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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

- In the Matter of the Application of The)
Cincinnati Gas & Electric Company to)
Modify its Non-Residential Generation)
Rates to Provide for Market-Based)
Standard Service Offer Pricing and to) **Case No. 03-93-EL-ATA**
Establish a Pilot Alternative)
Competitively-Bid Service Rate Option)
Subsequent to Market Development)
Period)

- In the Matter of the Application of The)
Cincinnati Gas & Electric Company for)
Authority to Modify Current Accounting)
Procedures for Certain Costs Associated) **Case No. 03-2079-EL-AAM**
With The Midwest Independent)
Transmission System Operator)

- In the Matter of the Application of The)
Cincinnati Gas & Electric Company for)
Authority to Modify Current Accounting)
Procedures for Capital Investment in its) **Case No. 03-2081-EL-AAM**
Electric Transmission And Distribution) **Case No. 03-2080-EL-ATA**
System And to Establish a Capital)
Investment Reliability Rider to be)
Effective After the Market Development)
Period)

- In the Matter of the Application of The)
Cincinnati Gas & Electric Company to)
Modify its Fuel and Economy Purchased) **Case No. 05-725-EL-UNC**
Power Component of its Market-Based)
Standard Service Offer.)

- In the Matter of the Application of Duke)
Energy Ohio, Inc., to Adjust and Set its) **Case No. 06-1069-EL-UNC**
System Reliability Tracker.)

- In the Matter of the Application of Duke)
Energy Ohio, Inc., to Adjust and Set its) **Case No. 05-724-EL-UNC**
System Reliability Tracker and Market)
Price.)

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In the Matter of the Application of Duke)
Energy Ohio, Inc., to Adjust and Set its) Case No. 06-1068-EL-UNC
System Reliability Tracker and Market)
Price.)

In the Matter of the Application of Duke)
Energy Ohio, Inc., to Adjust and Set its) Case No. 06-1085-EL-UNC
Annually Adjusted Component)
)

**DUKE ENERGY OHIO'S MEMORANDUM CONTRA TO THE OHIO
CONSUMERS' COUNSEL MOTION TO STAY DUKE ENERGY'S RATE
INCREASES, MOTION TO RENDER ALL RATE INCREASES AFTER
THE MARKET DEVELOPMENT PERIOD SUBJECT TO REFUND ON AN
ONGOING BASIS, AND DUKE ENERGY OHIO'S REPLY TO THE OHIO
CONSUMERS' COUNSEL MEMORANDA CONTRA DUKE ENERGY
OHIO'S MOTIONS TO EXTEND THE ANNUALLY ADJUSTED
COMPONENT, TO RECONCILE THE ANNUALLY ADJUSTED
COMPONENT THROUGH TRUE-UP, AND TO IMPLEMENT THE 2007
SYSTEM RELIABILITY TRACKER SUBJECT TO TRUE-UP**

The Ohio Consumers' Counsel's (OCC) Motion to Stay Duke Energy Ohio's (DE-Ohio) "Rate Increases" and render all of DE-Ohio's market-based standard offer market prices subject to refund reflects a gross misunderstanding of the Ohio Supreme Court's remand, DE-Ohio's market prices, applicable law, and the potential effect to residential consumers. OCC's posture in this case—its request to freeze certain scheduled price changes, its desire to present new evidence, and its determination to simply start launching into a whole new round of discovery—appears to proceed from a cynical belief that it can snatch victory from the jaws of resounding defeat if it simply pretends that it won the case at the Supreme Court. OCC did not win. It lost (although,

it should be emphasized, the customers OCC purports to represent clearly did win) and the Commission prevailed. This Commission should not permit OCC to convert the Court's substantive affirmance of the Commission's order into a victory by indulging OCC's request to freeze rates and reopen this proceeding. DE-Ohio asks that the Commission deny OCC's Motion for the reasons more fully explained below.

I. The Court remanded to the Commission with specific instructions to "thoroughly explain its conclusion that the modifications on rehearing are reasonable and identify the evidence it considered to support its findings" and to "compel disclosure of the requested information."¹

The basis of OCC's argument is that the Court "has ordered the Commission to reconsider certain aspects of its decision in the *Post MDP Service Case*."² The Court did no such thing and it is improper for OCC to suggest otherwise.

It may be useful, in considering OCC's request to convert this into a trial *de novo*, to review what the Court did, and did not, do. The Court expressly affirmed the Commission's holding in Case No. 03-93-EL-ATA *et. al.*, on seven of nine issues raised by OCC. DE-Ohio will address each: (1) "*Procedural Integrity of Alternative Proposal*"³ the Court held that "the Commission did not violate any of the procedural requirements set forth in R.C. 4928.14(A), 4909.18, or 4909.19, or any due process

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

² OCC's Motion at 9.

³ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 303 856 N.E.2d 213, 220 (2006).

guarantees;”⁴ (2) The “*Order Approving CG&E’s Market-Based Standard Service Offer*”⁵ the Court held that “the Commission’s finding that CG&E’s standard service offer was market based *is supported by sufficient probative evidence;*”⁶ (3) “*Modifications on Rehearing to Market-Based Standard Service Offer*”⁷ the Court held “OCC has not demonstrated harm or prejudice with respect to the Commission’s changes on rehearing to the price to compare component. Accordingly, we reject OCC’s second proposition of law;”⁸ (4) Regarding OCC’s assertion that the Commission failed to order a competitive bidding process the Court held “CG&E’s rate stabilization plan provides for a reasonable means of customer participation...there appears to be significant competition in CG&E’s service area through the presence of five competitive retail electric service providers...we reject OCC’s third proposition of law.”⁹ (5) Regarding OCC’s assertion that the MBSSO is discriminatory the Court rejected OCC’s assertion stating “OCC has not met its burden of showing the provision allowing a certain percentage of residential customers who shop to avoid the rate-stabilization charge is

⁴ *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 111 Ohio St. 3d 300, 305, 856 N.E.2d 213, 222 (2006).

⁵ *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 111 Ohio St. 3d 300, 309, 856 N.E.2d 213, 225 (2006).

⁶ *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 111 Ohio St. 3d 300, 310, 856 N.E.2d 213, 226 (2006).

⁷ *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 111 Ohio St. 3d 300, 311, 856 N.E.2d 213, 226 (2006).

⁸ *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 111 Ohio St. 3d 300, 312, 856 N.E.2d 213, 227 (2006).

⁹ *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 111 Ohio St. 3d 300, 313, 856 N.E.2d 213, 228 (2006).

discriminatory.”¹⁰ (6) OCC alleged that non-by-passable charges are improper and the Court held to the contrary relying on past precedent and the Commission’s finding that such charges are “part of CG&E’s competitive electric charges...;”¹¹ and finally (7) The Court also rejected OCC’s ineffective argument that the Commission’s order violated the Corporate Separation Requirements of R.C. 4928.17 holding that “R.C. 4928.17(C) expressly grants the Commission discretion to approve alternative corporate separation plans.”¹²

The Court remanded the case to the Commission to resolve two issues.¹³ In neither case did the Court order, or even suggest that the Commission should amend, suspend, or in any way alter, DE-Ohio’s MBSSO. First, the Court held that “we remand this matter to the Commission for further *clarification* of all modifications made in the first rehearing entry to the order approving the stipulation. On remand, 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 finding.”¹⁴ Second, regarding the discovery of alleged side agreements, the Court decided it “remand this matter to the

¹⁰ *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 111 Ohio St. 3d 300, 315, 856 N.E.2d 213, 229 (2006).

¹¹ *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 111 Ohio St. 3d 300, 316, 856 N.E.2d 213, 231 (2006).

¹² *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 111 Ohio St. 3d 300, 318, 856 N.E.2d 213, 232 (2006).

¹³ *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 111 Ohio St. 3d 300, 856 N.E.2d 213, (2006).

¹⁴ *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 111 Ohio St. 3d 300, 309, 856 N.E.2d 213, 225 (2006) (emphasis added).

Commission and order that it compel disclosure *of the requested information.*¹⁵ The Court left matters of confidentiality and admissibility entirely to the Commission.¹⁶

Nowhere in the Court's opinion is the case remanded for rehearing. No new evidence is being requested. The remand on the substantive points merely requires clarification; namely, explanation of conclusions and identification of evidence it "considered" – past tense. The remand associated with discovery is procedural. The Commission was instructed to order DE-Ohio to disclose alleged side agreements.¹⁷ By an Attorney Examiner Entry dated November 29, 2006, the Commission complied with the Court's order and DE-Ohio has sent discovery to all Parties.¹⁸

Compliance with the Court's order on remand does not require a hearing, but the Commission must file an Entry explaining its reasoning and setting forth the record evidence it relied upon to support its November 23, 2004, Entry on Rehearing.¹⁹ The Commission must also order DE-Ohio to disclose side agreements in response to OCC's discovery request which was a subject of the OCC's Supreme Court

¹⁵ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 323, 856 N.E.2d 213, 236 (2006) (emphasis added).

¹⁶ *Id.*

¹⁷ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 309, 856 N.E.2d 213, 225 (2006).

