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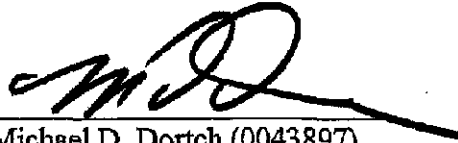
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OPAE invite this Commission to engage in a broad inquiry into the practices of DE-Ohio and its affiliates at the behest of parties that can show no injury from the allegations. The Commission should give no credence to these ill-conceived notions. It should reaffirm its prior Orders in this matter, and it should hold that no "side" agreements exist, and that the agreements produced by Cinergy and DERS are nothing but reasonable commercial transactions fully explained by the parties thereto.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'MD', with a long horizontal line extending to the right.

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

| | | | |
|-------------------------------------|---|-----------|----------------|
| In the Matter of the | : | Case Nos. | 03-93-EL-ATA |
| Consolidated Duke Energy Ohio, Inc. | : | | 03-2079-EL-AAM |
| Rate Stabilization Plan Remand and | : | | 03-2081-EL-AAM |
| Rider Adjustment Cases | : | | 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 REMAND RIDER REPLY BRIEF

May 30, 2007

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DUKE ENERGY OHIO'S REMAND RIDER REPLY BRIEF

INTRODUCTION:

On November 29, 2006, the Public Utilities Commission of Ohio (Commission) issued an Entry that suspended the various proceedings involving the annual review and adjustments to three Duke Energy Ohio (DE-Ohio) Riders, which in part, comprise DE-Ohio's Market Based Standard Service Offer (MBSSO). The riders at issue are the System Reliability Tracker (SRT), the Annually Adjusted Component (AAC) and the Fuel and Purchased Power Rider (FPP). On December 14, 2006, during a Pre-hearing Conference held at the Commission, the attorney examiners, over the objection of DE-Ohio, ordered the consolidation of the above styled cases. In an Entry dated February 1, 2007, the Commission decided to hold two hearings in the consolidated cases, the

first to address issues involving the Ohio Supreme Court's Remand and the Second to address DE-Ohio's Rider Adjustment Cases.

The purpose of the second phase of the above styled consolidated proceeding is limited to addressing the reasonable adjustment of DE-Ohio's Rider SRT, Rider FPP and Rider AAC prices, which should have gone into effect on January 1, 2007. Anything beyond the price setting of those specific Riders, including allegations regarding alleged side agreements and the proprietary of the Company's Infrastructure Maintenance Fund (IMF), are irrelevant and beyond the scope of these proceedings. The Commission afforded all Parties the ability to relitigate and brief those collateral issues in the first phase of the above captioned cases and those matters are currently pending before the Commission. Any further arguments on such issues should be disregarded or stricken.

The adjustment and setting of the 2007 market price for Riders FPP, SRT and AAC have been uncertain far too long. Further delay is harmful to the company by prolonging the timely recovery of prudently incurred costs, and is detrimental to consumers, who ultimately must pay a higher price over a compressed period than if DE-Ohio were able to charge an appropriate price beginning January 1, 2007 to recover market costs for the twelve months ending December 31, 2007. This is particularly true for Rider SRT, which by the Commission's Order, was temporarily set at zero during the pendency of these matters.¹ Moreover,

¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Entry at 6) (December 20, 2006).

as the calendar year 2007 rapidly passes, DE-Ohio will be making its filings to establish its 2008 prices. The sooner the current prices are established, the lower the impact to consumers for the remainder of the year.

On April 9, 2007, a Stipulation was reached by some, but not all Parties to the proceeding which resolves the 2007 price uncertainty for DE-Ohio's Riders at issue in these cases.² This Stipulation adopted most of the recommendations made by the Commission's auditor in the Rider FPP and Rider SRT cases, and Staff's audit recommendations regarding Rider AAC.³ At the recently concluded hearing regarding the adjustment to DE-Ohio's Rider SRT, Rider AAC and Rider FPP, Staff and DE-Ohio presented substantial evidence supporting the Stipulation. The Ohio Consumers' Counsel (OCC) was the only Party that presented evidence against the Stipulation and yet curiously, performed no analysis, and has no idea what effect its proposal may have on the market price paid by consumers.⁴

DE-Ohio respectfully requests that the Commission approve its applications to implement the Rider AAC, Rider SRT, and Rider FPP, as amended by the Stipulation without delay.

² *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Joint Remand Rider Exhibit 1) (April 19, 2007).

³ DE-Ohio's AAC is not subject to an audit by an outside firm. Commission Staff did review DE-Ohio's Application to establish its AAC filing and the Stipulation adopts all of the recommendations contained in the Supplemental Testimony of Staff's witness L'Nard Tufts filed March 9, 2007.

⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Remand Rider Tr. II. At 52-53) (April 19, 2007).

ARGUMENT:

Throughout these proceedings OCC and Ohio Partners for Affordable Energy (OPAE) have chosen to ignore the facts underlying these cases. They have chosen instead to base their arguments upon unsubstantiated theories. OCC and OPAE wish the Commission to believe that DE-Ohio acted in concert with its affiliates Duke Energy Retail Sales (DERS) and Cinergy Corp. (Cinergy) to support a higher market price and to cause residential consumers to subsidize non-residential consumers. The opposing parties maintain this posture in the second phase of these proceedings regarding DE-Ohio's Riders FPP, SRT, and AAC, without a shred of evidence to support their theories.

To make their case the OCC and OPAE continue to rely upon the existence of confidential commercial contracts between DERS or Cinergy and parties to the proceedings in Case No. 03-93-EL-ATA, *et al.*, which established DE-Ohio's MBSSO. DE-Ohio will not repeat its arguments, set forth in its briefs during the first phase of these proceedings regarding its lack of involvement in the negotiation of those contracts. Those issues are fully briefed and before the Commission. DE-Ohio will demonstrate that it has fulfilled its burden of proof regarding the Riders FPP, SRT, and AAC market prices, that there is ample support for the Stipulation resolving all issues in the second phase of these proceedings, and that the arguments presented by OCC and OPAE are incorrect based upon the facts and law.

I. DE-Ohio has met its burden of proof and the test for approval of partial stipulations.

Throughout these proceedings, in the first phase regarding the issues raised by the Court on remand, and now the second phase regarding the Rider FPP, Rider SRT, and Rider AAC cost recovery components of DE-Ohio's MBSSO, OCC has reminded DE-Ohio and the Commission that DE-Ohio retains the burden of proof. OCC continues to rely upon the wrong standard for DE-Ohio to meet its burden and fails to acknowledge that it has the burden of persuasion.

