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Office of the Ohio Consumers' Counsel

Janine L. Migden-Ostrander
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Your Residential Utility Advocate

April 27, 2007

Ms. Renee Jenkins, Director
Public Utilities Commission of Ohio
Docketing Division
180 East Broad Street, 13th Floor
Columbus, Ohio 43215-3793

Re: OCC's Reply Post-Hearing Brief, Phase I, Case Nos. 03-93-EL-ATA, et al.

Dear Ms. Jenkins:

Attached please find three "Confidential" copies of OCC's Reply Post-Hearing Brief, Phase I, in the above captioned Consolidated Cases. Pursuant to an oral Motion for Protective Treatment of Confidential Materials, which the Attorney Examiners' granted at hearing on March 21, 2007, parties were formally instructed to file the confidential versions of their briefs under seal.[1] Consistent with the Attorney Examiners' ruling on this matter, please file all copies of OCC's "Confidential" Reply Post-Hearing Brief, Phase I, under seal.

In addition, please find copies of OCC's redacted (public version) Reply Post-Remand Brief, Phase I, which should be docketed for public access.

Very truly yours,

Jeffrey L. Small
OCC Trial Attorney

Cc: Persons on electronic service list

[1] Tr. Vol. III at 176-177 (March 21, 2007).

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

PUBLIC VERSION

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

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REPLY POST-REMAND BRIEF, HEARING PHASE 1, BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. PREFATORY COMMENTS

The initial briefs submitted in these cases to the Public Utilities Commission of Ohio ("PUCO," or "Commission") featured many expected and a few less expected statements and arguments. Initial briefs submitted by Duke Energy Ohio, Inc. ("Duke Energy Ohio" or the "Company," including its predecessor company, "CG&E") and its affiliated companies (Cinergy Corp. and Duke Energy Retail Sales, or "DERS"[1]) feature arguments that conflict with the decision by the Supreme Court of Ohio[2] regarding the 2004 Stipulation[3] entered into during proceedings before the PUCO ("*Post-MDP Service*

[1] Duke Energy Ohio's affiliates submitted a single, joint brief ("DERS/Cinergy Corp. Brief").

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

[3] The stipulation contained in Joint Ex. 1, dated May 29, 2004, was referred to in the OCC Initial Brief as the "Stipulation." Since a new stipulation was submitted in April 2007, a year number has been added to distinguish the "2004 Stipulation" from the "2007 Stipulation."

Case"). The Company's Merit Brief ("Company Brief") includes an array of counter-intuitive and new explanations for its activities prior to the appeal. The activities of Duke Energy Ohio and its affiliates that the Office of the Ohio Consumers' Counsel ("OCC") has placed into the record for these cases, in the form of documents and testimony (including that of Company witnesses), tell a very different story than the after-the-fact explanations submitted by Duke Energy Ohio and its affiliates.

The PUCO's Staff ("Staff") submitted an Initial Brief on Remand ("Staff Brief") that makes virtually no use of the record that has been developed in these cases. Staff is direct: "[I]t does not appear that allowing the commission to change its mind was part of the Supreme Court's charge in its remand."[4] Staff does not explain how its interpretation could be consistent with the Court's statement that "[u]pon disclosure [of the side agreements], the commission may, if necessary, decide any issues pertaining to *admissibility* of that information."[5] The Court's decision to remand the case therefore contemplated a hearing as well as the consideration of evidence, and every deliberative tribunal is expected to decide a case fairly -- i.e. permitting the possibility of a new outcome -- based upon the entire record. Furthermore, the supplemented record exists because of the Commission's efforts (as stated in various entries) to obtain additional record evidence"[6] upon which to decide these cases on remand ("*Post-MDP Remand*

[4] Staff Brief at 3.

[5] *Consumers' Counsel 2006* at ¶94 (emphasis added).

[6] An early entry in these cases stated "that a hearing should be held in the remanded RSP case [i.e. *Post-MDP Service Case*], in order to obtain the record evidence required by the court." Entry at 3, ¶7 (November 29, 2006).

Case").[7] The additions to the record would have been important during the *Post-MDP Service Case* conducted during 2004, and the additions to the record are important to the Commission's decision in 2007. The Commission should make use of the full record in these cases.

An intriguing Merit Brief was submitted on April 13, 2007 by the Ohio Energy Group ("OEG Brief"). [redacted][8] However, [redacted]. OEG agrees with the OCC's position that the "Ohio Supreme Court decision affirms the Commission's authority to mandate RSPs which result in '*market based*' rates without the consent of any party, including the utility."[9] The OEG also states that "a variation of [OCC Witness] Talbot's historic cost proposal may be valid in a future RSP. Establishing '*market based*' rates based upon projected long run costs is grounded in sound economics [and] may meet the statutory requirements. * * * [U]sing projected long-run cost as a proxy for [the] market may give the Commission an additional tool to protect consumers."[10] The OEG rejects Mr. Talbot's approach only in these cases that deal with

[7] For notational convenience, the portions of the case before and after the Court's deliberations are cited separately. The proceedings prior to the appeal are referred to, collectively, as the "*Post-MDP Service Case*," and the proceedings after the appeal are referred to, collectively, as the "*Post-MDP Remand Case*." However, a single record exists that is applicable to the ultimate decisions. These decisions include those regarding various charges that were the subject of testimony on April 10 and 19, 2007. Exhibit references to the portion of the proceedings after remand from the Court, the *Post-MDP Remand Case*, contain the word "Remand" to distinguish them from the earlier exhibits.

