

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The )  
Cincinnati Gas & Electric Company to Modify )  
its Nonresidential Generation Rates to )  
Provide for Market-Based Standard Service ) Case No. 03-93-EL-ATA  
Offer Pricing and to Establish an Alternative )  
Competitive-Bid Service Rate Option Sub- )  
sequent to the Market Development Period. )

In the Matter of the Application of The )  
Cincinnati Gas & Electric Company for )  
Authority to Modify Current Accounting ) Case No. 03-2079-EL-AAM  
Procedures for Certain Costs Associated with )  
the Midwest Independent Transmission )  
System Operator. )

In the Matter of the Application of The )  
Cincinnati Gas & Electric Company for )  
Authority to Modify Current Accounting )  
Procedures for Capital Investment in its ) Case No. 03-2081-EL-AAM  
Electric Transmission and Distribution System ) Case No. 03-2080-EL-ATA  
and to Establish a Capital Investment )  
Reliability Rider to be Effective after the )  
Market Development Period. )

ENTRY ON REHEARING

The Commission finds:

- (1) On January 10, 2003, Duke Energy Ohio, Inc., (Duke)<sup>1</sup> filed an application for authority to modify its nonresidential generation rates to provide for a competitive market option subsequent to the market development period. On October 8, 2003, Duke filed three additional, related cases. On September 29, 2004, following a hearing, the Commission issued its opinion and order, approving a stipulated rate stabilization plan (RSP) in the proceedings, with certain modifications. Following applications for rehearing, the Office of the Ohio

<sup>1</sup> Duke was, at that time, known as the Cincinnati Gas & Electric Company. It will be referred to as Duke, regardless of its legal name at any given time. Case names, however, will not be altered to reflect the changed name.

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Consumers' Counsel (OCC) filed notices of appeal to the Supreme Court of Ohio. The court issued its opinion on November 22, 2006, upholding the Commission's actions on most issues, but remanding the cases with regard to two issues.

- (2) An additional hearing was held, commencing on March 19, 2007. The Commission issued its order on remand on October 24, 2007.
- (3) Section 4903.10, Revised Code, indicates that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined by filing an application within 30 days after the entry of the order upon the journal of the Commission.
- (4) On November 23, 2007, applications for rehearing were filed by Duke, OCC, Ohio Partners for Affordable Energy (OPAE), and Industrial Energy Users-Ohio (IEU). The grounds for rehearing raised in each such application will be set forth below.
- (5) On December 3, 2007, memoranda contra the applications for rehearing were filed by Duke, OCC, OPAE, IEU, Dominion Retail, Inc., (Dominion) and Ohio Marketers' Group (OMG).<sup>2</sup>
- (6) The Commission has reviewed all the arguments for rehearing. Many of those arguments merely repeat positions previously presented to the Commission and do not offer anything new. The Commission has already considered, decided, and discussed such positions in its order on remand and the Commission does not intend to repeat those discussions in this entry on rehearing. Accordingly, the Commission finds that arguments for rehearing not discussed below have been adequately considered by the Commission in its order on remand and are being denied.
- (7) Duke sets forth six grounds for rehearing:
  - (a) Duke alleges that the Commission, without statutory authority, modified Duke's market-based standard service offer (MBSSO) price. Specifically, Duke objects that: (1) the order makes the infrastructure maintenance fund (IMF) avoidable for nonresidential switched load that agrees to remain off Duke's standard MBSSO price

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<sup>2</sup> OMG is comprised of Constellation NewEnergy, Inc.; Strategic Energy, LLC; and Integrys Energy Services.

