BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio for Approval of an Electric Security Plan.	)))	Case No. 08-0920-EL-SSO
In the Matter of the Application of Duke Energy Ohio for Approval to Amend Accounting Methods.	)))	Case No. 08-0921-EL-AAM
In the Matter of the Application of Duke Energy Ohio for Approval of a Certificate of Public Convenience and Necessity to Establish an Unavoidable Capacity Charge.	)))))	Case No. 08-0922-EL-UNC
In the Matter of the Application of Duke Energy Ohio for Approval to Amend its Tariff.	)))	Case No. 08-0923-EL-ATA

APPLICATION FOR REHEARING BY THE SIERRA CLUB OHIO CHAPTER AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential consumers of Duke Energy Ohio, Inc. ("Company" or "Duke") and the Sierra Club pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35(A), applies for rehearing of the Opinion and Order issued by the Public Utilities Commission of Ohio ("PUCO" or "Commission") on December 17, 2008. The OCC and Sierra Club submit that the Commission's Opinion and Order in the above-captioned cases is unreasonable and unlawful in the following particulars:

A. Assignment of Error 1: The Commission's Opinion and Order unreasonably and unlawfully denied residential aggregation customers the opportunity to fully bypass standby service when they purchase generation from an entity other than Duke.

1. The Commission erred in applying its standard for partial stipulations to the issue of the bypassability of SRA-CD and SRA-SRT by residential governmental aggregation customers when all parties to the Stipulation agreed to carve the issue out of the Stipulation for litigation.

2. The Commission's failure to allow residential aggregation customers to avoid rider SRA-CD is inconsistent with its treatment of residential aggregation customers and shopping customers in the FirstEnergy service territory.

3. The Commission's Opinion and Order unreasonably discriminates against residential governmental aggregation customers in not permitting them to avoid the SRA-CD rider when they shop and requiring them to return to the same standard service offer price as non-residential governmental aggregation customers who are permitted to avoid the SRA-CD rider when they shop.

4. The Commission's Opinion and Order unreasonably narrowly interprets SB 221's definition of "standby service" as it relates to shopping customers when the language of the statute specifically identifies the definition.

B. Assignment of Error 2: The commission erred when it failed to provide for standards, due process opportunities and approval criteria for exemptions from Rider SAW by mercantile customers.

1. The Commission failed to apply the three prong test to the Stipulation, which called for limiting Mercantile Opt-Out to 3 MW.

2. Neither the Commission's Opinion and Order nor the Commission's rules provide for due process for parties to contest the legitimacy of granting the exemptions for contributions to the energy efficiency rider.

3. Neither the Commission's Opinion and Order nor the Commission's rules provide for standards that mercantile customers must meet to obtain an exemption from Rider SAW.

4. Neither the Commission's Opinion and Order nor the Commission rules clarify the consequences of an exempted mercantile customer's failure to meet the energy savings projected during its application for an exemption.

The reasons for granting this Application for Rehearing are set forth in the accompanying Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. HISTORY AND STATEMENT OF THE ISSUES

The Commission issued its December 17, 2008 Opinion and Order in response to the Application of Duke Energy Ohio for Approval of an Electric Security Plan ("Application") and in response to a Stipulation and Recommendation ("Stipulation") signed and docketed by several parties, including Duke OCC and the Sierra Club on October 27, 2008. All issues were resolved by the Stipulation except for the issue as to whether residential governmental aggregation customers could avoid Rider SRA-SRT and would receive the shopping credit (or could avoid Rider SRA-CD) as non-residential governmental aggregation customers are permitted. All parties to the stipulation

explicitly "carve[d] out for litigation. . ." the by-passability by residential governmental aggregation customers of the Rider SRA-CD and Rider SRA-SRT in the stipulation.[1] During the evidentiary hearing on November 10, 2008, the parties in this case litigated another issue, an issue settled by all parties except the Industrial Energy Users-Ohio ("IEU"). This issue addresses which mercantile customers could be exempted from the energy efficiency rider, Rider SAW.

Parties filed initial briefs on November 17, 2008 and reply briefs on November 26, 2008.

II. ARGUMENT

A. Assignment of Error 1: The Commission's Opinion and Order unreasonably and unlawfully denied residential aggregation customers the opportunity to fully bypass standby service when they purchase generation from an entity other than Duke.

1. The Commission erred in applying its standard for partial stipulations to the issue of the bypassability of SRA-CD and SRA-SRT by residential governmental aggregation customers when all parties to the Stipulation agreed to carve the issue out of the Stipulation for litigation.

In the Opinion and Order the Commission should not have found that the three prong test does apply to the issue as to whether residential aggregation customers should be permitted to bypass SRA-CD and SRA-SRT.[2] The Commission identified two problems with applying the statutory standard to the residential aggregation customer bypass issue rather than the partial stipulation standard.

