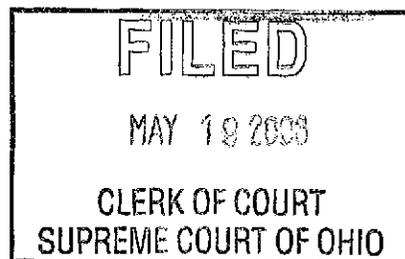


IN THE SUPREME COURT OF OHIO

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

**MOTION TO SEAL CONTENTS OF MERIT BRIEF AND ASSOCIATED FILINGS
PENDING RESOLUTION OF CONFIDENTIALITY ISSUES ON APPEAL
BY
APPELLANT,
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
(ATTACHMENT 1 OF 4)**



IN THE SUPREME COURT OF OHIO

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

MERIT BRIEF
BY
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I. HISTORY OF THE CASE AND INTRODUCTION

A. Introduction

This is the second appeal of the above-captioned cases before the Public Utilities Commission of Ohio (“PUCO” or “Commission”) in which the Office of the Ohio Consumers’ Counsel (“OCC”) represents over 600,000 residential utility customers of Duke Energy Ohio, Inc. (“Duke Energy” or “Company,” formerly known as “CG&E”). The first appeal resulted in this Court’s decision in November 2006 that remanded the case to the Commission for further consideration. *Ohio Consumers’ Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 (“*Consumers’ Counsel 2006*”). The subsequent history on remand involved discovery by the OCC and the presentation of extensive evidence regarding side agreements the Company entered into to remove opposition to its proposed generation rate plans. Four years after a flurry of side negotiations took place outside the view of the OCC and the public and two years after the oral argument in the OCC’s first appeal, *the Commission has yet to consider the OCC’s arguments that the deals struck were discriminatory, anti-competitive, and unlawful*. The Court should decide these rate-setting and related matters based upon the record.

The oral argument by the Company’s counsel on April 25, 2006 offered the assurance that the PUCO’s denial of the OCC’s discovery would not prove significant because an affiliate of the Company was not counted among the certified retail electric service (“CRES”) providers of generation service. *Consumers’ Counsel 2006*, Oral Argument (April 25, 2006) (Atty. Colbert) (“none of the competitors are affiliates . . .”). However, the Company’s affiliates -- Duke Energy Retail Sales (“DERS,” in 2004 called Cinergy Retail Sales, or “CRS”) and Cinergy Corp. -- figure prominently in the story of side deals that the OCC unfolded on remand as the direct result of the Court upholding the OCC’s right to discovery. *Consumers’ Counsel 2006* at ¶94. In its

Order on Remand dated October 24, 2007 (“Remand Order”) (Appx. 9.), the PUCO disappointingly brushed aside the important legal implications of this story as merely involving “[a]ncillary issues raised by parties in the remand phase and not considered [in the Remand Order].”¹ Compounding the situation, the PUCO ordered broad redactions that unlawfully conceal from the public the side deals and the involvement of Duke Energy’s affiliates.² The Court should order that the full record be released to the public.

B. Standard of Review

This Court uses a *de novo* standard of review to decide all matters of law such as those raised in this case. *Grafton v. Ohio Edison* (1996), 77 Ohio St.3d 102, 105; *Cleveland Electric Illuminating Co. v. Public Util. Comm.* (1996), 76 Ohio St.3d 521, 523; *Industrial Energy Consumers of Ohio Power Co. v. Public Util. Comm.* (1994), 68 Ohio St.3d 559, 563; 629 N.E.2d 423, 427; 1194-Ohio-435. The Court should reverse the PUCO’s unlawful effort to approve Duke Energy’s rate plan that violates Ohio law.

The Court’s review of the case below is important because the Commission ignored provisions of R.C. Chapters 4905 and 4928. These chapters contain key rate-setting provisions for electric generation service in the wake of Ohio’s electric restructuring law. This Court has repeatedly stated that the PUCO is a creature of statute, and as such does not have the authority to act beyond the authority provided under Ohio statutes. See, e.g., *Industrial Energy Users – Ohio v. Public Util. Comm.*, 2008-Ohio-990, *Canton Storage and Transfer Co. v. Public Util. Comm.* (1995), 72 Ohio St. 3d 1, 647 N.E.2d 136.

¹ *In re Post-MDP Remand Case*, Case Nos. 03-93-EL-ATA, et al., Order on Remand at 20 (October 24, 2007) (“Remand Order” in the “*Post-MDP Remand Case*”) (Appx. 9.).

² Remand Order at 42 (Appx. 50.).

C. Statement of Facts

1. History of these cases before remand to the Commission

On January 10, 2003, the Company filed an application containing proposals to provide a market-based standard service offer for electric generation service and to establish an alternative competitive bidding process (“competitive market option,” or “CMO”) for the period after the market development period (“post-MDP”). *Consumers’ Counsel 2006* at ¶4.

On January 26, 2004, the Company filed another application that asked the Commission to approve either the approach contained in the earlier application or a substitute plan (“ERRSP Plan”) for pricing generation service that the Company submitted for approval. *Consumers’ Counsel 2006* at ¶5.

The hearing on the applications was delayed in connection with the filing of a stipulation in these cases that described another plan of service (“Stipulation Plan” as described in the “2004 Stipulation” filed on May 19, 2004). Duke Energy, Staff, and other parties that included several large customers and membership organizations made up of large customers (Industrial Energy Users – Ohio (“IEU”), Ohio Energy Group (“OEG”), and Ohio Hospital Association (“OHA”)) executed the 2004 Stipulation. The Ohio Marketers Group (“OMG,” consisting of MidAmerican Energy, Strategic Energy, Constellation Power Source, Constellation NewEnergy and WPS Energy Services), PSEG Energy Resources, the National Energy Marketers Association, the OCC and the Ohio Manufacturers Association representing broad customer groups, and Ohio Partners for Affordable Energy (“OPAE”) did not execute the 2004 Stipulation.

The parties who did not execute the Stipulation were permitted a very short period during which they could inquire into the Stipulation by means of discovery. The OCC sought copies of all side-agreements between Duke Energy and other parties in these cases, and the Company

refused to provide copies of such agreements. The first witness appeared at hearing on May 20, 2004 (based on pre-filed testimony not related to the 2004 Stipulation). The OCC began the hearing on May 20, 2004 with an oral Motion to Compel Discovery of side agreements. The Motion to Compel Discovery was denied. *Consumers' Counsel 2006* at ¶6.

The Commission's Order in the consolidated cases that began in 2003 ("*Post-MDP Service Case*"³) was issued on September 29, 2004, which approved the May 19, 2004 Stipulation with some conditions. The Order evaluated the Commission's three goals used in the evaluation of post-MDP rate plans: rate stability for customers, financial stability for the company, and encouragement of competition.⁴ Several parties, including Duke Energy and the OCC, filed applications for rehearing on October 29, 2004. The Company asked the PUCO to either i) approve its original CMO proposal; ii) approve the Stipulation without conditions or modifications, or iii) approve a new rate plan ("*New Proposal*"), proposed for the first time in the Company's Application for Rehearing.

In a November 23, 2004 Entry on Rehearing, the PUCO adopted (in principal part) the *New Proposal* without any hearing regarding the Company's new proposals for rates. The Commission ordered the Company to submit follow-up filings with the Commission before Duke Energy could place certain of the rate increases in the *New Proposal* into effect.

The duration of PUCO cases captioned above -- the first of which began in January 2003 -- is partly the result of an appeal of the *Post-MDP Service Case* and remand by the Supreme

³ The *Post-MDP Service Case* and the *Post-MDP Remand Case* are the same case having a single record. The separate designations help to distinguish the proceedings that resulted in the PUCO's decision in 2004/2005 from the subsequent decision reached in 2007.

⁴ *Post-MDP Service Case*, Order at 15 (September 29, 2004) (Appx. 23.). Thereafter, the Court 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.

Court of Ohio (“Court”) in *Consumers’ Counsel 2006*. The OCC initiated its first appeal on May 23, 2005. The Court issued its opinion on November 22, 2006. The Court stated that the “commission abused its discretion in barring discovery of side agreements.” *Consumers’ Counsel 2006* at ¶194. The Court also stated that the “portion of the commission’s first rehearing entry approving CG&E’s [now Duke Energy’s] alternative proposal is devoid of evidentiary support.” *Consumers’ Counsel 2006* at ¶128.