- through 2008 even though such customers may return to Duke at the monthly average hourly locational marginal price (LMP) MBSSO price; and (2) the order makes the rate stabilization charge (RSC) and the annually adjustable component (AAC) avoidable for non-residential customers that want the option to return to Duke at the standard MBSSO price.
- (b) Duke alleges that the Commission's order, contrary to statute, deprives provider-of-last-resort (POLR) service to non-residential switched load that agrees to remain off Duke's standard MBSSO price through 2008.
  - (c) Duke alleges that the Commission, without statutory authority, modified Duke's MBSSO price by making the RSC and AAC avoidable by all switched load.
  - (d) Duke alleges that, by enabling switched load to avoid paying the IMF, AAC, and RSC, the Commission order conflicts with statutory policy because it requires Duke to subsidize the competitive retail electric service (CRES) market.
  - (e) Duke alleges that the Commission's order is unjust and unlawful because it requires Duke to retain its generating assets in conflict with statute.
  - (f) Duke alleges that the Commission's order is unjust and unreasonable because it is ambiguous that the non-residential regulatory transition charge continues through December 31, 2010.
- (8) We would note first that, in various portions of its application for rehearing, Duke refers to the IMF as a rider that would help to cover the costs of capacity. (Duke application for rehearing at 5, 13, and 15.) As repeatedly indicated by Duke, it is the system reliability tracker (SRT) that ensures that Duke is financially able to purchase sufficient capacity to serve its customers. On the other hand, the IMF, as we discussed in our order on remand, does not address capacity costs, but, rather, compensates Duke for pricing risk incurred in its provision of statutory POLR service.
- (9) Duke's first four grounds for rehearing all touch on the avoidability of various riders by various customers. Most of these matters were

comprehensively discussed in the order on remand and will not be covered again here. However, Duke does note that the order on rehearing, issued on April 13, 2005, in these proceedings, allowed shopping customers to choose to return at the rate-stabilized price by electing to pay the old rate stabilization charge (RSC) and the annually adjustable component (AAC) while they were shoppers. However, as Duke indicates, the order on remand did not take this option into account. (Duke application for rehearing at 4, 10.) We should have done so. Therefore, we will grant rehearing to modify and clarify the applicability of various riders during shopping situations.

First, it is clear that residential shopping customers must always have the right to return to Duke's POLR service at the RSP price. As stated in the order on remand, residential customers would pay the SRT and the IMF, while shopping, as those riders represent impacts on Duke of maintaining the ability to provide service for returning customers, one covering cost of capacity and one covering pricing risk.

With regard to nonresidential shopping customers, an additional division must be made. The first group of nonresidential shopping customers includes those considered in the order on remand. These customers would agree to remain off the RSP through 2008 and to return to Duke's service only at the LMP price, as specified and fully described in the April 13, 2005, order on rehearing, findings 16 through 18. In exchange for their agreement to remain off the RSP and return at that price, those customers would avoid the SRT and the IMF as, once again, those riders represent impacts on Duke of maintaining the ability to provide service for returning customers. The nonresidential shopping customers would also avoid the AAC, as we have previously found that it is a charge for generation-related cost. (Contrary to some statements by Duke, they would also avoid the RSC, as that rider has been eliminated as separate from the generation charge.)

The second group of nonresidential shopping customers includes those, not considered in the order on remand, that prefer to have the option to return to Duke's service at the rate-stabilized price. In order for Duke to maintain its preparedness to serve those customers at a rate-stabilized price, Duke will incur additional capacity costs, additional pricing risk, and additional generation-related costs. Therefore, the Commission finds that such customers should be charged the SRT, and the IMF.

As we stated in the April 13, 2005, order on rehearing, shopping customers will be liable for payment of all of the riders on a going-forward basis, if and when they return to Duke's service.

- (10) We also note that Duke attempts to support several of its rehearing arguments by reference to matters that are outside of the record of these proceedings. This effort occasioned OCC's subsequent motion to strike. Although we will not strike Duke's references to information that is not a part of the record, neither will we consider this information in our deliberations on rehearing.
- (11) Duke's fifth ground for rehearing asserts that the Commission had no authority to require it to retain its generating assets. Rather, Duke suggests, the Commission should permit Duke to void the requirement in its corporate separation plan that it transfer its assets to an exempt wholesale generator. (Duke application for rehearing at 21-22.) The Commission grants rehearing on Duke's fifth ground for rehearing for the purpose of giving further consideration to the matter. Our order on remand with respect to the transfer of assets shall remain in place pending our further review of this issue.
- (12) Duke's sixth ground for rehearing asks for clarification of the termination date of its nonresidential regulatory transition charge (RTC). ((Duke application for rehearing at 20.) Although we believe that the order on remand was clear on this point, we will restate that the residential RTC terminates at the end of 2008 and that the nonresidential RTC terminates at the end of 2010.
- (13) OCC sets forth three grounds for rehearing:
  - (a) OCC alleges that 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, and to base its conclusion upon competent evidence, in violation of Section 4903.09, Revised Code, and case law. OCC breaks this assignment of error into three, more specific, claimed errors.
    - i. OCC suggests that the remand order fails to eliminate capacity charges that are simply surcharges that Duke requested for customers to pay, without any evidentiary basis for why consumers should pay them.

