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FILE

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

DUKE ENERGY OHIO'S REPLY TO THE OHIO CONSUMERS' COUNSEL'S MEMORANDUM CONTRA THE MOTIONS FOR PROTECTIVE ORDER OF DUKE ENERGY OHIO, DUKE ENERGY RETAIL SALES, CINERGY CORP., AND KROGER AND MEMORANDUM CONTRA THE MOTION FOR A PRE-HEARING CONFERENCE

INTRODUCTION:

Pursuant to O.A.C. 4901-1-24(A) Duke Energy Ohio, Inc., (DE-Ohio respectfully requests this honorable Public Utilities Commission of Ohio (Commission) grant DE-Ohio's request prohibiting the Ohio Consumers' Counsel (OCC) from publicly disclosing confidential material gathered through discovery in these proceedings.

As part of these proceedings, OCC sought discovery from DE-Ohio, both through multiple subpoena duces tecum, and later through written discovery requests. The information requested by OCC consists of information held by DE-Ohio or other Parties such as Cinergy Corp.

(Cinergy), Ohio Hospital Association (OHA), Kroger, and Duke Energy Retail Sales consisting of confidential commercial contracts, terminated commercial contracts, business analysis, internal correspondence, financial analysis, business operations, and other related but sensitive and trade secret information necessitating a Protective Agreement.

In the case of DE-Ohio specifically, the information consists of a denial by DE-Ohio that DE-Ohio is a party to the contracts, that it does not know the reasoning of the signatories to the contracts, and discusses that DERS had no obligation to enter the certain contract signed subsequent to the Commission's November 23, 2004, Entry on Rehearing. OCC is also seeking the public use of financial analysis performed by and for Cinergy regarding the impact of the MBSSO to Cinergy. DE-Ohio and OCC have signed several Protective Agreements during the course of these proceedings, which limited the manner in which OCC may use protected material. By notice, OCC has indicated that it intends to use the "Protected Materials in these proceedings in *such a manner not provided for within the Protective Agreement.*"[1]

On March 2, 2007, DE-Ohio filed its Motion for a Protective Order in the above styled proceeding, requesting this Commission to maintain the confidentiality of DE-Ohio's Trade Secret Information. Among the reasons supporting DE-Ohio's Motion was the fact that OCC's request was unreasonable in that it purported to make public every single

[1] OCC's notice to disclose sent to DE-Ohio at 1 (February 23, 2007) (emphasis added).

document provided to OCC, including confidential business transactions involving DERS, Cinergy, and counterparties, but not DE-Ohio. DE-Ohio's request to maintain the confidential status of this information was supported by a number of parties to the proceeding, including both DERS and Cinergy, as well as various other unaffiliated parties.

On March 13, 2007, OCC filed its Memorandum Contra the Motions for Protective Order, which among other things, appears to limit OCC's current public disclosure initiative to the specific attachments to the testimony of its witness Beth Hixon although OCC reserves the right to make public additional confidential information.[2] OCC has filed this information under seal in accordance with the Protective Agreements. The documents attached to Ms. Hixon's testimony, which constitute Trade Secret Information and which concern DE-Ohio continue to [redacted] all negotiated by various counterparties, but not DE-Ohio (Trade Secret Information).[3] DE-Ohio has however maintained information related to the transactions referenced above in its role as the incumbent utility required to provide various services to Competitive Retail Electric Service (CRES) providers. DE-Ohio is required to

[2] *See, In re DE-Ohio's MBSSO,* Case No. 03-93-EL-ATA *et. al.* (OCC's Memo Contra),(March 13, 2007 at 12).

[3] *See BEH attachments 2,3,4,5,8,9,10,12,17,19,21.*

maintain CRES provider information as confidential pursuant to O.A.C. 4901:1-20-16(G)(4)(d).[4]

Although OCC no longer seeks to make public all of the confidential information it collected through discovery, it continues to insist on the public use of a substantial amount of information, more than four hundred pages, consisting of all of the confidential commercial contracts and internal correspondence. OCC has not advanced any reason for making the documents public other than its insistence that public policy demands such treatment and OCC supports such policy.[5] OCC's declaration of policy is in direct conflict with OCC's history and actions in this case. OCC has repeatedly signed confidential side agreements not filed with the Commission, excluded parties from settlement discussions, and required parties to maintain its settlement proposals as confidential, including in this proceeding. Apparently OCC's rule is that if you agree with OCC confidentiality is ok, but if not, all information must be public. The Commission should not condone such inconsistent and manipulative conduct by OCC.

ARGUMENT:

I. DE-Ohio's information, and the commercial contracts and transactions related thereto sought by OCC from DE-Ohio and others, are trade secrets under Ohio law.

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[4] OHIO ADMIN. CODE ANN. § 4901:1-20-16(G)(4)(d) (Baldwin 2007).

[5] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (OCC's Memo Contra at 8) (March 13, 2007).

Ohio Administrative Code Section 4901-1-24(A) permits the Commission to issue a protective order that "[D]iscovery may be had only on specified terms and conditions;...*A trade secret or other confidential research, development, commercial, or other information not be disclosed* or be disclosed only in a designated way...."[6]

The definition of Trade Secret contained in R.C. 1333.61(D) is as follows:

> "Trade secret" means information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:
> (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
> (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[7]

The Ohio Supreme Court has adopted the following factors as relevant to determining whether a document constitutes a trade secret: (1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, i.e., by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the

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[6] OHIO ADMIN. CODE ANN. § 4901-1-24 (Baldwin 2007) (emphasis added).

