IN THE SUPREME COURT OF OHIO

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

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 2 OF 4)

FILED
MAY 19 2008
CLERK OF COURT
SUPREME COURT OF OHIO

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IN THE SUPREME COURT OF OHIO

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

NOTICE OF APPEAL OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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FILED
FEB 19 2008
CLERK OF COURT
SUPREME COURT OF OHIO

Appellant, the Office of the Ohio Consumers' Counsel, pursuant to R.C. 4903.11, R.C. 4903.13, and S. Ct. Prac. R. II (3)(B), hereby gives notice to the Supreme Court of Ohio and to the Public Utilities Commission of Ohio ("Appellee" or "PUCO") of this appeal to the Supreme Court of Ohio from Appellee's Order on Remand entered in its Journal on October 24, 2007 and Appellee's Entry on Rehearing entered in its Journal on December 19, 2007 in consolidated cases (each docket designation noted in the caption above) before the PUCO. The Order on Remand was issued in response to this Court's decision in the first appeal of the consolidated cases. *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789.

Pursuant to R.C. Chapter 4911, Appellant is the statutory representative of the residential customers of the Duke Energy Ohio, Inc. ("Duke Energy" or the "Company," formerly known as the Cincinnati Gas and Electric Company). Appellant was a party of record in the cases before the PUCO.

On November 22, 2007, Appellant timely filed an Application for Rehearing from the October 24, 2007 Order on Remand pursuant to R.C. 4903.10. Appellant's Application for Rehearing was denied with respect to the issues raised in this appeal by an Entry on Rehearing entered in Appellee's Journal on December 19, 2007. The Order on Remand re-adopted a Duke Energy proposal that was the subject of the OCC's first appeal of the consolidated cases.

Appellant files this Notice of Appeal, complaining and alleging that Appellee's October 24, 2007 Order on Remand and December 19, 2007 Entry on Rehearing result in a final order that is unlawful and unreasonable, and that Appellee erred as a matter of law, in the following respects that were raised in Appellant's Application for Rehearing:

A. 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* (1929), 120 Ohio St. 426, 430.

   1. 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.

   2. 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.

B. 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, thereby permitting the destruction of the competitive market for generation service that could provide benefits for customers.

   1. 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.

   2. 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, and the discrimination has caused serious damage to the competitive market for generation service.

   3. The Remand Order fails to prohibit Duke Energy's violation of corporate separation requirements, which has caused serious damage to the competitive market for generation service that was intended to provide benefits to customers.

   4. The Remand Order fails to prohibit violations of Ohio law revealed in the expanded record on remand, including the violation of R.C. 4928.02(H) and R.C. 4928.37, which has caused serious damage to the competitive market for generation service.

C. 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.

WHEREFORE, Appellant respectfully submits that the Appellee's October 24, 2007 Order on Remand and December 19, 2007 Entry on Rehearing are unreasonable and unlawful and should be reversed, vacated, or modified. These cases should be remanded to Appellee with instructions to correct the errors complained of herein.

Respectfully submitted,

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OHIO CONSUMERS' COUNSEL

By: ______________________

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal of the Office of the Ohio Consumers' Counsel was served upon the Chairman of the Public Utilities Commission of Ohio by leaving a copy at the office of the Chairman in Columbus and upon all parties of record by electronic service and regular U.S. Mail this 19th day of February, 2008.

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CERTIFICATE OF FILING

I hereby certify that a Notice of Appeal of the Office of the Ohio Consumers' Counsel was filed with the docketing division of the Public Utilities Commission in accordance with sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code.

Jeffrey L. Small
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Office of the Ohio Consumers' Counsel

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the 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

ORDER ON REMAND

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<u>ORDER ON REMAND</u>

The Commission, coming now to consider the evidence presented in these proceedings, pursuant to the Supreme Court of Ohio's remand in *Ohio Consumers' Counsel v. Public Utilities Commission* (2006), 111 Ohio St.3d 300, the transcripts of the hearing, and briefs of the parties, hereby issues its order on remand.

APPEARANCES:

The following parties made appearances in the remand phase of these proceedings:

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Kravitz, Brown & Dortch, by Michael P. Dortch, 145 East Rich Street, Columbus, Ohio 43215, on behalf of Cinergy Corp. and Duke Energy Retail Sales, Inc.

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OPINION:

I. HISTORY OF THE PROCEEDINGS

On June 22, 1999, the Ohio General Assembly passed legislation[1] requiring the restructuring of the electric utility industry and providing for retail competition with regard to the generation component of electric service (SB 3). Pursuant to SB 3, on August 31, 2000, the Commission approved a transition plan for Duke Energy Ohio, Inc., (Duke or company).[2] [3] In that opinion, the Commission, among other things, allowed Duke a market development period (MDP) ending no earlier than December 31, 2005, for residential customers and, with regard to each other customer class, ending when 20 percent of the load of each such class switched the purchase of its generation supply to a certified supplier. The transition plan opinion also granted Duke accounting authority to defer and recover a regulatory transition charge (RTC) that would continue through 2008 for residential customers and through 2010 for nonresidential customers.

On January 10, 2003, Duke filed an application in *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Case No. 03-93-EL-ATA, (03-93) for authority to modify its nonresidential generation rates to provide for a competitive market option (CMO), including both a market-based standard service offer and an alternative competitive bidding process, for rates subsequent to the MDP.

On October 8, 2003, Duke filed three additional, related cases. In *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 (03-2079), Duke requested authority to modify

1 Amended Substitute Senate Bill No. 3 of the 123rd General Assembly.

2 *In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan, Approval of Tariff Changes and New Tariffs, Authority to Modify Current Accounting Procedures, and Approval to Transfer its Generating Assets to an Exempt Wholesale Generator*, Case No. 99-1658-EL-ETP *et al.*

3 Duke was, at that time, known as the Cincinnati Gas & Electric Company. It will be referred to as Duke, regardless of its legal name at any given time. Case names, however, will not be altered to reflect the changed name.

its current accounting procedures to allow it to defer incremental costs related to its participation in the Midwest Independent Transmission System Operator (MISO). In *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 Nos. 03-2080-EL-ATA (03-2080) and Case No. 03-2081-EL-AAM (03-2081), Duke requested authority (a) to modify its current accounting procedures to allow it to defer incremental costs related to its net capital investment in electric transmission and distribution facilities, where that investment was made between January 1, 2001, and the date when such investment is reflected in the company's base rates, together with a carrying charge, and (b) to establish a capital investment rider to recover those deferred transmission and distribution facilities capital investments after the end of the MDP.

On December 9, 2003, the Commission issued an entry consolidating 03-93, 03-2079, 03-2080, and 03-2081 and requesting that Duke file a rate stabilization plan (RSP) that would stabilize prices following the termination of the MDP, while allowing additional time for the competitive retail electric services (CRES) market to grow. Duke filed a proposed RSP on January 26, 2004. On March 9, 2004, most of the parties to these proceedings filed objections to Duke's proposed RSP. On April 22, 2004, a public hearing on Duke's applications was held in Cincinnati. An evidentiary hearing commenced on May 17, 2004, but was adjourned in order to allow the parties to engage in settlement discussions. On May 19, 2004, a stipulation and recommendation (stipulation) was filed by Duke, staff of the Commission, FirstEnergy Solutions Corp., Dominion Retail, Inc. (Dominion), Industrial Energy Users-Ohio (IEU), Green Mountain Energy Company, Ohio Energy Group, Inc. (OEG), The Kroger Co. (Kroger), AK Steel Corporation (AK Steel), Cognis Corp. (Cognis), People Working Cooperatively (PWC), Communities United for Action (CUFA), and Ohio Hospital Association (OHA) (collectively, signatory parties). The stipulation was not signed by Ohio Consumers' Counsel (OCC), Ohio Partners for Affordable Energy (OPAE), The Ohio Manufacturers' Association (OMA), National Energy Marketers Association, PSEG Energy Resources & Trade LLC, or Constellation Power Source, Inc. It was also not signed by Constellation NewEnergy, Inc. (Constellation); MidAmerican Energy Company; Strategic Energy, LLC; or Integrys Energy Services, Inc. (formerly known as WPS Energy Services, Inc.). These four entities are collectively referred to as Ohio Marketers Group (OMG).

On May 20, 2004, the evidentiary hearing resumed. At the hearing, OCC made an oral motion to compel discovery from Duke regarding alleged side agreements between Duke and other parties to the stipulation. The attorney examiners denied OCC's motion to compel. Duke, staff, and other parties presented testimony and evidence in support of the stipulation and Duke's original proposal and others presented testimony and evidence in opposition to the stipulation and the proposal. On September 29, 2004, the Commission issued its opinion and order approving the stipulation with certain modifications. The stipulation provided for the establishment of an RSP for Duke that would govern the rates and riders to be charged by Duke from January 1, 2005, through December 31, 2008 (with certain aspects of those rates also extending through the end of 2010). The order approved changes in certain cost components, increased the avoidability of certain charges by shopping customers, and directed full corporate separation of the generation component by Duke if it failed to implement the stipulation as modified. The Commission also affirmed the attorney examiners' denial of OCC's discovery motion relating to side agreements.

Applications for rehearing were filed by Duke, OCC, OMG, and CPS. In its application for rehearing, Duke also proposed various modifications to the stipulation, which modifications would, when taken together, effectuate an alternative to the stipulated version of the RSP. On November 23, 2004, the Commission issued an entry on rehearing in which it found that Duke's proposed modifications to the stipulation were meritorious and, making certain further revisions, granted rehearing in part. The rehearing applications by OCC and CPS were denied. OMG's application for rehearing was granted in part and denied in part. OCC, MidAmerican, and Dominion filed applications for a second rehearing. These applications were denied on January 19, 2005, except for a narrow issue raised by MidAmerican. The Commission issued a third rehearing entry on April 13, 2005, that further refined Duke's RSP and certain of the RSP riders, based on MidAmerica's application for rehearing.

On March 18 and May 23, 2005, OCC filed notices of appeal to the Supreme Court of Ohio, raising seven claimed errors. Following briefing and oral argument on the consolidated appeals, the supreme court issued its opinion on November 22, 2006. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789. In that opinion, the Court upheld the Commission's actions on issues relating to procedural requirements, due process, support for the finding that the standard service offer was market-based, harm or prejudice that might have been caused by changes on rehearing to the price-to-compare component, reasonableness of Duke's alternative to the competitive bidding process, non-discriminatory treatment of customers, non-bypassability of certain charges, corporate separation, and denial of certain discovery based on irrelevance under the second and third prongs of the stipulation-reasonableness test. However, the Court remanded these proceedings to the Commission with regard to two portions of the Commission decision and also held that the side agreements are not privileged.

Pursuant to the court's direction on remand, by entry of November 29, 2006, the attorney examiners directed Duke to disclose to OCC the information that OCC had requested with regard to side agreements. In the November 29, 2006, entry, the examiners also found that a hearing should be held to obtain the record evidence required by the court, in order to explain thoroughly our conclusion that the modifications on rehearing are reasonable and to identify the evidence we considered to support our findings. The examiners scheduled a prehearing conference for December 14, 2006, to discuss the procedure to be established.

On December 7, 2006, Duke responded to the disclosure direction, stating that OCC had requested "copies of all agreements between [Duke] and a party to these consolidated cases (and all agreements between [Duke] and an entity that was at any time a party to these consolidated cases) that were entered into on or after January 26, 2004." Duke notified the Commission that only one such agreement existed and that is was between Duke and the city of Cincinnati. It provided a copy of that agreement to OCC and all other parties to the proceedings.

On December 13, 2006, Duke filed a motion for clarification of the examiners' entry of November 29, 2006. Duke expressed its belief that the remand "presupposes that there already is evidence of record to support the Commission's decision." Thus, it asked that the examiners "clarify" that the proposed hearing would be limited to briefs and/or oral argument, citing record evidence. On December 20, 2006, OCC filed a memorandum contra this motion for clarification. OCC opined that the motion should be denied on procedural grounds, as Duke failed to seek an interlocutory appeal of the examiners' entry. OCC also disagreed with Duke on substantive grounds, arguing in favor of a full hearing, following a period for discovery and noting that, if no hearing were held, the court's order that side agreements be disclosed would have no practical purpose. The Commission responded to this motion on January 3, 2007, refusing to "clarify" the examiners' ruling but confirming that the hearing would include the presentation of testimony and the introduction of evidence. On February 1, 2007, OCC filed an application for rehearing, asserting that the Commission's entry prematurely dealt with issues relating to the admissibility of evidence. On February 12, 2007, Duke, Duke Energy Retail Sales, LLC, (DERS), and Cinergy Corp. (Cinergy) filed memoranda contra this application for rehearing.[4] The application for rehearing was denied by operation of law.

Meanwhile, on December 13, 2006, OCC filed a motion for a *subpoena duces tecum*, asking, in part, that DERS provide copies of any agreements between DERS and customers of Duke, between affiliates of DERS and customers of Duke, and related correspondence and other documents. On December 18, 2006, OCC moved for a second, similar *subpoena duces tecum*. On December 20, 2006, DERS objected and moved to quash the two *subpoenae* on various grounds, including the ground that they were unduly burdensome. On that same day, Duke filed a motion in support of DERS's motion to quash, as well as a motion for a protective order, asking that further discovery in these proceedings not be permitted. On December 21, 2006, IEU filed a motion in support of the motions by DERS and Duke. On December 28, 2006, OCC filed a motion to strike DERS's motion to quash, together with a memorandum contra Duke's motion for a protective order, and a motion to strike IEU's memorandum. OCC asserted that DERS's motion should be stricken on the grounds that it

4 DERS and Cinergy are affiliates of Duke, with DERS being a CRES provider in Duke's certified territory.

was not a party to the proceedings. It opposed Duke's motion on the ground that the requested protective order would prevent OCC from developing its case on remand. OCC moved to strike IEU's memorandum, claiming that memoranda in support are not permitted by the Commission's procedural rules. With regard to OCC's motion to strike DERS's motion to quash, on January 2, 2007, DERS filed both a memorandum contra and a limited motion to intervene. With regard to OCC's memorandum contra Duke's motion for a protective order, Duke filed a reply on January 2, 2007. The examiners denied the motion to strike IEU's memorandum in support, denied Duke's motion for a protective order, denied OCC's motion to strike the motion to quash, and granted, in part, the motion to quash, restricting the *subpoenae* to requesting copies of agreements with customers of Duke that are current or past parties to these proceedings or affiliates or members of current or past parties.

At the prehearing on December 14, 2006, the remanded cases were consolidated with proceedings regarding various riders associated with Duke's RSP and various procedural matters were addressed. On February 1, 2007, the examiners issued an entry scheduling a hearing on the remand aspects of the consolidated cases to begin on March 19, 2007. The hearing on the riders was scheduled for a separate time. Only the remanded cases are being considered in this order on remand.

On February 2, 2007, Duke, DERS, and Cinergy filed motions *in limine*, seeking to exclude certain agreements and related documents from these proceedings. With those motions, Cinergy filed a limited motion to intervene and DERS renewed its limited motion to intervene. On February 7, 2007, staff of the Commission filed a memorandum in response to the *motions in limine*, asserting that the agreements in question are not relevant, on the grounds that no stipulation is currently before the Commission and *corporate separation claims should be raised in a separate proceeding*. OMG filed a memorandum in response on February 9, 2007. OMG asserted that ruling on relevance or admissibility would be premature at that time. OCC opposed the motions on several grounds, both procedural and substantive. It also opposed intervention by Cinergy and DERS. Duke, Cinergy, and DERS filed replies to OMG's responsive memorandum, on February 14, 2007. On February 16, 2007, Duke, Cinergy, and DERS filed replies to OCC's memorandum contra their motions *in limine*. On February 28, 2007, the examiners granted the motions for intervention for the limited purpose of protecting confidential information and, in light of the supreme court's directives, denied the motions to exclude evidence of the side agreements.

Through the course of these remanded proceedings, numerous motions for protective orders, covering purported confidential materials, were filed. The subject of confidential treatment of discovered material arose in the prehearing held near the start of the remand phase. At that time, counsel for Duke mentioned the existence of confidentiality agreements with several of the parties. According to OCC's March 13, 2007, filing with the Commission, OCC, on February 23, 2007, notified Duke, DERS, Cinergy, Kroger, and OHA that they should either make public certain documents or prove to the Commission that such material deserved confidential treatment. On March 2, 2007, Duke, DERS, Cinergy, Kroger, and OHA filed motions for a protective order covering the disputed material. On that same day, IEU also filed a letter expressing its concern over OCC's proposed release. On March 5, 2007, the OEG similarly filed a letter opposing OCC's proposed disclosure of confidential materials. On March 9, 2007, OMG filed its response to this controversy, explaining that agreements between customers and their CRES providers must be kept confidential. On March 13, 2007, OCC responded with a memorandum contra all five motions. OHA filed a reply on March 14, 2007. On March 15, 2007, Duke, Cinergy, DERS, and IEU filed replies.

The hearing commenced on March 19, 2007, as scheduled. Before the start of testimony, the examiners ruled, with regard to the confidentiality dispute, that the motions for protective orders would be granted for a period of 18 months from March 19, 2007, on the condition that the granting of those protective orders may be modified by the Commission if it deems appropriate to do so in light of the actions that it takes. (Rem. Tr. I at 9.) Duke presented the testimony of Sandra Meyer, Judah Rose, and John Steffen. OCC presented the testimony of Neil Talbot and Beth Hixon. Staff of the Commission presented the testimony of Richard Cahaan.

Duke, OCC, OMG, OEG, OPAE, Cinergy, DERS, and staff filed merit briefs on April 13, 2007. On April 24, 2007, OMG and Dominion filed reply briefs. Duke, OCC, Cinergy, DERS, IEU, OEG, OPAE, PWC, and staff filed reply briefs on April 27, 2007. On April 30, 2007, a reply brief was filed by OEG.

PWC's reply brief also included a motion to strike a portion of the merit brief filed by OPAE. OPAE responded on May 4, 2007, with a memorandum contra the motion to strike. PWC filed its reply on May 14, 2007. On June 1, 2007, PWC renewed its motion to strike, expanding the motion to cover parts of a merit brief filed by OPAE following the hearing on the rider aspects of this consolidated proceeding. OCC weighed in on this controversy on June 6, 2007, opposing PWC's motion. OPAE filed its memorandum contra on June 8, 2007, also filing its own motion to strike portions of Duke's reply brief in the rider phase of the hearing (which motion will not be dealt with in this opinion and order). On June 11, 2007, PWC filed its replies. On June 15, 2007, Duke filed a memorandum contra the motion to strike, to which OPAE replied on June 18, 2007.

II. DISCUSSION

A. Introductory Issues

1. Confidentiality

(a) Procedural Background Related to Confidentiality

As noted previously, numerous motions for orders protecting the confidentiality of various documents were filed during the course of these remanded proceedings. Initially, those motions were made either by parties supporting confidentiality or by parties who were complying with confidentiality agreements. In response to a notice by OCC, pursuant to those confidentiality agreements, that it intended to make certain information public, Duke, DERS, Cinergy, OHA, and Kroger filed motions for protective orders on March 2, 2007, covering material supplied by them to OCC. On March 9, 2007, Constellation filed a memorandum supporting Kroger's motion for a protective order. On March 13, 2007, OCC filed a memorandum contra the motions for protective orders. Reply memoranda were filed on March 14 and 15, 2007. Additional documents were subsequently filed under seal, with motions for protective orders.[5]

On the first day of the hearing in these proceedings, the attorney examiners issued a bench ruling on these motions, stating that all of the pending motions for protective orders would be granted for a period of 18 months from that date, provided that such orders might be modified by the Commission if it deems it appropriate to do so. (Rem. Tr. I at 9.)

On July 26, 2007, the chairman of the Commission received a public records request for certain of the information covered by the protective order granted by the examiners. On August 8, 2007, the examiners issued an entry calling for specific issues to be addressed by parties, relating to the possible modification of the protective order. Responsive memoranda were filed on August 16, 2007, by six of the parties.

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5 All or portions of the following documents were filed under motions for protective orders: *subpoena duces tecum*, filed on February 5, 2007; transcript of remand deposition of Charles Whitlock, filed on February 13, 2007; transcripts of remand depositions of Denis George, Gregory Ficke, and James Ziolkowski, with attachments, filed on March 15, 2007; remand reply memoranda filed on March 15, 2007, by Duke, Cinergy, and DERS; transcripts of remand depositions of Beth Hixon and Neil Talbot, filed by Duke on March 16, 2007; and transcript of remand deposition of Beth Hixon, stipulation, and exhibits, filed by OCC on March 16, 2007. In addition, all or portions of the following items were filed confidentially, pursuant to examiner order: transcript of remand prehearing conference held on December 14, 2006; transcript of remand hearing, held March 19-21, 2007, and filed on April 3-4, 2007, together with exhibits; remand merit briefs of OCC, OMG, Duke, Cinergy and DERS, and OPAE, all filed April 13, 2007; supplemental remand testimony filed on April 17, 2007, by OCC; remand reply brief of OMG, filed April 24, 2007; remand reply briefs of OCC, Duke, OPAE, and Cinergy and DERS, filed April 27, 2007.

(b) <u>Legal Issues Relating to Confidentiality</u>

Section 4905.07, Revised Code, provides that all facts and information in the possession of the Commission shall be public, except as provided in Section 149.43, Revised Code, and as consistent with the purposes of Title 49 of the Revised Code. Similarly, Section 4901.12, Revised Code, specifies that, "[e]xcept as provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX of the Revised Code, all proceedings of the public utilities commission and all documents and records in its possession are public records." Section 149.43, Revised Code, indicates that the term "public records" excludes information that, under state or federal law, may not be released. The Supreme Court of Ohio has clarified that the "state or federal law" exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State* (2000), 89 Ohio St.3d 396, 399.

Similarly, Rule 4901-1-24, Ohio Administrative Code (O.A.C.), allows the Commission to protect the confidentiality of information contained in a filed document, "to the extent that state or federal law prohibits release of the information, including where the information is deemed . . . to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code."

Ohio law defines a trade secret as

information . . . that satisfies both of the following:

(1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

(2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Section 1333.61(D), Revised Code.

The Ohio Supreme Court has found that an *in camera* inspection is necessary to determine whether materials are entitled to protection from disclosure. *State ex rel. Allright Parking of Cleveland Inc. v. Cleveland* (1992), 63 Ohio St. 3d 772. Rule 4901-1-24(D)(1), O.A.C., also provides that, where confidential material can be reasonably redacted from a document without rendering the remaining document incomprehensible or of little meaning, redaction should be ordered rather than wholesale removal of the document from public scrutiny. Thus, in order to determine whether to issue a protective order, it is necessary to review the materials in question; to assess whether the information constitutes a trade secret under Ohio law; to decide whether nondisclosure of the materials will be consistent with the purposes of Title 49, Revised Code; and to evaluate whether the confidential material can reasonably be redacted.

The Commission has conducted an *in camera* review of the materials in question. We will now consider each of the two tests to assess whether trade secrets are present. If we find trade secrets to be present, we will then consider whether, based on our review of the documents, nondisclosure will be consistent with purposes expressed in Title 49. We will, finally, evaluate the possibility of redaction, if necessary.

(c) Tests for Trade Secrets

(1) Independent Economic Value

a. Arguments

As noted above, Section 1333.61(D), Revised Code, provides that, for information to be classified as a trade secret, it must derive "independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use." Several of the parties addressed this issue in their memoranda.

Duke describes the materials in dispute as including business analyses, financial analyses, internal business procedures, responses to data requests, interrogatories, internal correspondence, customer information such as consumption levels and load characteristics, discussions of these items during sealed depositions, commercial contracts of Duke's affiliates and material ancillary to those contracts. (Duke Motion for Protective Order, March 2, 2007, at 2.) Duke "asserts that all of the information it has marked as confidential in these proceedings relates to the [Duke], DERS, or Cinergy contracts and the matters ancillary thereto." (Duke Memorandum in Support of Motion for Protective Order, March 2, 2007, at 11.) Duke also notes that, in other cases:

> [t]he Commission has often afforded confidential treatment to commercial contracts between parties in competitive markets. When it recently granted a protective order regarding terms in a competitive contract in [*In the Matter of the Joint Application of North Coast Gas Transmission LLC and Suburban Natural Gas Company for Approval of a Natural Gas Transportation Service Agreement*, Case No. 06-1100-PL-AEC], the Commission held "we understand that negotiated price and quantity terms can be sensitive information in a competitive environment."

(Duke Memorandum in Support of Motion for Protective Order, March 2, 2007, at 11.)

Cinergy explains that the material in question contains the terms of an economic development assistance agreement and "includes information regarding the nature of the service . . ., the specific Cinergy subsidiary which is to provide electric service . . ., the level and duration of Cinergy's assistance . . ., the amount of load . . ., and the terms upon which either party may end the agreement." (Cinergy Memorandum in Support of Motion for Protective Order, March 2, 2007, at 5.) Cinergy maintains that this information is a trade secret and is not a public record. Cinergy also maintains that the information is economically significant to the contracting parties (Cinergy Memorandum in Support of Motion for Protective Order, March 2, 2007, at 5-6; Cinergy Reply Memorandum, March 15, 2007, at 11.)

DERS summarizes the documents about which it is concerned as being "over 1200 pages of documents that include or relate to confidential commercial contracts, business operations and include depositions in these proceedings, introducing and discussing such protected materials." (DERS Motion for Protective Order, March 2, 2007, at 2.) DERS also points out that all "of the information that DERS provided falls into the category of sensitive information in a competitive environment." (DERS Memorandum in Support of Motion for Protective Order, March 2, 2007, at 9.) In addition, DERS asserts that release of the terms and conditions of these contracts, as well as its business analysis, operational decisions, and customer information, to the public and to DERS's competitors will interfere with competition in the industry. Explaining further, DERS notes that it performed proprietary analysis to determine pricing constructs and conditions upon which to base its contracts. Disclosure, it claims, would result in DERS's foresight into energy markets and customer service becoming apparent to competitors, especially if DERS is the only competitive supplier subjected to this disadvantage. (DERS Reply to Memorandum Contra, March 15, 2007, at 7.)

Supporting its motion for a protective order covering OHA member agreements, OHA points out that Section 4928.06(F), Revised Code, specifically contemplates the Commission maintaining the confidentiality of certain types of information relating to CRES providers. OHA asserts that the information does derive independent economic value from not being known to competitors who can use it to their own financial advantage. The general counsel of OHA, Mr. Richard Sites, in a supportive affidavit, affirms that the release of this information would provide competitors of OHA's members the ability to use the information to their competitive advantage and to the detriment of OHA and its members. He explains, further, that the information in the documents provides members the means to conduct their operations on a more economic basis and that OHA and the affected members have expended significant funds and time to negotiate the agreements. If made public, Mr. Sites states, competitors would have access to this information at no cost and the value of the documents to OHA and its members would be negated. (OHA Memorandum in Support of Motion for Protective Order, March 2, 2007, at 5; Affidavit of Richard L. Sites in Support of Motion for Protective Order, March 2, 2007, at 4.)

Noting that the documents contain term and pricing information concerning its purchase of competitive retail electric service, Kroger also maintains that disclosure of this information to its competitors in the retail grocery and produce business would cause severe disadvantage to Kroger, explaining that Kroger competes for goods and services, including electric service, to operate its stores, factories, warehouses, and offices. The disclosure of price and other terms it has negotiated for the provision of electric services, it states, would provide its competitors with "a bogey to target in their own negotiations for competitive retail electric services and reveal information concerning Kroger's operation costs." It asserts that this information should remain protected for so long as the agreement in question is in effect. (Kroger Memorandum in Support of Motion for Protective Order, March 2, 2007, at 5-6.)

While not filing a motion for a protective order, IEU also filed a letter in the docket, on March 2, 2007, strongly supporting the granting of protective orders. IEU states that it understands OCC to be threatening to disclose customer names, account numbers, customer locations, prices, and other sensitive information, without any redaction and without the customers' express written consent.

On March 5, 2007, OEG also filed a letter in support, noting that the documents in question contain information reflecting OEG members' electric costs and that those members operate in highly competitive industries.

On March 9, 2007, Constellation, the counterparty to the Kroger agreement that was the subject of Kroger's motion, filed a memorandum supporting Kroger's motion. Constellation points out that the documents in question contain proprietary pricing and other information. Constellation asserts that disclosure of this information would place both Kroger and Constellation at a competitive disadvantage. (Constellation Memorandum in Response to Motion for Protective Order of Kroger Co., March 9, 2007, at 2-3).

b. Resolution

The parties arguing in favor of confidentiality make it clear that they consider the material in question to have economic value from not being known by their competitors and to have content that would allow competitors to obtain economic value from its use. OHA states this quite clearly, explaining that the material allows the contracting parties to run their businesses more economically and to compete more effectively. The discussion by DERS is also particularly helpful, noting that, in addition to customers' identities and pricing, its own marketing strategies would also be helpful to a competitor. Cinergy also points to deposition testimony showing the economic significance of these contracts.

We recognize that OCC disagrees with the moving parties' contentions. According to OCC, the burden is on those seeking confidential treatment. As OCC points out, the Commission has held that, pursuant to Sections 4901.12 and 4905.07, Revised Code, there is a strong presumption in favor of disclosure that the party claiming protective status must overcome. OCC also maintains that the Commission has required specificity from those that seek to keep information from the public record and that the specificity required by law and supported by the terms of both the protective agreements and the protective attachment is missing from the motions. (OCC Memorandum Contra Motions for Protective Orders, March 13, 2007, at 8-9, 11.) OPAE also disagrees, arguing that the information, other than individual customers' account numbers, should be released. It stresses the importance of open proceedings and public scrutiny of Commission orders and asserts that the parties claiming protection have not met their burden of proof. (OPAE letter, August 16, 2007.)

It is clear to us, from our review of the information, that at least certain portions of the documents would indeed meet this portion of the definition of trade secrets. We agree with the parties seeking protective treatment that certain portions of the material in question have actual or potential independent economic value derived from their not being generally known or ascertainable by others, who might derive economic value from their disclosure or use. Specifically, we find that the following information has actual or potential independent economic value from its being not generally known or ascertainable: customer names, account numbers, customer social security or employer identification numbers, 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.

(2) Efforts to Maintain Secrecy

a. Arguments

The second test under Section 1333.61(D), Revised Code, as quoted above, requires a finding that the information in question has been the subject of reasonable efforts to maintain confidentiality. Again, the parties argue the point.

Duke submits that only Duke employees with a legitimate need to know the information covered by this dispute have access to it or are aware of it, that the information is only known to the individual counterparties and is not otherwise disseminated, and that the information is confidentially maintained in separate files that are only accessible to individuals with a legitimate need to know the information. (Duke Reply to Memorandum Contra, March 15, 2007, at 6-7.)

DERS asserts that the "information that OCC seeks to make public is trade secret information maintained by DERS and counterparties in a confidential manner." (DERS Memorandum in Support of Motion for Protective Order, March 2, 2007, at 8.) In DERS's March 15, 2007, reply, it confirms that all disputed information is maintained by it in a confidential manner.

Similarly, Cinergy submits that the information is the subject of reasonable steps taken by Cinergy to protect it from disclosure to those who have no need for it, even within Cinergy and its affiliates. (Cinergy Reply to Memorandum Contra, March 15, 2007, at 11.)

OHA confirms that the information in question is treated by OHA as confidential and is not disclosed outside of the OHA and its members except under confidentiality agreements or in the context of regulatory proceedings where protection is granted. OHA included, with its supporting memorandum, an affidavit of its general counsel, Mr. Richard Sites. Mr. Sites states that the material in question is known only by a very limited number of employees of OHA and its members who were engaged in the negotiation of the agreements or those who need to know their contents in order to verify compliance. He affirms that OHA and its members maintain internal practices to prevent disclosure. Further, he states that the information is never made available outside of OHA or its members other than as the subject of a confidentiality agreement required by these proceedings. (Affidavit of Richard L. Sites in Support of Motion for Protective Order, March 2, 2007, at 4-5.)

Kroger, in its memorandum supporting its motion for a protective order, asserts that it has treated the documents in question as proprietary, confidential business information, available exclusively to Kroger management and counsel. The documents are, it says, either stamped as confidential or treated as such and have only been disclosed to Kroger employees and counsel, other than subject to the protective agreement executed by OCC. (Kroger Memorandum in Support of Motion for Protective Order, March 2, 2007, at 6.)

OEG notes that the terms of these agreements are kept secret even from other OEG members, as the knowledge of such costs might prove advantageous to others. (OEG letter, filed March 5, 2007.)

Constellation notes that all Constellation contracts are kept confidential. (Constellation Memorandum in Response to Motion for Protective Order of Kroger Co., March 9, 2007, at 2.)

In its memorandum contra, OCC claims that some of the documents sought to be protected were obtained by OCC from other sources and, therefore, have lost their protected status under the protective agreements, although it does not cite evidence for this claim. OCC also states that Duke has released discussions of documents as part of discovery without any claim to confidentiality. In addition, OCC argues that maintaining confidentiality would be restrictive and cumbersome at the hearing. (OCC Memorandum Contra Motions for Protective Orders, March 13, 2007, at 7.)

b. Resolution

It is clear to us, from reading the many memoranda submitted on this issue, that the parties advocating confidential treatment have sought, at all junctures, to keep this information confidential and have treated the documents in question as proprietary, confidential business information. The second prong of the test is, therefore, satisfied. The information described above as deriving independent economic value from being not generally known to or ascertainable by others should, therefore, be deemed trade secret information.