¹⁸ *In re DE-Ohio's Remand*, Case No. 03-93-EL-ATA (Entry at 2) (November 29, 2006).

¹⁹ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 309, 856 N.E.2d 213, 225 (2006).

Appeal.²⁰ By an Attorney Examiner Entry dated November 29, 2006, the Commission complied with the Court's order with respect to the discovery at issue and DE-Ohio has sent discovery to all Parties.²¹

With the narrowest of bases for the remand of this proceeding, there is simply no reason to indulge OCC's desire for a brand new hearing. Indeed, under similar circumstances the Commission has not held additional evidentiary hearings, suspended rates, or taken other similar actions that are clearly detrimental to the utility and could well be detrimental to consumers. The Commission's precedent is to issue an Entry citing record evidence, in the case of *East Ohio* Staff workpapers, and resolve the Court's remand on that basis.²²

In *East Ohio*, just like the instant case, the Court remanded to the Commission based upon OCC's appeal alleging the Commission's order lacked evidentiary support pursuant to R.C. 4903.09.²³ The Staff filed workpapers showing support for the Commission's order from the record evidence.²⁴ The Commission accepted the workpapers as record evidentiary support for its order satisfying the Court's remand order. In *East Ohio* the OCC filed a letter agreeing that the workpapers satisfied

²⁰ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 323, 856 N.E.2d 213, 236 (2006).

²¹ *In re DE-Ohio's Remand*, Case No. 03-93-EL-ATA (Entry at 3) (November 29, 2006).

²² *In re East Ohio Merger*, Case No. 96-991-GA-UNC (Entry at 2) (October 12, 2000).

²³ *Id.*

²⁴ *Id.*

the remand order and no evidentiary hearing was required.²⁵ No hearing was held or rate suspended or amended as a result of the remand. The Commission should follow the same process in these proceedings.

In these cases there is ample record evidence to support the Commission's November 23, 2006, Entry on Rehearing. DE-Ohio suggests that the Commission allow the parties to file briefs detailing the evidentiary support. If the Commission has additional questions DE-Ohio recommends that it permit oral argument so that Parties have an opportunity to clarify the evidence and answer any questions. Only if the Commission is not satisfied with the existing record evidence should additional evidence be obtained and a hearing be held for the limited purpose of supporting the Commission's Entry on Rehearing. Such a process satisfies the Court's remand process and permits all Parties an opportunity to be heard.

The process suggested by DE-Ohio is particularly appropriate given the procedural delays suggested by OCC so that it may put on an expert witness on market price issues outside the scope of the Court's remand. Given the 45 day delay and the resulting March hearing date proposed at the December 14, 2006, prehearing conference, there is no reason not to utilize the briefing and oral argument process suggested by DE-Ohio. If the Commission is dissatisfied with the record evidence at the conclusion of such a process it may still hold the March hearing. If no hearing is

²⁵ *Id.*

necessary all Parties will save time and expense. The OCC should not be permitted to compel a process that opens Pandora's Box by re-litigating DE-Ohio's market price *de novo*. Such a process was not contemplated by the Court's remand and would jeopardize the Commission's objectives of stable prices for consumers, stable revenues for the electric distribution utility, and the development of the competitive retail electric market.

Finally, the inappropriate process being suggested by OCC would give rise to an appeal by DE-Ohio. DE-Ohio agreed to a market price, including a process to amend certain components of that market price through 2008. A deviation from the agreed upon market price and process would give rise to an appeal by DE-Ohio alleging that improper amendment of its market price in a manner outside the parameters permitted by R.C. 4928.05. Further, there is no statutory authority for the Commission to amend an electric distribution utility's market-based standard service offer absent an application of the utility. It is black letter law that the Commission has only the authority granted to it by statute.²⁶ Because statutory authority is absent, DE-Ohio will oppose any attempt by the Commission to amend the already approved, and Court affirmed, market price. The Commission should not permit OCC to control the process and place the Commission or Parties in an untenable procedural position.

²⁶ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 85 Ohio St. 3d 87, 88 706 N.E.2d 1255, 1256 (1999).

II. There are no “rate increases” at issue and there can be no irreparable harm to residential consumers.

The OCC makes two erroneous assertions. First it asserts that there are “rate increases” at issue.²⁷ OCC asserts that the adjustments to the System Reliability Tracker (SRT), the Annually Adjusted Component (AAC), Fuel and Purchased Power Tracker (FPP), and the Infrastructure Maintenance Fund (IMF) are regulated applications for rate increases pursuant to 4909.18.²⁸ OCC’s view is unsupported under existing law.

