

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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Consolidated Duke Energy Ohio, Inc.,)
Rate Stabilization Plan Remand and)
Rider Adjustment Cases.)
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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

APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT OF
INDUSTRIAL ENERGY USERS-OHIO

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APPLICATION FOR REHEARING

This case, involving Duke Energy-Ohio's ("DE-Ohio") rate stabilization plan ("RSP"), was remanded to the Public Utilities Commission of Ohio ("Commission") by the Ohio Supreme Court ("Court") in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 on November 22, 2006. The Court directed the Commission to provide additional record evidence and sufficient reasoning to support certain findings within the Commission's Opinion and Order and Entry on Rehearing approving Duke's current RSP, and to compel disclosure of side agreements connected to the Stipulation and Recommendation ("Stipulation") filed with the Commission on May¹⁹, 2004 in order for the Commission to determine whether serious bargaining took place between the parties to the Stipulation, which is the first of the Commission's three-prong test for evaluating stipulations.¹

¹ The Commission's three-prong test in evaluating stipulations requires an examination of: 1) whether serious bargaining occurred among capable, knowledgeable parties; 2) whether the settlement, as a package, benefits ratepayers and is in the public interest; and 3) whether the settlement violates any important regulatory principal or practice.

On remand, the Attorney Examiners issued an Entry bifurcating the proceeding to separately consider the Court's remand of the RSP case ("Phase I") and the issues relating to the costs and management of certain defined components of the RSP previously approved by the Commission ("Phase II").² The evidentiary hearing for the Phase I portion of this proceeding commenced on March 19, 2007 and concluded on March 21, 2007. Pursuant to the Attorney Examiners' procedural schedule, initial briefs and reply briefs were filed by several of the parties on April 13 and 24, 2007, respectively.

On October 24, 2007, the Commission issued its Order on Remand with respect to the Phase I portion of the proceeding in which it, among other things, admitted into the evidentiary record all of the side agreements produced on remand while also finding that certain portions of those side agreements are trade secrets and, thus, subject to the Commission's rules for protective orders. As a result of the Commission's *in camera* review of the side agreements produced upon discovery, the Commission found that "the existence of side agreements, in which several of the signatory parties agreed to support the stipulation, raises serious doubts about the integrity and openness of the negotiation process related to that stipulation," and therefore the Commission concluded that it should reject the Stipulation.³

Pursuant to Section 4903.10, Revised Code ("R.C.") and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."), Industrial Energy Users-Ohio ("IEU-Ohio") hereby submits its Application for Rehearing and Memorandum in Support of the Commission's

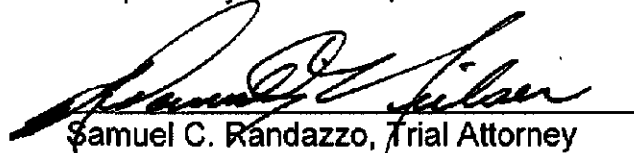
² Entry at 2 (February 1, 2007).

³ Order on Remand at 27 (October 24, 2007).

October 24, 2007 Order on Remand in this proceeding under the following points of error:

1. The Commission erred by finding that any side agreements are relevant to whether serious bargaining of a stipulation occurred inasmuch as no stipulation remained in effect subsequent to its September 29, 2004 Opinion and Order and November 23, 2004 Entry on Rehearing;
2. The Commission erred in admitting all side agreements inasmuch as the prejudicial effect of admitting the side agreements outweighs the probative value and because the admission is a needless presentation of cumulative evidence;
3. The Commission erred by finding that the information in the side agreements could be released without the customers' permission pursuant to Rule 4901:1-10-24, O.A.C.; and
4. The Commission erred in admitting into the evidentiary record side agreements that the Commission determined were irrelevant and, thus, inadmissible pursuant to Ohio Rule of Evidence 402.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

I. INTRODUCTION

In its November 22, 2006 Opinion remanding this case to the Commission, the Court held that the “existence of side agreements between [Duke] and the signatory parties entered into around the time of the stipulation could be relevant to ensuring the integrity and openness of the negotiation process” in the Commission’s three-part test in evaluating stipulations.⁴ The Court rejected arguments that the side agreements are not discoverable because they are privileged settlement communications.⁵ Consequently, the Court directed the Commission to “...compel disclosure of the requested information,” and stated that “upon disclosure, the commission may, if necessary, decide any issues pertaining to admissibility of that information.”⁶ The Court

⁴ *Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300 at ¶ 85 (2006).

