

# LARGE FILING SEPERATOR SHEET

CASE NUMBER: 03-93-EL-ATA  
03-2079-EL-AAM  
03-2080-EL-ATA  
03-2081-EL-AAM  
05-724-EL-UNC  
05-725-EL-UNC

FILE DATE: 11-10-08

SECTION: 160817

NUMBER OF PAGES: 200

DESCRIPTION OF DOCUMENT: Conf. Release

discussion is delay. The agreement in the 2007 Stipulation to hold additional discussions is meaningless, as stated by OCC Witness Haugh.<sup>24</sup> The Auditor's recommendation that the Company end its active management of coal and emission allowances should be ordered without additional discussion.

In response to OCC Witness Haugh's testimony regarding paragraph 3 of the 2007 Stipulation, Duke Energy Ohio states that EVA "made no recommendation" in connection with finding 6 on page 1-8 of the Auditor's Report.<sup>25</sup> Finding 6 states that "DE-Ohio continues to purchase fuel and emission allowances in a manner that is inconsistent with best industry practices,"<sup>26</sup> and follows that finding in major recommendation 2 by recommending that "DE-Ohio adopt traditional utility procurement strategies related to the procurement of coal and emission allowances and cease its 'active management' of such procurements."<sup>27</sup> The Company's active management of coal should be discontinued, the net margins associated with the trading of coal would be eliminated under such circumstances, and the topic of the pass through of net margins should not need to be constantly revisited under EVA's recommendations that are supported by the OCC.

Paragraph 5 of the 2007 Stipulation relates to AAC calculations, and OCC Witness Haugh recommended against setting the AAC charge above 5.6 percent of

---

<sup>24</sup> OCC Remand Rider Ex. 2 at 3 (Haugh Supplemental).

<sup>25</sup> Company Initial Phase II Brief at 7-8.

<sup>26</sup> PUCO Ordered Remand Rider Exhibit I at 1-8. ¶6 (Auditor's Report).

<sup>27</sup> *Id.* at 1-9.

"little g."<sup>28</sup> Staff's Initial Phase II Brief states its support of Staff Witness Tufts' check on plant additions,<sup>29</sup> but the controversy in these cases is whether a return on CWIP should be included in the AAC. Mr. Tufts stated no opinion on that matter,<sup>30</sup> and the opinion of Mr. Haugh should be followed regarding the exclusion of a return on CWIP.

Duke Energy faults OCC Witness Haugh for having "no idea what price consumers will pay if DE-Ohio is denied the ability to recover CWIP," arguing that he did not evaluate factors that the Company might "substitut[e] for the scrubbers that represent the bulk of DE-Ohio's capital environmental investment at issue in these proceedings."<sup>31</sup> That evaluation was presented by Mr. Gregory Ficke, former president of the Company and advisor to its current president as a consultant.<sup>32</sup>

[A. Gregory Ficke] We're going to have those costs whether we implement the RSP or not, the only difference is going to be with the RSP we get a revenue component associated with the AAC. AAC costs are going to be there whether we enter into the RSP or not because we've got to meet environmental requirements, we've got to meet Homeland Security requirements. Those dollars we're going to spend, so they wouldn't be relevant to this. \* \* \* With regard to AAC costs, there is only a positive effect of the RSP, there is no negative effect.

Q. [OCC Counsel] I'm not sure I understand that. What do you mean, positive effect?

<sup>28</sup> OCC Remand Rider Ex. 1 at 11 (Haugh). As stated in the OCC's Initial Phase II Brief, the 2007 Stipulation does not recommend an AAC level. OCC Initial Phase II Brief at 26, footnote 90. Paragraph 5 of the 2007 Stipulation addresses calculations, not recommended AAC charges that are at issue between the OCC and the Company. Joint Remand Rider Ex. 1 at 6, ¶5 (2007 Stipulation).

<sup>29</sup> Staff Initial Phase II Brief at 7.

<sup>30</sup> Tr. Remand Rider Vol. II at 35 (April 19, 2007) (Tufts) ("I did not form an opinion and that's not part of my testimony").

<sup>31</sup> Company Initial Phase II Brief at 10.

<sup>32</sup> OCC Remand Rider Ex. 9 at 13 (Ficke).

A. [Gregory Ficke] We're going to build a scrubber at some plant. We're going to build that scrubber whether we get an RSP reimbursement as part of the AAC or not. So the only relevant aspect of the RSP to a financial evaluation is how much does it increase your revenues. Your costs are not going to be affected because we're going to build the scrubber anyway.<sup>33</sup>

As evident from Mr. Ficke's testimony, the current substitution possibilities between the capital investment in a scrubber and other factors does not exist.

The Company is evidently in the process of installing a scrubber, the capital investment in which will be recovered by future customers of the Company's plants. Duke Energy Ohio would like early consideration of its capital expenditures in a regulatory-type inclusion of a return on CWIP. The Company fails to recognize, however, the Commission's regulatory practice of evaluating such inclusions in costs only in some instances and only after an installation is 75 percent or more complete.<sup>34</sup> The Commission should set the AAC charge at 5.6 percent of "little g" as part of the PUCO's effort "to consider the reasonableness of expenditures" in the AAC category.<sup>35</sup>

Paragraph 8 of the 2007 Stipulation would render EVA's "recommendation 6 on page 1-10 of the . . . Audit[or's] Report . . . inapplicable."<sup>36</sup> EVA's recommendation would exclude the use of the DENA Assets for purposes of calculating the SRT.<sup>37</sup> In its place, the Company proposes to charge for capacity from the DENA Assets based upon broker quotes, prices for third party transactions, or by a method acceptable to only the

---

<sup>33</sup> Id. at 128-129 (Ficke).

<sup>34</sup> OCC Remand Rider Exhibit 1 at 6 (Haugh).

<sup>35</sup> *Post-MDP Service Case*, Entry on Rehearing at 10 (November 23, 2004).

<sup>36</sup> Joint Remand Rider Ex. 1 at 7, ¶8.

<sup>37</sup> The "DENA Assets" were formerly owned by Duke Energy North America and are currently owned by Duke Energy Ohio. OCC Initial Phase II Brief at 4.

Company and the PUCO Staff.<sup>38</sup> Duke Energy Ohio states that “Staff and DE-Ohio clarified any ambiguity relating to the use of DE-Ohio’s DENA assets to meet the SRT reserved capacity requirements in a Stipulation entered on the record at hearing on April 19, 2007.”<sup>39</sup> The issue raised by the poorly drafted paragraph 8 of the 2007 Stipulation was that it did not provide meaningful customer protections against the wide use of the DENA Assets.<sup>40</sup> The Company proposes to depart from the cost basis for its standard service offer where it believes it can charge a higher market rate (i.e. the higher of cost or market),<sup>41</sup> which in this instance is also where the prices for capacity could be influenced upward from the market price by the Company.<sup>42</sup> The “Clarification” between the Company and Staff only attempted to address the first of these three issues.<sup>43</sup>

The faults with the “Clarification” regarding whether the Company would attempt the wide use of the DENA Assets are numerous. Asked whether the “Clarification” eliminated the use of the DENA Assets for overlapping periods, Company Witness Smith first stated that nothing in the “Clarification” addressed that issue.<sup>44</sup> Later in his testimony, Mr. Smith stated that the “Clarification” restricted the use of the DENA Assets from overlapping periods by requiring Commission approval.<sup>45</sup> Company

---

<sup>38</sup> Joint Remand Rider Ex. 1 at 7, ¶8.

<sup>39</sup> Company Initial Phase II Brief at 9.

<sup>40</sup> See OCC Initial Phase II Brief at 29.

<sup>41</sup> See, e.g., OCC Remand Ex. 1 at 6 (Talbot).

<sup>42</sup> See, e.g., OCC Initial Phase II Brief at 12.

<sup>43</sup> OCC Remand Rider Ex. 3.

<sup>44</sup> Tr. Remand Rider Vol. II at 88 (April 19, 2007) (Smith) (“I think nothing [would prevent the company having overlapping seven-day periods]”).

<sup>45</sup> Id. at 90 (Smith).

Witness Smith explained that the words “emergency” in the “Clarification” means in response to the forced outage of a generating station “or a sudden rise in the load due to weather or other factors.”<sup>46</sup> He stated that “intermittent means periodically.”<sup>47</sup> Neither explanation demonstrates the Company’s intention to limit the use of its DENA Assets to circumstances that cannot be dealt with in a more cost-effective manner by means other than resorting to using the DENA Assets.

The 2007 Stipulation contains numerous faults that result from the narrow interests of those who fashioned the agreement and the haste with which the agreement was patched together. The broad public interest is not served by approval of the 2007 Stipulation. The Commission should order the Company to comply with all the recommendations contained in the Auditor’s Report and the OCC-sponsored testimony.

### **3. The Settlement Package Violates Important Regulatory Policies and Practices.**

Both Duke Energy Ohio and the PUCO Staff feature in their briefs the existence of settlement discussions in which all parties “participated.”<sup>48</sup> These arguments apparently respond to the Supreme Court of Ohio’s admonition that settlements that permit utilities to sidestep an entire customer class should be viewed with suspicion.<sup>49</sup> The procedure apparently endorsed by both these parties is somewhat different than that pursued during the *Post-MDP Service Case* when settlements were reached in secret negotiations. This time, parties such as the OCC and OPAE were offered a chance in

---

<sup>46</sup> Id. at 87 (Smith).

<sup>47</sup> Id.

<sup>48</sup> Company Initial Phase II Brief at 4; Staff Initial Phase II Brief at 4.

<sup>49</sup> *Time Warner AxS v. Public Util. Comm.* (1996), 75 Ohio St.3d 229, 234, 661 N.E.2d 1097. The case was previously quoted by the OCC. OCC Initial Phase I Brief at 67.

Phase II of these proceedings to observe that they were being completely ignored. Company Witness Smith felt comfortable testifying that all parties were contacted regarding the 2007 Stipulation negotiations,<sup>50</sup> but had no knowledge of whether any proposals by the OCC were communicated.<sup>51</sup> The OCC is concerned with *actual* participation for representatives of residential customers in settlement discussions. The Commission should also be concerned with the *actual* ability of residential representatives to participate in settlement discussions as a regulatory principal.

Staff takes issue with the use of CWIP precedent as a traditional regulatory policy and practice for purposes of evaluating the third criterion for the evaluation of partial stipulations. Staff states that the Commission's approach to a return on CWIP for the purpose of calculating the AAC charge "does not apply in this case."<sup>52</sup> Staff does not seem to appreciate that it has accepted a CWIP approach -- the incorrect approach proposed by Duke Energy Ohio -- in these cases. As OCC Witness Haugh pointed out:

DE-Ohio witness Wathen's "'new' formula to determine a market price" (page 5 again) simply seeks cost-based recovery that is similar to the traditional methodology for the treatment of CWIP, but without any limitation regarding the percentage of completion for additions to environmental plant.<sup>53</sup>

The difference between the approaches taken by the OCC and the Staff/Company is not conceptual, but is based upon the application of CWIP concepts in these proceedings.

---

<sup>50</sup> Company Remand Rider Ex. 6 at 5 (Smith).

<sup>51</sup> Tr. Remand Rider Vol. II at 108 (April 19, 2007) (Smith).

<sup>52</sup> Staff Initial Phase II Brief at 7.

<sup>53</sup> OCC Remand Rider Ex. 1 at 7 (Haugh), referring to Company Remand Rider Ex. 5 (Wathen Supplemental).

Staff is willing to accept the Company's calculations based upon a return on 100 percent of CWIP in environmental plant and no showing by the Company regarding the percentage that the plant is complete. No precedent exists for such calculations, which should be based upon a showing that the environmental plant is at least 75 percent complete.<sup>54</sup> No such showing exists in the record of these proceedings. The Commission has already applied its traditional cost evaluation techniques in these proceedings, as evidenced by its instructions to EVA that the Auditor should follow techniques formerly used in electric fuel component cases.<sup>55</sup> The OCC supports AAC calculations that exclude a return on CWIP for environmental plant, as that evaluation of AAC charges is presented in the testimony of OCC Witness Haugh.<sup>56</sup> The different result proposed by the Company and accepted by the Staff violates important regulatory policies and practices.

#### IV. CONCLUSION

The OCC supports the positions presented in the Auditor's Report, and the Commission should adopt these positions despite the proposal of the stipulators that the independent Auditor's recommendations should somehow be "withdrawn." The Auditor's Report makes many recommendations regarding the manner in which the Company's fuel and capacity procurement practices should be altered or continued that

---

<sup>54</sup> OCC Remand Rider Ex. 1 at 6 (Haugh).

<sup>55</sup> The Auditor's Report states that the Commission requested that EVA "follow the general guidance that had been provided for the Electric Fuel Component audits" from the formerly applicable Ohio Administrative Rules. PUCO Ordered Remand Rider Exhibit 1 at 1-2 through 1-3 (Auditor's Report).

<sup>56</sup> OCC Remand Rider Ex. 1 at 6-8 (Haugh).

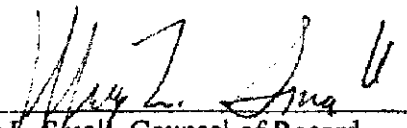


should be adopted by the Commission. The OCC also supports the continued prohibition against including the cost of using DENA Assets in the calculation of SRT charges.

The Commission should eliminate that portion of the proposed AAC charge that can be attributed to a return on all CWIP and set the AAC at 5.6 percent of "little g." Future management performance audits should include a review of Duke Energy's operations that contribute to the AAC charges.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER  
CONSUMERS' COUNSEL

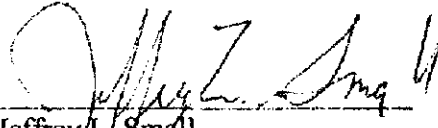


Jeffrey L. Small, Counsel of Record  
Ann M. Hotz  
Larry S. Sauer  
Assistant Consumers' Counsel

**Office Of The Ohio Consumers' Counsel**  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
Telephone: 614-466-8574  
E-mail: [small@occ.state.oh.us](mailto:small@occ.state.oh.us)  
[hotz@occ.state.oh.us](mailto:hotz@occ.state.oh.us)  
[sauer@occ.state.oh.us](mailto:sauer@occ.state.oh.us)

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing  
 (Confidential) *Reply Post-Remand Brief, Hearing Phase II, by the Office of the Ohio  
 Consumers' Counsel*, has been served upon the below-named persons in unredacted form  
 (pursuant to the Attorney Examiners' instructions) via electronic transmittal this 30<sup>th</sup> day  
 of May 2007.



Jeffrey L. Small  
 Assistant Consumers' Counsel

cmooney2@columbus.rr.com  
dboehm@bklawfirm.com  
mkurtz@bklawfirm.com  
sam@mwncmh.com  
dneilsen@mwncmh.com  
barthroyer@aol.com  
mlpetricoff@vssp.com

mchristensen@columbuslaw.org  
paul.colbert@duke-energy.com  
rocco.d'ascenzo@duke-energy.com  
mdortch@kravitzllc.com  
Thomas.McNamee@puc.state.oh.us  
ricks@ohnet.org  
anita.schafer@duke-energy.com

Scott.Farkas@puc.state.oh.us  
Jeanne.Kingery@puc.state.oh.us

**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**

**TABLE OF CONTENTS**

	<b><u>Page Number</u></b>
INTRODUCTION:.....	3
ARGUMENT: .....	6
I.    DE-OHIO HAS MET ITS BURDEN OF PROOF AND THE TEST FOR APPROVAL OF PARTIAL STIPULATIONS.....	7
II.   THE STIPULATION MEETS EACH PRONG OF THE COMMISSION'S 3-PART TEST TO ASSESS STIPULATIONS SIGNED BY SOME, BUT NOT ALL, PARTIES. ....	13
A. The Stipulation was a product of serious bargaining among capable and knowledgeable parties. ....	14
B. The Stipulation benefits the public interest. ....	26
C. The Stipulation does not violate any important regulatory principle or practice.....	27
III.  THE STIPULATION ADOPTS NEARLY ALL OF THE AUDITOR'S REPORT IN THE ABOVE CAPTIONED PROCEEDINGS.....	30
IV.   ALL OTHER TERMS AND CONDITIONS OF THE STIPULATION ARE REASONABLE. ....	39
V.    THE STIPULATED RIDER AAC MARKET PRICE IS REASONABLE. ....	41
CONCLUSION: .....	49

**BEFORE****THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the	:		
Consolidated Duke Energy Ohio, Inc.	:	Case Nos.	03-93-EL-ATA
Rate Stabilization Plan Remand and	:		03-2079-EL-AAM
Rider Adjustment Cases	:		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 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.<sup>1</sup> Moreover,

---

<sup>1</sup> *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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

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.

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

<sup>3</sup> 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.

<sup>4</sup> *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.<sup>5</sup> Pursuant to R.C. 4928.14 applications for an MBSSO are filed under R.C. 4909.18.<sup>6</sup> Revised Code Section 4909.18 requires the Commission to determine whether the application "may be unjust or unreasonable."<sup>7</sup> 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.<sup>8</sup>

<sup>5</sup> Ohio Rev. Code Ann. § 4928.14 (Baldwin 2007).

<sup>6</sup> *Id.*

<sup>7</sup> Ohio Rev. Code Ann. § 4909.18 (Baldwin 2007).

<sup>8</sup> *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.<sup>9</sup> 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....*<sup>10</sup>

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.<sup>11</sup>

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.<sup>12</sup> 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

<sup>9</sup> Ohio Rev. Code Ann. § 4928.05 (Baldwin 2007).

<sup>10</sup> *Id.* (emphasis added).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

quoted portion of R.C. 4928.05.<sup>13</sup> 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.*<sup>14</sup>

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.<sup>15</sup>

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

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

<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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*

<sup>16</sup> Ohio Rev. Code Ann. § 4905.33(B) (Baldwin 2007).