(d) Consistency with Purposes of Title 49

Having determined that both statutory tests for the presence of trade secrets are met in this situation by at least certain of the information in the covered documents, we must determine whether it is consistent with the purposes of Title 49 of the Revised Code to maintain confidentiality of this information. The legislature was quite clear that the purposes of Title 49 include the encouragement of competition, diversity, and flexible regulatory treatment of the electric industry, specifically requiring the Commission to "take such measures as it considers necessary to protect the confidentiality" of CRES suppliers' information. Sections 4928.02, 4928.06(F), Revised Code. We find, therefore, that maintenance of this trade secret information as confidential is consistent with the purposes of Title 49.

(e) Redaction

Based on our *in camera* review of the documents in question, we believe that they can be redacted to shield the trade secret information while, at the same time, disclosing all information that we have not found to be a trade secret, without rendering the documents incomprehensible or of little meaning. Therefore, pursuant to our ruling on this issue, those documents must now be redacted to keep confidential only those matters we have ruled to be trade secrets. In order to accomplish this task, Duke shall work with the parties to the side agreements to prepare a redacted version of the confidential information attached to the prefiled testimony of Ms. Hixon and will file that redacted version within 45 days of the date of this order on remand. Each party will then be required to redact all other sealed documents that such party filed with the Commission. Redacted versions of all documents filed in these proceedings shall be docketed no later than 60 days after the date of this order on remand. The redacted information will be subject to a protective order for a period of 18 months from the initial grant of protection on March 19, 2007. Any party desiring an extension of that protective order should file a motion to that effect, no less than 60 days before the termination of the protective order.

2. PWC Motions to Strike

PWC, with the filing of its reply brief, moved to strike portions of the initial briefs of OPAE. Specifically, PWC asks the Commission to strike language that states that "PWC is not a party with a position distinct from CG&E-Duke's own position" because it operates "virtually all demand-side management programs funded by CG&E-Duke and has CG&E-Duke representation on its Board." PWC asserts that no evidence of record supports this language and that OPAE's unfounded claims suggest that PWC does not exercise its independent judgment regarding the issues in these consolidated proceedings. PWC finds OPAE's claims to be highly misleading and harmful in its relationship with residential consumer clients, cooperative consumer agencies, and community supporters. Absent record evidence supporting OPAE's insinuation, PWC urges the Commission to strike the specified portions of OPAE's brief.

OPAE's memorandum contra was filed on May 4, 2007. OPAE argues against the striking of the disputed language, seeking to show the truth of the questioned statements. OPAE points out that PWC itself concedes both that it obtains funding from Duke and that its primary interest in these cases is to ensure that funding continues. OPAE also notes that PWC signed the stipulation in these cases and took no position contrary to Duke's position. Thus, OPAE concludes, there is no reason to strike the statements.

PWC's reply, filed on May 14, 2007, continues the debate, urging the Commission to strike the entire memorandum contra, as "nothing more than a continuation of innuendo and careless accusations that can harm PWC." PWC proclaims, *inter alia*, that there is no evidence that PWC acts in disregard of residential consumers' interests or that PWC's motivation is solely to continue Duke's funding of PWC's activities.[6]

The Commission will not strike arguments made by parties in these pleadings. However, as always, the Commission will base its determination on record evidence. Thus, any arguments that are not supported by evidence of record in these proceedings will be ignored.

B. <u>Supreme Court of Ohio Remand</u>

1. <u>Background</u>

As noted previously, on March 18 and May 23, 2005, OCC filed notices of appeal to the Ohio Supreme Court, raising seven claimed errors. Following briefing and oral argument on the consolidated appeals, the supreme court issued its opinion on November 22, 2006. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789. In its opinion, the Supreme Court of Ohio upheld the Commission's actions on issues relating to procedural requirements, due process, support for the finding that the standard service offer was market-based, harm or prejudice that might have been caused by changes on rehearing to the price-to-compare component, reasonableness of Duke's alternative to the competitive bidding process, nondiscriminatory treatment of customers,

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6 This order on remand considers only those portions of the consolidated proceedings that relate to the matters remanded from the Supreme Court of Ohio. Matters relating to the riders will be considered in a subsequent order. The dispute relating to striking language from pleadings continued into the rider phase of the proceedings. That continued portion of this dispute will be considered in the subsequent order.

non-bypassability of certain charges, corporate separation, and denial of certain discovery based on irrelevance under the second and third prongs of the stipulation-reasonableness test. However, the court remanded these proceedings to the Commission with regard to two portions of the Commission decision.

The first portion of the decision that was the subject of remand relates to the justification for modifications made in the first entry on rehearing. The Commission had granted rehearing with regard to certain modifications to the opinion and order that were proposed by Duke in its application for rehearing. The court remanded the case back to the Commission ". . . for further clarification of all modifications made in the first rehearing entry to the order approving the stipulation. On remand, the commission is required to thoroughly explain its conclusion that the modifications on rehearing are reasonable and identify the evidence it considered to support its findings." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 36. The court expressed its concern that modifications were made without sufficient explanation of the rationale for those modifications and without citation to the record. It explained in more detail that the "commission approved the infrastructure-maintenance-fund charge without evidentiary support or justification. The commission approved other modifications without citing evidence in the record and with very little explanation." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 35.

The other area of remand concerns a discovery dispute. At the hearing, counsel for OCC had stated that, two days prior, OCC had transmitted to Duke a request for production of all agreements between Duke and parties to these proceedings, entered into on or after January 26, 2004. Duke had responded that it did not intend to comply with that request. OCC moved for an order compelling production. After oral argument relating to the motion, the examiners denied the motion, stating that the Commission has previously held side agreements to be irrelevant to their consideration of stipulations and, in addition, privileged. On appeal, although the court upheld "the commission's denial of OCC's discovery request to the extent that the relevance of the information sought was based on the second and third prongs of the reasonableness test" for stipulations, it found that the Commission erred in denying discovery under the first criterion. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 80. Under that first criterion, the Commission determines whether a proposed stipulation is the product of serious bargaining. The court found that the "existence of side agreements between [Duke] and the signatory parties entered into around the time of the stipulation could be relevant to ensuring the integrity and openness of the negotiation process." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 85. The court further explained that, in determining whether or not there was serious bargaining, the "Commission cannot rely merely on the terms of the stipulation but, rather, must determine whether there exists sufficient evidence that the stipulation was the product of serious bargaining. Any such concessions or inducements apart from the terms agreed to in the stipulation might be relevant to deciding whether negotiations were fairly conducted." *Ohio Consumers' Counsel* *v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 86. In addition, although not directly related to the remand, the court refused to recognize a settlement privilege applicable to Ohio discovery practice. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 89. It noted that, even if there were such a privilege, it would not apply to the settlement agreement itself, but only to the discussions underlying the agreement. Thus, it held that the side agreements are not privileged. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 93.

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 and arose, therefore, as part of the September 29, 2004, opinion and order in these proceedings. The remand for lack of evidentiary support arose because of an issue first addressed in the Commission's November 23, 2004, entry on rehearing. Therefore, although the court discussed the lack of evidentiary support first, in this order on remand we find it critical to consider the issues in the order in which the errors were made.

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.

2. Discovery Remand

(a) Consideration of Side Agreements

(1) Extent of Supreme Court's Directive

Several of the parties have made arguments relating to whether or not the Commission should consider any side agreements[7] revealed through discovery. The most extreme of these statements would have had the Commission compel production of the agreements, as the motion was framed prior to appeal, and do nothing more. "The Court required that discovery be permitted and it has been. Nothing more need be done to satisfy the court's side agreement directive." (Staff remand brief at 4.) In reply to this comment, Dominion noted that "this interpretation makes no sense, in that it assumes that the court remanded the case simply so OCC could perform a vain act." (Dominion remand reply at 7.) We agree.

7 We use the term "side agreements" here to refer to a number of agreements that were entered into by one or more of the parties to these proceedings and were related to matters that are the subject of the proceedings.

The Supreme Court of Ohio, in its opinion, specifically ordered that, after compelling disclosure of the side agreements, the Commission "may, if necessary, decide any issues pertaining to admissibility of that information." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 94. The court also held that the "existence of side agreements between [Duke] and the signatory parties entered into around the time of the stipulation could be relevant to ensuring the integrity and openness of the negotiation process." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 85. Hence, the court required this Commission not only to order disclosure of side agreements but, also, to consider their relevance to the integrity and openness of the bargaining process. Merely compelling discovery, as advocated by some of the parties, is not the end of the Commission's responsibility.

(2) Continued Existence of Stipulation

In addition, many parties argued that no stipulation remains in existence and that, therefore, any disclosed side agreements are irrelevant to the proceeding.[8] Without the existence of an approved stipulation, the seriousness of the bargaining that led up to that stipulation is irrelevant, they contend. For example, Duke asserts that "[u]ltimately, the Commission issued its Opinion and Order rejecting the Stipulation on September 29, 2004." (Duke remand brief at 11.) OEG is slightly less affirmative in its position, stating that the stipulation was "effectively rejected by the Commission . . . ." (OEG remand reply at 6.) OEG's argument is that the Commission "so changed the Stipulation as to render it of no consequence." (OEG remand brief at 7.) Staff concurs in that view, but goes further. It asserts that, "[i]f stipulating parties are dissatisfied with the Commission's changes, they may, through rehearing application, express that objection." Staff continued its explanation, stating that "the company, a signatory to the stipulation, had . . . rejected the Opinion and Order by filing an Application for Rehearing. Thus it was apparent that the Stipulation was no longer meaningful." (Staff remand brief at 14. See also staff's Memorandum in Response to Motions *In Limine*, February 7, 2007, where staff says that there is "no reason to consider that old stipulation.") DERS and Cinergy follow similar logic in their arguments.

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

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8 Duke remand brief at 2, 5, 6, 7, 11, and 12; Duke remand reply at 6, 33, and 44; Cinergy and DERS remand brief at 1, 5, 6, 11, 16, and 17; Cinergy and DERS remand reply at 9 and 13; OEG remand brief at 7; OEG remand reply at 6; IEU remand reply at 3; staff remand brief at 2, 13, 14, and 15; staff remand reply at 2.

(Cinergy and DERS remand brief at 5 [emphasis in original].)

The Commission disagrees with this entire line of reasoning. While we could engage in a discussion of the substance of the changes to the stipulation that were ordered by the Commission and determine whether they were or were not major changes, we will not do so. Rather, we will focus on two more critical topics. First, and most important, the Supreme Court of Ohio has already issued an opinion that was based, in part, on the court's interpretation of the stipulation as continuing to be relevant. That conclusion is, therefore, not for this Commission to overturn. As succinctly stated by OMG, "the argument that the Stipulation has terminated is inconsistent with the Supreme Court's Remand." (OMG remand reply at 2.)

Further, the face of the stipulation makes it clear the stipulation was never terminated. The stipulation reads as follows, with regard to termination based on Commission-ordered modifications:

> This Stipulation is expressly conditioned upon its adoption by the Commission, in its entirety and without modification. Should the Commission reject or modify all or any part of this Stipulation or impose additional conditions or requirements upon the Parties, the Parties shall have the right, within 30 days of issuance of the Commission's order, to either [*sic*] file an application for rehearing. Upon the Commission's issuance of an Entry on Rehearing that does not adopt the Stipulation in its entirety without modification, any party may terminate and withdraw from the Stipulation *by filing a notice with the Commission within 30 days of the Commission's order on rehearing*. Upon such notice of termination or withdrawal by any Party, pursuant to the above provisions, the Stipulation shall immediately become null and void.

(Stipulation at 3 [emphasis added].) Thus, the stipulation set up a system for the signatory parties to follow, in the event they disagreed with Commission-ordered modifications. First, the disagreeing party was required to file an application for rehearing. If rehearing was not successful, the party then had 30 days to file a notice of termination of the stipulation. While applications for rehearing were filed, no such notice of termination was filed by any party.

This point was clearly made and understood by the court and was noted by the nonsignatory parties. The court indicated that "the stipulation included a provision that allowed any signatory party to withdraw and void the rate-stabilization plan should the commission reject or modify any party of the stipulation." However, the court continued, "[n]one of the signatory parties exercised its option to void the agreement despite significant modifications made by the commission to the original stipulation." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 46. As the argument was expressed by OPAE, "[c]learly, [Duke's] filing of an application for rehearing was contemplated by the stipulation and, pursuant to the terms of the stipulation, did not constitute [Duke's] withdrawal from the stipulation." (OPAE remand reply at 2.) Similarly, OMG points out that the stipulation "does not contain an automatic termination provision; in fact, it has a specific provision that keeps the Stipulation in place with modifications unless and until a party within 30 days formally withdraws." Because "at no time did any party withdraw," the stipulation remained in effect. (OMG remand reply at 4.)

We agree. According to its terms, the stipulation was never terminated and, therefore, remained in effect as modified by the Commission's orders.

(b) Seriousness of Bargaining in Light of Side Agreements

(1) General Rule Concerning Evaluation of Stipulations

Rule 4901-1-30, O.A.C., authorizes parties to Commission proceedings to enter into stipulations. Although not binding on the Commission, the terms of such agreements are accorded substantial weight. *See Consumers Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, 125, citing *Akron v. Pub. Util. Comm.* (1978), 55 Ohio St.2d 155. This concept is particularly valid where the stipulation is supported or unopposed by the vast majority of parties in the proceeding in which it is offered.

The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. *See, e.g., Ohio-American Water Co.*, Case No. 99-1038-WW-AIR (June 29, 2000); *The Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14, 1994); *Ohio Edison Co.*, Case No. 91-698-EL-FOR et al. (December 30, 1993); *The Cleveland Electric Illuminating Co.*, Case No. 88-170-EL-AIR (January 30, 1989); *Restatement of Accounts and Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC (November 26, 1985). The ultimate issue for our consideration is whether the agreements, which embody considerable time and effort by the signatory parties, are reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

(1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?

(2) Does the settlement, as a package, benefit ratepayers and the public interest?

(3) Does the settlement package violate any important regulatory principle or practice?

The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.* (1994), 68 Ohio St.3d 559 (citing *Consumers' Counsel, supra*, at 126). The court stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission.

(2) Supreme Court Review

Referring to the three-prong test, OCC argued on appeal that this Commission cannot make a reasonableness determination regarding the stipulation without knowing whether side agreements existed among the stipulating parties and the terms of those agreements. The court disagreed in part, explaining that it had previously "rejected exactly this argument as applied to the second and third prongs of the reasonableness test." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 80. However, it agreed with OCC's contention, as to the first prong of the test. "OCC suggests that if [Duke] and one or more of the signatory parties agreed to a side financial arrangement or some other consideration to sign the stipulation, that information would be relevant to the commission's determination of whether all parties engaged in '*serious bargaining*.' We agree." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 84.

Therefore, we will, as directed, examine the circumstances surrounding the side agreements and consider whether the existence of the side agreements may have caused any of the signatory parties to refrain from seriously bargaining over the terms of the stipulation or to impact other parties' bargaining.

(3) Impact of Side Agreements on Serious Bargaining

OCC submitted, as part of the testimony of Ms. Beth Hixon, a number of side agreements that, it suggests, evidence a lack of serious bargaining. OCC argues that the side agreements prove that the stipulation lacked substantial support from a number of interested stakeholders. (OCC remand brief at 34-38, 45-48.) OCC also contends that existence of the side agreements confirms that nothing important was discussed at settlement meetings to which all of the parties were invited. Rather, OCC claims, Duke made concessions only to a few large customers, documented in the side agreements. (OCC remand brief at 44-45, 50-51.)

OPAE also contends that neither it nor OCC was invited to any open negotiating sessions during the period between the Commission's order and the entry on rehearing. OPAE claims that Duke made no effort to meet the concerns of OPAE in the settlement process and that it was never invited to negotiate a side agreement. According to OPAE, only large users got special deals and were induced to sign a stipulation, even though such users were not actually subject to the terms of the stipulation. OPAE also claims that the alternative proposal introduced by Duke was supported by parties because the large users had reached side agreements that would insulate them from the effect of a portion of the generation price increases publicly proposed by Duke. (OPAE *remand brief* at 7-10.)

OEG claims that the side agreements were valid business transactions and were not used to purchase intervenor support for the stipulation. OEG also claims that there was no evidence to suggest that the agreements were unfairly priced, and therefore no evidence that these agreements were anything other than arm's-length commercial transactions. (OEG remand reply at 6-8.)

Duke argues that the record evidence proves that it held extensive settlement discussion with all parties to these proceedings and that all parties reviewed the stipulation before it was filed. Duke also claims that the Commission rejected the stipulation and that, therefore, support for the stipulation is irrelevant. Duke also contends that there is nothing wrong with confidential meetings with one or more parties to a case to the exclusion of other parties, that such a process encourages settlement to the benefit of all stakeholders, and that OCC engages in the same conduct. (Duke Energy Ohio remand brief at 42.)

a. Timing of Side Agreements

OCC groups the agreements into three time periods: those signed prior to the issuance of the Commission's opinion, those signed after the opinion but prior to the issuance of the Commission's entry on rehearing, and those signed after issuance of the entry on rehearing. Breaking their analysis down into those three groups and discussing them at length, OCC contends, *inter alia*, that the agreements "undermine the reliance that can be placed upon the publicly stated support by a variety of parties for [Duke's] proposals . . . ." (OCC remand brief at 31.)

OMG argues that, regardless of when the agreements were signed, the side agreements were consideration for some signatory parties supporting the stipulation. (OMG remand reply at 11-14.) According to OMG, the side agreements, which were intended to induce support for the stipulation, were never terminated. Further, OMG contends that the record clearly shows a course of conduct by which signatory parties received rate discounts that were not generally available to other similarly situated customers. (OMG remand reply at 12.) OMG also argues that, because it is common for agreements to be made orally with the written version following weeks or months thereafter, the date the side agreements were signed does not necessarily constitute the date the agreements were reached. (OMG remand reply at 12-14.)

On the other hand, Duke points out that the vast majority of these contracts was signed after the close of the evidentiary record and therefore could not have affected the Commission's consideration of the case or the parties' position with respect to the litigation. (Duke remand brief at 25-26).

OEG also indicates that many of the agreements became effective after the stipulation was signed. It claims that events occurring after the stipulation was signed could not have affected the stipulation. (OEG remand brief at 7.)

Certainly, timing of the side agreements has relevance to this issue. The supreme court's opinion did not specifically address this point, as the facts regarding timing of the side agreements were not then in evidence. However, the court did reference the general issue of side agreement timing. The court stated that "[t]he existence of side agreements between [Duke] and the signatory parties entered into *around the time of the stipulation* could be relevant to ensuring the integrity and openness of the negotiation process." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 85 (emphasis added). The court did not specifically make reference to side agreements being entered into only *before* the stipulation. Therefore, we must interpret the court's concern involving side agreements "around the time of the stipulation" to cover a broader, but unspecified, time period, both before and after the date the stipulation was entered into.

Clearly, any side agreement signed within a short time prior to the stipulation might have had an impact on a signatory party's support for the stipulation. Similarly, a side agreement signed shortly after execution of the stipulation might have documented the parties' earlier, oral understanding. Therefore, we find that side agreements entered into before the Commission issued its opinion and order are relevant to our evaluation of the seriousness of bargaining that led to the stipulation with regard to Duke's RSP. However, with regard to agreements that were executed after the opinion and order or the entry on rehearing, we note that they appear, based on testimony in the record, to be renegotiations of earlier side agreements. (Rem. Tr. III at 124-5. See, also, Duke Rem. Ex. 3, at 35-6.) While such substituted arrangements might show a continued understanding among parties, it is unlikely that they would be relevant to the evaluation of the first prong of the test for a stipulation that was remanded to us from the supreme court. Arrangements that were renegotiations, after the issuance of the opinion and order or the entry on rehearing, demonstrate little with regard to how seriously the parties bargained over the stipulation. Therefore, any agreements that documented renegotiations of side agreements that had been entered into prior to the issuance of the opinion and order are deemed irrelevant to this proceeding and form no part of the basis for our opinion.[9]

b. Support Provisions

Without referring to any matters that we have deemed to be trade secret, we will now consider whether side agreements may have impacted the bargaining process that led to the stipulation. The stipulation was executed on May 19, 2004. Affiliates of Duke

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9 We would also note, however, that it would be possible for a side agreement to be entered into after the issuance of an opinion and order and still be relevant to the consideration of a stipulation, where it appears to the Commission that such a side agreement may have documented an understanding that had previously been reached.

entered into six agreements with signatory parties, all of which are nonresidential customers or associations representing nonresidential customers, between May 19 and July 7, 2004. The Duke affiliate was, in each case, either Cinergy, the parent of Cincinnati Gas & Electric Company, or Cinergy Retail Sales LLC, the predecessor of DERS and a CRES provider. Each of those six agreements included a provision requiring support of the stipulation. (OCC Rem. Ex. 2A attachments.)

c. Resolution Regarding Serious Bargaining

Certain of the parties to the stipulation had signed side agreements that required them to support the stipulation. While it is true that these agreements were executed on the same day as the stipulation or after that date, there is no evidence regarding the dates when the actual understandings may have been reached. We also note that there were other parties that did not have agreements requiring support of the stipulation and that a few of those entities did sign the stipulation. However, we have limited evidence regarding the continued presence and participation of the supportive parties during stipulation negotiations, or regarding the willingness of Duke to compromise with parties who may not have been discussing side arrangements. The fact that the contracting party may have been an affiliate of Duke, rather than the regulated utility itself, is irrelevant to our interest in the motivations of the signatory party to support the stipulation. Based on the supreme court's expressed concern over the "integrity and openness of the negotiation process" and its requirement that we seek affirmative "evidence that the stipulation was the product of serious bargaining," we now find that we do not have evidence sufficient to alleviate the court's concern. Rather, we find that the existence of side agreements, in which several of the signatory parties agreed to support the stipulation, raises serious doubts about the integrity and openness of the negotiation process related to that stipulation. Based 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. We now expressly reject the stipulation on such grounds.

3. Evidentiary Support Remand

(a) Supreme Court's Directive

The Supreme Court of Ohio, reviewing the modifications we made to our opinion and order when we issued our entry on rehearing, found insufficient support for those modifications. The court noted that the Commission is empowered to modify orders, as long as the modifications are justified. "The commission's reasoning and the factual basis supporting the modifications on rehearing must be discernible from its orders. . . . [A]ccordingly, we remand this matter to the commission for further clarification of all modifications made in the first rehearing entry to the order approving the stipulation. On remand, the commission is required to thoroughly explain its conclusion that the modifications on rehearing are reasonable and identify the evidence it considered to support its findings." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 35-36.

Specifically, the court identified three areas about which it was concerned. The first topic to be supported was the "commission's approval of the infrastructure-maintenance fund as a component" of the RSP. The court was particularly concerned about whether that item was a cost component or a surcharge. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 29-30. Second, the court was troubled about the Commission's setting of a "baseline" for calculating various of the components, thereby presetting charges for certain years without record evidence. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 31. Finally, the court pointed out the lack of clarity about the impact of the various modifications relating to the level of charges that cannot be avoided by those customers who obtain their generation service from a competitive supplier. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 32-33.

The court's directive is no longer expressly applicable, as we have now found that the stipulation should not have been adopted. As a result of that finding, changes made to the opinion and order are moot.[10] Without a stipulation to consider, we are compelled to consider Duke's RSP application, as filed on January 26, 2004, and subsequently modified by Duke prior to the initial hearing in these proceedings. ([Duke's] Filing in Response to the Request of the Public Utilities Commission of Ohio to File a Rate Stabilization Plan [RSP application], January 26, 2004; Duke Ex. 11, at 3-5.) We will review the reasonableness of the RSP application in light of the record evidence developed both in the initial hearing and in the hearing on remand, recognizing, also, that certain aspects of the RSP that was approved in these proceedings have already been implemented. We note, in this regard, that the initial hearing considered support for the competitive market option filed by Duke, the RSP filed and modified by Duke, and the proposed but now rejected stipulation.

(b) Legal Standard for Adoption of RSP

In adopting SB 3, the legislature set forth the policy of the state of Ohio with regard to competitive retail electric service. That policy includes matters such as ensuring the availability of reasonably priced electric service, ensuring the availability of retail electric services that provide appropriate options to consumers, encouraging innovation and market access for cost-effective service, promoting effective customer choice, ensuring effective competition, and protecting consumers against unreasonable market deficiencies and market power. The Supreme Court of Ohio has, recently, emphasized the importance of ensuring that these policy objectives are considered. *See Elyria Foundry Co. v. Pub. Util. Comm* (2007), 114 Ohio St.3d 305. Ohio law specifically requires each electric distribution utility, such as Duke, to "provide consumers, on a comparable and nondiscriminatory basis

10 The approach we will take in this order on remand will, nevertheless, serve as a complete response to the court's request for support for the changes made on rehearing.

within its certified territory, a market-based standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service." Section 4928.14(A), Revised Code. Section 4928.14(B), Revised Code, provides that, "[a]fter its market development period, each electric distribution utility also shall offer customers within its certified territory an option to purchase competitive retail electric service the price of which is determined through a competitive bidding process." Therefore, we will be reviewing Duke's proposal to ensure these policies and requirements are met.

(c) Consideration of RSP Proposal

Duke's proposed RSP is comprised of two major components: an avoidable, or cost-to-compare, component and an unavoidable, or provider-of-last-resort (POLR), component. We will review each of these components and then consider other terms in the proposal. Finally, we will evaluate whether the proposal, overall, meets the statutory requirements.

(1) RSP Proposal: Generation Charge

Under the terms of the original application, the generation charge, through 2008, was proposed to be equal to the unbundled generation charge (or "big G"), reduced by the RTC, resulting in what has been known as "little g." (Duke RSP application at 17.) Duke's modifications to its application altered the generation charge in two ways. First, the generation charge was reduced by 15 percent, creating a portion of the POLR charge (designated as the rate stabilization charge, or RSC) out of that reduction. Thus, the generation charge became 85 percent of little g. Second, Duke added a tracker element, to adjust the generation charge by the incremental cost of fuel and economy purchased power, excluding emission allowances. This fuel and purchased power tracker was originally to be calculated on the basis of projected native load fuel cost and projected retail sales volumes, as compared with a baseline of the fuel rate frozen on October 6, 1999. ([Duke] Ex. 11, at 4, 7-8.) OCC witness Pultz agreed that "increases in the cost of fuel and purchased power costs should be recovered through a bypassable charge." (OCC Ex. 3A, at 15.)

We find that little g is a reasonable base for setting the market price of generation. Little g was the generation charge prior to the unbundling of electric services, less the statutorily required regulatory transition charges. Hence, it is a logical starting point for a market rate. Because the omitted 15 percent of little g is proposed to become a POLR charge, we will discuss the question of whether the generation charge should be 85 percent or 100 percent of little g, below, as part of our discussion of the proposed POLR component.

We also find, based on the evidence of record in these proceedings, the fuel and economy purchased power tracker to be reasonable as a part of the market-based charge for generation, with certain modifications to Duke's proposal, as will be discussed below.

The embedded cost of generation that was unbundled, pursuant to SB 3, already included the cost of fuel and purchased power. ([Duke] Ex. 11, at 9.) The most recent determination of such costs was made in *In the Matter of the Regulation of the Electric Fuel Component Contained Within the Rate Schedules of Cincinnati Gas & Electric Company and Related Matters*, Case No. 99-103-EL-EFC. Therefore, the baseline for the incremental costs to be included in the fuel and economy purchased power tracker was reasonably proposed as the amount of such costs allowed in that case. (See [Duke] Ex. 11, at 8.)

In the application, the fuel and economy purchased power tracker was proposed not to include the cost of emission allowances. The now-rejected stipulation also proposed a tracker, designated there as the FPP, that similarly collected incremental fuel and economy purchased power costs. Through the process of these proceedings and during the pendency of the supreme court's review, the FPP was put into place and was the subject of evidentiary audit proceedings before this Commission. In the first such proceeding, the Commission adopted a stipulation detailing numerous aspects of the FPP's calculation, including the allocation of EPA-allotted zero-cost SO_2 emission allowances and the promise that neither NOx emission allowance costs nor NOx emission allowance transaction benefits would be included in the FPP through the end of 2008. *In the Matter of the Regulation of the Fuel and Economy Purchased Power Component of The Cincinnati Gas & Electric Company's Market-Based Standard Service Offer*, Case No. 05-806-EL-UNC, Opinion and Order (February 6, 2006), at 4-5. That stipulation was not opposed by any party and no application for rehearing was filed with regard to the opinion and order that adopted it. We now find that, on the basis that the fuel and economy purchased power tracker in Duke's proposal is analogous to the FPP in the previously approved RSP, the matters approved in Case No. 05-806-EL-UNC should remain in effect. Therefore, Duke's proposed fuel and economy purchased power tracker calculation should be modified to parallel that of the FPP.

(2) <u>RSP Proposal: Provider of Last Resort Charge</u>

The POLR component is proposed by Duke to be a charge that includes costs that Duke determined are necessary for it to "maintain a reliable generation supply and to fulfill its statutory POLR obligation," with annual increases capped at 10 percent of little g, calculated cumulatively. It proposed including in this component taxes, fuel, environmental costs, purchased power, transmission congestion, homeland security, and reserve capacity. In its modifications, it proposed removing fuel and purchased power from the POLR component and making those items the subject of a separate tracker. In addition, it proposed to charge a fixed RSC equal to 15 percent of little g. (Duke RSP application at 17-18; [Duke] Ex. 11, at 3, 9-10.) Duke's witness Steffen testified that the POLR charge should be unavoidable, on the ground that "all consumers, including those who switch to a CRES provider, benefit from [Duke's] POLR obligation . . .." ([Duke] Ex. 11, at 11.)

The Supreme Court of Ohio has approved the concept of an unavoidable charge to recover, for an electric distribution utility, the costs of providing POLR services. *Constellation NewEnergy, Inc. v. Pub. Util. Comm.* (2004), 104 Ohio St.3d 530, at para. 36-40. However, the court has also specifically directed us to consider carefully the nature of the costs being collected through POLR charges. "We point out that while we have affirmed the commission's order with regard to the POLR costs in this and previous cases, the commission should carefully consider what costs it is attributing as costs incurred as part of an electric-distribution utility's POLR obligations." *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 340, at para. 26. Therefore, in compliance with the court's directive, we will evaluate each of the elements of Duke's proposed POLR rider to determine whether it is a legitimate POLR charge.

a. <u>Reserve Margin Costs</u>

Duke proposed that its POLR rider would include a component for reserve margin costs. ([Duke] Ex. 11, at 10.) Duke's witness Steffen explained that this component would recover for the reserve margin that Duke maintains for all load and for the call options that it maintains to cover switched load. He noted that factors affecting these costs include "the outstanding load, existing capacity, market concentration, credit risks, and regulatory risks." Duke intended, he testified, to purchase call options to cover some or all of the switched load and that this component would recover those out-of-pocket costs. The initial POLR charge included no costs for call options. The planned 17-percent reserve margin for all load was described by him as being "based on the annualized capital cost of constructing a peaking unit." ([Duke] Ex. 11, at 15.) The initial POLR charge calculations allowed for the recovery of $52,898,560 for the projected cost of a peaking unit. ([Duke] Ex. 11, at attachment JPS-7.)

Although the stipulation in these proceedings has now been rejected, a component that was designed to recover analogous costs, the system reliability tracker or SRT, has been implemented since the approval of Duke's RSP. In order to assist with our analysis of the application, we will describe the stipulation's provisions in this area. The stipulation provided for the recovery of the cost of maintaining adequate capacity reserves, as a part of what was designated the annually adjusted component (AAC) of the POLR charge. (Stipulation, May 19, 2004, at para. 3.) The exact same attachment was a part of the stipulation, detailing Mr. Steffen's calculation, as was a part of Mr. Steffen's direct testimony filed a month earlier. Thus, the stipulation still proposed to calculate the reserves on the basis of the cost of constructing a peaking unit. (Stipulation, May 19, 2004, at Ex. 1.) However, in the stipulation there is no mention of adding out-of-pocket costs of call options to the peaker cost.[11]

[11] We note that, on remand, Mr. Steffen nevertheless testified that call option costs were included as a part of the stipulated AAC's reserve margin pricing component. Duke Rem. Ex. 3, at 21.

The modifications to the stipulation, proposed by Duke on rehearing, moved the cost of the reserve margin into two newly designated components: the SRT and the infrastructure maintenance fund, or IMF, the latter of which is discussed below. This carving up of the AAC was discussed in the hearing on remand. The modifications, Mr. Steffen explained, "carved out several of the underlying cost and pricing factors previously embedded elsewhere in the Stipulated AAC, and included them as separately named POLR components or trackers. These carved out components became the IMF and the SRT." (Duke Rem. Ex. 3, at 16.) He testified further as to the new method of calculating reserve costs that was proposed in the modifications suggested in the application for rehearing. "In contrast to the fixed reserve margin amount proposed in the Stipulated AAC, the SRT is a mechanism of pure cost recovery of maintaining necessary capacity reserves (15% planning reserve for switched and non-switched load), and is subject to an annual review and true-up." (Duke Rem. Ex. 3, at 22.) It was noted, by many parties, that this actual-cost method of calculating the cost of reserves resulted in a much lower charge than the peaker unit cost methodology that had been proposed in Duke's application and in the stipulation. (See, for example, OCC rem. brief at 18-20; OCC Rem Ex. 1, at 31-32, 46, 48.)

