

IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel, ) Case No. 08-0367  
Appellant, ) Second Appeal from the Public  
v. ) Utilities Commission of Ohio  
The Public Utilities Commission ) Case Nos. 03-93-EL-ATA, 03-2079-  
of Ohio, ) EL-AAM, 03-2081-EL-AAM,  
Appellee. ) 03-2080-EL-ATA

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MEMORANDUM IN OPPOSITION TO MOTION OF  
DUKE ENERGY RETAIL SALES TO INTERVENE  
BY  
APPELLANT,  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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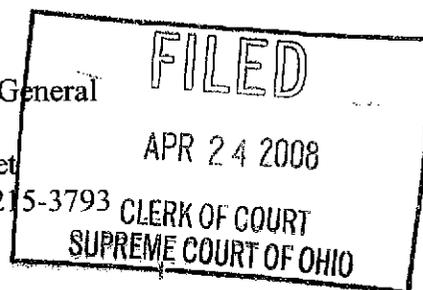
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## **I. INTRODUCTION**

Appellant, the Office of the Ohio Consumers' Counsel ("OCC"), opposes the intervention of Duke Energy Retail Sales, Inc. ("DERS") in the instant appeal. DERS and its affiliated company, Duke Energy Ohio, Inc. ("DE-Ohio," formerly CG&E), both filed motions to intervene on April 14, 2008. Pursuant to S.Ct.Prac.R. XIV(2)(B), the OCC submits this Memorandum in Opposition to DERS' Motion to Intervene ("DERS Motion").

DERS alleges no interest in this appeal that cannot be adequately represented by Appellant, the Public Utilities Commission of Ohio ("PUCO" or "Commission"). Furthermore, in the event that the Court grants DE-Ohio's Motion to Intervene ("DE-Ohio Motion"), Applicant in the cases below, DERS' perspective in this appeal is the same as that provided by DE-Ohio (an affiliate of DERS). The Court's rules and the rules of appellate procedure are not designed to provide multiple opportunities for the argument of a single perspective.

## **II. HISTORY OF THE CASE**

The OCC initiated its appeal on May 23, 2005 regarding the Commission's first Order and Entry on Rehearing in Case Nos. 03-93-EL-ATA, et al. ("*Post-MDP Service Case*"). The Supreme Court of Ohio issued its opinion on November 22, 2006. *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 ("*Consumers' Counsel 2006*"). The Court held that the PUCO erred by failing to properly support (i.e. in the PUCO's Entry on Rehearing) modifications to generation rates sought by Duke Energy that were initially approved in the PUCO's Order issued in November 2004. *Id.* at ¶95. The Court also held that the PUCO erred by failing to compel the disclosure of side agreements. *Id.* The case was remanded for additional consideration by the Commission.

The case on remand from the Supreme Court of Ohio (“*Post-MDP Remand Case*”) was heard in two phases, the first of which addressed the framework for post-market development period (“post-MDP”) rates.<sup>1</sup> The hearing on Phase I was conducted in three days, beginning on March 19, 2007. The OCC offered extensive evidence that resulted from discovery obtained as the result of the Court’s decision in *Consumers’ Counsel 2006*. A major issue in the case on remand was the significance of evidence presented by the OCC that side deals were entered into to settle the *Post-MDP Service Case*.

An Order on Remand was issued by the PUCO on October 24, 2007, and an Entry on Rehearing was issued on December 19, 2007. See OCC Notice of Appeal, attachments (February 19, 2008). The Commission found that “[b]ased upon the expanded record of this case and review of the side agreements, we now reach the inevitable conclusion that there is a sufficient basis to question whether the parties engaged in serious bargaining . . . .” *Post-MDP Remand Case*, Order on Remand at 27 (October 24, 2007) (attached to OCC Notice of Appeal), discussed in *Consumers’ Counsel 2006* at ¶24. However, the PUCO reestablished the same rate results as stated in its decision that was the subject of the OCC’s appeal in *Consumers’ Counsel 2006* (with an exception that has no practical effect on the rates of customers<sup>2</sup>).

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<sup>1</sup> Phase II of the hearing involved cases consolidated with the case on remand. The Commission decision in Phase II is the subject of a related appeal, Supreme Court of Ohio Case No. 08-0466.

<sup>2</sup> A change on remand regarding whether some non-residential customers can bypass the “IMF” charge has no practical effect because the Commission did not approve tariffs that would implement the change.

### III. ARGUMENT AGAINST INTERVENTION

#### A. “Intervention Of Right” Is Inapplicable.

DERS and DE-Ohio argue that this Court is *required*, pursuant to the “intervention of right” stated in Civ. R. 24(A), to grant their interventions in this appeal. DERS Motion at 2, DE-Ohio Motion at 1-2, both citing Civ. R. 24(A).<sup>3</sup> The claim of an intervention as of right is misplaced and the Court is not required to grant the intervention that DERS and DE-Ohio seek. Regarding the rule’s applicability to appeals, explicitly mentioned in Civ. R. 24(A)(1) (Appx. 30), it is well settled law that “intervention of right” is inapplicable to the court of appeals whose procedures are governed by appellate rules. App. R. 1 (Appx. 29), applied in *State of Ohio v. McGettrick*, 31 Ohio St.3d 138, 141. The Supreme Court of Ohio also has rules, and the Court makes discretionary decisions regarding motions as provided by the Court’s inherent powers. *City of Rocky River v. State Employment Relations Bd.* (1989), 43 Ohio St.3d 1, 4.

The Supreme Court’s rules permit the application of the Civil Rules cited by DERS, to the extent not in conflict with the Court’s rules, under circumstances where the Court hears a case as *an original action*. S.Ct.Prac.R. X(2). The applicability of Civ. R. 24 under the limited circumstance of the exception for an original action before the Court is demonstrated in the case law. See, e.g., *Citizen Action for a Livable Montgomery v. Hamilton County Bd. of Elections*, 115 Ohio St.3d 437, 440, 2007-Ohio-5379 ¶¶22-24. Rules such as Civ. R. 24(A) are, however, clearly inapplicable to pure *appeals* (which are governed entirely by the Court’s rules), and may not limit or impede the Supreme Court of Ohio in its exercise of its inherent powers. The only parties who have the right to appear in this appeal are Appellant (OCC) and Appellee (PUCO).