DE-Ohio filed its application to establish its MBSSO pursuant to R.C. 4928.14.⁵ Pursuant to R.C. 4928.14 applications for an MBSSO are filed under R.C. 4909.18.⁶ Revised Code Section 4909.18 requires the Commission to determine whether the application "may be unjust or unreasonable."⁷ OCC never attempts to define what standard the Commission must apply to determine what "may be unjust or unreasonable." Instead OCC cites an inapplicable statutory section, R.C. 4909.19, and suggests that various MBSSO components and calculations are unjust and unreasonable because they are not cost based, or otherwise do not comport to a traditional regulatory standard.⁸

⁵ Ohio Rev. Code Ann. § 4928.14 (Baldwin 2007).

⁶ *Id.*

⁷ Ohio Rev. Code Ann. § 4909.18 (Baldwin 2007).

⁸ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (OCC's Remand Rider Merit Brief at 2, 5-19) (May 17, 2007).

The Commission should reject OCC's argument for two reasons. First, R.C. 4909.19 and the traditional regulatory ratemaking statutes such as R.C. 4909.15, are expressly inapplicable to these proceedings.⁹ Revised Code Section 4928.05 plainly states:

On and after the starting date of competitive retail electric service, *a competitive retail electric service supplied by an electric utility or electric services company shall not be subject to supervision and regulation* by a municipal corporation under Chapter 743. of the Revised Code or *by the public utilities commission* under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, *except section 4905.10, division (B) of 4905.33, and sections 4905.35 and 4933.81 to 4933.90....*¹⁰

In other words, the Commission must determine DE-Ohio's burden of proof by the just and reasonable standard through the Commission's remaining price jurisdiction as set forth in R.C. 4928.05.¹¹

The jurisdiction over the MBSSO price vested in the Commission by R.C. 4928.05 is that jurisdiction set forth in R.C. 4905.33(B) and R.C. 4905.35, nothing more, and nothing less.¹² The Court recognized that R.C. 4928.05 sets forth the Commission's jurisdiction over competitive retail electric service such as the MBSSO at issue in these proceedings holding that 4905.33(B) and 4905.35 are applicable due to the above

⁹ Ohio Rev. Code Ann. § 4928.05 (Baldwin 2007).

¹⁰ *Id.* (emphasis added).

¹¹ *Id.*

¹² *Id.*

quoted portion of R.C. 4928.05.¹³ Similarly, the Commission has held that:

However, these parties seem to forget that, with the expiration of the MDP, *generation rates are subject to the market (not the Commission's traditional cost-of-service rate regulation)* and that the plan was an option that AEP voluntarily proposed. [*45] *Section 4928.05(A)(1), Revised Code*. We make this observation to point out that, under the statutory scheme, company earnings levels would not come into play for establishing generation rates -- market tolerances would otherwise dictate, just as AEP argued (AEP Reply Br. 26-27). We are strongly committed to encouraging the competitive market in AEP's service territories as it is the policy of this state, per Section 4928.02, Revised Code. Given that commitment, *we do not feel that the earnings levels evidence or cost-based analyses and arguments presented by OEG, OCC, IEU-Ohio or LIA justify rejection of this provision.*¹⁴

Thus, DE-Ohio's burden of proof to demonstrate that its MBSSO, including the Riders FPP, SRT, and AAC components at issue in these cases, is just and reasonable, is set forth in R.C. 4905.33(B) and 4905.35, the statutes governing price that expressly define the market pricing authority retained by the Commission pursuant to R.C. 4928.05.¹⁵

¹³ *Ohio Consumers' Council v. Pub. Util. Comm'n*, 111 Ohio St.3d 300, 314, 856 N.E.2d 213, 229 (2006).

¹⁴ *In re AEP's MBSSO*, Case No. 04-169-EL-UNC (Opinion and Order at 18) (January 26, 2005) (emphasis added).

¹⁵ Ohio Rev. Code Ann. § 4928.05 (Baldwin 2007).

Revised Code Section 4905.33(B) prohibits DE-Ohio from setting its market price below cost for the purpose of destroying competition.¹⁶ Neither OCC nor OP&E has put on any evidence that DE-Ohio's Rider FPP, Rider SRT, Rider AAC, or its MBSSO price as a whole, is set below cost. In fact, the Commission has set the Rider FPP, Rider SRT, and Rider AAC market price components to recover specified costs including fuel, purchased power, emission allowance, reserve capacity, environmental, homeland security, and taxes.¹⁷ The Riders FPP, SRT, and AAC audits confirm that DE-Ohio is charging its cost for each component, plus its financing costs in the form of a return on capital investment of environmental equipment in the Rider AAC.¹⁸ Ultimately, OCC argues that DE-Ohio's market price is too high, not too low. The evidence is overwhelming that DE-Ohio has met its burden of proof that its market price is not below cost for the purpose of destroying competition.

Revised Code Section 4905.35 prohibits DE-Ohio from giving undue preference to any person.¹⁹ The Court has already held that there is no such discrimination in DE-Ohio's MBSSO approved by the Commission opining that "*OCC has not met its burden of showing that*

¹⁶ Ohio Rev. Code Ann. § 4905.33(B) (Baldwin 2007).

¹⁷ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (Entry on Rehearing at 8-12) (November 23, 2004).

¹⁸ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (Joint Remand Rider Ex. 1) (April 9, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (Commission Ordered Remand Rider Ex. 1, 1A, 1B) (April 10, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (Staff Remand Rider Ex. 1, 2) (May 17, 2007).

¹⁹ Ohio Rev. Code Ann. § 4905.35 (Baldwin 2007).

the provision allowing a certain percentage of residential customers who shop to avoid the rates stabilization charge is discriminatory."²⁰

All switched load avoids Rider FPP, all residential consumers pay Rider SRT and all switched non-residential load may choose to pay or conditionally avoid Rider SRT. Rider AAC is avoidable in exactly the same manner and to the same extent as the rate stabilization charge (RSC) that the Court expressly found was not discriminatory. DE-Ohio has met its burden of proof regarding the standard set forth by R.C. 4905.35.

OCC and OPAC raise one final argument, not regarding discrimination, but regarding whether there was serious bargaining among capable and knowledgeable parties, the first prong of the Commission's three part test to assess partial Stipulations, which may be relevant to the discussion of whether DE-Ohio has met its burden of proof regarding R.C. 4905.35. [REDACTED]

[REDACTED] This argument is simply incorrect.

First, all DE-Ohio consumers, including those with DERS and Cinergy contracts, pay DE-Ohio the full Rider FPP, Rider SRT, and Rider

²⁰ *Ohio Consumers' Council v. Pub. Util. Comm'n*, 111 Ohio St.3d 300, 315, 856 N.E.2d 213, 229 (2006).

²¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (OCC's Remand Rider Merit Brief at 21-23) (May 17, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (OPAC's Remand Rider Merit Brief at 6-10) (May 17, 2007).

AAC price. There is no record evidence to the contrary. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

DERS, and Cinergy, acted as one, an argument that DE-Ohio denies and that is unsupported by the evidence, there is no record evidence that there was discrimination in the negotiation or implementation of the contracts.