A. Adjustments to DE-Ohio’s MBSSO components do not constitute a rate increase.

The Court expressly upheld the price to compare and POLR components of DE-Ohio’s MBSSO as competitive charges.²⁹ Thus, adjustments to DE-Ohio’s MBSSO components are not within the scope of the Court’s order on Remand. There is nothing in the Court’s opinion, or any statute, that transforms changes to approved trackers into a “rate increase,” as that term is used in the statute. Further, the SRT, AAC, IMF, and FPP are components of a market price because they are part of DE-Ohio’s compensation for providing a competitive retail electric service, its MBSSO.³⁰ As part of DE-Ohio’s market price the MBSSO

²⁷ OCC’s motion at 4.

²⁸ *Id.* at 4-7.

²⁹ *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 111 Ohio St. 3d 300, 311-12, 316, 856 N.E.2d 213, 227, 230-31 (2006).

³⁰ Ohio Rev. Code Ann. §§ 4928.03, 4928.05, 4928.14 (Baldwin 2006).

components are not subject to traditional regulation but are governed by the Commission's jurisdiction set forth in R.C. 4928.05.³¹

Revised Code Section 4928.05 limits the Commission's jurisdiction over competitive retail electric service market prices to pricing below cost for the purpose of destroying competition and discriminatory pricing.³² The Commission and the Court have expressly found that DE-Ohio's MBSSO components meet the standard set forth by R.C. 4928.05.³³ There is simply no lawful or factual basis to stay, amend, or otherwise determine that DE-Ohio's market price should be subject to refund.

B. There is no irreparable harm to residential consumers from the implementation of DE-Ohio's MBSSO components.

The OCC makes inaccurate assumptions to reach the illogical conclusion that residential consumers will suffer harm unless DE-Ohio's MBSSO is implemented subject to refund on a going forward basis. First, OCC incorrectly assumes that DE-Ohio's entire market price is at issue on remand. DE-Ohio will not repeat its previous discussion of the Court's remand except to reiterate that the Court did not order the Commission to reverse any portion of DE-Ohio's market price. The Court merely ordered the Commission to support its first Entry on Rehearing

³¹ Ohio Rev. Code Ann. 4928.05 (Baldwin 2006).

³² Ohio Rev. Code Ann. §§ 4928.05, 4905.33(B), 4905.35 (Baldwin 2006).

³³ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 311, 856 N.E.2d 213, 226 (2006).

with reasoning and record evidence and to order disclosure of alleged side agreements.³⁴

Second, the OCC assumes that re-litigating DE-Ohio's market price would result in a decrease for consumers. The OCC is wrong. While DE-Ohio's current prices are reasonably within the scope of other competitive retail electric prices offered in the market, they have moved toward the low end of the market price to the benefit of all consumers, including the residential consumers that OCC represents. The low prices offered by DE-Ohio are responsible for consumers returning to DE-Ohio from competitive retail electric service (CRES) providers who cannot beat its price. The low price currently offered by DE-Ohio, and other Ohio utilities, is also apparent through a simple comparison to the market prices in states like New Jersey, Maryland, and Illinois, just to name a few. Surely, the OCC is not advocating that residential consumers should be subjected to the volatile and high prices similar to auction and request for proposal processes, as currently experienced in other states.

Finally, the OCC is assuming that consumers are harmed by DE-Ohio's MBSSO market prices. They are not. If DE-Ohio's market prices become uncompetitive, consumers have a remedy. They can switch to a lower priced provider that may be available. CRES providers are available for every customer class in DE-Ohio's certified territory. If DE-Ohio offers an excessive price, it is harmed by the loss of load.

³⁴ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 309, 323, 856 N.E.2d 213, 225, 236 (2006).

Consumers respond to price and demand and tend to move to the lowest price. OCC, and the Commission, should permit the market to work and deny OCC's Motion.

III. A stay is inappropriate under the circumstances of this case.

The OCC incorrectly relies upon *In re COI of Ameritech* and *In re Commission's review of Columbus Southern Power Company* to argue that a Stay is appropriate in these circumstances.³⁵ Those cases are inapplicable to the present circumstance. In each of the cited cases there was an almost certain likelihood that application of the applicable issues would change upon a determination by the Court or administrative agency.³⁶ In these proceedings there is almost complete certainty that no component of DE-Ohio's MBSSO will change.

Such certainty exists because the Commission and the Court have affirmed all aspects of DE-Ohio's MBSSO.³⁷ The Commission need only support its Entry on Rehearing with reasoning and evidence of record. There is little danger that the Commission cannot support its decision with record evidence. Absent additional clarification by the Commission that its Entry on Rehearing was reasonable the Court may overturn some portion of DE-Ohio's market price in a future appeal taken from the Commission's Entry to satisfy the Court on remand. DE-Ohio is confident that the Commission had good reasons to order the modified

³⁵ OCC's Motion at 8.

