LARGE FILING SEPERATOR SHEET

CASE NUMBER: 03-93-EL-ATA
03-2079-EL-AAM
03-2080-EL-ATA
03-2081-EL-AAM
05-724-EL-UNC
05-725-EL-UNC

FILE DATE: 11-10-08

SECTION: 9 of 17

NUMBER OF PAGES: 200

DESCRIPTION OF DOCUMENT: Cont. Release

CONFIDENTIAL PROPRIETARY
TRADE SECRET

James B. Gainer
Vice President, Regulatory and Legislative Strategy
Cinergy Services, Inc.
139 East Fourth Street
Cincinnati, OH 45202

or such other address as is provided in writing by the recipient from time to time.

9. The City agrees that this Settlement Agreement constitutes a legal, valid and binding obligation enforceable against it in accordance with its terms, subject to any equitable or sovereign or other immunity defenses. CG&E agrees this Settlement Agreement constitutes a legal, valid and binding obligation enforceable against it in accordance with its terms, subject to any equitable defenses. This Settlement Agreement is for the exclusive benefit of the Parties and may not be assigned without the written consent of the non-assigning party.

10. This Settlement Agreement shall be governed by and construed in accordance with the laws of the State of Ohio.

11. Except as provided in Paragraph 1 above, this Settlement Agreement does not modify any other terms of the Electricity Agreements and all other terms of the Electricity Agreements shall remain in full force and effect.

Entered into on this 14th day of June:

On Behalf of
The Cincinnati Gas & Electric Company

John Finnigan,
Senior Counsel
The Cincinnati Gas & Electric Company
139 East Fourth Street
Cincinnati, Ohio 43202

On Behalf of the
City of Cincinnati

Valerie A. Lemmie
City Manager
City of Cincinnati
801 Plum Street, Room 122
Cincinnati, OH 45202

and

Julie Larita McNeil Esq.
City Solicitor
City of Cincinnati
Room 214
801 Plum Street, Room 122
Cincinnati, OH 45202

OCC REMAND EX.5 6

01593

Ohio Consumers' Counsel
Third Set Interrogatories
Duke Energy Ohio, Inc.
Case No. 03-93-EL-ATA
Following Remand
Date Received: January 19, 2007
Response Due: January 29, 2007

OCC-INT-03-RI55 (Revised)

REQUEST:

How many megawatt-hours were served by a CRES provider in the second quarter of 2004 for:

a. Customers on Customer List 1?

b. Customers on Customer List 2?

RESPONSE:

CONFIDENTIAL PROPRIETARY TRADE SECRET

Objection: This question (and its subparts a-b) is not calculated to lead to discovery of relevant evidence to these cases. However, without waiving said objection:

a-b. DE-Ohio has not performed this calculation. However, in the spirit of cooperation, DE-Ohio has prepared a spreadsheet to summarize the requested information. Please note that the attched spreadsheet contains confidential customer information.

WITNESS RESPONSIBLE: N/A

CONFIDENTIAL PROPRIETARY
TRADE SECRET

Billed KWH

NAME	ACCOUNT	REVCLASS	REVPER 04/01/2004	05/01/2004	06/01/2004	Grand Total
AIR PRODUCTS AND CHEMICALS	[redacted]	74			0	0
	[redacted]	94	25,853,710	25,188,257	26,924,875	77,966,842
AIR PRODUCTS AND CHEMICALS Total			25,853,710	25,188,257	26,924,875	77,966,842
DEACONESS HOSPITAL	[redacted]	92	888,879	1,111,972	1,355,345	3,356,196
DEACONESS HOSPITAL Total			888,879	1,111,972	1,355,345	3,356,196
DRAKE MEMORIAL HOSPITAL	[redacted]	96	1,156,899	1,340,980	1,499,420	3,997,299
DRAKE MEMORIAL HOSPITAL Total			1,156,899	1,340,980	1,499,420	3,997,299
FORD MOTOR/ZF BATAVIA	[redacted]	94	11,251,397			11,251,397
	[redacted]	94	14,458,275			14,458,275
FORD MOTOR/ZF BATAVIA Total			25,709,672			25,709,672
GENERAL ELECTRIC	[redacted]	94	586,709	554,595	594,905	1,736,209
	[redacted]	94	79,640	81,083	83,508	244,231
	[redacted]	94	87,257	93,833	101,429	282,519
	[redacted]	94	243,544	266,663	338,129	848,336
	[redacted]	94	226,524	232,729	257,806	717,059
	[redacted]	94	785,886	826,356	830,514	2,442,756
GENERAL ELECTRIC Total			2,009,560	2,055,259	2,206,291	6,271,110
KROGER	[redacted]	92	242,418	240,193	286,860	769,471
	[redacted]	72	1,494	1,422	1,518	4,434
	[redacted]	72	1,300	1,130	1,000	3,430
	[redacted]	92	297,611	291,762	314,807	904,180
	[redacted]	92	250,259	282,232	290,135	822,626
	[redacted]	72	1,136	1,055	1,127	3,318
	[redacted]	72	0	0	0	0
	[redacted]	92	363,938	372,315	415,391	1,151,644
	[redacted]	74	323	289	386	998
	[redacted]	92	176,165	192,050	211,235	579,450
	[redacted]	72	657	333	265	1,255
	[redacted]	72	4,490	4,530	4,520	13,540
	[redacted]	92	249,039	266,268	298,348	813,655

01594

KROGER

[redacted]	92	268,027	270,664	346,201	884,892
[redacted]	92	272,464	301,021	317,910	891,395
[redacted]	92	233,308	241,325	285,107	759,740
[redacted]	72	4,086	4,266	3,600	11,952
[redacted]	92	308,439	295,172	332,051	935,662
[redacted]	72	568	607	677	1,852
[redacted]	92	411,710	428,619	515,924	1,356,253
[redacted]	92	314,890	354,482	382,222	1,051,594
[redacted]	92	200,187	183,745	203,262	587,194
[redacted]	72	7,776	8,316	8,748	24,840
[redacted]	72	2,400	2,400	2,400	7,200
[redacted]	72	490	500	370	1,360
[redacted]	92	296,529	300,157	349,189	945,875
[redacted]	94	843,955	903,869	962,379	2,710,203
[redacted]	92	239,227	284,250	301,391	824,868
[redacted]	72	7,400	6,279	6,904	20,583
[redacted]	72	4,212	2,664	5,922	12,798
[redacted]	72	372	324	324	1,020
[redacted]	92	71,623	66,004	75,466	213,093
[redacted]	92	243,620	259,577	309,815	813,012
[redacted]	92	272,289	272,996	298,430	843,715
[redacted]	92	230,769	264,983	308,545	804,297
[redacted]	92	326,592	334,628	406,148	1,067,368
[redacted]	72		600	12,300	12,900
	92	1,629			1,629
[redacted]	72	13,560	14,040	15,840	43,440
[redacted]	72	367	313	321	1,001
[redacted]	92	270,481	306,360	336,581	913,422
[redacted]	92	291,062	317,935	367,115	976,112
[redacted]	92	276,693	285,269	347,415	909,377
[redacted]	92	254,000	269,644	305,195	828,839
[redacted]	72	3,950	3,470	4,000	11,420
[redacted]	72	4,580	4,240	4,420	13,240
[redacted]	92	210,030	208,937	233,133	652,100
[redacted]	72	22,560	25,920	33,120	81,600
[redacted]	92	271,423	264,484	298,422	834,329
[redacted]	72	269	231	234	734
[redacted]	92	212,901	230,988	266,276	710,165
[redacted]	92	234,961	269,664	263,386	768,011

CONFIDENTIAL PROPRIETARY
TRADE SECRET

KROGER	[redacted]	92	392,995	366,577	386,155	1,145,727
	[redacted]	92	249,471	285,692	309,001	844,164
	[redacted]	92	246,651	268,513	351,046	866,210
	[redacted]	92	92,700	93,662	115,647	302,009
	[redacted]	92	254,710	269,454	324,036	848,200
	[redacted]	72	821	850	900	2,571
	[redacted]	72		(764)		(764)
	[redacted]	92	267,471	302,610	319,213	889,294
	[redacted]	92	206,454	210,789	260,802	678,045
	[redacted]	92	180,334	194,610	226,692	601,636
	[redacted]	92	612,216	683,481	896,758	2,192,455
	[redacted]	92	270,553	313,650	337,290	921,493
	[redacted]	72	3,320	2,790	3,520	9,630
	[redacted]	92	176,614	177,719	218,075	572,408
	[redacted]	72	7,746	6,953	6,598	21,297
	[redacted]	92	262,698	261,196	291,612	815,506
	[redacted]	92	274,729	265,785	295,032	835,546
	[redacted]	72	5,252	4,900	5,113	15,265
	[redacted]	92	260,502	249,759	279,547	789,808
	[redacted]	72	6,037	5,823	6,409	18,269
	[redacted]	92	41,438	43,791	51,115	136,344
	[redacted]	94	251,681	245,662	278,877	776,220
	[redacted]	92	255,633	277,235	324,778	857,646
	[redacted]	92	243,935	277,374	282,745	804,054
	[redacted]	92	259,294	267,862	318,114	845,270
	[redacted]	72	12,480	11,280	16,440	40,200
	[redacted]	92	161,779	181,904	180,661	524,344
	[redacted]	92	245,399	284,625	292,661	822,685
	[redacted]	92	224,059	237,520	279,553	741,132
	[redacted]	92	243,600	260,132	304,384	808,116
	[redacted]	92	160,510	169,724	194,249	524,483
	[redacted]	92	59,415	68,620	90,626	218,661
KROGER Total			14,148,726	14,932,300	16,983,984	46,065,010
MARATHON / ASHLAND PETROLEUM CO	[redacted]	72	10,160	6,400	5,280	21,840
	[redacted]	94	88,468	52,099	53,111	193,678
	[redacted]	94	685,813	709,657	636,695	2,032,165
	[redacted]	94	108,246	105,290	118,133	331,669
MARATHON / ASHLAND PETROLEUM CO Total			892,687	873,446	813,219	2,579,352

CONFIDENTIAL PROPRIETARY
TRADE SECRET

MARATHON / SSA ACCOUNTS

[redacted]	72	30,000	32,720	34,000	96,720
[redacted]	72	15,280	14,200	16,520	46,000
[redacted]	72	27,120	26,080	28,440	81,640
[redacted]	72	20,160	18,480	21,600	60,240
[redacted]	72	30,120	32,760	31,440	94,320
[redacted]	72	14,160	13,440	14,820	42,420
[redacted]	72	21,840	21,480	23,640	66,960
[redacted]	72	8,409	8,553	10,230	27,192
[redacted]	72	15,540	14,100	17,880	47,520
[redacted]	72	29,920	28,640	29,600	88,160
[redacted]	72	16,360	17,280	17,000	50,640
[redacted]	72	27,360	25,560	26,700	79,620
[redacted]	92	22,982	24,668	28,000	75,650
[redacted]	72	15,490	17,024	19,627	52,141
[redacted]	72	17,180	18,030	20,370	55,580
[redacted]	72	22,920	21,840	28,800	73,560
[redacted]	72	31,440	31,200	31,260	93,900
[redacted]	72	30,800	31,040	36,720	98,560
[redacted]	72	31,560	34,560	36,840	102,960
[redacted]	72	31,500	28,560	30,600	90,660
[redacted]	72	12,960	16,020	15,480	44,460
[redacted]	72	27,840	18,240	30,720	76,800
[redacted]	72	22,320	23,920	26,920	73,160
[redacted]	72	0	24,480	28,200	52,680
[redacted]	72	27,300	27,360	30,660	85,320
[redacted]	72	24,840	24,000	25,080	73,920
[redacted]	72	9,720	10,240	11,960	31,920
[redacted]	72	5,200	4,040	3,800	13,040
[redacted]	72	30,240	27,240	31,560	89,040
[redacted]	72	27,040	24,000	26,080	77,120
[redacted]	72	26,560	26,880	28,640	82,080
[redacted]	72	30,720	32,160	33,360	96,240
[redacted]	72	29,440	29,920	35,360	94,720
[redacted]	72	31,440	33,720	36,480	101,640
[redacted]	72	24,640	25,280	30,480	80,400
[redacted]	72	20,520	22,920	23,040	66,480
[redacted]	72	33,720	30,720	32,760	97,200
[redacted]	72	11,920	12,400	15,520	39,840

CONFIDENTIAL PROPRIETARY
TRADE SECRET

MARATHON / SSA ACCOUNTS	[redacted]	72	19,980	22,500	26,280	68,760
	[redacted]	72	14,820	14,940	16,200	45,960
	[redacted]	72	24,120	21,000	23,520	68,640
	[redacted]	72	25,440	24,400	27,360	77,200
	[redacted]	72	29,600	33,840	34,880	98,320
	[redacted]	72	7,047	7,793	7,349	22,189
	[redacted]	72	8,240	7,440	7,920	23,600
	[redacted]	72	22,600	21,280	23,000	66,880
	[redacted]	72	33,120	30,720	33,920	97,760
	[redacted]	72	37,320	23,280	25,920	86,520
	[redacted]	72	31,728	29,592	33,552	94,872
MARATHON / SSA ACCOUNTS Total			1,110,576	1,110,540	1,230,088	3,451,204
MCCULLOUGH-HYDE MEMORIAL HOSPITAL	[redacted]	92	323,226	363,913	416,561	1,103,700
MCCULLOUGH-HYDE MEMORIAL HOSPITAL Total			323,226	363,913	416,561	1,103,700
MERCY FRANCISCAN HOSPITAL MT AIRY	[redacted]	92	880,137	1,040,103	1,189,912	3,110,152
MERCY FRANCISCAN HOSPITAL MT AIRY Total			880,137	1,040,103	1,189,912	3,110,152
MERCY HOSPITAL ANDERSON	[redacted]	92	990,242	1,118,791	1,373,353	3,482,386
MERCY HOSPITAL ANDERSON Total			990,242	1,118,791	1,373,353	3,482,386
MERCY HOSPITAL CLERMONT	[redacted]	92	607,268	666,199	724,504	1,997,971
MERCY HOSPITAL CLERMONT Total			607,268	666,199	724,504	1,997,971
MERCY HOSPITAL FAIRFIELD	[redacted]	92	30,411	22,649	21,920	74,980
	[redacted]	92	1,063,777	1,165,380	1,304,600	3,533,757
MERCY HOSPITAL FAIRFIELD Total			1,094,188	1,188,029	1,326,520	3,608,737
PROCTER & GAMBLE	[redacted]	72	2,532	2,148	1,992	6,672
	[redacted]	92	83,691	67,366	65,725	216,782
	[redacted]	74	19,200	12,480	12,000	43,680
	[redacted]	94	47	34	25	106
	[redacted]	94	497,966	546,868	631,722	1,676,556
	[redacted]	74	3,580	1,861	533	5,974
	[redacted]	94	1,934,974	2,132,708	2,380,873	6,448,555
	[redacted]	92	1,160,138	1,277,804	1,384,068	3,822,010
	[redacted]	94	13,941	14,994	13,927	42,862
	[redacted]	72	1,360	1,162	1,188	3,710

CONFIDENTIAL PROPRIETARY
TRADE SECRET

PROCTER & GAMBLE	[redacted]	72	12,360	14,860	21,660	48,880
		94	319,431	301,825	371,143	992,399
		74	938	1,676	2,826	5,440
		74	600	300	150	1,050
		72	5,392	4,694	4,770	14,856
		92	64,693	66,662	78,663	210,018
		92	8,529	5,596	4,496	18,621
		92	115,908	135,559	154,899	406,366
		92	78,628	82,292	97,990	258,910
		72	4,680	4,170	4,350	13,200
		92	875,684	1,093,685	1,217,277	3,186,646
		94	42,310	42,154	54,499	138,963
		74	1,871	1,886	3,181	6,938
		94	86,838	101,964	121,266	310,068
PROCTER & GAMBLE Total			5,335,291	5,914,748	6,629,223	17,879,262
TRI HEALTH CORP PROP	[redacted]	92	1,134,365	1,248,117	1,428,858	3,811,340
		92	146,442	149,968	174,362	470,772
		92	1,446,400	1,630,935	1,715,523	4,792,858
		92	2,540,970	3,015,304	3,170,514	8,726,788
TRI HEALTH CORP PROP Total			5,268,177	6,044,324	6,489,257	17,801,758
Grand Total			**86,269,238**	**62,948,861**	**69,162,552**	**218,380,651**

- - -

CONFIDENTIAL EXCERPT

FROM THE PUCO HEARING REGARDING

CONSOLIDATED DUKE ENERGY OHIO, INC. RATE

STABILIZATION PLAN REMAND, AND RIDER ADJUSTMENT

CASES.

- - -

VOLUME I

- - -

MONDAY, MARCH 19, 2007

- - -

(Confidential Portion.)

MS. HOTZ: May I approach the witness?

EXAMINER KINGERY: You may.

MS. HOTZ: OCC would like to mark a seven-page document as OCC Remand Exhibit No. 5.

EXAMINER KINGERY: It will be so marked.

MS. HOTZ: Thank you.

(EXHIBIT MARKED FOR IDENTIFICATION.)

Q. (By Ms. Hotz) This is a confidential document, marked "Confidential" anyways. OCC Exhibit Remand 5 is the response of Duke Energy - Ohio to OCC interrogatory No. 55 revised. The interrogatory

asked "How many megawatt-hours were served by a CRES provider in the second quarter of 2004?" Is that correct?

A. That's the question, yes.

Q. Do you recognize the names of the customers on the spreadsheet pages as customers in the Duke Energy - Ohio -- I mean as, yeah, as customers in the Duke Energy - Ohio service territory when you worked for Duke?

MR. DORTCH: I'm sorry, may I have the question repeated?

(Question read.)

MR. DORTCH: Thank you.

A. All of the names in the far left column headed Name appear to be customers that Duke serves. I'm sure these customers have locations elsewhere, but I believe each of these has at least one meter in our service territory.

Q. Okay. If you go to the very last page --

A. I'm there.

Q. -- where it shows grand total.

A. I see that.

Q. And says 218,386,651 kilowatt-hours.

A. I see the number. I'm just trying to

establish what it is. According to the heading at the very top of page 1, this appears to be a report of billed kilowatt-hours, and that line is headed Grand Total. I am not sure what the period might be, but I agree with you that the 218 et cetera number is a grand total of kilowatt-hours.

Q. Okay. Would you agree that the question asks for the second quarter of 2004?

A. It does.

Q. So does it appear to you that this response is giving the total there at the bottom where it says "Grand Total" is the total number of kilowatt-hours that were served by a CRES provider in the second quarter of 2004?

A. The clarification I would ask for is there's an A and a B that refers to a customer list 1 and customer list 2, and I'm not familiar with what that means. So I don't know the answer to the question that you just asked.

Q. Okay. Are these customers that are listed on this document the same customers that were parties to the DERS agreements that you testify about?

MR. D'ASCENZO: Objection. The customer

list 1 and 2 in parts A and B were created by OCC as part of this discovery request.

MS. HOTZ: I didn't ask anything about list 1 or list 2. I asked about just the customers listed on this document.

MR. D'ASCENZO: Well, the list of customers on the document presumably by -- assuming that the response -- the answer is in response to the questions, that list was created by OCC.

MS. HOTZ: I just asked about the customers on the pages. The pages do not differentiate between customers on list 1 and customers on list 2.

EXAMINER KINGERY: Objection overruled.

You may answer.

THE WITNESS: Reread it, please.

(Question read.)

A. This is the first time I believe that I've seen this response. I haven't really correlated it to anything, so I don't know.

Q. So if you were going to transfer or if you were going to change the 218,380,651 kilowatt-hours to megawatt-hours, what would it be?

A. I think you just move it over three to

the left.

Q. So it would be, what? 218 --

A. 380. 381.

Q. 381. And about what percentage is that to 986,397 megawatt-hours?

MR. D'ASCENZO: Objection. Where did that number come from?

MS. HOTZ: I'm just asking him what the percentage is.

MR. D'ASCENZO: What's the foundation?

MS. HOTZ: It's just --

EXAMINER KINGERY: Can you give us some --

MS. HOTZ: Never mind.

Q. (By Ms. Hotz) Do you know if any of the customers listed on this response had a contract with DERS?

A. I believe that at least some of the customers on this list have agreements/contracts with DERS.

Q. Okay. Do you know if any of the agreements in the first set included a provision that forbid signatory parties to contest the CG&E's filed stipulation?

MR. D'ASCENZO: Objection.

MR. DORTCH: Objection.

MR. D'ASCENZO: First set of what?

MS. HOTZ: In any of the CRS agreements.

THE WITNESS: Am I supposed to answer?

EXAMINER KINGERY: She clarified her question, solved the objection.

MR. BOEHM: I'm sorry, I'm not clear. The CG&E CRESs? What CRES agreements?

MS. HOTZ: The CRS agreement.

MR. BOEHM: I know what CRES means. Which CRES?

MS. HOTZ: CRS agreements.

EXAMINER KINGERY: Can we hear the question read back?

(Question read.)

MR. BOEHM: I'm sorry. I was getting CRES and CRS because they were using the same term. Excuse me.

EXAMINER KINGERY: Okay.

A. I don't recall that.

MS. HOTZ: That's all I have.

EXAMINER KINGERY: Thank you.

Mr. Petricoff.

- - -

CROSS-EXAMINATION

By Mr. Petricoff:

Q. Good afternoon, Mr. Steffen.

A. Good afternoon.

EXAMINER KINGERY: Or, excuse me one second. Should we stay sealed at this point for your questioning or should we move on --

MR. PETRICOFF: No, I don't have anything that's -- I think we can go back on the public record for all of mine.

EXAMINER KINGERY: We'll move the record back to public at this point.

MR. PETRICOFF: Actually, before we do that, while we're still off the record --

EXAMINER KINGERY: We're off the record.

(End of Confidential Portion.)

(Confidential portion.)

EXAMINER KINGERY: The record will be sealed at this point.

MR. COLBERT: Mr. Howard, do you have a preliminary matter?

MR. PETRICOFF: I think we are going to

take that at the end, as I understand it. Thank you anyway.

MR. COLBERT: Fair enough, thank you.

Q. (By Mr. Colbert) Ms. Hixon, would you turn to your attachment 2, please.

A. I have that.

Q. Thank you. Now, attachment 2 is a contract between Cinergy Retail Sales and various hospitals shown on an attached Exhibit 1. Is that correct?

A. It's an agreement between the hospitals and CRS, yes.

Q. And CRS is now known as Duke Energy Retail Sales. Is that your understanding?

A. Yes.

Q. This contract was entered into May 19, 2004?

A. At Bates stamp 350 it says it was effective the 19th day of May.

Q. Please turn to paragraph one.

A. I have that.

Q. That paragraph, it says, "Beginning January 1, 2005, and through December 31, 2008, Cinergy will offer to sell retail electric generation

service to the Hospitals for all their CG&E accounts as a firm power, all-in, fixed rate equal to the applicable tariff rate of The Cincinnati Gas & Electric Company's unbundled generation rate approved by the Public Utilities Commission." Is that what it says? Is that accurate?

A. You've read that correctly.

Q. Thank you. Would you describe that -- we talked about a concept of baseline. Would you describe that as a baseline or starting point?

A. In the context of this agreement, that could be described as a baseline or starting point.

Q. Thank you. By the way, Cinergy in the context of this agreement means Cinergy retail sales. Is that your understanding?