First, the Commission insisted that because "Others remained in agreement as to this provision" and because no one else argued that residential aggregation customers

[1] Stipulation at 32, fn 11.
[2] O&O at 28.

should be permitted to bypass SRA-CD and SRA-SRT there was a partial stipulation.[3] However, a partial stipulation occurs only when one or more parties dissents from the outcome produced in a stipulation. In such cases, parties will not sign the stipulation[4] or will sign on to only certain portions of a stipulation.[5] Or the parties will sign only a Supplemental Stipulation.[6] That was not the case in this Stipulation. In this Stipulation all parties were able to satisfy their positions on the issue by agreeing to "carve out" and "litigate" an issue, asking the Commission to decide the issue by employing the evidentiary standard set forth in the guiding statute. In so doing, no party to the Stipulation explicitly took a position on residential governmental aggregation and apart from noting that it would be litigated, there is very little in the Stipulation on the subject.

Whether or not any other parties contested the issue is not relevant to whether an issue is partially settled or not. Frequently a party will sign on to a stipulation that has provisions with which the party is not concerned but the party does so in order to get approval of only the limited issues with which the party is concerned. Just because other parties are not willing to take advantage of such provisions in a stipulation does not mean that the provision is partially stipulated. For example, if residential customers are willing to include a provision about interruptible service but do not take advantage of that provision, that does not mean that the provision is partially stipulated. Just because OCC

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[3] Id.

[4] This is how IEU resolved its concerns with exemptions for mercantile customers.

[5] This is how North Coast Gas Transmission LLC and Ohio Gas Marketers Group handled a stipulation that resolved issues in multiple cases, including some cases in which those parties did not intervene. *In the Matter of the Regulation of the Purchased Gas Adjustment Clauses Contained Within the Rate Schedules of Columbia Gas of Ohio Inc. And Related Matters,* Case No. 05-221-GA-GCR et al, Joint Stipulation and Recommendation (December 28, 2007) at fns 14 and 18.

[6] In Case No. 05-1125-EL-ATA et. al. OCC signed only the Supplemental Stipulation docketed on November 7, 2005 in exchange for not contesting the Stipulation filed with the Application docketed on September 9, 2005. However, OCC would not sign the Initial Stipulation in that case.

is the only party that took advantage of the opportunity to contest the residential governmental aggregation bypassability issue does not mean that the provision was partially stipulated.

Moreover, Duke Witness Smith clarified;

> In my testimony, at pages 13 and 14, I inadvertently gave the impression that, except for OCC, there was unanimity among the parties regarding the ability and advisability of residential governmental aggregation customers bypassing the Rider SRA-SRT and receiving a shopping credit. I would like to clarify that statement and indicate that several parties did not express a position on that issue and some parties expressed the view that all generation related charges should be. . . avoidable.[7]

Indeed not all parties agreed with the Company's position on this issue. Therefore, the Commission's factual supposition on which it based its standard of review is incorrect.

The second problem the Commission identified that caused the Commission to base its evaluation on a partial stipulation standard was that OCC had "stipulated that the ESP, with the aggregation issue undecided, would be more favorable in the aggregate than a market rate offer."[8] Based on OCC's agreement to that provision, the Commission appears to have concluded that OCC could not change its mind after the Commission makes a decision and argue that the ESP is no longer more favorable in the aggregate than a market rate offer.[9] But OCC did not agree to the Commission applying the partial stipulation standard to the residential governmental aggregation bypassability issue. Rather OCC agreed that "the ESP, with the aggregation issue undecided, would be more favorable in the aggregate than a market rate offer" but only if the Commission used the

[7] Tr. Vol. 1 at 19.
[8] O&O at 28.
[9] Id.

normal litigation standard, which is the statutory standard to determine the aggregation issue. That is the reason the parties carved the issue out for litigation.

OCC's view was that putting aside the aggregation issue and looking at the terms and conditions of the stipulation, taken as a whole, the ESP was more favorable in the aggregate than a market rate. Should the Commission have properly interpreted the law and applied it to the facts in the case, the barriers to aggregation would have been removed thereby affirming more strongly that the ESP in the aggregate is more favorable than a market rate offer. The Commission's decision in this case denying residential customers the same opportunities available to commercial and industrial customers, casts that conclusion in doubt.

If residential customers have no way to protect themselves over the next three years should the ESP rates – through all its riders – exceed the market rate, then this ESP is not more favorable in the aggregate than a market rate. The problem is that Duke's rates are perilously close to a market rate and no one knows (except maybe Duke) just how much they will attempt to increase rates over the next three years under the myriad of riders they have at their disposal. Should the scales tip during the three year term of this ESP such that the ESP rate exceeds the market rate, customers will need tools to protect their interests. Those tools include seeking a better rate through aggregation. And if the Commission authorizes residential customers to pay charges – that commercial and industrial customers do not pay- and that would be added to the generation charges, their ability to protect themselves will be greatly diminished.