³⁶ *Id.*

³⁷ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 856 N.E.2d 213, (2006).

Alternative Proposal on rehearing and is certain that there is sufficient record evidence to support the Commission's first rehearing entry. Under such circumstances the Court must sustain the Commission. Thus, with such a low probability that the Court will overturn the Commission's Entry on Rehearing, no stay should issue.

Finally, OCC's request presumes the Commission has authority to grant a stay absent an order by the Court. As previously discussed, the MBSSO is a market price. The Commission's approval authority over a market price is limited by R.C. 4928.05. Absent a finding that DE-Ohio is not charging an appropriate price pursuant to R.C. 4928.05, the Commission lacks authority to stay the MBSSO price. Not only is there no allegation of such a finding but the Court specifically found DE-Ohio's MBSSO to comply with the R.C. 4928.05 standard of comparable and non-discriminatory.³⁸ The remedy afforded the Commission and the OCC, if either believes that pricing is non-competitive, is set forth in R.C. 4928.06.³⁹ That remedy is to report and recommend to the legislature.⁴⁰ Nowhere is the Commission authorized to issue a stay in the event of a Court remand on other issues, or even in the event that prices are high due to an alleged lack of competition. For the reasons more fully explained above, DE-Ohio asks that the Commission deny OCC's Motion in its entirety.

³⁸ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 311, 856 N.E.2d 213, 226 (2006).

³⁹ Ohio Rev. Code Ann. § 4928.06 (Baldwin 2006).

⁴⁰ *Id.*

IV. DE-Ohio's Reply to OCC's Memorandum Contra DE-Ohio's Motion to implement its 2007 SRT forecasted charges.

The Commission should grant DE-Ohio's Motion to Implement the 2007 System Reliability Tracker Market Price Subject To True-Up (SRT Motion). In filing the SRT Motion, DE-Ohio is merely seeking to maintain the status quo and the integrity of the MBSSO pricing mechanisms approved by the Commission, so that neither the company nor its consumers will be harmed by the unfortunate delays in the above captioned proceedings.

DE-Ohio's SRT mechanism is but one pricing component of DE-Ohio's total market price. It was this entire market price, which DE-Ohio agreed to charge consumers, not bits and pieces. Failing to permit DE-Ohio to charge consumers for reserve capacity purchases under its SRT subject to true-up constitutes a change to DE-Ohio's market price.

Altering previously approved pricing mechanisms is not only confiscatory but outside the scope of the Commission's jurisdiction. Revised Code Title 49 does not grant the Commission statutory authority to sua sponte change an electric distribution utility's market price for a competitive retail electric service. Specifically, R.C. 4928.05 limits the Commission's jurisdiction over the market price of a competitive retail electric service, including a firm supply of generation service, stating in relevant part:

On and after the starting date of competitive retail electric service, *a competitive retail electric service supplied by an electric utility... shall not*

*be subject to supervision and regulation... by the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except section 4905.10, division (B) of 4905.33, and sections 4905.35 and 4933.81 to 4933.90....*⁴¹

Revised Code Section 4928.05 thus divests the Commission of jurisdiction over the market price of any “competitive retail electric service,” including the SRT component of DE-Ohio’s MBSSO at issue in this case, subject to the Commission’s limited authority contained in R.C. 4905.33(B) and R.C. 4905.35.⁴² These exceptions prohibit CG&E from pricing below cost for the purpose of destroying competition and from discriminatory pricing.⁴³

The SRT is a reasonable market price since it is a cost recovery mechanism through which DE-Ohio may recover only its actual costs for maintaining a reserve capacity level necessary to fulfill its POLR obligation and is subject to an annual true-up. This charge is subject to an annual due process review and hearing in which the Commission performs an audit of expenditures and allows any party to comment regarding the costs charged to consumers.⁴⁴

In Case No. 05-724-EL-UNC, DE-Ohio filed its application and supporting testimony to set the level of its 2006 SRT. The following a full evidentiary hearing, the parties entered into a stipulation and the 2006

⁴¹ Ohio Rev. Code Ann. § 4928.05 (Baldwin 2005) (*emphasis added*).

⁴² *Id.*

⁴³ Ohio Rev. Code Ann. §§ 4905.33(B), 4905.35 (Baldwin 2005),

⁴⁴ *In re DE-Ohio’s MBSSO*, Case no. 03-93-EL-ATA et al., (November 23, 2004) (Entry Rehearing at 10); In fact, as a direct result of this due process review and true-up, the current SRT includes a refund to consumers of nearly \$10 million.