[8] See, e.g., OCC Initial Brief at 34 and 47.

[9] OEG Brief at 2 (emphasis sic).

[10] Id. at 5-6.

pricing for 2007-2008.[11] [redacted]

[redacted][12] However, the Commission should protect all consumers.

The Commission should re-evaluate this case given the overwhelming evidence demonstrating that customer support for the Company's proposals is weak and largely based upon inducements to settle that lessened or eliminated the impact of new charges on supporters of the Company's proposals. The Commission should base Duke Energy Ohio's standard service offer rates for the period ending December 31, 2008 on verifiable costs. Rate components such as the IMF that have no cost basis should be eliminated. Revenues from shared resources should be used to arrive at net costs for standard service offer rates. The dealings that helped settle the *Post-MDP Service Case* must cease. The Commission should further encourage the development of the competitive market for generation service by making all standard service offer rates bypassable. Finally, the Commission should direct its Staff to investigate the interrelationships between the Company and its affiliates, including any Company abuses of its corporate separation requirements. The PUCO Staff should investigate whether the amounts paid to signatory parties of the side deals were and are being subsidized by other customers.

[11] Id.

[12] [redacted]

II. INTRODUCTION

A. Remand from the Supreme Court of Ohio

The briefs in these cases provide a confusing collection of statements regarding the appeal of the *Post-MDP Service Case* to the Supreme Court of Ohio ("Court").[13] The Court stated that the "portion of the commission's first rehearing entry approving CG&E's [now Duke Energy Ohio's] alternative proposal is devoid of evidentiary support."[14] The briefs submitted by the OCC,[15] the Ohio Partners for Affordable Energy ("OPAE"),[16] and the Ohio Marketers Group ("OMG," consisting of MidAmerican Energy, Strategic Energy, Constellation Power Source, Constellation NewEnergy, and Integrys Energy, the latter formerly known as WPS Energy Services)[17] support the conjecture by the Supreme Court of Ohio that the IMF that was first proposed in an Application for Rehearing by Duke Energy Ohio was "some type of surcharge and not a cost component." *Consumers' Counsel 2006* at ¶30.

The Court also stated that the "commission abused its discretion in barring discovery of side agreements."[18] The Court specifically mentioned one relevant use of such information at trial regarding the evaluation of settlement agreements (i.e. whether there was serious bargaining) pursuant to the three prong test normally used by the

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[13] *Consumers' Counsel 2006*.

[14] Id. at ¶28.

[15] OCC Initial Brief at 21-24.

[16] OPAE Brief at 14-16.

[17] OMG Brief at 21-25.

[18] *Consumers' Counsel 2006* at ¶94.

Commission's to test such agreements.[19] *Consumers' Counsel 2006* also supported the use of settlement agreements under Evid. R. 408 for "several purposes."[20] The agreements were presented by the OCC in evidence not only to demonstrate the absence of serious bargaining to settle the *Post-MDP Service Case*, but also to demonstrate the absence of substantial support for the Company's rate plans, the negative impact the plans have had on development of the competitive market, the discrimination that exists when the entire plan is revealed [redacted][21]

B. Burden of Proof

The OCC's Initial Post-Remand Brief ("OCC Initial Brief") set out the burden of proof, as stated in R.C. 4909.18 and/or R.C. 4909.19, which rests upon Duke Energy Ohio in these cases.[22] The OMG states a proposition of law that conflicts with statute: "A filed stipulation shifts the criteria of acceptance by the Commission from one in which the applicant bears the burden of proving that the relief sought is lawful and reasonable, to whether the stipulation taken as a whole is reasonable."[23] The burden of proof upon the applicant is statutory, resting in this case upon Duke Energy Ohio, and cannot be shifted or otherwise changed by the activities of any litigant in a proceeding. The present cases vividly illustrate why the burden of proof cannot be shifted by a

[19] Id. at ¶86.

[20] Id. at ¶92.

[21] [redacted]

[22] As stated by Duke Energy Ohio itself: "DE-Ohio retains the burden of proof to show that its Application is just and reasonable in these proceedings." Duke Energy's Reply to OCC's Memorandum Contra to Duke Energy Ohio's Motion for Clarification at 12 (December 26, 2006).

[23] OMG Brief at 6.

stipulation since otherwise the burden could have been shifted as the result of the Company's efforts to purchase the support of parties in these cases as described in the OCC's Initial Brief. The Company has the burden to demonstrate that the rate increases that they have requested are reasonable.

The OCC does not bear any burden of proof in these cases. The OCC explained in its Initial Brief and will furthermore explain in the following sections how Duke Energy Ohio has failed to prove that its post-MDP pricing proposals should be adopted without alteration by the Commission.

III. HISTORY OF THE CASES (BASED UPON THE RECORD)

The procedural and substantive history of these consolidated cases is contained in the OCC Initial Brief that was submitted on April 13, 2007. Initial briefs were submitted on that date in opposition to the Company's proposals by the OCC, OPAE, and the OMG.