OCC's witness Pultz discussed recovery for reserve margin costs. Mr. Pultz argued that shopping customers "should not have to pay both the power supplier and [Duke] for the same service." Therefore, he concluded, "any capacity reserves should . . . be included in a rider that could be modified as transmission arrangements change." (OCC Ex. 3A, at 17.)

The SRT calculation and avoidability were considered by this Commission in *In the Matter of the Application of The Cincinnati Gas & Electric Company to Adjust and Set its System Reliability Tracker Market Price*, Case No. 05-724-EL-UNC, Opinion and Order (November 22, 2005). In that case, we adopted an unopposed stipulation, in an order that was not subjected to an application for rehearing. We agreed, there, that the SRT should be avoidable by any nonresidential customer that signs a contract or provides a release agreeing to remain off Duke's standard service offer through 2008 and to return to Duke's service, if at all, at the higher of the RSP price or the hourly, locational marginal pricing market price. We also agreed, based on that stipulation, to several aspects of calculation of the SRT and our subsequent review of the SRT charges.

We find, based on the evidence of record in these proceedings and precedent from the supreme court, that the collection of costs of maintaining a reserve margin is appropriate for collection through a POLR rider. ([Duke] Ex. 11, at 14-16.) *See Constellation NewEnergy, Inc. v. Pub. Util. Comm.* (2004), 104 Ohio St.3d 530, at para. 40. We find, further, that the methodology approved for the SRT, and the avoidability also approved for the SRT, should be continued. This was reviewed by us as a POLR charge and was found reasonable. We continue to believe that Duke will not incur POLR costs with regard to a nonresidential customer that has committed not to avail itself of Duke's POLR services.

Therefore, such customers should avoid participation in the POLR reimbursement methodology. In addition, the approved methodology specifically allows the charge to be adjusted and reconciled quarterly, thus minimizing the magnitude of any changes to be absorbed by customers. Finally, the stipulation in the SRT case specifically provides for SRT transactions to be audited by us. This provision allows us to ensure, on an ongoing basis, that costs being passed through the SRT rider are appropriate for inclusion in a POLR charge.

b. Other Specified Costs

In addition to reserve margin, Duke's application, as modified, proposed that the RSP's POLR component would include incremental costs for homeland security, environmental compliance, emission allowances, and taxes. ([Duke] application at 17; Duke Ex. 11, at 10.) We will, at this point, review Duke's description of these factors and then discuss the reasonableness of recovery of these items through a POLR charge.

Taking them in the order listed by Duke, homeland security is first. Duke's witness described this component as being "designed to recover the revenue requirement on net capital expenditures and related O&M expenses associated with security improvements required for homeland security purposes. Only the revenue requirement associated with costs in excess of those incurred in year 2000 will be recovered." He provided examples of the items for which expenditures might be incurred, such as information technology security, additional security guards, and monitoring hardware. ([Duke] Ex. 11, at 13.)

In the environmental compliance and emission allowance areas, Mr. Steffen testified that the POLR charge was "designed to recover the revenue requirement associated with capital expenditures, net of accumulated depreciation, incurred to comply with existing and future environmental requirements, including the cost of emission allowances" and incremental operation and maintenance expenses. He also noted that the emission allowance costs would "be netted against the revenue recovered via the emission allowance component of the frozen EFC rate." The baseline for this calculation is the year 2000. ([Duke] Ex. 11, at 12-13.)

The tax aspect of the proposed POLR charge was "designed to recover any incremental expense [Duke] might incur as a result of significant changes in tax legislation. This includes federal, state and local taxes on income, property, payroll or any other taxes that are levied on [Duke]." ([Duke] Ex. 11, at 14.)

With regard to the calculation of the amounts of this charge, there must be a baseline against which to compare Duke's expenditures. To the extent that costs covered by the AAC are already being recovered by Duke, those same costs should not be recovered again. Following enactment of SB 3, requiring the unbundling of electric services, the Commission approved Duke's transition plan, unbundling those services on the basis of Duke's financial records as of December 31, 2000. *In the Matter of the Application of The*

Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan, Approval of Tariff Changes and New Tariffs, Authority to Modify Current Accounting Procedures, and Approval to Transfer its Generating Assets to an Exempt Wholesale Generator, Case No. 99-1658, *et seq.* Thus, any generation-related expenditures prior to that date would already be included in little g. We find that it is reasonable to allow Duke to collect for expenditures it makes in these areas, where those expenditures are greater than the levels approved in its last rate case prior to unbundling. Therefore, we find that, in all three situations (homeland security, environmental compliance, and taxes), calculations of incremental expenditures shall be based on changes in costs after December 31, 2000.

One further point must be made with regard to calculation of the amount of this proposed charge. As in the case of some of the other components of Duke's proposed RSP, these portions of the POLR charge must be reviewed in the light of not only the application and testimony on record but, also, the events that have transpired since the application was filed and the decisions made by this Commission in related proceedings. Duke's proposed modifications to the stipulation moved the emission allowance costs to the FPP, as discussed above. Also as discussed above, a stipulation relating to the FPP further adjusted the recovery of emission allowance costs. As we noted, that stipulation was adopted by us without objection and should remain in effect. Thus, we will follow the terms of that stipulation with regard to treatment of emission allowance costs.

In determining whether the costs of environmental compliance, homeland security, and taxes should be recoverable through a POLR rider that is charged to all customers, we must follow the direction provided in recent decisions by the Supreme Court of Ohio. The Dayton Power & Light Company's (DP&L) rate stabilization plan includes an environmental investment rider that was intended to allow that company to recover environmental plant investments and incremental operations and maintenance, depreciation, and tax costs. The Commission, in furtherance of the goal of promoting competition, required that rider to be avoidable by shopping customers, thereby increasing the price to compare. The supreme court did not disagree with that conclusion. *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 340.

We find that Duke's proposed POLR charge should be considered in an analogous manner. Here, the environmental compliance aspect of the POLR charge is comparable to DP&L's environmental investment rider. It is directly related to the generation of electricity. We note the testimony of witnesses for Constellation, who explained that environmental compliance costs, as well as other generation-related costs such as security and taxes, should not be a part of a POLR charge, as generation sold by CRES providers must also comply with environmental requirements and, so, the price of that generation includes recovery of environmental compliance costs. As a result, it argues, inclusion of environmental compliance costs in POLR charge would result in shoppers paying for this category of expenses twice. (OMG Ex. 14, at 6; OMG Ex. 11, at 8-9.) OCC's witness Pultz agreed. (OCC Ex. 3A, at 18-20. See also OMG brief, at 15-19.) We agree. Therefore, and in order to continue encouraging the development of the competitive market for generation, we find that the environmental compliance, tax, and homeland security aspects of Duke's proposed POLR charge should be avoidable and, thus, not part of a POLR charge. This change will have the effect of increasing the price to compare over what it would have been under Duke's application and, thus, increasing the ability of CRES providers to market their services. The emission allowances that Duke proposed to recover through a POLR charge will be, as discussed above, treated as provided in the FPP-related stipulation previously adopted by this Commission.

c. Rate Stabilization Charge

As noted above, the proposed RSC would equal 15 percent of little g and would be charged to all consumers, regardless of who provides their generation services. In order to determine whether this is actually a charge for POLR services, as it is described by Duke in its amended application, we note that non-shopping customers would pay, for their generation, only 85 percent of little g. Duke would recover the other 15 percent of the cost of the generation that is provided to nonshoppers through the payment of the RSC. Clearly, payment of the RSC is a portion of their payment for the embedded cost of generation. Therefore, we conclude that the RSC should not be allowed as a portion of Duke's POLR charge. However, that does not mean that the portion of little g that would be recovered through the RSC should not be paid by nonshoppers. That 15 percent of little g was, before unbundling, a legitimate charge for generation. Therefore, we also conclude that the generation charge should be increased from 85 percent of little g to 100 percent of little g as it was in Duke's original application.

d. POLR Risk Costs

We recognize that identifiable and specifically calculable costs may not be the only costs that are incurred by Duke in its standing ready to serve shopping customers. Mr. Steffen noted that there is a risk to Duke inherent in the provision of POLR service. ([Duke] Ex. 11, at 10.) This has also been recognized by the supreme court. *Ohio Consumers' Counsel v. Pub. Util. Comm. (2007), 114 Ohio St.3d 340, at para. 18.*

Under the terms of Duke's application, POLR service risk would have been recovered by making the RSC unavoidable or only partially avoidable. We have found that this is an inappropriate methodology. However, that does not mean that such risk does not exist. In the remand hearing, considering support for the elements of the now-rejected stipulation, Mr. Steffen explained that the IMF (which equaled a percentage of little g) was a non-cost based charge that is "the way [Duke] proposed to calculate an acceptable dollar figure to compensate [Duke] for the first call dedication of generating assets and the opportunity costs of not simply selling its generation into the market at potentially higher prices." (Duke Rem. Ex. 3, at 26.) Similarly, he also testified that the "IMF is not tied directly to a specific out of pocket expense and it is not a pass through of actual tracked costs. It is a component of the formula for calculating the total market price [Duke] is offering and is willing to accept in order to supply consumers and to support its POLR risks and obligations." (Duke Rem. Ex. 3, at 25.)[12] We read this explanation as a statement that the IMF was, in the modified stipulation, an element that was designed to compensate Duke for the pricing risk of providing POLR service. While we are not now considering the modified stipulation, we are considering the reasonableness of Duke's application. As it no longer includes an element that would compensate Duke for this risk, we will now consider the parties' arguments on the IMF issue, to determine whether an analogous charge would be an appropriate charge for this purpose.

OCC disputes that the IMF was carved out of the stipulated AAC and priced within the original AAC amount. Mr. Talbot, on behalf of OCC, claimed that the IMF was, simply, a new charge, not a part of the stipulated AAC. (OCC Rem Ex. 1, at 48.) OCC believes that the AAC should be seen as compensation for existing capacity, along with little g. (OCC remand brief at 17.) It is not, according to OCC, justified on the basis of risk, reliability, or opportunity cost. (OCC remand brief at 21-23.)

OCC also argues against the IMF on the basis of dollar values assigned to various components. It points out, first, that the combination of the IMF and SRT is only less than the stipulated reserve margin amount in 2005 and 2006. The total, once the IMF increased in 2007, would be greater in subsequent years, OCC explains. (OCC Rem Ex. 1, at 48; OCC remand brief at 23.) Second, OCC points out that the original reserve margin estimate, against which the IMF is compared by Duke, was too high. It notes that the cost of acquiring existing capacity in the market, which is the basis for the SRT that Duke says was carved out of the original reserve margin, is far less than the cost of building a new peaking unit, which was the basis for the stipulated reserve margin. Therefore, according to OCC, the SRT and the IMF only fall within the original estimate because that estimate was too high. (OCC remand brief at 17-20; OCC remand reply at 14-15.)

OMG contends that the IMF is a POLR charge and that POLR charges are, by definition, noncompetitive and therefore must be cost justified. OMG suggests that the cost justification of the IMF is unconvincing. At most, OMG believes, the IMF could be an "energy charge" and, thus, avoidable. (OMG remand brief at 21-25.)

We are tasked, under Chapter 4928 of the Revised Code, with approving generation charges that are market-based and consistent with the state policy set forth in this chapter. Although, in some instances, costs or changes in costs may serve as proxies for reasonable market valuations or changes in such valuations, this is not the same as establishing prices

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12 By itself, a company's testimony that a price is "acceptable" as part of a standard service offer might not provide a sufficient basis to establish that the standard service offer produces reasonably priced retail electric service. In this instance, as we will discuss below, we also have considered Duke's testimony comparing its RSP price to market prices and have found that a standard service offer that includes a charge for recovery of pricing risk would be reasonably priced.

based on costs. Similarly, a market-based standard service offer price is not the same as a deregulated price. Standard service offers remain subject to Commission jurisdiction under Chapter 4928 of the Revised Code. And, standard service offers must be consistent with state policy under Section 4928.02, Revised Code. *Elyria Foundry Co. v. Pub. Util. Comm.* (2007), 114 Ohio St. 3d 305. Thus, while a standard service offer price need not reflect the sum of specific cost components, the result must produce reasonably priced retail electric service, avoid anticompetitive subsidies flowing from noncompetitive to competitive services, be consistent with protecting consumers from market deficiencies and market power, and meet other statutory requirements. Duke's original application for an RSP addressed risk recovery through the RSC, thereby recovering such costs from shoppers. Duke had proposed that the IMF charge would equal six percent of little g during 2007 and 2008. We find that the terms proposed by Duke for the IMF, the rationale for which was supported on remand, are reasonable for determination of a market-based charge to compensate for the pricing risk incurred by Duke in its provision of statutory POLR service. Recognizing that this component is not cost-based, we note that it is not necessary, under Section 4928.14, Revised Code, for components of a market price to be based on cost.

The next issue relates to the avoidability of a risk recovery rider. Duke noted that "[a]ll consumers in [Duke's] certified territory benefit by having first call on [Duke's] physical generating capacity at a price certain." (Duke remand reply at 18.) Duke also asserts that the Supreme Court of Ohio has found POLR service to be a part of the market-based standard service, making market-based pricing appropriate. (Duke remand reply at 18-19.) Duke's witness Steffen testified regarding increased avoidability resulting in stimulation of the market. (Duke Rem. Ex. 3, at 30; Duke's remand brief at 15.)

OCC, in discussing the previously approved IMF, asserts that the IMF should be fully avoidable, arguing that "even an apparently small non-bypassable charge can threaten a large percentage of competitive retailers' profit margins – margins that can be very small." (OCC remand brief at 66, citing Rem. Tr. II at 84-85.) Alternatively, OCC suggests that "termination" of the IMF would "remove a barrier to competitive entry . . . ." (OCC remand brief at 66.)

OMG also argues in favor of avoidability of the IMF. OMG, on the other hand, says that the IMF, as a POLR charge, is either an unavoidable distribution charge that may be cost-based or a generation charge that must be avoidable. (OMG remand brief at 22; OMG remand reply at 15. *Accord*, Dominion remand reply at 3.)

Ohio law specifically references a utility's standard service offer serving as a default, or POLR, service for shopping customers. Section 4928.14(C), Revised Code. Thus, it is clear that POLR service is a legally mandated generation function of Duke, as the distribution utility in its certified territory. *See Ohio Consumers' Counsel v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 340, at para. 24. Thus, while POLR service and, hence, the risk recovery rider, must be provided at a market price, it is reasonable that it also be unavoidable by any customer who may use that POLR service. (*See* Duke remand reply at 28.) However, we also find that a nonresidential customer who agrees that it will remain off Duke's service and that it will not avail itself of Duke's POLR service does not, by definition, cause Duke to incur any risk. Therefore, the risk recovery rider must be avoidable by nonresidential shoppers who agree to remain off the RSP, on the same terms as the SRT. On the other hand, the risk recovery rider must be unavoidable with regard to nonresidential shoppers who have not agreed to remain off the RSP and with regard to all residential shoppers.

(3) RSP Proposal: Other Provisions

The application filed by Duke also contained certain other provisions that we will, here, review.

The first paragraph ended the MDP for all customer classes on December 31, 2004. In actuality, the MDP ended for nonresidential customers on that date but continued through December 31, 2005, for residential customers. Similarly, the second paragraph addressed the termination of shopping credits. The resolution of these issues, now having already transpired, will not be further addressed.

In the fourth paragraph, Duke proposed that the RTC would continue through 2010. Also, in the sixth paragraph, Duke offered to maintain the five percent generation rate decrease for residential customers. These matters were discussed in detail in the opinion and order in these proceedings. We adopt that discussion for present purposes. We also find that termination of the RTC at the end of 2008, and termination of the five percent discount for residential customers will further encourage the development of competition. Termination of the RTC at the same time as the RSP will allow development of a post-RSP plan in its entirety. Elimination of the five-percent discount will increase the price-to-compare and, thus assist competitors.

In the seventh paragraph, Duke agreed to maintain the generation price of little g through 2008. We agree.

In the eighth paragraph, Duke proposed to defer certain FERC-approved transmission costs for subsequent recovery in its next distribution base rate case. We approved a similar provision in the stipulation and, in Duke's subsequent distribution rate, this issue was also addressed. *In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Electric Distribution Rates*, Case No. 05-59-EL-AIR. We will adopt the outcome that we reached in that rate case as appropriate here.

The ninth paragraph of Duke's proposal addressed shopping customers' return to Duke's generation service. This topic was specifically addressed by us in a post-hearing process, prior to appeal. In our order on rehearing, issued on April 13, 2005, we determined a specific return-pricing methodology to be used. We adopt that conclusion here, as a modification of Duke's proposal. We find that the outcome we previously ordered is fair to customers and to Duke, and will result in market-based pricing and price transparency.

The tenth paragraph addresses the planned filing of a transmission and distribution base rate case. In the eleventh paragraph, Duke proposed a capital investment reliability rider to recover costs associated with capital investments in its distribution system. It similarly proposed a transmission cost order to recover changes in certain transmission costs. As a distribution base rate case has been filed and decided, and its stipulated outcome addressed similar issues, these provisions are moot. *In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Electric Distribution Rates*, Case No. 05-59-EL-AIR.

Paragraph 12 of the application dealt with the continuation of energy efficiency program funding, the filing of a demand side management cost rider, and the commitment of funds toward economic development in its territory. On January 24, 2006, Duke filed applications to implement ten electric and natural gas DSM programs for residential, commercial, and industrial consumers, as well as a research DSM program.[13] On June 14, 2007, a stipulation was filed in those proceedings, signed by Duke, Commission staff, OEG, OCC, and Kroger. The stipulation was approved by the Commission on July 11, 2007. Pursuant to the stipulation, Duke will recover the costs of the DSM programs through DSM cost recovery riders applicable to residential electric and gas sales and nonresidential electric sales. On July 20 and 30, 2007, Duke filed its DSM tariff, effective July 31, 2007. Therefore, this provision is moot.

In paragraph 13, Duke proposed the use of a competitive bidding process to test the generation price. A competitive bidding option is critical under the terms of Ohio law. Section 2938.14(B), Revised Code. The supreme court upheld a similar process in its review of our opinion and order in these proceedings. *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 340, at para. 56. Therefore, we see no reason to deviate from the approach we previously approved.

Finally, in paragraph 14, Duke made certain proposals related to corporate separation and the transfer of generating facilities. Our resolution of this issue was also upheld by the court. *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 340,

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13 *In the Matter of the Application for Recovery of Costs, Lost Margin and Performance Incentive Associated with the Implementation of Electric Residential Demand Side Management Programs by the Cincinnati Gas & Electric Company*, Case No. 06-91-EL-UNC; *In the Matter of the Application for Recovery of Costs, Lost Margin and Performance Incentive Associated with the Implementation of Electric Non-Residential Demand Side Management Programs by the Cincinnati Gas & Electric Company*, Case No. 06-92-EL-UNC; *In the Matter of the Application for Recovery of Costs, Lost Margin and Performance Incentive Associated with the Implementation of Natural Gas Demand Side Management Programs by the Cincinnati Gas & Electric Company*, Case No. 06-93-GA-UNC.

at para. 71, 76. In the opinion and order in these proceedings, we found that, in order for Duke to provide stable prices, it was imperative that Duke retain its generating assets. We noted that there was no evidence presented that would support an argument that Duke or any Duke affiliate would have an undue advantage as a result of not structurally separating. Therefore, Duke's corporate separation plan shall be amended to require it to retain its generating assets during the RSP.

(4) RSP Proposal: Statutory Compliance

Ohio law requires Duke to "provide customers, 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 service to consumers, including a firm supply of electric generation service." Section 4928.14(A), Revised Code.[14] Thus, in order for us to approve Duke's RSP proposal, we must be able to find that the proposal provides comparable and nondiscriminatory service and that all aspects necessary to maintain electric generation service are available on a market basis, including firm supply.

In his testimony at the original hearing in these proceedings, Duke's witness Judah Rose testified that the proposed RSP price to compare is competitive. In reaching that conclusion, Mr. Rose compared the RSP price to compare with the price under Duke's proposed competitive market option and, also, to generation rates for other Ohio utilities and actual rates of certain CRES providers. He also noted the ability of the Commission to test the market to ensure that generation rates under the RSP are not significantly different. ([Duke] Ex. 7, at 41-47.) See also *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 340, at para. 41. We also note that Mr. Rose updated his market evaluation for purposes of the hearing on remand, finding that it remained within the range of market prices today. (Duke Rem. Ex. 2, at 2-13.) (See also OEG remand reply brief at 12.) On the basis of his evaluation, Mr. Rose confirmed, at the remand hearing, that current market prices were 28 percent higher than the RSP price. (Rem. Tr. I at 81.) Further, the supreme court refused to overturn our original conclusion that the RSP was a market-based rate, noting that our modifications on rehearing had been structured to promote competition. *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 340, at para. 44; Opinion and Order at p 26. The situation is similar here, as our order requires modifications to Duke's RSP that will further increase avoidability of price components by shoppers.

14 In addition, Duke is required to provide customers the option to purchase competitive retail electric service, the price of which is determined through a competitive bid, provided that the Commission may determine that such a process is not required if other means to accomplish generally the same option for customers is readily available in the market and a reasonable means for customer participation is developed. Section 2918.14(B), Revised Code. The alternative to a competitive bid process approved here is unchanged from that reviewed and approved by the court. We do not believe that changes in customer shopping percentages since the time of the application should affect the legality of the plan. The competitive bidding alternative will, therefore, not be discussed further.

As we have previously stated, we support parties' efforts to stabilize prices to provide additional time for competitive electric markets to grow. *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period of The Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, Opinion and Order (September 2, 2003, at 29.) We would point out, as we did in our opinion and order, that Section 4928.14, Revised Code, allows us flexibility in approving methods for determining market-based rates for standard service offers. As incisively discussed by staff's economist, Richard Cahaan, we have three control mechanisms. We can adjust the level of the price charges, we can order certain components of the price to be avoidable, and we can require the price to be adjusted on various schedules and bases. On the basis of the evidence presented in the original record in these proceedings and that presented on remand, we find that the design of the RSP, as it was originally proposed by Duke and modified both by Duke and in this order on remand, achieves a proper balance in the determination of market-based rates. (*See* Staff Rem. Ex. 1, *passim*.)

We find that basing the generation rate on little g, with adders to reflect changes in certain costs and with the provision of a POLR charge based on the cost of maintaining necessary capacity reserves, where it can be monitored for continued reflection of market rates, and a pricing risk recovery rider, is market based. We also find that nothing about this RSP, as we are approving it today, is discriminatory or noncomparable. Further, we find that Duke's proposed RSP, as modified by Duke and in this order on remand, does offer all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service.

C. Associated Applications

As previously noted, Duke filed three associated applications at the same time as the application for approval of its market rate. Case No. 03-2079-EL-AAM, relating to deferral of MISO costs, has been mooted by the resolution of *In the Matter of the Transmission Rates Contained in the Rate Schedules of The Cincinnati Gas & Electric Company and Related Matters*, Case No. 05-727-EL-UNC, Finding and Order (October 5, 2005). Case Nos. 03-2080-EL-ATA and 03-2081-EL-AAM, relating to deferral and recovery of costs related to capital investment in distribution and transmission facilities, have been mooted by the adoption of a stipulation in *In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Electric distribution Rates*, Case No. 05-59-EL-AIR, Opinion and Order (December 21, 2005). Therefore, these three applications should be dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) On September 29, 2004, the Commission issued its opinion and order in these consolidated proceedings. Following entries on rehearing, OCC appealed the decision to the Supreme Court of Ohio.

(2) On November 22, 2006, the Supreme Court of Ohio issued an opinion in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, remanding the cases back to the Commission on two grounds.

(3) On November 29, 2006, in compliance with the remand order of the court, the attorney examiners directed Duke to disclose to OCC the information that OCC had requested in discovery.

(4) A hearing on remand was held on March 19-21, 2007, for the purpose of gathering such additional evidence as might be necessary to comply with the court's remand order.

(5) Briefs and reply briefs on remand were filed on April 13, 24, 27, and 30, 2007.

(6) Motions for protective orders were filed by several parties, with regard to numerous documents in these proceedings.

(7) Under the provisions of Sections 4905.07, 4901.12, 149.43, and 1333.61(D), Revised Code, and Rule 4901-1-24, O.A.C., the Commission is empowered, assuming confidentiality is consistent with the purposes of Title 49 of the Revised Code, to issue protective orders to keep confidential such material as we find to be a trade secret on the bases that (a) it derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use and (b) it is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(8) Following an *in camera* review, the Commission finds that customer names, account numbers, customer social security or employer identification numbers, contract termination dates or other termination provisions, financial consideration in each contract, price of generation referenced in each contract, and volume of generation covered by each contract does meet each of the two tests required for a finding that the information is a trade secret and, in addition, that confidential treatment of such information is consistent with the purposes of Title 49 of the Revised Code.

(9) Redaction of trade secret information is required, by precedent and by Rule 4901-1-24(D)(1), O.A.C., where reaction is possible without rendering the remaining document incomprehensible or of little meaning.

(10) We find the redaction of the trade secret information is possible without rendering the remaining documents incomprehensible or of little meaning and should be carried out as described in our opinion.

(11) Motions by PWC to strike certain portions of pleadings should be denied.

(12) The stipulation in these proceedings was adopted, with modifications, by the Commission and was never terminated by the signatory parties.

(13) Any side agreement entered into prior to the time the Commission issued its opinion and order in this case is relevant to our evaluation of the seriousness of bargaining that led to the stipulation with regard to Duke's RSP. Any agreements that documented renegotiations of side agreements that had been entered into prior to the issuance of the opinion and order are irrelevant and form no part of the basis for our opinion.

(14) Based on provisions in the side agreements, requiring parties to support the stipulation, and given the limited record evidence regarding the continued presence and participation of the supportive parties during negotiations, there is insufficient evidence to support a finding that the parties engaged in serious bargaining. Therefore, the stipulation will now be rejected.

(15) Under Section 4928.14, Revised Code, Duke is required to 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, including a firm supply of electric generation service.

(16) Duke's RSP, as originally proposed in its application and modified by Duke and in this order on remand, provides 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, including a firm supply of electric generation service. The RSP appropriately balances goals of protecting consumers from risk, assuring Duke of some level of financial stability, and encouraging the development of the competitive market. Duke's RSP, as modified in this order on remand, should be approved.

(17) Case Nos. 03-2079-EL-AAM, 03-2080-EL-ATA, and 03-2081-EL-AAM are moot and should be dismissed.

(18) All arguments raised in these consolidated proceedings but not addressed in this order on remand should be denied.

ORDER:

It is, therefore,

ORDERED, That, regarding side agreements and documents discussing such side agreement, customer names, account numbers, and customer social security or employer identification numbers, contract termination date or termination provisions, financial consideration for each contract, price or generation referenced in each contract, and volume of generation covered by each contract shall all be deemed trade secret information and shall be maintained on a confidential basis under protective orders for a period of eighteen months from March 19, 2007. It is, further,

ORDERED, That information that is not a trade secret be placed in the public record in these proceedings, as set forth in this order on remand. It is further,

ORDERED, That parties comply with redaction instructions set forth in this order on remand. It is, further,

ORDERED, That PWC's motions to strike, filed on April 27 and June 1, 2007, be denied. It is, further,

ORDERED, That the stipulation filed in these proceedings be rejected. It is, further,

ORDERED, That Duke's RSP, as modified by this order on remand, be approved. It is, further,

ORDERED, That Duke file tariffs for Commission approval that reflect the terms of this order on remand, within 45 days. It is, further,

ORDERED, That the applications in Case Nos. 03-2079-EL-AAM, 03-2080- EL-ATA, and 03-2081-EL-AAM be dismissed. It is, further,

ORDERED, That all arguments raised in these consolidated proceedings but not addressed in this order on remand be denied. It is, further, ORDERED, That a copy of this order on remand be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Donald L. Mason

JWK/SEF:geb

Entered in the Journal
OCT 2 4 2007

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the 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

ENTRY ON REHEARING

The Commission finds:

(1) On January 10, 2003, Duke Energy Ohio, Inc., (Duke)[1] filed an application for authority to modify its nonresidential generation rates to provide for a competitive market option subsequent to the market development period. On October 8, 2003, Duke filed three additional, related cases. On September 29, 2004, following a hearing, the Commission issued its opinion and order, approving a stipulated rate stabilization plan (RSP) in the proceedings, with certain modifications. Following applications for rehearing, the Office of the Ohio

[1] Duke was, at that time, known as the Cincinnati Gas & Electric Company. It will be referred to as Duke, regardless of its legal name at any given time. Case names, however, will not be altered to reflect the changed name.

Consumers' Counsel (OCC) filed notices of appeal to the Supreme Court of Ohio. The court issued its opinion on November 22, 2006, upholding the Commission's actions on most issues, but remanding the cases with regard to two issues.

(2) An additional hearing was held, commencing on March 19, 2007. The Commission issued its order on remand on October 24, 2007.

(3) Section 4903.10, Revised Code, indicates that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined by filing an application withn 30 days after the entry of the order upon the journal of the Commission.

(4) On November 23, 2007, applications for rehearing were filed by Duke, OCC, Ohio Partners for Affordable Energy (OPAE), and Industrial Energy Users-Ohio (IEU). The grounds for rehearing raised in each such application will be set forth below.

(5) On December 3, 2007, memoranda contra the applications for rehearing were filed by Duke, OCC, OPAE, IEU, Dominion Retail, Inc., (Dominion) and Ohio Marketers' Group (OMG).[2]

(6) The Commission has reviewed all the arguments for rehearing. Many of those arguments merely repeat positions previously presented to the Commission and do not offer anything new. The Commission has already considered, decided, and discussed such positions in its order on remand and the Commission does not intend to repeat those discussions in this entry on rehearing. Accordingly, the Commission finds that arguments for rehearing not discussed below have been adequately considered by the Commission in its order on remand and are being denied.

(7) Duke sets forth six grounds for rehearing:

(a) Duke alleges that the Commission, without statutory authority, modified Duke's market-based standard service offer (MBSSO) price. Specifically, Duke objects that: (1) the order makes the infrastructure maintenance fund (IMF) avoidable for nonresidential switched load that agrees to remain off Duke's standard MBSSO price

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2 OMG is comprised of Constellation NewEnergy, Inc.; Strategic Energy, LLC; and Integrys Energy Services.

through 2008 even though such customers may return to Duke at the monthly average hourly locational marginal price (LMP) MBSSO price; and (2) the order makes the rate stabilization charge (RSC) and the annually adjustable component (AAC) avoidable for non-residential customers that want the option to return to Duke at the standard MBSSO price.

(b) Duke alleges that the Commission's order, contrary to statute, deprives provider-of-last-resort (POLR) service to non-residential switched load that agrees to remain off Duke's standard MBSSO price through 2008.

(c) Duke alleges that the Commission, without statutory authority, modified Duke's MBSSO price by making the RSC and AAC avoidable by all switched load.

(d) Duke alleges that, by enabling switched load to avoid paying the IMF, AAC, and RSC, the Commission order conflicts with statutory policy because it requires Duke to subsidize the competitive retail electric service (CRES) market.

(e) Duke alleges that the Commission's order is unjust and unlawful because it requires Duke to retain its generating assets in conflict with statute.

(f) Duke alleges that the Commission's order is unjust and unreasonable because it is ambiguous that the non-residential regulatory transition charge continues through December 31, 2010.

(8) We would note first that, in various portions of its application for rehearing, Duke refers to the IMF as a rider that would help to cover the costs of capacity. (Duke application for rehearing at 5, 13, and 15.) As repeatedly indicated by Duke, it is the system reliability tracker (SRT) that ensures that Duke is financially able to purchase sufficient capacity to serve its customers. On the other hand, the IMF, as we discussed in our order on remand, does not address capacity costs, but, rather, compensates Duke for pricing risk incurred in its provision of statutory POLR service.

(9) Duke's first four grounds for rehearing all touch on the avoidability of various riders by various customers. Most of these matters were

comprehensively discussed in the order on remand and will not be covered again here. However, Duke does note that the order on rehearing, issued on April 13, 2005, in these proceedings, allowed shopping customers to choose to return at the rate-stabilized price by electing to pay the old rate stabilization charge (RSC) and the annually adjustable component (AAC) while they were shoppers. However, as Duke indicates, the order on remand did not take this option into account. (Duke application for rehearing at 4, 10.) We should have done so. Therefore, we will grant rehearing to modify and clarify the applicability of various riders during shopping situations.

First, it is clear that residential shopping customers must always have the right to return to Duke's POLR service at the RSP price. As stated in the order on remand, residential customers would pay the SRT and the IMF, while shopping, as those riders represent impacts on Duke of maintaining the ability to provide service for returning customers, one covering cost of capacity and one covering pricing risk.

