# LARGE FILING SEPERATOR SHEET

## CASE NUMBER:

Case Nos. 03-93-EL-ATA, 03-2079-EL-AAM, 03-2080-EL-ATA, 03-2081-EL-AAM, 05-724-EL-UNC, 05-725-EL-UNC, 06-1068-EL-UNC, 06-1069-EL-UNC & 06-1085-EL-UNC

## FILE DATE:

1/23/08

## SECTION:

6 OF 7

## NUMBER OF PAGES:

200

## DESCRIPTION OF DOCUMENT:

Redacted documents filed pursuant to October 24, 2007 Order by M. Dortch on behalf of DE-Ohio

the Company.[44] Such major changes to CG&E's proposal and to rates should be the subject of notice and investigation, including by parties to these cases who have a right to ample discovery,[45] as well as briefing regarding the legal deficiencies that are present in the new proposal.

The Company's new proposal contains an even more unusual addition that is not carefully explained. CG&E states:

> CG&E also requests that the Commission open a proceeding to determine the conditions under which an electric distribution utility may purchase or build a generating facility and recover the costs of the purchase or build over the remaining life of the facility. Resolution of this issue is important to ensuring the provision of reliable electric service throughout Ohio.[46]

This component of CG&E's new plan -- represented by the Company as important to "reliable electric service throughout Ohio" -- violates the electric restructuring legislation in general, is the antithesis of the corporate separation statutes in particular, and offends the ratemaking statutes that were designed by the General Assembly to balance a utility's opportunity for profit with the protection of Ohio consumers. For example, the purpose of corporate separation is to "ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business."[47] CG&E's various plans all suffer from the defect that the Company seeks to extend

---

[44] The ten-day period provided for memoranda contra applications for rehearing, stated under Ohio Adm. Code 4901-1-35(B), was not designed for and is not conducive to an in-depth analysis of proposed increases in rates. Information from discovery would be important to a more comprehensive evaluation. The OCC reserves the right to make more extensive comments on the impact that CG&E's new proposal will have on customers in the event that the Commission considers the Company's "alternate" proposal.

[45] R.C. 4903.082; Ohio Adm. Code 4901-1-16. No consideration should be given to CG&E's new proposal without ample discovery and a full hearing.

[46] CG&E Application for Rehearing at 5.

[47] R.C. 4928.17(A)(3).

an undue preference for its own generation. The Commission is a creature of statute and cannot rewrite Ohio law,[48] whether at CG&E's behest or otherwise.

C. CG&E Does Not Have The Right To Proceed Without Commission Approval

As stated above, R.C. 4909.42 does not authorize CG&E to implement the rates that it has proposed in these cases that conflict with the Commission's orders. Additionally, CG&E states that it intends to "implement its market prices for non-residential consumers on January 1, 2005, and its *distribution rate increase requested in Case No. 04-680-EL-AIR*, subject to refund, pursuant to R.C. 4909.42."[49] The distribution rate increases in Case No. 04-680-EL-AIR include increases for residential customers in 2006 and base those increases, in part, on distribution and transmission service rendered to residential customers during the 2001-2004 period.[50] The Commission has determined in the above-captioned cases that residential customers may not be charged more for distribution service until January 1, 2006, and that those increases may not include amounts to recover deferred costs for service rendered before that date.[51] Additionally, the *distribution* rate case in Case No. 04-680-EL-AIR was filed on June 15, 2004, and is proceeding on a completely different timeline than the above-captioned cases. R.C. 4909.42, even if applicable, would not permit distribution rate increases until after January 1, 2005.[52]

CG&E's argument favoring its "right to proceed" ignores the Company's violation of its obligations to provide competitive rates. R.C. 4928.14(B) states:

---

[48] *Canton Storage and Transfer Co. v. Pub. Util. Comm.* (1995), 72 Ohio St.3d 1.

[49] CG&E Application for Rehearing at 28 (emphasis added).

[50] *In re CG&E Distribution Rate Increase*, Case No. 04-680-EL-AIR, Application at 3 (June 15, 2004).

[51] Order at 34.

[52] R.C. 4909.42 states that a proposed increase may go into effect "at the expiration of two hundred seventy-five days from the date of filing" (approximately nine months).

> After that market development period, each electric distribution utility also shall offer customers within its certified territory an option to purchase competitive retail electric service the price of which is determined through a competitive bidding process.

The law requires that the Company offer customers the option to purchase power at a competitively bid rate. That competitive bid rate must be determined by a process that is approved according to the requirements of Ohio Adm. Code 4901:1-35. The rules provide that a "fixed-rate service for which bids are solicited shall be used as the initial service offer on and after the end of the market development period for residential and small general service customers who have not chosen otherwise * * * ." [53] The Company has failed to make any application pursuant to the Commission's rules that require a fixed-rate service, the solicitation of bids, and the application of such service to customers who have not chosen another source of generation service.[54] Such an application was required by July 1, 2004.[55] CG&E may not proceed with only the rates that it wants without providing other, legally required rates that provide customers with the protection provided by the competitive marketplace.

CG&E's various proposals in these cases are noteworthy for their lack of attention to the competitive bidding process that is an integral part of post-MDP service under R.C. Chapter 4928. The only "reward" a winning bidder would obtain, under the bidding process proposed by CG&E in its applications, is a designation as the "winning bidder" on a website.[56] CG&E's "test bid" concept under the Partial Stipulation offers no prospect for bidders to actually gain a share

---

[53] *Ohio Adm. Code* 4901:1-35-03, Appendix B.

[54] Instead, the Commission's Order approves a variable rate standard service offer for CG&E in the absence of a CG&E application for such a rate that complies with the documentation and notice requirements contained in Ohio Adm. Code 4901:1-13-03, Appendix A.

[55] Ohio Adm. Code 4901:1-35-03(A) and (C).

[56] January 2003 Application, Ex. C-3 to Exhibit 2 ("Request for Proposals"), Section 8.0 ("Notification of Customers").

of the CG&E market assures that any bid will be a failure. The Company's "alternate" proposal makes only fleeting reference to the bidding process when it states that CG&E's proposed "SRT process" would include purchased power "through bilateral contracts, requests for proposal, or auctions."[57] The Commission should reaffirm the emphasis that it placed on the competitive bidding process in the FirstEnergy post-MDP cases.

> We believe that a CBP should be conducted to assure the Commission and all interested stakeholders that the charges for generation service under the ERRSP Stipulation Plan do not exceed long-term market prices that result from a CBP * * * and find that the Applicants' proposal to measure the results of such a CBP against the generation charge provides no meaningful comparison to determine whether or not to end the ERRSP Stipulation Plan. Once a CBP has been conducted, such result can be provided to our Staff for its analysis of the appropriate comparison and the Commission can then determine whether to approve the winning bids or maintain the ERRSP Stipulation Plan.[58]

As quoted above, the Commission intends more that the "test bid" proposed by CG&E in the Partial Stipulation, but rather intends to use the results of the CBP process if the rates are found to be competitive. A comparison between any "rate stabilization plan" approved by the Commission in this case and the results of a competitive bidding process -- conducted on an annual basis as customer rates change on an annual basis -- is necessary to ensure a legitimate competitive bidding process as required under Ohio law.[59] The Commission should, at the least, insist upon these requirements for the CG&E competitive bidding process so that customers in the CG&E service territory are able to benefit from the lowest rates possible.

---

[57] CG&E Application for Rehearing at 17.

[58] *In re FirstEnergy Post-MDP Service*, Case No. 03-2144-EL-ATA, Order at 15 (June 9, 2004).

[59] The OCC's position regarding an appropriate bidding process is located elsewhere in this docket. See, e.g., OCC Application for Rehearing at 16-17.

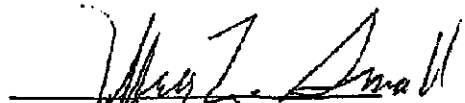
CG&E may not ignore its obligations and proceed with new rates without even making a legally required application for approval of an alternative set of rates that would protect consumers.

## III. CONCLUSION

CG&E's Application for Rehearing does not adequately support its assignments of error, should not include what amounts to a new application, and is defective in its attempted support for "self help" in the wake of the Commission's Order. CG&E's Application for Rehearing should be rejected in its entirety. Instead, the Commission should correct the errors described in the OCC's Application for Rehearing and otherwise develop the competitive market according to the General Assembly's protection for consumers against high prices such as those proposed by CG&E in these cases.

Respectfully submitted,

Janine Migden-Ostrander
Consumers' Counsel



Jeffrey L. Small, Trial Counsel
Ann M. Hotz
Larry S. Sauer
Assistant Consumers' Counsel

**OFFICE OF THE OHIO CONSUMERS' COUNSEL**
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 (T)
(614) 466-9475 (F)
small@occ.state.oh.us

## CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Memorandum Contra to CG&E's Application for Rehearing was served via electronic U.S. Mail, this 8th day of November 2004.

Jeffrey L. Small

**SERVICE LIST**

Paul Colbert, Esq.
Cinergy Corporation
155 East Broad Street
Columbus, OH 43215
Paul.Colbert@Cinergy.com

Samuel C. Randazzo, Esq.
McNees, Wallace & Nurick, LLC
21 East State Street
Columbus, OH 43215
srandazzo@mwncmh.com

Michael L. Kurtz, Esq.
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 2110
Cincinnati, OH 45202
mkurtz@BKLlawfirm.com

David F. Boehm, Esq.
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 2110
Cincinnati, OH 45202
dboehm@BKLlawfirm.com

Craig G. Goodman, Esq.
National Energy Marketers Assoc.
3333 K Street NW, Suite 110
Washington, DC 20007
cgoodman@energymarketers.com

Dane Stinson, Esq.
Bailey Cavalieri, LLC
One Columbus
10 W. Broad St., Suite 2100
Columbus, OH 43215
Dane.stinson@baileycavalieri.com

Thomas W. McNamee, Esq.
Assistant Attorney General
Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, Ohio 43215
thomas.mcnamee@puc.state.oh.us

Thomas J. O'Brien, Esq.
Sally Bloomfield, Esq.
Bricker & Eckler, LLP
100 South Third Street
Columbus, OH 43215
tobrien@bricker.com
sbloomfield@bricker.com

M. Howard Petricoff, Esq.
Vorys, Sater, Seymour & Pease
P.O. Box 1008
Columbus, OH 43216-1008
mhpetricoff@cssp.com

W. Jonathan Airey, Esq.
Vorys, Sater, Seymour & Pease
P.O. Box 1008
Columbus, OH 43216-1008
wjairey@vssp.com

Shawn P. Leyden, Esq.
PSEG Energy Resources & Trader LLC
80 Park Plaza, 19th Floor
Newark, NJ 07102
shawn.leyden@pseg.com

Barth E. Royer, Esq.
Judith B. Sanders, Esq.
Bell, Royer & Sanders Co., LPA
33 South Grant Ave.
Columbus, OH 43215
broyer@brscolaw.com

Richard Sites, Esq.
Ohio Hospital Association
155 E. Broad St., 15th Floor
Columbus, OH 43215
ricks@ohanet.org

David C. Rinebolt
Ohio Partners For Affordable Energy
337 S. Main St., 4th Floor, Suite 5
P.O. Box 1793
Findlay, OH 45839-1793
drinebolt@aol.com

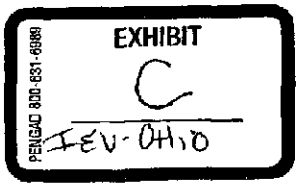
People Working Cooperatively, Inc.
Mary W. Christensen, Esq.
401 North Front Street, Suite 350
Columbus, Ohio 43215-2499
Mchristensen@Columbuslaw.org

Communities United for Action
Noel M. Morgan, Esq.
Legal Aid Society of Greater Columbus
215 East Ninth Street, Suite 200
Cincinnati, Ohio 45202
nmorgan@lascinti.org

First Energy Solutions Corp.
Arthur E. Korkosz, Esq.
76 South Main Street
Akron, Ohio 44308
KorkoszA@FirstEnergyCorp.com

Benita A. Kahn, Esq.
Vorys, Sater, Seymour & Pease
P.O. Box 1008
Columbus, OH 43216-1008
bakahn@vssp.com

IEU-Ohio Exh C




# Harvard Electricity Policy Group
# Forty-Third Plenary Session

Panel: "Wholesale and Retail Electricity Market Models:
Will They Mesh Well or Cancel Each Other Out?"

Presented by:

**Janine Migden-Ostrander**

**Office of the Ohio Consumers' Counsel**

June 1, 2006

# Is the "Sky now Falling"?

How do we address the perceived failures of retail and wholesale electric markets while ensuring adequate generating capacity going forward?