Initial briefs were submitted in support of the Company's proposals by Duke Energy Ohio and its affiliated companies, the PUCO's Staff, and OEG. The briefs of parties supporting Duke Energy Ohio's plans contain allegations and misstatements of fact that these parties hope will be substituted for the facts in the record, the record upon which the Commission should and must rely to make and explain its decisions. The appalling misstatement of facts by certain parties, particularly their false statements regarding the responses of OCC's witnesses during cross-examination, will be pointed out in this Reply Post-Remand Brief ("Reply Brief").

As an example of unsupported allegations that parties hope will be taken as fact, Duke Energy Ohio provides (notably, without citation) an after-the-fact explanation for its settlement activities and those of its affiliated companies during 2004:

> 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.[24]

This rendition of the "facts" is a fiction that is not contained in the record of these cases, is self contradictory, and is peculiar given the information that is contained in the record.

Duke Energy Ohio's explanation in the above-quoted passage is self contradictory. First Duke Energy Ohio states that parties "were referred to DERS . . . and other CRES providers doing business in DE-Ohio's certified territory."[25] Immediately afterwards, Duke Energy Ohio admits that DERS did not submit an application to the Commission for CRES certification until later, and therefore could not have been "doing business in DE-Ohio's certified territory."[26] If Duke Energy Ohio and DERS' functions were truly separate, then Duke Energy Ohio would not have referred customers to DERS based upon an application that was only being formulated internally by DERS before DERS was certified.

The actual record in these cases repeatedly documents the mixing of business between Duke Energy Ohio and its affiliates. [redacted]

[24] Company Brief at 9.

[25] Id.

[26] Id. DERS (formerly Cinergy Retail Sales) was certified in October 2004. [redacted]

[redacted][27] [redacted]

[redacted][28] [redacted]

[redacted][29] [redacted]

[redacted][30] Therefore, inquiries by such parties regarding service from a CRES provider not only lack any documentation in the record, they also seem unlikely since these parties were already knowledgeable regarding CRES service.

[redacted]

[redacted][31] [redacted]

[27] OCC Initial Brief at 40, citing [redacted]

[28] OCC Initial Brief at 42, citing [redacted]

[29] See, e.g., OCC Initial Brief at 41-42.

[30] [redacted]

[31] [redacted]

[redacted][32]

[redacted][33]

[redacted][34]

[redacted][35]

[redacted][36]

[32] [redacted]

[33] [redacted]

[34] The DERS/Cinergy Corp. Brief provides a summary of contracts, entitled "FACTS: THE CONTRACTS PRODUCED BY DERS AND CINERGY." DERS/Cinergy Brief at 10. [redacted]

[35] OEG Brief at 6-7.

[36] See, e.g., OCC Initial Brief at 52. [redacted]

[redacted][37] [redacted]

The Commission should ignore declarations like these that parties seek to substitute for the contents of the actual record.

IV. ARGUMENT

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

The Commission should only approve standard service offer rates that, in the absence of true market pricing, move to rates with bases that can be checked and monitored by the PUCO rather than being based on Duke Energy Ohio's desires. The objective should be to approve a good proxy for market-based rates based upon measurable and verifiable costs.[38] The Commission should consider the reasonableness

[37] *OCC Initial Brief at 53,* [redacted]

[38] OCC Remand Ex. 1 at 6 (Talbot). OCC Witness Talbot testified that rate components should "meet[ ] the double standard of reflecting measurable accounting costs and verifiable costs." Id. at 47.

of Duke Energy Ohio's standard service offer rates with regard to the relationship between the components proposed by the Company. As stated by OCC Witness Talbot, "[t]here should be no overlap or duplication of items and the components should work together to achieve standard service offer rates that provide for reasonably priced service and meet the three standards of rate stability for customers, financial stability for the company, and encouragement of competition."[39]

Duke Energy Ohio contradicts itself in its efforts to dismiss the penetrating testimony of OCC Witness Talbot on the subject of duplicative capacity charges. First, Duke Energy Ohio states that "Mr. Talbot merely recommends that all MBSSO components should be fully avoidable to stimulate competition."[40] Shortly thereafter, however, Duke Energy Ohio admits that Mr. Talbot went further and "dispute[d] this claim [of support for SRT and IMF charges]" that was attempted by Company Witness Steffen.[41]

The OCC Initial Brief discusses the Company's documentation (such as it is) for the totality of the SRT and IMF charge.[42] The purported basis of the Company's argument in support of the proposal contained in its Application for Rehearing is shown in Attachment JPS-SS1 to the testimony of Company Witness Steffen.[43] Duke Energy Ohio cites to Mr. Steffen's testimony:

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[39] Id. at 17 (Talbot).

[40] Company Brief at 15.

[41] Id. at 19.

[42] OCC Initial Brief at 17-20.