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<sup>3</sup> The Motions to Intervene also mention Civ. R. 24(B) regarding permissive intervention. The Motions to Intervene do not, however, provide any analysis under Civ. R. 24(B).

**B. DERS Did Not Support Its Claim That Its Interests Are Not Already Adequately Represented.**

DERS argues, without support, that its interests in this appeal are not adequately represented by existing parties. The inadequacy of existing parties to argue DERS' position is not supported by the DERS Motion other than as contained in a conclusory statement. DERS simply states that "its interests are not, and in fact cannot be, adequately represented by existing parties." DERS Motion at 3. DERS did not provide any reason that its interests are not represented by Appellant-PUCO and did not provide any analysis on the topic. The DERS Motion should be denied since DERS did not reveal an interest that cannot be adequately represented by Appellee-PUCO.

**C. DERS And DE-Ohio Have A Common Set Of Corporate Interests That Do Not Require The Intervention Of *Two* Parties.**

In the event that the Court grants the DE-Ohio Motion to Intervene, the Court should recognize that DERS and DE-Ohio share a common set of interests. The participation of both affiliates in this appeal would be duplicative and is unwarranted, and should only be permitted if DERS and DE-Ohio consolidate their participation and presentations to the Court in this appeal. DERS and DE-Ohio proceeded in lockstep during the proceedings before the PUCO, both procedurally and substantively.

The affiliates submitted simultaneous motions in limine to prevent the OCC from presenting evidence of side deals, supported each other during the PUCO hearing, and briefed the case on remand without any differences in position.<sup>4</sup> A competitive retail electric service

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<sup>4</sup> The DE-Ohio pleading contained in the Appendix shows the tight coordination of DERS and DE-Ohio pleadings. *Post-MDP Remand Case*, DE-Ohio Motion for Protective Order at 2 (December 20, 2006) (Appx. 17) ("supports Duke Energy Retail Sales' (DERS) Motion to Quash the Subpoenas Duces Tecum, which was filed simultaneously herewith").

("CRES") provider, unaffiliated with the Duke companies, stated the following in its reply brief during the *Post-MDP Remand Case*:

If [DE-Ohio, Cinergy, and DERS] are separate entities, Cinergy, which is not a certified CRES provider, clearly would have no stake in the outcome. On the other hand, DERS, despite the fact that it has no sales force, no customers, no revenues, and has never served the first end-user customer is, at least nominally, a CRES provider, which should lead one to expect that it would side with every other marketer participating in this proceeding in opposing the provision of the RSP that makes the IMF charge non-bypassable.

Dominion Retail Reply Brief at 4 (April 24, 2007) (Appx. 06). Dominion concluded: "The consideration for these agreements was, pure and simple, customer support for the DE-Ohio position in a proceeding [the *Post-MDP Service Case*] to which neither Cinergy nor DERS was a party, a position which, at least with respect to DERS [as a certified CRES], would certainly seem to be directly contrary to its self-interest as a CRES provider." *Id.* at 10. In stark contrast to the behavior of the unaffiliated CRES providers in the *Post-MDP Remand Case*, DERS took DE-Ohio's position at every turn before, during, and after the hearing. DERS shares a common set of interests with those of DE-Ohio.

In feigned separateness from DE-Ohio, DERS states concern in this appeal over the revelation of DERS' "customers, its pricing constructs, and its marketing strategies." DERS Motion at 3. Counsel for DE-Ohio on remand -- who also represented DERS at times during the remand proceedings<sup>5</sup> -- supported an attempt to quash the OCC's subpoena (i.e. directed to DERS) to prevent the OCC from obtaining information regarding the side deals. DE-Ohio counsel argued:

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.

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<sup>5</sup> Counsel for DE-Ohio represented all three Duke-affiliated companies during the negotiation of protective agreements.

*Post-MDP Remand Case*, DE-Ohio Motion for Protective Order at 11 (December 20, 2006)

(Appx. 26). The agreements do not involve competitive retail electric service, and were explored by the OCC in the *Post-MDP Remand Case* because they involved non-CRES (i.e. DE-Ohio) interests. The documents do not involve DERS customers, pricing, or marketing as a CRES provider.

DERS and DE-Ohio have more than similar interests, they have a *common set of interests*. In the event the Court grants DE-Ohio's Motion, the participation of DERS would be duplicative and the DERS Motion should be denied.

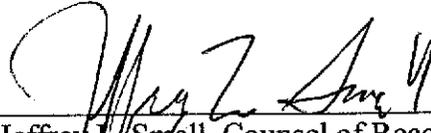
#### **IV. CONCLUSION**

The DERS Motion should be denied. In the event that the DE-Ohio Motion to Intervene is granted, the Court should recognize that the two Duke-affiliated companies share a common interest and that DERS should not also be an additional party to this appeal. The identity of interests involving DERS and DE-Ohio has already been demonstrated, as a practical matter, in the *Post-MDP Remand Case*. DERS' status as a party should only be permitted if DERS and DE-Ohio consolidate their participation and presentations to the Court in this appeal.

**WHEREFORE**, Appellant respectfully requests that this Court deny the DERS Motion to Intervene.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER  
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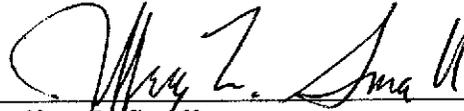
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Memorandum in Opposition to Motion to Intervene of Duke Energy Retail Sales by the Office of the Ohio Consumers' Counsel* was served upon the following counsel, by regular U.S. Mail, this 24<sup>th</sup> day of April 2008.