⁵ *Id.* at ¶ 93-94. However, the Court previously found that privilege did apply to the second and third prongs of the Commission’s test for evaluating stipulations. See *Id.* at ¶ 80, citing *Constellation NewEnergy v. Pub. Util. Comm.*, 104 Ohio St.3d 530 at ¶ 10-15 (2004).

⁶ *Id.* at ¶ 94.

did not direct the Commission to find that all such agreements are relevant or admissible into the evidentiary record in this proceeding. Rather, the Court appropriately left those decisions to the Commission after the Commission reviewed the agreements at issue.

As a result of the Commission's unreasonable and unlawful construction of the history in this case and its efforts to, despite its prior rulings, reinstate the RSP it previously identified and approved, customers are left with a legacy of needless litigation over the role, purpose and disclosure of confidential agreements.

IEU-Ohio therefore seeks rehearing of the Commission's Order on Remand for the reasons identified in the attached Application for Rehearing and as discussed more fully below, urges the Commission to find that the side agreements and related documents produced through the discovery process and the associated testimony related thereto be deemed inadmissible and thus stricken from the evidentiary record in this proceeding.

II. ARGUMENT

- A. The Commission erred by finding that any side agreements are relevant to whether serious bargaining of a stipulation occurred inasmuch as no stipulation remained in effect subsequent to its September 29, 2004 Opinion and Order and November 23, 2004 Entry on Rehearing.**

The first and only Stipulation that was filed in this case was filed with the Commission on May 19, 2004. A hearing on the reasonableness of the Stipulation followed. In ruling on the Stipulation in its September 29, 2004 Opinion and Order, the Commission made significant modifications to the Stipulation and, thus, effectively

rejected it. Despite the modifications, Duke sought rehearing of the September 29, 2004 Opinion and Order and requested that the Commission accept one of three proposals: "to either (I) reinstate the Stipulation; (II) adopt the alternative proposal..., or (III) acknowledge and approve CG&E's [Duke's] statutory right to implement its previously-filed market-based standard service offer (MBSSO)."⁷

In its Entry on Rehearing, the Commission adopted Duke's alternative proposal (hereinafter "Alternative Proposal"), subject to further Commission modifications.⁸ In other words, the end result was substantively and procedurally distinct from the May 19, 2004 Stipulation. The Commission Staff succinctly described the situation in its Initial Brief in the remand proceeding:

It must be remembered that the Stipulation was a recommendation that the Commission adopt a particular outcome in the case, for simplicity, we may refer to this as outcome A. The Commission did not order outcome A, instead it did something else, let us refer to this as outcome B. In the Staff's view these are quite distinct outcomes. The company rejected outcome B and, through an Application for Rehearing, asked the Commission to order something different yet, outcome C. Ultimately, in the Entry on Rehearing, the Commission did a fourth thing, it ordered outcome D. It seems apparent that the fact that some parties recommended outcome A to the Commission provides no justification for the Commission to ultimately order outcome D. No party ever recommended the final outcome in the case. No one agreed. There was no stipulation. While the outcome in the Entry on Rehearing was reasonable and actually superior to the outcome that the Staff supported in the Stipulation, no one agreed to support it before the fact.

The presence or absence of the Stipulation therefore makes no difference. It fails the basic test of relevance. It does not make any matter at issue in the case more or less likely. The Commission could have

⁷ CG&E Application for Rehearing at 2 (October 29, 2004). Duke also provided notice to the Commission and all of the parties that "in the event the Commission fails to grant the relief requested...[Duke] will proceed to implement market-based rates for its commercial, industrial and other public authority customer classes effective January 1, 2005." *Id.* Pursuant to Duke's Electric Transition Plan ("ETP"), the market development period ("MDP") for residential customers would not end prior to December 31, 2005. Opinion and Order at 4 (September 29, 2004).

⁸ Entry on Rehearing at 9 (November 23, 2004).

reached exactly the same outcome whether or not the Stipulation had been filed. The only difference would have been that the Commission would have had to have written out all the details that constituted the plan itself rather than relying on the shorthand of adoption by reference.⁹

Despite the fact that (largely as a result of the modifications made by the Commission) the ultimate Commission-approved product was completely different from the Stipulation both substantively and procedurally, the Commission labeled the Alternative Proposal an "amendment to the stipulation."¹⁰ Regardless of the artificial label used by the Commission, based on the pleadings filed with the Commission prior to the remand proceeding, no party to the Stipulation and not even OCC appeared to believe that the Stipulation remained in effect.¹¹ In fact, the Commission later acknowledged that Duke and OCC viewed the resulting RSP as something produced outside of the Stipulation.¹² Thus, prior to the remand proceeding, only the Commission acted as if the Stipulation remained viable and only in form but not substance. This pretense may be related to the Commission's prior holding that it could not command a utility to file an RSP.¹³ Perhaps the Commission felt that it needed to pretend the

⁹ Initial Brief on Remand Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio at 14-15 (April 13, 2007) (internal citations and footnotes omitted).