# Late 2004

- "Retail Competition is for Everyone"
- Main themes: competition can work for all customers; touted success of shopping in N. Ohio; advocated for a "portfolio approach" for the Standard Service Offer (SSO)

# A lull in retail shopping in Ohio

- Dramatic decline in retail shopping in N. Ohio since January 06
- Retail structural problems
  * Remnants of past regulatory decisions – e.g.,unbundling; RTC
  * Rate Stabilization Plans (RSPs) – rate increases w/o the ability to bypass

# A lull in retail shopping in Ohio

- The "new regulation" of generation in Ohio
  * Under CGE's RSP, distribution customers could be forced to pay for the purchase of a generating plant
  * AEP seeks pre-approval for construction/recovery of an IGCC plant – 100% CWIP and no cap on construction costs
  * No true corporate separation

# The retail "nether world" - Ohio

- Ohio retail consumers face a "gray" world somewhere between full regulation and full competition where only the utilities seemingly prosper
  * FE's 1st Qtr 06 profit increased 38% even with a deferral of their increased fuel costs
  * Current rates are considered "sacred" but utilities increased costs are readily added in (without significant review) and recovery is guaranteed (through the nonbypassable restrictions imposed on the SSO customers)
  * No relief from competitive providers who can't "compete" with flaws in retail structure and flawed wholesale market as well

# The wholesale "nether world"

- News is full of stories about short-term wholesale auctions resulting in large percentage increases to customers trapped on the SSO in a variety of restructured states
  * e.g., Maryland
  * OH has seen wholesale auctions that have failed to generate acceptable bids

# The Wholesale "Nether World"

- Reflects short-term market prices
- Does not provide incentives for construction of new baseload capacity
  - Scarcity problem:
    - Growth in demand
    - Plant retirements
      - Environmental regulations
      - Unit age
  - How do we finance new construction under deregulation?
    - Traditional financing
    - Consumers

# The wholesale "nether world"

- Litany of concerns with the state of wholesale market development in the Midwest
  * Dependence on a Uniform Clearing Price (in LMP markets) that often is based on sky-rocketing gas costs
  * Stalled Joint and Common Market
  * Lack of long-term transmission rate design for Midwest

# The wholesale "nether world"

* Lack of long-term bilateral contracts
* Increased transmission costs – both for RTO operations (including capacity markets that don't guarantee new capacity) and transmission improvements
* And the list could go on!!!

# What do we do now?

- **Certainly retail competition cannot succeed without a viable wholesale market**
  * Obviously, those of us who promoted retail competition dramatically underestimated the work that needed to be done to provide such wholesale markets

# What do we do now?

- First, and foremost, the work needed to fully develop the wholesale markets must be completed in a timely matter
- Second, the **Competitive Procurement of Generation (CPG)** must become a reality
  * Concept works whether retail price is determined through competition or by administrative (or regulated) means

# What do we do now?

* Focus on long-run supply and demand-side portfolios that are competitively-bid
* Establish resource diversity goals that satisfy your particular state's needs/goals
* Use a "laddered" approach that utilizes both short-run and long-run assets
* Develop creative tools to incent construction of new generation

# What do we do now?

- Benefits include:
  * promotion of wholesale competition;
  * incents the construction of new baseload capacity while also using competitive forces to achieve the least-cost for this new generation;
  * promotes supply diversity;
  * enhances energy efficiency efforts

# What do we do now?

- Focus on further improvements to wholesale market; cost-effective transmission enhancements; and, the **CPG** will allow for customers to pay the lowest possible rates **in the long-run**
- In a "choice" state, such a focus also allows the final decision on whether retail competition should actually proceed (or retail regulation should return) to be postponed until a truly fair determination can be made

# What do we do now?

- In a regulated state, such a focus allows for the least-cost generation portfolio to be employed
- In the **short-run**, we may be forced to acknowledge that an immature wholesale market – itself a "work in progress", will further exacerbate poor retail markets in "choice" states and result in higher SSO prices

  * Prices will go up in regulated states as well for many of the same reasons

# What do we do now?

- The OCC has been actively involved in the debate on wholesale market development and the removal of retail impediments and pledges to continue those efforts in the future
- At the same time, the OCC has committed to further developing the **CPG** concept (briefly discussed herein) in a generic and an Ohio-specific manner

**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 | : | | 03-2081-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 MERIT BRIEF**

---

**SUMMARY OF THE ARGUMENT:**

The Ohio Supreme Court's Order remanding Case No. 03-93-EL-ATA *et al.*, is precise. The scope of the remand encompasses only two narrow points: (1) Does the record evidence support the Public Utilities Commission of Ohio's (Commission) November 23, 2004, Entry on Rehearing; and (2) Are there side agreements that precluded serious bargaining among capable and knowledgeable Parties, the first prong of the three part test regarding the adoption of partial stipulations.[1] The Ohio Consumers' Counsel (OCC) asserts that the issues are significantly broader, requiring the Commission's reconsideration of the entirety of Duke Energy Ohio's (DE-Ohio) market-based standard service offer (MBSSO). The Commission, to this point, has allowed

---

[1] *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 309, 323 856 N.E.2d 213, 225, 236 (2006).

abundant due process by permitting the broad presentation of evidence, as requested by OCC.

Following the presentation of evidence, DE-Ohio asserts that the Commission's decision with regard to the remand of DE-Ohio's MBSSO pricing structure as determined in the Commission's November 23, 2004, Entry on Rehearing is clear. The record evidence supports only one conclusion; there was an abundance of evidentiary support for the establishment of DE-Ohio's MBSSO market price that became effective January 1, 2005, for non-residential consumers and January 1, 2006, for residential consumers.

Further, the evidence is clear that the various confidential commercial contracts entered into by Duke Energy Retail Sales (DERS) and Cinergy Corporation (Cinergy) were not only appropriate but irrelevant and unrelated to the establishment of DE-Ohio's MBSSO market price. The confidential commercial contracts are not side agreements, as alleged by OCC, because DE-Ohio was not a party to those contracts, and the contracts had absolutely no influence or impact on the establishment of the Stipulation agreed to by the Parties or DE-Ohio's MBSSO. Even if there were some nexus between the confidential commercial contracts of DERS and Cinergy and the Stipulation, which DE-Ohio denies, the existence of the contracts would still be irrelevant because the Stipulation itself was not adopted by the Commission.

Accordingly, the Commission should issue an Entry stating its reasoning and citing the record evidence reaffirming its November 23, 2004, Entry on Rehearing, and hold that DE-Ohio did not enter into any relevant or improper

side agreements and that the DERS and Cinergy contracts are irrelevant to these cases. The conclusion follows from the recitation of the evidence presented by the witnesses at the hearing concluded March 21, 2007.

In his Second Supplemental Testimony, DE-Ohio witness John Steffen explains precisely how the record evidence collected in the evidentiary hearing ending June 1, 2004, fully supported the MBSSO ordered by the Commission on November 23, 2004, including the Infrastructure Maintenance Fund (IMF) and the System Reliability Tracker (SRT). DE-Ohio witness Judah Rose, in his Second Supplemental Testimony, testified that the same record evidence fully supported the fact that the Commission's November 23, 2004, Entry on Rehearing ordered an MBSSO that was, and still is, a market price.

Moreover, Staff witness Richard C. Cahaan, through his Prepared Testimony filed March 9, 2007, confirmed that the evidence supported the November 23, 2004, MBSSO ordered by the Commission. Mr. Cahaan offered further insight into the Commission's rationale supporting its November 23, 2004, Entry on Rehearing, stating that the determination to increase the level of avoidability of DE-Ohio's Riders only served to further balance the interest of the stakeholders, including both DE-Ohio and the ultimate consumers. Neither OCC's direct testimony nor cross-examination of DE-Ohio's and Staff's witnesses disputed or weakened the evidence presented by DE-Ohio and Staff regarding the establishment of DE-Ohio's MBSSO in November 2004.

The only witness that recommended a different MBSSO price than that ordered by the Commission was OCC witness Neil H. Talbot. Mr. Talbot's

testimony lacked substance. It was merely a recommendation, unsupported by any analysis, fact or law, that all of the MBSSO components should be fully avoidable, that some components, such as the IMF, should be eliminated, while the remaining components should be updated on a cost basis. Besides the fact Mr. Talbot's recommendations are contrary to law requiring market prices, not cost-based rates,[2] the cross-examination of Mr. Talbot revealed that he knows little of the requirements and conditions of the Ohio competitive retail electric market. Further, Mr. Talbot possesses little knowledge of the competitive retail electric market in any other state, and conceded that he had performed absolutely no analysis and could not reach a single conclusion regarding the effect of his recommendations on consumers and DE-Ohio. In short, Mr. Talbot could not support his own recommendation with facts or law. Under such circumstances, the Commission should not give OCC's recommendation any consideration and should treat the evidence presented by DE-Ohio and Staff as uncontroverted. The only logical conclusion and reasonable interpretation of the evidence is reaffirmation of the Commission's November 23, 2004, Entry on Rehearing and DE-Ohio's current MBSSO pricing structure.

With respect to the irrelevant commercial contracts of DERS, which OCC has labored to make the focus of this proceeding and which OCC has improperly alleged are side agreements, DE-Ohio witness John P. Steffen testified that DE-Ohio's only involvement with DERS was that DERS paid DE-Ohio to amend its billing system and that DE-Ohio performed consolidated

---

[2] Ohio Rev. Code Ann. § 4928.14 (Baldwin 2007).

billing functions as it does for any competitive retail electric service (CRES) provider. On cross-examination by OCC, Mr. Steffen testified that he was not personally involved with the negotiation of the DERS or Cinergy contracts.[3]

OCC attempts to infer improper behavior on the part of DE-Ohio through the direct testimony of its witness Beth E. Hixon. Ms. Hixon simply expresses areas of "concern," and in the end concedes that she did not find any wrongdoing on the part of DE-Ohio or any Duke Energy affiliate. The lack of weight the Commission should give Ms. Hixon's testimony becomes clear upon examination of the facts and her concessions on cross-examination. On cross-examination, Ms. Hixon agreed that the common contract terms involving DE-Ohio that she references are reasonable.[4] She also agreed that other terms she describes as obligating and requiring action by DE-Ohio could be resolved economically among the parties to the contract.[5]

An examination of the evidence surrounding the execution of those commercial contracts shows that: (1) The contracts would not have been before the Commission for its consideration of the Stipulation; (2) The Commission rejected the Stipulation in any case; (3) Almost all of the contracts were entered after the close of evidence; (4) All of the option contracts were entered after the Commission issued its November 23, 2004, Entry on Rehearing; (5) Mr. Ficke had no substantive involvement in the negotiation or implementation of the DERS contracts; (6) Mr. Ziolkowski's description of the history of the contracts

3 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (TR. I at 109, 133) (March 19, 2007).
4 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (TR. III at 32, 33) (March 21, 2007).
5 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (TR. III at 59-61) (March 21, 2007).

was uninformed as he was not involved in the analysis of any of the contracts and did not know about the existence of most contracts; and (7) Despite the use of the term "CG&E" in an email discussion between DERS and [redacted] the parties knew the contracts did not involve DE-Ohio.

The record evidence also demonstrates that Ms. Hixon performed no analysis regarding the economic reasonableness of the contracts and lacked the expertise to perform such analysis. Under these circumstances, OCC has made no showing that the contracts in question have any bearing on these proceedings. The contracts simply had no affect on the establishment of DE-Ohio's MBSSO.

Ultimately, Ms. Hixon makes no attempt to address the only issue expressly raised by the Court regarding alleged "side agreements;" whether such agreements were relevant to the Commission's determination that the Parties engaged in serious bargaining.[6] The failure of OCC's witness to address the issue of serious bargaining is because: (1) The Commission rejected the Stipulation so serious bargaining relative to the Stipulation is irrelevant; (2) OCC did not ask for the contracts it now alleges affected the Stipulation so such contracts could not have been considered; and [redacted]

[6] *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 320 856 N.E.2d 213, 234 (2006).

DE-Ohio's rate stabilized MBSSO, as initially proposed in January 2004, and supported through direct testimony was a reasonable market price. The Stipulation produced an MBSSO that was also a reasonable market price. Even assuming that the existence of the DERS and Cinergy contracts somehow affected the price derived through the Stipulation, which DE-Ohio denies, it would not change the fact that the Stipulation produced a market price within the range of reasonable and supported prices in the competitive retail electric service market. Accordingly, the Commission should hold that the contracts are not side agreements, are irrelevant to these proceedings, had absolutely no bearing on the Stipulation entered into by the signatory Parties and that the Stipulation itself was not adopted. Accordingly, there is no cause for additional investigation.

DE-Ohio respectfully requests the Commission to issue an Entry on Remand affirming its November 23, 2004, Entry on Rehearing. As part of the Entry on Remand, the Commission should explain that the MBSSO resulting from its November 23, 2004, Entry on Rehearing is proven reasonable because it resulted in a lower market price for consumers than the Stipulated market price, as well as providing more avoidability for switched load. The Commission should also cite to the record evidence fully supporting the MBSSO it ordered on November 23, 2004, making it clear that such evidence existed at the conclusion of the June 1, 2004, evidentiary hearing. Finally, the Commission should hold that the DERS and Cinergy contracts are irrelevant to these proceedings and no additional investigation is necessary.

**HISTORY OF THE PROCEEDINGS:**

Long before the 03-93-EL-ATA case commenced, Cinergy, on behalf of its operating companies DE-Ohio and Duke Energy Indiana, entered a [redacted]

On January 10, 2003, DE-Ohio filed its application before the Commission, pursuant to R.C. 4928.14, to establish its MBSSO.[7] DE-Ohio's application permitted all stakeholders an opportunity to participate in the competitive retail electric market. The application, now known as the competitive market option (CMO), was never acted upon by the Commission. Instead, the Commission instructed DE-Ohio to file a rate stabilization plan (RSP) MBSSO because it was concerned about a lack of development of the competitive wholesale electric market and the ability of the wholesale market to support the competitive retail electric market.[8] On January 26, 2004, in response to the Commission's request, DE-Ohio filed its RSP MBSSO.[9]

On February 4, 2004, and completely unrelated to the MBSSO proceeding, DE-Ohio signed a contract with the City of Cincinnati regarding the naming rights to the City Convention Center. At that time, the City of Cincinnati was not a Party to the MBSSO proceeding, although the City did eventually intervene in the proceeding, filing its Motion on April 21, 2004.

---

7 *In re DE-Ohio MBSSO*, Case No. 03-93-El-ATA, *et al.* (Application) (January 10, 2003); Ohio Rev. Code Ann. § 4928.14 (Baldwin 2007).