Neither OCC, nor OPAE, approached DERS for such a contract as did other consumers. In fact, there is no evidence that DERS refused to enter into a contract with any consumer. DERS has the right to negotiate its contracts on terms appropriate for the circumstance of each particular customer just like any other competitive retail electric service (CRES) provider. There is no evidence that DERS did anything else in the contracts at issue in these proceedings. As the Court found, OCC and OPAE have failed to meet their burden of persuasion that DE-Ohio's MBSSO, including that Riders FPP, SRT, and AAC, are discriminatory in violation of R.C. 4905.35.

DE-Ohio asserts that the applicable law and evidence demonstrate that DE-Ohio has met its burden of proof in these cases.

²² *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (OCC witness Hixon's Testimony at Ex. 17) (March 9, 2007).

II. The Stipulation meets each prong of the Commission's 3-part test to assess Stipulations signed by some, but not all, parties.

The Commission's rules authorize parties to enter into stipulations.²³ Although not binding on the Commission, such agreements are accorded substantial weight.²⁴ In considering the weight to be given and, ultimately, the reasonableness of a stipulation, the Commission uses a three-prong test approved by the Supreme Court of Ohio:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?
2. Does the settlement, as a package, benefit ratepayers and the public interest?
3. Does the settlement package violate any important regulatory principle or practice?²⁵

As thoroughly discussed in DE-Ohio's Remand Rider Merit Brief, the Stipulation entered into by some, but not all of the Parties to these proceedings, meets the aforementioned requirements.²⁶ Moreover, the Stipulation provides many benefits to all consumer classes including residential consumers represented by the OCC.

²³ O. A. C. 4901-1-30.

²⁴ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 592 N.E.2d 1370, 1373, 64 Ohio St. 3d 123, 126 (1992).

²⁵ *Id.*

²⁶ *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).

A. The Stipulation was a product of serious bargaining among capable and 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 settlement discussions.²⁷ 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. Neither OCC nor OPAE argue to the contrary.

During the settlement discussions, many positions were advocated and considered and were ultimately accepted or rejected by the negotiating parties. Admittedly, not all of the demands made by the various parties, including those requested by DE-Ohio, were incorporated into the final Stipulation. That fact, however, does not detract from the Stipulation's reasonableness and benefits to all stakeholders, including DE-Ohio's ultimate consumers. Few Stipulations, if any, incorporate each and every demand by each and every party but, rather, include concessions made by parties to reach an acceptable resolution. The Stipulation at issue does just that, and is a direct result of serious bargaining among knowledgeable parties.

²⁷ *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).

OCC and OPAE make three arguments that there was no serious bargaining among capable and knowledgeable parties. They argue that: (1) there was no serious bargaining because all of their suggestions were rejected;²⁸ (2) the Stipulation does not include support of all customer classes, particularly the residential class;²⁹ and (3) [REDACTED]

[REDACTED] Each of the arguments raised by OCC and OPAE are legally and factually flawed. DE-Ohio will discuss each in turn.

The first issue, that there was no serious bargaining because the signatories rejected the settlement positions of OCC and OPAE, has nothing to do with the reasonableness of the Stipulation and everything to do with the reasonableness of, and the motivation behind, the offers made by OCC and OPAE. In discussing this issue, DE-Ohio is conscious of the confidential nature of the settlement discussions and will endeavor not to reveal confidential settlement information as part of this discussion.

OCC has, throughout these proceedings insisted that all information be available to the public, particularly DERS's confidential commercial contracts. OCC has so far however, failed to make the terms

²⁸ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (OCC's Remand Rider merit Brief at 21) (Mat 17, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (OPAE's Remand Rider Merit Brief at 5) (May 17, 2007).

²⁹ *id.*

³⁰ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (OCC's Remand Rider merit Brief at 21-24) (Mat 17, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (OPAE's Remand Rider Merit Brief at 6-10) (May 17, 2007).

and conditions of its phase two settlement offer to the parties, public. If OCC does so it will be readily apparent to the Commission that OCC sought DE-Ohio's capitulation of the issues remanded to the Commission by the Court and fully litigated by the parties in the first phase of these proceedings. Those issues are fully briefed³¹ and awaiting the Commission's decision. It is completely reasonable for DE-Ohio, Staff, and the other signatories to reject OCC's offer to settle phase one issues, in a settlement of phase two regarding the FPP, SRT, and AAC.

Regarding OPAE's participation in the settlement discussions leading to the phase two Stipulation, DE-Ohio is unaware of any substantive comment made by OPAE during the settlement discussions. Unlike OCC, which made a settlement offer, OPAE made none.

DE-Ohio is aware of the unfounded accusations made by OPAE regarding People Working Cooperatively (PWC) in these proceedings. The prior settlement offer made by OPAE in 2004, is part of the public record in these cases.³¹ In the original MBSSO proceeding, DE-Ohio agreed to nearly all of OPAE's settlement offer, including the amount of money to fund energy efficiency and weatherization programs. The only item that DE-Ohio refused to agree upon was that OPAE should administer the energy efficiency and weatherization programs instead of the independent Duke Energy Community Partnership, which includes a

³¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (OPAE's MBSSO Settlement Offer) (July 16, 2004).

voting board of many community organizations and OCC and Staff as non-voting members.

Basically, DE-Ohio would not agree to transfer control of energy efficiency and weatherization dollars from the Duke Energy Community Partnership (DECP) to OPAE. OPAE was quite clear that the only reason it did not sign the settlement was DE-Ohio's refusal to give it control of the program dollars. OPAE has not offered one suggestion regarding the interest of any party or consumer other than itself throughout these proceedings. It was reasonable for DE-Ohio, Staff, and the other Stipulation signatories to reject OPAE's unspoken position.

The second reason OCC and OPAE claim there was no serious bargaining is because some stakeholders, specifically residential advocates, did not support the Stipulation. OCC and OPAE are incorrect as a matter of law and fact. There was substantial support by residential representatives, and every stakeholder, except OCC and OPAE, either supported the Stipulation or choose not to oppose the Stipulation.

The signatories to the Stipulation include: (1) DE-Ohio representing the utility's interest; (2) Staff, representing the balanced interests of all stakeholders; (3) Ohio Energy Group (OEG), representing the interest of Industrial consumers; (4) PWC, representing its own interest as a commercial consumer and the interest of low income residential consumers that rely upon programs funded by DE-Ohio for energy efficiency and weatherization services; (5) the Ohio Hospital

Association (OHA), representing the interest of hospitals specifically, and commercial consumers generally; and (6) the City of Cincinnati, representing its specific interests and the statutory representative of residential consumers within its municipal boundaries.³²

Those entities expressly stating that they would not oppose the phase two Stipulation include: (1) Kroger, representing itself and commercial consumers; (2) Ohio Marketer Group (OMG) representing competitive retail electric service (CRES) provider interests; (3) Dominion Retail Sales (Dominion) also representing CRES provider interest; and (4) Industrial Energy Users-Ohio (IEU-Ohio) representing industrial consumer interests. Thus, all stakeholders participated in direct settlement discussions or litigation of the Stipulation and decided to either support or not oppose the Stipulation. Only OCC and OPAC opposed the Stipulation.