[7] OHIO REV. CODE ANN. § 1333.61(D) (Banks Baldwin) (2005).

information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information.[8]

As discussed in DE-Ohio's Motion, the protected material is proprietary, confidential, and a trade secret, as that term is used in R.C. 1333.61. Trade secret information, such as that at issue here, is entitled to protection under Ohio's trade secrets act,[9] R.C. 1333.61, Ohio's "public records act,"[10] and under the federal Trade Secrets and Freedom of Information acts.[11] DE-Ohio supports the arguments of DERS, Cinergy, and the counterparties to the various commercial contracts and terminated contracts that OCC seeks to make public, constitute Trade Secret Information maintained in a confidential manner. DE-Ohio also avers that its information discovered by OCC is a trade secret and otherwise protected by OCC rule absent authority to release such information by DERS, which authority has not been provided.[12]

Further, none of documents and information, including DE-Ohio's qualifies as a "public record" unless and until admitted into evidence. Revised Code Section 149.43(A)(1), in relevant part, defines "public record" as "*records* kept by any public office . . . ." According to Chief Justice Thomas Moyer, "[T]he definition of a 'public record' must be read in conjunction with the term 'record.' Section 149.011(G) defines 'record' to include 'any document . . . created or received by or coming under the

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8 *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St. 3d 396 (Ohio 2000).
9 *Id.*
10 OHIO REV. CODE § 149.011 (Baldwin 2007).
11 18 U.S.C. § 1905 (2007); 5 U.S.C. 552(b)(4) (2007).
12 OHIO ADMIN. CODE ANN. § 4901:1-20-16(G)(4)(d) (Baldwin 2007).

jurisdiction of any public office . . . which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.' Thus, *to the extent that an item does not serve to document the activities of a public office, it is not a public record."*[13]

The following description of the information that OCC wishes to make public applies to each and every document identified by OCC, including DE-Ohio's. First, only those individuals acting on behalf of DE-Ohio, who have a legitimate business need-to-know, have access to, and are aware of the discovered information and its contents. Second, the contracts, terminated contracts and related information attached to Ms. Hixon's testimony, are only known to the individual counterparties. It was not disseminated to third parties. Third, DE-Ohio and its agents maintained the information in a confidential manner, keeping them in separate files, accessible to only those few individuals who have a legitimate business access need. In fact, OCC has learned this through discovery.

Fourth, the Trade Secret Information has legitimate economic and commercial value to both DE-Ohio and the counterparties of the individual agreements. DERS is a CRES provider operating in a competitive market, it is not a regulated utility. Release of the terms and conditions of its contracts, and terminated contracts, not to mention its

[13] Moyer, J., Interpreting Ohio's Sunshine Laws: A Judicial Perspective, 59 N.Y.U. ANN. SURV. AM. L. 247 (2003) (Emphasis added).

confidential business analysis, operational decisions, customer information, into the public and more offensively, to competitors, will not only harm DERS' business interests but will interfere with competition. The release of information possessed by DE-Ohio regarding such transactions will also harm the competitive retail electric market including the counterparties to the DERS and Cinergy transactions.

DE-Ohio was not involved in the negotiation of the contracts at issue in these proceedings, including the terminated contracts, and has not been effected by those documents or influenced in any way by the counterparties thereto. All counterparties to the DERS and Cinergy contracts are paying DE-Ohio its full MBSSO price and DE-Ohio has not engaged in any transaction with its affiliates to create subsidies. In short DE-Ohio has performed as it is supposed to perform and its affiliates have engaged in arms length transactions with customers. There is no reason to make a public release of information in this case where similar information related to non-affiliated parties would not be released.

Further, one of the goals the Commission stated when it asked DE-Ohio to agree to a Rate Stabilization Plan MBSSO is the development of the competitive market. If this Commission permits confidential commercial contracts, and the information related thereto, to be made public, in this or any other proceeding, such disclosure will have a chilling affect on participation in the market place by other CRES providers. [redacted]

[redacted] OCC's unwarranted malicious attacks may result in DERS's inability to compete in that market to the detriment of the market and the Commission's goal.

The public disclosure of this information has broader ramifications with respect to the counterparties of these agreements and may place them at a competitive disadvantage within their own industries. [redacted] The contracts and operational transactions those businesses engage in are not widely disseminated or typically disclosed in a public fashion to competitors. Confidential commercial transactions allow those individual entities to maintain a competitive advantage within their respective markets.

The concept of keeping commercial contracts confidential is nothing new. The Commission has often afforded confidential treatment to commercial contracts between parties in competitive markets.[14] When it recently granted a protective order regarding terms in a competitive contract in *North Coast*, the Commission held "we understand that negotiated price and quantity terms can be sensitive information in a competitive environment."[15] All of the information that DE-Ohio provided falls into the category of sensitive information in a competitive

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

15 *Id.*

environment. Therefore, the Commission has express authority to maintain the confidentiality of information it received by it during the discovery process.[16] In this instance, OCC has not offered DE-Ohio the option of redacting the confidential material. Redaction might be possible but would be difficult due to the large number of counterparties and the necessity for agreement among them. Each contract has a confidentiality provision pledging the counterparties to support efforts to maintain the confidentiality of the protected material.