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

<sup>18</sup> *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).

<sup>19</sup> 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."<sup>20</sup>

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 OPAE 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. The argument is that discrimination exists because some parties with DERS or Cinergy contracts do not pay some portion of the Riders FPP, SRT, and AAC.<sup>21</sup> 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

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

<sup>21</sup> *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.*, (OPAE's Remand Rider Merit Brief at 6-10) (May 17, 2007).

AAC price. There is no record evidence to the contrary. Second, the record evidence demonstrates that consumers with DERS contracts receive an option in exchange for payments from DERS.<sup>22</sup> Finally, even if the Commission agrees with OCC's and OPAE's argument that DE-Ohio, 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.

---

<sup>22</sup> *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.<sup>23</sup> Although not binding on the Commission, such agreements are accorded substantial weight.<sup>24</sup> 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?<sup>25</sup>

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.<sup>26</sup> Moreover, the Stipulation provides many benefits to all consumer classes including residential consumers represented by the OCC.

<sup>23</sup> O. A. C. 4901-1-30.

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

<sup>25</sup> *Id.*

<sup>26</sup> *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.<sup>27</sup> 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.

---

<sup>27</sup> *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;<sup>28</sup> (2) the Stipulation does not include support of all customer classes, particularly the residential class;<sup>29</sup> and (3) the support of some of the signatories is suspect because they have other contractual arrangements with DERS or DE-Ohio.<sup>30</sup> 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

---

<sup>28</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (OCC's Remand Rider merit Brief at 21) (May 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).

<sup>29</sup> *Id.*

<sup>30</sup> *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).

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 briefed 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.<sup>31</sup> 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

---

<sup>31</sup> *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.<sup>32</sup>

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 OPAE opposed the Stipulation.

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

Revised Code Section 4911.15 states that:

---

<sup>32</sup> *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).

<sup>33</sup> *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).

<sup>34</sup> *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.*<sup>35</sup>

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

<sup>35</sup> Ohio Rev. Code Ann. § 4911.15 (Baldwin 2007) (emphasis added).

such consumers. It is simply the statutory representative of residential consumers.<sup>36</sup>

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.<sup>37</sup>

Finally, OCC and OPAE argue that there was no serious bargaining as some parties signed the Stipulation only because they signed

<sup>36</sup> Ohio Rev. Code Ann. § 4911.15 (Baldwin 2007).

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

contracts that permit them to avoid paying increases in Riders FPP, SRT, or AAC.<sup>38</sup> This is a factually incorrect assertion.

OCC and OPAC 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.<sup>39</sup>

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.<sup>40</sup> 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-

<sup>38</sup> *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.*, (OPAC's Remand Rider Merit Brief at 6-10) (May 17, 2007).

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

<sup>40</sup> *Id.*

Ohio opposed the case consolidation.<sup>41</sup> 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 OPAC 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.<sup>42</sup> 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 OPAC regarding the contract and recognize Cincinnati's support for the Stipulation.

Next, OCC and OPAC suggest that OEG and OHA did not engage in serious bargaining because their members have option contracts with DERS.<sup>43</sup> They allege that OEG and OHA were prohibited from opposing the Stipulation because of the contract term calling for support of 03-93-

---

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

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

<sup>43</sup> *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.*, (OPAC's Remand Rider Merit Brief at 6-10) (May 17, 2007).



EL-ATA, *et al.*, and because they avoid price increases as a result of the contracts.<sup>44</sup> Both allegations are factually incorrect.

Just as with Cincinnati's contract with DE-Ohio, nothing in the DERS contracts prohibits any member of OHA and OEG from opposing increases resulting from DE-Ohio's application in Cases No. 05-725-EL-UNC, 06-1069-EL-UNC, 05-724-EL-UNC, 06-1068-EL-UNC, and 06-1085-EL-UNC, the cases at issue in phase two of these proceedings. 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.<sup>45</sup>

Further, the OHA and OEG members that have DERS contracts all pay DE-Ohio the entirety of the FPP, SRT, and AAC, including any price increases the Commission may approve from time to time. Even if the Commission agrees with OCC and OPAE that the option contracts are nothing more than an attempt to gain support for DE-Ohio's market price, which DE-Ohio wholly denies, the record evidence shows that OHA's and OEG's signatories pay half or more of approved increases.<sup>46</sup> The Commission has significant experience with OEG and OHA through

---

<sup>44</sup> *Id.*

<sup>45</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (Tr. at 18-22) (December 14, 2006).

<sup>46</sup> *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 OPAE 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.<sup>47</sup> 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 OPAE's members are also such providers, Cincinnati Hamilton County Community Action Agency (CHCCAA) and Clermont County Community Action Agency (CCCAA). 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.

---

<sup>47</sup> *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.*, (OPAE'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.<sup>48</sup>

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.<sup>49</sup> 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.<sup>50</sup>

---

<sup>48</sup> *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).

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

<sup>50</sup> *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.<sup>51</sup> The Commission agrees with this statutory interpretation.<sup>52</sup>

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

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

<sup>52</sup> *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.<sup>53</sup>

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

First, DE-Ohio agrees that it will allocate its coal margins according to the stipulation reached in Case No. 05-806-EL-UNC.<sup>56</sup> 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

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

<sup>54</sup> *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).

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

<sup>56</sup> *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.<sup>57</sup> 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.<sup>58</sup>

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.<sup>59</sup> 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.<sup>60</sup>

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

---

<sup>57</sup> *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).

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

<sup>59</sup> *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).

<sup>60</sup> *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.<sup>61</sup> 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.<sup>62</sup> DE-Ohio agrees with the auditor's recommendation and addresses this concern through the Stipulation.<sup>63</sup>

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

---

<sup>61</sup> *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).

<sup>62</sup> *Id.* at 6.

<sup>63</sup> *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.<sup>64</sup> 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.<sup>65</sup> 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.

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

<sup>65</sup> *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.<sup>66</sup> 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.<sup>67</sup>

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

<sup>66</sup> Ohio Rev. Code Ann. § 4928.38 (Baldwin 2007).

<sup>67</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Remand Rider TR 1 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.<sup>68</sup> 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

---

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

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.<sup>72</sup>

---

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

<sup>70</sup> *Id.*

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

<sup>72</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (PUCO Ordered Remand Rider Exhibit I 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.<sup>73</sup> 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.<sup>74</sup>

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

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

<sup>74</sup> *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.<sup>75</sup> The Stipulation also affords the ability to consider and agree upon additional reasonable pricing methodologies.<sup>76</sup>

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.

---

<sup>75</sup>

*Id.*

<sup>76</sup>

*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.<sup>77</sup> 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.<sup>78</sup> 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

<sup>77</sup> *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).

<sup>78</sup> *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.<sup>79</sup> 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.<sup>80</sup> 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...*"<sup>81</sup> 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".<sup>82</sup> This increase is distributed equally across all customer classes.<sup>83</sup> The

---

<sup>79</sup> *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).

<sup>80</sup> *Id.* at 26-27.

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

<sup>82</sup> *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).

<sup>83</sup> *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.<sup>84</sup> In addition, Staff witness Richard C. Cahaan supported inclusion of CWIP from a policy perspective.<sup>85</sup> 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.<sup>86</sup>

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.<sup>87</sup> Those arguments are just

<sup>84</sup> *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).

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

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

<sup>87</sup> *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.<sup>88</sup> 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."<sup>89</sup>

---

<sup>88</sup> OHIO REV. CODE ANN. § 4928.05 (Anderson 2007).

<sup>89</sup> *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.<sup>90</sup> 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.<sup>91</sup>

<sup>90</sup> *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).

<sup>91</sup> *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.<sup>92</sup> 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."<sup>93</sup> 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

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

<sup>93</sup> *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 OP&E'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 OP&E, 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.<sup>94</sup>

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.<sup>95</sup> DE-Ohio has an obligation to meet environmental compliance standards or else it must simply shut down its non-compliant plants.

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

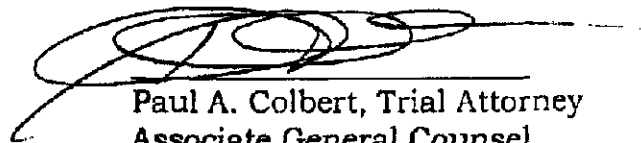
<sup>95</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Remand Rider Tr. II at 33) (April 19, 2007).

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.<sup>96</sup> 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,



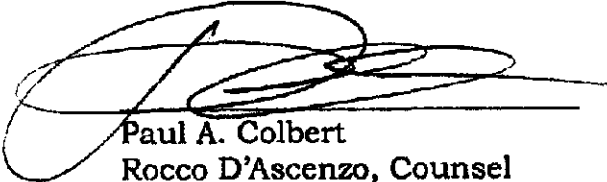
Paul A. Colbert, Trial Attorney  
Associate General Counsel  
Rocco D'Ascenzo, Counsel  
Duke Energy Ohio  
2500 Atrium II, 139 East Fourth Street  
P. O. Box 960  
Cincinnati, Ohio 45201-0960  
(513) 287-3015

---

<sup>96</sup> *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.



Paul A. Colbert  
Rocco D'Ascenzo, Counsel

Anne.Harmerstein@puc.state.oh.us  
BarthR@att.net;  
Stephen.Herly@puc.state.oh.us  
ricks@ohioatt.org;  
Scott.Herly@puc.state.oh.us  
shawn.lord@pseg.com  
Thomas.H.Harney@puc.state.oh.us  
mchristensen@columbuslaw.org;  
Werner.Margen@puc.state.oh.us  
cmooney2@columbus.rr.com  
rsmithla@aol.com  
nmorgan@inscinti.org  
schwartz@wainc.com  
dane.stinson@baileycavalieri.com  
cgoodman@energymarketers.com;  
sbloomfield@bricker.com  
dboehne@bkllawfirm.com;  
TOBrien@bricker.com;  
mkurtz@bkllawfirm.com;  
anita.schaier@duke-energy.com  
michael.pahutski@duke-energy.com  
paul.colbert@duke-energy.com  
rocco.d'ascenzo@duke-energy.com  
tschneider@mgsglaw.com  
korkosza@firstenergycorp.com  
eagleenergy@fuse.net;  
dneilsen@mwncmh.com;  
JKubacki@strategicenergy.com  
jbowser@mwncmh.com;  
lmcalister@mwncmh.com;  
sam@mwncmh.com;  
bingham@occ.state.oh.us

**03043**

HOTZ@occ.state.oh.us  
SAUER@occ.state.oh.us  
MHPetricoff@vssp.com  
SMALL@occ.state.oh.us  
mdortch@kravitzllc.com

**CONFIDENTIAL****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

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).<sup>1</sup> In an Entry dated November 23, 2006, and affirmed by Order from the bench during a pre-hearing conference held December 14,

---

<sup>1</sup> *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.<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup> 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.

---

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

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

<sup>4</sup> *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.<sup>5</sup> 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.<sup>6</sup> 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

---

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

<sup>6</sup> *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.<sup>7</sup> 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.<sup>8</sup> Specifically, OCC incorrectly asserts that DE-Ohio has not met its burden of proof that active management is an effective method of

<sup>7</sup> *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).

<sup>8</sup> *Id.* at 5-9.

low cost fuel procurement.<sup>9</sup> With respect to DE-Ohio's active management strategy, the auditor recommends that DE-Ohio cease flattening its position on a daily basis.<sup>10</sup> The auditor prefers that the Company adjust its position on a quarterly basis unless circumstances dictate otherwise.<sup>11</sup> 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.<sup>12</sup> 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

---

<sup>9</sup> *Id.*

<sup>10</sup> *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).

<sup>11</sup> *Id.*

<sup>12</sup> 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.<sup>13</sup>

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.<sup>14</sup> 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

---

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

<sup>14</sup> *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.<sup>15</sup> Company shareholders absorb all transaction costs related to active management including overhead and broker fees, not consumers.<sup>16</sup> 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."<sup>17</sup>

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.<sup>18</sup> 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

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

<sup>16</sup> *Id.*

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

<sup>18</sup> *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.<sup>19</sup> 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.<sup>20</sup> The Commission properly approved the Stipulation provision regarding Coal procurement.<sup>21</sup>

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.<sup>22</sup> 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

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

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

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

<sup>22</sup> *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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup>

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

---

<sup>23</sup> *Id.* at 14.

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

<sup>25</sup> *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.<sup>26</sup> 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.<sup>27</sup> The Stipulation also affords the ability to consider and agree upon additional reasonable pricing methodologies.<sup>28</sup>

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

---

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *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.<sup>29</sup> 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.<sup>30</sup> 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.

---

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

<sup>30</sup> *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.<sup>31</sup> 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.<sup>32</sup> As Staff witness Mr. Cahaan testified there are differences between prices constructed in a regulatory regime versus those constructed in a market regime.<sup>33</sup> 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."<sup>34</sup> In a footnote to the quoted criticism OCC alleges

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

<sup>32</sup> *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).

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

<sup>34</sup> *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.<sup>35</sup> 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.

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.<sup>36</sup> The Commission fully discussed the evidence of record regarding recovery of a return on CWIP in its Opinion and Order.<sup>37</sup> No more is

---

<sup>35</sup> *Id.*

<sup>36</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (Staff Exhibits 2, 2(A), and 3) (April 9, 2007).

<sup>37</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Opinion and Order at 21-23) (November 20, 2007).

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.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> At the December 14, 2006, prehearing conference the

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

<sup>39</sup> *Id.*

<sup>40</sup> *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.<sup>41</sup>

OCC argued for the inclusion of all Parties and supported consolidation of the cases.<sup>42</sup> DE-Ohio opposed consolidation but agreed on the basis that the purpose of consolidation was to move the cases quickly to conclusion.<sup>43</sup> 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 OPAE 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.<sup>44</sup> OCC and OPAE allege that the terms of the confidential commercial contracts lead to the conclusion that there was no serious

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

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *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.*, (OPAE Rider Application for Rehearing) (December 20, 2007).

bargaining among the Parties. The Commission properly held otherwise.<sup>45</sup>

Signatories to the Stipulation include DE-Ohio, Staff, People Working Cooperatively (PWC), The City of Cincinnati (City) and the Ohio Energy Group (OEG).<sup>46</sup> Only OCC and OPAE opposed the Stipulation. Neither OCC nor OPAE presented evidence connecting the confidential commercial contracts to the Stipulation.<sup>47</sup> 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

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

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

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

settlement discussions.<sup>48</sup> 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.<sup>49</sup>

OCC and OPAC argue that the support of some of the signatories is suspect because they have other contractual arrangements that may effect their negotiating position.<sup>50</sup> OCC's and OPAC'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.<sup>51</sup> OEG is an advocate for industrial customers. Some of OEG's members have contractual arrangements with an affiliate of DE-Ohio. Industrial Energy Users-Ohio (IEU-Ohio) also represents industrial customers. It has a contractual arrangement with an affiliate of DE-Ohio. PWC provides energy efficiency and weatherization services to low

<sup>48</sup> *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).

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

<sup>50</sup> *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.*, (OPAC Remand Application for Rehearing) (December 20, 2007).

<sup>51</sup> 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. Some of its members have a contractual relationship with an affiliate of DE-Ohio. 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. Kroger also has contractual relationships with a DE-Ohio affiliate. 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.



Finally, OCC and OPAE argue that there was no serious bargaining as some Parties signed the Stipulation only because they signed contracts that permit them to avoid paying increases in Riders FPP, SRT, or AAC.<sup>52</sup> 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.<sup>53</sup> 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.

<sup>52</sup> *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).

<sup>53</sup> *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.<sup>54</sup> 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.<sup>55</sup>

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.<sup>56</sup>

**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.<sup>57</sup>

<sup>54</sup> *Id.*

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

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

<sup>57</sup> *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.<sup>58</sup> 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.<sup>59</sup>

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

---

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

<sup>59</sup> *Id.*

the public. Once again the Commission properly found the Stipulation benefits the public.<sup>60</sup>

**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.<sup>61</sup> 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.<sup>62</sup> The Commission agrees with this statutory interpretation.<sup>63</sup>

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-

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

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

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

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

**03067**

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 OP&E'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,

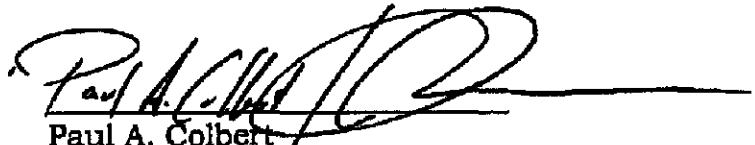


Paul A. Colbert, Trial Attorney  
Associate General Counsel  
Rocco D'Ascenzo, Counsel  
Duke Energy Ohio  
2500 Atrium II, 139 East Fourth Street  
P. O. Box 960  
Cincinnati, Ohio 45201-0960  
(513) 419-1827

03069

**CERTIFICATE OF SERVICE**

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

  
Paul A. Colbert  
Rocco D'Ascenzo, Counsel

Anne.Hammerstein@puc.state.oh.us  
BarthRoyer@aol.com;  
Stephen.Reilly@puc.state.oh.us  
ricks@ohanet.org;  
Scott.Farkas@puc.state.oh.us  
shawn.leyden@pseg.com  
Thomas.McNamee@puc.state.oh.us  
mchristensen@columbuslaw.org;  
Werner.Margard@puc.state.oh.us  
cmooney2@columbus.rr.com  
rsmithla@aol.com  
nmorgan@lascinti.org  
schwartz@evainc.com  
dane.stinson@baileycavalieri.com  
cgoodman@energymarketers.com;  
sbloomfield@bricker.com  
dboehm@bkillawfirm.com;  
TOBrien@bricker.com;  
mkurtz@bkillawfirm.com;  
anita.schafer@duke-energy.com  
michael.pahutski@duke-energy.com  
paul.colbert@duke-energy.com  
rocco.d'ascenzo@duke-energy.com  
tschneider@mgsglaw.com  
korkosza@firstenergycorp.com  
eagleenergy@fuse.net;  
dneilsen@mwncmh.com;  
JKubacki@strategicenergy.com  
jbowser@mwncmh.com;  
lmcaster@mwncmh.com;  
sam@mwncmh.com;  
bingham@occ.state.oh.us

03070

HOTZ@occ.state.oh.us  
SAUER@occ.state.oh.us  
MHPetricoff@vssp.com  
SMALL@occ.state.oh.us  
mdortch@kravitzllc.com




CONFIDENTIAL PROPRIETARY  
TRADE SECRET

CONFIDENTIAL

# THE CINCINNATI GAS & ELECTRIC COMPANY

## Summary of Projected 2006 Capacity and Purchased Power Costs Incurred to Serve POLR Load Customers <sup>1/</sup>

### Total Estimated Capacity Costs and Jurisdictional Allocation

Line No.	Description	May (A)	June (B)	July (C)	August (D)	September (E)	Total (F)	Line No.
1	Daily Fixed Strike Energy Firm LD Call Option with Capacity Backing							1
2	Mid-Merit Gas Tolling Agreement							2
3	Regulatory Capacity Purchase							3
4	9.0 Heat Rate Call Option with Capacity Backing							4
5	Base Load Tolling Agreement with Must-Take Firm Energy							5
6	Daily Fixed Call Option with Unit Outage Contingency							6
7	Total Applicable to Retail Customers							7

<sup>1/</sup> Excludes Cost Recoverable Via the Fuel and Purchased Power Tracker.