Specifically, regarding residential consumer interests, OPAC states that the "stipulation has no support from marketers, residential customers or any other customer group that will be subject to its terms."³³ OPAC's statement is simply false. First, residential consumers are clearly represented by the signatories to the Stipulation.³⁴

Revised Code Section 4911.15 states that:

³² *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (Joint Remand Rider Ex. 1) (April 9, 2007); Ohio Rev. Code Ann. § 4911.15 (Baldwin 2007).

³³ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (OPAC's Remand Rider Merit Brief at 5) (May 17, 2007).

³⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (Joint Remand Rider Ex. 1) (April 9, 2007); Ohio Rev. Code Ann. § 4911.15 (Baldwin 2007).

The consumers' counsel, *at the request* of one or more residential consumers residing in, or municipal corporations located in, an area served by a public utility *or whenever in his opinion the public interest is served*, may represent those consumers or corporations whenever an application is made to the public utilities commission by any public utility desiring to establish, modify, amend, change, increase, or reduce any rate, joint rate, toll, fare, classification, charge, or rental.

The consumers' counsel may appear before the public utilities commission as a representative of the residential consumers of any public utility *when a complaint has been filed* with the commission that a rate, joint rate, fare, toll, charge, classification, or rental for commodities or services rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted by the utility is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of the law.

*Nothing in Chapter 4911. of the Revised Code shall be construed to restrict or limit in any manner the right of a municipal corporation to represent the residential consumers of such municipal corporation in all proceedings before the public utilities commission, and in both state and federal courts and administrative agencies on behalf of such residential consumers concerning review of decisions rendered by, or failure to act by, the public utilities commission.*³⁵

Thus, Cincinnati is the statutory representative of residential consumers residing within its boundaries and so represented residential consumers in these proceedings. Cincinnati needs neither a request by residential consumers nor a complaint filed before the Commission to represent

³⁵ Ohio Rev. Code Ann. § 4911.15 (Baldwin 2007) (emphasis added).

such consumers. It is simply the statutory representative of residential consumers.³⁶

Further, residential consumers elected Cincinnati's Mayor and City Council. Cincinnati also has daily interaction with its residents because it provides many services to them. OCC, on the other hand, has not shown that it is acting either at the request of any DE-Ohio residential consumer, or upon a complaint filed before the Commission. Therefore, OCC's participation in these proceedings must be because, in the Consumers' Counsel's opinion, the public interest is served, which is hardly a mandate to act in these cases. At least OCC has the statutory discretion to represent residential consumers; OPAE, on the other hand, has no residential members, does not serve any residential consumers directly, and has not advocated for the interests of residential consumers. Contrary to the incorrect arguments made by OCC and OPAE, the Stipulation enjoys broad support from every consumer class, and enjoys the support of the strongest residential advocate, namely the City of Cincinnati that is a party to these proceedings.³⁷

Finally, OCC and OPAE argue that there was no serious bargaining as some parties signed the Stipulation only [REDACTED]

³⁶ Ohio Rev. Code Ann. § 4911.15 (Baldwin 2007).

³⁷ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (Joint Remand Rider Ex. 1) (April 9, 2007).

[REDACTED]

[REDACTED] This is a factually incorrect assertion.

OCC and OPAE are referring to three types of contracts. The first is a contract between Cincinnati and DE-Ohio regarding naming rights for the City's convention center and contains terms whereby DE-Ohio paid Cincinnati one million dollars and Cincinnati agreed not to oppose DE-Ohio's market price set in Case No. 03-93-EL-ATA, *et al.* This agreement also set the agreed upon price where it would be beneficial for Cincinnati to explore aggregation.³⁹

OCC ignores the fact that the agreement with the City of Cincinnati included no 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. Therefore, the contract did not, and does not, prohibit Cincinnati from taking a position contrary to DE-Ohio's position in phase two of these proceedings.⁴⁰ 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 phase two of these proceedings, with Case No. 03-93-EL-ATA, *et al.*, which does not. DE-

³⁸ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (OCC's Remand Rider Merit Brief at 21-24) (Mar 17, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (OPAE's Remand Rider Merit Brief at 6-10) (May 17, 2007).

³⁹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Remand Exhibit 6) (March 21, 2007).

⁴⁰ *Id.*

Ohio opposed the case consolidation.⁴¹ Cincinnati became involved in the second phase of these cases for its own reason, which, upon information and belief, had to do with concerns regarding the change in the Rider FPP price. Cincinnati supported the Stipulation of its own accord and such support had nothing to do with the contract signed between it and DE-Ohio.

OCC and OPAE continue to try to discredit DE-Ohio and Cincinnati. However, the contract between Cincinnati and DE-Ohio is a public contract approved by Cincinnati's City Council after review by the City Attorney and DE-Ohio's attorney. The contract was signed by a former Cincinnati City Manager and current Commissioner.⁴² The contract contains valid consideration for all parties and benefits Cincinnati, DE-Ohio, and consumers who do not pay any of the costs associated with the contract. The Commission should ignore the factually incorrect allegations of OCC and OPAE regarding the contract and recognize Cincinnati's support for the Stipulation.

Next, OCC and OPAE suggest that [REDACTED] and [REDACTED] did not engage in serious bargaining because their members have option contracts with DERS.⁴³ They allege that [REDACTED] and [REDACTED]

the Stipulation [REDACTED]

⁴¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (Tr. at 18-22) (December 14, 2006).

⁴² *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Remand Exhibit 6) (March 21, 2007).

⁴³ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (OCC's Remand Rider merit Brief at 21-24) (May 17, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (OPAE's Remand Rider Merit Brief at 6-10) (May 17, 2007).

[REDACTED]

Just as with Cincinnati's contract with DE-Ohio, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] As previously stated, 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 with Case No. 03-93-EL-ATA, *et al*, which has nothing to do with setting DE-Ohio's FPP, SRT, and AAC except that the methodology for setting the market price was approved in Case No. 03-93-EL-ATA *et al*. DE-Ohio opposed the case consolidation.⁴⁵

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Commission has significant experience with OEG and OHA through

⁴⁴

Id.

⁴⁵

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

⁴⁶

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).

their participation in many cases before the Commission. Neither organization 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 OEG and OHA despite the increased market prices their members will pay is strong evidence of serious bargaining among the parties.

Finally, OCC and OPAC attack the Stipulation support of PWC because PWC has energy efficiency and weatherization contracts with DE-Ohio and part of its interest in these proceedings is to maintain the funding for those contracts.⁴⁷ This is a wholly unfair and inaccurate attack on PWC.

