BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Cincinnati Gas & Electric Company To Modify its Non-Residential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish a Pilot Alternative Competitively-Bid Service Rate Option Subsequent to Market Development Period.	)	Case No. 03-93-EL-ATA
In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Modify Current Accounting Procedures for Certain Costs Associated with The Midwest Independent Transmission System Operator.	)	Case No. 03-2079-EL-AAM
In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Modify Current Accounting Procedures for Capital Investment in its Electric Transmission and Distribution System And to Establish a Capital Investment Reliability Rider to be Effective After the Market Development Period.	)	Case No. 03-2081-EL-AAM Case No. 03-2080-EL-ATA

PUBLIC VERSION REDACTED

APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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November 23, 2007

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PUBLIC VERSION REDACTED

APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential consumers of Duke Energy Ohio, Inc. ("Company" or "Duke Energy," including its predecessor The Cincinnati Gas and Electric Company) and pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35(A), applies for rehearing of the Order on Remand ("Remand Order") issued by the Public Utilities Commission of Ohio ("PUCO" or "Commission")

on October 24, 2007 in the above-captioned cases. The OCC submits that the Commission's Remand Order is unreasonable and unlawful in the following particulars:

A. The Commission's Remand Order is unreasonable and unlawful because the Commission failed, as a quasi-judicial decision-maker, to "permit a full hearing upon all subjects pertinent to the issues(s), and to base [its] conclusion upon competent evidence" in violation of R.C. 4903.09 and case law. *City of Bucyrus v. State Dept. of Health*, 120 Ohio St. 426, 430.

1. The Remand Order fails to eliminate capacity charges that are simply surcharges that the Company requested for customer to pay, without any evidentiary basis for why consumers should pay them.

2. The Remand Order fails to consider the needs of the competitive market for the bypassability of all standard service offer components based upon the record.

3. The Remand Order fails to eliminate the additional "AAC" charges that the Company requested, without any evidentiary basis for why customers should pay them.

B. The Commission's Remand Order is unreasonable and unlawful because it fails to prohibit pricing and price elements in side agreements that violate Ohio statutes and rules, thereby permitting the devastation of the competitive market for generation service that could provide benefits for customers.

1. The Remand Order fails to consider all legally permitted uses of the discovery that was required by the Court in the decision to remand the case.

2. The Remand Order fails to prohibit Duke Energy's discriminatory pricing that demonstrates the standard service offer rates were too high for customers discriminated against, and the discrimination has caused serious damage to the competitive market for generation service.

3. The Remand Order fails to prohibit Duke Energy's violation of corporate separation requirements, which has caused serious damage to the competitive market for generation service that was intended to provide benefits to customers.

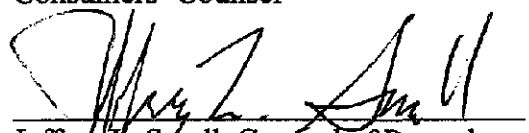
4. The Remand Order fails to prohibit the [redacted], which has caused serious damage to the competitive market for generation service.

C. The Commission's Remand Order is unreasonable and unlawful because it withholds information from public scrutiny by designating the contents of documents "trade secret" without legal justification.

The reasons for granting this Application for Rehearing are set forth in the attached Memorandum in Support.

Respectfully submitted,

Janine L. Migden-Ostrander
Consumers' Counsel



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MEMORANDUM IN SUPPORT

I. HISTORY OF THE CASE AND INTRODUCTION

A. Introduction

These cases, on remand from the Supreme Court of Ohio, are important for their determination of, among other matters, the manner in which generation rates will be set for 600,000 residential utility customers and tens of thousands of other customers for the 2007-2008 period. The PUCO has important decisions to make about the rates residential

customers and Ohio businesses will pay for generation service and the future of electric choice in areas served by Duke Energy. The General Assembly intended that the Commission would approve reasonable standard service offer rates as well as provide a real opportunity for customers to have competitive options to the generation rates provided by Duke Energy. The record supports the need for the Commission to take corrective actions that support reasonable prices and the development of the competitive market.

The issues presented in these cases require the Commission to make determinations on matters of law and policy. Serious problems exist in Duke Energy's proposals. In the absence of a competitive framework to protect customers, Duke Energy has submitted proposals to increase its standard service rates for generation service. Ohio law and sound public policy require the Commission to modify Duke Energy's pricing for the standard service offer rates that the Company proposes to charge its customers.

B. Remand from the Supreme Court of Ohio

The duration of some of the cases captioned above -- the first of which began in January 2003 -- is partly the result of an appeal of that portion of the case that concluded in 2004 (hereinafter, "*Post-MDP Service Case*") and remand by the Supreme Court of Ohio ("Court").[1] The matters addressed by the Court that necessitated the remand have been extensively discussed in pleadings regarding the appropriate scope for the hearings that followed the remand.[2] The Court stated that the "portion of the commission's first rehearing entry approving CG&E's [now Duke Energy's] alternative proposal is devoid

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

[2] See, e.g., Duke Energy's Motion for Clarification (December 13, 2006) and the OCC's Memorandum Contra Motion for Clarification (December 20, 2006).

of evidentiary support."[3] The Court also stated that the "commission abused its discretion in barring discovery of side agreements."[4]

The Office of the Ohio Consumers' Counsel ("OCC") presented extensive evidence regarding the missing support for Duke Energy's standard service offer rate proposals as well as the problems caused by side agreements the Company entered into with the intent of removing opposition by certain customers to its proposals that affected many other customers. The Commission should have acted upon this evidence and modified its previous entries and orders such that new standard service generation offers would result.

C. Burden of Proof

The burden of proof regarding the applications submitted in these cases rests upon Duke Energy. The posture of these cases -- in which various proposals for rate changes for components of standard service offers for 2007-2008 have been linked by consolidation with the remand of the underlying Case No. 03-93-EL-ATA, et. – does not alter the burden of proof.

The OCC does not bear any burden of proof in these cases. R.C. 4928.14(A) requires the filing of an application pursuant to R.C. 4909.18 regarding these cases. In a hearing regarding a proposal that does not involve an increase in rates, R.C. 4909.18 provides that "the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility." In a hearing regarding a proposal that does involve an increase in rates, R.C. 4909.19 provides that, "[a]t any hearing involving

[3] *Consumers' Counsel 2006* at ¶28.

