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Revised Code prohibit selectively discounting tariff service. Duke/CG&E seeks to avoid this statutory requirement by having the discount paid by the Utility's parent corporation or sister affiliate. The Commission should make the appropriate findings of law and fact that charging a customer less than the tariff rate for a tariff service is illegal regardless of how the discount is paid or who pays the discount.

The second cardinal principle is that a regulated utility may not offer or pay financial or other monetary consideration in order to obtain support for a rate filing. The Commission should make the appropriate findings of law and fact that the side agreements, by trading discounts and cash payments for support of the Stipulation, nullify the Stipulation as a basis for the Commission to make rate determinations.

The third cardinal principle is that the regulated utility must be run separate and apart from its unregulated affiliates. The Commission should make the appropriate findings of law and fact that a program whereby a non regulated affiliate which does not sell power, but makes cash payments to standard service, customers of the utility violates Section 4928.02(G), Revised Code and Section 4928.17 Revised Code.

In sum, the side agreements exposed in this proceeding have harmed the public in two important ways. First, it has stymied the development of the competitive market by eliminating the opportunity for certain customers to choose to take service from a competitive retail electric supplier as well as creating a barrier of the payment of the IMF charge by shopping customers for which no discreet benefit is obtained. Second, it has undermined the integrity of the Commission's rate making process.

II. PROCEDURAL HISTORY

Since 2003, the Commission has encouraged Electric Distribution Utilities to file Rate Stabilization Plans which would provide rate certainty for consumers, provide financial stability for utility companies, and encourage the development of competition.[1] The predecessor of Duke Energy Ohio, Inc. (CG&E), filed applications in these matters to modify its nonresidential generation rates to provide for market-based standard service offer pricing and to establish an alternative competitive-bid process subsequent to the end of the market development period (MDP), to permit it to defer costs and investments, and to establish a rider to recover certain capital investments.

On September 29, 2004, the Commission issued its opinion and order in these proceedings. It approved, with certain modifications, the Stipulation filed by CG&E, the Staff, First Energy Solutions Corp., Dominion Retail, Inc., Industrial Energy Users-Ohio ("IEU"), Green Mountain Energy Company, The Ohio Energy Group, Inc. ("OEG"), The Kroger Co., AK Steel Corporation ("AK Steel"), Cognis Corp. ("Cognis"), People Working Cooperatively, Communities United for Action, and The Ohio Hospital Association ("OHA"). Other parties, including the Ohio Office of Consumers' Counsel ("OCC") and OMG, opposed this Stipulation. The Stipulation provided for the establishment of a Rate Stabilization Plan ("RSP") for CG&E that would govern the rates to be charged by CG&E from January 1, 2005 through December 31, 2008 with certain aspects of those rates also extending through the end of 2010. The Commission's

[1] In re: Dayton Power and Light Company, Case No. 02-2779-EL-ATA, et al., Opinion and Order, September 2, 2003.

September 29, 2004 Opinion and Order approved the stipulation with some modifications.

On October 29, 2004, CG&E, OCC, and OMG filed Applications for Rehearing. On November 23, 2004, the Commission issued its First Entry on Rehearing, denying OCC's Application for Rehearing but granting in part and denying in part the Applications for Rehearing filed by CG&E and OMG.

With respect to CG&E's Application for Rehearing, the Commission granted rehearing and authorized certain changes to the Opinion and Order to adjust or establish an annual adjustment component ("AAC"), a fuel and purchase power component ("FPP"), an infrastructure maintenance fund ("IMF"), and a system reliability tracker ("SRT").

Additional Applications for Rehearing were filed by Mid-American Energy Company, Dominion Retail, Inc., and OCC. In its Second Entry on Rehearing dated January 19, 2005, the Commission granted Mid-American's Application for Rehearing for further consideration but denied the Applications for Rehearing of Dominion Retail, Inc. and OCC.

The OCC appealed these matters to the Ohio Supreme Court. On appeal, the Ohio Supreme Court remanded the Duke Rate Stabilization Plan proceedings to the Commission finding:

> For the reasons explained above, we hold that the commission failed to comply with R.C. 4903.09 by not providing record evidence and sufficient reasoning when it modified its order on rehearing and that the commission abused its discretion when it denied discovery regarding alleged side agreements. Accordingly, the commission's orders are affirmed in part and reversed in part, and this

> matter is remanded for further consideration consistent with this opinion.

Ohio Consumers' Counsel v. Pub. Util. Comm. 111 Ohio St. 3d. 300 at 322.

On November 29, 2006, the Attorney Examiner issued an entry finding that "[a] hearing should be held in the remanded RSP Case, in order to obtain the record evidence required by the Court." Testimony was filed on behalf of Duke/CG&E on February 28, 2007 and by the OCC on March 9, 2007. The Staff also filed testimony on March 9, 2007 and the hearing proceeded from March 19 through March 21, 2007. Pursuant to the direction of the Attorney Examiners, OMG consisting of Consolation NewEnergy, Inc., Strategic Energy, LLC and Integrys, Energy Services, Inc. (formerly known as WPS Energy Services, Inc.) submits this initial post-hearing brief.

III. ARGUMENT

A. The Stipulation on which the Duke Rate Stabilization Plan is based fails the reasonableness test for it was not the product of serious bargaining.

Rule 4901-1-30 Ohio Administrative Code provides that parties may enter into full or partial stipulations. While these stipulations are not binding on the Commission, they are accorded substantial weight. Consumers Counsel v. Pub. Util. Comm. 64 Ohio St. 3d 123, 125 (1992). More importantly, a filed stipulation shifts the criteria of acceptance by the Commission from one in which the applicant bears the burden of proving that the relief sought is lawful and reasonable, to whether the stipulation taken as a whole is reasonable. Further, in considering whether a stipulation is "reasonable" the Commission has applied a three part test consisting of: 1) whether the stipulation was the product of serious bargaining among capable, knowledgeable parties; 2) whether the

stipulation as a package, benefits rate payers and the public interest; and 3) whether the stipulation violates any important regulatory principle or practice. Indus. Energy Consumers of Ohio v. Pub. Util. Comm. 68 Ohio St. 3d 547 (1994).

In the matter at bar, the Commission considered the Stipulation, and after applying the three part test above, found the Stipulation reasonable.[2] In accordance with the Commission's practice no separate or detailed analysis was made of the various rates and charges that made up either the Market Based Standard Service Offer (MBSSO) or the Provider of Last Resort ("POLR") charges which retail customers who take service from Competitive Retail Electric Suppliers ("CRES") must pay for a default back up service.

The rational in the Industrial Energy Users case and those that followed in a long line of decisions upholding the reasonableness standard for accepting stipulations is to encourage settlement. Further, though not articulated in these decisions, settlements by their very nature are compromises, so one would not expect the same level of numerical analysis in a compromised rate that one would find in a rate designed by a single applicant and proven using cost of service criteria. The trade off in having rates that may have lower level of mathematical proof is that the rates, though not consistent, are acceptable to those or representatives of those who have to pay them.

When the Stipulation was presented and the hearing switched from one in which Duke/CG&E must prove the MBSSO and POLR rates to be just and reasonable to one in which the Stipulation must be shown to be reasonable, OCC served discovery requesting to see all the side agreements between the sponsors of the Stipulation and the Duke/CG&E. The fear of the OCC was that rather than an agreement to correct general

[2] See In Re Cincinnati Gas & Electric Case No. 03-93-EL-ATA Opinion and Order September 29, 2004.

flaws in the RSP rates presented in the application, or address anomalies to individual or small groups of customers that might occur when the RSP rates are applied, that the Stipulation was achieved by trading favors. Further, that the favors traded may be paid for by overcharging other customers. The Commission relying on the recent Supreme Court decision in Constellation v. Pub. Util. Comm. 104 Ohio St. 3d 530 (2004) denied the request to compel discovery, but OCC appealed and the Supreme Court distinguished its Constellation decision and held:

> OCC argues that the existence of side agreement could be relevant to a determination that the stipulation was not the product of serious bargaining. OCC suggests that if CG&E and one or more of the signatory parties agreed to a side financial arrangement or some other consideration to sign the stipulation, that information would be relevant to the commission's determination of whether all parties engaged in "serious bargaining." We agree.

Ohio Consumers' Counsel v. Pub. Util. Comm. 111 Ohio St. 3d 300 at 320.

1. The evidence in the record proves that one or more signatory parties had financial arrangements with Duke/CG&E as an inducement to sign the Stipulation.

After the Supreme Court remand, the Attorney Examiner in accordance with both the spirit and the letter of the Supreme Court's remand did permit full discovery of the side agreements and the internal Duke/CG&E communications that explained the agreements. These documents leave no doubt that the purpose of the side agreements was to purchase support for the RSP rates by exempting supporters from having to pay the full amount of the proposed increases.[3] As stated by Mr. Ziolkowski, an employee of Duke/CG&E whose deposition is part of the record in this proceeding, in a May 11, 2006 internal e-mail,

[3] Direct prepared testimony of Beth E. Hixon, Attachment 21, May 15, 2006 E-mail from J. Ziolkowski to J. Gomez.

> [a] number of large customers, some represented by industry groups, intervened in the filing. . . . To eliminate this roadblock and prevent a formal hearing, CG&E negotiated special conditions with the interveners and ultimately reached agreements with them.[4]

The June 7, 2004 Agreement between Cinergy Corp. "(Cinergy") and Cognis reflects the intended purpose – to offer discounts in exchange for support of the RSP rates.[5] This confidential agreement provides in part that (quoting from the contract):

> 1. Cognis shall, through December 31, 2008, purchase its full requirements generation service pursuant to its current tariff and pursuant to the Electric Reliability and Rate Stabilization Plan approved by the Public Utilities Commission of Ohio (Commission).
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> 2. Cinergy shall reimburse Cognis for the first 4% of the annually adjusted component of Provider of Last Resort Charges actually paid by Cognis during the calendar year 2005; the first 8% actually paid in 2006; the first 12% actually paid in 2007; and the first 16% actually paid in 2008.
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> ...
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> 5. Cognis shall support a Stipulation filed by The Cincinnati Gas & Electric Company and Cognis, in Case No. 03-93-EL-ATA, and any related litigation.[6]

Cognis' contract with Cinergy clearly provided discounted rates from Duke/CG&E in exchange for Cognis' promise to support the Stipulation.

Moreover, the agreement with Cognis was expressly linked to the Commission's holding in 03-93-EL-ATA. The Cognis agreement states that the agreement would terminate if the Commission, "in case no. 03-93-EL-ATA, fails to issue an order

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[4] Id.
[5] Direct prepared testimony of Beth E. Hixon, Attachment 5, June 7, 2004 Agreement between Cinergy Corp. and Cognis Energy Corp.
[6] Id.

acceptable to Cinergy."[7] This provision coupled with the discounts provided by Duke/CG&E to Cognis show the side agreement for what it is – a financial arrangement to induce a large commercial customer to support and sign the Stipulation.

It is important for the Commission to make the following observations about the Cinergy agreement with Cognis. First, although a party to the agreement, Cinergy is not a utility which provides utility service to Cognis. Cinergy is a utility holding company that owns utilities including but not limited to Duke/CG&E. These facts beg the question why is the parent holding company contracting with a retail customer to purchase power from its subsidiary at discounted prices? The only logical explanation is because Duke/CG&E under Sections 4905.22, 4905.32 and 4905.35 Revised Code is prevented from offering discounts to tariff service to selected customers without specific approval by the Commission under Section 4905.31 Revised Code. No pretense can be raised that the agreement between Duke/CG&E's parent, Cinergy, and Cognis was a CRES marketing effort of any sort. This brings us to the second observation. The consideration for Cognis to sign the agreement was clearly the discount off tariff it could not otherwise obtain. The consideration given to Cinergy was Cognis' support for Cinergy subsidiary's RSP rates – rates Cognis would not have to pay by virtue of the side agreement. Any doubt that Cinergy's true consideration for forcing its subsidiary to grant Cognis a discount off tariff rates was the right for its subsidiary to charge customers the RSP rates provided in the Stipulation is eliminated by the fact that Cinergy could, pursuant to the terms of the agreement, cancel the discounts to Cognis if the Commission altered the RSP rates provided in the Stipulation to be charged to others[8].

[7] Id., p. 2.
[8] Id.

The parent and affiliates of Duke/CG&E not only provided an inducement to Cognis, but also provided similar inducements to many other large commercial customers. For example, the IEU entered into an agreement effective May 28, 2004 for the benefit of Marathon Ashland, Inc. and General Motors, Inc.[9]

Like the contract with Cognis, the IEU contract expressly provided for monthly reimbursements to Marathon and GM by a non utility subsidiary of Duke/CG&E to customers of Duke/CG&E for tariff service. Quoting from the contract:

> ...Cinergy shall reimburse Customers for payments made to The Cincinnati Gas & Electric Company as follows: (1) From January 1, 2005 through December 31, 2005, any Customer purchasing competitive retail electric service from a non-Cinergy affiliated competitive retail electric service provider shall maintain the shopping credit structure (payment of Big G less applicable shopping credit) approved by the Commission in case no. 99-1658-EL-ETP and Cinergy shall reimburse monthly such customers for half of the amount billed to customers as the component of the Provider of Last Resort (POLR) charge paid to The Cincinnati Gas & Electric Company; (2) from January 1, 2005 through December 31, 2005, Cinergy shall reimburse GM monthly the full amount billed to and paid by GM as the RTC component paid to The Cincinnati Gas & Electric Company provided GM is purchasing competitive retail electric service from a non-Cinergy affiliated competitive retail electric service provider during such calendar year; (3) beginning January 1, 2005, through December 31, 2005, for all Customers purchasing competitive retail electric service from a Cinergy affiliated competitive retail electric service provider, Cinergy shall reimburse monthly all such Customers for the as billed and actual full amount of the RTC, the as billed and actual full amount of any Rate Stabilization Charges, and half of the amount billed to Customers as the POLR component actually paid to the Cincinnati Gas & Electric Company; (4) beginning January 1, 2006, for Customers purchasing the above described competitive retail electric service from a Cinergy affiliated competitive retail electric service

[9] Direct prepared testimony of Beth E. Hixon, Attachment 4, May 28, 2004 Agreement between Cinergy Corp., through its agent CRS, and IEU – Ohio.

> provider, Cinergy shall reimburse monthly all Customers for the full amount billed to and paid by Customers as the RTC, the full amount billed to and paid by Customers as Rate Stabilization Charges, and half of the amount billed to Customers as the POLR component actually paid to The Cincinnati Gas & Electric Company.[10]

Once again, the consideration that Cinergy through its agent was to receive for the discount to its subsidiary's tariff rates was that IEU was required to support the Stipulation filed by CG&E in Case No. 03-93-EL-ATA. Further, IEU's agreement with Cinergy also provided that Cinergy would pay IEU $100,000 "as compensation for legal services, upon the issuance of a final order of the Commission satisfactory to Cinergy."[11] This cash payment is particularly troubling, for despite the description – that it is compensation for legal services – the payment can be terminated in the event that "[t]he Commission, in Case No. 03-93-EL-ATA, fails to issue a final order acceptable to Cinergy."[12] If the payment was to compensate for legal expenses, those expenses would arise whether the Commission approved the Stipulation or not. If the payment is a monetary inducement, then of course it must be based on the condition precedent of Duke/CG&E getting its consideration – the right to charge the RSP rates it wants.

Cinergy, directly or through its affiliate acting as agent, also signed agreements with OEG and OHA with terms similar to the Cognis and IEU agreements. For instance, both contracts provide reimbursements to the members of each association for various charges including Rate Stabilization Charges.[13] And just like the other contracts, both agreements required the commercial customer to support CG&E's Stipulation in Case

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[10] Id., p. 2-3.
[11] See Direct Prepared Testimony of Beth E. Hixon, Attachment 4, May 28, 2004 Agreement between Cinergy Corp., through its agent CRS, and IEU-Ohio.
[12] Id.
[13] See Direct Prepared Testimony of Beth E. Hixon, Attachment 2, May 19, 2004 Agreement between CRS and the Hospitals and Attachment 3, May 19, 2004 Agreement between CRS and certain OEG members, p. 2.

No. 03-93-EL-ATA and any related litigation, and included a termination provision in the event that the Commission issued an order unacceptable to CG&E in Case No. 03-93-EL-ATA. As yet even further evidence of the true nature of these side agreements, OHA's side agreement included a cash payment of $50,000 by Cinergy to OHA to sign the agreement, with the $50,000 being payable upon "the issuance of a final appealable order of the Public Utilities Commission of Ohio satisfactory to Cinergy."[14]

2. The Stipulation Side Arrangements were superseded by the Option Contracts.

Duke/CG&E may argue that the above described side agreements are irrelevant because they lapsed when the Commission issued its Orders on Rehearing which materially changed the Stipulation and thus triggered the ability of Cinergy to terminate the agreements. Such an argument though must fail for two reasons.

First, regardless of whether the agreements subsequently lapsed or were terminated, the rates presented to the Commission in the Stipulation for acceptance were based on these side agreements. Thus, the RSP rates contemplated the selected discounts. This taints the Stipulation for it is now no longer clearly the product of a bargained compromise, but one of purchased support. Sections 4905.22, 4905.32 and 4905.35 Revised Code would not have permitted selected discounts and cash payments to customers by the Utility or its affiliates where the only express consideration was an agreement to charge other customers more than what the Stipulation supporters would pay for like service. Such an agreement would clearly violate the non discriminatory statutory standards.

[14] See direct prepared testimony of Beth E. Hixon, Attachment 2, May 19, 2004 Agreement between CRS and the Hospitals, p. 2.

Second, the side agreements with the various trade associations were not terminated, but simply replaced or amended with the option contracts between Duke/CG&E's affiliated competitive retail electric supplier Duke Energy Retail Sales, LLC ("DERS"). In other words, the first set of agreement never lapsed, they were merely superseded.[15]

An internal Duke/CG&E email presents a succinct summary of how and why the original side agreements were replaced with the option contracts.[16] Once again, Mr. Ziolkowski, a rate expert, in writing to the budgeting department at Duke/CG&E explains how it has come to pass that DERS, has no sales and no revenues and 22 million dollars in expenses.

> CG&E (Duke Energy Ohio) filed its RSP (known as the Electric Reliability and Rate Stabilization Plan, ERRSP) during the first half of 2004. A number of large customers, some represented by industry groups, intervened in the filing. CG&E's and the PUCO's goal was to obtain rapid approval of the RSP such that the new rates could go into effect on 1/1/2005. The interveners represented a roadblock, however. To eliminate this roadblock and prevent a formal hearing, CG&E negotiated special conditions with the interveners and ultimately reached agreements with them.[17]

The agreements referenced in the email were the side agreements discussed above.

The email continues, summarizing the transition from the side agreements to the option contracts, "[t]he original settlement agreement with the interveners called for Cinergy to form a "CRES" (Certified Retail Electric Supplier – the State of Ohio must

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[15] See e.g. Direct Prepared Testimony of Beth E. Hixon, Attachment 2, June 7, 2004 Agreement between Cinergy Corp. and [redacted] Attachment 11, October 28, 2004 Agreement between Cinergy Corp. and [redacted]

[16] See Direct Prepared Testimony of Beth E. Hixon, Attachment 21, May 15, 2006 E-mail from J. Ziolkowski to J. Gomez.

[17] Id.

certify all retail electric providers in terms of creditworthiness, etc.). The Cinergy CRES was to provide generation service for the interveners at pre-specified contractual rates."[18] However,

> ...[a]t the last minute (i.e., December 2004), Cinergy's top management decided that the CRES settlement was too risky, and Cinergy essentially decided to not follow through with the contract. To prevent lawsuits for breach of contract, Cinergy entered into negotiations with each of the parties and agreed to make monthly or quarterly payments in lieu of offering generation service from the CRES.[19]

These payments were the option contracts attached to the Direct Prepared Testimony of Beth E. Hixon, Attachment 17.

Continuing to follow the Duke/CG&E e-mail as a roadmap,

> [t]he payments for each group of the "CRES" customers differ from each other. Generally speaking, the contracts with each group specify that the customers belonging to that group will receive refunds of various RSP riders (e.g., Rider AAC, Rider FPP, Rider IMF, Rider SRT, etc.). Each month or quarter, I prepare statements that show the amount of money that is to be refunded to each customer, and the payments are made from the CBU's (non-regulated generation) budget.
>
> These payments will last through December 2008 at which point the ERRSP will terminate.[20]

The terms of the actual option contracts confirm the roadmap presented by the internal CG&E email. For instance, the option contract between DERS and [redacted]a member of the OEG, provided a quarterly financial payment to [redacted]ven though [redacted]ontinued to obtain power through CG&E (and not the CRES affiliate). The

[18] Id.
[19] Id.
[20] See Direct Prepared Testimony of Beth E. Hixon, Attachment 21, May 15, 2006 E-mail from J. Ziolkowski to J. Gomez.

amount of the quarterly payment was equivalent to the amount paid by [redacted] to CG&E during the quarter under CG&E's Market-Based Standard Service Offer (MBSSO) minus the sum of the following: [redacted] Significantly, the [redacted] greement, like all other option contracts, contained a provision whereby the agreement superseded and replaced the previous side agreement.[22]

It is also important for the Commission to recognize that these option contracts are simply an attempt to disguise an otherwise prohibited for of discounted utility services. First, it is undisputed that the customers tied to the option contracts received power from Duke/CG&E and not its CRES affiliate. As stated in the internal Duke/CG&E e-mail:

> So as you can see, the "CRES" customers are actually full-requirement customers of Duke Energy Ohio, but they receive payments from the Company instead of receiving generation service from the Cinergy CRES...[23]

In fact, Duke/CG&E's CRES affiliate did not serve any retail customers but still had at least $22 million per year in expenses. That alone raised internal questions within Duke/CG&E during Duke/CG&E's annual budgeting process.[24] Lastly, each option contract was not based on a market price, but rather the applicable utility service

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[21] See Direct Prepared Testimony of Beth E. Hixon, Attachment 3, May 19, 2004 Agreement between CRS and certain OEG members, p. 2.
[22] Id.
[23] See Direct Prepared Testimony of Beth E. Hixon, Attachment 21, May 15, 2006 E-mail from J. Ziolkowski to J. Gomez.
[24] Id.

provided to the customer.[25] All of these facts establish that the option contracts were simply a guise whereby Duke/CG&E provided discounted utility services to select customers to secure the customers support for the Stipulation.

3. The Option Contracts are a thinly veiled utility service discount agreement.

The fact that the option contracts (1) follow the side agreements in time, (2) go to the same interested parties, (3) contain roughly the same discounts as the side agreements and (4) grant the same consideration to Duke/CG&E's - namely support to charge the RSP rates of Duke/CG&E's design as provided in the Stipulation - is reason enough to view the option contracts as just subsequent documents intended to carry out the original transaction envisioned by the side agreements. However, in the event that additional support is required to verify this fact, the internal memos quoted above clearly provide that Duke/CG&E in fact characterized the option contracts in much the same manner.

OMG expects that Duke/CG&E will attempt to characterize the option contracts[26] as valid CRES transactions which stand on their own and thus do not represent utility discounts. In order to examine the validity of this characterization, it is important to examine the operations of DERS to determine if it is a legitimate CRES or merely a shell entity. OMG subpoenaed Charles Whitlock, the person identified by DERS in discovery as the spokesperson for DERS, to testify on cross examination. By agreement Mr. Whitlock's deposition was entered into the record in lieu of making Mr. Whitlock travel

[25] See Direct Prepared Testimony of Beth E. Hixon, Attachment 17, Option Agreements.

[redacted]

to Columbus and testify.[27] The deposition makes clear that, at most, DERS is only a "potential" CRES, but not *functioning* as a CRES presently. First, aside from Mr. Whitlock, DERS has no employees[28], and Mr. Whitlock is only a part time employee of DERS. Further, Mr. Whitlock does not have a DERS business card, and is paid by Duke Energy Services[29] not DERS. DERS does not now, nor has it ever, sold a single kWh to a customer in Ohio[30] and Mr. Whitlock, DERS spokesperson, is unaware if it has ever conducted any marketing activity.[31]

What DERS does have though are expenses. In 2006, DERS paid out over 22 million dollars to option contract holders who are members of IEU, OEG and OHA.[32] Coincidentally, IEU, OEG and OHA were all signatories to the Stipulation. Under the option contracts DERS does not sell power to the option contract customers, instead it pays them set discounts off Duke/CG&E's POLR tariff rates, utility rates which are not tied to the competitive price of energy. From Duke/CG&E's perspective the option contract customers are standard service customers who pay the full, regular tariff rate. Then, as explained in Mr. Ziolkowski's email, an employee of Duke Energy Services sends the option contract customer a check which represents a discount of certain POLR charges.[33]

On its face this is a clear and simple example of an illegal, utility discount plan. As the Supreme Court explained in AK Steel v. Pub. Util. Comm. 95 Ohio St. 3d 765 , in order for a limited discount to be available, all like customers must have an opportunity

[27] See OMG Exhibit 4.
[28] Id. P. 93.
[29] Id. P. 15.
[30] Id. P.61.
[31] Id.
[32] Id. 100-104.
[33] Direct prepared testimony of Beth E. Hixon, Attachment 21, May 15, 2006 E-mail from J. Ziolkowski to J. Gomez.

to enjoy the discount. In AK Steel, the Court approved a limited discount open only to the first 25% of a rate class who signed up as an inducement. The Court reasoned that all customers in the rate class had an equal chance to sign up in time for the limited discount. In contrast, the option contracts does provide such an equal chance. Rather, discounts provided by the option contracts are available to only select customers, who coincidentally have a connection via members with a signatory party or are a signatory party to the Stipulation. Such a design fails the AK Steel decision test for a utility giving select discounts.

The thin veil that Duke/CG&E presents as an attempt to legitimize this otherwise prohibited type of discount program is that under the option contracts DERS may someday, if it elects to do so, supply the customer as a CRES based on the Duke/CG&E tariff price minus the discount. It strains credibility to claim that a CRES with no sales, no sales force, no revenue, no full time employees, and no active customers is anything but a mere shell corporation.

B. The option contracts violate Section 4928.02(G), Revised Code.

There is yet another problem with the option contracts. The retail customers are utility customers for sometime (or all the time) taking utility standard service as a condition of the contract. The strongest claim that DERS can make with respect to supporting itself as a legitimate CRES is that while it is true that it does not have customers today, the option contract allows it to go into business at some undetermined point in the future if market prices make CRES marketing attractive. If the goal of DERS's business plan was to reserve customers for future sales conditioned on market prices declining, such a right could have been accomplished by simply writing an option

contract that permits DERS to begin marketing if power prices drop to a level that support selling at the Duke/CG&E tariff price minus the discount. What makes the DERS plan unique are the so called option payments. Only an affiliated CRES could possibly benefit, on a company wide consolidated balance sheet approach, from a business plan under which sales were steered to the Utility. The General Assembly when it passed the restructuring bill[34] was well aware that an affiliated CRES could be used to dual market, and that such activity was anticompetitive behavior. So the Restructuring Act provided in Section 4928.02, Revised Code that the Commission

> (G) *Ensure effective competition in the provision of* retail electric service by avoiding anti competitive subsidies flowing from a non competitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa;

The option contracts represent just the type of joint marketing venture between the Utility and an affiliated CRES that the General Assembly sought to ensure would not occur. Pursuant to the option contracts, the customer must stay with Duke/CG&E, or be transferred to its affiliated CRES, DERS, either way the customer is secured for the Duke/CG&E family of companies and excluded from shopping with any other non-affiliated CRES.

C. The option contracts violate Section 4928.17, Revised Code.

The option contracts also violate the notion of corporate separation as set forth in Section 4928.17(A), Revised Code. Section 4928.17, Revised Code, provides that a public utility such as Duke/CG&E must implement a corporate separation plan that provides for the provision of competitive electric retail service or the non-electric product

[34] Ohio Consumers' Counsel v. Pub. Util. Comm., 111 Ohio St. 3d 300, 2006-Ohio-5789.

or service through a fully separated affiliate of the utility and that the plan includes separate accounting, a code of conduct, and other measures as are necessary to ensure full separation. The plan must also satisfy the public interest in preventing unfair competitive advantage and preventing the abuse of market power. Finally, the plan must be sufficient to ensure that the utility nor any affiliate, division or part thereof shall extend any undue preference or advantage.

The option contracts violate this required notion of corporate separation. In Item 9 of the May 19, 2004 agreement between the hospitals and Cinergy Retail Sales, LLC (the predecessor of DERS), the hospitals are to "cause the Ohio Hospital Association to support a Stipulation filed by The Cincinnati Gas and Electric Company and the Ohio Hospital Association, in case no. 03-93-EL-ATA, and any related litigation."[35] In other words, in a contract between an affiliated CRES and a customer, one of the provisions of the contract is to require that customers make and support a stipulation with an electric distribution utility. If there were truly a corporate separation plan in place, this option contract could never have been issued.

D. There is no basis for the IMF charges.

The Ohio Supreme Court found that the infrastructure maintenance fund ("IMF") charge to be without evidentiary support or justification, determining that the Commission cannot justify the modifications made on rehearing merely by stating that those changes benefit consumers and the utility and promote competitive markets. Ohio Consumers' Counsel v. Pub. Util. Comm., 111 Ohio St. 3d 300 at 309. Thus, the issue of the IMF charge was remanded to be determined in this proceeding.

[35] See Direct Prepared Testimony of Beth E. Hixon, Attachment 2, May 19, 2004 Agreement between CRS and the Hospitals.

The statutory scheme under restructuring is fairly straight forward. An electric distribution company will charge for wire services as wire services remain a franchised monopoly service. Because these are monopoly services the rates and charges for the non competitive wire services remain subject to pricing under Section 4905.18 Revised Code which provides for cost of service pricing. Section 4928.14 (A) Revised Code also provides that electric distribution companies shall offer a default service for those who do not purchase power on the open market. This default or standard service is offered on a bundled service basis that contains the same wire service charges set by cost of service criteria for shopping customers; plus a competitive energy component priced at market rates[36].

The IMF charge did not appear until the second Order on Rehearing[37] and in that Order the IMF is listed as non by-passable wire charge funding provider of last resort charge services. Since the IMF charge was not a part of the Stipulation or the evidentiary hearing, the burden rests with Duke/CG&E in this proceeding to establish IMF true nature and justify its cost. Since the IMF is listed as a POLR charge it must be cost justified, as opposed to if the IMF was listed as an energy charge in which case it would have to be priced at market.

Duke/CG&E Witness Steffen presented the case for the IMF charge. Mr. Steffen's position is that IMF and the SRT are merely sub components of the Reserve Margin charge which was a POLR charge in the Stipulation and permitted Duke/CG&E to purchase excess capacity in the open market to be ready to serve customers in the event of excessive demand. Mr. Steffen then cost justifies the IMF rate by noting that if

[36] Section 4928.14(A), Revised Code.
[37] Case No. 03-93-EL-ATA – Second Order on Rehearing 1/19/2005.

the two sub components (SRT and IMF) of the Margin Reserve are added together they total $45,080,000 which is less than the $52,898,560 for the Reserve Margin calculated as the cost and listed as such in the Stipulation.[38]

In sum, Duke/CG&E's position is that the Reserve Margin was a POLR service for it was designed to maintain service for all customers in the event of peak demands above the expected level, and the cost of providing the Reserve Margin was addressed in the Stipulation which the Commission found reasonable. Given this theory, that the fact SRT and IMF are sub components of the Reserve Margin, which was approved in the Stipulation, Duke/CG&E put no other evidence in the record as the use and cost of the IMF.

Even if one accepts the argument that the IMF is a sub component of the Reserve Margin, the cost justification is far from convincing. The fact that the total of the charges for the SRT and the IMF are less than the amount Duke/CG&E originally estimated has many alternative explanations. For example, the IMF could have been over priced and the SRT under priced, thus the total of the two may be the same, but that is because both are inaccurate. The cost justification in the Stipulation was based on projected costs of capacity, and the sum of the SRT and IMF may be lower now because the projections were both overstated. In sum, the fact that the two cost components total less than the projected Reserve Margin cost projection offers little proof that either the IMF or the SRT are correctly priced.

In a subsequent proceeding the SRT was converted to a tracked cost and made by-passable by those retail customers who shopped and agreed not to return to the standard

[38] Duke Remand Ex. 3 at 26-27.

service prior to the end of the RSP.[39] The sub component argument was also challenged on factual grounds. OCC Witness Talbott refuted the concept that the IMF was part of the Reserve Margin component of the Stipulation testifying that "the SRT ... is the sole successor to the reserve margin charge." OCC Remand Ex. 1 at 4.