PWC is one of a number of energy efficiency and weatherization service providers to residential consumers in the greater Cincinnati area. Two of OPAC's members are also such providers, Cincinnati Hamilton County Community Action Agency (CHCCAA) and Clermont County Community Action Agency (CCCCAA). Those service providers and others, compete for contracts awarded through the Duke Energy Community Partnership (DECP), an organization that includes all the service providers. Besides the service providers, OCC and Staff are non-voting members.

⁴⁷ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (OCC's Remand Rider merit Brief at 23) (May 17, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (OPAC's Remand Rider Merit Brief at 6-7) (May 17, 2007).

For almost thirty years now DECP has awarded energy efficiency and weatherization contracts to service providers in DE-Ohio's certified territory. DE-Ohio does not control these contracts as it has just one vote. In fact, at the last meeting DE-Ohio and PWC were both out voted by other members that awarded a contract to CHCCAA over the objections of DE-Ohio and PWC. OCC and Staff regularly report on DECP's activities.

DE-Ohio maintains a representative on PWC's board because PWC's activities contribute to the well being of the Cincinnati community as PWC is one of, if not, the best service provider, not only in DE-Ohio's certified territory, but throughout the nation. DE-Ohio does not have any agreement with PWC except for the contracts awarded by the DECP. PWC has opposed DE-Ohio in the past and at times has aligned itself with OCC. For example PWC worked with OCC to have DE-Ohio and other utilities amend practices relative to unauthorized billing agents, walk-in offices, and pay stations. Nothing in the record should diminish the Commission's consideration of PWC's support for the Stipulation. DE-Ohio is proud of the accomplishments of PWC and proud to have PWC's support in this case. DE-Ohio also knows that if PWC disagrees with its positions PWC will not hesitate to take positions contrary to DE-Ohio's.

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 should ignore OCC's and OPAE's allegations as contrary to fact and/or law.

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.⁴⁸

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.⁴⁹ 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.⁵⁰

⁴⁸ *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).

⁴⁹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Joint Remand Rider Exhibit 1 at 4) (April 19, 2007).

⁵⁰ *Id.*

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 the public. DE-Ohio's prices remain below the national average and well below states that have implemented unfettered auction pricing such as Illinois, Maryland, and New Jersey. In contrast, OCC's recommendations would result in higher prices as have occurred in those states.

C. The Stipulation does not violate any important regulatory principle or practice.

DE-Ohio's MBSSO pricing structure, including its Rider amendment and implementation, constitutes a market price in Ohio's deregulated environment for competitive retail electric service. In Ohio, generation is deregulated. DE-Ohio has previously discussed the

Commission's authority over its MBSSO price pursuant to R.C. 4928.05, including the Rider components at issue in this phase of the proceedings. Suffice it to say that 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.⁵¹ The Commission agrees with this statutory interpretation.⁵²

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 construction work in progress (CWIP), do not apply with respect to generation service, including DE-Ohio's Riders AAC, FPP and SRT.

The Stipulation maintains the integrity of DE-Ohio's pricing structure in a manner that is consistent with the Commission's goals for rate stabilization plans striving for: (1) rate certainty for consumers; (2) financial stability for the utility; and (3) the further development of competitive markets. The Stipulation allows DE-Ohio to continue to actively manage its generation fuel, purchased power, and emission allowance positions in a manner that is beneficial both to consumers and

⁵¹ Ohio Rev. Code Ann. §§ 4928.05, 4905.33(B), 4905.35 (Baldwin 2007).

⁵² *In re AEP's MBSSO*, Case No. 04-169-EL-UNC (Opinion and Order at 18) (January 26, 2005).

to the Company while maintaining its competitive market price. The adjustment of its Riders provides financial stability for DE-Ohio and more predictable prices for consumers.

The Stipulation fully complies with all relevant and applicable regulatory principles. For example, the Stipulation is consistent with the State of Ohio's policies regarding the start of competitive retail electric service. The Stipulation ensures that consumers continue to have access to adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced competitive retail electric service through DE-Ohio. The Stipulation also avoids any anti-competitive subsidies between competitive retail electric service and non-competitive retail electric services.

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

III. The Stipulation adopts nearly all of the Auditor's Report in the Above Captioned Proceedings.

Despite the claims made by parties opposing the Stipulation, the Stipulation is a reasonable compromise of issues surrounding the adjustment of three of the Company's Riders raised during the second phase of the recently concluded hearing in the above captioned cases. DE-Ohio's Rider FPP and Rider SRT are subject to an annual review and audit performed by an independent outside auditing firm. The auditor's report was made part of the evidentiary record in the above styled proceedings.⁵³

OCC needlessly devotes a large portion of its brief advocating that DE-Ohio should follow the recommendations made by the auditor in its report.⁵⁴ By the terms of the Stipulation, the Parties agree that DE-Ohio will implement all but two of the auditor's recommendations.⁵⁵

First, DE-Ohio agrees that it will allocate its coal margins according to the stipulation reached in Case No. 05-806-EL-UNC.⁵⁶ In fact, DE-Ohio has been properly allocating coal margins since stipulation approval in early 2006. It is clear that the auditor's point in this respect addressed a specific coal contract involving a dispute over undelivered

⁵³ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (PUCO Ordered Remand Rider Exhibit 1)(April 19, 2007).

⁵⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Initial Post-Remand Merit Brief Phase II at 5-10)(May 17, 2007).

⁵⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Stipulation at 8) (April 9, 2007).

⁵⁶ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Stipulation at 8) (April 9, 2007). In the Auditor's report, the auditor refers to this provision as paragraph "D" of the Stipulation. In fact, this reference is incorrect and actually refers to paragraph 4 of the Stipulation, which was repeated in paragraph "D" of the Commission's Opinion and Order in Case No 05-806-EL-UNC.

coal for the two years prior to the MBSSO effective date, as well as in 2005, when the FPP was only chargeable to non-residential consumers.⁵⁷ The Stipulation at issue in this proceeding addresses this specific concern and offers a benefit to consumers through a larger credit than recommended by the auditor and also shares the credit with residential consumers who were not even subject to either the MBSSO or the Rider FPP in 2005 when the coal was not delivered.⁵⁸

Second, DE-Ohio agrees that it will not require coal suppliers to allow the resale of coal as a condition for the sale. As explained in the Supplemental Testimony of Charles Whitlock, DE-Ohio does not currently require this as a condition for consideration of a contract, although it does include the possibility of resale as a term for the RFP.⁵⁹ This inclusion in the RFP does not mean that DE-Ohio will pass up an attractive deal simply because a supplier will not permit its coal to be resold. However, as explained by Mr. Whitlock, the resale of coal is beneficial to consumers as margins on the sales are passed through to consumers.⁶⁰

Third, DE-Ohio is agreeing to conduct the study to report on the recurring overstatement of coal inventory at the Zimmer Station. It should be noted that an overstatement of inventory does not cause an

⁵⁷ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (PUCO Ordered Remand Rider Exhibit 1 at 1-9)(April 19, 2007).

⁵⁸ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Stipulation at 4) (April 9, 2007).

