

FILE

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the
Consolidated Duke Energy Ohio, Inc.
Rate Stabilization Plan Remand and
Rider Adjustment Cases

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Case Nos. 03-93-EL-ATA
03-2079-EL-AAM
03-2081-EL-AAM
03-2080-EL-ATA
05-725-EL-UNC
06-1069-EL-UNC
05-724-EL-UNC
06-1068-EL-UNC
06-1085-EL-UNC

**DUKE ENERGY OHIO'S MEMORANDUM CONTRA THE OHIO
CONSUMERS' COUNSEL'S AND OHIO PARTNERS FOR AFFORDABLE
ENERGY'S APPLICATION FOR REHEARING**

INTRODUCTION:

The Ohio Consumers' Counsel (OCC) and Ohio Partners for Affordable Energy (OPAE) each filed an Application for Rehearing asking the Public Utilities Commission of Ohio (Commission) to reconsider its order regarding the implementation of Duke Energy Ohio's (DE-Ohio) riders that form part of its Market-Based Standard Service Offer (MBSSO).¹ In an Entry dated November 23, 2006, and affirmed by Order from the bench during a pre-hearing conference held December 14,

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¹ In re DE-Ohio's MBSSO, Case No. 03-93-EL-ATA et al., (OCC Rider Application for Rehearing) (December 20, 2007); In re DE-Ohio's MBSSO, Case No. 03-93-EL-ATA et al., (OPAE Rider Application for Rehearing) (December 20, 2007).

2006, the cases listed above were consolidated before the Commission on remand from the Court.²

The OCC and OPAE each base their Application for Rehearing on inconsistent and fallacious arguments that the Commission should reject. OCC argues that the Commission failed to permit a full hearing regarding all pertinent issues.³ OCC's argument is inconsistent with the due process permitted by the Commission that afforded OCC with two separate evidentiary hearings. During those hearings OCC put on substantial evidence on every conceivable issue relative to the Court's remand of the Commission's Order establishing DE-Ohio's MBSSO.

Next, OCC alleges that the Commission impermissibly delegated its authority to DE-Ohio and Staff.⁴ This is an outrageous claim that is inconsistent with, and ignores, the process that DE-Ohio must undertake to implement any portion of its MBSSO. Before DE-Ohio may effectuate any rider, including those at issue in this proceeding, it must file a tariff with the Commission. OCC has the ability to challenge any tariff filing and the Commission may approve or deny the tariff. It does not matter that the process to achieve the tariff filing is by discussions with Staff or otherwise. The Commission has not improperly delegated its authority to Staff or DE-Ohio.

² *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (Entry at 3) (November 23, 2006).

³ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (OCC Rider Application for Rehearing at 5) (December 20, 2007).

⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (OCC Rider Application for Rehearing at 16) (December 20, 2007).

OCC also argues that certain parties lacked standing to participate in these cases.⁵ OCC argued for consolidation of these cases. DE-Ohio argued against consolidation. OCC prevailed. It can hardly complain that Parties to some of the cases were, post-consolidation, permitted to participate in all of the cases. Apparently OCC expected the Attorney Examiners to limit Party participation during hearing based upon the particular case in which each Party intervened. Such an approach is not practical or fair. Once the cases were consolidated a Party to one case was a Party to all cases.

Finally, OCC and OPAE allege that the Commission failed to properly apply the three part test for assessment of partial stipulations.⁶ The basis of OCC's and OPAE's allegation is that Stipulating Parties did not capitulate to their viewpoint or that they did not offer a viewpoint despite having the opportunity to do so. Such an allegation is specious because if all Parties were satisfied by a Stipulation it would be unanimous, not partial. The nature of contested Stipulations is that some parties are not satisfied. That circumstance does not cause the Commission's adoption of a Stipulation to be improper or unlawful.

There is one more issue that OCC and OPAE raise during their argument that the Commission improperly adopted the Stipulation

⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (OCC Rider Application for Rehearing at 19) (December 20, 2007).