[4] Id. at ¶94.

rates or charges sought to be increased, the burden of proof to show that the increased rates or charges are just and reasonable shall be on the public utility." In the following sections, the OCC will explain how Duke Energy has failed to prove that its post-MDP pricing proposals should be adopted without alteration by the Commission.

D. Procedural History of these Cases

On January 10, 2003, the Company filed an application ("January 2003 Application"[5]) containing proposals to provide a market-based standard service offer and to establish an alternative competitive bidding process for the period after the market development period for non-residential customers.[6] Numerous parties and the Commission's staff ("Staff") filed comments on the Company's proposals in March and April 2003.

On December 9, 2003, the Commission issued an entry that stated:

> As the competitive retail market for electric generation has not fully developed in the CG&E [now Duke Energy] territory, the Commission finds it advisable that CG&E file a rate stabilization plan as part of these proceedings, for the Commission's consideration.[7]

The Entry also set a procedural schedule.

On January 26, 2004, the Company filed another application ("January 2004 Application"). The January 2004 Application asked the Commission to approve either the approach contained in the January 2003 Application (the "competitive market option," or "CMO") or a substitute plan ("ERRSP Plan") for pricing generation service

[5] The January 2003 Application initiated Case No. 03-93-EL-ATA.

[6] January 2003 Application at 1.

[7] Entry at 5 (December 9, 2003).

that the Company submitted for approval in response to the Commission's request on December 9, 2003.[8]

On March 22, 2004, the OCC moved to continue these cases until after the Staff prepared a report on its investigation. Among other matters, the OCC was concerned that discovery responses from Duke Energy stated that explanations of its applications would be forthcoming only in pre-filed testimony. An entry was issued on April 7, 2004 that extended the procedural schedule a few weeks and set these cases for hearing on May 17, 2004 and did not provide for a Staff report of investigation. Duke Energy submitted pre-filed testimony on April 15, 2004 in which it described its "revised ERRSP." The PUCO Staff filed testimony on April 22, 2004 and intervening parties, including the OCC, filed testimony on May 6, 2004.

The hearing was delayed in connection with the filing of a stipulation in these cases that described another plan of service ("Stipulation Plan" as described in the "Stipulation" filed on May 19, 2004[9]). Duke Energy, Staff, Dominion Retail, Green Mountain Energy, FirstEnergy Solutions, and other parties (including several large customers and membership organizations made up of large customers) executed the Stipulation. The Ohio Marketers Group ("OMG," consisting of MidAmerican Energy, Strategic Energy, Constellation Power Source, Constellation NewEnergy and WPS Energy Services), PSEG Energy Resources, the National Energy Marketers Association,

[8] January 2004 Application at 8.

[9] The Stipulation was later submitted and admitted as Joint Ex. 1.

the OCC and the Ohio Manufacturers Association representing broad customer groups,[10] and OPAE did not execute the Stipulation.

The parties who did not execute the Stipulation were permitted a very short period during which they could inquire into the Stipulation by means of discovery. The OCC sought copies of all side-agreements between Duke Energy and other parties in these cases, and the Company refused to provide copies of such agreements. The first witness appeared at hearing on May 20, 2004 (based on pre-filed testimony not related to the Stipulation). The OCC began the hearing on May 20, 2004 with an oral Motion to Compel Discovery of side agreements. The Motion to Compel Discovery was denied. [11]

The Commission's Order in the *Post-MDP Service Case* was issued on September 29, 2004, which approved the May 19, 2004 Stipulation with some conditions. The Order evaluated the Commission's three goals used in the evaluation of post-MDP rate plans: rate stability for customers, financial stability for the company, and encouragement of competition.[12] Several parties, including Duke Energy and the OCC, filed applications for rehearing on October 29, 2004. The Company asked the PUCO to either i) approve its original CMO proposal; ii) approve the Stipulation without conditions or modifications, or iii) approve a new rate plan ("New Proposal"), proposed for the first time in the Company's Application for Rehearing.

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[10] The Ohio Manufacturers Association stated in its Motion to Intervene that it is "the only statewide association exclusively serving manufacturers. It has more than 2,400 Ohio manufacturing companies as members." OMA Motion to Intervene at 2 (March 5, 2004).

[11] Tr. Vol. II at 8, line 4 though 15 (2004).

[12] Order at 15 (September 29, 2004). Thereafter, the Court stated that it has "recognized the commission's duty and authority to enforce the competition-encouraging statutory scheme of S.B. 3 . . . ." *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 at ¶44 (*"Consumers' Counsel 2006"*).

In a November 23, 2004 Entry on Rehearing, the PUCO adopted (in principal part) the New Proposal. The Commission ordered the Company to submit filings with the Commission before Duke Energy could place certain of the rate increases in the New Proposal into effect.

The OCC initiated its appeal on May 23, 2005. The Court issued its opinion on November 22, 2006. The Court held that the PUCO erred by failing to properly support modifications to post-MDP rates in the PUCO's November Entry on Rehearing and erred by failing to compel the disclosure of side agreements.[13] The Court remanded the case for additional consideration by the Commission.

On November 29, 2006, the Attorney Examiner issued an Entry in the above-captioned cases that provided for a "hearing . . . to obtain the record evidence required by the court," and ordered that a prehearing conference be held on December 14, 2006.[14] The above-captioned cases were consolidated (i.e. constituting the *Post-MDP Remand Case*). A procedural Entry was issued on February 1, 2007 that, among other matters, set a cut-off date for discovery and a hearing date for March 19, 2007.

On February 2, 2007, the *Post-MDP Remand Case* was set for hearing in two phases, the first of which would address the framework for post-MDP rates. The hearing on the first phase was conducted in three days, beginning on March 19, 2007. The case was briefed in April 2007. The Remand Order in the above-captioned cases was issued on October 24, 2007.

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[13] *Consumers' Counsel 2006* at ¶95.

[14] Entry 3, ¶(7) (November 29, 2006).

The Remand Order reinstated all of the Commission's previous standard service offer determinations that were set before these cases were appealed.[15] The Remand Order made minor adjustments to the bypassability of generation components. For residential customers, the entire rate stabilization charge ("RSC") and annually adjusted component ("AAC") are bypassable under the Remand Order[16] while these charges were previously bypassable for only the first twenty-five percent of residential customers.[17] Also, the Remand Order changed the infrastructure maintenance fund ("IMF") component in current rates to a fully bypassable charge for non-residential customers who provide certain assurances that they will not return to the Company's standard service offer rates.[18]

II. ARGUMENT

A. The Commission's Remand Order is unreasonable and unlawful because the Commission failed, as a quasi-judicial decision-maker, to "permit a full hearing upon all subjects pertinent to the issues(s), and to base [its] conclusion upon competent evidence" in violation of R.C. 4903.09 and case law. *City of Bucyrus v. State Dept. of Health*, 120 Ohio St. 426, 430.