⁵⁹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (DE-Ohio Remand Rider Exhibit 2 at 9) (April 10, 2007).

⁶⁰ *Id.* at 9-10.

increase in FPP costs, but rather, would likely cause an under recovery as it is likely more fuel is actually burned at the Zimmer plant than is reflected in Rider FPP. It is in DE-Ohio's interests to determine whether it is underreporting the amount of fuel burned at its Zimmer Station. Similarly, DE-Ohio is agreeing to perform sensitivity analysis as requested in the auditor's fifth recommendation. In fact, DE-Ohio already has such analysis incorporated in its modeling simulations.

Fourth, in its Initial Post-Remand Brief Hearing Phase II, OCC opposes the Stipulation and criticizes DE-Ohio as needlessly raising costs recovered through the FPP.⁶¹ OCC's position is unsupportable. There is no evidence that DE-Ohio has needlessly caused Rider FPP costs to increase, either in the past, present, or in the future. To support its position, OCC cites to the auditor's recommendation that DE-Ohio should adopt a portfolio strategy that would include long-term coal purchases, beyond 2008.⁶² DE-Ohio agrees with the auditor's recommendation and addresses this concern through the Stipulation.⁶³

DE-Ohio does not have an approved market price at which it may sell competitive retail electric generation service to consumers after December 31, 2008. DE-Ohio has no certain method for the recovery of costs related to any long-term fuel purchases beginning in 2009. Absent

⁶¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Initial Post-Remand Merit Brief Phase II at 5)(May 17, 2007).

⁶² *Id.* at 6.

⁶³ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Joint Remand Rider Exhibit 1 at 5) (April 9, 2007).

an approved price, it is difficult for the Company to project its load and switching risks. At present, fuel and purchased power is fully bypassable by switched load. It is likely that fuel and purchased power will continue to be bypassable after 2008. Absent a known and defined pricing mechanism, it is imprudent for DE-Ohio to enter into such long term agreements when it is unknown how, and whether, DE-Ohio may recover those costs. It is beneficial to all stakeholders if DE-Ohio has a known and approved pricing mechanism for the recovery of fuel costs beyond 2008 so that the Company can better evaluate which long-term contract opportunities offer the best option for both the Company and its FPP consumers.

The Stipulation addresses the auditor's concern regarding coal contracts beyond 2008. The Stipulation provides that the Parties will enter into discussions regarding the recovery of these costs and will endeavor to reach agreement prior to the next FPP audit in the fall of 2007, which will include the review of the period that is the subject of Case No. 06-1068-EL-UNC, consolidated as part of the above styled proceeding. Once there is certainty to the pricing mechanism in which DE-Ohio will pass through costs of fuel, DE-Ohio will be able to evaluate potential long-term coal contracts.

It is curious that OCC is criticizing DE-Ohio's coal procurement position beyond 2008 in this proceeding, while at the same time arguing that the Company should delay making any proposal for the recovery of

the related costs.⁶⁴ OCC's position is detrimental both to the Company and to consumers and is inconsistent with the Commission's goals of price certainty for consumers, financial stability for utilities and the development of the competitive retail electric market. Through the Stipulation, DE-Ohio is proactively addressing a concern raised by the auditor in a reasonable manner to the benefit of all stakeholders. OCC is welcome to participate in the discussions regarding the determination of the market price for the recovery of fuel costs after 2008 if it so chooses. In fact, OCC is already a party to Case No. 06-1068-EL-UNC consolidated above.

The two auditor conditions excepted by the Stipulation involve DE-Ohio's active management portfolio strategy and the use of former Duke Energy North America (DENA) assets through the Rider SRT to address short-term capacity needs.

With respect to the Company's active management strategy, the auditor recommends that DE-Ohio cease flattening its position on a daily basis, but rather prefers the Company adjust its position on a quarterly basis unless circumstances dictate otherwise.⁶⁵ 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.

⁶⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Remand Rider Exhibit 2 at 2) (April 19, 2007).

⁶⁵ *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).

Procurement strategies and protocols that were relevant and appropriate for a fully regulated world simply do not make sense in a deregulated environment where consumers may switch to a competitive supplier at their pleasure, a utility's load is not necessarily constant and indefinite, and a utility is responsible for its position in the marketplace.⁶⁶ Commission Witness Seth Schwartz, the auditor, on cross-examination explained the difference between an active management strategy and traditional regulated procurement as follows:

The objective of active management is to match to the best extent possible the commitment to sell power with the commitment to supply power either by generation or purchased power, and to supply the inputs necessary to generate power, meaning especially the fuel supply and emission allowances associated with that generation as precisely as possible, and continue to reevaluate that position on a daily basis and, based upon the reevaluation, either buying or selling additional commitments for fuel or purchased power or emission allowances so that there is a daily balancing of commitments to sell power with the commitments to supply power. And the cost difference between the two is hedged. In a portfolio management system there is not really a matching precisely of the costs to supply generation with the future demand for the electricity from all ratepayer classes because that demand continues for an indefinite period and is not precisely known.⁶⁷

DE-Ohio's active management results in the Company constantly reviewing its position to be sure that the all stakeholders are sitting in

⁶⁶ Ohio Rev. Code Ann. § 4928.38 (Baldwin 2007).

⁶⁷ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Remand Rider TR I at 57) (April 19, 2007).

the most advantageous position in terms of price, inventory, and quality of fuel. The Company matches the cost of supplying generation to the demand for electricity and hedges any cost difference between generating electricity and purchasing power.

As 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.⁶⁸ 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

⁶⁸ *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.⁶⁹ Company shareholders absorb all transaction costs related to active management including overhead and broker fees, not consumers.⁷⁰ 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."⁷¹

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 to not follow the auditor's recommendation to abandon this strategy. The Commission should approve this term of the Stipulation without modification.

The second auditor recommendation excepted by the Stipulation involves the use of capacity from DE-Ohio's former legacy DENA assets through the Rider SRT to fulfill a short-term capacity shortfall. The auditor's justification for not including DENA capacity as a resource eligible for inclusion through the SRT is that affiliate transactions are difficult to audit and a market price is difficult to verify.⁷²

⁶⁹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Remand Rider TR II at 72-78) (April 19, 2007).

⁷⁰ *Id.*

⁷¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Remand Rider TR I at 59) (April 19, 2007).

⁷² *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (PUCO Ordered Remand Rider Exhibit 1 at 6-4 -6-5)(April 19, 2007).

DE-Ohio is committed to providing consumers with the capacity necessary to maintain reliable service at a reasonable price. Therefore, it is highly beneficial to consumers that all reasonably priced generation options are available and at their disposal to meet their needs, especially in an emergency. The legacy DENA 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.⁷³ The very nature of a capacity purchase in an emergency makes the market price unpredictable as the availability of capacity is simply unknown. Accordingly, as explained in the Company's Initial Remand Merit Brief, a capped market price is unreasonable.⁷⁴

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

⁷³ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Joint Remand Rider Exhibit 1 at 5) (April 19, 2007).