03071

RECEIVED

JUN 01 2005

DOCKETING DIVISION  
Public Utilities Commission of Ohio

CONFIDENTIAL

Attachment DFE 1  
CONFIDENTIAL PROPRIETARY Schedule B  
Page 2 of 6  
TRADE SECRET

THE CINCINNATI GAS & ELECTRIC COMPANY

Protected Daily Fixed Strike Energy Firm Liquidated Damages Call Option

Line No.	Description (A)	Amount (B)	Description (C)	Amount (D)	Line No.
June					
1	Days		July		1
2	Daily Hours		Days		2
3	MW's Optioned		Daily Hours		3
4	MW's Subject to Reservation Charge		MW's Optioned		4
5	Charge Per MWH		MW's Subject to Reservation Charge		5
6	Cost per kW-month Capacity		Charge Per MWH		6
7	Capacity Charge		Cost per kW-month Capacity		7
August					
8	Days		September		8
9	Daily Hours		Days		9
10	MW's Optioned		Daily Hours		10
11	MW's Subject to Reservation Charge		MW's Optioned		11
12	Charge Per MWH		MW's Subject to Reservation Charge		12
13	Cost per kW-month Capacity		Charge Per MWH		13
14	Capacity Charge		Cost per kW-month Capacity		14

SUMMARY

15 Total Daily Call Options Capacity Charge

030728

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15

**THE CINCINNATI GAS & ELECTRIC COMPANY****Projected Mid-Mark Gas Tolling Agreement**

Line No.	Description	Amount	Description	Amount	Line No.
	(A)	(B)	(C)	(D)	
May			June		
1	MW's		MW's		
2	Capacity Charge/Kw/Month		Capacity Charge/Kw/Month		
3	CG&E's Capacity Charge		CG&E's Capacity Charge		
4	Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT		Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT		
July			August		
5	MW's		MW's		
6	Capacity Charge/Kw/Month		Capacity Charge/Kw/Month		
7	CG&E's Capacity Charge		CG&E's Capacity Charge		
8	Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT		Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT		
9	Total Tolling Agreement Capacity Charge				9
			September		
			MW's		
			Capacity Charge/Kw/Month		
			CG&E's Capacity Charge		
			Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT		

**CONFIDENTIAL**

Attachment DFE 1  
Schedule B  
Page 4 of 8

**CONFIDENTIAL PROPRIETARY  
TRADE SECRET**

**THE CINCINNATI GAS & ELECTRIC COMPANY**

**Projected Purchased Capacity**

Line No.	Description (A)	Amount (B)	Description (C)	Amount (D)	Line No.
June					
1	MW's		MW's		
2	Capacity Charge/Kw/Month		Capacity Charge/Kw/Month		
3	CG&E's Capacity Charge		CG&E's Capacity Charge		
4	Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT		Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT		
August					
5	MW's		MW's		
6	Capacity Charge/Kw/Month		Capacity Charge/Kw/Month		
7	CG&E's Capacity Charge		CG&E's Capacity Charge		
8	Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT		Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT		
9	Total Tolling Agreement Capacity Charge				

03074

CONFIDENTIAL PROPRIETARY  
TRADE SECRET

THE CINCINNATI GAS & ELECTRIC COMPANY

Projected Base Load Tolling Agreement with Must-Take Firm Energy

03075

CONFIDENTIAL

Line No.	Description (A)	Amount (B)	Description (C)	Amount (D)	Line No.
June					
1	MWs		MWs		
2	Capacity Charge/Kw/Month		Capacity Charge/Kw/Month		
3	Cost per kW-month Capacity		Cost per kW-month Capacity		
4	CG&E's Capacity Charge		CG&E's Capacity Charge		
5	Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT		Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT		
August					
6	MWs		MWs		
7	Capacity Charge/Kw/Month		Capacity Charge/Kw/Month		
8	Cost per kW-month Capacity		Cost per kW-month Capacity		
9	CG&E's Capacity Charge		CG&E's Capacity Charge		
10	Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT		Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT		
11	Total Tolling Agreement Capacity Charge				

CONFIDENTIAL

Attachment DFE 1  
Schedule B  
Page 6 of 6

CONFIDENTIAL PROPRIETARY  
TRADE SECRET

## THE CINCINNATI GAS & ELECTRIC COMPANY

### Projected Base Load Tolling Agreement with Must-Take Firm Energy

Line No.	Description (A)	Amount (B)	Description (C)	Amount (b)	Line No.
			July		
1	MWs				
2	Capacity Charge/Kw/Month		Capacity Charge/Kw/Month		
3	CG&E's Capacity Charge		CG&E's Capacity Charge		
4	Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT		Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT		
			September		
5	MWs				
6	Capacity Charge/Kw/Month		Capacity Charge/Kw/Month		
7	CG&E's Capacity Charge		CG&E's Capacity Charge		
8	Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT		Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT		
9	Total Tolling Agreement Capacity Charge				

03076

**CONFIDENTIAL**

**THE CINCINNATI GAS & ELECTRIC COMPANY**  
Projected Capacity Position for 2006

Attachment DFE 1  
Schedule C  
Page 1 of 1  
**CONFIDENTIAL PROPRIETARY**  
**TRADE SECRET**

Updated On: May 25, 2006

	2006	January	February	March	April	May	June	July	August	September	October	November	December
Supply													
Maintenance *													
Supply with Maintenance Considerations													
Native and Switched Peak Demand													
Call Option & RTP													
CG&E Native Load Capacity Position													
Margin													
Capacity Position @ 15% Reserve Margin													
Capacity Position @ 15% Reserve Margin without Maintenance													

(\*) - represents the maintenance schedule based upon economics and resource constraints. Also this uses the highest weekly volume during the month. The schedule and can be adjusted for peak days.  
Please note: Switched customers are included in this analysis.

03077

CONFIDENTIAL

CONFIDENTIAL PROPRIETARY  
TRADE SECRET

Attachment DFE 2  
Schedule B  
Page 1 of 6

## THE CINCINNATI GAS & ELECTRIC COMPANY

### Summary of Estimated 2005 Capacity and Purchased Power Costs Incurred to Serve Native Load Customers <sup>1/</sup>

03078

#### Total Estimated Capacity Costs and Jurisdictional Allocation

Line No.	Description	June (A)	July (B)	August (C)	September	Total (E)	Line No.
1	Firm Liquidated Damages SX16 Energy Product	\$	\$	\$	\$	\$	1
2	Daily Fixed Strike Energy Firm Liquidated Damages Call Option	\$	\$	\$	\$	\$	2
3	Mid-Merit Gas Tolling Agreement	\$	\$	\$	\$	\$	3
4	Purchased Capacity	\$	\$	\$	\$	\$	4
5	Base Load Tolling Agreement with Must-Take Firm	\$	\$	\$	\$	\$	5
6	Total Applicable to Retail Customers	\$	\$	\$	\$	\$	6

<sup>1/</sup> Excludes Cost Recoverable Via the Fuel and Purchased Power Tracker.



CONFIDENTIAL

# THE CINCINNATI GAS & ELECTRIC COMPANY

CONFIDENTIAL PROPRIETARY  
TRADE SECRET

Firm Liquidated Damages \$ X 10 Energy Products  
For the Period June 1 - August 31, 2005

Line No.	Description (A)	Amount (B)	Description (C)	Amount (D)	Description (E)	Amount (F)	Line No.
1	Weekdays		Weekdays		August		1
2	Daily Hours		Daily Hours				2
3	Hours		Hours				3
4	MWhs Purchased		MWhs Purchased				4
5	MWhs Purchased		MWhs Purchased				5
6	Cost Per MWh		Cost Per MWh				6
7	Total Cost		Total Cost				7
	SUMMARY						
8	Estimated Costs Recoverable Via Rider SRT						8

03079

**CONFIDENTIAL**

**THE CINCINNATI GAS & ELECTRIC COMPANY**

### Daily Fixed Strike Energy Firm Liquidated Damages Call Option

Line No.	Description	Amount
	(A)	(B)
	June	
1	Days	
2	Daily Hours	
3	MWHs Optioned	
4	MWHs Subject to Reservation Charge	
5	Charge Per MWH	
6	Capacity Charge	
	(C)	(D)
	July	
1	Days	
2	Daily Hours	
3	MWHs Optioned	
4	MWHs Subject to Reservation Charge	
5	Charge Per MWH	
6	Capacity Charge	
	(C)	(D)
	August	
1	Days	
2	Daily Hours	
3	MWHs Optioned	
4	MWHs Subject to Reservation Charge	
5	Charge Per MWH	
6	Capacity Charge	
	(C)	(D)
	<b>SUMMARY</b>	
7	Total Daily Call Options Capacity Charge	

03080

03081

THE CINCINNATI GAS & ELECTRIC COMPANYMid-Merit Gas Tolling Agreement

Line No.	Description	Amount	Description	Amount	Line No.
(A)	(B)		(C)	(D)	
June			July		
1	MWs		MWs		1
2	Capacity Charge/Kw/Month		Capacity Charge/Kw/Month		2
3	CG&E's Capacity Charge		CG&E's Capacity Charge		3
4	Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT		Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT		4
August			September		
5	MWs		MWs		5
6	Capacity Charge/Kw/Month		Capacity Charge/Kw/Month		6
7	CG&E's Capacity Charge		CG&E's Capacity Charge		7
8	Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT		Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT		8
9	Total Tolling Agreement Capacity Charge				9

THE CINCINNATI GAS & ELECTRIC COMPANYPurchased Capacity

Line No.	Description	Amount	Description	Amount	Line No.
	(A)	(B)	(C)	(D)	
June			July		
1	MW's		MW's		1
2	Capacity Charge/Kw/Month		Capacity Charge/Kw/Month		2
3	CG&E's Capacity Charge		CG&E's Capacity Charge		3
4	Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT		Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT		4
August			September		
5	MW's		MW's	0	5
6	Capacity Charge/Kw/Month		Capacity Charge/Kw/Month	\$ -	6
7	CG&E's Capacity Charge		CG&E's Capacity Charge	\$ -	7
8	Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT		Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT	\$ -	8
9	Total Tolling Agreement Capacity Charge				9

**THE CINCINNATI GAS & ELECTRIC COMPANY****Base Load Tolling Agreement with Must-Take Firm Energy**

Line No.	Description	Amount	Description	Amount	Line No.
	(A)	(B)	(C)	(D)	
June			July		
1	MWs		MWs		1
2	Capacity Charge/Kw/Month		Capacity Charge/Kw/Month		2
3	CG&E's Capacity Charge		CG&E's Capacity Charge		3
4	Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT		Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT		4
August			September		
5	MWs		MWs		5
6	Capacity Charge/Kw/Month		Capacity Charge/Kw/Month		6
7	CG&E's Capacity Charge		CG&E's Capacity Charge		7
8	Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT		Estimated Monthly Costs Recoverable Via System Reliability Tracker - Rider SRT		8
9	Total Tolling Agreement Capacity Charge				9

**CONFIDENTIAL**

THE CINCINNATI GAS & ELECTRIC COMPANY  
Capacity Position for 2005

	2005											
	January	February	March	April	May	June	July	August	September	October	November	December
Supply												
Maintenance *												
Supply with Maintenance Considerations												
Native and Switched Peak Demand												
Call Option & RTP												
CG&E Native Load Capacity Position												
Margin												
Capacity Position @ 15% Reserve Margin												
Capacity Position @ 15% Reserve Margin without Maintenance												

(\*) - represents the maintenance schedule based upon economic and resource constraints. Also this uses the highest weekly volume during the month. The schedule has flexibility and can be adjusted for peak days.  
Please note: Switched customers are included in this analysis.

03084

**CONFIDENTIAL**

Attachment DFE 3

**CONFIDENTIAL PROPRIETARY  
TRADE SECRET**

**THE CINCINNATI GAS & ELECTRIC COMPANY**

**Summary of Actual 2005 Capacity and Purchased Power Costs  
Incurred to Serve Native Load Customers <sup>1/</sup>**

**Total Estimated Capacity Costs and Jurisdictional Allocation**

Line No.	Description	June (A)	July (B)	August (C)	September (D)	Total (E)	Line No.
1	Firm Liquidated Damages 5X16 Energy Product with Capacity Backing	\$	\$	\$	\$	\$	1
2	Daily Fixed \$75 Strike Energy Firm LD Call Option with Capacity Backing	\$	\$	\$	\$	\$	2
3	Daily Fixed \$100 Strike Energy Firm LD Call Option with Capacity Backing	\$	\$	\$	\$	\$	3
4	Daily Fixed \$75 Strike Energy Firm LD Call Option with Capacity Backing	\$	\$	\$	\$	\$	4
5	Mid-Merit Gas Tolling Agreement	\$	\$	\$	\$	\$	5
6	Regulatory Capacity Purchase	\$	\$	\$	\$	\$	6
7	Daily Fixed Call Option with Unit Outage Contingency	\$	\$	\$	\$	\$	7
8	Total Applicable to Retail Customers	\$	\$	\$	\$	\$	8

1 Excludes Cost Recoverable Via the Fuel and Purchased Power Tracker.

03085

CONFIDENTIALCONFIDENTIAL PROPRIETARY  
TRADE SECRETTHE CINCINNATI GAS & ELECTRIC COMPANYSummary of the 2005 SRT Cost Savings

CG&E SRT FILING - as filed		Volume	June	July	August	September	Total
Description - SRT Filing							
Firm Liquidated Damages 5X16 Energy Product							
Daily Fixed Strike Energy Firm Liquidated Damages Call Option							
Mid-Merit Gas Tolling Agreement @ \$3.00/kWh-mo							
Purchased Capacity							
Base Load Tolling Agreement with Must-Take Firm Energy							
Total Applicable to Retail Customers							
Did not purchase the Base Load Tolling with Must-Take Firm Energy							
Energy from Firm LD 5X16 extracted from SRT (separate energy and capacity)							
Net Cost after Adjustments for Products Changes							
(Savings)/Cost on Firm Liquidated Damages 5X16 Energy Product							
(Savings)/Cost on Daily Fixed Strike Energy Firm Liquidated Damages Call Option *							
(Savings)/Cost on Mid-Merit Gas Tolling Agreement **							
(Savings)/Cost on Purchased Capacity ***							
Net Cost after Adjustments for Products Amount/Price Changes							
Total Cost Savings							

(\*) Fixed Strike Call Options represent 375 MWs instead of 75 MWs in the filing

(\*\*) Tolling Agreement was 300 MWs instead of 350 MWs in the filing

(\*\*\*) Reg. Capacity Purchases represent 151 MWs instead of the 200 MWs in the filing

03086



03087

**CINERGY.**

CONFIDENTIAL PROPRIETARY  
TRADE SECRET

03088

**CINERGY.**

TRADE SECRET

03089

**CINERGY**

Apr. 5. 2005 1:17PM

No. 7037 P. 2

03090

**CINERGY.**

Attachment DFE 5

Apr. 5. 2005 1:18PM

03091

N

Attachment DFE 5  
Page 5 of 27

**CINERGY.**

03092 **CINERGY.**

03093

03094

[REDACTED]



03095

03096

03097

03098

---

**03099**

**03100**

---

**03101**

**03102**



03103

---

**03104**

---

03105

03106

---

**03107**

03108

03109

---

**03110**



03111

**03112**

**03113**

**Attachment DFE 5**  
**Page 27 of 27**

>

**CONFIDENTIAL PROPRIETARY  
TRADE SECRET**

Supplemental  
Attachment DFE 2  
Schedule C  
Page 1 of 1

RECEIVED-DOCKETING DIV

2005 SEP -1 PM 1:35

P000

**CONFIDENTIAL**

**THE CINCINNATI GAS & ELECTRIC COMPANY**  
Capacity Position for 2005

Updated on November 30, 2004

	2005	2006	January	February	March	April	May	June	July	August	September	October	November	December
Supply														
Maintenance *														
Supply with Maintenance Considerations														
Native and Switched Peak Demand														
Call Option & RTP														
CO&E Native Load Capacity Position														
Margin														
Capacity Position @ 15% Reserve Margin														
Capacity Position @ 15% Reserve Margin without Maintenance														

(\*) - represents the maintenance schedule based upon economics and resource constraints. Also this uses the highest weekly volume during the month. The schedule has flexibility and can be adjusted for peak days.