If Witness Talbott is incorrect, and the SRT and IMF are merely parts of the same reserve margin charge, then logically if the Commission found that the SRT was not an essential POLR charge and at the retail customer's election could be made by-passable, then the same should be true of the IMF.

The IMF cost justification though really begins to unravel when one considers the side agreements and the fact that Stipulation may lack the verification of being agreed to by opposing parties. If the Stipulation is tainted, and no longer passes the Industrial Energy Users three part test, the Stipulation cannot be used to justify the Reserve Margin cost of which Duke/CG&E now claims the IMF is a sub component. In sum, the burden on Duke/CG&E is to justify the IMF charge on cost of service principles. The record in this matter has no independent cost justification of the IMF.

Duke/CG&E Witness Rose could not remember what the components of the IMF were. Tr. I, 77. Witness Steffens was emphatic that the IMF was not a discreet charge for a discreet service. That is, unlike the FPP which tracts fuel expense, or the SRT which is based on the actual cost of capacity costs billed to Duke/CG&E, or the AAC which is based on environmental and Homeland Security costs, the IMF is not associated with any discrete expense. Tr. I, 123. Rather, Mr. Steffen stated that Duke looked at the "totality of the price" and believed that the price, without care for the actual components

[39] See the Second Entry on Rehearing paragraph 6 response to Mid American Energy p.2 and Opinion and Order, Case No. 05-724-EL-UNC, November 22, 2005.

comprising such price, met a reasonable standard that the company was willing to accept. Tr. I, 121.

The POLR services are monopoly services. To prevent the charging of monopolistic services, a POLR fee cannot be just what the franchised monopolist would want to charge. If such economic rents were permitted the system could quickly break down. In this case, given the side agreements unsubstantiated charges are particularly questionable for one wonders as to whether the non discreet services charges are funding the discounts. The IMF charge may be proper as an energy charge, for there the pricing criteria is whether in sum the energy charge is at market and does not have to be a discreet cost of service based charge. What can be said definitively though is that the record in the matter at bar does not cost justify the IMF as a wire service POLR expense. Thus, the IMF must be made a by-passable charge.

III. CONCLUSION

For the foregoing reasons the OMG request:

A. The Commission find that the Stipulation fails the reasonableness test and should not be accepted for rate making purposes.

B. The Commission find that charging a customer less than the tariff rate for a tariff service is illegal regardless of how the discount is paid or who pays the discount.

C. The Commission find that a program whereby a non regulated affiliate which does not sell power, but makes cash payments to retail standard service

retail customers of the utility violates Section 4928.02(G), Revised Code and Section 4928.17 Revised Code

D. The Commission find that the IMF is not a utility POLR charge and thus must be by-passable if it is charged at all.

Ohio Marketers Group does not ask that the option contracts be invalidated at this time because of the harm that may cause to the community, but in light of the anti competitive nature of the agreements, asks that Duke be required to meet with the Staff and the CRES authorized to make retail energy sales on the Duke\CG&E system to discuss how to remove barriers to shopping and report back to the Commission.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Confidential Initial Post-Hearing Brief of The Ohio Marketers Group was served by email on April 13, 2007 to all of the trial counsel on the special email list prepared by the Attorney Examiners. Non-confidential copies of the Initial Post-Hearing Brief were served on the following parties of record by email or first class mail this 13th day of April 2007.

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BEFORE
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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
	:		05-724-EL-UNC
	:		05-725-EL-UNC
	:		06-1068-EL-UNC
	:		06-1069-EL-UNC
	:		06-1085-EL-UNC

THE MERIT BRIEF OF CINERGY CORP. AND DUKE ENERGY RETAIL SALES, LLC

CONFIDENTIAL VERSION

SUBMITTED UNDER SEAL

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TABLE OF CONTENTS

I. INTRODUCTION

Cinergy Corp ("Cinergy") and Duke Energy Retail Sales, LLC ("DERS") find themselves in an unusual position in these proceedings. Neither was a party to these proceedings when the issues now before this Commission were determined. Neither company has any interest in these proceedings other than an interest in preserving certain confidential business information that each was compelled to produce. Yet, both find themselves forced to address unsupported accusations of improprieties by the Office of Consumers Counsel ("OCC") based on the existence of commercial agreements between Cinergy/DERS and third parties that have no relevance to the issues remaining following the Supreme Court of Ohio's decision on remand. OCC has apparently determined that such allegations represent its only opportunity to discredit decisions made by this Commission ***that have been affirmed by the Supreme Court of Ohio on direct appeal.***

In pursuing this strategy, OCC has lost sight of the fact that the additional discovery that it was permitted was not from Cinergy and DERS, but from CG&E. OCC has also lost sight of the only issue that prompted the Ohio Supreme Court to permit it further discovery in the first place: Whether ***a single agreement*** to which OCC was denied access through discovery had any relevance to the bargaining that occurred among capable, knowledgeable representatives of parties to a stipulation submitted to this Commission which, for its own reasons, the Commission declined to adopt.

II. PROCEDURAL BACKGROUND

A. CG&E's Initial Application Addressing the End of its Market Development Period.

The Cincinnati Gas & Electric Company[1] ("CG&E") initiated PUCO Case No. 03-93-EL-ATA on January 10, 2003, by filing an application to modify its non-residential generation rates to provide for a market-based standard service offer ("MBSSO") to its customers and to establish a competitive bid service rate option ("CBP"), all as contemplated by Am. Sub. S.B. 3. CG&E's filing was intended to conform to the statutory process by which market based pricing was to be made available to its customers at the end of the market development period described within Am. Sub. S.B. 3 and within Orders issued by this Commission in CG&E's electric transition plan case, Case No. 99-1658-EL-ETP. Numerous parties intervened in Case No. 03-93-EL-ATA *et al.*, and comments were filed in March and April, 2003, regarding CG&E's proposals. As described within its application, CG&E indicated its intention to divest itself of all generation assets.

On December 17, 2003, nearly a year after CG&E filed its application in Case No. 03-93-EL-ATA *et al.*, this Commission issued its Finding and Order in case number 01-2164-EL-ORD. In that docket, the Commission adopted rules 4901:1-35-01 *et seq.* (hereafter "Rule 35") which contain the Commission's regulations regarding the conduct of the competitive bid process and the terms that would control electric utilities' market-priced standard service offers to the public. Thus, nearly a year after CG&E proposed

[1] CG&E's name was changed to DE-Ohio, of course, following this Commission's approval of the merger between Cinergy Corp. and Duke Energy in Case No. 05-732-EL-MER. In this brief, Cinergy and DERS will refer to this entity as CG&E prior to the merger, and as DE-Ohio post merger.

the manner in which it would "go to market," the Commission formalized the rules that would govern the process of "going to market."

B. The Commission's Request to CG&E for an RSP Proposal.

This Commission is of course constrained by those provisions of Am. Sub. S.B. 3 that terminated the Commission's jurisdiction to regulate the price of the generation portion of electric service. Although without legal authority to prescribe rates, this Commission chose to act upon its concern that the markets for electric generation service were not developed to the extent that the Commission felt the General Assembly believed would be the case when it enacted Am. Sub. S.B. 3.

With legitimate concerns and legal constraints upon its ability to address those concerns,[2] this Commission issued an entry dated December 9, 2003, that, among other things, asked CG&E to **voluntarily** file a plan that would protect its customers against the same sort of substantial price increases in electric generation costs that have occurred in other states that have "gone to market." Specifically, the Commission asked CG&E to propose a rate stabilization plan ("RSP") that would satisfy three different, and in many ways, inconsistent goals: (1) provide rate certainty for consumers, (2) provide financial stability for the utility, and (3) provide for the further development of competitive markets.

Again, it is worth remembering that this Commission asked CG&E to submit an RSP proposal a week before the Commission issued Rule 35 regulating the manner in which electric utilities were to conduct their CBP processes and providing for the utilities' market-based, standard service offers to customers. Thus, the Commission plainly

[2] Indeed, Cinergy and DERS share the Commission's concern that market based prices may result, at least in the short term, in an increase to all consumers in the cost of electric power within Ohio.

contemplated that CG&E would submit a plan that would differ dramatically from the Commission's CBP and standard service offer rules, contained within Rule 35, at the time that it made its request to CG&E.

CG&E complied on January 26, 2004, and filed an RSP that differed significantly from the original plan that CG&E had filed in preparation for the end of its market development period. Among the key differences between the original application and the RSP, CG&E indicated that if it was to accept responsibility for stabilizing market rates, it would need to retain control of its generation assets.

Additional parties intervened, comments were filed on the RSP proposal, and CG&E, Staff, and others filed testimony regarding the RSP. Evidentiary hearings began May 17, 2004.

C. The Proposed Stipulation.

Hearings regarding CG&E's RSP proposal were continued when, on May 19, 2004, CG&E filed a stipulation that modified its RSP proposal. CG&E, the Commission's Staff, and ten intervening entities or interest groups – First Energy Solutions ("FES"), Dominion Retail ("Dominion"), Green Mountain Energy, Kroger, Cognis Corp., People Working Cooperatively ("PWC"), Communities United for Action ("CUFA"), IEU-Ohio, the Ohio Energy Group ("OEG"), and the Ohio Hospital Association ("OHA") – each executed the stipulation and agreed to support this Commission's adoption of their stipulation. CG&E filed supplemental testimony on May 20, 2004, in support of the stipulation. Staff witness Richard Cahaan submitted supplemental testimony in support of the stipulation on May 24, 2004.

Without necessarily indicating disagreement with the stipulation, a number of intervenors chose not to execute the stipulation. Two intervenors, however, the Ohio Consumer's Counsel ("OCC") and Ohio Marketers' Group ("OMG") actively opposed terms within the stipulation. Seeking evidence in support of its opposition, OCC moved on May 20, 2004, for an order compelling the production of any agreements **between CG&E and any party to the proceedings.**[3] OCC's motion to compel was denied by the Hearing Examiners. OCC and OMG then filed testimony in opposition to the stipulation on May 26, 2004, and hearings resumed on May 26 and May 27, 2004.

D. The Commission's Rejection of the Proposed Stipulation.

On September 29, 2004, the Commission issued an Opinion and Order in which it offered to "approve" the stipulation, but only with material modifications to its terms. However, as filed by the parties, the stipulation provided that all parties were released from any obligations thereunder if the Commission failed to approve the stipulation *without* material modification. Thus, the Commission's action effectively invalidated the stipulation and the parties believed that it ceased to exist upon issuance of the Commission's Opinion and Order.

E. CG&E's Response to the Commission's Rejection of the Proposed Stipulation.

On October 29, 2004, CG&E and others, including OCC, filed applications for rehearing in response to the Commission's September 29, 2004, Opinion and Order. In its application for rehearing, CG&E disagreed with the proposed modifications and renewed its request that the Commission either (1) approve its original RSP proposal and allow it to implement its MBSSO and CBP proposals or (2) approve the RSP as modified

[3] An agreement dated February 5, 2004 (as subsequently amended), between CG&E and the City of Cincinnati, Ohio was the only agreement responsive to the discovery request.

by the stipulation or (3) approve a third and new option in which CG&E proposed to reduce its total recovery by breaking certain proposed charges into different component elements, by proposing that some (but not all) such components remain non-bypassable, and by changing the percentages of customers that might bypass components. CG&E also asked the Commission to approve its retention of generation assets that CG&E had previously indicated would be divested by December 31, 2004.

F. **The Commission's November 24, 2004, Entry on Rehearing.**

On November 24, 2004, the Commission rejected CG&E's request that it be authorized to "go to market" as proposed in its application. The Commission also rejected CG&E's request that the Commission approve the RSP, as modified by the stipulation. Finally, the Commission rejected CG&E's compromise proposal. The Commission then offered to accept only certain components of the alternative proposal in CG&E's October 29, 2004, Application for Rehearing, and rejected certain others. With respect to even those components that it was willing to accept, the Commission required that CG&E justify those components through later filings before they would become effective.

Without Commission approval, CG&E could not conduct the CBP or offer MBSSO pricing to customers. Without Commission approval, CG&E's continued ownership and operation of generation assets after December 31, 2004, would constitute a technical violation of Orders issued in CG&E's ETP case. CG&E therefore yielded to the Commission and subsequently amended its tariffs to implement an RSP on the terms outlined in the Commission's November 24, 2004, Entry on Rehearing, despite its dissatisfaction with the Commission's Entry, which would reduce CG&E's revenues by

approximately 32 Million dollars as measured against CG&E's RSP proposal. That foregone revenue is directly reflected in prices significantly beneath the level CG&E believed appropriate considering the market risks that appeared to exist at the end of 2004.

G. **The Supreme Court of Ohio's Remand to this Commission.**

Unlike CG&E, OCC was unwilling to accept the result imposed by the Commission. After the Commission overruled several additional applications for rehearing, OCC appealed to the Ohio Supreme Court on May 23, 2005. On November 22, 2006, the Ohio Supreme Court issued its opinion in this matter as *Ohio Consumers Counsel v. PUCO*, 2006-Ohio-5789. Significantly, ***the Court upheld the Commission's action against every substantive argument raised as error by the OCC*** – including CG&E's retention of its generating assets.

The Court found merit, nonetheless, regarding two assignments of error raised by OCC regarding purely procedural issues. The Court remanded the case to this Commission with an instruction that the Commission support its modifications to the RSP by reference to the evidentiary record. In addition, apparently accepting the Commission's "approval" of the stipulation at face value, the Court held that OCC should receive those agreements between CG&E and other parties to the proceedings that it had requested in discovery, finding that those agreements could be relevant to the narrow issue of whether the stipulation resulted from "serious bargaining among capable, knowledgeable parties" – the first element of the three-part test this Commission employs in deciding whether or not to approve a stipulation by some, but not all, parties.

H. The Unnecessary and Unfair Involvement of Cinergy Corp and Duke Energy Retail Sales, LLC in the Post-Remand Discovery Process.

In December 2006, CG&E complied with the Supreme Court of Ohio's opinion and provided OCC with the single contract responsive to OCC's May, 2004 motion to compel by producing a February, 2004, contract between CG&E and the City of Cincinnati, Ohio. While the City had appeared in the RSP case and was aware of the stipulation, it ultimately chose to withdraw – without supporting the stipulation.

Recognizing at last that it's "victory" before the Supreme Court of Ohio was a hollow one because the only agreement responsive to its discovery request was obviously and entirely irrelevant to the issue identified by the Supreme Court, and notwithstanding that it had not sought any other discovery in 2004, OCC sought to expand discovery based on allegations made in a separate lawsuit filed in federal court. As a result, on December 13, and December 18, 2006, OCC demanded that agreements between DERS (an entity formed by Cinergy to compete in the Ohio market as a competitive retail electric service provider) or *any* corporate affiliate of DERS with *any* customer of CG&E be produced. DERS objected to that request and moved to quash the subpoena.

On January 2, 2007, the attorney examiner correctly concluded that OCC's discovery request was too broad. Nonetheless, and even though the mandate of the Ohio Supreme Court had already been satisfied, the attorney examiner granted OCC a limited expansion of its discovery. OCC was permitted to discover any agreements between DERS and any party to the RSP case. After obtaining this expanded discovery, OCC served a similar subpoena duces tecum upon Cinergy.

When they received subpoenas compelling them to produce commercial contracts to which they are parties, Cinergy and DERS moved, and were granted the right, to

intervene to protect their commercial agreements from public disclosure. Cinergy and DERS asked the Commission for the protection to which their agreements are legally entitled pursuant to Ohio's Trade Secrets Act, Ohio Revised Code § 1333.61(D), the federal Trade Secrets Act, 18 U.S.C. § 1905, and this Commission's rules, O.A.C. § 4901-1-24.

I. Cinergy and DERS' Responses to OCC's Subpoena.

In response to the subpoenas from OCC, Cinergy produced two agreements and DERS produced a total of thirty-one agreements to OCC. Had OCC issued its ***2007*** subpoenas to Cinergy and DERS in 2004 and had OCC's ***2007*** discovery demands upon DERS and Cinergy been granted at the time OCC moved to compel production from CG&E on May 20, 2004, Cinergy would have had ***no*** agreements to produce and DERS would have produced ***two*** agreements **BEGIN REDACTION** – a May 19, 2004, agreement between DERS and OEG; and a May 19, 2004, agreement between DERS and the OHA. **END REDACTION** Thus, the ***only*** agreements produced to OCC by Cinergy and ***twenty-nine*** of the thirty-one agreements produced to OCC by DERS in 2007, would not have been produced to OCC in response to its May 20, 2004, motion to compel for the simple reason that they did not exist until *after* the date of the stipulation, OCC's discovery request, and the evidentiary hearing held during 2004.[4]

[4] The next closest agreement in time to the date of the stipulation is an agreement between DERS and **BEGIN REDACTION** IEU-Ohio dated May 28, 2004, more than a week following the date of the stipulation, which is then followed in order by an economic development agreement dated June 7, 2004 between Cinergy and Cognis Corp., and then by a DERS agreement dated July 7, 2004 with Kroger. **END REDACTION**

III. FACTS: THE CONTRACTS PRODUCED BY DERS AND BY CINERGY.

A. Contracts in which DERS Agreed to Provide Service to its Customers.

Not surprisingly, the DERS agreements concern DERS' efforts to secure customers for itself. Each DERS agreement reflects DERS' economic decisions based upon publicly available information regarding the status of the PUCO's RSP case and the likely market for electric generation service in Ohio. Any CRES monitoring the case could have used the same information, including the nature of the opposition to CG&E's RSP, in the same way that DERS used that information.

BEGIN REDACTION In agreements reached between May 2004, and November 2004, DERS agreed to provide generation service to members of industry groups that were opposing CG&E's RSP filing. By opposing CG&E's proposed prices, these industry groups identified themselves as entities that viewed the price of generation as something of significance. A number of these same customers offered load patterns attractive to a CRES seeking market share. DERS simply used the fact that certain customers were opposed to certain proposed RSP riders to offer service at a price to be determined through specified discounts to a recognized baseline – the CG&E price that DERS expected this Commission to approve. DERS then based its discounts upon those portions of CG&E's RSP that generated the most heated opposition. All contracts entered into by DERS prior to this Commission's Opinion and Order of September 29, 2004, provided a price based upon the price that DERS expected would be established by this Commission's approval of the stipulation. When the Commission rejected the stipulation, however, DERS' contracts with its customers were, by their terms, void.

When CG&E filed its application for rehearing, DERS again used the same marketing strategy based on a similar assumption that the Commission would accept CG&E's alternative proposal regarding its RSP. During negotiations that occurred in November, 2004 – six ***months*** after the stipulation was filed – DERS employed the same concept that it employed during the summer of 2004. It again offered its potential customers prices based upon the prices proposed by CG&E minus discounts based upon those components of CG&E's proposed prices that had generated strong opposition from potential market participants. Again, however, the parties included provisions that would nullify the contracts if the anticipated prices were not approved. As a result, when the Commission rejected the alternatives proposed by CG&E in its application for rehearing, the "Pre-Rehearing Agreements" – to use the terminology employed by OCC's witness on the subject, Ms. Beth Hixon – were also void. **END REDACTION**

In both cases, of course, CG&E's proposals were matters of public record, the opposition of the intervenors was similarly public record, and any CRES pursuing market share could have offered prices based upon the same publicly available information used by DERS to create a pricing mechanism attractive to the load CRESes would logically most want to serve.

B. The DERS BEGIN REDACTION Option END REDACTION Agreements.

BEGIN REDACTION When this Commission rejected CG&E's alternative proposal on November 24, 2004, DERS again re-evaluated its ability to offer service to potential market participants. This time, however, DERS concluded that the risks associated with competing against the prices the Commission was insisting CG&E offer were simply too great. DERS was unwilling to use the same strategy a third time.

Nonetheless DERS remained interested in securing a customer base should market conditions permit it to compete. Thus, DERS executed a different strategy. It purchased options to provide service to certain customers in the event that market economics would allow it to profitably serve those customers, at the same time allowing it to limit the significant risks to which a CRES attempting to enter the market at the beginning of 2005 would be exposed.

Ultimately (with the exception of a contract betwee[redacted]and DERS for the benefit o[redacted]these option agreements are the only agreements between DERS and its customers that were not rendered void before they went into effect and are the contracts that have been and continue to be performed. If market conditions lead DERS to conclude that it can move into the market profitably, DERS will benefit from the customer base that it has created.

C. **The Kroger Agreements.**

As OCC's witness regarding the contracts points out (OCC Remand Exhibit 2(A), Prepared Testimony of Beth Hixon (hereafter, "Hixon Testimony") pp. 23-25), the agreements involving Kroger are a bit different than DERS' agreements with other customers. Ms. Hixon also identified the reasons why: Kroger was already a party to contracts with another CRES supplier that was supplying its generation needs. Thus, the DERS agreements with Kroger provide that should Kroger's agreements end in 2006 or 2007, DERS would provide service. Should Kroger's existing supply agreement end in 2008 as appeared most likely, DERS could obtain the right to provide service to Kroger, but only if it was prepared to meet whatever price Kroger could obtain in the market.

D. The Cinergy Agreements.

Cinergy produced two agreements, both with Cognis Corp. The first was entered into two weeks after the stipulation was filed with this Commission and the second, six months later. In neither is Cinergy required to supply energy to Cognis. Mr. Greg Ficke, President of CG&E and a Vice-President of Cinergy at the time Cinergy entered into the Cognis agreements,[5] occupied a unique position in which to understand the agreements between Cinergy and Cognis and the impacts of those agreements on Cinergy and CG&E.

Mr. Ficke acknowledged the obvious fact that the interest of Cinergy includes the interests of CG&E, but also explained that Cinergy had a number of incentives completely unrelated to CG&E for entering into the Cognis agreements:

> Q. Now these documents, why were these documents entered into, [the Cognis agreements, exhibits] 15 and 16?
> A. Well, I think from our standpoint the company, Cognis, agreed to support the stipulation and later our application for rehearing.
>
> . . .
>
> Q. So isn't it connected – isn't execution of exhibit 15 connected with the stipulation.
> A. Correct.
>
> Q. All right. And Exhibit 16 paragraph 5 refers to support of the application for rehearing. So wasn't Exhibit 16 executed in connection with Cognis's support for the ap. for rehearing?
> A. I think that's what I said, but if that's not what I said, that's what I meant to say.
>
> Q. **Is there any other purposes for these agreements, Exhibits 15 and 16?**
> A. Other than addressed on the face of the agreement, I do recall that during this time Cognis which is a rather large employer was undergoing a bargaining unit activity which was impacting their operations. They had been acquired by a foreign company which was placing a number of constraints upon their continued

[5] Mr. Ficke is now a retired consultant to DE-Ohio.

> operation, and as a corporation I don't think we wanted to see such a prominent employer impacted negatively, and I do recall – the only reason I bring it up is I do recall those circumstances being brought to my attention by Cognis and their rather precarious situation in terms of being able to continue to operate.
>
> Cinergy Corp. had an interest, may still have a continuing interest, in providing energy to companies in the general vicinity of Cognis in terms of constructing and operating cogeneration plants and, in a sense, had a continuing interest in the vibrancy of that area, and I guess finally, just you know, as a corporate citizen had an interest in our customers continuing profitable operations.

(OCC Remand Exhibit 9, Confidential Feb. 20, 2007 Deposition of Greg Ficke (hereafter "Ficke Depo.") pp. 74-75.)

Cinergy entered into these agreements because it was interested in pursuing cogeneration development opportunities with Cognis through one of Cinergy's unregulated subsidiaries;[6] was concerned about the continued viability of one of its larger users of both electricity and other products and services provided by unregulated Cinergy entities; recognized that Cognis' prosperity impacted the larger community in which Cinergy companies operate, including an impact on employment levels that in turn, indirectly impact Cinergy operations;[7] and is interested in promoting the economic viability in the Cincinnati area in which Cognis is located. ***END REDACTION***

III. LAW AND ARGUMENT

OCC – an entity created and charged by law exclusively with the representation of residential customers of Ohio utilities – produced one witness to testify regarding the contracts produced to OCC by Cinergy and DERS. That witness, Beth Hixon, neither qualified to render legal opinions nor offering any direct factual testimony, was presented

[6] Mr. Ficke was later asked questions in which he identified Tri Gen, a/k/a Cinergy Solutions as the specific Cinergy affiliates concerned with potential development of cogeneration. (Ficke Depo. at 76.)
[7] Increased unemployment in the Cincinnati area has both direct and indirect effects on demand for still other Cinergy-provided services, including electric power provided by CG&E.

to advocate OCC's position that the Commission should investigate DERS and Cinergy for reasons that are not clear:

- Ms. Hixon does not suggest – in fact, Ms. Hixon does not even discuss – any impact any DERS or Cinergy contract has upon the price paid by residential consumers. For that matter, Ms. Hixon does not suggest that ***any*** of the contracts impact ***any*** price paid by ***any*** customer to CG&E.
- Ms. Hixon acknowledged that she has conducted no studies which suggest ***any*** way in which ***anyone***, in ***any*** rate group, might suffer an injury as a result of contracts that Cinergy or DERS produced and she acknowledged that she is unaware of ***any*** such studies. (Hixon Testimony, pp. 125-130.)
- Ms. Hixon also testified that she conducted no studies and is unaware of any that demonstrate that the DERS contracts were entered into at prices that were unreasonable in relation to the late 2004 – early 2005 market conditions. (Hixon Testimony, p. 118.)
- Ms. Hixon was also unwilling to testify that DERS, Cinergy or CG&E have violated this Commission's corporate separation rules. (Hixon Testimony, pp. 64-66, Transcript of Hearing Vol. III, March 21, 2007 (hereafter "Hixon Cross"), pp. 142-143.)

Nonetheless, OCC insists, based entirely upon Ms. Hixon's testimony, that this Commission investigate Cinergy and DERS to determine whether they violated the corporate separation rules of this Commission, OAC § 4901:1-20-16.

BEGIN REDACTION Ms. Hixon testified that she believes the contracts are evidence of "unjust discrimination" by CG&E in favor of certain large commercial and

industrial customers of CG&E, at the expense of other large commercial and industrial customers of CG&E. (Hixon Testimony, p. 69.) In reaching this conclusion, Ms. Hixon simply ignores both the fact that these customers are not her constituents, and the fact that if the options are exercised, CG&E's relationship with those customers – at least in regard to generation service – ends. **END REDACTION**

A. The Cinergy and DERS Agreements Had No Effect on the Outcome Of CG&E's RSP Case.

The Ohio Supreme Court remanded this matter to this Commission for two purposes, only the second of which is relevant to DERS and Cinergy. The Court held that OCC should have received the discovery it requested in 2004 (not that which it requested in 2007), and that the Commission should determine whether any agreements produced in response to that discovery were relevant to the issue of whether any stipulation approved by the Commission was the product of "significant bargaining among capable, knowledgeable parties." Ms. Hixon does not address these points in her testimony because first, discovery in 2004 would have yielded only one agreement between CG&E and another party and that party did not support the stipulation, and second, because no stipulation was ever accepted by the Commission.

Instead, OCC seeks to recast the entire focus of the Supreme Court's opinion by advocating that the Commission engage in an investigation based on "common threads" between the agreements. (Hixon Testimony, p. 45.) Ms. Hixon asserts that the net effect of her "threads" is to insulate large customers of CG&E from the rate increases proposed in the stipulation, which she then posits must mean that the company's stipulation did not have substantial support of CG&E's customers. (Hixon Testimony, p. 59.)

First, and most obvious, the record in this matter shows that CG&E's proposals were never accepted by this Commission – the support of CG&E customers for CG&E's proposals therefore is ultimately irrelevant. OCC recognizes, of course, that the stipulation was rendered irrelevant by the Commission's Entries of September and November 2004. In fact, OCC itself has argued that this Commission rejected the stipulation. *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (OCC's Memorandum Contra CG&E's Application for Rehearing at 3 n. 3, Nov. 8, 2004). OCC is now judicially estopped from asserting otherwise *Fish v. Bd. of Commissioners of Lake County* (1968), 13 Ohio St. 2d 99, 102; *State v. Nunez* (Ohio App. 2d Dist. 2007), 2007-Ohio-1054, 2007 WL 756517. at ¶ 6.

Second, the record in this matter shows that all customers that received service from CG&E pay the same Commission-approved price for that service. While it is the case that **BEGIN REDACTION** certain customers, willing to leave CG&E at a time when the market favors DERS, will pay DERS a lower rate than they pay CG&E, they also cease to be CG&E customers. The whole point of market competition is to foster competitive pricing. Ms. Hixon herself admitted on cross examination by CG&E's counsel, Mr. Colbert – after first sparring about the subject – that price is a significant factor in motivating customers to switch suppliers. (Hixon Cross, pp. 30-32.) **END REDACTION**

B. Neither Cinergy nor DERS Have Violated the Corporate Separation Rules of This Commission.

Prior to the hearings on remand, Cinergy and DERS repeatedly asked that those intimating violations of the corporate separation rules be directed to pursue their allegations properly using the complaint processes applicable to the corporate separation

rules. Both Cinergy and DERS also objected to the introduction of their contracts into evidence in these proceedings when OCC sought to introduce them not to address the issues on remand but instead to support its vague allusions of misconduct.

1. **Ms. Hixon's "Common Thread" Analysis Reveals Nothing but Commercial Contracts that Contain Terms One Would Anticipate.**

Nonetheless, OCC succeeded in injecting the agreements into these proceedings. OCC relies solely upon Ms. Hixon to explain its actions. Ms. Hixon, in turn, asks this Commission to view with suspicion what she refers to as the four "common threads" that run through all the agreements. Ms. Hixon's "common threads" are:

- The contracts deal with the purchase of power from DERS;
- The contracts contain what Ms. Hixon describes as the "reimbursement" of various rate elements;
- The contracts provide that DERS' customers will support the CG&E stipulation; and
- The contracts provide that the agreements will be terminated in the event the Commission fails to approve the stipulation.

In response to each of Ms. Hixon's "common threads," DERS and Cinergy can only respond: "Well of course." DERS was formed for the specific purpose of operating a CRES business. Necessarily, it seeks to sell generation services to customers. It is not surprising, nor does it indicate a nefarious purpose, that DERS would enter into contracts in which it agrees to sell power to customers. Thus, Ms. Hixon's first thread is meaningless.

Ms. Hixon's statement of her second "common thread" is somewhat misleading. DERS does not "reimburse" its customers under the contracts. Viewed in their correct context, and as Ms. Hixon herself admits, the structure of the DERS contracts, generally,

provide for specific discounts applied to a baseline determined by DE-Ohio's rates. Ms. Hixon admits that in the abstract there is nothing wrong with such a structure and that it may be reasonable to adopt such a structure. (Hixon Cross, pp. 32-34.) Ms. Hixon apparently objects that the level of discounts is determined through relationships to various components of DE-Ohio's RSP. However, as discussed above, DERS' pricing structure is based upon publicly available information and reflects nothing more than the application of sound marketing principles.

Ms. Hixon is somewhat less than clear why she believes her third "common thread" should concern this Commission. Both the "Pre-Order contracts" and "the Pre-Rehearing contracts" – to borrow Ms. Hixon's terminology – are based upon the parties' understanding of the economic consequences that would result from this Commission's anticipated approval of CG&E's prices, and a desire to secure economic benefits out of those consequences. As a result, the parties naturally would support an outcome that would secure them the anticipated economic benefit.

It is equally difficult to understand Ms. Hixon's concern with her fourth "common thread," which is related to the fact that the contracts all contain language nullifying the contracts in the event this Commission chose not to approve the stipulation (or later, the alternative proposal by CG&E). Failure by this Commission to approve the stipulation (or the alternative) would obviously change the economic equations upon which the parties had based their agreements. Because the parties recognized the potential that this Commission might not act in accord with their expectations, they sought to protect themselves against such an event. Ms. Hixon's "common threads", therefore, are merely

logical economic terms, are in no way remarkable, and certainly do not justify OCC's demands for an investigation.

2. CG&E Did Not Negotiate DERS' Agreements.

Although not described as one of her "common threads," Ms. Hixon expresses a fifth concern in that she claims that CG&E was directly involved in the negotiation of the DERS agreements, asserting that CG&E (1) was represented in those negotiations by its President, Mr. Greg Ficke, and (2) that CG&E bound itself to various actions in those agreements. Ms. Hixon bases her claim that CG&E negotiated DERS' agreements on the statement that Mr. Greg Ficke, the former president of CG&E admitted in his deposition that he was involved in the negotiation process on behalf of CG&E. (Hixon Testimony, p. 28.)