⁷⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (DE-Ohio Remand Rider Merit Brief at 9-10) (May 17, 2007).

purchases.⁷⁵ The Stipulation also affords the ability to consider and agree upon additional reasonable pricing methodologies.⁷⁶

Similarly, the pricing methodologies set forth in the Stipulation relative to the DENA capacity ensure the ability of the next 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. This Commission should approve this Stipulation provision so that consumers will have access to a low-priced and available resource in the event of an emergency and be somewhat insulated from volatile day-ahead market prices.

IV. All other terms and conditions of the Stipulation are reasonable.

The Stipulation includes resolution of issues not addressed in the audit report. These issues include a resolution of the Company's Rider AAC market price for 2007, the location of the generation related charges on consumer bills, as well as the treatment of congestion costs formerly recovered through the Company's Transmission Cost Recovery Tracker (Rider TCR). The resolution of these issues through the Stipulation is not only reasonable but is consistent with prior Commission decisions.

⁷⁵

Id.

⁷⁶

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

First, with respect to the issue surrounding congestion component costs, the Stipulation provides that congestion component costs will be recovered as a component of Rider FPP rather than through Rider TCR. This agreement is nothing more than a movement of the cost recovery mechanism and does not affect the actual dollars recovered or the ability to bypass those charges through switching. The congestion component costs are closely related to fuel and their recovery through Rider FPP simply makes sense.

In its Initial Remand Rider Brief, OCC opposes this provision to the Stipulation, but its justification is confusing.⁷⁷ It appears that OCC is interpreting this provision to mean something other than a simple affirmation of what this Commission already ordered as part of its interim adjustment of Rider FPP, before any final decision in this proceeding. The Commission already approved this relocation of cost recovery in its Order in the above styled proceeding on December 20, 2006.⁷⁸ This provision is simply a restatement of the Commission's Order that treatment of congestion component costs and losses will continue to be recovered through Rider FPP as part of the Stipulation settlement.

Similarly, OCC opposes the portion of the Stipulation that states that the Company will work with Staff to amend its bill form so that

⁷⁷ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Initial Post-Remand Merit Brief Phase II at 25)(May 17, 2007).

⁷⁸ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Entry at 7)(December 20, 2006).

generation related riders such as Riders FPP, SRT, and AAC will be located in the generation portion of the consumer bill.⁷⁹ OCC's dispute with this provision appears to be due to its narrow reading of this provision and an unfounded concern that not all generation related charges will be relocated.⁸⁰ It is clear that the Parties to the Stipulation intended that DE-Ohio shall relocate all generation related Riders, subject only to reasonable systems costs, as evidenced by the use of the language "*generation related charges such as the AAC, SRT and FPP...*"⁸¹ The Parties listed Riders SRT, FPP and AAC because those charges are directly at issue in phase two of the above-styled proceeding. It was not meant to exclude all other generation related charges, otherwise the Parties would have omitted the "such as" from the provision.

V. The stipulated Rider AAC market price is reasonable.

The Stipulation also resolves all issues surrounding the adjustment to the Company's Rider AAC price for 2007. In its Application and supporting testimony filed in Case No. 06-1085-EL-UNC, as well as in the later consolidated cases, DE-Ohio supported an AAC adjustment of approximately 9.1% of the company's "little g".⁸² This increase is distributed equally across all customer classes.⁸³ The

⁷⁹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Initial Post-Remand Merit Brief Phase II at 17-18 and 26-27)(May 17, 2007).

⁸⁰ *Id.* at 26-27.

⁸¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Joint Remand Rider Exhibit 1 at 6) (April 19, 2007).

⁸² *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (DE-Ohio Remand Rider Ex. 4 at 11) (September 1, 2006).

⁸³ *Id.*

support for this increase included the exact cost components used to justify the setting of the Company's initial Rider AAC market price in 2004, including the recovery of construction work in progress expenses for environmental compliance (CWIP).

The Commission Staff thoroughly reviewed the Company's 2007 Rider AAC filing and supported the Company's filing through the testimony of Staff witness L'Nard Tufts.⁸⁴ In addition, Staff witness Richard C. Cahaan supported inclusion of CWIP from a policy perspective.⁸⁵ With respect to the 2007 Rider AAC price, the Stipulation incorporates all adjustments and findings made by Staff as articulated by Staff witness Tufts and his supporting schedules.⁸⁶

OCC's opposition to the 2007 Rider AAC can be summed up with two points; (1) CWIP should not be included because if generation was fully regulated, CWIP could only be recovered if construction was 75% complete; and (2) there should be a full management and performance audit of the AAC.

With regard to the inclusion of CWIP in the Rider AAC price, OCC's position on the 2007 AAC mirrors the arguments it made in 2004 when the initial Rider AAC price was established.⁸⁷ Those arguments are just

⁸⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Staff Remand Rider Ex. 2 at 2-4) (April 19, 2007).

⁸⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Staff Remand Rider Ex. 3 at 2) (April 19, 2007).

⁸⁶ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Joint Remand Rider Exhibit 1 at 6) (April 19, 2007).

⁸⁷ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Remand Rider TR II at 55-56) (April 19, 2007).

as irrelevant today as they were in 2004. OCC maintains that CWIP should not be included in the 2007 AAC because under a traditional and fully regulated ratemaking paradigm, CWIP would only be recovered under certain circumstances, such as if construction was 75% complete. First, as discussed previously, generation is deregulated and the traditional regulatory concepts such as a limit on CWIP based on construction are no longer applicable to competitive retail electric services.⁸⁸ There is no such limitation on CWIP with respect to generation because, statutorily, those restrictions were eliminated by the Legislature.

The Commission recognized the important distinction between regulation and deregulation in its November 23, 2004 Entry on Rehearing, which established DE-Ohio's MBSSO and approved the level and type of charges for Rider AAC. In overruling OCC's objection that traditional rate making concepts should apply to the Company's MBSSO, and more specifically, Rider AAC, the Commission stated, "[s]ection 4928.14, Revised Code provides that competitive retail electric services, including a firm supply of electric generation service, shall be provided to consumers at market-based rates, rather than establishing such charges through the traditional rate-based approach under 4909.18, Revised Code."⁸⁹

⁸⁸ OHIO REV. CODE ANN. § 4928.05 (Anderson 2007).

⁸⁹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Entry on Rehearing at 17) (November 23, 2004).

It is indisputable that CWIP is included in DE-Ohio's current market price as established in 2004. It was included in the initial support for the market price as demonstrated by attachment JSP-4 to the testimony of Company witness John P. Steffen, and incorporated in the Direct Testimony of William D. Wathen in Case No. 06-1085-EL-UNC.⁹⁰ Moreover, the existence of CWIP in the current pricing structure is evidenced through OCC's witness Mr. Haugh's recommendation to exclude all CWIP related expenses from DE-Ohio's 2007 Rider AAC market price because it results in a reduction of the total Rider AAC price to a level below what the Commission approved in 2004. Simply put, CWIP is in the current price and should continue to be recovered in the 2007 price.