2. History of these cases on remand to the Commission

a. Introduction

On February 2, 2007, the *Post-MDP Remand Case* was set for hearing in two phases, the first of which would address the framework for post-MDP rates. The hearing on the first phase was conducted in three days, beginning on March 19, 2007. The OCC presented extensive evidence regarding side agreements the Company entered into that removed opposition by large customers to the Company’s proposals that affected other customers, and presented evidence on the subject of Duke Energy’s failure to support its standard service offer rate proposals.

The key testimony of OCC Witness Hixon emphasized an important connection between the side agreements and the *Post-MDP Service Case*:



5

[REDACTED]

b. Pre-PUCO Order Agreements

OCC Witness Hixon described five side agreements bearing dates from May 19, 2004 to July 7, 2004, referred to in her testimony as “Pre-PUCO Order Agreements,”⁷

that involved customers who were parties to the *Post-MDP Service Case* [REDACTED]

[REDACTED] (“Customer Parties”).⁸ The Customer Parties who were involved

in the side agreements [REDACTED]⁹

[REDACTED]¹⁰), [REDACTED]

[REDACTED]¹¹ [REDACTED]¹² [REDACTED]¹³

⁵ [REDACTED]

⁶ [REDACTED]

⁷ OCC Remand Ex. 2(A) at 11 (Supp. 14.).

⁸ Id. The side agreements are attached to Ms. Hixon’s testimony as BEH Attachments 2-6 (Supp. 2.).

⁹ [REDACTED]

¹⁰ [REDACTED]

¹¹ [REDACTED]

¹² [REDACTED]

¹³ [REDACTED]

[REDACTED]

[REDACTED]¹⁴ The 2004 Stipulation proposed post-MDP pricing based upon a bypassable price to compare and a non-bypassable provider of last resort (“POLR”) charge made up of a rate stabilization charge (“RSC”) and the first of the proposed annually adjusted components (“AAC1”).¹⁵ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁶ [REDACTED]¹⁷ [REDACTED]

[REDACTED]

[REDACTED]¹⁸ [REDACTED]

[REDACTED]¹⁹ [REDACTED]

[REDACTED]²⁰

¹⁴ [REDACTED]

¹⁵ Joint Ex. 1 at ¶3 and ¶8 (2004 Stipulation) (Supp. 751-753 and 760). The annually adjusted component was redefined in the Company’s Application for Rehearing.

¹⁶ [REDACTED]

¹⁷ [REDACTED]

¹⁸ [REDACTED]

¹⁹ [REDACTED]
²⁰ [REDACTED]

The supplemented record also reveals that the City of Cincinnati (“City”) -- an intervenor in the *Post-MDP Service Case* that withdrew from the cases on July 13, 2004 without filing a brief -- entered into an agreement with Duke Energy (the “City Agreement”). The side agreement, executed on June 14, 2004 and entitled “Settlement Agreement” provided the City with \$1 million and required the City to withdraw from the *Post-MDP Service Case*.²¹ The City did not file an initial brief by the June 22, 2004 deadline, and did not file a reply brief by the July 6, 2004 deadline. The City did, in fact, withdraw from the *Post-MDP Service Case*.

Duke Energy and two of its affiliated companies entered into the Pre-PUCO Order Agreements and the City Agreement with the Customer Parties. Duke Energy (formerly CG&E) was a named party in the City Agreement. Cinergy Corp. was a named party in the agreements [REDACTED]²² [REDACTED]²³ Duke Energy Retail Sales (“DERS”), formerly known as Cinergy Retail Sales (“CRS”), was a named party in the agreements with [REDACTED]

[REDACTED] The Duke-affiliated companies (formerly the Cinergy-affiliated companies) used affiliates of Duke Energy to [REDACTED]

[REDACTED] The three Duke-affiliated companies that were involved in the side deals did not act independently of one another in 2004, and they continued to operate with a single management directive thereafter (including during the course of the *Post-MDP Remand Case*).

The natures of the three Duke-affiliated companies that entered into agreements with Customer Parties are contained within the record of the *Post-MDP Remand Case*. Duke Energy, formerly the Cincinnati Gas and Electric Company, was the applicant in the cases before the

²¹ OCC Remand Ex. 6 at ¶4 (Supp. 626).

²² [REDACTED]

Commission and had the rights and obligations afforded electric distribution utilities in Ohio. It owns generating plants. Duke Energy employs workers to run its operating company functions such as generating electricity in power plants.²⁴ However, its professional and administrative services are provided by employees of an affiliated service corporation (“Shared Services”²⁵) that also provides professional services to a wide range of Duke-affiliated companies. The corporate titles for executive and other positions at Duke Energy and its affiliated companies, including the president of Duke Energy, are held by Shared Services employees.²⁶

DERS, referred to in the side agreements by the pre-merger name of Cinergy Retail Sales (and oftentimes referred to in agreements as “Cinergy,” which should not be confused with Cinergy Corp.), is one of the Duke-affiliated companies that also uses the professional services provided by Shared Services.²⁷ DERS was organized in 2003 but was not certified as a competitive retail electric service (i.e. CRES) provider in Ohio until October 7, 2004,²⁸

[REDACTED]

DERS has no employees,²⁹ no revenue, and no customers.³⁰ DERS lacks any indicia of a going concern.³¹

²³ [REDACTED]

²⁴ OCC Remand Ex. 9 at 36 (Ficke) (Supp. 698.).

²⁵ OCC Remand Ex. 8 at 10 (Ziolkowski) (Supp. 670.); OCC Remand Ex. 9 at 10-11 (Ficke) (Supp. 686-687.); Company Remand Ex. 3 at 1 (Steffen) (Supp. 728-B).

²⁶ See, e.g., OCC Remand Ex. 9 at 11 (Ficke) (Supp. 687.).

²⁷ OMG Remand Ex. 4 at 30-31 (Whitlock) (Supp. 723.).

²⁸ OCC Remand Ex. 2(A) at 12 (Supp. 15.).

²⁹ OMG Remand Ex. 4 at 30 (Whitlock) (Supp. 723.).

³⁰ OMG Remand Ex. 4 at 61 (Whitlock) (Supp. 16.). The information filed by DERS with the Commission in Case No. 04-1323-EL-CRS provided financial statements for 2005, a period before Mr. Whitlock’s involvement with DERS, that shows no revenues. OCC Remand Ex. 2(A), BEH Attachment 22 (Supp. 487).

³¹ See, e.g., OMG Remand Ex. 4 at 29-33, 48-55 (Supp. 8-9.). The president of DERS, Charles Whitlock, stated that there is no person serving a customer contact function for DERS (id. at 50)

[REDACTED]

[REDACTED]³² Duke Energy Corporation is the parent of Cinergy Corp.³³ [REDACTED]

[REDACTED]

Three individuals within the Duke-affiliated companies figure prominently in each of the Pre-PUCO Order Agreements. Each of the Pre-PUCO Order Agreements, regardless of which Duke-affiliate was named, was executed by Duke Energy (formerly CG&E) trial counsel in his title within the Company.³⁴

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[REDACTED]

[REDACTED]³⁵ [REDACTED]

[REDACTED]

(Supp. 14.). DERS does not have enabling (i.e. trading) agreements. Id. at 54-55 (Supp. 15.). The position of CEO appears to be vacant. Id. at 29 (Supp. 8.). In response to a question about employees of the Duke-affiliated companies, Mr. Whitlock stated: "I've got to be candid with you, man, I barely know who I work for." Id. at 49 (Supp. 13.). Financial statements for DERS taken from the DERS filings at the PUCO list a few inter-corporate items and an expense line for "Option Premium Expense" related to the agreements analyzed by OCC Witness Hixon. OCC Remand Ex. 2(A), Attachment 22 (Supp. 489-490.).

³² [REDACTED]

³³ OCC Remand Ex. 2(A) at 13 (Supp. 16.).

³⁴ OCC Remand Ex. 2(A), BEH Attachments 2-6 (Supp. 81-110.).

³⁵ [REDACTED]

[REDACTED] 36 [REDACTED]

[REDACTED] 37

Q. Were agreements of this type that dealt with support of the [S]tipulation in 03-93 routinely brought to your attention? Would you have seen those types of documents in this time frame?