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**IN THE SUPREME COURT OF OHIO**

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v.	)	EL-AAM, 03-2081-EL-AAM,
	)	03-2080-EL-ATA
The Public Utilities Commission	)	
of Ohio,	)	
	)	
Appellee.	)	
	)	
	)	

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**APPENDIX**

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FILE

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

Case Nos. 03-93-GA-ATA, *et al.*

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REPLY BRIEF  
OF  
DOMINION RETAIL, INC.

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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 : Case Nos. 03-93-GA-ATA, *et al.*  
Rider Adjustment Cases. :

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REPLY BRIEF  
OF  
DOMINION RETAIL, INC.

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I. INTRODUCTION

The post-market development period rate stabilization plan ("RSP") of Duke Energy Ohio ("DE-Ohio")<sup>1</sup> is again before the Commission pursuant to the decision of the Ohio Supreme Court in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d. 300 (2006), remanding this matter on what are, ostensibly, two different grounds. The court found that the Commission (1) had failed to set forth its reasoning and failed to identify any factual basis for the charges it had authorized in fashioning the version of the RSP it ultimately approved, and (2) had improperly barred the Office of the Ohio Consumers' Counsel ("OCC") from discovering whether any side agreements existed between DE-Ohio and the other parties to a stipulation submitted during the initial hearing (the "Stipulation") that might cast doubt on whether the Stipulation was, in fact, the product of serious bargaining.<sup>2</sup> However, although these grounds

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<sup>1</sup> The application which initiated Case No. 03-93-EL-ATA was filed by DE-Ohio's predecessor, the Cincinnati Gas & Electric Company, on January 10, 2003. However, for ease of reference, both entities will be referred to herein as DE-Ohio.

<sup>2</sup> Whether a stipulation is the product of serious bargaining among knowledgeable parties is, of course, the first prong of the familiar three-part test employed by the Commission and approved by the Ohio Supreme Court for evaluating stipulations [*see, e.g., Consumers Counsel v. Pub. Util. Comm.*, 64 Ohio St. 3d 123 (1992), at 125].

may appear to be separate and distinct, they are actually interrelated, as both go to whether the Commission had an adequate record basis for the version of the RSP it ultimately put in place.

Dominion Retail, Inc. ("Dominion Retail"), an intervenor in these proceedings, is a Commission-certified supplier of competitive retail electric retail service ("CRES") operating on the DE-Ohio system. Although participating in the remand hearing, Dominion Retail did not file an initial brief. However, lest its silence be construed as signifying that it agrees with the arguments advanced on brief by DE-Ohio, Cinergy Corp. ("Cinergy")/Duke Energy Retail Sales, LLC ("DERS), the Ohio Energy Group ("OEG"), and the Commission staff ("Staff"), Dominion Retail hereby files its reply brief in accordance with the schedule established by the presiding attorney examiners at the conclusion of the hearing. Dominion Retail agrees with and endorses the positions on the remand issues set forth in the initial brief of the Ohio Marketer's Group ("OMG") as well as much of what OCC has to say in its initial brief, and will not repeat the OMG and OCC arguments here. However, there are several claims made in the DE-Ohio, Cinergy/DERS, OEG and Staff briefs that Dominion Retail cannot permit to pass without comment.

**I. ARGUMENT**

**A. THERE IS STILL NO EVIDENCE OF RECORD DEMONSTRATING THAT THE NON-BYPASSABLE INFRASTRUCTURE-MAINTENANCE FUND CHARGE IS BASED ON COST.**

As the court noted in its decision, the Commission, in its November 23, 2004 First Entry on Rehearing, accepted, in large measure, the alternative RSP as proposed by DE-Ohio in its initial rehearing application, including an element styled as the infrastructure-maintenance fund ("IMF") charge, without providing the explanation required by Section 4903.09, Revised Code, and without identifying any record evidence that would support the IMF charge (*Consumers'*

*Counsel*, 307-308). Indeed, as the court observed, the Commission, in attempting to justify the departure from the version of RSP originally approved in its September 29, 2004 Opinion and Order, stated only that the modifications would provide rate certainty for consumers, ensure financial stability for DE-Ohio, and further encourage the development of competitive markets (*Consumers' Counsel*, 307). With respect to the IMF, the court specifically noted that it was impossible to determine, based on the record before it, whether the IMF charge "was some type of surcharge and not a cost component" (*Consumers' Counsel*, 308), thereby implicitly recognizing the importance of the distinction between the two. As ably argued by OMG in its initial brief, because the IMF charge, which is a component of the provider-of-last-resort ("POLR") charge, is not based on actual cost and does not fund discreet wire services, it does not meet the test for a non-bypassable charge and, thus, cannot properly be visited on switching customers (OMG Br., 2).<sup>3</sup> Rather, to use the court's term, the record shows that the IMF is merely a "surcharge" designed to generate additional revenues for DE-Ohio over and above the cost of providing monopoly utility service.

In view of the court's decision, one would have expected those parties supporting the retention of the existing RSP to delve into the evidence presented at the remand hearing and to present detailed arguments in an attempt to show that the IMF charge is cost based. This did not happen. Instead, Staff merely rehashes the philosophical discussion contained in the testimony of its witness Cahaan regarding the inherent conflict in the Commission's stated goals in approving the RSP (*see* Staff Remand Ex. 1, *passim*), and pats the Commission on the back for

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<sup>3</sup> Dominion Retail leaves it to the Commission whether, under these circumstances, the IMF charge can be appropriately applied to non-switching customers served pursuant to what is, by law, supposed to be a market-based standard service offer.

coming up with a result that supposedly balanced these competing interests (Staff Brief, 10-12).<sup>4</sup> Indeed, notwithstanding the express reference to the IMF in the court's decision, Staff never even mentions the IMF charge in its brief, let alone providing an analysis of the basis of the charge. OEG, for its part, does at least cite the testimony of DE-Ohio witness Steffen on the subject before handing the argument off to the "Duke companies" with the stated expectation that they will discuss the issue in detail (OEG Brief, 4-5).<sup>5</sup> That leaves us with the DE-Ohio brief, which, although parroting the testimony of Mr. Steffen (*see* DE-Ohio Br., 16-22), never answers the specific question the court posed: Where is the evidence that supports the proposition that the IMF charge is based on cost?

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<sup>4</sup> Before accepting the Staff's congratulations, the Commission should consider the evidence showing the state of competition in the DE-Ohio market. In 2004, switching rates for commercial, industrial, and residential customers were 22.04%, 19.87%, and 4.91%, respectively (Tr. II, 133). As of December 21, 2006, the corresponding numbers had dropped to 8.40%, 0.36%, and 2.32% (OCC Remand Ex. 2A, 63). Thus, although Commission-approved plan may have served the enunciated goals of providing rate certainty for consumers and ensuring financial stability for DE-Ohio, it is certainly a stretch for Staff to pretend that the RSP has done anything to further the development of the competitive market in DEO's service territory. In so stating, Dominion Retail readily concedes that there are a number of factors that have contributed to the decline in switching rates over this period, some of which have nothing to do with the Commission-approved RSP. However, the failure of the Commission to include the shopping credits as provided in the Stipulation or, alternatively, to maintain the even greater level of benefits to switching customers provided in the RSP approved its September 29, 2004 Opinion and Order certainly played at least some role.

<sup>5</sup> Dominion Retail finds OEG's reference to the "Duke companies" rather curious. If, as these affiliated companies (*i.e.*, DE-Ohio, Cinergy, and DERS) maintain, they are actually separate entities, why would OEG expect Cinergy and DERS to support DE-Ohio witness Steffen on this issue? If these are separate entities, Cinergy, which is not a certified CRES provider, clearly would have no stake in the outcome. On the other hand, DERS, despite the fact that it has no sales force, no customers, no revenues, and has never served the first end-user customer is, at least nominally, a CRES provider, which should lead one to expect that it would side with every other marketer participating in this proceeding in opposing the provision of the RSP that makes the IMF charge non-bypassable. Mercifully, contrary to OEG's expectation, Cinergy and DERS had the good sense to leave this issue well enough alone in their joint brief.

All DE-Ohio tells us is that the IMF charge, which first surfaced in DE-Ohio's alternative RSP proposal, was, along with the new system reliability tracker ("SRT"), originally embedded in the annually adjusted component ("AAC") of the POLR charge proposed in the Stipulation (DE-Ohio Remand Ex. 3, at 16, 19; DE-Ohio Br., 18). Because the IMF and SRT components in the modified alternative RSP ultimately approved by the Commission were, in total, less than the implied combined level of these charges in the stipulated AAC (*see* DE-Ohio Remand Ex. 3, at 26-27; DE-Ohio Remand Ex. 3, Attachment JPS-SS1), DE-Ohio contends that that the IMF charge must necessarily be reasonable, and argues that the record support for the Stipulation, by implication, supports the IMF (DE-Ohio Br., 18).

The justification offered by DE-Ohio is problematic in at least two respects. First, although, according to DE-Ohio witness Steffen, the SRT is "a pure cost recovery mechanism" designed to recover the expenses incurred by DE-Ohio in fulfilling its POLR obligation (DE-Ohio Ex. 3, at 24), the IMF charge is neither tied to a specific out-of-pocket expense, nor intended to pass through actual tracked costs (*see* DE-Ohio Ex. 3, at 25). Rather, the IMF is the product of a formula created by DE-Ohio to produce "an acceptable dollar figure to compensate DE-Ohio for first call dedication of generating assets and the opportunity costs of not simply selling its generation into the market at potentially higher prices" (DE-Ohio Ex. 3, at 26). Plainly, the fact that the IMF is acceptable to DE-Ohio does not make it cost based.

Second, and perhaps more importantly, record support for the Stipulation does not somehow mysteriously morph into record support for a charge that was created as a part of a totally different package, even if some parties – most notably, the Staff – view the final version of the RSP approved in the Commission's January 19, 2005 Second Entry on Rehearing as a better overall deal than either the Stipulation or the modified version of the Stipulation approved

by the Commission in its September 29, 2004 Opinion and Order. Moreover, ignoring, for the moment, the impact the discovery of side agreements between the "Duke companies" and certain of the signatory parties has on the reasonableness of the Commission's reliance on the Stipulation as the framework for the RSP it ultimately approved, the Commission, in any event, must recognize that, unlike the Stipulation, which Dominion Retail and Green Mountain Energy signed, the RSP it approved does not have the support of any marketer.<sup>6</sup> Thus, any comfort the Commission may have taken from the fact that there were at least two marketers on board the Stipulation, has now evaporated. When this is coupled with OCC's opposition to both versions of the RSP, the claim that the final version of RSP balanced competing interests rings hollow. Without the support of any representatives of two of the stakeholder interests most concerned about the state of the competitive environment – unaffiliated CRES providers and residential customers – the burden of showing independent evidentiary support for the IMF charge takes on additional significance.

To divert attention from the lack of evidentiary support for the IMF charge, Staff, OEG, and DE-Ohio, focus, instead, on the remedies recommended by OCC witness Tafbot (*see* OCC Remand Ex. 1), roundly attacking his proposals on the grounds that they are unworkable, ill-considered, and contrary to law. Whatever one thinks of these recommendations, the

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<sup>6</sup> Although Dominion Retail most certainly did not agree with every aspect of the RSP set forth in the Stipulation, it is inherent in negotiated settlements that no party emerges with everything it wants. Thus, although recognizing that certain features of the stipulation, including the AAC, were not good for marketers generally, Dominion Retail, which targets residential customers, believed that the \$7 million in shopping credits available to residential customers under the Stipulation would provide it with at least some opportunity to compete successfully in the residential market in DE-Ohio's service territory. Although certain features of the RSP ultimately approved offset the impact of the elimination of the shopping credits to some degree, the benefits to switching residential customers are still significantly less than under the stipulated plan. Under these circumstances, Dominion Retail's signature on the Stipulation cannot be construed as support for any vestige of the stipulated plan that made its way into the RSP ultimately approved.