¹⁰ Entry on Rehearing at 9.

¹¹ See, Response of Dominion Retail, Inc. to Application for Rehearing of Cincinnati Gas & Electric Company at 2 (November 8, 2004); Memorandum Contra Application for Rehearing by Constellation NewEnergy, Inc., MidAmerican Energy Company, Strategic Energy LLC, and WPS Energy Services, Inc. (aka Ohio Marketers Group) at 3 and 17 (November 8, 2004); and Green Mountain Energy Company's Memorandum in Response to the Cincinnati Gas & Electric Company's, Ohio Consumers' Counsel's, Ohio Marketers Group's, and Constellation Power Service, Inc.'s Applications for Rehearing at 1-2 (November 8, 2004).

¹² Second Entry on Rehearing at 8 (January 19, 2005).

¹³ *In the Matter of the Application for Approval of a Standard Service Offer and Competitive Bidding Process for the Monongahela Power Company*, Case No. 04-1047-EL-ATA, Finding and Order at 4 (April 6, 2005).

Stipulation survived its assassination by the Commission because of some concern that the utility would “walk” on the RSP opportunity. Whatever the purpose of the Commission’s pretense, Duke has now accepted the Commission’s recent reinstatement of “Outcome D.”

Despite the arguments and behavior of the parties to this case indicating that no Stipulation remained in effect, upon remand, in a misguided effort to be responsive to the Court’s directive that the Commission determine the relevance of side agreements, the Commission backed into a finding of relevance by asserting that the Stipulation remained in effect.¹⁴ All three of the Commission’s bases for holding that the Stipulation remained in effect are in error.

First, the Commission agreed with Dominion Retail Inc., (“Dominion”) that the Court would not have directed the Commission to determine the relevance of the side agreements if it was clear that no stipulation remained in effect.¹⁵ This assertion misinterprets the Court’s remand directive and, more importantly, imprudently ceded its discretion regarding admission of the side agreements in the remand proceeding. As pointed out numerous times throughout this proceeding and, as acknowledged by the Commission itself, the Court specifically stated that “upon disclosure, the commission **may, if necessary**, decide any issues pertaining to admissibility of that information.”¹⁶ The Commission should not disregard the Court’s directive that the Commission decide the admissibility of the information discovered on remand and the Commission’s rules giving it such authority.

¹⁴ Order on Remand at 23.

¹⁵ *Id.* at 20.

¹⁶ *Consumers’ Counsel* at ¶ 94 (emphasis added).

Second, the Commission also indicated in its Order on Remand that it believed a stipulation existed because the Court “issued an opinion that was based, in part, on the court’s interpretation of the stipulation as continuing to be relevant,” and that such a conclusion was not for the Commission to overturn.¹⁷ While the Court indicated that no party exercised its option to void the Stipulation,¹⁸ it did not conduct an in-depth investigation of whether or not the modifications made by the Commission in its Opinion and Order effectively rendered the Stipulation void and superseded by the Alternative Proposal. However, throughout the Court’s Opinion, the Court referenced the resulting RSP as CG&E’s (Duke’s) “alternative proposal” and also acknowledged that “significant modifications” were made to the original Stipulation.¹⁹ Nonetheless, the Court did not make a specific determination as to whether the Stipulation remained in effect after the Commission issued its Opinion and Order and Entry on Rehearing.

Finally, the Commission pointed out that the “face of the stipulation makes it clear the stipulation was never terminated” because no party filed a notice of its intention that it would terminate and withdraw from the Stipulation.²⁰ The Commission’s reliance on this language is not conclusive of the fact that the Stipulation remained in effect after the Commission issued its Opinion and Order. First, the Stipulation specifically states that it is “expressly conditioned upon its adoption by the Commission, in its entirety and without modification.”²¹ It is clear from the confusing record in this case that the

¹⁷ Order on Remand at 22.