With regard to nonresidential shopping customers, an additional division must be made. The first group of nonresidential shopping customers includes those considered in the order on remand. These customers would agree to remain off the RSP through 2008 and to return to Duke's service only at the LMP price, as specified and fully described in the April 13, 2005, order on rehearing, findings 16 through 18. In exchange for their agreement to remain off the RSP and return at that price, those customers would avoid the SRT and the IMF as, once again, those riders represent impacts on Duke of maintaining the ability to provide service for returning customers. The nonresidential shopping customers would also avoid the AAC, as we have previously found that it is a charge for generation-related cost. (Contrary to some statements by Duke, they would also avoid the RSC, as that rider has been eliminated as separate from the generation charge.)

The second group of nonresidential shopping customers includes those, not considered in the order on remand, that prefer to have the option to return to Duke's service at the rate-stabilized price. In order for Duke to maintain its preparedness to serve those customers at a rate-stabilized price, Duke will incur additional capacity costs, additional pricing risk, and additional generation-related costs. Therefore, the Commission finds that such customers should be charged the SRT, and the IMF.

As we stated in the April 13, 2005, order on rehearing, shopping customers will be liable for payment of all of the riders on a going-forward basis, if and when they return to Duke's service.

(10) We also note that Duke attempts to support several of its rehearing arguments by reference to matters that are outside of the record of these proceedings. This effort occasioned OCC's subsequent motion to strike. Although we will not strike Duke's references to information that is not a part of the record, neither will we consider this information in our deliberations on rehearing.

(11) Duke's fifth ground for rehearing asserts that the Commission had no authority to require it to retain its generating assets. Rather, Duke suggests, the Commission should permit Duke to void the requirement in its corporate separation plan that it transfer its assets to an exempt wholesale generator. (Duke application for rehearing at 21-22.) The Commission grants rehearing on Duke's fifth ground for rehearing for the purpose of giving further consideration to the matter. Our order on remand with respect to the transfer of assets shall remain in place pending our further review of this issue.

(12) Duke's sixth ground for rehearing asks for clarification of the termination date of its nonresidential regulatory transition charge (RTC). ((Duke application for rehearing at 20.) Although we believe that the order on remand was clear on this point, we will restate that the residential RTC terminates at the end of 2008 and that the nonresidential RTC terminates at the end of 2010.

(13) OCC sets forth three grounds for rehearing:

(a) OCC alleges that 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, and to base its conclusion upon competent evidence, in violation of Section 4903.09, Revised Code, and case law. OCC breaks this assignment of error into three, more specific, claimed errors.

i. OCC suggests that the remand order fails to eliminate capacity charges that are simply surcharges that Duke requested for customers to pay, without any evidentiary basis for why consumers should pay them.

ii. OCC suggests that 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.

iii. OCC suggests that the remand order fails to eliminate the additional AAC charges that Duke requested, without any evidentiary basis for why customers should pay them.

(b) In its second assignment of error, OCC alleges that 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, thereby permitting the devastation of the competitive market for generation service that could provide benefits for customers. OCC breaks this assignment of error into four, more specific, claimed errors.

i. First, OCC suggests that 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.

ii. Second, OCC suggests that the remand order fails to prohibit Duke's discriminatory pricing that demonstrates the standard service offer rates were too high for customers discriminated against, and the discrimination has caused serious damage to the competitive market for generation service.

iii. Third, OCC suggests that the remand order fails to prohibit Duke's violation of corporate separation requirements, which has caused serious damage to the competitive market for generation service that was intended to provide benefits to customers.

iv. Fourth, OCC suggests that the remand order fails to prohibit the impact of certain side agreements, causing serious damage to the competitive market for generation service.

(c) In its third assignment of error, OCC alleges that 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.

(14) In support of the first section of its first ground for rehearing, OCC claims that little g, the RSC, and the IMF all recover for the costs of existing capacity and are, therefore, duplicative. (OCC application for rehearing at 11.)

(15) Duke claims, in its memorandum contra, that the record evidence fully supports the IMF. (Duke memorandum contra at 4-13.)

(16) Pursuant to the order on remand, the RSC has been eliminated and the amounts that would have been charged through the RSC will be recovered through the generation charge, from which the RSC originated. On the other hand, the IMF, as fully discussed in the order on remand, is a rider to recover for pricing risk. The IMF and the portion of the generation charge that previously represented the RSC are therefore not duplicative.

(17) In support of the second subsection of its first ground for rehearing, OCC argues that the IMF and the SRT should be bypassable. OCC asserts that the Commission failed to consider record evidence on this issue and failed to consider the competitive market's need for full bypassability. (OCC application for rehearing at 14-15.)

(18) Duke, in its memorandum contra, harkens back to Section 4928.14(A) and (C), Revised Code, which require only electric distribution utilities (EDUs) to provide default service for all consumers. Further, it suggests that POLR charges cannot affect the competitive market, since CRES providers have no POLR-related costs and, therefore, do not include such costs in their prices. (Duke memorandum contra at 13.)

(19) The Commission has fully discussed this issue in the order on remand. Rehearing on this ground will be denied.

(20) In support of the third section of its first ground for rehearing, OCC argues about the reasonableness of a return on construction work in progress (CWIP). (OCC application for rehearing at 15-17.) This matter is not addressed in the order on remand. The reasonableness of Duke's recovery of CWIP through the AAC rider was argued by OCC and was thoroughly considered by the Commission on pages 21

through 24 of our November 20, 2007, opinion and order in the rider phase of these consolidated proceedings. We see no need to repeat that discussion here. This ground for rehearing will be denied.

(21) In its second ground for rehearing, OCC claims that the order on remand failed to prohibit pricing and price elements in side agreements that violate Ohio statutes and rules, thereby permitting the devastation of the competitive market for generation service that could provide benefits for customers. As with the first ground, OCC breaks this assertion into several sections. In the first, third and fourth sections, OCC asserts that, in various ways, the Commission should have expanded the use of the discovered side agreements. (OCC application for rehearing at 17-21, 27-30.)

(22) In response, Duke notes that the supreme court allowed the Commission complete discretion to decide issues relating to admissibility of the side agreements. Consistent with its role as the decider of fact, Duke argues that this allows the Commission to determine admissibility, the issues to which evidence is relevant, and the appropriate holdings to be reached. Duke also claims that the Commission permitted discovery well beyond that required by the Court or requested by OCC. After allowing such discovery, Duke submits that the Commission properly ruled on the relevance of the evidence. Duke also points out that OCC is asking for a ruling on allegations that OCC itself refused to make at the hearing. With regard to corporate separation issues, Duke also indicates that OCC made no claim that Duke is operating outside the parameters approved by the Commission in its corporate separation plan. (Duke memorandum contra at 16-19, 22.)

DERS and Cinergy, in their memorandum contra, argue that the Commission complied with the mandate of the court and that the Commission has no obligation to expand the scope of the proceedings before it. (DERS and Cinergy memorandum contra at 9-12.)

(23) OCC is incorrect. There is an almost limitless number of claims that the side agreements might support. Their existence does not make them relevant to our consideration of the matter before us: Duke's application for approval of an RSP. As we said in the order on remand, the purpose of these proceedings is, at this point, only to consider those matters that are relevant to the application and remanded to us by the supreme court. The first, third, and fourth sections of the second ground for rehearing will be denied.

(24) In the second section of the second ground for rehearing, OCC contends that the total effect of Duke's RSP is pricing that is discriminatory and that the Commission should have considered the expanded record on that issue. (OCC application for rehearing at 21-27.)

(25) Duke asserts that all of its customers are paying Commission-approved rates. Duke also points to testimony by OCC's witness in which she admitted her lack of expertise in the area covered by the side agreements. (Duke memorandum contra at 19-21.)

(26) As we discussed in the order on remand, our purpose was only to consider issues remanded by the supreme court. For purposes of this proceeding, this issue is ancillary and, therefore, should be denied.

(27) OCC's final ground for rehearing claims that the Commission erred in its designation of certain portions of the record as trade secrets. OCC claims that the Commission made "no significant effort to reduce the amount of information shielded from public scrutiny." OCC complains that parties failed to address the individual contents of the documents and, thus, failed to meet their burden of proof. (OCC application for rehearing at 30-37.)

(28) DERS and Cinergy strenuously object to OCC's argument. They point out that OCC is continuing to exaggerate its complaint by suggesting that "nearly every word" will be redacted. Rather, DERS and Cinergy point out, the Commission's ruling provided a detailed list of specific items that could be protected on the basis of its *in camera* inspection. (DERS and Cinergy memorandum contra at 6-9).

IEU points out that OCC has raised nothing new in this regard. It also notes that the law does *not* require a motion for protective treatment to explicitly describe the information for which the protective order is sought. (IEU memorandum contra at 6-8.)

In addition to disagreeing with the content of OCC's argument, Duke suggests that it is premature. It claims that the issue is not ripe until the parties comply with the Commission's redaction order.

(29) This matter was fully discussed in the order on remand. OCC's application for rehearing on this ground will be denied.

(30) OPAE sets forth two grounds for rehearing:

(a) In its first assignment or error, OPAE alleges that the Commission acted unreasonably and unlawfully when, having rejected the May 19, 2004, stipulation on the basis of the remand record of the side agreements, it approved Duke's application; given that the statutory requirements of Sections 4928.14 and 4909.18, Revised Code, and the Commission's own RSP goals were not met, the Commission should have dismissed the application and ordered Duke to file a new application for the provision of standard service electric generation in its service territory.

(b) In its second assignment of error, OPAE alleges that the Commission acted unreasonably and unlawfully when it found that the IMF charge was reasonable.

(31) Arguing with regard to its first assignment of error, OPAE suggests that, rather than considering its original application, the Commission should have found all the evidence to be tainted and should have dismissed the application. OPAE reviews various precedents to reach the conclusion that the Commission did not have the authority to adopt this RSP without the existence of a stipulation supported by a wide variety of customer groups. It also re-argues its concern regarding some components being cost-based and others being market-based. (OPAE application for rehearing at 5-12.)

(32) Duke argues, in its memorandum contra, that broad support does exist for its RSP. (Duke memorandum contra at 24-26.)

(33) OPAE is incorrect in its belief that we did not consider the quality of the evidence before us. We did review and consider all aspects of the evidence presented at the original hearing in these proceedings, finding such evidence to be persuasive and convincing with regard to the outcome ordered in the order on remand. The evidence was not tainted by the side agreements.

(34) Also with regard to its first ground for rehearing, while it is true that there is no longer an RSP stipulation in these proceedings, we note that Duke's RSP application, which we approved as modified, includes the possibility that the Commission might use a bid process to test the generation price against market prices. We find that, under current circumstances, a traditional competitive bidding process is not required in light of the possibility that the Commission could solicit

test bids. As we said in the opinion and order in these proceedings, considering a similar provision, this test bid procedure "offers a reasonable alternative to a more traditional competitive bidding process, provides for a reasonable means of customer participation through the various options that are open to customers under the RSP, and fulfills the statutory requirements for a competitive bidding process." We also point out that this aspect of the RSP was not overturned by the court. Additionally, we note the support for Duke's RSP that was discussed in Duke's memorandum contra.

(35) With regard to its second ground for rehearing, OPAE argues that the IMF is not a reasonable component of the RSP and is a new and duplicative charge. It asks that the IMF be eliminated. (OPAE application for rehearing at 12-13.)

(36) This issue was fully discussed in our order on remand. The assignment of error will be denied.

(37) IEU sets forth four grounds for rehearing:

(a) In its first assignment of error, IEU alleges that the Commission erred by finding that any side agreements are relevant to whether serious bargaining of a stipulation occurred, inasmuch as no stipulation remained in effect subsequent to its September 29, 2004, opinion and order, and November 23, 2004, entry on rehearing.

(b) In its second assignment of error, IEU alleges that the Commission erred in admitting all side agreements, inasmuch as the prejudicial effect of admitting the side agreements outweighs the probative value and because the admission is a needless presentation of cumulative evidence.

(c) In its third assignment of error, IEU alleges that the Commission erred by finding that the information in the side agreements could be released without the customers' permission, pursuant to Rule 4901:1-10-24, Ohio Administrative Code (O.A.C.).

(d) In its fourth assignment of error, IEU alleges that the Commission erred in admitting into the evidentiary record side agreements that the Commission determined were irrelevant and, thus, inadmissible pursuant to Rule 402, Ohio Rules of Evidence.

(38) IEU, to support its first and second grounds for rehearing, repeats its argument that there was, at the time of the remand, no stipulation in effect, as the parties' stipulation had been modified by the Commission. Ignoring the plain language of the Supreme Court of Ohio and of its own agreement, IEU believes that "it was unnecessary for any party to withdraw from the Stipulation." (IEU application for rehearing at 10.) Without a stipulation, IEU contends, the side agreements are not relevant. Further, IEU believes that admission of those side agreements was improper, as the prejudicial effect outweighed the probative value. The "prejudicial effect" cited by IEU is the risk of release of "sensitive information." Finally, IEU claims that admission of the agreements is a "needless presentation of cumulative evidence and that, therefore, the agreements should have been reviewed *in camera* and never admitted into the record, even if necessary for evaluation of the first prong of the stipulation test. (IEU application for rehearing at 5-13.)

(39) OCC disagrees with IEU's claim that the stipulation was not still in effect and asserts that the side agreements' admission was neither prejudicial nor cumulative, pointing out that no actual *unfair* effect of the evidence was described by IEU. (OCC memorandum contra at 3-6.) Similarly, OPAE insists that the stipulation remained in effect prior to the issuance of the order on remand. OPAE contends that issues of admissibility of the side agreements are moot, as IEU failed to submit an interlocutory appeal relating to their admission at the hearing on remand. (OPAE memorandum contra at 8-10.) Dominion also weighs in on this discussion, correcting IEU's characterization of a prior Dominion argument and agreeing with the Commission's finding that the side agreements were relevant. OMG also agrees that the stipulation remained in existence at the time of the hearing on remand and that evidence of those agreements was properly admitted.

(40) The matter covered by IEU's first assignment of error, relating to the relevance of any side agreement in the face of the claimed nonexistence of the stipulation, was fully discussed in our order on remand. With regard to IEU's second assignment of error, in light of the fact that we found that the terms of the side agreement bore directly and critically on our ability to consider the stipulation, we find that their probative value was extremely high. In addition, we find that evidence of the side agreements was not prejudicial in any way and did not confuse

the issues or the Commission. Therefore, on balance, it was not error to admit the agreements into the record. Further, with regard to IEU's extraordinary suggestion that the side agreements should have been evaluated, for purposes of the three-prong stipulation test, outside of the record, we note that Section 4903.09, Revised Code, requires the Commission, in all contested cases, to develop a complete record of the proceedings, which record forms the basis for the ultimate determinations in such cases. Both of these assignments of error will be denied. To do as suggested by IEU, to wit, to render findings of fact based on non-record evidence, would surely constitute reversible error.

(41) With regard to its third assignment of error, IEU cites to an administrative rule prohibiting release of certain customer information by EDUs. IEU proposes to use this narrow administrative rule to reach the conclusion that no trade secret information in this case may ever be released into the public record without customer consent.

(42) OPAE points out that the cited rule does not apply to the release of information by the Commission. It suggests that the sensitive customer identification information could be permanently redacted from the documents held under seal. OCC also points out that the rule in question only touches on the release of account numbers and social security numbers.

(43) The Commission found, in the order on remand, that various kinds of information in the side agreements should be considered to be a trade secret, including customer names, identifying numbers, and certain contract terms. Rule 4901:1-10-24, Ohio Administrative Code, referenced by IEU, prohibits electric distribution utilities from publicly releasing a customer's account number or social security number without the customer's consent, except in certain listed circumstances. IEU makes the claim that "because all of the information that has been deemed a trade secret cannot be released without customer consent, all such information should be stricken from the record." (IEU application for rehearing at 15.) IEU is apparently attempting to expand this administrative rule to prevent the Commission from allowing the public release of filed documents, where those documents include not only account numbers and social security numbers but, also, various contract terms. We decline to reach this conclusion.

We do agree, however, that the continued protection of customer account numbers, social security numbers, and employer identification numbers would be a burden on customers under the current 18-month protective order. IEU's third ground for rehearing will be granted only to extend the protective order duration to five years with regard to customer account numbers, social security numbers, and employer identification numbers.

(44) IEU's fourth ground for hearing alleges that irrelevant side agreements should not have been admitted into the record. It asks the Commission to direct all parties to return or destroy all discovered documents that were ultimately found to be irrelevant.

(45) OMG claims that not all of the side agreements were admitted, on the basis that the Commission found certain ones of them to be irrelevant. OCC believes that the side agreements were all properly admitted and that their use should be expanded.

(46) With regard to IEU's fourth ground for rehearing, the Commission finds that the attorney examiners properly admitted all side agreements into the record. While we ultimately found that certain of those documents would form no part of the basis for our opinion, that does not mean that we did not need to review them in order to reach that conclusion. Our statement that such agreements were "deemed irrelevant" was, perhaps, imprecise. We will therefore clarify that statement. Our intent was merely to say that the terms of those particular side agreements did not affect our order on remand in any way. From an evidentiary standpoint, however, they remained relevant and admissible. We would point out, here, that evidence does not become retroactively inadmissible when a court or administrative body fails to use that information as part of its decision. IEU's fourth ground for rehearing will be denied.

It is, therefore,

ORDERED, That the applications for rehearing by OCC and OPAE be denied. It is, further,

ORDERED, That Duke's fifth ground for rehearing be granted as set forth in Finding (11) for further consideration of the matters specified therein and that the remainder of Duke's application for rehearing be granted in part and denied in part. It is, further,

ORDERED, That the applications for rehearing by IEU be granted in part and denied in part. It is, further, ORDERED, That a copy of this entry on rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie (abstained)

Donald L. Mason

JWK/SEF;geb

Entered in the Journal

DEC 19 2007

Reneé J. Jenkins
Secretary

SUMMARY OF
THE COMMISSION'S OPINION AND ORDER
OF SEPTEMBER 29, 2004,
IN THE CINCINNATI GAS & ELECTRIC COMPANY
RATE STABILIZATION PLAN CASES
CASE NOS. 03-93-EL-ATA, ET AL.

On June 22, 1999, the Ohio General Assembly passed legislation requiring the restructuring of the electric utility industry and providing for retail competition with regard to the generation component of electric service (Amended Substitute Senate Bill No. 3 of the 123rd General Assembly). Pursuant to that legislation, on August 31, 2000, the Commission issued an opinion and order approving a transition plan for The Cincinnati Gas & Electric Company (CG&E). During the CG&E's market development plan, the Commission anticipated that competition would develop to the level described by the Ohio General Assembly in Senate Bill 3.

On January 10, 2003, CG&E filed an application for authority to modify its nonresidential generation rates to provide for a competitive market option. On October 8, 2003, CG&E filed three additional, related cases requesting authority to modify certain accounting procedures related to its participation in Midwest Independent Transmission System Operator and its investment in transmission and distribution facilities, and requesting authority to establish a capital investment rider to recover deferred transmission and distribution costs. Subsequent to the filing of these four cases, the Commission requested that CG&E file a rate stabilization plan. CG&E filed that plan on January 26, 2004.

Following the filing of its rate stabilization plan, CG&E filed a stipulation signed by it and several of the intervening parties, including staff of the Commission, FirstEnergy Solutions Corp.; Dominion Retail, Inc.; Industrial Energy Users-Ohio; Green Mountain Energy Company; Ohio Energy Group, Inc.; The Kroger Co.; AK Steel Corporation; Cognis Corp.; People Working Cooperatively; Communities United For Action; and Ohio Hospital Association. Parties that did not sign the stipulation include Ohio Consumers' Counsel; Constellation NewEnergy Inc.; MidAmerican Energy Company; Strategic Energy, LLC; WPS Energy Services, Inc.; Constellation Power Source, Inc.; Ohio Partners for Affordable Energy; The Ohio Manufacturers Association; National Energy Marketers Association; and PSEG Energy Resources & Trade LLC.

In the opinion and order, the Commission is approving the stipulation with certain modifications, including:

- requiring Commission approval for all changes in the amount or avoidability of the annually adjustable component of the price, and providing that the Commission, in evaluating such changes, would consider cost savings as well as increases (see page 32),

- allowing the annually adjustable component to be avoidable during 2005 for shopping customers (see page 32),

- eliminating the cap on the increases in the annually avoidable component of the price (see page 32),
- increasing the percentage of nonresidential shopping customers who may avoid paying the rate stabilization charge from 25 percent to 50 percent (see page 19),
- requiring Commission approval for all increases in the amount of recovery of fuel and economy power purchases (see page 17),
- allowing the deferral of certain 2004 and 2005 distribution expenses only with regard to nonresidential consumers and not residential consumers (see pages 34-35),
- requiring that CG&E comply with the terms of the Commission's order approving the stipulation in CG&E's electric transition plan (Case No. 99-1658-EL-ETP, et al.) such that residential consumers pay regulatory transition charges only through 2008 and receive a five percent discount on generation charges through 2005 (see pages 36-37),
- requiring the calculation of the incremental cost of power, for purposes of the price to be paid by nonresidential shopping customers upon their return to CG&E, on the basis of costs incurred only by CG&E, not by its affiliates (see page 35),
- prohibiting CG&E from requiring nonresidential consumers to waive their statutory provider of last resort rights (see page 35),
- providing that, if CG&E does not implement the stipulation as modified, CG&E will be required to establish full corporate separation (see page 34), and
- modifying the 90-day notice requirement regarding CRES contracts for purposes of avoiding the rate stabilization charge (see page 20).

This summary was prepared to provide a brief statement of the Commission's action in these cases. It is not part of the Commission's decision and does not supersede the full text of the Commission's opinion and order.

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the 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

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The Commission, coming now to consider the stipulation, testimony, and other evidence presented in these proceedings, hereby issues its opinion and order.

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I. HISTORY OF THE PROCEEDINGS

On June 22, 1999, the Ohio General Assembly passed legislation[1] requiring the restructuring of the electric utility industry and providing for retail competition with regard to the generation component of electric service (SB 3). Pursuant to SB 3, on August 31, 2000, the Commission issued an opinion and order (ETP opinion) approving a transition plan, as modified by three stipulations (ETP stipulation), with regard to the electric transition plan (ETP) of The Cincinnati Gas & Electric Company (CG&E or company).[2] In its ETP opinion, the Commission, among other things, allowed CG&E a market development period (MDP) ending no earlier than December 31, 2005, for residential customers and, with regard to each other customer class, ending when 20 percent of the load of each such class switches the purchase of its generation supply to a certified supplier. During the MDP, the Commission anticipated that competition would develop to the level described by the Ohio General Assembly in SB 3. The ETP opinion provides that the shopping credits for switching customers will continue through December 31, 2005, even if the MDP has previously terminated.[3] The ETP opinion granted CG&E accounting authority to defer and recover a regulatory transition charge (RTC) which would continue through 2008 for residential customers and through 2010 for nonresidential customers. The ETP opinion also granted residential consumers a five

1 Amended Substitute Senate Bill No. 3 of the 123rd General Assembly.

2 *In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan, Approval of Tariff Changes and New Tariffs, Authority to Modify Current Accounting Procedures, and Approval to transfer its Generating Assets to an Exempt Wholesale Generator,* Case No. 99-1658-EL-ETP, et al., Opinion and Order.

3 As the Commission understands this provision, a nonresidential, shopping customer would, during 2005, continue to pay for CG&E generation under the terms of the ETP opinion, and would receive a shopping credit from CG&E determined under the terms of the ETP opinion.

percent reduction on CG&E's charges for the generation component of its electric service. That opinion also approved a corporate separation plan for CG&E and required CG&E to take a variety of actions related to its transmission system, including the transfer of its generating assets to an exempt wholesale generator by no later than December 31, 2004.

On January 10, 2003, CG&E filed an application in *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period,* Case No. 03-93-EL-ATA (03-93) for authority to modify its nonresidential generation rates to provide for a competitive market option (CMO), including both a market-based standard service offer (CMO MBSSO) and an alternative competitive bidding process (CMO CBP), for rates subsequent to the MDP. The CMO MBSSO would establish a rate, with both fixed and variable components, for nonresidential customers that do not switch to a competitive retail electric service (CRES) provider for generation services. In addition, the CMO CBP would provide a system whereby CRES providers could submit bids, and the winning, approved bid could be available for customers to accept or reject for a one-year period. The 03-93 application specifically states that it does not serve as notice to the Commission to end the MDP for any class of consumers. A technical conference was held on February 12, 2003. Numerous entities filed motions for intervention, comments, and responses to comments regarding the application. In addition, motions for dismissal and/or consolidation were filed and denied.

On October 8, 2003, CG&E filed three additional, related cases. In *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 (03-2079), CG&E requests authority to modify current accounting procedures to allow it to defer incremental costs related to its participation in the Midwest Independent Transmission System Operator (MISO). In *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 Nos. 03-2080-EL-ATA (03-2080) and Case No. 03-2081-EL-AAM (03-2081), CG&E requests authority (a) to modify its current accounting procedures to allow it to defer incremental costs related to its net capital investment in electric transmission and distribution facilities, where that investment was made between January 1, 2001, and the date when such investment is reflected in the company's base rates, together with a carrying charge, and (b) to establish a capital investment rider to recover those deferred transmission and distribution facilities capital investments after the end of the MDP.

On December 9, 2003, the Commission issued an entry consolidating 03-93, 03-2079, 03-2080, and 03-2081. The Commission also requested that CG&E file a rate stabilization plan (RSP) which would stabilize prices following the termination of the MDP, while allowing additional time for the CRES market to grow. The Commission established a procedural schedule which would culminate in the holding of an evidentiary hearing on April 19, 2004. CG&E filed a proposed RSP on January 26, 2004.

In addition to participation in these proceedings by CG&E and the Commission's staff (staff), intervention was granted to the following parties:

> Ohio Consumers' Counsel (OCC); Green Mountain Energy Company (GMEC); Constellation NewEnergy, Inc., MidAmerican Energy Company, Strategic Energy, LLC, and WPS Energy Services, Inc. (collectively referred to as Ohio Marketers Group or OMG); Constellation Power Source, Inc. (CPS); Industrial Energy Users-Ohio (IEU); Ohio Energy Group, Inc. (OEG); The Kroger Co. (Kroger); AK Steel Corporation (AK Steel); Ohio Partners for Affordable Energy (OPAE); People Working Cooperatively (PWC); The Ohio Manufacturers' Association (OMA); Communities United for Action (CUFA); Dominion Retail , Inc. (Dominion); FirstEnergy Solutions Corp. (FES); National Energy Marketers Association (NEMA); Ohio Hospital Association (OHA); PSEG Energy Resources & Trade LLC (PSEG); and Cognis Corp. (Cognis).[4]

On February 6, 2004, OCC filed a motion to shorten the discovery response time. The motion was granted by attorney examiner entry dated February 18, 2004. That entry also scheduled a local hearing for April 22, 2004, and, due to conflicts with other ongoing matters, revised the remainder of the procedural schedule, establishing April 26, 2004, as the start of the evidentiary hearing.

On March 9, 2004, most of the parties to these proceedings filed objections to CG&E's proposed RSP. OCC, OPAE, CUFA, and Kroger filed a joint motion, on March 22, 2004, to continue the matter and to order a staff investigation. A March 25, 2004, an attorney examiner entry ordered a settlement conference to be held on March 31, 2004, at which the procedural schedule would be discussed. On March 26, 2004, a group of parties composed of CG&E, Dominion, GM, OMG, and CPS, filed a motion to extend the procedural schedule by three weeks in order to allow more opportunity to discuss settlement of the matter. Following an informal discussion of the schedule among the parties present for the settlement conference, an entry was issued on April 7, 2004, confirming the parties' agreement to start the evidentiary hearing on May 17, 2004. Direct testimony was filed by CG&E on April 15, 2004, by staff on April 22, 2004, and by OCC and other intervenors on May 6, 2004.

On April 22, 2004, the local public hearing was held as scheduled, in the city of Cincinnati. The testimony in Cincinnati was mainly directed to the witnesses' general opposition to increasing rates and to the effect that those increases would have on consumers who are poor, disabled, or on fixed incomes.

On May 17, 2004, the evidentiary hearing commenced, as scheduled. CG&E moved for a continuance until May 20, 2004, on the basis that settlement discussions were continuing. Following a discussion of scheduling and procedural issues, the motion was

4 The city of Cincinnati, General Electric Company, Duke Realty Corporation, and Energy America, LLC, also intervened, but subsequently withdrew as parties to the proceedings.

granted. CG&E and some of the intervenors filed a stipulation and recommendation (stipulation) on May 19, 2004, which would, if approved, resolve all of the issues in these cases. The stipulation was signed by CG&E, staff, FES, Dominion, IEU, GMEC, OEG, Kroger, AK Steel, Cognis, PWC, CUFA and OHA (collectively, signatory parties). The stipulation was not signed by OCC, OMG, CPS, OPAE, OMA, NEMA or PSEG (collectively, nonsignatory parties). On May 20, 2004, CG&E filed supplemental testimony of its witnesses, and the hearing began again. Supplemental testimony was filed by staff on May 24, 2004, and by intervenors on May 26, 2004. The hearing concluded on June 1, 2004.

Post-hearing briefs were filed on June 22, 2004, and reply briefs were filed on July 2, 2004.[5] Letters from consumers, expressing opposition to CG&E's CMO and RSP, have also been filed in the docket of 03-93.[6]

II. SUMMARY OF THE STIPULATION

The stipulation was intended by the signatory parties to resolve all of the outstanding issues in the four consolidated cases. The stipulation includes the following provisions:

1. The MDP would end for nonresidential consumers on December 31, 2004.

2. The MDP would end for residential consumers on December 31, 2005.

3. CG&E would charge an unavoidable fee made up of two components: (1) a rate stabilization charge (RSC), and (2) an annually adjusted component (AAC) which is intended to maintain adequate capacity reserves and to recover CG&E's costs associated with homeland security, taxes, environmental compliance, and emission allowances.[7] The RSC would be effective for nonresidential consumers beginning on January 1, 2005, and for residential consumers beginning on January 1, 2006. The AAC would be effective for all consumers beginning January 1, 2005, although CG&E would waive collection of AAC from residential consumers during 2005.

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5 PSEG filed a document which is styled a "letter brief in lieu of a formal reply brief" on July 6, 2004, four days after the deadline for receipt of reply briefs.

6 On September 2, 2004, OMG and CPS requested that the Commission take administrative notice of an August 6, 2004, order of the Federal Energy Regulatory Commission regarding MISO's proposal to implement a market-based congestion management program and certain energy spot markets, in docket EL04-691-000. As there was no opposition to this request, the Commission hereby takes administrative notice as requested.

7 The stipulation actually refers to the RSC and the AAC as being two parts of a provider of last resort fee. It is somewhat confusing in its various references to these charges. For the sake of clarity, the term "provider of last resort" (or POLR) will be used in this opinion and order to refer only to the obligation of CG&E to provide last-resort services to consumers in its area. The RSC and the AAC will be discussed independently of each other.

Increases to the AAC could be made through either (1) an automatic annual increase of six percent of little g,[8] or (2) an annual increase of up to eight percent of little g if CG&E can document, for the Commission, that level of cumulative actual costs for homeland security, taxes, environmental compliance, and emission allowances, above a baseline equal to the amount of such costs included in the rates approved for calendar year 2000, in CG&E's last rate case. All increases to the AAC under the stipulation would be cumulative but would be limited, for residential consumers, to no move than five percent effective January 1, 2005 (the collection of which is waived), six percent effective January 1, 2006, seven percent effective January 1, 2007, and eight percent effective January 1, 2008.

4. The RSC would be avoidable for the first 25 percent of load, in each consumer rate class, to switch to a CRES provider or governmental aggregator, subject to all of the following conditions:

   A. The ability to bypass the RSC would be effective on January 1, 2005, for all nonresidential consumers and on January 1, 2006, for all residential consumers.

   B. All consumers in the remaining 75 percent of load, by consumer rate class, would pay the RSC.

   C. CG&E would maintain a queue of switched consumers by load, effective January 1, 2005.

   D. To qualify to bypass the RSC, a nonresidential consumer would either (a) enter into a contract with a creditworthy CRES provider to provide firm generation service for all of that consumer's needs through December 31, 2008, or (b) provide CG&E an assurance that it will purchase competitive retail electric generation service from a CRES provider by signing an agreement with CG&E to return to CG&E only at (1) the highest purchased power costs incurred by CG&E or by any affiliate to serve any of CG&E's consumers during the applicable calendar month or (2) the highest cost generation dispatched by CG&E or by any affiliate to serve any of CG&E's consumers during the applicable calendar month. Bypassing, nonresidential consumers which have a contract with a CRES provider would also have to agree that, if their contracting CRES provider defaults, the consumer may only return to service from CG&E at the market rate, and, if no generation is available, be subject to disconnection. Such consumers waive their statutory right to POLR service.

   E. Residential consumers would be able to bypass the RSC if they are in the first 25 percent of residential load as determined by order and if

[8] "Little g" refers to the embedded cost of generation (prior to the unbundling of generation, transmission, and distribution services pursuant to SB 3), minus the RTC.

CG&E receives a proper direct access service request (DASR). DASRs for residential consumers served under existing contracts with a CRES provider as of January 1, 2006, shall be considered received as of their original receipt date. Residential consumers who bypass the RSC would be subject to any applicable tariffed minimum stay or exit fee provisions.