A. In this time frame, sure.

Q. So there were other agreements that you saw, not just this Ohio Hospital Association agreement[?]

A. Much like those that you showed me in you Exhibit No. 3 [same as OCC Remand Ex. 2(A), Attachment BEH 18].

Q. Did you see what's marked as Exhibit 5 [same as OCC Remand Ex. 2(A), Attachment BEH 2] or drafts of it before this agreement was executed?

A. I may have.

[REDACTED]

A. Yes.

Q. And were those negotiations that resulted in the agreements such as that shown on Exhibit 5, were those part of a public process that involved all the parties to the 03-93 case?

A. No.

Mr. Ficke was involved in the negotiations with [REDACTED] 38 He stated that he was "less involved"

in the agreement with [REDACTED] 39 [REDACTED]

[REDACTED] 40

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

36 [REDACTED]

37 OCC Remand Ex. 9 at 26-27 (Ficke) (Supp. 694-695.). When asked if a CG&E representative was involved in negotiating agreements [REDACTED], Mr. Ficke responded: "I was involved in it." Id at 36 (Supp. 698.).

38 Id. at 77-80 ("I reviewed drafts of the documents," id at 77) (Supp. 707.).

39 Id. at 82 (Ficke) (Supp. 712.).

40 [REDACTED]

[Redacted]

[Redacted] 41 [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted] 42 [Redacted]

[Redacted] 43 [Redacted]

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[Redacted] 44 [Redacted]

[Redacted]

[Redacted] 45 [Redacted]

41 [Redacted]

42 [Redacted]

43 [Redacted]

44 [Redacted]

45 [Redacted]

[REDACTED] 46 [REDACTED]

[REDACTED]

[REDACTED] 47 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 48 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 50 [REDACTED]

[REDACTED]

[REDACTED]

c. Pre-Rehearing Agreements

The Commission's evaluation of the terms of the 2004 Stipulation, largely in areas outside the core scope of Duke Energy's post-MDP pricing proposals for generation service, changed the course of the Company's plans and those of its fellow stipulating parties. The Commission's September 29, 2004 Order increased the percentage of nonresidential shopping customers who could avoid the RSC⁵¹ in an environment where switch rates were

46 [REDACTED]
47 [REDACTED]
48 [REDACTED]
49 [REDACTED]
50 [REDACTED]

⁵¹ *Post-MDP Service Case*, Order at 19 (September 29, 2004) (Appx. 89.).

declining,⁵² adjusted provisions for the AAC1 charge (making it depend on “legitimate expenses,”⁵³ reduced the pass-through of costs because “CG&E may be recovering some percentage of these costs through off-system sales,”⁵⁴ and left undetermined the degree to which it could be bypassed⁵⁵), eliminated a deferral that would increase later distribution rates for residential customers,⁵⁶ prohibited a provision in the 2004 Stipulation that would require “any consumers to waive their statutory POLR rights,”⁵⁷ and refused to “allow the RTC collection from residential consumers to be extended beyond 2008.”⁵⁸

The Company protested the Commission’s oversight in Duke Energy’s Application for Rehearing on October 29, 2004. [REDACTED]

[REDACTED]

[REDACTED]⁵⁹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁶⁰

Ms. Hixon testified regarding five side agreements bearing dates from [REDACTED]

[REDACTED] referred to in her testimony as “Pre-Rehearing Agreements,”⁶¹ [REDACTED]

⁵² Id. at 23 (Appx. 93.).

⁵³ Id. at 32 (Appx. 102.).

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id. at 35 (Appx. 105.).

⁵⁷ Id.

⁵⁸ Id. at 36 (Appx. 106.).

⁵⁹ [REDACTED]

⁶⁰ [REDACTED]

⁶¹ [REDACTED]

[REDACTED] 62

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 63

The Company’s Application for Rehearing in the *Post-MDP Service Case* proposed post-MDP pricing based upon a price to compare and a provider of last resort (“POLR”) charge made up of the rate stabilization charge (“RSC”), a revised annually adjusted component (“AAC”), the system reliability tracker (“SRT,” the successor to the previous Reserve Margin charge), and an additional charge in the form of a infrastructure maintenance fund (“IMF”) adder. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 64 [REDACTED] 65 [REDACTED]

[REDACTED]

62 [REDACTED]

63 [REDACTED]

[REDACTED]

64 [REDACTED]

[REDACTED]

[REDACTED] 66 [REDACTED]

[REDACTED] 67

[REDACTED] 68

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 69 [REDACTED]

[REDACTED] 70

[REDACTED]

[REDACTED]

[REDACTED] 71 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

65 [REDACTED]

66 [REDACTED]

67 [REDACTED]

68 [REDACTED]

69 [REDACTED]

70 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁷²

[REDACTED]

[REDACTED]

[REDACTED]⁷³

d. Implementation of the Pre-Rehearing Agreement provisions and the option agreements

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

First, the option agreements show the effect of the *Post-MDP Service Case* on positions taken by [REDACTED] who were selected for favored treatment by the Company.

The option agreements were entered into “by CRS [re-designated DERS] with individual

⁷¹ [REDACTED]

⁷² [REDACTED]

customers who were the Customer Parties in the Pre-Rehearing Agreements [REDACTED]
[REDACTED]” and were “entered into after the PUCO’s November 23, 2004
Entry on Rehearing, during the period [REDACTED]⁷⁴ [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁷⁵

Second, another set of customers received favored treatment over other customers
[REDACTED]. One example of such favored treatment is the City
Agreement, according to which the City received \$1 million and agreed to withdraw from the
Post-MDP Service Case.⁷⁶

[REDACTED]
[REDACTED]
[REDACTED]⁷⁷ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁷⁸ [REDACTED]

⁷³ [REDACTED]

⁷⁴ OCC Remand Ex. 2(A) at 48 (Supp. 51.).

⁷⁵ [REDACTED]

⁷⁶ Company Remand Ex. 3 at 33 (Supp. 731.).

⁷⁷ [REDACTED]
[REDACTED]

⁷⁸ [REDACTED]

[REDACTED] 79 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] 80 [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] 81 [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] 82 Despite this incorrect belief -- demonstrated by the fact that CRS (now
DERS) has no customers and no revenues 83 [REDACTED]
[REDACTED]

[REDACTED] 84 [REDACTED]

79 [REDACTED]
80 [REDACTED]
81 [REDACTED]
82 [REDACTED]

83 OMG Remand Ex. 4 at 61 (Whitlock) (Supp. 16.). The information filed by DERS with the Commission in Case No. 04-1323-EL-CRS provided financial statements for 2005, a period before Mr. Whitlock's involvement with DERS, that shows no revenues. OCC Remand Ex. 2(A), BEH Attachment 22 (Supp. 487.).

84 [REDACTED]

[REDACTED] 85 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 86

The twenty-two option agreements that are attached to OCC Witness Hixon's testimony⁸⁷

[REDACTED]

[REDACTED] 88 [REDACTED]

[REDACTED] 89

[REDACTED]

[REDACTED] 90

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 91 [REDACTED]

[REDACTED]

85 [REDACTED]

86 [REDACTED]

87 [REDACTED]

88 [REDACTED]

89 [REDACTED]

90 [REDACTED]

91 [REDACTED]

[REDACTED] 92 [REDACTED]

[REDACTED]

[REDACTED] 93 [REDACTED]

[REDACTED]

[REDACTED] 94 [REDACTED]

[REDACTED] 95

[REDACTED]

[REDACTED] 96

The lineage of the option agreements and option payments was provided by James Ziolkowski.⁹⁷ Mr. Ziolkowski is a Rate Supervisor for Shared Services, and he testified in the *Post-MDP Service Case* regarding the Company’s CMO proposal.⁹⁸ His responsibilities include answering rate-related questions for both Company representatives and consumers.⁹⁹ His understanding of the background for electric restructuring and the history of the *Post-MDP Service Case* is extensive.¹⁰⁰ In May 2006, [REDACTED] [REDACTED] about the “concept behind the CRES

92 [REDACTED]
93 [REDACTED]
94 [REDACTED]
95 [REDACTED]
96 [REDACTED]

⁹⁷ The identity of the author of the main contents of BEH Attachment 21 was revealed in the PUCO’s public docket as part of new redactions submitted on January 23, 2008. The redacted version of OCC Witness Hixon’s testimony submitted to the Court are the same as those filed in the PUCO’s public docket by Duke Energy.