Furthermore, aggregation is viewed as an important vehicle to help assure that the ESP remains more favorable in the aggregate not just at the time of the PUCO decision

but also *throughout the term of the ESP*. The hope is that Duke is aware that if their numerous rider increases go up too much, they are at risk of losing customers to other suppliers, will temper the amount of their increases. If the commission insists on denying the residential customers the shopping credit that will diminish the feasibility of government aggregation. Under those circumstances Duke will have no internal constraints as to how much they attempt to increase rates. Thus, if the barriers to government aggregation are not removed, the ESP may not be more favorable in the aggregate than a market rate during the entire term of the ESP.

OCC had a good reason to assume that the Commission would apply the normal litigation standard to issues that are litigated as a provision of a settlement. The Commission's own precedent has established that practice:

> Contrary to OCC's arguments, completely stipulated cases would no longer be contested and the requirements of Section 4909.19 Revised Code, would no longer apply. OCC's argument, however, would have merit if it was directed to the filing of partial stipulations. Partially stipulated cases would still be considered contested and subject to Section 4909.19, Revised Code, which would require a hearing for an application filed under Section 4927.04(A), Revised Code and which would require the Commission to issue an order with findings of facts and conclusions of law.[10]

a. R.C. 4928.143 Standards

For the reasons stated above the Commission erred in applying the three prong partial stipulation standard to the aggregation issue and should reconsider the issue using the statutory standard that must be applied to litigated issues. R.C. 4928.143 sets forth

[10] *In the Matter of the Commission's Promulgation of Rules for Establishment of Alternative Regulation for Large Local Exchange Telephone Companies,* Case No. 92-1149-TP-COI, Finding and Order, (January 7, 1993) at 88.

the evidentiary requirements for approval of an ESP. R.C. 4928.143(C)(1) establishes Duke's burden of proof in this proceeding; "The burden of proof in the proceeding shall be on the electric distribution utility." Additionally, R.C. 4928.143(C)(1) specifies the substantive basis for approval or disapproval of an ESP application:

> The commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4938.142 of the Revised Code.

If the Commission applies the appropriate litigation standard to the aggregation issue the Commission should permit residential aggregation customers to bypass both Rider SRA-SRT and Rider SRA-CD for the reasons stated in the Application for Rehearing.

At the very least, if the Commission decides not to allow residential aggregation customers to bypass Rider SRA-CD which OCC asserts would be an inappropriate outcome – then residential customers should not be required to return to 115% of the standard service offer. Rather residential governmental aggregation customers should be permitted to choose between the standard service offer or a market rate, whichever is less since the SRA-CD is designed to compensate Duke's so-called risk if such customers return. A less costly return to the standard service offer would only be fair if the Commission will not permit residential aggregation customers the same bypass opportunity that non-residential aggregation customers receive who return to 115% of the standard service offer. Moreover, the statute explicitly allows this by-through to market option.

b. Governmental Aggregation Requirements under R.C. 4928.20(J)

The Commission erred in its decision by ignoring R.C. 4928.20(J) which establishes that governmental aggregators may elect to avoid provider of last resort charges imposed by the electric distribution utility if they are willing to return to the electric distribution utility at the electric distribution utility's market price:

> On behalf of the customers that are part of a governmental aggregation under this section and by filing written notice with the public utilities commission, the legislative authority that formed or is forming that governmental aggregation may elect not to receive standby service within the meaning of division (B)(2)(e)(d) of section 4928.143 of the Revised Code from an electric distribution utility in whose certified territory the governmental aggregation is located and that operates under an approved electric security plan under that section. **Upon the filing of that notice, the electric distribution utility shall not charge any such customer to whom electricity is delivered under the governmental aggregation for the standby service.** Any such consumer that returns to the utility for competitive retail electric service shall pay the market price of power incurred by the utility to serve that consumer plus any amount attributable to the utility's cost of compliance with the alternative energy resource provisions of section 4928.64 of the Revised Code to serve the consumer.[11]

2. The Commission's failure to allow residential aggregation customers to avoid Rider SRA-CD is inconsistent with its treatment of residential aggregation customers and shopping customers in the FirstEnergy service territory.

In the Commission's Opinion and Order establishing the ESP for Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company (together "FirstEnergy") the Commission allowed FirstEnergy's residential

[11] Emphasis added.

aggregation customers and other shoppers to avoid all generation charges.[12] That approach is contrary to the Commission's requirement in Duke's ESP that residential governmental aggregation customers must pay the not insignificant Rider SRA-CD.

FirstEnergy proposed to charge an unavoidable Minimum Default Service Rider ("Rider MDS"), which "would compensate the Companies for the administrative costs and hedging costs associated with committing to obtain adequate generation resources to supply the entire retail customer load, recognizing the risk and costs of customers switching to an alternative generation supplier."[13] The Commission completely denied FirstEnergy recovery of this rider "especially in light of the possibility that the impact of Rider MDS would impede shopping."[14]

Additionally, FirstEnergy proposed charging the Standby Charges for Generation Rider ("Rider SBC") as an avoidable rider that allows FirstEnergy to recover costs for the "risk of customers coming back to the electric utility during times of rising prices." The Commission modified but approved this rider emphasizing "Rider SBC complies with the provisions of Section 4928.20(J), Revised Code, which requires that customers of aggregations be permitted to avoid charges for standby power by agreeing not to return to the rate provided under the ESP; instead such customers would pay a market rate in the event of a return to electric utility service." The Commission characterized Duke's Rider-SRA-CD as permitting Duke recovery for providing customers with a first call on