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

9 *In re DE-Ohio MBSSO*, Case No. 03-93-El-ATA, *et al.* (Response to the Request of the Commission to File and RSP) (January 26, 2004)

Following the January 26, 2004, filing of its RSP MBSSO, DE-Ohio engaged in serious settlement negotiations among the Parties, including OCC and the Staff. DE-Ohio held a settlement conference on March 31, 2004, which included a technical presentation of the RSP and CMO MBSSO options. During the settlement conference, and with the encouragement of Staff, DE-Ohio announced that it would, at the request of any Party, have settlement discussions with the large group, sub-sets of the Parties, and individual Parties. These discussions ultimately resulted in a Stipulation, which was filed with the Commission on May 19, 2004. The City of Cincinnati was not a Party to the Stipulation and ultimately withdrew from the case.

Between March 31, 2004, and May 19, 2004, when DE-Ohio filed a stipulation to settle the case, there were many discussions with many different Parties in many settings, including the OCC. During those settlement discussions, some Parties who were consumers in DE-Ohio's service territory indicated that they were interested in obtaining service from a CRES provider. Those Parties, and the customers they represented, were referred to DERS, then known as Cinergy Retail Sales, and other CRES providers doing business in DE-Ohio's certified territory. At that time DERS was preparing its application for certification before the Commission. There is no evidence that DE-Ohio showed any favoritism toward its affiliated CRES provider or that DE-Ohio participated in DERS's negotiations with customers.

The hearing to review DE-Ohio's RSP MBSSO application was scheduled to begin on May 17, 2004, but was postponed to allow the conclusion of

settlement discussions among all Parties. On May 18, 2004, OCC made its first discovery request for contracts between DE-Ohio and Parties to the proceedings.[10] OCC's discovery request was narrowly, and properly, framed to request only DE-Ohio agreements with Parties.[11] Had DE-Ohio responded to OCC's request, only the February 4, 2004, contract with the City of Cincinnati would have been responsive to OCC's request.

On May 19, 2004, after a full day of negotiation with all Parties, including OCC, DE-Ohio filed a Stipulation signed by the Company, Staff, First Energy Solutions (FES), Dominion Retail Sales, Green Mountain Energy, People Working Cooperatively (PWC), Communities United for Action (CUFA), Cognis, Kroger, Industrial Energy Users-Ohio (IEU-Ohio), Ohio Energy Group (OEG), and the OHA. Independently, also on [redacted] DERS signed contracts to provide competitive retail electric service to [redacted] DE-Ohio was neither involved with, nor a party to, the DERS contracts. [redacted]

On May 20, 2004, OCC repeated its discovery request at the commencement of the evidentiary hearing on the Stipulation.[12] The Commission denied OCC's oral motion to compel discovery.[13] Thereafter, the evidentiary hearing began and was completed on June 1, 2004.[14] [redacted]

---

10 *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Requests for Production of Documents Seventh Set at 3) (May 18, 2004).

11 *Id.*

12 *Id.* at TR. II at 8 (May 20, 2004).

13 *Id.*

14 *Id.* at TR. VII (June 1, 2004).

[redacted]. Once again, DE-Ohio was not a party to the contracts. The only contract in which DE-Ohio was actually involved was a June 14, 2004, amendment to its February 4, 2004, contract with the City of Cincinnati. Ultimately, the Commission issued its Opinion and Order rejecting the Stipulation on September 29, 2004.

DE-Ohio, OCC, and other Parties filed Applications for Rehearing following the Commission's Opinion and Order. DE-Ohio, as part of its Application for Rehearing, made an Alternative Proposal based upon the existing record evidence established during the hearing ended June 1, 2004. The Alternative Proposal incorporated some of the changes made by the Commission in its Opinion and Order and renamed and repositioned certain components proposed in the Stipulation. The Alternative Proposal included new component names and a lower total price than what was in the Stipulation, but contained no new concepts. The Alternative Proposal resulted in a lower MBSSO price than was agreed to in the Stipulation, and permitted more consumers to avoid greater portions of the MBSSO. [redacted] Once again, DE-Ohio did not participate in the DERS or Cinergy contracts and did not enter any contracts of its own during that period.

The Commission issued its Entry on Rehearing on November 23, 2004.[15] It did not adopt DE-Ohio's Alternative Proposal, but made significant changes to avoidability and the market price charged to returning customers necessitating additional Entries on Rehearing. DERS entered all of its option contracts subsequent to the Commission's November 23, 2004, Entry on Rehearing. [redacted] The Commission issued its final Entry on Rehearing, and final appealable order in these cases, on April 13, 2005.[16]

OCC appealed the Commission's November 23, 2004, Entry on Rehearing on numerous grounds. Ultimately, the Ohio Supreme Court rejected all of the grounds raised by the OCC except that it remanded to the Commission on two procedural issues.[17] Specifically, the Court remanded to the Commission ordering it to: (1) State its reasoning and cite record evidence in support of changes the Commission made in its November 23, 2004, Entry on Rehearing; and (2) Disclose through discovery "side agreements" previously requested by the OCC, in discovery.[18]

On remand, the Commission permitted expansive discovery allowing OCC to receive contracts entered between DERS or Cinergy [redacted] At hearing the Commission permitted OCC to submit evidence recommending changes to DE-Ohio's

[15] *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Entry on Rehearing) (November 23, 2004).
[16] *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Entry on Rehearing) (April 13, 2005).
[17] *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 856 N.E.2d 213, (2006).
[18] *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 309, 856 N.E.2d 213, 225 (2006).

MBSSO and the contracts of DERS and Cinergy. The case has now been submitted to the Commission for a decision based upon the record evidence.

**ARGUMENT:**

There are two issues before the Commission in these proceedings on Remand from the Court. First, the Commission must decide whether the record evidence supported its November 23, 2004, Entry on Rehearing, and if so, to provide better evidentiary support and explanation in its decision. That Entry on Rehearing together with several subsequent Commission Entries, established DE-Ohio's current MBSSO price. Pursuant to R.C. 4928.14 DE-Ohio's MBSSO is, and must be, a market price.[19] Although some of these consolidated cases represent discussions of components of DE-Ohio's market price, there is no statutory requirement that the MBSSO is made up of different components and it is the total market price that remains of primary concern to DE-Ohio. Both the Commission and the Court have held that the MBSSO is a market price.[20]

Second, the Commission must determine whether DE-Ohio entered into improper "side agreements" and whether those agreements resulted in an advantage to some Parties in the negotiation process to the detriment of other Parties and the detriment was so severe as to eviscerate "serious bargaining," which is required for the Commission to consider and approve partial Stipulations. DE-Ohio avers that it did not enter any side agreements and that

---

[19] Ohio Rev. Code Ann. § 4928.14 (Baldwin 2007).

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

the DERS and Cinergy contracts are irrelevant to these proceedings. For the reasons that follow, DE-Ohio asserts that the Commission should affirm its November 23, 2004, Entry on Rehearing, and determine that DE-Ohio did not enter "side agreements" to the advantage or detriment of any Party.

## I. The record evidence supports the MBSSO ordered by the Commission in its November 23, 2004, Entry on Rehearing.

### A. The record evidence fully supports the Commission's November 23, 2004, Entry on Rehearing.

Regarding the MBSSO ordered by the Commission on November 23, 2004, the Court held that "the Commission is required to thoroughly explain its conclusion that the modifications on rehearing are reasonable and identify the evidence it considered to support its findings."[21] There is full evidentiary support for such an explanation. As evidenced by Staff witness Richard C. Cahaan in his Supplemental Testimony filed March 9, 2007, many benefits accrued to consumers through the Commission's November 23, 2004, Entry on Rehearing. As stated by Mr. Cahaan, the additional level of avoidability, *i.e.*, the ability of consumers to avoid DE-Ohio charges upon switching their purchase of firm generation service to a CRES provider, which was accomplished through the Commission's November 23, Entry on Rehearing, was paramount.[22] Mr. Cahaan also acknowledged that DE-Ohio's market

---

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

22 *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Cahaan's Testimony at 11, 13) (March 9, 2007).

price, as approved on Rehearing, resulted in a lower price than had been agreed upon in the Stipulation.[23]

DE-Ohio witness John P. Steffen similarly testified that the Commission's November 23, 2004, Entry on Rehearing implemented an MBSSO that increased avoidability and shopping incentives to stimulate the competitive retail electric service market, and lowered the overall market price from that proposed by DE-Ohio in the Stipulation.[24] Clearly, the reasons for supporting the MBSSO ordered by the Commission are substantial and uncontroverted on the record.

OCC's only witness addressing the structure of DE-Ohio's approved MBSSO market price was witness Neil H. Talbot. Mr. Talbot does not directly address the Commission's reasoning for its November 23, 2004, MBSSO in his Prepared Testimony filed March 9, 2007. Mr. Talbot merely recommends that all MBSSO components should be fully avoidable to stimulate competition.[25] This recommendation is unsupportable and Mr. Talbot provides no basis to question the reasonableness of the Commission's conclusions to the contrary. On cross-examination, Mr. Talbot admitted that approximately 96.2% of DE-Ohio's MBSSO charges are fully by-passable. Mr. Talbot's testimony supports the reasoning offered by DE-Ohio and Staff witnesses that almost all of DE-Ohio's MBSSO is already avoidable.

---

[23] *Id.* at 11.

[24] *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Steffen's Second Supplemental Testimony at 30-31) (February 28, 2007).

[25] *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Talbot's Prepared Testimony at 6) (March 9, 2007).

Given that DE-Ohio was not a Party to the Commission's deliberations establishing the Company's MBSSO market price through the November Entry on Rehearing, and that the Commission did not approve the Alternative Proposal submitted by DE-Ohio, the Company will not attempt to divine the precise rationale employed by the Commission in establishing DE-Ohio's MBSSO on November 23, 2004. Clearly, however, ample rational exists in the record evidence.

The MBSSO price approved by the Commission is consistent with the Commission's three goals for rate stabilized MBSSO market prices. It provides price certainty to consumers, financial stability to DE-Ohio and furthers the competitive market. The MBSSO approved by the Commission was within the range of market prices presented on the record at the initial evidentiary hearing. The MBSSO price approved is less than the price supported by DE-Ohio at the evidentiary hearing and the Stipulated market price. To satisfy the Supreme Court's Order on Remand, the Commission should clearly explain its rational in its Entry on Remand.

### B. The factual evidence supports reaffirmance of the Commission's November 23, 2004, Entry on Rehearing.

DE-Ohio and Staff have requested that the Commission reaffirm its November 23, 2004, Entry on Rehearing.[26] The record evidence demonstrates that DE-Ohio's current MBSSO formula, as approved in the November 23, Entry on Rehearing, is superior to both the MBSSO contained in the

[26] *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Meyer's Direct Testimony at 7) (February 28, 2007); *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Cahaan's Testimony at 13-14) (March 9, 2007).

Commission's September 29, 2004, Opinion and Order, and the MBSSO proposed by DE-Ohio in a Stipulation supported by many Parties including Staff. The record evidence also contains support for each element of the MBSSO. Finally, the record evidence demonstrates that DE-Ohio's MBSSO, ordered by the Commission on November 23, 2004, was, and remains, a good deal for consumers who would pay higher prices if the MBSSO were re-set today.[27]

The Staff testified that the November 23, 2004, MBSSO ordered by the Commission is superior to the MBSSO resulting from the September 29, 2004, Opinion and Order because it lowered risk to consumers and DE-Ohio thereby serving the goal of developing the competitive retail electric service market.[28] Staff witness Richard C. Cahaan testified that there are three important control mechanisms to consider regarding the evaluation of DE-Ohio's MBSSO: (1) The level of total MBSSO price; (2) The amount of DE-Ohio generation charges avoidable by shopping customers; and (3) The mechanism for adjusting prices under changing conditions.[29] Although Staff acknowledged that the overall MBSSO price pursuant to the November 23, 2004, Entry on Rehearing, was between the price set by the Commission's September 29, 2004, Opinion and Order, and the Stipulation submitted by the Parties, including Staff, it found that the decreased risk, and increased avoidability made the November 23,

---

[27] *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Rose Second Supplemental Testimony at 11, 12) (February 28, 2007);

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

[29] *Id.* at 7.

2004, MBSSO ordered by the Commission superior.[30] All of the changes in price, avoidability, and risk are supported in the record evidence as detailed in the testimony of DE-Ohio witness John P. Steffen.

Mr. Steffen's testimony detailed the record evidence produced at the original evidentiary hearing in these proceedings ended June 1, 2004, and testified that the evidence supported every aspect of the Commission's November 23, 2004, Entry on Rehearing. This evidence is summarized on JPS-SS1 attached to Mr. Steffen's testimony and shows that the total revenues collected under DE-Ohio's current MBSSO, including the IMF and SRT, are less than the revenues supported by Mr. Steffen in his original testimony.[31] Schedule JPS-SS1 also shows that the split of the Stipulated AAC Reserve Margin component resulted in the IMF and SRT components in the Commission's November 23, 2004, Entry on Rehearing.[32] Further, on page 27 of his Second Supplemental Testimony, Mr. Steffen testified that:

> [E]ven with the addition of the cost based SRT ($14,898,000) for reserve capacity, and taking the IMF at its fully implemented (*i.e.*, residential and non-residential) level, DE-Ohio is charging less than the $52,898,560 originally proposed and supported by the Company as its market price for reserve margin and the dedication of its physical capacity.[33]

In other words, Mr. Steffen testified that the total projected revenues associated with the IMF and SRT through December 31, 2008, are less than the revenues that DE-Ohio would have collected under the Stipulation.

---

30 *Id.* at 11-14.

31 *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Steffen's Second Supplemental Testimony at JPS-SS1) (March 9, 2007).

32 *Id.*

33 *Id.* at 27.

OCC witness Talbot disputes this claim and accuses Mr. Steffen of misleading the Commission, but Mr. Talbot failed to do the simple math necessary to verify Mr. Steffen's statements. Tellingly, OCC failed to cross-examine Mr. Steffen on this subject in order to support its inflammatory claims.[34] As shown in the table below the Stipulated Reserve Margin Component of the AAC would have resulted in total revenues of $211,594,240, while the total revenues for the SRT and IMF combined, assuming residential collections during 2005 and a higher SRT than we now know to be correct, reach a maximum of $210,023,270. The record evidence supporting the revenues associated with the IMF and SRT is clear.

