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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

DUKE ENERGY OHIO'S MERIT BRIEF

SUMMARY OF THE ARGUMENT:

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

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

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

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

Further, the evidence is clear that the various confidential commercial contracts entered into by Duke Energy Retail Sales (DERS) and Cinergy Corporation (Cinergy) were not only appropriate but irrelevant and unrelated to the establishment of DE-Ohio's MBSSO market price. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Even if there were some nexus between the confidential commercial contracts of DERS and Cinergy and the Stipulation, which DE-Ohio denies, the existence of the contracts would still be irrelevant because the Stipulation itself was not adopted by the Commission.

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

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

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

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

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

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

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

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

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The lack of weight the Commission should give Ms. Hixon's testimony becomes clear upon examination of the facts and her concessions on cross-examination. [REDACTED]

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

[REDACTED]

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

Ultimately, Ms. Hixon makes no attempt to address the only issue expressly raised by the Court regarding alleged "side agreements;" whether such agreements were relevant to the Commission's determination that the Parties engaged in serious bargaining.⁶ The failure of OCC's witness to address the issue of serious bargaining is because: (1) The Commission rejected the Stipulation so serious bargaining relative to the Stipulation is irrelevant; (2) OCC did not ask for the contracts it now alleges affected the Stipulation so such contracts could not have been considered; and (3) [REDACTED]

[REDACTED]

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

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

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

HISTORY OF THE PROCEEDINGS:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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

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

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

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

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

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

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

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

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

On May 19, 2004, after a full day of negotiation with all Parties, including OCC, DE-Ohio filed a Stipulation signed by the Company, Staff, First Energy Solutions (FES), Dominion Retail Sales, Green Mountain Energy, People Working Cooperatively (PWC), Communities United for Action (CUFA), Cognis, Kroger, Industrial Energy Users-Ohio (IEU-Ohio), Ohio Energy Group (OEG), and the OHA. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

On May 20, 2004, OCC repeated its discovery request at the commencement of the evidentiary hearing on the Stipulation.¹² The Commission denied OCC's oral motion to compel discovery.¹³ Thereafter, the evidentiary hearing began and was completed on June 1, 2004.¹⁴ [REDACTED]

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

¹¹ *Id.*

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

¹³ *Id.*

¹⁴ *Id.* at TR. VII (June 1, 2004).

[REDACTED]

[REDACTED]

[REDACTED] The only contract in which DE-Ohio was actually involved was a June 14, 2004, amendment to its February 4, 2004, contract with the City of Cincinnati. Ultimately, the Commission issued its Opinion and Order rejecting the Stipulation on September 29, 2004.

DE-Ohio, OCC, and other Parties filed Applications for Rehearing following the Commission's Opinion and Order. DE-Ohio, as part of its Application for Rehearing, made an Alternative Proposal based upon the existing record evidence established during the hearing ended June 1, 2004. The Alternative Proposal incorporated some of the changes made by the Commission in its Opinion and Order and renamed and repositioned certain components proposed in the Stipulation. The Alternative Proposal included new component names and a lower total price than what was in the Stipulation, but contained no new concepts. The Alternative Proposal resulted in a lower MBSSO price than was agreed to in the Stipulation, and permitted more consumers to avoid greater portions of the MBSSO. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Commission issued its Entry on Rehearing on November 23, 2004.¹⁵ It did not adopt DE-Ohio's Alternative Proposal, but made significant changes to avoidability and the market price charged to returning customers necessitating additional Entries on Rehearing. DERS entered all of its option contracts subsequent to the Commission's November 23, 2004, Entry on Rehearing. [REDACTED]

[REDACTED] The Commission issued its final Entry on Rehearing, and final appealable order in these cases, on April 13, 2005.¹⁶

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

On remand, the Commission permitted expansive discovery allowing OCC to receive contracts entered between DERS or Cinergy [REDACTED]

[REDACTED] At hearing the Commission permitted OCC to submit evidence recommending changes to DE-Ohio's

¹⁵ *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Entry on Rehearing) (November 23, 2004).

¹⁶ *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Entry on Rehearing) (April 13, 2005).