5. Subject to Federal Energy Regulatory Commission (FERC) approval of the proposed MISO Day 2[9] tariffs and on-going FERC regulation, load-serving entities could rely upon CG&E's reserve capacity to meet their reserve capacity requirements for loads served within CG&E's certified service territory.

6. CG&E would establish accounting deferrals representing the difference between its current revenue requirement on the net capital investment related to its distribution business from July 1, 2004, through December 31, 2005, less the revenue requirement on capital investment related to its electric distribution business approved by the Commission in Case No. 92-1464-EL-AIR. CG&E would implement a rider for recovery of these accounting deferrals, effective January 1, 2006, amortized over five years.

7. CG&E would withdraw its pending distribution base rate case, Case No. 04-680-EL-AIR, and that it would file a new distribution base rate case with rates to be effective January 1, 2006.

8. CG&E's market-based standard service offer, as set forth in the stipulation would consist of two basic components: a price to compare component and an unavoidable component. The price to compare represents that portion of the market-based standard service offer that consumers switching to a CRES provider will avoid paying to CG&E.

9. CG&E would establish a tariff applicable to the first 25 percent of residential load to purchase generation service from a CRES provider not affiliated with CG&E, such that the applicable residential consumers receive an additional bill credit per kilowatt-hour (kWh). The bill credits would be limited to a total of no more than $ 7,000,000.00 for the period of January 1, 2006, through December 31, 2008, and no more than $3,000,000 in any calendar year.

10. CG&E would establish transmission cost riders for nonresidential consumers beginning January 1, 2005, and for residential consumers beginning January 1, 2006. These riders would be designed to recover all MISO and FERC approved transmission and ancillary service rates and charges. The transmission cost riders are only to be charged to consumers taking generation service from CG&E.

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9 MISO Day 2 is a date identified with MISO becoming responsible for the reliability of all control areas within its footprint, including CG&E, and responsible for the centralized dispatch of all generating units designated as network resources (OMG Ex. 13, at 7).

19. CG&E would maintain the five percent generation rate decrease for residential consumers through 2008, unless CG&E's collection of RTCs from residential consumers is not extended through December 31, 2010, in which case the residential five percent generation decrease would end effective immediately or on January 1, 2005, whichever is later.

20. CG&E would file a motion to dismiss Ohio Supreme Court Case Nos. 03-1207, 03-2034, and 04-563, would cease prosecution before the Commission of any case based on its assertion that the requirements imposed on CRES providers with respect to collateral requirements and supplier agreements apply to governmental aggregators, and would not assert this same argument in the future in any proceeding or in any dealings with governmental aggregators.

21. The stipulation does not amend or supersede any provision of the ETP stipulation, except as expressly stated.

III. CRITERIA FOR EVALUATING STIPULATIONS

Rule 4901-1-30, Ohio Administrative Code (O.A.C.), authorizes parties to Commission proceedings to enter into stipulations. Although not binding on the Commission, the terms of such agreements are accorded substantial weight. *See Consumers Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125 (1992), *citing Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155 (1978). This concept is particularly valid where the stipulation is supported or unopposed by the vast majority of parties in the proceeding in which it is offered.

As an initial matter, OCC argues that the stipulation should not be approved because OCC was denied the opportunity to conduct adequate discovery regarding what it claims are side agreements to the stipulation (OCC Brief at 55). In its brief, OCC argues that this denial caused two independent problems. First, because OCC could not obtain discovery of any side agreements, it could not use the information that it might have thereby learned in order to identify other admissible evidence or other appropriate witnesses who might have testified as to discrimination. Second, OCC believes that the content of any side agreements should also have been admitted so that it could show that the total package of the stipulation (including any side agreements) was not in the public interest (being, perhaps, anticompetitive, discriminatory, or otherwise repugnant to Ohio law) and that the settlement was not the result of serious bargaining. (OCC Brief at 55-56.) At the hearing, OCC requested that CG&E be compelled to answer its discovery of all agreements between CG&E and any party to this proceeding (Tr. II at 8-15). OCC seeks to reopen the record to admit additional evidence that would result from such discovery (OCC Brief at 56-57).

The attorney examiners denied OCC's motion to compel on the basis that the Commission has previously found that the existence or nonexistence of "side agreements" is irrelevant and that, to the extent that such agreements have anything to do with settlement discussions, they are also privileged (Tr. II at 14-15; *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for The Dayton*

11. Shopping credits for all nonresidential consumers would end on December 31, 2004, and for all residential consumers on December 31, 2005. However, nonresidential consumers that are switched to a CRES provider on December 31, 2004, would continue to receive the applicable shopping credit set forth in the ETP opinion. Percentage of income payment plan (PIPP) consumers would also continue to be eligible to receive shopping credits.

12. The RTC approved in the ETP stipulation would remain a non-by-passable charge and would be effective for all consumers, including residential consumers, through December 31, 2010.

13. The Commission could choose to determine and implement a competitive bidding process to test CG&E's price to compare against the market price. If the price to compare for the first 25 percent of load to switch is significantly different than the bid price, then either the Commission or CG&E could begin discussions with all parties to continue, amend, or terminate the stipulation.

14. CG&E would have no obligation to transfer its generating assets to an exempt wholesale generator by December 31, 2004.

15. CG&E would calculate the avoidable fuel cost component of the price to compare by using the average costs for fuel consumed at CG&E's plants, and economy purchased power costs, for all sales in CG&E's certified service territory. CG&E would adjust its fuel costs quarterly and would calculate the fuel costs to be part of the price to compare by using a baseline of the fuel costs approved by the Commission in Case No. 99-103-EL-EFC. In no instance would the fuel cost portion of the price to compare be reduced. Fuel used by CG&E's plants, and economy purchased power obtained to serve The Union Light, Heat and Power Company (ULH&P) load would remain part of the calculation of average fuel and purchased power costs until CG&E's Power Sales Agreement, Rate Schedule FERC No. 56, is terminated.

16. CG&E would extend its existing contracts for weatherization and energy assistance, pursuant to contract changes made in conjunction with the Cinergy Community Energy Partnership board, through December 31, 2008.

17. CG&E would implement a residential demand side management tracker.

18. CG&E would enter into good faith discussions with the Ohio Department of Development (ODOD) to establish an annual arrearage crediting program for PIPP consumers and would permit percentage of income payment plan consumers to receive the residential shopping credit approved by the Commission in the ETP opinion through December 31, 2005, for the first 25 percent of residential load to switch to a CRES provider conditioned upon the inclusion of such consumers toward the first 25 percent of residential load to switch.

Power and Light Company, Case No. 02-2779-EL-ATA, *et al.*, Opinion and Order [September 2, 2003] [DP&L RSP case], at 9-12.) The Commission agrees with the examiners' ruling on this issue as it finds no reason to depart from established precedent.

The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. *See, e.g., Ohio-American Water Co.*, Case No. 99-1038-WW-AIR, Opinion and Order (June 29, 2000); *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR, Order on Remand (April 14, 1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT, Opinion and Order (March 30, 1994); *Ohio Edison Co.*, Case No. 91-698-EL-FOR et al., Opinion and Order (December 30, 1993); *Cleveland Electric Illuminating. Co.*, Case No. 88-170-EL-AIR, Opinion and Order (January 31, 1989); *Restatement of Accounts and Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC, Opinion and Order (November 26, 1985). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

(1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?

(2) Does the settlement, as a package, benefit ratepayers and the public interest?

(3) Does the settlement package violate any important regulatory principle or practice?

The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 547 (1994) *(citing Consumers' Counsel, supra*, at 126). The court stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission *(Id.)*. Therefore, we will review the terms of the stipulation based on these criteria.

A. <u>Is the settlement a product of serious bargaining among capable, knowledgeable parties?</u>

The first criterion of the Commission's analysis requires a stipulation to represent the product of serious bargaining among knowledgeable, capable parties. In their briefs, CG&E, GMEC, OEG, and staff all claim that the stipulation meets this test. They point out that the signatory parties represent knowledgeable and capable stakeholders from every type of participant in the CRES market, including the EDU, two residential CRES providers, one commercial and industrial CRES provider, three organizations representing commercial and industrial customers, a commercial consumer, an industrial consumer, and two organizations representing residential consumer interests. Further, these parties are represented by counsel with experience in utility matters. In addition, the signatory parties claim that the stipulation resulted from numerous negotiating sessions, taking place over several months and involving concessions on both sides, in order to create an agreement. Therefore, these parties argue that the Commission should approve the stipulation. (CG&E Initial Brief at 45-46; Staff Initial Brief at 4; GMEC Initial Brief at 5.)

OCC and OPAE claim that the stipulation is flawed because the group that supports the stipulation is not representative of all customer groups (OCC Initial Brief at 54; OPAE Initial Brief at 8). They argue that the focus of one of the residential customer groups to sign the stipulation has been on narrow issues related to the PIPP program and that the focus of the other residential customer group has been on demand side management (DSM) programs funded by the company. Further, OPAE claims that OCC, which is the organization designated by Ohio statute to represent Ohio residential customers and OPAE, which is an advocate for residential and low-income customers, remains opposed to the stipulation. With the absence of these residential representatives, OCC and OPAE argue that the stipulation should not be approved by the Commission. (OCC Initial Brief at 54; OPAE Reply Brief at 8-9.) OCC also questions whether serious bargaining took place. For example, it cites to paragraph 18 of the stipulation that provides CG&E's commitment to implement a residential DSM tracker set initially at $0.00. OCC claims that this is a meaningless provision that should be reviewed by the Commission. (OCC Reply Brief at 15.)

The Commission finds that serious bargaining did occur, among capable, knowledgeable parties. As noted in the opinion and order in the *DP&L RSP* opinion, the "standard does not require one hundred percent cooperation or participation." There is no evidence that all parties were not invited to participate in settlement discussion. As a matter of fact, testimony at the hearing indicates that all parties participated in negotiating sessions, even though not all signed the stipulation. Multiple bargaining sessions, open to all parties, took place before commencement of the hearings. It should also be noted that the parties to the negotiations have been involved in many cases before the Commission. (Tr. V at 166-169.) Thus, the Commission finds that the stipulation meets the first requirement of the three-pronged test.

B. Does the settlement, as a package, benefit ratepayers and the public interest?

1. Basic Analysis

For the second criterion, the Commission must find that a stipulation, as a package, benefits ratepayers and the public interest. CG&E, GMEC, OEG, and staff claim that this stipulation meets that requirement. They first note that, although under the stipulation, the MDP ends for nonresidential consumers on December 31, 2004, and on December 31, 2005, for residential consumers (Jt. Ex. 1 at 4), consumers will continue to receive service through 2008 at stable rates, because CG&E is agreeing to continue its generation rates, subject to limited annual increases for certain components of its costs (CG&E Ex. 12, at 6). They point out that CG&E will also maintain the five percent generation rate decrease for residential consumers, and that shopping credits for residential consumers will be maintained through 2005 (Jt. Ex. 1 at 15, 19). According to CG&E witness Steffen, these benefits will allow customers to continue to receive incentivized prices (CG&E Ex. 12, at 8). CG&E also notes that, as an additional benefit to ratepayers and the public interest, it will extend its existing contracts for weatherization and energy assistance and its agreement to enter into good faith discussions with ODOD to establish an annual arrearage crediting program for PIPP consumers (Jt. Ex. 1 at 18). All of these parties note that, under the stipulation, CG&E will withdraw its pending appeals challenging municipal aggregation, which has been the means by which the majority of competition in Ohio has come into existence (CG&E Initial Brief at 47-48; Staff Initial Brief at 5-6; GMEC Initial Brief at 5-8; OEG Initial Brief at 4,7). Staff and CG&E also point out that, under the stipulation, certain costs, including fuel and purchased power costs, will be avoidable by shopping customers (Staff Initial Brief at 5; CG&E Initial Brief at 48). CG&E claims that this will increase the ability of competitive suppliers to attract customers and to enhance the development of the competitive market (CG&E Ex. 12, at 8). CG&E also notes that a total of $7 million is provided under the stipulation, to implement a bill credit per kWh for switching residential consumers up to $3 million per year in 2006 through 2008. This will provide residential consumers with a $7 million benefit. CG&E also agrees to extend existing contracts for weatherization and energy assistance which would otherwise expire at the end of 2005 (CG&E Ex.12, at 9-10). CG&E notes that, as an additional benefit to ratepayers and the public interest, under the stipulation, it is withdrawing its pending distribution base rate case seeking $78.1 million; it is reducing the annual caps for AAC charges; and it is allowing the RSC to be avoidable for the first 25 percent of customers who switch to a CRES provider (OEG Initial Brief at 8; CG&E Initial Brief at 47-48)

In their support of the stipulation, GMEC and CG&E claim that certain charges are capped, including the annual increases to the AAC charges for nonresidential customers, which are capped at six percent of CG&E's little g rate, if CG&E implements an automatic increase, or at eight percent of little g in the event that CG&E opts to justify to the Commission its actual costs. Similarly, they point to CG&E's agreement to cap increases in the AAC charges for residential consumers at five percent for 2005, six percent for 2006, seven percent for 2007 and eight percent for 2008. (GMEC Initial Brief at 9; CG&E Initial Brief at 47.) GMEC also pointed out that, under the stipulation, CG&E has compromised on several issues, as compared with its original RSP application, including extending the residential shopping credits, extending the MDP for residential customers, and extending the scope and duration of the accounting deferrals associated with capital investment in its transmission and distribution system, resulting in savings to consumers (GMEC Initial Brief at 10)..

Certain of the nonsignatory parties argue that there are very few benefits to ratepayers or the public interest in the stipulation. OPAE contends that, under the stipulation, consumers face rate increases of at least six percent per year and that these increases are not stabilized. OPAE claims that supporters of the stipulation falsely claim, as a benefit, various advantages resulting from the stipulation as compared to the original CMO proposal offered by CG&E. OPAE argues that such savings are fictional because the original CMO proposed by CG&E was never approved by the Commission. (OPAE Reply Brief at 10.) OPAE also points out that one of the claimed benefits is the extension of the rate freeze for residential customers through 2005; however, it notes that this is a function of SB 3 and the original ETP stipulation, not the stipulation. According to OPAE, there are no savings from following these already existing statutory and regulatory provisions. In addition, OPAE argues that delaying a distribution rate case, in which distribution rates could arguably go down, is no benefit to ratepayers (*Id.* at 10).

In their brief, OMG and CPS similarly argue that the stipulation does not benefit ratepayers. They point out that, under the stipulation, standard service customers will face three increases: an AAC increase for additional environmental, reserve margin, and security costs for generation; a fuel and purchased power increase; and a rider for transmission and congestion increases. OMG and CPS also note that, under the stipulation, while 25 percent of customers can avoid the RSC by switching to a CRES provider, 75 percent of customers will have to purchase a rate stabilization service of questionable value. They also submit that shopping customers will be made to pay for generation assets they will not use. (OMG/CPS Reply Brief at 5-6.)

OCC contends in its brief that the stipulation would impose between $425 million and $366 million more on residential customers than the ETP stipulation, not including whatever fuel increases residential customers will pay (OCC Reply Brief at 7-8). OCC also argues that the stipulation does not provide certainty or stable rates to customers (OCC Reply Brief at 8). According to OCC, violation of the customer benefits from the ETP stipulation is harmful to ratepayers and the deferrals recommended by the stipulation are injurious to a broad range of future ratepayers (OCC Initial Brief at 54). OCC discounts the value of the PIPP and DSM provisions in the stipulation by arguing that these are merely agreements for CG&E to conduct further discussions and do not commit CG&E to attain any specific outcome. OCC points out that the ODOD has no obligation to change its policies and practices or its contracts with CG&E and the claimed benefit for DSM commits CG&E to $0.00, which actually means nothing for ratepayers. (OCC Reply Brief at 15.)

In this opinion and order, the Commission is modifing the stipulation in a variety of ways. Based on the evidence, the Commission finds that the stipulation, with the modifications discussed in this opinion and order, does benefit the public in a number of ways. The most immediate benefit is the stabilization of the price of generation. The price can not change from the current generation rate except to account for increases in certain categories of costs. In addition, each proposed increase will be subject to Commission oversight and approval. In the event that market prices fall prior to the end of 2008, the Commission will be in a position to implement a competitive bidding process to test the price and may amend or terminate the stipulation, as modified, if appropriate. Thus, the stipulation, as modified in this opinion and order, would act as a hedge against substantial price increases for the next four years. Further, under the stipulation, a large percentage of customers may avoid the RSC charge by switching to a CRES provider, and all increases sought by CG&E remain subject to Commission review and approval. In addition, the stipulation, as modified, provides bill credits to customers and extension of weatherization and energy assistance to customers. Also, CG&E's withdrawal of its distribution rate case and the withdrawal of its supreme court challenges will benefit customers.

2. Commission Goals for Rate Stabilization Plans

The Commission has established three goals that may be met by an RSP, where CRES markets have not fully developed by the end of a utility's MDP: (1) rate certainty for consumers, (2) financial stability for the utility, and (3) the further development of competitive markets. *DP&L RSP Opinion, FirstEnergy RSP Opinion.* We will therefore further consider the benefit to the ratepayers and the public interest on the basis of these three objectives.

a. Rate Certainty

GMEC, Staff, CG&E, and OEG argue that the objective of rate certainty is met by the stipulation. They claim that rate certainty and stability through 2008 is ensured because base electric generation rates are capped, the residential generation rate discount is continued, and a residential, per kWh, bill credit is provided (Staff Initial Brief at 5; GMEC Initial Brief at 12; OEG Initial Brief at 4; CG&E Initial Brief at 43). These parties argue that the stipulation both ensures that customers will be able to receive stable, relatively low-cost service even if the market price fluctuates and, also, will allow customers to purchase service on the competitive market. CG&E further contends that rate certainty to consumers is provided through a stable price to compare, with adjustments only to permit recovery of fuel and purchased power costs; a charge that permits CG&E to recover an RSC from 75 percent of its customers; and a revenue requirement related to the provision of reliable generation service; and rate subsidies such as shopping credits, a residential discount, and a residential per kWh bill credit. CG&E notes that the costs to maintain reliable competitive generation service include the costs necessary to maintain an adequate reserve margin, environmental costs, environmental allowances, taxes, transmission costs, and fuel costs. (CG&E Initial Brief at 43.)

Those in support of the stipulation argue that the consumer rate stability aspect of the stipulation is further advanced by CG&E's agreement to withdraw its pending electric distribution base rate cases (Case Nos. 04-680-EL-AIR and 04-681-EL-AAM). CG&E had initially filed these cases with new rates to become effective January 1, 2005. According to its application in Case No. 04-680, CG&E seeks an annual increase in the revenue requirement of approximately $78.1 million. Under the stipulation, CG&E agrees to withdraw these pending cases and refile them in 2005 so that the new rates would not become effective until 2006. According to these parties, dismissing the distribution rate cases is equivalent to a $78.1 million savings. (GMEC Initial Brief at 6-7, 10; CG&E Initial Brief at 48; OEG Initial Brief at 6.)

PSEG, OPAE, OMG, CPS and OCC argue that the stipulation does not achieve the Commission's goal of rate certainty and stability. OPAE notes that SB 3 requires rates to be frozen and provides that the only way distribution rates can be altered during the MDP is through an increase or decrease in transmission rates, approved by FERC and a reciprocal rebalancing of the distribution component of the rate (OPAE Initial Brief at 3). PSEG contends that rate certainty is not achieved by the stipulation because rate components are not fixed or predictable and because charges for fuel and taxes increase (PSEG Reply Brief at 8). OCC argues that the stipulation fails to stabilize prices following the end of the MDP and that a large portion of all customer charges are unavoidable by customers (OCC Initial Brief at 13).

OCC also criticizes the stipulation by pointing out that CG&E's costs for maintaining an adequate reserve margin, its homeland security costs, environmental compliance, and taxes, which are included in the AAC charge, may be automatically increased six percent per year on a cumulative basis without Commission approval, or more with Commission approval. OCC also notes that, under the stipulation, CG&E's fuel and purchased power costs are subject to unlimited increases. Further, it states that the stipulation includes a rider charged to customers for transmission and congestion charges that will be neither fixed nor predictable. (OCC Initial Brief at 13, 15.) OCC contends that another major flaw in the stipulation is that there is also no provision requiring that increases in any of these costs be balanced against decreases. In addition, according to OCC witness Pultz, the methodology used by CG&E to determine cost increases has numerous faults. These include the failure to take into account that increasing revenue requirements fail to recognize the depreciation of CG&E plants, the cost of equity calculations do not recognize present financial conditions, gross-up factors do not consider the elimination of the gross receipts tax, and the calculations do not account for the full benefits to CG&E of environmental upgrades. (OCC Initial Brief at 13; OCC Ex. 3A at 20). With regard to the delay in CG&E's distribution rate case, OPAE contends that delaying a rate case proceeding in which rates could arguably decrease is no benefit to ratepayers (OPAE Reply Brief at 10). OCC similarly argues that there is no benefit to residential customers from CG&E's withdrawal of a pending distribution base rate case with rates to be effective January 1, 2006, because distribution rates for residential class cannot change in response to a distribution rate case filing until January 1, 2006, under the provisions of the ETP stipulation (OCC Reply Brief at 13-14).

The Commission is concerned about CG&E's proposed cost increases in two areas. First, as pointed out by OCC, there may be cost savings that would offset cost increases that CG&E experiences in the future. Therefore, the Commission will consider such possible savings when it evaluates potential increases in the AAC for future years. Second, the Commission is reluctant to authorize automatic increases in any portion of the rates. Therefore, in order to allow the Commission to monitor increases in the cost of fuel and economy purchased power, the Commission will modify the stipulation to require all fuel and economy purchased power increases to be filed with the Commission on a quarterly basis. The Commission will have a yearly review of the preceding four quarters' filings to determine whether they accurately reflect actual costs incurred by CG&E.

Upon review, the Commission finds that, considering the stipulation as a whole and taking into account the modifications to the stipulation which are made in this opinion and order, the stipulation does provide a reasonable level of price stability for consumers. Under the RSP, CG&E will be holding prices to a given level, other than accounting for certain cost increases, rather than allowing generation rates to follow market trends. The Commission will be monitoring those increases on an ongoing basis. Without the existence of the stipulation, consumers would be subject to much greater market fluctuations than under this plan. The Commission, in stating that it is looking for price stability and predictability for consumers did not mean that prices must be locked into their current levels but, rather, that stability be enhanced. The stipulation, as modified, will clearly enhance the stability of rates.

b. <u>Financial Stability of CG&E</u>

CG&E contends that the stipulation provides a degree of revenue certainty for it by allowing the recovery of some of the costs that it incurs to maintain reliable competitive generation service to customers (CG&E Initial Brief at 43). These costs include an adequate reserve margin, environmental costs, environmental allowances, taxes, transmission costs, and fuel costs. GMEC claims that revenue certainty is provided by permitting CG&E to recover a capped AAC charge and deferral of certain distribution investments. GMEC also contends that revenue certainty is provided through riders to recover costs relating to MISO transmission schedules and a tracker for transmission congestion and other potential costs imposed by MISO. (GMEC Initial Brief at 12.)

Those opposed to the stipulation argue that CG&E can maintain financial security by recovering its costs of environmental compliance and homeland security through sales of power on the wholesale market (OMG Initial Brief at 19). PSEG contends that the stipulation will have little to do with the financial stability of the regulated retail operations of CG&E and more to do with the financial stability of CG&E's competitive wholesale marketing and trading activities, which under the stipulation, would continue to be engaged in by CG&E without benefit of any corporate separation. It also argues that CG&E will be able to undercut competitive suppliers in these wholesale markets because CG&E's POLR customers will guarantee full cost recovery. According to PSEG, CG&E's bids in these wholesale markets need only cover its incremental costs since all fixed costs will be recovered from POLR customers. (PSEG Reply Brief at 9.)

Based on the evidence, we find that the stipulation, with the modifications made in this opinion and order, does provide CG&E with a reasonable level of financial stability. The company will be able to anticipate a relatively level amount of revenue, and will be assured the recovery of certain of its increases in expenses.

c. <u>Evolution of a Competitive Market</u>

CG&E, GMEC, and staff claim that the provisions of the stipulation enhance the development of a competitive market. CG&E notes that, currently, several competitive suppliers are active in CG&E's service territory and consumers should be able to obtain service from these suppliers during the term of the stipulation (CG&E Ex. 12, at 11). In addition, by adding fuel and purchased power to the price to compare, which are adjusted quarterly, and making the RSC avoidable by up to 25 percent of load, CG&E witness Steffen claimed that the stipulation enhances the opportunities for competitive suppliers to attract customers and become more well-established in CG&E's service territory (CG&E Ex. 12, at 11). In addition, under the stipulation, there are various subsidies that are provided to market participants such as shopping credits, per kWh bill credits, and the ability of 25 percent of load by consumer class to bypass the RSC (CG&E Initial Brief at 43-44).

GMEC similarly claims that the stipulation will enhance the development of a competitive market. GMEC points to a price to compare for the first 25 percent of switched load that is equivalent to little g, arguing that this will provide CRES marketers with the opportunity to compete for residential load in CG&E's service territory. GMEC also notes that the cost of fuel and economy purchased power are avoidable by shoppers and that this will also encourage CRES market development. (GMEC Initial Brief at 10.)

PSEG, OMG, CPS, and OCC discount the claims that the stipulation will encourage development of a CRES market. PSEG argues that, rather than encourage the development of a market, the stipulation continues the status quo in which CG&E remains the monopsony buyer and dominant supplier of power for the retail load in its service territory. PSEG claims that this, in effect, immunizes CG&E's generation from wholesale and retail competition and eliminates any significant risk CG&E faces with respect to such generation (PSEG Reply Brief at 3).

OCC claims that the price to compare under the stipulation is initially established too low and it argues that this will hurt the development of competition (OCC Reply Brief at 12). OCC cites to witness Corbin's testimony that, under the stipulation, for the 75 percent or more of residential load that does not avoid the RSC, the stipulation creates the same, higher generation rate for consumers in comparison with the original proposal by CG&E, while the price to compare is still initially too low (OCC Ex. 6, at 8).

OMG and CPS argue that the price to compare is equivalent to the unbundled cost of generation from CG&E's transition case, less the RTC and the RSC charges. OMG and CPS note that CG&E's calculation of little g is not based on any actual sales. According to OMG/CPS witness Lacey, little g is approximately 19 to 25 percent less than the unbundled rate for the DS and DP tariff schedules and, therefore, CRES providers will have to deliver power that is priced 19 to 25 percent less than CG&E's price at it last rate increase case (OMG/CPS Brief at 25, 30; OMG Ex. 13, at Attachment FL-3). Further, Mr. Lacey testified that the stipulation price to compare is both lower than the incentivized shopping credit for most commercial and industrial customers, and significantly lower than the current shopping credit, resulting in a detrimental impact on competition (OMG Ex. 13, at 10).

The Commission is very concerned about the impact that the stipulation may have on competition. As part of the stipulation, the first 25 percent of a load for each customer class that switches to a CRES avoids the RSC charge. While we note that the level of switching for all nonresidential classes of customers has reached the 20 percent threshold, there are two disturbing patterns that have emerged. First, the 20 percent level of switching that was reached on July 16, 2002, fell below the 20 percent level on June 13, 2003, and has remained below that 20 percent threshold (CG&E Ex. 4, at attachment WLG-1). Second, while the commercial and industrial classes exceeded the 20 percent level during the 2002-2003 years, only the industrial class reached to the 25 percent level and, even for that group, the 25 percent level was only maintained for three months. Clearly, shopping by these customer classes does not exhibit the vigor that the Commission envisioned. More encouragement to these customer classes is required. While it appears that the price to compare for those customers who avoid the RSC is such that competition will be encouraged, it also appears that competition may not be enhanced at the price to compare for the remainder of the customers. Accordingly, we believe that the percentage of shopping customers in these classes that can avoid the RSC charge should be increased from the 25 percent level, as set forth in the stipulation, to 50 percent of the customers in the class. We believe that this will encourage the development of the nonresidential CRES market in CG&E's service territory as was envisioned in SB 3. We do not believe that this modification is necessary for the residential market, as the percentage of residential consumers who are shopping has never even approached the 25 percent level. With this modification, we find that the stipulation is reasonably likely to enhance the development of the retail market for generation in CG&E's territory.

The Commission notes that, under paragraph 4(D) of the stipulation, nonresidential consumers are required to provide a minimum of 90 days' notice to CG&E of the effective date of a contract with a CRES provider in order to be a part of the group that may avoid the RSC. Based on the date of this opinion and order, this deadline may not be feasible for some customers. Therefore, with regard to any customer for whom notice is not feasible due to the date of this opinion and order, 60 days' notice shall be provided to CG&E.

C. Does the settlement package violate any important regulatory principle or practice?

1. Compliance with Applicable Law

Competitive retail electric service is covered by Chapter 4928 of the Ohio Revised Code, which is the codification of SB 3. The Ohio legislature stated that its policy is, *inter alia*, to ensure the availability of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced electricity, on an unbundled basis; to ensure that diverse supplies and suppliers give consumers effective choice over their selection of supplies and suppliers; and to ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and *vice versa*. Section 4928.02, Ohio Revised Code.

In order to fulfill its goals, the legislature provided that each electric distribution utility (EDU) is required to take certain actions, after its MDP, a time during which the legislature anticipated that a competitive electric market would develop. The statute provides as follows:

> (A) 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, including a firm supply of electric generation service. Such offer shall be filed with the public utilities commission under section 4909.18 of the Revised Code.
>
> (B) After that market development period, each electric distribution utility also shall offer customers within its certified territory an option to purchase competitive retail electric service the price of which is determined through a competitive bidding process. . . . At the election of the electric distribution utility, and approval of the commission, the competitive bidding option under this division may be used as the market-based standard offer required by division (A) of this section. The commission may determine at any time that a competitive bidding process is not required, if other means to accomplish generally the same option for customers is readily

> available in the market and a reasonable means for customer participation is developed.

Section 4928.14, Ohio Revised Code.

The Commission has adopted rules to effectuate SB 3, including the provision of a market-based standard service offer and a competitive bidding process, under Section 4928.14, Ohio Revised Code. The Commission's rules provide the following:

> (A) Pursuant to division (A) of section 4928.14 of the Revised Code, after its market development period, each EDU 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, including a firm supply of electric generation service. Pursuant to division (B) of section 4928.14 of the Revised Code, each EDU also shall offer customers within its certified territory an option to purchase competitive retail electric service the price of which is determined through a competitive bidding process. . . .
>
> (B) The commission may waive any requirement of Chapter 4901:1-35 of the Administrative Code for good cause shown or upon its own motion.
>
> (C) Notwithstanding the requirements of rule 4901:1-35-03 of the Administrative Code and the attached appendices A and B of that rule, the EDU may propose a plan for a standard service offer and/or competitive bidding process that varies from these rules where there is substantial support from a number of interested stakeholders.

Rule 4901:1-35-02, O.A.C.

In addition to provisions requiring a market-based standard service offer and a competitive bidding process, Ohio law also includes a section addressing corporate separation.

> Except as otherwise provided in sections 4928.31 to 4928.40 of the Revised Code and beginning on the starting date of competitive retail electric service, no electric utility shall engage in this state, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service and supplying a competitive retail electric service, or in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service, unless the utility implements and operates under a corporate separation plan that is approved by the public utilities commission under this section, is consistent with the policy specified in section 4928.02 of the Revised, Code, and achieves all of the [listed goals].

Section 4928.17(A), Ohio Revised Code.

The signatory parties submit that the stipulation satisfies policy goals of SB 3 and does not violate any legal requirements. The nonsignatory parties disagree. The elements of that disagreement will be discussed individually.

(a) <u>Would the Stipulation End the Nonresidential MDP in Violation of Law or Commission Rule or Order?</u>

The stipulation would terminate the MDP for nonresidential customers on December 31, 2004, and for residential customers of December 31, 2005. (Joint Ex. 1, at Paras. 1, 2.) The parties dispute whether or not this is permissible.

The termination of the MDP is controlled by both Ohio law and the ETP stipulation. Section 4928.40(B)(2), Revised Code, provides that the MDP is not to end prior to December 31, 2005, unless the Commission orders an earlier termination for a given customer class on the basis that there is either 20 percent switching rate in that class or effective competition in the utility's certified territory. The ETP stipulation, as discussed in the ETP opinion, provides that, while the MDP for residential consumers will not end prior to December 31, 2005, CG&E may end the MDP for nonresidential consumers when 20 percent of a given class switches the purchase of its generation supply to a certified supplier.[10] Thus, the termination of the MDP for nonresidential customers on December 31, 2004, is only permissible if the Commission finds twenty percent switching for those customers, or effective competition.

OMA, in its initial post-hearing brief, argues that CG&E's attempt to end the nonresidential MDP at this time should be rejected, as the level of switching in the industrial class is less than 20 percent. As support for its position, OMA points to the testimony at the hearing by CG&E witness Stevie, who adopted the pre-filed testimony of CG&E witness Greene. Mr. Stevie, according to OMA, was "correcting the pre-filed testimony" in stating that the industrial switching level is 19.87 percent. OMA also notes that Staff witness Cahaan stated that he had concluded that the appropriate level had been switched only on the basis of CG&E's representation that it had reached 20 percent. (OMA Brief at 2-3.)