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

## TABLE

**Comparison of Reserve Margin Revenue with SRT and IMF Revenue**

| | | | |
|---|---|---|---|
| **Reserve Margin Revenue Originally Requested**[35] | | | |
| Annual Amount[36] | | $ | 52,898,560 |
| Number of Years | | | 4 |
| Total Reserve margin Revenue Requested | | $ | 211,594,240 |
| **Total of SRT and IMF Revenue** | | | |
| SRT Revenue Requested[37] | | $ | 14,898,000 |
| Number of Years | | | 4 |
| Total SRT Revenue[38] | | $ | 59,592,000 |
| IMF Basis (Little g) | | | |
| Non-residential | $493,031,471[39] | | |
| Residential | $259,124,875[40] | | |
| Total | $752,156,346[41] | | |
| IMF Revenue[42] | | | |
| 2005 Non-residential at 4% | | $ | 19,721,259 |
| 2005 Residential[43] at 4% | | | 10,364,995 |
| 2006 Non-residential at 4% | | | 19,721,259 |
| 2006 Residential at 4% | | | 10,364,995 |
| 2007 Non-residential at 6% | | | 29,581,888 |
| 2007 Residential at 6% | | | 15,547,493 |
| 2008 Non-residential at 6% | | | 29,581,888 |
| 2008 Residential at 6% | | | 15,547,493 |
| Total IMF Revenue | | $ | 150,431,270 |
| Total SRT and IMF Revenue Allowed | | $ | 210,023,270 |

---

35 Non-by-passable.

36 *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Steffen's Direct Testimony at JPS-7) (April 15, 2004).

37 *In re DE-Ohio's SRT*, Case No. 04-1820-EL-ATA (Application at Attachment A) (December 3, 2004).

38 Partially by-passable.

39 *In re DE-Ohio's SRT*, Case No. 04-1820-EL-ATA , et al (TR IV at OMG Exhibit 10)(June 10, 2004).

40 *Id.*

41 *Id.*

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

43 2005 residential revenue shown on a pro-forma basis to provide an apples to apples comparison, even though the residential generation price was not effective until January 1, 2006.

Further, Mr. Talbot disputes DE-Ohio's position that the original reserve capacity component of the AAC in the Stipulation included the commitment for capacity for expected load.[44] Mr. Talbot simply ignores Mr. Steffen's testimony now and at the 2004 evidentiary hearing. Under cross examination by OMG counsel Mr. Petricoff, Mr. Steffen clarified this very point stating that "we still believe we have to plan for first call for all of that load... We plan to have the capacity to service the entire POLR load."[45] Mr. Steffen's belief is supported by R.C. 4928.14 that requires DE-Ohio to maintain an offer of firm generation service for all load in its certified territory.[46] The record evidence clearly demonstrated that the reserve capacity component of the AAC included capacity for expected load as well as planning reserves. The charge for capacity for expected load is now known as the IMF and the charge for planning reserve capacity is now known as the SRT. OCC's failure to understand the distinction does not alter the facts set forth in the evidence.

Mr. Steffen's testimony listed the pre-existing record evidence necessary to satisfy the Court's Remand requirement that the Commission cite record evidence in support of its November 23, 2004, Entry on Rehearing.[47] In particular, JPS-SS1 satisfies the Court's inquiry regarding the IMF and the SRT.[48] Additionally, Mr. Steffen testified that more of DE-Ohio's MBSSO components are avoidable by switched load than had been proposed under the

---

[44] *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA *et al.* (Talbot's Prepared Testimony at 31) (March 9, 2007).

[45] *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA *et al.* (TR. IV at 115, 83-84) (June 10, 2004).

[46] Ohio Rev. Code Ann. § 4928.14 (Baldwin 2007).

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

[48] *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 306-307, 856 N.E.2d 213, 224 (2006).

Stipulation or the Commission's September 29, 2004, Opinion and Order.[49] In this respect, Mr. Steffen's testimony supports the Staff's testimony that the November 23, 2004, Entry on Rehearing reduced the risk for consumers and the Company and enhanced the competitive retail electric market by increasing avoidability.

OCC witness Talbot is the only other witness to present evidence regarding DE-Ohio's MBSSO. Mr. Talbot's testimony, however, amounts to a recommendation that the Commission adopt a new market price in place of the market price it ordered on November 23, 2004.[50] Mr. Talbot makes three primary recommendations regarding DE-Ohio's market price. First, the Commission should set DE-Ohio's generation market price on a cost basis without regard to market conditions or pricing consequences.[51] Second, the Commission should make all of DE-Ohio's MBSSO components avoidable.[52] And third, the Commission should decrease price volatility, and demand response, by adjusting the FPP on an annual, instead of a quarterly, basis.[53]

Unfortunately, Mr. Talbot is not aware that generation must be set at a market price in Ohio rather than a cost basis,[54] did not know that almost all of DE-Ohio's MBSSO is fully avoidable by all consumers, including residential

---

[49] *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA *et al.* (Steffen's Second Supplemental Testimony at 30) (March 9, 2007).

[50] *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA *et al.* (Talbot's Prepared Testimony at 6-7) (March 9, 2007).

[51] *Id.* at 6.

[52] *Id.*

[53] *Id.* at 7.

[54] Ohio Rev. Code Ann. § 4928.14 (Baldwin 2007).

consumers,[55] and had no idea whether his recommendations would result in a higher or lower price for consumers because he had not performed any analysis *on his own proposal.*[56] The Commission should give no weight to the testimony of a witness that does not understand the jurisdictional requirements for setting DE-Ohio's market price, thought over 18% of DE-Ohio's price was unavoidable at the moment he took the stand and admitted that only 3.6% is unavoidable, and had no idea how his recommendations might affect consumers. The Commission should simply disregard Mr. Talbot's testimony as wholly lacking a credible basis.

Even Mr. Talbot's expertise is in doubt.[57] The Commission should give Mr. Talbot's testimony no weight as he was completely unprepared to render supportable opinions or recommendations in these proceedings. The Commission should affirm its November 23, 2004, Entry on Rehearing resulting in DE-Ohio's current MBSSO.

## II. The record evidence demonstrates that DE-Ohio has no side agreements and that the DERS and Cinergy contracts are irrelevant to these cases.

The *entire* testimony of OCC witness Beth E. Hixon is devoted to unfounded innuendo regarding various contracts between DE-Ohio affiliates and [redacted]

[redacted]

[55] *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA *et al.* (TR. II at 8, 88) (May 20, 2007).

[56] *Id.* at 96-97

[57] *Id.* at 10-14; (Mr. Talbot testified that he monitored the electric generation market prices of other states, but during cross examination Mr. Talbot admitted that he was unfamiliar with a reports produced by his own firm regarding electric generation market pricing in deregulated states. He was also unfamiliar with market pricing in Virginia, Illinois, Maryland, New Jersey and other states.) *Id.* at 14-32.

The facts are that throughout the duration of the initial MBSSO proceeding, DE-Ohio had only one contract with a Party to these proceedings that was arguably responsive to OCC's discovery request on May 20, 2004. That contract is an amendment to an earlier contract with the City of Cincinnati regarding naming rights to the convention center and is a public contract approved by the Cincinnati City Council.[58] The initial contract was executed with the City prior to its intervention in the MBSSO proceeding. Further, the amendment was entered on June 14, 2004, after the close of the evidentiary hearing regarding DE-Ohio's MBSSO and therefore, could have had no influence on the Commission's September 29, 2004, Opinion and Order, or the November 23, 2004, Entry on Rehearing. The City never signed the May 19, 2004, Stipulation and ultimately withdrew from the case. The contract required DE-Ohio to make payment to various City divisions in exchange for an amendment to the "aggregate generation rate" specified in the original contract.[59] The "aggregate generation rate" is simply the price at which it is economic for the City to switch to a CRES provider, it is not a market price paid by the City or anyone else. The City did agree to withdraw from these cases under the terms of the contract but only after it had the opportunity to fully participate in the hearing ending June 1, 2004.[60] The contract between DE-Ohio and the City had no effect on the City's rates or market prices paid to

58 *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA *et al.* (OCC Remand Ex. 6).
59 *Id.*
60 *Id.*

DE-Ohio. Like every other DE-Ohio consumer, the City pays the prices approved by the Commission.

DE-Ohio's only transaction with its affiliates, DERS and Cinergy, is a standard billing transaction required by DE-Ohio's tariffs permitting a CRES provider to pay for changes to DE-Ohio's billing system necessary to accommodate the CRES provider's consolidated billing, and the processing of that billing.[61]

Despite the innuendo and inferences propounded by OCC, DE-Ohio did not participate in the negotiation of the DERS and Cinergy contracts. OCC attempts to make its case through the deposition transcript of Greg Ficke, the former President of The Cincinnati Gas & Electric Company, now known as DE-Ohio, and Vice President of Cinergy Corp., now known as Duke Energy Corporation.[62] However, contrary to the baseless speculation and innuendo set forth by the OCC, Mr. Ficke was not involved in negotiating the DERS contracts and any other representation by OCC is incorrect.

Specifically, OCC asked Mr. Ficke whether there was "a CG&E representative involved" in the negotiation of the DERS contracts.[63] Mr. Ficke responded that he was involved.[64] OCC then asked expressly whether he was involved in the negotiation of the contracts and Mr. Ficke responded that he "was involved in preparations of information, reviewing information, those sorts

---

61 *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Steffen's Second Supplemental Testimony at 37, JPS-SS2) (March 9, 2007).

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

63 *Id.* at 35-36.

64 *Id.* at 36

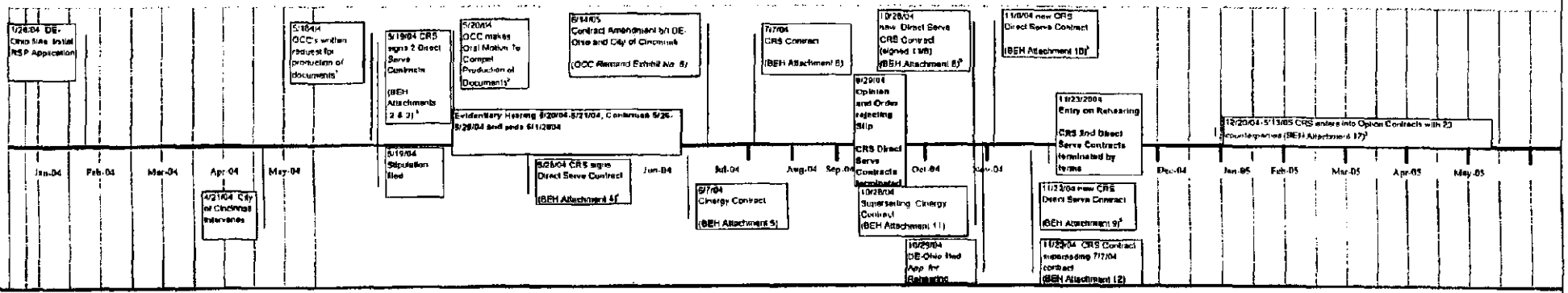
of things in my role as Vice President of Cinergy Corp.," and that no actual CG&E employee was involved.[65] Regarding the Cinergy contract with [redacted] Mr. Ficke also responded that he reviewed drafts and provided comments.[66] He also explained that Cinergy was motivated to enter the [redacted] contract as an economic development effort to preserve a major employer in Cincinnati and to develop cogeneration business between [redacted] and a non-regulated Cinergy affiliate.[67] No objective reading of Mr. Ficke's deposition could conclude that he had any substantive involvement in the negotiation of the DERS and Cinergy contracts, nor was his involvement in any capacity other than as Vice President of Cinergy Corp.

Further, the record shows that the vast majority of contracts were signed after the close of the evidentiary record and, therefore, could not have affected the Commission's consideration of the case or the Party's positions with respect to the litigation of the MBSSO Stipulation. The timeline in the table below shows all of the transactions in relation to these cases. Finally, the DERS and Cinergy contracts would not have been discoverable in the initial evidentiary proceeding because neither OCC, nor any other Party, sought any of the contracts that the Companies have produced on remand. OCC sought only contracts between DE-Ohio and Parties to these proceedings.[68] None of the contracts OCC complains of on remand would have been responsive to OCC's discovery requests in the initial proceedings and could not have been

65 *Id.*
66 *Id.* at 77.
67 *Id.* at 74-76.
68 *In re DE-Ohio's MBSSO Case*, 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).

considered by the Commission. Under such circumstances, none of the DERS and Cinergy contracts are relevant to these proceedings.

# Time Line for DE-Ohio's MBSSO Approval in Comparison to the DERS and Cinergy Contracts




1 OCC's Request stated as follows" Please provide copies of all agreements between CG&E and a party to these consolidated cases (and all agreements between CG&E and an entity that was at any time a party to these consolidated cases) that were entered into on or after January 26th, 2004."

2 OCC's Oral Motion to Compel was identical to its written request for production. *It only requested agreements between CG&E and a party to the case.*

No other contracts were requested or would have been before the Commission, and therefore could not have been relevant.

3 All of the Option Contracts were entered into after the Commission's Entry on Rehearing which set DE-Ohio's MBSSO market price. Therefore, option contracts could not have any effect on the setting of DE-Ohio's MBSSO.

4 Initial Direct Serve Contracts were terminated on September 29, 2004, by the terms of the contracts because the Commission's Opinion and Order materially changed the market price at which CRS was going to serve the customers.