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

> [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.[44]

Duke Energy Ohio states that Mr. Talbot "failed to do the simple math necessary to verify Mr. Steffen's statements."[45] As stated by OMG, "[t]he fact that the total of the charges for the SRT and the IMF are less than the amount Duke/CG&E *originally estimated* has many alternative explanations."[46] Instead of accepting Duke Energy Ohio's simplistic presentation, OCC Witness Talbot probed into the empirical reasoning behind the Company's Reserve Margin proposal contained in the 2004 Stipulation as well as into the reasoning behind the SRT and IMF that were first proposed in the Company's Application for Rehearing. Duke Energy Ohio provided no other evidence in support for its IMF charge as part of the *Post-MDP Remand Case*.

A correct understanding of the comparison between the charges contained in the 2004 Stipulation Plan and those proposed by the Company in its Application for Rehearing requires the recognition that the Reserve Margin component that was contained in the 2004 Stipulation was an estimate that turned out to be many times the amount actually needed to provide for a reserve margin. The amount for the originally estimated reserve margin plus the IMF charge added by the "New Proposal" in the Company's Application for Rehearing would far exceed the $52,898,560 Reserve Margin

[44] Company Brief at 18, citing Company Remand Ex. 3 at 27 (Steffen).

[45] Id. at 19.

[46] OMG Brief at 23 (emphasis added).

estimate that was contained in the Steffen testimony prefiled on April 15, 2004 and subsequently used to support the plan contained in the 2004 Stipulation.[47] The simple math performed by Company Witness Steffen merely supports the Company's desire to charge standard service offer rates that exceed Duke Energy Ohio's costs for its reserve margin, rates that do not serve as a good proxy for market-based rates.[48]

The Reserve Margin calculation in Mr. Steffen's Attachment JPS-7 that is also attached to the 2004 Stipulation[49] was obtained by multiplying 826.54 megawatts (826,540 kilowatts), which was 17 percent of the Company's projected peak megawatts for 2005, by $64 per kilowatt-year, which was the annualized cost of a *new* peaking unit using Electric Power Research Institute Technical Assessment Guide (EPRI-TAG) estimates.[50] The market prices for capacity were far below the cost of building *new* generating capacity. When the Company substituted estimated costs of acquiring *existing* capacity in the regional generation market (as reflected in the SRT), the charge dropped from $52,898,560 to $14,898,000 as reflected in the summary table provided in the Company's Brief.[51] The Company's switch for its Reserve Margin estimates from the

[47] Company Ex. 11, Attachment JPS-7 (Steffen). The figure is again reproduced in the Company's summary table. Company Brief at 20.

[48] Company Witness Steffen's "simplistic[ ]" calculations, and the truth regarding the SRT as the sole successor to the Reserve Margin component in the 2004 Stipulation Plan, is also the subject of comment by OPAE. OPAE Brief at 16.

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

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

[51] Company Brief at 20, rows on which footnotes 36 and 37 appear. The table compares charges for a four-year period, but contributes nothing to comparing figures based on a single year. The comparison between the 2004 Stipulation Plan and the New Proposal on a four-year basis would contrast the amount for the SRT (i.e. the sole successor to the Reserve Margin) at $52,898,560 times four years plus the IMF charge for four years. The sum, $362,025,510 obviously exceeds the amount for the original Reserve Margin (i.e. $211,594,240) by the amount of the IMF (an entirely new charge).

cost of new capacity to the cost of existing capacity is reflected in footnote 37 to the Company Brief that dates the $14,898,000 figure to a Company filing on December 3, 2004 (i.e. after the New Proposal was approved in the *Post-MDP Service Case*).[52]

The cross-examination of Company Witness Steffen established that the capacity charge sought by the Company was part of "an overall price [at which Duke Energy Ohio] would be willing to manage the POLR load."[53] According to Company Witness Steffen, the Company's "overall price [was] not a buildup of discrete charges. It's an overall price that the company [was] willing to offer."[54] Therefore, the overstatement of the Company's reserve margin costs from a theoretical level[55] resulted in the addition of an entirely new charge, the IMF, to reestablish rates that the Company desired. Instead of Duke Energy Ohio's desired rates, the Commission should base rates upon measurable and verifiable costs that serve as a proxy for market-based rates. Customers do not "desire" to part with their hard-earned money without a reasonable basis for the Company's charges.

It is clear, as stated by OCC Witness Talbot, that the SRT is the "true successor to the Reserve Margin charge, which was calculated strictly in terms of reserve margin and

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[52] The much-reduced estimate proved to be an over-estimate. The SRT charge was initially too high, and was subject to a true-up in favor of consumers that resulted in a negative SRT charge at the end of 2006.

[53] Tr. Vol. I at 122 (Steffen) (2007). The Company faults the OCC for not cross-examining Mr. Steffen. Company Brief at 19. The lack of OCC cross-examination does not make the matters discussed by Mr. Steffen uncontroverted (see, e.g., OCC Remand Ex. 1 at 36-44 (Talbot)), and the extensively cross-examination of Mr. Steffen by OMG counsel eliminated the need for the OCC's cross-examination.

[54] Tr. Vol. I at 123 (Steffen) (2007).