CG&E replied to OMA's argument, stating that it has met both the 20 percent threshold and the effective competition test. As to the threshold, CG&E asserts that Dr. Stevie, by adopting Mr. Greene's testimony, confirmed that CG&E reached the 20 percent level during 2002. It notes that this evidence was not contradicted by any party and that the statute does not require the threshold level to be maintained for any specified period of time. The company also notes that effective competition is demonstrated by its having

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10 The stipulation also provides that, in the event of a termination of the MDP prior to December 31, 2005, the rate freeze on nonswitching customers in that class, and the rate freeze for transmission, distribution, and ancillary service on switching customers will end. The shopping credits on switched customers would continue through 2005. The RTC would continue to be collected through 2010. (ETP opinion at 6.)

reached 20 percent switching and by the existence of five active CRES providers in its territory. (CG&E Reply Brief at 41-43.)

The Commission finds that the statutory threshold of 20 percent has been met for all nonresidential classes of customers of CG&E. CG&E witness Greene testified in writing as to the manner in which CG&E determines its level of switching and the level of switching that it was then experiencing. As of April 9, 2004, he reported that the commercial class had 22.1 percent switched, the industrial class had 21.5 percent switched, the public authority class had 19.5 percent switched, and the residential class had 5.0 percent switched. At the hearing, Mr. Greene was not present, but his testimony was adopted and sponsored by Dr. Stevie, with certain amendments. Although OMA describes Dr. Stevie's revision of Mr. Greene's numbers as corrections, the actual testimony differs from that conclusion. Dr. Stevie stated that he would "like to update the switching percentages." He supplied a new effective date for his numbers, bringing them current to May 14, 2004. As of that date, the commercial class had risen to 22.04 percent, the industrial class had fallen to 19.87 percent, the public authority class had increased to 20.37 percent and the residential class had dropped to 4.9 percent. (Tr. II at 132-134.) It should also be noted that Mr. Greene's written testimony, adopted by Dr. Stevie, also included a chart showing the history of customer switching by class. According to that information, the commercial class first passed the 20 percent level on July 11, 2002, the industrial class on May 26, 2002, and the public authority class on July 16, 2002. While the statute states that the MDP may be ended early by a Commission finding that there is 20 percent switching, the Commission does not construe that provision to require that the threshold must necessarily be maintained until the date of the Commission's determination. Rather, the Commission may find that the level has been attained and that the company is therefore eligible to request early termination.

In addition, the Commission finds that the statutorily required "effective competition" in the nonresidential classes of customers of CG&E has been shown, on the basis of (a) all three of those classes having surpassed 20 percent switching in 2002, (b) the 20 percent level having been maintained for the commercial class through the present, for the industrial class until the middle of 2004, and for the public authority class until July 2003, with no class having fallen off substantially from the 20 percent level, and (c) the presence of five active CRES suppliers in the territory. Therefore, it is permissible for the nonresidential MDP to be terminated as of December 31, 2004.

(b) Does the Stipulation offer a Market-Based Standard Service Offer?

CG&E contends that the RSP established in the stipulation would offer a market-based standard service offer, in compliance with the terms of Section 4928.14(A), Revised Code. The company states that the RSP complies with the statute "because it is consistent with other market prices for this service and is therefore reasonable." (CG&E brief at 15.) For purposes of showing such consistency, CG&E witness Judah L. Rose analyzed the price to compare under the stipulation, comparing it with three other price determinations to analyze whether or not it is "consistent with other market prices."

First, Mr. Rose considered the price that would result from the application of the CMO MBSSO that was the subject of CG&E's initial application in this proceeding. Mr. Rose's theory in doing so was that, since the CMO MBSSO is intended to recreate the price that CRES providers would offer in a competitive market for one-year fixed price service (CG&E Ex. 7, at 7), if the CMO MBSSO can be below the price to compare calculated pursuant to the stipulation, then competitors could offer consumers lower prices (CG&E Ex. 7, at 42; CG&E Ex. 8, at 3).

A basic understanding of the CMO MBSSO will be helpful in understanding Mr. Rose's analysis. The CMO MBSSO is based on monthly price indices in the "into Cinergy" market. The CMO MBSSO would then adjust the base price to reflect a number of factors, such as a reflection of the company's payment of closer to the ask price than the bid price; a covariance factor to cover the risk of unknown future usage; an estimated loss charge to cover physical losses; a supply management fee to cover scheduling, balancing, procurement and risk management, hourly adjustment, load following, odd lots and floats, and migration; an operating risk adjustment to cover commodity-related risks such as booking and settlement error, modeling error and forecasting; a credit adjustment to cover uncollectible accounts; a fixed POLR rider to cover physical generating capacity; a variable POLR rider to cover costs of call options related to the risk of customers returning to CG&E; a market true-up adjustment to recoup costs of liquidating hedges related to customers leaving CG&E; an adjustment to eliminate prices higher than the 98th percentile, and to subsequently track and recover those prices; and a flex down option to allow CG&E to lower its price to meet competition in certain circumstances. (CG&E Initial Brief at 53-54.)

In comparing the CMO MBSSO price with the prices under the stipulation, Mr. Rose made alterations to the CMO MBSSO prices, lowering power prices (using 2003 levels rather than 2004), adding greater load shape information and nonblock pricing, using lower margins, and using lower supply management fees, which he stated might come about due to lower costs, lower risks, or greater competition. (CG&E Ex. 8, at 2-3.) CG&E asserts that certain of these adjustments "represent actual conditions that reasonably could be expected to occur in the competitive market." Others, it says, "are reasonable because these cost components of the [CMO MBSSO] are likely to decrease over time as CG&E and other competitors acquire more knowledge and experience in providing competitive retail electric generation service in CG&E's service territory." (CG&E Brief at 18.) Following these adjustments, Mr. Rose found that the CMO MBSSO might be above, below, or close to the price to compare determined under the provisions of the stipulation, depending on market conditions (*Id.* at 3). Mr. Rose thus proclaimed that the stipulation price is "non-predatory and can support competition . . .." (*Id.* at 3.)

Next, Mr. Rose compared the price under the stipulation to generation rates for other Ohio utilities. He found that these prices are comparable and concluded that the stipulation price is, therefore, not predatory. (*Id.* at 4.)

Finally, CG&E's witness Rose considered actual prices at which some CRES providers have contracted to provide retail service. He stated that this comparison shows that actual prices are below CG&E's likely price to compare under the stipulation. (*Id.* at 4.)

CG&E also contends that the rate to be charged under the stipulation is a market-based standard service offer, as required by law, on other bases. The company points out that, since it is a net purchaser of power in the wholesale market and the stipulation would require it to charge its economy purchased power costs as part of its price to compare, the stipulation would result in the equivalent of a wholesale market rate. (CG&E Brief at 23.) CG&E also asserts that the rates in the stipulation compare favorably to other market prices that were discussed by the Commission in its June 9, 2004, opinion and order in the post-MDP case for FirstEnergy Corp. *In the Matter of the Applications of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Continue and Modify Certain Regulatory Accounting Practices and Procedures, for Tariff Approvals and to Establish Rates and Other Charges Including Regulatory Transition Charges Following the Market Development Period,* Case No. 03-2144-EL-ATA (*FirstEnergy RSP* case). Finally, the company reasons that the rates under the stipulation are market-based since they result from arm's length settlement negotiations among various stakeholder groups. It cites the Commission's decision in the *DP&L RSP* case as proof that the Commission will accept this rationale for rates being market-based.

Staff comments that it believes the stipulation's rates to be market based because customers have an option to shop, because the stabilized price under the stipulation can be changed by the same sorts of items that would drive changes in market prices, and because of the signatory parties' agreement to rates and processes for change under the stipulation. (Staff Initial Brief at 6-7.)

The nonsignatory parties do not believe that the stipulation results in a market-based standard service offer. OCC states, initially, that the rate in the stipulation is not market based because "[a] proper market-based standard service offer would depend on CG&E's purchases of electricity in the generation market . . .." (OCC Brief at 12. *See also* OCC Reply Brief at 18.) Further, as the stipulation rate is based on a "legacy rate" from CG&E's last rate case, OCC argues that it cannot, by definition, be a market-based rate. In addition, OCC criticizes the stipulation rate on the bases that it is uncertain and unstable from the point of view of the customers and that it is expensive, after consideration of the various price adjustments that are included in the proposal (*Id.* at 13).

As to CG&E's comparison of the stipulation rate with generation rates charged by other utilities, OCC points out the testimony by OCC witness Talbot criticizing the adjustments made by CG&E to the CMO MBSSO in its use of that rate as a comparison to the stipulation rate. OCC argues that the "five major downward adjustments" to the CMO MBSSO in this regard totally undermine its validity and render it worthless as a comparison model. (*Id.* at 41-42; OCC Ex. 2, at 6.)

OMG and CPS also argue against the rate in the stipulation being considered a market-based rate. They note that those rates "do not evolve from what a willing buyer and willing seller would agree upon and thus cannot be considered 'market based.'" (OMG/CPS Brief at 30.) Further, OMG and CPS explain that, since the rate is based on the unbundled cost of generation and subtracting regulatory transition costs, a CRES provider would have to deliver generation at "19% to 25% less than CG&E did in its last rate case." (*Id.* at 30.)

Like OCC, OMG and CPS attempt to refute CG&E witness Rose' comparisons of the stipulation rate with other data. OMG and CPS submit that the comparison with prices being charged by CRES providers is not appropriate, since the prices were 2003 prices for 2004 delivery, while the period in question is 2005-2008, and since the listed CRES prices are for all classes of customers and for delivery in other service areas. OMG and CPS also argue that the comparison with CMO MBSSO prices is unhelpful since the CMO MBSSO is merely a "projection based on survey data and does not reflect what actual sales for a future period may be. (*Id.* at 31-32.)

OPAE similarly argues that the stipulation does not include a market-based standard service offer. Rather, it reasons that there can be no market based standard service offer when it has been shown that there is no market that would support competition. (OPAE Initial Brief at 4.)

PSEG also contends that the stipulation fails to adopt a market-based rate. It describes the stipulation as putting in place a cost-based rate, noting that the stipulation's rates are based on CG&E's costs of providing generation service, as determined in its last rate case, plus the RSC, plus recovery for certain types of incremental costs." (PSEG Reply Brief at 4, quoting CG&E Initial Brief at 32.)

The Commission finds that the rate under the stipulation is a market-based rate. The Commission notes that Section 4928.14, Revised Code, allows it flexibility in approving processes for determining market-based rates for the standard service offer. The Commission finds that the stipulation was negotiated among five suppliers and organizations representing various categories of consumers, from low income residential consumers to large industrial users. The stipulation also includes provisions that provide for changes to reflect changes in certain costs. In addition, the stipulation, as revised by this opinion and order, allows the Commission to monitor the prices and confirm that, over time, those prices remain market-based and that consumers have adequate options for choosing among generation suppliers.

(c) <u>Does the Stipulation Include a Competitive Bidding Process?</u>

As quoted above, Section 4928.14, Revised Code, requires that, after the end of the MDP, an electric utility will provide a market-based standard service offer of all CRES necessary to maintain essential electric service to consumers and the option to purchase CRES at a price which is determined through a competitive bidding process. Section 4928.14, Revised Code, also provides that the competitive bidding process may be replaced with other means to accomplish generally the same option for customers.

Under provision 13 of the stipulation, the parties agree that the Commission may determine and implement a process to test CG&E's price to compare against the market price, using the price for the first 25 percent of load of each consumer class to switch to a CRES provider. Also, under the stipulation, if the price to compare is significantly different than the bid price, either the Commission or CG&E may begin discussions with all parties to continue, amend, or terminate the stipulation.

CG&E contends that this provision of the stipulation complies with Section 4928.14(B), Revised Code. CG&E points out that the Commission may, under the statute, determine at any time that a competitive bidding process is not required, if other means to accomplish generally the same option for customers is readily available in the market and a reasonable means for customer participation is developed (CG&E Initial Brief at 24-25). CG&E claims that, since under the stipulation, the Commission may at any time determine and implement a competitive bidding process to test CG&E's price to compare against the market price, it complies with the statute. CG&E also argues that the stipulation complies with the statute because it provides an option for the Commission to conduct a competitive bidding process at any time, including terms that permit consumers to receive the information necessary to evaluate and choose winning bidders, and a process for the parties to modify or terminate the stipulation if the price to compare is significantly different from the bid price (CG&E Initial Brief at 26).

In the alternative, CG&E requests that the Commission find that a competitive bidding process is not required because other means to accomplish generally the same option for customers are readily available in the market and a reasonable means exists for customer participation. According to CG&E, the other means to accomplish the same result are the competitive bidding process provided under the stipulation, the option to purchase power directly from CRES providers, the option to aggregate, and the option to purchase power from CG&E at a market-based rate (CG&E Initial Brief at 27). Finally, CG&E argues that its market-based rates are equivalent to a competitively bid rate, given that: (1) the stipulation provides for CG&E to charge its economy purchased power costs as part of its price to compare;[11] (2) CG&E is a net purchaser of power;[12] and (3) given OCC witness Neil H. Talbot's testimony at hearing that this will result in the equivalent of a wholesale market rate.[13] To the extent that the stipulation also contains unavoidable generation charges, CG&E believes that these charges are appropriate compensation to CG&E for providing POLR service. (CG&E Initial Brief at 27.)

OPAE, PSEG, OMG, CPS, and OCC all argue that Provision 13 of the stipulation fails to meet the requirements of Section 4909.14(B), Revised Code. They claim that the system proposed in the stipulation isn't actually available to customers because it only provides a process to test whether the market can produce rates that are lower than or competitive with the rates established by the RSP. And, if those rates could be lower than or competitive with the stipulation's rates, it only provides that discussions on what steps to take will begin. Further, they argue that the term "significantly different" is not defined and that there is no guarantee that any winning bid will actually be selected. As a result, they claim that few if any bids will actually be submitted. They also argue that the stipulation is inconsistent with the Commission's decision in the *FirstEnergy RSP* case, in which the Commission intends to use the results of a competitive bidding process if the rates are found to be competitive. These parties urge the Commission to consider placing on CG&E the same directives it placed upon FirstEnergy in its RSP. They also argue that system in the stipulation fails to follow current administrative rules relating to competitive bidding processes. They argue that the rules require, among other things, that the

11 Joint Exhibit 1 at 13.

12 CG&E Exhibit 11 at Attachment JPS-7.

13 Tr. IV at 95-96.

competitive bidding process be conducted by a third party auctioneer; that there be at least two bids, one for residential and small commercial and the other for large commercial and industrial customers; and that the competitive bid-out be for a fixed price. Finally, they urge the Commission to consider other directives such as following a declining clock auction, as used in the New Jersey model referenced by the Commission in its FirstEnergy order, or using a process of generation service procurement, such as a portfolio approach, in order to provide the greatest benefit for customers.

As we have previously stated in the *FirstEnergy RSP* case, the Commission has substantial discretion in approving the process for a market-based standard service offer and competitive bidding process. We find that the procedure established by the stipulation offers a reasonable alternative to a more traditional competitive bidding process, provides for a reasonable means of customer participation through the various options that are open to customers under the RSP, and fulfills the statutory requirements for a competitive bidding process. We are not directing that a bidding process be conducted by CG&E at this time as was required in the *FirstEnergy RSP* case, as the amount of competition and the current pricing levels distinguish the two situations.

(d) Is the Stipulation Discriminatory?

As noted above, Section 4928.14, Revised Code, requires that service provided by EDUs be nondiscriminatory. OCC contends that the stipulation discriminates against those consumers who do not fall within the first 25 percent to switch, as they will not be able to avoid the RSC (OCC Brief at 31). Specifically, OCC notes that residential consumers who are already switched when the plan goes into effect will not have to submit a request to avoid the RSC (*Id.* at 33) and that not all customers will have equal opportunity to learn about or participate in the possible avoidance of the RSC (*Id.* at 34).

CG&E argues that similarly situated consumers would be charged the same rates and dissimilar consumers would be charged different prices. CG&E believes that the stipulation is not discriminatory, as similar customers contacting the company at the same time would be treated similarly and because every consumer has an equal opportunity to avoid the RSC (CG&E Initial Brief at 35-36). To these arguments, OCC replies that the stipulation is an "invitation to pervasive discrimination" and that not all consumers do have equal access, since some are "grandfathered." (OCC Reply Brief at 25-26.)

The Commission does not find that there is material discrimination present in the stipulation. While some consumers will be "grandfathered" due to their having switched to a CRES provider prior to January 1, 2006, any consumer may become a part of that group. The Commission also does not believe that there is any evidence that lack of knowledge of the program may be used to discriminate against some consumers. Therefore, the Commission finds that the stipulation is nondiscriminatory.

(e) Does the AAC in the Stipulation Create a Subsidy, is it Anti-Competitive, or is it Unreasonable?

OMG and CPS urge the Commission to find that the stipulation creates a subsidy from shopping customers to standard service offer customers, due to the fact that certain costs of generation are made unavoidable rather than being part of the cost to compare. Cross-subsidies are prohibited by Section 4928.02(G), Revised Code. Specifically, OMG and CPS reason that environmental compliance costs and homeland security costs should be part of the cost of generation (and therefore avoidable by shopping consumers), since any entity which generates electric power must comply with these requirements. This is inequitable, and creates a subsidy, according to OMG and CPS, since the shopping consumers do not buy the power that is generated in consequence of the payment of these costs. Rather, OMG and CPS note that the shoppers must pay similar costs to their CRES providers. (OMG/CPS Brief at 15-18.)

Similarly, OMG and CPS argue that the cost of CG&E's reserve margin is also a generation expense that should be avoidable by shoppers. OMG and CPS point out that a nonresidential shopping customer who avoids the RSP would get no benefit from CG&E's reserve margin, as that customer would be required to waive POLR service. (*Id.* at 20-23.) In addition, OMG and CPS submit that no capacity for returning shoppers will be needed after MISO Day 2, since the task of balancing demand and generation will then be the task of MISO (*Id.* at 23, 25).

CG&E responds to these arguments by stating that the payment to CG&E by shoppers, for environmental, security, tax, emissions allowances, and reserve capacity, is intended to compensate CG&E for its statutory POLR service (CG&E Reply Brief at 19). It also suggests that, under MISO Day 2, the CRES providers will not have to hold reserve capacity but may, instead, rely on CG&E's reserve capacity (*Id.* at 20). Finally, as to MISO's capacity management, CG&E stresses that OMG witness McNamara's testimony confirmed that MISO will provide economic efficiencies in the capacity market sometime after Day 2 begins (*Id.* at 22).

OMG and CPS note further that nonresidential shoppers who avoid the RSC may not return to standard service offer but, rather, can only return to CG&E at CG&E's highest incremental cost. Thus, OMG and CPS say, it is illogical to charge those customers for the costs to comply with environmental and security requirements for plants that are not pledged to serve them. (OMG/CPS Reply Brief at 18.) OMG and CPS, finally, note that power that is not sold by CG&E to shoppers is available for it to sell on the wholesale market, thereby enabling it to recover more of its environmental and security costs. (*Id.* at 18-19.)

The stipulation provides that, on an annual basis, CG&E may increase its AAC charge, based on increases in its expenses related to environmental costs, emissions charges, homeland security, taxes, and excess capacity. Pursuant to that document, the increases in these charges are capped at eight percent of "little g" for nonresidential consumers and are capped on a sliding scale of five to eight percent of "little g" for residential consumers (with 2005 collections waived for residential consumers). The proposal would allow the company, however, to increase the AAC charge by six percent annually, without any showing of actual increased charges. All of that AAC charge under the stipulation is to be paid by all consumers, regardless of what provider supplies their generation service.

The Commission does not find that the AAC creates a subsidy, as CG&E does have expenses related to its statutory obligation to provide POLR service. However, as discussed below, the Commission does have certain concerns regarding the appropriate reserve capacity and the reasonableness of the system for determining appropriate annual increases.

(1) Reserve Capacity

OMG and CPS argue that, under the stipulation, a separate reserve margin cost is part of the AAC charge that is applied to all customers, those shopping and those not shopping. They also complain that CG&E seeks a reserve margin of 17 percent of its anticipated total peak demand on its system, priced at $64 per kWh per year. According to witness Steffens, the cost of the reserve margin in the AAC calculation will exceed $52 million for the first year, or close to half of all AAC charges (CG&E application at 7; Joint Ex. 1, attachment JPS-7). OMG and CPS claim that, under the stipulation, despite commercial and industrial customers having paid for POLR service, they are not assured of firm service because they must prepare to be disconnected if insufficient power is available despite their having paid for reserve margin (OMG/CPS Brief at 22). OMG and CPS argue that, because these customers are not assured of firm service, they should not be charged a POLR fee to insure firm service.

OMG and CPS also claim that CG&E should not purchase capacity rights beyond the needs of standard service offer customers beyond MISO Day 2. First, OMG and CPS argue that there is no evidence in the record that capacity will not be available in the market in 2005 or beyond (OMG/CPS Brief at 24). Further, because the stipulation requires returning customers to pay the incremental cost of obtaining back-up service, CG&E is at little financial risk other than for collecting payment. OMG and CPS also claim that, prior to MISO Day 2, CG&E remains responsible for securing sufficient capacity in the event a shopping customer's CRES provider fails. However, under MISO Day 2, CG&E no longer should purchase capacity rights beyond the needs of its SSO customers because (a) balancing demand and generation will then be the task of MISO and (b) market participants that are provided generation will be charged according to the MISO tariff and will have to post appropriate security (OMG/CPS Brief at 23). Further, OMG and CPS contend that no strong case has been made for the claim that CG&E should purchase an additional amount of reserve capacity to cover a defaulting CRES provider. OMG and CPS claim that, because reserve margins are a reliability cost of providing generation, the cost of the reserve margins should be in the generation component and not in the unavoidable AAC charge (OMG/CPS Brief at 24-25).

Discussing the reserves planned under the company's filings, prior to the stipulation, OCC states that CG&E does not need to hold a reserve margin to meet the entire load in its service territory. It cites to OCC witness Talbot's testimony that the East Central Area Reliability Council (ECAR) has projected reserve margins of over 38 percent through 2008 (OCC Ex. 1, at 56). OCC claims that, with this much capacity available in the region, CG&E should recover costs for just enough reserve margin to meet its own load. OCC also argues that the level of risk associated with supplier default and customer return is too uncertain to justify any level of coverage of the risk. OCC claims that much of the risk of default is mitigated because CG&E requires CRES providers to meet certain financial and technical criteria and because suppliers provide financial guarantees to cover the risk of default. Thus, according to OCC, a lower level of coverage is needed. (OCC Brief at 49-50.)

CG&E asserts that OMG and CPS's arguments regarding the reserve capacity are without merit. It contends that a reserve capacity is necessary for it to maintain a firm supply of competitive retail electric generation service for all consumers. It argues that winning bidders do not have the statutory POLR obligation set forth in Section 4928.14(A), Revised Code and can walk away from their contract obligations while CG&E still has the POLR obligation for the reserve capacity at the market price (CG&E Reply Brief at 20). Further, under Provision 11 of the stipulation, the reserve capacity costs for CRES providers will be reduced when MISO Day 2 becomes effective because CRES providers will be permitted to rely on CG&E's reserve capacity at no charge (Jt. Ex. 1, at 2). CG&E also claims that OMG and CPS mischaracterize Mr. McNamara's testimony and that he noted that MISO will provide economic efficiencies in the capacity markets and that such efficiencies will not be available for one to three years after the Day 2 market begins in March 2005, if at all (Tr. VI at 46-47). According to CG&E, Mr. McNamara also testified that, if CG&E has low cost capacity it should maintain it to provide a cost advantage for its consumers, because this will benefit all consumers (CG&E Brief at 22-23; Tr. VI at 46-47).

In its brief, IEU cites to Constellation witness Michael Smith, who testified that a Day 2 market, implemented by MISO, would provide centralized dispatch of generation, day-ahead and real-time energy markets, and locational market pricing. However, he also noted that implementation of the MISO Day 2 market will enhance overall system reliability. While IEU notes that the development of an effective market has been more difficult and taken longer than expected, IEU claims that the market continues to develop safely and will protect consumers against market deficiencies. (IEU Initial Brief at 10, 13.)

The evidence demonstrates that the reserve margin parameters, as set forth in the stipulation, as modified, are reasonable. As noted by CG&E, CRES providers of generation have no POLR obligation. As a result, these entities can decline to provide power and, in that event, the Commission will require CG&E to provide service, thus necessitating reserve capacity. Paragraph five of the stipulation also allows market participants to rely on CG&E's reserve capacity to ensure compliance with an RTO's or state's reliability obligation. At this point in time, the Commission finds reasonable the reserve capacity levels established in the stipulation, as those levels impact the stipulation during 2005. Nevertheless, the nonsignatory parties raise a legitimate issue whether, under MISO Day 2, CG&E should purchase capacity rights beyond the needs of SSO customers, because MISO will have the obligation to balance demand and generation. As will be discussed in the next section, the Commission will require CG&E to obtain Commission approval for any increases in the AAC. Therefore, the Commission will be in a position to continue to review the actual impact of MISO Day 2 on CG&E's costs and need to provide reserve capacity after MISO Day 2 has gone into effect.

(2) System for Determining Increases to AAC

As described above, the stipulation would provide for a minimum level of annual increases to the AAC (six percent) and a maximum level of such increases (eight percent, after proof of corresponding costs). The Commission is concerned that this system may be fair and reasonable to neither consumers nor the company. The automatic floor would impose on consumers an increase when no increase might be warranted. The cap would limit the company's recovery of legitimate expenses. Therefore, rather than instituting an artificial floor and cap on the AAC increases, the Commission will, when requested by CG&E but no more often than annually,[14] determine the appropriate level of possible increase in the AAC charge, and the appropriate level of avoidability by shopping customers, on the basis of its consideration of CG&E's proven expenses in these categories, the development of the market in each consumer class, off-system sales by CG&E in the marketplace, the impact of MISO Day 2 on the market, and such other factors as it may deem appropriate from time to time. No increases in the AAC will be allowed without Commission approval. It is the Commission's goal to ensure that prices remain market-based and that consumers have adequate options for choosing alternate generation suppliers, while assuring a reasonable level of revenue stability for the company.

In Attachment JPS-2 of the stipulation, CG&E presented calculations of its 2004 costs for reserve margin, emission allowances, environmental compliance, homeland security, and taxes, a portion of which CG&E seeks to recover in 2005. Those costs total $107,514,533, according to CG&E. The calculation continues by finding that those costs would allow CG&E an eight percent AAC increase under the terms of the stipulation, all of which would be paid by all consumers, whether they purchase their generation from CG&E or from a CRES provider.

It was the intent of the signatory parties to determine, in the stipulation, the appropriate AAC increase for 2005. The Commission has no reason to dispute the accuracy of the figures presented by CG&E for its 2004 costs in these categories. However, the Commission is convinced that CG&E may be recovering some percentage of these costs through off-system sales and, also, is aware that MISO Day 2 is scheduled to take effect on March 1, 2005. The Commission is also cognizant of the rate shock that would result from a dramatic increase in a single year. Therefore, the Commission will only allow costs of $53,757,267 to be considered in justifying the AAC increase for 2005, as compared with the $60,172,508 that would have been recoverable pursuant to the eight percent cap under the stipulation.

With regard to development of the nonresidential generation market in 2005, the Commission notes that approximately 20 percent of each nonresidential consumer class is shopping. This reflects some progress in the development of the market. According to the testimony of CG&E witness Greene, all three nonresidential classes of consumers reached a 20 percent shopping level between May 26, 2002, and July 16, 2002. Since that time, however, they have all remained within a few percentage points of that level. (Attachment WLG-1 to CG&E Ex. 4.) In order to ensure that shipping levels continue to increase, the Commission finds that addditional encouragement of this market is appropriate. Upon consideration of all of these factors, the Commission finds that 100 percent of the AAC should therefore be avoidable by shopping consumers during 2005. Further, to ensure the competitive market continues to develop, both the amount of recovery and the percentage

14 The Commission suggests that CG&E coordinate any requests that it may make to the Commission for AAC increases with periodic filings that it may be required to make with MISO.

that may be avoidable will be reviewed by the Commission when it considers the AAC for subsequent years, based on the facts as they then appear.

Because the AAC is intended to compensate CG&E for its POLR responsibilities, and because the Commission, after the modifications in this opinion and order, will be in a position to monitor at least the company's expenses, the market, trading activities by the company, and the workings of MISO, the Commission finds that the increase to the AAC for 2005 and the level of unavoidability of the AAC for 2005 that are authorized in this opinion and order will be reasonable, not anticompetitive, and not likely to create a subsidy. The Commission will determine whether any subsequent AAC increases or changes to the level of avoidability are reasonable, not anticompetitive, and not likely to create a subsidy, at the time that it considers any such application from the company.

(f) Should the Stipulation Require CG&E to Complete its Corporate Separation?

Section 4928.17, Revised Code, prohibits electric utilities from engaging in certain noncompetitive and competitive businesses unless it implements and operates under a corporate separation plan which satisfies a number of conditions. Under the ETP opinion, CG&E had a corporate separation plan that required it to complete its structural separation by the end of 2004. The stipulation provides that CG&E would not be required to transfer generating assets to an electric wholesale generator by the end of 2004. Approval of this provision would thus be an amendment of its corporate separation plan.

OCC, OMG, and CPS submit that CG&E should be required to comply with its existing corporate separation plan and statutory provisions, and should not be permitted to retain ownership of its generation assets. While the Commission has some flexibility to allow complete structural separation to be delayed for a period of time for good cause, OCC asserts that this flexibility is not unlimited as to time. OCC notes that the terms of the stipulation do not explain how the goals of structural separation will be met without actual structural separation. (OCC Brief at 17-20.)

OMG and CPS reason that corporate separation was discussed in the ETP stipulation and, thus, should not be changed in the stipulation, which is not signed by all of the parties to the ETP stipulation. It also argues that the failure to separate its generation facilities is clearly prohibited by Section 4928.17, Revised Code. From a policy standpoint, OMG and CPS point out that, without corporate separation, CG&E could use its utility assets to secure its general obligations, including those from its energy trading activities. (OMG/CPS Brief at 11-15.)

CG&E counters OCC, OMG, and CPS's concerns, indicating that it is operating under a Commission-approved separation plan, in accordance with the provisions of Section 4928.17(A), Revised Code. After the MDP, CG&E says that it will only be providing the market-based standard service offer and/or the competitive bidding process as required by Section 4928.14, Revised Code. It notes that there was no evidence introduced at the hearing that would support an argument that CG&E, by not structurally separating, would give itself or any affiliate an undue advantage. CG&E stresses that, in order to provide service at stable rates, it must retain its generating assets. (CG&E Reply Brief at 23-31.)

The Commission finds that it is reasonable for CG&E to retain its generating assets during the period in which it is committing to provide stabilized rates. It would not be appropriate to ask the company to stabilize its rates and then to deny it the opportunity to do so. Therefore, CG&E's corporate separation plan shall be amended to allow it to retain its generating assets through 2008, after which time the stabilized prices under the stipulation will terminate and corporate separation should be reconsidered. It should be noted that, if the company does not implement the stipulation as modified by this opinion and order, then full separation should be established as directed, and under the time frames established in, the ETP opinion.

(g) Does the Collection of Distribution Deferrals Violate the Rate Cap of SB 3?

The stipulation would allow CG&E to establish accounting deferrals for the difference between (a) CG&E's current revenue requirement on the net capital investment related to its distribution business and (b) the revenue requirement on CG&E's capital investment in its electric distribution business from July 1, 2004, through December 31, 2005. The amounts deferred would be recovered over a period of five years, starting on January 1, 2006. (Jt. Ex. 1, at 11-12.)

OCC opposes this aspect of the stipulation. It refers to the rate cap provision of SB 3 which states that "the total of all unbundled components in the rate unbundling plan are capped and shall equal during the market development period . . . the total of all rates and charges in effect under the applicable bundled schedule of the electric utility . . . in effect on the date before the effective date of this section . . .." Section 4928.34(A)(6), Revised Code. OCC contends that, by deferring the cost of capital investments made between July 2004 and December 2005, and recovering those costs subsequently, CG&E would render the rate cap provision meaningless. (OCC Brief at 24-27.)

CG&E controverts OCC's argument, stating that accounting deferrals are not rate increases. The company contends that, since rates would not rise as a result of distribution cost increases until after the end of the MDP, there can be no violation of the rate freeze. (CG&E Reply Brief at 36-37.)

The Commission finds that, while deferrals are not rate increases, the amounts that would be deferred under the stipulation are representative of amounts that ultimately may be charged to customers. Those costs, if and when ultimately recovered, would be based on accruals during the MDP, and the deferrals would therefore violate the rate cap under SB 3.

The termination of the MDP is therefore a critical factor in determining the legality of the distribution deferrals. Under the stipulation, the MDP for residential consumers will continue through December 31, 2005. The MDP for nonresidential consumers will end with the effective date of this opinion and order. However, CG&E could have requested that the nonresidential consumers' MDP be terminated as early as May or July, 2002 (depending on the class), on the basis that all classes of nonresidential consumers had then surpassed the 20 percent shopping level. Therefore, the Commission finds that it is appropriate to allow CG&E to defer, for future recovery, the identified distribution costs for July 1, 2004, through December 31, 2005, as set forth in the stipulation with regard to nonresidential consumers. As set forth in the stipulation, the rate design for recovery of these deferrals would be determined in CG&E's next electric distribution base rate case (Jt. Ex. 1, at 12). Because the same cannot be said for the residential class of customers, we will not allow such deferrals for residential consumers.