5 *2nd Direct Serve Contracts were terminated* on November 23, 2004, by the terms of the contracts because the Commission's Entry on Rehearing materially changed the market price at which CRS was going to serve the customers

OCC has raised a number of specific concerns regarding the contracts leading to its recommendations that the Commission make all generation related charges by-passable, prohibit reimbursement of Regulatory Transition Charges, and conduct an investigation regarding possible code of conduct and corporate separation violations.[69] DE-Ohio addresses below each concern raised by OCC.

First, OCC raised four concerns relative to DERS contracts [redacted]

[redacted] The four concerns are that each contract: [redacted]

There is nothing wrong with any such provisions and the record evidence supports such a finding by the Commission.

---

[69] *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at 73-74) (March 9, 2007).

[70] *Id.* at 12, 31.

[71] *Id.* at 13-14, 32.

The first contract provision questioned by Ms. Hixon stated a concern that DERS entered into contracts [redacted] Ms. Hixon made the same complaint with respect to the two Cinergy contracts with [redacted] Again, there is nothing wrong with such a provision where, as in this instance, the utility is not a party to the transaction. [redacted][4]

Second, Ms. Hixon is concerned about what she characterizes as the [redacted] Ms. Hixon's concern in this regard is without foundation as [redacted]

---

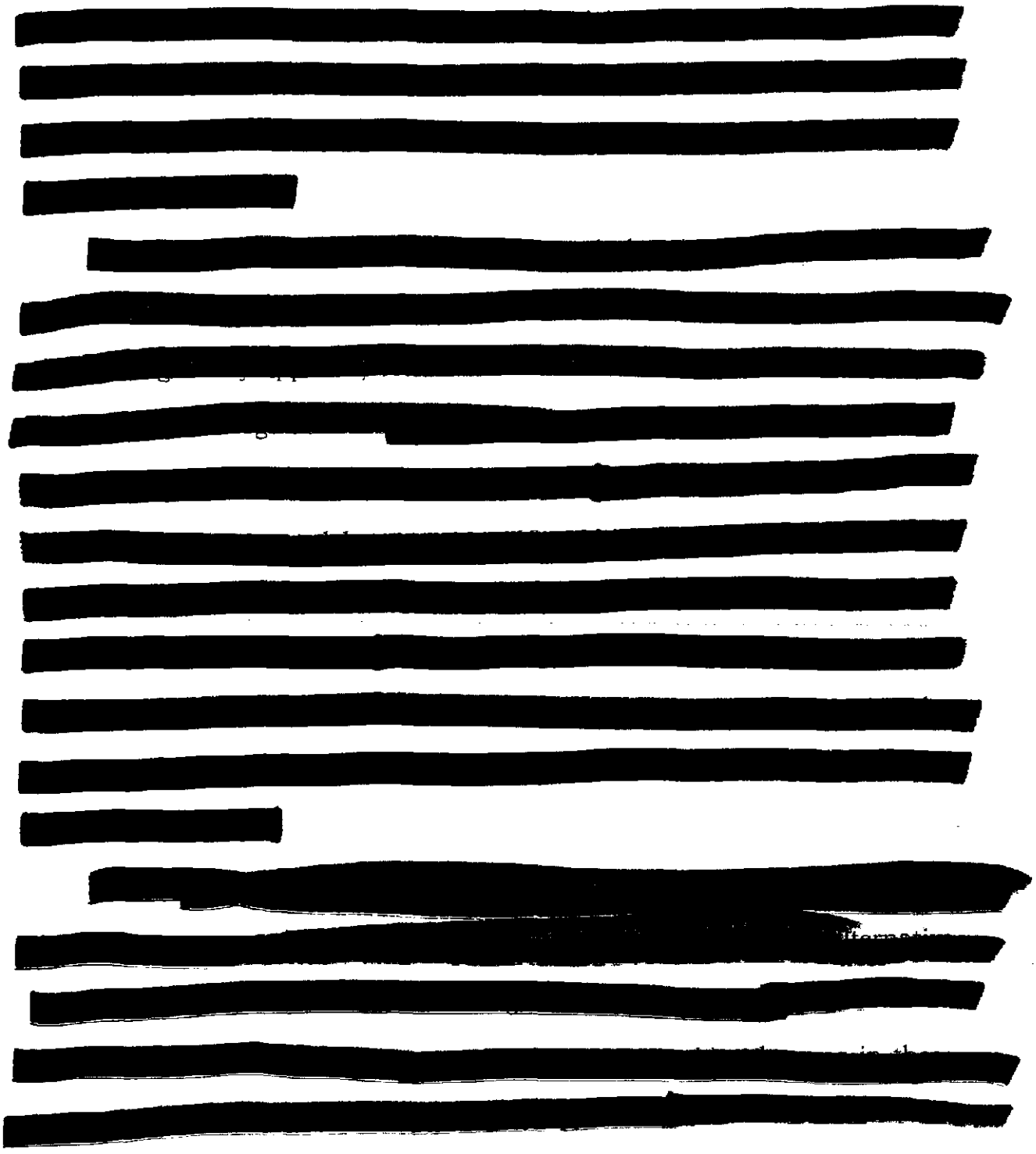
72 *Id.* at 13, 32.

73 *Id.*

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

75 *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at 13, 32) (March 9, 2007).

76 Ohio Rev. Code Ann. § 4928.37 (Baldwin 2007).



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

78 *Id.* at 37-38.

79 *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at BEH-Attachment 2-11) (March 9, 2007).

80 *Id.* at 13, 32.

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

[redacted]

Finally, OCC witness Beth E. Hixon was concerned that [redacted]

Ultimately, Ms. Hixon contradicted each of her concerns on cross-examination and found the contract terms she examined to be reasonable. She was correct on cross-examination, and the concerns raised in her direct testimony were baseless. [redacted]

Only two contracts were exceptions. The [redacted] contract, entered well after [redacted] signed the Stipulation, was not terminated as [redacted] was paying DERS under the terms of the contract.[84] The Cinergy contracts with [redacted] had little to do with these proceedings and had nothing to do with DE-Ohio.

---

82 *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at 14, 32) (March 9, 2007).

83 *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (TR. III at 33-34) (March 21, 2007).

84 *Id.* at BEH-Attachments 6, 12.

The [redacted] contracts had everything to do with Cinergy attempting to be a good corporate citizen by helping [redacted] trying to secure cogeneration business for a non-regulated affiliate, and trying to gain support for its regulated affiliate.[85] There is nothing wrong with DE-Ohio's actions regarding the [redacted] or [redacted] contracts.

Ms. Hixon also raised concerns with certain contract provisions, in the same contracts previously discussed that appear to commit DE-Ohio to some action.[86] [redacted]

First, DE-Ohio cannot explain the contract terms in a DERS contract. It is, however, important to note that DE-Ohio was not a party to these contracts and therefore, could not be bound to them. Also, DERS never asked DE-Ohio to comply with any contract terms. Both Greg Ficke and Charles Whitlock, the President of DERS, testified to the fact that DERS never asked DE-Ohio to take any action, let alone an action pursuant to its contracts.[88]

Second, [redacted]

---

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

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

[87] *Id.*

[88] *In re DE-Ohio's MBSSO Case*, 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*, Case No. 03-93-EL-ATA *et al.* (Whitlock's Deposition Transcript at 106-107) (January 11, 2007).

The filing was public and all contract signatories could have reviewed the filing. The contract terms may have simply been a reflection of the public knowledge of the signatories. Regardless, there is simply no record evidence that DE-Ohio was ever involved in any of these contract provisions or was bound by them.

Ms. Hixon maintains that DE-Ohio was engaged in the contract negotiations based upon Mr. Ficke's deposition statements.[91] Despite the fact that Ms. Hixon's direct testimony is footnoted throughout, she does not cite to any portion of Mr. Ficke's deposition transcript which would support such an allegation-- clearly because it is apparent from the deposition transcript that Mr. Ficke was not substantially involved in the negotiation of the contracts. As previously discussed, with respect to the various DERS and Cinergy agreements questioned by OCC, Mr. Ficke stated, "I was involved in preparations of information, reviewing information, those sorts of things in my role as a Vice President of Cinergy Corp. I guess if you are asking for someone

---

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

90 *In re DE-Ohio's MBSSO Case*, 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).

91 *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at 28) (March 9, 2007).

involved in the negotiations who is exclusively a CG&E employee...*I don't think there was anybody involved in negotiations* that was like that."[92]

Ms. Hixon also points to e-mails between [redacted] and Paul Colbert and James Gainer, attorneys for Duke Energy Shared Services who were acting on behalf of DERS at the time, as evidence of DE-Ohio's involvement in the contract negotiations.[93] She suggests that because the e-mails reference "[redacted]/CG&E settlement," instead of [redacted]/CRS settlement, that DE-Ohio was involved.[94] She also suggests that DE-Ohio's involvement is evidenced because Paul Colbert inadvertently signed the documents as "Senior Counsel, The Cincinnati Gas & Electric Company."[95] These incidents do not reveal the intent of the contract signatories. The contracts were signed between DERS and [redacted]

While the signatories may have used inaccurate but convenient nomenclature, and Mr. Colbert may have made an error in his signature line by inadvertently misstating the company he was representing at the time, the contract itself reveals the signatories were not mistaken as to the identity of the contracting parties. Mr. Colbert is an employee of a shared services company and provided legal service on behalf of all of the Cinergy-owned corporations. If that is the only communication error regarding over thirty contracts between numerous parties, it becomes clear that DE-Ohio followed proper corporate

---

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

93 *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at 29) (March 9, 2007).

94 *Id.*

95 *Id.*

96 *Id.* at BEH-Attachments 2, 8.

separation and code of conduct protocol. There is nothing in these communications, or anywhere else in the record to suggest DE-Ohio involvement in the contract negotiations.

Ms. Hixon also questions contractual provisions that [redacted]

Finally, Ms. Hixon discusses various option contracts between DERS and various customers.[99] Except for the Cinergy contract, DE-Ohio's contract with the City of Cincinnati, and the DERS contract with [redacted], the option contracts are the only contracts that [redacted]

It is significant to note that all of the option contracts were entered into after the Commission issued its November 23, 2004, Entry on Rehearing in these proceedings.[101] In other words, the evidentiary record was closed, all parties had presented their cases and the Commission had reached a decision

---

97 *Id.* at 30.

98 *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (TR. III at 33-34) (March 21, 2007).

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

100 *Id.* at BEH-Attachment 17.

101 *Id.* at 55.

prior to the effective date of all of the option contracts. Ms. Hixon does not dispute this fact, but incredibly believes the contracts are relevant to the MBSSO proceeding because they derive from the prior contracts that she believes were used to gain support for the Stipulation and Alternative Proposal.[102] DE-Ohio has already discussed the readily apparent reasons why the contract signatories reasonably supported the May 19, 2004, Stipulation, and the Alternative Proposal made by DE-Ohio on rehearing, because it was in their economic self interest. The important point is that Ms. Hixon agrees.[103] On their own terms, and based upon the effective dates of each option contracts, these contracts could not be relevant to the Commission's determination in these cases.

[redacted] OCC's use of the email results in a complete misrepresentation of the communication, which was simply Mr. Ziolkowski's response to an inquiry that was forwarded to him by fellow employee. Mr. Ziolkowski is not a manager or corporate officer. He had no first-hand knowledge regarding the negotiation of the DERS contracts or any of the history of the preceding direct serve contracts. Mr. Ziolkowski's email was based upon his own speculation and conclusions.

---

102 *Id.*

103 *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (TR. III at 33-34) (March 21, 2007).

104 *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at 54) (March 9, 2007).

OCC is well aware of this fact. The deposition transcript makes it clear that Mr. Ziolkowski did not know of the existence of the option contracts, had never seen the option contracts, was not involved in the negotiating process, had not performed any analysis regarding the contracts, did not know of anyone in the Company that had performed analysis, and simply calculated the payments using a monthly automated report.[105] As was the case regarding Mr. Ficke's deposition transcript, no reasonable person reading Mr. Ziolkowski's deposition transcript could conclude that the e-mail relied upon by Ms. Hixon is specific legal or technical analysis of these contracts or that Mr. Ziolkowski had any substantive or improper involvement with the option contracts. Mr. Ziolkowski only became involved with the agreements in the spring of 2006, as a result of the merger of Duke Energy Corporation and Cinergy Corporation, when the prior individual who had administered the contracts took a new position with the company. OCC is wrong to use inference where facts are available.

Ms. Hixon raises four final concerns with the contracts.[106] [redacted]

[redacted]

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

[106] *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA *et al.* (Hixon's Prepared Testimony at 56) (March 9, 2007).

[107] OHIO ADMIN. CODE ANN. CHAPTER 4901:1-35 (Baldwin 2007).

[redacted] This issue has been decided by the Commission and the Court.[109] Specifically, the Court held:

> We conclude that the Commission's approval of CG&E's alternative to the competitive bidding process was reasonable and lawful. The Commission found that CG&E's price to compare, as part of the standard service offer, was market based, and OCC has offered no evidence to contradict that finding. Various consumer groups were parties to the Stipulation and approved the price to compare and the method by which the price to compare would be tested to ensure that it remains market based. CG&E's rate stabilization plan provides for a reasonable means of customer participation. *Finally, there appears to be significant competition in CG&E's service area through the presence of five competitive electric retail service providers.* For these reasons we reject OCC's third proposition of law.[110]

Even if the OCC were correct in its argument [redacted] Revised Code Section 4928.14 permits the utility to forgo the competitive bid process if consumers have substantially the same option as they have in the competitive market.[111] Pursuant to the findings of the Commission and the Court, no competitive bidding process is required as consumers have such options. DE-Ohio has five active CRES providers in its certified territory providing service to this day.

---

108 *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA *et al.* (Hixon's Prepared Testimony at 56) (March 9, 2007).