A. Yes, that's how Cinergy is defined on the first page of the agreement.

Q. It goes on to say subtracted from that baseline or the firm power all-in fixed rate would be regulatory transition charge less one mil. Is that -- with some exceptions that follows, is that your understanding?

A. Yes. As you continue to read after the unbundled generation rate it says "less the

regulatory transition charge approved in the same case less one mil." It provides then an exception for specific hospitals.

Q. Thank you. That's all I need of that exhibit. Thank you.

Ms. Hixon, if you would turn to page 4 of your testimony at lines 2 and 3 of your testimony you state that "the side agreements," as you call them, "were a part of CG&E's efforts to obtain support for PUCO approval of a rate stabilization plan acceptable to CG&E." Is CG&E, what is now known as Duke Energy - Ohio, a party to any of the contracts that you refer to as side agreements?

A. Well, as I describe in my testimony in discussing each of the side agreements, while CG&E is not a stated party at the very beginning of each agreement, there is indications that CG&E was involved and that CG&E was impacted by those agreements, so, no, they're not a stated party.

Q. Thank you. We'll discuss the rest of your opinion later.

I will say there are several contracts that the operating companies or what was CG&E is a party to; is that correct, specifically the City of

Cincinnati contracts, and there is also a contract with Constellation NewEnergy that is Cinergy on behalf of its operating companies. Is that your understanding?

A. When you say several, are those the two you are referring to?

Q. Those are the two I'm referring to.

A. Those side agreements, the City of Cincinnati I do not discuss, but I understand from Mr. Steffen's testimony that CG&E was a party to that contract. The Constellation NewEnergy, could you give me more clarification as to what you are referring to?

Q. Sure. And I believe you discuss a series of contracts relative to serving Kroger that include wholesale contracts for Constellation NewEnergy is one of those in the series of that contract.

A. In regards to the Kroger contract on page 24 of my testimony, first full paragraph, I do describe how the Kroger side agreement that I've discussed, July the 7th, is different because it's predicated on the purchase of generation from NewEnergy, and I do reference the Cinergy operating companies are involved with that transaction.

Q. Okay. All of the remaining contracts are between DERS or its predecessor, Cinergy Retail Sales, or Cinergy Corp., and various counterparties to those contracts; is that correct?

A. And by remaining contracts maybe as a reference if we could go to the table of contents.

Q. I'm talking about the contracts what you call "side agreements" attached to your testimony.

A. The side agreements attached to my testimony as shown, for example, in the table of contents, are between CRS and other parties or Cinergy Corp. and other parties.

Q. Thank you. Ms. Hixon on page 7 of your testimony on line 7 to 11, you list the parties that signed the May 19, 2004, stipulation. Is that correct?

A. Yes. Those lines that's what I attempted to do.

Q. Okay. In addition to those parties DE-Ohio was a signatory; is that right?

A. I think the first party I list is CG&E.

Q. I'm sorry, so you did. Now, of those parties, staff, FirstEnergy Solutions, Dominion Retail, Green Mountain Energy, People Working

Cooperatively, and Communities for Action did not execute contracts with either affiliates of DE-Ohio or DE-Ohio where those contracts involved pricing based upon components of DE-Ohio's MBSSO. Is that your understanding?

A. I'm not aware that staff, FES, Dominion Retail, Green Mountain, or People Working Cooperatively had any contracts or side agreements. They were not provided to us, so I'm not aware of any.

Q. And that's true of Communities for Action as well?

A. Communities for Action would be the same.

Q. Thank you. Now, you also list the parties who opposed the stipulation, and those parties, let's see, include Ohio Marketers Group, PSEG Energy Resources, National Energy Marketers Association, Ohio Partners for Affordable Energy, OCC, and the Ohio Manufacturers Association; is that correct?

A. Yes, that's what I listed.

Q. Okay. And we've already discussed a contract involving Constellation NewEnergy, who is a member of Ohio Marketers Group; is that correct?

A. In reference to Kroger's side, I mentioned that Constellation was Kroger's energy supplier, and we did discuss the transaction, yes.

Q. And can you tell me who the members of Ohio Manufacturers Association are?

A. I do not know the specific members.

Q. Do you know if any of the signatories to any of the contracts are members of the Ohio Manufacturers Association?

A. Since I don't know the members of the Ohio Manufacturers Association, no, I cannot.

MR. COLBERT: May we approach, your Honor?

EXAMINER KINGERY: You may.

Q. Ms. Hixon, I've handed a document now marked as Duke Energy - Ohio Remand Exhibit 19.

EXAMINER KINGERY: It will be so marked.

(EXHIBIT MARKED FOR IDENTIFICATION.)

Q. And I would represent to you that that's an e-mail from Mr. Boehm to myself indicating that Ford is a member of the Ohio Manufacturers Association. Is that what it appears to be to you?

MR. SMALL: Your Honor, I object.

MR. ROYER: I object.

MR. SMALL: We have a document that counsel sitting at the table here is testifying who is a member of what. This is essentially trying to put Mr. Boehm's statement, counsel, into evidence.

MR. ROYER: Out and out hearsay.

MR. COLBERT: Your Honor, the witness has testified as to who has contracts and who doesn't on both sides of the stipulations. We're simply -- she has also testified she doesn't know who the members of OMA are. OMA, of course, is a well-known group with lots of members, and we're simply pointing out that the witness doesn't know whether members of parties that opposed the stipulation, just like members of parties that supported the stipulation, signed contracts that she is objecting to.

MR. SMALL: Ms. Hixon has answered his question what she knows and what she doesn't know. That should be sufficient. I don't see that this has any -- this is improper evidence.

MR. ROYER: To quote from Mr. Colbert yesterday if you wanted to get this in, he had a way to get it in, but it's not by handing her a piece of paper that is clear hearsay and implying this is the truth.

MR. COLBERT: Your Honor, if I may, on that, there are many contracts that are attached to Ms. Hixon's testimony that have been allowed in through discovery as relevant to this proceeding. None of them have been supported by a witness from the companies that are parties to those contracts, yet, they have been allowed in.

This is cross-examination on those contracts, her understanding of it, and it's relevant to this case, and, you know, certainly if we're letting in lots of other evidence that we believe is otherwise irrelevant, we ought to be permitted to test the knowledge surrounding those contracts.

MR. ROYER: Your Honor, please, the information that's in the testimony was information that was provided in discovery to OCC and comes in unless they're saying -- that this is not what they purport it to be. Hearsay doesn't apply there. They were given to OCC based on a request, an admission. This is Mr. Colbert trying to establish the fact that Ford is a member of OMA, which it probably is, and we may stipulate that, but I object to the process while he is trying to get that into the record. It is not appropriate.

MR. COLBERT: I certainly would accept such a stipulation, but beyond that, the representation has already been made on the stand by Ms. Hixon in response to questions that DE-Ohio and DERS and Cinergy Corp. had been working together and are parties in one in the same contract. She explained that when she said while we are not named parties, you know, there was an effect to DE-Ohio and from DE-Ohio in these contracts.

So there are accusations being made of us with absolutely no support. We think that it's fair that we get to fully explore those accusations.

EXAMINER KINGERY: Would parties be willing to stipulate that Ford is an member of OMA?

MR. BOEHM: I would.

MR. COLBERT: DE-Ohio is willing to stipulate.

EXAMINER KINGERY: Mr. Small?

MR. SMALL: I would be willing to stipulate that Ford is a member of the Ohio Manufacturing Association along with thousands of other manufacturers in the state of Ohio.

You know --

MR. COLBERT: Approximately 1,800.

MR. SMALL: They didn't file a motion to intervene in the case. They did explain who they were and what their interest was. It is important though to establish we are not going to -- by so stipulating I'm not going to without objection let counsel testify here and have that established as fact. We are on a very dangerous and slippery slope by the introduction of that e-mail.

MR. COLBERT: I have no intention of going further on this.

EXAMINER KINGERY: We do understand the hearsay problem. If there are no objections that Ford is a member of OMA along with many other customers in the state of Ohio, we will take that as so stipulated, and then we will not admit this as an exhibit.

MR. COLBERT: That's fine. With the stipulation, I certainly don't need it admitted. Thank you, your Honor.

Q. (By Mr. Colbert) Ms. Hixon, do you know whether DERS has contracts with counterparties other than the contracts and counterparties you have examined?

A. While I'm not aware of any other

contracts or agreements that DERS has with counterparties, I have reviewed all of the agreements that were provided to us. I also have been made aware that DERS has no other revenue, and in the deposition of the individual who was provided to give us information about financial statements, I understand that the option payments under the agreements that are attached to my testimony reflect the expenses in the financial statements for 2005 and 2006.

Q. Do you understand that's no, you are not aware of other contracts?

A. I guess what I'm saying I'm not aware of any other contracts, and by everything that I've seen leads me to understand that what's been given to us are the agreements with other parties.

Q. Do you know whether DERS has ever turned down a customer that has requested a contract?

A. No, I don't know that.

Q. Now, a minute ago you talked about financial statements in discovery. Have you examined DERS's financial statements showing the amount of option payments by year?

A. We were provided through discovery copies

of requests for invoice payments. We were also provided copies of the 2005 and 2006 income statements and balance sheets. Attached to those documents was further account detail which showed the entries each month related to option payments that either had been made or were accrued.

Q. And you also took financial statements off of the Commission's website from publicly filed documents by DERS; is that correct?

A. Yes, that's attachment 2 to my testimony, which is Exhibit C-3 from a filing with the application that shows DERS's financial statements 2005 and projected income for 2006.

Q. Ms. Hixon, did you do any calculations to determine the costs of the particular DERS contracts that you have examined?

A. What do you mean by the term "costs of"?

Q. The annual amount of the option payments associated with those contracts in the aggregate.

A. I did attempt to reconcile, for example, on my attachment 22, the third page that says "Statement of Income" and there's an "option premium expense" of "13,768,812." I did attempt to reconcile those to the statements that were provided to us, a

statement of income at the deposition of Mr. Savoy as well as the monthly account detail behind that, and then I also attempted to reconcile various months to the invoices that they provided through the summary as well, and I found through documentation that the option expense payments attached to -- with agreements attached to my testimony did reconcile back to those monthly expenses.

Q. They reconciled exactly?

A. I think I probably rounded to the dollar, so I don't know that they reconciled exactly.

Q. Dollar is close enough.

A. I didn't reconcile every single month because all the detail was not available in the documentation that we had to be able to do that. But that's what I tried to do.

Q. Well, when you say -- maybe I'm a little bit confused. When you say you did not reconcile each month, how did you come up with a -- how did you come to the conclusion that it, in fact, reconciled for the year end?

A. Well, for example, the option premium expense of approximately $13.8 million was reflected in the accounts of DERS as contra revenue. Each

month there were entries made to that contra revenue account. I reconciled each monthly entry to see that it totaled approximately $13.8 million.

I then attempted with the additional invoices provided to us to see whether or not those totaled what the entries were, and as I said, while I wasn't able to reconcile every single month, I came very close.

MR. COLBERT: Your Honor, I think we can go back on the public record now for the time being.

EXAMINER KINGERY: Thank you. The record will be unsealed at this point.

(End of confidential portion.)

(Confidential portion.)

Q. On page 39 of your testimony you suggest that paragraph 12 of the contract with various OEG members was dependent on a Commission order acceptable to DE-Ohio. Now, you may want to refer to that provision, but that provision appears to allow adjustments among the counterparties to maintain the economic value of the contract in the event an MBSSO is approved that changes the economic value to the counterparties.

Is that an accurate representation of your understanding of that provision?

MR. SMALL: Objection, your Honor, facts not in evidence. If I understood the question, and I may not have understood the question, but if I understood the question, it started out with a representation of the materials found on page 39, line 7 through 9, and the question asked -- referred to DE-Ohio and that is not what it says and that's not a fact in evidence.

EXAMINER KINGERY: Perhaps you could restate your question.

MR. COLBERT: Sure.

Q. Ms. Hixon, would you turn to attachment 9

of your testimony, paragraph 12?

A. I have that.

MR. ROYER: Can we get the Bates number?

MR. COLBERT: It's page 5 of the contract.

MR. ROYER: The Bates number?

MR. COLBERT: 324. Is everybody there?

Q. Ms. Hixon, that is the paragraph that you are referring to in your testimony on page 39.

A. Yes. At page 39 I reference that provision and say it's identical to the one in the superseded agreement, and I actually discuss and quote that provision on page 19 of my testimony.

Q. And is it your understanding that is a termination provision in the contract?

A. No, that's not what I testified to. It tied the agreement to the outcome in the post-MDP service case.

Q. In the fourth line of that contract, what is ST Cinergy, is that CRS?

MR. SMALL: For our reference where are we? Are we on Bates stamp 323?

MR. COLBERT: We've not left paragraph 12.

A. My understanding in provision 12, the fourth line down, the word Cinergy refers to Cinergy Retail Sales or CRS as defined on page 320 of the agreement.

Q. Okay. And Cinergy, that is CRS, will provide the same economic value to impacted customers. Who in this case are customers; do you know?

A. Again on page 320 the customers are defined. Do you want me to list their names? AK Steel, Air Products & Chemicals, Incorporated, BP Products north America, Ford Motor Company, GE Aircraft Engines, and the Proctor and Gamble Company.

Q. So does that paragraph terminate this agreement in any manner?

MR. SMALL: Objection, calls for a legal conclusion.

Q. Is it your understanding that this paragraph terminates the agreement in any manner?

A. No. My understanding is what I have in my testimony; that this provision tied the agreement to the outcome of the case.

Q. And it requires some action on the part of Cinergy Retail Sales, now Duke Energy Retail

Sales, to customers; is that correct?

A. The action required in the last three lines for Cinergy or CRS, yes.

Q. On page 43 of your testimony at lines 6 to 11 you describe the payment structure by Kroger to DERS during 2005 and indicate that DERS will reimburse to Kroger one half of the SRT and AAC actually paid. Is that correct?

A. Yes, that's what it says.

Q. Does the first 50 percent of nonresidential load switch avoid paying the AAC?

A. The PUCO-approved MBSSO, as I describe on page 53, for the AAC was bypassable for the first 50 percent of load switching subject to notice by customers of a CRES contract through 12/31/08 and agreements to other provisions per CG&E's savings.

Q. The latter part, the conditions refers to SRT, doesn't it? That's how they avoid the SRT.

A. My recollection from the tariff sheets that I looked at there were similar provisions related to both -- to all three, RSC and the AAC and the SRT for nonresidential.

Q. Okay. It is at least your understanding that this SRT is also avoidable by a sizable amount

of load, at least 50 percent of switched load, under certain circumstances for nonresidential customers.

A. As I just described, yes.

Q. Do you know whether Kroger avoided payment of the AAC or SRT or both?

A. I do not know what Dominion East Ohio was paid for by Kroger, so I don't know if they avoided it in terms of actually paying it. I know that as attached to my testimony and discussed in my testimony there's a notice that Kroger provided to avoid AAC, and in addition, attached to my testimony is a copy of the invoice for Kroger that indicates whether or not DERS under the option agreement was going to be reimbursing them for anything and so that invoice would give you insight as to whether or not certain units of Kroger paid or did not pay the AAC or SRT.

Q. Just to clarify you said Dominion East Ohio. Did you mean Constellation NewEnergy?

A. No, I meant DE-Ohio.

Q. Okay.

A. Other.

Q. Thank you.

MR. KURTZ: For purposes of clarification

you meant option agreements. Kroger has no option agreements. You may want to restate your answer.

THE WITNESS: Thank you, under their agreement.

Q. Well, does Duke Energy - Ohio have more than 50 percent load switch for nonresidential customers; do you know?

A. At a specific point as of today?

Q. At any point in time, 50 percent.

A. Well, I know in my testimony I give the switch statistics as of 12/31/06 and not above 50 percent and I believe the last time I checked on Duke's website it was not above 50 percent.

Q. So, thus far, it would be your understanding that all nonresidential load that switched at least has the opportunity to avoid the AAC and SRT.

A. Subject to the conditions I described per the tariffs, notice, and CRES contract, they had the opportunity.

Q. Now, during 2005, Kroger paid DERS the additional allowance component of the FPP pursuant to the agreement. Is that correct?

A. I believe in my testimony I do

describe -- if I may have a moment? Yes, at page 48 and 49 I described -- as I was corrected earlier -- that Kroger resulted in paying pursuant to the November 22, 2004, agreement.

Q. Ms. Hixon, when -- well, first, do any of the contracts attached to your testimony involve residential customers?

A. No, they do not.

Q. Ms. Hixon, early in this discussion we talked about CRES provider contracts; that is, that they have contracts with customers. To the best of your knowledge, are those contracts usually for some period of time?

A. Yes.

Q. And are they commonly for a year in duration?

A. I know that they can be for a variety of periods. I can't say what they commonly are. I don't know.

Q. Do you have any -- in your experience with the OCC, do you have any idea what --

A. I know that they can be for a period of one year or more. I don't know what the common or the -- by common I assume you mean usual or typical.

I don't know.

Q. Okay. And during the period of time that the contract exists, whatever period that is, are the customers bound to the CRES provider with whom they have a contract?

MR. SMALL: Objection, calls for a legal conclusion.

Q. Is it your understanding that they would -- that customers would be unavailable for solicitation by other CRES providers during the period of their contract with the CRES provider that they have chosen?

A. It would depend upon the terms of the contract. I don't think I've ever seen a contract that said I couldn't be solicited by another CRES provider.

Q. But in order to change, they would have to abide by the contract provisions which may let them out without any penalty or perhaps there might be a penalty associated with that?

MR. SMALL: Same objection.

MR. COLBERT: I'm asking her for her understanding. She is with the Ohio Consumers' Counsel. They have substantial experience with

contracts with CRES providers and residential customers. These provisions that we're talking about have commonly been discussed in many cases before the Commission.

EXAMINER KINGERY: I'll allow the question with the caveat it is her understanding, not a legal conclusion.

A. Again, it would depend upon the terms of the contract.

Q. Could you describe your understanding of terms that OCC has had experience with?

A. Unfortunately, there's not too many electric contracts out there. My familiarity with competitive providers in terms of contracts are probably greater on the gas side. To the extent they do tend to mirror each other, some it could simply be a month-to-month basis to get out of the contract. There may be penalties associated with it. Provisions pursuant to the Commission's rules about notice both to the customer and from the customer would have to be taken into consideration.

Q. And taking all of those into consideration, it would be your understanding that both parties, both the customer and the CRES

provider, would live within the parameters of those various provisions?

A. To the extent there's a contract that both parties agreed to, they would agree to live within those provisions.

Q. Okay. And if a customer wanted to switch to another CRES provider for some reason, what one of those reasons might be, might be to get a lower price, as we discussed earlier.

A. That could be a reason.

Q. And such a customer could move back to the utility's market based standard service offer as well for the same reason or different reasons. Is that correct?

A. It depends on the term of the contract whether they could move back or not, and the reasons could be many.

Q. But at the end of the contract the customers would have the freedom to move.

A. At the end of the contract the customer is free to do whatever they want because there is no contract.

EXAMINER KINGERY: We are still in the sealed part of the record. You have been asking

questions that are --

MR. COLBERT: I'm sorry, we can go to the public.

EXAMINER KINGERY: The record will be unsealed at this point.

(End of confidential portion.)

(Confidential portion.)

Q. (By Mr. Kurtz) The first Kroger agreement is dated July, 2004; is that correct?

A. Yes.

Q. Okay. And when was the stipulation in this case?

A. The stipulation was filed in the case on May 19, 2004.

Q. And you read -- you refer to the Supreme Court remand order in your testimony, don't you?

A. Yes.

Q. And the issue on remand is to determine whether or not the parties signing the stipulation in May satisfied the first prong of the three-prong test, that is, there was serious bargaining by capable, knowledgeable individuals; isn't that right?

MR. SMALL: Objection, your Honor.

MR. KURTZ: Then I will move to strike all of her testimony that refers to the Supreme Court. She cites it throughout her testimony.

EXAMINER KINGERY: What's your objection?

MR. SMALL: It would be nice to get the objection on before we get the oral argument.

The question had to do with whether being limited to that particular topic. As the Attorney Examiners know, we have spent three months determining what the -- wrangling over what the scope of this proceeding would be.

MR. KURTZ: I'll rephrase.

EXAMINER KINGERY: Okay. Thank you.

Q. One of the issues was whether or not the stipulation satisfied -- this is the issue on remand, whether the stipulation satisfied the first part of the three-prong test, that is, it was a product of serious bargaining among capable and knowledgeable individuals; isn't that correct?

A. My understanding from the reading of the Supreme Court decision is that is mentioned as -- not mentioned, that the Supreme Court did indicate that that was an issue.

Q. Are you making the allegation that an

agreement as signed by Kroger in July of 2004 somehow impacted the seriousness of its bargaining two months prior?

A. I think as I described the Kroger agreement, what I am saying is the terms and the conditions in that agreement were tied to the stipulation as well as Kroger's support of that stipulation.

Q. So it's your belief that an agreement as signed in July impacted the seriousness of Kroger's bargaining two months earlier in May? Don't you have your dates confused? Wouldn't it have been before the stipulation was signed?

A. Well, chronologically I can't disagree with your dates. I think that if you read the side agreement and see its relationship to this case and Kroger supporting that stipulation, that it's something the Commission needs to consider, not necessarily in the context of serious bargaining.

Q. Well, in the context of serious bargaining do you contend an agreement signed in July of 2004 impacted the seriousness of Kroger -- Kroger's bargaining two months prior in May? Chronologically speaking, isn't that basically

impossible?

A. Given that I have the agreement to look at, it has the date, chronologically, you are correct. In terms of how long that agreement took to negotiate, what occurred in relationship to the stipulation and this agreement prior to that time, I don't know.

Q. Do you know what happened between -- between May 19, 2004, and July when the Kroger agreement was signed, or are you speculating that something might have occurred?

A. I am not speculating. I am telling you I don't know.

Q. Okay. You were provided three Kroger agreements in discovery. I count two that were attached to your testimony. Is that right?

A. Yes.

Q. Okay. Those two agreements you've attached are not effective by their own terms; isn't that right?

MR. SMALL: Objection. Calls for a legal conclusion.

EXAMINER KINGERY: Sustained.

Q. The two you have attached have been

superseded by the third agreement; isn't that correct?

A. My understanding the third agreement at some point in time in 2005 did supercede the second, but that means that for some -- my interpretation is for some period of time during 2005 that earlier agreement would have been in effect.

Q. Is there some reason you decided not to attach the only currently effective Kroger agreement with Cinergy Resources?

A. Yes.

Q. Is the reason you elected not to attach it is because that agreement provided for the reimbursement of RSP costs of absolutely zero?

A. No.

Q. Okay. Well, isn't it true that third agreement, the only effective Kroger agreement, provided for the reimbursement of not IMF, AAC, RTC, anything -- none of the -- none of the charges that are the subject of this case; isn't that correct?

A. I don't have the agreement with me, so I can't answer that.

Q. The agreements that you're concerned with are the agreements for the supply of wholesale

generation service from Cinergy Resources to Constellation NewEnergy, Mr. Howard and Mr. Petricoff's client, for ultimate use by Kroger; isn't that right?

A. No, those are not the agreements I'm concerned with.

Q. The agreement you elected not to attach, the current effective agreement, is for the sale of generation from Cinergy Wholesale to Constellation NewEnergy to Kroger; isn't that right?

A. I don't have the third agreement that you are talking about with me, so I can't say that.

Q. So you don't know -- let me ask you this. You say at page 61 that market development is your primary concern in this case and that Mr. Talbot is dealing with the other two issues that the Commission needs to balance, at the top of page 61. Do you see that?