Commission should not lose sight of the fact that POLR charges must be based on the cost of providing monopoly utility service. Thus, as OMG argues in its initial brief, in the absence of an evidentiary showing that the IMF charge is based on these costs and is not just a revenue generating surcharge, the IMF charge should be made by-passable by switching customers -- a remedy that is clearly workable, reasonable, and lawful.

**B. IN THE FACE OF EVIDENCE DEMONSTRATING THAT THE STIPULATION WAS NOT THE PRODUCT OF SERIOUS BARGAINING AMONG PARTIES WITH COMPETING INTERESTS, THE COMMISSION CANNOT RELY ON THE PARTIES' ACCEPTANCE OF THE STIPULATION AS A BASIS FOR FINDING ITS TERMS TO BE REASONABLE.**

**1. The Stipulation Remains Relevant.**

In response to the court's finding that the Commission erred by failing to permit OCC to conduct discovery designed to determine if there were side agreements that could cast doubt on whether the Stipulation satisfied the "serious negotiations" prong of the standard governing stipulations, the parties supporting retention of the RSP ultimately approved make much of the fact that Stipulation was not adopted by the Commission (*see, e.g.,* Staff Br., 13; OEG Br., 7). As these parties would have it, all the Commission had to do to carry out the court's mandate was to provide OCC with the opportunity to conduct the discovery it had previously been denied. Plainly, this interpretation makes no sense, in that it assumes that the court remanded the case simply so OCC could perform a vain act. Despite the fact that the Stipulation was not approved as filed, the court clearly understood that the terms of the Stipulation provided the framework for the RSP the Commission eventually approved. The Staff's notion that the Stipulation is somehow irrelevant because "(t)he Commission could have reached exactly the same outcome whether or not the Stipulation had been filed" (Staff Br., 15) is ludicrous. If there were no Stipulation, there would have been no record support for its features, many of which ultimately

made their way, albeit in a modified form, into the approved version of the RSP. The Commission cannot lawfully pull an RSP out of thin air, and it did not do so in this case. Indeed, the Commission had to rely on the Stipulation as a starting point, because there was no evidentiary record that supported the alternative RSP proposed by DE-Ohio in its rehearing application, there being no hearings after the May 26, 2004 hearing on the Stipulation. The court clearly understood the continuing relevance of the Stipulation, otherwise, it would not have remanded the case for a reassessment of whether the Stipulation met the "serious bargaining" test.

2. That Certain Side Agreements May Have Been Executed After The Stipulation Was Filed Has No Bearing On The Principle Involved.

On brief, OEG maintains that any agreements between signatories to the Stipulation and various Duke entities that did not take effect until after the Stipulation was signed are irrelevant because such agreements could not have affected the Stipulation itself (OEG Br., 7).<sup>7</sup> Dominion Retail disagrees. As Staff correctly points out, parties making recommendations to the Commission can be assumed to be motivated by self-interest (Staff Br., 2). Staff then goes on to observe that such "self-interest is healthy and is the assumption that drives all Commission processes" (*id.*). Indeed, it is this assumption that permits the Commission to accord considerable weight to stipulations supported by a broad range of parties with competing interests. Under such circumstances, the Commission can be confident that, although no party

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<sup>7</sup> In addressing the side agreements issue, Dominion Retail understands its obligations regarding disclosure of agreements that were admitted into the record under seal. However, in discussing these matters, Dominion Retail takes its cue from OEG, which filed only a public version of its brief. Thus, although Dominion Retail will refrain from disclosing the specifics of any particular agreement between a Duke entity and a signatory to the Stipulation, Dominion will proceed on the assumption that it can discuss these matters in general terms without running afoul of confidentiality constraints and that, to the extent OEG has publicly revealed *certain specifics*, those specifics are now fair game.

got everything it wanted, the trade-offs in the negotiating process resulted in a stipulated resolution acceptable to all concerned.

This principle also extends to filings supporting the proposals of another party. Surely, the Commission is entitled to assume that, when a party endorses a particular recommendation, it signifies that its self-interest is satisfied by that recommendation. However, if it is subsequently shown that the party's self-interest was satisfied, not by the proposal in question, but by a side agreement unknown to the Commission, the Commission can no longer rely on the party's endorsement of proposal as a signal that the proposal is reasonable from the standpoint of either that party or other similarly situated parties. This is particularly important in a case where, as here, the proposal in question has not been subjected to scrutiny in an evidentiary hearing. If it is shown that the support of parties that endorsed DE-Ohio's alternative RSP was bought and paid for, this leaves the Commission in the untenable position of having approved an RSP that almost no one actually found acceptable except DE-Ohio itself.<sup>8</sup> Thus, leaving aside the possibility that the side agreements may have been in the works prior to the execution of the Stipulation, that certain side agreements were entered into after the Stipulation was filed has no bearing on the underlying principle.

3. **Although The Currency Of A Side Agreements Is Significant Where The Nature Of The Currency Is Such That The Party In Question Knows That It Will Not Be Subject To Certain Provisions Of A Stipulation Or An RSP That It Has Publicly Endorsed, The More Important Issue Is The Nature Of The Consideration Involved.**

OEG also takes the position that the only perceived problem with certain of the side agreements is "the currency they were priced in," and suggests that if the currency had been

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<sup>8</sup> Yes, it is true that Staff also supported the proposal, but, according to the Staff brief, the Staff is not motivated by self-interest (see Staff Br., 2). Thus, the Staff is not a stakeholder, and its endorsement of the RSP does not invoke the "serious bargaining" principle under discussion.

strictly dollars, rather than reimbursement of certain components of the RSP, the specter of impropriety would never have reared its ugly head (OEG Br., 10). Again, Dominion Retail disagrees. First, the currency of these agreements is what it is. Although it is clearly not unlawful for the contracting parties to utilize reimbursement of certain components of the RSP as the currency of a transaction, the fact that this was the currency used clearly undercuts the Commission's reliance on the public support of the party receiving the reimbursement as a testament to the reasonableness of the charges in question. Under these circumstances, the purpose of the "serious bargaining" standard is completely thwarted. However, the more important issue is not the currency used, but the consideration received.