1. The Remand Order fails to eliminate capacity charges that are simply surcharges that the Company requested for customers to pay, without any evidentiary basis for why consumers should pay them.

[15] The generation component charges that resulted from the *Post-MDP Service Case* were listed in OCC-sponsored testimony. OCC Remand Ex. 2(A) at 53 (Hixon).

[16] Remand Order at 34-35.

[17] OCC Remand Ex. 2(A) at 53 (Hixon).

[18] Remand Order at 38.

a. The IMF is a surcharge.

In *Consumers' Counsel 2006*, the Court was concerned that "the infrastructure-maintenance fund may be some type of surcharge and not a cost component."[19] The Court was correct. The IMF charge was unsupported by the record at the conclusion of the *Post-MDP Service Case*, and it continues to be unsupported by the record -- in violation of R.C. 4903.09 and case law that requires a decision upon competent evidence[20] -- as the result of the Remand Order. In assessing Duke Energy's standard service offer pricing components, the prize for vagueness, ambiguity, and duplication of charges surely must go to the IMF charge that consumers will be required to pay despite there being no basis or support from the testimony regarding the Stipulation Plan or any other testimony.[21] The plan proposed by Duke Energy in its Application for Rehearing provides for duplicative capacity charges, and therefore does not provide for reasonably priced generation service for the Company's customers.

The Court determined that the Commission violated R.C. 4903.09 when it approved certain charges in the *Post-MDP Service Case* "without record evidence and without setting forth any basis for the decision."[22] The Court was particularly concerned regarding the explanation for the capacity charges as the result of the *Post-MDP Service Case*, specifically naming the IMF.[23] The Remand Order purports to return to, and judge for purposes of setting standard service generation offers, the Company's "RSP

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[19] Consumers' Counsel 2006 at ¶30.

[20] R.C. 4903.09 requires that the Commission "shall file . . . finding of fact and written opinions setting forth the reasons prompting the decision arrived at, based upon said findings of fact." See also, *City of Bucyrus v. State Dept. of Health*, 120 Ohio St. 426, 430.

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

[22] Id. at ¶27.

[23] Id. at ¶30.

application, as filed on January 26, 2004, and subsequently modified by Duke prior to the initial hearing in these proceedings."[24] The IMF was first proposed in the Company's later-filed Application for Rehearing, however, and reappears on pages 35-38 of the Remand Order without an explanation based upon the modified application filed by the Company. The Remand Order is object-driven, intended to reestablish customer payments for all components of the generation charges proposed by Duke Energy in its Application for Rehearing in the *Post-MDP Service Case.*

The Remand Order ignores the very history of these cases that it repeats in great detail. According to Duke Energy, the IMF's ancestry is clear -- it is one of two successor charges to the Reserve Margin portion in the original "annually adjusted component" charge in the Duke Energy's Stipulation Plan that was the subject of the Commission's hearing in May 2004.[25] This claim conflicts with the Company's response to the OCC's discovery (entered into the record) that the IMF and "little g" both compensate the Company for existing capacity.[26] The ancestry claimed by Duke Energy for the IMF is incorrect: the sole successor to the charge for the Reserve Margin under the Stipulation Plan is the SRT. The Commission appears to agree, concluding from the history of the "carve[ ] out"[27] from the originally proposed reserve margin that "the collection of costs of maintaining a reserve margin is appropriate for collection through a [non-bypassable SRT] POLR rider." The result is that an additional, non-bypassable IMF component to the POLR charge is unsupported.

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[24] Remand Order at 28.

[25] Company Remand Ex. 3 at 26 ("The IMF was previously embedded in the reserve margin component of the Stipulated AAC price of $52,898,560.) (Steffen).

[26] OCC Remand Ex. 1, NHT Attachment 6 (quoted and analyzed in OCC Remand Ex. 1 at 42) (Talbot).

[27] Remand Order at 32.

The duplication of capacity charges that customers much pay is exhibited by qualitative responses to the OCC's inquiries regarding the support for capacity-related charges in the Company's standard service offer rates. The Company stated that "[l]ittle g and the IMF [i.e. the Infrastructure Maintenance Fund] represent compensation for the Company's *existing* capacity."[28] The Company also states that "[t]he RSC is the Company charge for providing a stable market price over a prolonged period of time."[29] OCC Witness Talbot concluded that "the basis for the IMF charge seems to be similar, if not identical, to that of the RSC charge."[30] Mr. Talbot stated that "[t]here appears to be over-charging for existing capacity to the extent that little g and the RSC and the IMF are all recovering the costs or risks of existing capacity"[31] and that "[t]here is no assurance that these charges are not duplicative."[32]

b. Neither risk, opportunity cost, nor reliability arguments support the IMF charge.

The evidence demonstrates that the IMF comes from thin air -- i.e., a new surcharge was inserted as suspected by the Court -- that is explained by Duke Energy as the added amount that the Company is "willing to accept."[33] The Company's justification for the IMF charge was also stated as follows: "[It] is compensation for its opportunity cost associated with committing its assets at first call to MBSSO load."[34] As

[28] Id., NHT Attachment 6 (quoted and analyzed in OCC Remand Ex. 1 at 42) (emphasis added) (Talbot).

[29] Id., NHT Attachment 12 (quoted and analyzed in OCC Remand Ex. 1 at 53) (Talbot).

[30] OCC Remand Ex. 1 at 38 (Talbot).

[31] Id. at 42.

[32] Id.

[33] Duke Energy Remand Ex. 3 at 25.

[34] Duke Energy's response to OCC-INT-04-RI67, made part of the presentation by OCC Witness Talbot. OCC Remand Ex. 1, Attachment NHT-5.