(h) Are the Stipulation's Provisions Governing the Return of Nonresidential Customers to CG&E after Shopping Reasonable?

The stipulation states that nonresidential consumers who have been served by a CRES provider and who have avoided paying the RSC will, upon their return to CG&E, have no guarantee of power (having waived their statutory POLR rights) and, if there is power available, will have to pay CG&E a market rate which is the higher of (a) the highest purchased power costs incurred by CG&E or by any affiliate to serve any of CG&E's consumers during the applicable calendar month or (b) the highest cost generation dispatched by CG&E or by any affiliate to serve any of CG&E's consumers during the applicable calendar month (Jt. Ex. 1, at 9-10).

OMG and CPS complain that this provision of the stipulation, in practical effect, forces a returning shopper to pay the highest power prices in the service areas of CG&E, or its affiliates in Kentucky and Indiana. OMG and CPS request that the Commission treat this provision in the same way that it handled a similar issue in *FirstEnergy RSP* case, requiring the market for analyzing and specifying market pricing to be that market served by the utility company in question. (OMG/CPS Brief at 19-20.)

The Commission finds that, as in the *FirstEnergy RSP* case, the issue of the price for returning customers is crucial for marketers and aggregators to offer competitive products and for the appropriate risks to be imposed on those customers. We believe the relevant market for analyzing and specifying market pricing is that served by CG&E. Relevant market pricing for customers returning to generation service provided by CG&E needs, therefore, to be a market-based price for CG&E alone. In addition, under the stipulation provision 4D, some classes of shopping customers must agree to waive their statutory rights to POLR service if no generation is available, and be subject to disconnection. The Commission will not sanction a stipulation provision that requires any consumers to waive their statutory POLR rights. Although the Commission will permit CG&E to charge returning nonresidential consumers a market price, it must, by law, provide service to those consumers when requested to do so. Section 4933.83, Revised Code.

We are satisfied with CG&E's explanation that its customers have first call on the East Bend, Miami Fort No. 6, and Woodsdale Units until they are transferred to ULH&P. After that transfer, expenses related to those units will no longer be included in the calculation of the AAC. (Tr. IV at 83-84; CG&E Reply Brief at 21.)

2. Compliance with ETP Stipulation

The electric service provided by CG&E is also controlled by the ETP stipulation and the ETP opinion that adopted them. OCC reasons that the doctrine of collateral estoppel bars relitigation of the ETP stipulation. Further, OCC urges the Commission to determine that a stipulation cannot be modified without the consent of all of the parties to that agreement. (OCC Brief at 20-23.) Without the consent of all parties to a stipulation, the Commission will not undertake lightly the task of modifying terms of a stipulation approved by the Commission.

Certain of the nonsignatory parties allege that a number of provisions in the stipulation violate the ETP stipulation.[15] The clearest of these violations involves the dates on which the collection of the RTC from residential consumers will end and on which the five percent reduction in generation prices for residential consumers will end. The ETP stipulation, in paragraph nine, provides that, with regard to residential customers, they will be allowed a five percent discount on generation through the end of 2005 and they will pay RTC only through the end of 2008. The stipulation, on the other hand, specifies that the five percent discount will continue through 2008 and the RTC will be payable through 2010, for residential consumers (Jt. Ex. 1, at 16, 19). However, the stipulation goes on to provide that if the Commission will not extend the residential payment of RTC through 2010, then CG&E will terminate the five percent discount as of the end of 2004 (*Id.* at 19).

CG&E supports the legitimacy of the stipulation by noting that the ETP stipulation did not require CG&E to extend the discount past 2005. It points out that Section 4928.40(C), Revised Code, allows the discount to remain in effect for such portion of the MDP as the Commission determines. CG&E believes that it is reasonable for it to recover additional RTC in exchange for continuing the discount. (CG&E Reply Brief at 36-39.)

OCC also points to Section 4928.40(C), Revised Code, to support its contention that the discount may be terminated only if it is "unduly discouraging market entry by . . . alternative suppliers." It asserts that the record in this case does not support a finding of undue discouraging of market entry. (OCC Brief at 29-31.)

The Commission will not allow the RTC collection from residential consumers to be extended beyond 2008 as this would directly violate the ETP stipulation. Therefore, under the stipulation, CG&E would refuse to extend the residential discount. While the Commission can not require the extension of the discount past 2005, there is no evidence on the record to support ending the discount before December 31, 2005. Therefore, the

[15] The Commission would also note that the ETP opinion allowed CG&E to recover, as a part of the RTC, certain costs for purchasing power, transferring generation assets to an exempt wholesale generator, and accounting for shopping incentives. Since (1) the transfer of generation assets has not been completed, (b) the cost of purchased power will be recovered during 2005 under the stipulation, and (c) the MDP for nonresidential customers is ended, thereby eliminating the obligation for any new shopping credits, the Commission believes that certain of these costs may be over-counted. However, there is no evidence on the record as to this issue. Thus, the Commission cannot evaluate the extent to which, if any, this may be a problem. The Commission expects the company to account for these items appropriately.

discount must remain in place through December 31, 2005, and will not end at the end of 2004 pursuant to the stipulation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) On January 10, 2004, CG&E filed an application for authority to modify its nonresidential generation rates to provide for a competitive market option for rates subsequent to its MDP.

(2) On October 8, 2004, CG&E filed applications for authority to modify its current accounting procedures to allow it to defer certain costs related to its participation in MISO and related to its investment in transmission and distribution facilities, and for authority to establish a capital investment rider to recover the deferred transmission and distribution costs.

(3) A local public hearing was held on April 22, 2004, in Cincinnati. The evidentiary hearing commenced on May 17, 2004, and was continued. The evidentiary hearing began again on May 20, 2004, and concluded on June 1, 2004.

(4) A stipulation, proposing to resolve all of the issues in these cases but not signed by all of the parties, was filed on May 19, 2004.

(5) The ultimate issue for the Commission's determination is whether the stipulation, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

   (a) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
   (b) Does the settlement, as a package, benefit ratepayers and the public interest?
   (c) Does the settlement package violate any important regulatory principle or practice?

(6) The Commission finds that the stipulation meets the three listed criteria, when modified as follows: (a) to require Commission approval for all changes in the amount or avoidability of the AAC, and to provide that the Commission, in evaluating such changes, would consider cost savings as well as increases, (b) to allow the AAC to be avoidable during 2005, (c) to eliminate the cap on the increases in the AAC, (d) to increase the percentage of nonresidential shopping customers who may avoid paying the RSC from 25 percent to 50 percent, (e) to require Commission approval for all increases in the amount of recovery of fuel and economy power purchases, (f) to allow the deferral of certain distribution

expenses only with regard to nonresidential consumers, (g) to require that residential consumers pay RTC charges only through 2008 and receive a five percent discount on generation charges through 2005, (h) to require the calculation of the incremental cost of power, for purposes of the price to be paid by nonresidential shopping consumers upon their return to CG&E, on the basis of costs incurred only by CG&E, not by its affiliates, (i) to prohibit CG&E from requiring nonresidential consumers to waive their statutory POLR rights, (j) to provide that, if CG&E does not implement the stipulation as modified, CG&E will be required to establish full corporate separation, and (k) to allow certain notices to CG&E with regard to consumers which have contracts with CRES providers to be made with only 60 days' notice for all notices to be delivered prior to January 1, 2005.

(7) The RSP set forth in the stipulation, as modified by this opinion and order, balances three objectives: (a) rate certainty, (b) financial stability for CG&E, and (c) the further development of competitive markets.

(8) All nonresidential customer classes of CG&E have attained at least 20 percent switching, thereby allowing the MDP to end for all nonresidential classes.

It is, therefore,

ORDERED, That the stipulation be approved, to the extent and subject to the modifications and conditions set forth above. It is, further,

ORDERED, that OCC's request to reopen this proceeding be denied. It is, further,

ORDERED, That CG&E file tariffs for Commission approval that reflect the terms of the stipulation, as modified by this order within 75 days. It is, further

ORDERED, That CG&E file proposed transmission costs riders for review by Commission staff. It is, further,

ORDERED, That CG&E file its proposed residential demand side management tracker for review by Commission staff. It is, further,

ORDERED, That CG&E's accounting deferrals be approved. It is, further,

ORDERED, That, if CG&E does not implement the stipulation as modified by this opinion and order, then CG&E must fully separate its generating assets as directed in the Commission's ETP order. It is, further, ORDERED, That a copy of this opinion and order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Judith A. Jones

Donald L. Mason

Clarence D. Rogers, Jr.

JWK/SEF;geb

Entered in the Journal
SEP 2 9 2004

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the 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

CONCURRING OPINION OF CHAIRMAN ALAN R. SCHRIBER

When stakeholders gather "around the table" to reach consensus, there is clearly a significant amount of give and take. In this Order, through the hard work of many parties, there was a significant amount of agreement on so many of the issues, both simple and arcane. For that, many are to be commended for the Stipulation that we were presented with.

As is usually the case, however, there are those who are left by the wayside either because their interests are not negotiable or because their status is thought to be non-threatening to the outcome of the total package. It is the latter condition that has caused my colleagues and me to make modifications to the Stipulation with which we were presented.

Specifically, the commissioners turned their attention to the commercial and small industrial (C & I) consumers that play a major role in our economy but, because of their diversity and size, have had little voice in the establishment of cogent rate design; typically the rates that they pay exceed those of other rate classes including residential. In this vein, we felt it appropriate to modify the Stipulation. Most importantly, we believe that, because of the extraordinary rates paid by C & I customers, the role of the marketplace in providing competitive alternatives should be a large value-added proposition for doing business in Ohio. As such, we have advocated opening up more possibilities for more customers with regard to the magnitude of Cinergy's generation that might be "avoided". Furthermore, we do not believe that shopping should be deterred by the prospect of paying for costs associated exclusively with Cinergy's generation. These might include the costs of reserves, the costs of environment compliance, and security.

One should be mindful of the fact that customers who choose alternate suppliers of electricity do not leave Cinergy in a lurch; power not sold direct to end-users can be sold in the marketplace. Further, Cinergy proposes to establish its own retail affiliate. Presumably it can be a formidable competitor in the market for C & I customers.

As a whole, I believe that lending credibility to the arguments of the commercial and small industrial customers is in keeping with the objectives set forth by Ohio's Governor. As a member of his Jobs Cabinet, I am acutely aware of the importance of creating an environment that eases the way for upstart businesses. This includes the cost of energy. It is in this spirit that we chose to make the modifications that we did. I am also aware that Cinergy's financial well-being is critical to the delivery of power to southwest Ohio. Unlike its customers, Cinergy has the ability to follow any number of regulatory paths to follow in order to enhance its balance sheet, including the rate case.

Alan R. Schriber, Chairman

Entered in the Journal
SEP 29 2004

Reneè J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify Its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period.	)	Case No. 03-93-EL-ATA
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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

ENTRY ON REHEARING

The Commission finds:

(1) The applicant, The Cincinnati Gas & Electric Company (CG&E), filed applications in these matters to modify its nonresidential generation rates to provide for market-based standard service offer pricing and to establish an alternative competitive-bid process subsequent to the end of the market development period (MDP), to permit it to defer costs and investments, and to establish a rider to recover certain capital investments.

(2) On September 29, 2004, the Commission issued its opinion and order (opinion and order) in these proceedings. In the opinion and order, the Commission approved, with certain modifications, a stipulation (stipulation) filed by some of the parties in the cases (signatory parties), including CG&E; staff of the Commission (staff); FirstEnergy Solutions Corp. (FES); Dominion Retail, Inc. (Dominion); Industrial Energy Users-Ohio (IEU); Green Mountain Energy Company (GMEC); Ohio Energy Group, Inc. (OEG); The Kroger Co. (Kroger); AK Steel

Corporation; Cognis Corp. (Cognis); People Working Cooperatively (PWC); Communities United For Action; and Ohio Hospital Association (OHA). Parties that did not sign the stipulation (nonsignatory parties) include Ohio Consumers' Counsel (OCC); Constellation NewEnergy Inc. (Constellation); MidAmerican Energy Company (MidAmerican); Strategic Energy, LLC (Strategic); WPS Energy Services, Inc. (WPS); Constellation Power Source, Inc. (CPS); Ohio Partners for Affordable Energy (OPAE); The Ohio Manufacturers' Association (OMA); National Energy Marketers Association; and PSEG Energy Resources & Trade LLC. (Constellation, MidAmerican, Strategic, and WPS may be referred to collectively as Ohio Marketers Group (OMG).)

(3) The stipulation provided, *inter alia,* for the establishment of a rate stabilization plan for CG&E that would govern the rates to be charged by CG&E from January 1, 2005, through December 31, 2008 (with certain aspects of those rates also extending through the end of 2010). The opinion and order approved the stipulation while making a number of modifications to its content.

(4) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days of the entry of the order upon the Commission's journal.

(5) On October 29, 2004, CG&E, OCC, OMG, and CPS filed applications for rehearing.

(6) In its application for rehearing, CG&E requests, in the alternative, that the Commission either (a) reinstate the stipulation without modification, (b) adopt CG&E's suggestions, as described in its application for rehearing, or (c) "acknowledge and approve CG&E's statutory right to implement its previously-filed market-based standard service offer." (CG&E's application for rehearing at 2.) CG&E also sets forth twelve additional assignments of error that relate to the Commission's consideration and modification of the stipulation in the opinion and order. Thus, CG&E's application for rehearing actually sets forth thirteen assignments of error, as follows:

   (a) In CG&E's first assignment of error, it contends that the Commission erred in failing to adopt the stipulation without modification and requests that the Commission consider modifying the opinion and order on the basis of its suggestions.

(b) In CG&E's second assignment of error, it contends that the Commission erred in purporting to establish the amount of the market price that CG&E charges for its market-based standard service offer (MBSSO), including the price to compare and provider of last resort (POLR) components and by retaining authority to approve increases or decreases in the MBSSO through annual rate reviews.

(c) In CG&E's third assignment of error, it contends that the Commission erred in finding that additional regulatory transition charges (RTCs) proposed in the stipulation to be assessed against residential consumers during 2009 and 2010 would conflict with the stipulation and recommendation approved in *In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan, Approval of Tariff Changes and New Tariffs, Authority to Modify Current Accounting Procedures, and Approval to Transfer its Generating Assets to an Exempt Wholesale Generator*, Case No. 99-1658-EL-ETP et al. (August 31, 2000) (*ETP* opinion), while requiring CG&E to maintain a stable generation rate for those consumers after the MDP.

(d) In CG&E's fourth assignment of error, it contends that the Commission erred in denying CG&E accounting deferrals and recovery of such deferrals through a rider amortized over a five-year period, from July 1, 2004, through December 31, 2005, related to its net capital investment to CG&E's distribution plant made on behalf of residential consumers.

(e) In CG&E's fifth assignment of error, it contends that the Commission erred in permitting all consumers to avoid POLR charges, thereby requiring CG&E to further subsidize the competitive retail electric market.

(f) In CG&E's sixth assignment of error, it contends that the Commission erred in not permitting CG&E to recover all of its POLR costs.

(g) In CG&E's seventh assignment of error, it contends that the Commission erred in denying CG&E recovery of POLR costs based upon the concept of rate shock without any evidence of record.

(h) In CG&E's eighth assignment of error, it contends that the Commission erred in permitting up to 50 percent of nonresidential consumers to avoid payment of the rate stabilization charge (RSC) of the POLR charge without CG&E's consent.

(i) In CG&E's ninth assignment of error, it contends that the Commission erred in attempting to compel CG&E either to accept the Commission's modifications of the stipulation or to take a variety of specified actions.

(j) In CG&E's tenth assignment of error, it contends that the Commission erred in attempting to determine CG&E's MBSSO by capping the price based on CG&E's cost instead of permitting a market price.

(k) In CG&E's eleventh assignment of error, it contends that the Commission erred in failing to approve CG&E's applications in these proceedings on a timely basis and in ruling only on the rate stabilization service requested by the Commission and offered as a settlement by CG&E.

(l) In CG&E's twelfth assignment of error, it contends that the Commission erred in failing to approve CG&E's MBSSO proposed on January 10, 2003.

(m) In CG&E's thirteenth assignment of error, it contends that the Commission erred in failing to acknowledge CG&E's rights to implement market rates and in failing to approve the market-based rates for which CG&E applied on January 10, 2003.

(7) OCC sets forth twelve assignments of error in its application for rehearing, as follows:

(a) OCC's first seven assignments of error relate to its contention that the stipulation, adopted by the opinion and order, violates important regulatory principles and practices. In OCC's first assignment of error, it contends that the Commission erred in failing to review alleged side agreements between individual parties, resulting in an inadequate review of the standard service offer (SSO).

(b) In OCC's second assignment of error, it contends that the Commission erred in allowing certain non-bypassable charges.

(c) In OCC's third assignment of error, it contends that the Commission erred in failing to price noncompetitive services through a statutory rate case.

(d) In OCC's fourth assignment of error, it contends that the Commission erred in allowing an SSO that is not a market-based rate.

(e) In OCC's fifth assignment of error, it contends that the Commission erred in failing to include a competitive bidding process.

(f) In OCC's sixth assignment of error, it contends that the Commission erred in failing to require CG&E to transfer its generation assets to a separate affiliate.

(g) In OCC's seventh assignment of error, it contends that the Commission erred in approving rates that are discriminatory.

(h) OCC's next four assignments of error relate to its contention that the stipulation, adopted by the opinion and order, does not, as a package, benefit ratepayers and the public interest. In OCC's eighth assignment of error, it contends that the Commission erred in failing to consider alleged side agreements.

(i) In OCC's ninth assignment of error, it contends that the Commission erred in approving an SSO that does not result in the rate certainty that the Commission has identified as its objective in allowing for rate stabilization plans.

(j) In OCC's tenth assignment of error, it contends that the Commission erred in failing to further the Commission's objective of developing a competitive market.

(k) In OCC's eleventh assignment of error, it contends that the Commission erred in failing to require specificity in the percentage of income payment plan (PIPP), weatherization and demand side management (DSM) programs in the stipulation.

(l) OCC's last assignment of error relates to its contention that the stipulation, adopted by the opinion and order, is not a product of serious bargaining among capable, knowledgeable parties. Specifically, in the twelfth assignment of error, OCC contends that the Commission erred in failing to allow for discovery of alleged side agreements between individual parties, resulting in a stipulation that is not a product of serious bargaining among capable, knowledgeable parties.

(8) In its application for rehearing, OMG sets forth five assignments of error, as follows:

(a) In OMG's first assignment of error, it contends that the Commission erred in failing to find that shopping customers should not have to pay CG&E's POLR charges unless they actually receive generation or capacity from CG&E.

(b) In OMG's second assignment of error, it contends that the Commission erred in not allowing all customers the option of electing not to purchase rate stabilization service and to avoid the RSC and the annually adjusted component, as defined in the opinion and order (AAC).

(c) In OMG's third assignment of error, it contends that the Commission erred in not establishing a flat 60-day notice period for customers to waive the rate stabilization service and be relieved from paying the RSC.

(d) In OMG's fourth assignment of error, it contends that the Commission was unclear with regard to whether a nonresidential shopping customer that returns to CG&E would pay, for each hour of CG&E service, either CG&E's incremental cost of supplying power for the month of the customer's return or the highest hourly price during the month in question.

(e) In OMG's fifth assignment of error, it contends that the Commission was unclear as to the status of the current nonresidential shopping customers for calendar year 2005.

(9) In its application for rehearing, CPS sets forth one assignment of error. Specifically, CPS contends that the Commission erred in failing to require an immediate auction in the event that it finds the rate stabilization plan (RSP) rates to be above market PRICES.

(10) Memoranda responsive (both in support and contra) to the various applications for rehearing were filed on November 8 and November 18, 2004, by CG&E, OCC, OMG, OPAE, GMEC, Dominion, IEU, Kroger, Cognis, OHA, PWC, FES, and OEG (OEG amended its filing on November 9, 2004).[1] IEU, Kroger, Cognis, OHA, PWC, FES, and OEG indicated their support for CGE's first assignment of error.

(11) The Commission has reviewed all the arguments for rehearing and will discuss below those arguments where the Commission finds further clarification or comment is required, or where rehearing is granted. Arguments for rehearing not discussed below have been adequately considered by the Commission in its opinion and order and are being denied.

(12) CG&E's first assignment of error requests, in essence, that the Commission consider its suggested modifications of the opinion and order. CG&E's suggestions are as follows:

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1 On November 18, 2004, OMG filed a motion for leave to supplement its memorandum contra in order to respond to certain issues discussed by GMEC and Dominion in their memoranda contra. In the interest of allowing the parties the opportunity for argument related to these issues, this motion will be granted.

(a) CG&E would retain five of the modifications required by the opinion and order; specifically, (1) the extension of the five percent residential discount through December 31, 2005; (2) the recovery of deferred distribution costs from only nonresidential consumers; (3) the termination of the recovery of RTCs from residential consumers as of December 31, 2008; (4) the calculation of a market price for returning nonresidential consumers based upon only CG&E's wholesale market costs; AND (5) the calculation of actual AAC and FPP, including both cost decreases and increases in each cost category.

(b) CG&E suggests that the Commission modify the opinion and order to provide for an infrastructure maintenance fund (IMF) charge to compensate CG&E for committing its generation capacity to serve MBSSO consumers through 2008. The SUGGESTED IMF would be equal to four percent of "little g" as a component of CG&E's POLR charge during 2005 and 2006, and equal to six percent of "little g" as a component of CG&E's POLR charge during 2007 and 2008.

(c) CG&E suggests that the cost of purchased power necessary to maintain system reliability be moved from the AAC, where it was covered in the stipulation and the opinion and order, to a separate component, which CG&E suggested designating as a system reliability tracker (SRT). The SRT would permit CG&E to apply annually to the Commission to purchase power to cover peak and reserve capacity requirements and to flow through those actual costs on a dollar-for-dollar basis.

(d) CG&E suggests that the remaining portion of the AAC, as well as the RSC, be totally avoidable for the first 50 percent of nonresidential consumer load to switch to an alternate supplier and for the first 25 percent of residential consumer load to switch to an alternate supplier, as had been ordered for 2005 by the Commission.

(e) CG&E suggests that the opinion and order be modified to increase avoidability of costs by moving the recovery of emission allowances (EAs) from the AAC (under the stipulation) to recovery as part of the fuel and economy purchased power component of the price to compare (FPP).

(f) CG&E suggests that increases in the AAC for nonresidential consumers be set at four percent of "little g" in 2005, an additional four percent in 2006, and allowing CG&E to apply for additional recovery of actual costs in 2007 and 2008, and by setting increases in the AAC for residential consumers at six percent of "little g" during 2006 and allowing CG&E to apply for additional recovery of actual costs in 2007 and 2008.

(13) The Commission has reviewed CG&E's proposed modifications of the opinion and order and believes that, with certain clarifications and revisions, the suggestions are meritorious. Therefore, rehearing will be granted on CG&E's first assignment of error. The required clarifications and revisions are as follows:

(a) The amendment to the stipulation, attached to CG&E's application for rehearing, details the involvement that it expects from the Commission in the determination of the appropriate levels for the SRT, the AAC, and the FPP in various years. As to the SRT, CG&E suggests that it would make an estimate, during the fourth quarter of each year, starting in 2004, of its load for the following year and of the purchases necessary to maintain a sufficient reserve margin. CG&E would "apply to the Commission for approval of such expenditures." (CG&E's application for rehearing, attachment 1, at 7.) Attachment 2 to CG&E's application for rehearing, on page 3, describes the timeline and mechanics for this calculation, filing, and approval. That document states that "the Commission will approve the plan or approve an agreed upon alternative."

As to the AAC, CG&E proposes that the level of the charge be preset for 2005 and 2006. The Commission's involvement in setting the level for 2007 and 2008 is described in CG&E's proposed amendment to the stipulation.

Following CG&E's filing of a schedule demonstrating its increases in "net costs incurred for homeland security, taxes, and environmental compliance during each year," Commission staff would audit CG&E's calculations. "If the Staff audit confirms CG&E's calculation, the rates shall be effective" for the following year. If staff disagrees with the calculations, a hearing would be held, to be concluded within 90 days of the original filing. (CG&E's application for rehearing, attachment 1, at 2-3.)

With regard to the FPP, CG&E would, on an ongoing basis, make quarterly filings with the Commission as to a proposed fuel and economy purchased power rate (including fuel and economy purchased power costs, a reconciliation adjustment, a system loss adjustment, and EAs). While CG&E refers to "periodic audits," it specifies no procedure for Commission review. (CG&E's application for rehearing, attachment 3, at 2.)

It is unclear, in any of these three categories of costs, the extent to which the Commission will be reviewing CG&E's expenditures in the context of its audits. In all of these cases, the Commission finds that it is therefore necessary to clarify that the Commission, in its consideration of CG&E's expenditures in these categories, will continue to consider the reasonableness of expenditures. It is not in the public interest to cede this review. Nor would it foster any rate certainty to allow all decisions of this nature to be free from Commission review of reasonableness. Therefore, the Commission will require CG&E, by September 1 of each year, to file with the Commission an application to establish the FPP, the SRT and the AAC levels for the following year (except with regard to the AAC where that amount is already established for 2005 and 2006 through our opinion and order, as modified by this entry on rehearing). CG&E's calculations will include all cost increases and decreases in all covered cost categories. The Commission will review those filings and will issue appropriate orders. The filing for 2005 should be made within ten days following the issuance of this entry on rehearing.

(b) The descriptions of the costs that are to be included in the SRT, the AAC, and the FPP are unclear as to the baseline for determination of includable cost components. "Little g" was originally determined by reference to the embedded generation cost. *ETP* opinion. That cost included certain of the items to be recovered by the SRT, the AAC, and the FPP. The Commission's modification of its opinion and order, pursuant to CG&E's first assignment of error, will clarify the baselines for these components as follows. First, at the time of CG&E's last rate case, the Commission staff determined that CG&E had sufficient generation capacity to cover all of its peak load and provider of last resort obligations. Therefore, the amount included in its approved generation cost for these obligations was zero. *In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Electric Rates in its Service Area*, Case No. 92-1464-EL-AIR, Staff Report (March 17, 1991), at 15. As a result, all amounts in the SRT are in excess of the cost of capacity requirements which are a part of "little g." Second, with regard to the AAC, the costs of environmental compliance, security, and tax law changes, will all be based on changes in costs since the year 2000. Third, with regard to the FPP, the amounts to be recovered for fuel, economy purchased power, and EAs are those in excess of amounts authorized in CG&E's last electric fuel component proceeding.

(c) The SRT, as proposed by CG&E in its first assignment of error, would be unavoidable by shoppers. The Commission is aware that CG&E is required to maintain adequate reserves to meet its obligation as the provider of last resort. The SRT is designed to allow the recovery of expenses related to this obligation. However, it is currently unclear how this obligation will change, if at all, following the effectiveness of "MISO Day 2" (as explained in the opinion and order). Therefore, the Commission will clarify that the SRT for 2005, the level of which will be determined based on an initial SRT filing to be made by CG&E within 30 days after the issuance of this entry on rehearing, will be unavoidable. However, the avoidability or unavoidability of the SRT for all subsequent years will be determined by the Commission in a proceeding to be commenced by CG&E within 60 days following the implementation of MISO Day 2, or by July 1, 2005, whichever is earlier.

(d) In its responsive memorandum, GMEC argues, in part, that the stipulation previously restricted the seven million dollar bill credit to residential consumers served by a competitive retail electric service (CRES) provider not affiliated with CG&E. GMEC claims that, in deleting the bill credit provision and enhancing other incentives for shopping by residential consumers, CG&E would improperly eliminate that restriction. GMEC notes that, on August 23, 2004, CG&E's affiliate, Cinergy Retail Sales, Inc., filed an application to become a CRES provider. A certificate was issued to it on October 7, 2004. GMEC argues that Cinergy's name-brand recognition poses a threat that the shopping incentives could be exhausted before other CRES providers have been given an opportunity to compete. Therefore, GMEC requests that the Commission require that all shopping incentives available to the first 25 percent of switched residential load be available only to customers served by a CRES provider not affiliated with CG&E.

The Commission disagrees with GMEC on this issue. We note that, in the *ETP* opinion, the Commission stated that CG&E's nonresidential MDP could be terminated prior to December 31, 2005, only to the extent that it did not have an affiliated retail electric generation provider. As pointed out by GMEC, on October 7, 2004, Cinergy Retail Sales, Inc., an affiliated CRES provider, was issued a certificate to provide CRES in CG&E's service territory. However, the MDP for nonresidential consumers has been ended, due to the existence of more than 20 percent shopping levels. Thus, the restriction that might have prohibited CG&E from having an affiliated CRES provider is no longer effective. As to the limitation in the stipulation on the availability of the seven million dollar bill credit only to customers of nonaffiliated CRES providers, the Commission will not require that customers of affiliates and customers of nonaffiliates be similarly distinguished. The Commission will continue to monitor the residential market.

(14) The Commission has previously determined that rate stabilization plans should provide rate certainty for consumers, provide financial stability for utility companies, and encourage the development of competition. Opinion and Order at 15; *In the Matter of the Applications of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Continue and Modify Certain Regulatory Accounting Practices and Procedures, for Tariff Approvals and to Establish Rates and Other Charges Including Regulatory Transition Charges Following the Market Development Period*, Case No. 03-2144-EL-ATA, Opinion and Order (June 9, 2004); *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for The Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, *et al.*, Opinion and Order (September 2, 2003) (*Dayton* opinion). The opinion and order provided adequate rate certainty for consumers in the CG&E service area. The opinion and order had modified the stipulation to require consideration of cost savings as well as cost increases, and to require Commission review of fuel and economy purchased power increases. The modifications to the opinion and order which are being made by this entry on rehearing do not change these items and, further, clarify Commission review of all annual changes to the cost components. Thus, rate certainty for consumers is being ensured.

The stipulation, as modified by the opinion and order, provided adequate assurance of financial stability for CG&E. Nothing in the proposed modifications suggested by CG&E in its first assignment of error would alter that conclusion.

The opinion and order modified the stipulation in a variety of aspects designed to encourage the development of competitive markets. First, the percentage of nonresidential consumers that can avoid the RSC and the AAC was increased by the opinion and order from 25 percent to 50 percent. Second, the opinion and order decreased the total cost of service for residential consumers by extending the residential discount until December 31, 2005; by terminating the collection of RTCs as of December 31, 2008; and by charging only nonresidential consumers for the cost of certain capital investments in CG&E's distribution system. The revisions to the opinion and order which are being made by this entry on rehearing would leave all of these modifications in place and would also make two other positive changes. First, the opinion and order will be modified to increase the price to compare for all shoppers by moving the cost of EAs from the unavoidable portion of the price to the avoidable portion for the price. Second, the opinion and order will be modified to further increase the price to compare by making the AAC permanently avoidable for a percentage of each class of consumers.[2]

Therefore, the Commission finds that the modifications of the opinion and order suggested by CG&E in its first assignment of error will provide rate certainty for consumers, will provide financial stability for CG&E, and will further encourage the development of competitive markets. CG&E's first assignment or error is therefore granted, subject to the clarifications and revisions discussed above.

(15) CG&E's second assignment of error includes two separate arguments. To the extent that it refers to annual reviews by the Commission, this issue was discussed previously in this entry. The remainder of this assignment of error is made moot by the grant of rehearing with regard to CG&E's first assignment of error.

(16) Several of CG&E's other assignments of error, including those described above as numbers three, four, five, six, seven, eight, ten, eleven, twelve, and thirteen, are also moot. Some discussion of certain aspects of the ninth assignment of error is warranted.

(a) In its ninth assignment of error, CG&E argues that the Commission's order is unjust and unlawful because it attempts to compel CG&E to divest its generation assets if CG&E does not accept the changes to the stipulation required by the Commission's opinion and order. CG&E

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2 Dominion and Green Mountain both complained that the deletion of the provision in the stipulation which would have provided seven million dollars in bill credits for residential consumers would harm competition. The analysis by Dominion and Green Mountain is discussed and challenged in certain respects by OMG in its supplement to its memorandum contra. The Commission finds that the modifications to the opinion and order being made by this entry on rehearing provide sufficient other incentives for shopping by residential consumers that the loss of these bill credits is not unreasonably unsupportive of the development of competition.

claims that the Commission does not possess the statutory authority to require CG&E to divest its generation assets. It claims that Section 4928.17(E), Revised Code, permits CG&E to determine whether it will, or will not, divest its generation assets. CG&E also claims that it is not bound by the stipulation approved by the Commission in the *ETP* opinion because all parties, including CG&E, have the statutory right to seek an amendment to CG&E's corporate separation plan. CG&E claims that it applied for, and the Commission has approved, such an amendment, as part of the stipulation, modified or otherwise.