MR. SMALL: Objection. Mischaracterizes the testimony.

Q. I'll read it.

MR. SMALL: There is not anything about primary. There are five different bases for her testimony.

MR. KURTZ: Okay. Let me rephrase.

EXAMINER KINGERY: Thank you.

Q. I said primary by memory, but you actually say, "while in this testimony I will principally address the third goal - market development." Is that better "principally"?

A. Yes, that's what it says.

Q. Okay. Now, you then cite some statistics on pages 62 through 63 at the bottom about how market development and competitiveness and shopping has actually been reduced in the period of May, 2004, through December, 2006. Do you see those numbers?

A. Yes, I do.

Q. And you see that in December 2006 the commercial shopping percentages, well, they went from 19.7 percent during a time when there was shopping incentives to 0.36 percent at the end of 2006. Do you see those numbers?

A. I think you may have the numbers out of order. The first number is the commercial. It went from 22.04 to 8.40.

Q. Okay. Good. Thank you. You're right. Okay, the commercial went from 22.04 to 8.40 from a period when there was shopping incentives to today

when there are no shopping incentives; is that right?

A. I address the two time periods. What you have added to it is the term when there was shopping incentive and when there is no shopping incentive.

Q. Are you familiar -- are you aware the shopping incentives -- shopping credit and the incentive built into it expired at the end of 2005?

A. And what I was going to say is that it is my recollection that the shopping credit from CG&E during the market development period did include an incentive.

Q. The wholesale power supply agreement that Kroger negotiated with --

EXAMINER KINGERY: Excuse me a minute. This is a sealed record right now. I apologize.

AUDIENCE MEMBER: Excuse me.

EXAMINER KINGERY: That's fine.

Q. The wholesale power supply agreement, the third Kroger agreement currently effective, the one you got in discovery but didn't include in your testimony, for sale to NewEnergy marketers, ultimate sale to Kroger, do you remember -- do you recall that that was a continuation of a power supply arrangement that started in 2001?

A. I think that from what I hear from your question, you are talking about the third agreement that is -- that superseded the first two in my testimony.

Q. Correct.

A. The first two agreements in my testimony, as you look at them, as I've explained, are not with NewEnergy while the wholesale agreement is behind those other agreements. My understanding is that these were agreements between CRS and Kroger.

Q. For the sale of generation supply to NewEnergy for ultimate purchase by Kroger. Have you read the documents?

A. Are you talking about the third agreement?

Q. I think -- I think all three.

A. Okay.

Q. Do you see the provision where it says: "Cinergy will exercise its right under section No. 1 and No. 2 to sell power to NewEnergy in 2006 and 2007"?

A. Okay. For example, I am looking at the July 7, 2004, agreement between Cinergy Retail Sales and Kroger. And you've referenced a provision that

happens to be on Bate stamp 1176, provision 4 which says: "Cinergy operating companies shall exercise their extension 1 and 2," and then it references the December 14, 2004, confirmation letter agreement.

Again, as I read this agreement, the two that are in my testimony, this is between CRS and Kroger. A provision of this says that "Cinergy operating companies, who didn't seem to be a party will exercise their option." So that's the distinction that I am making.

Q. Well, why don't you address my question? Isn't that provision you read for the supply of wholesale generation service for ultimate consumption by Kroger? Or don't you --

A. Yes. The Cinergy operating companies' extensions 1 and 2 under the confirmation letter agreement is to sell generation supply to NewEnergy in 2006 and 7 to Kroger.

Q. So the answer --

A. That is a completely separate agreement than this.

Q. Okay. Let me back up. One of your -- do you understand that the wholesale generation supply -- do you know any -- do you know what price

that Cinergy agreed to sell to NewEnergy for ultimate consumption by Kroger? Do you know the price?

A. I don't know. I believe it might have been stated in that confirmation letter agreement and the documents attached to it.

Q. If you don't know the price, then you have no way of knowing whether or not that was a fair market value transactions. Isn't that analytically correct?

A. Since I don't know the price, I can't make a judgment on that.

Q. So are you suggesting to the Commission there is anything wrong with Kroger buying electricity from NewEnergy provided by Cinergy Resources at a negotiated price?

A. No, I'm not.

Q. Okay. Let me turn to the option agreements. You would agree, wouldn't you, that options are legitimate business tools in a competitive commodity market?

A. Generally, yes.

Q. Is it correct that an option is the future right to buy or sell a commodity at some price commonly known as the strike price?

A. I accept that.

Q. Do you accept that the person who has the option pays for the right to buy or sell a commodity at a fixed strike price sometime in the future because that option has some value?

A. That party may, yes.

Q. Okay. Do you look at the Wall Street Journal? Do you look at the pork bellies and gold and silver and wheat and all the option contracts that are traded every day? You are familiar that happens, aren't you?

A. Not really, I don't.

Q. So you are not -- you are not familiar with option agreements?

A. In the general sense as you've described them and as I have reviewed these agreements.

Q. Do you consider yourself an expert in option agreements?

A. No.

Q. From your lay experience do you recognize that the longer the option term is, the greater the value and, therefore, the greater the cost? In other words, if I have an option to buy Proctor and Gamble stock or pork bellies for the next 10 years at some

price, I am going to have to pay a lot more than if I have that right for the next week because there's more chance that the price will change over that 10-year period. Do you understand that basic concept?

A. I understand the concept. I can't confirm that I agree with it. I think it's -- it's dependent upon what you expect to have happen over the period of time.

Q. All of us being equal, the longer the option, the more valuable it is because there is the more chance it will become in the money; isn't that right?

A. It could, yes.

Q. Isn't it absolutely true that the longer -- the longer the option, the more you have to pay for it?

A. I don't know.

Q. Okay. Do you know that the greater the volatility of the commodity, the more price fluctuation, that typically the more one would have to pay for that option?

A. I would agree that volatility would -- the degree of volatility would impact the price and

greater volatility might result in a higher price.

Q. Now, you recognize the Senate Bill 3 treated electric supply as a deregulated commodity, generally speaking; isn't that right?

A. Senate Bill 3 restructured Ohio's electric industry to make generation competitive.

Q. So is there anything wrong just in -- is there anything wrong with an option agreement to buy or sell electricity in a deregulated market? Is there anything inherently wrong with it?

A. No.

Q. DERS has option agreements with the various -- with [redacted] hospitals, I don't know, and members of IEU, members of OEG. That's the nature of your testimony -- and you attached all or most of those option agreements, correct?

A. Those agreements and the agreements that they superseded, yes.

Q. And under those option agreements DERS has the exclusive option to supply generation at a stated strike price from the time the options were signed approximately May, 2005, all the way through the end of 2008; isn't that right?

A. Could I have a moment please to look at

them? Not all of them.

Here's my understanding because, for example, on the contract found at Bate stamp No. 4 in attachment 17, which is the contract with [redacted] there's a description of a base contract price. There is the term -- there is an adjusted base contract that talks about an equivalence related to [redacted] There is also discussion of the transmission charges, and I think those are set forth in Exhibit B. So actually it doesn't look completely fixed.

If you go to Exhibit B, you will see the fuel charge shall be equal to [redacted] imposed by CG&E, which I understand does change.

Q. That's correct. So a fixed formula what the strike price will be is set forth in Exhibit B; isn't that right?

A. Exhibit B sets forth the price at which CRS exercises their option the party would pay for generation.

Q. That's the strike price, isn't it, for this option Exhibit B?

A. It could be, yes.

Q. It is, isn't it?

A. It's up to CRS to determine. It doesn't say they will -- a strike price to me makes it sound like when it hits that price, we will do some action. The options to me still remains with CRS to determine whether they wish to exercise it.

Q. Well, in your lay understanding -- your nonexpert understanding of options, the strike price is the price at which the older of the option can exercise? They have the right to do -- they have the right -- they could exercise the option today and take a loss, couldn't they?

A. They could exercise the option at any time under this agreement.

Q. Right. But the point of an option is you are making a bet that the market is going to go one way or the other, and if it -- under these agreements if the market price for generation goes up, the option has no or less value. If the market price goes down, then it has great value, and they will strike it and make money. That's the way these options work, just like all other options; isn't that right?

A. You can say that that is what CRS would

consider. There's nothing in this agreement that tells me that CRS will take an action because of what you describe. I don't disagree with your logic but there's nothing in this agreement that says that.

Q. You don't know -- you don't know when or under what decision criteria CRS would exercise the option even though they have the right any time between now and the end of 2008 --

A. No, I don't.

Q. Now, DERS paid the customers for the option to supply their load; that is correct, isn't it?

A. Yes.

Q. And that's really what you're complaining about, is that DERS paid these customers in the currency of the SRT of the payment of AAC, and all these charges had a dollar amount, and it's that -- the currency that was used, the reimbursement of these various charges, is what you are complaining about; isn't it? Because you don't know -- answer that question.

A. What my testimony is about is not the option agreements by themselves, but in conjunction with the previous agreements that they superseded and

their relationship to this case.

Q. If the option agreements were not priced in terms of AAC and SRT and all those, but had just $10,000 or a million dollars, would you have an objection to them, or is it just the currency that was used in the -- which was the RSP currency?

A. If the option agreements had simply dollar amounts, as you've said, but superseded two other agreements that were related to this case and were negotiated by DE-Ohio and its affiliates to garner support for an RSP, and that's acceptable to that company, I would still have a problem with it.

MR. COLBERT: Objection. Motion to strike. There is no evidence on the record that De-Ohio negotiated any of these agreements in any way.

MR. SMALL: And I -- Mr. Colbert is wrong, in my opinion. There is evidence in the record. We admitted it as part of Mr. Ficke's deposition.

EXAMINER KINGERY: Motion denied.

Q. Are you an expert in generation forecasting? Do you do forward price curves to try to predict what electricity will cost in the future?

Have you ever done so?

A. No.

Q. Okay. At the time these option agreements were entered into, you then did no generation price forcast through the end of 2008, correct?

A. I'm sorry, I didn't understand that question.

Q. As of the day these options were signed, May of 2005, you did no analysis as to what the future price of electricity would be in the Cinergy/Duke service territory on a forward basis; isn't that correct?

A. You are asking me whether the day that these agreements were signed whether I did an analysis?

Q. Well, going -- starting from the day the agreements were signed, did you do such analysis? I know you would have done it in 2007. But did you go back and try to look whether the generation price as of the date the options were signed through the end of the option period was reflective of long term forward price curves or any such analysis?

A. I did no such analysis in relationship to

these option agreements.

Q. As of today, you have done no forward price forecast to try to predict what the price of electricity would be through the end of 2008; isn't that correct?

A. No, I haven't.

Q. Okay. In order to determine whether or not an option was fairly priced, wouldn't you have to know that information?

A. You would have to do that type of analysis if you want to make that judgment.

Q. Okay. To know whether an option was fairly priced, wouldn't you also have to know the type of load that you would be agreeing to serve if you exercise the option?

A. That would be part of the analysis.

Q. Did you do any analysis of the kW demand of any of the parties who have the option agreements?

A. No.

Q. Okay. What about the kilowatt-hour usage?

A. No.

Q. Wouldn't the ability to serve a [redacted] kilowatt-hours in the case of [redacted] versus [redacted]

[redacted] kilowatt-hours a year in the case of [redacted] wouldn't [redacted] be a bigger -- a more valuable option because you have more load to serve?

A. More valuable to the person that was -- had the ability to exercise the option, surely.

Q. That would be DERS, correct?

A. Yes.

Q. Okay. Did you do any analysis of the load factors of any of the customers who granted options?

A. No.

Q. Wouldn't it be cheaper to serve a customer with very high 100 percent load factor around the clock with no shaping of the market generation than one with a very spikey load factor?

A. In general, you would think so, yes.

Q. Okay. Wouldn't the fact -- wouldn't the customer with very high off-peak usage relative to on peak usage be a cheaper customer to serve; off-peak pricing is cheaper in the market?

A. Yes.

Q. You did no analysis of customer usage characteristics who are the -- whose option agreements you attached to your testimony; is that

correct?

A. I have not done that analysis.

Q. Do you look at the credit of any of the option parties, in other words, [redacted]

[redacted]

A. No.

Q. Wouldn't the credit be a fact for that, would go into the pricing of an option, the ability of the customer to pay?

A. In value and option you would probably consider that.

Q. What about the usage history or the usage forecast of the customers?

A. Yes.

Q. Okay. You didn't look at any of that either, did you?

A. No.

Q. Okay. So sitting here today you cannot -- let me start again.

Since you did no forward price forecast at any time of what electricity prices are expected to be, and since you've looked at none of the usage characteristics of these option customers, you don't really have any idea as to whether or not DERS

overpaid, underpaid, paid a reasonable amount for these options; isn't that correct?

A. No. Since I have not done the analysis, I do not have any conclusion or judgment as to that.

Q. Since you -- since options are a legitimate business tool in a competitive electricity market, and you have no idea whether or not this was a reasonable price to pay for these options, you don't have -- what basis do you have to conclude that these option agreements are in any way anti-competitive?

A. To the extent that parties to these agreements were at any time prior to the agreements served by a competitive retail supplier, and that the switching statistics now show that those individual customers are no longer with a competitive retail supplier, I know that these option agreements have had an effect on competition.

In terms of the agreements and their precise values as you've described, I've not done the analysis so I can't tell you specifically which ones have certain values, but I know the actions that have occurred in relationship to the competitive market.

Q. Are you assuming that all the customers

who gave DERS option agreements were at one time shopping and now they are back with the utility?

A. I am not assuming that all of them were, but I know that some of them were.

Q. Do you know which ones have been with the utility from the beginning of Senate Bill 3 all the way through today?

A. I don't know specifically.

Q. So if they were with the utility the whole time, if they were never shopping, the fact that they are still not shopping is -- what do you conclude about the effect on competition? [redacted] has never shopped. It's always bought from the utility. Does that mean that there was some adverse effect on competition?

A. There could have been an adverse effect on competition if that particular customer could have shopped but chose not to because of the option agreement as well as the preceding superseded agreements and all of the provisions related to them.

Q. Couldn't the reason that [redacted] has never shopped also be that the market price for electricity is higher than what the utility is charging under the stabilized price?

A. It could be.

Q. Would you turn to page 73 of your testimony, please. I would like to go through your recommendations here beginning on line 6 -- line 13. And I will read these. They are not numbered. You recommend that prohibition of discriminatory treatment, anti-competitive activities that accompanied Duke's RSP as adopted -- as adopted and modified by the Commision. Okay. Let me ask you about that.

MR. McNAMEE: Are we still on the sealed record?

EXAMINER KINGERY: Yes, we are. Should this go off the sealed record based on what you are going to ask?

MR. KURTZ: That's fine.

EXAMINER KINGERY: We will unseal the record at this point. Thank you.

(End of confidential portion.)

01661

R

OCC EXHIBIT 28

CORRECTIONS TO THE

March 9, 2007
CONFIDENTIAL
PREPARED TESTIMONY
of
BETH E. HIXON
ON BEHALF OF THE
OFFICE OF THE OHIO CONSUMERS' COUNSEL

Page	Line	Change
8	4	"four" should be "five"
19	8	"whether PUCO's" should be "whether the PUCO's"
31	15	"October" should be "September"
32	4	"I aware" should be "I am aware"
35	2	"October 28" should be "November 8"
39	10	"to that in the superseded agreement" should be "to one that was in the superseded agreement"
39	13	"whether PUCO's" should be "whether the PUCO's"
39	Footnote 54	"Bate stamp 334" should be "Bate stamp 324"
42	15	"Pre-Rehearing has" should be "Pre-Rehearing Agreement has"
43	Footnote 62	"Provision 2" should be "Provision 5"
46	18	"copied it" should be "copied it to"
50	14	"2006" should be "2005"
59	1	"December 2004" should be "November 2004"
60	Footnote 94	"2004" should be "2003"
62	20	"19.70" should be "19.87"
64	15	"like" should be "likely"
71	Footnote 111	"at 59" should be "at 7"
72	5	"Dominion Energy" should be "Dominion Retail"

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 OHA, 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 (3) Almost all of the contracts were signed after the Stipulation was submitted to the Commission, and in many instances, after the Commission issued its Opinion and Order and Entry on Rehearing.

---

[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 wholesale supply contract with [redacted] so that [redacted] could fulfill its commitments to [redacted] under its CRES contract with [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 May 19, 2004, DERS signed contracts to provide competitive retail electric service to members of OEG and OHA. DE-Ohio was neither involved with, nor a party to, the DERS contracts. Moreover, DERS's contracts would not have been responsive to OCC's May 18, 2004, discovery request because DE-Ohio was not a party to the contracts.

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] Between May

---

[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).

28, 2004 and July 7, 2004, DERS and Cinergy signed various contracts with different Parties to the cases. 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. Between October 28, 2004, and November 22, 2004, DERS and Cinergy entered into new contracts with customers superseding the previously referenced contracts. 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. The DERS option contracts superseded all of its prior contracts and were signed between December 20, 2004, and May 13, 2005. 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 and Parties, or members of Parties, to these proceedings. 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 Parties to these proceedings or members of organizations that are Parties to these proceedings.

---

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

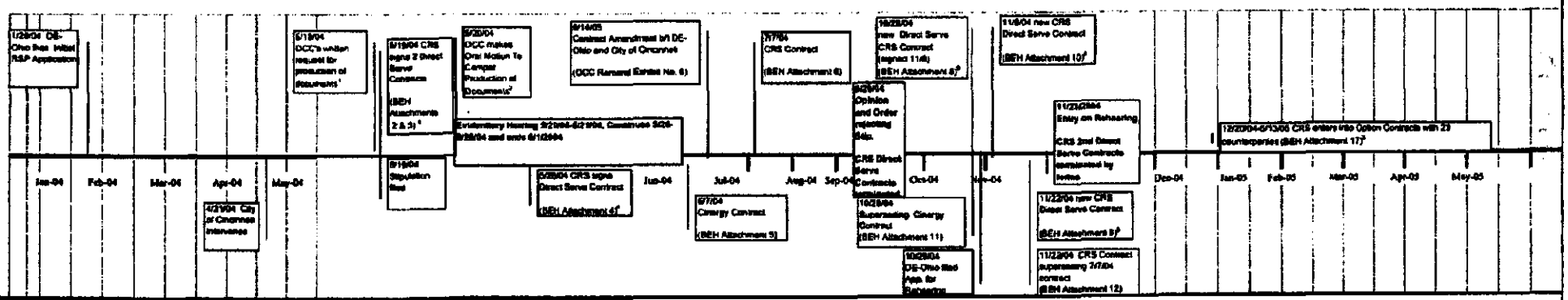
of things in my role as Vice President of Cinergy Corp.," and that no actual CG&E employee was involved.[65] Regarding the Cinergy contract with Cognis Corp., Mr. Ficke also responded that he reviewed drafts and provided comments.[66] He also explained that Cinergy was motivated to enter the Cognis contract as an economic development effort to preserve a major employer in Cincinnati and to develop cogeneration business between Cognis 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

OH689

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 entered May 19, 2004, May 28, 2004, July 7, 2004, November 8, 2004, and November 22, 2004, and regarding Cinergy contracts dated June 7, 2004, and October 28, 2004.[70] The four concerns are that each contract: (1) Provided for the provision of generation service to Parties to these proceedings, or such Parties' members, through December 31, 2008; (2) Provided for the reimbursement of specified MBSSO components or regulatory transition charges (RTC) to such Parties; (3) Required the Parties to support the May 19, 2004, Stipulation or DE-Ohio's Alternative Proposal offered in these proceedings; and (4) Contained a termination provision tied to the Commission's decision in these proceedings.[71] 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 for the provision of generation service.[72] There is nothing wrong with a CRES contract for the CRES provider to sell generation service to a customer. In fact, that is the very purpose of CRES contracts. Ms. Hixon made the same complaint with respect to the two Cinergy contracts with Cognis that were conditioned upon Cognis's purchase of generation service from DE-Ohio.[73] Again, there is nothing wrong with such a provision where, as in this instance, the utility is not a party to the transaction. Every consumer is free to agree to purchase competitive retail electric generation service for any particular period from any service provider whether a CRES provider or a utility.[74]

Second, Ms. Hixon is concerned about what she characterizes as the reimbursement of charges to customers.[75] Ms. Hixon's concern in this regard is without foundation as what she characterized as a reimbursement is simply the calculation of the price the consumer would have paid under the direct serve agreements with DERS had those contracts ever been effective. Irrespective of the characterization of the price contained in the direct serve DERS contracts, reimbursement of RTC is expressly permitted by statute.[76] Regarding other charges, such as various MBSSO components, there is no statutory prohibition against a reimbursement for a competitive retail electric

---

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).

service. Regardless, in these contracts, DE-Ohio's MBSSO price approved by the Commission was clearly used as the baseline to set the price the customer must pay if it takes service from DERS, not an improper refund of DE-Ohio's MBSSO market price.

On cross examination, Ms. Hixon agreed that it was reasonable for Parties to a contract to establish a price from a baseline, and if the baseline required regulatory approval, condition the contract upon the approval of the baseline by the regulator.[77] Ultimately, Ms Hixon agreed that the DERS contract with the hospitals set such a baseline.[78] In fact, a review of all of the DERS contracts executed between May 19, 2004, and November 22, 2004, reveals the contracts all set a price for DERS to serve the customer using DE-Ohio's MBSSO as a baseline.[79] Actually, a review of the contracts reveals there is no reimbursement at all, simply the calculation of the market price the customer is to pay DERS determined by subtracting an amount from DE-Ohio's MBSSO price.

Ms. Hixon also questioned these contracts because the signatories to these contracts agreed to support the Stipulation, and later the Alternative Proposal made by DE-Ohio on rehearing in these proceedings.[80] Ms. Hixon however, agreed that such an arrangement was reasonable when, as in these cases, the baseline depended on regulatory approval.[81] It is not unreasonable

---

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).

that DERS would have required the contract signatories to support a filing that if changed, would have a significant economic impact upon their agreed upon market price.

Finally, OCC witness Beth E. Hixon was concerned that the contracts contain a termination provision triggered by the Commission's decision in these cases.[82] Again, this is not surprising given that the Commission's decision could change the economic benefits of the contract by changing the agreed to baseline, DE-Ohio's MBSSO. Once again, on cross examination, Ms. Hixon agreed that such a termination clause was reasonable to protect the economic interests of the signatories.[83]

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. Ultimately, all of the contracts discussed by Ms. Hixon concerning these issues were terminated due to the Commission's holdings in these cases and replaced by contracts, now known as option contracts.

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] that is not an affiliate of DE-Ohio, 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] ntracts.

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] Ms. Hixon discusses contract terms that state that DE-Ohio shall not amend its rates for dual feeds, allow continued purchases through its load management riders, and make certain filings in its next distribution rate case.[87]

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, each of the contract terms discussed by Ms. Hixon was capable of resolution between the contract signatories through economic compensation.

---

[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).

On cross examination, Ms. Hixon agreed that the parties could resolve the terms through economic transactions, although she does not agree that is what is called for in the contract provisions.[89] 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.[90] 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 OHA 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 "OHA/CG&E settlement," instead of OHA/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 the hospitals.[96]

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 require DERS to pay specific fees to OHA and IEU-Ohio, but fails to explain the nature of her concern.[97] DE-Ohio knows of nothing that restricts one party to a contract, in this instance, DERS, from paying another party any amount for any purpose. In this case, it appears that DERS was paying for legal fees incurred in the support of the baseline market price agreed to in the contracts. Given the importance of the baseline, this makes perfect sense, and as previously discussed, Ms. Hixon agrees.[98]

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 are currently effective having superseded all of the prior contracts previously discussed.[100]

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.