⁹⁸ Company Ex. 5 (Ziolkowski) (Supp. 732.); OCC Remand Ex. 8 at 7 (Ziolkowski) (Supp. 669.).

⁹⁹ Company Ex. 5 at 2 (Supp. 737.).

¹⁰⁰ [REDACTED]

payments” of approximately \$22 million annually.¹⁰¹ [REDACTED] to Mr.

Ziolkowski because “[he] and [REDACTED] are the only ones [he was] aware of who kn[e]w this stuff.”¹⁰² Mr. Ziolkowski’s response was as follows:¹⁰³

Here is the history behind the so-called “CRES” payments:

During late 2003, the Public Utilities Commission of Ohio asked all of the electric investor-owned utilities in the State of Ohio to prepare and submit Rate Stabilization Plans. At that time, we were still in our Market Development period following the implementation of electric Customer Choice in January 2001. During the Market Development Period, electric rates were frozen, and the original plan was for all of the utilities to offer market-based rates following the end of the Market Development period. The Market Development period was scheduled to end no later than 12/31/05.

By 2003, the PUCO and other groups became concerned that the competitive electric retail market in Ohio was not sufficiently robust to prevent wild price swings under pure competition and market pricing. The problems in California and the subsequent Enron meltdown also colored their feelings. As a result, they asked the utilities to offer Rate Stabilization Plans in lieu of pure market pricing.

CG&E (Duke Energy Ohio) filed its RSP (know 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. 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.

The original settlement agreement with the interveners called for Cinergy to form a “CRES” (Certified Retail Electric Supplier - the State of Ohio must 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. At the last minute (i.e. December 2004), Cinergy’s top management decided that the CRES settlement was too risky, and Cinergy essentially decided not to 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.

So as you can see, the “CRES” customers are actually full-requirement customers of Duke Energy Ohio, but they receive payment from the Company instead of receiving

¹⁰¹ OCC Remand Ex. 2(A), BEH Attachment 21 at Bates stamp 647 (Supp. 486.).

¹⁰² Id., Bates stamp 646 (Supp. 485.).

¹⁰³ Id. at Bates stamp 645-646 (Supp. 484-485.).

generation service from the Cinergy CRES (the Cinergy CRES does not have any retail customers, [REDACTED])

The 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 [REDACTED] at which point the ERRSP will terminate.

By the way, the “CRES” customers include some of the [REDACTED]
[REDACTED]
[REDACTED]

Hope this helps.

The message from the Company insider is detailed and clear: “CG&E negotiated special conditions with interveners” who “represented a roadblock,” and “top management decided that the CRES settlement was too risky.”¹⁰⁴ Mr. Ziolkowski explained that “risky” referred to serving “large industrials at a fixed price given the volatile market conditions.”¹⁰⁵ Therefore, “Cinergy top management” did not intend that a direct supply relationship exist between any of the affiliated companies and Customer Parties. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹⁰⁴ Id.

¹⁰⁵ OCC Remand Ex. 8 at 35 (Ziolkowski) (Supp. 682.).

e. The IMF surcharge.

In *Consumers' Counsel 2006*, the Court was concerned that “the infrastructure-maintenance fund [or “IMF”] may be some type of surcharge and not a cost component.” *Consumers' Counsel 2006* at ¶30. The OCC presented the testimony of Neil Talbot who testified that “the basis for the IMF charge seems to be similar, if not identical, to that of the RSC charge.”¹⁰⁶ Mr. Talbot stated that “[t]here appears to be over-charging for existing capacity to the extent that little g and the RSC and the IMF are all recovering the costs or risks of existing capacity”¹⁰⁷ and that “[t]here is no assurance that these charges are not duplicative.”¹⁰⁸

f. The Remand Order

The *Post-MDP Remand Case* was briefed in April 2007. The Remand Order was issued on October 24, 2007, and the Entry on Rehearing was issued on December 19, 2007. In the Remand Order, the PUCO concluded that “[b]ased on the expanded record of this case and our 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 and, therefore, that we should not have adopted the stipulation.”¹⁰⁹ The PUCO stated in the Remand Order that components of Duke Energy’s rate plan must be reviewed in light of “events that have transpired since the application was filed and the decisions made by this Commission in related proceedings.”¹¹⁰ The Remand Order states, however, that issues raised by the OCC stemming from the contents of side

¹⁰⁶ OCC Remand Ex. 1 at 38 (Supp. 536.).

¹⁰⁷ Id. at 42 (Supp. 540.).

¹⁰⁸ Id.

¹⁰⁹ Remand Order at 27 (Appx. 35.).

¹¹⁰ Id. at 34 (Appx. 42.).

deals were “ancillary” to the remand proceedings, and the PUCO *did not make determinations based upon the evidence the OCC presented*.¹¹¹

The Remand Order reinstated all of the Commission’s previous standard service offer determinations that were set before these cases were appealed.¹¹² In the Remand Order, the PUCO made minor adjustments to the bypassability of generation components. For residential customers, the entire rate stabilization charge (“RSC”) and annually adjusted component (“AAC”) are bypassable under the Remand Order¹¹³ while these charges were previously bypassable for the first twenty-five percent of residential customers.¹¹⁴ Residential customer switching at the end of 2006 was 2.32 percent, rendering the change meaningless.¹¹⁵

II. ARGUMENT

Proposition of Law No. 1:

The Commission’s Remand Order Is Unreasonable And Unlawful Because It Fails To Prohibit Pricing And Price Elements In Side Agreements That Violate Ohio Statutes And Rules.

- A. The Remand Order fails to consider all legally permitted uses of the discovery that was required by the Court in the decision to remand the case, with the result that there was never a time in the five-year history of the cases that the OCC had both the discovery contemplated by law and the ability to have evidence resulting from discovery considered for a decision by the PUCO.**

The Remand Order limits consideration of evidence presented by the OCC in a manner that does not abide by the Court’s directive in *Consumers’ Counsel 2006*. The PUCO states in the Remand Order:

¹¹¹ Id. at 20 (Appx. 28.).

¹¹² The generation component charges that resulted from the *Post-MDP Service Case* were listed in OCC-sponsored testimony. OCC Remand Ex. 2(A) at 53 (Supp. 56.).

¹¹³ Remand Order at 34-35 (Appx. 42-43.).

¹¹⁴ OCC Remand Ex. 2(A) at 53 (Supp. 56.).

It should be noted that the side agreement issue is relevant to these cases, according to the court's opinion, only with regard to the serious bargaining prong of the Commission's analysis of stipulations

* * *

It should also be noted that these proceedings are being considered only with regard to issues remanded to us for further consideration. Therefore, we are limiting our deliberation and order to those remanded issues. Ancillary issues raised by parties in the remand phase and not considered in this order on remand, such as potential corporate separation violations and affiliate interactions, will be denied.¹¹⁶

The limitation is artificial, being unreasonably imposed for purposes of issuing the Remand Order and is not based upon the decision of the Court in *Consumers' Counsel 2006*.

The OCC raised matters of [REDACTED] in its evidence, its pleadings, briefs, and its Application for Rehearing as matters vital to the "competitiveness" issue that makes up one of the Commission's three tests for the advisability of approving an electric distribution utility's rate plan.¹¹⁷ The Court has stated that it "recognize[s] the commission's duty and authority to enforce the competition-encouraging statutory scheme of S.B. 3" *Consumers' Counsel 2006* at ¶44. The matters raised by the OCC on remand were vital to the furtherance of that statutory scheme, and the Commission has no legal basis for limiting the use of evidence regarding side agreements to simply the matter of "serious bargaining" with respect to the 2004 Stipulation.

The Remand Order improperly limits the decision by the Court to holding that the Commission "erred in denying discovery under the first criterion [for the consideration of stipulations]."¹¹⁸ The Ohio Supreme Court determined that the PUCO improperly barred side agreements as part of a "settlement privilege" (*Consumers' Counsel 2006* at ¶89) and specifically

¹¹⁵ [REDACTED]

¹¹⁶ Remand Order at 20 (Appx. 28.).