(b) We find no merit to this assignment of error. Clearly the Commission has the statutory authority to require CG&E to implement a corporate separation plan. Section 4928.17(A), Revised Code, provides that no electric utility shall engage, either directly or through an affiliate, in the businesses of supplying both a noncompetitive retail electric service and a competitive retail electric service unless the utility implements and operates under a corporate separation plan that is approved by the Commission. Section 4928.17(A)(1), Revised Code, further provides that the plan must provide, at a minimum, for the provision of the CRES or the nonelectric product or service through a fully separated affiliate of the utility. Pursuant to these statutory requirements, CG&E filed an application for, and the Commission approved, CG&E's corporate separation plan in the *ETP* opinion. Under that order, we found that good cause existed to allow the separation of CG&E's generation assets as proposed by CG&E to occur by December 31, 2004. We found that this satisfied the public interest in preventing unfair competitive advantage and preventing the abuse of market power. We further noted that we would closely monitor the implementation of the plan and take appropriate steps where we found competitive inequality, unfair competitive advantage, or abuse of market power. In addition, CG&E fully acknowledged these statutory requirements and the Commission's authority to approve a utility's corporate separation plan on pages 51-53 of its initial brief supporting the *ETP* stipulation. It is disingenuous for CG&E now to argue that the Commission lacks statutory authority over an electric utility's separation of generation assets.

(c) As a part of the stipulation, CG&E sought Commission approval of a delay in the implementation of its corporate separation plan. CG&E has argued that any party has the right to file an application seeking to amend CG&E's corporate separation plan. We do not disagree. However, all such applications for amendments are subject to the approval of the Commission. Absent Commission approval, no such amendment is authorized. In addition, while CG&E is correct that the Commission approved a delay in the implementation of CG&E's corporate separation as part of our opinion and order, we did so as part of a package of modifications to the stipulation that we found to be appropriate and in the public interest. We further noted that, if the company did not implement the stipulation as revised by the opinion and order, then full separation should be established as directed by, and under the time frames established in the *ETP* opinion. The Commission's approval of CG&E's proposed delay in the implementation of its corporate separation remains conditional, being now conditioned on CG&E's acceptance of the Commission's modifications and clarifications set forth in this entry on rehearing. CG&E's ninth assignment of error is denied.

(17) In its application for rehearing, OCC included three assignments of error (numbers one, eight, and twelve) that relate to the Commission's refusal to require discovery of side agreements. As the Commission has previously confirmed, side agreements, being information related to the negotiation of a proposed stipulation, are privileged and therefore not discoverable. *Dayton* opinion, at 13-14. In addition, even if it were not privileged, information relating to side agreements is not relevant to the determination of this matter. As stated in the *Dayton* opinion, "the Commission would note that no agreement among the signatory parties to the stipulation can change the terms of the stipulation. Either the terms of the

stipulation are, on their face, beneficial to the ratepayers and the public or they are not. Even if there were side agreements among the signatory parties, those agreements would not change the public benefit or detriment of the stipulation." *Dayton* opinion at 14. Rehearing on these grounds is denied.

(18) OCC's second assignment of error and OMG's first and second assignments of error relate to their argument that the Commission should not have allowed certain non-bypassable charges. They claim that the AAC and the RSC should be avoidable. The Commission, as described above, has found that the stipulation, as modified and clarified by the opinion and order and this entry on rehearing, benefits consumers as a package. In addition, the Commission notes that the avoidability of the SRT will be specifically considered during 2005. Rehearing on these grounds is denied.

(19) In OCC's third assignment of error, it argues that the Commission unreasonably and unlawfully established a procedure to increase the AAC that does not meet the requirements of Section 4928.15, Revised Code. OCC claims that the AAC is a noncompetitive service under Section 4928.01(B), Revised Code. As a result, OCC contends that Section 4928.15, Revised Code, requires that noncompetitive services be priced through Section 4909.18, Revised Code. Further, OCC claims that, because the AAC charge is meant to increase rates, Section 4909.18, Revised Code, requires a full review of the company as conducted in a traditional rate case. We find no merit to this assignment of error. Section 4928.15, Revised Code, provides that no electric utility shall supply noncompetitive retail electric distribution, transmission, or ancillary service in this state except pursuant to a schedule for that service that is filed with the Commission under Section 4909.18, Revised Code. The AAC, about which OCC is complaining, is not a charge placed upon distribution or transmission, and is not an ancillary service. Thus, a traditional rate case review under Section 4909.18, Revised Code, is inapplicable.

In addition, the Commission has found, and finds in this entry on rehearing, that the stipulation, as modified by the opinion and order and by this entry on rehearing, is not unreasonable as to the amount to be charged under the AAC. Section 4928.14, Revised Code, provides that competitive retail electric services, including a firm supply of electric generation service, shall be provided to consumers at market-based rates, rather than establishing such charges through the traditional rate-based approach under Section 4909.18, Revised Code. Thus, the statutory requirement for the Commission, and what is provided under the stipulation as modified, is to ensure that CG&E's generation rates are market-based. In this case, the AAC is a part of CG&E's competitive electric generation charge, which we have previously determined to be a market-based rate. Accordingly, we deny this portion of OCC's application for rehearing.

(20) OCC's fourth and fifth assignments of error are also denied. The Commission found, in its opinion and order, that the price under the stipulation is market-based. The Commission noted that the governing statute allows for flexibility in the determination of such charges and that the stipulation satisfied the statutory requirements. As to competitive bidding, the Commission found that the stipulation offered a reasonable alternative to a traditional process. The stipulation, as futher modified by this entry on rehearing, meets these two requirements no less than did the stipulation as filed.

(21) OCC's sixth assignment of error relates to its belief that CG&E's generation assets should be transferred to a separate affiliate. This topic was discussed fully above. Rehearing is denied.

(22) OCC's seventh assignment of error states that the rates approved are discriminatory. The Commission has previously found that any residential consumer has the opportunity to become a part of the group that can receive shopping incentives. Opinion and order at 28. Therefore, there is no discrimination. Rehearing on this ground is denied.

(23) OCC's ninth and tenth assignments of error relate to its argument that the stipulation does not result in rate certainty or the development of competition. The Commission has fully discussed these issues in this entry on rehearing, as well as in the opinion and order. Rehearing on these grounds is denied.

(24) OCC's eleventh assignment of error states that more specificity should have been required in CG&E's plans regarding the PIPP, weatherization and DSM programs. The Commission notes that CG&E agreed to extend its current programs regarding weatherization and energy assistance. This is sufficient "detail." As to DSM programs, CG&E committed that it would work to develop such programs in a collaborative process. The Commission finds this approach to be reasonable. Therefore, rehearing on this ground is denied.

(25) In OMG's application for rehearing, its third assignment of error states that the Commission should have established a flat, 60-day notice for waiver of the rate stabilization service. CG&E, in its memoranda contra OMG's application for rehearing, states (at page 7) that "in the spirit of compromise [it] agrees to a flat 60-day notice provision as requested by OMG." However, CG&E suggests that the notice may be provided to CG&E starting on December 15, 2004. The Commission finds that notice cannot be given in time for a consumer to bypass the RSC and the AAC by the beginning of 2005. Therefore, the Commission will grant rehearing as follows: (a) the opinion and order is modified to allow a flat 60-day notice period; (b) notices may be given to CG&E any time after the issuance of this entry on rehearing; and (c) for those consumers wishing to avoid the RSC and the AAC as of any date between January 1, 2005, and January 24, 2005 (for whom a 60-day notice is impossible), notice to CG&E by December 15, 2004, shall be considered timely. The Commission further finds that CG&E should inform the Commission, within three days following the issuance of this entry on rehearing, as to the process it will employ to ensure that all nonresidential customers that may be affected by these provisions will be notified of these deadlines.

(26) OMG's fourth assignment of error requests clarification of the cost to be charged to returning, nonresidential shoppers. In CG&E's memorandum contra OMG's application for rehearing, CG&E states that such customers would pay "the highest hourly cost of power for each hour during which CG&E served the consumer." To the extent that the opinion and order was unclear on this point, rehearing is granted on this ground. CG&E will charge any returning, nonresidential shopper, for each hour it provides service to the returned shopper, the highest hourly cost of power that CG&E incurs for that hour. That highest hourly cost of power could, therefore, fluctuate on an hourly basis. For customers without time-of-day meters, CG&E should work with staff to develop an appropriate process to calculate such charges.

(27) OMG's final assignment of error requests clarification of the status of current nonresidential shopping customers for the calendar year 2005. CG&E responds that it would be inequitable and unlawful to require CG&E "to further subsidize the shopping consumers by permitting shopping consumers who are switched as of December 31, 2004, and receiving shopping credits during 2005, to avoid the RSC or the AAC during 2005." The Commission agrees with OMG. The RSC and the AAC, as well as the SRT (which covers cost

components that were a part of the AAC as discussed in the opinion and order), should be avoidable by current, nonresidential shopping credit customers during 2005. The Commission finds that this will encourage further development of the competitive market.

OMG also requested that nonresidential consumers who are receiving shopping credits be allowed to give notice to CG&E of their intent to avoid the RSC and AAC effective January 1, 2006. The Commission finds that notice of intent to avoid the RSC and the AAC could be given well in advance of January 1, 2006, based on a consumer's execution of the appropriate contract with a CRES provider. Rehearing on this ground is therefore granted.

(28) In its application for rehearing, CPS argues that the opinion and order should be amended to state that, if the Commission at any time finds the RSP to be a non-market rate, the Commission on its own may call for a bid-out to be conducted pursuant to Section 4928.14(B), Revised Code. As discussed in our opinion and order, Section 4928.14(B), Revised Code, provides that the Commission may determine at any time that a competitive bidding process is not required, if other means to accomplish generally the same option for customers are readily available in the market and a reasonable means for customer participation is developed. The opinion and order further found that the procedure established by the stipulation offers a reasonable alternative to a more traditional competitive bidding process, provides for a reasonable means of customer participation through the various options that are open to customers under the RSP, and fulfills the statutory requirements for a competitive bidding process. Further, we note that, under paragraph 13 of the stipulation, the "parties agree that the Commission may determine and implement a competitive bidding process to test CG&E's price to compare." Accordingly, the Commission retains the authority under the stipulation to implement a competitive bidding process at any time. CPS's application for rehearing is therefore denied.

It is, therefore,

ORDERED, That the motion by OMG for leave to file a supplement to its memorandum contra be granted. It is, further,

ORDERED, That the application for rehearing filed in this matter by CG&E be granted in part and denied in part. It is, further, ORDERED, That the application for rehearing filed in this matter by OCC be denied. It is, further,

ORDERED, That the application for rehearing filed in this matter by OMG be granted in part and denied in part. It is, further,

ORDERED, That the application for rehearing filed in this matter by CPS be denied. It is, further,

ORDERED, That the stipulation be approved, to the extent and subject to the modifications and clarifications set forth in the September 29, 2004, opinion and order in these proceedings, as further modified by this entry on rehearing. It is, further,

ORDERED, That a copy of this entry on rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Judith A. Jones

Donald L. Mason

Clarence D. Rogers, Jr.

JWK/SEF;geb

Entered in the Journal
NOV 2 3 2004

Reneé J. Jenkins
Secretary

4901:1-20-16 Corporate separation.

(A) Purpose and scope Electric utilities are required by section 4928.17 of the Revised Code, to file with the commission an application for approval of a proposed corporate separation plan. The rule provides that all the state's electric utility companies must meet the same standards so 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. Generally, this rule applies to the activities of the regulated utility and its transactions with its affiliates. However, to ensure compliance with this rule, examination of the books and records of other affiliates may be necessary. Compliance with paragraph (G)(4) of this rule shall begin immediately. Compliance with the remainder of this rule shall coincide with the start date of competitive retail electric service, January 1, 2001, unless extended by commission order for an electric utility pursuant to division (C) of section 4928.01 of the Revised Code.

(B) Definitions

(1) "Affiliates" are companies that are related to each other due to common ownership or control. The affiliate standards shall also apply to any internal merchant function of the electric utility whereby the electric utility provides a competitive service.

(2) "Electric utilities" are as defined in division (A)(11) of section 4928.01 of the Revised Code.

(3) "Fully allocated costs" are the sum of direct costs plus an appropriate share of indirect costs. For purposes of this rule, the term "fully allocated costs" shall have the same meaning as the term "fully loaded embedded costs" as that term appears in division (A)(3) of section 4928.17 of the Revised Code.

(4) "Employees" are all full-time or part-time employees of an electric utility or its affiliates, as well as consultants, independent contractors or any other persons performing various duties or obligations on behalf of or for an electric utility or its affiliate.

(5) "Competitive supplier" means any entity or entities, including aggregators, brokers, and marketers, offering to supply electricity or energy-related goods or services at retail, by sale or otherwise, within the service territory of the electric utility.

(6) "Customer" means any entity that is the ultimate retail consumer of goods and services.

(C) Beginning on the starting date of competitive retail electric service, no electric utility shall supply in this state, either directly or through an affiliate, a noncompetitive retail electric service and a competitive retail electric service (or a noncompetitive retail electric service and a product or service other than retail electric service) unless under a commission-approved corporate separation plan.

(D) Cross-subsidies between an electric utility and its affiliates are prohibited. An electric utility's operating employees and those of its affiliates shall work/function independently of each other.

(E) Electric utilities that structurally separate regulated electric utility business from nonregulated business and that certify to the commission on an annual basis that there is no sharing of employees and that there are no unregulated transactions between the electric utility and the unregulated affiliate, may be granted exemptions from certain audit requirements.

(F) This rule applies to all affiliate transactions and shared services. Transactions made in accordance with rules or regulations approved by the federal energy regulatory commission, securities and exchange commission, and the commission, which rules the electric utility shall maintain in its cost allocation manual (CAM) and file with the commission, shall provide a rebuttable presumption of compliance with the costing principles contained in this rule. Upon a showing of reasonable grounds for complaint, the electric utility has the burden of proof to demonstrate compliance with approved transactional costing rules or regulations.

(G) Electric utilities are required by section 4928.17 of the Revised Code to file an application for approval of a proposed corporate separation plan. The proposed plans shall include provisions relating to the following:

(1) Structural safeguards

(a) An electric utility shall place a copy of the minutes of each board of directors meeting in the CAM in accordance with paragraph (J) of this rule, where it shall be maintained for a minimum of three five years.

(b) An electric utility may not share employees with any affiliate, if the sharing, in any way, violates paragraph (G)(4) of this rule. An electric utility shall maintain in the CAM a copy of the job description of each shared employee (except for shared consultants and shared independent contractors). The electric utility shall maintain in the CAM a list of the names of and job summaries for shared consultants and shared independent contractors. An electric utility shall ensure that all shared employees appropriately record and charge their time based on fully allocated costs. An electric utility shall add to the CAM a copy of all transferred employees' previous and new job descriptions.

(c) Electric utilities and their affiliates that provide services to customers within the electric utility's service territory shall function independently of each other and shall not share facilities and services if such sharing in any way violates paragraph (G)(4) of this rule.

(d) During an interim period, an electric utility has the burden of establishing "good cause" for selecting an interim functional separation plan (as opposed to a structural separation). The interim plan shall provide a detailed timeline for progression to full structural separation and shall be subject to periodic commission staff review at the staff's discretion.

(2) Separate accounting Each electric utility and its affiliates shall maintain, in accordance with generally accepted accounting principles and an applicable uniform system of accounts, books, records, and accounts that are separate from the books, records, and accounts of its affiliates.

(3) Financial arrangements Except as the commission may approve, the financial arrangements of an electric utility are subject to the following restrictions:

(a) Any indebtedness incurred by an affiliate shall be without recourse to the electric utility.

(b) An electric utility shall not enter into any agreement with terms under which the electric utility is obligated to commit funds to maintain the financial viability of an affiliate.

(c) An electric utility shall not make any investment in an affiliate under any circumstances in which the electric utility would be liable for the debts and/or liabilities of the affiliate incurred as a result of actions or omissions of an affiliate.

(d) An electric utility shall not issue any security for the purpose of financing the acquisition, ownership, or operation of an affiliate.

(e) An electric utility shall not assume any obligation or liability as a guarantor, endorser, surety, or otherwise with respect to any security of an affiliate.

(f) An electric utility shall not pledge, mortgage, or use as collateral any assets of the electric utility for the benefit of an affiliate.

(4) Code of conduct

(a) The electric utility shall not release any proprietary customer information (e.g., individual customer load profiles or billing histories) to an affiliate, or otherwise, without the prior authorization of the customer, except as required by a regulatory agency or court of law.

(b) On or after the effective date of this rule, the electric utility shall make customer lists, which include name, address, and telephone number, available on a nondiscriminatory basis to all nonaffiliated and affiliated certified retail electric competitors transacting business in its service territory, unless otherwise directed by the customer. This paragraph does not apply to customer-specific information, obtained with proper authorization, necessary to fulfill the terms of a contract, or information relating to the provision of general and administrative support services.

(c) Employees of the electric utility's affiliates shall not have access to any information about the electric utility's transmission or distribution systems (e.g., system operations, capability, price, curtailments, and ancillary services) that is not contemporaneously and in the same form and manner available to a nonaffiliated competitor of retail electric service.

(d) Electric utilities shall treat as confidential all information obtained from a competitive supplier of retail electric service, both affiliated and nonaffiliated, and shall not release such information unless a competitive supplier provides authorization to do so, or unless the information was or thereafter becomes available to the public other than as a result of disclosure by the electric utilities.

(e) The electric utility shall not tie (nor allow an affiliate to tie) or otherwise condition the provision of the electric utility's regulated services, discounts, rebates, fee waivers, or any other waivers of the electric utility's ordinary terms and conditions of service, including but not limited to tariff provisions, to the taking of any goods and/or services from the electric utility's affiliates.

(f) The electric utility shall ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa.

(g) The electric utility, upon request from a customer, shall provide a complete list of all suppliers operating on the system, but shall not endorse any suppliers nor indicate that any supplier will receive preference because of an affiliate relationship.

(h) The electric utility shall ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power. Employees of the electric utility or persons representing the electric utility shall not indicate a preference for an affiliated supplier. All electric utilities shall, at a minimum, provide information in their transition filings so as to enable the commission to determine whether they have met their burden of proof to satisfy this paragraph as it relates to joint advertising between the electric utility and an affiliate, joint marketing activities between the electric utility and an affiliate, and the use of the name and logo of the electric utility.

(i) The electric utility shall provide comparable access to products and services related to tariffed products and services and specifically comply with the following: (i) An electric utility shall be prohibited from unduly discriminating in the offering of its products and/or services;

) The electric utility shall apply all tariff provisions in the same manner to the same or similarly situated entities, regardless of any affiliation or nonaffiliation;

(iii) The electric utility shall not, through a tariff provision, a contract, or otherwise, give its affiliates preference over nonaffiliated competitors of retail electric service or their customers in matters relating to any product and/or service;

(iv) The electric utility shall strictly follow all tariff provisions;

(v) Except to the extent allowed by state law, the electric utility shall not be permitted to provide discounts, rebates, or fee waivers for any state regulated monopoly service; and

(vi) Violations of this rule shall be enforced and subject to the disciplinary actions described in divisions (C) and (D) of section 4928.18 of the Revised Code.

(j) Shared 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.

(k) Notwithstanding paragraph (G)(4) of this rule, in a declared emergency situation, an electric utility may take actions necessary to ensure public safety and system reliability. The electric utility shall maintain a log of all such actions that do not comply with paragraph (G)(4) of this rule, which log shall be subject to review by ·he commission.

(5) Complaint procedure The electric utility shall establish a complaint procedure for the issues concerning compliance with this rule. All complaints, whether written or verbal, shall be referred to the general counsel of the utility or their designee. The legal counsel shall orally acknowledge the complaint within five working days of its receipt. The legal counsel shall prepare a written statement of the complaint that shall contain the name of the complainant and a detailed factual report of the complaint, including all relevant dates, companies involved, employees involved, and the specific claim. The legal counsel for the electric utility shall inform the complainant that the complainant has the right to submit a written characterization of the complaint and the facts supporting it for entry into the CAM. If the complainant desires to submit such a written characterization, the legal counsel for the electric utility shall include that characterization in the CAM. The legal counsel shall communicate the results of the preliminary investigation to the complainant in writing within thirty days after the complaint was received, including a description of any course of action that was taken. The legal counsel for the electric utility shall inform the complainant that the complainant has the right to submit a response to the results of the preliminary investigation and/or action taken by the electric utility for entry into the CAM. If the complainant desires to submit such a written response, the legal counsel for the electric utility shall include that response in the CAM. The legal counsel shall keep a file in the CAM, in accordance with paragraph (J) of this rule, of all such complaint statements for a period of not less than five years. This complaint procedure shall not in any way limit the rights of a party to file a complaint with the commission.

(H) Additional transition plan content requirements for a corporate separation plan

) A description and timeline of all planned education and training, throughout the holding company structure, to ensure that electric utility and affiliate employees know and can implement the policies and procedures of this rule.

(2) A copy of a policy statement to be signed by electric utility and affiliate employees who have access to any nonpublic electric utility information, which indicates that they are aware of, have read, and will follow all policies and procedures regarding limitation on the use of nonpublic electric utility information. The statement will include a provision stating that failure to observe these limitations will result in appropriate disciplinary action.

(3) A description of the internal compliance monitoring procedures and the methods for corrective action for compliance with this rule.

(4) A detailed description outlining how the electric utility and its affiliates will comply with this rule, except paragraph (K) of this rule. The format shall list the rule and then provide the description. For example: Corporate separation paragraph (G)(1)(b) of this rule – an electric utility may not share employees with any affiliate, if the sharing, in any way violates paragraph (G)(4) of this rule.

- Detailed description of compliance.

(5) Each electric utility shall make available for commission staff review the initial CAM, the contents of which are set forth in paragraph (J) of this rule.

(6) A detailed listing of the electric utility's electric services and the electric utility's transmission and distribution affiliates' electric services.

(I) Access to books and records

(1) The commission staff has the authority to examine books, accounts, and/or other pertinent records kept by an electric utility or its affiliates as they may relate to the businesses for which corporate separation is required under section 4928.17 of the Revised Code.

(2) The commission staff may investigate such electric utility and/or affiliate operations and the interrelationship of those operations at the commission staff's discretion. In addition, the employees and officers of the electric utility and its affiliates shall be made available for informational interviews, at a mutually agreed time and place, as required by the commission staff to ensure proper separations are being followed.

(3) If such employees, officers, books, and records cannot be reasonably made available to the commission staff in the state of Ohio, then upon request of the commission staff, the appropriate electric utility or affiliate shall reimburse the commission for reasonable travel expenses incurred.

(J) Cost allocation manual

(1) Each electric utility's affiliate, which provides products and/or services to the electric utility and/or receives products and/or services from the electric utility, shall maintain information in the CAM, documenting how costs are allocated between the electric utility and affiliates and the regulated and nonregulated operations.

(2) The CAM will be maintained by the electric utility.

(3) The CAM is intended to ensure the commission that no cross-subsidization is occurring between the electric utility and its affiliates.

(4) The CAM will include:

(a) An organization chart of the holding company, depicting all affiliates, as well as a description of activities in which the affiliates are involved;

(b) A description of all assets, services, and products provided to and from the electric utility and its affiliates;

(c) All documentation including written agreements, accounting bulletins, procedures, work order manuals, or related documents, which govern how costs are allocated between affiliates;

(d) Information on employees who have either transferred from the electric utility to an affiliate or are shared between the electric utility and an affiliate and shall be consistent with paragraph (G)(1)(b) of this rule.

(e) A log of all complaints brought to the utility regarding this rule; and

(f) Board of director minutes.

(5) The method for charging costs and transferring assets shall be based on fully allocated costs.

(6) The costs should be traceable to the books of the applicable corporate entity.

(7) The electric utility and affiliates shall maintain all underlying affiliate transaction information for a minimum of five years.

(8) Following approval of a corporate separation plan, an electric utility shall send to the director of the utilities department of the commission (or their designee) every six months a summary of any changes in the CAM.

(9) The electric utility shall designate an employee who will act as a contact for the commission staff, when seeking data regarding affiliate transactions, personnel transfers, and the sharing of employees. The electric utility shall update the commission of changes in the contact.

(K) Commission staff audits

(1) The commission staff will perform an audit of the CAM in order to ensure compliance with this rule.

(2) In order to facilitate meaningful data collection, the initial engagement shall cover the first twelve months after the starting date of competitive retail electric service.

(3) Audits will be at the commission staff's discretion, but will attempt to follow a biennial schedule, unless otherwise ordered by the commission.

(4) During an interim functional separation period, additional audits may be required and an external auditor selected and managed by the commission may conduct the audit.

HISTORY: Eff 3-10-00; 10-23-04

Rule promulgated under: RC 111.15

Rule authorized by: RC 4928.06

Rule amplifies: RC 4928.17, 4928.18, 4928.31(A)(2), 3928.34(A)(8)

4901-1-24 Motions, for protective orders.

(A) Upon motion of any party or person from whom discovery is sought, the commission, the legal director, the deputy legal director, or an attorney examiner may issue any order which is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Such a protective order may provide that:

(1) Discovery not be had.

(2) Discovery may be had only on specified terms and conditions.

(3) Discovery may be had only by a method of discovery other than that selected by the party seeking discovery.

(4) Certain matters not be inquired into.

(5) The scope of discovery be limited to certain matters.

(6) Discovery be conducted with no one present except persons designated by the commission, the legal director, the deputy legal director, or the attorney examiner.

(7) A trade secret or other confidential research, development, commercial, or other information not be disclosed or be disclosed only in a designated way.

(8) Information acquired through discovery be used only for purposes of the pending proceeding, or that such information be disclosed only to designated persons or classes of persons.

(B) No motion for a protective order shall be filed under paragraph (A) of this rule until the person or party seeking the order has exhausted all other reasonable means of resolving any differences with the party seeking discovery. A motion for a protective order filed pursuant to paragraph (A) of this rule shall be accompanied by:

(1) A memorandum in support, setting forth the specific basis of the motion and citations of any authorities relied upon.

(2) Copies of any specific discovery requests which are the subject of the request for a protective order.

(3) An affidavit of counsel, or of the person seeking a protective order if such person is not represented by counsel, setting forth the efforts which have been made to resolve any differences with the party seeking discovery.

(C) If a motion for a protective order filed pursuant to paragraph (A) of this rule is denied in whole or in part, the commission, the legal director, the deputy legal director, or the attorney examiner may require that the party or person seeking the order provide or permit discovery, on such terms and conditions as are just.

(D) Upon motion of any party or person with regard to the filing of a document with the commission's docketing division relative to a case before the commission, the commission, the legal director, the deputy legal director, or an attorney examiner may issue any order which is necessary to protect the confidentiality of information contained in the document, to the extent that state or federal law prohibits release of the information, including where the information is deemed by the commission, the legal director, the deputy legal director, or the attorney examiner to constitute a trade secret under Ohio law, and where nondisclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code. Any order issued under this paragraph shall minimize the amount of information protected from public disclosure. The following requirements apply to a motion filed under this paragraph:

(1) All documents submitted pursuant to paragraph (D) of this rule should be filed with only such information redacted as is essential to prevent disclosure of the allegedly confidential information. Such redacted documents should be filed with the otherwise required number of copies for inclusion in the public case file.

(2) Three unredacted copies of the allegedly confidential information shall be filed under seal, along with a motion for protection of the information, with the secretary of the commission, the chief of the docketing division, or the chief's designee. Each page of the allegedly confidential material filed under seal must be marked as "confidential," "proprietary," or "trade secret."

(3) The motion for protection of allegedly confidential information shall be accompanied by a memorandum in support setting forth the specific basis of the motion, including a detailed discussion of the need for protection from disclosure, and citations of any authorities relied upon. The motion and memorandum in support shall be made part of the public record of the proceeding.

(4) If a motion for a protective order is filed in a case involving a request for approval of a contract between a telecommunications carrier and a customer, and the contract has an automatic approval process, unless the commission suspends the automatic approval process or otherwise rules on the motion for a protective order, the motion for a protective order will be automatically approved for an eighteen-month period beginning on the date that the contract is automatically approved. Nothing prohibits the commission from rescinding the protective order during the eighteen-month period. If a motion for a protective order for information included in a gas marketer's renewal certification application case filed pursuant to section 2928.09 of the Revised Code, or a competitive retail electric service provider's renewal certification application case filed pursuant to section 4928.09 of the Revised Code, is granted, the motion will be automatically approved for a twenty-four month period beginning with the date of the renewed certificate. Nothing prohibits the commission from rescinding the protective order during the twenty-four month period. Automatic approval of confidentiality under this provision shall not preclude the commission from examining the confidentiality issue de novo if there is an application for rehearing on confidentiality or a public records request for the redacted information.

(E) Pending a ruling on a motion filed in accordance with paragraph (D) of this rule, the information filed under seal will not be included in the public record of the proceeding or disclosed to the public until otherwise ordered. The commission and its employees will undertake reasonable efforts to maintain the confidentiality of the information pending a ruling on the motion. A document or portion of a document filed with the docketing division that is marked "confidential," "proprietary," or "trade secret," or with any other such marking, will not be afforded confidential treatment and protected from disclosure unless it is filed in accordance with paragraph (D) of this rule.

(F) Unless otherwise ordered, any order prohibiting public disclosure pursuant to paragraph (D) of this rule shall automatically expire eighteen months after the date of its issuance, and such information may then be included in the public record of the proceeding. A party wishing to extend a protective order beyond eighteen months shall file an appropriate motion at least forty-five days in advance of the expiration date of the existing order. The motion shall include a detailed discussion of the need for continued protection from disclosure.

(G) The requirements of this rule do not apply to information submitted to the commission staff. However, information submitted directly to the legal director, the deputy legal director, or the attorney examiner that is not filed in accordance with the requirements of paragraph (D) of this rule may be filed with the docketing division as part of the public record. No document received via facsimile transmission will be given confidential treatment by the commission.

Effective: 05/07/2007

R.C. 119.032 review dates: 02/20/2007 and 09/30/2010

Promulgated Under: 111.15

Statutory Authority: 4901.13

Rule Amplifies: 4901.13, 4901.18

Prior Effective Dates: 3/1/81, 6/1/83, 12/25/87, 4/4/96, 7/7/97

4901:1-35-02 Purpose and scope.

(A) Pursuant to division (A) of section 4928.14 of the Revised Code, after its market development period, each EDU 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, including a firm supply of electric generation service. Pursuant to division (B) of section 4928.14 of the Revised Code, each EDU also shall offer customers within its certified territory an option to purchase competitive retail electric service the price of which is determined through a competitive bidding process. The purpose of this chapter is to establish rules for the form and process under which an EDU shall file an application for standard service offer and competitive bidding process and the commission's review of that application.

(B) The commission may waive any requirement of Chapter 4901:1-35 of the Administrative Code for good cause shown or upon its own motion.

(C) Notwithstanding the requirements of rule 4901:1-35-03 of the Administrative Code and the attached appendices A and B of that rule, the EDU may propose a plan for a standard service offer and/or competitive bidding process that varies from these rules where there is substantial support from a number of interested stakeholders.

HISTORY: Eff. 5-27-04

Rule promulgated under: RC 111.15

Rule authorized by: RC 4928.06, 4928.14

Rule amplifies: RC 4928.14

R.C. 119.032 review dates: 09/30/2008

149.43 Availability of public records for inspection and copying.

(A) As used in this section:

(1) "Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity operating the alternative school pursuant to section 3313.533 of the Revised Code. "Public record" does not mean any of the following:

(a) Medical records;

(b) Records pertaining to probation and parole proceedings or to proceedings related to the imposition of community control sanctions and post-release control sanctions;

(c) Records pertaining to actions under section 2151.85 and division (C) of section 2919.121 of the Revised Code and to appeals of actions arising under those sections;

(d) Records pertaining to adoption proceedings, including the contents of an adoption file maintained by the department of health under section 3705.12 of the Revised Code;

(e) Information in a record contained in the putative father registry established by section 3107.062 of the Revised Code, regardless of whether the information is held by the department of job and family services or, pursuant to section 3111.69 of the Revised Code, the office of child support in the department or a child support enforcement agency;

(f) Records listed in division (A) of section 3107.42 of the Revised Code or specified in division (A) of section 3107.52 of the Revised Code;

(g) Trial preparation records;

(h) Confidential law enforcement investigatory records;

(i) Records containing information that is confidential under section 2710.03 or 4112.05 of the Revised Code;

(j) DNA records stored in the DNA database pursuant to section 109.573 of the Revised Code;

(k) Inmate records released by the department of rehabilitation and correction to the department of youth services or a court of record pursuant to division (E) of section 5120.21 of the Revised Code;

(l) Records maintained by the department of youth services pertaining to children in its custody released by the department of youth services to the department of rehabilitation and correction pursuant to section 5139.05 of the Revised Code;

(m) Intellectual property records;

(n) Donor profile records;

(o) Records maintained by the department of job and family services pursuant to section 3121.894 of the

Revised Code;

(p) Peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT residential and familial information;

(q) In the case of a county hospital operated pursuant to Chapter 339. of the Revised Code or a municipal hospital operated pursuant to Chapter 749. of the Revised Code, information that constitutes a trade secret, as defined in section 1333.61 of the Revised Code;

(r) Information pertaining to the recreational activities of a person under the age of eighteen;

(s) