant to O.A.C. 4901:1-20-16. OCC obtained the current version of the CAM through discovery and Staff also has a copy. The CAM specifies [REDACTED]

[REDACTED]

[REDACTED]

OCC has raised no questions regarding DE-Ohio's CAM and DE-Ohio is in compliance with the rule requirements.

DE-Ohio is also in full compliance with the code of conduct sections of O.A.C. 4901:1-20-16 as it has not released improper

¹⁹³ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (TR. III at 32-33) (March 21, 2007).

¹⁹⁴ *Id.* at 37-38.

¹⁹⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC's Remand Merit Brief at 65, 71) (April 13, 2007).

information, except as required by the Commission in these cases at the request of OCC, and has not favored any CRES provider, including its own affiliate. In these cases the record indicates it required its affiliate to pay for billing system changes like any other CRES provider.¹⁹⁶ The record also demonstrates that DE-Ohio and DERS maintain separate books and records.¹⁹⁷

There has been substantial discovery into DE-Ohio's conduct in these proceedings. OCC put on testimony regarding its opinion of DE-Ohio's conduct based upon the discovery it obtained. DE-Ohio has no more information to provide to OCC or the Commission. Further investigation is unnecessary. DE-Ohio has done nothing wrong and its affiliates [REDACTED]

[REDACTED]

F. The Commission should keep all proprietary information confidential

The confidential and proprietary nature of many of the previously discussed [REDACTED] as well as other information exchanged during discovery and obtained through depositions were the subject of numerous Motions for Protective Orders filed by many of the Parties to these proceedings. At the outset of the remand hearing, from the bench the attorney examiners granted all of the various Motions for Protective

¹⁹⁶ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Steffen's Second Supplemental Testimony at 37) (February 28, 2007).

¹⁹⁷ *Id.*

Orders.¹⁹⁸ The Attorney examiners stated that the Motions would be granted for a period of eighteen months on the condition that the granting of those motions may be modified if the Commission deems it appropriate.¹⁹⁹ DE-Ohio respectfully requests that the Commission maintain the confidential nature of the [REDACTED] and other information exchanged during these proceedings and affirm the attorney examiner's ruling from the bench.

There is no need to put the confidential information obtained by OCC in these proceedings in the public domain. First, with r [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁹⁸ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (TR. I at 8-10) (March 19, 2007).

¹⁹⁹ *Id.*

²⁰⁰ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Hixon Prepared testimony at BEH 6 and 12) (March 9, 2007).

[REDACTED]

[REDACTED]

[REDACTED], over the course of discovery in the initial MBSSO proceeding, the Remanded MBSSO proceeding, and the now consolidated Rider Adjustment Cases, DE-Ohio has provided OCC with thousands of pages of confidential and proprietary trade secret documents pursuant to Protective Agreements. The protected materials provided by DE-Ohio pursuant to the Protective Agreements include but are not limited to confidential business analysis, financial analysis, internal business procedures, responses to data requests, interrogatories, confidential internal correspondence, specific customer information including load consumption levels, and load characteristics, as well as in-depth discussions of the aforementioned items during sealed depositions which occurred as part of overly broad discovery in the above styled proceedings.

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.²⁰²

²⁰¹

In re North Coast Gas, Case No. 06-1100-PL-AEC (Entry at 2) (February 7, 2007).

Trade secret information, such as that at issue here, is entitled to protection under Ohio's trade secrets act,²⁰³ R.C. §1333.61, Ohio's public records act,²⁰⁴ and under the federal Trade Secrets and Freedom of Information acts.²⁰⁵ The information that OCC seeks to make public is trade secret information maintained by DE-Ohio and counterparties in a confidential manner.

OCC cannot claim to have been prejudiced through the confidential treatment of the information which was protected by the attorney examiner's bench order. The confidential documents OCC wished to use were admitted into evidence in the above styled proceeding and are before this Commission to determine the relevance. Accordingly, OCC has not suffered any harm by the confidential treatment of the information, nor will it in the future. The Commission should maintain the confidential nature of this information.

IV. Suggested findings of law and fact.

²⁰² Ohio Rev. Code Ann. § 1333.61(D) (Baldwin 2007).

²⁰³ *Id.*

²⁰⁴ Ohio Rev. Code Ann. § 149.011 (Baldwin 2007); [REDACTED] and information do not even qualify as a "public record" unless and until admitted 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.)

²⁰⁵ 18 U.S.C. § 1905 (2007); 5 U.S.C. 552(b)(4) (2007).

DE-Ohio requests that the Commission issue an Entry with the following findings of law and fact:

Findings of Law:

[REDACTED]

[REDACTED]

2. DE-Ohio met its burden of proof that the MBSSO ordered by the Commission is just and reasonable and therefore, not priced below cost for the purpose of destroying competition pursuant to R.C. 4905.33(B) or discriminatory pursuant to R.C. 4905.35.
3. DE-Ohio's MBSSO is a market price.
4. The provider of last resort component required by R.C. 4928.14(A) and 4928.14(C) includes all non-bypassable components of the MBSSO and is set at a market price.
5. The price to compare component of DE-Ohio's MBSSO includes all bypassable charges and is a market price.
6. The competitive bid process component of DE-Ohio's MBSSO is in compliance with R.C. 4928.14 because other options are generally available for customers in the competitive retail electric service market.

Findings of Fact:

1. The record evidence available at November 23, 2004, demonstrates that DE-Ohio's MBSSO is set within the range of market prices.

2. The record evidence available at November 23, 2004, as set forth on JPS-SS2 attached to Mr. Steffen's Second Supplemental Testimony, demonstrates that the components of DE-Ohio's MBSSO, including the Infrastructure Maintenance Fund and the System Reliability Tracker were derived from DE-Ohio's Annually Adjusted Component set forth in the May 19, 2004, Stipulation filed at the Commission.
3. The record evidence available at November 23, 2004, demonstrates that Mr. Steffen testified that the reserve capacity component of the Annually Adjusted Component included compensation for the commitment of DE-Ohio's existing capacity.
4. DE-Ohio complied with the Commission order to provide OCC with discovery of all contracts it had with Parties to these proceedings.
5. The only contract between DE-Ohio and any Party to these proceedings is a contract with the City of Cincinnati.

CONCLUSION:

For the reasons set forth above, DE-Ohio respectfully requests the Commission reaffirm the MBSSO it ordered on November 23, 2004, in its Entry on Rehearing and reject OCC's request for further investigation.


Respectfully Submitted,

A handwritten signature in black ink, appearing to be "Paul A. Colbert", written over a horizontal line.

Paul A. Colbert, Trial Attorney
Associate General Counsel
Rocco D'Ascenzo, Counsel
Duke Energy Ohio
2500 Atrium II, 139 East Fourth Street
P. O. Box 960
Cincinnati, Ohio 45201-0960
(513) 287-3015

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically on the following parties this 27th day of April 2007.



Paul A. Colbert
Rocco D'Ascenzo, Counsel

Anne.Hammerstein@puc.state.oh.us
BarthRoyer@aol.com;
Stephen.Reilly@puc.state.oh.us
ricks@ohanet.org;
Scott.Farkas@puc.state.oh.us
shawn.leyden@pseg.com
Thomas.McNamee@puc.state.oh.us
mchristensen@columbuslaw.org;
Werner.Margard@puc.state.oh.us
cmooney2@columbus.rr.com
rsmithla@aol.com
nmorgan@lascinti.org
schwartz@evainc.com
dane.stinson@baileycavalieri.com
cgoodman@energymarketers.com;
sbloomfield@bricker.com
dboehm@bkllawfirm.com;
TOBrien@bricker.com;
mkurtz@bkllawfirm.com;
anita.schafer@duke-energy.com
michael.pahutski@duke-energy.com
paul.colbert@duke-energy.com
rocco.d'ascenzo@duke-energy.com
tschneider@mgsglaw.com
korkosza@firstenergycorp.com
eagleenergy@fuse.net;
dneilsen@mwncmh.com;
JKubacki@strategicenergy.com
jbowser@mwncmh.com;
lmcaster@mwncmh.com;
sam@mwncmh.com;
bingham@occ.state.oh.us
HOTZ@occ.state.oh.us
SAUER@occ.state.oh.us

MHPetricoff@vssp.com
SMALL@occ.state.oh.us
mdortch@kravitzllc.com