- ii. OCC suggests that 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.
- iii. OCC suggests that the remand order fails to eliminate the additional AAC charges that Duke requested, without any evidentiary basis for why customers should pay them.

(b) In its second assignment of error, OCC alleges that 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. OCC breaks this assignment of error into four, more specific, claimed errors.

- i. First, OCC suggests that 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.
- ii. Second, OCC suggests that the remand order fails to prohibit Duke'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.
- iii. Third, OCC suggests that the remand order fails to prohibit Duke'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.
- iv. Fourth, OCC suggests that the remand order fails to prohibit the impact of certain side agreements, causing serious damage to the competitive market for generation service.

- (c) In its third assignment of error, OCC alleges that 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.
- (14) In support of the first section of its first ground for rehearing, OCC claims that little g, the RSC, and the IMF all recover for the costs of existing capacity and are, therefore, duplicative. (OCC application for rehearing at 11.)
- (15) Duke claims, in its memorandum contra, that the record evidence fully supports the IMF. (Duke memorandum contra at 4-13.)
- (16) Pursuant to the order on remand, the RSC has been eliminated and the amounts that would have been charged through the RSC will be recovered through the generation charge, from which the RSC originated. On the other hand, the IMF, as fully discussed in the order on remand, is a rider to recover for pricing risk. The IMF and the portion of the generation charge that previously represented the RSC are therefore not duplicative.
- (17) In support of the second subsection of its first ground for rehearing, OCC argues that the IMF and the SRT should be bypassable. OCC asserts that the Commission failed to consider record evidence on this issue and failed to consider the competitive market's need for full bypassability. (OCC application for rehearing at 14-15.)
- (18) Duke, in its memorandum contra, harkens back to Section 4928.14(A) and (C), Revised Code, which require only electric distribution utilities (EDUs) to provide default service for all consumers. Further, it suggests that POLR charges cannot affect the competitive market, since CRES providers have no POLR-related costs and, therefore, do not include such costs in their prices. (Duke memorandum contra at 13.)
- (19) The Commission has fully discussed this issue in the order on remand. Rehearing on this ground will be denied.
- (20) In support of the third section of its first ground for rehearing, OCC argues about the reasonableness of a return on construction work in progress (CWIP). (OCC application for rehearing at 15-17.) This matter is not addressed in the order on remand. The reasonableness of Duke's recovery of CWIP through the AAC rider was argued by OCC and was thoroughly considered by the Commission on pages 21

through 24 of our November 20, 2007, opinion and order in the rider phase of these consolidated proceedings. We see no need to repeat that discussion here. This ground for rehearing will be denied.

- (21) In its second ground for rehearing, OCC claims that the order on remand failed 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. As with the first ground, OCC breaks this assertion into several sections. In the first, third and fourth sections, OCC asserts that, in various ways, the Commission should have expanded the use of the discovered side agreements. (OCC application for rehearing at 17-21, 27-30.)
- (22) In response, Duke notes that the supreme court allowed the Commission complete discretion to decide issues relating to admissibility of the side agreements. Consistent with its role as the decider of fact, Duke argues that this allows the Commission to determine admissibility, the issues to which evidence is relevant, and the appropriate holdings to be reached. Duke also claims that the Commission permitted discovery well beyond that required by the Court or requested by OCC. After allowing such discovery, Duke submits that the Commission properly ruled on the relevance of the evidence. Duke also points out that OCC is asking for a ruling on allegations that OCC itself refused to make at the hearing. With regard to corporate separation issues, Duke also indicates that OCC made no claim that Duke is operating outside the parameters approved by the Commission in its corporate separation plan. (Duke memorandum contra at 16-19, 22.)