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

110 *Id.* (emphasis added)

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

Second, Ms. Hixon opined that the contracts impeded the development of the competitive retail electric service market.[112] [redacted]

Ohio Administrative Code Section 4901:1-20-16 recognizes as an affiliate even "internal merchant functions of the electric utility, whereby the electric utility provides a competitive service."[114] OCC's theory demands that it recognize all Duke Energy Corporation affiliates as one entity. That stands the rule upon its head. [redacted][115] [redacted][116] Certainly Duke Energy Corporation cannot be faulted for following standard consolidated accounting principles. The rules require that DE-Ohio does not subsidize DERS and vice versa.[117] OCC has presented no evidence of any improper financial transaction between DE-Ohio and DERS or Cinergy. That is because there is no such transaction.

---

[112] *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at 56) (March 9, 2007).

[113] *Id.* at 63.

[114] OHIO ADMIN. CODE ANN. CHAPTER 4901:1-20-16(B)(1) (Baldwin 2007).

[115] *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (DE-Ohio Remand Exhibits 24, 25, 26) (March 9, 2007).

[116] *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (TR. III at 104) (March 21, 2007).

[117] OHIO ADMIN. CODE ANN. CHAPTER 4901:1-20-16(D) (Baldwin 2007).

Further, even Ms. Hixon's logic is entirely faulty. Any consumer who signs a contract with any CRES provider, or that chooses to remain with the utility, is not going to switch providers unless offered a lower price. [redacted] The CRES provider seeking the business simply has to offer an attractive price. That is true of DERS's customers, just as it is true of [redacted] or [redacted] customers. There is no change to the demand curve, or improper conduct. The customer simply gets the price it negotiates. That is how the market is supposed to work. If these contracts have resulted in lower prices for some customers, that is a benefit of the market not a detriment.

Third, Ms. Hixon alleged the contracts are discriminatory.[118] This allegation is without merit. Any customer is free to call DERS and seek service just as they may seek service from any other CRES provider. All consumers, including the signatories to the various contracts, are paying DE-Ohio the MBSSO price approved by the Commission, no more and no less. OCC has not alleged otherwise. There is no discrimination involved in the provision of contracts by DERS or Cinergy.

Finally, Ms. Hixon believes that "secret" negotiations excluding OCC from the discussions influenced the Commission by creating support for the Stipulation and Alternative Proposal that would not have been forthcoming

[118] *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at 56) (March 9, 2007).

otherwise.[119] First, the record evidence shows that DE-Ohio held extensive settlement discussions with *all* Parties to these proceedings and *all* Parties reviewed the Stipulation before it was filed.[120] Second, the Commission rejected the Stipulation and the Alternative Proposal so it is difficult to see how support for each proposal is relevant to the MBSSO ultimately ordered by the Commission. Third, there is nothing wrong with confidential meetings with one or more Parties to a case to the exclusion of other Parties. Such a process encourages settlement to the benefit of all stakeholders. Sound public policy encourages the negotiated resolution of litigation and other disputes.

Further, 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.[121] OCC negotiated and entered into an agreement with DE-Ohio in Case No. 99-1658-EL-ETP whereby DE-Ohio paid $750,000 to OCC and the Ohio Department of Development.[122] Like the contracts at issue in these proceedings, that contract with OCC was never filed before the Commission. OCC entered a contract with DP&L that OCC tried to enforce before the Commission and the Court.[123] That contract was also not filed for approval with the Commission. Additionally, OCC held confidential settlement discussions regarding its appeal of the Commission's order approving the Duke

---

[119] *Id.*

[120] *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Ficke's Deposition Transcript at 22-23) (February 20, 2007) (emphasis added).

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

[122] *Id.* at DE-Ohio Remand Ex. 20.

[123] *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 110 Ohio St. 3d 394, 399, 853 N.E.2d 1153, 1159 (2006).

Energy merger with Cinergy without Staff participation even though the Commission, not DE-Ohio, was a party to the appeal.[124] That settlement was similarly not filed before the Commission although it was made public. Finally, OCC held confidential settlement discussions with Parties in the 2004 MBSSO proceedings, including with Staff, but excluding DE-Ohio.[125] OCC made confidential settlement offers to the other parties that have not been revealed to this day.[126] Apparently, using this double standard, it is acceptable for 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. In all events, OCC's concerns are misplaced and should be dismissed.

Even after raising all of the aforementioned concerns, Ms. Hixon stated that she has not found any wrongdoing on the part of DE-Ohio nor is she making any accusations.[127] Despite the fact that Ms. Hixon does not find or allege a violation of any rule, Ms. Hixon requests an investigation into possible wrongdoing by DE-Ohio. The Commission should reject OCC's recommendation. If OCC believes it has evidence of improper behavior, a complaint is the proper process. There is no such evidence and no need for an investigation. OCC has conducted full discovery and all of the facts are before

---

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

125 *Id.* at DE-Ohio Remand Ex. 23.

126 *Id.*

127 *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA *et al.* (TR. III at 105) (March 21, 2007).

the Commission. There is no reason to expend further time and resources on this issue.

***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,

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 13th day of April 2007.

Paul A. Colbert
Rocco D'Ascenzo, Counsel

EAGLE ENERGY, LLC
DONALD I. MARSHALL, PRESIDENT
4465 BRIDGETOWN ROAD SUITE I
CINCINNATI OH 45211-4439
Phone: (513) 251-7283

SKIDMORE SALES & DISTRIBUTING COMPANY, INC.
ROGER LOSEKAMP
9889 CINCINNATI-DAYTON RD.
WEST CHESTER OH 45069-3826
Phone: 513-755-4200
Fax: 513-759-4270

**Intervener**

AK STEEL CORPORATION
LEE PUDVAN
1801 CRAWFORD ST.
MIDDLETOWN OH 45043-0001

BOEHM, DAVID ESQ.
BOEHM, KURTZ & LOWRY
36 EAST SEVENTH STREET SUITE 1510
CINCINNATI OH 45202-4454

CITY OF CINCINNATI
JULIA LARITA MCNEIL, ESQ
805 CENTRAL AVE STE 150
CINCINNATI OH 45202-5756

COGNIS CORPORATION
35 E. 7TH STREET SUITE 600
CINCINNATI OH 45202-2446
Phone: (513) 345-8291

Fax: (513) 345-8294
CONSTELLATION NEWENERGY, INC.
TERRY S. HARVILL
1000 TOWN CENTER SUITE 2350
SOUTHFIELD MI 48075
Phone: (248) 936-9004

CONSTELLATION POWER SOURCE, INC.
MICHAEL D SMITH
111 MARKETPLACE, SUITE 500
BALTIMORE MA 21202
Phone: 410-468-3695
Fax: 410-468-3541

CONSUMERS' COUNSEL, OFFICE OF

10 WEST BROAD STREET SUITE 1800

COLUMBUS OH 43215

DOMINION RETAIL, INC.
GARY A. JEFFRIES, SENIOR COUNSEL
1201 PITT STREET
PITTSBURGH PA 15221
Phone: (412) 473-4129

FIRSTENERGY SOLUTIONS CORP.
IRENE PREZELJ, MANAGER, MARKETING
395 GHANT ROAD GHE-408

AKRON OH 44333
Phone: (330) 315-6851

GREEN MOUNTAIN ENERGY COMPANY
JOHN BUI
600 W. 6TH STREET SUITE 900
AUSTIN TX 78701
Phone: (512) 691-6339
Fax: (512) 691-5363

INDUSTRIAL ENERGY USERS-OHIO
SAMUEL C. RANDAZZO, GENERAL COUNSEL
MCNEES WALLACE & NURICK LLC 21 EAST STATE STREET 17TH FLOOR
COLUMBUS OH 43215

PETRICOFF, M.
VORYS, SATER, SEYMOUR & PEASE
52 EAST GAY STREET P.O. BOX 1008
COLUMBUS OH 43216-1008
Phone: (614) 464-5414
Fax: (614) 719-4904

HOTZ, ANN
ATTORNEY AT LAW
OFFICE OF CONSUMERS' COUNSEL 10 W. BROAD STREET, SUITE 1800
COLUMBUS OH 43215

ROYER, BARTH
BELL, ROYER & SANDERS CO,. L.P.A.
33 SOUTH GRANT AVENUE
COLUMBUS OH 43215-3900

KORKOSZ, ARTHUR
FIRST ENERGY, SENIOR ATTORNEY
76 SOUTH MAIN STREET LEGAL DEPT., 18TH FLOOR
AKRON OH 44308-1890

STINSON, DANE ESQ.
BAILEY CAVALIERI LLC
10 W. BROAD ST. SUITE 2100
COLUMBUS OH 43215
Phone: (614) 221-3155
Fax: (614) 221-0479

NONE

Phone: (614) 469-8000

KROGER COMPANY, THE

MR. DENIS GEORGE 1014 VINE STREET-GO7
CINCINNATI OH 45202-1100

KURTZ, MICHAEL
BOEHM, KURTZ & LOWRY
36 EAST SEVENTH STREET SUITE 1510
CINCINNATI OH 45202
Phone: (513) 421-2255
Fax: (513) 421-2764

LEGAL AID SOCIETY OF CINCINNATI

215 E. 9TH STREET SUITE 200
CINCINNATI OH 45202-2146

MORGAN, NOEL
LEGAL AID SOCIETY OF CINCINNATI
215 E. NINTH STREET SUITE 200
CINCINNATI OH 45202

MIDAMERICAN ENERGY COMPANY
BARBARA HAWBAKER, BALANCING & SETTLEMENT ANALYST
4299 NW URBANDALE DRIVE
URBANDALE IA 50322
Phone: (515) 242-4230

PETRICOFF, M.
VORYS, SATER, SEYMOUR & PEASE

52 EAST GAY STREET P.O. BOX 1008
COLUMBUS OH 43216-1008
Phone: (614) 464-5414
Fax: (614) 719-4904

NATIONAL ENERGY MARKETERS ASSOCIATION
CRAIG G. GOODMAN, ESQ.
3333 K STREET N.W. SUITE 110
WASHINGTON DC 20007
Phone: (202) 333-3288
Fax: (202) 333-3266

GOODMAN, CRAIG
NATIONAL ENERGY MARKETERS ASSOC.
3333 K STREET, N.W. SUITE 110
WASHINGTON DC 20007

OHIO ENERGY GROUP, INC.

KURTZ, MICHAEL
BOEHM, KURTZ & LOWRY
36 EAST SEVENTH STREET SUITE 1510
CINCINNATI OH 45202
Phone: (513) 421-2255
Fax: (513) 421-2764

OHIO HOSPITAL ASSOCIATION
RICHARD L. SITES
155 E. BROAD STREET 15TH FLOOR
COLUMBUS OH 43215-3620
Phone: (614) 221-7614
Fax: (614) 221-7614

*SITES, RICHARD ATTORNEY AT LAW
OHIO HOSPITAL ASSOCIATION
155 EAST BROAD STREET 15TH FLOOR
COLUMBUS OH 43215-3620
Phone: 614-221-7614
Fax: 614-221-4771

OHIO MANUFACTURERS ASSN

33 N. HIGH ST
COLUMBUS OH 43215

PETRICOFF, M.
OHIO MARKETER GROUP
VORYS, SATER, SEYMOUR & PEASE
52 EAST GAY STREET P.O. BOX 1008
COLUMBUS OH 43216-1008
Phone: (614) 464-5414
Fax: (614) 719-4904

OHIO PARTNERS FOR AFFORDABLE ENERGY
COLEEN MOONEY
DAVID RINEBOLT
337 SOUTH MAIN STREET 4TH FLOOR, SUITE 5, P.O. BOX 1793
FINDLAY OH 45839-1793
Phone: 419-425-8860
Fax: 419-425-8862

PEOPLE WORKING COOPERATIVELY, INC.
CHRISTENSEN, MARY ATTORNEY AT LAW
CHRISTENSEN & CHRISTENSEN
401 N. FRONT STREET SUITE 350
COLUMBUS OH 43215
Phone: (614) 221-1832
Fax: (614) 221-2599

LEYDEN, SHAWN ATTORNEY AT LAW
PSEG ENERGY RESOURCES & TRADE LLC
80 PARK PLAZA, 19TH FLOOR
NEWARK NJ 07102
Phone: 973-430-7698

STRATEGIC ENERGY, L.L.C.
CARL W. BOYD
TWO GATEWAY CENTER
PITTSBURGH PA 15222
Phone: (412) 644-3120

PETRICOFF, M.
VORYS, SATER, SEYMOUR & PEASE
52 EAST GAY STREET P.O. BOX 1008
COLUMBUS OH 43216-1008
Phone: (614) 464-5414
Fax: (614) 719-4904

WPS ENERGY SERVICES, INC.
DANIEL VERBANAC
1716 LAWRENCE DRIVE
DE PERE WI 54115
Phone: (920) 617-6100

GRAND ANTIQUE MALL

9701 READING RD.
CINCINNATI OH 45215

MIDWEST UTILITY CONSULTANTS, INC.
PATRICK MAUE
5005 MALLET HILL DRIVE
CINCINNATI OH 45244
Phone: 513-831-2800
Fax: 513-831-0505

RICHARDS INDUSTRIES VALVE GROUP
LEE WOODURFF
3170 WASSON ROAD
CINCINNATI OH 45209
Phone: 513-533-5600
Fax: 513-871-0105

HOWARD, STEPHEN ATTORNEY AT LAW
VORYS, SATER, SEYMOUR AND PEASE
52 EAST GAY STREET P.O. BOX 1008
COLUMBUS OH 43216-1008
Phone: (614) 464-5401

**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 | : | | 03-2081-EL-AAM |
| | : | | 03-2080-EL-ATA |
| | : | | 05-724-EL-UNC |
| | : | | 05-725-EL-UNC |
| | : | | 06-1068-EL-UNC |
| | : | | 06-1069-EL-UNC |
| | : | | 06-1085-EL-UNC |

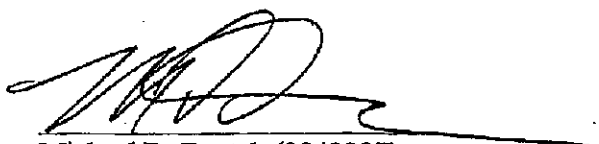
# THE MERIT BRIEF OF CINERGY CORP. AND DUKE ENERGY RETAIL SALES, LLC

**CONFIDENTIAL VERSION**

**SUBMITTED UNDER SEAL**



Respectfully Submitted,



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

Attorneys for
CINERGY CORP.