II. The Commission should not be swayed by OCC's baseless allegations.

In its Memorandum Contra, OCC attempts to justify its public disclosure initiative through allegations founded upon little more than inference and innuendo. For instance, OCC questions the secrecy of the information and DE-Ohio's efforts to limit the dissemination of its Trade Secret Information given that OCC obtained [redacted][17] OCC's claims in this regard are ridiculous.

First, of course the counter parties to respective contracts have their respective contracts. By definition, a contract is an agreement between two or more parties creating obligations that are enforceable or

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16 *Id.*

17 *See OCC Memorandum Contra* at 6 and 11.

otherwise recognizable at law.[18] This does not change the confidential or proprietary nature of the documents. DERS negotiated with the counterparties and executed the contracts with the individual counterparties. To claim that simply because OCC was able to get copies of a certain contract through a discovery request to a named counterparty to that agreement does change the confidential nature of the document. Otherwise, no contract would ever be considered confidential or a trade secret.

Second, the fact that a former employee absconded with confidential trade secret documents without the company's permission or knowledge also does not waive the confidential nature of the document. Mr. Deeds, during his tenure as a Cinergy Services employee and in his capacity as a DERS representative, was given access to the confidential information. As OCC discovered in the deposition of Mr. Deeds, Mr. Deeds had a legitimate business need to know about the contracts in the scope of his employment. As an employee of the company, Mr. Deeds was obligated to follow the company protocols including those related to maintaining corporate trade secrets, document treatment and retention. The fact that upon his departure from the company he improperly, and without the company's knowledge or permission, left with trade secret information does not change the status or ownership of the information. The information received by OCC from Mr. Deeds continues to belong to

[18] Black's Law Dictionary, 259 (7th Ed. 2000).

DERS and remains confidential. Arguably, OCC was under a duty to inform DERS, or an appropriate tribunal, that it was in receipt of confidential information misappropriated from its owner.[19] DE-Ohio's discovery discloses that OCC may have obtained the confidential information from Mr. Deed's attorney in June of 2006.[20]

Mr. Deeds, as an ex-employee, remains bound by the confidentiality clauses in the agreement as well as the companies' protocols regarding the treatment of trade secret information. Likewise, OCC by way of the protective agreements executed as part of the discovery of the above captioned matter, is obligated not to disclose the information. To the extent that OCC acquired knowledge of the information from Mr. Deeds through a subpoena or through discussions with his attorney, OCC at the very least, had constructive notice of the improper methods in which this information was obtained. OCC should not be permitted to circumvent both its agreement and obligation to maintain confidential information and benefit through the improper and potentially illegal acts of an ex-employee.

The simple fact remains that there has been no finding of any wrongdoing by DE-Ohio regarding the transactions between DERS and Cinergy with counterparties. The Trade Secret Information consisting of the effective contracts and the related transactions were executed and

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19 OHIO R. PROF. COND. 3.3(b), 4.1(b) (2007).

20 [redacted]

occurred after the Commission issued its Entry on Rehearing establishing DE-Ohio's MBSSO market price. Those contracts have no bearing on the Commission's determination as to whether or not DE-Ohio's price was reasonable or a market price. This Commission should not base any determination of the confidentiality of DE-Ohio's confidential material upon OCC's unproven mischaracterizations and baseless conspiracy theories.

In its Memorandum Contra, OCC also attempts to justify [redacted]

In fact, OCC brought such an agreement to the attention of the Supreme Court of Ohio in its appeal of the Commission's approval of a change in The Dayton Power and Light Company's (DP&L) recovery of billing system costs.[22] A[redacted]

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21 OCC Memo Contra at 13.

22 *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 110 Ohio St. 3d 394 (2006).

23 Hixon deposition at 148-151.

[redacted]

Regardless of the characterization of DE-Ohio's Trade Secret Information, there is no evidence other than the baseless allegations by OCC that DERS' and Cinergy's contracts are anything but legitimate

24 [redacted]
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26 *See Attachment B.*

business transactions. In fact, Ms. Hixon, in her deposition makes it clear that she is not alleging any corporate separation plan or code of conduct violation,[27] and makes no conclusions as to whether any of the Commission's affiliate rules have been violated.[28]

III. OCC will not be harmed by maintaining the confidential nature of the Trade Secret Information.

As a general principal, confidential commercial contracts and related materials should not be freely placed into the public realm to the detriment of the signatories where there is no need for such disclosure. This is particularly true where such materials can be considered by the Commission, while under seal.

The Commission should not permit OCC to abuse its process to make information public that would not otherwise be public, particularly, as in these proceedings, where the information is irrelevant to the case and could not have influenced the outcome of the proceedings. DE-Ohio has provided the information to OCC and OCC has been permitted to use this information to formulate its opinions and file its testimony in the above styled proceeding. Although DE-Ohio maintains its position that the information is irrelevant to the scope of the above styled proceedings, DE-Ohio has not prohibited OCC from using the information.

Arguments regarding relevancy and admissibility aside, should the Commission permit this information into evidence, DE-Ohio maintains

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27 Hixon deposition at 185.