DERS and Cinergy, in their memorandum contra, argue that the Commission complied with the mandate of the court and that the Commission has no obligation to expand the scope of the proceedings before it. (DERS and Cinergy memorandum contra at 9-12.)

- (23) OCC is incorrect. There is an almost limitless number of claims that the side agreements might support. Their existence does not make them relevant to our consideration of the matter before us: Duke's application for approval of an RSP. As we said in the order on remand, the purpose of these proceedings is, at this point, only to consider those matters that are relevant to the application and remanded to us by the supreme court. The first, third, and fourth sections of the second ground for rehearing will be denied.



- (24) In the second section of the second ground for rehearing, OCC contends that the total effect of Duke's RSP is pricing that is discriminatory and that the Commission should have considered the expanded record on that issue. (OCC application for rehearing at 21-27.)
- (25) Duke asserts that all of its customers are paying Commission-approved rates. Duke also points to testimony by OCC's witness in which she admitted her lack of expertise in the area covered by the side agreements. (Duke memorandum contra at 19-21.)
- (26) As we discussed in the order on remand, our purpose was only to consider issues remanded by the supreme court. For purposes of this proceeding, this issue is ancillary and, therefore, should be denied.
- (27) OCC's final ground for rehearing claims that the Commission erred in its designation of certain portions of the record as trade secrets. OCC claims that the Commission made "no significant effort to reduce the amount of information shielded from public scrutiny." OCC complains that parties failed to address the individual contents of the documents and, thus, failed to meet their burden of proof. (OCC application for rehearing at 30-37.)
- (28) DERS and Cinergy strenuously object to OCC's argument. They point out that OCC is continuing to exaggerate its complaint by suggesting that "nearly every word" will be redacted. Rather, DERS and Cinergy point out, the Commission's ruling provided a detailed list of specific items that could be protected on the basis of its *in camera* inspection. (DERS and Cinergy memorandum contra at 6-9).
- IEU points out that OCC has raised nothing new in this regard. It also notes that the law does not require a motion for protective treatment to explicitly describe the information for which the protective order is sought. (IEU memorandum contra at 6-8.)
- In addition to disagreeing with the content of OCC's argument, Duke suggests that it is premature. It claims that the issue is not ripe until the parties comply with the Commission's redaction order.
- (29) This matter was fully discussed in the order on remand. OCC's application for rehearing on this ground will be denied.
- (30) OPAE sets forth two grounds for rehearing:

- (a) In its first assignment of error, OP&A&E alleges that the Commission acted unreasonably and unlawfully when, having rejected the May 19, 2004, stipulation on the basis of the remand record of the side agreements, it approved Duke's application; given that the statutory requirements of Sections 4928.14 and 4909.18, Revised Code, and the Commission's own RSP goals were not met, the Commission should have dismissed the application and ordered Duke to file a new application for the provision of standard service electric generation in its service territory.
  - (b) In its second assignment of error, OP&A&E alleges that the Commission acted unreasonably and unlawfully when it found that the IMF charge was reasonable.
- (31) Arguing with regard to its first assignment of error, OP&A&E suggests that, rather than considering its original application, the Commission should have found all the evidence to be tainted and should have dismissed the application. OP&A&E reviews various precedents to reach the conclusion that the Commission did not have the authority to adopt this RSP without the existence of a stipulation supported by a wide variety of customer groups. It also re-argues its concern regarding some components being cost-based and others being market-based. (OP&A&E application for rehearing at 5-12.)
  - (32) Duke argues, in its memorandum contra, that broad support does exist for its RSP. (Duke memorandum contra at 24-26.)
  - (33) OP&A&E is incorrect in its belief that we did not consider the quality of the evidence before us. We did review and consider all aspects of the evidence presented at the original hearing in these proceedings, finding such evidence to be persuasive and convincing with regard to the outcome ordered in the order on remand. The evidence was not tainted by the side agreements.
  - (34) Also with regard to its first ground for rehearing, while it is true that there is no longer an RSP stipulation in these proceedings, we note that Duke's RSP application, which we approved as modified, includes the possibility that the Commission might use a bid process to test the generation price against market prices. We find that, under current circumstances, a traditional competitive bidding process is not required in light of the possibility that the Commission could solicit