⁶ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (OCC Rider Application for Rehearing at 21) (December 20, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (OPAE Rider Application for Rehearing) (December 20, 2007).

regarding DE-Ohio's Annually Adjusted Component (AAC), System Reliability Tracker (SRT), and Fuel and Purchased Power tracker (FPP). That argument is that some signatory Parties had an ulterior motive resulting from confidential commercial contracts such Parties entered with a DE-Ohio affiliate. Such an argument is inconsistent with the facts. First, Signatories such as Staff and People Working Cooperatively had no contracts with a DE-Ohio affiliate. Second, even assuming OCC's and OPAE's allegation that contracting Parties do not pay the full amount of the rider increases to be true, an allegation that DE-Ohio continues to deny, such Parties pay some portion of the increase. OCC and OPAE ignore the fact that such Parties could oppose any increase, and were certainly free to do so in these proceedings. Their participation in negotiating, and ultimately signing the Stipulation, should not be discounted. The Commission should deny OCC's and OPAE's Application for Rehearing.

ARGUMENT:

Fundamentally, OCC and OPAE are arguing that the Commission should reduce MBSSO components that recover only costs. With the exception of a return on environmental investment and the construction work in progress associated with such investments, DE-Ohio receives no return for the services it provides through the Riders FPP, SRT, and AAC. The Commission, through an independent auditor or its Staff, audits all of DE-Ohio's expenditures. The amount of expenditures is not in

dispute. Ultimately, OCC and OPAE seek to delay DE-Ohio's recovery of current expenditures. In a market environment where DE-Ohio assumes market risks, it is unfair to deprive DE-Ohio of cost recovery in a manner concurrent with its expenditures.

I. The Commission has permitted Parties sufficient process regarding all issues.

Inexplicably OCC alleges that it was not permitted a full hearing regarding three issues: (1) The continued use of active management regarding coal purchases; (2) The ability of DE-Ohio to purchase capacity from its legacy Duke Energy North America (DENA) generating assets to alleviate short term emergencies; and (3) The ability of DE-Ohio to recover CWIP associated with environmental investments included in the AAC.⁷ OCC's allegation is simply not true. OCC had a full opportunity to litigate all issues, including the three issues it contests.

A. OCC had a full opportunity to litigate DE-Ohio's use of active management.

Rather than arguing that it did not have an opportunity to litigate the active management issue, OCC argues that the Commission should require DE-Ohio to follow the auditor's recommendations instead of the Stipulation.⁸ Specifically, OCC incorrectly asserts that DE-Ohio has not met its burden of proof that active management is an effective method of

⁷ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (OCC Rider Application for Rehearing at 5-15) (December 20, 2007).

⁸ *Id.* at 5-9.

low cost fuel procurement.⁹ With respect to DE-Ohio's active management strategy, the auditor recommends that DE-Ohio cease flattening its position on a daily basis.¹⁰ The auditor prefers that the Company adjust its position on a quarterly basis unless circumstances dictate otherwise.¹¹ The auditor's recommendation is based upon a preference for traditional regulated utility procurement strategies for fuel and emission allowances (EAs), which may remain appropriate in a fully regulated jurisdiction. The auditor's recommendation is also just that, a recommendation. It does not bind the Commission or the Stipulating Parties. In this instance the Stipulating Parties decided to depart from the auditor's recommendation and the Commission properly approved the departure.

Procurement strategies and protocols that were relevant and appropriate for regulation simply do not make sense in a market environment where consumers may switch to a competitive supplier at their pleasure, a utility's load is constant and indefinite, and a utility is responsible for its position in the marketplace.¹² DE-Ohio's active management results in the Company constantly reviewing its position to be sure that the all stakeholders are sitting in the most advantageous position in terms of price, inventory, and quality of fuel. The auditor

⁹ *Id.*

¹⁰ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (PUCO Ordered Remand Rider Exhibit 1 at 3-5)(April 19, 2007).