In a misplaced effort to link the option contracts to these proceedings OCC relies upon an e-mail from Mr. Jim Ziolkowski, a Duke Energy Shared Services employee in the Rate Department responsible for calculating the option payments as the billing function paid for by DERS.[104] 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] First, Ms Hixon is concerned that the Stipulation improperly influenced the Commission's waiver of its rules regarding competitive bidding processes.[107] OCC's concern stems from an incorrect inference that the Parties supporting the Stipulation did so solely because the DERS and Cinergy contracts required

---

[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).

such support.[108] OCC's position regarding the competitive bid process, the subject of the specified rules, is baseless. 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 that the contracts influenced the Commission to waive the rules, which it is not, it would be immaterial. 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] Ms. Hixon asserted that DE-Ohio has caused customers to return to MBSSO service by having DERS subsidize customers and operate at a loss while DE-Ohio serves consumers and acts as a profit center.[113] To arrive at this conclusion Ms. Hixon and OCC ignored the rules and the evidence.

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. The evidence demonstrates that Duke Energy Corporation has many affiliates that show a loss in a given year.[115] Even Ms. Hixon admits that DE-Ohio is not subsidizing all of the affiliates with losses.[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. Nothing in any of the contracts, option contracts, or pre-option contracts, prohibits a customer from switching. 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 Constellation's customers or Dominion Retail Sale's 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

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

CONFIDENTIAL

INITIAL POST-REMAND BRIEF, HEARING PHASE I, BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

Janine L. Migden-Ostrander
Consumers' Counsel

Jeffrey L. Small, Trial Attorney
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
Telephone: 614-466-8574
Fax: 614-466-9475
E-mail: small@occ.state.oh.us
hotz@occ.state.oh.us
sauer@occ.state.oh.us

Dated: April 13, 2007

TABLE OF CONTENTS

Page

TABLE OF CONTENTS cont'd

TABLE OF CONTENTS cont'd

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

CONFIDENTIAL

INITIAL POST-REMAND BRIEF, HEARING PHASE I,
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. PREFATORY COMMENTS

These cases, on remand from the Supreme Court of Ohio, are important for their determination of, among other matters, the manner in which generation rates will be set for 600,000 residential utility customers and tens of thousands of other customers for the 2007-2008 period. The Public Utilities Commission of Ohio ("PUCO," or "Commission") has important decisions to make about the future of electric choice in areas served by Duke Energy Ohio, Inc. ("Duke Energy Ohio" or the "Company," including its predecessor company, "CG&E") and the rates residential customers and Ohio businesses will pay for generation service. The General Assembly intended that the Commission would approve reasonable standard service offer rates as well as provide a real opportunity for customers to have competitive options to the generation rates

provided by Duke Energy Ohio. The record supports the need for the Commission to take corrective actions that support reasonable prices and the development of the competitive market.

The issues presented in these cases require the Commission to make determinations on matters of law and policy. Serious problems exist in Duke Energy Ohio's proposals. In the absence of a competitive framework to protect customers, Duke Energy Ohio has submitted proposals to increase its standard service rates for generation service. Ohio law and sound policy require the Commission to modify Duke Energy Ohio's proposals for pricing the standard service offer rates that the Company proposes to charge its customers.

II. INTRODUCTION

A. Remand from the Supreme Court of Ohio

The duration of some of the cases captioned above -- the first of which began in January 2003 -- is partly the result of an appeal and remand by the Supreme Court of Ohio ("Court").[1] The matters addressed by the Court that necessitated the remand have been extensively discussed in pleadings regarding the appropriate scope for the hearings that followed the remand.[2] The Court stated that the "portion of the commission's first rehearing entry approving CG&E's [now Duke Energy Ohio's] alternative proposal is devoid of evidentiary support."[3] The Court also stated that the "commission abused its

[1] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 ("*Consumers' Counsel 2006*").

[2] See, e.g., Duke Energy Ohio's Motion for Clarification (December 13, 2006) and the OCC's Memorandum Contra Motion for Clarification (December 20, 2006).

[3] *Consumers' Counsel 2006* at ¶28.

discretion in barring discovery of side agreements."[4] The Office of the Ohio Consumers' Counsel ("OCC") presented extensive evidence regarding the missing support for Duke Energy Ohio's standard service offer rate proposals as well as the problems caused by side agreements that the Company entered into with the intent of removing opposition to the its proposals that affected many other customers. The Commission should act upon this evidence and modify its previous entries.

The OCC's appeal of that portion of the case that concluded in 2004 (hereinafter, "*Post-MDP Service Case*") challenged the Commission's authority to determine standard service offer rates for generation service without relying upon actual markets to set rates.[5] The Court, however, deferred to the Commission's determinations regarding the establishment and modification of rates,[6] a matter that the Commission stressed by stating that "the governing statute allows for flexibility in the determination of such [market-based standard service offer] charges . . . ."[7] The decision regarding the Commission's subject matter authority to approve and impose generation rates upon customers also decided the Commission's subject matter authority regarding these same rates without the

[4] Id. at ¶94.

[5] OCC Notice of Appeal, Propositions of Law 1 and 2 (March 18, 2005 in Appeal 05-518; May 23, 2005 in Appeal 05-946).

[6] *Consumers' Counsel 2006* at ¶44 and ¶56.

[7] Entry on Rehearing at 18, ¶20 (November 23, 2004).

requirement that Duke Energy Ohio provide generation service at "voluntary" rates.[8] The determination of rates that customers *must pay* in these recent proceedings ("*Post-MDP Remand* Case"[9]) is the same subject matter as the rates that Duke Energy Ohio *must charge* for its standard service offer. The result in *Consumers' Counsel 2006* does not rely upon Duke Energy Ohio being a volunteer under its statutory obligation to "offer . . . all competitive retail electric services necessary to maintain essential electric service to consumers" and "file[ ] [such offer] with the public utilities commission under section 4909.18 of the Revised Code."[10]

The Commission should exercise its discretion and flexibility and require Duke Energy Ohio to provide new standard service offer rates based upon the evidence presented during the hearings on remand.[11]

B. Burden of Proof

The burden of proof regarding the applications submitted in these cases rests upon Duke Energy Ohio. The posture of these cases -- in which various proposals for rate

[8] Duke Energy Ohio previously stated its intention to charge customers according to its proposal submitted to the Commission on January 10, 2003, but asked the Commission to "acknowledge these statutory rights." Duke Energy Ohio Application for Rehearing at 30 (October 29, 2004). The Company has never fully explained the extent of its claimed right to action independent of that approved by the Commission, which includes more recent statements after the remand. Duke Energy President Meyer was asked at the recent hearing whether the Company would not comply with the Commission's order on remand regarding standard service pricing. She responded that "the company may seek rehearing and provide alternatives." Tr. Vol. I at 45-46 (2007).

[9] For notational convenience, the portions of the case before and after the Court's deliberations are cited separately. However, a single record exists. Exhibit references to the proceedings after remand from the Court, the *Post-MDP Remand Case*, contain the word "Remand" to distinguish them from the earlier exhibits.

[10] R.C. 4928.14(A).

[11] For example, the record evidence supports the suspicion of the Supreme Court of Ohio that "the infrastructure-maintenance fund [charge] may be some type of surcharge and not a cost component." *Consumers' Counsel 2006* at ¶30.

changes for components of standard service offers for 2007-2008 have been linked by consolidation with the remand of the underlying Case No. 03-93-EL-ATA, et. -- does not alter the burden of proof.

The OCC does not bear any burden of proof in these cases. In a hearing regarding a proposal that does not involve an increase in rates, R.C. 4909.18 provides that "the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility." In a hearing regarding a proposal that does involve an increase in rates, R.C. 4909.19 provides that, "[a]t any hearing involving rates or charges sought to be increased, the burden of proof to show that the increased rates or charges are just and reasonable shall be on the public utility." In the following sections, the OCC will explain how Duke Energy Ohio has failed to prove that its post-MDP pricing proposals should be adopted without alteration by the Commission.

C. The OCC Framework

The OCC will address and amplify the general concern, stated by the Commission in its Entry on Rehearing in the *Post-MDP Service Case*, regarding the reasonableness of alleged cost components upon which Duke Energy Ohio's standard service offer rates were built. The Commission previously stated: "It is not in the public interest to cede this review. Nor would it foster any rate certainty to allow all decisions of this nature [regarding rate components] to be free from Commission review of reasonableness."[12] The Commission should carefully consider the components devised by Duke Energy Ohio to ensure, pursuant to Ohio policy stated in R.C. 4928.02(A), "the availability . . . of

[12] Entry on Rehearing at 10 (November 23, 2004).

adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service."[13]

The OCC also emphasizes the major theme that echoes from R.C. 4928.02(B)-(H), whereby it is Ohio policy to support competition and competitive options for customers regarding retail electric service. This theme provides the backdrop for the third of the Commission's goals for "rate stabilization plans" -- "further development of competitive markets."[14] Switching statistics since the time of the hearings in 2004 in the *Post-MDP Service Case* show that the competitive market is in retreat, and the evidence in this case demonstrates how Duke Energy Ohio has orchestrated such an event as part of its settlement of the *Post-MDP Service Case*. Duke has acted in contravention of the policy of the State of Ohio and Commission's goal that rate stabilization plans encourage the competitive market. Barriers to competition should be removed.

The concurring opinion by Chairman Schriber to the original Order in the *Post-MDP Service Case* connects with both of the above-stated themes (i.e. reasonable prices and competitive options) as well as with Ohio policy stated in R.C. 4928.02(I) regarding the "state's effectiveness in the global economy."

> [W]e [i.e. the commissioners] have advocated opening up more possibilities for more customers with regard to the magnitude of Cinergy's generation that might be "avoided". Furthermore, we do not believe that shopping should be deterred by the prospect of paying for costs associated exclusively with Cinergy's generation. These might include the costs of reserves, the costs of environment compliance, and security.[15]

---

[13] R.C. 4928.02(A).

[14] See, e.g., Order at 15 (September 29, 2004). The Supreme Court of Ohio recently stated that it has "recognized the commission's duty and authority to enforce the competition-encouraging statutory scheme of S.B. 3 . . . ." *Consumers' Counsel 2006* at ¶44.

[15] Order, Concurring Opinion of Chairman Alan R. Schriber at 2 (September 29, 2004).

While the Chairman's statement was not directed towards the situation confronted by residential customers, the bypassability of standard service offer charges should be examined afresh as the result of the recently concluded hearing. Those standard service offer charges should be made bypassable for all customers of Duke Energy Ohio.

D. The Documents Related to the Company's Side Deals Should be Available to the Public.

The Attorney Examiners announced at the beginning of the hearing on March 19, 2007 that a decision on whether information accumulated by the OCC should be made public will be decided along with the merits of these cases. The OCC has asked that the documents that are attached to the testimony of OCC Witness Beth Hixon be available for public inspection,[16] consistent with R.C. 149.43, 4901.12 and 4905.07 as well as Ohio Adm. Code 4901-1-24(D).[17] Ms. Hixon's testimony, as further explained in this Initial Post-Remand Brief, reveals the fallacy that agreements between affiliates of Duke Energy Ohio and parties or members of parties (referred to collectively by Ms. Hixon as "Customer Parties"[18]) to these cases are competitive supply arrangements and explains that they are settlement agreements connected with these cases.

The evidence presented at hearing exposes the intricate, behind-the-scenes dealings of the Duke-affiliated companies by which they gained the support of selected customers for their post-MDP pricing proposals and have held that support through the

[16] OCC Memorandum Contra Motions for Protective Orders at 11-12 (March 13, 2007).

[17] Id. at 9.

[18] *OCC Remand Ex. 2(A) at 4 (Hixon).*

proceedings on remand. The OCC presents its case through documents, but also through the words of employees and past employees of the Duke-affiliated companies. As an example, two agreements featured in this case are between Cognis (a party and an industrial customer of Duke Energy Ohio) and Cinergy Corp. (an existing Duke-affiliated company that is not qualified to provide competitive retail electric service in the area served by Duke Energy Ohio). In its Motion for Protection, Cinergy Corp. euphemistically refers to the agreements as "economic development assistance."[19] The testimony of Gregory Ficke, president of Duke Energy Ohio (then the Cincinnati Gas & Electric Company) and vice president of Cinergy Corp. at the time of the *Post-MDP Service Case*, is contained in the record.[20]

> Q. Now, these documents, why were these documents entered into, [Exhibit] 15 and 16?
>
> A. Well, I think from our standpoint the company, Cognis, agreed to support the stipulation and later our application for rehearing.

The issue, therefore, is one of revealing the totality of the settlement reached between the Duke-affiliated companies (at the time, the Cinergy-affiliated companies) in the *Post-MDP Service Case* as well as revealing the continuing effect of the overall settlement on the *Post-MDP Remand Case*. The public should have access to the information.

---

[19] Cinergy Motion for Protection at 5.

[20] OCC Remand Ex. 9 at 73. The positions held by Mr. Ficke were examined at his deposition (id. at 12). Exhibits 15 and 16 in the deposition were also attached to the testimony of Ms. Hixon. See OCC Remand Ex. 2(A), Attachments 5 and 11.

III. PROCEDURAL HISTORY OF THE CASES

On January 10, 2003, the Company filed an application ("January 2003 Application"[21]) containing proposals to provide a market-based standard service offer and to establish an alternative competitive bidding process for the period after the market development period for non-residential customers.[22] Numerous parties and the Commission's staff ("Staff") filed comments on the Company's proposals in March and April 2003.

On December 9, 2003, the Commission issued an entry that stated:

> As the competitive retail market for electric generation has not fully developed in the CG&E [now Duke Energy Ohio] territory, the Commission finds it advisable that CG&E file a rate stabilization plan as part of these proceedings, for the Commission's consideration.[23]

The Entry also set a procedural schedule.

On January 26, 2004, the Company filed another application ("January 2004 Application"). The January 2004 Application proposed that the Commission approve either the approach contained in the January 2003 Application (the "competitive market option," or "CMO") or a substitute plan ("ERRSP Plan") for pricing generation service that the Company submitted for approval in response to the Commission's request on December 9, 2003.[24]

---

[21] The January 2003 Application initiated Case No. 03-93-EL-ATA.

[22] January 2003 Application at 1.

[23] Entry at 5 (December 9, 2003).

[24] January 2004 Application at 8.

On March 22, 2004, the OCC moved to continue these cases until after the Staff prepared a report on its investigation. Among other matters, the OCC was concerned that discovery responses from Duke Energy Ohio stated that explanations of its applications would be forthcoming only in pre-filed testimony. An entry was issued on April 7, 2004 that extended the procedural schedule a few weeks and set these cases for hearing on May 17, 2004 and did not provide for a Staff report of investigation. Duke Energy Ohio submitted pre-filed testimony on April 15, 2004 in which it described its "revised ERRSP." The PUCO Staff filed testimony on April 22, 2004 and intervening parties, including the OCC, filed testimony on May 6, 2004.

The hearing was delayed in connection with the filing of a stipulation in these cases that described another plan of service ("Stipulation Plan" as described in the "Stipulation" filed on May 19, 2004[25]). Duke Energy Ohio, Staff, Dominion Retail, Green Mountain Energy, FirstEnergy Solutions, and other parties (including several large customers and membership organizations made up of large customers) executed the Stipulation. The Ohio Marketers Group ("OMG," consisting of MidAmerican Energy, Strategic Energy, Constellation Power Source, Constellation NewEnergy and WPS Energy Services), PSEG Energy Resources, the National Energy Marketers Association, the OCC and the Ohio Manufacturers Association representing broad customer groups,[26] and OPAE did not execute the Stipulation.

[25] The Stipulation was later submitted and admitted as Joint Ex. 1.

[26] The Ohio Manufacturers Association stated in its Motion to Intervene that it is "the only statewide association exclusively serving manufacturers. It has more than 2,400 Ohio manufacturing companies as members." OMA Motion to Intervene at 2 (March 5, 2004).

The parties who did not execute the Stipulation were permitted a very short period during which they could inquire into the Stipulation by means of discovery. The OCC sought copies of all side-agreements between Duke Energy Ohio and other parties in these cases, and the Company refused to provide copies of such agreements. The first witness appeared at hearing on May 20, 2004 (based on pre-filed testimony not related to the Stipulation). The OCC began the hearing on May 20, 2004 with an oral Motion to Compel Discovery of side agreements. The Motion to Compel Discovery was denied.[27]

Duke Energy Ohio filed supplemental testimony on May 20, 2004 in support of the Stipulation, and Staff Witness Cahaan submitted supporting testimony on May 24, 2004. The OCC and OMG submitted testimony in opposition to the Stipulation on May 26, 2004. The hearing resumed on May 26, 2004 (after two days in recess) for the testimony of witnesses for Duke Energy Ohio, the OCC, the OMG, and one witness for the Staff.

The Commission's Order in the *Post-MDP Service Case* was issued on September 29, 2004, which approved the May 19, 2004 Stipulation with some conditions. Several parties, including Duke Energy Ohio and the OCC, filed applications for rehearing on October 29, 2004. The Company asked the PUCO to either i) approve its original CMO proposal; ii) approve the Stipulation, or iii) approve a new rate plan ("New Proposal") that was proposed for the first time in the Company's Application for Rehearing.

In a November 23, 2004 Entry on Rehearing, the PUCO adopted (in principal part) the New Proposal. The Commission ordered the Company to submit filings with the Commission before Duke Energy Ohio could place certain of the rate increases in the New Proposal into effect.

---

[27] Tr. Vol. II at 8, line 4 though 15 (2004).

The OCC initiated its appeal on May 23, 2005. The Supreme Court of Ohio issued its opinion on November 22, 2006. The Court held that the PUCO erred by failing to properly support modifications to post-MDP rates in the PUCO's November Entry on Rehearing and erred by failing to compel the disclosure of side agreements,[28] and remanded the case for additional consideration by the Commission.

On November 29, 2006, the Attorney Examiner issued an Entry in the above-captioned cases that provided for a "hearing . . . to obtain the record evidence required by the court," and ordered that a prehearing conference be held on December 14, 2006.[29] The above-captioned cases were consolidated (i.e. constituting the *Post-MDP Remand Case*). A procedural Entry was issued on February 1, 2007 that, among other matters, set a cut-off date for discovery and a hearing date for March 19, 2007.

On February 2, 2007, the *Post-MDP Remand Case* was set for hearing in two phases, the first of which would address the framework for post-MDP rates and the second of which would address various matters regarding the level of rates. The hearing on the first phase was conducted in three days, beginning on March 19, 2007. A briefing schedule was set at the conclusion of the first phase of the hearings.[30]

---

[28] *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 at ¶95 ("*Consumers' Counsel 2006*").

[29] Entry 3, ¶(7) (November 29, 2006).

[30] The second phase of the hearings began on April. 10, 2007. The substance of the second phase will be addressed in a subsequent brief.

IV. ARGUMENT

A. The Pricing of the Post-MDP Standard Service Offer Lacks a Reasonable Basis, and Results in Unreasonably Priced Retail Electric Service for Customers.

1. Overview

Duke Energy Ohio's current standard service offer generation rates are neither firmly based on accounting costs, as they would be under traditional electric utility ratemaking, nor are they based on prices determined in actual markets.[31] Rather, the standard service offers are composed of a variety of components having different bases. Some components are based on dated historical accounting costs, others are based on accounting costs of services currently acquired by Duke in the market place, and yet others are poorly-defined, partly duplicative and quantitatively uncertain estimates of costs or risks allegedly borne by Duke Energy Ohio.[32] As stated by OCC Witness Talbot, "[t]his confusion allows the Company's proposals to avoid thorough scrutiny."[33]

The Commission should only approve standard service offer rates that, in the absence of true market pricing, move to rates whose bases can be checked and monitored by the PUCO rather than being based on Duke Energy Ohio's desires. The objective should be to approve a good proxy for market-based rates based upon measurable and verifiable costs.[34] Duke Energy Ohio pays lip service to this principle, and offered the speculations and oscillating presentations by Duke Energy Ohio Witness Rose both in

[31] OCC Remand Ex. 1 at 3-4, 6 (Talbot).

[32] Id. at 4-6.

[33] Id. at 55.

[34] Id. at 6. OCC Witness Talbot testified that rate components should "meet[ ] the double standard of reflecting measurable accounting costs and verifiable costs." Id. at 47.

2004 and in the 2007 hearing as the measure of the market.[35] The Commission's best alternative -- and the direction that the Commission seems to have begun in the *Post-MDP Service Case*[36] -- is to devise better defined and more tightly constructed cost-based rates that would provide a reasonable proxy for market-based rates.

Considering the limited amount of time (about twenty months) covered by the current proceeding regarding standard service offer rates, it may be more practical for the Commission to tighten-up the cost basis of the current standard service offer than to institute a process that depends more fully on observed market prices.[37] In making this observation, the OCC is in no way presaging its recommendations for the period beginning in 2009, when different considerations may apply. With a longer period upon which to formulate and implement a post-MDP pricing plan, more options exist for determining prices for Duke Energy Ohio's standard service offer generation service.[38]

2. The Commission should focus on the capacity charges in Duke Energy Ohio's standard service offer rates.

a. The standard service offer charges related to capacity are duplicative and not based upon measurable and verifiable costs.

The Commission should consider the reasonableness of Duke Energy Ohio's standard service offer rates with regard to the relationship between the components

[35] See the later discussion regarding the unreliability and variability of the CMO pricing presented by Company Witness Rose.

[36] OCC Remand Ex. 1 at 6 and 70 (Talbot).

[37] During the hearing, OCC Witness Talbot discussed the immediate-term tightening of the cost basis for the 2007-2008 period, as well as how the Commission's options expand for a later time period. Tr. Vol. III at 56-57 (2007) (Talbot).

[38] Id.

proposed by the Company. As stated by OCC Witness Talbot, "[t]here should be no overlap or duplication of items and the components should work together to achieve standard service offer rates that provide for reasonably priced service and meet the three standards of rate stability for customers, financial stability for the company, and encouragement of competition."[39] The plan proposed by Duke Energy Ohio in its Application for Rehearing provides for duplicative capacity charges, and therefore does not provide for reasonably priced generation service for the Company's customers.

The duplication of capacity charges is exhibited by qualitative responses to the OCC's inquiries regarding the support for capacity-related charges in the Company's standard service offer rates. The Company states that "[l]ittle g and the IMF [i.e. the Infrastructure Maintenance Fund] represent compensation for the Company's *existing* capacity."[40] The Company also states that "[t]he RSC is the Company charge for providing a stable market price over a prolonged period of time."[41] OCC Witness Talbot concluded that "the basis for the IMF charge seems to be similar, if not identical, to that of the RSC charge."[42] Mr. Talbot stated that "[t]here appears to be over-charging for existing capacity to the extent that little g and the RSC and the IMF are all recovering the

[39] OCC Remand Ex. 1 at 17 (Talbot).

[40] Id., NHT Attachment 6 (quoted and analyzed in OCC Remand Ex. 1 at 42) (emphasis added) (Talbot).

[41] Id., NHT Attachment 12 (quoted and analyzed in OCC Remand Ex. 1 at 53) (Talbot).