¹¹⁷ See, e.g., *Post-MDP Service Case*, Case No. 03-93-EL-ATA, et al., Order at 15 (September 29, 2004) (Appx. 85).

mentioned *one* relevant use of such information at trial regarding the test of settlement agreements. *Id.* at ¶86. With that example in hand (and only one was required), the Court determined that the OCC’s right to discovery was improperly denied.

The OCC’s proposition of law in its first appeal focused on the improper denial of discovery that was “reasonably calculated to lead to the discovery of other admissible evidence.”¹¹⁹ The OCC argued, among other matters, that “the production of the side agreements could have identified individuals who the OCC would have wanted as witnesses and could have provided the OCC with insights into public policy concerns such as discrimination that would have been useful in the cross-examination of witnesses. The denial of the OCC’s Motion to Compel prevented the full development of the record in these cases.”¹²⁰ The OCC’s argument in its first appeal, in light of the proceedings on remand, was prophetic. The Court did not reject the OCC’s argument or limit the PUCO’s inquiries, but left further development of the argument to further deliberations “consistent with th[e] decision.” *Consumers’ Counsel 2006* at ¶94-95.

The Commission’s Second Entry on Rehearing in 2005 (from which the OCC ultimately took its first appeal) depended upon the support stated in the 2004 Stipulation. *Consumers’ Counsel 2006* at ¶46. However, *Consumers’ Counsel 2006* also supports the use of settlement agreements under Evid. R. 408 for “several purposes.” *Id.* at ¶92. Evid. R. 408 (Appx. 163.) states that settlement proposals and agreements are “not admissible to prove liability for or invalidity of the claim or its amount.” The OCC never suggested using settlement agreements for such a purpose in the *Post-MDP Service Case*. “This rule does not require exclusion when the

¹¹⁸ Remand Order at 19 (Appx. 27.).

¹¹⁹ Supreme Court Case No. 05-946, OCC Merit Brief at 32 (June 28, 2005) (i.e. briefing of *Consumers’ Counsel 2006*).

¹²⁰ *Id.* at 33-34.

evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.”¹²¹ The list is not exhaustive. The OCC used the agreements during the remand hearing to impeach the credibility of witnesses, demonstrate violations of the Ohio Administrative Code and Ohio statutes, and show that the anticompetitive effect of the agreements addressed the “competitiveness prong” of the Commission’s three-part test regarding “rate stabilization plans.” The PUCO, however, stated that these uses of the evidence addressed “[a]ncillary issues.”¹²²

The agreements between the Duke-affiliated companies and others provide vital information regarding the totality of the Duke Energy rate plan with respect to, among other things, [REDACTED]

[REDACTED] These competitive conditions were important to the initial case before the Commission. The Remand Order erred by limiting the applicability of the information discovered after the obstacle to discovery was removed. Having first refused to permit the discovery of side agreements in 2004, the PUCO slammed the door in 2007 on any consideration of the detailed contents of the side agreements that were discovered by the OCC. The Court should reverse the Remand Order, and state that Ohio law has been violated.

¹²¹ Evid. R. 408 (Appx. 163.).

¹²² Remand Order at 20 (Appx. 28.).

B. The Remand Order fails to prohibit Duke Energy's discriminatory pricing that demonstrates the standard service offer rates were too high for customers discriminated against.

The post-MDP generation pricing resulting from the cases below is discriminatory in favor of the Customer Parties who benefited from side deals. R.C. 4905.35 (Appx. 156.) states:

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) (Appx. 160.) states that rates must be nondiscriminatory:

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.

The latter statute forms the backbone of Duke Energy's applications to provide generation service, but the statute also requires the Company to provide its services without discriminatory treatment of its customers. The statute furthers Ohio policy that requires "nondiscriminatory, and reasonably priced retail electric service" and the furtherance of "effective competition in the provision of retail electric service by avoiding anticompetitive subsidies" pursuant to R.C. 4928.02(A) and (G) (Appx. 159.).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[Redacted] 123 [Redacted] 124 [Redacted]
[Redacted]
[Redacted]
[Redacted]

[Redacted]
[Redacted]
[Redacted]
[Redacted] 125 [Redacted]

[Redacted]
[Redacted] 126 [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

123 [Redacted]
124 [Redacted]
125 [Redacted]
126 [Redacted]
[Redacted]
[Redacted]

[REDACTED]¹²⁷ The Remand Order states that the IMF should be bypassable for any “nonresidential customer who agrees that it will *remain off Duke’s [generation] service* and [provides that] it will not avail itself of Duke’s POLR service. . . .”¹²⁸

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Commission has dealt with utility efforts to discriminate using corporate affiliates as a device. In 1997, Ameritech engaged in a program whereby customers were charged less if they subscribed to both Ameritech telephone service and cable television service offered by Ameritech New Media, an affiliate of Ameritech.¹²⁹ The Commission held that the program violated R.C. 4905.35 (Appx. 156.), the statute noted directly above, that prohibits discrimination against utility customers. Rejecting Ameritech’s arguments, the Commission stated:

Indeed, if Ameritech’s arguments were followed to their logical conclusion, nothing in the Ohio statutes would preclude a public utility from setting up corporate affiliates to underwrite the utility bills of selected customers, thereby offering below-tariff rates that would be insulated from regulatory oversight.¹³⁰

¹²⁷ [REDACTED]

¹²⁸ Remand Order at 38 (Appx. 46.).

¹²⁹ *In re OCTA Complaint Against Ameritech*, Case No. 97-654-TP-CSS, Order at 4 (July 17, 1997) (Supp. 802.).

¹³⁰ *Id.* at 5 (Supp. 803.).

[REDACTED]

136

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

137

[REDACTED]

[REDACTED]

[REDACTED] During 2004, when the

Commission held its last full hearing in this matter before the OCC's first appeal, the switching rates to CRES providers for commercial, industrial, and residential customers were 22.04, 19.87, and 4.91 percent.¹³⁸ It was the legislative plan that standard service offers would coincide with a functioning competitive market for electricity. The switching statistics, however, fell to 8.40, 0.36, and 2.32 percent for commercial, industrial, and residential customers by December 31, 2006.¹³⁹

The record provides evidence of the main source of the decline in switching levels. [REDACTED]

[REDACTED]

¹³⁶ [REDACTED]

¹³⁷ [REDACTED]

¹³⁸ Tr. Vol. II at 133 (CG&E Witness Stevie) (2004) (cited in OCC Remand Ex. 2(A) at 62, as corrected in OCC Remand Ex. 2(B) (Supp. 65)).

¹³⁹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 140 [REDACTED] 141 [REDACTED]

[REDACTED]

[REDACTED]

The Commission's Remand Order should have evaluated the expanded record on remand and directly addressed the subject of discriminatory treatment of customers based upon that expanded record. The Commission's failure to hold that the Company unlawfully discriminates in its pricing of electricity, in violation of Ohio statutes, is reversible legal error.

C. The Remand Order fails to prohibit Duke Energy's violation of corporate separation requirements.

The facts elicited by the OCC and presented in testimony in the *Post-MDP Remand Case* should have resulted in PUCO findings that its rules regarding interactions between corporate affiliates were violated. The PUCO, however, refused to consider the record evidence and make such determinations.

All electric utilities filed electric transition plans and committed to follow corporate separation rules. For instance, Ohio Adm. Code 4901:1-20-16(A) (Appx. 133.) was adopted "so

140 [REDACTED]

141 [REDACTED]

a competitive advantage is not gained solely because of corporate affiliation. This rule should create competitive equality, preventing unfair competitive advantage and prohibiting the abuse of market power.” [REDACTED]

[REDACTED]

[REDACTED]

Other provisions within the corporate separation rules are applicable under the facts revealed in these cases. In Ohio Adm. Code 4901:1-20-16(G)(1)(c) (Appx. 133.), the Commission required that “[e]lectric utilities and their affiliates that provide services to customers within the electric utility’s service territory shall function independently of each other....” Also, Ohio Adm. Code 4901:1-20-16(G)(4)(h) (Appx. 133.) required that “[e]mployees of the electric utility or persons representing the electric utility shall not indicate a preference for an affiliated supplier.” Based on the facts presented in these cases, it is clear that

[REDACTED]

[REDACTED]

[REDACTED]

In Ohio Adm. Code 4901:1-20-16(G)(4)(j) (Appx. 133.), the Commission required that “[s]hared representatives or shared employees of the electric utility and affiliated competitive supplier shall clearly disclose upon whose behalf their representations to the public are being made.” Corporate counselors are shared employees. The designation of trial counsel for Duke Energy -- i.e. representation as “Senior Counsel, The Cincinnati Gas & Electric Company”¹⁴² [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 143

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 144

The PUCO's Remand Order should have evaluated the expanded record on remand and based its decision regarding the abuse of corporate affiliations on that expanded record. The violations of corporate separation requirements contained in Ohio Adm. Code 4901:1-20-16 (Appx. 133.) prevented fair competition from developing in areas served by Duke Energy. The Court should correct this legal error.