¹¹ *Id.*

¹² Ohio Rev. Code Ann. § 4928.38 (Baldwin 2007).

testified that the Company matches the cost of supplying generation to the demand for electricity and hedges any cost difference between generating electricity and purchasing power.¹³

As DE-Ohio witness Mr. Whitlock explained in his Supplemental Direct Testimony, the auditor's recommendation to abandon active management poses a substantial risk to consumers and delays the company's ability to react affirmatively to changing market factors.¹⁴ The auditor's recommendation to evaluate the Company's position on a quarterly basis unless conditions deem otherwise is ambiguous and is purely speculative given that there is no definition as to what the auditor would consider to be an appropriate circumstance for a re-evaluation of a position sooner than on a ninety-day basis. Sitting back and waiting to evaluate a position every ninety days would likely result in consumers saddled with higher cost fuel and EAs as opportunities to take advantage of market highs and lows for fuel and EAs have passed. As the Commission is aware through experience, during a ninety-day period, prices for coal and EAs could fluctuate dramatically. Active management affords the Company the ability to manage its market position to the benefit of all stakeholders, including the ultimate consumer.

The evidence shows that DE-Ohio's active management strategy has not increased costs to consumers and has not inhibited the

¹³ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Remand Rider TR I at 57) (April 19, 2007).

¹⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (DE-Ohio Remand Rider Exhibit 2 at 6) (April 10, 2007).

Commission's ability to audit DE-Ohio's transactions.¹⁵ Company shareholders absorb all transaction costs related to active management including overhead and broker fees, not consumers.¹⁶ Witness Schwartz, under cross-examination by the OCC, stated that while the number of transactions occurring under an active management strategy is greater than with a traditional regulated procurement strategy, the auditor was able to "adequately audit the transactions in accordance with standard auditing procedures."¹⁷

The Parties to the Stipulation, including the Commission Staff, recognize the benefits to an active management procurement strategy in a deregulated market and have agreed not to follow the auditor's recommendation to abandon this strategy. The Commission approved this term of the Stipulation without modification in its Opinion and Order.¹⁸ The evidence supports the Commission's decision and the Commission should deny OCC's Application for Rehearing.

OCC had its opportunity to litigate its position regarding DE-Ohio's active management. As discussed above the FPP proceeding in Case No 05-725-EL-UNC was consolidated in the above styled cases. The auditor was present and available for cross-examination at the April 2006 hearing of this matter. OCC had the ability to pre-file testimony for its

¹⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Remand Rider TR II at 72-78) (April 19, 2007).

¹⁶ *Id.*

¹⁷ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Remand Rider TR I at 59) (April 19, 2007).

¹⁸ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Opinion and Order at 15) (November 20, 2007).

witnesses, conduct discovery, and cross-examine DE-Ohio's own witnesses regarding the merits of active management. There is no requirement that Parties to a Stipulation must agree to every conceivable position advocated in a proceeding. Such a concept is contrary to the very purpose for settlements or Stipulations in legal proceedings.

B. OCC had a full opportunity to litigate the issue of coal portfolio purchases.

OCC also argues that the Commission should compel DE-Ohio to enter long term coal procurement contracts.¹⁹ The Stipulating Parties agreed with the auditor's recommendation and decided that discussions should ensue to determine how DE-Ohio might reasonably enter long term coal contracts in a market environment with Rate Stabilization Plans providing certainty only through December 31, 2008.²⁰ The Commission properly approved the Stipulation provision regarding Coal procurement.²¹

OCC alleges that failure to require DE-Ohio to enter long term coal procurement contracts leaves "customers totally exposed to the market" beginning January 1, 2009.²² OCC's argument regarding DE-Ohio's coal procurement contracts directly conflicts with its argument regarding CWIP where OCC argues that customers should not pay CWIP on plant

¹⁹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (OCC Rider Application for Rehearing at 8) (December 20, 2007).

²⁰ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Joint Remand Rider Exhibit 1 at 5) (April 9, 2007).

²¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Opinion and Order at 16) (November 20, 2007).

²² *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (OCC Rider Application for Rehearing at 8) (December 20, 2007).

that may not be serving customers beginning in 2009.²³ OCC cannot have it both ways and the Commission should deny its Application for Rehearing.

C. OCC had a full opportunity to litigate whether DE-Ohio may include legacy Duke Energy North America capacity in SRT charges.

OCC had a full opportunity to present evidence, cross-examine DE-Ohio's witness Mr. Whitlock, and the auditor regarding the use of legacy Duke Energy North America (DENA) generating assets as part of the SRT planning reserve margin. The legacy DENA generating assets are now owned by DE-Ohio but are not committed to serve DE-Ohio customers as part of DE-Ohio's MBSSO. The legacy DENA assets operate exclusively in the competitive wholesale electric market. No charges associated with the DENA assets have been passed through the SRT.

The Stipulation, approved by the Commission, permits DE-Ohio to use legacy DENA capacity to fill an emergency short capacity position.²⁴ This ability is a reliability measure for the protection of customers. It includes compensation for the capacity that the Commission must approve in an SRT case.²⁵

It is highly beneficial to consumers that all reasonably priced generation options are available and at DE-Ohio's disposal to meet capacity requirements, especially in an emergency. The legacy DENA

²³ *Id.* at 14.

²⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Joint Remand Rider Exhibit 1 at 5) (April 9, 2007).

²⁵ *Id.*

assets are no exception. The need for available capacity options is especially true in the day-ahead market where a sudden capacity constraint coupled with a desperate need for capacity would likely expose consumers to high prices. In the Stipulation, the Parties have agreed to a methodology for determining a market price for the legacy DENA assets and under what limited circumstances DE-Ohio could include this capacity to meet short-term capacity needs.²⁶ The very nature of a capacity purchase in an emergency makes the market price unpredictable as the availability of capacity is simply unknown.

The Stipulation provides the Commission with two definitive alternatives for pricing the DENA capacity at the time it is needed through the midpoint of broker quotes and an average of third party purchases.²⁷ The Stipulation also affords the ability to consider and agree upon additional reasonable pricing methodologies.²⁸

Similarly, the pricing methodologies set forth in the Stipulation relative to the DENA capacity ensure the ability of the applicable SRT auditor to audit all DENA transactions occurring during the audit period. This is true because the pricing methodologies require DE-Ohio to maintain records of brokers' quotes and/or third party transactions. Thus the Commission will have a record to assess the reasonableness of future DENA short term capacity transactions. To this date DE-Ohio has

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Id.

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Id.

²⁸

In re DE-Ohio's MBSSO, Case No. 03-93-EL-ATA, *et al.* (Joint Remand Rider Exhibit 1 at 7) (April 19, 2007).

not included legacy DENA capacity in the SRT. Therefore, the issue has not been before the Commission in any subsequent SRT case.

OCC incorrectly alleges that the inclusion of the legacy DENA assets in the SRT violates a prior Stipulation entered by OCC.²⁹ That Stipulation requires DE-Ohio to apply to the Commission for approval to include the legacy DENA assets in the SRT and to provide OCC with workpapers and other supporting data.³⁰ These cases represented an application to the Commission for approval, and the Commission has approved the use, of the legacy DENA assets under limited emergency circumstances. This satisfies the first condition of the 2005 Stipulation. Second, OCC has all of the workpapers and other information regarding the use of the legacy DENA assets as planning reserves. If there comes a time when DE-Ohio actually seeks to pass a charge through the SRT associated with the legacy DENA assets it will provide information to OCC. To date there is no such information and DE-Ohio has satisfied the second prong of the 2005 Stipulation. The Commission properly considered the 2005 Stipulation and approved the emergency use of the legacy DENA assets through the SRT. The Commission should deny OCC's Application for Rehearing.

²⁹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (OCC Rider Application for Rehearing at 10) (December 20, 2007).