This is emphatically *not* the testimony of Mr. Ficke, who was both CG&E's president and a Cinergy Vice President at the time in question. Excerpts from Mr. Ficke's deposition, quoted at considerable length below, reveal that Ms. Hixon has distorted Mr. Ficke's testimony and her interpretation of his testimony ignores its context entirely:

> Q. Who in the CG&E and affiliated companies negotiated these agreements?
> A. There were a number of lawyers involved. There were representatives from Cinergy Retail Sales that were involved.
>
> Q. And who would that be?
> A. From the Legal department would be Paul Colbert, Jim Gainer. From Cinergy Retail Sales, Jason Barker, Jack Farley, Uma . . . Nanjundan. . . . Chuck Whitlock. There were a number of people that I recall being involved from time to time.
>
> Q. And that was with the negotiations.
> A. Either with the – and it depends how you define "negotiations." I mean, there's a lot of preparation for negotiations which a lot of people are involved in. They aren't all involved in sitting across

the table if that that's how you're defining "negotiations." I was more defining people that were involved with the process.

(Ficke Depo., pp. 29-31.)

Q. A little while ago you mentioned who were several individuals that were involved in negotiating agreements between CRS and other parties in the May time frame. Was there a CG&E representative involved in that process considering all the provisions in this, for instance, Exhibit 5 that relate to Cincinnati Gas & Electric Company.

A. I was involved in it.

Q. Okay. Anybody else besides you? You were involved in the negotiations of these agreements, is that correct?

A. I was involved in the preparations of information, reviewing information, ***those sorts of things in my role as a vice president of Cinergy Corp.*** I guess if you're asking for someone involved in the negotiations who is exclusively a CG&E employee, you know like maybe some of the workers on the coal pile at some of these stations, they're CG&E employees, they only work for a CG&E plant, I don't think there was anybody involved in the negotiations that was like that.

Q. So the only people who would be in some way connected with CG&E would be you as President and also legal counsel that represented more than one corporation.

A. Yeah, and there were a number of Cinergy Services folks that did work for a number of the affiliates. And Legal is a good example of that, being Cinergy Services and doing work for a number of different affiliates.

Q. Mr. Barker and Mr. Farley and Ms. Nanjundan and Mr. Whitlock are all examples of that?

A. I don't know what their classification is, but I would not be surprised if they were Cinergy Services employees.

Q. Were you referring to anybody besides that group of Cinergy Services, Inc. employees that would have been involved in the process of negotiating those agreements?

A. No, although I just – I don't mean for that to be an exhaustive list.

. . .

(Ficke Depo., pp. 35-37 (emphasis supplied).)

Q. . . . Mr. Steffan's name appears on this; can you tell me what his role was in the process?
A. Jack was Vice President of Rates, Cinergy Corp.
. . .
Q. Do you know what his role in negotiations of the agreements with parties at this particular point in time?
A. I should have mentioned him in that group of names that I mentioned before, so either preparing information, attending meetings, problem solving, any of those functions it would have been typical for Jack Steffan to participate in.

(Ficke Depo., pp. 46-47.)

Q. What was your involvement, either directly or in the background, with the **BEGIN REDACTION** Cognis **END REDACTION** agreements . . . ?
A. I reviewed draft of the documents, probably provided comments, explained at a high level what the contents of the agreements were. So generally involved in the negotiations with the support of a number of the people we've talked about.

(Ficke Depo., p. 77.)

Thus, Mr. Ficke's testimony does not support Ms. Hixon's statement. Instead, Mr. Ficke identifies himself as virtually the only person associated with CG&E that could even be said to be involved in the negotiations, and he makes it clear that his involvement resulted principally from his role as a Cinergy Vice President, not as President of CG&E. Moreover, Mr. Ficke makes it clear that in even that capacity, his involvement was indirect and principally involved providing and reviewing information. Mr. Ficke certainly does not suggest that he *ever*, in *any way*, was involved in making an economic decision on behalf of DERS.

3. CG&E Is Not Legally Bound by DERS Agreements.

Finally, Ms. Hixon suggests that this Commission should be troubled by provisions within the DERS and Cinergy agreements which she states "binds" CG&E to some action. Again, Ms. Hixon is not a lawyer and it is improper for her to express any

opinion regarding the legal effect of an agreement made by one entity upon another entity not party to that agreement. Moreover, Mr. Ficke's testimony again refutes her suggestion.

During his deposition, Mr. Ficke was asked to explain contract terms that refer to CG&E. Mr. Ficke's response was clear:

> Q. And were you aware that there were commitments made in agreements such as that shown in Exhibit 2 regarding the manner in which CG&E would submit its next distribution rate case?
> A. I think I was generally aware of it, and I think at the time I did ask our Rate department whether these were things that we were going to do anyway, something to that effect. Is this really any – does it really cause us any problem? Is it something we were going to do anyway? And I believe that that was the case. It wasn't something binding us in any way because it was what we were going to do in any event.
>
> Q. So do you believe that CG&E fulfilled the, for lack of a better word, dictates of that paragraph 5?
> A. I don't think this could dictate what we did or didn't do. My belief is that this is how we were approaching the case in any event.

(Ficke Depo., pp. 28-29.)

Mr. Ficke's response cannot be more clear. He was not concerned by the fact that a simple statement of fact was being included in the agreement, nor did he view the statement as in any way binding upon CG&E. Ms. Hixon's concern is without merit. The inclusion of a statement of fact regarding DE-Ohio's plans does not legally bind DE-Ohio.

C. The Cinergy and DERS Contracts Do Not Constitute Unlawful Discrimination by DE-Ohio Among Its Large Commercial and Industrial Customers.

The one allegation of wrongdoing that Ms. Hixon does appear prepared to actually support is her allegation that the agreements represent DE-Ohio's

"discrimination" in favor of certain customers. Neither the evidence nor the law, however, supports Ms. Hixon's analysis.

Initially, the contracts are those of DERS and Cinergy, not DE-Ohio. DERS and Cinergy are unregulated commercial entities entitled to enter into any agreements they choose, with any party they choose, without the necessity of justifying those agreements or seeking approval of those agreements from anyone other than their own respective boards of directors. In short, neither has an obligation to serve, and neither has an obligation to deal with customers on a non-discriminatory basis. Both are free to strike deals on whatever economic terms they can obtain.

Applying Ms. Hixon's allegation to CG&E – a regulated entity to which the concept of "discrimination" might properly be applied – is equally unavailing. There is no evidence in the record to even suggest that any customer of DE-Ohio pays DE-Ohio anything other than the tariffed rates approved by this Commission. No evidence suggests that DE-Ohio receives any more than the revenues it is authorized by this Commission to receive. No evidence suggests that DE-Ohio receives any less than the revenues which this Commission authorized it to receive. Furthermore, no evidence suggests that any residential customer pays anything more than it otherwise would pay for retail electric generation.

D. OCC's "Miscellaneous" Intimations Regarding the Agreements Are Equally Without Merit.

Finally, Ms. Hixon's testimony contains a number of statements in an attempt to support insinuations of improper discrimination or violations of the corporate separation rules. These slightly more specific insinuations of wrongdoing demonstrate the lack of legal substance to Ms. Hixon's concerns.

For example, Ms. Hixon asserts that one of her concerns with the agreements is that the net effect of the agreements allows some customers to avoid paying DE-Ohio the RTC this Commission approved in CG&E's ETP case. Ms. Hixon stated that she had been advised that the avoidance of the RTC in this manner was unlawful. (Hixon testimony, p. 69.) Of course, Ms. Hixon, who is not a lawyer, was forced to admit on cross examination that she was unaware that that Am. Sub. S. B. 3 expressly permits third parties to pay the RTC charges of others. (Hixon Cross, p. 135.); *see also* R.C. § 4928.37.

Similarly, Ms. Hixon professes concern that the Agreements somehow will influence this Commission's decision to grant waivers of this Commission's rules to DE-Ohio. Ms. Hixon ignores the fact that CG&E did not exactly "request" waivers to this Commission's rules. Instead, *this Commission* asked CG&E to propose an RSP. This Commission was obviously aware when it did so that any such filing by CG&E would not conform to Rule 35 of this Commission's rules.

Similarly, Ms. Hixon complains that none of CG&E's filings conformed to those portions of Rule 35 which govern standard service offers and CBP processes. (Hixon Testimony, pp. 57-58.) Again, Ms. Hixon fails to acknowledge that CG&E filed its original application a full year before this Commission adopted Rule 35, or – again – that the week before this Commission adopted Rule 35 the Commission asked CG&E to submit an RSP that it knew would inevitability not conform to Rule 35.

Ms. Hixon also complains that CG&E "excluded" OCC from negotiations regarding the stipulation. (Hixon Testimony, p. 56.) As the record shows, however, this statement is simply not true. First, the evidence demonstrates that CG&E conducted

extensive negotiations with all parties to these proceedings that cared to engage in such negotiations. (Supplemental Testimony of Richard C. Cahaan filed May 24, 2004, Staff Exhibit 2, pp. 1-2.) Even if it had not done so, however, there is no requirement of law that compels CG&E to negotiate with all parties, or indeed with any parties to a litigated case. Furthermore, there is no requirement of law that compels all parties to a case to agree to a particular stipulation in order for that stipulation to be submitted to this Commission for its consideration.

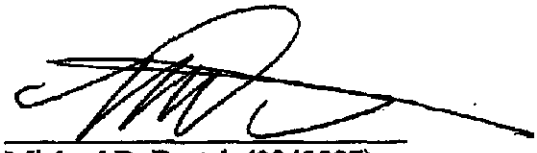
To the extent that OCC complains that at least some negotiations occurred outside its presence, however, it should be remembered that record evidence also demonstrates that OCC itself negotiated with parties to the proceeding while "excluding" CG&E from participation in those negotiations. (*See* DE-Ohio, Remand Exhibit 22.) Moreover, the record demonstrates that OCC regularly enters into confidential settlement agreements with parties that are not filed with this Commission. For example, the record shows that CG&E paid $750,000 to OCC and the Ohio Department of Development as part of the resolution of CG&E's ETP case in the year 2000, and yet the settlement agreement in which it agreed to do so was not filed with this Commission. OCC, of course, supported the stipulation filed with this Commission in that matter. Similarly, the record shows that OCC entered into a secret agreement with Dayton Power & Light Co. ("DP&L") in DP&L's ETP case that was not filed with this Commission in conjunction with the stipulation. This agreement became public knowledge only when OCC later demanded that this Commission enforce that agreement, of which this Commission had no prior knowledge.

To be clear, neither DERS nor Cinergy accuse OCC of engaging in illegal or even improper conduct. Except as it may be constrained by Ohio's open records laws, OCC is entitled to negotiate with others, publicly or privately. DERS and Cinergy will point out, however, that OCC's attempts to describe the process through which the parties to the RSP negotiated the stipulation as something improper or illegal is incredibly duplicitous, given OCC's willingness to engage in the same conduct.

V. CONCLUSION.

For the foregoing reasons, this Commission should ignore OCC's red herring arguments and issue an entry determining that it is satisfied that the Cinergy and DERS contracts are beyond the jurisdiction of this Commission.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically upon parties, their counsel, and others through use of the following email addresses this 13th day of April 2007.

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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
	)	06-1085-EL-UNC
	)	06-1068-EL-UNC

OHIO PARTNERS FOR AFFORDABLE ENERGY'S INITIAL BRIEF

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April 13, 2007

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	)	05-725-EL-UNC
	)	06-1069-EL-UNC
	)	05-724-EL-UNC
	)	06-1085-EL-UNC
	)	06-1068-EL-UNC

OHIO PARTNERS FOR AFFORDABLE ENERGY'S
INITIAL BRIEF

I. INTRODUCTION

Ohio Partners for Affordable Energy ("OPAE"), an intervenor in the above-captioned cases, hereby submits its post-hearing brief in these consolidated proceedings before the Public Utilities Commission of Ohio ("Commission"). This part of the proceedings concerns the remand for additional consideration by the Ohio Supreme Court of the Commission's findings in its Entry on Rehearing of November 23, 2004 in Case No. 03-93-EL-ATA, et al., which findings were appealed to the Court by the Office of the Ohio Consumers' Counsel ("OCC"). In the Entry on Rehearing, the Commission approved a proposal made by The Cincinnati Gas & Electric Company ("CG&E"), now Duke Energy Ohio, Inc. ("Duke"). On appeal, the Court found that the Commission had erred by failing to compel disclosure of side agreements and by failing to support properly modifications made in the Entry on Rehearing. *Ohio Consumers' Counsel v.*

Pub. Util. Comm. (2006), 111 Ohio St.3d 300. On remand, the Commission is required to address and correct these errors.

II. THE STIPULATION MUST BE REJECTED IN LIGHT OF THE OVERWHELMING EVIDENCE (CURRENTLY UNDER SEAL) OF A LACK OF SERIOUS BARGAINING TO REACH A SETTLEMENT ACCEPTABLE TO THE PARTIES IN THE CASE.

The primary issue on remand from the Ohio Supreme Court is whether the stipulation supported by CG&E and certain other parties meets the Commission's criteria for the reasonableness of stipulations. In considering the reasonableness of a stipulation, the Commission uses a three-prong test approved by the Court:

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?

Ohio Consumers' Counsel v. Pub. Util. Comm. (1992), 64 Ohio St.3d 123, 126.

In remanding this case to the Commission for further consideration, the Court questioned whether the existence of side agreements supports the Commission's finding that serious bargaining had taken place among the parties. *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 300. The Court found that the Commission had erred in denying discovery requested by OCC of side agreements as relevant to the first test of reasonableness of stipulations, i.e., whether the settlement is a product of serious bargaining among capable, knowledgeable parties. The Court found that the existence of side

agreements could be relevant to a determination that the stipulation was not the product of serious bargaining.

As the Court stated, if CG&E and one or more of the signatory parties to the stipulation agreed to a side financial arrangement or some other consideration to sign the stipulation, that information would be relevant to the Commission's determination whether all parties engaged in serious bargaining. The existence of side agreements between CG&E and the signatory parties entered into around the time of the stipulation could be relevant to ensuring the integrity and openness of the negotiation process. Id.

The Court also found that the issue whether there was serious bargaining could not be resolved solely by reviewing the proposed stipulation. The Commission cannot rely merely on the terms of the stipulation but rather must determine whether there exists sufficient evidence that the stipulation was the product of serious bargaining. Any concessions or inducements apart from the terms agreed to in the stipulation have relevance when deciding whether the settlement negotiations were fairly conducted. The existence of concessions or inducements is particularly relevant in the context of open settlement discussions involving multiple parties, such as those that purportedly occurred in this case. If there were special considerations in the form of side agreements among the signatory parties, one or more parties may have gained an unfair advantage in the bargaining process, and the open settlement discussions were compromised. Id.

The evidence on remand, currently under seal, demonstrates that side agreements undermined the negotiations among the parties so that the Commission must conclude on remand that serious bargaining did not take place at the settlement negotiations. The Commission's criteria for the reasonableness of stipulations have not been met, and the stipulation must be rejected.

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OCC witness Hixon testified that she is aware of five agreements ("pre-order agreements") between CG&E-affiliated companies and customer parties to Case No. 03-93-EL-ATA, et al., which were entered into before the Commission's September 29, 2004 Opinion and Order. She testified that the customer parties (or members of the customer party organization) making these five pre-order agreements [the Ohio Hospital Association ("Hospitals"), Kroger, the Industrial Energy Users-Ohio ("IEU-OH"), the Ohio Energy Group ("OEG") and Cognis], were parties who signed the stipulation in Case No. 03-93-EL-ATA. OCC Ex. R-2A at 6. Ms. Hixon also testified that, although each pre-order agreement had specific terms and conditions, there were common threads in all the pre-order agreements. Id. at 13-26.

The common threads among these five pre-order agreements are that each agreement dealt with 1) the provision of generation service to the agreeing customer party, 2) the reimbursement of proposed charges to the agreeing customer party, 3) support by the agreeing customer party for the stipulation, and 4) termination provisions tied to the outcome of Case No. 03-93-EL-ATA. OCC

Ex. R-2 at 13-14. Ms. Hixon testified that the pre-order agreements contained provisions under which the agreeing customer parties would be reimbursed by CG&E-affiliated companies for portions of the various charges that CG&E was proposing at the time.

For example, under provisions of the May 19, 2004 agreement between Cinergy Retail Services ("CRS"), an affiliate of CG&E, and the Hospitals, during 2005 through 2008, CRS was to reimburse the Hospitals for "any rate stabilization charge (a component of the provider of last resort charge)" paid by the Hospitals to CG&E. OCC Ex. R-2A at 16. The May 19, 2004 agreement also provided that the Hospitals shall cause the Ohio Hospital Association to support a stipulation filed by CG&E and the Ohio Hospital Association in Case No. 03-93-EL-ATA. Id. The conditions under which the agreement would terminate were tied to the Commission's decision in Case No. 03-93-EL-ATA, et al. One condition under which the pre-order agreement would terminate was if the Commission failed to issue an order acceptable to CRS in Case No. 03-93-EL-ATA, et al. Id. at 17.

One could argue that this constitutes a sham transaction. CRS is a competitive retail electric supplier. Under the agreement, however, it is simply a conduit for payments to a party, which is a transaction that does not involve electricity sales.

Ms. Hixon testified that there were also pre-rehearing agreements made by CG&E-affiliates with customer parties (or members of the customer party organization) after the Commission's September 29, 2004 Opinion and Order,

which had modified the stipulation. Id. at 30. The pre-rehearing agreements replaced the terms and conditions of the pre-order agreements. The customer parties entering into these pre-rehearing agreements committed to supporting CG&E's application for rehearing in Case No. 03-93-EL-ATA, et al., which featured an amended stipulation containing CG&E's alternative proposal. In a similar manner to the pre-order agreements, each of the pre-rehearing agreements had specific terms and conditions, but common threads related to Case No. 03-93-EL-ATA, et al. The common threads in the pre-rehearing agreements were, again, 1) the provision of generation service to the customer parties, 2) the reimbursement of proposed charges to the customer parties, 3) support by the customer parties for CG&E's application for rehearing in Case No. 03-93-EL-ATA, et al., and 4) termination provisions tied to the outcome of the case. OCC Ex. R-2A at 32-47.

Ms. Hixon also testified about payments made by CRS to the Ohio Hospital Association and IEU-OH. OCC Ex. R-2A at 30, 47. These payments were agreed to in the pre-order agreements and continued to the pre-rehearing agreements. Id.

She also testified about option agreements made by CRS with individual customers who were customer parties (or members of customer party organizations) to the pre-rehearing agreements. Id. at 48. She testified that OCC was provided copies of twenty-two option agreements between CRS and CG&E customers who were parties (or members of parties) to Case No. 03-93-EL-ATA, et al. These customers were part of three customer groups with which

there were pre-rehearing agreements, the Ohio Hospital Association, OEG and IEU-OH. Under the option agreements with CRS, the customer would take generation service from CG&E and grant CRS the exclusive option to provide generation to the customer during 2005 through 2008. CRS had the right to exercise the option at any time. In exchange for this right, CRS would pay the customers the option payment set forth in the agreement. The option payments generally followed the pattern of CRS reimbursing components of CG&E's charges set forth in the stipulation. OCC Ex. R-2A at 51.

Ms. Hixon testified that all three sets of side agreements (pre-order, pre-rehearing, and option) relate to CG&E's efforts to obtain support for the Commission's approval of a proposal acceptable to CG&E. Id. at 55. The first two sets of agreements (the pre-order and pre-rehearing) provided, through CG&E affiliated companies, generation and/or reimbursement for portions of CG&E's charges set forth in the stipulation and its alternative proposal. The option agreements came about when it was determined that the Commission's decision could invalidate the previous agreements and that the provision of generation under the previous agreement by a CG&E affiliate was too risky. Id. at 55. The option agreements restored many of the benefits to the customer parties contemplated under the first two sets of agreements. The benefits were agreed to in exchange for the parties supporting CG&E's proposal in Case No. 03-93-EL-ATA, et al. Id.

Ms. Hixon testified that the effect of the side agreements was to insulate certain large customers from the rate increases proposed in the stipulation, the

alternative proposal and the Commission's December 2004 Entry on Rehearing. Pursuant to the side agreements, those customer parties supported CG&E's proposals for post-market development period ("MDP") generation pricing in this case to the detriment of other customers who did not benefit from the inducements offered only to a limited number of parties by CG&E. As a result of the side agreements, CG&E's proposals did not have support from customers who would pay all the rate increases in the stipulation. In sum, while the Commission's rules allow for a standard service offer that varies from its rules where there is substantial support from a number of interested stakeholders [Ohio Adm. Code 4901:1-35-02(C)], here there was no support from parties representing customers who would actually pay all the rate increases in CG&E's generation pricing stipulation. Id. at 59.

Ms. Hixon also testified that the side agreements show that a great deal of negotiation and agreement was undertaken outside the view of the OCC and was not revealed in the testimony of this case. Id. at 71. The large electricity users that supported the stipulation were favored with side agreements. The side agreements distorted any negotiating process that was conducted in the open. The open negotiating sessions could not involve serious bargaining because the large electricity users had reached side agreements so that they would not be subject to many of the generation rate increases that were publicly proposed by CG&E and set forth in the stipulation. The reason for the support of the stipulation by large electricity users is that they were actually exempt from certain charges set forth in the stipulation.

Thus, there were exclusionary negotiations that resulted in the first round of side agreements (the pre-order agreements) that brought about the support of the large users. The second round of exclusionary negotiations, which led to the second round of side agreements (the pre-rehearing agreements), was based in part on provisions in the first pre-order side agreements and the need to maintain the economic advantages provided to these customer parties after the issuance of the Opinion and Order. The second round of exclusionary negotiations held the customer parties to the stipulation and to their support of CG&E's alternative proposal in its application for rehearing.

Neither OCC nor OPAE was invited to any open negotiating session during the period between the Commission's order and the Entry on Rehearing. The alternative proposal introduced by CG&E in its application for rehearing was supported by the stipulating parties because the large users had reached side agreements that would exempt them from the portions of the generation price increases publicly proposed by CG&E in the alternative proposal.

The post-rehearing option agreements were also based on maintaining the side agreements that favored these large use customers and not subjecting them to the generation price increases publicly approved for CG&E. Again, OCC and OPAE were excluded from the discussions that resulted from CG&E's approved post-MDP generation pricing. Id. at 72-73.

Certainly CG&E made no effort to meet the concerns of OPAE in the settlement process. OPAE was never invited to negotiate a side agreement, nor were any offers made to OPAE that might have induced OPAE to sign or support

a stipulation. OPAE did not get a special deal. Other non-profit organizations did not get special deals. Small business customers did not get special deals. Residential customers did not get special deals. Only the large users got special deals and were induced to sign a stipulation and recommend it to the Commission even though the special deal was the large users were not actually subject to the terms of the stipulation that they were recommending. The clear benefit to the large users in signing the stipulation is that they were not subject to the terms of the stipulation.

The customer parties supporting the stipulation were the ones with side deals that exempted them from the stipulation's terms. This is prima facie evidence that there was no customer support for the stipulation's terms. No customer actually subject to the terms of the stipulation supported it. The stipulation was an illusion that falsely convinced the Commission that customer support existed for a CG&E proposal when, in fact, the customers supporting the proposal before the Commission had actually agreed in secret side deals not to be subject to the stipulated terms. Under the circumstances, the Commission must find that there was no customer support for the stipulation.

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III. THE STIPULATION WAS NOT BALANCED AND DID NOT REPRESENT THE VIEWS OF ALL CUSTOMER CLASSES.

In addition to the side agreements providing overwhelming evidence that serious bargaining did not take place at the settlement negotiations so that the Commission's criteria for the reasonableness of settlements have not been met, there is related proof that serious bargaining among the parties did not take place at the settlement negotiations. As OPAE noted in its brief before the Commission, the stipulation was not balanced and did not represent the views of all customer classes.

The stipulation had no support from residential customers. OCC, which by statute, represents residential customers, steadfastly opposed the stipulation, as did OPAE, which has served as an advocate for residential and low-income customers since its founding in 1996. OPAE also represents the interests of its member agencies located in the CG&E service territories, which agencies are commercial customers of CG&E. Two parties supporting the stipulation might have claimed to represent the residential class. One of those parties, Communities United for Action, limited its focus in this case to issues related to the Percentage of Income Payment Plan. The other, People Working Cooperatively ("PWC"), operates virtually all demand-side management programs funded by CG&E-Duke and has CG&E-Duke representation on its Board. Therefore, PWC is not a party with a position distinct from CG&E-Duke's own position.

There was good reason why the residential class did not support the stipulation. In spite of the Commission's professed goals for rate stabilization

plans, the stipulation only achieved a vast enrichment of CG&E-Duke at the expense of the residential class. Rates increased dramatically; they certainly were not stabilized. The stipulation offered no benefits to ratepayers; it merely sanctioned charges. The stipulation could not be found to be in the public interest when it dramatically increased rates with little regard to costs incurred by the utility. Thus, ratepayers, and especially residential ratepayers, were harmed by the stipulation in the form of higher rates. The stipulation failed to meet the standards for approval established by the Commission and approved by the Supreme Court.

The Commission should have been particularly suspect of any claim that the stipulation was balanced and represented the views of all customer classes. The stipulation clearly did not represent the views or satisfy the interests of the residential class or any other class. The Commission cannot find that serious bargaining took place among the parties when the stipulation was not a balanced agreement representative of the customer classes.

IV. THE STIPULATION AND ALTERNATIVE PROPOSAL VIOLATE OHIO LAW.

The evidence of the side agreements and the fact that the stipulation was not supported by any customer classes provide overwhelming proof that serious bargaining did not take place at the settlement negotiations. In addition, the Commission should also question whether serious bargaining takes place when a settlement violates Ohio law. Serious bargaining would certainly require a stipulation that conformed to Ohio law.

OPAE did not sign the stipulation because it violates Ohio law. The Commission has no option but to follow the statutes enacted by the Ohio General Assembly. *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87. The Commission is a creature of statute and cannot exceed its statutory authority. Id.

The Commission should not approve a stipulation that violates Ohio law. The proper course for the Commission to have followed in light of the changed circumstances of the failure of the competitive retail electric service market to develop was to ask the General Assembly to enact new legislation authorizing the Commission to act to address the market failure. Instead, the Commission made no request for legislative authority to address market failures and proceeded without statutory authorization to approve rate stabilization plans, which violate current law. The General Assembly, not the Commission, must make the decisions regarding how to modify legislatively the regulatory framework to address the failure of the competitive retail market to develop.

The existence of a stipulation before the Commission allows the Commission to consider the stipulation by applying the three-prong test for the *reasonableness of stipulations and thereby avoid the fundamental problem* whether the Commission has statutory authority for its orders. In this case, the Commission avoided the lack of statutory authority for its orders by claiming, falsely, to be approving a stipulation that meets its three-prong test. On remand, it is clear in this case that the stipulation did not meet the three-prong test because there was no serious bargaining among the negotiating parties. Such a

stipulation no longer provides the Commission with the cover it seeks to abuse its discretion and act outside the statutory framework and the bounds of Ohio law.

V. THE COMPONENTS OF THE CURRENT STANDARD SERVICE OFFER PRICING ARE POORLY DEFINED AND DO NOT HAVE A REASONABLE BASIS.

The second issue on remand is the lack of record support for CG&E's current standard service offer pricing. The Court found that the Commission's first entry on rehearing dated November 23, 2004 approving CG&E's alternative proposal was devoid of evidentiary support. There were no citations to the record supporting the Commission's modifications on rehearing. After all, CG&E and the parties supporting its position did not file proper applications for rehearing; they filed a stipulation instead. This procedure is not supported by the Commission's rules. In addition, the Commission did not sufficiently set forth its reasoning for the changes on rehearing. Instead, the Commission merely asserted, without further justification, that the modifications would provide rate certainty for consumers, ensure financial stability for CG&E, and further encourage the development of competitive markets.

The Court noted that the Commission approved the infrastructure maintenance fund ("IMF") as a component of the provider of last resort ("POLR") charge without reference to record evidence and without explanation. The Commission offered no factual basis or other justification for approving the IMF charge. The Court could not determine what the IMF was without explanation from the Commission.

The Court found that the Commission's reasoning and the factual basis supporting the modifications on rehearing must be discernible from its orders. The Commission was required to make further clarification of all modifications made in the first entry on rehearing to the order approving the stipulation. On remand, the Commission is required to thoroughly explain its conclusion that the modifications on rehearing are reasonable and identify the evidence it considered to support its findings.

The evidence on remand demonstrates that the components of the current standard service offer pricing are poorly defined and do not have a reasonable basis. OCC witness Neil H. Talbot testified that the current standard service offer is neither consistently cost based nor consistently market based. If the market cannot determine market prices for the standard service offer (because a functioning market does not exist), then the next best proxy is a consistently cost-based standard service offer.

Because the specific items of the standard service offer are parts of broader components, which in turn are parts of rates paid by customers, OCC witness Talbot urged the Commission to consider the overall reasonableness of these broader items and the reasonableness of the rates they constitute. OCC Ex. R-1 at 17. There should be no overlap or duplication of items, and the components should work together to achieve standard service offer rates that are reasonably priced and cost based.

Mr. Talbot testified that the rate stabilization charge ("RSC") and the IMF charge have no cost basis and that the tariff generation charge ("TGC") is a

historic charge that should be updated. OCC Ex. R-1 at 16. He testified that there is a difficulty in finding a reasonable basis for some of the charges, that there is a problem of differing or conflicting pricing methodologies, and a problem determining how the various rate components fit together. OCC Ex. R-1 at 64.

OCC witness Talbot's testimony strongly confirms the supposition of the Ohio Supreme Court that the IMF may be "some type of surcharge and not a cost component." *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3 300, 308. The system reliability tracker ("STR") and the IMF charges together amount to $45,080,000, which is less than the $52,898,560 for the reserve margin calculation supporting the stipulation. CG&E-Duke witness Steffen argues (simplistically) that there is no evidentiary problem regarding the basis for the SRT and IMF charges. CG&E-Duke Ex. R-3 at 26-27. The total of the charges for the SRT and the IMF are only less than the amount for CG&E-Duke's original reserve margin estimate under the stipulation because the actual costs for the SRT were far less than the estimates contained in Mr. Steffen's testimony in support of the stipulation. In Mr. Talbot's words, "the SRT . . . is the sole successor to the Reserve Margin charge." OCC Ex. R-1 at 4. The IMF charge should therefore be eliminated as a new and duplicative charge.

Mr. Talbot also noted that the charges are caught between a market-pricing framework and cost-base justification for specific rate components. While some components are apparently cost based, CG&E-Duke also uses a broader justification, namely that the components are part of a market-based pricing.

This allows CG&E-Duke to claim that cost-based items do not need to be specifically justified if the overall total price is reasonable. OCC Ex. R-1 at 65.

However, in the absence of a functioning market, there is no clear evidence as to what exactly the market price is. This leaves an accounting cost basis as a proxy, and a precisely estimated proxy is better than an approximate one. Greater reliance on actual accounting costs can provide a relatively stable proxy for market prices. Tightening up the cost basis of the charges is a reasonable response to the challenge of developing a consistent and reasonable framework for the standard service offer pricing that provides reasonable prices. OCC Ex. R-1 at 72-73.

Mr. Talbot testified that the status quo is not acceptable because it is impossible to find a reasonable and consistent basis for all of the pricing components separately or in combination as they are currently designed. OCC Ex. R-1 at 73. Given that the components of the current standard service offer pricing are poorly defined and do not have a reasonable basis, the Commission must determine a proxy of consistently calculated embedded and current costs to serve as a reasonable price for consumers. Id. at 74.

VI. CONCLUSION

The evidence of the side agreements, currently under seal, clearly demonstrates that there was no serious bargaining among the parties. No customer group supported the terms of the stipulation and agreed to be bound by them. The Commission's criteria for the reasonableness of settlements have not

been met and the Commission cannot find that the stipulation should have been approved. Moreover, the components of the current standard service offer pricing are poorly defined and do not have a reasonable basis. In addition, the IMF charge should be eliminated as a new and duplicative charge. Finally, the Commission has no statutory authority to approve CG&E's rate stabilization plan, the stipulation or the alternative proposal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Ohio Partners for Affordable Energy's Initial Brief, Confidential, has been electronically delivered to the following parties in the above-captioned proceedings on this 13th day of April 2007.