Please note: Switched customers prior to December 31, 2004 are not included in this analysis.

03114

CONFIDENTIAL PROPRIETARY  
TRADE SECRET

CONFIDENTIAL

Supplemental  
Attachment DFE 3

THE CINCINNATI GAS & ELECTRIC COMPANY

Summary of Actual 2005 Capacity and Purchased Power Costs  
Incurred to Serve Native Load Customers <sup>1/</sup>

Total Estimated Capacity Costs and Jurisdictional Allocation

Line No.	Description	June (A)	July (B)	August (C)	September (D)	Total (E)	Line No.
1	Firm Liquidated Damages SX16 Energy Product with Capacity Backing						1
2	Daily Fixed \$75 Strike Energy Firm LD Call Option with Capacity Backing						2
3	Daily Fixed \$100 Strike Energy Firm LD Call Option with Capacity Backing						3
4	Daily Fixed \$75 Strike Energy Firm LD Call Option with Capacity Backing						4
5	Mid-Merit Gas Tolling Agreement						5
6	Regulatory Capacity Purchase						6
7	Daily Fixed Call Option with Unit Outage Contingency						7
8	Total Applicable to Retail Customers						8

1 Excludes Cost Recoverable Via the Fuel and Purchased Power Tracker.

03115

CONFIDENTIAL PROPRIETARY  
TRADE SECRET

CONFIDENTIAL

Supplemental  
Attachment DFE 4

## THE CINCINNATI GAS & ELECTRIC COMPANY

### Summary of the 2005 SRT Cost Savings

CG&E SRT FILING - as filed		Volume	June	July	August	September	Total
Description - SRT Filing							
Firm Liquidated Damages 5X16 Energy Product							
Daily Fixed Strike Energy Firm Liquidated Damages Call Option							
Mid-Merit Gas Tolling Agreement @ \$3.00/kW-mo							
Purchased Capacity							
Base Load Tolling Agreement with Must-Take Firm Energy							
Total Applicable to Retail Customers							
Did not purchase the Base Load Tolling with Must-Take Firm Energy							
Energy from Firm LD 5X16 extracted from SRT (separate energy and capaci							
Net Cost after Adjustments for Products Changes							
(Savings)/Cost on Firm Liquidated Damages 5X16 Energy Product							
(Savings)/Cost on Daily Fixed Strike Energy Firm Liquidated Damages Call Option *							
(Savings)/Cost on Mid-Merit Gas Tolling Agreement **							
(Savings)/Cost on Purchased Capacity ***							
Net Cost after Adjustments for Products Amount/Price Changes							
Total Cost Savings							

(\*) Fixed Strike Call Options represent 275 MWs instead of 75 MWs in the filing

(\*\*) Tolling Agreement was 300 MWs instead of 350 MWs in the filing

(\*\*\*) Reg. Capacity Purchases represent 251 MWs instead of the 200 MWs in the filing

03116

03117

RECEIVED-DOCKETING DIV

139

2005 SEP 23 AM 9:17

PUCO

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

(The following transcript is  
confidential and under seal.)

**ORIGINAL**

1 MR. COLBERT: Thank you, your Honor.

2 ATTORNEY EXAMINER FARKAS: Okay.

3 You may proceed.

4 Q. (By Ms. Hotz) Mr. Esamann, will you  
5 please refer to Attachment DFE-1, Schedule B,  
6 page 1 of 6.

7 ATTORNEY EXAMINER KINGERY: That was  
8 schedule what? I'm sorry. B?

9 MS. HOTZ: 1 of 6, yes.

10 A. I'm sorry, DFE-1 or 2?

11 Q. DFE-1.

12 A. Okay. I have it.

13 Q. What is this document?

14 A. DFE-1, Schedule B, page 1 of 6?

15 Q. Yes.

16 A. This is a document which estimates  
17 the costs of various products that we -- we  
18 propose would fit with our portfolio well at  
19 this point that would provide us with the  
20 necessary capacity and/or energy products for  
21 the summer of 2006.

22 Q. How many megawatts of capacity does  
23 CG&E have available to it through these  
24 products?



1           A.    You could refer back to Attachment  
2   DFE-1, Schedule C, page 1 of 1, and that is a  
3   summary of the analysis that I explained  
4   earlier that we go through and near the bottom  
5   there is a line that says "Capacity position @  
6   15 percent reserve margin." There would be  
7   products purchased in the months of May, June,  
8   July, August, and September in order to meet  
9   our -- the needs of our system. So they would  
10  fill those shortfalls in those particular  
11  months.

12           Q.    So how many megawatts is that?

13           A.    Well, for the month of May -- excuse  
14  me. Let me refer to you DFE-1, Schedule B,  
15  page 2 of 6 and then each of the pages  
16  subsequent to that will show you by product the  
17  amount of megawatts by month that are being  
18  purchased.

19           Q.    Okay. That's good. Could you add  
20  those all up and indicate what -- would it take  
21  you a long time to do that?

22           A.    No. By month?

23           Q.    Yes, please.

24           A.    Well, for May the only product that

1 is projected for May is on Schedule B, page 3  
2 of 6 and that is [REDACTED] megawatts. That's a  
3 Mid-Merit Gas Tolling Agreement. In June -- in  
4 June the total of the products purchased again  
5 on schedule B, page 2 of 6 through 6 of 6 sums  
6 to [REDACTED] megawatts. And I believe July and  
7 August would also be [REDACTED] megawatts.  
8 September sums to [REDACTED] megawatts.

9 Q. Okay. Thank you for doing that.  
10 Could you please turn to Supplemental  
11 Attachment DFE-3.

12 A. Which one again? I'm sorry.

13 Q. Supplement Attachment DFE-3.

14 A. Okay.

15 Q. What is this document?

16 A. This document reflects the actual  
17 products purchased for reliability needs for  
18 the summer of 2005 in order to meet our load.  
19 These are again the actual products purchased  
20 and the costs of each of those products of the  
21 capacity component of that cost.

22 Q. What does the term native load  
23 customer on this document mean?

24 A. Native load customers would be those

1 customers that we have on a retail basis that  
2 we have an obligation to serve through the  
3 market-based standard service offer.

4 Q. Okay. When you go back to DFE-1,  
5 Schedule B, page 1 of 6, I notice you have  
6 incurred to serve POLR load customers. How's  
7 come did you say POLR load customers in that  
8 schedule and native load customers in  
9 Attachment DFE-3?

10 A. Okay. DFE-1, Schedule B, page 1 of  
11 6?

12 Q. Yes.

13 A. That is for 2006.

14 Q. Uh-huh.

15 A. So we are proposing to purchase for  
16 the customers that we provide -- we project  
17 will provide service to through CG&E. And we  
18 are also providing capacity purchases for those  
19 customers in which we have the provider of last  
20 resort obligation to the extent a CRES supplier  
21 would default or otherwise customers who would  
22 switch back to us. So this is for 2006. The  
23 document that you were at before, DFE-3, is  
24 the -- are the actual amounts that we expended

1 for the summer months of 2005 so --

2 Q. So the distinction is actual.

3 A. 2005 actual, DFE-1, Schedule B, 1 of  
4 6, is 2006 projected.

5 Q. Okay.

6 A. Right.

7 Q. Now, let's go through each of these  
8 products that you have here on Supplemental  
9 Attachment DFE-3 and I would like to know how  
10 many times or how frequently you exercised  
11 these products during 2005.

12 A. Okay.

13 Q. Could you tell me for line 1,  
14 please.

15 A. Line 1 is -- is purchasing capacity  
16 only to back up a -- a 5-by-16 energy product  
17 in the marketplace just to ensure that we have  
18 capacity in place behind that product so this  
19 is not an exercisable situation. It's a  
20 purchase -- an outright purchase of capacity to  
21 back up the 5-by-16 energy product that we  
22 purchased.

23 Q. Was it ever used?

24 A. These are must take -- this is a

1 must take product so it's taken every day in  
2 the months that are shown here, June, July,  
3 August, September, and the energy component  
4 runs through the FPP.

5 Q. So was the capacity used?

6 A. Well, the capacity is there that we  
7 have identified as a backup to this product.  
8 So we're buying a 5-by-16 product in the  
9 marketplace from someone that --

10 Q. Right.

11 A. -- may or may not have a generation  
12 source. They are just market participants.

13 Q. Right.

14 A. And what we have done we've went  
15 ahead and bought that product but to ensure we  
16 have the capacity to the extent that this  
17 product wouldn't show up, whoever was in the  
18 market didn't deliver this product, we wanted  
19 to ensure we could still go to an asset and say  
20 actually we want you to produce power for us at  
21 whatever price it takes to produce it. We use  
22 two facts to back up, a capacity and component.

23 Q. Did you ever use either of those?

24 A. Capacity stands as backup to ensure

1       you have a source to get this from. The 5 by  
2       16s is something we must take.

3             Q.     So you took it. Did you use it?

4             A.     Yes, yeah, we used it, yes.

5             Q.     How many times did you use it?

6             A.     Well, we used it. In this case you  
7       must take it so when you buy this product, you  
8       are buying energy and you are putting it into  
9       your portfolio each and every day.

10            Q.     Did you use it to serve the native  
11       load customers?

12            A.     Yes, yes. It was bought for our  
13       native load customers.

14            Q.     Uh-huh. And so it was used?

15            A.     Yes.

16            Q.     And how -- how was it used?

17            A.     It was used to provide energy to  
18       those customers. It just became part of our  
19       portfolio just like a generating plant would  
20       become part of our portfolio.

21            Q.     Okay. How about this "daily fixed  
22       \$75 strike energy firm LD call option with  
23       capacity backing," was that ever used?

24            A.     Yes. That's a different product

1 and, again, in this case we ensure that there  
2 is capacity behind that but then we buy a  
3 market product which is a call option with a  
4 \$75 strike price and to the extent that we  
5 would strike that product at \$75, that would be  
6 done on behalf of our native load customer.

7 Q. Did you strike it?

8 A. Yes.

9 Q. How many times did you strike it?

10 A. My memory of that is about [REDACTED] times  
11 across the summer months.

12 Q. And if you did strike that, how long  
13 would it be used?

14 A. That product is -- typically these  
15 products, and I think this one is that way, a  
16 day-ahead call option for 16 hours the  
17 following day, 16 peak hours.

18 Q. Okay. And under No. 3 did you  
19 strike the daily fixed \$100 option?

20 A. Yes, we did. We struck it less  
21 frequently and, again, subject to check I think  
22 that number is [REDACTED] times we struck it  
23 during the summer.

24 Q. Okay. How about No. 4, the daily

1 fixed \$75 strike energy?

2 A. That's a similar product, exactly  
3 the same product as on line 2. This would have  
4 just come from a different supplier so that's  
5 why it's listed out separately.

6 Q. So that's included in the [REDACTED] times?

7 A. Those two together, yes.

8 Q. Okay. How about this "Mid-Merit Gas  
9 Tolling Agreement"?

10 A. That's a -- an agreement we entered  
11 into to pay a capacity right, a capacity  
12 premium on a per kilowatt month basis to a --  
13 an owner of a combined cycle gas plant. And  
14 then that gave us the right to buy gas either  
15 on the market or on a forward basis to burn  
16 through that and produce electricity so toll  
17 the gas through that plant is why it's called a  
18 tolling arrangement.

19 Q. Did you use that gas ever?

20 A. Yes. We used this [REDACTED] It  
21 was a good heat rate product. And it was also  
22 we actually were able to purchase this at a  
23 very good price in the marketplace, so we used  
24 that [REDACTED] I don't know the number of times



1 that was offered into the market but actually  
2 think we have to offer it every day. I don't  
3 know how many times it cleared the market.

4 Q. So you -- so, now, say that again,  
5 please.

6 A. We have to offer this every day. We  
7 are a network service provider, and as a  
8 result, we have to offer that into the  
9 marketplace. It may or may not clear the  
10 market, but we're obligated to offer that in at  
11 the economic parameters of that particular  
12 year.

13 Q. So into MISO or into --

14 A. Yes, into MISO.

15 Q. Into MISO?

16 A. Right.

17 Q. So you -- so you used it, but it  
18 wasn't included in the dispatch all the time.

19 A. We used it, and when we did use it,  
20 it would be included in our dispatch so, again,  
21 you have other units on our system and  
22 depending upon how those units are performing  
23 at any given day or hour, we may or may not  
24 need to offer these. We may have better

1 economic choices available to us just from our  
2 own generation. If load is lower in a  
3 particular day, we may not need any of these  
4 products and that's why you see in some cases  
5 limited number of strikes on those things.  
6 It's an economic choice as you have information  
7 in the moment about load and available  
8 generation or other market sources.

9 Q. So how often did you -- did you  
10 offer No. 5 into the market?

11 A. Well, as I said, I think we offered  
12 it every day. As a MISO market participant, we  
13 are required to do that as a network service  
14 provider, but I don't know how many times it  
15 cleared the market.

16 Q. What percentage would you guess?

17 A. I don't know.

18 MR. COLBERT: Objection. She's  
19 asking the witness to speculate.

20 MS. HOTZ: Well, he is responsible  
21 for planning this for the future.

22 ATTORNEY EXAMINER FARKAS: I will  
23 let him make an educated guess if he knows.

24 A. I don't have -- I don't know the

1 information here as to how many times this was  
2 cleared in the marketplace. I don't know that.

3 Q. Okay. Under No. 6 how often did you  
4 use this product?

5 A. This product is strictly capacity.  
6 This is, again, allows us to buy certain  
7 products in the marketplace but to make sure  
8 that we still have purchased enough capacity, a  
9 generating source that to the extent those  
10 market products aren't delivered on that, we  
11 can -- we can go to a generator to actually get  
12 the energy we need. This is important because  
13 what's left out or forgotten sometimes you  
14 can't store electricity and so as a result, we  
15 have to generate that electricity  
16 instantaneously. We can participate in  
17 financial markets to get products that help us  
18 to hedge our risks and our exposure, but when  
19 the day is done, we have to deliver physical  
20 electricity to our customers and this allows us  
21 the ability to know that to the extent some of  
22 these market products, you know, don't deliver  
23 or get cut in some way, that we have the  
24 capacity secured deliverable into MISO that

1 we can generate the energy from those sources.

2 So this is just a backup really.

3 Q. So did you -- so you purchased the  
4 fuel yourself for this?

5 A. No. In these cases we would have  
6 bought the capacity and then had the right to  
7 take the energy at market prices.

8 Q. Okay. How often did you do that?

9 A. Well, we [REDACTED]  
10 [REDACTED]

11 And so as a result, we just -- we were able to  
12 meet our reserve requirements with MISO and for  
13 planning purposes with this capacity, but in  
14 the end the energy was essentially in the MISO  
15 market that we purchased it from.

16 Q. Okay. So it [REDACTED]  
17 [REDACTED]

18 A. [REDACTED] We were buying market energy  
19 and this was just a capacity backup for that.

20 Q. Okay. Now, No. 7, "daily fixed call  
21 option with unit outage contingency."

22 A. Yeah. This is a very similar  
23 product to the options above. The difference  
24 here is that one of the largest contingencies

1 that we have to plan for and one of the largest  
2 risks on our system is out -- our outages that  
3 are unplanned, so we certainly plan and take  
4 outages and but these are mechanical beasts and  
5 they do break down and they unfortunately break  
6 down sometimes at the most inopportune times  
7 for us.

8 This product was a call option, but  
9 it was predicated on a certain number of  
10 outages occurring over the course of the summer  
11 before we would have basically a financial  
12 payment back from this supplier, and we did  
13 not -- we did not get fortunately to an outage  
14 level in which we would get financial payment  
15 back from this supplier.

16 Q. [REDACTED]  
17 [REDACTED]

18 A. We were -- our generating units  
19 performed very well this summer which was good,  
20 and so subsequently this product was [REDACTED]  
21 [REDACTED] from an energy perspective.

22 Q. Okay. Can you provide the record  
23 with information as to how often the Mid-Merit  
24 Gas Tolling Agreement was accepted into the

1 MISO dispatch?

2 A. Certainly. I don't have that  
3 information with me but.

4 MS. HOTZ: Could you provide that as  
5 a late-filed exhibit?

6 MR. COLBERT: Well, we can provide  
7 it to you.

8 ATTORNEY EXAMINER FARKAS: Are you  
9 going to mark that as an exhibit --  
10 confidential exhibit then?

11 MR. COLBERT: Well, we would submit  
12 it to OCC, and it would be a confidential  
13 document, so from our standpoint it would be  
14 under seal if they offer it into the case.  
15 It's up to them if they want to offer it in.

16 ATTORNEY EXAMINER FARKAS: Okay.

17 MR. COLBERT: We would think about  
18 our response to that. I'm not sure what the  
19 relevancy of it is, but we can think about  
20 that. I don't have any objection to it  
21 offhand.

22 MS. HOTZ: Your Honor, I think it's  
23 relevant because it goes to whether or not CG&E  
24 is overpurchasing.

1 ATTORNEY EXAMINER KINGERY: Okay.

2 Well, I would say you need to enter it as an  
3 exhibit if you want to.

4 MS. HOTZ: As a late-filed exhibit?

5 ATTORNEY EXAMINER FARKAS:

6 Late-filed exhibit.

7 MS. HOTZ: Under seal?

8 ATTORNEY EXAMINER FARKAS: Under  
9 seal.

10 MS. HOTZ: Okay.

11 Q. What was the approximate average  
12 cost per million -- per megawatt of these  
13 options that were purchased in 2005 for 2005?

14 A. I don't know what the average was.  
15 It varied by product. I haven't calculated the  
16 average.

17 Q. But you could probably calculate it  
18 from the schedules that you gave us and the  
19 information you gave us for the megawatts that  
20 were available per month?