**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

## CONFIDENTAL 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

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

## TABLE OF CONTENTS

## I. INTRODUCTION

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

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

## II. PROCEDURAL BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

**C. The Proposed Stipulation.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[redacted] When the Commission rejected the stipulation, however, DERS' contracts with its customers were, by their terms, void.

When CG&E filed its application for rehearing, DERS again used the same marketing strategy based on a similar assumption that the Commission would accept CG&E's alternative proposal regarding its RSP. During negotiations that occurred in November, 2004 – six ***months*** after the stipulation was filed – DERS employed the same concept that it employed during the summer of 2004. [redacted]

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

**B. The DERS BEGIN REDACTION Option END REDACTION Agreements.**

**BEGIN REDACTION** When this Commission rejected CG&E's alternative proposal on November 24, 2004, DERS again re-evaluated its ability to offer service to potential market participants. [redacted]

[redacted]

Ultimately ([redacted]

[redacted]

C. **The Kroger Agreements.**

As OCC's witness regarding the contracts points out (OCC Remand Exhibit 2(A), Prepared Testimony of Beth Hixon (hereafter, "Hixon Testimony") pp. 23-25), [redacted]

[redacted]

D. **The Cinergy Agreements.**

Cinergy produced two agreements, both with [redacted] The first was entered into two weeks after the stipulation was filed with this Commission and the second, six months later, [redacted] Mr. Greg Ficke, President of CG&E and a Vice-President of Cinergy at the time Cinergy entered into the [redacted] agreements,[5] occupied a unique position in which to understand the agreements between Cinergy and [redacted] and the impacts of those agreements on Cinergy and CG&E.

Mr. Ficke acknowledged the obvious fact that the interest of Cinergy includes the interests of CG&E, but also explained that Cinergy had a number of incentives completely unrelated to CG&E for entering into the [redacted] agreements:

Q. Now these documents, why were these documents entered into, [redacted] 5 and 16?

A. [redacted]

. . .

Q. So isn't it connected – [redacted]

A. Correct.

Q. All right. [redacted]

A. I think that's what I said, but if that's not what I said, that's what I meant to say.

Q. **Is there any other purposes for these agreements, Exhibits 15 and 16?**

A. Other than addressed on the face of the agreement, I do recall that during this time [redacted]

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

[redacted]

> Cinergy Corp. had an interest, may still have a continuing interest, in providing energy to companies in the general vicinity of [redacted] in terms of constructing and operating cogeneration plants and, in a sense, had a continuing interest in the vibrancy of that area, and I guess finally, just you know, as a corporate citizen had an interest in our customers continuing profitable operations.

(OCC Remand Exhibit 9, Confidential Feb. 20, 2007 Deposition of Greg Ficke (hereafter "Ficke Depo.") pp. 74-75.)

Cinergy entered into these agreements because it was interested in pursuing cogeneration development opportunities with [redacted] through one of Cinergy's unregulated subsidiaries;[6] was concerned about the continued viability of one of its larger users of both electricity and other products and services provided by unregulated Cinergy entities; recognized that [redacted]rosperity impacted the larger community in which Cinergy companies operate, including an impact on employment levels that in turn, indirectly impact Cinergy operations;[7] and is interested in promoting the economic viability in the Cincinnati area in which [redacted] is located. **END REDACTION**

## III. LAW AND ARGUMENT

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

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

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

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

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

**BEGIN REDACTION** Ms. Hixon testified that she believes the contracts are evidence of "unjust discrimination" by CG&E in favor of certain large commercial and

industrial customers of CG&E, at the expense of other large commercial and industrial customers of CG&E. (Hixon Testimony, p. 69.) In reaching this conclusion, Ms. Hixon simply ignores both the fact that these customers are not her constituents, and the fact that if the options are exercised, CG&E's relationship with those customers – at least in regard to generation service – ends. **END REDACTION**

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

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

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

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

[redacted] hile it is the case that [redacted] The whole point of market competition is to foster competitive pricing. Ms. Hixon herself admitted on cross examination by CG&E's counsel, Mr. Colbert – after first sparring about the subject – that price is a significant factor in motivating customers to switch suppliers. (Hixon Cross, pp. 30-32.) **END REDACTION**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. I was involved in it.

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

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

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

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

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

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

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

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

. . .

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

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

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

. . .

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

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

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

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

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

(Ficke Depo., p. 77.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

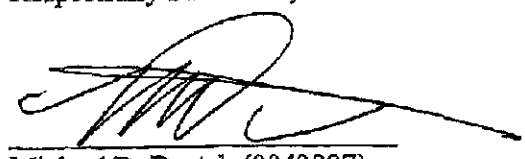
To the extent that OCC complains that at least some negotiations occurred outside its presence, however, it should be remembered that record evidence also demonstrates that OCC itself negotiated with parties to the proceeding while "excluding" CG&E from participation in those negotiations. (*See* DE-Ohio,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

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

## V. CONCLUSION.

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

Respectfully Submitted,



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

Attorney 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 email addresses this 13th 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

**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

---

## TABLE OF CONTENTS:

**Page Number**

**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 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. Procario)(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 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 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, 3004); *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, 3004). *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 Kentucky[75] 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.

## III. DE-Ohio did not enter into any so called "side agreements" and did not violate any code of conduct or corporate separation rules.

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 and did not participate in the negotiations of the contracts entered into by Duke Energy Retail Sales (DERS) or Cinergy Corp. (Cinergy).

The contracts entered by DERS were not related to DE-Ohio's Stipulation or Alternative Proposal except to the extent that it was in the

---

[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).

economic self interest of the signatories [redacted][86] The Cinergy contract with [redacted] was simply a contract seeking to gain business for non-regulated Cinergy affiliates, preserve jobs in the Cincinnati Community, and assist its regulated affiliate, DE-Ohio.[87] Such aspirational goals for its portfolio of subsidiaries do not give rise to corporate separation concerns. Nothing in the DERS or Cinergy contracts did, or could, bind DE-Ohio to perform any action. Finally, DE-Ohio did not violate its Corporate Separation Plan, or O.A.C. 4901:1-20-16. The accusations of OCC, OPAE, and OMG to the contrary are inaccurate because they ignore the facts and law relevant to the issues presented in these proceedings.

The accusations made by OCC, OPAE, and OMG are grounded in conspiracy theory and have no basis in the fact. The record simply does not support the accusations. Their arguments ignore the cross-examination of OCC's witness Beth E. Hixon, the only witness to testify of concerns regarding the DE-Ohio, DERS, and Cinergy contracts. Ms. Hixon's cross-examination is in direct conflict with her pre-filed direct testimony. 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, all of whom testified that DE-Ohio was not involved in the negotiation of the DERS and Cinergy contracts. The simple explanation is that the contracts represent arms length agreements between consenting parties that inure to the benefit of the signatories. OCC, OPAE, and OMG insist that there is a grand conspiracy to the detriment of consumers and offer unreasonable interpretations to arrive at their conclusion.

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]

The various DERS and Cinergy contracts at issue are not "side agreements" because DE-Ohio was not a Party to those contracts. 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.*

Stipulation was negotiated by DE-Ohio [redacted] There is nothing wrong with the various contracts produced in discovery and now in evidence before the Commission.

**A. As previously discussed in DE-Ohio's merit brief the record evidence demonstrates that the DE-Ohio, DERS, and Cinergy contracts are irrelevant to these proceedings.**

OCC, OPAE, and OMG, rely solely upon the testimony of OCC witness Beth E. Hixon to arrive at their conclusion that the DE-Ohio, DERS, and Cinergy contracts are relevant to these cases and exerted improper influence upon the Commission and improperly affect the competitive retail electric service market. In her direct testimony, Ms. Hixon segmented the contracts into three categories, Pre-PUCO Order Agreements,[89] Pre-Rehearing Agreements,[90] and Option Agreements.[91]

Given the Court's remand order that the purpose of permitting discovery previously requested by OCC so the Commission could consider whether the contracts would have been relevant to its determination of "whether all parties engaged in serious bargaining;" Ms. Hixon's categories are not helpful for several reasons.[92] First, the

---

[89] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at 11) (March 9, 2007).

[90] *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 even if DE-Ohio had possession of, and could have produced the DERS and Cinergy contracts, which it could not, OCC would have received only the DERS contracts with [redacted] and [redacted].[94] No other contracts would have been provided for the simple reason that they did not exist. Even had DE-Ohio been able to update discovery during the evidentiary hearing ending June 1, 2004, with DERS contracts, only one additional contract, with [redacted] would have been provided.[95] [redacted] No other contract could have possibly influenced the Commission's decision or serious bargaining among the Parties as they all occurred after the presentation of evidence and the conclusion of negotiations.

---

[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).

Even accepting the dubious categories assigned to the contracts by Ms. Hixon, the reasons she gives for being concerned with the contracts in her direct testimony are in conflict with her testimony on cross-examination. Initially, Ms. Hixon lists four concerns with the Pre-PUCO Order and Pre-Rehearing contracts. Those concerns are that the contracts: [redacted][96] Not only is there nothing wrong with any such contract provisions but on cross-examination Ms. Hixon agrees such provisions are reasonable.[97]

The first concern raised by Ms. Hixon, [redacted] is a legal issue. [redacted]

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

The second issue raised by Ms. Hixon, [redacted] is similarly a non issue. First [redacted][99] Ms. Hixon agreed that [redacted] is reasonable.[100] The third concern raised by Ms. Hixon, [redacted] is likewise a non-issue because once again Ms. Hixon agreed such a provision is reasonable where, as in these cases, [redacted][101] [redacted][102] In the end Ms. Hixon agreed that all of the contract provisions she was concerned about are reasonable.

As previously mentioned, the Cinergy contract with [redacted] presents an admittedly different situation. The Cinergy contract with [redacted] had little to do with these proceedings and had nothing to do with

---

99 *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).

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

101 *Id.* at 33.

102 *Id.* at 33-34.

DE-Ohio. Cinergy, the parent corporation of DE-Ohio, entered the [redacted] contract for its own reasons without involvement by DE-Ohio. Cinergy, attempting to be a good corporate citizen by helping a [redacted] which is not a DE-Ohio affiliate, attempted to secure cogeneration business for a non-regulated affiliate,[103] and tried to gain support for its regulated affiliate.[104] There is nothing wrong with either DE-Ohio's or Cinergy's actions regarding the [redacted] contract.

Ms. Hixon also raised concerns with certain contract provisions, in the same contracts previously discussed that appear to commit DE-Ohio to some action.[105] On cross-examination, Ms. Hixon agreed that the parties could [redacted][106] Further, the existence of these terms in the DERS contracts can be explained by the simple fact that DE-Ohio had already filed a distribution base rate case prior to the effective dates of these contracts.[107] The filing was public and all contract signatories could

[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).

have reviewed the filing. The contract terms may have simply been a reflection of the public knowledge of the signatories.

Regardless, there is simply no record evidence that DE-Ohio was ever involved in any of these contract provisions or was bound by them. Certainly, DE-Ohio was not a party to these contracts and therefore, could not be bound to them. Also, both Greg Ficke and Charles Whitlock, the President of DERS, testified to the fact that DERS never asked DE-Ohio to take any action, let alone an action pursuant to its contracts.[108] DE-Ohio cannot be responsible for contract provisions where it is not a party to the contracts and was not involved in the negotiation of the contracts.

Finally, both OCC and OMG continue to object to the DERS option contracts.[109] Both OCC and OMG allege that the [redacted]

[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.*

OCC witness Hixon offers the only testimony alleging any concerns with the option contracts.[111] Necessarily, [redacted][112] Ms. Hixon testified on cross-examination that she is not an expert on option contracts, options are a legitimate tool in competitive markets, and she performed no analysis on the reasonableness of the option prices specified in the contracts.[113]

Also on cross-examination, Ms. Hixon opines that she is primarily concerned about the option contracts because she believes they have adversely affected competition.[114] [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 [redacted] 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, OCC divided [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.

OCC Remand Exhibit 5 is information provided to OCC by DE-Ohio in response to an OCC discovery request. [redacted] It shows that many of those customers, [redacted][120] [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] For example, [redacted] but most of its load always remained with DE-Ohio. The accounts that remained with DE-Ohio are not shown on the Exhibit. The proper conclusion is to recognize that several customers with contracts have never switched, and that several customer who switched before entering into a contract remain switched despite having a contract.

[redacted][122] Ultimately, this is just another example of OCC's failure to properly represent the record evidence.

OCC and OMG rely heavily upon an e-mail sent by Mr. Ziolkowski, a Duke Energy Shared Services Company employee, in an attempt to implicate DE-Ohio in an improper role regarding the negotiation and administration of the DERS and Cinergy contracts.[123] Both OCC and

---

[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).

OMG ignore the testimony of Mr. Ziolkowski, which OCC requested be admitted as part of the evidentiary record.

Mr. Ziolkowski's testimony makes it clear that he did not know of the existence of the option contracts, had never seen the option contracts, was not involved in the negotiating process of any contracts, had not performed any analysis regarding any contracts, did not know of anyone in the Company that had performed analysis, [redacted][124] No reasonable person reading Mr. Ziolkowski's deposition transcript could conclude that the e-mail relied upon by Ms. Hixon is a legal or technical analysis of the contracts or that Mr. Ziolkowski had any substantive or improper involvement with the option contracts. OCC and OMG are wrong to use inference where facts are available.