D. The Remand Order fails to prohibit the [REDACTED]

[REDACTED]

[REDACTED] 145 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

142 [REDACTED]

143 [REDACTED]

144 [REDACTED]

145 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 147

[REDACTED]

The Commission's Remand Order should have evaluated the expanded record on remand and directly addressed the subject of Duke Energy's [REDACTED] based upon that expanded record. The Court should correct this legal error.

Proposition of Law No. 2

The Commission's Remand Order Is Unreasonable And Unlawful Because The Commission Failed, As A Quasi-Judicial Decision-Maker, To "Permit A Full Hearing Upon All Subjects Pertinent To The Issues(s), And To Base [Its] Conclusion Upon Competent Evidence" In Violation Of R.C. 4903.09 And Case Law. *City Of Bucyrus V. State Dept. Of Health*, 120 Ohio St. 426, 430.

A. The Remand Order fails to eliminate capacity charges that are simply surcharges that the Company requested for customers to pay, without any evidentiary basis for why consumers should pay them.

1. The IMF is, as the Court suspected, a surcharge.

In *Consumers' Counsel 2006*, the Court was concerned that "the infrastructure-maintenance fund may be some type of surcharge and not a cost component." *Consumers' Counsel 2006* at ¶30. The Court was correct. The IMF charge was unsupported by the record at the conclusion of the *Post-MDP Service Case*, and it continues to be unsupported by the record -- in violation of R.C. 4903.09 (Appx. 154.) and case law that requires a decision upon competent

146 [REDACTED]

147 [REDACTED]

evidence¹⁴⁸ -- as the result of the Remand Order. In assessing Duke Energy's standard service offer pricing components, the prize for vagueness, ambiguity, and duplication of charges surely must go to the IMF charge that consumers pay despite there being no basis or support from the testimony regarding the Stipulation Plan or any other testimony.¹⁴⁹ The plan proposed by Duke Energy in its Application for Rehearing provides for duplicative capacity charges, and therefore does not provide for "reasonably priced" generation service for the Company's customers as required by R.C. 4928.02(A) (Appx. 159.).

The Court determined that the Commission violated R.C. 4903.09 (Appx. 154.) when it approved certain charges in the *Post-MDP Service Case* "without record evidence and without setting forth any basis for the decision."¹⁵⁰ The Court was particularly concerned regarding the explanation for the capacity charges as the result of the *Post-MDP Service Case*, specifically naming the IMF.¹⁵¹ The Remand Order purports to return to, and judge for purposes of setting standard service generation offers, the Company's "RSP application, as filed on January 26, 2004, and subsequently modified by Duke prior to the initial hearing in these proceedings."¹⁵² The IMF was first proposed in the Company's Application for Rehearing filed after the hearing (and after the November 2004 Order), however, and reappears on pages 35-38 of the Remand Order without an explanation based upon the modified application filed by the Company. The Remand Order is result-driven, intended to reestablish the PUCO decision in the *Post-MDP*

¹⁴⁸ R.C. 4903.09 requires that the Commission "shall file . . . finding of fact and written opinions setting forth the reasons prompting the decision arrived at, based upon said findings of fact." (Appx. 154.). See also, *City of Bucyrus v. State Dept. of Health*, 120 Ohio St. 426, 430.

¹⁴⁹ OCC Remand Ex. 1 at 48 (Supp. 546.).

¹⁵⁰ *Consumers' Counsel 2006* at ¶27.

¹⁵¹ *Id.* at ¶30.

¹⁵² Remand Order at 28 (Appx. 36.).

Service Case (that the OCC appealed) for all components of the generation charges proposed by Duke Energy in its Application for Rehearing in the *Post-MDP Service Case*.

The Remand Order ignores the very history of these cases that it repeats in great detail. According to Duke Energy, the IMF's ancestry is clear -- it is one of two successor charges to the Reserve Margin portion in the original "annually adjusted component" charge in the Duke Energy's Stipulation Plan that was the subject of the Commission's hearing in May 2004.¹⁵³ This claim conflicts with the Company's response to the OCC's discovery (entered into the record) that the IMF and "little g" both compensate the Company for existing capacity.¹⁵⁴ The ancestry claimed by Duke Energy for the IMF is incorrect: the sole successor to the charge for the Reserve Margin under the Stipulation Plan is the SRT (i.e. the System Reliability Tracker). The Commission appears to agree, concluding from the history of the "carve[] out"¹⁵⁵ from the originally proposed reserve margin that "the collection of costs of maintaining a reserve margin is appropriate for collection through a [non-bypassable SRT] POLR rider." The result is that customers should not be paying an additional, non-bypassable IMF component to the POLR charge. The PUCO result in the Remand Order is unsupported.

The duplication of capacity charges that customers must pay is exhibited by qualitative responses to the OCC's inquiries regarding the support for capacity-related charges in the Company's standard service offer rates. The Company stated that "[l]ittle g and the IMF [i.e. the Infrastructure Maintenance Fund] represent compensation for the Company's *existing*

¹⁵³ Company Remand Ex. 3 at 26 ("The IMF was previously embedded in the reserve margin component of the Stipulated AAC price of \$52,898,560.) (Supp. 730.).

¹⁵⁴ OCC Remand Ex. 1, NHT Attachment 6 (quoted and analyzed in OCC Remand Ex. 1 at 42) (Supp. 589.).

¹⁵⁵ Remand Order at 32 (Appx. 40.).

capacity.”¹⁵⁶ The Company also states that “[t]he RSC is the Company charge for providing a stable market price over a prolonged period of time.”¹⁵⁷ OCC Witness Talbot concluded that “the basis for the IMF charge seems to be similar, if not identical, to that of the RSC charge.”¹⁵⁸ Mr. Talbot stated that “[t]here appears to be over-charging for existing capacity to the extent that little g and the RSC and the IMF are all recovering the costs or risks of existing capacity”¹⁵⁹ and that “[t]here is no assurance that these charges are not duplicative.”¹⁶⁰

2. Neither risk, opportunity cost, nor reliability arguments support the IMF charge.

The evidence demonstrates that the IMF comes from thin air -- i.e., a new surcharge was inserted as suspected by the Court -- that is explained by Duke Energy as the added amount that the Company is “willing to accept.”¹⁶¹ The Company’s justification for the IMF charge was also stated as follows: “[I]t is compensation for its opportunity cost associated with committing its assets at first call to MBSSO load.”¹⁶² As OCC Witness Talbot explained, Duke Energy’s arguments in support for such a charge were couched in terms of three concepts -- risk, reliability and opportunity cost -- that the Company misapplied.¹⁶³

¹⁵⁶ Id., NHT Attachment 6 (quoted and analyzed in OCC Remand Ex. 1 at 42) (emphasis added) (Supp. 589.).

¹⁵⁷ Id., NHT Attachment 12 (quoted and analyzed in OCC Remand Ex. 1 at 53) (Supp. 602.).

¹⁵⁸ OCC Remand Ex. 1 at 38 (Supp. 536.).

¹⁵⁹ Id. at 42 (Supp. 540.).

¹⁶⁰ Id.

¹⁶¹ Company Remand Ex. 3 at 25 (Supp. 729.).

¹⁶² Duke Energy’s response to OCC-INT-04-RI67, made part of the presentation by OCC Witness Talbot. OCC Remand Ex. 1, Attachment NHT 5 (Supp. 586.).

¹⁶³ OCC Remand Ex. 1 at 37-42 (Supp. 535-540.).