[42] OCC Remand Ex. 1 at 38 (Talbot).

costs or risks of existing capacity"[43] and that "[t]here is no assurance that these charges are not duplicative."[44]

OCC Witness Talbot shared his insights regarding the proper compensation for capacity. He noted the Company's response that the percentage of energy not used by standard service offer customers from capacity supposedly "committed" to these customers, and paid for by these customers, was "approximately 11%" in 2006.[45] There was no credit back to standard service offer customers for this period.[46] Some sharing of the costs for the capacity would be required before Duke Energy Ohio's standard service offer components could be considered cost-based (i.e. on Company's costs). The Commission previously stated that it was "convinced that CG&E may be recovering some percentage of these costs through off-system sales" when it permitted only a portion of AAC charges from the Stipulation to be charged to standard service offer customers."[47] Another basic problem with capacity costs is plainly stated by OCC Witness Talbot: "There is no justification for the IMF on the record."[48] A sound system of basing standard service offer rates on measurable and verifiable costs would provide credits to customers for sales to customers not on the Company's standard service offer rates and would eliminate the IMF charge.

---

[43] Id. at 42.

[44] Id.

[45] Id. at 43 (citing NHT Attachment 4, a response to OCC Interrogatory RI 140(k)).

[46] Id. at 43.

[47] Order at 3 (September 29, 2004).

[48] OCC Remand Ex. 1 at 48 (Talbot).

Revenues for the use of capacity that is paid for by standard service offer customers should be netted against the cost of that capacity, and the IMF charge should be eliminated.

b. The System Reliability Tracker is the sole successor to the Reserve Margin portion of the Annually Adjusted Component in the Stipulation Plan.

In assessing Duke Energy Ohio's standard service offer pricing components, the prize for vagueness, ambiguity, and duplication of charges surely must go to the IMF charge that has no basis or support from the testimony regarding the Stipulation Plan or any other testimony.[49] According to Duke Energy Ohio, the IMF's ancestry is clear -- it is one of two successor charges to the Reserve Margin portion in the original "annually adjusted component" charge in the earlier Stipulation Plan that was the subject of the Commission's hearing in May 2004.[50] The claim conflicts with the Company's response to the OCC's discovery (previously cited) that the IMF, together with "little g" compensate the Company for existing capacity.[51] The ancestry claimed by Duke Energy Ohio for the IMF is incorrect: the sole successor to the charge for the Reserve Margin under the Stipulation Plan is the System Reliability Tracker ("SRT").

The purported basis of the Company's argument in support of its New Proposal is shown in Attachment JPS-SS1 to the testimony of Company Witness Steffen.[52] The

---

[49] Id. at 48.

[50] Company Remand Ex. 3 at 26 ("The IMF was previously embedded in the reserve margin component of the Stipulated AAC price of $52,898,560.) (Steffen).

[51] OCC Remand Ex. 1, NHT Attachment 6 (quoted and analyzed in OCC Remand Ex. 1 at 42) (Talbot).

[52] Company Remand Ex. 3, Attachment JPS-SS1 (Steffen).

lower arrow in that one-page attachment asserts a connection between the Reserve Margin component ($52,898,560) from the Stipulation Plan to the SRT ($15,000,000) and IMF ($30,080,000). Since the SRT and IMF charges together amount to $45,080,000, according to Witness Steffen's Attachment JPS-SS1, an amount less than the $52,898,560 from the Stipulation Plan, Witness Steffen argues that there is no evidentiary problem regarding the basis of the SRT and IMF charges.[53] According to Company Witness Steffen: "Attachments JPS-2 through JPS-7 included in my Direct Testimony and included as Attachments to the Stipulation presented the supporting pricing calculations."[54]

This Company's argument is disingenuous. Important to the correct understanding of the charges contained in the Stipulation Plan and the New Proposal is the fact that the Reserve Margin component that resulted from the Stipulation was itself an estimate that turned out to be many times the amount actually needed to provide for a reserve margin. The addition of the IMF charge by the New Proposal to the original reserve margin estimate would far exceed the $52,898,560 Reserve Margin estimate that was contained in the Steffen testimony prefiled on April 15, 2004 and subsequently used to support the Stipulation Plan.[55]

---

[53] Company Remand Ex. 3 at 26-27 (Steffen). Company Witness Steffen concluded that the "evidence of record from the May Hearing fully supported the Stipulation and consequently the Alternative [i.e. New] Proposal." Id. at 30.

[54] Company Remand Ex. 3 at 20 (Steffen).

[55] Company Ex. 11, Attachment JPS-7 (Steffen).

The support for the Reserve Margin figures, as described in Mr. Steffen's Attachment JPS-7 from the *Post-MDP Service Case*,[56] is deceptively simple. The Reserve Margin calculation was obtained by multiplying 826.54 megawatts (826,540 kilowatts), which was 17 percent of the Company's projected peak megawatts for 2005, by $64 per kilowatt-year, which was the annualized cost of a new peaking unit using Electric Power Research Institute Technical Assessment Guide (EPRI-TAG) estimates.[57] The obvious flaw in this calculation is that the Midwest ISO/ ECAR/ ReliabilityFirst region had (and still has) excess capacity over and above the 17 percent required reserve margin.[58] Company testimony in 2004 confirmed this fact.[59] Not surprisingly, this excess capacity resulted in market prices for capacity that were far below the cost of building *new* generating capacity that provided the underlying basis for the Company's calculations. Thus, when the Company substituted the costs of acquiring *existing* capacity in the regional generation market -- as reflected in the SRT that was based upon estimated costs of acquiring capacity for the year ahead -- the charge dropped by 72 percent from $52,898,560 to $15,000,000 as shown in Company Witness Steffen's Attachment JPS-SS1.[60] Even this much-reduced estimate proved to be an over-estimate,

[56] Id.; see also Joint Ex. 1, Attachment JPS-7.

[57] Company Ex. 11, Attachment JPS-7 (Steffen) (reviewed by OCC Witness Talbot, OCC Remand Ex. 1 at 32).

[58] OCC Ex. 1 at 56-57 and Tr. Vol. II at 66-67 (2007) (Talbot) ("adequate capacity or more than adequate"). The 17 percent required reserve margin was subsequently reduced to 15 percent. OCC Remand Ex. 1 at 31 (Talbot).

[59] Company Ex. 7 at 33, lines 17-20 (Rose).

[60] See also, OCC Remand Ex. 1 at 46-48 (Talbot).

with the result that the SRT charge was initially too high and was subject to a true-up in favor of consumers that resulted in a negative SRT charge at the end of 2006.

It is clear, then, that the Reserve Margin charge was inappropriately based on the cost of building new peaking units at a time when there was abundant spare capacity in the region that was available at much lower prices.[61] But what is also clear is that the SRT is the sole successor to the Reserve Margin component; it is the SRT that is the charge for lining up reserve capacity.[62] The total of the charges for the SRT and the IMF only fit within the amount of the Company's Reserve Margin estimate under the Stipulation because costs for the SRT turned out to be much less than the estimates contained in Company Witness Steffen's testimony in support of the Stipulation.[63] As stated by OCC Witness Talbot:

> It is incorrect to say that, between the Stipulation and the current standard service offer, "these underlying costs were merely reduced, repositioned, made avoidable or carved out into the IMF and SRT charges." (Mr. Steffen, Second Supplemental Testimony at page 30) In fact, the IMF is a brand new charge.[64]

The IMF is a new charge from the New Proposal, one that denies customers the benefit of reduced prices that should result from actual tracking of Duke Energy Ohio's reserve margin costs.

---

[61] Id. at 46.

[62] Id. at 48.

[63] Id.

[64] Id. at 48 (Talbot), quoting Company Remand Ex. 3.

c. Neither risk, opportunity cost, nor reliability explanations support the IMF charge, and duplicative charges resulted.

The evidence demonstrates that the IMF comes from thin air, as if the Company was looking for a filler -- i.e., a new charge to add to the SRT to bring it into approximate initial equality with the old Reserve Margin estimate. The Company's justification for the IMF charge was also stated as follows: "[It] is compensation for its opportunity cost associated with committing its assets at first call to MBSSO load."[65] As OCC Witness Talbot explains, Duke Energy Ohio's arguments in support for such a charge are couched in terms of three concepts -- risk, reliability and opportunity cost -- that the Company misapplies.[66]

Regarding "risk," the Company's claim that the standard service offer adds to its level of risk is not substantiated. As OCC Witness Talbot pointed out:

> The Company cannot show what level of risk it is taking on. [I]t cannot even claim that it is taking on any net risk at all and on the face of it[, the] [sic] standard service offer reduces risk. And the Company has not justified its claims in terms of any quantitative risk analysis."[67]

More fundamentally, Mr. Talbot points out that the Company has completely misused the concept of risk. In financial parlance, risk results from having an open or uncovered position in the market, either as buyer or seller. Absent the standard service offer, the Company would be selling the electricity from its generating units into the competitive market, but with the standard service offer it has a relatively assured market for the

---

[65] DE-Ohio's response to OCC-INT-04-RI67, made part of the presentation by OCC Witness Talbot. OCC Remand Ex. 1, Attachment NHT-5.

[66] OCC Remand Ex. 1 at 37-42 (Talbot).

[67] Id. at 39 (Talbot).

output of its generating plants and therefore has a less exposed position -- i.e., one with *reduced* risk.[68]

The second concept on which the Company bases its claim for the IMF is opportunity cost. The evidentiary basis for the Company's claim in this area is non-existent. The Company has not performed any opportunity cost analysis,[69] let alone submitted such an analysis to the Commission for its review and the review of intervening parties.

The third concept misapplied by the Company is "reliability." The SRT has that specific function, providing for the acquisition of capacity corresponding to a reserve margin over expected peak demand.[70] The definition of the risks or costs for which the IMF is supposed to compensate the Company suffers from a serious problem: the IMF duplicates costs and compensates for risks that are covered by other components of Duke Energy Ohio's standard service offer. These components are those that relate to capacity, the SRT, the RSC, and also "little g." As noted above, the SRT is, by definition, a tracker that compensates the Company for acquiring a 15 percent reserve margin over and above predicted peak demand for the year ahead. Surely this is adequate for the purpose of assuring system reliability, and nothing more should be claimed for achieving this

[68] Id. at 38, 41, and 53 (Talbot). Regarding the testimony of Company Witness Steffen, Mr. Talbot stated that "Mr. Steffen does not provide a balanced assessment in which, absent the assurance of sales to standard service offer consumers, the Company would also be subject to 'price volatility in the energy and capacity markets.'" Id. at 41 (quoting Steffen's Second Supplemental Testimony at 27, Company Remand Ex. 3 at 27). Mr. Talbot also states that the testimony of Company Witness Meyer suffers from the same misrepresentation of the risk situation. Id. at 39 (referring to Company Remand Ex. 1 at 9).

[69] OCC Remand Ex. 1 at 39 and 42, citing DE-Ohio's response to OCC Interrogatory RI 140 ("The Company has not performed such a calculation," OCC Remand Ex. 1, NHT Attachment 4).

[70] See, e.g., OCC Remand Ex. 1 at 41 (Talbot).

purpose. The SRT is the sole successor to the Reserve Margin component under the Stipulation Plan.

It cannot be emphasized enough that the Company's claim that the IMF is included within the overall amount earlier claimed under the Reserve Margin portion of the provider of last resort charge contained in the Stipulation is erroneous. As shown in Company Witness Steffen's Testimony, Attachment JPS-SS1, the level of the IMF was set at 4 percent of "little g."[71] That percentage is only applicable to 2005-2006; in 2007 the percentage increases to 6 percent, which increases the Company's revenue from this charge from approximately $30 million (as shown in the attachment) to $45 million.[72] Together, with the estimated $15 million for the SRT, this increases the total of the two new charges to $60 million that customers would pay.[73] Such collections by the Company would be larger than the $52,898,560 claimed under the Reserve Margin component despite the significant reductions in the Reserve Margin estimate from that stated in Company testimony regarding the SRT in the Stipulation Plan. The Company proposes to increase the IMF to 9 percent of "little g" in 2008, which would increase the revenue from this charge to approximately $67,500,000.[74] The resulting revenue figure provides further evidence that the IMF is not only a new charge not contemplated by the Stipulation Plan, but is a *major source of an increasing level for standard service offer charges that customers would pay.*

---

[71] Company Remand Ex. 3 (Steffen).

[72] OCC Remand Ex. 1 at 48 (Talbot).

[73] Id.

[74] That is, each additional percentage of "little g" would collect approximately $7.5 million.

Turning to the RSC, according to the Company: "The RSC is the Company charge for providing a stable market price over a prolonged period of time."[75] This purpose is also the basis upon which Duke Energy Ohio attempts to support the IMF, which is supposed to be compensation for the dedication of assets to standard service offer service. If the RSC had legitimacy at any point, it was for ratemaking purposes by being a component of legacy generation costs in "little g"; i.e. it was fifteen percent of "little g" and was based upon historical accounting costs as determined in the Company's last rate case that included generation costs.[76] The IMF lacks any claim to legitimacy, and is for some unexplained reason expressed as an additional percentage of "little g" that increases over time without any lineage from these legacy generation costs. "Little g" itself, which includes a rate of return on generation rate base, implicitly compensates the Company for some degree of risk related to generation assets.

The proposed charges for the IMF have not been properly supported by Duke Energy Ohio, and are unreasonable. Analysis of the IMF -- on a stand-alone basis and even more so in combination with the RSC, the SRT, and "little g" -- reveals that the IMF has no reasonable basis or rationale.

The IMF is, as conjectured by the Supreme Court of Ohio, "some type of surcharge and not a cost component." *Consumers' Counsel 2006* at ¶30. The IMF should be removed from the Company's standard service offer charges.

---

[75] OCC Remand Ex. 1, NHT Attachment 12 (Company Response to OCC-INT-04-RI62(a)).

[76] The alleged historical basis of the RSC is, or was, that it was a component of "little g," namely a portion of the generation charge approved by the Commission in the Company's last rate case. The difference between the 15 percent of "little g" recovered through the RSC and the remaining 85 percent is that the former portion was made non-bypassable by a percentage of customers. OCC Remand Ex. 2(A) at 53.

3. The Commission should ensure reasonably priced standard service offer rates based upon verification of all costs.

These cases feature, for the first time, a review of Duke Energy Ohio's proposed AAC charge. The Commission has already moved the Company's standard service offer in the direction of a cost-based proxy for market prices as it has approved the Company's SRT and FPP pricing components, which are based upon costs actually incurred by the Company to acquire goods or services in the marketplace.[77] The Commission should tighten its review over these components,[78] and should also take this step regarding its review of the AAC in order to formulate a measurable and verifiable cost-based proxy for market-based rates.[79] The Commission should take the next logical step in its review process and exclude all elements where producers do not recover costs until they sell products or services.[80] This subject will be revisited by the OCC in light of testimony in the second phase of this proceeding.[81]

---

[77] OCC Remand Ex. 1 at 6 (Talbot).

[78] OCC Witness Talbot testified that "Duke Energy Ohio has too much latitude in making decisions regarding the setting of its FPP charges" (OCC Remand Ex. 1 at 25) and echoed the concern that "'DE-Ohio continues to purchase fuel and emission allowances in a manner that is inconsistent with best industry practices among regulated utilities." Id. at 27 (quoting the Auditor).

[79] Id.

[80] Id. at 33 (Talbot).

[81] Exclusion of the "CWIP" portion of the AAC calculation is the subject of testimony OCC Witness Talbot. Id. The exclusion of CWIP is also addressed in the prefiled testimony of OCC Witness Haugh that will be further discussed in the OCC's post-hearing brief for phase II of the case on remand.

4. Duke Energy Ohio compared its standard service offer rates to the fiction first created as the Company's Competitive Market Option.

a. Duke Energy Ohio's CMO has been shown to be useless as a basis for comparison for other standard service offer proposals.

The Company, through Witness Rose, presented a range of estimates for market prices based on a variety of different assumptions.[82] As pointed out by OCC Witness Talbot in both 2004 and 2007, the prices presented by Mr. Rose are speculative, have changed based upon the changing needs of Duke Energy Ohio's litigation position, and present such a wide range of prices that the testimony does not provide a useful benchmark from which the Commission can judge a reasonable standard service offer.[83]

Duke Energy Ohio's comparisons to its CMO creation should not be mistaken as comparisons to the "market." The market indices that Duke Energy Ohio uses are not reliable measures of a market price and the adjustments that the Company uses to the market indices are duplicative, imprecise, and in some cases do not represent costs or risks that the market-based standard service offer provider would face.[84] The Commission should not rely upon such a questionable and unverifiable approach as the measure of whether Duke Energy Ohio's New Proposal provides rates that are comparable to the market. Furthermore, the Commission should recall from testimony in the 2004 hearing that Company Witness Rose made it abundantly clear that the pricing

[82] See, e.g., OCC Remand Ex. 1 at 68-69 ("The range of Mr. Rose's 'market' prices was so large that the pricing exercise lost all credibility.") (Talbot).

[83] OCC Remand Ex. 1 at 67-69 (Talbot) (e.g. "complex, artificial, and imprecise" and "it all depends upon how you assess those factors" which "was not a sound basis for determining electricity market prices in 2004 and it is not a sound basis today").

[84] Id. 67.

method was not designed to be a market-based standard service offer for small customers.[85]

Following the submission of the Stipulation, Duke Energy Ohio presented downward adjustments to the CMO calculations in an attempt to demonstrate that one of its rate proposals was not too low so as to be predatory when compared with market rates.[86] Duke Energy Ohio's opportunistic manipulation of the CMO results to fit the circumstances of the Company's Stipulation proposal showed that the CMO "was 'padded' so as to be on the high side."[87] OCC Witness Talbot testified that Duke Energy Ohio Witness Rose's "five major downward adjustments to his earlier estimates"[88] "totally undermine[d] the MBSSO edifice [Rose] created last year."[89] As a result, Duke Energy Ohio's testimony regarding the CMO is worthless regarding the comparison of the New Proposal to "market" rates.[90]

b. Duke Energy Ohio's market indices are not reliable measures of market prices that are required by R.C. 4928.14.

Although Duke Energy Ohio Witness Rose attempted to justify Duke Energy Ohio's reliance upon indices to develop the CMO on the basis that "the index is a non-

[85] Tr. Vol. III at 59, lines 22-24 (2004).

[86] OCC Ex. 2 at 2 (Talbot Supplemental), referring to Company Ex. 8 (Rose Supplemental).

[87] Id. at 3.

[88] Id. at 2.

[89] Id. at 6.

[90] Id. ("[n]or should it be used * * * to create a competitive pricing benchmark against which to test the reasonableness or ERRSP pricing"), also OCC Remand Ex. 1 at 69 (Talbot) ("not a sound basis for determining electricity market prices").

utility source of information widely used by power suppliers,"[91] the market indices selected by Duke Energy Ohio are not currently a reliable measure of market prices. Witness Rose seemed to recognize that the indices are not yet reliable when he added to his testimony that "the integrity of the market and market indices is being further reinforced by more oversight at regional and federal levels."[92]

Additionally, Witness Rose alleged that "the FERC staff has come out with a view that the 'into' Cinergy indices that are being used and contemplated being used in the CMO are in substantial compliance with FERC requirements."[93] Witness Rose noted that the FERC Staff's view was presented in *Report on Natural Gas and Electricity Prices Indices.*[94] However, there is no specific reference to the "Into Cinergy" indices in that report. Upon cross-examination, Witness Rose pointed to the following paragraph in that report to support his assertion:

> Argus Energy Intelligence, ICE, Io, NGI and Platts [should] be deemed to be in substantial compliance with the standards of the Policy Statement (a) on condition that they publish direct volume and transaction number data on which index prices are calculated (or indicate when no such data is available) and (b) on condition that they affirm the Commission will, upon an appropriate request, have access to relevant data in the event of an investigation of possible false price reporting or manipulation of prices.[95]

---

[91] Company Ex. 7 at 34 (Rose).

[92] Id. at 35.

[93] Tr. Vol. III at 64, line 23 through 65 (2004).

[94] OCC Ex. 11.

[95] Id. at 60, referred to by Witness Rose (Tr. Vol. III at 144 (2004)).

Therefore, the FERC Staff did not find that the "Into Cinergy" index in particular[96] is in compliance, but found that the ICE and the Platts index publishers (that Duke Energy Ohio has proposed to rely on) may be in compliance under certain conditions.

As stated in the quote directly above, the "substantial compliance" designation by FERC Staff is dependent upon two conditions that have not yet been made by the publishers and may not be made. In particular, the FERC Staff noted in the paragraph preceding the one quoted above:

> [W]hile Platts states that it is open to assisting the Commission, it also reserves the right not to comply with a request for disclosure. This also does not meet the Policy Statement expectation that, in a specific and targeted investigation of possible false reporting or manipulation of market prices, price index publishers would provide the Commission access to the transaction data needed to determine whether price reporters violated applicable rules or statutes.[97]

Therefore, it appears that the index publishers may not be willing to meet the conditions the Commission Staff stated that they must meet to be in "substantial compliance."

Even more disconcerting about Duke Energy Ohio's CMO construct, the Company relies upon forward index prices.[98] The FERC Staff made a very particular comment regarding forward price reporting:

> [T]he results clearly indicate that few companies report long-term transactions to index developers; over 75 percent of respondents indicated that they reported no forward fixed price natural gas or electricity transactions to index developers. Staff assumes that few long-term transactions are reported and the prices for such

---

[96] In fact some respondents to the surveys complained about "the need for index developers to provide greater transparency in the development of their indices and additional information about reported transactions, such as the level of market activity at specific trading points and how reported prices are used in calculating their indices." Id. at 17.

[97] Id at 59.

[98] Company Ex. 7 at 7 (Rose).

> transactions reflected in index developers' publications are based upon a very small self-selected sample coupled with journalistic judgment.[99]

This statement shows that the FERC Staff's view of forward price indices, such as those Duke Energy Ohio relies upon in its CMO, is not favorable and that such indices would not likely be relied upon by the FERC Staff to determine the appropriateness of tariff rates. For that reason, the CMO, which relies on forward indices, is not appropriate and the Commission should not rely upon it for comparison to proposed standard service offer prices (or any other purpose). Additionally, as OCC Witness Talbot demonstrated, forward prices vary drastically from year to year.[100]

Under Company Witness Rose's CMO construct, forward price indices are adjusted by nine factors, six of which are not justified in principle and three of which were not been properly developed.[101] In the more recent hearing on remand from the Supreme Court of Ohio, Company Witness Rose made no attempt to support his questionable constructs. Instead, he stated that he made various new assumptions and relied upon "updated parameters" that he does not describe or defend.[102] The Commission should lend no weight to the comparisons made by Duke Energy Ohio with the CMO fiction that the Company has created.

The reasonable alternative to the Company's artificial, CMO construct is to place "[g]reater reliance on actual accounting costs -- rather than costs estimated from pricing

---

[99] OCC Ex. 11 at 31.

[100] OCC Ex. 1 at 18-19 (Talbot).

[101] OCC Post-Hearing Merit Brief at 45-49 (June 22, 2004).

[102] Company Remand Ex. 2 at 12, lines 8-11 (Rose).

theories and models -- [that] can provide a relatively stable proxy for market prices."[103] This is the direction that the Commission seems to have headed in its determinations regarding Duke Energy Ohio's standard service offer rates.[104] This reasonable alternative supports the elimination of the duplicative charges sought by Duke Energy Ohio in the New Proposal that the Company proposed in its October Application for Rehearing.

B. The Agreements Entered Into by Duke Energy Ohio to Gain Support for its New Proposal Reveal that the Company has Exerted Market Power and is Not Providing Reasonably Priced Retail Electric Service.