[55] Id. at 122.

did not relate to the dedication of existing capacity."[56] As further stated by OCC Witness Talbot:

> It is incorrect to say that, between the Stipulation and the current standard service offer, "these underlying costs were merely reduced, repositioned, made avoidable or carved out into the IMF and SRT charges." (Mr. Steffen, Second Supplemental Testimony at page 30) In fact, the IMF is a brand new charge.[57]

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

The Company attack on OCC Witness Talbot falsely states that Mr. Talbot did not know the details regarding which standard service offer charges are avoidable and by whom.[58] Mr. Talbot's testimony demonstrated his command of the Company's standard service rates and the ability to avoid (or not avoid) rate components, both present and as part of their historical development.[59] He testified:

> After the first 25 percent or 50 percent of each customer class's load has switched, other retail customers cannot avoid paying these charges when they switch to competitive retailers. Like the earlier flex-down provision, it is a warning to market entrants that if they are successful, they or their customers will be penalized. It is important to understand that unlike an incumbent monopolist such as a distribution utility, competitive retailers have to incur significant marketing and other overhead and indirect costs if they are to enter a market. They are unlikely to do this unless there is the chance of establishing a large customer base in competition

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

[57] Id., quoting Company Remand Ex. 3.

[58] Company Brief at 22.

[59] See, e.g., OCC Remand Ex. 1 at 9-13 and 21 (Talbot). The Company's citation to the hearing transcript is confusing, but Mr. Talbot showed his command of terms and conditions regarding standard service offer rates in his live testimony on March 20, 2007.

> with not only the incumbent utility but also other competitors who are likely to be pursuing the same limited opportunity.[60]

Mr. Talbot is aware that some rate components are avoidable by only a certain percentage of customers within a rate class.[61] That fact tends to confuse discussions on the subject.

Contrary to Duke Energy Ohio's assertion (absent citation to the record), Mr. Talbot is also very aware that standard service offer rates must be market-based.[62] OCC Witness Talbot testified regarding an acceptable "proxy for market prices" based on a "cost-based standard service offer," noting that this was consistent with "the direction in which the Commission has been moving."[63] Regarding the AAC charge, first reviewed for its cost basis in these cases, the Commission's review should concentrate further on a measurable and verifiable cost-based proxy for market-based rates.[64] The Commission should exclude all elements where producers do not recover costs until they sell products or services.[65]

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[60] OCC Remand Ex. 1 at 63 (Talbot).

[61] See, e.g., Tr. Vol. II at 87-88 (Talbot) (2004).

[62] Company Brief at 22.

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

[64] Id. at 47.

[65] Id. at 33.

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

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

[redacted][66] [redacted][67]

[redacted][68]

[66] [redacted]

[67] [redacted]

[68] Motion for Protection at 11.

[redacted][69]

[redacted][70]

[redacted][71] [redacted]

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

a. The 2004 Stipulation remains relevant.

The parties supporting Duke Energy Ohio's standard service offer pricing seem to have forgotten that the Court remanded the case based upon the barring of *discovery* which is a preliminary part of litigation. Instead, these parties dismiss the case presented

[69] [redacted]

[70] OCC Initial Brief at 50.

[71] The alter ego doctrine, which asks if control over a corporation is complete such that it has no separate mind, is explained in numerous cases. See, e.g., *Sanderson Farms, Inc. v. Gasbarro*, 2004 Ohio 1460.

by the OCC by narrowing the Court's decision. For example, Duke Energy Ohio states that the "Commission rejected the Stipulation so serious bargaining relative to the Stipulation is irrelevant,"[72] and DERS/Cinergy Corp. state that "[f]irst, and most obvious, the record in this matter shows that CG&E's proposals were never accepted by this Commission."[73] Staff simply states that "[t]here was no stipulation."[74] OEG agrees: "First, there is no Stipulation."[75]

The issue regarding "serious bargaining," however, remains important to these cases. The Entry on Rehearing that ordered the standard service offer rates depended upon the existence of a stipulation,[76] the PUCO defended its decision before the Supreme Court of Ohio on the basis that many parties entered into a stipulation to support the rate plan,[77] and the Court relied upon these PUCO representations while observing that "[n]one of the signatory parties exercised its option to void the agreement."[78] Financial

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[72] Company Brief at 6.

[73] DERS/Cinergy Corp. Brief at 17.

[74] Staff Brief at 15.

[75] OEG Brief at 7.

[76] See, e.g., Entry on Rehearing at 21.

[77] *Consumers' Counsel 2006*, Supreme Court Case No. 05-946, PUCO Merit Brief at 4 ("The record revealed multitudes of benefits from the [2004] Stipulation") and 15 ("The record shows that the rate was negotiated between suppliers and consumers") (August 5, 2005).

[78] *Consumers' Counsel 2006* at ¶46. DERS/Cinergy Corp. sell the Court short, stating that it "apparently accept[ed] the Commission's 'approval' of the stipulation at face value." *DERS/Cinergy Corp.* Brief at 7. The Court's analysis appears to have been its own since the OCC is not aware that any party pointed out the absence of a notice regarding nullification of the2004 Stipulation. The 2004 Stipulation provides that "[u]pon the Commission's issuance of an Entry on Rehearing that does not adopt the Stipulation in its entirety without modification, any Party may terminate and withdraw from the Stipulation by filing a notice with the Commission within 30 days of the Commission's order on rehearing. Upon such notice of termination or withdrawal by any Party, pursuant to the above provisions, the Stipulation shall immediately become null and void." Joint Ex. 1 at 3. The notice is separate and apart from the filing of an application for rehearing. Id.

arrangements involving the Customer Parties that were never presented to the Commission are important to explain the support that the Company received for its rate plans, and the echoes of those financial arrangements continue to explain the type of support presently relied upon by Duke Energy Ohio.