Regarding “risk,” the basis cited in the Remand Order for the Commission’s approval of the IMF charge,¹⁶⁴ the Company’s claim that the standard service offer adds to its level of risk is not supported by the record. As OCC Witness Talbot pointed out:

The Company cannot show what level of risk it is taking on. [I]t cannot even claim that it is taking on any net risk at all and on the face of it[, the] [sic] standard service offer reduces risk. And the Company has not justified its claims in terms of any quantitative risk analysis.”¹⁶⁵

More fundamentally, Mr. Talbot pointed out that the Company has completely misused the concept of risk. In financial parlance, risk results from having an open or uncovered position in the market, either as buyer or seller. Absent the standard service offer, the Company would be selling the electricity from its generating units into the competitive market, but with the standard service offer it has a relatively assured market for the output of its generating plants and therefore has a less exposed position -- i.e., one with *reduced* risk.¹⁶⁶

The second concept on which the Company based its claim for the IMF was opportunity cost. The evidentiary basis for the Company’s claim in this area is non-existent. The Company has not performed any opportunity cost analysis,¹⁶⁷ let alone submitted such an analysis to the Commission for its review and the review of intervening parties.

The third concept misapplied by the Company is “reliability.” The SRT has that specific function, providing for the acquisition of capacity corresponding to a reserve margin over expected peak demand.¹⁶⁸ The definition of the risks or costs for which the IMF is supposed to

¹⁶⁴ Remand Order at 37 (“pricing risk incurred by Duke”) (Appx. 45.).

¹⁶⁵ OCC Remand Ex. 1 at 39 (Supp. 537.).

¹⁶⁶ Id. at 38, 41, and 53 (Supp. 536, 539, and 551.).

¹⁶⁷ OCC Remand Ex. 1 at 39 and 42 (Supp. 537 and 540.), citing DE-Ohio’s response to OCC Interrogatory RI 140 (“The Company has not performed such a calculation,” OCC Remand Ex. 1, NHT Attachment 4 (Supp. 583.)).

¹⁶⁸ See, e.g., OCC Remand Ex. 1 at 41 (Supp. 539.).

compensate the Company suffers from a serious problem: the IMF duplicates costs and compensates for risks that are covered by other components of Duke Energy's standard service offer. These components are those that relate to capacity, the SRT, the RSC, and also "little g." As noted above, the SRT is, by definition, a tracker that compensates the Company for acquiring a 15 percent reserve margin over and above predicted peak demand for the year ahead. The SRT is the sole successor to the Reserve Margin component under the Stipulation Plan and the IMF is simply an additional surcharge.

The proposed charges for the IMF were not supported by record evidence. Analysis of the IMF -- on a stand-alone basis and even more so in combination with the RSC, the SRT, and "little g" -- reveals that the PUCO's decision to allow Duke Energy to charge customers the IMF has no reasonable basis or rationale. The IMF is, as conjectured by this Court, "some type of surcharge and not a cost component." *Consumers' Counsel 2006* at ¶30. The Court should order the removal of the IMF from the Company's standard service offer charges so that customers do not pay an IMF charge.

B. The Remand Order fails to consider the needs of the competitive market for the bypassability of all standard service offer components based upon the record.

An important feature of Duke Energy's standard service offer, as reestablished in the Remand Order, is that two of its six components are payable to Duke Energy by residential customers even if they switch to a CRES provider (i.e. "nonbypassable"). In spite of the fact that all the standard service offer charges are generation-related, the IMF and the SRT remain non-bypassable for residential customers (i.e. customers must pay Duke Energy even if the customers switch to another provider of generation service). The analysis of risk, reliability and opportunity cost, restated in part above, shows that the record is devoid of evidence to support non-

bypassable charges that are damaging to the emergence of competition. The Court recently stated that “the commission should carefully consider what [non-bypassable] costs it is attributing as costs incurred as part of an electric-distribution utility’s POLR obligations.” *Ohio Consumers’ Counsel v. Public Util. Comm.*, 2007-Ohio-4276 at ¶26. Simply labeling generation components “POLR” does not substitute for record evidence.

OCC Witness Talbot pointed out that even an apparently small non-bypassable charge can threaten a large percentage of competitive retailers’ profit margins -- margins that can be very small.¹⁶⁹ Mr. Talbot explained that non-bypassable charges impose a barrier to competitive supply of generation service.¹⁷⁰ The entire removal of the IMF charge (which is, again, totally non-bypassable for residential customers as the result of the Remand Order) would remove a barrier to competitive entry into the electricity marketplace.

The Remand Order states that components of Duke Energy’s rate plan must be reviewed in the light of more than the contents of the original application and the original testimony, but also in light of “events that have transpired since the application was filed and the decisions made by this Commission in related proceedings.”¹⁷¹ During 2004, when the Commission held its initial hearing in the cases below, the switching rates to competitive retail electric service (“CRES”) providers for commercial, industrial, and residential customers were 22.04, 19.87, and 4.91 percent.¹⁷² The switching statistics fell to 8.40, 0.36, and 2.32 percent for commercial, industrial, and residential customers by December 31, 2006.¹⁷³ The decline is attributable to

¹⁶⁹ Tr. Vol. II at 84-85 (2007) (Supp. 787-788.).

¹⁷⁰ OCC Remand Ex. 1 at 62-63 (Supp. 560-561.).

¹⁷¹ Remand Order at 34 (Appx. 42.).

¹⁷² Tr. Vol. II at 133 (Company Witness Stevie) (2004) (cited in OCC Remand Ex. 2(A) at 62, as corrected in OCC Remand Ex. 2(B) (Supp. 65.)).

¹⁷³ OCC Remand Ex. 2(A) at 63 (Supp. 66.).

Duke Energy's anti-competitive activities associated with the removal of opposition to its rate plan proposals, its violation of corporate separation requirements, and the existence of non-bypassable generation charges.

The history of the competitive market, as revealed by the record evidence in this case, is that the marketplace desperately needs encouragement by allowing customers to purchase generation service from a competitive provider without having to make redundant payments to the electric utility. The PUCO only appears to address this history when it "encourage[es] the development of the competitive market for generation" by making "the environmental compliance, tax, and homeland security aspect of Duke[Energy]'s proposed POLR charge . . . avoidable."¹⁷⁴ These "aspects" of the generation charge constitute the AAC component of Duke Energy's generation rates, a component that was already avoidable in the Commission's original disposition of the cases below. The PUCO's "encourage[ement]" is meaningless.

The Remand Order fails to heed the Court's concerns regarding non-bypassable "POLR" charges, fails to apply the Commission's own test for rate plans that requires promotion of the competitive market, and fails to follow the Remand Order's own directive that events that have transpire should be addressed on remand. All generation charges should be bypassable by customers.

Proposition of Law No. 3:

The Commission's Remand Order Is Unreasonable And Unlawful Because It Withholds Information From Public Scrutiny By Designating The Contents Of Documents "Trade Secret" Without Legal Justification.

The PUCO's Remand Order incorrectly reached the conclusion that a substantial portion of the record in the *Post-MDP Remand Case* is "trade secret information [maintained as]

confidential.”¹⁷⁵ R.C. 4901.12 (Appx. 153.) requires that “all proceedings of the public utilities commission and all documents and records in its possession are public records,” except as provided in the exceptions under R.C. 149.43 (Ohio’s public records law, Appx. 144.). R.C. 4905.07 (Appx. 155.) states that, “[e]xcept as provided in section 149.43 of the Revised Code . . . , all facts and information in the possession of the public utilities commission shall be public” The Commission has noted that R.C. 4901.12 and R.C. 4905.07 “provide a strong presumption in favor of disclosure, which the party claiming protective status must overcome.”¹⁷⁶

Ohio Adm. Code 4901-1-24(D) (Appx. 140.) requires of the PUCO that “[a]ny order issued under this paragraph shall *minimize* the amount of information protected from public disclosure.”¹⁷⁷ The Commission stated in a 2004 case:

The Commission has emphasized, in *In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, Entry issued November 23, 2003, that:

[a]ll proceedings at the Commission and all documents and records in its possession are public records, except as provided in Ohio’s public records law (Section 149.43, Revised Code) and as consistent with the purposes of Title 49 of the Revised Code. Ohio public records law is intended to be liberally construed to ‘ensure that governmental records be open and made available to the public . . . subject to only a few very limited exceptions.’ *State ex. rel. Williams v. Cleveland* (1992), 64 Ohio St. 3d 544, 549, [other citations omitted].¹⁷⁸

¹⁷⁴ Remand Order at 35 (Appx. 43.).