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[12] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating company, and the Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code in the Form of an Electric Security Plan,* Case No. 08-935-EL-SSO, Opinion and Order, ("FE O&O")(December 19, 2008) at 35.
[13] FE O&O at 26.
[14] Id at 28.

its capacity "permitting customers to switch to competitive suppliers, and assuming the risk associated with maintaining a reasonably stable price during the ESP period."[15]

Although FirstEnergy's Rider SBC sounds very similar in function to Duke's Rider SRA-CD, the Commission treated them differently, allowing FirstEnergy's residential governmental aggregation customers to avoid the charge and Duke's residential governmental aggregation customers to pay it. The Commission has not justified its different applications of R.C. 4928.20 (J) to essentially the same charge in two different service territories. For that reason, the Commission should treat the residential governmental aggregation customers in the Duke service territory the same as it is treating the FirstEnergy residential governmental aggregation customers and allow them to bypass a rider that reimburses the utility for assuming the risk of allowing customers to shop during times of fluctuating prices.

FirstEnergy also proposed the Non-distribution Service Uncollectible Rider ("Rider NDU") as an unavoidable rider that "promotes social objectives."[16] The Commission again approved this rider only on the basis that it be bypassable as consistent with its previous decision *in re FirstEnergy*.[17] The Commission should not just be consistent between cases, but should also be consistent in its policies between service territories to ensure that its decisions are fairly considered. Accordingly, the Commission should apply R.C. 4928.20(J) in the same way in the two cases and allow Duke residential governmental aggregation customers to bypass Duke's Rider SRA-CD if

[15] Opinion and Order at 27.
[16] FE O&O at 32.
[17] Case No. 08-936-EL-SSO, Opinion and Order (November 25, 2008).

FirstEnergy residential governmental aggregation customers are permitted to bypass FirstEnergy's Rider SBC.

3. The Commission's Opinion and Order unreasonably narrowly interprets SB 221's definition of "standby service" as it relates to shopping customers when the language of the statute specifically sets forth the definition.

The Commission concludes against the clear and unambiguous language in S.B. 221 that "standby service" is limited only to SRA-SRT and does not include SRA-CD.[18] The Commission admits that it must allow governmental aggregation customers to bypass "standby service" under R.C. 4928.20(J). R.C. 4928.20(J) states:

> The legislative authority that formed or is forming that governmental aggregation may elect not to receive standby service within the meaning of division (B)(2)(d) of section 4928.143. . .

Despite that language, the Commission does not perceive that R.C. 4928.143(B)(2)(d) is a definition of standby service.

R.C. 4928.143(B)(2)(d) states:

The plan may provide for or include, without limitation, any of the following:

> Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, backup, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service.

While standby service is only one item listed in (B)(2)(d), (B)(2)(d) obviously lists items that are synonymous with standby service such as backup,

[18] Opinion and Order at 27.

supplemental power and default service. Because R.C. 4928.20(J) promises a meaning in division (B)(2)(d), the meaning can only be taken in the context of the entire category of (B)(2)(d).

The reason why (B)(2)(d) may list so many synonyms for standby service as it relates to generation service provided to shoppers is because the utilities use the same terms to refer to different services in their tariffs. For example, Columbus Southern Power limits the use of the term Stand-by Service as service provided to customers who have their own source of generation that is 50,000 kwhs or less but not to service provided to customers who have greater sources of generation.[19] Additionally, the different utilities use different terms for the same service. DP&L calls its standard service offer "Default Service."[20] While Cleveland Electric Illuminating refers to the rates it charges customers who return from shopping to the standard service offer POLR Service Pricing.[21] For this reason, the legislature uses the various terms as synonyms to refer to any generation service that that is provided to a customer when they are in need of the utility's generation.

The Commission correctly points out that the meaning of the word "standby" service under R.C. 4928.20(J) must involve standby service only as it relates to shopping, not as it relates to net metering service as argued by the Staff.[22] The Commission's attempt to distinguish Rider SRA-SRT from Rider SRA-CD, however, is not clear and most importantly the significance of any distinction is not clear. The Commission states that Rider SRA-SRT "will compensate Duke for its 'purchase [of] capacity necessary to

[19] Original Sheet 27-1D.
[20] Fourth Revised Sheet G 14.
[21] Original Sheet 102, page 1 of 3
[22] Staff Reply Brief at 4-5.

maintain an offer of firm generation services and [provision of] default service to all consumers in its certified territory; . . .whether switched or unswitched."[23] On the other hand the Commission states that Rider SRA-CD "is intended to compensate Duke for providing customers with a first call on its capacity, foregoing the opportunity to sell capacity that is currently dedicated to its standard service offer, permitting customers to switch to competitive suppliers, and assuming the risk associated with maintaining a reasonable stable price during the ESP."[24]

The only difference between Rider SRA-SRT and Rider SRA-CD is that Rider SRT is purchased capacity and Rider SRA-CD is utility owned capacity. Both are dedicated to the standard service offer. Although the Commission perceives that Rider SRA-CD requires Duke to forego the opportunity to sell SRA-CD capacity, nothing in Duke's plan actually forbids Duke from selling excess capacity from either SRA-CD or SRA-SRT assets, nor from choosing between the type of capacity it will allocate to the Ohio consumers and that it will allocate to third party purchasers. That is what Duke does with its Active Management System.