OCC Witness Talbot explains, Duke Energy's arguments in support for such a charge are couched in terms of three concepts -- risk, reliability and opportunity cost -- that the Company misapplies.[35]

Regarding "risk," the apparent basis upon which the Remand Order approved the IMF charge,[36] the Company's claim that the standard service offer adds to its level of risk is not substantiated. As OCC Witness Talbot pointed out:

> The Company cannot show what level of risk it is taking on. [I]t cannot even claim that it is taking on any net risk at all and on the face of it[, the] [sic] standard service offer reduces risk. And the Company has not justified its claims in terms of any quantitative risk analysis."[37]

More fundamentally, Mr. Talbot points out that the Company has completely misused the concept of risk. In financial parlance, risk results from having an open or uncovered position in the market, either as buyer or seller. Absent the standard service offer, the Company would be selling the electricity from its generating units into the competitive market, but with the standard service offer it has a relatively assured market for the output of its generating plants and therefore has a less exposed position -- i.e., one with *reduced* risk.[38]

The second concept on which the Company bases its claim for the IMF is opportunity cost. The evidentiary basis for the Company's claim in this area is non-

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[35] OCC Remand Ex. 1 at 37-42 (Talbot).

[36] Remand Order at 37.

[37] Id. at 39 (Talbot).

[38] Id. at 38, 41, and 53 (Talbot). Regarding the testimony of Company Witness Steffen, Mr. Talbot stated that "Mr. Steffen does not provide a balanced assessment in which, absent the assurance of sales to standard service offer consumers, the Company would also be subject to 'price volatility in the energy and capacity markets.'" Id. at 41 (quoting Steffen's Second Supplemental Testimony at 27, Company Remand Ex. 3 at 27). Mr. Talbot also states that the testimony of Company Witness Meyer suffers from the same misrepresentation of the risk situation. Id. at 39 (referring to Company Remand Ex. 1 at 9).

existent. The Company has not performed any opportunity cost analysis,[39] let alone submitted such an analysis to the Commission for its review and the review of intervening parties.

The third concept misapplied by the Company is "reliability." The SRT has that specific function, providing for the acquisition of capacity corresponding to a reserve margin over expected peak demand.[40] The definition of the risks or costs for which the IMF is supposed to compensate the Company suffers from a serious problem: the IMF duplicates costs and compensates for risks that are covered by other components of Duke Energy's standard service offer. These components are those that relate to capacity, the SRT, the RSC, and also "little g." As noted above, the SRT is, by definition, a tracker that compensates the Company for acquiring a 15 percent reserve margin over and above predicted peak demand for the year ahead. Surely this is adequate for the purpose of assuring system reliability, and nothing more should be claimed for achieving this purpose. The SRT is the sole successor to the Reserve Margin component under the Stipulation Plan.

The proposed charges for the IMF have not been supported by Duke Energy, and are unreasonable. Analysis of the IMF -- on a stand-alone basis and even more so in combination with the RSC, the SRT, and "little g" -- reveals that the IMF has no reasonable basis or rationale. The IMF is, as conjectured by the Court, "some type of

[39] OCC Remand Ex. 1 at 39 and 42, citing DE-Ohio's response to OCC Interrogatory RI 140 ("The Company has not performed such a calculation," OCC Remand Ex. 1, NHT Attachment 4).

[40] See, e.g., OCC Remand Ex. 1 at 41 (Talbot).

surcharge and not a cost component."[41] The IMF should be removed from the Company's standard service offer charges so that customers do not pay an IMF charge.

2. The Remand Order fails to consider the needs of the competitive market for the bypassability of all standard service offer components based upon the record.

An important feature of Duke Energy's standard service offer, as reestablished in the Remand Order, is that two of its six components are non-bypassable by residential customers who switch to CRES providers. In spite of the fact that all the standard service offer charges are generation-related, the IMF and the SRT remain non-bypassable (i.e. customers must pay Duke Energy even if the customers switch to another provider of generation service). The analysis of risk, reliability and opportunity cost, restated in part above, shows that the record is devoid of evidence to support non-bypassable charges.[42] Labeling a generation component "POLR" does not substitute for record evidence.

OCC Witness Talbot pointed out that even an apparently small non-bypassable charge can threaten a large percentage of competitive retailers' profit margins -- margins that can be very small.[43] Mr. Talbot explained that non-bypassable charges impose a barrier to competitive supply of generation service.[44] The entire removal of the IMF charge (which is, again, totally non-bypassable as the result of the Remand Order) would remove a barrier to competitive entry into the electricity marketplace.

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[41] *Consumers' Counsel 2006* at ¶30.

[42] The Remand Order again runs afoul of R.C. 4903.09 that requires that the Commission "shall file . . . finding of fact and written opinions setting forth the reasons prompting the decision arrived at, based upon said findings of fact." See also, *City of Bucyrus v. State Dept. of Health*, 120 Ohio St. 426, 430.

[43] Tr. Vol. II at 84-85 (2007) (Talbot).

[44] OCC Remand Ex. 1 at 62-63 (Talbot).

During 2004, when the Commission held its last full hearing in this matter, the switching rates to competitive retail electric service ("CRES") providers for commercial, industrial, and residential customers were 22.04, 19.87, and 4.91 percent.[45] The Commission's "competitiveness" test for approval of electric utility rate plans provided hope that Duke Energy's new standard service offer would usher in a period in which the competitive electricity market would further develop and mature to the benefit of customers. However, the switching statistics fell to 8.40, 0.36, and 2.32 percent for commercial, industrial, and residential customers by December 31, 2006.[46] The Remand Order states that components of Duke Energy's rate plan must be reviewed in the light of more than the contents of the original application and testimony.[47]

The history of the competitive market, as revealed by the record evidence in this case, is that the marketplace desperately needs encouragement by allowing customers to purchase generation service from a competitive provider without having to make redundant payments to the electric utility. All generation charges should be bypassable by customers.

3. The Remand Order fails to eliminate the additional "AAC" charges that the Company requested for customers to pay, without any evidentiary basis for why customers should pay them.

The reasonableness of a return on construction work in progress ("CWIP") for environmental plant in the AAC calculations is a matter not addressed in the Remand Order and not covered by Staff's inquiries in the other cases that were heard along with

[45] Tr. Vol. II at 133 (CG&E Witness Stevie) (2004) (cited in OCC Remand Ex. 2(A) at 62, as corrected in OCC Remand Ex. 2(B)) (Hixon)).

[46]

[47] Remand Order at 34.

the cases on remand. Asked if he formulated an opinion regarding whether a return on such CWIP is an appropriate component of the AAC, Staff Witness Tufts stated that he "did not form an opinion and that's not part of [his] testimony."[48] Neither the Company nor the Staff provided any detail -- for example, of the percentage completion of environmental upgrades at Duke Energy Ohio's plants -- that might further inform the Commission regarding the Company's cost of providing service to customers. The result is lack of evidentiary support regarding the nature of a major portion of AAC charges.