28 *Id.* at 184-189.

that public policy dictates that DE-Ohio's, as well as all of the other parties', Trade Secret Information be maintained as confidential. OCC has not specified any public use of any document that it could not achieve under seal in the presentation of its case.[29]

As stated previously, this Commission has recognized the need to keep commercial terms, pricing, pricing structures and the like confidential.[30] OCC's argument that maintaining confidentiality will be a cumbersome exercise in the hearing of the above captioned matter should not carry the day. OCC's own actions have forced DERS and Cinergy to be Parties in this proceeding in order to protect their interests. Any alleged burden, which DE-Ohio denies, is OCC's creation and should not be relieved at the expense of DE-Ohio or any other Party.

IV. OCC's request for Rehearing.

In its Memorandum Contra, OCC requests that the Commission hold another pre-hearing conference to discuss many issues, including but not limited to, order of witnesses, and the procedure to address the confidential nature of information which OCC insists upon making public. While DE-Ohio is not opposed to the pre-hearing conference, the company does find it ironic that both DE-Ohio, DERS, and Cinergy, have requested time and time again that this Commission offer some guidance as to the scope of the hearing and the relevancy, treatment and

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29 *Id.*

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

admissibility of evidence, while OCC has vehemently opposed any such request.

As stated above, DE-Ohio objects to OCC's attempts to use the administrative burden placed upon OCC in presenting its case as a justification to make Trade Secret Information public. OCC has created this situation through its unreasonable and oppressive attempts to make all Trade Secret Information public. This proceeding is not the first time that this Commission has had to address confidential information in an evidentiary hearing and is well equipped to do so in a reasonable and efficient manner. OCC's inconvenience is not an excuse.

OCC is the only party seeking to make confidential, proprietary trade secret information public. In fact, many of the Parties, who are not affiliated with Duke Energy Corporation, have gone on record in support of keeping information confidential, in direct opposition to OCC. For example, on March 2, 2007, Industrial Energy Users-Ohio (IEU-Ohio) filed a letter calling OCC's actions to the attention of the Commission, and implored the Commission to take a proactive stance to protect Trade Secret Information which if released could have a disastrous impact on the Ohio economy.[31] DE-Ohio wholly supports IEU-Ohio in this request. Even Constellation NewEnergy Inc. (Constellation) is not immune from the impact of OCC's dubious crusade, as Constellation is now forced to defend its own confidential commercial contracts from public disclosure

[31] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (IEU-Ohio's Letter) (March 2, 2007).

in this proceeding.[32] This Commission should put an end to OCC's oppressive and harassing behavior so that the Parties can more fully focus on the real issues in the case.

CONCLUSION:

For the reasons set forth in DE-Ohio's March 2, 2007, filing, as well as those contained in this Reply, DE-Ohio respectfully requests the Commission grant this Motion for Protective Order and prohibit the public disclosure of the Trade Secret Information.

Respectfully Submitted,

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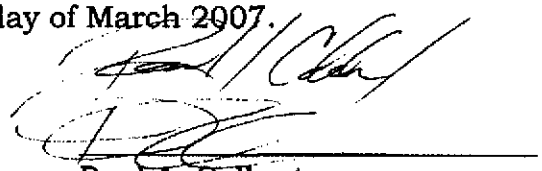
[32] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (Constellation's Memorandum in Response) (March 9, 2007).

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically on the following parties this 15th day of March 2007.



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No. 2005-0945

SUPREME COURT OF OHIO

110 Ohio St. 3d 394; 2006 Ohio 4706; 853 N.E.2d 1153; 2006 Ohio LEXIS 2900

May 9, 2006, Submitted
September 27, 2006, Decided

PRIOR HISTORY: APPEAL from the Public Utilities Commission, Nos. 03-2405-EL-CSS, 04-85-EL-CSS, and 03-2341-EL-ATA. Ohio Consumers' Counsel v. PUC, 109 Ohio St. 3d 1412, 2006 Ohio 1892, 846 N.E.2d 50, 2006 Ohio LEXIS 967 (2006)

DISPOSITION: Order affirmed.

HEADNOTES: *Public utilities -- Consolidated billing by electricity-distribution company -- Costs of billing for providers of competitive retail electric service -- Expenses caused by default of provider of competitive retail electric service.*

COUNSEL: Janine L. Migden-Ostrander, Ohio Consumers' Counsel, Jeffrey L. Small, and Larry S. Sauer, for appellant.

Jim Petro, Attorney General, Duane Luckey, Senior Deputy Attorney General, and Steven T. Nourse and William L. Wright, Assistant Attorneys General, for appellee, Public Utilities Commission of Ohio.

Faruki, Ireland & Cox, P.L.L., Charles J. Faruki, and Jeffrey S. Sharkey, for intervening appellee, the Dayton Power & Light Company.

Bell, Royer & Sanders Co., L.P.A., Barth E. Royer, and Judith B. Sanders, urging affirmance for amicus curiae, Dominion Retail, Inc.

JUDGES: O'DONNELL, J. MOYER, C.J., RESNICK, PFEIFER, LUNDBERG STRATTON, O'CONNOR and LANZINGER, JJ., concur.