Moreover, both the Rider SRA-SRT and SRA-CD are forms of standby power; the former is capacity that is purchased while the latter is capacity that is maintained internally to have available to customers. R.C. 4928.20 clearly does not permit these standby charges to be assessed against government aggregation customers. There is no rationale for the distinction that the Commission attempts to draw with respect to the origin of that capacity, nor is there any such discussion in the law. The Commission

[23] Opinion and Order at
[24] Id.

should reconsider its reasoning and its decision in splitting hairs between the sources of standby capacity.

Additionally, the Staff's complaint that the reading of (B)(2)(d) is not a definition of the term standby service because such a reading creates a paradox is inaccurate.[25] The Staff points out that standby service cannot be the same as the POLR services identified under (B)(2)(d) because R.C. 4928.20(K) assumes that governmental aggregation will face nonbypassable generation charges. R.C. 4928.20(K) states:

> The commission shall adopt rules to encourage and promote large-scale governmental aggregation in this state. For that purpose, the commission shall conduct an immediate review of any rules it has adopted for the purpose of this section that are in effect on the effective date of the amendment of this section by S.B. 221 of the 127th general assembly, July 31, 2008. Further, within the context of an electric security plan under section 4928.143 of the Revised Code, the commission shall consider the **effect on large-scale governmental aggregation of any nonbypassable generation charges**, however collected, that would be established under that plan, except any nonbypassable generation charges that relate to any cost incurred by the electric distribution utility, the deferral of which has been authorized by the commission prior to the effective date of the amendment of this section by S.B. 221 of the 127th general assembly, July 31, 2008.

The Staff concludes that because of this provision, the reading of (B)(2)(d) as a definition of standby charges does not make sense because that reading would assume that governmental aggregations cannot bypass any generation charges. But that is not the case. There are two generation charges that the Commission must require governmental aggregators to pay: surcharges for generation facilities built after January 1, 2009 under

[25] Staff Reply Brief at 5.

R.C. 4928.143(B)(2)(c) and deferrals that were authorized prior to the effective rate of SB 221. It is the effect of those two types of nonbypassable generation charges that the Commission must consider in the context of an electric security plan. Neither of those two nonbypassable generation charges are relevant in this case but their existence explains why the Commission must "consider the effect on large-scale governmental aggregation of any nonbypassable generation charges."

Besides authorizing governmental aggregators the opportunity to opt-out of most provider of last resort services, the General Assembly adopted other provisions that establish its intent to promote large-scale governmental aggregations such as R.C. 4928.20(K):

> The commission shall adopt rules to encourage and promote large-scale governmental aggregation in this state. For that purpose, the commission shall conduct an immediate review of any rules it has adopted for the purpose of this section that are in effect on the effective date of the amendment of this section by S.B. 221 of the general assembly.

The same paragraph directs the Commission to consider the effect of nonbypassable generation charges within an ESP under section 4928.143 of the Revised Code:

> The commission shall consider the effect on large-scale governmental aggregation of any nonbypassable generation charges, however collected, that would be established under that plan, except any nonbypassable generation charges that relates to a cost incurred by the electric distribution utility, the deferral of which has been authorized by the commission prior to the effective date of the amendment of this section by S.B. 221 of the 127th general assembly.

Thus, R.C. 4928.20 (K) specifically instructs the Commission to consider the impact of nonbypassable charges as this pertains to new construction and pro-SB 221 deferrals to assess their impact on government aggregation. Under this context the assessment of the unnecessary SRA-CD as a nonbypassable charge is unlawful in that it impedes any kind of government aggregation. Thus the legislation is clear in R.C. 4928.20 that not only should standby rates not be charged, but any nonbypassable charge that stands in the way of government aggregation should not be permitted. It is clear that the legislative intent is to promote aggregation, not to erect barriers that make it unachievable.

The Commission should also consider the reasons why the legislature may have believed that protecting government aggregation was so important. In essence government aggregation under SB 221 allows competition to continue while not obligating the state to move to competitive markets on a permanent basis. Under SB 221, if a market option is chosen – even on a phase-in basis, the end result in five or perhaps ten years is an irrevocable move to competition, unless the law changes again. Aggregation appropriately provides consumers with the best protection by presenting both options – either a regulated rate through the ESP or a competitive rate under aggregation. Aggregation also protects all customers by putting pressure on utilities to be more accountable and more efficient and modest in their rate increase requests. If they ask too much, aggregation provides customers with the ability to go elsewhere. In these hard economic times, this is clearly important.