DE-Ohio faces far more market risk under the current statutory framework than it faced in a regulated environment. In the competitive retail electric service market, DE-Ohio has no assurances of long-term cost recovery as existed in a traditional fully regulated legislative paradigm. All utilities must seek to recover costs when the market price permits. As explained in the Company's Initial Remand Merit brief, R.C. 4928.38 provides that an electric utility is wholly responsible for its position in the market.⁹¹

⁹⁰ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (DE-Ohio Remand Rider Ex. 4 at WDW-1) (September 1, 2006).

⁹¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (DE-Ohio Initial Remand Rider Merit Brief at 13)(May 17, 2007); *Citing* Ohio Rev. Code Ann. § 4928.38 (Baldwin 2007).

OCC has no idea what price consumers will pay if DE-Ohio is denied the ability to recover CWIP as part of its market price.⁹² OCC's recommendation constrains DE-Ohio's ability to invest in necessary infrastructure upgrades to meet environmental compliance standards and ultimately harms consumers. If DE-Ohio cannot recover CWIP on its environmental investments it will be forced to substitute emission allowances, more expensive low sulfur coal, and purchased power for the scrubbers included in CWIP, to meet environmental requirements. Those substitutes will directly affect the price included for recovery in the Company's Rider FPP and directly affect the price for all consumers.

In its Initial Merit Brief for phase two of this proceeding, OPAE makes the impetuous statement that "the stipulation is contrary to the recommendation of the management performance auditor that a return on CWIP be excluded from the AAC."⁹³ OPAE's statement is untrue, offensive and a deliberate attempt to mislead this Commission. First, there is no current management performance audit for Rider AAC, only a financial audit. Second, Commission Ordered Exhibit 1 only addressed the Company's Riders FPP and SRT. Rider AAC and its underlying costs were not included within the scope of this review. Third, the auditor makes absolutely no finding or recommendation whatsoever regarding the recovery of CWIP through the Company's Rider AAC. The

⁹² *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Remand Rider Tr. II at 52) (April 19, 2007).

⁹³ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OPAE Initial Merit Brief Phase II at 11)(May 17, 2007).

Commission should give absolutely no weight to a brief submitted by a Party that contains such deliberate and blatant falsehoods.

The remainder of OPAE's brief borrows heavily from previous filings made by the OCC in this proceeding. DE-Ohio has already addressed and countered those specific allegations and arguments in the Company's prior Pleadings. In the interest of time and judicial economy, DE-Ohio respectfully incorporates its previous responses to those baseless allegations herein.

As mentioned previously, DE-Ohio's MBSSO is a market price, it is not a regulated rate. As long as the Company's total price is within the range of prices available to consumers in the market, under a deregulated paradigm, it is irrelevant what types of underlying costs are included in the price, as long as the total price is just and reasonable. The Commission should not be persuaded by the recommendations made by OCC, and echoed by OPAE, which are made without much forethought or any regard to the ultimate consequence or impact to consumers.

OCC's second criticism of the Company's current Rider AAC pricing structure is that there is not a provision for an annual management performance audit. Under the present Rider AAC structure, in order to adjust the price, DE-Ohio must file an application with the Commission, which is subject to a financial audit for accuracy of costs. All interested stakeholders, including OCC have an opportunity

to intervene, conduct discovery and litigate various positions. A management review is simply not necessary given the nature of the expenses recovered in Rider AAC. The procedural timeline for implementing the Rider AAC provides ample opportunity through discovery and hearings to fully explore and vet any issue that any Party deems worthy of investigation.

The Rider AAC underlying cost components include adjustments for tax law changes, homeland security and environmental compliance. Tax law changes are purely financial in nature and the Company has no control over the adjustments. The Commission currently verifies whether DE-Ohio is accurately reflecting the effects of the changes in tax law in its Rider AAC price. No further review is necessary. If any Party believes that DE-Ohio is not accurately reflecting tax law changes in its price, they may raise those concerns based upon either the financial audit or through their own investigation.

The second Rider AAC expense is related to homeland security. Homeland security is one of this country's highest-level priorities. There is no evidence that DE-Ohio's prior, or current, homeland security expenditures are imprudent. OCC has made no such claim. A management and performance review is a needless expense and an inefficient use of both Company and Commission resources. DE-Ohio respectfully questions whether the Commission or the OCC truly desires

to be in a position of second guessing expenses incurred to protect generation related assets given the world in which we live.

The third Rider AAC cost component is environmental compliance. These expenses include, among other things, reagent costs for the operation of scrubbers and for the installation and operation of environmental compliance equipment, such as scrubbers, on the Company's generation assets. The reagent expenses are already subject to a financial review and true up as part of the Company's annual filing. Reagent costs are directly related to the type of fuel burned at the Company's generation stations. If less expensive coal with higher sulfur content is burned, the emissions must be scrubbed or allowances purchased. There is nothing in the record to suggest that Staff is incapable of performing any audit deemed necessary. Staff, in fact, testified that it was capable of performing such audits.⁹⁴

Investment in environmental compliance equipment, as well as the operation and installation of such equipment, are financial in nature. The Commission presently audits these expenses and verifies that the Company actually incurred the expenses it seeks to recover.⁹⁵ DE-Ohio has an obligation to meet environmental compliance standards or else it must simply shut down its non-compliant plants.

⁹⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Remand Rider Tr. II at 41-44) (April 19, 2007).

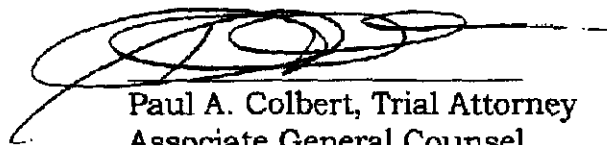
⁹⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Remand Rider Tr. II at 33) (April 19, 2007).

There is simply no evidence or even suggestion, that DE-Ohio has, in any way, made imprudent investments in environmental compliance technologies. Further, it is undisputed that the Commission has adequate resources and experience to perform the annual Rider AAC financial audit.⁹⁶ There is simply no reason to add another management performance review.

CONCLUSION:

For the reasons set forth above, DE-Ohio respectfully requests the Commission approve DE-Ohio's applications to implement its Riders SRT, FPP, and AAC market prices as amended by the Stipulation before it in these proceedings.

Respectfully Submitted,



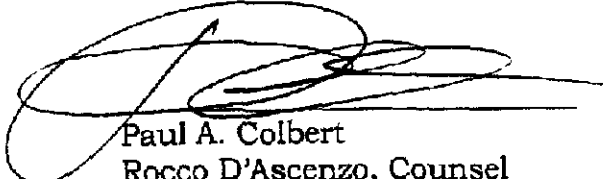
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⁹⁶

Id. at 43-44.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically on the following parties this 30th day of May 2007.



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