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

¹⁸ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 309, 856 N.E.2d 213, 225 (2006).

MBSSO [REDACTED] The case has now been submitted to the Commission for a decision based upon the record evidence.

ARGUMENT:

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

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

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

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

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

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

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

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

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

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

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

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

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

²³ *Id.* at 11.

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

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

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

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

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

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

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

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

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

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

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

²⁹ *Id.* at 7.

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

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

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

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

³⁰ *Id.* at 11-14.

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

³² *Id.*

³³ *Id.* at 27.

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

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

TABLE
Comparison of Reserve Margin Revenue with SRT and IMF Revenue

Reserve Margin Revenue Originally Requested³⁵

Annual Amount ³⁶	\$	52,898,560
Number of Years		<u>4</u>
Total Reserve margin Revenue Requested	\$	<u>211,594,240</u>

Total of SRT and IMF Revenue

SRT Revenue Requested ³⁷	\$	14,898,000
Number of Years		<u>4</u>
Total SRT Revenue ³⁸	\$	<u>59,592,000</u>

IMF Basis (Little g)		
Non-residential	\$493,031,471 ³⁹	
Residential	<u>\$259,124,875⁴⁰</u>	
Total	<u>\$752,156,346⁴¹</u>	

IMF Revenue ⁴²		
2005 Non-residential at 4%	\$	19,721,259
2005 Residential ⁴³ at 4%		10,364,995
2006 Non-residential at 4%		19,721,259
2006 Residential at 4%		10,364,995
2007 Non-residential at 6%		29,581,888
2007 Residential at 6%		15,547,493
2008 Non-residential at 6%		29,581,888
2008 Residential at 6%		<u>15,547,493</u>
Total IMF Revenue	\$	<u>150,431,270</u>
Total SRT and IMF Revenue Allowed	\$	<u>210,023,270</u>

³⁵ Non-by-passable.

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

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

³⁸ Partially by-passable.

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

⁴⁰ *Id.*

⁴¹ *Id.*

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

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

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

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

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

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

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

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

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

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

OCC witness Talbot is the only other witness to present evidence regarding DE-Ohio's MBSSO. Mr. Talbot's testimony, however, amounts to a recommendation that the Commission adopt a new market price in place of the market price it ordered on November 23, 2004.⁵⁰ Mr. Talbot makes three primary recommendations regarding DE-Ohio's market price. First, the Commission should set DE-Ohio's generation market price on a cost basis without regard to market conditions or pricing consequences.⁵¹ Second, the Commission should make all of DE-Ohio's MBSSO components avoidable.⁵² And third, the Commission should decrease price volatility, and demand response, by adjusting the FPP on an annual, instead of a quarterly, basis.⁵³

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

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

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

⁵¹ *Id.* at 6.

⁵² *Id.*

⁵³ *Id.* at 7.

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

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

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

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

The entire testimony of OCC witness Beth E. Hixon [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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

⁵⁶ *Id.* at 96-97

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

The facts are that throughout the duration of the initial MBSSO proceeding, DE-Ohio had only one contract with a Party to these proceedings that was arguably responsive to OCC's discovery request on May 20, 2004. That contract is an amendment to an earlier contract with the City of Cincinnati regarding naming rights to the convention center and is a public contract approved by the Cincinnati City Council.⁵⁸ The initial contract was executed with the City prior to its intervention in the MBSSO proceeding. Further, the amendment was entered on June 14, 2004, after the close of the evidentiary hearing regarding DE-Ohio's MBSSO and therefore, could have had no influence on the Commission's September 29, 2004, Opinion and Order, or the November 23, 2004, Entry on Rehearing. The City never signed the May 19, 2004, Stipulation and ultimately withdrew from the case. The contract required DE-Ohio to make payment to various City divisions in exchange for an amendment to the "aggregate generation rate" specified in the original contract.⁵⁹ The "aggregate generation rate" is simply the price at which it is economic for the City to switch to a CRES provider, it is not a market price paid by the City or anyone else. The City did agree to withdraw from these cases under the terms of the contract but only after it had the opportunity to fully participate in the hearing ending June 1, 2004.⁶⁰ The contract between DE-Ohio and the City had no effect on the City's rates or market prices paid to

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

⁵⁹ *Id.*

⁶⁰ *Id.*

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

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

[REDACTED]

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

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

⁶³ *Id.* at 35-36.