4. The Commission's Opinion and Order unreasonably discriminates against residential governmental aggregation customers in not permitting them to avoid the SRA-CD rider when they shop and requiring them to return to the same standard service offer price as non-residential governmental aggregation customers who are permitted to avoid the SRA-CD rider when they shop.

The Commission essentially ignored the argument that allowing non-residential customers to avoid SRA-CD and SRA-SRT is discriminatory under R.C. 4905.35, which prohibits Duke to "make or give any undue or unreasonable preference to any person. Additionally, R.C. 4928.02(A) sets forth a policy that discourages discriminatory pricing. And R.C. 4905.142(A) directs Duke to provide all consumers "on a comparable and nondiscriminatory basis within its certified territory a standard service."[26] On the other hand, the Staff argued that residential and nonresidential customers are differently positioned persons and that it is "not discriminatory to treat differently positioned persons differently."[27] The Staff appears to have argued that for some reason the utility has to make more provision for the return of residential governmental aggregation customers than it does for nonresidential governmental aggregation customers.[28] But the Staff does not explain why that is the case. Nor is there any evidence in the record to support this discriminatory treatment.

If both residential and nonresidential customers must return to the standard service offer at the same price what difference will it make with regard to the provision that must be made by the utility to find power for the returning customers? The Midwest ISO market is not short on power nor is the transmission constrained in the Cinergy

[26] OCC Brief at
[27] Staff Reply Brief at 6.
[28] Id at 6-7.

service territory such that power could not be had for both residential and nonresidential customers upon their return to the standard service offer.[29] As long as they both pay the market price, power would be equally available for both.

The Commission actually acknowledges that the nonresidential governmental aggregation customers are very similar to residential governmental aggregation customers:

> Residential and nonresidential customers are not differently situated in any way to justify what would then be different return pricing provisions.[30]

Given that the Commission recognizes that nonresidential governmental aggregation customers are not differently situated than residential aggregation customers, they both should be permitted to bypass the same riders.

In any case, having allowed nonresidential customers to bypass both the SRA-SRT and the SRA-CD but allowing residential customers to bypass only the SRA-SRT, the Commission has created a situation that positions the residential and nonresidential customers differently. For this reason, if the residential customers will not receive the shopping credit, the Commission should not require residential customers to return to the same pricing provisions that the nonresidential customers do. Instead, if residential customers are only permitted to bypass the SRA-SRT they should be permitted to return to the standard service offer price rather than the 115% of the standard service offer price or the market rate whichever is less.

For the reasons stated above the Commission should allow the residential governmental aggregation customers to bypass the same riders that nonresidential

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[29] *National Electric Transmission Congestion Study* U.S. Dept. of Energy (August 2006) at 23.
[30] Opinion and Order at 28.

governmental aggregation customers can bypass. And both residential and nonresidential customers should be permitted to return to the market price as required under R.C. 4928.20(J). If the Commission will not permit residential governmental aggregation customers to bypass Rider SRA-CD as it permits nonresidential customers to do the different classes would not be similarly situated and the residential customers should be permitted to return to the standard service offer.

B. Assignment of Error 2: The Commission erred when it failed to provide for standards, due process opportunities and approval criteria for exemptions from Rider SAW by mercantile customers.

1. The Commission failed to apply the three prong test to the Stipulation which called for limiting Mercantile Opt-Out to 3 MW

It is ironic that the Commission applied the three prong test to the Governmental Aggregation when it was specifically carved out but failed to do so with respect to the mercantile opt-out. The three prong test requires that the Settlement be a product of serious bargaining, that it provide a benefit to the customers and is in the public interest and violates no policy or practice. Indeed the Stipulation with respect to the Governmental Aggregation fits all three criteria. The Stipulation was the result of negotiations involving many parties representing a diverse group of interests. Only one party objected to this provision in a stipulation that was supported by similarly situated parties. This issue regarding opt-out was a major issue for some parties and was at the very heart of what was bargained for in exchange for other concessions. The Commission's change to the Stipulation represents a material modification which could

potentially trigger nullification and litigation of the entire case pursuant to the terms of the Stipulation.

Just as the granting of the opt-out under R.C. Sec 4928.66 is left for Commission consideration, so are the terms under which it would be granted. It is well within the purview of the Commission to adopt limitations to the opt-out as set forth in arms length bargaining in a Stipulation. This Commission need not grant unfettered mercantile opt-out. From a public policy standpoint, setting the threshold at this time as parties wrestle with compliance and implementation issues is very burdensome. Potentially, very large numbers of customers could seek to opt-out.

If many mercantile customers seek to opt-out, the applications will require very substantial resources on the part of Duke, the Commission and the intervenors to verify each and every application. Unlike a commercial or industrial program offered by the utility where the program is somewhat cookie-cutter and therefore lends itself more easily to verification, the measures of each individual customer can run the gamut making it all the more difficult and costly to verify. Who is going to pay those costs? Certainly no customers should subsidize these opt-out costs. There is also the question of if several hundred or thousand applications swarm the Commission, does the Commission or any of the intervenors or the Company have the resources to review each and every application with the attention it merits? OCEA would oppose a claim that Duke should not recover the legal costs associated with these applications since this is an inefficient way to meet the benchmarks. A 3 megawatt size limitation at this early stage cuts a very wide swath and will be difficult enough to manage. The parties should all get some experience in addressing this complex issue before opening the floodgates to potential pandemonium.