1. Overview - its "All in the [corporate] Family"

The supplemented record in these cases reveals the side agreements that Duke Energy Ohio undertook to gain support for the Company's proposals for standard service offer generation rates -- i.e., the proposal in the Stipulation and also the proposal contained in the Company's Application for Rehearing. The side agreements undermine the reliance that can be placed upon the publicly stated support by a variety of parties for the Company's proposals, cast new light upon the near collapse of the competitive market in areas served by Duke Energy Ohio, and raise other serious regulatory concerns.[105] The Commission should address each of these issues so that post-MDP electric service is provided in at reasonable prices.

The Commission should approve standard service offer rates that are reasonable for all customers and move to cost-based rates, encourage the development of a

---

[103] *OCC Remand Ex. 1 at 70 (Talbot).*

[104] Id. at 70-71; see also Entry on Rehearing at 10 (November 23, 2004) ("not . . . cede this review").

[105] See, e.g., OCC Remand Ex. 2(A) at 56 (Hixon).

competitive market for generation service, and more closely scrutinize the activities of Duke Energy Ohio. The Commission should ignore the support shown by parties to these cases who have reached separate agreements with Duke Energy Ohio as the price for their support for the Company's proposals. These parties have arranged with the Company to avoid parts of the standard service offer rates that they claim to support, and do not represent the residential customers who would pay the rates. The rates proposed by the Company, as stated above (based upon the supplemented record on remand), are not reasonable and the Company has not satisfied its burden of proof regarding proposed standard service offer rates. The Commission should scrutinize the cost basis for Duke Energy Ohio's standard service offer rates as a reasonable proxy for market-based rates, and these rates should be bypassable in order to provide customers the opportunity to choose between providers of competitive retail electric generation service.

2. The Company's plan for standard service offer rates lacks substantial support, and the stated support did not result from serious bargaining.

a. Overview

In *Consumers' Counsel 2006*, the Supreme Court of Ohio agreed that "if CG&E and one or more of the signatory parties agreed to a side financial or some other consideration to sign the stipulation, the information would be relevant to the commission's determination of whether all parties engaged in 'serious bargaining'"[106] under the three-prong test approved in *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St. 3d 123, 125. The overwhelming evidence in this case demonstrates that

[106] *Consumers' Counsel 2006* at ¶84.

many of the signatory parties were given side inducements to settle, and the first prong of the test for the reasonableness of a Stipulation was not met.

The supplemented record on remand provides behind-the-scenes information regarding the means used by Duke Energy Ohio to gain support for its rate proposals, and this supplemented record should be carefully considered in the Commission's deliberations. The side agreements between the Company and other parties should have been revealed earlier, pursuant to the Commission rule that "[a] written stipulation must be signed by all of the parties joining therein, and *must be filed with the commission and served upon all parties to the proceeding*."[107] Aside from the Stipulation that was filed on May 19, 2004, the many agreements in which the Company and parties to the *Post-MDP Service Case* agreed to support the Stipulation and the Company's Application for Rehearing were not properly filed or served.[108] This situation limited the scope of the information that was available to the Commission in the *Post-MDP Service Case*.

The testimony of OCC Witness Hixon emphasizes an important connection between the side agreements and the *Post-MDP Service Case*:

> [T]he fundamental effect of the side agreements was to insulate those large customers from the rate increases proposed in the Stipulation filed in May 2004, the Alternative Proposal proposed in Duke Energy Ohio's October 2004 Application for Rehearing, and the decision contained in the Commission's November 2004 Entry on Rehearing. Pursuant to the side agreements, those Customer Parties [i.e., parties or members of organizations that were parties] supported Duke Energy Ohio's proposals for post-MDP generation pricing in this case. So rather than a plan for a post-MDP standard service offer and/or competitive bidding process that varies from the PUCO's rules "where there is substantial support from a

[107] Ohio Adm. Code 4901-1-30(B).

[108] The agreements are the main subject of testimony by OCC Witness Hixon. See OCC Remand Ex. 2(A) at 11-73.

> number of interested stakeholders," the result in this proceeding was that Duke Energy Ohio's proposals did not have substantial support from customers who would pay all the rate increases in Duke Energy Ohio's generation pricing plans.[109]

As set forth in Ms. Hixon's testimony, the bulk of the side agreements were part of three sets that correspond in time to the Company's Stipulation Plan in May 2004, the Company's Application for Rehearing that was submitted in the last days of October 2004, and the end of 2004 after standard service offer rates were approved.[110]

b. Pre-PUCO Order Agreements

i. The Stipulation lacked substantial support

OCC Witness Hixon described five side agreements bearing dates from May 19, 2004 to July 7, 2004, referred to in her testimony as "Pre-PUCO Order Agreements,"[111] that involved customers who were parties to the *Post-MDP Service Case* or members of organizations that were parties ("Customer Parties").[112] The Customer Parties who were involved in the side agreements were a number of hospitals (executed by OHA trial counsel Richard Sites[113]), industrial customer members of OEG (executed by OEG trial

[109] OCC Remand Ex. 2(A) at 58-59 (Hixon), quoting Ohio Adm. Code 4901:1-35-02(C). The original text contained "December 2004," which was corrected on the stand. OCC Remand Ex. 2(B) (Hixon errata sheet).

[110] OCC Witness Hixon provided a summary table of the agreements, along with their dates. OCC Remand Ex. 2(A), BEH Attachment 18.

[111] OCC Remand Ex. 2(A) at 11 (Hixon).

[112] Id. The side agreements are attached to Ms. Hixon's testimony as BEH Attachments 2-6.

[113] OCC Remand Ex. 2(A), BEH Attachment 2 at 5 (Bate stamp 351).

counsel David Boehm[114]), IEU for the benefit of Marathon and General Motors (executed by IEU trial counsel Samuel Randazzo[115]), Cognis,[116] and Kroger.[117]

Each agreement contained nearly identical provisions stating that the OHA, OEG, IEU, Cognis, and Kroger would "support a Stipulation filed by the Cincinnati Gas & Electric Company . . . in case no. 03-93-EL-ATA [the *Post-MDP Service Case*]."[118] The Stipulation proposed post-MDP pricing based upon a bypassable price to compare and a non-bypassable provider of last resort ("POLR") charge made up of a rate stabilization charge ("RSC") and the first of the proposed annually adjusted components ("AAC1").[119] Each Pre-PUCO Order Agreement provided for the reimbursement to Customer Parties of charges proposed by the Company in the Stipulation through the end of 2008 or non-payment of such charges to Duke Energy Ohio,[120] and termination tied to the outcome of the *Post-MDP Service Case*.[121] Some agreements also provided for reimbursement of

---

[114] Id., BEH Attachment 3 at 6 (Bate stamp 332).

[115] Id., BEH Attachment 4 at 6 (Bate stamp 346).

[116] Id., BEH Attachment 5.

[117] Id., BEH Attachment 6. The version contained in BEH Attachment 6 does not include the signature of Kroger trial attorney Michael L. Kurtz. Id., BEH Attachment 6 at 7. However, Kroger Corporate Energy Manager Denis George stated that the document, executed on Bate stamped page 1179, was executed by Kroger. OCC Remand Ex. 7 at 15 and 20 (George).

[118] OCC Remand Ex. 2(A), BEH Attachment 2 at 3, ¶9; BEH Attachment 3 at 4, ¶6; BEH Attachment 4 at 4, ¶7; BEH Attachment 5 at 2, ¶5; BEH Attachment 6 at 5, ¶8.

[119] Joint Ex. 1 at ¶3 and ¶8 (Stipulation). The annually adjusted component was redefined in the Company's Application for Rehearing.

[120] OCC Remand Ex. 2(A), BEH Attachment 2 at 2, ¶2 (RSC); BEH Attachment 3 at 2-3, ¶1a-1b (AAC1, RSC, and RTC, less if served by non-affiliated CRES); BEH Attachment 4 at 2-3, ¶1 (AAC1, RSC, RTC, less if served by non-affiliated CRES); BEH Attachment 5 at 2, first ¶2 (AAC); BEH Attachment 6 at 3-4, ¶¶2-3 (AAC and non-payment of RSC to Duke Energy Ohio).

[121] Id. at 14 and 17 (Hixon). See also, BEH Attachment 2 at 3, ¶B; BEH Attachment 3 at 5, ¶B; BEH Attachment 4 at 4, ¶A; BEH Attachment 5 at 2, ¶B; BEH Attachment 6 at 6, ¶B.

non-bypassable regulatory transition charges that were set in the electric transition plan ("ETP") case for the Company.[122] The side agreement with the hospitals provided for a $50,000 payment to the Ohio Hospital Association,[123] and the side agreement with IEU provided for a $100,000 payment to IEU for "legal services."[124]

The supplemented record also reveals that the City of Cincinnati ("City") -- an intervenor in the *Post-MDP Service Case* that withdrew from the cases on July 13, 2004 without filing a brief -- entered into an agreement with Duke Energy Ohio (the "City Agreement"). The side agreement, executed on June 14, 2004 by CG&E attorney John Finnigan and City Manager Valerie Lemmie, provided the City with $1 million and required the City to withdraw from the *Post-MDP Service Case*.[125] The City did not file an initial brief by the June 22, 2004 deadline, and did not file a reply brief by the July 6, 2004 deadline -- and the City did, in fact, withdraw from the *Post-MDP Service Case*.

The PUCO should find that the Pre-PUCO Order Agreements significantly reduce the importance of stated support for the Company's Stipulation proposal to replace post-MDP pricing according to the Commission's rules under Ohio Adm. Code 4901:1-35-02(C).[126] The Stipulation was executed and supported by the Company and the PUCO

---

[122] Id., BEH Attachment 3 at 2-3, ¶1a-1b; BEH Attachment 4 at 2-3, ¶1.

[123] Id., BEH Attachment 2 at 2, ¶4.

[124] Id., BEH Attachment 4 at 3, second ¶3. It is unfathomable that these terms for payments to parties that supported Duke Energy Ohio's proposals would be protected from the public record for these cases.

[125] OCC Remand Ex. 6 at ¶4.

[126] OCC Remand Ex. 2(A) at 58 (Hixon) ("substantial support from a number of interested stakeholders").

Staff as well as the OHA, OEG (including AK Steel[127]), IEU, Cognis, and Kroger.[128] Also supporting the Stipulation were People Working Cooperatively and Communities United for Action[129] who were interested in the contracts for weatherization and energy assistance that were extended as part of the Stipulation.[130] Other supporting parties were marketers Dominion Retail and Green Mountain Energy whose support appears to have been tied to billing credits included in the Stipulation that were later eliminated (along with the marketer support) by the Company's New Proposal.[131] Parties that did not sign the Stipulation were the OCC, the Ohio Partners for Affordable Energy, the Ohio Manufacturers Association, the Ohio Marketers Group (comprised of Constellation NewEnergy, Inc., MidAmerican Energy, Strategic Energy, and WPS Energy Services), Constellation Power Source, PSEG Energy Resources & Trade, and the National Energy Marketers Association. The support for the Stipulation relied upon by the Commission, as the Stipulation was adjusted by the November Entry on Rehearing, is reduced to the PUCO Staff, two community organizations, and FirstEnergy Solutions (an affiliate of a fellow electric utility) when Customer Parties that entered into side agreements are

[127] AK Steel is one of the OEG members with whom a Pre-PUCO Order Agreement was executed. Id., BEH Attachment 3 at 1.

[128] Joint Ex. 1 at 26-30 (Stipulation).

[129] People Working Cooperatively and Communities United for Action.

[130] Joint Ex. 1 at 18, ¶16.

[131] See *Post-MDP Service Case*, Green Mountain Memorandum in Response to CG&E Application for Rehearing (November 8, 2004) and Dominion Retail Memorandum in Response to CG&E Application for Rehearing (November 8, 2004).

excluded. Such support does not constitute "substantial support from a number of interested stakeholders" that might support waiver from the post-MDP pricing rules.[132]

ii. The Duke-affiliated companies acted together to settle the *Post-MDP Service Case*.

Duke Energy Ohio and two of its affiliated companies entered into the Pre-PUCO Order Agreements and the City Agreement with the Customer Parties. Duke Energy Ohio (formerly CG&E) was a named party in the City Agreement. Cinergy Corp. was a named party in the agreements with IEU[133] and Cognis.[134] Duke Energy Retail Sales ("DERS"), formerly known as Cinergy Retail Sales ("CRS"), was a named party in the agreements with the hospitals, the OEG industrial customers, and Kroger. The Duke-affiliated companies (formerly the Cinergy-affiliated companies) used affiliates of Duke Energy Ohio to accomplish the side deals that obtained support for the Company's pricing proposals. The three Duke-affiliated companies that were involved in the side deals did not act independently of one another in 2004, and they continued to operate with a single management directive thereafter (including during the course of the *Post-MDP Remand Case*).[135]

The natures of the three Duke-affiliated companies that entered into agreements with Customer Parties should be understood to interpret the side agreements. Duke Energy Ohio, formerly the Cincinnati Gas and Electric Company, is the applicant in these

---

[132] Ohio Adm. Code 4901:1-35-02(C).

[133] OCC Remand Ex. 2(A), BEH Attachment 4 at 1.

[134] Id., BEH Attachment 5 at 1.

[135] The pleadings in these proceedings bear witness to the identical voice used by the Duke-affiliated companies. A more expansive discussion of the topic can be found in the pleadings. See, e.g., OCC Memorandum Contra Motion in Limine at 16-18 (February 13, 1007).

cases and had the rights and obligations afforded electric distribution utilities in Ohio. It owns generating plants. Duke Energy Ohio employs workers to run its operating company functions such as generating plants.[136] However, its professional and administrative services are provided by employees of an affiliated service corporation ("Shared Services"[137]) that also provides professional services to a wide range of Duke-affiliated companies. The corporate titles for executive and other positions at Duke Energy Ohio and its affiliated companies, including the president of Duke Energy Ohio, are held by Shared Services employees.[138]

DERS, referred to in the side agreements by the pre-merger name of Cinergy Retail Sales (and oftentimes referred to in agreements as Cinergy, which should not be confused with Cinergy Corp.), is one of the Duke-affiliated companies that also uses the professional services provided by Shared Services.[139] DERS was organized in 2003 but was not certified as a competitive retail electric service ("CRES") provider in Ohio until October 7, 2004,[140] approximately five months after the first of the Pre-PUCO Order

[136] OCC Remand Ex. 9 at 36 (Ficke).

[137] OCC Remand Ex. 8 at 10 (Ziolkowski); OCC Remand Ex. 9 at 10-11 (Ficke); Company Remand Ex. 3 at 1 (Steffen).

[138] See e.g. OCC Remand Ex. 9 at 11 (Ficke).

[139] OMG Remand Ex. 4 at 30-31 (Whitlock).

[140] OCC Remand Ex. 2(A) at 12. See also *In re Certification of Cinergy Retail Sales*, Case No. 04-1323-EL-CRS (October 7, 2004) (Certificate 04-124(1) issued).

Agreements were executed. DERS has no employees,[141] no revenue, and no customers.[142] DERS lacks any indicia of a going concern.[143]

Cinergy Corp. "operates" much like DERS utilizing employees of Shared Services. Cinergy Corp., through a series of corporations, owns DERS.[144] Duke Energy Corporation is the parent of Cinergy Corp.[145] Cinergy Corp. is not qualified to conduct CRES service in the area served by Duke Energy Ohio.

Three individuals within the Duke-affiliated companies figure prominently in each of the Pre-PUCO Order Agreements. Each of the Pre-PUCO Order Agreements, regardless of which Duke-affiliate was named, was executed by Duke Energy Ohio (formerly CG&E) trial counsel in his title within the Company:[146]

> Paul A. Colbert, Senior Counsel
> The Cincinnati Gas & Electric Company
> 155 East Broad Street, Columbus, Ohio 43215

[141] OMG Remand Ex. 4 at 30 (Whitlock).

[142] OMG Remand Ex. 4 at 61(Whitlock). The information filed by DERS with the Commission in Case No. 04-1323-EL-CRS provided financial statements for 2005, a period before Mr. Whitlock's involvement with DERS, that shows no revenues. OCC Remand Ex. 2(A), BEH Attachment 22.

[143] See, e.g., OMG Remand Ex. 4 at 29-33, 48-55. The president of DERS, Charles Whitlock, stated that there is no person serving a customer contact function for DERS (id. at 50). DERS does not have enabling (i.e. trading agreements). Id. at 54-55. The position of CEO appears to be vacant. Id. at 29. In response to a question about employees of the Duke-affiliated companies, Mr. Whitlock stated: "I've got to be candid with you, man, I barely know who I work for." Id. at 49. Financial statements for DERS taken from the DERS filings at the PUCO list a few inter-corporate items and an expense line for "Option Premium Expense" related to the agreements analyzed by OCC Witness Hixon. OCC Remand Ex. 2(A), Attachment 22; see also Company Remand Ex. 26, Statement 10 (negative taxable income).

[144] OMG Remand Ex. 4 at 19-20 (Whitlock).

[145] OCC Remand Ex. 2(A) at 13 (Hixon).

[146] OCC Remand Ex. 2(A), BEH Attachments 2-6.

The person listed to receive notices for the Duke-affiliated companies in each agreement is James B. Gainer, an attorney for Duke Energy Ohio in the *Post-MDS Service Case*.[147] The president of CG&E, Gregory Ficke, was not only involved in broad-based discussions with parties in the *Post-MDP Service Case*,[148] but also with the Pre-PUCO Order Agreements. Mr. Ficke's discussion of the May 2004 negotiating process is as follows:[149]

> Q. Were agreements of this type that dealt with support of the [S]tipulation in 03-93 routinely brought to your attention? Would you have seen those types of documents in this time frame?
>
> A. In this time frame, sure.
>
> Q. So there were other agreements that you saw, not just this Ohio Hospital Association agreement[?]
>
> A. Much like those that you showed me in you Exhibit No. 3 [same as OCC Remand Ex. 2(A), Attachment BEH 18].
>
> Q. Did you see what's marked as Exhibit 5 [same as OCC Remand Ex. 2(A), Attachment BEH 2] or drafts of it before this agreement was executed?
>
> A. I may have.
>
> Q. So you were aware before the May agreements were executed that there were negotiations for support of the stipulation in 03-93?
>
> A. Yes.

---

[147] See, e.g., Company Memorandum Contra IEU Motion to Dismiss (March 18, 2003). Mr. Gainer was apparently involved in the negotiations. See, e.g., OCC Remand Ex. 7 at 21 (George). The reference to "Cinergy" at the point that identifies Mr. Gainer in the agreements is apparently a generic name since the named Cinergy affiliate in the Pre-PUCO Order Agreements is Cinergy Corp. in the IEU and Cognis agreements and Cinergy Retail Services in agreements with the hospitals, OEG, and Kroger.

[148] OCC Remand Ex. 9 at 22-23 (Ficke).

[149] OCC Remand Ex. 9 at 26-27 (Ficke). When asked if a CG&E representative was involved in negotiating agreements in the May time frame, Mr. Ficke responded: "I was involved in it." Id at 36.

Q. And were those negotiations that resulted in the agreements such as that shown on Exhibit 5, were those part of a public process that involved all the parties to the 03-93 case?

A. No.

Mr. Ficke was involved in the negotiations with Cognis.[150] He stated that he was "less involved" in the agreement with Kroger,[151] but Kroger's Denis George remembers Mr. Ficke's presence at meetings.[152]

OCC Witness Hixon provided an illustration that shows both the Company's involvement in the Pre-PUCO Order Agreements and the fact that these agreements were actually part of a larger settlement of the *Post-MDP Service Case* that was not revealed during that portion of these cases. Using documents provided in discovery by the OHA, Ms. Hixon noted communications that involved Paul Colbert, James Gainer, and Gregory Ficke that explicitly discussed a draft of a Pre-PUCO Order Agreement as containing "OHA CG&E Settlement Terms."[153] OHA and CG&E negotiated a side agreement in the *Post-MDP Service Case* that used a supposedly independent affiliate of CG&E as a named party.

The Pre-PUCO Order Agreements mix the business of the Duke-affiliated companies in a manner that eliminates any notion that their operations related to the *Post-MDP Service Case* were separate and independent from one another. These agreements, other than that involving Cognis, promise a direct supply relationship with Customer

[150] Id. at 77-80 ("I reviewed drafts of the documents," id at 77).

[151] Id. at 82 (Ficke).

[152] OCC Ex. 7 at 21-22 (George).

[153] OCC Remand Ex. 2(A) at 29 (Hixon) (referring to BEH Attachment 7).

Parties. The OEG agreement with CRS and the IEU agreement with Cinergy Corp. recognize that CRS and Cinergy Corp. were not qualified to provide the direct supply at the time the agreements were executed,[154] and the IEU agreement merely states that Cinergy Corp. would create an affiliated company to provide service.[155] The Duke-affiliated companies reached agreements with a single corporate directive, then used their corporate entities or the creation of corporate entities to carry out the common purpose.

Aside from the terms regarding support for the Stipulation (including payments to the OHA and IEU as parties to the *Post-MDP Service Case*), many other terms relate to business in which only Duke Energy Ohio was involved. The agreement with the hospitals limits amendment of CG&E tariff charges regarding dual feeds prior to 2009.[156] The agreement with the OEG members provides that CG&E would propose that Rider CIR be "based upon distribution net plant" in the Company's "next distribution base rate case."[157] The OEG agreement contains a provision concerning CG&E waiver of a minimum stay provision in the Company's tariff.[158] The OEG, IEU, and Kroger agreements address earlier agreements in Case No. 99-1658-EL-ETP in which CG&E

[154] OCC Remand Ex. 2(A), BEH Attachment 3 at 4, ¶4 ("Cinergy," meaning CRS); BEH Attachment 4 at 4, ¶6 ("Cinergy," meaning Cinergy Corp.).

[155] Id., Attachment BEH 4 at 4, ¶6. DERS (formerly CRS) President Whitlock stated that CRS was the corporation by which the Cinergy-affiliated companies would engage in competitive markets. Id. at 63 (Whitlock).

[156] OCC Remand Ex. 2(A), Attachment 2 at 3, ¶6 (Hixon).

[157] Id., Attachment 3 at 4, ¶5 (Hixon).

[158] Id., Attachment BEH 3 at 4, ¶7. The provision not only involves CG&E, but it would be illegal for the Company to waive such a tariff provision. The Commission stated that a utility violates R.C. 4905.35 when it waives provisions of tariffs filed with the Commission. *In re Complaint of Suburban Fuel Gas Against Columbia Gas*, PUCO Case No. 86-1747-GA-CSS, Order at 23 (August 4, 1987). R.C. 4905.32, 4905.33, and 4905.35 do not permit the Company to waive its tariff provisions according to the utility's desire to gain support for its tariff filings.

was the applicant.[159] The Kroger agreement provides that the "Cinergy Operating Companies shall exercise their Extension 1 and Extension 2 options under the December 14, 2000 Confirmation Letter Agreement to sell generation supply to New Energy in 2006 and 2007 for resale to Kroger."[160] However, "Cinergy Operating Companies" refers to CG&E and Public Service of Indiana[161] and did not involve CRS (which did not exist at the time). The Kroger agreement also states that it meets the standard in the Stipulation under which the Company proposed that the RSC would be bypassable, a test that could only be administered under tariffs approved for Duke Energy Ohio under the supervision of the Commission.[162] The commitments in the Pre-PUCO Order Agreements that involve Duke Energy Ohio again demonstrate that the Duke-affiliated companies acted together to settle the *Post-MDP Service Case.*

iii. The stated support for the Company's proposals did not result from serious bargaining.