Probably the most inventive (and also the most procedurally obtuse) argument posed against the OCC's position that the 2004 Stipulation remains important was raised by DERS/Cinergy Corp. The Duke Energy Ohio affiliates state that the OCC previously argued before the Commission that the PUCO rejected the 2004 Stipulation, and that the OCC is therefore "judicially estopped from asserting otherwise."[79] *State v. Nuunez*, 2007 Ohio 1054, cited by DERS/Cinergy Corp. as authority for the proposition of law, states that such an inconsistent position must have "succeeded in persuading a court to accept that party's earlier position" leading to "the perception that either the first or second court was misled" so that the argument presents "an unfair advantage" to the arguing party.[80] First, contrary to the DERS/Cinergy Corp. argument, the OCC was *unsuccessful* in its argument before the PUCO regarding the status and persuasiveness of the 2004 Stipulation. Second, there can be no misleading a "second court" because the OCC's arguments were and are before the same Commission. Finally, and most importantly, the OCC's current position recognizes the Supreme Court of Ohio's decision, and it is

[79] DERS/Cinergy Corp. Brief at 17.

[80] *State v. Nuunez*, 2007-Ohio-1054 at ¶7.

inconceivable that heeding the Court's decision in the case that directed the remand could constitute "an unfair advantage."[81]

The Supreme Court of Ohio determined that the support by the signatories parties for the Company's proposals remains relevant. The testimony of OCC Witness Hixon demonstrated in great detail [redacted][82] Once the PUCO reached a decision in the *Post-MDP Service Case* that was acceptable to Duke Energy Ohio, [redacted][83] [redacted][84] [redacted]

[81] Id. DERS/Cinergy Corp. also rely upon *Fish v. Board of Commissioners* (1968), 13 Ohio St. 2d 99, 102. That case discusses two separate judicial proceedings, one in which the Board made an election in 1957 and a later proceeding decided by the Court in 1968. *Fish* is inapplicable to the case before the Commission since the proceedings in 2004 and 2007 constitute a single judicial proceeding based upon a single record.

[82] [redacted]

[83] [redacted]

[84] [redacted]

[redacted][85][redacted][86][redacted]

[redacted][87]

b. The 2004 Stipulation remains relevant and has had lasting effects.

The Commission should render its decision based upon the full record and with open eyes in these cases. The Company and its supporters ask the Commission to make its decision by accepting a hypothetical litigation situation that they pose for 2004. Duke Energy Ohio states that "the record shows that the vast majority of contracts were signed after the close of the evidentiary record and, therefore, could not have affected the Commission's consideration of the case of the Party's positions with respect to the litigation of the MBSSO Stipulation."[88] [redacted]

[redacted][89] and well before the period when Duke Energy Ohio claims it concluded its negotiations with parties in the open.[90] The Commission relied upon that stipulation

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[85] [redacted]

[86] [redacted]

[87] [redacted]

[88] Company Brief at 26.

[89] [redacted]

[90] Company Brief at 10 ("full day of negotiation" on May 19, 2004). The Company's account of the negotiations is entirely without support in the record.

(i.e. the 2004 Stipulation), both in its Order and in its evaluation of the modifications first proposed by the Company in its Application for Rehearing, and its support by a number of the Customer Parties.

The Commission was falsely led to believe that many customers simply agreed to the proposed standard service charges (proposed in the Stipulation and in the Company's Application for Rehearing) [redacted] The Commission's knowledge of the supplemented record -- the result of discovery opened by the Commission in the *Post-Remand Case* -- should result in a different decision.

Like the hypothetical litigation situation offered by the Company and its supporters, the OCC could spin its own tale regarding the *Post-MDP Service Cases* in 2004 under circumstances where the OCC was provided with only the side agreement with the City of Cincinnati in response to the OCC's discovery requests. Such a response would not have explained the crumbling opposition to the Company's proposals in the spring of 2004. The right to ample discovery, pursuant to R.C. 4903.082, should have entitled the OCC to seek additional explanation for the changed behavior of the Customer Parties. This line of inquiry regarding how matters might have transpired in 2004, like that argued by Duke Energy Ohio, is not worthwhile. *Consumers' Counsel 2006* does not require or recommend that the Commission ignore the supplemented record (including the record of events that transpired while these cases were pending before the Court). The opposite should be expected: the Court is likely to be disappointed if the substantial evidence gained as the result of the *Post-Remand Case* is swept aside in favor of a

decision that was reached in 2004 without the information that is presently available to the Commission.

c. The argument that the affiliates acted separately fails.

[redacted][91] [redacted][92] [redacted][93]

[91] Company Brief at 35.

[92] Black's Law Dictionary (Fifth Edition) at 387 (West Publishing Co. 1983).