Like the instruction to the management/performance Auditor that its audit should "follow the general guidance that had been provided for the Electric Fuel Component audits,"[49] the Commission should be interested in evaluating the Company's AAC cost submissions in light of past regulatory practice. Such practice considered only CWIP upgrades that were 75 percent or more complete before determining whether any return on CWIP should be included in rates.[50]

Mindful of the Commission's order regarding the "Rider" portion of the cases issued before the filing of this Application for Rehearing, the inclusion of plant CWIP amounts (for which there is no evidence as to when such plant investment will be in-service) in the AAC[51] is inconsistent with the Company's representations on other generation charge components in the consolidated record.[52] [redacted]

[48] Tr. Remand Rider Vol. II at 35 (April 19, 2007) (Tufts).

[49] PUCO Ordered Remand Rider Exhibit 1at 1-2 (Auditor's Report).

[50] OCC Remand Rider Ex. 1 at 6 (Haugh).

[51] *In re Duke Energy Rider Cases*, Case Nos. 05-724-EL-UNC, et al., Order at 21-24 (November 20, 2007) ("Rider Order" in the "*Rider Cases*").

[52] The Remand Order again runs afoul of R.C. 4903.09 that requires that the Commission "shall file . . . finding of fact and written opinions setting forth the reasons prompting the decision arrived at, based upon said findings of fact." See also, *City of Bucyrus v. State Dept. of Health*, 120 Ohio St. 426, 430.

[redacted]

[redacted][53] Duke Energy should not be permitted to charge customers for plant CWIP amounts through the AAC in a manner that could only be justified by the assumption of long-term provision of generation service to its customers while [redacted]

[redacted] The AAC should not include amounts requiring customers to pay for CWIP.

B. The Commission's Remand Order is unreasonable and unlawful because it fails to prohibit pricing and price elements in side agreements that violate Ohio statutes and rules, thereby permitting the devastation of the competitive market for generation service that could provide benefits to customers.

1. The Remand Order fails to consider all legally permitted uses of the discovery that was required by the Court in the decision to remand the case.

The Remand Order limits consideration of evidence presented by the OCC in a manner that does not abide by the Court's directive in its remand. The Remand Order states:

> It should be noted that the side agreement issue is relevant to these cases, according to the court's opinion, only with regard to the serious bargaining prong of the Commission's analysis of stipulations . . . .
>
> * * *
>
> It should also be noted that these proceedings are being considered only with regard to issues remanded to us for further consideration. Therefore, we are limiting our deliberation and order to those remanded issues. Ancillary issues raised by parties in the remand phase and not considered in this order on remand, such as potential

[53] These matters, along with evidentiary support that includes warnings from the Auditor, were extensively briefed in the *Rider Cases*. OCC Initial Post-Remand Brief, Phase II at 6-7.

> corporate separation violations and affiliate interactions, will be denied.[54]

The side agreements and related documents presented by the OCC were not admitted into the record for the limited purposes stated in the Remand Order. The limitation is artificial, being unreasonably imposed for purposes of issuing the Remand Order and is not based upon the decision of the Court in *Consumers' Counsel 2006*.

The OCC raised matters of [redacted] in its evidence, its pleadings, briefs, and again in the instant Application for Rehearing as matters vital to the "competitiveness" issue that makes up one of the Commission's three tests for the advisability of approving an electric distribution utility's rate plan.[55] The Court stated in *Consumers' Counsel 2006* that it "recognize[s] the commission's duty and authority to enforce the competition-encouraging statutory scheme of S.B. 3 . . . ."[56] The matters raised by the OCC on remand were vital to the furtherance of that statutory scheme, and the Commission has no legal basis for limiting the use of evidence regarding side agreements to simply the matter of "serious bargaining" with respect to the 2004 Stipulation.

The Remand Order departs from the remand decision when it limits the decision by the Court to holding that the Commission "erred in denying discovery under the first criterion [for the consideration of stipulations]."[57] The Ohio Supreme Court determined that the PUCO improperly barred side agreements as part of a "settlement privilege,"[58]

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[54] Remand Order at 20.

[55] See, e.g., *Post-MDP Service Case*, Case No. 03-93-EL-ATA, et al., Order at 15 (September 29, 2004).

[56] *Consumers' Counsel 2006* at ¶44.

[57] Remand Order at 19.

[58] *Consumers' Counsel 2006* at ¶89.

and specifically mentioned *one* relevant use of such information at trial regarding the test of settlement agreements.[59] With that example in hand (and only one was required), the Court determined that the OCC's right to discovery was improperly denied.

The OCC's proposition of law on appeal focused on the improper denial of discovery that was "reasonably calculated to lead to the discovery of other admissible evidence."[60] The OCC argued, among other matters, that "the production of the side agreements could have identified individuals who the OCC would have wanted as witnesses and could have provided the OCC with insights into public policy concerns such as discrimination that would have been useful in the cross-examination of witnesses. The denial of the OCC's Motion to Compel prevented the full development of the record in these cases."[61] The argument, in light of the proceedings on remand, was prophetic. The Court did not reject the OCC's argument or limit the PUCO's inquiries, but left further development of the argument to further deliberations "consistent with th[e] decision." *Consumers' Counsel 2006* at ¶94-95.

The Commission's Second Entry on Rehearing (from which the OCC ultimately took its appeal) depended upon the stipulation filed in this case in May 2004.[62] However, *Consumers' Counsel 2006* also supports the use of settlement agreements under Evid. R. 408 for "several purposes."[63] Evid. R. 408 states that settlement proposals and agreements are "not admissible to prove liability for or invalidity of the claim or its

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[59] Id. at ¶86.

[60] Supreme Court Case No. 05-946, OCC Merit Brief at 32 (June 28, 2005) (i.e. briefing of *Consumers' Counsel 2006*).

[61] Id. at 33-34.

[62] *Consumers' Counsel 2006* at ¶46.

[63] Id. at ¶92.

amount." The OCC never suggested using settlement agreements for such a purpose in the *Post-MDP Service Case*. "This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."[64] The list is not exhaustive. The agreements were used during the remand hearing to impeach the credibility of witnesses, and the anticompetitive effect of the agreements addressed the "competitiveness prong" of the Commission's three-part test regarding "rate stabilization plans."[65]

The agreements between the Duke-affiliated companies and others provide vital information regarding the totality of the Duke Energy rate plan with respect to, among other things, [redacted] These competitive conditions were important to the initial case before the Commission. The Remand Order erred by limiting the applicability of the information discovered after the obstacle to discovery was removed. The OCC could not be expected to lay out chapter and verse regarding how it might use agreements at trial without the OCC having access to the information, and the ruling in the Remand Order otherwise was legal error.