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

Consolidated Duke Energy, Ohio, Inc.,	)	Case Nos. 03-93-EL-ATA
Rate Stabilization Plan Remand, and	)	03-2079-EL-AAM
Rider Adjustment Cases	)	03-2080-EL-ATA
Procedures for Capital Investment in its	)	03-2081-EL-AAM
Electric Transmission And Distribution	)	05-724-EL-UNC
System And to Establish a Capital	)	05-725-EL-UNC
Investment Reliability Rider to be	)	06-1068-EI-UNC
Effective After the Market Development	)	06-1069-EL-UNC
Period	)	06-1085-EL-UNC

REPLY POST-HEARING BRIEF OF THE OHIO MARKETERS GROUP

CONFIDENTIAL VERSION

April 24, 2007

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Consolidated Duke Energy, Ohio, Inc.,	)	Case Nos. 03-93-EL-ATA
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Effective After the Market Development	)	06-1069-EL-UNC
Period	)	06-1085-EL-UNC

REPLY POST-HEARING BRIEF OF THE OHIO MARKETERS GROUP

I. INTRODUCTION

Seven Initial Merit Briefs were filed in the matter at bar. Four of the briefs, representing the positions of Duke Energy Ohio formerly known as Cincinnati Gas and Electric Company ("Duke/CG&E"), Duke Energy Retail Sales LLC ("DERS") Cinergy Corporation ("Cinergy Corp.") (together referred to as "DERS/Cinergy Corp", the Ohio Energy Group ("OEG"), and the Staff of the Commission seek findings of law and fact that support the November 23, 2004 Entry on Rehearing and affirm the tariffs put in place based upon that Entry.[1] In addition, Duke/CG&E, DERS and the OEG ask the Commission to refrain from any further examination of or action taken regarding the Side Agreements.[2] Three of the Initial Merit Briefs, filed by Office of the Consumers' Counsel ("OCC"), Ohioans For Affordable Energy ("OPAE") and the Ohio Marketers

[1] Duke Merit Brief, p. 7; Cinergy Corp. and DERS Merit Brief, p. 26; Staff Initial Brief, p. 7; OEG Initial Brief, p. 11.

[2] For purposes of this Reply Brief the term "Side Agreements" refers to the thirty-two agreements listed on Side Agreement reference table. See OCC witness Hixon's testimony, Attachment 18.

Group ("OMG") ask for findings of law and fact that find the May 19, 2004 stipulation (the "Stipulation") was partially the product of financial inducements paid for by Duke/CG&E and/or its affiliate(s) and, as such, fails the "bargained in good faith by knowledgeable parties" criteria for acceptance of a Stipulation.[3] The OCC, OPAE and OMG also take the position that Duke/CG&E failed to substantiate the new charges, including the Infrastructure Maintenance Fee ("IMF"), which followed from the November 23, 2004 Entry on Rehearing as required by the Supreme Court's remand. OCC and OPAE request rate relief from the tariffs filed in accordance with the November 23, 2004 Entry on Rehearing, while the OMG asks only that the IMF be made by-passable.

II. ARGUMENT

A. The Stipulation in the Duke\CG&E Rate Stabilization Case As Modified By The Commission Is In Full Force And Effect And Thus Must Be Addressed As Part of the Supreme Court Remand

As argued in their respective Briefs, Duke/CG&E, DERS/Cinergy Corp., OEG, and the Staff posit that the Stipulation was terminated by the Commission's subsequent modifications.[4] Believing the Stipulation was terminated prior to the November 23, 2004 Entry on Rehearing, these parties argue that there is no need to examine the Side Agreements. Further, DERS/Cinergy Corp. and Duke/CG&E argue that the Side Agreements themselves, which were contingent upon parties' support of the Stipulation, were rendered null and void in light of the earlier termination of the Stipulation.

On its face, the argument that the Stipulation has terminated is inconsistent with the Supreme Court's Remand. The proponents of this theory provide no support or

[3] OPAE Initial Brief, p. 4; OCC Initial Brief, pp. 70-71; and OMG Initial Brief, pp. 25-26.
[4] Staff Initial Brief, pp. 14-15; OEG Initial Brief, pp. 6-7; Duke Merit Brief, pp. 2, 5, and 7; and DERS Merit Brief, pp. 5 and 16.

rationale in their respective Initial Briefs. Nor could legal support be found. If the Stipulation was not valid why would the High Court remand with instruction to compel discovery about the Stipulation. More important the Commission's November 23, 2004 Entry on Rehearing affirms the existence of the Stipulation.

> ORDERED, that the stipulation be approved, to the extent and subject to the modifications and clarifications set forth in the September 29, 2004 opinion and order in these proceedings, as further modified by the entry on rehearing.[5]

If the modifications which the Commission added to Stipulation were so unacceptable to Duke/CG&E, and the signatory parties as to cause them to withdraw the now approved stipulation, then procedurally Duke\CG&E and the OEG should have filed for rehearing.[6] The only parties that sought rehearing of the November 23, 2004 Entry on Rehearing were the OCC and MidAmerican Energy Company, neither of whom were a signatory party to the Stipulation. The OCC ultimately appealed the matter to the Supreme Court alleging among other issues that the Stipulation violated the three criteria for accepting a stipulation[7], thus setting up the remand on the question of whether the Side Agreements invalidated the Stipulation.

Given this procedural background and the specific remand instruction from the Supreme Court to complete discovery on the Stipulation, it was somewhat surprising to find the Staff and Duke/CG&E and DERS/Cinergy Corp. arguing that the Stipulation was terminated by the November 23,2004 Entry on Rehearing. The Staff in its Initial Brief wrote:

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[5] Entry on Rehearing November 23, 2004.
[6] Section 4903.10, Revised Code
[7] The three criteria are set out in Industrial Energy Users v. Pub. Util. Com. (1994), 68 Ohio St. 3d. 547.

> In fashioning the Entry on Rehearing[8] the Commission did not rely on any recommendation by a party (as it had when making the original Order) because there was no stipulation that had any vitality.[9]

Similarly, DERS/Cinergy Corp. in its Initial Brief states:

> However, as filed by the parties, the stipulation provided that all parties were released from any obligations thereunder [sic] if the Commission failed to approve the stipulation *without material modification.* Thus, the Commission's action effectively invalidated the stipulation and the parties believed that it ceased to exist upon issuance of the Commission's Opinion and Order.[10]

The Stipulation, however, does not contain an automatic termination provision; in fact, it has a specific provision that keeps the Stipulation in place with modifications unless and until a party within 30 days formally withdraws.

Quoting from page 3 of the Stipulation itself:[11]

> Upon the Commission's issuance of an Entry on Rehearing that does not adopt the Stipulation in its entirety without modification; any Party may terminate and withdraw from the Stipulation by filing a notice with the Commission within 30 days of the Commission's order on rehearing. Upon such notice of termination or withdrawal by any Party, pursuant to the above provisions, the Stipulation shall immediately become null and void. (Emphasis added).

A review of the docket card in this proceeding reveals that no party withdrew from the Stipulation within 30 days. In fact, at no time did any party withdraw from the Stipulation. Further, Duke/CG&E filed tariffs to implement the November 23, 2004 Entry on Rehearing an act which is mutually exclusive with rejection of the Commission modified Stipulation.

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[8] The Entry on Rehearing here is the November 23, 2004 Entry quoted above.
[9] Initial Brief of the Staff of the Public Utilities Commission, p. 17.
[10] Merit Brief of Cinergy Corp. and Duke Energy Retail Sales LLC, p. 5.
[11] The Stipulation was filed on May 19, 2004 in Case No. 03-93-EL-ATA.

The fact that the Stipulation has not been terminated and is specifically part of the Duke/CG&E Rate Stabilization Order has two significant legal implications. First, it defeats any defense that examination of the side agreements is irrelevant because the Stipulation has terminated. Second, as more fully discussed in Section B below, it provides the context for the scope and use of the mandated discovery. The Supreme Court permitted the discovery so that the Commission could revisit whether the Stipulation was the product of financial inducements.

B. The Supreme Court Remand Allowing Discovery of the Side Agreements Applied To All Arrangements That Offered Financial Inducements In Exchange For Support of the Stipulation.

In its decision remanding to the Commission further discovery of the alleged side agreements, the Ohio Supreme Court stated:

> OCC argues that the existence of side agreements could be relevant to a determination that the stipulation was not the product of serious bargaining. OCC suggests that if CG&E and one or more of the signatory parties agreed to a side financial arrangement or some other consideration to sign the stipulation, that information would be relevant to the commission's determination of whether all parties engaged in "serious bargaining." We agree.[12]

The High Court then goes on to specifically find and order:

> We hold that the commission abused its discretion in barring discovery of side agreements in this matter based on a federal settlement privilege. We remand this matter to the commission and order that it compel disclosure of the requested information.[13]

The Commission has a statutory responsibility to supervise state-franchised monopolies. Accordingly, it goes without saying that permissible discovery in this remanded proceeding would be evidence necessary to determine whether or not "... CG&E and one or more of the signatory parties agreed to a side financial arrangement or some other

[12] Ohio Consumers' Counsel v. Pub. Util. Comm. (2006), 111 Ohio St. 3d 300 at 320.
[13] Consumers Counsel v. Pub. Util. Comm. (2006), 111 Ohio St. 3d 300 at 323.

consideration to sign the stipulation". Ohio Consumers' Counsel v. Pub. Util. Comm. 111 Ohio St. 3d 300 at 320. Following this clear mandate from the Supreme Court, the Hearing Examiners, as part of the January 2, 2007 Entry, permitted discovery of Side Agreements[14] between the Duke/CG&E and signatory parties to the Stipulation. Moreover, the Hearing Examiners permitted discovery of discussions and negotiations between the various Duke/CG&E family of companies, including Duke/CG&E's parent and subsidiaries, and members of the signatory trade associations as well as the trade associations themselves.

The discovery produced thirty-one (31) side agreements: two (2) between Duke/CG&E's parent, Cinergy Corp., and a retail customer of Duke/CG&E; and twenty-nine (29) between Duke Retail Energy Services ("DERS"), an affiliate of Duke/CG&E, and members of the signatory trade associations. The OEG argues that the Commission has provided discovery to OCC on "side agreements" well beyond that which a "technical" reading of the Court's Order would require.[15] Similarly, DERS/Cinergy Corp. argue that the "Court held that OCC should have received the discovery it requested in 2004 (not that which it requested in 2007) and that the Commission should determine whether any agreements produced in response to that discovery were relevant to the issue of whether any stipulation approved by the Commission was the produce of 'significant bargaining among capable, knowledge parties'."[16]

As discussed in OMG's Initial Brief,[17] the reasonableness standard for accepting stipulations is to encourage settlement by the assurance that rates are just and reasonable

[14] The Hearing Examiners had previously issued subpoenas *duces tecum* for the Side Agreements. The January 2, 2007 Entry denied multiple motions to stay, deny, dismiss or protect discovery.
[15] OEG Initial Brief, p. 7.
[16] DERS Merit Brief, p. 16.
[17] See p. 7.

if informed and capable representatives of affected stakeholders agree to the proposed rates after serious negotiation. In the instant proceeding, Duke/CG&E appears to have tainted the "serious bargaining" with financial inducements. The Side Agreements disclose the offering of cash payment(s), and unique rate discounts not available to the entire rate class – intended to induce support for the Stipulation. The only conclusion that can be drawn from the support of a signatory party directly or indirectly receiving financial incentives is that the financial incentives are adequate, not that the rates are just and reasonable. Simply put, if a signatory party is receiving financial inducements, it cannot objectively endorse a rate it is not paying. These Side Agreements precluded serious bargaining among capable and knowledgeable parties. Accordingly, the Commission cannot use the Stipulation to establish the reasonableness of Duke Energy Ohio's standard service offer rates.

In reviewing prior Commission acceptance of stipulations, the High Court has disallowed stipulations when key stakeholders were excluded or did not join in the Stipulation.[18] In a similar fashion, the payment of financial inducements to the signatory parties which are not enjoyed by other similarly-situated effectively eliminates the support from that class of customers. The Side Agreements show that financial incentives were paid to [redacted], OEG, DEC [redacted] and the Ohio Hospital Association ("OHA"). Eliminating those signatory parties leaves the Stipulation with virtually no support. The Stipulation is opposed by the legal representative of residential consumers[19], a social action group[20] and the marketers.[21] Thus, it cannot be said that the Stipulation enjoys broad support among the stakeholders.

[18] Time Warner AxS v. Pub. Util. Comm. 75 Ohio St. 3d 233 (1996).
[19] OCC

In the instant proceeding, certain parties have argued that deliberation of the Side Agreements is beyond the scope of the Commission's review. Given that the Side Agreements include cash payments and special discounts, it is not surprising that those who paid the financial incentives and those who received them seek to limit the Commission's review of the Side Agreements. OEG raises what it calls a "technical" argument noting that since the Supreme Court's order only approved the OCC discovery request from May 2004, no additional evidence can be produced or considered. The "technical" argument the OEG raises is the exclusion doctrine, by stating that the Commission abused it discretion by not compelling the OCC's May 2004 discovery, the Supreme Court meant to exclude the Commission from considering any other discovery. The exclusion argument must fail because the Court's Remand Order did not contain any limiting language. For example, the Supreme Court did not compel "only" the May 2004 discovery to be considered. Nor can such an exclusion be fashioned from other comments that the Court included in its decision. In fact, the intent of the High Court seems to be for inclusion of additional discovery, as noted in the quote above, the High Court agreed with the OCC's argument that financial inducements to signatory parties could nullify a stipulation. If an inference can be taken about the remand order it would be that the Commission must allow additional discovery to determine if financial inducements were offered and accepted. Now that such agreements have been found and confirm that millions of dollars have been paid, the Commission cannot turn a blind eye to the Side Agreements.

[20] OPAE.
[21] OMG and Dominion Retail.

Duke/CG&E raises a similar technical defense. Duke/CG&E claims that, since the Side Agreements are between its parent or a sister affiliate, rather than the regulated utility, the Side Agreements fall out of the purview of the Supreme Court's decision and cannot be reviewed.[22] The Supreme Court affirmatively required that "CG&E" agreements must be produced, so CG&E's affiliate agreements with the signatory parties or their members cannot be considered by the Commission. Such a conclusion simply cannot be wrenched from the wording of the Supreme Court decision. There is no legal support for assuming an affirmative requirement to produce specific contracts creates an unarticulated prohibition on considering directly related agreements. Further, such a theory runs counter to the Commission's rule favoring broad discovery.[23]

If the Commission's authority to prevent rate discrimination could be avoided by merely injecting a non-regulated subsidiary to arrange financial inducements or grant the discounts a regulated utility could not legally grant, the Commission could not protect the public from monopolistic rents. Prior to electric restructuring, the Commission, in a telephone case, found that a utility's parent's practice of tying discounts on a regulated utility phone service to non-regulated cable service violated the non-discrimination standards established in Section 4905.33 and 4905.35 Revised Code. That exercise of Commission authority was affirmed by the Supreme Court in Ameritech Ohio v. Pub. Util. Comm., 86 Ohio St. 3d 78 (1999). In addition to the Sections 4905.33 and 4905.35 Revised Code, the General Assembly, as part of electric restructuring, specifically authorized the Commission to demand and enforce a Code of Conduct that separates the regulated from the non-regulated operations of utilities owned and operated by holding

[22] Duke/Energy Ohio Merit Brief, p. 2.
[23] Rule 4901-1-16 of the Ohio Administrative Code.

companies that conduct both utility and non-utility commercial operations (see Section 4929.17, Revised Code). Further, the General Assembly instructed the Commission to prevent preferential treatment between regulated utilities and their non-regulated affiliates (Section 4929.02(G), Revised Code). The OMG extensively addressed this argument in its Initial Merit Brief. Simply put, the Commission has not only the authority but the obligation to prohibit joint marketing efforts between regulated utilities and their non-regulated parents or subsidiaries.

Finally, the Staff sees no basis for additional analysis of the Side Agreements as it did not believe that evidence of a violation of Commission rule or corporate separation had been provided. "Staff sees only agreements with mutual compensation." Staff Initial Brief, p. 16. To reach this conclusion, Staff must first ignore the fact that the DERS is a shell entity that has never conducted business as a CRES in the state of Ohio.

The evidence is unmistakable. DERS has no customers, and one part-time employee who does not possess a DERS business card and who is paid *not* by DERS but by Duke Energy Services.[24] DERS has never sold a single kWh to a customer in Ohio. DERS has never conducted any marketing activity. Although DERS has never sold electricity in Ohio, DERS has accrued significant expenses paying out over $22,000,000 to Duke/CG&E utility customers in 2006.[25] This is not the fact pattern of a marketing company; it is the fact pattern of a utility discount scheme being paid though non regulated affiliate because the utility could not grant such discounts.

[24] OMG Ex. 4, p. 15.
[25] OMG Ex. 4, pp. 100-104.

C. Regardless of When They Were Signed, The Side Agreements Were Consideration for Some Signatory Parties Supporting the Stipulation.

At page 25 of its Confidential Merit Brief, Duke/CG&E argues that the vast majority of contracts were signed after the close of the evidentiary record and, therefore, could not have affected the Commission's consideration of the case or the parties' positions with respect to the litigation of the Stipulation. Additionally, Duke/CG&E provides a "timeline" at page 28 of its Merit Brief that purportedly emphasizes the timing of the contracts in relation to these cases. Similarly, the OEG argues in its Initial Brief at page 7 that "many, if not all, of the allegedly offensive agreements became effective after the Stipulation was signed." The OEG further argues that "events occurring after the Stipulation was signed could not have affected the Stipulation itself." OEG Initial Brief, p. 7.

This timing argument fails for three reasons. First, Cinergy Corp., or subsidiaries DERS and its predecessor Cinergy Retail Sales, LLC) executed agreements contemporaneously with the Stipulation.[26] Duke/CG&E argues that these must now be ignored under the incorrect assumption that the Stipulation was terminated. As demonstrated above, the Stipulation was never terminated. Secondly, the Side Agreements that Duke/CG&E's parent arranged to induce support for the Stipulation were never terminated.[27] Thus, Duke/CG&E is factually incorrect in stating that there is a gap between the signing of the first of the Side Agreements and the evidentiary hearing.

[26] See Initial Merit Brief of OMG, pp. 9-11, discussing the May 2004 agreements between Cinergy Corp. and Cognis, IEU and OEG.
[27] Direct prepared testimony of Beth E. Hixon, Attachment 5, June 7, 2004 Agreement between Cinergy Corp. and Cognis Energy Corp.

Second, even if we assume that the May and June Side Agreements were terminated, a series of Agreements ("November Agreements") followed in November 2004 that match up with the November 23, 2004 Entry on Rehearing. These November Agreements modify the terms but preserve the basic tenets of the May/June Side Agreements. Thus, the record clearly shows a course of conduct by which Stipulation signatory trade association members received rate discounts that were not generally available to other similarly-situated customers.

Third, the Duke/CG&E timing defense fails because it assumes the existence of a fact that is not in evidence. Unarticulated, but essential to the Duke\CG&E timing defense, is the assumption that the signature date on the written Side Agreements is the date the trade of Stipulation support for financial inducements took place. It is common for agreements to be made orally with the written codification following weeks or months there after. The Supreme Court recognized the essential question when it instructed the Commission to find whether Duke-affiliated companies offered considerations, financial or otherwise, to selected customers in return for their support of the Stipulation. The best evidence of whether there was financial consideration for support of the Stipulation are the terms of the Side Agreements – not the signature date.

The May/June dated Side Agreements were carefully negotiated documents, written and reviewed by attorneys for both sides and signed by company officers. All the May \ June Side Agreement have provisions similar to the Cognis Corp. ("Cognis") June agreement with Duke\CG&E parent Cinergy Corp. Under that agreement Cinergy Corp. singular consideration is Cognis' pledge to:

> Cognis shall support a Stipulation filed by The Cincinnati Gas & Electric Company and Cognis, in Case No. 03-93-EL-ATA, and any related litigation.[28]

As the afore-mentioned reference portrays, Cognis' exclusive consideration appears to be a guarantee from the regulated utility Duke/CG&E's unregulated parent that Cognis will pay less than the Commission-approved tariff rate if it procures power from the regulated utility. This point is well-documented:

> Cinergy shall reimburse Cognis for the first 4% of the annually adjusted component of Provider of Last Resort Charges actually paid by Cognis during the calendar year 2005; the first 8% actually paid in 2006; the first 12% actually paid in 2007; and the first 16% actually paid in 2008.[29]

The Cognis Side Agreement is the proverbial "smoking gun." Quite simply, the Cognis Agreement clearly elucidates the negotiations that trade Cognis' explicit support for the Stipulation with secret and exclusive discounts off of the Commission's approved tariff rate. DERS\Cinergy Corp. attempts to explain this away with an excerpt from the deposition of Mr. Ficke who was the vice president of Cinergy Corp. at the time the Cognis Agreement was executed. In this deposition excerpt, Mr. Ficke states that he now recalls that Cinergy also wanted to give Cognis a discount to assist economic development. Mr. Ficke also remembered "other" factors while negotiating the Cognis Agreement over three years ago, including Cognis' continued financial solvency and a possible cogeneration deal.[30] If Cinergy the parent was entirely concerned with economic development then it could have had the utility apply for an economic development discount contract under Section 4905.31, Revised Code as opposed to having a non approved agreement with the Utility's parent. Further, if economic

[28] See OCC witness Hixon testimony, Attachment 5, p. 2.
[29] Id.
[30] DERS Merit Brief, p. 13.

development or cogeneration were consideration we would think that Cinergy (or Cognis) would have enumerated these important factors in the executed contract. After all, the purpose of any written agreement is to establish the precise matters agreed to, and absent ambiguity, it is the obligations stated in the written agreement that courts enforce. Again, the Cognis Agreement is devoid of any mention of economic development concerns. In assigning the proper weight to evidence in the instant proceeding, we submit that the Cognis Agreement, an executed contract that expressly lists the consideration and is signed by all parties, is superior evidence to Mr. Ficke's three year old, apparently self-serving, statement that directly contradicts the actual language of the written Cognis Agreement.

DERS also argues that since the contract in question was actually signed two weeks after the Stipulation was filed, the written statement that Cognis would support the Stipulation was no longer evidence of consideration. That argument is flawed in numerous ways. First, there is no evidence that the actual agreement did not take place before the actual signature date. In fact, since Cognis did sign both the Stipulation as well as the contract that created the duty to sign the Stipulation, the inference is that the meeting of the minds took place at the time of the Stipulation and before the contract was executed. Given the task of drafting, reviewing and executing a contract for a significant purchase commitment, two weeks is not an uncommon amount of time to convert an oral agreement to an executed written document. More important, if signing and supporting the Stipulation is removed from the contract, there is no consideration to Cinergy Corp. being given for the discounts. These are "make-weigh arguments" that simply cannot

overcome the evidence of a written, timely, specific contract which call for a trade of utility rate discounts in exchange for support of the Stipulation.

Before leaving Mr. Ficke's deposition though it must also be pointed out that if in fact the consideration for Cognis receiving discounts off utility rates was a private cogeneration deal with a non-regulated affiliate of the utility, such would be a blatant violation of Section 4928.02(G) and the Code of Conduct which under Section 4928.17, Revised Code prohibits using regulated utility assets or services for non-regulated business ventures.

D. The IMF Charge Was Not Supported As A POLR Charge And Thus Cannot Be Made Non By-Passable.

The Supreme Court in Constellation NewEnergy v. Pub. Util. Comm., 104 Ohio St. 3d 530 (2004) held that the Commission could institute a Provider of Last Resort ("POLR") charge that the Court defined as "costs incurred by the utility for risks associated with its legal obligations as the default provider of electricity for customers who shop and then return to the utility for generation."[31] Because utilities can only provide the POLR service, it is a regulated service and, as such, is based on cost of service. In fact, in the aforementioned Constellation NewEnergy case, the Supreme Court held that POLR fees would be subject to cost justification and review in subsequent Commission reviews. The regulated POLR service is priced differently than non regulated energy commodity. Under Section 4928.14(A), Revised Code, the competitive generation cost is priced at market, while monopoly utility wire service is priced under Section 4909.18, Revised Code.

[31] See Constellation NewEnergy v. Pub. Util. Comm. (2004), 104 Ohio St. 3d 530 at 539, at footnote 5.

As noted above, the Supreme Court found that the Commission erred in allowing Duke to incorporate supplemental charges to its previously approved RSP without making on-the-record findings of fact or citing evidence that supported its decision. The High Court's remand to the Commission was to substantiate these supplemental charges. One such supplemental charge is the IMF, which did not appear until Duke/CG&E's application for rehearing following the Opinion and Order[32] which the Commission adopted as part of its November 23, 2004 Entry on Rehearing. As detailed on page 18 of its Initial Merit Brief, Duke/CG&E seek to fulfill the Supreme Court's Remand with Mr. Steffen's presentation of the cost estimates employed in the utility's original application – which did not contain an IMF charge. The IMF charge was *not* a part of the Stipulation or the original evidentiary hearing. Now in the remanded evidentiary hearing Mr. Stephens simply testifies that the rates created by the November 23, 2004 Entry on Rehearing provide less revenue to Duke/CG&E than it would have received under the Stipulation. With that, Duke/CG&E contend that the IMF charge is fully justified and should be recovered. Duke/CG&E believes that this argument is adequate to meet the Court's requirement on remand because the Commission previously found that the Stipulation produced a market based standard service price.[33]

There are at least five (5) reasons why Duke/CG&E's bold assertion fails. First, this argument is logically inconsistent with Duke/CG&E's position that the Stipulation terminated due to the November 23, 2004. If the Stipulation terminated on November 24, 2004 then it cannot be used a factual proof in remand hearing to verify either the nature or the cost of the IMF charge. Second, it should be noted that, if the Commission

[32] See the October 29, 2004 Application for Rehearing of CG&E in Case No. 03-93-EL-ATA at p. 12.
[33] Duke\CG&E Initial Brief, pp. 18-21.

subsequently concludes that the Stipulation was the product of financial inducements and favors to many of the signatory parties, no weight can be afforded to Mr. Steffens' testimony. After all, without the Stipulation, no Commission-approved rates would exist to enable Mr. Steffens to declare that Duke/CG&E will earn less revenues under the November 23, 2004 Entry on Rehearing than under the Stipulation.

Third, even if the Commission concludes that the Stipulation still meets the criteria for acceptance of a partial stipulation, Mr. Steffen's testimony still fails to adequately demonstrate that the IMF charge is properly categorized as a discrete non-bypassable charge for POLR service. This is the standard in order to make the IMF charge a non-bypassable fee. Mr. Steffen's testimony fails to justify the IMF charge as an essential POLR expense and, accordingly, the IMF charge must be made a by-passable charge.

Finally, under cross examination, Mr. Steffens testified that the IMF charge is not only a discrete charge for a specified service; rather it represents the overall amount of money that Duke/CG&E seeks to charge ratepayers for Rate Stabilization Service.[34] If the IMF is not a discrete charge for POLR service, then it must be a component of the market service price of providing generation and thus by-passable.

The evidence in this case also demonstrates that Duke/CG&E will not be harmed if the IMF charge is made by-passable. Indeed, to the extent that retail customers do not buy Duke/CG&E's generation, that generation is free to be sold on the open market. Mr. Rose testified that the generation portion of the market based standard service is currently below market price.[35] Thus, unless Duke/CG&E established that the IMF charge is a

[34] Tr. I, 121-123.
[35] Tr. I, 75-76.

discrete cost required to provide POLR service, there is no reason to believe that Duke/CG&E will not reach Mr. Steffens' target revenue because Duke/CG&E sells the surplus generation into the market. As a matter of logic, OMG notes that, if the Commission is correct that, an RSP is necessary because market prices are far above the RSP prices, then the Commission must also conclude that Duke/CG&E will not be harmed and, indeed, will benefit from selling its freed-up generation without any additional non by-passable charges.

In sum, Duke/CG&E bears the burden of proving that the IMF is a discrete POLR charge. Duke/CG&E failed to meet this burden. Accordingly, the Commission should conclude that the IMF charge should be made by-passable.

III. CONCLUSION

The Supreme Court's remand in this matter presented two important questions for the Commission's review. First, it required the Commission to hold an additional proceeding to review and set the correct charges for the rate components established in the November 23, 2004 Entry on Rehearing. Second, the Supreme Court distinguished the Constellation NewEnergy case and so required the Commission to review the Side Agreements to determine if any financial inducements led to support for the Stipulation. It is important to the customers of Duke/CG&E that the Commission establishes the proper market-based standard service and POLR fees for the remaining year and a half of the Rate Stabilization Plan. In addition, it is important to all retail electric customers in Ohio that the Commission clearly and unambiguously state that cash payments and exclusive discounts to selected customers in return for regulatory support cannot and will not be tolerated. Further, the mere existence of a shell subsidiary should not prevent the

Commission from investigating and enforcing the statutory separation of regulated and non-regulated business activities of the utilities that they are charged with regulating.

WHEREFORE, for the reasons articulated in its Initial and Reply Briefs, the OMG request:

A. The Commission find that the Stipulation fails the reasonableness test and should not be accepted for rate making purposes.

B. The Commission find that charging a customer less than the tariff rate for a tariff service is illegal regardless of how the discount is paid or who pays the discount.

C. The Commission find that a program whereby a non regulated affiliate which does not sell power, but makes cash payments to retail standard service retail customers of the utility violates Section 4928.02(G), Revised Code and Section 4928.17 Revised Code

D. The Commission find that the IMF is not a utility POLR charge and thus must be by-passable if it is charged at all.

Ohio Marketers Group does not ask that the option contracts be invalidated at this time because of the harm that may cause to the community, but in light of the anti competitive nature of the agreements, asks that Duke be required to meet with the Staff and the CRES authorized to make retail energy sales on the Duke\CG&E system to discuss how to remove barriers to shopping and report back to the Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Confidential Reply Post-Hearing Brief of The Ohio Marketers Group was served by email on April 24, 2007 to all of the trial counsel on the special email list prepared by the Attorney Examiners. Non-confidential copies of the Reply Post-Hearing Brief were served on the following parties of record by email or first class mail this 24th day of April 2007.

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BEFORE
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	)	05-725-EL-UNC
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CONFIDENTIAL

REPLY POST-REMAND BRIEF, HEARING PHASE I, BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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Dated: April 27, 2007

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REPLY POST-REMAND BRIEF, HEARING PHASE I, BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. PREFATORY COMMENTS

The initial briefs submitted in these cases to the Public Utilities Commission of Ohio ("PUCO," or "Commission") featured many expected and a few less expected statements and arguments. Initial briefs submitted by Duke Energy Ohio, Inc. ("Duke Energy Ohio" or the "Company," including its predecessor company, "CG&E") and its affiliated companies (Cinergy Corp. and Duke Energy Retail Sales, or "DERS"[1]) feature arguments that conflict with the decision by the Supreme Court of Ohio[2] regarding the 2004 Stipulation[3] entered into during proceedings before the PUCO ("*Post-MDP Service*

[1] Duke Energy Ohio's affiliates submitted a single, joint brief ("DERS/Cinergy Corp. Brief").

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

[3] The stipulation contained in Joint Ex. 1, dated May 29, 2004, was referred to in the OCC Initial Brief as the "Stipulation." Since a new stipulation was submitted in April 2007, a year number has been added to distinguish the "2004 Stipulation" from the "2007 Stipulation."

Case"). The Company's Merit Brief ("Company Brief") includes an array of counter-intuitive and new explanations for its activities prior to the appeal. The activities of Duke Energy Ohio and its affiliates that the Office of the Ohio Consumers' Counsel ("OCC") has placed into the record for these cases, in the form of documents and testimony (including that of Company witnesses), tell a very different story than the after-the-fact explanations submitted by Duke Energy Ohio and its affiliates.

The PUCO's Staff ("Staff") submitted an Initial Brief on Remand ("Staff Brief") that makes virtually no use of the record that has been developed in these cases. Staff is direct: "[I]t does not appear that allowing the commission to change its mind was part of the Supreme Court's charge in its remand."[4] Staff does not explain how its interpretation could be consistent with the Court's statement that "[u]pon disclosure [of the side agreements], the commission may, if necessary, decide any issues pertaining to *admissibility* of that information."[5] The Court's decision to remand the case therefore contemplated a hearing as well as the consideration of evidence, and every deliberative tribunal is expected to decide a case fairly -- i.e. permitting the possibility of a new outcome -- based upon the entire record. Furthermore, the supplemented record exists because of the Commission's efforts (as stated in various entries) to obtain additional record evidence"[6] upon which to decide these cases on remand ("*Post-MDP Remand*

[4] Staff Brief at 3.