[93] [redacted]

[redacted]

[94] [redacted]

[95] OCC Initial Brief at 42, citing [redacted]

[96] Company Brief at 26.

[97] See OCC Initial Brief at 39 and [redacted]

[redacted][98]

[redacted][99]

[redacted][100] [redacted]

[redacted][101]

[redacted]

[98] Company Brief at 25-26. The Company asserts that Company Witness Steffen "testified that DE-Ohio's only involvement with DERS was that DERS paid DE-Ohio to amend its billing systems and that DE-Ohio performed consolidated billing functions as it does for any . . . CRES provider." Company Brief at 4-5. That statement is not true, as is evident from Ms. Hixon's testimony (including its documentation) and the deposition transcripts entered into evidence. The statement that this is the "only involvement" is also not contained in Mr. Steffen's testimony. See Company Remand Ex. 3 at 32-38 (Steffen).

[99] [redacted]

[100] Company Brief at 5.

[101] [redacted]

[redacted][102] [redacted]

[redacted][103] [redacted][104] [redacted]

[redacted]

[102] Company Brief at 34, citing *In re DE-Ohio Distribution Rate Case,* Case No. 04-680-EL-AIR (May 7, 2004).

[103] Company Brief at 31.

[104] [redacted]

[redacted][105]

[redacted][106]

[redacted][107]

[redacted][108]

[105] Joint Ex. 1 at 4-5, ¶3 (2004 Stipulation).

[106] [redacted]

[107] [redacted]

[108] Company Brief at 38.

[redacted][109] [redacted]

[redacted][110]

[redacted][111] Mr. Don Wathen, Duke Energy Ohio's Director of Revenue Requirements in Rates and also a Company Witness in these cases,[112] [redacted][113] [redacted][114] [redacted][115] [redacted]

[109] [redacted]

[110] [redacted]

[111] [redacted]

[112] Company Remand Rider Exs. 3-5. Mr. Wathen testified that he is "responsible for the preparation of financial and accounting data used in wholesale and retail rate filings for Duke Energy Ohio (DE-Ohio) and Duke Energy Kentucky (DE-Kentucky, including petitions for changes in fuel and gas cost adjustment factors, and various other recovery mechanisms." Company Remand Rider Ex. 3 at 2.

[113] [redacted]

[114] [redacted]

[115] [redacted]

[redacted] [116]

[redacted] [117]

[116] [redacted]

[117] The Company would apparently like to eliminate the evidence presented by the OCC [redacted] All forms of evidence against the Company's interest appear to be objectionable to Duke Energy Ohio.

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

The development of the competitive market is one of the Commission's three goals that it uses in the evaluation of post-MDP rate plans.[118] A means by which the Commission has addressed market development has been to change utility proposals regarding the bypassability of proposed charges.[119] The record shows that market development has suffered greatly since the Company placed the proposal contained in its Application for Rehearing into its tariffs.[120]

OEG comments that, "[a]s a general matter, OEG agrees that all generation-related charges should be bypassable" but "disagree[s] with OCC on the importance of developing a competitive market."[121] OEG therefore rejects one of the Commission's guiding goals that are considered in the evaluation of rate plans (i.e. market development). No doubt the OEG's position is guided by the knowledge that its members have been able to [redacted].[122] [redacted]

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

[119] See, e.g., Order, Concurring Opinion of Chairman Alan R. Schriber at 2 (September 29, 2004).

[120] OCC Initial Brief at 59.

[121] OEG Brief at 8.

[122] [redacted]

[redacted][123]

[redacted] The PUCO Staff's reaction to this situation -- that aggrieved persons should "file a complaint and air their concerns in the proper forum"[124] -- is disappointing. Market development depends upon more than adjustment of the ability of shoppers to avoid generation charges, [redacted][125] The evidence has been placed before the Commission in these cases, and customers should not be asked to wait for the results of a complaint case when development of the competitive market is presently at issue.

Reasonable tariffs should be approved in these cases, and all customers should be subject to their provisions without discrimination. The total effect of the post-MDP generation pricing by the Company is discriminatory in favor of the Customer Parties. R.C. 4905.35 is among a group of anti-discrimination statutes that reflect Ohio policy,[126] and states:

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[123] [redacted]

[124] Staff Brief at 16.

[125] See OCC Initial Brief at 63-65.

[126] See R.C. 4905.32 to 4905.35.

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

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

> After its market development period, an electric distribution utility in this state shall provide consumers, on a comparable and *nondiscriminatory* basis within its certified territory, a market-based standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers.[127]

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

The Company's treatment of its customers is highly discriminatory. [redacted][128] [redacted][129] [redacted][130] [redacted]

[127] Emphasis added.

[128] Company Brief at 41.

[129] [redacted]

[130] [redacted]

[redacted][131]

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

[redacted][132]

[redacted][133]

[redacted][134]

The Commission did not previously receive the information presented by the OCC in this *Post-MDP Remand Case*, partly because of the negotiating process in the *Post-MDP Service Case* during which [redacted]

[131] [redacted]

[132] [redacted]

[133] OEG Brief at 8.