OPINION BY: O'DONNELL

OPINION:

[*394] [***1155] **O'DONNELL, J.**

[**P1] In this appeal, the Ohio Consumers' Counsel challenges an order issued by the Public Utilities Commission of Ohio ("PUCO") that approved a 2004 agreement between the Dayton Power & Light Company ("DP&L") and several other entities, Dominion Retail, Inc., Green Mountain Energy Company, Miami Valley Communications Council, and Industrial Energy Users-Ohio, each of which had questioned DP&L's efforts to recoup the cost of changing its billing practices after the General Assembly deregulated the retail electricity market in 1999.

[**P2] The PUCO order at issue changed the way in which DP&L could recover its billing-system costs. For the reasons that follow, we affirm the PUCO's order.

Facts

[**P3] DP&L incurred the $ 18.8 million in billing-system costs at issue in this case because the statutes that deregulated electricity in Ohio required electric utilities to "unbundle" or separate the costs of electricity generation from the costs of electricity distribution. See R.C. 4928.10(C)(2) and 4928.35. As a result, DP&L developed new computer programs enabling the company to produce the type of customer bills that the statutes and PUCO regulations required in a deregulated electricity market.

[**P4] In 2000, the PUCO approved DP&L's initial plan to charge "CRES providers" for the costs associated with the billing-system changes. A CRES provider is a provider of competitive retail electric service. See Ohio Adm.Code 4901:1-10-01(F) and 4901:1-21-01(A)(10). Both Dominion Retail, Inc. and Green [*395] Mountain Energy Company -- which joined the 2004 agreement at issue -- are CRES providers.

[**P5] In the competitive retail market for electricity established by the General Assembly in 1999, cus-

tomers have the option to choose to continue paying their original electricity provider for generation service or to select a CRES provider for that service. R.C. 4928.14. Regardless of which provider the customer selects, the electricity generated by the provider is delivered over wires owned and maintained by the electric utility, and that company can continue to charge for the delivery service.

[**P6] The PUCO requires electric utilities such as DP&L that distribute electricity to offer "consolidated billing" to the CRES providers that want to offer competing electricity generation service to retail customers in the utility company's territory. Ohio Adm.Code 4901:1-10-29(G). See, also, Ohio Adm.Code 4901:1-10-01(D) ("'Consolidated billing' means that a customer receives a single bill for electric services provided during a billing period" for both distribution services and generation services). Evidence in the record before us indicates that DP&L had to do substantial reprogramming of its computers to accommodate the new requirement that it offer a consolidated bill showing the unbundled charges incurred by any customer in its territory who chose to buy electricity generation service from a CRES provider while DP&L continued to provide electricity-distribution service to the customer.

[**P7] [***1156] In making its initial 2000 plan to charge CRES providers for the billing-system changes, DP&L calculated that it would have to charge $ 4.76 for each consolidated bill it generated for a CRES provider to fully recover the costs of the billing changes. DP&L concluded that potential CRES providers in its territory would not be willing to pay such a high price for the production of each customer bill, so DP&L chose to charge CRES providers $ 1.90 per bill under a one-year contract or $ 1.56 per bill under a two-year contract.

[**P8] The lesser amount did not satisfy CRES providers such as Dominion Retail and Green Mountain Energy Company, and as a result, Dominion filed a complaint with the PUCO in 2003, and Green Mountain then intervened to challenge the amount DP&L charged CRES providers for each consolidated customer bill DP&L generated for them. The Miami Valley Communications Council -- a regional council of governments interested in promoting competition in the retail electricity market -- likewise filed a complaint against DP&L with the PUCO in 2003 alleging that DP&L charged CRES providers excessive amounts for billing services.

[**P9] The PUCO consolidated the cases and granted motions to intervene filed by the Consumers' Counsel and Industrial Energy Users-Ohio. At a hearing before the PUCO on these complaints, Dominion Retail and Miami Valley offered [*396] evidence that the DP&L charges were "excessive and unreasonable," "discourage[d] shopping," and constituted a "barrier to competition." Expert testimony presented by the Consumers' Counsel echoed those views, describing the charges to CRES providers as "a significant impediment to competition" that would "significantly decrease the savings a residential customer would expect to realize" from switching to a new provider of retail electric-generation service.

[**P10] After several days of hearings before the PUCO in 2004, all parties except the Consumers' Counsel reached an agreement to change the way in which DP&L could recover the $ 18.8 million in billing-related costs it had incurred from 1999 to 2001. The stipulation called for DP&L to charge CRES providers only $ .20 per customer bill (to cover the cost of transmitting customer data electronically between DP&L and the CRES provider) and then -- beginning January 1, 2006 -- allowed DP&L to recover from all of its customers those costs of the billing-system changes that had been approved in an audit.

[**P11] The stipulation also provided for DP&L to recover from a CRES provider's customers any of DP&L's out-of-pocket costs resulting from the default of that CRES provider after reasonable efforts to recover from the CRES provider.

[**P12] The Consumers' Counsel refused to join the stipulation. The PUCO considered the objections raised by the Consumers' Counsel but nonetheless approved the agreement in February 2005, concluding that a reasonable arrangement would benefit ratepayers and the public. The Consumers' Counsel filed an application for rehearing, but the PUCO denied that application. This appeal followed.