With the foregoing in mind, the Commission should evaluate the expanded record on remand and base its decision regarding the advisability and the legality of Duke Energy's proposals on that expanded record. In an effort to assist the Commission in that

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[64] Id.

[65] The competitiveness of "five competitive electric retail service providers," relied upon by the Ohio Supreme Court (*Consumers' Counsel 2006* at ¶56) is seriously undermined by the revelations in the case on remand. [redacted]

endeavor, the following sections again present the policy and legal basis that should require alteration of the Duke Energy rate plan considering the totality of that plan as it is more fully explained in the expanded record.

2. The Remand Order fails to prohibit Duke Energy's discriminatory pricing that demonstrates the standard service offer rates were too high for customers discriminated against, and the discrimination has caused serious damage to the competitive market for generation service.

The total effect of the post-MDP generation pricing by the Company is discriminatory in favor of the Customer Parties (i.e. parties or members of groups that were parties, referred to collectively by OCC Witness Hixon as "Customer Parties"[66]) R.C. 4905.35 states:

> 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.[67]

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.[68]

The latter statute forms the backbone of what Duke Energy refers to as its "provider of last resort" obligation, but it also requires the Company to provide its services without discriminatory treatment of its customers. The statute furthers Ohio policy that requires

[66] OCC Remand Ex. 2(A) at 4 (Hixon).

[67] Emphasis added.

[68] Emphasis added.

"nondiscriminatory, and reasonably priced retail electric service" and the furtherance of "effective competition in the provision of retail electric service by avoiding anticompetitive subsidies" pursuant to R.C. 4928.14(A) and (G).

[redacted]

[69] [redacted]

[70] DERS has discussed its payments to customers and the "effect such payments may have had on DE-Ohio's MBSSO price," citing aggregate payments of $13.8 million in 2005 and $22.2 million in 2006. DERS Memorandum Contra OCC's Motion to Strike DERS' Motion to Quash at 9 (January 2, 2007).

[71] [redacted]

[72] [redacted]

[73] [redacted]

[redacted][74]

[redacted][75] [redacted]

[redacted][76] The Remand Order states that the IMF should be bypassable for any "nonresidential customer who agrees that it will *remain off Duke's [generation] service* and [provides that] it will not avail itself of Duke's POLR service. . . ."[77] [redacted]

[74] [redacted]

[75] See, e.g., Remand Order at 37.

[76] [redacted]

[77] Remand Order at 38.

The Commission has dealt with utility efforts to discriminate using corporate affiliates as a device. In 1997, Ameritech engaged in a program whereby customers were charged less if they subscribed to both Ameritech telephone service and cable television service offered by Ameritech New Media, an affiliate of Ameritech.[78] The Commission held that the program violated R.C. 4905.35, the statute noted directly above, that prohibits discrimination against utility customers. Rejecting Ameritech's arguments, the Commission stated:

> Indeed, if Ameritech's arguments were followed to their logical conclusion, nothing in the Ohio statutes would preclude a public utility from setting up corporate affiliates to underwrite the utility bills of selected customers, thereby offering below-tariff rates that would be insulated from regulatory oversight.[79]

[redacted]

[78] *In re OCTA Complaint Against Ameritech*, Case No. 07-654-TP-CSS, Order at 4 (July 21, 1997).

[79] Id. at 5.

[80] [redacted]

[81] Id.

[82] [redacted]

[83] [redacted]

[redacted]

[redacted][84] [redacted]

[redacted]

[redacted]

[redacted][85]

[redacted]

[84] Entry on Rehearing at 14 (November 23, 2004).

[85] OCC Remand Ex. 2(A) at 61-62 (Hixon).

[redacted][86]

[redacted] During 2004, when the Commission held its last full hearing in this matter, the switching rates to competitive retail electric service ("CRES") providers for commercial, industrial, and residential customers were 22.04, 19.87, and 4.91 percent.[87] It was hoped that Duke Energy's standard service offer would usher in a period in which the competitive electricity market would further develop and mature. In fact, the switching statistics had fallen to 8.40, 0.36, and 2.32 percent for commercial, industrial, and residential customers by December 31, 2006.[88]

The record provides evidence of the main source of the decline in switching levels. [redacted][89]

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[86] [redacted]

[87] Tr. Vol. II at 133 (CG&E Witness Stevie) (2004) (cited in OCC Remand Ex. 2(A) at 62, as corrected in OCC Remand Ex. 2(B)) (Hixon)).

[88] [redacted]

[89] [redacted]

[redacted][90][redacted]

[redacted]

The Commission's Remand Order should have evaluated the expanded record on remand and directly addressed the subject of discriminatory treatment of customers based upon that expanded record.

3. The Remand Order fails to prohibit Duke Energy's violation of corporate separation requirements, which has caused serious damage to the competitive market for generation service that was intended to provide benefits to customers.

The facts elicited by the OCC and presented in testimony in the *Post-MDP Remand Case* should have enlivened a discussion regarding the proper role of electric utility affiliates that has otherwise been left largely dormant since the early days of Ohio's restructuring of electric utility regulation. All electric utilities filed electric transition plans and committed to follow corporate separation rules. For instance, Ohio Adm. Code 4901:1-20-16(A) was adopted "so a competitive advantage is not gained solely because of corporate affiliation. This rule should create competitive equality, preventing unfair competitive advantage and prohibiting the abuse of market power."

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Other provisions within the corporate separation rules are applicable under the facts revealed in these cases. In Ohio Adm. Code 4901:1-20-16(G)(1)(c), the Commission required that "[e]lectric utilities and their affiliates that provide services to customers within the electric utility's service territory shall function independently of each other...." Also, Ohio Adm. Code 4901:1-20-16(G)(4)(h) required that "[e]mployees of the electric utility or persons representing the electric utility shall not indicate a preference for an affiliated supplier." Based on the facts presented in these cases, it is clear that [redacted]

In Ohio Adm. Code 4901:1-20-16(G)(4)(j), the Commission required that "[s]hared representatives or shared employees of the electric utility and affiliated competitive supplier shall clearly disclose upon whose behalf their representations to the public are being made [redacted][91]

[91] [redacted]

[redacted][92] [redacted]

[redacted]

[redacted][93]

The Commission's Remand Order should have evaluated the expanded record on remand and based its decision regarding the abuse of corporate affiliations on that expanded record. The violations of corporate separation requirements prevented fair competition from developing in areas served by Duke Energy.