[134] [redacted]

[redacted] The OCC raised this matter in its Initial Brief, noting the concerns of the Ohio Supreme Court in *Time Warner AxS v. Pub. Util. Comm.* (1996), 75 Ohio St.3d 229, 234, 661 N.E.2d 1097.

Time Warner states that the Court does not prohibit caucuses between parties during the course of negotiations. However, a rush to adopt a partial settlement without addressing core concerns of a customer class in a case (i.e. the situation addressed in *Time Warner*) is against public policy and will be scrutinized by the Court. [redacted]

Duke Energy Ohio does not directly address the *Time Warner* concerns, but accuses the OCC of conducting discussions in these cases without involving the Company.[135] The Company does not mention that the OCC, unlike the Company, holds no purse strings to bestow benefits upon parties to reach a settlement or arrange litigation support. Any preliminary discussions involving the OCC and another consumer party would ultimately need to lead back to the Company, whereas the Company obviously could (and did) conclude a settlement agreement and arrange for litigation support in side deals involving other parties without ever including the OCC.

In the merger-related appeal that the Company references,[136] the OCC negotiated with the real party in interest in the appeal, the Company, and thereby settled a case

[135] Company Brief at 43.

[136] Id. at 42-43.

pending at the Supreme Court of Ohio where there was no need to file the settlement at the PUCO. That settlement was in the public domain, as stated in an OCC filing at the Court to dismiss the case (and as the Company itself admits in its Brief).[137] Finally, the Company's somewhat ironic accusation that it "paid $750,000 to OCC and the Ohio Department of Development" in a 1999 case does not accurately portray the document referenced by the Company.[138] What is stated in the document referenced by the Company is that "CG&E will contribute $500,000 to a customer education campaign concerning customer choice jointly managed and designed by CG&E and OCC."[139] The document does not state that any amounts were to be paid to the OCC;[140] Duke's mischaracterization of the facts should not be condoned.

V. CONCLUSION

The Commission should re-evaluate this case given the overwhelming evidence demonstrating that signatories to the 2004 Stipulation -- who later became the supporters of the Company's proposals as stated in Duke Energy Ohio's Application for Rehearing -- [redacted] Customer support for the Company's proposals is weak.

[137] Id. at 43. Far from trying to conceal the existence of the settlement, as Duke Energy Ohio did in the *Post-MDP Service Case*, the OCC issued a press release on May 5, 2006, informing the public of its settlement on behalf of residential consumers regarding the appeal of the order approving the Duke Energy merger with Cinergy. Company Brief at 42-43. It has been the policy of the current Consumers' Counsel that any settlement reached with a public utility be made available to the public. In this regard, the settlement document referenced by the Company regarding DP&L involved a 1999 case, and the document was made public by the OCC in a more recent case before the PUCO. Indeed, the OCC's placement of the document in the public domain is presumably what enabled Duke to reference it in its brief.

[138] Id. at 42, citing Company Remand Ex. 20.

[139] Company Remand Ex. 20.

[140] Id.

The OCC developed an extensive record that exposes the weak foundation upon which Duke Energy Ohio's standard service offer rates rest. The Commission should carefully consider the supplemented record and modify the standard service offer rates that are stated in the Company's tariffs. The Commission should base Duke Energy Ohio's standard service offer rates for the period ending December 31, 2008 on verifiable costs. Revenues from shared resources should be used to arrive at net costs for standard service offer rates, and rate components such as the IMF that have no cost basis should be eliminated.

The Commission's intent to foster competition has been seriously undermined by the side agreements. The side dealings that helped the Company settle the *Post-MDP Service Case* must cease in order to promote reasonable rates for all customers and to encourage competition. The Commission should also encourage the development of the competitive market for generation service by making all standard service offer rates bypassable.

Finally, the Commission should direct its Staff to investigate the interrelationships between the Company and its affiliates, including any Company abuses of its corporate separation requirements. These interrelationships -- including the means by which DERS is able to run ever increasing losses [redacted] -- should be fully reviewed and audited.[141] The source of funds for over $20 million per year in payments should be carefully examined in the review and audit to determine the extent to which customers who did not receive payments were harmed. [redacted]

[141] OCC Remand Ex. 2(A) at 73-74 ("review or audit" by "Staff (or an auditor hired by the Staff at DE-Ohio's expense)") (Hixon).

[redacted] Duke Energy Ohio should be required to show cause why it is not in violation of corporate separation requirements regarding affiliate interactions.

Respectfully submitted,

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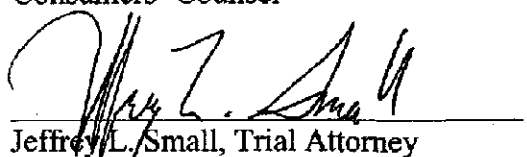

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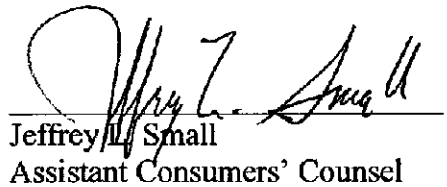
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Reply Post-Remand Brief, Hearing Phase I, by the Office of the Ohio Consumers' Counsel,* has been served upon the below-named persons (pursuant to the Attorney Examiners' instructions) via electronic transmittal this 27th day of April 2007.



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