³⁰ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (Stipulation and Recommendation at 4-5) (October 25, 2005).

D. The OCC had a full opportunity to litigate the DE-Ohio's ability to recover CWIP through the AAC.

OCC cross-examined DE-Ohio's witness, Mr. Wathen regarding CWIP. It also cross-examined Staff witness Mr. Tufts. Interestingly, OCC declined to cross-examine Staff witness Mr. Cahaan except to determine that he was the witness responsible for Staff's AAC CWIP position.³¹ OCC was not denied process regarding the AAC CWIP issue it raised.

Essentially OCC wants the Commission to treat CWIP in the same manner it used in a fully regulated environment even though the retail electric service is competitive, not regulated.³² As Staff witness Mr. Cahaan testified there are differences between prices constructed in a regulatory regime versus those constructed in a market regime.³³ OCC never challenged Staff's testimony. Further, OCC's own witness, Mr. Haugh, ignored the difference completely.

In its Application for Rehearing OCC wrongly alleges that DE-Ohio's CWIP position is "inconsistent with the Company's representations regarding other generation charge components in the consolidated record."³⁴ In a footnote to the quoted criticism OCC alleges

³¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (Tr. II. at 130-132) (April 19, 2007).

³² *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (OCC Rider Application for Rehearing at 13-14) (December 20, 2007).

³³ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (Staff Exhibit 3 at 3) (April 9, 2007).

³⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (OCC Rider Application for Rehearing at 15) (December 20, 2007).

that the Commission's Opinion and Order did not state the facts relied upon in its approval of CWIP.³⁵ There is no basis for either allegation.

DE-Ohio's CWIP calculation is entirely consistent with its position for other MBSSO components. In each component, including the FPP and SRT, DE-Ohio seeks cost recovery in real time. The FPP is adjusted quarterly with a true-up and the SRT is based on an annual estimate with a true-up. In the competitive market real time recovery of expenses is precisely how competitors price their product. A return on CWIP as the expense is incurred is entirely consistent with DE-Ohio's position concerning generation prices. On the other hand OCC asserts that DE-Ohio should enter long term coal contracts because its generating plants will continue to run but should not recover CWIP because the plants may not serve customers after 2008. OCC's position is inconsistent, not DE-Ohio's.

Additionally, DE-Ohio provided Staff, and through discovery OCC, with all of the accounting information to support its CWIP recovery. Staff witness Mr. Tufts audited the accounting supporting DE-Ohio's CWIP recovery and Staff witness Mr. Cahaan supported the policy behind the calculation.³⁶ The Commission fully discussed the evidence of record regarding recovery of a return on CWIP in its Opinion and Order.³⁷ No

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Id.

³⁶

In re DE-Ohio's MBSSO, Case No. 03-93-EL-ATA *et al.*, (Staff Exhibits 2, 2(A), and 3) (April 9, 2007).

³⁷

In re DE-Ohio's MBSSO, Case No. 03-93-EL-ATA, *et al.* (Opinion and Order at 21-23) (November 20, 2007).

more is required and the Commission should deny OCC's Application for Rehearing.

II. The Commission has not ceded its authority to DE-Ohio or Staff.

OCC improperly alleges that the Commission has unlawfully delegated its authority to DE-Ohio and Staff.³⁸ The basis of OCC's allegation is the Commission's approval of discussions between Staff and DE-Ohio leading to a bill credit for customers.³⁹ OCC's allegation is a canard.

Before DE-Ohio may implement a bill credit it must file tariffs that the Commission must approve and that OCC may challenge. In these proceedings that means that OCC may challenge the bill credits in the applicable FPP proceeding. The Commission has ceded no authority and should deny OCC's Application for Rehearing in its entirety.

III. Each Party was properly granted standing in all of these proceedings.

In an Entry dated November 23, 2006, and affirmed by Order from the bench during a pre-hearing conference held December 14, 2006, the cases listed above were consolidated before the Commission on remand from the Court.⁴⁰ At the December 14, 2006, prehearing conference the

³⁸ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (OCC Rider Application for Rehearing at 16) (December 20, 2007).