¹⁸ *Consumers’ Counsel* at ¶46.

¹⁹ *Id.*

²⁰ Order on Remand at 22 citing Stipulation and Recommendation at 3.

²¹ Stipulation at 3 (May 19, 2004).

Stipulation was not adopted in its entirety without modification. Accordingly, it was unnecessary for any party to withdraw from the Stipulation. Also, in IEU-Ohio's case, IEU-Ohio made it clear that its position regarding the Stipulation was not based on its merits, but on practical considerations.²² Second, although no signatory party filed a formal notice terminating the Stipulation,²³ all parties carried on as if the Stipulation was no longer valid. In fact, Dominion and the Ohio Marketers Group ("OMG"), both of whom were signatories to the Stipulation and who now argue that the Stipulation did remain in effect, filed responses to Duke's Application for Rehearing in which they opposed the Alternative Proposal and advocated in favor of the Commission reinstating the Stipulation.²⁴ The Commission rejected the requests to reinstate the Stipulation in its Entry on Rehearing.²⁵ It is inconsistent at best for these parties to now argue, and for the Commission to agree, that the Stipulation is in effect. Finally, from a common sense standpoint, it is not possible for both the Commission-modified Alternative

²² *Id.* at 2, fn 1.

²³ *Id.* Duke's Application for Rehearing did provide notice to the Commission and all of the parties that modification to the Stipulation would be rejected by proclaiming that "in the event the Commission fails to grant the relief requested...[Duke] will proceed to implement market-based rates for its commercial, industrial and other public authority customer classes effective January 1, 2005." Pursuant to Duke's ETP, the MDP for residential customers would not end prior to December 31, 2005. Opinion and Order at 4 (September 29, 2004). In response to Duke's Application for Rehearing, IEU-Ohio filed a memorandum urging support of the Stipulation or the Alternative Proposal offered by Duke. Industrial Energy Users-Ohio's Memorandum in Response to the Cincinnati Gas & Electric Company's Application for Rehearing and Alternative Proposal at 2 (November 8, 2004).

²⁴ See, Response of Dominion Retail, Inc. to Application for Rehearing of Cincinnati Gas & Electric Company at 2 (November 8, 2004) where Dominion stated: "Dominion Retail, Inc. ... as a signatory to the Stipulation, continues to support the resolution of the issues proposed therein...However, Dominion Retail opposes the alternative proposal advanced by [Duke] in its application for rehearing...." See also, Memorandum Contra Application for Rehearing by Constellation NewEnergy, Inc., MidAmerican Energy Company, Strategic Energy LLC, and WPS Energy Services, Inc. (aka Ohio Marketers Group) at 3 and 17 (November 8, 2004). See also, Green Mountain Energy Company's Memorandum in Response to the Cincinnati Gas & Electric Company's, Ohio Consumers' Counsel's, Ohio Marketers Group's, and Constellation Power Service, Inc.'s Applications for Rehearing at 1-2 (November 8, 2004).

²⁵ Entry on Rehearing at 9.

Proposal and the Stipulation to be in effect at the same time when they are significantly and substantively different. The fact that Duke and other parties ultimately accepted the Alternative Proposal does not mean the original Stipulation was ever in effect inasmuch as the final product did not involve all of the terms and conditions for which the parties originally bargained.

For the reasons explained above, the Commission should find on rehearing that no Stipulation exists and, as such, the side agreements produced through discovery are irrelevant and inadmissible to the evidentiary record.

B. The Commission erred in admitting all side agreements inasmuch as the prejudicial effect of admitting the side agreements outweighs the probative value and because the admission is a needless presentation of cumulative evidence.

By holding that a stipulation remained in effect subsequent to the Commission's September 29, 2004 Opinion and Order and November 23, 2004 Entry on Rehearing, the Commission was forced to decide the relevance of the discovered information on remand and whether or not that information should be admitted into the record for the Commission's review. Then, the Commission proceeded to reject the Stipulation which had long ago been replaced by a Commission-ordered RSP, which the Staff described as "Option D," and, as described above, the Commission then admitted all of the side agreements into the evidentiary record.²⁶

While the Commission has enacted rules regarding the scope of discovery, it has not specifically enacted rules that determine when evidence proffered at a hearing should be admitted. Thus, the appropriate place to look for guidance on evidentiary

²⁶ Order on Remand at 17.

issues not covered by the Commission's rules is the Ohio Rules of Evidence.²⁷ Ohio Rule of Evidence 402 states in part that "evidence which is not relevant is not admissible."