Thus placing some limitations is in the public interest and certainly in the interests of non-opt-out customers who could potentially pay uninvited costs. Placing limitations is more efficient in terms of costs, resources and time. Placing limitations also ensures a greater balance in the implementation of programs so that the Company meets its benchmarks through the provision of programs for all customer classes. Without limitations, the amount of the benchmark that can be achieved through opt-out remains a mystery and could impact the Company's planning with respect to meeting the benchmark.

Lastly, no policy or practice is violated by this stipulation. Given that this is new ground, there is no practice in place to be violated. As to policy, it is clear that SB 221 granted the Commission considerable discretion in its execution. This extends to the opt-out where there is no requirement that the all mercantile customers automatically be allowed to opt-out. The Commission is granted the discretion to make appropriate determinations. In the interests of administrative ease, at least in this first early stage, the Commission can adopt the recommendation of the parties in the Stipulation and limit the breadth of the opt-out. Specifically, R.C. 4928.66(A)(2) (c) states: "Any mechanism designed to recover the cost of energy efficiency and peak demand reduction programs ...**may** exempt mercantile customers that commit their demand-response resources or other customer-sited capabilities..." (emphasis added). Thus the opt-out is completely discretionary and the Commission could exercise its discretion to preclude *any* opt-out. Therefore, adopting a settlement that places reasonable limitations on the potential amount of opt-out is entirely within the Commission's authority to do.

2. Neither the Commission's Opinion and Order nor the Commission's rules provide for a due process for parties to contest the legitimacy of the granting of exemptions for contributions to the energy efficiency rider.

In its Opinion and Order and in the Findings and Orders issued under the Rulemaking dockets the Commission has made only two decisions with regard to its approval processes for exemptions. In its Opinion and Order in this case the Commission determined that all mercantile customers may apply for exemptions from Rider SAW[31] and that mercantile customers must meet the Duke's benchmark in order to receive an exemption.[32]

Beyond those two guidelines, R.C. 4928.66(A)(2)(c) requires the Commission to approve exemptions for a mercantile customer who "makes . . existing or new demand-response, energy efficiency, or peak demand reduction capability available to an electric distribution utility". . . only if the "exemption will reasonably encourage such customers to commit those capabilities to those programs." The Commission must address multiple factual issues in approving such exemptions. First, the Commission must determine if a mercantile customers capability is applicable and effective as a demand-response, energy efficiency, or peak demand reduction capability in the same magnitude as that required by the utility. Second, the Commission must determine if the capability is as effective as the applicant claims. Third, the Commission must determine if the customer would have implemented the capabilities with or without the exemption. Fourth, the Commission must determine if the customer would continue existing capability without the exemption. Accordingly, the Commission must conduct a hearing to address these factual issues.

[31] Opinion and Order at 37.
[32] Opinion and Order at 36.

Because other parties have considerable interest in the four factual issues identified above and likely other issues not identified above, the Commission must make due process proceedings available. Parties will likely want to issue discovery upon all applicants for exemptions and will want to have the opportunity to test the capabilities claimed and the necessity of the exemption to encourage the customer to develop or continue the capability. Other customers and environmental groups will want the opportunity to contest some applications for exemption because poorly designed capabilities may result in subsidies by other customer classes to the Rider SAW or may result in the utility not actually meeting the benchmarks. Because the Commission has not made such due process hearings available through the issuance of its S.B. 221 rules, the Commission must through its order, make it clear that there will be a review with the opportunity for intervention by interested parties and a hearing in each of these applications.

3. Neither the Commission's Opinion and Order nor the Commission's rules provide for standards that mercantile customers must meet to obtain an exemption from Rider SAW.

To provide for more efficiency on behalf of all interested parties, including mercantile customers, the Commission, the Staff, environmental groups and non-mercantile customers, the Commission should establish rules that would clarify what standards mercantile customers must meet to obtain an exemption. For example, the Commission should identify the types of proof that the Commission will require to establish that an energy efficiency or peak demand reduction capability will actually contribute the load reduction the mercantile customer claims it will contribute. Moreover, the Commission should clarify what evidence is necessary to demonstrate that

the exemption actually contributed to the mercantile customer's institution of new demand reduction capabilities and to demonstrate that the exemption actually contributed to the mercantile customer's continuation of already existing demand reduction capabilities. Further, mercantile customers should be required to pay for monitoring and evaluation conducted by a credible third party – preferably the same entity the utility uses – to demonstrate and verify that the savings are indeed achieve.