OCC's and OMG's use of the Ziolkowski e-mail is another prime example of their improper use of record evidence. In this case they relied upon an e-mail they knew to be an inaccurate portrayal of DE-Ohio's involvement based upon OCC's questioning of the author and insistence that the deposition transcript be admitted as testimony. Yet, OCC and OMG ignored the testimony and relied upon the inaccurate e-mail. The Commission should take note of OCC's liberal misuse of evidence and give OCC's arguments little credence.

---

[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).

After all of the discussion, there is simply no evidence that the DE-Ohio contracts are relevant to these proceedings. In fact the evidence shows that the contracts could not be relevant as the vast majority of contracts occurred after the filing of the Stipulation submitted to the Commission and after the close of evidence.

**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 because the DERS and Cinergy contracts somehow deceived the Commission into believing the Stipulation was the result of serious bargaining and had broad based support. 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, or which could be relevant to any contract signed by DERS or Cinergy.

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, the DERS and Cinergy contracts had no impact on the bargaining among the Parties, and even after discounting the Parties that have contracts with DERS and Cinergy, 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 without DERS or Cinergy contracts were [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] and the [redacted][133] The only Parties opposing the Stipulation that did not have contracts with DERS or Cinergy are OCC, OMG, OPAE, PSEG Energy Resources, and the National Energy Marketers' Association.[134]

Therefore, contrary to the assertions of OCC, OMG, and OPAE, even if the Commission accepts their argument that it should consider the Stipulation only with the support of those who did not sign DERS or Cinergy contracts, 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); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Tr. III at 45) (March 21, 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. Even under this restrictive view the Stipulation enjoyed wide support.

Further, DE-Ohio asserts that all of the signatories deserve consideration. [redacted][135] The only Stipulation supporters that signed DERS or Cinergy contracts prior to signing the Stipulation are the [redacted] and [redacted]. [redacted] did not sign DERS or Cinergy contracts until after the submission of the Stipulation and the Cinergy contract with [redacted] was not signed until after the close of evidence on June 1, 2004.[136] Therefore, the Commission should consider the support of [redacted] and [redacted]

Finally, DE-Ohio is not a party to the [redacted] and [redacted] contracts and there is no evidence that it was involved in the negotiation of those contracts despite OCC's unsupported claims to the contrary. DE-Ohio asks only that the Commission read the testimony of Greg Ficke, Jim Ziolkowski, and Denis George. The record demonstrates that neither Mr. Ficke, Mr. Ziolkowski, nor DE-Ohio was involved in the negotiation of the DERS contracts with [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]

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 OPAE argue, however, that the Stipulation is relevant because DE-Ohio conducted secret negotiations to the exclusion of some Parties, including the aforementioned groups.[141] First, DE-Ohio held discussions with all Parties. It invited all Parties to such discussions and all Parties, including OCC and OPAE, received the Stipulation prior to its filing at the Commission. Both OCC and OPAE 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.

Apparently, OCC and OPAE are concerned that they did not have negotiations with DERS during that time period. OCC is not a customer and it would have been odd had DERS solicited OCC. OPAE is not a customer in DE-Ohio's certified territory; so, it would have been equally

---

[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.* (OPAE'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.* (OPAE's Remand Merit Brief at 9-10) (April 13, 2007).

odd had DERS solicited OPAE. DERS might have solicited OPAE's members in DE-Ohio's certified territory, the Hamilton and Clermont County Community Action Agencies, but it was certainly not under any obligation to do so.

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]

Similarly, OPAE's claim that it was not a participant to confidential 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, OPAE 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.* (OPAE'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.* (OPAE 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.

### D. That all, or some, consumers pay a low market price is not a barrier to entry but a sign of competition.

OCC and OMG argue that because some, but not all, customers received contracts from DERS or Cinergy that: (1) DE-Ohio's market price is too high; and (2) the contract prices represent a barrier to entry preventing CRES provider participation in the competitive retail electric service market.[162] Assuming for a moment that all of the arguments made by OCC and OMG are correct that DE-Ohio, DERS, and Cinergy acted as one, an assumption that DE-Ohio denies and is not supported by the evidence, effectively OCC and OMG are arguing that low prices are bad for consumers. This turns R.C. Chapter 4928 on its head because it was intended to produce lower prices for consumers.

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]

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] The only reasonable conclusion is that the consumers in question made a good deal in the competitive retail electric service market. There is no evidence that any other consumers suffer as a

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).

result. In fact, the evidence is to the contrary; [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 subsidy by non-residential consumers of residential consumers. [redacted]

Additionally, there is no barrier to entry created by the contracts. [redacted] There is no more barrier to entry than if the same customers had switched the purchase of their generation supply to [redacted] or any other CRES provider. In order to gain the business, a competing CRES

---

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).

provider must offer better terms and conditions, including price. Nothing more is required to gain the business of the DERS and Cinergy customers.

### E. The DERS and Cinergy contracts do not violate any statute, any provision of O.A.C. 4901:1-20-16, or DE-Ohio's Corporate Separation Plan.

OCC suggests that the Commission should require DE-Ohio to "show cause" why it is not in violation of corporate separation requirements regarding affiliate interactions.[171] OMG alleges that the DERS and Cinergy contracts violate R.C. 4928.02 and R.C. 4928.17 involving subsidies and corporate separation.[172] To arrive at such conclusions OCC and OMG ignore the facts and law applicable to these cases.

First, OCC and OMG continue to ignore the fact that DE-Ohio is not a party to the DERS and Cinergy contracts. Both parties attempt to tie DE-Ohio to the contracts by asserting that it acted in concert with its affiliates because of the contract pricing methodology and because the signatories are Parties to these proceedings.[173] Both OCC and OMG attempt to support their accusations with the testimony of OCC witness Hixon, including her assertion that Mr. Greg Ficke participated in contract negotiations, and the e-mail of Mr. Jim Ziolkowski, reprinted in

---

[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).

full in OCC's brief.[174] As previously stated, to reach their conclusions OCC and OMG ignore the testimony of Mr. Ficke and Mr. Ziolkowski regarding their involvement in contract negotiations. OCC and OMG ignore other evidence as well.

OCC did ask Mr. Ficke whether there was "a CG&E representative involved" in the negotiation of the DERS contracts and Mr. Ficke responded that he was involved.[175] OCC then asked expressly whether he was involved in the negotiation of the contracts and Mr. Ficke responded that he "was involved in *preparations of information, reviewing information*, those sorts of things *in my role as Vice President of Cinergy Corp.*," and that no actual CG&E employee was involved.[176] Regarding the Cinergy contract with [redacted] Mr. Ficke also responded that he reviewed drafts and provided comments.[177] He also explained that Cinergy was motivated to enter the [redacted] contract as an economic development effort to preserve a [redacted] and to [redacted] At no time did Mr. Ficke represent that he directly participated in the negotiation of the DERS and Cinergy contracts, nor

---

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.

was his involvement in any capacity other than as Vice President of Cinergy Corp.

OCC attempts to corroborate Ms. Hixon's testimony that Mr. Ficke was involved in the DERS and Cinergy contracts through the testimony [redacted][179] OCC asked Mr. George about what Duke Energy Shared Services employees were involved in settlement discussions to resolve these proceedings, and discussions involving DERS contracts with [redacted][180]

Eventually, OCC asked specifically whether Mr. Ficke was involved in discussions.[181] Mr. George responded that "I remember Mr. Ficke being involved somewhere along this process, but I can't recall at which time, and which of these agreements he was involved in. But I remember him being at meetings."[182] This testimony is hardly reliable proof that Mr. Ficke did anything improper. It is not clear what meetings regarding what agreements he was involved with.

The only other time Mr. George mentions Mr. Ficke the testimony is similar. Regarding the November 2004 contract between DERS and [redacted] As part of

---

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.

the same discussion Mr. George stated that "I don't recall us particularly clarifying why Mr. Ficke might have been in the room other than we do business with the Cinergy organization in several states and pay them a lot of money each year. I think Mr. Ficke was partly there in as a customer service representative capacity."[183] Nothing in Mr. George's testimony places Mr. Ficke in any particular meeting for any particular purpose; this is hardly support for an allegation of improper conduct.

OCC and OMG distort the situation involving Mr. Ziolkowski even more than their representations involving Mr. Ficke. Both rely entirely on an e-mail sent by Mr. Ziolkowski to a fellow employee. OCC and OMG completely ignore Mr. Ziolkowski's testimony about his e-mail. Mr. Ziolkowski's testimony, as set forth in his deposition made part of the record at the insistence of OCC, should not be ignored. Mr. Ziolkowski testifies that he did not know of the existence of the option contracts, had never seen the option contracts, was not involved in the negotiating process, had not performed any analysis regarding the contracts, did not know of anyone in the Company that had performed analysis, [redacted][184] From Mr. Ziolkowski's testimony it is clear that his e-mail is inaccurate and was not intended as a factual representation.

---

183 *Id.* at 46-49.

184 *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).

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]

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).

utility.[188] It prohibits cross-subsidies between the utility and its affiliate and requires each to work independently of the other.[189] Finally, O.A.C. 4901:1-20-16 requires the utility and affiliate to maintain separate accounting and prohibits the utility from incurring indebtedness of the affiliate, committing funds to maintain the financial viability of the affiliate, incurring liabilities of the affiliate, issuing security on behalf of the affiliate, or assuming a financial obligation of an affiliate.[190] There is no evidence of such transactions between DE-Ohio and DERS or Cinergy in these proceedings for the simple reason that there are no such transactions. Absent such transactions there can be no violation of R.C. 4928.02(G) or O.A.C. 4901:1-20-16.

Next, OMG alleges a violation of R.C. 4928.17, the corporate separation rules.[191] OMG asserts a violation based upon the existence of [redacted] OMG ignores the fact that the record evidence shows that on cross-examination, [redacted]

[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OMG's Remand Merit Brief at 20-21) (April 13, 2007).
[192] *Id.* at 21.

[redacted][193] Ms Hixon even agreed that the [redacted].[194] OMG also ignores the fact that DE-Ohio is operating pursuant to a Commission approved corporate separation plan and no Party has placed any evidence in the record of these proceedings regarding its terms and conditions or compliance therewith. Because DE-Ohio is operating pursuant to a valid corporate separation plan there is no R.C. 4928.17 violation.

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] 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 have done nothing more than enter arms length transactions with willing third parties.

## F. The Commission should keep all proprietary information confidential

The confidential and proprietary nature of many of the previously discussed contracts, 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 various contracts and other information exchanged during these proceedings and affirm the attorney examiner's ruling form the bench.

There is no need to put the confidential information obtained by OCC in these proceedings in the public domain. First, with respect to the various option agreements of DERS, these agreements give insight into DERS's business operations and its [redacted] Putting this information into the public domain would place DERS at a competitive disadvantage and would undermine the competitive market this Commission has worked so diligently to encourage.

Second, DERS is not the only CRES provider that would be affected by a public disclosure of commercial contracts in this proceeding. There are contracts of another CRES provider, who is very active in Ohio's competitive market who is at risk by the public disclosure of information in this proceeding.[200] A disclosure of all of this information would have a significant and detrimental impact on their ability to compete as well.

---

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).

The Commission has regularly permitted such contracts and price information to remain confidential.[201]

Lastly, in addition to the commercial contracts discussed above, 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); Cinergy's documents 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:**

1. The DERS and Cinergy contracts are irrelevant to the Commission's determination in these proceedings.
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:**

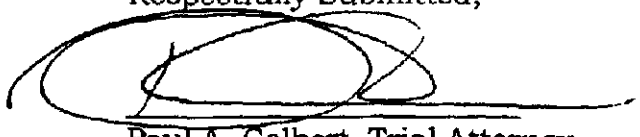
1. The record evidence available at November 23, 2004, demonstrates that DE-Ohio's MBSSO is set within the range of market prices.

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.

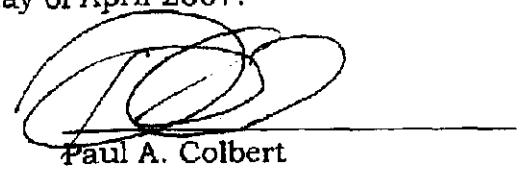
Respectfully Submitted,



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;
lmcalister@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

**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 | : | | 03-2081-EL-AAM |
| | : | | 03-2080-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**

**CONFIDENTIAL VERSION**

**SUBMITTED UNDER SEAL**



Respectfully Submitted,

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

Attorneys for
CINERGY CORP.

**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***

## CONFIDENTAL 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 **BEGIN REDACTION** option agreements. **END REDACTION**

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 **BEGIN REDACTION** option agreements **END REDACTION** 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 **BEGIN REDACTION** option agreements **END REDACTION** 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 **BEGIN REDACTION** option agreements **END REDACTION** 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 **BEGIN REDACTION** option **END REDACTION** 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 **BEGIN REDACTION** option **END REDACTION** 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 **BEGIN REDACTION** option agreements **END REDACTION** 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 **BEGIN REDACTION** option agreements **END REDACTION** if OCC, OPAE and OMG are correct.

The DERS **BEGIN REDACTION** option agreements **END REDACTION** 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 **BEGIN REDACTION** option contracts [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 **BEGIN REDACTION** option agreements **END REDACTION** are a "thinly veiled" utility service discount agreement, that the **BEGIN**

**REDACTION** option agreements **END REDACTION** violate R.C. § 4928.17(A) (the corporate separation statute), and finally that the **BEGIN REDACTION** option agreements **END REDACTION** violate Ohio public policy as expressed within § 4928.02(G). OCC complains that the **BEGIN REDACTION** option agreements **END REDACTION** 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.