³⁹ *Id.*

⁴⁰ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (Entry at 3) (November 23, 2006).

Attorney Examiners decided that each attorney for all Parties would be noticed in all proceedings.⁴¹

OCC argued for the inclusion of all Parties and supported consolidation of the cases.⁴² DE-Ohio opposed consolidation but agreed on the basis that the purpose of consolidation was to move the cases quickly to conclusion.⁴³ Having agreed to consolidation it is disingenuous of OCC to argue that certain Parties improperly participated in some of the cases. All of the Parties intervened in at least one of the consolidated cases and participated in all of the cases after consolidation. The Commission consolidated the cases, determined the participating Parties, and all Parties, including OCC, agreed. OCC is prohibited by the doctrine of *res judicata*, and fundamental fairness from asserting a lack of standing at this stage of the proceeding.

IV. The Commission properly considered the elements necessary to approve a partial Stipulation.

OCC and OPAC incorrectly argue that the Commission failed to consider each element necessary to approve a partial Stipulation because it did not take into account the effect of confidential commercial contracts.⁴⁴ OCC and OPAC allege that the terms of the confidential commercial contracts lead to the conclusion that there was no serious

⁴¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (Tr. December 14, 2006 Prehearing Conference) (January 8, 2007).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (OCC Rider Application for Rehearing at 21-37) (December 20, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (OPAC Rider Application for Rehearing) (December 20, 2007).

bargaining among the Parties. The Commission properly held otherwise.⁴⁵

Signatories to the Stipulation include DE-Ohio, Staff, People Working Cooperatively (PWC) , The City of Cincinnati (City) and the Ohio Energy Group (OEG).⁴⁶ Only OCC and OPAE opposed the Stipulation. Neither OCC nor OPAE presented evidence connecting the confidential commercial contracts to the Stipulation.⁴⁷ The Stipulation was entered almost three years after the Commission issued its Entry on Rehearing in Case No. 03-93 EL-ATA, and nothing in the confidential commercial contracts mentions any other case in these proceedings.

OCC's and OPAE's argument amounts to a suggested prohibition against any Stipulation with Parties to a DE-Ohio case establishing any component of its market price absent agreement by OCC and OPAE. There is simply no such standard.

A. There was serious bargaining among knowledgeable Parties.

With respect to the requirement of serious bargaining among capable and knowledgeable parties, all of the parties to these proceedings, including Commission Staff, Marketers, Non-residential Consumers, OCC and OPAE, were invited and participated in the

⁴⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Opinion and Order at 27) (November 20, 2007).

⁴⁶ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Stipulation at 9) (April 9, 2007).

⁴⁷ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Opinion and Order at 26) (November 20, 2007).

settlement discussions.⁴⁸ All of the Parties, including the signatories to the Stipulation, as well as those who chose not to sign, have extensive experience before the Commission. The Commission properly held that the negotiating Parties have extensive knowledge and experience.⁴⁹

OCC and OPAE argue that the support of some of the signatories is suspect because they have other contractual arrangements that may effect their negotiating position.⁵⁰ OCC's and OPAE's arguments are flawed.

There is no requirement that each Party negotiating a Stipulation come to the table with the same interest, position, or relationships. In these cases, the Commission Staff is involved in the day to day regulation of DE-Ohio and represents the balanced interests of all stakeholders. The City is the statutory representative of residential customers in DE-Ohio's service territory and has contractual relationships with DE-Ohio.⁵¹ OEG is an advocate for industrial customers. [REDACTED]

[REDACTED]. Industrial Energy Users-Ohio (IEU-Ohio) also represents industrial customers. [REDACTED]

[REDACTED]. PWC provides energy efficiency and weatherization services to low

⁴⁸ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (DE-Ohio Remand Rider Ex. 6 at 5) (April 6, 2007).

⁴⁹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Opinion and Order at 27) (November 20, 2007).