21 A. Well, again, remember those  
22 schedules were for the projected 2006 levels  
23 that we walked through.

24 Q. Oh, okay.

1           A.    So that's different than what we  
2           were referring to.

3           Q.    Okay.

4           A.    These would be supported by purchase  
5           contracts that I believe may have been provided  
6           under seal as well.

7           Q.    Okay.  Yeah.  The Mid-Merit Gas  
8           Tolling Agreement is the most expensive of the  
9           six products purchased.  Why is that?

10          A.    More than likely, and I think it  
11          would fit with this product, the more a  
12          capacity purchase -- two things could be going  
13          on.  More capacity purchased would be in the  
14          money.  It would cost you more so an example  
15          would be a \$100 strike price call option should  
16          cost you less for the option premium than would  
17          a \$75 strike option and in the case of a  
18          tolling arrangement if it's a very -- a very  
19          good heat rate plan, the supplier could demand  
20          more for that.

21                    The second thing is that it could be  
22          just sheer number of megawatts which I suspect  
23          this has an impact on this as well.

24          Q.    What is the cheapest per megawatt of



1 the six products listed?

2 A. Well, the least expensive product  
3 would be the regulatory capacity purchase where  
4 we have bought other products with some kind of  
5 an energy feature to fit our portfolio but  
6 where we are attempting to just ensure that we  
7 have physical capacity to back up those  
8 products those tend to be less expensive  
9 because we are not asking for any kind of a  
10 fixed price. We're paying for the right to  
11 have that capacity, but generally we are  
12 having -- we're paying for that right at a  
13 market price. So those tend to be less  
14 expensive.

15 MS. HOTZ: I'm just checking to make  
16 sure I didn't have any more confidential. You  
17 don't mind discussing the products; it's just  
18 the dollars associated in the megawatts?

19 MR. COLBERT: Yes, I believe that's  
20 all that is redacted. That's the numbers that  
21 are redacted.

22 MS. HOTZ: I don't have any more  
23 confidential questions.

24 ATTORNEY EXAMINER FARKAS: Does

1 anyone else have any confidential questions?

2 Mr. Smith, do you have any on  
3 this -- on the confidential?

4 MR. SMITH: Not intentionally, no.

5 ATTORNEY EXAMINER FARKAS: Okay.

6 Well, let's -- then this portion of the record  
7 here forward will be recorded publicly.

8 MR. COLBERT: Your Honor, before we  
9 do that if I might discuss the admissibility of  
10 the exhibit that they've asked for and we don't  
11 have a problem providing the information but  
12 this was the first time it was asked to be  
13 admitted as relevant and we would object to  
14 that in that the question goes to the 2005  
15 purchases. The 2005 level of the SRT was  
16 approved by the Commission in another case, in  
17 03-93, and the only thing that this schedule  
18 does is show that we actually made purchases  
19 for substantially less than the amount that was  
20 approved. And it goes to how that flows  
21 through in rates so that the price charged to  
22 customers is substantially less than the amount  
23 approved by the Commission there can be no  
24 relevance as to whether or not we purchased an

1 appropriate amount in 2005.

2 That's been decided so to the extent  
3 that's the purpose of the exhibit CG&E would  
4 object.

5 MS. HOTZ: Your Honor, the reason  
6 why the Commission set forth this hearing is to  
7 establish -- is to listen to interested  
8 parties' concerns about the SRT. This is the  
9 first hearing that there has been on the SRT  
10 and we believe that past experience with the  
11 SRT is very relevant to how it's used in the  
12 future.

13 ATTORNEY EXAMINER KINGERY: We are  
14 going to allow the document to be admitted but  
15 with the understanding that we're not using it  
16 for any discussion of the appropriate level of  
17 the 2005 SRT as Mr. Colbert has pointed out  
18 that was set. But we certainly can use that  
19 information to discuss appropriate levels for  
20 the future. Does that make sense?

21 MS. HOTZ: Thank you.

22 MR. COLBERT: Thank you, your Honor.

23 ATTORNEY EXAMINER FARKAS: Let's go  
24 off the record.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

(Discussion off the record.)

(The following testimony is on the  
public record.)

**CONFIDENTIAL**

**REPORT OF THE FINANCIAL AND  
MANAGEMENT/PERFORMANCE  
AUDIT OF THE FUEL AND  
PURCHASED POWER RIDER OF  
DUKE ENERGY - OHIO**

OCTOBER 12, 2006

**CONFIDENTIAL**

*Prepared for:*  
*Public Utilities Commission of Ohio*  
*180 East Broad Street*  
*Columbus, OH 43215-3793*

*Prepared by:*  
*Energy Ventures Analysis, Inc.*  
*1901 N. Moore Street, Suite 1200*  
*Arlington, VA 22209-1706*  
*(703) 276-8900*

*Larkin & Associates PLLC*  
*15728 Farmington Road*  
*Livonia, MI 48154*  
*734/522-3420*

03140

CONFIDENTIAL

## Table of Contents

INTRODUCTION.....	1-1
Background Of The CG&E RSP .....	1-1
Initial Audit Of The Fuel And Purchased Power Factor .....	1-2
Follow-Up Audit Of The Fuel And Purchased Power Factor .....	1-5
Major Management Audit Findings .....	1-5
Management Audit Recommendations .....	1-9
FUEL PROCUREMENT AUDIT .....	2-1
Plant Descriptions.....	2-1
Overview .....	2-1
Management And Organization.....	2-7
Policies And Procedures .....	2-8
Inventory Management .....	2-9
Physical Inventory .....	2-10
Coal Procurement.....	2-11
Commercial Model .....	2-12
Coal Management.....	2-12
Coal Solicitations .....	2-15
Prior Audit Period High Sulfur Coal Solicitation .....	2-15
Audit Period Solicitations .....	2-17
Procurement Administration.....	2-19
Spot Coal Procurements .....	2-20
Contract Review .....	2-22
.....	2-24
.....	2-26
.....	2-27
.....	2-28
.....	2-29
.....	2-30
.....	2-30
.....	2-31
.....	2-31
.....	2-32
.....	2-32
.....	2-33
.....	2-34
ENVIRONMENTAL AUDIT .....	3-1
Environmental Requirements .....	3-1
Previous Environmental Audit .....	3-2
Emission Banks .....	3-4
SO <sub>2</sub> Protocol .....	3-4
SO <sub>2</sub> Allowance Trading .....	3-5
POWER PLANT PERFORMANCE .....	4-1
Benchmarking.....	4-1
Findings.....	4-4
FUEL, ECONOMY PURCHASED POWER AND EMISSION ALLOWANCE COMPONENT (FPP COMPONENT) AUDIT .....	5-1

Introduction And Background .....	5-1
Requested Information .....	5-3
Interviews And Site Visit .....	5-3
Chapter Organization .....	5-3
Certificate Of Accountability Of Independent Auditors .....	5-5
Determination OF FPP Rates in DE-Ohio's Filings For The Period Under Review....	5-6
Third Quarter 2005.....	5-6
Fourth Quarter 2005 .....	5-8
First Quarter 2006.....	5-10
Second Quarter 2006.....	5-13
Third And Fourth Quarter 2006— Reconciliation Adjustments Applicable To January 2005 Through June 2006.....	5-16
Minimum Review Requirements.....	5-17
Review Related To Coal Order Processing.....	5-21
Purchase Orders Aand Approved Purchase Requisitions.....	5-21
Invoice And Voucher Procedures.....	5-22
BTU Adjustments.....	5-22
Fuel Ledger .....	5-23
Freight And Barge Vouchers .....	5-24
Fuel Analysis Reports.....	5-24
Retroactive Escalations .....	5-25
Review Related To Station Visitation And Coal Processing Procedure .....	5-25
Review Related To Fuel Supplies Owned Or Controlled By The Company .....	5-28
Review Related To Purchased Power.....	5-28
Review Related To Service Interruptions And Unscheduled Outages .....	5-29
FPP Filings, Supporting Workpapers And Documentation.....	5-30
Active Management.....	5-31
Accounting Detail.....	5-33
Changes To Fuel, Purchased Power Procurement And Emission Allowance Procurement.....	5-34
Internal Audits.....	5-36
1. Commercial Fuels Management Review .....	5-36
2. Emission Allowance Review .....	5-37
3. MISO Audit .....	5-38
Memorandum Of Findings.....	5-39
Recommendations.....	5-39
SYSTEM RELIABILITY TRACKER .....	6-1
Background .....	6-1
2006 Rider SRT .....	6-3
2007 Rider SRT Proposal.....	6-4
Evaluation of DE-Ohio's 2007 Rider SRT Proposal.....	6-4



## List of Exhibits

Exhibit 1-1. List Of Interviews.....	1-5
Exhibit 2-1. DE-Ohio Steam Electric Generating Capacity.....	2-2
Exhibit 2-2. DE-Ohio Combustion Turbines .....	2-2
Exhibit 2-3. DE-Ohio Coal Purchases During Audit Period .....	2-3
Exhibit 2-4. DE-Ohio Coal Purchases During Previous Audit .....	2-3
Exhibit 2-5. Comparison Of Audit Period Performance.....	2-4
Exhibit 2-6. Historic Spot Market Coal Prices.....	2-4
Exhibit 2-7. First Half 2006 Coal Expenses For DE-Ohio And Nearby Utilities.....	2-5
Exhibit 2-8. SO <sub>2</sub> Adjusted Delivered Prices For DE-Ohio And Nearby Utilities (\$/MMBTU).....	2-5
Exhibit 2-9. Historical Coal Purchase Costs For DE-Ohio And Nearby Utilities .....	2-6
Exhibit 2-10. Fuel Procurement In CG&E .....	2-7
Exhibit 2-11. DE-Ohio Inventory Levels During Audit Period .....	2-9
Exhibit 2-12. DE-Ohio Inventory Levels Compared To Industry Levels .....	2-10
Exhibit 2-13. Physical Inventory Results For Miami Fort And Zimmer .....	2-11
Exhibit 2-14. DE-Ohio Coal Position as Of June 30, 2005 and March 31, 2006.....	2-12
Exhibit 2-15. Margins Generated Through Active Management Of Coal Hedges.....	2-13
Exhibit 2-16. Cost Of Financial and Physical Swaps During Audit Period .....	2-15
Exhibit 2-17. Spot Coal Agreements .....	2-20
Exhibit 2-18. DE-Ohio Long-Term Coal Supply Agreements .....	2-23
Exhibit 2-19. Contract Allocations To ULHP For East Bend Per DE-Ohio (Tons).....	2-23
Exhibit 2-20. [REDACTED] .....	2-25
Exhibit 2-21. [REDACTED] .....	2-25
Exhibit 2-22. [REDACTED] .....	2-26
Exhibit 2-23. [REDACTED] .....	2-27
Exhibit 2-24. [REDACTED] .....	2-28
Exhibit 2-25. [REDACTED] .....	2-29
Exhibit 2-26. [REDACTED] .....	2-30
Exhibit 2-27. [REDACTED] .....	2-30
Exhibit 2-28. [REDACTED] .....	2-31
Exhibit 2-29. [REDACTED] .....	2-32
Exhibit 2-30. [REDACTED] .....	2-32
Exhibit 2-31. [REDACTED] .....	2-33
Exhibit 2-32. [REDACTED] .....	2-33
Exhibit 2-33. [REDACTED] .....	2-34
Exhibit 2-34. [REDACTED] .....	2-35
Exhibit 3-1. DE-Ohio Phase I Compliance Strategy .....	3-2
Exhibit 3-2. DE-Ohio EA Bank Through Audit Period .....	3-4
Exhibit 3-3. Summary Of 2006 EA Trades During Audit Period .....	3-5
Exhibit 3-4. SO <sub>2</sub> Emission Allowance Prices.....	3-6
Exhibit 4-1. Ohio Utility Coal-Fired Power Plant Heat Rates For Audit Period.....	4-2
Exhibit 4-2. Ohio Utility Coal-Fired Power Plant Capacity Factors For Audit Period....	4-2
Exhibit 4-3. MISO Coal-Fired Power Plant Heat Rates During Audit Period.....	4-3
Exhibit 4-4. MISO Coal-Fired Power Plant Cumulative Generation By Heat Rate For Audit Period.....	4-4
Exhibit 5-1. DE-Ohio's Third Quarter 2005 FPP Filing .....	5-7
Exhibit 5-2. DE-Ohio's Fourth Quarter 2005 FPP Filing.....	5-9
Exhibit 5-3. DE-Ohio's First Quarter 2006 FPP Filing .....	5-12

Exhibit 5-4. DE-Ohio's Second Quarter 2006 FPP Filing .....	5-15
Attachment 5-1. Reconciliation Adjustments .....	5-42
Attachment 5-2. Documents Requested June 28, 2006. ....	5-58
Attachment 5-3. Documents Requested July 6, 2006. ....	5-63
Exhibit 6-1. Summary Of H12006 SRT Capacity and Purchased Power Costs .....	6-3
Exhibit 6-2. Comparison Of June 2005 and June 2006 SRT Costs .....	6-4

## 1

## INTRODUCTION

Energy Ventures Analysis, Inc. (EVA) was selected by the Public Utilities Commission of Ohio (PUCO) to review the reasonableness of the fuel and economy purchased power (FPP) component of the market based rates of Cincinnati Gas & Electric (CG&E) division of Duke Energy Ohio (DE-Ohio) through an independent audit. EVA, with its subcontractor Larkin & Associates (Larkin), performed the initial financial and management/performance audit on October 5, 2005 for the period beginning January 1, 2005 and ending June 30, 2005. This audit reviews the fuel procurement activities in the subsequent period beginning July 1, 2005 and ending June 30, 2006.

### Background Of The CG&E RSP

Ohio Law, Senate Bill No. 3 (SB3), enacted in 1999 required restructuring of the electric utility industry and provided for a five year market development period. On August 31, 2000, the Commission approved CG&E's transition plan, which provided for a market development period ending no earlier than December 31, 2005 for residential customers. The market development period for other customers classes would end when 20 percent of the load of each such class had switched electricity providers. The transition plan provided for CG&E to recover regulatory transition charges through 2008 for residential customers and 2010 for nonresidential customers.

When the Commission realized the "fully competitive market (did) ... not develop as quickly as was envisioned by lawmakers in Senate Bill 3", it looked to how it could "help prevent electric customers from facing 'sticker shock' from electric rates when the

market development period ends". The outcome was the development of rate stabilization plans (RSP's) that would insure the continuation of "stable, competitive rates". The PUCO has approved RSP's for American Electric Power, Dayton Power and Light, FirstEnergy, as well as CG&E.

As noted above, the CG&E RSP was developed at the request of the Commission. A stipulation on the CG&E RSP was negotiated by many of the parties to the proceeding. Among other things, the stipulation provided that "CG&E would calculate the avoidable fuel cost component of the price to compare by using the average costs of fuel consumed at CG&E's plants and economy purchased power costs, for all sales in CG&E's certified service territory. CG&E would adjust its fuel costs quarterly and would calculate the fuel costs to be part of the price to compare by using a baseline of the fuel costs approved by the Commission in Case No. 99-103-EL-EFC. In no instance would the fuel cost portion of the price to compare be reduced."<sup>1</sup>

As noted above, the annual review of the FPP was included in the original Opinion and Order. The clarification that the review was to determine the "reasonableness" of the FPP was part of the Entry on Rehearing. Also part of the Entry on Rehearing was the clarification that the "amounts to be recovered for fuel, economy purchased power, and EAs are those in excess of amounts authorized in CG&E's last electric fuel component proceeding". (Entry on Rehearing, Finding (13)(c))

## **Initial Audit Of The Fuel And Purchased Power Factor**

EVA was selected to perform both the initial and follow-up reviews of the FPP. The Request for Proposal indicated that there were no longer specific statutory requirements.<sup>2</sup> The Commission did indicate that it would be appropriate to follow the general guidance that had been provided for the Electric Fuel Component audits which was contained in Appendix D and Appendix E to Chapter 4901:1-11, O.A.C. CG&E also indicated that it believed that the independent review would be "EFC-like".

<sup>1</sup> Opinion and Order in Case No. 03-93-EL-ATA et al.

<sup>2</sup> These were eliminated with SB3.

There are major differences between the EFC and the FPP which made an EFC-like review somewhat difficult. One major difference was that the EFC included all costs, while the FPP was intended to simply capture the difference between current and baseline costs. A second major difference related to the fact that the FPP relates to only native customers and is for up to four years. As a result, CG&E viewed the related fuel and emission allowance commitments differently. A third major difference related to the annual nature of the EFC, which provided continuity to the process. The last EFC audit of the CG&E was performed in 1999 and the company described therein bears little resemblance to the CG&E of today. More importantly, however, is the fact that during this transition period, CG&E operated as a deregulated entity. The re-entry into regulatory oversight with respect to the FPP created a host of issues related to both the allocation of utility assets and CG&E's approach to fuel procurement.

CG&E was required to make a number of decisions in computing the FPP. Because the order did not lay out the specifics, CG&E believed that it had the license to evaluate and select which approach to use. Not surprisingly, the range of alternative approaches was large and CG&E's elections had very significant ratepayer impacts. Compounding the auditing problems, CG&E continuously modified its approach to many of these items.<sup>3</sup>

EVA along with its subcontractor, Larkin and Associates, prepared and filed a Report of the Financial and Management/Performance Audit of the Fuel and Purchase Power Rider of the Cincinnati Gas & Electric Company on October 7, 2005 in which many issues were raised regarding the appropriateness of CG&E allocations. Following a hearing and the filing of briefs and reply briefs, the parties to the preceding negotiated a stipulation which was approved by the Commission. Included in the stipulation were the following provisions related to fuel acquisition:

- A. The parties agree that, for each future FPP audit period, CG&E shall prepare (1) documentation of coal purchases, by plant, by supply, by month, including coal quality and price; (2) documentation of coal contract performance summaries indicating tons ordered, tons received, tons shipped to synfuel plants, quality, quality deviations from contract specifications, and actions taken by the utility to address non-performance; and (3) documentation of generation, and coal burn, by plant, during each FPP audit period.