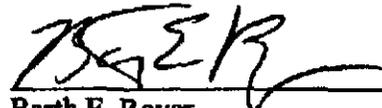
DE-Ohio and Cinergy/DERS make much of the fact that, other than DE-Ohio agreement with the city of Cincinnati, none of the side agreements at issue are with DE-Ohio. Although DE-Ohio may not be a party to these transactions, DE-Ohio is clearly the third-party beneficiary of all these agreements, in that the quid pro quo for each of these deals was the requirement that the contracting party support DE-Ohio's position in this proceeding. Dominion Retail agrees that the question of whether these other Duke entities may have violated the affiliate separation rules is not an issue for this docket. However, the fact remains that the consideration for these transactions had nothing whatever to do with attracting customers to competitive retail service -- the usual purpose of inducements extended by marketers in contract negotiations. The consideration for these agreements was, pure and simple, customer support for the DE-Ohio position in a proceeding to which neither Cinergy nor DERS was a party, a position which, at least with respect to DERS, would certainly seem to be directly contrary to its self-interest as a CRES provider. Under these circumstances, the Commission cannot reasonably find that the Stipulation and the subsequent support of certain parties for the alternative RSP proposed by DE-

Ohio in its application on rehearing was the result of serious bargaining. Although bargaining undoubtedly occurred, the nature of the resulting bargains was such that the Commission cannot rely on the public positions of the parties in question as an indicator of the reasonableness of either the Stipulation or the RSP it ultimately approved.

### III. CONCLUSION

Consistent with the foregoing discussion, the Commission should find that the IMF charge is by-passable by switching customers.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served upon the parties listed below by first class U.S. mail, postage prepaid, and/or by electronic mail this 24th day of April 2004.



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**FILE**

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**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

- In the Matter of the application of Duke Energy Ohio To Modify Its Market-Based Standard Service Offer ) Case No. 06-986-EL-UNC
  
- In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Non-Residential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish a Pilot Alternative Competitively-Bid Service Rate Option Subsequent to Market Development Period ) Case No. 03-93-EL-ATA
  
- In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Modify Current Accounting Procedures for Certain Costs Associated With The Midwest Independent Transmission System Operator ) Case No. 03-2079-EL-AAM
  
- In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Modify Current Accounting Procedures for Capital Investment in its Electric Transmission And Distribution System And to Establish a Capital Investment Reliability Rider to be Effective After the Market Development Period ) Case No. 03-2081-EL-AAM  
Case No. 03-2080-EL-ATA
  
- In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Fuel and Economy Purchased Power Component of its Market-Based Standard Service Offer. ) Case No. 05-725-EL-UNC
  
- In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its System Reliability Tracker. ) Case No. 06-1069-EL-UNC

In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its System Reliability Tracker and Market Price.	)	Case No. 05-724-EL-UNC
In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set the Annually Adjusted Component	)	Case No. 06-1085-EL-UNC

**MOTION FOR PROTECTIVE ORDER AND MEMORANDUM IN SUPPORT OF THE MOTION TO QUASH FILED BY DUKE ENERGY RETAIL SALES LLC**

Duke Energy Ohio (DE-Ohio) by its counsel and pursuant to Ohio Administrative Code (O.A.C.) Section 4901-1-24(A), respectfully requests that the Public Utilities Commission of Ohio (Commission) issue a Protective Order that Discovery not be had in the cases involving the remand of DE-Ohio's MBSSO as the Supreme Court's remand does not require further discovery, the record evidence gathered during the Commission's previously held full evidentiary hearing should be cited to support its position, and the OCC's discovery requests exceed the bounds of the above-captioned matters for a variety of reasons. In the alternative, DE-Ohio requests an appropriate order limiting discovery to specified terms and conditions and prohibiting inquiry into certain matters.

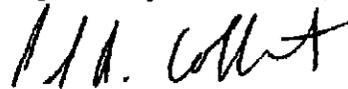
In support of its Motion, DE-Ohio submits its Memorandum in Support in which it also supports Duke Energy Retail Sales' (DERS) Motion to Quash the Subpoenas Duces Tecum, which was filed simultaneously herewith. The Subpoenas are not only inappropriate

because further discovery should be precluded but also outside the scope of these proceedings.

Finally, DE-Ohio objects to OCC's attempt to to consolidate Case No. 06-986-EL-UNC into these proceedings by including it in the caption in its discovery requests without the order of the Attorney Examiner or the Commission. Case No. 06-986-EL-UNC, DE-Ohio's Application to Amend its Market Based Standard Service Offer (MBSSO) Market Price is not a part of these proceedings and has not yet been considered by the Commission. The Commission should not permit OCC to manage the Commission's docket and merge cases without proper Commission approval.

For all of the foregoing reasons as well as those more fully set forth in the accompanying memorandum, DE-Ohio respectfully requests that the Commission issue an appropriate Protective Order regarding Discovery in the above captioned proceedings, quash OCC's Supoenas, and order OCC to use the proper case captions.

Respectfully submitted,



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**MEMORANDUM IN SUPPORT**

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The OCC's first and second Requests for Admission, Interrogatories, and Requests for Production of Documents to DE-Ohio and, collaterally, its subpoenas to Duke Energy Retail Sales (DERS), are, according to the OCC, necessary in view of the Ohio Supreme Court's recent ruling in *Ohio Consumers' Counsel v. Public Util. Comm'n.*<sup>1</sup> OCC's view however, misreads the Supreme Court's holding that upheld the Commission and DE-Ohio's MBSSO in every substantive respect.