⁵⁰ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (OCC Remand Application for Rehearing at 23-29) (December 20, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (OPAE Remand Application for Rehearing) (December 20, 2007).

⁵¹ Ohio Rev. Code Ann. § 4911.15 (Baldwin 2007).

income residential customers in Ohio and Kentucky and has contractual relationships with DE-Ohio to fund such services. PWC's contracts result from a competitive bid process controlled by members of the Duke Energy Community Partnership, a collaborative of many Southern Ohio community groups including OPAE's members. The Ohio Hospital Association (OHA) represents hospitals in Ohio. [REDACTED]

[REDACTED]. OPAE represents Ohio Community Action Agencies, two of which are in DE-Ohio's certified territory and have contractual relationships with DE-Ohio. OCC is, like the City, a statutory representative of residential customers. Kroger is a commercial customer representing its interests. [REDACTED]

Dominion Retail Sales and the Ohio Marketers' Group represent competitive retail electric service providers. Each of these Parties fully participated in negotiation of the Stipulation at issue in these proceedings.

Ultimately, Staff, DE-Ohio, the City, OEG, and OHA supported the Stipulation and only OCC and OPAE opposed it. The Stipulation enjoyed support from a regulator representing a balanced interest of all Parties, a utility, residential representatives, and industrial and commercial customer representatives. Clearly serious bargaining resulted in a broad based, although not unanimous, Stipulation.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁵² This is a factually incorrect assertion.

None of the contracts referred to by OCC and OPAE prevent any of the signatories to the Stipulation from paying increases in the FPP, SRT, or AAC.⁵³ In fact, all of the Parties who take competitive retail service from DE-Ohio, pay DE-Ohio its entire MBSSO market price. The Commission has significant experience with Staff, the City, PWC, OEG and OHA through their participation in many cases before the Commission. None of those Parties would hesitate to oppose an application or Stipulation that resulted in an increase unless they felt that the application or Stipulation was just and reasonable. That is the case before the Commission in these proceedings. The support of these Parties despite the increased market prices set forth in the Stipulation is strong evidence of serious bargaining among the parties.

OCC and OPAE also ignore the fact that the contracts, public and confidential, which they complain taint the negotiation process, do not include any language regarding Case Nos. 05-725-EL-UNC, 06-1069-EL-UNC, 05-724-EL-UNC, 06-1068-EL-UNC and 06-1085-EL-UNC.

⁵² *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (OCC Remand Application for Rehearing at 23-29) (December 20, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (OPAE Remand Application for Rehearing) (December 20, 2007).

⁵³ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC's Witness Hixon's Testimony at Ex. 17) (March 9, 2007).

Therefore, the contracts do not prohibit any party from taking a position contrary to DE-Ohio's position regarding the MBSSO Riders.⁵⁴ To the extent there is any confusion on this point it is OCC's doing as OCC requested and supported the consolidation of Case Nos. 05-725-EL-UNC, 06-1069-EL-UNC, 05-724-EL-UNC, 06-1068-EL-UNC and 06-1085-EL-UNC having to do with the MBSSO Riders, with Case No. 03-93-EL-ATA, *et al.*, which does not. DE-Ohio opposed the case consolidation.⁵⁵

Despite the protestations of OCC and OPAE to the contrary, the Stipulation in phase two of these proceedings was the product of serious bargaining among capable and knowledgeable parties. The Commission correctly found that serious bargaining among knowledgeable Parties occurred.⁵⁶

B. The Stipulation benefits the public interest.

Similarly, the evidence shows that the Stipulation will benefit the public interest. As explained in the Company's Merit Brief, DE-Ohio witness Paul Smith testified that the Stipulation furthers the Commission's three goals for rate stabilized MBSSOs: (1) rate certainty for consumers; (2) financial stability for electric distribution utilities; and (3) the continued development of the competitive retail electric service market.⁵⁷

⁵⁴ *Id.*

⁵⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (Tr. at 18-22) (December 14, 2006).