⁶⁴ *Id.* at 36

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Finally, the DERS and Cinergy contracts would not have been discoverable in the initial evidentiary proceeding because neither OCC, nor any other Party, sought any of the contracts that the Companies have produced on remand. OCC sought only contracts between DE-Ohio and Parties to these proceedings.⁶⁸ None of the contracts OCC complains of on remand would have been responsive to OCC's discovery requests in the initial proceedings and could not have been

⁶⁵ *Id.*

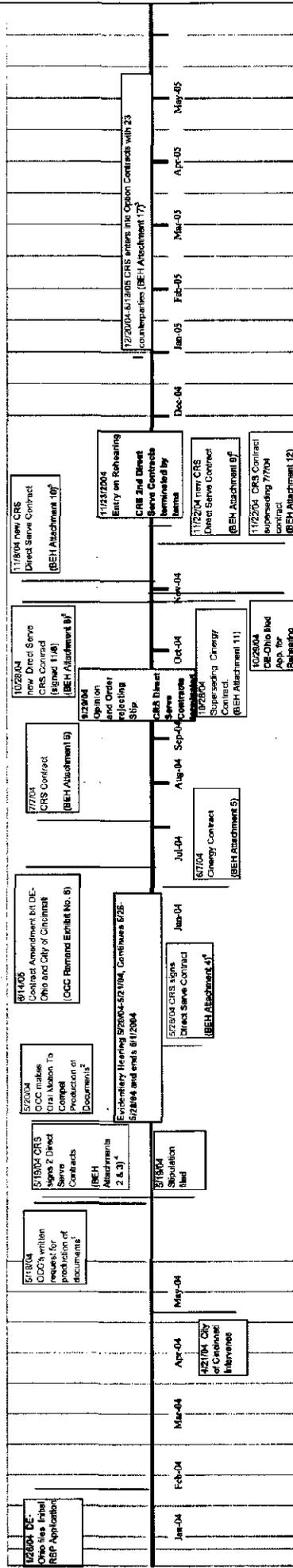
⁶⁶ *Id.* at 77.

⁶⁷ *Id.* at 74-76.

⁶⁸ *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Requests for Production of Documents Seventh Set at 3) (May 18, 2004); *Id.* at TR. II at 8 (May 20, 2004).

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

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



1 OCC's Request dated as follows? Please provide copies of all agreements between COCA and a party to these consolidated cases (and all agreements between COCA and a party to the case).

2 OCC's Ohio Motion to Compel was filed on its website on 1/23/04. It only requested agreement between COCA and a party to the case. No other motions were requested or would have been before the Commission, and therefore would not have been entered.

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

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

5 The Direct Serve Contracts were terminated on November 23, 2004, by the terms of the contracts because the Commission's entry on rehearing retroactively changed the market prices at which CBS was going to serve the customers.

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

[REDACTED]

⁶⁹ *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at 73-74) (March 9, 2007).
⁷⁰ *Id.* at 12, 31.
⁷¹ *Id.* at 13-14, 32.

[REDACTED]

[REDACTED]

⁷² *Id.* at 13, 32.

⁷³ *Id.*

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

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

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

[REDACTED]

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

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

⁸⁴ *Id.* at BEH-Attachments 6, 12.

[REDACTED]

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

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

⁸⁷ *Id.*

⁸⁸ *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Ficke's Deposition Transcript at 29, 51-52) (February 20, 2007); *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA *et al.* (Whitlock's Deposition Transcript at 106-107) (January 11, 2007).

[REDACTED]

⁸⁹ *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (TR. III at 60) (March 21, 2007).
⁹⁰ *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at BEH-Attachments 2-12) (March 9, 2007); *In re DE-Ohio Distribution Rate Case*, Case No. 04-680-EL-AIR (Application) (May 7, 2004).
⁹¹ *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at 28) (March 9, 2007).