<sup>3</sup> For example, the fourth quarter FPP reverses a credit for the monetization of a 2005 coal hedge that CG&E had previously flowed through the FPP.

- B. The parties agree that, as part of the next FPP audit, the FPP auditor will perform a complete review of the five high sulfur coal contracts entered into by CG&E during the FPP audit period of January 1, 2005, through June 30, 2005, but which were not provided to the auditor for review during the prior audit period. Nothing in the stipulation will deprive any party of its rights with regard to such review.
- C. The parties agree that CG&E will develop a methodology for allocating fuel costs or fuel contracts to the Union Light Heat & Power Company (ULH&P) following the transfer of certain of its generating units. That methodology will be reviewed in the next FPP audit.
- D. The parties agree that all issues regarding pre-2005 coal contract sales are resolved by the stipulation and that no change to the FPP rate is necessary related to this issue. The parties also agree that no allocation, as between FPP customers and non-FPP customers, of the benefits and costs associated with such sales is necessary. This issue is resolved by the stipulation for the entire RSP period, from January 1, 2005 through December 31, 2008. The parties agree to discuss criteria for the equitable assignment of benefits and costs of CG&E's coal contract sales margins regarding contracts executed on or after January 1, 2005. If the parties are unable to agree upon such criteria, then the FPP auditor shall review the criteria in the next FPP audit. In addition, the FPP auditor shall review the criteria in the next FPP audit. In addition, the FPP auditor shall review the application of such criteria and verify the equitable assignment to FPP customers of the benefits and costs of coal contract sales executed on or after January 1, 2005.
- E. The parties agree that CG&E will fully document any intra-company coal transactions, including those that occurred during the FPP audit period of January 1, 2005, through June 30, 2005, and will receive the same type of management approvals as CG&E requires relative to the purchase of emission allowances from affiliates. The required documentation must show that intra-company purchases cost no more than the market alternatives.
- F. The parties agree that CG&E's FPP customers will receive the benefits of the reduced fuel costs associated with Tyrone Synfuel, but not other revenues or costs associated with Tyrone Synfuel. The agreement with regard to this issue is intended to apply to the entire RSP period, from January 1 2005, through December 31, 2008, but does not apply to any other synfuel arrangements.
- G. The parties agree that as a resolution of the specified recommendation of the auditor, CG&E will economically manage fuel, power, and emission allowances forward for the balance of the RSP period.

## Follow-Up Audit Of The Fuel And Purchased Power Factor

EVA and its subcontractor Larkin & Associates conducted a follow-up audit on the Fuel and Purchased Power Rider of DE-Ohio<sup>4</sup> for the period July 1, 2005 through June 30, 2006. While this audit period included four quarters, as opposed to the two quarters included in the initial audit, it was intended to be a follow up audit such that the auditors could rely on findings from the first audit. Like the first audit, the follow-up audit was conducted through a combination of document review, site visits and interviews. The site visits included the DE-Ohio headquarters in Cincinnati and the Beckjord power plant.

EVA and Larkin conducted interviews with the individuals in the positions listed in Exhibit 1-1. Larkin conducted additional interviews as listed in Section 5.

### Exhibit 1-1. List Of Interviews

Position
President - Commercial Asset Management
Vice President - Rates (Ohio & Kentucky)
Rate Coordinator
Rate Analyst
Manager - Generation & Dispatch Ops
Sr. Financial Analyst
Manager - Accounting
Manager - Accounting
Manager - Power Scheduling
Director - Portfolio Management
Vice President - Commercial Analytics
Analyst - Portfolio Management
Desk Head - Coal Operations
Manager - Fuel Supply
Manager - Origination

## Major Management Audit Findings

1. The Cinergy division of assets into regulated and unregulated effective January 1, 2006 and the merger of Cinergy and Duke Energy effective April 1, 2006 changed both the organization and composition of the fuel procurement group.

<sup>4</sup> The name of CG&E has been changed to Duke Energy Ohio. Hereafter, CG&E is referred to as DE-Ohio except when specifically referring to the prior organization.

As part of the reorganization, DE-Ohio has new senior management of the fuel procurement function (i.e., the President Commercial Asset Management and the Director Portfolio Management) with limited experience in the fuel area. DE-Ohio retained the experienced fuel procurement staff with direct responsibility for fuel procurement, and added additional staff to replace personnel that left due to transfers and retirements.

2. According to the FERC Form 423 filings made by DE-Ohio, average fuel costs increased by almost 10 percent on a cents per MMBTU basis between the current and prior audit periods. The increase is due to higher contract coal prices and a higher percent of spot coal purchases. The reported delivered coal prices are higher than they would have been if large quantities of older below-market contract purchases had not been resold. The increased cost was mitigated in part by the credits for the margins on the re-sold contracts which were allocated to the FPP pursuant to paragraph D of the stipulation.
3. The transfer of East Bend and Miami Fort 6 to Union Light Heat and Power (ULHP) was completed. Effective January 1, 2006, coal procurement costs for these units ceased being subject to PUCO oversight. A decision was made to allocate Miami Fort coal costs in order to give ULHP the joint ownership of the station and to transfer where possible and over time specific procurements for East Bend. DE-Ohio's methodology with respect to the allocation of existing coal supplies to East Bend was tied to historic consumption patterns, coal compatibility issues, and a general desire to minimize contract sharing.
4. DE-Ohio considers itself to be unregulated because native customers are not obligated to purchase power from DE-Ohio. EVA considers DE-Ohio to be at least partly regulated because the RSP and FPP provide for recovery of costs included in the RSP such as fuel costs. Unlike the "regulated" parts of Duke<sup>5</sup>, DE-Ohio continues to employ active management of its coal, emission allowance, and energy supply. What this means is that it buys and sells coal, emission allowance, and energy positions where it can economically manage its load obligations using transactable forward markets. Only the margins from fuel

<sup>5</sup> The former Public Service of Indiana, Union Light Heat and Power, and Duke Power, now DE-Indiana, DE-Kentucky and DE-Carolinas.



transactions that meet the following four conditions are only flowed through the FPP:

- a. The sale was from the DE-Ohio burn book.
  - b. The sale resulted from a long position in the DE-Ohio burn book. (This is the language in DE-Ohio's written criteria, but during the audit period, DE-Ohio credited the margins from all of the contract re-sales executed after January 1, 2005, except [REDACTED] regardless of whether there was a "long position" in the DE-Ohio burn book. DE-Ohio has agreed to modify this language to reflect its actual practice and continue this policy in the future.)
  - c. The sale was executed during the RSP period of January 1, 2005 through December 31, 2008.
  - d. The deliveries of the associated coal occurred during the RSP period of January 1, 2005 through December 31, 2008.
5. EVA finds DE-Ohio criteria for the passing through of margins in the FPP acceptable, except for the written statement that the sale resulted from a long position, which DE-Ohio has agreed to change, and was not following in practice during the audit period.

During the audit period, DE-Ohio flowed margins of approximately \$14 million through the FPP associated with its active management<sup>6</sup>. DE-Ohio did not pass through over \$35 million in margins generated from the resale of coal covered by the paragraph D of the stipulation.

The calculation of the margin on the re-sale of contract coal does not include the cost of the replacement coal. For example, if DE-Ohio resells a \$40 ton of coal for \$50 per ton and replaces this coal for \$46 per ton, it records a \$10 per ton margin. In this case, the net margin is \$4 per ton, not \$10 per ton, and it is the net margin that flows through the FPP.

<sup>6</sup> Actually, DE-Ohio flowed \$15.4 million in margins through the FPP during the first three quarters and then reversed \$1.0 million in the fourth quarter. Larkin was able to track the dollar flow for the first three quarters but has issues related to the reversal.

6. DE-Ohio continues to purchase fuel and emission allowances in a manner that is inconsistent with best industry practices among regulated utilities. Namely, DE-Ohio is not maintaining a contract portfolio but, pursuant to directives by DE-Ohio management, DE-Ohio actively looks to limit commitments beyond the end of the RSP period. This strategy may increase the costs of both short-term and long-term procurements and certainly exposes DE-Ohio ratepayers to market volatility after 2008. DE-Ohio has forgone term commitments with fixed pricing to avoid these future commitments in both the current and prior audit periods.
7. Another non-traditional aspect of DE-Ohio fuel procurement is that it seeks to "flatten" its coal position on a daily basis based upon short-term market events. In other words, DE-Ohio runs its models every day to determine economic generation and the resulting coal and emission allowance requirements, as well as the amount of economy energy purchases. Both external (e.g., weather, natural gas prices, etc.) and internal (e.g., unit outages) events can cause fluctuations. If the daily run shows DE-Ohio to be long coal, DE-Ohio seeks to sell coal to "flatten" its exposure by selling coal. Conversely, if the results show DE-Ohio to be short, DE-Ohio seeks to buy coal. Under this model, DE-Ohio can literally buy coal one week, sell it the next, and buy it back the third week. As DE-Ohio flattens its position, the forecast of future coal prices is not a determinative factor.
8. In post audit discussions with DE-Ohio procurement personnel, the issue of continued active management of the DE-Ohio coal supply was discussed. EVA explained its position that this approach was problematic for a number of reasons including the lack of an audit trail and the lack of documentation that this is an economical way to manage its fuel, emission allowance and purchased power supply. EVA specifically told DE-Ohio that it should be prepared to provide an audit trail and demonstrate its approach yielded a lower FPP cost.
9. Because of the delay in resolving the allocation of zero-cost emission allowances between the native and non-native loads, DE-Ohio did not manage its emission allowance position for 2006 per its own protocol, which would have required DE-Ohio to begin "flattening" its position on October 1, 2005. The allocation was not

finally resolved until early February 2006, and DE-Ohio began to purchase emission allowances to cover its needs for the native load in late January 2006. The market price for emission allowances increased sharply from October 2005 to February, and EVA estimates that an additional \$14 to \$16 million in emission allowance expense was incurred as a result of this delay.

10. EVA audited the policies and procedures for implementation of the Rider SRT, under which DE-Ohio recovers the cost of purchasing reserve capacity requirements, and found that these procedures were reasonable and prudent during the audit period. EVA does not believe that DE-Ohio provided data or evidence which would support the authorization for DE-Ohio to purchase reserve capacity from DENA Assets as part of the SRT. EVA believes that the market for reserve capacity is not liquid and transparent enough for there to be an audit trail to assure that affiliate purchases from DENA were at prices no greater than market, and also believes that the purchase of reserve capacity from DENA could discourage other suppliers from making competitive offers to DE-Ohio.
11. Larkin found the financial audit trail to be significantly improved.

## **Management Audit Recommendations**

1. EVA recommends for the audit period that the Company pass through the native load portion of the net margins associated with the trading of DE-Ohio coal assets purchased for delivery during the audit period except for these specifically excluded by paragraph D of the stipulation. This includes all of the coal received and then resold under the [REDACTED] agreement. The margin from the re-sale of this coal during the audit period was \$959,626.
2. EVA recommends that DE-Ohio adopt traditional utility procurement strategies related to the procurement of coal and emission allowances and cease its "active management" of such procurements throughout the balance of the RSP period. Accordingly, DE-Ohio should develop and implement a portfolio strategy such that it purchases coal through a variety of short, medium and long-term agreements with appropriate supply and supplier diversification with credit-worthy

counterparties. EVA further recommends that DE-Ohio no longer seek to flatten its position on a daily basis.

3. EVA recommends that as long as the FPP is in effect coal suppliers should not be required to allow the resale of their coal for the offers to be considered.
4. EVA recommends that DE-Ohio initiate a study to report on the recurring overstatement of coal inventory at the Zimmer station.
5. EVA recommends that DE-Ohio present several alternate sensitivity analyses of key variables, i.e., emission allowance prices and market coal prices, in its transaction review and approval process.
6. EVA recommends that purchases of reserve capacity from DENA Assets should not be eligible for inclusion in the SRT, as is currently the case.

## 2

# FUEL PROCUREMENT AUDIT

## Plant Descriptions

### Overview

During the first half of the audit period, Cinergy was responsible for coal procurement at four coal-fired plants operated by CG&E and natural gas and oil procurement at the gas- and oil-fired combustion turbines at Miami Fort, Beckjord, Woodsdale and Dicks Creek. As of January 1, 2006, Cinergy split its assets into two divisions: regulated assets and non-regulated assets. Cinergy classifies the CG&E assets as non-regulated. In addition to this split, CG&E transferred ownership of East Bend, the Woodsdale Station and Miami Fort #6 to Union Light, Heat and Power<sup>1</sup> (ULHP). CG&E is still responsible for fuel procurement at Miami Fort 6, but the costs associated with the fuel procurement for Miami Fort 6 will no longer be the province of the PUCO. On April 1, 2006, the merger with Duke Energy was completed. CG&E has been renamed Duke Energy Ohio (DE-Ohio).

General unit information about the steam generators is provided on Exhibit 2-1 and information about the turbines is presented in Exhibit 2-2. DE-Ohio also owns 912.6 MW of the Stuart station, 312 MW of the Conesville 4 station, and 198 MW of the Killen station. Stuart and Killen are operated by Dayton Power & Light (DPL); Conesville 4 is operated by Columbus Southern Power (CSP).

<sup>1</sup> ULHP is a wholly-owned subsidiary of CG&E.

Exhibit 2-1. DE-Ohio Steam Electric Generating Capacity

Operator	Plant	Unit	Capacity (MW)		CG&E Ownership	First Year of Operation	FGD	SO2 SIP (lb/MMBTU)
			Total	CG&E				
DE-Ohio	Miami Fort	5	80.0	80.0	100%	1949	No	5.0
		6	163.0	163.0	100%	1960	No	5.0
		7	500.0	320.0	64%	1975	Scheduled	5.5
		8	500.0	320.0	64%	1978	Scheduled	1.2
	Beckjord	1	94.0	94.0	100%	1952	No	1.8
		2	94.0	94.0	100%	1953	No	1.8
		3	128.0	128.0	100%	1954	No	1.8
		4	150.0	150.0	100%	1958	No	1.8
		5	238.0	238.0	100%	1962	No	7.2
		6	420.0	157.5	38%	1969	No	7.2
	East Bend	2	600.0	414.0	69%	1981	Yes	1.2
	Zimmer	1	1,300.0	605.0	47%	1991	Yes	RNSP
DP&L	Killen	2	600.0	198.0	33%	1982	Scheduled	1.2
	Stuart	1-4	2,340.0	912.6	39%	1970-1974	Scheduled	3.0
CSP	Conesville	4	780.0	312.0	40%	1973	Scheduled	5.7

Exhibit 2-2. DE-Ohio Combustion Turbines

Station	Unit	Capacity (MW)	First Year of Operation	Fuel	Fuel Delivery
Miami Fort	CT1	64.5	1971	No. 2 Oil	Barge
	CT2	64.5	1971	No. 2 Oil	Barge
	CT3	19.5	1971	No. 2 Oil	Barge
	CT4	19.5	1971	No. 2 Oil	Barge
	CT5	19.5	1971	No. 2 Oil	Barge
	CT6	19.5	1971	No. 2 Oil	Barge
Beckjord	CT1	61.2	1972	No. 2 Oil	Barge
	CT2	61.2	1972	No. 2 Oil	Barge
	CT3	61.2	1972	No. 2 Oil	Barge
	CT4	61.2	1972	No. 2 Oil	Barge
Woodsdale	CT1	94.0	1993	Natural Gas, Propane	Pipeline
	CT2	94.0	1992	Natural Gas, Propane	Pipeline
	CT3	94.0	1992	Natural Gas, Propane	Pipeline
	CT4	94.0	1992	Natural Gas, Propane	Pipeline
	CT5	94.0	1992	Natural Gas, Propane	Pipeline
	CT6	94.0	1992	Natural Gas, Propane	Pipeline
Dick's Creek	CT1	11.0	1965	Natural Gas, No. 2 Fuel Oil	Pipeline, Truck
	CT2	19.5	1969	Natural Gas, No. 2 Fuel Oil	Pipeline, Truck
	CT3	21.4	1969	No. 2 Oil	Truck
	CT4	21.4	1969	No. 2 Oil	Truck

## Fuel Purchases

DE-Ohio's coal procurement performance during the audit period is summarized in Exhibit 2-3. According to DE-Ohio's FERC Form 423 filings, DE-Ohio purchased 11.2 million tons of coal for its own plants at an average price of \$1.70 per MMBTU.<sup>2</sup> This excludes the coal DE-Ohio purchased and then resold to third parties.