¹⁷⁵ *Id.* at 17 (Appx. 25.).

¹⁷⁶ *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, *Opinion and Order* at 5 (October 18, 1990) (Supp. 811.).

¹⁷⁷ Emphasis added.

¹⁷⁸ *In re MxEnergy, Inc.*, Case No. 02-1773-GA-CRS et al., Entry at 1-2, ¶(3) (September 7, 2004) (notations in original) (Supp. 794-795.).

Faced with demands for “wholesale removal of the document from public scrutiny,”¹⁷⁹ the Commission reviewed several documents in the above-cited telephone case and determined in each circumstance how documents could be redacted “without rendering the remaining document incomprehensible or of little meaning. . . .”¹⁸⁰

The PUCO violated Ohio law as well as Commission is own precedent when it shielded significant provisions in side agreements from entering the public domain. Agreements purged of “customer names, . . . contract termination dates or other termination provisions, financial consideration in each contract, price of generation referenced in each contract, volume of generation covered by each contract, and terms under which any options may be exercisable” were rendered incomprehensible in the Remand Order.¹⁸¹

The Ohio Supreme Court has addressed the test for this claimed protection from disclosure under R.C. 149.43 (Appx. 144.), evaluated under the “state or federal law” exemption to the public records law:

We have also adopted the following factors in analyzing a trade secret claim:

(1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, *i.e.*, by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information.¹⁸²

¹⁷⁹ *Id.* at 3.

¹⁸⁰ *Id.*

¹⁸¹ Remand Order at 15 (Appx. 23.). The OCC does not object to the redaction of “account numbers, customer social security [and] employer identification numbers.” *Id.* The OCC also does not object to the redaction of the [REDACTED]

These agreements are not attached to OCC Remand Ex. 2(A) (OCC Witness Hixon testimony).

¹⁸² *Besser v. Ohio State University* (2000), 89 Ohio St. 3d 396, 399-400.

Such an analysis is absent from the PUCO's Remand Order, which repeats the conclusory statements made by parties to the agreements who do not want their activities revealed.

The Remand Order relies upon the cumulative arguments of various parties who submitted motions to protect information from inclusion in the public domain without analyzing specific documents regarding the appropriateness of withholding information contained in each from the public. For instance, the Remand Order restates DERS' argument that "the information that DERS provided falls into the category of sensitive information in a competitive environment."¹⁸³ [REDACTED]

[REDACTED]¹⁸⁴ [REDACTED]

[REDACTED]¹⁸⁵ [REDACTED]

[REDACTED]¹⁸⁶ The conclusion that the information involves sensitive competitive information is fundamentally at odds with the Commission's "inevitable conclusion that there is a sufficient basis to question whether the parties engaged in serious bargaining" regarding the 2004 Stipulation.¹⁸⁷ There would be no basis for such a conclusion if the Commission found that the agreements were simply legitimate competitive arrangements. They are not: the side agreements are settlement agreements and their progeny, and are not competitively sensitive CRES agreements.

Public revelation of the side agreements would not reveal "marketing strategies" of any CRES provider that "would . . . be helpful to competitors."¹⁸⁸ [REDACTED]

¹⁸³ Remand Order at 13 (Appx. 21.).

¹⁸⁴ [REDACTED]

¹⁸⁵ [REDACTED]

¹⁸⁶ Id. at 38 (Supp. 700.).

¹⁸⁷ Remand Order at 27 (Appx. 35.).

¹⁸⁸ Remand Order at 14 (Appx. 22.).

[REDACTED]

[REDACTED] 189 [REDACTED]

[REDACTED]

[REDACTED] 190 [REDACTED]

[REDACTED]

[REDACTED] The story of the strategy of removing opposition is summarized in an e-mail authored by Company Witness Ziolkowski, which states in part: "To eliminate this roadblock [REDACTED]

[REDACTED] and prevent a formal hearing, *CG&E negotiated* special conditions with the intervenors and ultimately reached agreements with them."¹⁹¹ DERS has no employees,¹⁹² no revenue, and no customers.¹⁹³ DERS lacks any indicia of a going concern.¹⁹⁴ The business of the Duke-affiliated companies was conducted in a manner that eliminates any notion that their operations were separate and independent from one another. The only "strategy" that would be revealed by

189 [REDACTED]
190 [REDACTED]

¹⁹¹ OCC Remand Ex. 2(A), BEH Attachment 21 at Bates stamp 645-646 (emphasis added) (Supp. 484-485.).

¹⁹² OMG Remand Ex. 4 at 30 (Whitlock) (Supp. 723.).

¹⁹³ Id. at 61 (Supp. 727.). The information filed by DERS with the Commission in Case No. 04-1323-EL-CRS provided financial statements for 2005, a period before Mr. Whitlock's involvement with DERS, that shows no revenues. OCC Remand Ex. 2(A), BEH Attachment 22 (Supp. 487.).

¹⁹⁴ See, e.g., OMG Remand Ex. 4 at 29-33, 48-55 (Supp. 8-9, 13-15.). The president of DERS, Charles Whitlock, stated that there is no person serving a customer contact function for DERS (id. at 50). DERS does not have enabling (i.e. trading agreements). Id. at 54-55 (Supp. 15.). The position of CEO appears to be vacant. Id. at 29 (Supp. 8.). In response to a question about employees of the Duke-affiliated companies, Mr. Whitlock stated: "I've got to be candid with you, man, I barely know who I work for." Id. at 49 (Supp. 13.). Financial statements for DERS taken from the DERS filings at the PUCO list a few inter-corporate items and an expense line for "Option Premium Expense" related to the agreements analyzed by OCC Witness Hixon. OCC Remand Ex. 2(A), Attachment 22 (Supp. 487.).

placing the unredacted side agreements into the public files is the strategy the Duke-affiliated companies used to settle the *Post-MDP Service Case* with a few large customers.

Rate-setting in a regulatory environment is inherently a public process that produces rates that are published and accessible to others. This is the underlying environment for R.C. 4901.12 and 4905.07, parts of which are recited above. The “economic value” to the side agreements at issue, however, stems from their discriminatory nature that is both against public policy and Ohio law. The *public* is not served, for instance, when [REDACTED]

[REDACTED]

[REDACTED] Unlawful activity should be eliminated by the Commission, not protected by concealing the unlawfulness behind claims of “economic value” derived from the prohibited activity.

For these reasons, the Remand Order incorrectly shielded from public view large amounts of information. The Court should reverse the Commission to permit public scrutiny of the information.

III. CONCLUSION

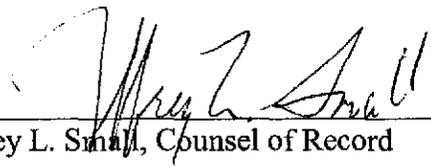
Two topics of fundamental importance to residential customers were covered by the remand from the Court: whether evidence of side financial arrangements should affect the outcome of these cases and whether there is evidence to support the Commission’s decision regarding increased rates that were proposed by Duke Energy in its Application for Rehearing filed in 2004. The Remand Order does not lawfully resolve either of these matters. The statutory imperatives to provide benefits to Ohio consumers by means of nondiscriminatory and reasonably priced electric service have not been met as the result of the PUCO’s handling of these two fundamental topics.

The competition that was intended under electric restructuring legislation has been seriously undermined by the side agreements. Yet, the Commission did not consider the OCC's arguments regarding the anti-competitive, discriminatory, and unlawful activities of Duke Energy. All customers should be provided reasonable rates, not just large customers who intervene in PUCO proceedings or who participate through the activities of membership organizations for small groups of large customers. Furthermore, the IMF is, as conjectured by this Court, simply a surcharge that is not supported by the record.

As the result of the foregoing, this Court should reverse, vacate, or modify the PUCO's decision and remand this case to the PUCO with instructions to correct the Commission's errors.

Respectfully submitted,

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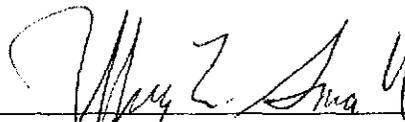
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief by the Office of the Ohio Consumers' Counsel (Public Version) was served upon the below-listed counsel by regular U.S. Mail, prepaid, this 19th day of May 2008.



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