Standard of Review

[**P13] "R.C. 4903.13 provides that a PUCO order shall be reversed, vacated, or modified by this court only when, upon consideration of the record, the court finds the order to be unlawful or unreasonable." *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004 Ohio 6767, P50, 820 N.E.2d 885. The court will not reverse or modify a PUCO decision as to questions of fact if the decision was not manifestly against the weight [***1157] of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004 Ohio 6896, 820 N.E.2d 921, P 29. The appellant bears the burden of demonstrating that the PUCO's decision is against the manifest weight of the evidence or is clearly unsupported by the record. Id.

[**P14] Although the court has "complete and independent power of review as to all questions of law" in

appeals from the PUCO, *Ohio Edison Co. v. Pub. Util. Comm.* (1997), 78 Ohio St.3d 466, 469, 1997 Ohio 196, 678 N.E.2d 922, the court has explained [*397] that it may rely on the expertise of a state agency like the PUCO in interpreting a law where "highly specialized issues" are involved "and where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly." *Consumers' Counsel v. Pub. Util. Comm.* (1979), 58 Ohio St. 2d 108, 110, 12 O.O.3d 115, 388 N.E.2d 1370.

Analysis

The Order Allowing DP&L to Charge Customers for the Billing-Related Changes Made by DP&L Is Reasonable

[**P15] The Consumers' Counsel contends first that the multiparty agreement approved by the PUCO is not beneficial to ratepayers and that it improperly deviates from DP&L's initial intention to recover from CRES providers rather than from consumers the $ 18.8 million cost of reprogramming DP&L's computers to accommodate new billing practices mandated by the General Assembly when the competitive retail market for electricity was established in Ohio. The PUCO, DP&L, and Dominion Retail each counter those arguments, claiming that the PUCO's approval of the agreement was entirely reasonable.

[**P16] This court applies a three-part test when evaluating the reasonableness of settlements approved by the PUCO: whether the settlement is a product of serious bargaining among capable, knowledgeable parties; whether the settlement, as a package, benefits ratepayers and the public interest; and whether the settlement package violates any important regulatory principles or practices. *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, 126, 1992 Ohio 122, 592 N.E.2d 1370. See, also, *AK Steel Corp. v. Pub. Util. Comm.* (2002), 95 Ohio St. 3d 81, 82-83, 2002 Ohio 1735, 765 N.E.2d 862.

[**P17] The Consumers' Counsel urges that the agreement in this case fails the second and third prongs of the test, alleging that consumers will pay costs under the agreement that DP&L initially planned to recover solely from CRES providers. To support its argument, the Consumers' Counsel points to a separate one-page sidebar agreement between DP&L and the Consumers' Counsel. In that sidebar agreement from June 2000, DP&L had agreed that it would "not seek recovery from residential customers" for costs associated with "billing system modifications" made by DP&L. The PUCO's failure to enforce that earlier agreement when DP&L and other parties presented their new agreement in October 2004 represented a "willful disregard of duty," according to the Consumers' Counsel.

[**P18] However, the June 2000 sidebar agreement was never filed with or approved by the PUCO, and for that reason, the PUCO refused to consider it when weighing the reasonableness of the 2004 agreement, explaining that "[u]nderstandings among parties that are important enough that the parties wish to [*398] have a means to bring them to the Commission's attention at a later time" should be [***1158] brought "to the Commission for approval" when those understandings are reached. The PUCO has taken a similar approach in past cases, and we have approved that practice. See, e.g., *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004 Ohio 6767, P14-15, 820 N.E.2d 885 (approving the PUCO's refusal to consider side agreements that had not been incorporated into the agreement at issue); *Cookson Pottery v. Pub. Util. Comm.* (1954), 161 Ohio St. 498, 505, 53 O.O. 374, 120 N.E.2d 98, citing G.C. 614-17, the predecessor of R.C. 4905.31 (contracts between a public utility and its customers that are not filed with the PUCO "shall not be lawful"). R.C. 4905.31(E) provides that no financial arrangement between a public utility and consumers "is lawful unless it is filed with and approved by" the PUCO.

[**P19] The PUCO's refusal, then, to consider the unapproved June 2000 sidebar agreement between the Consumers' Counsel and DP&L appears consistent with past practice and with the relevant statutory provision.

[**P20] The PUCO also properly applied our three-part test for weighing the reasonableness of the October 2004 agreement at issue in this case. Ample evidence in the record supports the PUCO's conclusion that the agreement would be a "benefit to ratepayers and the public interest" and would "limit[] any negative impact on competition in DP&L's territory" by doing away with DP&L's initial plan to charge CRES providers up to $ 1.90 for each consolidated electric bill prepared by the utility company.

[**P21] As the PUCO noted in its order, "it is a benefit to the ratepayers and the public interest for the parties to these cases to agree to a per-bill fee that is substantially lower than DP&L currently charges." The PUCO also explained that the 2004 agreement is consistent with standard regulatory practices because other electric and gas utility companies have been allowed to recover from their customers the same kind of billing-related charges that the agreement calls for DP&L to recover from its customers.

[**P22] The agreement also brings other benefits to the consumer. The reduced charges to CRES providers for each customer bill will lower any barrier that may have kept Dominion Retail and other competitors of DP&L from winning customers for retail electricity gen-

eration service in DP&L's territory. And because all customers benefit from having greater choices in a competitive retail electricity market, the stipulation's removal of a significant barrier to the entry of new competitors in DP&L's territory benefits all customers in that area. As a result, as one witness testified, it is reasonable to ask all customers to pay for that benefit.