Even if evidence is relevant, Rule 403 of the Ohio Rules of Evidence prohibits the admission of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury; relevant evidence may also be excluded if its probative value is substantially outweighed by considerations of undue delay or needless presentation of cumulative evidence.²⁸ The trial court has "broad discretion in the admission and exclusion of evidence under Evid. R. 403."²⁹

The prejudicial effect of admitting any of the side agreements produced during the discovery process outweighs any probative value that admission of the side agreements may have. The side agreements, as the Commission notes in its Order on Remand, are comprised of competitively sensitive and highly proprietary business financial information falling within the statutory characterization of a trade secret, as defined by Section 1333.61(D), R.C.³⁰ By admitting the side agreements into evidence, the parties to those agreements are unfairly prejudiced by the risk of having the

²⁷ Section 4903.22, R.C. states "Except when otherwise provided by law, all processes in actions and proceedings in a court arising under Chapters 4901., 4903., 4905., 4906., 4907., 4909., 4921., 4923., and 4925. of the Revised Code shall be served, and the practice and rules of evidence in such actions and proceedings shall be the same, as in civil actions." In addition, Section 4901.13, R.C. states in pertinent part, "The public utilities commission may adopt and publish rules to govern its proceedings and to regulate the mode and manner of...hearings related to parties before it." Thus, unless the Commission develops rules to govern proceedings before it, the rules of practice before the Commission are the same as in a civil action.

²⁸ Evid. R. 403.

²⁹ *Shimola v. Cleveland*, 625 N.E.2d 626, 629-630, 89 Ohio App.3d 505 (Ohio Ct. App. 1992).

³⁰ Order on Remand at 15 and 17.

sensitive information available to the public and the other parties to the proceeding who are direct competitors. The Commission's later determination that certain portions of the side agreements be subject to a protective order does not remedy the prejudicial effect because the affected parties are left with the administrative burden of having to extend the protective order every 18 months, despite the fact that none of the information within the agreements will ever change or lose its status as trade secrets and because they will remain at risk for public disclosure.

Moreover, the Commission should exclude the side agreements from the evidentiary record because the admission of all such agreements is a needless presentation of cumulative evidence. While there is sufficient record evidence to demonstrate the first prong of the test to determine the reasonableness of stipulations (the sealed portion of the transcripts of the evidentiary hearing, in particular) even if there was not, the Commission could simply review the side agreements *in camera* for the purpose of evaluating the first prong of the Commission's test for approving stipulations, and nothing more, without admitting them into the record.

For the reasons set forth above, the Commission should grant rehearing for the purpose of finding that regardless of whether any side agreements are relevant, they should have been deemed inadmissible pursuant to Ohio Rule of Evidence 403.

C. The Commission erred by finding that the information in the side agreements could be released without the customers' permission pursuant to Rule 4901:1-10-24, O.A.C.

Even if the side agreements are relevant and admissible into the evidentiary record, not only are they considered trade secrets subject to protective order under

Ohio law, but they also contain information that cannot be released without the customers' consent pursuant to Rule 4901:1-10-24, O.A.C.

The Commission found that the customer specific information is a trade secret, and admitted the evidence into the record subject to protective orders.³¹ While IEU-Ohio agrees that the information is a trade secret, the Commission erred in admitting the information into the record even subject to protective agreement for the reasons explained below.

The information is subject to the Commission's rules regarding consumer safeguards contained in Rule 4901:1-10-24, O.A.C., which precludes an electric distribution utility ("EDU") and others from making sensitive consumer information public without the customer's express written consent. IEU-Ohio has raised this argument in various pleadings and letters throughout this proceeding as well as during the evidentiary hearing.³² Yet the Commission's Order on Remand fails to address the issue and instead subjects the parties whose information is at risk to the administrative burden of having to file extensions of protective orders every 18 months. The information at issue is competitively sensitive now and will continue to be competitively sensitive indefinitely. Thus, even if the side agreements are deemed relevant and admissible, because the customers whose competitively sensitive trade secret information is contained in the side agreements have not consented to disclosure of that

³¹ Order on Remand at 15 and 17. It is the party who seeks to protect the information's obligation to file continuing requests for protective treatment every 18 months and the Commission has no obligation to grant continuing protective treatment. Rule 4901-1-24, O.A.C.