SRT was approved by the Commission.⁴⁵ Recently, in that same case, the Staff of the Commission issued its audit report finding that DE-Ohio's accounting for its 2005 SRT was accurate and accurately reported to the Commission.⁴⁶ In Case No. 06-1069-EL-UNC, DE-Ohio filed its application and supporting testimony for its proposed 2007 SRT costs. The products DE-Ohio is proposing to use to provide for its 2007 reserve capacity requirements are the same as those DE-Ohio used to meeting its 2006 capacity reserve approved by the Commission in Case Number 05-725-EL-UNC.⁴⁷ There is no evidence in any of the aforementioned cases that DE-Ohio's crediting or accounting of its SRT prices is anything but accurate and reasonable.

DE-Ohio unquestionably has an obligation to maintain adequate capacity reserves for its consumers. The necessity of adequate reserve capacity was litigated in Case Number 03-93-EL-ALA and fully supported through the direct testimony of DE-Ohio witness John P. Steffen.⁴⁸ Further, during the hearing of the matter, Mr. Steffen was subject to extensive cross-examination on the issue.⁴⁹ The Commission recognized the need for capacity reserves in approving the SRT recovery mechanism

⁴⁵ *In re DE-Ohio's Application to set and Adjust its SRT*, Case No. 05-724-EL-UNC, (November 22, 2005)(Opinion and Order).

⁴⁶ *In re DE-Ohio's Application to set and Adjust its SRT*, Case No. 05-724-EL-UNC, (December 4, 2006)(Report by the Staff of the Commission).

⁴⁷ *Id.*

⁴⁸ *See Case No. 03-93-EL-ATA, Direct Testimony of John P. Steffen at 11-14.*

⁴⁹ TR Vol IV. May 26, 2004 at 99.

in its Entry on Rehearing on November 23, 2004.⁵⁰ The Supreme Court of Ohio affirmed DE-Ohio's obligation to ensure generation supply for its consumers by offering a market-based standard service offer that establishes a generation market price for consumers who choose not to shop for an alternative supplier and for those who shop and return to DE-Ohio.⁵¹

Additionally, DE-Ohio has an obligation to meet MISO resource adequacy requirements in its day-ahead market. In order to meet this resource adequacy requirement, DE-Ohio must be able to acquire sufficient planning reserves. Accordingly, it is imperative that DE-Ohio make reserve capacity purchases for its consumers so that there is a firm supply of electric generation to fulfill these obligations. In order for DE-Ohio to make such purchases there must be a cost recovery mechanism, and thus the necessity for the Rider SRT.

In its two-paragraph Memorandum Contra to DE-Ohio's SRT Motion, OCC opposes DE-Ohio's SRT Motion to implement its forecasted 2007 SRT related charges and the SRT's annual true-up. OCC alleges that it is more reasonable for DE-Ohio to charge consumers "a rate that reflects only the expiration of the credits that were applied in the last

⁵⁰ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA (November 23, 2004) (Entry on Rehearing at 14).

⁵¹ OCC v. PUCO, 111 Ohio St.3d 300 (2006) at 23.

part of 2006 that corrected for Duke Energy's large over forecasting of SRT costs."⁵²

OCC's position is unsound, and its proposal harms consumers. As this Commission is well aware, Rider SRT is a pure cost recovery mechanism in which DE-Ohio is only able to charge the actual costs incurred for maintaining adequate reserve capacity for its consumers pursuant to its provider of last resort obligation (POLR). It is subject to an annual true-up and review to ensure consumers are only paying for actual costs. The annual true-up of the SRT was approved by the Commission as an integral component of the SRT mechanism and should not be denied.

At present, DE-Ohio's 2006 Rider SRT is acting as a credit to consumers for over collections for reserve capacity purchases made in 2006. The over collections were due to an over forecast of capacity costs arising out of unanticipated mild weather conditions and the volatility of capacity prices in the market. DE-Ohio's total Rider SRT expense in 2006, including the credit, is just under \$5 million. The 2006 Rider SRT credit will expire January 1, 2007. However, DE-Ohio's POLR obligation to maintain adequate reserve capacity will not.

Absent any Order by the Commission permitting DE-Ohio to implement a 2007 SRT market price, beginning January 1, 2007, DE-Ohio's Rider SRT will be set to zero and DE-Ohio will not have the

⁵² Memorandum Contra at 12.

planning reserve provided under the SRT. However, DE-Ohio will likely continue to make necessary capacity purchases to meet its MISO resource adequacy requirements. To the extent that DE-Ohio's consumers are not paying for the forward capacity purchases, that reserve capacity may not be available to those consumers. If additional capacity is needed to meet DE-Ohio's POLR obligation for its consumers, it will be purchased in the real time volatile market putting consumers at a greater risk to price volatility and the potential risk that capacity will not be available. Under OCC's proposal, consumers will pay these costs through the true-up mechanism of the Rider SRT at the appropriate time.