### Exhibit 2-3. DE-Ohio Coal Purchases During Audit Period<sup>3</sup>

Plant	Contract					Spot					Total				
	Tons (000)	BTU/lb	MMBTU	\$/Ton	\$/MMBTU	Tons (000)	BTU/lb	MMBTU	\$/Ton	\$/MMBTU	Tons (000)	BTU/lb	MMBTU	\$/Ton	\$/MMBTU
Beckjord	755.0	12,123	2.6	41.02	159.2	2,372.6	11,558	1.4	51.29	221.9	3,127.6	11,684	1.7	48.81	208.7
East Bend	656.4	12,198	4.4	31.88	130.7	-	-	-	-	-	656.4	12,198	4.4	31.88	130.7
Miami Fort 5-7	857.6	12,248	3.1	42.67	174.2	993.9	11,368	1.4	49.23	216.5	1,851.5	11,777	2.4	46.19	196.1
Miami Fort 8	917.1	11,149	0.7	48.70	218.4	757.1	11,038	0.9	41.13	186.3	1,674.2	11,100	0.9	45.28	204.0
W.H. Zimmer	3,047.1	12,408	5.2	28.95	115.8	850.8	11,894	4.4	34.39	144.2	3,897.9	12,256	5.0	30.14	122.6
Total	6,232.2	12,144	4.0	35.53	145.3	4,974.3	11,489	1.9	46.43	201.9	11,206.5	11,866	3.2	30.37	170.2

Source: FERC Form 423

Fuel expenses from the previous audit are summarized in Exhibit 2-4. DE-Ohio's fuel costs in the current audit period (July 2005 through June 2006) are almost 10 percent higher than in the prior audit period (January 2005 through June 2005) on a cents per MMBTU basis. While coal prices have come down in 2006 from their highs in 2004 (Exhibit 2-5), DE-Ohio experienced an increase in the audit period as a result of higher contract prices and a higher percent of spot purchases. (Exhibit 2-6)

### Exhibit 2-4. DE-Ohio Coal Purchases During Previous Audit

Plant	Contract					Spot					Total				
	Tons (000)	BTU/lb	MMBTU	\$/Ton	\$/MMBTU	Tons (000)	BTU/lb	MMBTU	\$/Ton	\$/MMBTU	Tons (000)	BTU/lb	MMBTU	\$/Ton	\$/MMBTU
Beckjord	368.2	12,540	3.2	33.29	132.7	985.1	11,564	1.8	51.88	224.2	1,353.3	11,827	2.1	46.85	198.0
East Bend	523.9	12,106	4.8	24.72	102.1	-	-	-	-	-	523.9	12,106	4.8	24.72	102.1
Miami Fort 5-7	485.8	12,593	4.2	31.70	125.9	288.6	11,407	2.4	51.36	225.1	754.2	12,171	3.6	38.70	158.0
Miami Fort 8	524.5	11,818	1.0	43.74	185.1	164.1	11,870	1.0	55.85	239.3	688.6	11,783	1.0	46.83	197.9
W.H. Zimmer	1,880.4	12,310	6.3	28.75	116.8	298.8	11,882	4.7	36.51	156.3	1,969.1	12,214	6.0	29.93	122.5
Total	3,562.6	12,270	4.7	31.24	127.3	1,726.6	11,570	2.2	48.88	215.6	5,289.1	12,041	3.9	37.32	155.0

Source: FERC Form 423

<sup>2</sup> EVA notes that it was not able to reconcile the FERC Form 423 numbers with the Monthly Recap Report. The differences could relate to timing and miscoding of certain purchases. Also, CG&E combines shipments from a number of purchasers in its FERC Form 423 filings.

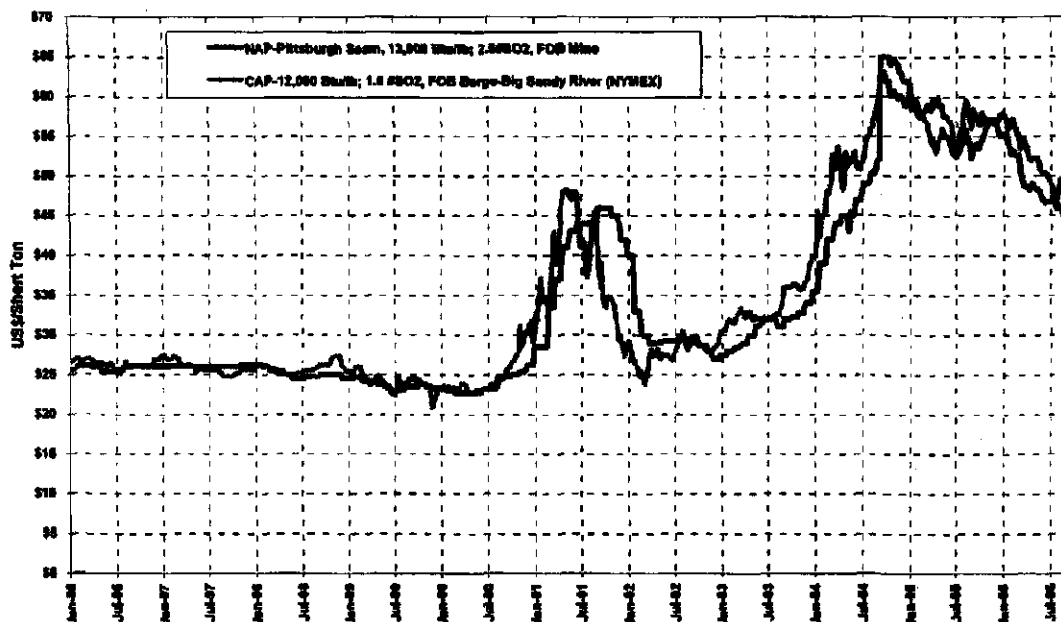
<sup>3</sup> East Bend data were only filed through October 2005. DE-Ohio or ULHP has an obligation to file this data.

**Exhibit 2-5. Comparison Of Audit Period Performance**

	#/MMBTU			% of Total Tons	
	Previous Audit Period	Current Audit Period	% Change	Previous Audit Period	Current Audit Period
Contract	127.3	146.3	15%	67%	56%
Spot	215.5	201.9	-6%	33%	44%
Total	155	170.2	10%	100%	100%

**Exhibit 2-6. Historic Spot Market Coal Prices**

EASTERN U.S. STEAM COAL PRICES



DE-Ohio is certainly not alone in experiencing higher coal prices. Exhibit 2-7 provides delivered cost for several nearby utilities.<sup>4</sup> Delivered costs are provided by contract and spot as well as by region.<sup>5</sup> DE-Ohio is in the middle of the pack with respect to delivered fuel costs compared to some nearby utilities. Costs are presented in a number of ways.

<sup>4</sup> FirstEnergy does not report its fuel purchases.

<sup>5</sup> On the FERC Form 423, CG&E is not reporting the components of blends it is purchasing. Hence, it is not showing any PRB volumes.



### Exhibit 2-7. First Half 2006 Coal Expenses For DE-Ohio And Nearby Utilities

Utility	By Contract Type							By Region and Coal Quality				
	Quantity (1000 tons)			Price \$/MMBTU				Price \$/MMBTU				
	Contract	Spot	Total	Contract	Spot	Total	Rank	NAP	CAP	ILB	WST	PRB
AEP - Columbus Southern	2,207.5	49.8	2,257.3	164.7	216.2	165.8	2	165.8	171.6	0.0	0.0	0.0
AEP - Ohio Power	1,819.6	412.4	2,232.0	180.8	190.8	185.4	3	180.3	183.3	0.0	0.0	0.0
DE-Ohio	2,937.4	2,210.3	5,147.7	154.0	204.2	174.8	4	123.1	211.9	180.3	229.7	0.0
Dayton P&L	3,646.8	653.2	4,300.0	199.0	225.1	202.8	5	190.4	202.8	0.0	0.0	0.0
LG&E-Kentucky Utilities	2,928.3	874.4	3,802.7	204.3	239.7	212.0	6	143.5	236.9	165.4	0.0	162.6
LG&E-Louisville G&E	3,669.1	504.4	4,073.4	148.1	159.5	149.5	1	146.8	189.5	190.1	0.0	0.0

Note: NAP-Northern Appalachia, CAP-Central Appalachia, ILB-Illinois Basin, WST-Western Bituminous, PRB-Powder River Basin.

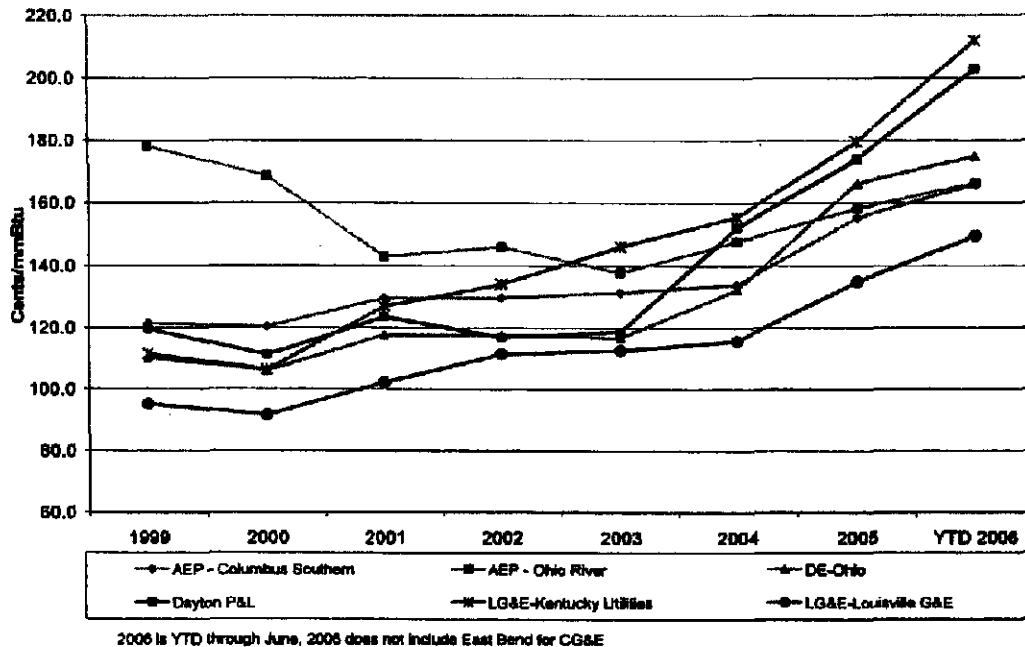
Some of the differences between the utilities can be explained by the differences in coal quality. Because of tradable allowances, the sulfur content often gets monetized in the coal price. The same data on a sulfur adjusted basis for the nearby utilities are presented in Exhibit 2-8. The SO<sub>2</sub> adjustments are based upon emission allowance values for the unscrubbed plants and a combination of variable operating costs of the scrubber and emission allowance costs (for the SO<sub>2</sub> not removed by scrubbing).

### Exhibit 2-8. SO<sub>2</sub> Adjusted Delivered Prices For DE-Ohio And Nearby Utilities (\$/MMBTU)

Utility	Units with FGD			Units without FGD			All Units	
	SO <sub>2</sub>			SO <sub>2</sub>			Total	Rank
	Delivered Cost	Adjustment	Total	Delivered Cost	Adjustment	Total		
AEP - Columbus Southern	\$ 156.73	\$ 3.73	\$160.46	\$ 168.07	\$ 37.14	\$205.21	\$ 174.94	2
AEP - Ohio Power	\$ -	\$ -	\$ -	\$ 161.93	\$ 13.18	\$175.11	\$ 175.11	3
DE-Ohio	\$ 124.03	\$ 4.60	\$128.63	\$ 204.67	\$ 13.58	\$218.25	\$ 194.05	4
Dayton P&L	\$ -	\$ -	\$ -	\$ 188.21	\$ 10.04	\$198.25	\$ 198.25	5
LG&E-Kentucky Utilities	\$ 207.55	\$ 0.71	\$208.26	\$ 177.16	\$ 28.35	\$205.51	\$ 207.02	6
LG&E-Louisville G&E	\$ 142.03	\$ 3.93	\$145.96	\$ -	\$ -	\$ -	\$ 145.96	1

Another measure of CG&E performance is an historical look at fuel costs. Exhibit 2-9 provides the average delivered price of coal as reported to FERC since 1999. The 2006 data are only for the first six months of the year. With the exception of Ohio Power, all of the utilities presented experienced higher costs since 1999. In 2005 and YTD 2006, CG&E ranked fourth on a delivered cost basis, as opposed to second in the earlier years.

**Exhibit 2-9. Historical Coal Purchase Costs For DE-Ohio And Nearby Utilities**



## ***Environmental Performance***

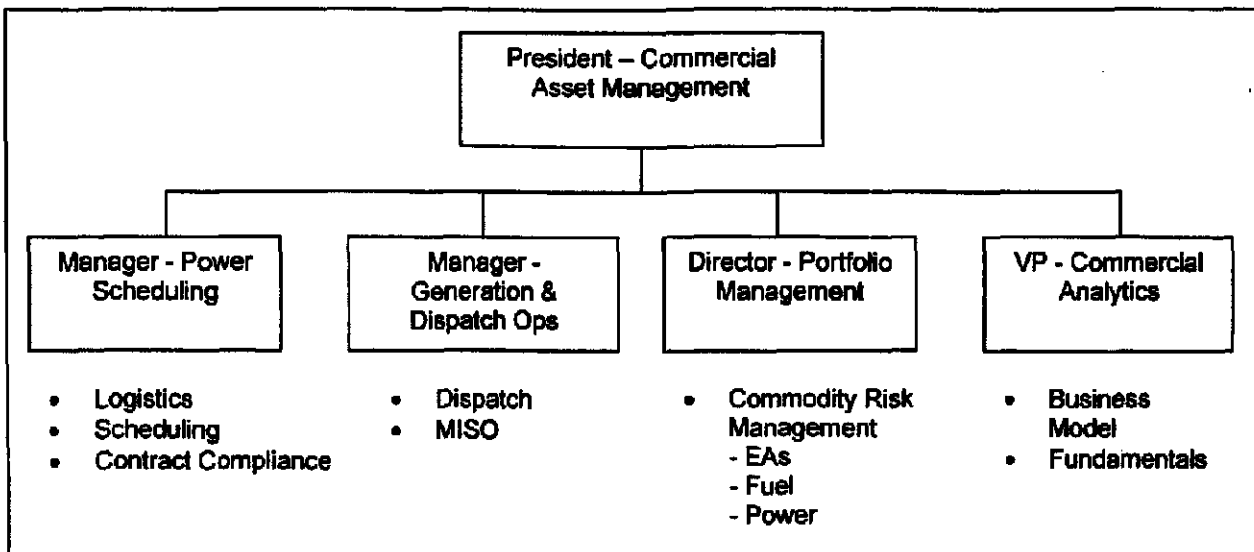
With the transfer of East Bend to ULHP, the only DE-Ohio plant equipped with a scrubber is Zimmer. Zimmer is subject to the Revised New Source Performance Standard which has the dual requirements of continuous emission reduction of 91 percent or an SO<sub>2</sub> emission rate of .548 pounds whichever is lower. For their respective compliance plans, DE-Ohio has committed to scrub Miami Fort #7 and #8; Dayton Power & Light has committed to scrub Killen #2 and Stuart #1-4; and Columbus Southern Power has committed to scrub Conesville #4. The addition of scrubbers on all of these units could dramatically change the coal demand profile for these units.

## Management And Organization

Since the previous audit, CG&E has undergone two significant corporate changes. The first change occurred on January 1, 2006, when Cinergy's assets were split into regulated assets (Public Service of Indiana) and unregulated assets (CG&E) and fuel supply was divided accordingly.<sup>6</sup> The second change occurred when the merger with Duke Energy became effective April 1, 2006. As Duke is regulated, the fuel group responsible for Public Service of Indiana and Union Light Heat and Power was merged with the Duke fuel procurement group.

During the audit period, responsibility for DE-Ohio fuel and emission allowance procurement lay with the President of Commercial Asset Management. He reported to the CEO of Duke Energy Americas who in turn reported to the Chairman, President and CEO of Cinergy. As shown in Exhibit 2-10, the President-Commercial Asset Management has responsibility for a number of areas including fuel.<sup>7</sup>

**Exhibit 2-10. Fuel Procurement In CG&E**



<sup>6</sup> Despite the FPP, Cinergy and Duke continue to refer to CG&E fuel procurement as an unregulated activity.

<sup>7</sup> On September 15, 2006, Duke Energy announced a reorganization which included the replacement of the CEO of Duke Energy Americas in the fuel supply chain with the President of Commercial Businesses. The President of Commercial Asset Management is now the Group Vice President for Commercial Asset Management.

This organization differs from the organization in effect during the prior audit period with respect to the consolidation of portfolio optimization and commercial fuels under the Director Portfolio Management. Previously Commercial Fuels and Portfolio Optimization were independent reports to the Senior Vice President Energy Portfolio Strategy and Management.

As a result of the split of the fuel group between regulated and unregulated businesses and an early retirement program, DE-Ohio lost two of its experienced senior managers during the audit period, but retained the staff personnel with direct responsibility for fuel procurement. The current management is relatively inexperienced in the coal area, but the organization is adequately staffed to support this activity. Through the audit period, the director of portfolio management continued to have personal responsibility for emission allowance trading which had previously been a full time position.<sup>8</sup>

## Policies And Procedures

As determined in the prior audit period, there are two policies and procedures manuals that relate to fuel procurement. Cinergy Commercial Fuels has a fuels policies and procedures manual that at best could be described as an overview document. It contains no specific information regarding such items as contract mix<sup>9</sup>, inventory targets<sup>10</sup>, or the procurement process<sup>11</sup>. Because of the lack of detail, in the prior audit EVA did not find the document to be particularly useful or relevant. Despite this finding, DE-Ohio made no changes to its policies and procedures manual during the audit period.

The second manual is the Risk Policy Manual which sets forth the credit policy for Cinergy's energy commodity transactions which includes fuel procurement. This is an excellent document, well written, comprehensive with sufficient detail to be meaningful. Cinergy would be well-served to model its fuel procurement policies and procedures manual after the Risk Policy Manual.

<sup>8</sup> This role was filled September 25, 2006, and EVA agrees with this decision.

<sup>9</sup> "Fuel purchases are made through a combination of long-term and spot market purchases. The optimal hedging strategy is determined by the Department ..."

<sup>10</sup> The Department develops optimum coal inventory strategies consistent with the generating stations' load and coal contractual requirements."

<sup>11</sup> There is nothing in the manual related to how the company solicits bids, qualifies new suppliers, purchases coal on an emergency basis, etc.