[5] *Consumers' Counsel 2006* at ¶94 (emphasis added).

[6] An early entry in these cases stated "that a hearing should be held in the remanded RSP case [i.e. *Post-MDP Service Case*], in order to obtain the record evidence required by the court." Entry at 3, ¶7 (November 29, 2006).

Case").[7] The additions to the record would have been important during the *Post-MDP Service Case* conducted during 2004, and the additions to the record are important to the Commission's decision in 2007. The Commission should make use of the full record in these cases.

An intriguing Merit Brief was submitted on April 13, 2007 by the Ohio Energy Group ("OEG Brief"). The OEG was an active participant in the side deals that resulted in the OEG's support for the Company's proposals during 2004 as well as in the *Post-MDP Remand Case*.[8] However, the OEG Brief demonstrates how its support evaporates as soon as the side deal no longer weighs on its decision-making. OEG agrees with the OCC's position that the "Ohio Supreme Court decision affirms the Commission's authority to mandate RSPs which result in '*market based*' rates without the consent of any party, including the utility."[9] The OEG also states that "a variation of [OCC Witness] Talbot's historic cost proposal may be valid in a future RSP. Establishing '*market based*' rates based upon projected long run costs is grounded in sound economics [and] may meet the statutory requirements. * * * [U]sing projected long-run cost as a proxy for [the] market may give the Commission an additional tool to protect consumers."[10] The OEG rejects Mr. Talbot's approach only in these cases that deal with

[7] For notational convenience, the portions of the case before and after the Court's deliberations are cited separately. The proceedings prior to the appeal are referred to, collectively, as the "*Post-MDP Service Case*," and the proceedings after the appeal are referred to, collectively, as the "*Post-MDP Remand Case*." However, a single record exists that is applicable to the ultimate decisions. These decisions include those regarding various charges that were the subject of testimony on April 10 and 19, 2007. Exhibit references to the portion of the proceedings after remand from the Court, the *Post-MDP Remand Case*, contain the word "Remand" to distinguish them from the earlier exhibits.

[8] See, e.g., OCC Initial Brief at 34 and 47.

[9] OEG Brief at 2 (emphasis sic).

[10] Id. at 5-6.

pricing for 2007-2008.[11] The OEG's position in the immediate-run in these cases is explained by the potential loss of OEG's favored position during the current rate stabilization plan period whereby its members have not been subjected to the full amount of rate increases due to financial arrangements with the Duke-affiliated companies that expire at the end of 2008.[12] However, the Commission should protect all consumers.

The Commission should re-evaluate this case given the overwhelming evidence demonstrating that customer support for the Company's proposals is weak and largely based upon inducements to settle that lessened or eliminated the impact of new charges on supporters of the Company's proposals. The Commission should base Duke Energy Ohio's standard service offer rates for the period ending December 31, 2008 on verifiable costs. Rate components such as the IMF that have no cost basis should be eliminated. Revenues from shared resources should be used to arrive at net costs for standard service offer rates. The dealings that helped settle the *Post-MDP Service Case* must cease. The Commission should further encourage the development of the competitive market for generation service by making all standard service offer rates bypassable. Finally, the Commission should direct its Staff to investigate the interrelationships between the Company and its affiliates, including any Company abuses of its corporate separation requirements. The PUCO Staff should investigate whether the amounts paid to signatory parties of the side deals were and are being subsidized by other customers.

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[11] Id.

[12] OCC Initial Brief at 54-55.

II. INTRODUCTION

A. Remand from the Supreme Court of Ohio

The briefs in these cases provide a confusing collection of statements regarding the appeal of the *Post-MDP Service Case* to the Supreme Court of Ohio ("Court").[13] The Court stated that the "portion of the commission's first rehearing entry approving CG&E's [now Duke Energy Ohio's] alternative proposal is devoid of evidentiary support."[14] The briefs submitted by the OCC,[15] the Ohio Partners for Affordable Energy ("OPAE"),[16] and the Ohio Marketers Group ("OMG," consisting of MidAmerican Energy, Strategic Energy, Constellation Power Source, Constellation NewEnergy, and Integrys Energy, the latter formerly known as WPS Energy Services)[17] support the conjecture by the Supreme Court of Ohio that the IMF that was first proposed in an Application for Rehearing by Duke Energy Ohio was "some type of surcharge and not a cost component." *Consumers' Counsel 2006* at ¶30.

The Court also stated that the "commission abused its discretion in barring discovery of side agreements."[18] The Court specifically mentioned one relevant use of such information at trial regarding the evaluation of settlement agreements (i.e. whether there was serious bargaining) pursuant to the three prong test normally used by the

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[13] *Consumers' Counsel 2006.*

[14] Id. at ¶28.

[15] OCC Initial Brief at 21-24.

[16] OPAE Brief at 14-16.

[17] OMG Brief at 21-25.

[18] *Consumers' Counsel 2006* at ¶94.

Commission's to test such agreements.[19] *Consumers' Counsel 2006* also supported the use of settlement agreements under Evid. R. 408 for "several purposes."[20] The agreements were presented by the OCC in evidence not only to demonstrate the absence of serious bargaining to settle the *Post-MDP Service Case*, but also to demonstrate the absence of substantial support for the Company's rate plans, the negative impact the plans have had on development of the competitive market, the discrimination that exists when the entire plan is revealed (including improper reimbursements of regulatory transition charges), and the exclusion of an entire customer class from negotiations.[21]

B. Burden of Proof

The OCC's Initial Post-Remand Brief ("OCC Initial Brief") set out the burden of proof, as stated in R.C. 4909.18 and/or R.C. 4909.19, which rests upon Duke Energy Ohio in these cases.[22] The OMG states a proposition of law that conflicts with statute: "A filed stipulation shifts the criteria of acceptance by the Commission from one in which the applicant bears the burden of proving that the relief sought is lawful and reasonable, to whether the stipulation taken as a whole is reasonable."[23] The burden of proof upon the applicant is statutory, resting in this case upon Duke Energy Ohio, and cannot be shifted or otherwise changed by the activities of any litigant in a proceeding. The present cases vividly illustrate why the burden of proof cannot be shifted by a

[19] Id. at ¶86.

[20] Id. at ¶92.

[21] OCC Remand Ex. 2(A) at 11-73 (Hixon).

[22] As stated by Duke Energy Ohio itself: "DE-Ohio retains the burden of proof to show that its Application is just and reasonable in these proceedings." Duke Energy's Reply to OCC's Memorandum Contra to Duke Energy Ohio's Motion for Clarification at 12 (December 26, 2006).

[23] OMG Brief at 6.

stipulation since otherwise the burden could have been shifted as the result of the Company's efforts to purchase the support of parties in these cases as described in the OCC's Initial Brief. The Company has the burden to demonstrate that the rate increases that they have requested are reasonable.

The OCC does not bear any burden of proof in these cases. The OCC explained in its Initial Brief and will furthermore explain in the following sections how Duke Energy Ohio has failed to prove that its post-MDP pricing proposals should be adopted without alteration by the Commission.

III. HISTORY OF THE CASES (BASED UPON THE RECORD)

The procedural and substantive history of these consolidated cases is contained in the OCC Initial Brief that was submitted on April 13, 2007. Initial briefs were submitted on that date in opposition to the Company's proposals by the OCC, OPAE, and the OMG.

Initial briefs were submitted in support of the Company's proposals by Duke Energy Ohio and its affiliated companies, the PUCO's Staff, and OEG. The briefs of parties supporting Duke Energy Ohio's plans contain allegations and misstatements of fact that these parties hope will be substituted for the facts in the record, the record upon which the Commission should and must rely to make and explain its decisions. The appalling misstatement of facts by certain parties, particularly their false statements regarding the responses of OCC's witnesses during cross-examination, will be pointed out in this Reply Post-Remand Brief ("Reply Brief").

As an example of unsupported allegations that parties hope will be taken as fact, Duke Energy Ohio provides (notably, without citation) an after-the-fact explanation for its settlement activities and those of its affiliated companies during 2004:

> During those settlement discussions, some Parties who were consumers in DE-Ohio's service territory indicated that they were interested in obtaining service from a CRES provider. Those Parties, and the customers they represented, were referred to DERS, then known as Cinergy Retail Sales, and other CRES providers doing business in DE-Ohio's certified territory. At that time DERS was preparing its application for certification before the Commission.[24]

This rendition of the "facts" is a fiction that is not contained in the record of these cases, is self contradictory, and is peculiar given the information that is contained in the record.

Duke Energy Ohio's explanation in the above-quoted passage is self contradictory. First Duke Energy Ohio states that parties "were referred to DERS . . . and other CRES providers doing business in DE-Ohio's certified territory."[25] Immediately afterwards, Duke Energy Ohio admits that DERS did not submit an application to the Commission for CRES certification until later, and therefore could not have been "doing business in DE-Ohio's certified territory."[26] If Duke Energy Ohio and DERS' functions were truly separate, then Duke Energy Ohio would not have referred customers to DERS based upon an application that was only being formulated internally by DERS before DERS was certified.

The actual record in these cases repeatedly documents the mixing of business between Duke Energy Ohio and its affiliates. For instance, the persons handling DERS business regarding side agreements in 2004 were Duke Energy Ohio's trial counsel (Paul

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[24] Company Brief at 9.

[25] Id.

[26] Id. DERS (formerly Cinergy Retail Sales) was certified in October 2004. OCC Remand Ex. 2(A) at 12. See also *In re Certification of Cinergy Retail Sales*, Case No. 04-1323-EL-CRS (October 7, 2004) (Certificate 04-124(1) issued).

Colbert),[27] James Gainer (also counsel in the *Post-MDP Service Case*) who negotiated CG&E settlement terms using DERS as a corporate cover,[28] and the president of CG&E (Gregory Ficke).[29] A party "referred to DERS" by Duke Energy Ohio under such circumstances would mean nothing more than pretending that discussions took place with DERS personnel (i.e. the same individuals representing Duke Energy Ohio) in an effort to disguise a side deal to settle these cases. Finally, most of the agreements that involved DERS were executed with parties or customer members of parties to the *Post-MDP Service Case* (referred to by OCC Witness Hixon and in this Reply Brief as "Customer Parties") who were already under contract with a CRES provider in 2004 when the side agreements were negotiated.[30] Therefore, inquiries by such parties regarding service from a CRES provider not only lack any documentation in the record, they also seem unlikely since these parties were already knowledgeable regarding CRES service.

An example of misstated fact is contained in the DERS/Cinergy Corp. Brief. DERS/Cinergy Corp. state that "the[ ] option agreements are the only agreements between DERS and its customers that were not rendered void" except for "a contract between [redacted] and DERS for the benefit [redacted]".[31] The record contains

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[27] *OCC Initial Brief at 40, citing OCC Remand Ex. 2(A), BEH Attachments 2-6.*

[28] OCC Initial Brief at 42, citing OCC Remand Ex. 2(A) at 29 and BEH Attachment 7 (Hixon).

[29] See, e.g., OCC Initial Brief at 41-42.

[30] OCC Remand Ex. 5.

[31] DERS/Cinergy Corp. Brief at 12. The record includes two agreements between [redacted] and DERS. OCC Remand Ex. 2(A), BEH Attachments 6 and 12. An invoice regarding "the November 2004 RSP settlement agreement between Cinergy [i.e. CRS] and [redacted]" is also in the record. Id., BEH Attachment 15 at Bate stamp 1159. The existence of an agreement with [redacted] was denied by DERS' president, Charles Whitlock. OMG Remand Ex. 4 at 121 (Whitlock).

agreements concerning these three parties, none of which are an option agreement.[32] The record contains an agreement between [redacted] and CG&E/PSI, but does not contain any agreement between [redacted] and DERS. [redacted] mistakenly thought that he was negotiating with [redacted] wholesale supplier when he entered into the agreement with DERS.[33] Even during this briefing period, DERS' counsel continues to blur any distinction between agreements that involve Duke Energy Ohio and DERS.[34]

A misstatement of the same contractual relationship is contained in the OEG Brief. OEG states:

> These "side agreements" consisted of a contract between DE-Ohio and the City of Cincinnati, a series of Option Agreements between DERS and certain industrial and commercial customers, and the extension of a wholesale power supply arrangement between DERS and [redacted] for retail delivery to [redacted][35]

The statement completely ignores the side agreement reached with [redacted] that involved Cinergy Corp. under which payments have been made without any pretense of generation supply by a CRES provider.[36] The statement also incorrectly states the contractual

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[32] OCC Initial Brief at 44, citing OCC Remand Ex. 7 at 17-19 and Deposition Ex. "A [redacted]. Agreements in the record include one between DERS and [redacted] (OCC Remand Ex. 2(A), BEH Attachments 6 and 12) and between [redacted] and the "Cinergy Operating Companies" who are defined as CG&E and PSI. OCC Remand Ex. 7, Deposition Ex. "A" [redacted]

[33] OCC Initial Brief at 65, citing OCC Remand Ex. 7 at 25 [redacted]

[34] The DERS/Cinergy Corp. Brief provides a summary of contracts, entitled "FACTS: THE CONTRACTS PRODUCED BY DERS AND CINERGY." DERS/Cinergy Brief at 10. That section fails to identify the agreements entered into with IEU as Cinergy Corp. contracts rather than DERS contracts. See, e.g., OCC Initial Brief at 55-56; OCC Remand Ex. 2(A), BEH Attachments 4 and 10.

[35] OEG Brief at 6-7.

[36] See, e.g., OCC Initial Brief at 52. The payments to [redacted] were confirmed in a deposition of Gregory Ficke (OCC Remand Ex. 9 at 79 (Ficke)) and documented by OCC Remand Ex. 2(A), BEH Attachment 14.

relationship that involved [redacted] which is all the more a significant misstatement since the OEG Brief was submitted by [redacted] As stated previously, the DERS [redacted] agreement provided for the "Cinergy Operating Companies" to extend a wholesale power supply arrangement between [redacted] and CG&E/PSI (not DERS).[37] The DERS [redacted] contractual arrangement was one of many (including th [redacted] agreements ignored by OEG) that demonstrate the mingling of business between Duke Energy Ohio and its affiliates.

The Commission should ignore declarations like these that parties seek to substitute for the contents of the actual record.

IV. ARGUMENT

A. The Pricing of the Post-MDP Standard Service Offer Lacks a Reasonable Basis, and Results in Unreasonably Priced Retail Electric Service for Customers.

The Commission should only approve standard service offer rates that, in the absence of true market pricing, move to rates with bases that can be checked and monitored by the PUCO rather than being based on Duke Energy Ohio's desires. The objective should be to approve a good proxy for market-based rates based upon measurable and verifiable costs.[38] The Commission should consider the reasonableness

[37] OCC Initial Brief at 53, citing OCC Remand Ex. 7, Deposition Ex. A. The agreements between DERS an [redacted] are part of OCC Witness Hixon's testimony and refer to agreements that involve the "Cinergy Operating Companies." OCC Remand Ex. 2(A), BEH Attachment 6 and Attachment 12 at 5, ¶6. OCC Remand Ex. 7 is the deposition o [redacted] The wholesale agreement that involves the "Cinergy Operating Companies" defines these companies as CG&E and PSI. OCC Remand Ex. 7, Deposition Ex. [redacted]

[38] OCC Remand Ex. 1 at 6 (Talbot). OCC Witness Talbot testified that rate components should "meet[ ] the double standard of reflecting measurable accounting costs and verifiable costs." Id. at 47.

of Duke Energy Ohio's standard service offer rates with regard to the relationship between the components proposed by the Company. As stated by OCC Witness Talbot, "[t]here should be no overlap or duplication of items and the components should work together to achieve standard service offer rates that provide for reasonably priced service and meet the three standards of rate stability for customers, financial stability for the company, and encouragement of competition."[39]

Duke Energy Ohio contradicts itself in its efforts to dismiss the penetrating testimony of OCC Witness Talbot on the subject of duplicative capacity charges. First, Duke Energy Ohio states that "Mr. Talbot merely recommends that all MBSSO components should be fully avoidable to stimulate competition."[40] Shortly thereafter, however, Duke Energy Ohio admits that Mr. Talbot went further and "dispute[d] this claim [of support for SRT and IMF charges]" that was attempted by Company Witness Steffen.[41]

The OCC Initial Brief discusses the Company's documentation (such as it is) for the totality of the SRT and IMF charge.[42] The purported basis of the Company's argument in support of the proposal contained in its Application for Rehearing is shown in Attachment JPS-SS1 to the testimony of Company Witness Steffen.[43] Duke Energy Ohio cites to Mr. Steffen's testimony:

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[39] Id. at 17 (Talbot).

[40] *Company Brief at 15.*

[41] Id. at 19.

[42] OCC Initial Brief at 17-20.

[43] Company Remand Ex. 3, Attachment JPS-SS1 (Steffen).

> [E]ven with the addition of the cost based SRT ($14,898,000) for reserve capacity, and taking the IMF at its fully implemented (i.e., residential and non-residential) level, DE-Ohio is charging less than the $52,898,560 originally proposed and supported by the Company as its market price for reserve margin and the dedication of its physical capacity.[44]

Duke Energy Ohio states that Mr. Talbot "failed to do the simple math necessary to verify Mr. Steffen's statements."[45] As stated by OMG, "[t]he fact that the total of the charges for the SRT and the IMF are less than the amount Duke/CG&E *originally estimated* has many alternative explanations."[46] Instead of accepting Duke Energy Ohio's simplistic presentation, OCC Witness Talbot probed into the empirical reasoning behind the Company's Reserve Margin proposal contained in the 2004 Stipulation as well as into the reasoning behind the SRT and IMF that were first proposed in the Company's Application for Rehearing. Duke Energy Ohio provided no other evidence in support for its IMF charge as part of the *Post-MDP Remand Case*.

A correct understanding of the comparison between the charges contained in the 2004 Stipulation Plan and those proposed by the Company in its Application for Rehearing requires the recognition that the Reserve Margin component that was contained in the 2004 Stipulation was an estimate that turned out to be many times the amount actually needed to provide for a reserve margin. The amount for the originally estimated reserve margin plus the IMF charge added by the "New Proposal" in the Company's Application for Rehearing would far exceed the $52,898,560 Reserve Margin

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[44] Company Brief at 18, citing Company Remand Ex. 3 at 27 (Steffen).

[45] Id. at 19.

[46] OMG Brief at 23 (emphasis added).

estimate that was contained in the Steffen testimony prefiled on April 15, 2004 and subsequently used to support the plan contained in the 2004 Stipulation.[47] The simple math performed by Company Witness Steffen merely supports the Company's desire to charge standard service offer rates that exceed Duke Energy Ohio's costs for its reserve margin, rates that do not serve as a good proxy for market-based rates.[48]

The Reserve Margin calculation in Mr. Steffen's Attachment JPS-7 that is also attached to the 2004 Stipulation[49] was obtained by multiplying 826.54 megawatts (826,540 kilowatts), which was 17 percent of the Company's projected peak megawatts for 2005, by $64 per kilowatt-year, which was the annualized cost of a *new* peaking unit using Electric Power Research Institute Technical Assessment Guide (EPRI-TAG) estimates.[50] The market prices for capacity were far below the cost of building *new* generating capacity. When the Company substituted estimated costs of acquiring *existing* capacity in the regional generation market (as reflected in the SRT), the charge dropped from $52,898,560 to $14,898,000 as reflected in the summary table provided in the Company's Brief.[51] The Company's switch for its Reserve Margin estimates from the

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[47] Company Ex. 11, Attachment JPS-7 (Steffen). The figure is again reproduced in the Company's summary table. Company Brief at 20.

[48] Company Witness Steffen's "simplistic[ ]" calculations, and the truth regarding the SRT as the sole successor to the Reserve Margin component in the 2004 Stipulation Plan, is also the subject of comment by OPAE. OPAE Brief at 16.

[49] Id.; see also Joint Ex. 1, Attachment JPS-7.

[50] Company Ex. 11, Attachment JPS-7 (Steffen) (reviewed by OCC Witness Talbot, OCC Remand Ex. 1 at 32).

[51] Company Brief at 20, rows on which footnotes 36 and 37 appear. The table compares charges for a four-year period, but contributes nothing to comparing figures based on a single year. The comparison between the 2004 Stipulation Plan and the New Proposal on a four-year basis would contrast the amount for the SRT (i.e. the sole successor to the Reserve Margin) at $52,898,560 times four years plus the IMF charge for four years. The sum, $362,025,510 obviously exceeds the amount for the original Reserve Margin (i.e. $211,594,240) by the amount of the IMF (an entirely new charge).

cost of new capacity to the cost of existing capacity is reflected in footnote 37 to the Company Brief that dates the $14,898,000 figure to a Company filing on December 3, 2004 (i.e. after the New Proposal was approved in the *Post-MDP Service Case*).[52]

The cross-examination of Company Witness Steffen established that the capacity charge sought by the Company was part of "an overall price [at which Duke Energy Ohio] would be willing to manage the POLR load."[53] According to Company Witness Steffen, the Company's "overall price [was] not a buildup of discrete charges. It's an overall price that the company [was] willing to offer."[54] Therefore, the overstatement of the Company's reserve margin costs from a theoretical level[55] resulted in the addition of an entirely new charge, the IMF, to reestablish rates that the Company desired. Instead of Duke Energy Ohio's desired rates, the Commission should base rates upon measurable and verifiable costs that serve as a proxy for market-based rates. Customers do not "desire" to part with their hard-earned money without a reasonable basis for the Company's charges.

It is clear, as stated by OCC Witness Talbot, that the SRT is the "true successor to the Reserve Margin charge, which was calculated strictly in terms of reserve margin and

[52] The much-reduced estimate proved to be an over-estimate. The SRT charge was initially too high, and was subject to a true-up in favor of consumers that resulted in a negative SRT charge at the end of 2006.

[53] Tr. Vol. I at 122 (Steffen) (2007). The Company faults the OCC for not cross-examining Mr. Steffen. Company Brief at 19. The lack of OCC cross-examination does not make the matters discussed by Mr. Steffen uncontroverted (see, e.g., OCC Remand Ex. 1 at 36-44 (Talbot)), and the extensively cross-examination of Mr. Steffen by OMG counsel eliminated the need for the OCC's cross-examination.

[54] Tr. Vol. I at 123 (Steffen) (2007).

[55] Id. at 122.

did not relate to the dedication of existing capacity."[56] As further stated by OCC Witness Talbot:

> It is incorrect to say that, between the Stipulation and the current standard service offer, "these underlying costs were merely reduced, repositioned, made avoidable or carved out into the IMF and SRT charges." (Mr. Steffen, Second Supplemental Testimony at page 30) In fact, the IMF is a brand new charge.[57]

The IMF is a new charge from the New Proposal, one that denies customers the benefit of reduced prices that should have resulted from actual tracking of costs associated with Duke Energy Ohio's reserve margin.

The Company attack on OCC Witness Talbot falsely states that Mr. Talbot did not know the details regarding which standard service offer charges are avoidable and by whom.[58] Mr. Talbot's testimony demonstrated his command of the Company's standard service rates and the ability to avoid (or not avoid) rate components, both present and as part of their historical development.[59] He testified:

> After the first 25 percent or 50 percent of each customer class's load has switched, other retail customers cannot avoid paying these charges when they switch to competitive retailers. Like the earlier flex-down provision, it is a warning to market entrants that if they are successful, they or their customers will be penalized. It is important to understand that unlike an incumbent monopolist such as a distribution utility, competitive retailers have to incur significant marketing and other overhead and indirect costs if they are to enter a market. They are unlikely to do this unless there is the chance of establishing a large customer base in competition

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

[57] Id., quoting Company Remand Ex. 3.

[58] Company Brief at 22.

[59] See, e.g., OCC Remand Ex. 1 at 9-13 and 21 (Talbot). The Company's citation to the hearing transcript is confusing, but Mr. Talbot showed his command of terms and conditions regarding standard service offer rates in his live testimony on March 20, 2007.

> with not only the incumbent utility but also other competitors who are likely to be pursuing the same limited opportunity.[60]

Mr. Talbot is aware that some rate components are avoidable by only a certain percentage of customers within a rate class.[61] That fact tends to confuse discussions on the subject.

Contrary to Duke Energy Ohio's assertion (absent citation to the record), Mr. Talbot is also very aware that standard service offer rates must be market-based.[62] OCC Witness Talbot testified regarding an acceptable "proxy for market prices" based on a "cost-based standard service offer," noting that this was consistent with "the direction in which the Commission has been moving."[63] Regarding the AAC charge, first reviewed for its cost basis in these cases, the Commission's review should concentrate further on a measurable and verifiable cost-based proxy for market-based rates.[64] The Commission should exclude all elements where producers do not recover costs until they sell products or services.[65]

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[60] OCC Remand Ex. 1 at 63 (Talbot).

[61] See, e.g., Tr. Vol. II at 87-88 (Talbot) (2004).

[62] Company Brief at 22.

[63] OCC Remand Ex. 1 at 6 (Talbot).

[64] *Id. at 47.*

[65] Id. at 33.

B. The Agreements Entered Into by Duke Energy Ohio to Gain Support for its New Proposal Reveal that the Company has Exerted Market Power and is Not Providing Reasonably Priced Retail Electric Service.

1. Overview - its "All in the [corporate] Family"

The Commission should ignore the support shown by parties to these cases who have reached side agreements with Duke Energy Ohio as the price for their support for the Company's proposals. The negotiation of side agreements destroyed the seriousness of the bargaining process in the *Post-MDP Service Case*. The Company and signatories to the 2004 Stipulation have maintained a coalition formed to support the Company's standard service offer proposals. Customer Parties to the 2004 Stipulation have arranged with the Company to avoid parts of the standard service offer rates that they claim to support, and do not represent the residential customers who would pay the rates.

Duke Energy Ohio and DERS/Cinergy Corp. feign their separateness and defend the agreements between either DERS or Cinergy Corp. and Customer Parties as bargains separate and apart from settlement of the *Post-MDP Service Case*.[66] That defense of the agreements was debunked by the extensive evidence presented by OCC Witness Hixon.[67] Duke Energy Ohio seems to have forgotten its earlier argument at the time it sought to quash the subpoena directed at DERS to prevent the OCC from obtaining information regarding the side deals:

> Because DE-Ohio is aware that DERS is not supplying generation service to any load in its service territory it is questionable that the DERS agreements represent competitive retail electric service.[68]

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[66] See, e.g., Company Brief at 25 ("DE-Ohio did not participate in the negotiation of the DERS and Cinergy contracts") and DERS/Cinergy Corp. Brief at 20.

[67] OCC Remand Ex. 2(A) at 11-73, including attachments.

[68] Motion for Protection at 11.

The OCC agrees, which is a principal reason that the OCC has examined the dealings of the Duke-affiliated companies in DERS' name. DERS is a mere shell corporation -- having no employees, no revenues, no customers, and no indicia of a going concern.[69] -- that has been used by the Duke-affiliated companies to purchase support for the Company's standard service offer rate proposals. Cinergy Corp. is the named party to the Cognis agreements, the boldest purchases of support for the Company's proposals during the *Post-MDP Service Cases* because they contain no masking of competitive retail electric service that could allow them to be otherwise interpreted.[70]

Under the circumstances revealed in the testimony of OCC Witness Hixon, the Commission should "pierce the corporate veil" and attribute the DERS as well as the Cinergy Corp. agreements to Duke Energy Ohio.[71] The Duke-affiliated companies jointly supported unreasonable and discriminatory standard service offer rates, destroyed the market for retail electric service, and violated both statutory and administrative law.

2. The Company's plan for standard service offer rates lacks substantial support, and the stated support did not result from serious bargaining.

a. The 2004 Stipulation remains relevant.

The parties supporting Duke Energy Ohio's standard service offer pricing seem to have forgotten that the Court remanded the case based upon the barring of *discovery* which is a preliminary part of litigation. Instead, these parties dismiss the case presented

[69] See, e.g., OCC Initial Brief at 40.

[70] OCC Initial Brief at 50.

[71] The alter ego doctrine, which asks if control over a corporation is complete such that it has no separate mind, is explained in numerous cases. See, e.g., *Sanderson Farms, Inc. v. Gasbarro*, 2004 Ohio 1460.

by the OCC by narrowing the Court's decision. For example, Duke Energy Ohio states that the "Commission rejected the Stipulation so serious bargaining relative to the Stipulation is irrelevant,"[72] and DERS/Cinergy Corp. state that "[f]irst, and most obvious, the record in this matter shows that CG&E's proposals were never accepted by this Commission."[73] Staff simply states that "[t]here was no stipulation."[74] OEG agrees: "First, there is no Stipulation."[75]

The issue regarding "serious bargaining," however, remains important to these cases. The Entry on Rehearing that ordered the standard service offer rates depended upon the existence of a stipulation,[76] the PUCO defended its decision before the Supreme Court of Ohio on the basis that many parties entered into a stipulation to support the rate plan,[77] and the Court relied upon these PUCO representations while observing that "[n]one of the signatory parties exercised its option to void the agreement."[78] Financial

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[72] Company Brief at 6.

[73] DERS/Cinergy Corp. Brief at 17.

[74] Staff Brief at 15.

[75] OEG Brief at 7.

[76] See, e.g., Entry on Rehearing at 21.

[77] *Consumers' Counsel 2006*, Supreme Court Case No. 05-946, PUCO Merit Brief at 4 ("The record revealed multitudes of benefits from the [2004] Stipulation") and 15 ("The record shows that the rate was negotiated between suppliers and consumers") (August 5, 2005).

[78] *Consumers' Counsel 2006* at ¶46. DERS/Cinergy Corp. sell the Court short, stating that it "apparently accept[ed] the Commission's 'approval' of the stipulation at face value." DERS/Cinergy Corp. Brief at 7. The Court's analysis appears to have been its own since the OCC is not aware that any party pointed out the absence of a notice regarding nullification of the2004 Stipulation. The 2004 Stipulation provides that "[u]pon the Commission's issuance of an Entry on Rehearing that does not adopt the Stipulation in its entirety without modification, any Party may terminate and withdraw from the Stipulation by filing a notice with the Commission within 30 days of the Commission's order on rehearing. Upon such notice of termination or withdrawal by any Party, pursuant to the above provisions, the Stipulation shall immediately become null and void." Joint Ex. 1 at 3. The notice is separate and apart from the filing of an application for rehearing. Id.

arrangements involving the Customer Parties that were never presented to the Commission are important to explain the support that the Company received for its rate plans, and the echoes of those financial arrangements continue to explain the type of support presently relied upon by Duke Energy Ohio.

Probably the most inventive (and also the most procedurally obtuse) argument posed against the OCC's position that the 2004 Stipulation remains important was raised by DERS/Cinergy Corp. The Duke Energy Ohio affiliates state that the OCC previously argued before the Commission that the PUCO rejected the 2004 Stipulation, and that the OCC is therefore "judicially estopped from asserting otherwise."[79] *State v. Nuunez*, 2007 Ohio 1054, cited by DERS/Cinergy Corp. as authority for the proposition of law, states that such an inconsistent position must have "succeeded in persuading a court to accept that party's earlier position" leading to "the perception that either the first or second court was misled" so that the argument presents "an unfair advantage" to the arguing party.[80] First, contrary to the DERS/Cinergy Corp. argument, the OCC was *unsuccessful* in its argument before the PUCO regarding the status and persuasiveness of the 2004 Stipulation. Second, there can be no misleading a "second court" because the OCC's arguments were and are before the same Commission. Finally, and most importantly, the OCC's current position recognizes the Supreme Court of Ohio's decision, and it is

[79] DERS/Cinergy Corp. Brief at 17.

[80] *State v. Nuunez*, 2007-Ohio-1054 at ¶7.

inconceivable that heeding the Court's decision in the case that directed the remand could constitute "an unfair advantage."[81]

The Supreme Court of Ohio determined that the support by the signatories parties for the Company's proposals remains relevant. The testimony of OCC Witness Hixon demonstrated in great detail how the side deals that accompanied the 2004 Stipulation (i.e. the "Pre-PUCO Order Agreements") were each transformed from one deal to another. The Pre-PUCO Order Agreements were converted into a second round of agreements ("Pre-Rehearing Agreements") in order to provide Customer Parties with similar benefits in return for support for Duke Energy Ohio's proposals in its Application for Rehearing.[82] Once the PUCO reached a decision in the *Post-MDP Service Case* that was acceptable to Duke Energy Ohio, the Pre-Rehearing Agreements were reworked into the option agreements[83] that provided similar benefits to Customer Parties for their support for Duke Energy Ohio's proposals, but at less risk to the affiliated companies.[84]

The transformation of one set of agreements into another has seen the number of side deals multiply, many of which remain in effect today and continue to determine the lines of debate in these cases. The history of the side deals exists in evidence in the form

[81] Id. DERS/Cinergy Corp. also rely upon *Fish v. Board of Commissioners* (1968), 13 Ohio St. 2d 99, 102. That case discusses two separate judicial proceedings, one in which the Board made an election in 1957 and a later proceeding decided by the Court in 1968. *Fish* is inapplicable to the case before the Commission since the proceedings in 2004 and 2007 constitute a single judicial proceeding based upon a single record.