Implementing DE-Ohio's 2007 forecasted SRT charges is reasonable. DE-Ohio's forecasted 2007 SRT price amounts to a total cost of approximately \$8.7 million. Allowing DE-Ohio to charge the estimated 2007 SRT to consumers beginning January 1, 2007 will mitigate the certain rate shock and volatility that will occur if the entire 2007 capacity purchase costs are charged to consumers during the annual true-up. Therefore, OCC's position places residential consumers at risk as it is more reasonable for DE-Ohio to charge consumers based upon its 2007 forecast subject to true-up.

OCC is operating under the incorrect assumption that DE-Ohio's entire market based standard service offer (MBSSO) has been reversed by

the Ohio Supreme Court.⁵³ This assumption is wrong. In fact, as explained above, the Court found all but two of OCC's propositions of law to be without merit.⁵⁴ The only issue on remand that is pertinent to the above styled actions is that the Court Ordered the Commission "to thoroughly explain its conclusion that the modifications on rehearing are reasonable and identify the evidence it considered to support its findings."⁵⁵ It is important that the Commission consider the extremely high likelihood that it will be able to adequately explain the reasonableness of its modifications on rehearing. DE-Ohio's motion should be granted. As explained above, the issue of the necessity of reserve capacity was thoroughly litigated in Case No. 03-93-EL-ATA. The Commission approved the Rider SRT under its authority vested pursuant to R.C. 4928.05.

For the foregoing reasons, as well as those contained in its SRT Motion, the Commission should grant DE-Ohio's Motion to Implement the 2007 System Reliability Tracker Market Price Subject To True-Up.

V. DE-Ohio's Reply to OCC's Memorandum Contra DE-Ohio's Motion to True-up the AAC.

The AAC mechanism is also an integral component of DE-Ohio's MBSSO price in case number 03-93-EL-ATA.⁵⁶ The AAC includes costs related to environmental compliance, homeland security and tax law

⁵³ Ohio Consumers' Counsel v. PUC of Ohio, 111 Ohio St. 3d 300 (Ohio 2006).

⁵⁴ *Id.*

⁵⁵ *Id.* at 309.

⁵⁶ *In re. De-Ohio's MBSSO*, Case no. 03-93-EL-ATA et al., (November 23, 2004) (Entry on Rehearing at 11).

changes.⁵⁷ The Commission approved the initial AAC price over baseline as “costs of environmental compliance, security and tax law...based on changes in costs since the year 2000.”⁵⁸

In addition to approving the initial AAC pricing mechanism in Case No. 03-93-EL-ATA, the Commission approved the procedure for both DE-Ohio and the Commission to follow, in setting the AAC for future periods beginning in 2007. The Commission Ordered DE-Ohio to file by September 1, of each year, an application including costs increases and decreases in all covered categories to establish the charge.⁵⁹ Following this filing, the Commission stated it will then “review those filings and will issue appropriate orders.” This is precisely the procedure followed by DE-Ohio in the above styled proceeding.

Similarly, through its pending Motion to Reconcile Through A True Up To January 1, 2007, The Annually Adjusted Component Ultimately Approved In This Proceeding (AAC Motion), DE-Ohio is simply requesting the Commission to issue an appropriate Order to allow the company to implement its 2007 AAC, however approved in this proceeding, so that it can be trued-up as if it had been fully approved and implemented on January 1, 2007.

Granting DE-Ohio’s AAC Motion will not cause any harm to consumers. The proposed true-up simply allows DE-Ohio to charge, and

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *In re. De-Ohio's MBSSO*, Case no. 03-93-EL-ATA et al., (November 23, 2004) (Entry on Rehearing at 11).

for its consumers to pay, the entire 2007 AAC market price ultimately approved in this proceeding. The consolidation, suspension and newly imposed delays of the procedural schedule in the above captioned proceedings will cause irreparable harm for both DE-Ohio and its consumers.

If DE-Ohio is unable to true-up the 2007 AAC charge once it is established, DE-Ohio will not be able to make the purchases for such necessary items as environmental reagents and other environmental compliance items. To balance the proposed and budgeted 2007 AAC expenses with the risk of not being able to recover those costs due to the procedural delay, DE Ohio might reconsider its coal procurement initiatives perhaps deciding to burn coal with a higher sulfur content and purchase emission allowances to make up for the difference in scrubbing reagents covered in the 2007 AAC. These additional expenses would eventually flow through to customers via DE-Ohio's FPP.