4. The Remand Order fails to prohibit the [redacted] which has caused serious damage to the competitive market for generation service.

[redacted]

[redacted][94] [redacted]

[redacted][95] [redacted]

[redacted]

[redacted]

[redacted][96] [redacted]

[redacted]

[redacted]

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92 [redacted]

93 [redacted]

94 [redacted]

95 [redacted]

96 [redacted]

[redacted][97] [redacted]

[redacted]

The Commission's Remand Order should have evaluated the expanded record on remand and directly addressed the subject of Duke Energy's [redacted] based upon that expanded record.

C. The Commission's Remand Order is unreasonable and unlawful because it withholds information from public scrutiny by designating the contents of documents "trade secret" without legal justification.

The Remand Order incorrectly reaches the conclusion that nearly all the information withheld from the public by means of redactions in the record is considered "trade secret information [maintained as] confidential."[98] The documents that the OCC asked the PUCO to disclose in the public domain were extensively discussed in the OCC's Memorandum Contra Motions for Protection submitted in these cases on March 13, 2007.

The OCC's Memorandum Contra Motions for Protection responded to motions by the Duke-affiliated companies and other parties that entered into agreements with those companies that sought to prevent public disclosure of certain documents that were obtained by the OCC in discovery. The ultimate rulings of the presiding officers, affirmed in principal part in the Remand Order, conflict with Ohio law and the prior decisions of the Commission.

R.C. 4901.12 requires that "all proceedings of the public utilities commission and all documents and records in its possession are public records," except as provided in the

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[97] [redacted]

[98] Remand Order at 17.

exceptions under R.C. 149.43. R.C. 149.43 is Ohio's public records law. R.C. 4905.07 states that, "[e]xcept as provided in section 149.43 of the Revised Code . . . , all facts and information in the possession of the public utilities commission shall be public . . . ." The Commission has noted that R.C. 4901.12 and R.C. 4905.07 "provide a strong presumption in favor of disclosure, which the party claiming protective status must overcome."[99]

Ohio Adm. Code 4901-1-24(D) requires of the PUCO that "[a]ny order issued under this paragraph shall *minimize* the amount of information protected from public disclosure."[100] The Commission stated in a 2004 case:

> The Commission has emphasized, in *In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, Entry issued November 23, 2003, that:
>
> > [a]ll proceedings at the Commission and all documents and records in its possession are public records, except as provided in Ohio's public records law (Section 149.43, Revise Code) and as consistent with the purposes of Title 49 of the Revised Code. Ohio pubic records law is intended to be liberally construed to 'ensure that governmental records be open and made available to the public ... subject to only a few very limited exceptions.' *State ex. rel. Williams v. Cleveland* (1992), 64 Ohio St. 3d 544, 549, [other citations omitted].[101]

Faced with demands for "wholesale removal of the document from public scrutiny,"[102] the Commission reviewed several documents in the above-cited telephone case and

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[99] *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, *Opinion and Order* at 5 (October 18, 1990).

[100] Emphasis added.

[101] *In re MxEnergy, Inc.*, Case No. 02-1773-GA-CRS et al., Entry at (3) (September 7, 2004) (notations in original).

[102] Id. at 3.

determined in each circumstance how documents could be redacted "without rendering the remaining document incomprehensible or of little meaning...."[103]

In violation of Ohio law as well as Commission precedent cited above, in these cases *nearly every word* in the disputed documents has been shielded from entering the public domain as the result of the Remand Order. Agreements purged of "customer names, . . . contract termination dates or other termination provisions, financial consideration in each contract, price of generation referenced in each contract, volume of generation covered by each contract, and terms under which any options may be exercisable" are rendered incomprehensible.[104] During the hearing, the same "wholesale" treatment was provided to all documents over which the mere claim of "confidentiality" was made by the Duke-affiliated companies and parties supporting the positions of those companies. The breadth of the redactions required by the Remand Order shows no significant effort to reduce the amount of information shielded from public scrutiny.

The Ohio Supreme Court has addressed the test for this claimed protection from disclosure under R.C. 149.43, evaluated under the "state or federal law" exemption to the public records law.

> We have also adopted the following factors in analyzing a trade secret claim:
>
> (1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the

[103] Id.

[104] Remand Order at 15. The OCC does not object to the redaction of "account numbers, customer social security [and] employer identification numbers." Id. According to Ohio Adm. Code 4901:1-10-24, Duke Energy may not disclose account or social security numbers without proper authorization. While not applicable to Commission action, support for this rule under the circumstances of these cases might take the form of redaction of such information for the public files for an indefinite period of time (i.e. unless otherwise ordered). While the rule also does not apply to the OCC, the OCC made significant efforts to redact all identification numbers before distributing the testimony of OCC Witness Hixon to counsel for various parties. See, e.g., OCC Memorandum Contra Motions for Protection at 17 (March 13, 2007).

> business, *i.e.*, by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information.'[105]

The analysis of these factors was largely missing in the motions for protection that were submitted by the Duke-affiliated companies and other parties. Not surprisingly, therefore, such an analysis is also absent from the PUCO's Remand Order which repeats the conclusory statements made by parties to the agreements. The Remand Order does not mention the OCC's detailed analysis of the documents in question, which are incorporated herein from the OCC's Memorandum Contra Motions for Protection.

The Commission's rules require specificity from those that seek to keep information from the public record. Ohio Adm. Code 4901-1-24(D)(3) requires movants for confidentiality to file a pleading "setting forth the *specific* basis of the motion, including a *detailed* discussion of the need for protection from disclosure...."[106] The specificity required by law was missing from the pleadings submitted by the Duke-affiliated companies and the other parties that submitted motions for protection.[107] A remarkable feature of the motions by the Duke-affiliated companies and other parties was that they all failed to address the individual contents of the documents that these parties sought to conceal from the public. These parties therefore failed to meet their burden

[105] *Besser v. Ohio State University* (2000), 89 Ohio St. 3d 396, 399-400.

[106] Emphasis added.