The support stated for the Company's proposals, touted even in argument before the Supreme Court of Ohio,[163] was tainted by the Company's incentives extended to a few large customers in return for their support for Company proposals. The results of the OCC discovery in the *Post-MDP Remand Case* confirm the OCC's impression of the settlement discussions to which all parties were invited: nothing important was discussed,

---

[159] OCC Remand Ex. 2(A), BEH Attachment 3 at 4, ¶8; BEH Attachment 4 at 4, ¶5; BEH Attachment 6 at 5, ¶10 (Hixon).

[160] Id., BEH Attachment 6 at 4, ¶4.

[161] OCC Remand Ex. 7 at 17-19 and Deposition Ex. "A" (George).

[162] OCC Remand Ex. 2(A), BEH Attachment 6 at 5, ¶9.

[163] *Consumers' Counsel 2006* at ¶85.

and the Company made no significant movement from its early proposals because representatives of large customers were engaged elsewhere in the real negotiations.

The revelations regarding the Companies concessions to a few large customers -- no doubt funded by the increases proposed for customers not represented in the real negotiations -- should alter the Commission's approach to these cases and invigorate negotiations that involve all parties. The OCC was not "left by the wayside . . . because [its] interests [were] not negotiable,"[164] but left because there were no meaningful negotiations as long as the Company conducted negations in which it "purchased" its support from a small number of customers.

c. Pre-Rehearing Agreements

i. The Stipulation lacked substantial support.

The Commission's evaluation of the terms of the Stipulation, largely in areas outside the core scope of Duke Energy Ohio's post-MDP pricing proposals for generation service, changed the course of the Company's plans and those of its fellow stipulating parties. The Commission's September 29, 2004 Order increased the percentage of nonresidential shopping customers who could avoid the RSC[165] in an environment where switch rates were declining,[166] adjusted provisions for the AAC1 charge (making it depend on "*legitimate* expenses,"[167] reduced the pass-through of costs because "CG&E

[164] Order, Concurring Opinion of Chairman Alan R. Schriber at 1 (September 29, 2004).

[165] Order at 19 (September 29, 2004).

[166] Id. at 23.

[167] Id. at 32.

may be recovering some percentage of these costs through off-system sales,"[168] and left undetermined the degree to which it could be bypassed[169]), eliminated a deferral that would increase later distribution rates for residential customers,[170] prohibited a provision in the Stipulation that would require "any consumers to waive their statutory POLR rights,"[171] and refused to "allow the RTC collection from residential consumers to be extended beyond 2008."[172] The main change to standard service offer pricing, therefore, was refusal of the Commission to cede ongoing review of the Company's claimed capacity costs.[173]

The Company protested the Commission's oversight in Duke Energy Ohio's Application for Rehearing on October 29, 2004. Another round of secret negotiations of side deals accompanied the Company's protest, and the agreements included the terminology contained within the Company's New Proposal.[174] OCC Witness Hixon testified that both Gregory Ficke (president of CG&E at the time) and Timothy Duff (an employee of Cinergy Services at the time) stated that the Commission's adjustments to the Stipulation led to the second round of secret negotiations and agreements.[175]

---

[168] Id. See discussion of Talbot testimony in Section IV.A.2.a. of this brief referring to the Company's response to OCC Interrogatory RI 140.

[169] Id.

[170] *Id.* at 35.

[171] Id.

[172] Id. at 36. However, the five percent reduction in residential rates past 2005 that was contained in the Stipulation was eliminated, providing CG&E with compensating revenue. Id.

[173] As argued above, such scrutiny is appropriate, and is supported by the results of *Consumers' Counsel 2006*.

[174] OCC Remand Ex. 2(A) at 31-32 (Hixon).

[175] Id. at 32. OCC Remand Ex. 9 at 40 (Ficke).

Ms. Hixon testified regarding five side agreements bearing dates from October 28, 2004 to November 22, 2004, referred to in her testimony as "Pre-Rehearing Agreements,"[176] that involved the same Customer Parties as were involved in the Pre-PUCO Order Agreements.[177] Each agreement contained parallel provisions stating that the OHA, OEG, IEU, Cognis, and Kroger would "support an Application for Rehearing filed by the Cincinnati Gas & Electric Company . . . seeking to restore the Stipulation, without modification, . . . or . . . approval, without modification of the alternative proposal made by the Cincinnati [G]as & Electric Company in its application for rehearing, in Case No. 03-93-EL-ATA [the *Post-MDP Service Case*]."[178]

The Company's Application for Rehearing proposed post-MDP pricing based upon a price to compare and a provider of last resort ("POLR") charge made up of the RSC, a revised annually adjusted component ("AAC"), the SRT (the successor to the previous Reserve Margin charge), and an additional charge in the form of the IMF adder.[179] The Pre-Hearing Agreements again provided for the reimbursement of charges proposed by the Company in the Application for Rehearing through the end of 2008 or non-payment of such charges to Duke Energy Ohio,[180] and termination tied to the

[176] OCC Remand Ex. 2(A) at 30 (Hixon).

[177] Id. The side agreements are attached to Ms. Hixon's testimony as BEH Attachments 8-12.

[178] OCC Remand Ex. 2(A), BEH Attachment 8 at 3-4, ¶9; see also BEH Attachment 9 at 4, ¶8; BEH Attachment 10 at 5, ¶8; BEH Attachment 11 at 2, ¶5; BEH Attachment 12 at 5, ¶10.

[179] Company Application for Rehearing, Attachment 1 at 1-2.

[180] OCC Remand Ex. 2(A), BEH Attachment 8 at 2, ¶2 (RSC, IMF, AAC, FPP); BEH Attachment 9 at 2-3, ¶2a-2b (RSC, AAC, SRT, IMF); BEH Attachment 10 at 2-3, ¶1 (RSC, SRT, IMF); BEH Attachment 11 at 2, ¶2 (AAC, SRT, IMF, and emission allowance portion of price to compare); BEH Attachment 12 at 3-4, ¶¶1-3 (AAC and SRT).

outcome of the *Post-MDP Service Case*.[181] Some agreements also provided for reimbursement of non-bypassable regulatory transition charges that were set in the ETP case for the Company.[182] The side agreement with the hospitals again provided for a $50,000 payment to the Ohio Hospital Association,[183] and the side agreement with IEU again provided for a $100,000 payment to IEU for "legal services."[184]

The PUCO should find that the Pre-Rehearing Agreements significantly reduce the importance of stated support of the proposal contained in the Company's Application for Rehearing to replace post-MDP pricing according to the Commission's rules under Ohio Adm. Code 4901:1-35-02(C).[185] The support for the Company's New Proposal relied upon by the Commission is dramatically reduced if Customer Parties that entered into side agreements are excluded. Such support does not constitute "substantial support from a number of interested stakeholders" that might support waiver from the post-MDP pricing rules.[186]

[181] Id. at 37 (Hixon). See also, BEH Attachment 8 at 4, ¶¶A and B; BEH Attachment 9 at 5,¶¶A and B; BEH Attachment 10 at 5, ¶A; BEH Attachment 11 at 3, ¶¶A and B; BEH Attachment 12 at 6, ¶¶A and B.

[182] OCC Remand Ex. 2(A), BEH Attachment 9 at 2-3, ¶2a-2b; BEH Attachment 10 at 2-3, ¶1.

[183] Id., BEH Attachment 8 at 3, ¶4.

[184] Id., BEH Attachment 10 at 4, ¶4. Parties should be able to address these terms in the public record.

[185] OCC Remand Ex. 2(A) at 58 (Hixon).

[186] Ohio Adm. Code 4901:1-35-02(C).

ii. The Duke-affiliated companies mingled their functions in the Pre-Rehearing Agreements after they mingled their functions in the Pre-PUCO Order Agreements

Duke Energy Ohio, Cinergy Corp. and DERS were the Duke-affiliated companies that entered into the Pre-Rehearing Agreements with the Customer Parties.[187] The Pre-Rehearing Agreements bear a close correspondence to their counterparts in the Pre-PUCO Order Agreements, even though some factual circumstances changed other than the charges proposed by the Company changed in its Application for Rehearing. For instance, the IEU agreement with Cinergy Corp. continued to provide that Cinergy Corp. would create an affiliated company to provide service[188] even though CRS (later renamed DERS) was certified as a CRES by October before the date on the IEU agreement.[189]

The three individuals (Colbert, Gainer, and Ficke) who figured prominently in each of the Pre-PUCO Order Agreements were also important, each in the same manner, to the Pre-Rehearing Agreements.[190] The Pre-Rehearing Agreements continued to mix

[187] See OCC Remand Ex. 2(A) at 31 for a summary.

[188] Id., Attachment BEH 10 at 5, ¶7.

[189] OCC Remand Ex. 2(A) at 12. See also *In re Certification of Cinergy Retail Sales*, Case No. 04-1323-EL-CRS (October 7, 2004) (Certificate 04-124(1) issued).

[190] Mr. Ficke discussed his familiarity with the Pre-Rehearing Agreements in his deposition. OCC Remand Ex. 9 at 35-39, 41, 77 (Ficke). The agreements themselves speak to the involvement of Messrs. Colbert and Gainer. OCC Remand Ex. 2(A), Attachments 8-12.

the business of the Duke-affiliated companies in a manner that eliminates any notion that their operations related to the *Post-MDP Service Case* were separate and independent from one another. As an example of that mixing, the president of Duke Energy Ohio (then CG&E) and vice president of Cinergy Corp., Gregory Ficke, stated that the Pre-PUCO Order and Pre-Remand Rehearing Agreements involving Cognis were executed because, "from our standpoint the company, Cognis, agreed to support the stipulation and later our application for rehearing."[191]

The commitments in the Pre-Rehearing Order Agreements that involved Duke Energy Ohio again demonstrate that the Duke-affiliated companies acted together to settle the *Post-MDP Service Case*.[192]

iii. The stated support for the Company's proposals did not result from serious bargaining.

The Customer Parties to the Pre-Rehearing Agreements supported the Company's New Proposal as it was submitted in the Company's Application for Rehearing.[193] The support stated for the Company's New Proposal, which was commented upon in the decision by the Supreme Court of Ohio,[194] was tainted by the incentives provided by the Company to a few large customers in return for their support for the New Proposal. Only the Consumer Parties that entered into the Pre-PUCO Order Agreements were part of the

---

[191] OCC Remand Ex. 9 at 73. The positions held by Mr. Ficke were examined at his deposition (id. at 12). Exhibits 15 and 16 in the deposition, referred to in the question posed to Mr. Ficke (id. at 9), were attached to the deposition as exhibits and were also attached to the testimony of Ms. Hixon. See OCC Remand Ex. 2(A). Attachments 5 and 11.

[192] OCC Remand Ex. 2(A) at 45-46 (Hixon).

[193] See, generally, memoranda in support dated November 8, 2004.

[194] *Consumers' Counsel 2006* at ¶85.

second round of negotiations, and the support gained by the Company came from Customer Parties that negotiated to insulate themselves from charges proposed in the New Proposal. Support for the New Proposal did not result from serious bargaining with those who would bear the full range of the Company's new charges.

d. Implementation of the Pre-Rehearing Agreement provisions and the option agreements

i. The Pre-Rehearing Agreements took on four paths and resulted in additional side payments.

The Pre-PUCO Order Agreements, the City Agreement, and the Pre-Rehearing Agreements are important because they show how the Company aligned support for the Stipulation and the Company's New Proposal without seriously bargaining with representatives from any broad based organizations. The effects of side agreements with Customer Parties continued during this *Post-MDP Remand Case*, both as the result of the continuing effect of agreements already discussed and related "option agreements." These option agreements presented one of four basic paths taken by the Duke-affiliated companies regarding agreements with parties and former parties to the *Post-MDP Service Case*.

First, the option agreements show the continuing effect of the *Post-MDP Service Case* on positions taken in these cases by the OHA, OEG, and IEU who were selected for favored treatment by the Company. The option agreements were entered into "by CRS [re-designated DERS] with individual customers who were the Customer Parties in the Pre-Rehearing Agreements with the Hospitals, the OEG members and IEU-Ohio" and were "entered into after the PUCO's November 23, 2004 Entry on Rehearing, during the

period December 2004 through February 2005."[195] While no CRES supply has taken place by any Duke-affiliated company to OHA, OEG, or IEU members under earlier agreements, payment was made to OHA in the amount of $50,000 and to IEU in the amount of $100,000 as provided in both the Pre-PUCO Order Agreements and the Pre-Rehearing Agreements with these two parties.[196]

Second, the record also shows that another set of customers received favored treatment over other customers without entering into option agreements. One example of such favored treatment is the City Agreement, according to which the City received $1 million and agreed to withdraw from the *Post-MDP Service Case*.[197]

Third, Cognis, the Customer Party that entered into the two agreements previously mentioned with Cinergy Corp., received reimbursements as provided for by its Pre-Rehearing Agreement.[198] The Cognis agreement, dated October 28, 2004, provides reimbursements by Cinergy Corp. for portions of the AAC, SRT, IMF, and emission allowance payments that Cognis makes to Duke Energy Ohio in return for Cognis' agreement to support Duke Energy Ohio's Application for Rehearing and to take "full requirements generation service pursuant to [Cognis'] current tariff."[199] The Cognis agreement, unique according to former CG&E President Ficke who helped negotiate the

---

[195] OCC Remand Ex. 2(A) at 48 (Hixon).

[196] Id. at 47.

[197] Company Remand Ex. 3 at 33 (Steffen).

[198] OCC Witness Hixon illustrated how the payments were processed. OCC Remand Ex. 2(A) at 48. The payments were confirmed in a deposition of Gregory Ficke. OCC Remand Ex. 9 at 79 (Ficke).

[199] OCC Remand Ex. 2(A), BEH Attachment 11 at 2, ¶1 (Hixon).

deal,[200] provides concessions to a Duke Energy Ohio customer. The Cognis agreement is devoid of any pretense regarding a purpose other than purchasing support for Duke Energy Ohio's New Proposal and to defeat development of the competitive market for generation service by retaining Cognis as a customer of Duke Energy Ohio.

Fourth, Kroger also transacted business with the Duke-affiliated companies according to its Pre-Rehearing Agreement. Before the *Post-MDP Service Case* began, Kroger had a supply arrangement with a CRES provider and an agreement with CG&E to provide wholesale power to Kroger's CRES provider.[201] This arrangement demonstrates that the Company has received payments for its generating capacity, payments that have not been credited back to standard service offer customers.[202]

Kroger engaged in discussions with the Company because of its concern that the *Post-MDP Service Case* would result in Kroger paying capacity charges to its CRES provider as well as to the Company in the form of non-bypassable rates.[203] It entered into negotiations with CRS because Kroger's representatives believed that CRS, not CG&E, was the "wholesale supplier of the electricity that is purchased by New Energy" which "in turn . . . is the retail supplier of the electricity to Kroger."[204] Despite this incorrect belief -- demonstrated by the fact that CRS (now DERS) has no customers and no

---

[200] OCC Remand Ex. 9 at 77 (Ficke).

[201] OCC Remand Ex. 7, Deposition Ex. A (George).

[202] OCC Remand Ex. 1 at 43 (citing NHT Attachment 4, a response to OCC Interrogatory RI 140(k)).

[203] OCC Remand Ex. 7 at 29 (George).

[204] Id. at 25.

revenues[205] -- the combined Duke-affiliated companies have managed to transact business with Kroger according to provisions in the Kroger Pre-Rehearing Agreement.[206] That agreement provided benefits to Kroger by way of the wholesale supply of generation service by Duke Energy Ohio to Kroger's CRES provider.[207] Furthermore, Kroger has been permitted to bypass standard service offer capacity charges based upon this firm CRES supply, even though no notice of CRES supply through the end of 2008 was provided to Duke Energy Ohio as required by tariff.[208]

ii. The option agreements should be scrutinized for their details.

The twenty-two option agreements that are attached to OCC Witness Hixon's testimony[209] provide that the customers receive generation service from Duke Energy Ohio through the end of 2008 unless DERS chooses to provide the generation service at a specified price.[210] The customer receives payments ("option payments") while receiving generation service from Duke Energy Ohio.[211] The option payments "follow the pattern

[205] OMG Remand Ex. 4 at 61(Whitlock). The information filed by DERS with the Commission in Case No. 04-1323-EL-CRS provided financial statements for 2005, a period before Mr. Whitlock's involvement with DERS, that shows no revenues. OCC Remand Ex. 2(A), BEH Attachment 22.

[206] OCC Remand Ex. 2(A) at 48 (Hixon).

[207] Id. at 42-44. See also BEH Attachment 12, Bate stamp 1182-1183, ¶¶1 and 2.

[208] OCC Remand Ex. 2(A) at 66-68 (Hixon).

[209] Id., BEH Attachment 17.

[210] Id. at 50.

[211] Id. at 51.

of CRS reimbursing components of CG&E's Provider of Last Resort Charge established in the Pre-Rehearing Agreements."[212]

The option agreements provide concessions to OHA, OEG, and IEU members that are no different conceptually than those provided [redacted] ursuant to an agreement with a non-CRES entity (e.g. with Cinergy Corp.). It is mere pretense for anyone to argue that DERS' option agreements are no different than those of a CRES provider that is not affiliated with Duke Energy Ohio. The option payments are based upon the Pre-Rehearing Agreements, and they explicitly relate back to and supersede those Pre-Rehearing Agreements.[213] Providing an example for OHA, OEG, and IEU members, the [redacted] option agreement "supersedes and replaces in its entirety the agreement between CRS and Counterparty dated October 28, 2004."[214] The [redacted] option agreement states that it "supersedes and replaces the agreement between CRS and [redacted] ated November 22, 2004."[215] The Marathon option agreement states that it "supersedes and replaces the agreement between CRS and MAP [i.e. Marathon Ashland Petroleum] dated November 8, 2004."[216] Because the agreement dated November 8, 2004 involving "Industrial Energy Users-Ohio (IEU-Ohio) for the benefit of Marathon

[212] OCC Remand Ex. 2(A) at 51 (Hixon).

[213] Id. at 51

[214] Id., BEH Attachment 17 at Bate stamp 87.

[215] Id., at Bate stamp 9.

[216] Id., at Bate stamp 41.

Ashland, Inc." was entered into by Cinergy Corp.,[217] Cinergy Corp. executed the Marathon option agreement "[a]s to clause 9.7 [containing the superseding language]."[218]

A spontaneous and clear statement of the lineage of the option agreements and option payments was provided by James Ziolkowski. Mr. Ziolkowski is a Rate Supervisor for Shared Services, and he testified in the *Post-MDP Service Case* regarding the Company's CMO proposal.[219] His understanding of the background for electric restructuring and the history of the *Post-MDP Service Case* is extensive.[220] In May 2006, a financial forecasting analyst inquired of Mr. Wathen (also a witness in this case) about the "concept behind the CRES payments" of approximately $22 million annually.[221] Mr. Wathen referred the inquiry to Mr. Ziolkowski because "[he] and Tim [Duff] are the only ones [he was] aware of who kn[e]w this stuff."[222] Mr. Ziolkowski's response was as follows:[223]

> Here is the history behind the so-called "CRES" payments:
>
> During late 2003, the Public Utilities Commission of Ohio asked all of the electric investor-owned utilities in the State of Ohio to prepare and submit Rate Stabilization Plans. At that time, we were still in our Market Development period following the implementation of electric Customer Choice in January 2001. During the Market Development Period, electric rates were frozen, and the original plan was for all of the utilities to offer market-based rates following the end of the Market Development period.

---

[217] Id., BEH Attachment 10 at 1.

[218] Id., BEH Attachment 17 at Bate stamp 42.

[219] *Company Ex. 5 (Ziolkowski); OCC Remand Ex. 8 at 7 (Ziolkowski).*

[220] Id. at 27-34.

[221] OCC Remand Ex. 2(A), BEH Attachment 21 at Bate stamp 647.

[222] Id., Bate stamp 646.

[223] Id. at Bate stamp 645-646.

The Market Development period was scheduled to end no later than 12/31/05.

By 2003, the PUCO and other groups became concerned that the competitive electric retail market in Ohio was not sufficiently robust to prevent wild price swings under pure competition and market pricing. The problems in California and the subsequent Enron meltdown also colored their feelings. As a result, they asked the utilities to offer Rate Stabilization Plans in lieu of pure market pricing.

CG&E (Duke Energy Ohio) filed its RSP (know as the Electric Reliability and Rate Stabilization Plan, ERRSP) during the first half of 2004. A number of large customers, some represented by industry groups, intervened in the filing. The interveners represented a roadblock, however. To eliminate this roadblock and prevent a formal hearing, CG&E negotiated special conditions with the interveners and ultimately reached agreements with them.

The original settlement agreement with the interveners called for Cinergy to form a "CRES" (Certified Retail Electric Supplier - the State of Ohio must certify all retail electric providers in terms of creditworthiness, etc.). The Cinergy CRES was to provide generation service for the interveners at pre-specified, contractual rates. At the last minute (i.e. December 2004), Cinergy's top management decided that the CRES settlement was too risky, and Cinergy essentially decided not to follow through with the contract. To prevent lawsuits for breach of contract, Cinergy entered into negotiations with each of the parties and agreed to make monthly or quarterly payments in lieu of offering generation service from the CRES.

So as you can see, the "CRES" customers are actually full-requirement customers of Duke Energy Ohio, but they receive payment from the Company instead of receiving generation service from the Cinergy CRES (the Cinergy CRES does not have any retail customers, but has at least $22 million of expenses).

The payments for each group of the "CRES" customers differ from each other. Generally speaking, the contracts with each group specify that the customers belonging to that group will receive refunds of various RSP riders (e.g., Rider AAC, Rider FPP, Rider IMF, Rider SRT, etc.). Each month or quarter, I prepare statements that show the amount of money that is to be refunded to each customer, and the payments are made from the CBU's (non-regulated generation) budget.

> These payments will last through December 2008 at which point the ERRSP will terminate.
>
> By the way, the "CRES" customers include some of the largest retail customers in the service territory: AK Steel, Procter & Gamble, General Electric, Ford, Ashland/Marathon, all of the hospitals, and others. That is why the payments total about $22 million per year. AK Steel by itself is a 220 MW customer.
>
> Hope this helps.

The message is detailed and clear: "CG&E negotiated special conditions with interveners" who "represented a roadblock," and "top management decided that the CRES settlement was too risky."[224] Mr. Ziolkowski explained that "risky" referred to serving "large industrials at a fixed price given the volatile market conditions."[225] Therefore, "Cinergy top management" did not intend that a direct supply relationship exist between any of the affiliated companies and Customer Parties. Thus, the Cognis Pre-Rehearing Agreement only appears conceptually separate from the final agreements that DERS entered into with the Customer Parties. The Cognis Pre-Rehearing Agreement turned out to be the model for settlement of the *Post-MDP* and *Post-Remand Cases* -- i.e. generation service by Duke Energy Ohio through the end of 2008 and reimbursements for payments made to Duke Energy Ohio.

The OHA, OEG, and IEU can be expected to argue in favor of the Company's New Proposal, knowing that their members receive increased payments from DERS to compensate for increased payments to Duke Energy Ohio. Their lack of opposition to

[224] Id.

[225] OCC Remand Ex. 8 at 35 (Ziolkowski).

rate increases that other customers are largely left to pay -- or even the lack of opposition to the existence of charges such as the IMF -- must be viewed in this light.