[**P23] Upon review, we have concluded that the record supports the reasonableness of the PUCO's order approving the 2004 agreement and contains [*399] sufficient probative evidence to justify the PUCO's factual findings that the agreement would benefit ratepayers and the public interest and would not violate any important regulatory principles or practices. The PUCO's decision finding the agreement reasonable is therefore not "manifestly against the weight of the evidence" and is not "so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty." *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm.* (2000), 88 Ohio St. 3d 549, 555, 2000 Ohio 422, 2000 Ohio 423, 728 N.E.2d 371.

The Order Allowing DP&L to Charge Customers for the Billing-Related Changes Made by DP&L Is Lawful

[**P24] The Consumers' Counsel further challenges the lawfulness of the [***1159] PUCO's order, arguing that the PUCO should not have deviated from one of its own earlier orders and should have enforced various statutory requirements that apply to utility rate increases. We conclude that the PUCO properly rejected both arguments.

[**P25] First, the Consumers' Counsel contends that in accordance with the PUCO's 2000 order, DP&L could not recover its billing-related costs from CRES providers before 2007. However, in *Consumers' Counsel v. Pub. Util. Comm.* (1984), 10 Ohio St. 3d 49, 50-51, 10 Ohio B. 312, 461 N.E.2d 303, we explained that the PUCO may change or modify earlier orders as long as it justifies any changes. The agreement reached by DP&L and the other parties in 2004, and approved by the PUCO in the proceedings below in 2005, created a new and entirely reasonable way for DP&L to recover the billing-related costs it had incurred between 1999 and 2001. As explained above, the record supported the change, and the PUCO fully explained its reasons for approving the agreement. The PUCO was not bound to adhere to an earlier arrangement that had created anticompetitive barriers to the entry of new CRES providers in DP&L's territory, and the PUCO's decision to remove those barriers by modifying an earlier PUCO order was not unlawful.

[**P26] The Consumers' Counsel next contends that the statutory requirements for utility rate increases should have been followed in the proceedings below. Under the statute cited by the Consumers' Counsel, a public utility seeking to change its existing rates for customers must "file a written application" with the PUCO and must prove at any hearing held on the request that it is "just and reasonable." R.C. 4909.18. The application for a rate increase must also be published by the PUCO in a newspaper in the utility company's territory, R.C. 4909.19, and public hearings must be held in large municipalities in the affected service area, R.C. 4903.083.

[**P27] Those specific statutory provisions were not followed in this case, as the proposal that DP&L's customers pay for the expenses it incurred to reprogram [*400] its computers between 1999 and 2001 to accommodate consolidated billing had emerged not from a formal rate-increase application but from the agreement between DP&L and the other parties in October 2004. Nonetheless, the agreement is valid, and the PUCO lawfully approved it in February 2005.

[**P28] The agreement in this case was reached in an R.C. 4905.26 complaint proceeding, not an R.C. 4909.18 rate-increase proceeding (with all of the attendant procedural requirements cited by the Consumers' Counsel). That former statutory provision was cited by CRES provider Dominion Retail and by the Miami Valley Communications Council when they filed their separate complaints against DP&L to initiate the proceedings that led to the agreement at issue several months later. In its February 2005 order approving the parties' settlement agreement, the PUCO acknowledged that the agreement "arose in the context of a complaint case" rather than in a rate-increase proceeding.

[**P29] We have repeatedly held that utility rates may be changed by the PUCO in an R.C. 4905.26 complaint proceeding such as this, without compelling the affected utility to apply for a rate increase under R.C. 4909.18. See, e.g., *Lucas Cty. Commrs. v. Pub. Util. Comm.* (1997), 80 Ohio St.3d 344, 347, 1997 Ohio 112, 686 N.E.2d 501 ("Pursuant to R.C. 4905.26 * * *, the commission may conduct an investigation and hearing, and fix new rates to be substituted for existing rates, if it determines that [***1160] the rates charged by the utility are unjust and unreasonable"); *Allnet Communications Servs., Inc. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 115, 117, 512 N.E.2d 350 ("R.C. 4905.26 is broad in scope as to what kinds of matters may be raised by complaint before the PUCO. In fact, this court has held that reasonable grounds may exist to raise issues which might strictly be viewed as 'collateral attacks' on previous orders"); *Ohio Util. Co. v. Pub. Util. Comm.* (1979), 58 Ohio St. 2d 153, 157, 12 O.O.3d 167, 389 N.E.2d 483 (in an R.C. 4905.26 proceeding, the PUCO can "order[] that new rates be put in effect").

[**P30] As R.C. 4905.26 itself provides, "any person, firm, or corporation," as well as the PUCO itself,

may file a complaint alleging that an existing or proposed utility rate or charge is unjust or unreasonable. That kind of allegation was raised by both Dominion Retail and the Miami Valley Communications Council in the proceedings below, each of which questioned the charges that DP&L imposed on CRES providers for consolidated-billing services. R.C. 4905.26 indicates that the parties to a complaint proceeding "shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses." No allegation exists that those requirements were not met in the proceedings below, and in fact the PUCO held several days of hearings on the complaints and heard from multiple witnesses, including a witness who testified on behalf of the Consumers' Counsel.