[REDACTED]

¹⁰² *Id.*
¹⁰³ *In re DE-Ohio's MBSSO Case, Case No. 03-93-EL-ATA, et al.* (TR. III at 33-34) (March 21, 2007).
¹⁰⁴ *In re DE-Ohio's MBSSO Case, Case No. 03-93-EL-ATA, et al.* (Hixon's Prepared Testimony at 54) (March 9, 2007).

[REDACTED]

¹⁰⁵ *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Ziolkowski's Deposition Transcript at 34-42, 48-50) (February 13, 2007).
¹⁰⁶ *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA *et al.* (Hixon's Prepared Testimony at 56) (March 9, 2007).
¹⁰⁷ OHIO ADMIN. CODE ANN. CHAPTER 4901:1-35 (Baldwin 2007).

[REDACTED]

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

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

Even if the OCC were correct in its argument [REDACTED] [REDACTED] which it is not, it would be immaterial. Revised Code Section 4928.14 permits the utility to forgo the competitive bid process if consumers have substantially the same option as they have in the competitive market.¹¹¹ Pursuant to the findings of the Commission and the Court, no competitive bidding process is required as consumers have such options. DE-Ohio has five active CRES providers in its certified territory providing service to this day.

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

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

¹¹⁰ *Id.* (emphasis added)

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Ohio Administrative Code Section 4901:1-20-16 recognizes as an affiliate even "internal merchant functions of the electric utility, whereby the electric utility provides a competitive service."¹¹⁴ OCC's theory demands that it recognize all Duke Energy Corporation affiliates as one entity. That stands the rule upon its head. The evidence demonstrates that [REDACTED]

[REDACTED]¹¹⁵ [REDACTED]

[REDACTED] Certainly Duke Energy Corporation cannot be faulted for following standard consolidated accounting principles. The rules require that DE-Ohio does not subsidize DERS and vice versa.¹¹⁷ OCC has presented no evidence of any improper financial transaction between DE-Ohio and DERS or Cinergy. That is because there is no such transaction.

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

¹¹³ *Id.* at 63.

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

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

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

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

Further, even Ms. Hixon's logic is entirely faulty. Any consumer who signs a contract with any CRES provider, or that chooses to remain with the utility, is not going to switch providers unless offered a lower price. Nothing [REDACTED] prohibits a customer from switching. The CRES provider seeking the business simply has to offer an attractive price. That is true of DERS's customers, just as it is true of Constellation's customers or Dominion Retail Sale's customers. There is no change to the demand curve, or improper conduct. The customer simply gets the price it negotiates. That is how the market is supposed to work. [REDACTED]

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

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

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

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

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

¹¹⁹ *Id.*

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

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

¹²² *Id.* at DE-Ohio Remand Ex. 20.

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

Energy merger with Cinergy without Staff participation even though the Commission, not DE-Ohio, was a party to the appeal.¹²⁴ That settlement was similarly not filed before the Commission although it was made public. Finally, OCC held confidential settlement discussions with Parties in the 2004 MBSSO proceedings, including with Staff, but excluding DE-Ohio.¹²⁵ OCC made confidential settlement offers to the other parties that have not been revealed to this day.¹²⁶ Apparently, using this double standard, it is acceptable for OCC to engage in “secret” settlement discussions and enter “secret” settlements but unacceptable for any other party to entertain confidential negotiations. If anything, the presumption should run the other way for a public agency such as the OCC. In all events, OCC’s concerns are misplaced and should be dismissed.

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

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

¹²⁵ *Id.* at DE-Ohio Remand Ex. 23.

¹²⁶ *Id.*

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

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

CONCLUSION:

For the reasons set forth above, DE-Ohio respectfully requests the Commission reaffirm the MBSSO it ordered on November 23, 2004, in its Entry on Rehearing and reject OCC's request for further investigation.

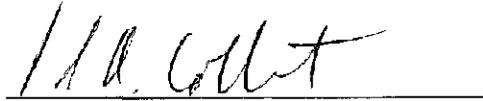
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I certify that a copy of the foregoing was served electronically on the following parties this 13th day of April 2007.



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