⁵⁶ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Opinion and Order at 27) (November 20, 2007).

⁵⁷ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (DE-Ohio Remand Rider Merit Brief at 6-10) (May 17, 2007).

Further, the Stipulation provides an added public benefit in that it requires DE-Ohio to issue a bill credit related to a confidential settlement stemming from a defaulted coal delivery contract in 2005, and in prior years. This credit is greater than the amount recommended by the auditor and will be provided in a more expedited manner.⁵⁸ This credit will mitigate and help offset the totality of the price adjustment for the 2007 MBSSO rider components, which will be recovered throughout the remainder of the year once approved by the Commission.⁵⁹

By the terms of the Stipulation all consumer classes, including residential consumers who were not even subject to the Company's MBSSO Rider FPP when the facts and circumstances occurred that necessitated the confidential contract settlement, will share in the credit. Accordingly, residential consumers receive a substantial benefit, in excess of what was recommended by the FPP auditor, through the terms of the very Stipulation that OCC is opposing. It should be noted that this provision remains in the Stipulation at the insistence of PWC, the City of Cincinnati and Staff over the objections of DE-Ohio. It truly represents a compromise of interests and a benefit for residential consumers despite OCC's lack of support. Finally, the Stipulation adopts almost all of the auditor's and Staff's recommendations so that the FPP, SRT, and AAC market price components are set at a reasonable level for the benefit of

⁵⁸ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Joint Remand Rider Exhibit 1 at 4) (April 19, 2007).

⁵⁹ *Id.*

the public. Once again the Commission properly found the Stipulation benefits the public.⁶⁰

C. The Stipulation does not violate any regulatory principle.

Neither does the Stipulation violate any regulatory principle. In Ohio, generation is deregulated. The Stipulation is consistent with the pricing structure recently approved by the Commission without any Stipulation by any Party.⁶¹ The Commission's authority over the market price is to decide whether the price is just and reasonable by determining whether it is set below cost for the purpose of destroying competition or is discriminatory.⁶² The Commission agrees with this statutory interpretation.⁶³

By express intent of the General Assembly, R.C. Chapter 4909 in its entirety, among other "traditional" regulated ratemaking statutes, are inapplicable to a competitive retail electric service such as DE-Ohio's MBSSO. Therefore, many regulatory principles and practices, which historically existed under a fully regulated construct, such as the limitation of CWIP recovery, do not apply with respect to generation service, including DE-Ohio's Riders AAC, FPP and SRT.

The Stipulation is a compromise of the issues surrounding the Company's management and price setting of certain components of DE-

⁶⁰ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Opinion and Order at 28-29) (November 20, 2007).

⁶¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Order on Remand) (October 24, 2007).

⁶² Ohio Rev. Code Ann. §§ 4928.05, 4905.33(B), 4905.35 (Baldwin 2007).

⁶³ *In re AEP's MBSSO*, Case No. 04-169-EL-UNC (Opinion and Order at 18) (January 26, 2005).

Ohio's MBSSO in a manner that is agreeable to DE-Ohio, the Staff of the Commission and the other signatory Parties. It is a balancing of positions and competing interests. The Stipulation provides many benefits to consumers including reasonable and stable market prices and permits the Company to maintain reliable firm generation service to all consumers while balancing various market risks. Accordingly, the Commission should maintain its Order and deny OCC's and OPAE's Application for Rehearing.

CONCLUSION:

DE-Ohio respectfully requests that the Commission deny OCC's and OPAE's Application for Rehearing in its entirety. The Commission formulated its Order based upon sound factual support and reasoning. OCC and OPAE have received more due process than required by the Court's remand opinion or statute. The Commission has made its determinations based upon the best information all Parties could place before it in a fully litigated environment. It has examined all of the public and confidential contracts. It has reexamined all of the components of DE-Ohio's MBSSO. The Commission should sustain its Order regarding the MBSSO Riders without amendment.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically on the following parties this 31st day of December 2007.



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