The Court's remand to the Commission is limited to two procedural issues: (1) the Commission is to support its November Entry on Rehearing approving DE-Ohio's MBSSO with reasoning and existing record evidence,<sup>2</sup> and (2) the Commission is to Order DE-Ohio to disclose "all agreements entered into on or after January 26, 2004, between [DE-Ohio] and the parties to the matters before the commission."<sup>3</sup>

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<sup>1</sup> 11 Ohio St.3d 300, 2006-Ohio-5789.

<sup>2</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm'n.*, 111 Ohio St. 3d 300, 309, 856 N.E.2d 213, 225 (2006).

<sup>3</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm'n.*, 111 Ohio St. 3d at 300, 319, 856 N.E.2d at 213, 236 (2006).

**I. Additional discovery is improper.**

**A. The Court's remand does not require additional discovery or hearing.**

The Commission has already conducted an exhaustive hearing in Case No. 03-93-EL-ATA *et. al.*, approving DE-Ohio's MBSSO and its various components and the evidentiary record is closed. The Court's remand order requires only that the Commission cite record evidence that it considered in rendering its November 23, 2004, Entry on Rehearing.<sup>4</sup>

The OCC cannot cite to any language in the Court's decision that would require further discovery or the Commission to collect new evidence in these proceedings. The Supreme Court held that "the commission is required to thoroughly explain its conclusion that the modification on rehearing are reasonable and identify the evidence it *considered* to support its findings."<sup>5</sup> This is not a directive to conduct an entirely new evidentiary hearing. DE-Ohio maintains that there is ample record evidence to support DE-Ohio's MBSSO. Unless and until the Commission determines that there is an evidentiary deficiency, the focus instead, should be on the evidence already introduced.

With respect to the second issue on remand, DE-Ohio has provided OCC with all agreements it requested in discovery, which consists of

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<sup>4</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 309, 856 N.E.2d 213, 225 (2006).

<sup>5</sup> *Id.* (emphasis added).

agreements between DE-Ohio and Parties to the proceedings. The Supreme Court held that the only agreements to be disclosed by DE-Ohio are those OCC "requested" in the original proceeding.<sup>6</sup> Those have been produced and are with the City of Cincinnati (City) for the convention center naming rights and service agreements with various departments within the City. Because the Commission has held its evidentiary hearing, there is ample record evidence, the Court ordered the Commission to cite previously considered record evidence on remand, and DE-Ohio has complied with the Court's discovery order on remand, no additional evidentiary hearing or discovery is necessary and the Commission should not permit any.

**B. Even if the Court's remand ordered a new hearing and additional discovery, the particular discovery requested by OCC is irrelevant to the instant proceedings because there is no nexus between the requested information and these cases.**

Agreements between non-parties to these proceedings, such as DERS, and other non-parties cannot be relevant to the instant proceedings because the Court held that the relevance of side agreements is limited to one issue only: "whether the commission erred in denying discovery of side agreements requested by OCC *as relevant to the first test of reasonableness*: whether the settlement is a product of serious bargaining among capable, knowledgeable parties."<sup>7</sup> It is difficult to

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<sup>6</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d at 300, 319, 856 N.E.2d at 213, 236 (2006).

<sup>7</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 319, 856 N.E.2d 213, 233 (Baldwin 2006) (emphasis added).

see how agreements between DERS, and its customers could be relevant to a test of reasonableness to a settlement signed exclusively by *Parties* to these proceedings. The OCC has not demonstrated that there may be a nexus between the DERS contracts and the Parties to these cases.

Further, DE-Ohio is charging all consumers, residential and non-residential, who take competitive retail electric service from DE-Ohio the appropriate market prices approved by the Commission. No residential or non-residential consumer is subsidizing any other consumers market price. There is simply no evidence that residential consumers have been harmed in any way. OCC's has not made any discovery request that could show the existence of a subsidy.

Indeed, under the current statutory framework DE-Ohio has no opportunity to seek cost recovery for any discount it may provide to any consumer because there is no rate-base rate-of-return regulation for generation service in Ohio. All DE-Ohio can do is ask the Commission to approve a market price.<sup>8</sup> DE-Ohio's approved MBSSO contains no mechanism that permits cost shifting among customer classes.

Non-residential consumers have long subsidized residential consumers in electric rates and that subsidy remained in DE-Ohio's last generation base rate case in 1991. Those generation rates form the basis of DE-Ohio's MBSSO where they are the entirety of the price to compare excluding the Fuel and Purchased Power tracker, and the by-passable

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<sup>8</sup> Ohio Rev. Code Ann. § 4928.14 (Baldwin 2006).

portions of the System Reliability Tracker and Annually Adjusted Component. Further, in Case No. 99-1658-EL-ETP, the Commission approved Transition Cost recovery that includes a further subsidy of residential consumers by non-residential consumers. Residential consumers pay transition charges only through 2008, while non-residential consumers pay such charges through 2010, including the portion that would have been assigned to residential consumers for that period of time. OCC's argument that residential consumers are overpaying is simply not true. If a new market price is set residential prices will increase. DE-Ohio does not think that is what the representative of residential consumers intends.

In short, absent an affirmative Order by this Commission re-opening the entire MBSSO proceeding, no new evidence can, or should, be submitted and all discovery requests by OCC, whether directed to DE-Ohio or third parties like DERS, should be quashed. Unless the Commission determines to start over and re-litigate DE-Ohio's entire MBSSO, a position DE-Ohio asserts is unlawful and unreasonable, the evidentiary record is closed.

In any case, the discovery propounded by OCC is irrelevant and not likely to lead to the discovery of admissible evidence in these matters. Ohio Administrative Code Section 4901-1-16(B) sets forth the scope of discovery in proceedings before the Commission, providing in relevant part,

“any party to a commission proceeding may obtain discovery of any matter, not privileged, *which is relevant* to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing, *if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.*”<sup>9</sup>

DE-Ohio has received two sets of discovery from the OCC, totaling over seventy requests including subparts, regarding issues surrounding the Commission’s approval of DE-Ohio’s MBSSO and purported side agreements.<sup>10</sup> OCC’s discovery requests also include numerous questions surrounding an employment lawsuit filed against DERS and Duke Energy Corporation, the parent company of DE-Ohio by a disgruntled ex-Duke Energy Shared Services employee. These matters are irrelevant to the above captioned cases and not reasonably calculated to lead to the discovery of relevant or admissible evidence.