[82] OCC Remand Ex. 2(A) at 31-32 (Hixon).

[83] The [redacted]greements did not develop into option agreements. For these Customer Parties, the Pre-Rehearing Agreements remained and benefits flowed to the Customer Parties under these agreements. OCC Remand Ex. 2(A) at 48-49 (Hixon).

[84] Id. at 53 (Hixon).

of communications between parties to the 2004 Stipulation,[85] financial documents,[86] and transcripts for the depositions of employees of the Duke-affiliated companies as well as a deposition of a Customer Party representative.[87]

b. The 2004 Stipulation remains relevant and has had lasting effects.

The Commission should render its decision based upon the full record and with open eyes in these cases. The Company and its supporters ask the Commission to make its decision by accepting a hypothetical litigation situation that they pose for 2004. Duke Energy Ohio states that "the record shows that the vast majority of contracts were signed after the close of the evidentiary record and, therefore, could not have affected the Commission's consideration of the case of the Party's positions with respect to the litigation of the MBSSO Stipulation."[88] The record also reveals that the negotiations with the OHA regarding the "OHA CG&E Settlement Agreement Terms" were conducted much earlier,[89] and well before the period when Duke Energy Ohio claims it concluded its negotiations with parties in the open.[90] The Commission relied upon that stipulation

[85] Id., BEH Attachment 7 ("OHA CG&E Settlement Terms") and BEH Attachment 13 ("OHA Support of CG&E").

[86] Reimbursements were made to Customer Parties as shown in OCC Remand Ex. 2(A), BEH Attachments 14 and 19. DERS financial statements show the magnitude of payments to Customer Parties. Id., BEH Attachment 22. The Cinergy-affiliated companies considered reimbursements under the agreements as "RSP Related." OCC Initial Brief at 63 and OCC Remand Ex. 2(A), BEH Attachment 23.

[87] OCC Remand Exs. 7 (George), 8 (Ziolkowski), and 9 (Ficke), as well as OMG Remand Ex. 4 (Whitlock).

[88] Company Brief at 26.

[89] OCC Remand Ex. 2(A), BEH Attachment 7 (especially the e-mail dated May 6, 2004 that essentially finalized the agreement dated May 19, 2004 (id., BEH Attachment 2)).

[90] Company Brief at 10 ("full day of negotiation" on May 19, 2004). The Company's account of the negotiations is entirely without support in the record.

(i.e. the 2004 Stipulation), both in its Order and in its evaluation of the modifications first proposed by the Company in its Application for Rehearing, and its support by a number of the Customer Parties.

The Commission was falsely led to believe that many customers simply agreed to the proposed standard service charges (proposed in the Stipulation and in the Company's Application for Rehearing) when these customers had no intention of facing the full brunt of the proposed increases in standard service offer rates. The Commission's knowledge of the supplemented record -- the result of discovery opened by the Commission in the *Post-Remand Case* -- should result in a different decision.

Like the hypothetical litigation situation offered by the Company and its supporters, the OCC could spin its own tale regarding the *Post-MDP Service Cases* in 2004 under circumstances where the OCC was provided with only the side agreement with the City of Cincinnati in response to the OCC's discovery requests. Such a response would not have explained the crumbling opposition to the Company's proposals in the spring of 2004. The right to ample discovery, pursuant to R.C. 4903.082, should have entitled the OCC to seek additional explanation for the changed behavior of the Customer Parties. This line of inquiry regarding how matters might have transpired in 2004, like that argued by Duke Energy Ohio, is not worthwhile. *Consumers' Counsel 2006* does not require or recommend that the Commission ignore the supplemented record (including the record of events that transpired while these cases were pending before the Court). The opposite should be expected: the Court is likely to be disappointed if the substantial evidence gained as the result of the *Post-Remand Case* is swept aside in favor of a

decision that was reached in 2004 without the information that is presently available to the Commission.

c. The argument that the affiliates acted separately fails.

The cumulative evidence presented during the *Post-MDP Remand Case* shows that the Duke-affiliated companies acted together to settle the *Post-MDP Service Case*. One feature of the mixed business of the Duke-affiliated companies is the commonality of persons, partially revealed above, who worked on agreements for Duke Energy Ohio's affiliates and who were also integrally involved in settlement of the *Post-MDP Service Case*. Duke Energy Ohio states that its trial counsel, Paul A. Colbert, "inadvertently misstate[ed] the company he was representing" when he executed contracts for the affiliated companies as "Senior Counsel" for the "The Cincinnati Gas & Electric Company" located at "155 East Broad Street, Columbus, Ohio 43215."[91] "Inadvertence" means "[h]eedlessness; lack of attention; want of care; carelessness; failure of a person to pay careful and prudent attention to the progress of a negotiation . . . by which his rights may be affected."[92] The Company apparently is more willing to admit the implausible -- that Mr. Colbert "fail[ed] . . . to pay careful attention to the progress of a negotiation" *ten times* during a period covering *May through November 2004*[93] while remaining at the

[91] Company Brief at 35.

[92] Black's Law Dictionary (Fifth Edition) at 387 (West Publishing Co. 1983).

[93] The ten contracts involve the hospitals (OCC Remand Ex. 2(A), BEH Attachments 2 and 8); OEG members (id., Attachments 3 and 9), IEU Ohio (id., Attachments 4 and 10); [redacted] (id., Attachments 5 and 11); and [redacted] (id., Attachments 6 and 12). The contracts that involved the hospitals, OEG members, and [redacted] named DERS (previously CRS) as a party, while the contracts that involved IEU and [redacted] named Cinergy Corp. as a party.

helm of the Company's cases – rather than admit that the dealings of Duke Energy Ohio and its affiliates are inextricably linked.

Other links between persons who negotiated for Duke Energy Ohio and its affiliated companies were revealed in the evidence. James Gainer, an attorney for Duke Energy Ohio in the *Post-MDP Service Case*, is listed to receive notices for the Duke-affiliated companies in the ten agreements executed by Mr. Colbert.[94] Mr. Gainer is also identified in correspondence with the Ohio Hospital Association ("OHA") as negotiating an "OHA CG&E Settlement Terms" for CG&E that attached an agreement with DERS.[95] The e-mail correspondence was copied to Paul Colbert and Gregory Ficke, president of CG&E. Duke Energy Ohio states that "no actual CG&E employee was involved" in the negotiation of the affiliate contracts,[96] but Mr. Ficke stated that he and other professional staff were all Shared Services employees.[97] Incredibly (in contradictory fashion), Duke Energy Ohio begins a paragraph by stating that Mr. Ficke "responded that he was involved [in the negotiation of affiliate contracts]" and ends that same paragraph by

[94] See, e.g., Company Memorandum Contra IEU Motion to Dismiss (March 18, 2003). Mr. Gainer was apparently involved in the negotiations. See, e.g., OCC Remand Ex. 7 at 21 [redacted]. The reference to "Cinergy" at the point that identifies Mr. Gainer in the agreements is apparently a generic name since the named Cinergy affiliate in the Pre-PUCO Order Agreements that involves IEU and [redacted] Cinergy Corp. while the named affiliate in agreements with the hospitals, OEG, a[redacted] was Cinergy Retail Services.

[95] OCC Initial Brief at 42, citing OCC Remand Ex. 2(A) at 29 and BEH Attachment 7 (Hixon).

[96] Company Brief at 26.

[97] See OCC Initial Brief at 39 and OCC Remand Ex. 9 at 10-11, 36 (Ficke).

stating that he was only "involve[d] in [a] capacity . . . as Vice President of Cinergy Corp.[98]

The provisions regarding Duke Energy Ohio's regulated business that are contained within various agreements between Duke Energy Ohio's affiliates and Customer Parties also demonstrate the mingling these businesses. An example is provided by a provision within the DERS agreement with the hospitals that would prohibit the "amend[ment of] the rates charged by The Cincinnati Gas & Electric for dual feeds for load existing prior to December 31, 2004 until at least December 31, 2008."[99] OCC Witness Hixon did *not* agree, as Duke Energy Ohio states, that "other terms she describes as obligating and requiring action by DE-Ohio could be resolved economically among the parties to the contract."[100] At the portion of the transcript cited by Duke Energy Ohio, Ms. Hixon states that provisions in the affiliate agreements would "seem to require action or no action by CG&E, [and] I'm not aware as to how what [Duke Energy Ohio counsel] described could be done."[101]

Duke Energy Ohio curiously states that the "existence of these terms [that involve Duke Energy Ohio's distribution tariffs] in the DERS contracts can be explained by the

[98] Company Brief at 25-26. The Company asserts that Company Witness Steffen "testified that DE-Ohio's only involvement with DERS was that DERS paid DE-Ohio to amend its billing systems and that DE-Ohio *performed consolidated billing functions as it does for any . . . CRES provider.*" *Company Brief at* 4-5. That statement is not true, as is evident from Ms. Hixon's testimony (including its documentation) and the deposition transcripts entered into evidence. The statement that this is the "only involvement" is also not contained in Mr. Steffen's testimony. See Company Remand Ex. 3 at 32-38 (Steffen).

[99] OCC Remand Ex. 2(A) at 27, citing BEH Attachment 2, ¶6.

[100] Company Brief at 5.

[101] Tr. Vol. III at 59 (2007) (Hixon). Also, Ms. Hixon did not agree "that the common contract terms involving DE-Ohio that she references [were] reasonable." Company Brief at 5, citing Tr. Vol. III at 32 (2007).

simple fact that DE-Ohio had already filed a distribution base rate case prior to the effective dates of these contracts."[102] The existence of a pre-filing notice regarding a distribution rate case in May 2004 may help to explain the timing of customer concerns regarding Duke Energy Ohio's distribution rates and terms of service. Such a notice does not explain, however, the role that such terms play if the subject matter of the agreements was truly *generation service.* The DERS agreements were settlements related to the *Post-MDP Service Case.*

Duke Energy Ohio provides other explanations for the DERS contracts that are incompatible with the facts. Duke Energy Ohio states that, "[a]ctually, a review of the contracts [prior to the option agreements] reveals there is no reimbursement at all, simply the calculation of the market prices the customer is to pay DERS determined by subtracting an amount from DE-Ohio's MBSSO price."[103] To the contrary, some of the agreements referred to by Ms. Hixon in her testimony (referred to by Duke Energy Ohio in the quote) involved Cinergy Corp. which was never a CRES provider.[104] A review of the contracts referred to by Duke Energy Ohio, even those that involved DERS, also reveals reimbursements under circumstances where DERS would supply no service and even when a CRES provider not affiliated with Duke Energy Ohio provided the generation service.

As an example of reimbursements without a supply relationship, Duke Energy Ohio and OEG filed the 2004 Stipulation on May 19, 2004 that provided for a non-

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[102] Company Brief at 34, citing *In re DE-Ohio Distribution Rate Case,* Case No. 04-680-EL-AIR (May 7, 2004).

[103] Company Brief at 31.

[104] *See, e.g., OCC Remand Ex. 2(A), BEH Attachments 5 and 11.*

bypassable annually adjusted component of a provider of last resort charge.[105] May 19, 2004 is also the stated effective date for a DERS agreement with the OEG member companies that provides (in part) that DERS will "reimburse each [OEG] Customer one-half of the annually adjusted component of the Provider of Last Resort charges (such charges do not include the Rates Stabilization Charge component . . .) thereafter paid to The Cincinnati Gas & Electric Company through December 31, 2008" if the OEG customer "switch[es] to a competitive retail electric service provider."[106] This provision in the OEG agreement did not require any service from DERS in order for reimbursement to occur. Many and different provisions can be found in the earlier DERS and Cinergy Corp. agreements that also provided for reimbursements that did not require DERS service.[107]

James Ziolkowski's place in these cases is minimized in the Company's Brief because he frankly informed other Shared Service employees, in an e-mail internal to Shared Service employees, about the events of these cases and the impact that the events had on their work. The Company characterizes Mr. Ziolkowski as "a Duke Energy Shared Service employee in the Rate Department responsible for calculating the option payments as the billing function paid for by DERS.[108] Mr. Ziolkowski's knowledge regarding the events of these cases, however, runs much deeper.

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[105] Joint Ex. 1 at 4-5, ¶3 (2004 Stipulation).

[106] OCC Remand Ex. 2(A), BEH Attachment 3 at 3, ¶1.b.

[107] See, e.g., OCC Remand Ex. 2(A), BEH Attachment 4 at 2-3, ¶1; BEH Attachment 5 at 1-2, ¶¶1-2; BEH Attachment 6 at 3-4, ¶¶1-3; BEH Attachment 9 at 2-3, ¶2; BEH Attachment 10 at 2-3, ¶1; BEH Attachment 11 at 2, ¶2; BEH Attachment 12 at 3-4, ¶¶1-3.

[108] Company Brief at 38.

Mr. Ziolkowski's knowledge has been featured twice in these proceedings. He first appeared as part of CG&E's litigation team and presented testimony in the *Post-MDP Service Case.*[109] His knowledge was also shared in the form of an e-mail that was attached to the testimony of OCC Witness Hixon and was featured at his deposition that is also part of the record.[110]

The history of Mr. Ziolkowski's e-mail traces back to an inquiry from Jon Gomez (Budgeting and Forecasting) on May 11, 2006. Mr. Gomez wanted to know whether $22 million in "CRES payments" per year was the correct amount through the end of 2008, and wanted to understand the "concept behind the CRES payments.[111] Mr. Don Wathen, Duke Energy Ohio's Director of Revenue Requirements in Rates and also a Company Witness in these cases,[112] asked Mr. Ziolkowski to respond to the question because "[y]ou and Tim [Duff] are the ones I'm aware of who know this stuff."[113] Mr. Duff assisted James Gainer,[114] who is elsewhere mentioned in this Reply Brief, and assisted in preparing exhibits to the option agreements.[115] Mr. Ziolkowski's e-mail text is very

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[109] See Company Ex. 5 (Ziolkowski).

[110] OCC Remand Ex. 2(A), BEH Attachment 21 (e-mail) and OCC Remand Ex. 8 (Ziolkowski transcript).

[111] Id. at Bate stamp 647.

[112] Company Remand Rider Exs. 3-5. Mr. Wathen testified that he is "responsible for the preparation of financial and accounting data used in wholesale and retail rate filings for Duke Energy Ohio (DE-Ohio) and Duke Energy Kentucky (DE-Kentucky, including petitions for changes in fuel and gas cost adjustment factors, and various other recovery mechanisms." Company Remand Rider Ex. 3 at 2.

[113] OCC Remand Ex. 2(A), BEH Attachment 21 at Bate stamp 646. Mr. Ziolkowski took over some functions related to option agreements when Mr. Tim Duff moved to Charlotte in 2006, a transfer to Mr. Ziolkowski "because these option payments are calculated based on various MBSSO components, and [he was] very familiar with [Duke Energy Ohio's] retail rates including all of the MBSSO components of those rates." OCC Remand Ex. 8 at 44 (Ziolkowski).

[114] OCC Remand Ex. 9 at 41 (Ficke).

[115] OMG Remand Ex. 4 at 67 (Whitlock).

descriptive of the course of the *Post-MDP Service Case*, demonstrates considerable knowledge of Ohio's regulatory environment, and is consistent regarding the activities of Duke Energy Ohio and its affiliated companies with other information contained in the record. Mr. Ziolkowski's e-mail presents a frank and unrehearsed statement regarding corporate dealings that strongly contrasts with the fiction that DERS' is a CRES whose activities are not governed by its ties to the Company and other Duke affiliates.[116]

Mr. Ziolkowski's e-mail provides important statements against the Company's interests that is not likely to ever become available with such frankness from the Company's officers (e.g. former CG&E president Ficke) or its attorneys (e.g. Messrs. Colbert and Gainer).[117]

[116] This fiction is refuted by the testimony of OCC Witness Hixon and transcripts that are part of the record of these cases. See OCC Remand Exs. 2(A), 7-9 and OMG Remand Ex. 4 (Whitlock). For instance, the Duke-affiliated companies would have the Commission believe that the president of DERS, Charles Whitlock, can serve as both a key figure in DERS' competitive activities (see, e.g., OMG Remand Ex. 4 at 58) as well as a key figure in purchases by Duke Energy Ohio covered by the FPP and the SRT. OMG Remand Ex. 4 at 39-40. This fiction was further refuted during these proceedings by the unwaivering support provided by DERS to Duke Energy Ohio's positions in these cases, a position under which DERS records no revenues and over $20 million in losses each year. OCC Remand Ex. 2(A), Attachments 21 and 22.

[117] The Company would apparently like to eliminate the evidence presented by the OCC in favor of carefully crafted and manicured statements from a Duke Energy Ohio "manager or corporate officer." Company Brief at 37. The statements of former CG&E president Ficke are part of the record, and the Company's Brief repeats Mr. Ficke's statement that he was involved in the DERS contracts. Company Brief at 25. Duke Energy Ohio makes the misleading argument that "no actual CG&E employee was involved" (id. at 26), knowing that only Shared Services employees such as Mr. Ficke were involved and that all managers and officers of the Duke-affiliated companies are Shared Services employees. OCC Initial Brief at 39. All forms of evidence against the Company's interest appear to be objectionable to Duke Energy Ohio.

3. The Company's approach to post-MDP service is discriminatory and has dealt the development of competitive markets a serious blow.

The development of the competitive market is one of the Commission's three goals that it uses in the evaluation of post-MDP rate plans.[118] A means by which the Commission has addressed market development has been to change utility proposals regarding the bypassability of proposed charges.[119] The record shows that market development has suffered greatly since the Company placed the proposal contained in its Application for Rehearing into its tariffs.[120]

OEG comments that, "[a]s a general matter, OEG agrees that all generation-related charges should be bypassable" but "disagree[s] with OCC on the importance of developing a competitive market."[121] OEG therefore rejects one of the Commission's guiding goals that are considered in the evaluation of rate plans (i.e. market development). No doubt the OEG's position is guided by the knowledge that its members have been able to bypass at least a portion of the IMF by means of side agreements with the Duke-affiliated companies.[122] This helps to explain the loss of market share by CRES providers in the two and a half years since the Commission approved Duke Energy Ohio's standard service offer.

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[118] See, e.g., Order at 15 (September 29, 2004). The Supreme Court of Ohio recently stated that it has "recognized the commission's duty and authority to enforce the competition-encouraging statutory scheme of S.B. 3 . . . ." *Consumers' Counsel 2006* at ¶44.

[119] See, e.g., Order, Concurring Opinion of Chairman Alan R. Schriber at 2 (September 29, 2004).

[120] OCC Initial Brief at 59.

[121] OEG Brief at 8.

[122] See, e.g., OCC Remand Ex. 2(A), BEH Attachment 17 at Bate stamp 11 (CRS payment t[redacted]

The Commission should make its findings in these cases with an understanding that the side agreements related to the *Post-MDP Service Case* have had a devastating effect on market development. As stated by OCC Witness Hixon:

> The side agreements were designed to retain generation business for the Company and to encourage the return of customers to the Company. * * * [T]he DE-Ohio affiliated companies used the side agreements to discriminate among customers and erect barriers to entry in the generation market for non-DEO[hio-]affiliated CRES providers.[123]

As has been shown, the side agreements are inextricably linked to the operations of the Company. The PUCO Staff's reaction to this situation – that aggrieved persons should "file a complaint and air their concerns in the proper forum"[124] – is disappointing. Market development depends upon more than adjustment of the ability of shoppers to avoid generation charges, but also on enforcement of the Commission's rules related to corporate separation.[125] The evidence has been placed before the Commission in these cases, and customers should not be asked to wait for the results of a complaint case when development of the competitive market is presently at issue.

Reasonable tariffs should be approved in these cases, and all customers should be subject to their provisions without discrimination. The total effect of the post-MDP generation pricing by the Company is discriminatory in favor of the Customer Parties. R.C. 4905.35 is among a group of anti-discrimination statutes that reflect Ohio policy,[126] and states:

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

[124] Staff Brief at 16.

[125] See OCC Initial Brief at 63-65.

[126] See R.C. 4905.32 to 4905.35.

> No public utility shall make or give any undue or unreasonable *preference or advantage* to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage.

Furthermore, R.C. 4928.14(A) states:

> After its market development period, an electric distribution utility in this state shall provide consumers, on a comparable and *nondiscriminatory* basis within its certified territory, a market-based standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers.[127]

The latter statute forms the backbone of what Duke Energy Ohio refers to as its "provider of last resort" obligation, but it also requires that the Company provide its services free of discriminatory treatment of its customers.

The Company's treatment of its customers is highly discriminatory. Duke Energy Ohio defends the activities that resulted in side deals with Customer Parties by stating that "[a]ny customer is free to call DERS and seek service just as they may seek service from any other CRES provider.[128] A defense against evidence of discrimination cannot be as simple as having the use of a telephone. Only Customer Parties who originally opposed the Company's post-MDP rate proposals received discounts on their electric service, leaving other customers with higher standard service offer rates. DERS has only executed "option agreements" with Customer Parties,[129] and th[redacted] and [redacted] agreements were each unique.[130] The substantial discounting of standard service offer

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[127] Emphasis added.

[128] Company Brief at 41.

[129] OCC Remand Ex. 8 at 25 (Ziolkowski); Tr. Vol. III at 48-50 (Hixon).

[130] OCC Remand Ex. 9 at 77 (regarding [redacted] id. at 88 (regardin[redacted]Ficke).

rates should be available to the other customers of the Company, including residential customers.[131]

4. The Company's approach to post-MDP service has raised additional problems that should be addressed.

Some of the Option Agreements provide for illegal reimbursement of a regulatory transition charge ("RTC").[132] OEG states that the Commission is powerless to prohibit the reimbursement of RTC charges due to the provisions contained within "ORC §4928.37(4) {sic §4928.37(A)(4)} which specifically allows for the payment of all or part of the RTC charges by third parties on behalf of a customer."[133] The payment of RTC by all customers is a requirement of R.C. 4928.37, whereby the "transition charge shall not be discounted by any party."[134] OEG fails to read the remainder of R.C. 4928.37(A)(4), which states that the payment of RTC charges by third parties may "not contravene sections 4905.33 to 4905.35 of the Revise Code or this chapter." These statutory provisions prohibit discrimination, and have been violated as stated above. The reimbursement scheme provided for in the side agreements is illegal.

The Commission did not previously receive the information presented by the OCC in this *Post-MDP Remand Case*, partly because of the negotiating process in the *Post-MDP Service Case* during which parties involved in side deals did not disclose their

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[131] The OCC does not endorse the form of the discounts provided by the Duke-affiliated companies. The RTC is non-bypassable by statute, and an Insufficient Return Notice Fee contained in the Company's tariffs may not be waived. *In re Complaint of Suburban Fuel Gas Against Columbia Gas*, PUCO Case No. 86-1747-GA-CSS, Order at 23 (August 4, 1987).

[132] See, e.g., OCC Remand Ex. 2(A), BEH Attachment 17 at Bate stamp 4[redacted]

[133] OEG Brief at 8.

[134] R.C. 4928.37(A)(3). During cross examination, counsel for Kroger suggested that "R.C. 4928.37(4)" was applicable. Tr. Vol. III at 135. Counsel probably intended to refer to R.C. 4928.37(A)(4).

deals to the OCC. The OCC raised this matter in its Initial Brief, noting the concerns of the Ohio Supreme Court in *Time Warner AxS v. Pub. Util. Comm.* (1996), 75 Ohio St.3d 229, 234, 661 N.E.2d 1097.

Time Warner states that the Court does not prohibit caucuses between parties during the course of negotiations. However, a rush to adopt a partial settlement without addressing core concerns of a customer class in a case (i.e. the situation addressed in *Time Warner*) is against public policy and will be scrutinized by the Court. The Customer Parties should have alerted the OCC regarding their proposed course of settlement in 2004, and should have provided their side agreements to the OCC without the need for the extensive discovery activities that were required before the OCC could present its case in 2007.

Duke Energy Ohio does not directly address the *Time Warner* concerns, but accuses the OCC of conducting discussions in these cases without involving the Company.[135] The Company does not mention that the OCC, unlike the Company, holds no purse strings to bestow benefits upon parties to reach a settlement or arrange litigation support. Any preliminary discussions involving the OCC and another consumer party would ultimately need to lead back to the Company, whereas the Company obviously could (and did) conclude a settlement agreement and arrange for litigation support in side deals involving other parties without ever including the OCC.

In the merger-related appeal that the Company references,[136] the OCC negotiated with the real party in interest in the appeal, the Company, and thereby settled a case

[135] Company Brief at 43.

[136] Id. at 42-43.

pending at the Supreme Court of Ohio where there was no need to file the settlement at the PUCO. That settlement was in the public domain, as stated in an OCC filing at the Court to dismiss the case (and as the Company itself admits in its Brief).[137] Finally, the Company's somewhat ironic accusation that it "paid $750,000 to OCC and the Ohio Department of Development" in a 1999 case does not accurately portray the document referenced by the Company.[138] What is stated in the document referenced by the Company is that "CG&E will contribute $500,000 to a customer education campaign concerning customer choice jointly managed and designed by CG&E and OCC."[139] The document does not state that any amounts were to be paid to the OCC;[140] Duke's mischaracterization of the facts should not be condoned.

V. *CONCLUSION*

The Commission should re-evaluate this case given the overwhelming evidence demonstrating that signatories to the 2004 Stipulation -- who later became the supporters of the Company's proposals as stated in Duke Energy Ohio's Application for Rehearing -- were given inducements to settle that lessened or eliminated the impact of new charges on these parties. Customer support for the Company's proposals is weak.

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[137] Id. at 43. Far from trying to conceal the existence of the settlement, as Duke Energy Ohio did in the *Post-MDP Service Case*, the OCC issued a press release on May 5, 2006, informing the public of its settlement on behalf of residential consumers regarding the appeal of the order approving the Duke Energy merger with Cinergy. Company Brief at 42-43. It has been the policy of the current Consumers' Counsel that any settlement reached with a public utility be made available to the public. In this regard, the settlement document referenced by the Company regarding DP&L involved a 1999 case, and the document was made public by the OCC in a more recent case before the PUCO. Indeed, the OCC's placement of the document in the public domain is presumably what enabled Duke to reference it in its brief.

[138] Id. at 42, citing Company Remand Ex. 20.

[139] Company Remand Ex. 20.

[140] Id.

The OCC developed an extensive record that exposes the weak foundation upon which Duke Energy Ohio's standard service offer rates rest. The Commission should carefully consider the supplemented record and modify the standard service offer rates that are stated in the Company's tariffs. The Commission should base Duke Energy Ohio's standard service offer rates for the period ending December 31, 2008 on verifiable costs. Revenues from shared resources should be used to arrive at net costs for standard service offer rates, and rate components such as the IMF that have no cost basis should be eliminated.

The Commission's intent to foster competition has been seriously undermined by the side agreements. The side dealings that helped the Company settle the *Post-MDP Service Case* must cease in order to promote reasonable rates for all customers and to encourage competition. The Commission should also encourage the development of the competitive market for generation service by making all standard service offer rates bypassable.

Finally, the Commission should direct its Staff to investigate the interrelationships between the Company and its affiliates, including any Company abuses of its corporate separation requirements. These interrelationships -- including the means by which DERS is able to run ever increasing losses as the result of payments to large customers without performing any supply function -- should be fully reviewed and audited.[141] The source of funds for over $20 million per year in payments should be carefully examined in the review and audit to determine the extent to which customers who did not receive payments were harmed. The Commission should ascertain whether the discounts paid to

[141] OCC Remand Ex. 2(A) at 73-74 ("review or audit" by "Staff (or an auditor hired by the Staff at DE-Ohio's expense)") (Hixon).

selected customers were financed on the backs of hard-working residential consumers to ensure that these consumers were not being required to subsidize the side deals. Duke Energy Ohio should be required to show cause why it is not in violation of corporate separation requirements regarding affiliate interactions.

Respectfully submitted,

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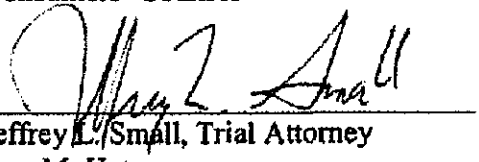
Consumers' Counsel



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Reply Post-Remand Brief, Hearing Phase I, by the Office of the Ohio Consumers' Counsel*, has been served upon the below-named persons (pursuant to the Attorney Examiners' instructions) via electronic transmittal this 27th day of April 2007.

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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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 REPLY BRIEF

INTRODUCTION:

On June 22, 1999, the 123rd Ohio General Assembly passed Amended Substitute Senate Bill No. 3 (SB 3). SB 3 reflected the General Assembly's plan to restructure retail electric service and its consequences are still felt today. In an effort to mitigate potential rate shock and balance the interests of all stakeholders, the Public Utilities Commission of Ohio (Commission) requested that Duke Energy Ohio (DE-Ohio) file a rate stabilization plan (RSP) market based standard service offer (MBSSO) to provide (1) rate certainty for consumers; (2) financial stability for the utility; and (3) the further development of competitive retail electric service markets.[1] In approving a market price

[1] *In re DE-Ohio MBSSO*, Case No. 03-93-EI-ATA, *et al.* (Entry at 3, 5) (December 9, 2003).

for DE-Ohio in November 2004, this Commission successfully achieved a fair balance of these opposing interests. As stakeholders continue to deal with these matters, this Commission must not lose sight of its goals.

Many Parties to these proceedings, and in particular the Ohio Consumers' Counsel (OCC), Ohio Partners for Affordable Energy (OPAE), and the Ohio Marketers' Group (OMG), are attempting to divert the Commission's attention from its goals. The positions taken by these parties are unsupportable because they ignore Ohio law, fail to consider the facts and evidence of record in these proceedings, are based in large part, upon mere inference and innuendo, and reflect a complete lack of understanding of the risks faced by utilities in the competitive retail electric market. If these special interest groups are successful in their crusade to impose their own regulatory scheme, it would seriously undermine the competitive retail electric market in Ohio and result in adverse impacts for all stakeholders. This is particularly true with respect to the positions advocated by the OCC. DE-Ohio submits that such a result is not intended by either the Legislature, or this Commission.

Sorting fact from fiction in the various initial briefs submitted in these proceedings, the following is indisputable:

1. In its November 23, 2004, Entry on Rehearing, this Commission approved a market price for DE-Ohio to charge consumers, namely DE-Ohio's MBSSO;[2]

2. DE-Ohio has a market price which has been unequivocally affirmed by the Ohio Supreme Court;[3]

3. DE-Ohio's implemented MBSSO is in the form of an RSP, expressly designed to further the Commission's three goals, as discussed above;

4. DE-Ohio's implemented MBSSO market price was within the range of market prices supported in the record evidence in Case No. 03-93-EL-ATA *et al.*, at the hearing ending June 1, 2004;[4]

5. DE-Ohio's MBSSO price ordered by the Commission in its November 2004, Entry on Rehearing, was lower than the RSP MBSSO price first proposed by the Company on January 26, 2004, and lower than the RSP MBSSO price supported by the Company's direct testimony submitted in April 2004;[5]

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[2] *In re DE-Ohio MBSSO*, Case No. 03-93-El-ATA, *et al.* (Entry on Rehearing) (November 23, 2004).

[3] *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 310, 856 N.E.2d 213, (2006); "We hold that the commission's finding that *CG & E's standard service offer was market based is supported by sufficient probative evidence." Id. Emphasis Added.*

[4] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Rose Second Supplemental Testimony at 6-11) (February 28, 2007).

[5] *Id.*

6. The Commission-approved MBSSO pricing structure results in a market price that falls between the price agreed to by the Parties to the May 19, 2004, Stipulation and the price set forth in the Commission's September 29, 2004, Opinion and Order (Opinion and Order); and

7. The Commission's Opinion and Order did not approve the Stipulation agreed to by the signatory Parties, and thus there was no approved Stipulation in these proceedings.[6]

As discussed further below, this Commission should remain focused on its three goals, find that the misguided allegations raised by the opposing intervenors lack credibility, and recognize and affirm the merit and evidentiary support for DE-Ohio's MBSSO as established in the Commission's November 23, 2004, Entry on Rehearing.