DE-Ohio's AAC mechanism is but one pricing component of DE-Ohio's total market price. It was this entire market price, which DE-Ohio agreed to charge consumers, not bits and pieces. The suspension of the above captioned proceeding prevents DE-Ohio from being able to implement its full market price as approved in Case No. 03-93-EL-ATA and agreed to by DE-Ohio. The indefinite delay in the procedural schedule and suspension of the hearing in this matter results in a Commission initiated change to DE-Ohio's market price. Changing

pricing mechanisms already approved as reasonable and agreed upon by the company is not only confiscatory but outside the scope of the Commission's jurisdiction.

As discussed in the previous section regarding DE-Ohio's SRT Motion, R.C. Title 49 does not grant the Commission statutory authority to sua sponte change an electric utility's market price, including the pricing mechanisms, for a competitive retail electric service. R.C. 4928.05 divests the Commission of jurisdiction over the market price of any "competitive retail electric service," including the AAC component of DE-Ohio's MBSSO at issue in this case, subject to the Commission's limited authority contained in R. C. 4905.33(B) and R. C. 4905.35.⁶⁰

Once again, OCC is operating under the misguided assumption that DE-Ohio's entire MBSSO has been invalidated by the Court. The fact that the commission did not adequately cite to the record in its Entry on Rehearing does not per se invalidate the AAC as a just, reasonable and necessary cost component of DE-Ohio's MBSSO. OCC ignores the fact that the component charges for environmental compliance, homeland security and taxes which are contained in the AAC, were embedded in DE-Ohio's initial Stipulation which was thoroughly litigated in Case No. 03-93-EL-ATA.

Specifically, DE-Ohio witness John P. Steffen testified on direct that the company's proposed POLR charge included a variable

⁶⁰ *Id.*

component to be adjusted on an annual basis, which included compensation to the company for the risks and costs associated with maintaining adequate capacity reserves and to recover costs associated with homeland security, taxes, environmental compliance and emission allowances.⁶¹ Mr. Steffen was subject to cross-examination by all parties, including OCC.

With respect to the AAC mechanism, the Commission's adjustment in its Entry on Rehearing, approving DE-Ohio's MBSSO structure resulted in the repositioning of the charges for emission allowances from the Stipulated AAC to the price to compare as a component of DE-Ohio's Fuel and Economy Purchased Power Rider (Rider FPP).⁶² Additionally, the Commission carved out the reserve margin charges dividing them into two separate components, (the system reliability charge [SRT] and the infrastructure maintenance fund [IMF]).⁶³ The remaining underlying pricing components in DE-Ohio's initially proposed AAC were homeland security, taxes, and environmental compliance. These are the very same pricing components approved by the Commission in Case No. 03-93-EL-ATA, and which DE-Ohio is basing its 2007 AAC price.

DE-Ohio is simply trying to keep all parties in the same position they were in prior to the suspension of the procedural schedule in the

⁶¹ *In re. De-Ohio's MBSSO*, Case no. 03-93-EL-ATA et al., (May 20, 2004) (Stipulation at 5).

⁶² *In re. De-Ohio's MBSSO*, Case no. 03-93-EL-ATA et al., (May 20, 2004) (Stipulation at JPS-2).

⁶³ *Id.*

above-captioned matters, nothing more. Accordingly, the Commission should approve DE-Ohio's AAC Motion.

VI. The Commission should permit the uninterrupted continuation of approved FPP and IMF market prices.

The OCC has now raised the issue of the continuation of the FPP and IMF. The Court has affirmed all of the MBSSO components, including the FPP and IMF. The OCC concedes in its Motion that DE-Ohio's IMF is not the subject of a pending case before the PUCO. Therefore, the Commission should take no action regarding the approved and established IMF market price. There is simply no basis to suspend, stay, or make subject to refund, any portion of DE-Ohio's market price. Such action by the Commission would constitute a breach the market price ordered by the Commission, approved by the Court, and agreed upon by DE-Ohio. Resulting market prices would be higher and thereby harm consumers. DE-Ohio would have no option but to take appropriate legal action.

CONCLUSION:

For the reasons more fully explained above DE-Ohio respectfully requests that the Commission deny OCC's Motion to Stay and to Render DE-Ohio's MBSSO Market Price Subject to Refund and grant DE-Ohio's Motions to Extend the AAC, Reconcile the AAC Subject to True-Up, and Implement the SRT Subject to True-Up.

Respectfully submitted,



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I certify that a copy of the foregoing Duke Energy Ohio Motion for Clarification was served electronically on the following parties this 15th day of December 2006.



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