3. The Company's approach to post-MDP service is discriminatory and has dealt the development of competitive markets a serious blow.

a. Overview

The Order in this case cites the "good cause shown" exception to the Commission's post-MDP pricing rules, Ohio Adm. Code 4901:1-35-02(B),[226] and emphasizes the need to encourage a competitive market for generation service.[227] The record contains ample evidence that the Company's discrimination that favored certain large customers has had a devastating effect on the development of the competitive market. The record also demonstrates that the wholly or partly non-bypassable charges among the components of the Company's post-MDP pricing, along with conditions placed on the bypassability of some charges, create barriers to entry for the competitive provision of generation service to customers of Duke Energy Ohio.

During 2004, when the Commission held its last full hearing in this matter, the switching rates to competitive retail electric service ("CRES") providers for commercial, industrial, and residential customers were 22.04, 19.87, and 4.91 percent.[228] It was hoped that Duke Energy Ohio's standard service offer would usher in a period in which the competitive electricity market would further develop and mature. In fact, the switching statistics had fallen to 8.40, 0.36, and 2.32 percent for commercial, industrial, and

---

[226] Order at 21 (September 29, 2004).

[227] See, e.g., Order at 18-20.

[228] Tr. Vol. II at 133 (CG&E Witness Stevie) (2004) (cited in OCC Remand Ex. 2(A) at 62, as corrected in OCC Remand Ex. 2(B)) (Hixon)).

residential customers by December 31, 2006.[229] The record provides evidence of the source of the decline in switching levels. In the event that all Customer Parties that are listed on OCC Remand Ex. 5 (all of whom shopped at the time of the 2004 hearing) had continued to shop using approximately the same usage in 2006 (shown on OCC Remand Ex. 4), the combined commercial and industrial shopping rate would have been 22.1 percent using megawatt hour sales in the area served by Duke Energy Ohio for the first quarter of 2006[230] and 20.3 percent for second quarter 2006.[231] The side deals between Duke Energy Ohio and the Customer Parties have devastated the competitive market.

The record reveals that the Commission needs to make adjustments to invigorate the competitive market.

b. The side agreements are discriminatory and have played a key anti-competitive role.

The total effect of the post-MDP generation pricing by the Company is discriminatory in favor of the Customer Parties. R.C. 4905.35 states:

> No public utility shall make or give any undue or unreasonable *preference or advantage* to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage.

[229] OCC Remand Ex. 2(A) at 63 (Hixon).

[230] The percentage is arrived at by dividing the "Grand Total" of megawatt-hours on OCC Remand Ex. 4 (218,380.651) by the total megawatt-hours for the combined commercial and industrial classes on OCC Remand Ex. 5, page 1 (i.e. 485,516 plus 501,104, or 986,620 MWH for the quarter ending March 31, 2006). Company Witness Steffen agreed that the usage figures on OCC Remand Ex. 4 are kilowatt-hours and not megawatt-hours. Tr. Vol. 1 at 114 (2007).

[231] The percentage is arrived at by dividing the "Grand Total" of megawatt-hours on OCC Remand Ex. 4 (218,380.651) by the total megawatt-hours for the combined commercial and industrial classes on OCC Remand Ex. 5, page 3 (i.e. 542,675 plus 534,493, or 1,077,168 MWH for the quarter ending June 30, 2006).

Furthermore, R.C. 4928.14(A) states:

> After its market development period, an electric distribution utility in this state shall provide consumers, on a comparable and *nondiscriminatory* basis within its certified territory, a market-based standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers.[232]

The latter statute forms the backbone of what Duke Energy Ohio refers to as its "provider of last resort" obligation, but it also requires that the Company provide its services free of discriminatory treatment of its customers.

The Company's treatment of its customers is highly discriminatory. Only Customer Parties received discounts on their electric service, leaving other customers (including directly comparable customers[233]) with higher standard service offer rates. The record reveals that the option agreements attached to the testimony of OCC Witness Hixon are the only option agreements executed,[234] and the Cognis and Kroger agreements were unique.[235] To the extent that charges to Customer Parties are "market-based" as required by R.C. 4928.14(A), then the standard service offer rates charged to other customers are too high. As an example, the reimbursements to Marathon Ashland include:

- Regulatory Transition Charge (RTC)
- Annually Adjusted Component of POLR Charge (AAC)

[232] Emphasis added.

[233] The discrimination is most obvious when comparing the net payments for a location such as a Marathon station or Kroger store (Customer Parties) with their competitors across the street. The anti-competitive activities of Duke Energy Ohio also threaten to be anti-competitive in markets where producer-suppliers use electricity.

[234] OCC Remand Ex. 8 at 25 (Ziolkowski); Tr. Vol. III at 48-50 (Hixon).

[235] OCC Remand Ex. 9 at 77 (regarding Cognis); id. at 88 (regarding Kroger) (Ficke).

- Fuel and Purchase Power (FPP) - includes Emission Allowance Expense
- 50% of System Reliability Tracker (SRT)
- Infrastructure Maintenance Fund (IMF) Charge in excess of 4% of "little g"
- Electric Choice Insufficient Return Notice Fee charge to customers, who have given notice of their return to CG&E standard tariff service on or before 12/30/2004 and are actively taking CG&E service no later than 01/31/2005.[236]

The substantial discounting of standard service offer rates should be available to the other customers of the Company, including residential customers.[237] The Company's handling of the *Post-MDP Service Case* in which the Company obtained support by arranging reimbursements for payments to the Company demonstrates that the standard service offer rates are not tightly based upon costs.

The Commission's finding in November 2004 that "the modifications of the opinion and order suggested by CG&E . . . will further encourage the development of the competitive markets"[238] was not informed by any analysis of the Company's side agreements and their likely impact upon development of the competitive market. The side agreements deal with the Company's settlement of the *Post-MDP Service Case* as well as subsequent and related reimbursement to Customer Parties for their payments to the Company for generation-related service. As stated by OCC Witness Hixon:

> The side agreements were designed to retain generation business for the Company and to encourage the return of customers to the Company. * * * [T]he DE-Ohio affiliated companies used the side agreements to discriminate among customers and erect barriers to

[236] OCC Remand Ex. 2(A), Attachment 17 at Bate stamp 44 (Marathon Ashland, Inc.).

[237] The OCC does not endorse the form of the discounts provided by the Duke-affiliated companies. The RTC is non-bypassable by statute, and an Insufficient Return Notice Fee contained in the Company's tariffs may not be waived. *In re Complaint of Suburban Fuel Gas Against Columbia Gas*, PUCO Case No. 86-1747-GA-CSS, Order at 23 (August 4, 1987).

[238] Entry on Rehearing at 14 (November 23, 2004).

> entry in the generation market for non-DEO[hio-]affiliated CRES providers.[239]

The Company has maintained throughout these proceedings that the Duke-affiliated companies that are parties to the side agreements are separate and independent of one another. However, as has been shown, the side agreements are inextricably linked to the operations of the Company. As an example, the Chief Financial Officer of the regulated business unit for the Cinergy-affiliated companies evaluated the *Post-MDP Service Case* in early 2005 by listing the CRS option payments as reductions to Company standard service offer charges to arrive at "RSP Related Revenues."[240]

The facts elicited by the OCC and presented in testimony in the *Post-MDP Remand Case* should enliven a discussion regarding the proper role of electric utility affiliates that has been left largely dormant since the early days for Ohio's restructuring of electric utility regulation. All electric utilities filed electric transition plans and committed to follow corporate separation rules. For instance, Ohio Adm. Code 4901:1-20-16(A) was adopted "so a competitive advantage is not gained solely because of corporate affiliation. This rule should create competitive equality, preventing unfair competitive advantage and prohibiting the abuse of market power." The *Post-MDP Service Case* illustrates the combined use of incumbent utility market power and its affiliated companies to roll back the development of the competitive market for generation service.

[239] OCC Remand Ex. 2(A) at 61-62 (Hixon).

[240] Id. at 63-64 (citing BEH Attachment 23).

Other provisions within the corporate separation rules are applicable under the facts revealed in these cases. In Ohio Adm. Code 4901:1-20-16(G)(1)(c), the Commission required that "[e]lectric utilities and their affiliates that provide services to customers within the electric utility's service territory shall function independently of each other...." Also, Ohio Adm. Code 4901:1-20-16(G)(4)(h) required that "[e]mployees of the electric utility or persons representing the electric utility shall not indicate a preference for an affiliated supplier." This independence (or lack of preference) is lacking for Duke Energy Ohio, Cinergy Corp., and DERS. Separate operations are really impossible in the environment created by the Duke-affiliated companies since all companies share the same professional staff.

In Ohio Adm. Code 4901:1-20-16(G)(4)(j), the Commission required that "[s]hared representatives or shared employees of the electric utility and affiliated competitive supplier shall clearly disclose upon whose behalf their representations to the public are being made." Corporate counsel are an example of shared employees. The designation of trial counsel for Duke Energy Ohio -- i.e. representation as "Senior Counsel, The Cincinnati Gas & Electric Company"[241] -- on agreements with Customer Parties that committed customers to support the Stipulation and the Company's Application for Rehearing mixed the representation of the electric utility (CG&E) with the Company affiliate (Cinergy Corp. or CRS) designated in the agreement. The role of CG&E President Ficke at the meetings with Kroger regarding side agreements involving CRS also seems to have been confusing.[242] Mr. Ficke's participation in meetings with

[241] See, e.g., OCC Remand Ex. 2(A), Attachment 2 at 5.

[242] OCC Remand Ex. 7 at 21-22 (George).

[redacted]nay have contributed to the mistaken impression b[redacted]epresentative [redacted]that CRS was the provider of wholesale power t[redacted]when CG&E was actually the provider.[243]

In addition to the above-stated rules, the Commission's Staff has the authority pursuant to Ohio Adm. Code 4901:1-20-16(I)(1) and (2) to examine the records of the utility and its affiliates, and they "may investigate such electric utility and/or affiliate operations and the interrelationship of those operations." The *Post-MDP Remand Case* provides ample reason for the Commission's Staff to conduct additional investigations regarding the interrelationships between the Duke affiliates. Such an investigation should address the broad subject matter rather than the narrower topics that the OCC could inquire into as a matter of discovery in an existing case. Duke Energy Ohio should be required to show cause why it is not in violation of corporate separation requirements regarding affiliate interactions.

c. Duke Energy Ohio's standard service offer price components should be bypassable.

An important feature of Duke Energy Ohio's standard service offer is that four of its six price components are not fully bypassable by customers who switch to CRES providers. Only the tariff generation rate (i.e. 85 percent of "little g") and the FPP are fully bypassable.[244] In spite of the fact that all the standard service offer charges are generation-related, the IMF, the AAC, the RSC and the SRT are not fully bypassable. The record reveals that the only customers that have been able to bypass any portion of

[243] OCC Remand[redacted]

[244] OCC Remand Ex. 2(A) at 53 (Hixon).

the IMF in net payments are those Customer Parties who, through side agreements, have agreed to remain with Duke Energy Ohio generation service through the end of 2008 and receive reimbursements of IMF payments.[245] This helps to explain the loss of market share by CRES providers in the two and a half years since the Commission approved Duke Energy Ohio's standard service offer.

While the Company argues that at least some percentage of customers can bypass all but a small percentage of standard service offer charges, OCC Witness Talbot pointed out that even an apparently small non-bypassable charge can threaten a large percentage of competitive retailers' profit margins -- margins that can be very small.[246] Mr. Talbot explained that non-bypassable charges, for an entire class of customers or for part of a customer class, impose a barrier to competitive supply of generation service.[247] In particular, the termination of the IMF charge (which is totally non-bypassable in the Company's tariffs) would remove a barrier to competitive entry into the electricity marketplace.

4. The Company's approach to post-MDP service has raised additional problems that should be addressed.

Some of the Option Agreements provide for reimbursement of a regulatory transition charge ("RTC").[248] The payment of RTC by all customers is more than a

[245] See, e.g., OCC Remand Ex. 2(A), BEH Attachment 17 at Bate stamp 89 (payment to [redacted]

[246] Tr. Vol. II at 84-85 (2007) (Talbot).

[247] OCC Remand Ex. 1 at 62-63 (Talbot).

[248] See, e.g., OCC Remand Ex. 2(A), Attachment 17 at Bate stamp 44 (Marathon Ashland, Inc.).

matter of fairness,[249] but is a requirement pursuant to R.C. 4928.37. Among other matters, that statute provides that the "transition charge shall not be discounted by any party."[250] As stated by OCC Witness Hixon: "The Duke-affiliated companies have turned the RTC into a bypassable charge that is no longer competitively neutral (i.e. it is bypassed only by certain customers with side agreements)."[251]

The Commission did not previously receive the information presented by the OCC in this *Post-MDP Remand Case*, partly because of the negotiating process in the *Post-MDP Service Case* during which parties involved in side deals did not disclose their deals to the OCC. The concerns of the Supreme Court of Ohio in *Time Warner AxS v. Pub. Util. Comm.* (1996), 75 Ohio St.3d 229, 234, 661 N.E.2d 1097 are worth repeating:

> [W]e feel compelled to note our grave concern regarding the partial stipulation adopted in the case at bar. The partial stipulation arose from settlement talks from which an entire customer class was intentionally excluded. This was contrary to the commission's negotiations standard . . . . * * * Ameritech managed to either settle its competitive issues or defer them until a later date, all without having its competitors at the settlement table. Under these circumstances, we question whether the stipulation, even assuming the commission's authority to approve it, promotes competition in the telephone industry as intended by the General Assembly. We could not create a requirement that all parties participate in all settlement meetings. However, given the facts in this case, we have grave concerns regarding the commission's adoption of a partial stipulation which arose from the exclusionary settlement meetings.[252]

---

[249] See id. at 69.

[250] R.C. 4928.37(A)(3). During cross examination, counsel for Kroger suggested that R.C. 4928.37(A)(4) was applicable. Tr. Vol. III at 135. Counsel probably intended to refer to R.C. 4928.37(A)(4), which provides that "[n]othing 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." As stated earlier, R.C. 4905.35 regarding discriminatory pricing has been violated.

[251] OCC Remand Ex. 2(A) at 69 (Hixon).

[252] *Time Warner AxS v. Public Util. Comm.*, 75 Ohio St. 3d 229.

Problems in the negotiating process in the *Post-MDP Service Case* stem from not listening to the Court's concerns.

The *Post-MDP Service Case* addressed the post-MDP pricing of generation service, including the applicability of the Commission's post-MDP pricing rules (i.e. Ohio Adm. Code 4901:1-35) and the extent to which competitive markets would set pricing for generation services. A series of vacuous settlement meetings were conducted to which parties to the *Post-MDP Service Case* were invited, but the Ziolkowski e-mail (quoted at length above) makes it clear that the substantive negotiations took place to consider the future of CRES generation supply without the representation of marketers or broad based consumer groups whose consumers would bear most of the burden of the generation charges. *Time Warner* states that the Court does not prohibit "caucuses" between parties during the course of negotiations, but a rush to adopt a partial settlement without addressing core concerns in a case is against public policy and will be scrutinized by the Court.

OCC Witness Hixon stated her concerns regarding the end of the negotiations and the hearing process in the *Post-MDP Service Case*:

> The statement on the record regarding separate negotiations at the time of the hearing in the Post-MDP Service Case was made by Staff Witness Cahaan that the "Staff encouraged the company to meet individually with each of the parties in the case to work out their individual problems." However, that statement was accompanied by an assurance from Staff Witness Cahaan that "[a]ll parties to the case were notified and were invited to participate in the settlement discussions." The Commission apparently relied upon this representation, stating in its September 29, 2004 Order that "[t]here is no evidence that all parties were not invited to participate in settlement discussion. As a matter of fact, testimony at the hearing indicates that all parties participated in negotiating sessions . . . ." Contrary to this belief held by the

> Commission, the side agreements in the May 2004 time frame show that a great deal of negotiation and agreement was undertaken outside the view of the OCC and was not revealed in testimony in this case.[253]

Proceedings to set rates for large portions of the public should be conducted so as to as provide the Commission and the public with a broad view of issues, and to permit parties to develop and present their cases as provided for under Ohio's statutes and the Commission's rules. The Commission should take notice and respond appropriately to the additional information that the OCC has elicited and presented in the *Post-MDP Remand Case.*

V. CONCLUSION

Two fundamental topics were covered by the remand from the Supreme Court of Ohio: whether the Company's New Proposal was supported by evidence and whether evidence of side financial arrangements should affect the outcome of these cases. The evidence presented by the OCC, principally in the form of testimony by Mr. Neil Talbot, demonstrates that the Company cannot support the charges in its New Proposal using the evidence submitted during the hearing in 2004 and the Company has not provided any supplemental testimony that supports the level of its standard service charges. The duplication in the Company's capacity charges should be eliminated, and the standard service offer rates should be based more closely on verifiable costs that reflect market-based prices.

The evidence presented by the OCC, principally in the form of testimony by Ms. Beth Hixon, demonstrates that the Company and its affiliates jointly orchestrated financial arrangements that removed opposition to the Company's proposals by a number

[253] OCC Remand Ex. 2(A) at 70 (Hixon) (citations omitted).

of large customers. The Commission should understand that the Customer Parties' support for the Company's proposals was bought by the Duke-affiliated companies out of the pocketbooks of customers (for instance, residential customers) who did not receive the Company's favored attention and have instead paid the excessive standard service offer rates proposed by Duke Energy Ohio. The evidence also reveals that the interaction between the Company and its corporate affiliates presents obstacles to the development of the competitive generation market in areas served by Duke Energy Ohio. The Commission, with the assistance of its Staff, should exert its supervisory authority over Duke Energy Ohio to resolve the problems identified in the OCC's testimony.

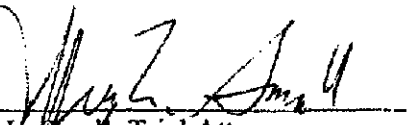
The Commission should re-evaluate this case given the overwhelming evidence demonstrating that signatories to the Stipulation, who largely became the supporters of the Company's New Proposal, were given inducements to settle that lessened or eliminated the impact of new charges on these parties. The Commission should base Duke Energy Ohio's standard service offer rates for the period ending December 31, 2008 on verifiable costs. Revenues from shared resources should be used to arrive at net costs for standard service offer rates, and rate components such as the IMF that have no cost basis should be eliminated.

The Commission's intent to foster competition has been seriously undermined by the side agreements. The dealings that helped settle the *Post-MDP Service Case* must cease in order to promote reasonable rates for all customers and to encourage competition. The Commission should also encourage the development of the competitive market for generation service by making all standard service offer rates bypassable.

Finally, the Commission should direct its Staff to investigate the interrelationships between the Company and its affiliates, including any Company abuses of its corporate separation requirements. These interrelationships -- including the means by which DERS is able to run ever increasing losses as the result of payments to large customers without performing any supply function -- should be fully reviewed and audited.[254] The source of funds for over $20 million per year in side deal payments should be carefully examined in the review and audit to determine the extent to which customers who did not receive payments were harmed. Duke Energy Ohio should be required to show cause why it is not in violation of corporate separation requirements regarding affiliate interactions.

Respectfully submitted,

Janine L. Migden-Ostrander
Consumers' Counsel



Jeffrey L. Small, Trial Attorney
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
Telephone: 614-466-8574
Fax: 614-466-9475
E-mail small@occ.state.oh.us
hotz@occ.state.oh.us
sauer@occ.state.oh.us

[254] OCC Remand Ex. 2(A) at 73-74 ("review or audit" by "Staff (or an auditor hired by the Staff at DE-Ohio's expense)") (Hixon).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing (confidential) *Initial Post-Remand Brief, Hearing Phase I, by the Office of the Ohio Consumers' Counsel,* has been served upon the below-named persons in unredacted form (pursuant to the Attorney Examiners' instructions) via electronic transmittal this 13th day of April 2007.

Jeffrey L. Small
Assistant Consumers' Counsel

emooney2@columbus.rr.com
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com
sam@mwncmh.com
dneilsen@mwncmh.com
barthroyer@aol.com
mhpetricoff@vssp.com
mchristensen@columbuslaw.org
paul.colbert@duke-energy.com
rocco.d'ascenzo@duke-energy.com
mdortch@kravitzllc.com
Thomas.McNamee@puc.state.oh.us
ricks@ohanet.org
anita.schafer@duke-energy.com

Scott.Farkas@puc.state.oh.us
Jeanne.Kingery@puc.state.oh.us

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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-ATA
Procedures for Capital Investment in its	)	03-2081-EL-AAM
Electric Transmission And Distribution	)	05-724-EL-UNC
System And to Establish a Capital	)	05-725-EL-UNC
Investment Reliability Rider to be	)	06-1068-EL-UNC
Effective After the Market Development	)	06-1069-EL-UNC
Period	)	06-1085-EL-UNC

INITIAL POST-HEARING BRIEF OF THE OHIO MARKETERS GROUP

CONFIDENTIAL VERSION

April 13, 2007

TABLE OF CONTENTS

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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-ATA
Procedures for Capital Investment in its	)	03-2081-EL-AAM
Electric Transmission And Distribution	)	05-724-EL-UNC
System And to Establish a Capital	)	05-725-EL-UNC
Investment Reliability Rider to be	)	06-1068-El-UNC
Effective After the Market Development	)	06-1069-EL-UNC
Period	)	06-1085-EL-UNC

INITIAL POST-HEARING BRIEF OF
THE OHIO MARKETERS GROUP

I. INTRODUCTION

The matter at bar concerns the remand of the Duke Energy Ohio [then known as Cincinnati Gas & Electric Company ("CG&E")] (hereinafter "Duke/CG&E") proposed Rate Stabilization Program ("RSP") decision in consolidated docket 03-93-EL-ATA. The Supreme Court approved the RSP in concept, but remanded the case on two issues. The first was to determine if alleged side agreements between signatory parties and Duke/CG&E tainted a May 19, 2004 stipulation in docket 03-93-EL-ATA (the "Stipulation") agreed to by only some of the parties in the case. Acceptance of the Stipulation formed the basis of some of the RSP rates. The Court also determined that separate and apart from the issue as to the validity of the Stipulation, certain of the RSP rate components including the infrastructure maintenance fund ("IMF"), were created in the Second Entry On Rehearing, and thus have no support in the evidentiary record. Thus, the High Court required the Commission to rehear the validity of the new RSP rate components including the IMF charge.

The Ohio Marketers Group ("OMG") participated in the original 03-93-EL-ATA proceeding and opposed the Stipulation in general, and the provider of last resort ("POLR") fees in particular. Now that the discovery has been completed on the side agreements, the evidence is overwhelming that the Stipulation was not a settlement negotiated by adverse parties, but one of purchased favors. As such, the Commission cannot rely on the Stipulation and must evaluate the remanded RSP rate components without regard to the Stipulation.

The record in this case also shows the IMF charge is not based on actual cost, does not fund discreet wire services and consists mainly of a request for increased payment for a franchise monopoly service. As such, the validity of the IMF for standard service customers is questionable at best, but the IMF certainly does not qualify as cost based utility service, which is the requirement for a non by-passable charge. For these reasons, the Commission should reject the IMF charge, or at a minimum make it a by-passable charge. Further, in light of the improper side agreements which appear to be aimed at eliminating competition and customer choice, the Commission should order Duke/CG&E to meet with the Staff and the competitive retail electric suppliers authorized to provide retail energy on the Duke/CG&E system to review existing barriers to market development.

Finally, Sections 4905.04 through 4905.06, Revised Code vests with the Commission both the authority and the responsibility to enforce the statutes and rules regulating the holders of state franchised monopolies. Even a cursory examination of the side agreements exposes a course of conduct where three cardinal principles of utility regulation have been intentionally violated. Sections 4905.32, 4905.33, and 4905.35