LAW AND ARGUMENT:

I. The Commission should maintain the course established by its November 23, 2004, Entry on Rehearing.

The Commission has successfully navigated a course that allows consumers to maintain relatively low and stable market prices while prices skyrocket in states that have implemented retail prices based upon wholesale bid processes. At the same time, the Commission's

[6] *See e.g. In re DE-Ohio MBSSO*, Case No. 03-93-El-ATA, *et al.* (OCC's Memorandum Contra CG&E's Application for Rehearing at fn 3.)(November 8, 2004); "CG&E's nomenclature regarding "reinstating" the Stipulation is misplaced,... The Commission never adopted the Stipulation, so there is nothing to reinstate." *See also, In re DE-Ohio MBSSO*, Case No. 03-93-El-ATA, *et al.* (Staff's Remand Merit Brief at 15) (April 16, 2007); "No party ever recommended the final outcome in the case. No one agreed. There was no Stipulation."

approach maintained the financial health of utilities while permitting competitive retail electric service (CRES) providers an opportunity to maintain a market position. This accomplishment is substantial given the inherent conflict in the goals of stable consumer prices, financial stability for utilities, and development of the competitive retail electric service market. DE-Ohio asserts that the Commission should maintain its course and recognize that the record evidence overwhelmingly supports its prior decision establishing DE-Ohio's MBSSO.

A. The record evidence fully supports DE-Ohio's MBSSO.

From the outset of this remand proceeding, DE-Ohio has correctly and consistently demonstrated that the Ohio Supreme Court clearly delineated the scope of the Commission's review on remand. With respect to the MBSSO pricing structure approved by this Commission in its November 23, 2004, Entry on Rehearing, the Court held that the Commission must "thoroughly explain its conclusion that the modifications on rehearing are reasonable and identify the evidence it considered to support its findings."[7] The Commission was to support its conclusion and was not directed to start afresh.

DE-Ohio, both through its testimony filed in the above-styled remand proceedings, and in its Initial Merit Brief, demonstrated that the existing record evidence supported the Commission's modifications on rehearing. Accordingly, DE-Ohio will not recite the evidence present in

[7] *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 309, 856 N.E.2d 213, 225 (2006).

the record that supports its MBSSO pricing structure again, but will simply summarize the points already made on brief, which address each position asserted by the special interests of the various intervenors.

In its Initial Post-Remand Brief, OCC first argues that DE-Ohio's MBSSO is unreasonable.[8] OCC alleges that the final MBSSO price is poorly-defined, duplicative, and contains what OCC maintains are "quantitatively uncertain estimates of costs or risks."[9] OCC's claims are wrong. Although the Commission-approved RSP-MBSSO resulted in a repositioning of the components and a total price lower than was initially proposed or supported at hearing, the various risk and cost factors considered and justified by DE-Ohio in establishing an acceptable market price did not change throughout the duration of the proceeding.

DE-Ohio's witness Steffen, through his Direct, Supplemental, and Second Supplemental Testimony filed in these proceedings, and on cross-examination in the initial proceeding, addressed and supported the various costs and risks facing DE-Ohio, as well as the price DE-Ohio was willing to charge as compensation for those factors.[10]

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[8] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC's Remand Merit Brief at 13.) (April 13, 2007).

[9] *Id.*

[10] *See In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Steffen's Testimony at 3-27) (April 15, 2004); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Steffen's Supplemental Testimony) (May 20, 2004); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Steffen's Second Supplemental Testimony) (February 28, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* Tr. VI. at 99, 102 (May 26, 2004).

For example, in Mr. Steffen's Direct Testimony, filed on April 15, 2004, he fully explained and supported the RSP-MBSSO pricing structure proposed by the Company in its January 26, 2004, filing, as well as several modifications made subsequently to enhance the competitive market.[11] The calculations and mathematical support for these pricing components were attached to Mr. Steffen's testimony and are part of the evidentiary record.[12]

Additionally, DE-Ohio witness Mr. Rose compared the price-to-compare component of the MBSSO price to three different market prices: (1) the price DE-Ohio would have offered pursuant to its January 10, 2003, application; (2) the MBSSO price offered by other Ohio electric distribution utilities; and (3) the actual prices offered by CRES providers in the market.[13] OCC has only criticized the comparison to DE-Ohio's competitive market option price.[14] The remainder of Mr. Rose's market price comparisons proving DE-Ohio's MBSSO is a market price remain uncontroverted on the record. Mr. Steffen's Supplemental Testimony supported several changes made to the Company's RSP-MBSSO pricing formula, which were the result of discussions and negotiations with all Parties, including Staff, OCC, various industrial and commercial

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[11] *See In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Steffen's Testimony at 3-27) (April 15, 2004).

[12] *Id.* at JPS-1 – 11.

[13] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, (Rose Direct Testimony at 45-47) (April 19, 2004).

[14] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, (OCC's Remand Merit Brief at 26-28) (April 13, 2007).

consumer groups, CRES providers, and residential consumer groups.[15] Significantly, Staff supported the modifications made to the RSP-MBSSO contained in the Stipulation.[16]

Throughout his Direct Testimony and on cross-examination, Mr. Steffen discussed at length the various costs and risks, including the commitment of first call generation capacity, DE-Ohio faced in offering a stabilized market price in a competitive retail electric market over four years.[17] The RSP-MBSSO price in total, not through any particular underlying component, represented the compensation for those factors.[18]

The record evidence clearly demonstrated that the implemented MBSSO was set at a market price in 2004.[19] The Commission confirmed this conclusion when it established the final price-to-compare, which was higher than the initial stipulated price-to-compare.[20] The same is true today. As evidenced by DE-Ohio's witness Judah Rose in his Second Supplemental Testimony, DE-Ohio's implemented MBSSO price

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15 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Steffen's Supplemental Testimony at 4-11) (May 20, 2004).

16 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Cahaan Supplemental Testimony at 1-4) (May 24 2004)

17 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* Tr. VI. at 52-53, 59-60, 94-99, 102, 126-127 (May 26, 2004).

18 *Id. at 54.*

19 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA (Opinion and Order at 24) (September 29, 2004),

20 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA (Entry on Rehearing at 14) (November 23, 2004). The final price-to-compare included the addition of emission allowances which were previously in the POLR component of the MBSSO, resulting in the overall higher price-to-compare.

is still in the range, although much lower, of acceptable and reasonable market prices.[21]

Clearly, the evidence supporting the reasonableness of DE-Ohio's MBSSO structure was not only present in the existing evidentiary record of the initial 03-93-EL-ATA, *et al.*, MBSSO proceedings, but it was abundant. In the Second Supplemental Testimonies of John P. Steffen and Judah Rose, DE-Ohio thoroughly explained this evidence as well as evidence showing that if the MBSSO were reset today, the market price would rise.[22] The Commission's Staff agrees as evidenced by its prefiled testimony.[23] In its Initial Merit Brief, DE-Ohio further demonstrated the record evidence supporting the reasonableness of its MBSSO and contrasted it to the dubious positions taken by the OCC and other special interests.[24] Once again, the Staff agrees with DE-Ohio's assessment.[25]

Accordingly, this Commission should affirm DE-Ohio's implemented MBSSO based upon the wealth of evidentiary support present in the record of these consolidated cases.

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[21] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* Rose Second Supplemental Testimony at 11) (February 28, 2007).

[22] See *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Steffen's Second Supplemental Testimony) (February 28, 2007); and (Rose Second Supplemental Testimony) (February 28, 2007).

[23] See *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Cahaan's Testimony at 13) (March 9, 2007).

[24] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (DE-Ohio's Remand Merit Brief at 14-23.) (April 13, 2007).

[25] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Staff's Remand Merit Brief at 3) (April 13, 2007).

B. Special interests are attempting to support their positions through a gross distortion of the facts.

The intervening special interests are making much ado about the various formulaic components that arrive at DE-Ohio's approved MBSSO price. Specifically, they assert that the infrastructure maintenance fund (IMF) in relation to the system reliability tracker (SRT) and "little g" of the implemented MBSSO, are an unsupportable fiction that results in double cost recovery for DE-Ohio. These special interests also incorrectly assume that the only evidence DE-Ohio presented in the record was in support of the stipulation. These Parties support their conclusions by distorting the facts presented in the initial MBSSO proceeding, by completely ignoring the purpose of the Commission requested RSP-MBSSO, and by improperly advocating that traditional cost-based regulated rate-making is still applicable. The specious arguments raised by the special interests are not only misleading and harmful to consumers, but are contrary to law. In light of this, DE-Ohio believes a brief historical review is appropriate.

It is all too convenient to forget that the term "RSP" is simply the name of a pricing mechanism, *i.e.* formula, used by the Commission and DE-Ohio to arrive at the total MBSSO price which DE-Ohio is willing and able to accept in the competitive retail electric service market in exchange for the provision of competitive generation service. As Mr. Steffen explained numerous times on cross-examination, and in his Second Supplemental Testimony, the RSP-MBSSO price as proposed,

designed, modified and eventually implemented was a "total package" price.[26] The approved MBSSO, like the previous RSP-MBSSO formulas addressed in these proceedings, contained a 100% bypassable price-to-compare and charges with varying degrees of avoidability comprising compensation for DE-Ohio's statutory Provider of Last Resort (POLR) obligation. Together, the price-to-compare and POLR comprise DE-Ohio's total market price for competitive retail electric service.

In his Second Supplemental Testimony, Mr. Steffen discussed the various MBSSO proposals and the differences in detail.[27] It is indisputable that throughout the duration of these proceedings, each version of DE-Ohio's RSP-MBSSO pricing formula included a price-to-compare and compensation for POLR services.[28] Additionally, the support used to arrive at a relatively stable and reasonable market price for consumers that furthered the competitive market, as well as provided the necessary compensation for DE-Ohio to remain financially healthy, was consistent throughout these proceedings.[29] This evidence was presented in the Company's January 26, 2004, RSP MBSSO application, as well as through the direct testimony of company witnesses John P. Steffen, Judah Rose, John C. Procario, James Rogers, James Ziolkowski, William Greene and Richard G. Stevie, filed in the proceedings on or

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[26] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* Tr. VI. at 99, 102 (May 26, 2004).

[27] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Steffen's Second Supplemental Testimony at 7-18) (February 28, 2007).

[28] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (Steffen's Direct Testimony at 4) (April 15, 2004).

[29] *Id.* at JPS 1-11.

about April 15, 2004, before the Stipulation was even formulated and submitted into the record.[30]

In the approved MBSSO, there were changes to underlying terms of some components, but not the overarching formula (Total MBSSO = price-to-compare + POLR charges), ultimately used to arrive at the total market price. The net result of those changes in the approved MBSSO was; 1) an overall lower total price for consumers; 2) increased avoidability of certain components; 3) an enhanced competitive market through an increased price-to-compare; and 4) the restructuring of certain components of the total price.

In a desperate attempt to support its factually inaccurate position, OCC incorrectly asserts that the IMF has no factual basis and that the SRT is the lone survivor of the Company's POLR reserve margin charge litigated in the initial MBSSO proceeding.[31] OCC's position relies upon the misguided assumption that the reserve margin component of the Company's variable POLR charge, was intended to be a pure cost recovery mechanism to provide reserve capacity for switched load. These assertions are wrong.

As more fully explained below, the reserve margin portion of the initially proposed variable POLR component was part of the total POLR

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[30] *See In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (Application) (January 26, 2004); *Id.*. (Steffen's Direct Testimony) (April 15, 2004); (Rose's Direct Testimony)(April 15, 2004); (John C. Procario)(April 15, 2004); (James Rogers)(April 15, 2004); (William Greene)(April 15, 2004); and Richard Stevie)(April 15, 2004).

[31] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, (OCC's Remand Merit Brief at 17) (April 13, 2007).

price, not a singular cost recovery mechanism. It was not a cost tracker. Similarly, the resulting IMF and the SRT are also part of DE-Ohio's total implemented POLR market price to the extent they are unavoidable. The lineage of these two charges, the IMF and SRT, are clear when one actually looks at the initial evidence and purpose of the reserve margin presented at the initial MBSSO proceeding.

Unnecessary controversy surrounds the establishment of the IMF and SRT in the approved MBSSO pricing formula. While the initials IMF and SRT do not appear in the evidentiary record prior to the Company's Application for Rehearing, contrary to the accusations in OCC's initial Merit Brief and as echoed in OMG's initial Merit Brief, the underlying justification for those price components, underlying obligations and related risk compensation, was fully litigated in the initial MBSSO proceeding.

The POLR charge as initially proposed and as later modified in the May 19, 2004, Stipulation, was comprised of a fixed component and as well as a variable component that was subject to a cumulative annual adjustment capped at 10% of "little g."[32] The initial POLR was 100% unavoidable, meaning all consumers, regardless of switching status, were to pay the entire POLR. The fixed component was the rate

[32] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (Steffen's Direct Testimony at 3) (April 15, 2004). The cap was cumulative such that it was 10% in year one, limited to a total of 20% over the initial baseline for year 2, 30% over the initial baseline for year 3 etc, regardless of the prior year's actual percentage increase.

stabilization charge (RSC) and was set at 15% of "little g".[33] As explained on direct and as clarified on cross-examination in the 2004 proceeding, the total POLR charge including the fixed RSC was compensation for various risks associated with providing POLR service.[34] The RSC remained constant throughout this proceeding and was implemented exactly as initially proposed.

As the name implies, the variable component of the POLR charge was adjustable but subject to a cumulative 10% annual cap.[35] This variable component, as initially proposed, was also part of the total price to compensate DE-Ohio for homeland security, tax adjustment changes, environmental compliance (including EAs) and a price for the reserve capacity to meet 117% of DE-Ohio's total load.[36] The basis for the market price for the 17% reserve margin was an estimate based upon data from a widely accepted industry source, of the levelized annual cost per kilowatt-year of constructing a peaking unit, including a reasonable return.[37] This mechanism, as part of the total POLR charge was 100% non-bypassable.

Again, the initially proposed reservation charge was a fixed price calculation with a cumulative 10% annual cap on increases in the POLR

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33 *Id.* at 4.

34 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (Steffen's Direct Testimony at 11) (April 15, 2004). *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* Tr. VI. at 59, 99 (May 26, 2004).

35 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (Steffen's Direct Testimony at 3) (April 15, 2004).

36 *Id.* at 12-16.

37 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (Steffen's Direct Testimony at 15) (April 15, 2004). *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* Tr. VI. at 102 (May 26, 2004).

charge. DE-Ohio considered and supported it as part of the total compensation package for providing POLR service, taking into account the various POLR obligation risks and the first call dedication of the Company's generation fleet for POLR consumers.[38] If the actual costs of providing the 17% reserve margin for all load exceeded the market price charged by the Company, or increased by more than cumulative 10% per annum, consumers reaped the benefit. If the annual costs were less than the market price, DE-Ohio benefited. In any event, DE-Ohio assumed 100% of this risk. In other words, this initial reserve margin POLR charge was not a direct pass through of costs, for purchasing reserve capacity to cover consumers who switched to a CRES provider. Accordingly, it is through this originally proposed reservation charge that the IMF and the SRT were born.

In its Application for Rehearing, DE-Ohio adjusted the reserve margin calculation and essentially divided it into two distinct components, the IMF and the SRT. DE-Ohio proposed the creation of an IMF from the original POLR charge to "compensate [DE-Ohio] *for committing its generation capacity* to *serve market based standard service offer customers through December 31, 2008.*"[39] In its November 23, 2004, Entry on Rehearing, the Commission approved an IMF charge "equal to 4% of little g during 2005 and 2006, and equal to 6% of "little g" during

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[38] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* Tr. VI. at 52-53, 54 (May 26, 2004).

[39] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA (Application for Rehearing at 13) (October 29, 2004).

2007 and 2008.[40] The IMF became a non-bypassable piece of DE-Ohio's POLR component of its MBSSO to compensate DE-Ohio, in part, for its POLR obligation.[41] All consumers in DE-Ohio's certified territory benefit by having first call on DE-Ohio's physical generating capacity at a price certain.

Even with all of the record evidence supporting the IMF, OMG argues that, because POLR costs are non-by-passable, they constitute a, "monopoly service" subject to the R.C. 4909.15 ratemaking formula, and that DE-Ohio has not met its burden to cost justify the IMF on a cost basis.[42] While DE-Ohio certainly could justify the first call dedication of its capacity to consumers on a cost basis, such a demonstration is not required.[43]

Revised Code Section 4928.14 clearly states that competitive retail electric service provided by an electric utility shall be market-based, not cost-based.[44] It is undisputed that the competitive retail electric service that a utility has the statutory obligation to provide pursuant to R.C. 4928.14 includes POLR service such as the IMF.[45] The Court has also found that the POLR charge is part of the market-based standard service

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[40] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA et al., (Entry on Rehearing at 8) (November 23, 2004), *citing In re DP&L's RSP and First Energy's RSP*.

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

[42] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al* (OMG's Remand Merit Brief at 21-24) (April 13, 2007).

[43] Ohio Rev. Code Ann. § 4928.14 (Baldwin 2007).

[44] *Id.*

[45] *Constellation v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530, 539, 820 N.E.2d 885, 893 (2004); *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 315-316, 856 N.E.2d 213, 230-231 (2006).

offer.[46] DE-Ohio has consistently argued that market-based pricing is not the same as cost-based regulation.

In Constellation, the Court referred to "costs incurred by DP&L for *risks*...."[47] Costs incurred for risks refer to economic costs, such as the opportunity costs bourn by DE-Ohio in these proceedings because it is foregoing its opportunity to sell its capacity at first call in the competitive retail electric market.[48] The Court agreed in its Remand Order holding that "the Commission found that these components were part of CG&E's competitive electric generation charges and were not charges on a distribution or transmission service under R.C. 4928.15. 'Due deference should be given to statutory interpretations by an agency that has accumulated substantial expertise'...."[49]

The IMF pricing mechanism: is not a regulated rate; is part of DE-Ohio's market price; compensates DE-Ohio for its risks associated with the provision of POLR service, is the first call commitment of its generating capacity; is reasonable; and is fully supported. DE-Ohio's IMF is consistent with the Commission's previously stated goals for Rate

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[46] *Id.*

[47] *Constellation v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530, 539, 820 N.E.2d 885, 893 (2004) (emphasis added).

[48] OCC, OMG, and OPAE appear confused that the opportunity cost is associated with the lost opportunity to sell into the wholesale market. That is incorrect, DE-Ohio asserts an apples to apples comparison is the lost opportunity in the competitive retail market versus the retail market, not retail versus the wholesale market.

[49] *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 316, 856 N.E.2d 213, 231 (2006) (emphasis added).

Stabilization Plans in that the IMF provides revenue certainty for DE-Ohio and price certainty for consumers.[50]

The SRT was created as a variable mechanism subject to an annual review and true-up, which permitted the direct pass through of reserve capacity costs for 15% of DE-Ohio's peak load. [51] This is entirely different from what was previously proposed by the Company in its initial POLR reserve margin price, which, as previously discussed, included the 117% of all load plus a reasonable return on costs as compensation for the Company's first call physical generation capacity commitment to its Ohio consumers.[52] The SRT as implemented is 100% avoidable to non-residential consumers who meet certain conditions. The SRT's avoidability is completely opposite to the IMF and their linear ancestor, the reserve margin POLR charge, which are not bypassable.

Together, the company's IMF and SRT components of the Company' s final POLR charge represent the return on and of investment in the physical capacity the Company previously proposed in the variable POLR charge for reserve margin.[53] This was thoroughly addressed in DE-Ohio's Initial Merit Brief filed in these Remand Proceedings.[54]

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[50] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Opinion and Order at 15) (September 29, 2004).

[51] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (Entry on Rehearing at 10) (November 23, 2004).

[52] *See* Direct Testimony of John P. Steffen; TR. IV at 102.

[53] *In re De-Ohio's MBSSO*, Case No. 03-93-EL-ATA et al., (Stipulation at JPS-2) (May 20, 2004).

[54] *In re De-Ohio's MBSSO*, Case No. 03-93-EL-ATA et al., (DE-Ohio's Remand Brief at 17-23) (April 13, 2007).

To support its position that the existence of the IMF is not justified, the OCC relies entirely upon the testimony of its witness Neil Talbot and completely ignores the testimony of DE-Ohio's witness Mr. Steffen who fully explained the IMF in his Second Supplemental Testimony.[55] Tellingly, and in order not to undercut its unsupportable claims, OCC elected not to cross-examine Mr. Steffen on this subject in the recently concluded proceeding. As more fully addressed in the Company's Initial brief, the weight that the Commission should afford Mr. Talbot's testimony is readily apparent.[56] OCC, like its witness Mr. Talbot, failed to do the simple math and historical research necessary to verify the risks and costs contained in the initial variable POLR reserve margin, which eventually became the IMF and SRT.

In the initial 2004 MBSSO proceeding, Mr. Steffen explained in his Direct Testimony and further discussed on cross-examination, the many risks DE-Ohio faced in providing the POLR service.[57] This safety net of a POLR obligation requires DE-Ohio to stand ready to catch those customers who either fall, or are ejected, from the service of a CRES provider. The RSP-MBSSO price as a whole represented DE-Ohio's willingness to provide a market price for consumers who wished to continue to take service from DE-Ohio as well as compensation for the

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[55] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Talbot's Prepared Testimony at 47-48) (March 9, 2007).

[56] *In re De-Ohio's MBSSO*, Case No. 03-93-EL-ATA et al., (DE-Ohio's Remand Brief at 19-23) (April 13, 2007).

[57] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (Steffen's Direct Testimony at 11) (April 15, 2004). *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* Tr. VI. at 59, 99 (May 26, 2004).

safety net of POLR service for all consumers, including those customers who decided to switch to a CRES provider.[58] This fact did not change in the approved MBSSO. Ultimately, the evidence of record shows that the market price of the IMF and SRT is less than the market price of the reserve capacity proposed in the Stipulation. [59]

II. Pure cost-based price setting inconsistent with Ohio law.

Throughout its Initial Merit Brief, OCC pleads that the Commission should return to cost-based rate making and establish a new MBSSO market price. OCC's request is unsupportable under the law. As recognized by the Commission Staff, OCC's recommendation that the Commission return to cost-based regulation to determine a market price is not only illegal but also irresponsible.[60] DE-Ohio completely agrees. OCC's recommendation completely undermines the integrity of the competitive market, is an insult to the Commission's three goals for RSP-MBSSO market prices, and most importantly, is against the law.

In Ohio's deregulated retail electric service environment, the Commission must determine if a market-based standard service offer is just and reasonable in response to a filing made by an electric distribution utility pursuant to R. C. 4909.18.[61] The standard by which

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[58] *Id.* at 99, 102.

[59] *In re De-Ohio's MBSSO,* Case No. 03-93-EL-ATA et al., (DE-Ohio's Remand Merit Brief at 17-23) (April 16, 2007).

[60] *In re De-Ohio's MBSSO,* Case No. 03-93-EL-ATA et al., (Staff's Remand Merit Brief at 6) (April 16, 2007).

[61] Ohio Rev. Code Ann. §§ 4928.14, 4909.18 (Baldwin 2007).

the Commission must determine if the market-based standard service offer is just and reasonable is set forth in R. C. 4928.05, which states:

> On and after the starting date of competitive retail electric service, *a competitive retail electric service supplied by an electric utility... shall not be subject to supervision and regulation... 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....[62]

Therefore, Revised Code Section 4928.05, by law, divests the Commission of its ability to engage "traditional regulated rate making" over the market price of any "competitive retail electric service," including the MBSSO at issue in this case.

In other words, traditional cost of service ratemaking statutes such as those contained in 4909.15, are no longer applicable to unbundled generation. More importantly, there is no statutory mathematical equation to determine a market price. Although the Commission is afforded a great deal of discretion in permitting formulas for determining a market price offered by a utility, the Commission's actual authority over denying a market price is limited to that which is contained in R. C. 4905.33(B) and R. C. 4905.35.[63] These exceptions prohibit utilities from

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[62] Ohio Rev. Code Ann. § 4928.05 (Baldwin 2007) (emphasis added).

[63] *Id.* The remainder of the exceptions set forth in R.C. 4928.05 are inapplicable to the case at hand. Specifically, R.C. 4905.10 addresses the Commission's authority and ability to assess annual fees to utilities for Commission expenses, the public utilities fund, transfer of funds and commissioner's salaries. *See* Ohio Rev. Code Ann. § 4905.10 (Baldwin 2007). Additionally, the exceptions set forth in R.C.§§4933.81 to 4933.90 pertain to the setting of service territories for electric companies. *See* Ohio Rev. Code Ann. §§ 4933.81, 4933.82, 4933.83, 4933.84, 4933.85, 4933.86, 4933.87, 4933.88, 4933.89, 4933.90 (Baldwin 2007).

pricing below cost for destroying competition and from discriminatory pricing.[64] Clearly, cost of service ratemaking is no longer provided for under Ohio law and OCC's recommendation is unsupportable. Both the Commission and the Court agree.[65]

Specifically, in its November 23, 2004 Entry on Rehearing, this Commission recognized that cost-based rate making is no longer provided for under Ohio law stating, "[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 traditional rate-based approach under Section 4909.18, Revised Code.*"[66]

Further, before the Supreme Court of Ohio, OCC argued that DE-Ohio's MBSSO is discriminatory pursuant to R.C. 4905.32 through 4905.35.[67] The Court cited R.C. 4928.05 to frame the basis of the Commission's, and the Court's determination and ultimately, as the basis for rejecting OCC's argument.[68]

It is truly ironic that OCC's position on Remand, which advocates a return to cost-based ratemaking, has completely changed from its

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[64] Ohio Rev. Code Ann. §§ 4905.33(B), 4905.35 (Baldwin 2007).

[65] *In re De-Ohio's MBSSO,* Case No. 03-93-EL-ATA et al., (Entry on Rehearing at 17) (November 23, 3004); *Ohio Consumers' Counsel v. Pub. Util. Comm'n,* 111 Ohio St. 3d 300, 314, 856 N.E.2d 213, 229 (2006).

[66] *In re De-Ohio's MBSSO,* Case No. 03-93-EL-ATA et al., (Entry on Rehearing at 17) (November 23, 3004). *Emphasis added.*

[67] *Ohio Consumers' Counsel v. Pub. Util. Comm'n,* 111 Ohio St. 3d 300, 313, 856 N.E.2d 213, 228 (2006).

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

position in the initial MBSSO proceeding, which proposed the determination of market prices through a competitive bid. However, given the recent developments in other deregulated states that have seen electricity prices rise upwards of 65% through wholesale auctions, OCC's opportunistic about-face is not surprising.[69] As pointed out by Staff, the Commission "does not need to examine the experience of other states to recognize the irresponsibility of moving to a competitive bid under current conditions in Ohio."[70] Hindsight is always 20/20. Just as OCC's position in 2004 was irresponsible, similarly, its new position for a return to cost-based rate making is as well.

OCC, like its expert Mr. Talbot has no idea what market price would result from its cost-based proposal. It does not know the resulting market price because Mr. Talbot performed no analysis.[71] Mr. Talbot does not know the consequences of the transfer of generating units to Duke Energy Kentucky. Mr. Talbot does not know the market price consequence of including DE-Ohio's legacy Duke Energy North America plants in rate base. Mr. Talbot is willing to simply permit the "chips to fall where they may."[72] OCC's proposal is irresponsible because the OCC does not know if prices will rise or fall under its proposal. It simply advocates lower prices on faith without any analysis.

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69 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* DE-Ohio Remand Exhibit 4 at page 2.

70 *Id.* at 8.

71 *In re. De-Ohio's MBSSO*, Case no. 03-93-EL-ATA et al., (DE-Ohio's Remand Merit Brief at 19-23) (April 13, 2007).

72 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* Tr. II. at 95 (March 20, 2007).

Next, OCC's recommendation would require the Commission to completely abandon the three goals, which for three years, have been the guiding principle for establishing RSP-MBSSOs throughout the state and afforded DE-Ohio's consumers stable prices while allowing a measure of revenue certainty to the Company. Although DE-Ohio questions how a pure cost-based rate could in any way constitute a proxy for a market price, if OCC is correct and its proposal would result in a lower market price, a return to a pure cost-based rate that is 100% bypassable would likely destroy opportunities to develop the competitive retail electric service market because CRES providers have difficulty competing with the current and higher price to compare. Such a result would also erode the financial stability of Ohio's utilities.

On the other hand, if OCC is wrong and market prices increase under their proposal, consumers will assume the burden of higher prices. Further, there is no guarantee that prices will increase sufficiently to stimulate competition, as OCC has done no such market analysis. Regardless of the outcome, OCC's proposal is ill advised and detrimental to all stakeholders.

If DE-Ohio's price is limited to actual cost recovery, as long as market prices stay above DE-Ohio's costs, CRES suppliers will be unable to gain any market share. Under this approach, DE-Ohio would no longer maintain a planning reserve for switched load and returning consumers would be faced with paying for electricity at spot prices,

assuming there are adequate supplies in the market to serve these customers. If, however, market prices fell below DE-Ohio's costs, the Company would not be able to adjust its price downward and would be forced out of the market. As discussed above, by law, a utility may not price its competitive retail electric services below costs to destroy competition.[73] Therefore, it would be impossible to provide any firm generation price or POLR service and consumers would be left without reliable service options if a CRES provider defaults.

Second, DE-Ohio's last full rate case which included generation was in the early 1990's.[74] Much has changed since that case. For example, in the last three years alone, DE-Ohio transferred all or part of three generating stations to its subsidiary Duke Energy Kentucky[75] and acquired several new gas fired generating stations sometimes referred to as the DENA assets.[76] Also, virtually all of the Company's major environmental compliance equipment has been added to DE-Ohio's books in the years after the Company's 1992 full rate case. If an accurate and purely cost-based generation rate base is to be established, as proposed by OCC, those factors, as well as many others, must be taken into account.

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[73] Ohio Rev. Code Ann. §§ 4905.33(B), 4905.35 (Baldwin 2007).

[74] *In re CG&E's Application to Increase its Rates,* Case No. 92-1462-EL-AIR et al., (Opinion and Order) (August 26, 1993).

[75] *See In re ULH&P's Application to Acquire Generating Assets,* KYPSC Case No. 2003-00252 (Order) (June 17, 2005).

[76] *In re the Merger of Cinergy Corp and Duke Energy,* Case No. 05-732-EL-MER et al (Opinion and Order)(December 21, 2005).

Similarly, OMG's argument that POLR related charges, such as the IMF, must be cost-based is also unsupportable.[77] The POLR obligation is, by statute, a competitive retail electric service, not a non-competitive regulated service.[78] Revised Code Section 4928.14 imposes the POLR obligation upon an electric utility.[79] It does so by requiring electric utilities to maintain an "offer of all *competitive retail electric services* necessary to maintain essential electric service to consumers..." and by requiring electric utilities to provide default service for customers of CRES providers.[80] This obligation is placed on electric utilities alone.[81]

A CRES provider other than an electric utility does not have a statutory POLR obligation and does not have the costs associated with the provision of that service. Further, because the POLR component of the market-based standard service offer is the provision of "a firm supply of electric generation service," it is a competitive retail electric service pursuant to R. C. 4928.03.[82] The Commission and the Court agree that electric utilities have a statutory POLR obligation pursuant to R. C. 4928.14, and that DE-Ohio must provide that POLR service to consumers at a market price.[83]

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77 *In re De-Ohio's MBSSO,* Case No. 03-93-EL-ATA et al., (OMG's Remand Merit Brief at 22) (April 16, 2007).

78 Ohio Rev. Code Ann. §§ 4928.14, 4928.03 (Baldwin 2007), App. at 154, CG&E's App. at 1.

79 Ohio Rev. Code Ann. § 4928.14 (Baldwin 2007), App. at 154.

80 *Id.*

81 *Id.*

82 Ohio Rev. Code Ann. § 4928.03 (Baldwin 2007).

83 *Constellation v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530, 539, 820 N.E.2d 885, 893 (2004) (discussing the RSS, provider of last resort, component of DP&L's market-based standard service offer).

The Commission should ignore the various distractions presented in these Remand proceedings and should not lose sight of the simple fact that its RSP initiatives have been a success. The Commission has successfully shielded consumers from the volatile wholesale market, afforded utilities some degree of revenue certainty and encouraged competition. By establishing DE-Ohio's MBSSO in 2004, the Commission permitted a total price that for the first 25% of residential consumer load, is over 96% bypassable.[84] DE-Ohio respectfully requests that the Commission affirm its November 23, 2004, Entry on Rehearing and DE-Ohio's MBSSO.