[107] The OCC's position is also supported by the terms of both the protective agreements entered into with various parties. See, e.g., DERS Motion for Protection, Attached Protective Agreement at 9 ("precise nature and justification for the injury").

under Ohio law. In its Order, the PUCO failed to conduct an analysis that would explain its decision to the public or to a court in review.[108]

The Remand Order appears to rely upon the cumulative arguments of various parties who submitted motions to protect information from inclusion in the public domain without analyzing specific documents regarding the appropriateness of withholding information contained in each from the public. For instance, the Remand Order restates DERS' argument that "the information that DERS provided falls into the category of sensitive information in a competitive environment."[109] That allegation has previously been refuted by the OCC in its Memorandum Contra Motions for Protection,[110] [redacted][111] [redacted][112] [redacted][113] The documents must be analyzed individually to conform to the legal requirements stated above.

Public revelation of the side agreements would not reveal "marketing strategies" of any CRES provider that "would . . . be helpful to competitors."[114] [redacted]

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[108] See *Trongren v. Public Util. Comm.* (1999), 85 Ohio St. 3d 87.

[109] Remand Order at 13.

[110] See, e.g., OCC Memorandum Contra Motion for Protection at 14 and 16.

[111] OCC Initial Post-Remand Brief, Hearing Phase I, at 39.

[112] [redacted]

[113] Id. at 38.

[114] Remand Order at 14.

[redacted][115][redacted][117][redacted][118][redacted][119][redacted][120][redacted] The only "strategy"

[115] [redacted]

[116] [redacted]

[117] [redacted]

[118] [redacted]

[119] [redacted]

[120] [redacted]

that would be revealed by placing the unredacted side agreements into the public files is the strategy for settling the *Post-MDP Service Case.*

Parties to side agreements that reduce their electricity costs in a rate-setting proceeding no doubt "consider the material in question to have economic value from not being known by their competitors," as stated in the Remand Order.[121] Rate-setting in a regulatory environment, however, is inherently a public process that produces rates that are published and accessible to others (including competitors). This is the underlying environment for R.C. 4901.12 and 4905.07, parts of which are recited above. The "economic value" to the side agreements at issue, however, stems from their discriminatory nature that is both against public policy and Ohio law (as discussed more fully above). The *public* is not served, for instance, when [redacted] Illegal activity should be eliminated by the Commission, not propped up by concealing the illegality behind claims of "economic value" derived from the prohibited activity.

The Remand Order incorrectly states that "the parties advocating confidential treatment have sought, at all junctures, to keep this information confidential . . . ."[122] Information provided by the OCC has documented other situations on the record to the contrary. For instance, the OCC's Memorandum Contra Motions for Protection states

[121] Remand Order at 11. Some claims regarding the competitive advantage provided by secrecy do not withstand scrutiny on their face. For instance, [redacted]

[122] Remand Order at 16-17. DERS has, of course, discussed its payments to customers and the "effect such payments may have had on DE-Ohio's MBSSO price," citing aggregate payments of $13.8 million in 2005 and $22.2 million in 2006. DERS Memorandum Contra OCC's Motion to Strike DERS' Motion to Quash at 9 (January 2, 2007).

that Attachment 16 to the testimony of OCC Witness Hixon was "communicated by DERS without any designation that the information was confidential."[123] That fact can be easily confirmed by examination of Attachment 16 that does not bear any DERS designation of confidentiality as required pursuant to its protective agreement with the OCC. Other stark instances of the Duke-affiliated companies' failure to protect information (such as many pages of Ficke and Ziolkowski transcript information[124]) not properly protected from public view were exhibited during the hearing.[125] On rehearing, the Commission should reevaluate the detailed analysis of the documents provided by the OCC's Memorandum Contra Motions for Protection and the testimony of OCC Witness Hixon.

For these reasons, the Order incorrectly shielded from public view large amounts of information, and the decision should be corrected or modified upon rehearing to permit public scrutiny of the information.

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[123] Memorandum Contra Motions for Protection at 18 (March 13, 2007).

[124] Remand Tr. Vol. I at 26-30 (March 19, 2007).

[125] Information has entered the public domain regardless of whether the Commission determines that it has sufficient evidence in the record to make this determination. The Commission has previously refused to state the legal procedure under which another government agency could release information in response to a public records request. In an order issued in 2006, the Commission specifically held that "the establishment of such a procedure, binding upon another government agency, is beyond . . . [the PUCO's] statutory authority." *In the Matter of the Review of Chapters 4901-, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685, Order at 33 (December 6, 2006). Furthermore, an Attorney Examiner recently refused to "limit the lawful exercise of OCC's judgment in response to a future public records request." *In the Matter of the Application of United Telephone Company of Ohio d/b/a Embarq For Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 49001:1-4, Ohio Administrative Code*, Case No. 07-760, Entry at 6 (August 10, 2007).

III. CONCLUSION

Two topics of fundamental importance to residential customers were covered by the remand from the Court: whether the Company's proposal for increasing rates in its Application for Rehearing filed in 2004 was supported by evidence and whether evidence of side financial arrangements should affect the outcome of these cases. The Order on Remand does not reasonably and lawfully deal with either of these matters. The statutory imperatives to provide benefits to Ohio consumers by means of nondiscriminatory and reasonably priced electric service has not been met as the result of the PUCO's handling of these two fundamental topics.

The Order was not supported by evidence submitted during the hearing in 2004, and the Company did not provide the additional evidence on remand in 2007 to support the level of its standard service charges to customers.

The competition that was intended under electric restructuring legislation has been seriously undermined by the side agreements. The dealings that helped settle the *Post-MDP Service Case* must cease in order to promote reasonable rates for all customers and to encourage competition.

Pursuant to R.C. 4903.10, the PUCO should abrogate and modify the Remand Order, consistent with the OCC's claims of error.

Respectfully submitted,

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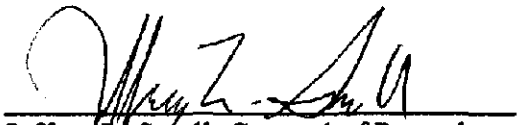

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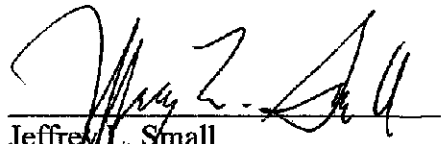
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Application for Rehearing 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 23rd day of November 2007. The version labeled "Confidential Version" should be treated by counsel in the same manner in which confidential versions of the briefs were treated.



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