[*401] [**P31] Some of the testimony in the R.C. 4905.26 complaint proceeding before the PUCO in 2004 indicated that the PUCO's 2000 order -- which allowed DP&L to charge CRES providers for the computer-related consolidated-billing costs that it incurred between 1999 and 2001 -- was unreasonable and posed a barrier to the entry of new CRES providers in DP&L's service area. Testimony presented after most of the parties in the complaint proceeding reached their October 2004 agreement indicated that shifting the computer-related costs from CRES providers to DP&L's customers would foster competition in DP&L's service area by "mak[ing] it easier for CRES providers to offer savings to customers." Multiple witnesses also testified that the agreed resolution of the complaint proceeding was reasonable and appropriate. Relying on that evidence in the record, the PUCO approved the agreement in February 2005.

[**P32] The PUCO acted lawfully. As noted above, this court has allowed the PUCO to impose new utility rates or to change existing rates in other R.C. 4905.26 complaint proceedings, and there is no dispute that the PUCO complied with all of the procedural requirements in the statute by holding a hearing and by allowing the parties to be represented by counsel and to compel the attendance of witnesses.

The Portion of the PUCO's Order Giving DP&L Additional Protections in the Event of a CRES Provider's Default Is Also Reasonable and Lawful

[**P33] Although the Consumers' Counsel primarily focuses on the reasonableness and lawfulness of the PUCO decision permitting DP&L to charge its customers for the costs that DP&L incurred when it made software changes in order to produce unbundled consolidated customer bills, the Consumers' Counsel also challenges a provision of the PUCO order allowing DP&L to recover from a CRES provider's customers any of DP&L's out-of-pocket costs resulting from the default of that CRES provider.

[**P34] The PUCO and DP&L argue that the Consumers' Counsel should not be permitted to raise this issue because she did not first raise it in the application for [***1161] rehearing before the PUCO. Those parties are correct in that R.C. 4903.10 states, "No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application.." Yet the Consumers' Counsel *did* challenge the default recovery mechanism in the application for rehearing, and the PUCO addressed the issue in its order denying rehearing. The Consumers' Counsel has therefore properly raised the issue.

[**P35] The default-recovery mechanism approved by the PUCO is unlawful according to the Consumers' Counsel because no statutory or regulatory provisions in Ohio expressly permit that kind of financial protection to be given to an [*402] electricity distributor like DP&L. Notably, though, the Consumers' Counsel cites no statutory provisions that *disallow* the practice either.

[**P36] R.C. 4928.08(B) requires CRES providers to "provid[e] a financial guarantee sufficient to protect customers and electric distribution utilities from default," and Ohio Adm.Code 4901:1-24-08(C) allows an electricity distributor (like DP&L) to "apply for relief" at the PUCO if a CRES provider fails to maintain such a guarantee. Those provisions -- the only ones cited by the Consumers' Counsel -- do not prevent the PUCO from approving the kind of additional financial protections given to DP&L to ensure that it will not incur losses when a CRES provider in its territory defaults.

[**P37] As one witness testified before the PUCO about this so-called default recovery rider, it "establishes a reasonable and appropriate process for the recovery by DP&L of prudently incurred costs of a CRES provider default * * * [and] will protect DP&L from costs that DP&L may incur to procure replacement power to serve customers who had been served by a defaulting CRES provider." Another witness testified that because DP&L does not select CRES providers (customers do), and because DP&L does not benefit from CRES providers' services (customers do), it is reasonable for the customers of a CRES provider to reimburse an electricity distributor such as DP&L for the out-of-pocket costs DP&L incurs when the CRES provider defaults. Testimony before the PUCO also indicated that similar default recovery mechanisms currently protect natural gas distributors.

[**P38] The PUCO cited and agreed with all of that testimony, stating in its February 2005 order that the default recovery mechanism "is not prohibited by any current statute or rule" and is in fact "permissible under the current statutory system." The likelihood that DP&L will ever invoke the default recovery mechanism is

small, the PUCO noted, but it is "a reasonable method to spread the risk of the competitive market."

[**P39] The PUCO's findings as to the reasonableness of this particular provision of the 2004 agreement are supported by the record, and its legal conclusion that the provision is not unlawful is correct. The order, therefore, allowing DP&L to recover from a CRES provider's customers any of DP&L's out-of-pocket costs resulting from the default of the CRES provider was both reasonable and lawful.

Conclusion

[**P40] For the reasons explained above, the order of the PUCO that allowed DP&L (1) to shift from CRES providers to DP&L's customers the costs that DP&L incurred to update its computer software in order to provide consolidated customer bills for CRES providers in its territory and (2) to recover from a [*403] CRES provider's customers any of DP&L's out-of-pocket costs resulting from the default of the CRES provider was both reasonable and lawful. The PUCO fully explained the rationale [***1162] for its order, evidence in the record supports the PUCO's decision, and the order is not inconsistent with any statutory or regulatory requirements. Therefore, the order of the PUCO is affirmed. n1

n1 In accordance with S.Ct.Prac.R. IX(8), the Consumers' Counsel filed a list of additional authorities before the oral argument in this case. That list of citations was timely filed, and we therefore deny the PUCO's and DP&L's motions to strike the list.

Order affirmed.

MOYER, C.J., RESNICK, PFEIFER, LUNDBERG STRATTON, O'CONNOR and LANZINGER, JJ., concur.