III. DE-Ohio did not enter into any so called "side agreements" and did not violate any code of conduct or corporate separation rules.

DE-Ohio entered into a contract with the City of Cincinnati on June 14, 2004, almost a month after the May 19, 2004, Stipulation was filed with the Commission and two weeks after the close of evidence at the original hearing in these proceedings.[85] DE-Ohio was not a party to any other contract with any Party to these proceedings and did not participate in the negotiations of the contracts entered into by Duke Energy Retail Sales (DERS) or Cinergy Corp. (Cinergy).

The contracts entered by DERS were not related to DE-Ohio's Stipulation or Alternative Proposal except to the extent that it was in the

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[84] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (TR. II at 88) (March 20, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (DE-Ohio Remand Exhibit 17) (March 20, 2007).

[85] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (OCC Remand Exhibit 6) (March 20, 2007).

economic self interest of the signatories to use such proposals as a baseline to calculate a market price for generation service, a strike price for an option, or the market price of an option.[86] The Cinergy contract with Cognis was simply a contract seeking to gain business for non-regulated Cinergy affiliates, preserve jobs in the Cincinnati Community, and assist its regulated affiliate, DE-Ohio.[87] Such aspirational goals for its portfolio of subsidiaries do not give rise to corporate separation concerns. Nothing in the DERS or Cinergy contracts did, or could, bind DE-Ohio to perform any action. Finally, DE-Ohio did not violate its Corporate Separation Plan, or O.A.C. 4901:1-20-16. The accusations of OCC, OPAE, and OMG to the contrary are inaccurate because they ignore the facts and law relevant to the issues presented in these proceedings.

The accusations made by OCC, OPAE, and OMG are grounded in conspiracy theory and have no basis in the fact. The record simply does not support the accusations. Their arguments ignore the cross-examination of OCC's witness Beth E. Hixon, the only witness to testify of concerns regarding the DE-Ohio, DERS, and Cinergy contracts. Ms. Hixon's cross-examination is in direct conflict with her pre-filed direct testimony. Their arguments also ignore the statutory requirements for

[86] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (Hixon's Prepared Testimony at BEH 2-12, 17) (March 9, 2007).

[87] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Ficke's Deposition Transcript at 74-77) (February 20, 2007).

setting DE-Ohio's market price and the rules regarding code of conduct and corporate separation.

DE-Ohio submits that the Commission should accept the testimony of DE-Ohio witness John P. Steffen, OCC's subpoenaed witnesses Greg C. Ficke, James E. Ziolkowski, and Denis George, all of whom testified that DE-Ohio was not involved in the negotiation of the DERS and Cinergy contracts. The simple explanation is that the contracts represent arms length agreements between consenting parties that inure to the benefit of the signatories. OCC, OPAE, and OMG insist that there is a grand conspiracy to the detriment of consumers and offer unreasonable interpretations to arrive at their conclusion.

The truth is that all consumers in DE-Ohio's certified territory enjoy relatively low market prices. If market prices were reset today they would be higher, just as prices have skyrocketed in every jurisdiction that has recently set market prices by any methodology. And, in the case of residential consumers, they would lose the subsidy that residential consumers receive from non-residential consumers, thus causing even greater increases for residential consumers.[88]

The various DERS and Cinergy contracts at issue are not "side agreements" because DE-Ohio was not a Party to those contracts. DE-Ohio's only contract is a public contract with the City of Cincinnati entered after the submission of the Stipulation on May 19, 2004. The

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[88] *See Infra pp.* 54-55.

Stipulation was negotiated by DE-Ohio independently of the DERS and Cinergy contracts and was not conditioned upon those contracts. Almost all of the DERS and Cinergy contracts were entered into after the submission of the Stipulation and the close of evidence in these proceedings. There is nothing wrong with the various contracts produced in discovery and now in evidence before the Commission.

A. As previously discussed in DE-Ohio's merit brief the record evidence demonstrates that the DE-Ohio, DERS, and Cinergy contracts are irrelevant to these proceedings.

OCC, OPAE, and OMG, rely solely upon the testimony of OCC witness Beth E. Hixon to arrive at their conclusion that the DE-Ohio, DERS, and Cinergy contracts are relevant to these cases and exerted improper influence upon the Commission and improperly affect the competitive retail electric service market. In her direct testimony, Ms. Hixon segmented the contracts into three categories, Pre-PUCO Order Agreements,[89] Pre-Rehearing Agreements,[90] and Option Agreements.[91]

Given the Court's remand order that the purpose of permitting discovery previously requested by OCC so the Commission could consider whether the contracts would have been relevant to its determination of "whether all parties engaged in serious bargaining;" Ms. Hixon's categories are not helpful for several reasons.[92] First, the

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[89] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at 11) (March 9, 2007).

[90] *Id.* at 30.

[91] *Id.* at 48.

[92] *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St.3d 300, 320-323, 856 N.E.2d 213, 234-236 (2006).

Commission did not adopt the Stipulation and therefore, neither it, nor the parties that supported it, could have influenced the Commission's decision in these proceedings. DE-Ohio, Staff, and OCC all agree that the Commission did not adopt the Stipulation.[93]

Second, OCC's original discovery request for agreements with Parties, only encompassed the City of Cincinnati agreement from DE-Ohio, and even if DE-Ohio had possession of, and could have produced the DERS and Cinergy contracts, which it could not, OCC would have received only the DERS contracts with OHA and OEG, the only contracts signed at that time.[94] No other contracts would have been provided for the simple reason that they did not exist. Even had DE-Ohio been able to update discovery during the evidentiary hearing ending June 1, 2004, with DERS contracts, only one additional contract, with IEU-Ohio, would have been provided.[95] All of the aforementioned contracts required DERS to sell generation directly to end use customers, like any other competitive retail electric service (CRES) provider. No other contract could have possibly influenced the Commission's decision or serious bargaining among the Parties as they all occurred after the presentation of evidence and the conclusion of negotiations.

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[93] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC's Memorandum Contra CG&E's Application for Rehearing at 3, footnote 3) (November 8, 2004).

[94] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Requests for Production of Documents Seventh Set at 3) (May 18, 2004); *Id.* at TR. II at 8 (May 20, 2004); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at BEH Attachments 2, 3) (March 9, 2007).

[95] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Requests for Production of Documents Seventh Set at 3) (May 18, 2004); *Id.* at TR. II at 8 (May 20, 2004); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at BEH Attachments 4) (March 9, 2007).

Even accepting the dubious categories assigned to the contracts by Ms. Hixon, the reasons she gives for being concerned with the contracts in her direct testimony are in conflict with her testimony on cross-examination. Initially, Ms. Hixon lists four concerns with the Pre-PUCO Order and Pre-Rehearing contracts. Those concerns are that the contracts: (1) provided for the provision of generation service to Parties to these proceedings, or such Parties' members, through December 31, 2008; (2) provided for the reimbursement of specified MBSSO components or regulatory transition charges (RTC) to such Parties; (3) required the Parties to support the May 19, 2004, Stipulation or DE-Ohio's Alternative Proposal offered in these proceedings; and (4) contained a termination provision tied to the Commission's decision in these proceedings.[96] Not only is there nothing wrong with any such contract provisions but on cross-examination Ms. Hixon agrees such provisions are reasonable.[97]

The first concern raised by Ms. Hixon, the provision of generation service to customers, is a legal issue. Revised Code Section 4928.03 declares generation service to be a competitive retail electric service and permits any CRES provider to sell such service to any customer.[98] There is simply nothing wrong with such a contract provision and there is no issue regarding this contract provision.

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96 *Id.* at 13-14, 32.

97 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (TR. III at 32-35) (March 21, 2007).

98 Ohio Rev. Code Ann. § 4928.03 (Baldwin 2007).

The second issue raised by Ms. Hixon, the reimbursement of portions of DE-Ohio's MBSSO price, is similarly a non issue. First, there is no reimbursement except as to the Cinergy contract with Cognis. All of the other contracts referenced by Ms. Hixon simply set a market price by subtracting various MBSSO components from the MBSSO, which the contracts used as a baseline.[99] Ms. Hixon agreed that setting a market price from such a baseline is reasonable.[100] The third concern raised by Ms. Hixon, the contract provisions requiring support of the Stipulation or Alternative Proposal, is likewise a non-issue because once again Ms. Hixon agreed such a provision is reasonable where, as in these cases, the signatories need Commission approval to establish the baseline effecting their economic interest in the contract.[101] Ms. Hixon agreed that termination provisions based upon rejection of the baseline by the Commission, her last concern, were also reasonable for the same reasons, to preserve the signatories' economic interests.[102] In the end Ms. Hixon agreed that all of the contract provisions she was concerned about are reasonable.

As previously mentioned, the Cinergy contract with Cognis presents an admittedly different situation. The Cinergy contract with Cognis had little to do with these proceedings and had nothing to do with

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99 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at BEH Attachments 2-12) (March 9, 2007).

100 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (TR. III at 32-33) (March 21, 2007).

101 *Id.* at 33.

102 *Id.* at 33-34.

DE-Ohio. Cinergy, the parent corporation of DE-Ohio, entered the Cognis contract for its own reasons without involvement by DE-Ohio. Cinergy, attempting to be a good corporate citizen by helping a major Cincinnati employer that had experienced a recent takeover, Cognis, which is not a DE-Ohio affiliate, attempted to secure cogeneration business for a non-regulated affiliate,[103] and tried to gain support for its regulated affiliate.[104] There is nothing wrong with either DE-Ohio's or Cinergy's actions regarding the Cognis contract.

Ms. Hixon also raised concerns with certain contract provisions, in the same contracts previously discussed that appear to commit DE-Ohio to some action.[105] On cross-examination, Ms. Hixon agreed that the parties could resolve the contract terms through economic transactions, although she does not agree that is what is called for in the contract provisions.[106] Further, the existence of these terms in the DERS contracts can be explained by the simple fact that DE-Ohio had already filed a distribution base rate case prior to the effective dates of these contracts.[107] The filing was public and all contract signatories could

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[103] The non-regulated affiliate was, at the time, Trigen Cinergy Solutions, now know as Duke Energy Generation Services, which provide generation services to industrial customers such as **BP Corporation** and, in this case, **Cognis**. There is of course, nothing wrong with Cinergy attempting to help a non-regulated affiliate secure business that in no way involves utility assets or services.

[104] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Ficke's Deposition Transcript at 73-77) (February 20, 2007).

[105] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at 27) (March 9, 2007).

[106] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (TR. III at 60) (March 21, 2007).

[107] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at BEH-Attachments 2-12) (March 9, 2007); *In re DE-Ohio Distribution Rate Case*, Case No. 04-680-EL-AIR (Application) (May 7, 2004).

have reviewed the filing. The contract terms may have simply been a reflection of the public knowledge of the signatories.

Regardless, there is simply no record evidence that DE-Ohio was ever involved in any of these contract provisions or was bound by them. Certainly, DE-Ohio was not a party to these contracts and therefore, could not be bound to them. Also, both Greg Ficke and Charles Whitlock, the President of DERS, testified to the fact that DERS never asked DE-Ohio to take any action, let alone an action pursuant to its contracts.[108] DE-Ohio cannot be responsible for contract provisions where it is not a party to the contracts and was not involved in the negotiation of the contracts.

Finally, both OCC and OMG continue to object to the DERS option contracts.[109] Both OCC and OMG allege that the contracts are simply a method by which DE-Ohio discounts its market price to certain customers to the detriment of the development of the market and discrimination against remaining customers.[110] Such allegations ignore the record evidence and the law.

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[108] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Ficke's Deposition Transcript at 29, 51-52) (February 20, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (Whitlock's Deposition Transcript at 106-107) (January 11, 2007).

[109] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC's Remand Merit Brief at 55) (April 13, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OMG's Remand Merit Brief at 19-20) (April 13, 2007).

[110] *Id.*

OCC witness Hixon offers the only testimony alleging any concerns with the option contracts.[111] Necessarily, because it is explicit in the contracts, all Parties acknowledge that DERS is paying customers in exchange for an option to provide competitive retail electric generation service at a strike price.[112] Ms. Hixon testified on cross-examination that she is not an expert on option contracts, options are a legitimate tool in competitive markets, and she performed no analysis on the reasonableness of the option prices specified in the contracts.[113]

Also on cross-examination, Ms. Hixon opines that she is primarily concerned about the option contracts because she believes they have adversely affected competition.[114] In its merit brief OCC relies upon a calculation related to its Remand Exhibits 4 and 5 to arrive at the conclusion that but for the option agreements, non-residential switched load would have exceeded 20% in 2006, instead of less than 9%.[115] OCC has misinterpreted its own exhibits.

As a minor matter, OCC misreferences the 218,350,651 MWh set forth in footnote 230 as coming from OCC Remand Exhibit 4 when it is really from OCC Remand Exhibit 5.[116] Conversely, in the same footnote,

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111 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at 55) (March 9, 2007).

112 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC's Remand Merit Brief at 54-55) (April 13, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OMG's Remand Merit Brief at 19-20) (April 13, 2007).

113 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (TR. III at 118-132) (March 21, 2007).

114 *Id.* at 130-131.

115 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Remand Ex. 4, 5).

116 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Remand Ex. 5 at 7).

the 986,620 MWh is referenced as coming from OCC Remand Exhibit 5 when in fact it is really found in OCC Remand Exhibit 4.[117]

In further misrepresenting its own exhibits, OCC divided *three months* of CRES provided sales data from OCC Remand Exhibit 5 into *one month* of data from Exhibit 4, which has only monthly data, as indicated in its heading, thereby overstating expected switched load at June 30, 2006, by approximately three times. Correcting that simple adjustment, to use a single month's data in both the numerator and denominator, would show expected switched non-residential load at June 30, 2006, at about 7%, or approximately equivalent to the non-residential switched load that exists today.[118] OCC however, makes additional errors regarding its interpretation of OCC Remand Exhibit 5.

OCC Remand Exhibit 5 is information provided to OCC by DE-Ohio in response to an OCC discovery request. It shows the amount of switched load for those customers with contracts shown on BEH 2 through 12 and 17 for the three-month period ending June 1, 2004.[119] It shows that many of those customers, for example **AK Steel**, have never purchased generation from a CRES provider because those customers do not appear on OCC Remand Exhibit 5.[120] It also does not show the <u>total</u> load of the customers listed on OCC Remand Exhibit 5, only the <u>switched</u>

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117 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Remand Ex. 4 at 1, 5 at 7) (69,162,552 divided into 986,620).

118 *Id.*

119 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Remand Ex. 5).

120 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Remand Ex. 5); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at BEH 2-12, 17) (March 9, 2007) (Compare customers listed in contracts to those listed on OCC Remind Exhibit 5).

load. For example, Proctor and Gamble had some switched load but most of its load always remained with DE-Ohio. The accounts that remained with DE-Ohio are not shown on the Exhibit. The proper conclusion is to recognize that several customers with contracts have never switched, and that several customer who switched before entering into a contract remain switched despite having a contract.

When the proper math is done OCC Remand Exhibits 4 and 5 combined with the testimony of DE-Ohio witness Bill Greene, show that the customers with contracts from DERS and Cinergy represented approximately 7% switched load in 2004 and continue to represent 7% switched load today.[121] Therefore, the approximately 13% of switched non-residential load in 2004 that has returned to DE-Ohio did so for reasons having nothing to do with the contracts.[122] Ultimately, this is just another example of OCC's failure to properly represent the record evidence.

OCC and OMG rely heavily upon an e-mail sent by Mr. Ziolkowski, a Duke Energy Shared Services Company employee, in an attempt to implicate DE-Ohio in an improper role regarding the negotiation and administration of the DERS and Cinergy contracts.[123] Both OCC and

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[121] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Remand Ex. 4 at 1, 5 at 7); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Green's Direct Testimony at 4)

[122] *Id.*

[123] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC's Remand Merit Brief at 56-58) (April 13, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OMG's Remand Merit Brief at 14-15) (April 13, 2007).

OMG ignore the testimony of Mr. Ziolkowski, which OCC requested be admitted as part of the evidentiary record.

Mr. Ziolkowski's testimony makes it clear that he did not know of the existence of the option contracts, had never seen the option contracts, was not involved in the negotiating process of any contracts, had not performed any analysis regarding any contracts, did not know of anyone in the Company that had performed analysis, and simply calculated the payments using a monthly automated report.[124] No reasonable person reading Mr. Ziolkowski's deposition transcript could conclude that the e-mail relied upon by Ms. Hixon is a legal or technical analysis of the contracts or that Mr. Ziolkowski had any substantive or improper involvement with the option contracts. OCC and OMG are wrong to use inference where facts are available.

OCC's and OMG's use of the Ziolkowski e-mail is another prime example of their improper use of record evidence. In this case they relied upon an e-mail they knew to be an inaccurate portrayal of DE-Ohio's involvement based upon OCC's questioning of the author and insistence that the deposition transcript be admitted as testimony. Yet, OCC and OMG ignored the testimony and relied upon the inaccurate e-mail. The Commission should take note of OCC's liberal misuse of evidence and give OCC's arguments little credence.

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[124] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Ziolkowski's Deposition Transcript at 34-42, 48-50) (February 13, 2007).

After all of the discussion, there is simply no evidence that the DE-Ohio contracts are relevant to these proceedings. In fact the evidence shows that the contracts could not be relevant as the vast majority of contracts occurred after the filing of the Stipulation submitted to the Commission and after the close of evidence.

B. It is irrelevant whether the May 19, 2004, Stipulation had broad-based support because the Commission rejected the Stipulation.

OCC, OMG, and OPAE continue to assert that the May 19, 2004, Stipulation submitted by many, but not all, of the Parties, should be disregarded because the DERS and Cinergy contracts somehow deceived the Commission into believing the Stipulation was the result of serious bargaining and had broad based support. Their assertion is simply irrelevant as the Commission rejected the Stipulation and issued its own order in these cases ultimately establishing its own MBSSO in its November 23, 2004, Entry on Rehearing.[125]

DE-Ohio, Staff, and OCC all agree that the Commission rejected the Stipulation.[126] OCC expressly stated that "[t]he Commission *never adopted the Stipulation*...."[127] Dominion Retail also understood the Commission rejected the Stipulation and thus, needed to reinstate the Stipulation for it to survive stating "Dominion Retail respectfully requests

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

[126] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC's Memorandum Contra CG&E's Application for Rehearing at 3, footnote 3) (November 8, 2004); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Staff's Remand Merit Brief at 14) (April 13, 2007).

[127] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC's Memorandum Contra CG&E's Application for Rehearing at 3, footnote 3) (November 8, 2004) (emphasis added).

that, if the Commission does not reinstate the Stipulation on rehearing, the Commission modify CG&E's alternative proposal...."[128] Further, Dominion Retail's comments also reveal, correctly, that there was no settlement regarding the Alternative Proposal. Thus, once the Commission rejected the Stipulation, there was never a reinstatement of the Stipulation for any Party to consider, or which could be relevant to any contract signed by DERS or Cinergy.

It is improper pursuant to the doctrine of *res judicata*, and disingenuous, for OCC, OPAE, OMG, or Dominion Retail to argue that the Stipulation, or the bargaining that resulted in the Stipulation, is relevant to the Commission's determination in these proceedings when OCC expressly argued, and OPAE and OMG had the opportunity to oppose OCC's argument in these proceedings, that the Commission did not adopt the Stipulation.

To make the matter clear, in its Application for rehearing DE-Ohio gave the notice set forth in the Stipulation, that it was no longer acceptable to DE-Ohio as modified by the Commission.[129] DE-Ohio stated that "[i]f the Commission declines to reinstate the Stipulation or adopt the Alternative Proposal, CG&E objects to the Commission's Order because the modifications to the Stipulation proposed by the Commission in its Order effectively reject the Stipulation and any market

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[128] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Dominion Retail Response to DE-Ohio's Application for Rehearing) (November 8, 2004).

[129] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (DE-Ohio's Application for Rehearing at 6) (October 29, 2004).

price acceptable to CG&E for rate stabilization service requested by the Commission."[130] Thus, even if there were disagreement over the Commission's rejection of the Stipulation there can be no disagreement over DE-Ohio's rejection of the Commission's Opinion and Order and withdrawal from the Stipulation. There was no Stipulation of any kind submitted by any Party on rehearing.

Even if the Commission had not rejected the Stipulation, the DERS and Cinergy contracts had no impact on the bargaining among the Parties, and even after discounting the Parties that have contracts with DERS and Cinergy, the Stipulation had broad support from a variety of stakeholders. As a predicate to this discussion it should be noted that the signatories to the Stipulation without DERS or Cinergy contracts were DE-Ohio, Staff, First Energy Solutions, Dominion Retail, Green Mountain Energy, People Working Cooperatively, and Communities United for Action.[131] The only signatories to the Stipulation that also have contracts with DERS and Cinergy are Cognis, Kroger, the Industrial Energy Users-Ohio, Ohio Energy Group, and the Ohio Hospital Association.[132] Those opposing the Stipulation that signed contracts, or had members that signed contracts, with Cinergy or DERS include

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130 *Id.* at 5-6.

131 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Stipulation) (May 19, 2004); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Hixon Prepared testimony at BEH 2-12, 17) (March 9, 2007).

132 *Id.*

Constellation and the Ohio Manufacturer's Association.[133] The only Parties opposing the Stipulation that did not have contracts with DERS or Cinergy are OCC, OMG, OPAE, PSEG Energy Resources, and the National Energy Marketers' Association.[134]

Therefore, contrary to the assertions of OCC, OMG, and OPAE, even if the Commission accepts their argument that it should consider the Stipulation only with the support of those who did not sign DERS or Cinergy contracts, the supporters include stakeholders from every consumer group. People Working Cooperatively and Citizens United for Action are residential advocacy and service groups that have large active constituencies in DE-Ohio's certified territory. Additionally, each is a non-residential customer in its own right. People Working Cooperatively runs an industrial center providing energy efficiency services for contractors that provide services to residential customers. First Energy Solutions, Dominion Retail, and Green Mountain are all CRES providers that sell generation service to all consumer groups. First Energy Solutions and Dominion still provide service to customers, Dominion Retail exclusively to residential customers, in DE-Ohio's certified territory. Of course the support of DE-Ohio and Staff should also be

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[133] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Stipulation) (May 19, 2004); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Hixon Prepared testimony at BEH 2-12, 17) (March 9, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Tr. III at 45) (March 21, 2007) (Stipulated on the record that Ford is a member of Ohio Manufacturer's Association, and upon information and belief, other Industrial customers that signed DERS and Cinergy contracts).

[134] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Stipulation) (May 19, 2004); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Hixon Prepared testimony at BEH 2-12, 17) (March 9, 2007).

considered. Even under this restrictive view the Stipulation enjoyed wide support.

Further, DE-Ohio asserts that all of the signatories deserve consideration. Kroger has only contracts that provide for wholesale service to its CRES provider, Constellation.[135] The only Stipulation supporters that signed DERS or Cinergy contracts prior to signing the Stipulation are the Ohio Hospital Association and Ohio Energy Group. Cognis and Industrial Energy Users-Ohio did not sign DERS or Cinergy contracts until after the submission of the Stipulation and the Cinergy contract with Cognis was not signed until after the close of evidence on June 1, 2004.[136] Therefore, the Commission should consider the support of Cognis and Industrial Energy Users-Ohio.

Finally, DE-Ohio is not a party to the Ohio Energy Group and Ohio Hospital Association contracts and there is no evidence that it was involved in the negotiation of those contracts despite OCC's unsupported claims to the contrary. DE-Ohio asks only that the Commission read the testimony of Greg Ficke, Jim Ziolkowski, and Denis George. The record demonstrates that neither Mr. Ficke, Mr. Ziolkowski, nor DE-Ohio was involved in the negotiation of the DERS contracts with Ohio Hospital Association or the Ohio Energy Group. Mr. George was involved as a

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[135] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Hixon Prepared testimony at BEH 6, 12) (March 9, 2007).

[136] *Id.* at BEH 4, 5.

Kroger employee but could not remember what meetings, if any, Mr. Ficke attended or in what capacity he may have attended.[137]

To bolster support for its contention that the Commission should not consider the Stipulation OCC cites *Time Warner Axs v. Pub. Util. Comm'n.*[138] OCC ignores, of course, the Court's recent holding in *Constellation v. Pub. Util. Comm'n* regarding the *Time Warner* footnote.[139] In rejecting Constellation's claim that the electric distribution utility violated the standard set by the Court in the *Time Warner* footnote the Court held:

> Assuming for the sake of argument that such an exclusion occurred, it was not directed at an "entire customer class," which was the factual predicate in the *Time Warner* footnote. As the Commission observes, "Since representatives on behalf of DP&L *residential, commercial, and industrial customers all participated* in the *settlement process and signed* the Stipulation, no entire customer class was excluded. The factual predicate upon which the *Time Warner* admonition was premised is simply not presented in this case.[140]

These cases are identical to *Constellation.* In these cases settlement discussions were held with all Parties and all customer classes. No Parties were excluded, in fact DE-Ohio held individual settlement discussions with OCC, OMG, and OPAE at various times and all Parties made settlement offers. Ultimately, Parties from every customer class

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137 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (George's Deposition Transcript at 21-22, 46-49) (February 20, 2007).

138 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC's Remand Merit Brief at 67) (April 13, 2007).

139 *Constellation v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530, 535, 820 N.E.2d 885, 890 (2004).

140 *Id.* (emphasis added).

signed the Stipulation. *Time Warner* is simply not applicable to the facts present in these cases.

OCC and OPAE argue, however, that the Stipulation is relevant because DE-Ohio conducted secret negotiations to the exclusion of some Parties, including the aforementioned groups.[141] First, DE-Ohio held discussions with all Parties. It invited all Parties to such discussions and all Parties, including OCC and OPAE, received the Stipulation prior to its filing at the Commission. Both OCC and OPAE complain that they were not included in settlement discussions between the September 29, 2004, Opinion and Order and the November 23, 2004, Entry on Rehearing.[142]

DE-Ohio did not conduct any settlement discussions with any Party during the period between the Commission's Opinion and Order and its Entry on Rehearing. DE-Ohio was busy attempting to formulate an Application for Rehearing that might result in an MBSSO acceptable to the Commission and DE-Ohio. There was no time for further negotiation.

Apparently, OCC and OPAE are concerned that they did not have negotiations with DERS during that time period. OCC is not a customer and it would have been odd had DERS solicited OCC. OPAE is not a customer in DE-Ohio's certified territory; so, it would have been equally

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[141] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC's Remand Merit Brief at 68) (April 13, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OPAE's Remand Merit Brief at 9) (April 13, 2007).

[142] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC's Remand Merit Brief at 50-51) (April 13, 2007); *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OPAE's Remand Merit Brief at 9-10) (April 13, 2007).

odd had DERS solicited OPAE. DERS might have solicited OPAE's members in DE-Ohio's certified territory, the Hamilton and Clermont County Community Action Agencies, but it was certainly not under any obligation to do so.

Finally, as discussed in DE-Ohio's merit brief, there is nothing wrong with confidential discussions with one or more Parties to the exclusion of other Parties in any case. Confidential settlement discussions resulting in agreements not brought to the Commission for approval are routinely engaged in by OCC and it is disingenuous for OCC to complain when it engages in the same conduct.[143] DE-Ohio is aware of, and the record evidence shows, at least four such agreements negotiated and entered by OCC.[144] OCC made confidential settlement offers to the other parties in these proceedings that have not been revealed to this day.[145]

Similarly, OPAE's claim that it was not a participant to confidential settlement discussions with DE-Ohio, was not offered a settlement, and did not sign the Stipulation because it violated Ohio law, is incorrect.[146] On May 10, 2004, OPAE approached DE-Ohio with a settlement offer.[147]

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[143] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (DE-Ohio Remand Ex. 20-23) (March 21, 2007).

[144] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (DE-Ohio Remand Ex. 20-23) (March 21, 2007); *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 110 Ohio St. 3d 394, 399, 853 N.E.2d 1153, 1159 (2006).

[145] *Id.*

[146] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (OPAE's Remand Merit Brief at 9-10, 13) (March 21, 2007)

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

OPAE's settlement offer was filed with the Commission under seal and the Commission granted confidentiality for an eighteen-month period that expired in 2006.[148] OPAE's settlement offer is therefore, now public record. OPAE's settlement proposal to DE-Ohio begins as follows:

> Ohio Partners for Affordable Energy ("OPAE") and Citizens United for Action ("CUFA") jointly make the following settlement offer to Cincinnati Gas & Electric Company ("CGE"). In return for an agreement on the following issues, OPAE and CUFA are willing to withdraw from the case or reach another disposition mutually agreeable to both parties.
>
> Our Proposal is as follows:
>
> 1. ***The company will provide OPAE with 1.345 million per year through 2008....***[149]

Thus, OPAE had no qualms about entering secret negotiations with DE-Ohio to the exclusion of almost all Parties, including OCC. It had no qualms about settlement through withdrawal or a side agreement not filed before the Commission, and it had no qualms about legal issues impeding settlement.[150] OPAE was willing to settle if DE-Ohio was willing to give it control of money.

DE-Ohio did not settle with OPAE because the Duke Energy Community Partnership (DECP) administers energy efficiency and weatherization contracts in DE-Ohio's certified territory. Both the Staff

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148 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (Entry) (September 28, 2004)

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

150 *Id.*

and OCC are members of the DECP board. In fact, as a result of the settlement with OCC regarding OCC's appeal of the Commission's order in the Duke Energy Corporation merger with Cinergy Corp., DE-Ohio set aside $250,000 for an OPAE member, the Cincinnati/Hamilton County Community Action Agency (CHCCAA), for an energy efficiency contract and CHCCAA has not spent even a single dollar and will likely forfeit the money to a contractor chosen next month by DECP.[151]

Apparently, OPAE and OCC wish to apply a double standard where it is acceptable for OPAE and OCC to engage in "secret" settlement discussions and enter "secret" settlements but unacceptable for any other party to entertain confidential negotiations. If anything, the presumption should run the other way for a public agency such as the OCC and a non-profit organization such as OPAE. In any event, OCC's and OPAE's concerns are misplaced and should be dismissed.

C. The Stipulation did not change the burden of proof required of DE-Ohio and is therefore not relevant.[152]

OMG makes an argument unique to these proceedings, but incorrect, that the presentation of the Stipulation to the Commission changed the burden of proof in these cases such that DE-Ohio need not prove its Application and the Stipulation are lawful and reasonable and all that it need show is that the Stipulation, taken as a whole, is

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[151] *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (DE-Ohio Remand Ex. 22) (March 21, 2007).

[152] *In re Dominion East Ohio's Application to Restructure its Commodity Service*, Case No. 05-474-GA-ATA (Opinion and Order at 13) (May 26, 2006).

reasonable pursuant to the traditional three prong test.[153] OMG alleges that the change in the burden of proof makes the Stipulation relevant throughout the proceeding because the Commission used the wrong criteria to determine the proper MBSSO ultimately ordered on November 23, 2004.[154]

OMG is incorrect because the Commission has always been clear that a Stipulation does not alter the burden of proof.[155] In *Dominion* the Commission held "the Commission would note in the first instance that the Stipulation does not change the burden of proof...."[156] The Commission has consistently followed this doctrine requiring the applicant to satisfy the burden of proof in cases before the Commission.[157]

More importantly, this is not an issue before the Commission on remand. The Commission held that the record evidence demonstrated that DE-Ohio's MBSSO is a market price.[158] The Court affirmed the Commission's order stating that no Party had refuted the evidence relied upon by the Commission.[159] The Commission and the Court also held

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153 *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (OMG's Remand Merit Brief at 6) (April 13, 2007).

154 *Id.* at 6-8.

155 *In re Dominion East Ohio's Application to Restructure its Commodity Service*, Case No. 05-474-GA-ATA (Opinion and Order at 13) (May 26, 2006).

156 *Id.*

157 *Ormet v. Ohio Power Company*, Case No. 05-1057-EL-CSS (Opinion and Order at 4) (June 14, 2006); *In re Vectren Decoupling Application*, Case No. 05-1444-GA-UNC (Opinion and Order at 10) (September 13, 2006)

158 *In re CG&E's MBSSO*, Case No. 03-93-EL-ATA (Opinion and Order at 24) (September 29, 2004).

159 *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St.3d 300, 310-311, 856 N.E.2d 213, 226 (2006).