Without providing such standards before mercantile customers start to apply for exemptions, mercantile customers may waste a great deal of time applying for exemptions that the Commission may not consider. Under such circumstances other parties may be required to respond to applications that the Commission would not consider approving. For those reasons, standards as set forth in rules would be helpful. Moreover, it is in everyone's best interests to avoid a situation where at the end of the year, the company falls short of the mandatory benchmarks because it relied to its detriment on the customers to meet their requirements. In the final analysis, it is the Company that has the obligation to pay the penalty that results.

Through its rules and in this Order, the Commission should publish the criteria it intends to rely upon in approving exemptions. The most critical criteria would be what the Commission deems necessary to demonstrate that the mercantile customers will achieve the relevant demand reductions that will actually contribute to the utilities benchmarks. Moreover, the Commission should require that the mercantile customers demonstrate after-the-fact that their demand reducing capabilities have actually achieved the energy savings. While the opt-out customer will not pay Rider-SAW, it should be equally clear that the opt-out customer will pay all costs associated with the opt-out and

that non-mercantile customers will not subsidize any portion of the costs of meeting the mercantile customer meeting the standards. Opt-out customers should be required to have a baseline consistent with the rules from which to measure savings that will be determined by an independent third party as part of monitoring and evaluation. If a mercantile customer fails to meet the benchmarks, then the customer should not be permitted to continue to opt-out and should be required to pay the rider. In that case the customer would become eligible for company programs.

Additionally, the Commission should establish criteria it intends to rely on to approve capabilities as encouraged by the exemption. For example, the Commission should require mercantile customers to provide very strict evidence that existing programs are encouraged by the exemption because by the very fact that they existed before the exemption indicates that the exemption was not needed nor is likely to be needed to continue the demand reducing capability.

4. Neither the Commission's Opinion and Order nor the Commission rules clarify the consequences of an exempted mercantile customers' failure to meet the energy savings projected during its application for an exemption.

Finally, the Commission should establish rules that will clarify who will be held responsible if a mercantile customer's demand reducing capabilities do not meet the energy savings the mercantile customer promised to contribute to the utilities benchmarks. Ultimately, under R.C. 4928.66(A)(1)(a) the utility is responsible for meeting the savings requirements under S.B. 221. But mercantile customers should be discouraged from attempting to claim that they can meet energy savings levels that are not realistic. While Duke by statute remains liable for underperformance by the

mercantile customer, Duke has the right to proceed against that mercantile customer for recovery of the penalty amount. Under no circumstance, as set forth in R.C. 4928.66 should ratepayers pay any portion of the penalty.

III. CONCLUSION

Pursuant to R.C. 4903.10, the PUCO should abrogate and modify the Entry on Rehearing, consistent with the OCC's & the Sierra Club's claims of error. The Commission should find that the term "standby service" as used in R.C. 4928.20(K) includes both Rider SRA-SRT and SRA-CD and therefore allow residential governmental aggregation customers to bypass both of those riders. If the Commission does not allow residential governmental aggregation customers to bypass both of those riders, the Commission will be discriminating against residential governmental aggregation customers who are in the same position as nonresidential governmental aggregation customers and the Commission will not be in compliance with the law. If the Commission does not allow residential governmental aggregation customers to bypass Rider SRA-CD and does allow nonresidential governmental aggregation customers to bypass Rider SRA-CD, the Commission has placed residential governmental aggregation customers in a different position than nonresidential governmental aggregation customers and should thus allow residential governmental aggregation customers to return to the standard service offer rather than 115% of the standard service offer, which is what nonresidential governmental aggregation customers will pay.

Additionally, because the Commission is allowing all mercantile customers to apply for exemptions from the Rider SAW if the customers meet the utilities benchmarks, the Commission should facilitate a more efficient management of those applications by

establishing standards to guide those applications and the review of those applications by interested parties. The Commission should establish a due process procedure that will allow interested parties to assert their interests in the granting of exemptions because such exemptions could result in the subsidy of the Rider SAW by other customers classes or in the failure of utilities to meet their benchmarks. Moreover the Commission should establish standards that mercantile must meet to demonstrate that their demand reducing capabilities will result in the energy savings that the mercantile customers claim will result. Additionally, the Commission should establish standards that the mercantile customers must meet to demonstrate that the demand reducing capabilities would not have been implemented, expanded or continued but for the exemptions. These standards should be supplemented by criteria the Commission intends to use in approving the exemptions. Finally, the Commission must establish the process that will be used to deal with demand reducing capabilities that have resulted in an exemption for the mercantile customers but that have not resulted in the energy reductions that the mercantile customer has promised.

Accordingly, the Commission should grant rehearing for the reasons stated above.

Respectfully submitted,

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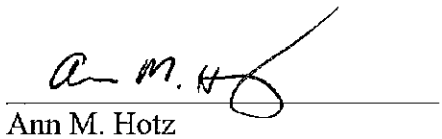
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Application for Rehearing by the Sierra Club Ohio Chapter and the Office of the Ohio Consumers' Counsel* has been served upon the below-named persons (pursuant to the Attorney Examiners' instructions) via electronic transmittal this 16th day of January, 2009.



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