test bids. As we said in the opinion and order in these proceedings, considering a similar provision, this test bid procedure “offers a reasonable alternative to a more traditional competitive bidding process, provides for a reasonable means of customer participation through the various options that are open to customers under the RSP, and fulfills the statutory requirements for a competitive bidding process.” We also point out that this aspect of the RSP was not overturned by the court. Additionally, we note the support for Duke’s RSP that was discussed in Duke’s memorandum contra.

- (35) With regard to its second ground for rehearing, OP&E argues that the IMF is not a reasonable component of the RSP and is a new and duplicative charge. It asks that the IMF be eliminated. (OP&E application for rehearing at 12-13.)
- (36) This issue was fully discussed in our order on remand. The assignment of error will be denied.
- (37) I&E sets forth four grounds for rehearing:
  - (a) In its first assignment of error, I&E alleges that 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.
  - (b) In its second assignment of error, I&E alleges that 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.
  - (c) In its third assignment of error, I&E alleges that 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, Ohio Administrative Code (O.A.C.).
  - (d) In its fourth assignment of error, I&E alleges that the Commission erred in admitting into the evidentiary record side agreements that the Commission determined

were irrelevant and, thus, inadmissible pursuant to Rule 402, Ohio Rules of Evidence.

- (38) IEU, to support its first and second grounds for rehearing, repeats its argument that there was, at the time of the remand, no stipulation in effect, as the parties' stipulation had been modified by the Commission. Ignoring the plain language of the Supreme Court of Ohio and of its own agreement, IEU believes that "it was unnecessary for any party to withdraw from the Stipulation." (IEU application for rehearing at 10.) Without a stipulation, IEU contends, the side agreements are not relevant. Further, IEU believes that admission of those side agreements was improper, as the prejudicial effect outweighed the probative value. The "prejudicial effect" cited by IEU is the risk of release of "sensitive information." Finally, IEU claims that admission of the agreements is a "needless presentation of cumulative evidence and that, therefore, the agreements should have been reviewed *in camera* and never admitted into the record, even if necessary for evaluation of the first prong of the stipulation test. (IEU application for rehearing at 5-13.)
- (39) OCC disagrees with IEU's claim that the stipulation was not still in effect and asserts that the side agreements' admission was neither prejudicial nor cumulative, pointing out that no actual unfair effect of the evidence was described by IEU. (OCC memorandum contra at 3-6.) Similarly, OPAE insists that the stipulation remained in effect prior to the issuance of the order on remand. OPAE contends that issues of admissibility of the side agreements are moot, as IEU failed to submit an interlocutory appeal relating to their admission at the hearing on remand. (OPAE memorandum contra at 8-10.) Dominion also weighs in on this discussion, correcting IEU's characterization of a prior Dominion argument and agreeing with the Commission's finding that the side agreements were relevant. OMG also agrees that the stipulation remained in existence at the time of the hearing on remand and that evidence of those agreements was properly admitted.
- (40) The matter covered by IEU's first assignment of error, relating to the relevance of any side agreement in the face of the claimed nonexistence of the stipulation, was fully discussed in our order on remand. With regard to IEU's second assignment of error, in light of the fact that we found that the terms of the side agreement bore directly and critically on our ability to consider the stipulation, we find that their probative value was extremely high. In addition, we find that evidence of the side agreements was not prejudicial in any way and did not confuse

the issues or the Commission. Therefore, on balance, it was not error to admit the agreements into the record. Further, with regard to IEU's extraordinary suggestion that the side agreements should have been evaluated, for purposes of the three-prong stipulation test, outside of the record, we note that Section 4903.09, Revised Code, requires the Commission, in all contested cases, to develop a complete record of the proceedings, which record forms the basis for the ultimate determinations in such cases. Both of these assignments of error will be denied. To do as suggested by IEU, to wit, to render findings of fact based on non-record evidence, would surely constitute reversible error.

- (41) With regard to its third assignment of error, IEU cites to an administrative rule prohibiting release of certain customer information by EDUs. IEU proposes to use this narrow administrative rule to reach the conclusion that no trade secret information in this case may ever be released into the public record without customer consent.
- (42) OPAE points out that the cited rule does not apply to the release of information by the Commission. It suggests that the sensitive customer identification information could be permanently redacted from the documents held under seal. OCC also points out that the rule in question only touches on the release of account numbers and social security numbers.
- (43) The Commission found, in the order on remand, that various kinds of information in the side agreements should be considered to be a trade secret, including customer names, identifying numbers, and certain contract terms. Rule 4901:1-10-24, Ohio Administrative Code, referenced by IEU, prohibits electric distribution utilities from publicly releasing a customer's account number or social security number without the customer's consent, except in certain listed circumstances. IEU makes the claim 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." (IEU application for rehearing at 15.) IEU is apparently attempting to expand this administrative rule to prevent the Commission from allowing the public release of filed documents, where those documents include not only account numbers and social security numbers but, also, various contract terms. We decline to reach this conclusion.

We do agree, however, that the continued protection of customer account numbers, social security numbers, and employer identification numbers would be a burden on customers under the current 18-month

protective order. IEU's third ground for rehearing will be granted only to extend the protective order duration to five years with regard to customer account numbers, social security numbers, and employer identification numbers.

- (44) IEU's fourth ground for hearing alleges that irrelevant side agreements should not have been admitted into the record. It asks the Commission to direct all parties to return or destroy all discovered documents that were ultimately found to be irrelevant.
- (45) OMG claims that not all of the side agreements were admitted, on the basis that the Commission found certain ones of them to be irrelevant. OCC believes that the side agreements were all properly admitted and that their use should be expanded.
- (46) With regard to IEU's fourth ground for rehearing, the Commission finds that the attorney examiners properly admitted all side agreements into the record. While we ultimately found that certain of those documents would form no part of the basis for our opinion, that does not mean that we did not need to review them in order to reach that conclusion. Our statement that such agreements were "deemed irrelevant" was, perhaps, imprecise. We will therefore clarify that statement. Our intent was merely to say that the terms of those particular side agreements did not affect our order on remand in any way. From an evidentiary standpoint, however, they remained relevant and admissible. We would point out, here, that evidence does not become retroactively inadmissible when a court or administrative body fails to use that information as part of its decision. IEU's fourth ground for rehearing will be denied.

It is, therefore,


ORDERED, That the applications for rehearing by OCC and OPAAE be denied. It is, further,

ORDERED, That Duke's fifth ground for rehearing be granted as set forth in Finding (11) for further consideration of the matters specified therein and that the remainder of Duke's application for rehearing be granted in part and denied in part. It is, further,

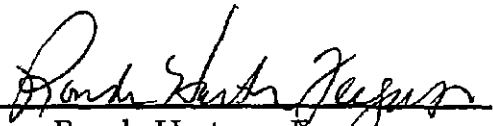
ORDERED, That the applications for rehearing by IEU be granted in part and denied in part. It is, further,

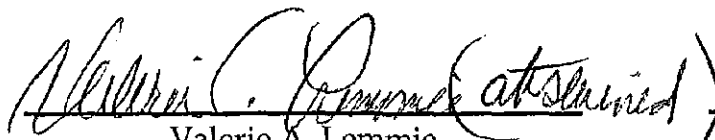
ORDERED, That a copy of this entry on rehearing be served upon all parties of record.

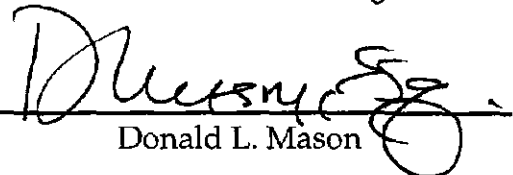
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