### **Inventory Management**

The policies and procedures manual does not contain specific inventory target by plant. EVA was advised that there is a [REDACTED] target. During the audit period, as shown on Exhibit 2-11, DE-Ohio's inventory at the plants it operates ranged between [REDACTED]

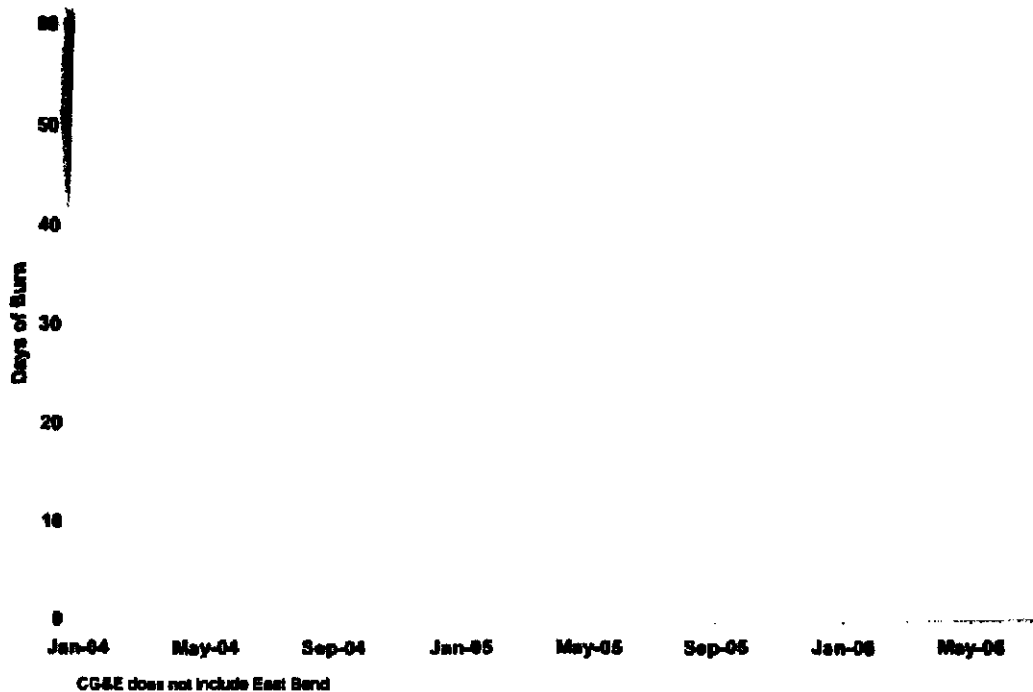
[REDACTED] This is a significant improvement over the prior audit period in which inventory levels ranged between 21 and 28 days. The inventory calculation does not include inventory at various docks, at the power plants operated by its partners, or, after January at East Bend.

#### **Exhibit 2-11. DE-Ohio Inventory Levels During Audit Period**



In Exhibit 2-12, EVA compares DE-Ohio inventory levels to average industry levels based upon EVA's proprietary stockpile report.<sup>12</sup> DE-Ohio maintains considerably lower inventory levels than other utilities which burn eastern coals, in general, and Central Appalachian and Northern Appalachian coals in particular.

<sup>12</sup> EVA publishes the COALCAST Stockpile Data Report on a monthly basis which provides indicative utility inventory levels by coal type on a real time basis.

**Exhibit 2-12. DE-Ohio Inventory Levels Compared To Industry Levels**

In the last few years, rail delivery problems, tight coal supply, and river disruptions have caused many utilities to rethink their inventory strategy recognizing that inventory carrying costs are preferable to taking a low cost unit off dispatch due to low coal supplies.

***Physical Inventory***

DE-Ohio has a policy to conduct an annual stockpile survey to determine the accuracy of its stockpile estimates. An aerial survey is used along with density testing and moisture analysis to quantify stockpile levels. The surveys are conducted in July and any necessary book adjustments are made the same year. DE-Ohio continues to follow the PUCO guidelines for adjustments to the DE-Ohio plants. No adjustments are made if the physical inventory tonnage is within three percent of book tonnage and the deviation

has been the in same direction for two consecutive surveys. If the deviation is three percent or greater and the direction has been the same for two consecutive surveys, an adjustment is made for one half of the difference up six percent (i.e., a 12 percent deviation).

In 2005, DE-Ohio made a 5.93 percent adjustment to increase inventory at Miami Fort and a 5.8 percent adjustment to decrease inventory at Zimmer. No adjustments were required for the other plants. As shown in Exhibit 2-13, similar adjustments were made to both plants in 2004 and overstatement of inventory has been a recurring problem for Zimmer. Even taking into account the fact that corrections are limited to six percent in any one year, the Zimmer situation is a problem that DE-Ohio needs to address it forthwith.

**Exhibit 2-13. Physical Inventory Results For Miami Fort And Zimmer**

Plant	Year	Tons per Fuel Ledger	Variance Per Physical Survey		Adjustment	
			Tons	Percent	Tons	Percent

## Coal Procurement

DE-Ohio coal procurement is complex. This is due to the expanded use of synfuel and DE-Ohio's approach with respect to how it manages its coal supply. DE-Ohio views each coal procurement<sup>14</sup> as a hedge and continually strives to optimize its hedged position. Therefore, DE-Ohio transacts substantially more coal than it actually requires for its own generation.

<sup>14</sup> Not every coal producer allows their coal to be resold. CG&E preferentially buys from those who do.

### **Commercial Model**

Coal, emission and economy energy requirements are re-determined on a daily basis by DE-Ohio's models. The model results include short and long position. DE-Ohio's Coal positions as of June 30, 2005 and March 31, 2006 are provided in Exhibit 2-14.

#### **Exhibit 2-14. DE-Ohio Coal Position as Of June 30, 2005 and March 31, 2006**

Short and long positions are then addressed through purchase and sale of incremental coal supplies.

### **Coal Management**

DE-Ohio actively manages its coal, emission, and forward economy energy positions. With respect to coal hedges, this means that DE-Ohio trades its position when it determines there is a financial advantage to do so. The margins from these trades flow through the FPP only if the following four criteria are met:

1. The sale was from the DE-Ohio burn book.
2. The sale resulted from a long position in the DE-Ohio burn book. (This is the language in DE-Ohio's written criteria, but during the audit period, DE-Ohio credited the margins from all of the contract re-sales executed after January 1, 2005, except [REDACTED] regardless of whether there was a "long position" in the DE-Ohio burn book. DE-Ohio has agreed to modify this language to reflect its actual practice and continue this policy in the future.)
3. The sale was executed during the RSP period of January 1, 2005 through December 31, 2008.



4. The deliveries of the associated coal occurred during the RSP period of January 1, 2005 through December 31, 2008.

Since the initiation of the FPP, DE-Ohio has generated in excess of \$58 million in margins related to its active management of the coal supply. Of the \$58 million, DE-Ohio has flowed a total \$14.3 million through the FPP, \$12.4 million of which was flowed through the FPP during the current audit period as shown in Exhibit 2-15.

**Exhibit 2-15. Margins Generated Through Active Management Of Coal Hedges**

	FPP - Period 1 January - June 2006	FPP - Period 2 July 2006 - June 2008	Total Since Initiation of FPP
--	---------------------------------------	---	----------------------------------

The margins are the difference between the purchase price and the sale price and do not take into account the cost of the replacement coal. In other words, if DE-Ohio has purchased coal for \$40 per ton and sells it for \$50 per ton, DE-Ohio records a \$10 per ton margin. If the replacement coal costs \$48 per ton, the margin does not get reduced by \$8 per ton.

To date, DE-Ohio has not passed through the FPP any margins generated as a result of the settlement with [REDACTED] which occurred during the audit period. A discussion of the settlement is found below. DE-Ohio did not pass through over [REDACTED] in margins generated from the resale of coal covered by the paragraph D of the stipulation.

EVA agrees with DE-Ohio's position that native load customers deserve the benefits of swaps of existing coal contracts, regardless whether such swaps are a result of DE-Ohio being over-committed for a certain type of coal. The proportionate share of the benefit of any swap on any position should flow through the FPP to the native customers, as is DE-Ohio's current practice. The written policy should be revised to make this clear.

With respect to its coal position, active management means that DE-Ohio seeks to flatten its coal position on a daily basis. DE-Ohio runs its models every day to determine generation and coal requirements. Both external (e.g., weather, natural gas prices, etc.) and internal (e.g., unit outages) events can cause fluctuations. If the daily run shows DE-Ohio to be long, DE-Ohio seeks to sell coal to "flatten" its exposure. Conversely, if the results show DE-Ohio to be short, DE-Ohio seeks to buy coal. Under this model, DE-Ohio can literally buy coal one week, sell it the next, and buy it back the third week. As DE-Ohio flattens its position, the forecast of future coal prices is not a determinative factor.

EVA believes that DE-Ohio has been pro-active in seeking opportunities to re-sell coal contracts which have greater value to other customers, and replacing this coal with less-costly coal for use in DE-Ohio's plants. These transactions are called "quality swaps" by DE-Ohio, and create value when the coal previously contracted by DE-Ohio would no longer be the least-cost coal for DE-Ohio's plants at current market prices. It is EVA's opinion that DE-Ohio has been much more active in this activity than most electric utilities, and that this activity has created substantial savings for the native customers, reflected in the \$14.3 million margin credited to the FPP shown above.

EVA has not been able to assess the complete cost and benefit of the component of active management which involves the daily flattening of its position in coal, electric energy, and emission allowances. In evaluating just the NYMEX coal "leg" of this process, EVA believes the cost of coal for native customers was increased through the daily flattening of its coal position. This is only one piece of the daily flattening of its coal position. As shown on Exhibit 2-16, the combination of financial and physical NYMEX transactions cost DE-Ohio about \$1.4 million during the audit period. All of these costs were flowed through the FPP, and are included in the \$14.3 million of net benefits shown in Exhibit 2-15 above.

**Exhibit 2-16. Cost Of Financial and Physical Swaps During Audit Period**

Finally, EVA noted in last year's audit that the originators at CG&E were rewarded through bonuses for their coal trading activities. EVA was advised in this audit that the originators no longer receive compensation tied to their trading activities, and we concur with this decision.

**Coal Solicitations****Prior Audit Period High Sulfur Coal Solicitation**

Requests for proposals are used to buy for multi-years and other methods for short-term requirements. During the prior audit period, CG&E conducted a multi-year solicitation for high sulfur coal for 2006 and beyond. During the last audit period, a bid summary was provided for EVA to review but EVA was not provided the contracts or the TARs to review. EVA noted in last year's audit that the bid summary indicated that CG&E had not chosen its suppliers solely based upon cost but reliability considerations. CG&E agreed to provide the information during the current audit period and EVA reserved the right to raise issues related to the evaluation and selections.

The new high sulfur contracts to which CG&E referred in the last audit period derived from [REDACTED] CG&E ultimately entered into [REDACTED] contracts resulting from this solicitation. Contracts were entered into with [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The TARs for each of these transactions provide a deal summary, an economic evaluation, and a description of the associated risks. In general, CG&E does a good job in the TARs. The only exception is with respect to the NPV calculations which are derived from a forward price curve for whatever subset of Northern Appalachia coals is being purchased (e.g., Ohio or Monongahela 13,000).

Technically, a forward price curve is a compilation of prices of actual transactions or bids and offers for forward delivery periods. Forward price curves typically change frequently and require liquidity. Liquidity means that there is ample depth in the market such that modest transactions do not alter pricing and/or positions can be monetized. As such, forward price curves make sense for certain markets and not others. They make sense for natural gas and they make sense for oil which is why there are active financial and physical markets developed for trading these commodities. Forward price curves may make sense for certain coal markets, such as Central Appalachia and the Powder River Basin in the U.S. and API2 (i.e., thermal coal delivered to Amsterdam, Rotterdam, and Antwerp) in Europe. They do not make sense, however, for Northern Appalachia coal, in general, or its sub-markets, in particular. This market and its sub-markets have neither the depth nor the liquidity to support a forward price curve and industry participants understand that these curves are simply estimates and are not derived from actual transactions. However, even if there were a legitimate forward price curve for Northern Appalachia coal, it is far from clear that the forward price curve is the appropriate yardstick against which to measure the net present value of these transactions.

The justification for long-term coal supply agreements is typically derived in one of the two following ways. If a utility has a portfolio strategy in which it satisfies its contracts through a combination of long, medium and short term agreements, it enters into contracts consistent with its strategy choosing the most attractive contracts based upon its alternatives in the context of achieving supply and supplier diversity with creditworthy counterparties. The above is the approach that DE-Ohio employs. In this case, the net present value should be derived not from a forward price curve but from a comparison

with the alternatives, i.e., other contract options. DE-Ohio compares each coal to a forward price curve instead. If the utility is simply choosing a contract versus the spot market, it must then consider forecasts of prompt coal prices that are based upon analysis of supply and demand and the other factors that are determinative as to price and justify the commitment in the context of these prices.

The NPVs in the TARs range from [REDACTED]. For all intents and purposes, these values are misleading and overstate the benefits of each contract to DE-Ohio.<sup>15</sup> DE-Ohio would do better to discuss the market for the relevant coal types and alternative outlooks.

#### Audit Period Solicitations

On August 15, 2005, DE-Ohio solicited quotations for long-term coal supply agreements with shipments expected to begin [REDACTED]. DE-Ohio asked for [REDACTED]

[REDACTED] but offered to consider [REDACTED]. DE-Ohio asked for [REDACTED]. While DE-Ohio indicated the primary purpose of the RFP was [REDACTED], the RFP asked for bids for a range in [REDACTED].

The RFP also indicated the [REDACTED]. The [REDACTED] based upon [REDACTED] and the [REDACTED] is based upon [REDACTED].

The [REDACTED] is based upon [REDACTED]. The [REDACTED] is based upon the [REDACTED].

Cinergy received [REDACTED] proposals from [REDACTED] suppliers. Cinergy evaluated the offers on an [REDACTED].

The bid evaluation EVA was provided considered [REDACTED].

<sup>15</sup> If the forward price curve was accurate it should be equal to the prices offered by the producers under the contracts themselves which would mean an NPV of zero.

DE-Ohio indicated that it selected to enter into a long-term agreement in May 2006 with

## EVA applauds DE-Ohio for supporting the

The contract is subject to successful test burns at Zimmer, Miami Fort #7, and Miami Fort #8.<sup>17</sup> The concern regarding the [REDACTED]

<sup>16</sup> DE-Ohio indicated it had been in discussion with:

DE-Ohio's decision to use this pricing approach is consistent with its prior unwillingness to commit to term agreements that extend beyond the RSP period. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

EVA believes that DE-Ohio erred by not considering the value associated with the pricing mechanism proposed by [REDACTED] and is concerned that in 2009 and beyond, the pricing offered by [REDACTED] would have been attractive vis-à-vis the market. In fact,

[REDACTED]

[REDACTED]

[REDACTED]

From the same solicitation, DE-Ohio rejected a bid from another producer because the [REDACTED]. Specifically, DE-Ohio stated that the bid was rejected [REDACTED] in this case, [REDACTED] is [REDACTED]

[REDACTED]

Given the [REDACTED]

[REDACTED]

[REDACTED]

### ***Procurement Administration***

The coal commitments are allocated to the DE-Ohio plants according to its optimization models. DE-Ohio monitors performance of its fuel procurement in its COMTRAC system. Information on each shipment is recorded. Pricing for each shipment is calculated based upon the prevailing price for that shipment. Monthly quality adjustments are determined by calculating the average quality for all of the shipments under each

purchase order, even those not going to DE-Ohio, and determining the appropriate adjustments.

A number of the older long-term contracts have BTU dead-bands, such that a producer does not receive a premium or penalty until the shipment quality is above or below the dead band amount. Dead bands are an artifact of a time when sampling and quality analysis was less rigorous. Dead bands do not make sense today given the current rigors of sampling and analysis. Further, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Even if the entire transportation costs are included in its calculation, the BTU adjustment does not reflect the heat rate penalties or other operating cost increases associated with receiving a below specification product.

### ***Spot Coal Procurements***

During the audit period, CG&E purchased spot coal from multiple suppliers. The spot agreements/purchase orders provided to EVA are listed by trade date in Exhibit 2-17. EVA notes that the agreements provided for review do not include all agreements in effect during the audit period.

#### **Exhibit 2-17. Spot Coal Agreements**



03175

## **Contract Review**

DE-Ohio is a party to a number of long-term coal supply agreements. The key provisions of the agreements which EVA was provided are summarized in Exhibit 2-18. Performance under each are described below. As part of the transfer of East Bend to ULHP, DE-Ohio allocated certain high sulfur coal supplies to ULHP as well. Exhibit 2-19 lists what DE-Ohio indicated were the contract allocations to ULHP for East Bend. These allocations do not include [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

03177

**Exhibit 2-18. DE-Ohio Long-Term Coal Supply Agreements**

**Exhibit 2-19. Contract Allocations To ULHP For East Bend Per DE-Ohio  
(Tons)**

03178

**Exhibit 2-20. Shipments Under** [REDACTED]

This agreement is unlike many other agreements in that it is a total tonnage agreement meaning the agreement does not end until all the coal is shipped, as adjusted for force majeure events. Nevertheless, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The allocation of [REDACTED] ions during the audit period is provided in Exhibit 2-21.

**Exhibit 2-21. Allocation Of** [REDACTED]

Since [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**Exhibit 2-22. Shipments Of** [REDACTED]

The third agreement with [REDACTED] a 10 year, three million ton contract for [REDACTED] Shipments under this contract began in September 2005. The contract was assigned to [REDACTED]

[REDACTED]

During the previous audit period, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

EVA believes that as the [REDACTED] contract relates to coal shipments during the RSP period, the margin that DE-Ohio is [REDACTED]

**Exhibit 2-23. Shipments Of**

03182

**Exhibit 2-24. Shipments To DE-Ohio Plants** [REDACTED]