The original discovery request at issue in DE-Ohio’s MBSSO and the subsequent appeal was for side agreements between DE-Ohio and any Parties to the proceeding. DERS was not, and is not, a party in any of the above captioned proceedings. DERS did not take part in any negotiations or settlement discussions related to any of the above captioned cases. Therefore, any agreements DERS has with DE-Ohio consumers are not the subject of the Supreme Court’s remand, were not discoverable during the initial proceeding, and were not the subject of a discovery request in the

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<sup>9</sup> OHIO ADMIN. CODE ANN. 4901-1-16 (B) (Anderson 2006) (emphasis added).

<sup>10</sup> See Attachment 1 and 2 OCC’s first and second set of Discovery respectively.

initial proceeding. Thus, even if DE-Ohio is required to produce agreements between itself and Parties to the above-captioned matters, the DERS agreements were never at issue.

Put another way, even if the Commission had initially ordered DE-Ohio to answer OCC's request to compel "all agreements entered into on or after January 26, 2004 between CG&E and the parties to the matter before the commission," the DERS agreements would not have been responsive. Hence, any attempt by OCC to discover them now, through requests to DE-Ohio or through subpoenas to DERS, is impermissible and irrelevant.

The agreements between DERS and its customers cannot be relevant to the DE-Ohio MBSO proceedings unless there is a transaction between DE-Ohio and DERS and DERS is subsidized by DE-Ohio. There is no such transaction. OCC has not alleged such a transaction, and the Commission has not found such a transaction through audit. The Commission retains audit authority to Duke Energy affiliates to the extent there are transactions between DE-Ohio and the applicable affiliate.

As to the remaining discovery requested, the Court seeks record evidence previously "considered" by the Commission, not new evidence submitted to justify the Commission's first Entry on Rehearing.<sup>11</sup> It is impossible to see how new discovery could lead to the submission of evidence previously considered. The Commission should not permit

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<sup>11</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 323, 856 N.E.2d 213, 236 (Baldwin 2006) (emphasis added)

additional discovery in these proceedings, nothing in the Court's remand hints that additional discovery is required.

Because OCC has failed to demonstrate a nexus between its discovery request and the instant proceedings DE-Ohio asks the Commission to quash OCC's Subpoenas and deny its ability to pursue additional discovery.

**II. The Commission lacks jurisdiction to issue the requested Subpoenas.**

The fact that DERS may have agreements with customers who happen to be DE-Ohio consumers is irrelevant. DERS is a competitive retail electric service provider that is registered with the Commission and is not prohibited from entering into agreements with consumers within DE-Ohio's certified territory. 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. If they do not, it is likely they are beyond the Commission's jurisdiction as DERS is an unregulated entity subject to the Commission's jurisdiction for certification and complaint purposes only regarding competitive retail electric service and corporate separation issues.<sup>12</sup>

In fact, it is doubtful that the Commission has jurisdiction to issue a subpoena to DERS for anything other than a corporate separation violation because R.C. 4928.05 divests the Commission of jurisdiction over

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<sup>12</sup> Ohio Rev. Code Ann. §§ 4928.16, 4928.18 (Baldwin 2006).

competitive retail electric service, including jurisdiction through 4903.02 and R.C. 4903.03, the statutes that grant the Commission subpoena authority. Only through 4928.18 does the Commission retain subpoena authority over competitive retail electric services and no violation of that section has been alleged.

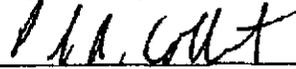
**III. A delay in implementation of DE-Ohio's MBSSO market price or a change to the market price, harms DE-Ohio.**

A delay in these proceedings harms DE-Ohio and creates a cause of action by DE-Ohio. DE-Ohio has relied upon the continuation of its market price as ordered by the Commission and approved by the Court and implementation of its market prices in a timely manner. DE-Ohio no longer is permitted to create regulatory assets to defer the income effect of price implementation delays. DE-Ohio is further harmed by adverse changes to its market price ordered by the Commission without an application by DE-Ohio. It is unfair to DE-Ohio, its shareholders, and consumers, to remove all certainty regarding its market prices by treating the Court's remand as if it reversed DE-Ohio's MBSSO. The Court affirmed the Commission and DE-Ohio in every substantive respect. While the procedural remand is important and must be properly addressed, DE-Ohio submits that the Commission should thwart OCC's efforts to relitigate market prices already decided and minimize the harm to all involved.

**CONCLUSION:**

For the reasons more thoroughly discussed above DE-Ohio asks that the Commission quash the Subpoenas issued to DERS and grant its Motion to deny or limit Discovery.

Respectfully Submitted,



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## **TITLE I. APPLICABILITY OF RULES**

### **RULE 1. Scope of Rules**

(A) These rules govern procedure in appeals to courts of appeals from the trial courts of record in Ohio.

(B) Procedure in appeals to courts of appeals from the board of tax appeals shall be as provided by law, except that App. R. 13 to 33 shall be applicable to those appeals.

(C) Procedures in appeals to courts of appeals from juvenile courts pursuant to section 2505.073 of the Revised Code shall be as provided by that section, except that these rules govern to the extent that the rules do not conflict with that section.

[Effective: July 1, 1971; amended effective July 1, 1994.]

## **RULE 24. Intervention**

**(A) Intervention of right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

**(B) Permissive intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

**(C) Procedure.** A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Civ.R. 5. The motion and any supporting memorandum shall state the grounds for intervention and shall be accompanied by a pleading, as defined in Civ.R. 7(A), setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of this state gives a right to intervene.

[Effective: July 1, 1970; Amended July 1, 1999.]