³² See, Letter to Chairman Schriber at 2 (March 2, 2007); Industrial Energy Users-Ohio's Reply to Memorandum Contra Motions of Duke Energy Ohio Inc., Duke Energy Retail Sales, Cinergy Corp., Ohio Hospital Association, and Kroger for Protective Orders by the Office of the Ohio Consumers' Counsel at 4 (March 15, 2007); Reply Brief of Industrial Energy Users-Ohio at 4 (April 27, 2007); and Rem. Tr. III at 12-13.

information, the Commission erred by admitting the information subject to protective treatment.

Furthermore, pursuant to Rule 4901:1-10-24, O.A.C., customers who have not consented to disclosure of specific customer information should not bear the administrative burden of having to renew the protective treatment when it is clear that the Commission's rules already provide for protected status.

Therefore, the Commission should find that because all of the information that has been deemed a trade secret cannot be released without customer consent, all such information should be stricken from the record.

D. The Commission erred in admitting into the evidentiary record side agreements that the Commission determined were irrelevant and, thus, inadmissible pursuant to Ohio Rule of Evidence 402.

In contravention of Ohio Rule of Evidence 402, which states, "evidence which is not relevant is not admissible," the Commission admitted into the evidentiary record side agreements that it determined were not relevant. As noted above, the Commission found side agreements entered into around the time the Stipulation was filed relevant to the first prong of the three-part test to determine the reasonableness of stipulations. However, the Commission went on to state that "with regard to agreements that were executed after the opinion and order or the entry on rehearing, we note that they appear, based on testimony in the record, to be renegotiations of earlier side agreements" and that:

while such substituted arrangements might show a continued understanding among parties, it is unlikely that they would be relevant to the evaluation of the first prong of the test for a stipulation that was remanded to us from the supreme court. Arrangements that were renegotiations, after the issuance of the opinion and order or the entry on

rehearing, demonstrate little with regard to how seriously the parties bargained over the stipulation.³³

Yet the Commission appears to have held in its Order on Remand that all of the side agreements, despite their relevance, should maintain a place in the Commission's docket and also be included in the evidentiary record by directing Duke to "work with the parties to the side agreements to prepare a redacted version of the confidential information attached to the prefiled testimony of Ms. Hixon...."³⁴

Redaction is unnecessary with respect to any information discovered during the proceeding that has been deemed irrelevant since it is inadmissible. Thus, even if the Commission determines that side agreements entered into prior to the Stipulation are relevant and admissible, the Commission should not admit those agreements it has deemed irrelevant.

By holding that the side agreements that the Commission determined are irrelevant are admissible, the Commission acted in contravention of the Ohio Rules of Evidence, misinterpreted the Court's remand directive and, more importantly, imprudently ceded its discretion regarding admission of the side agreements in the remand proceeding.

Because the Commission determined that the documents it considered "renegotiations" were irrelevant to the proceeding, the Commission erred by not holding that such documents are inadmissible and ordering their return to the parties from which they came. As such, IEU-Ohio requests that the Commission find that all documents identified by the Commission as irrelevant (specifically those that have been deemed

³³ *Id.* citing Rem. Tr. III at 124-5, also Duke Rem. Ex. 3 at 35-6.

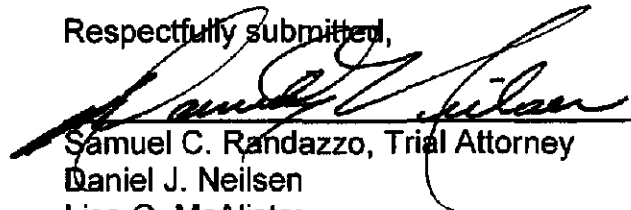
³⁴ *Id.* at 17.

"renegotiations" in the Order on Remand) are inadmissible and thus direct all parties to return or destroy all such documents produced through discovery.

IV. CONCLUSION

For the reasons set forth above, IEU-Ohio respectfully requests that the Commission grant rehearing for the purposes discussed herein.

Respectfully submitted,



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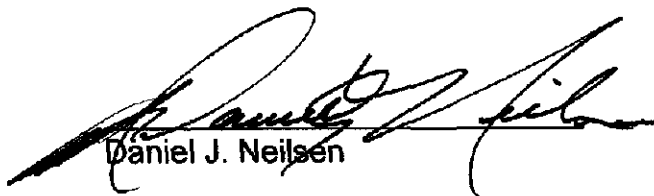
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *INDUSTRIAL ENERGY USERS- OHIO'S APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT* was served upon the following individuals this 21st day of November 2007 via electronic transmission.



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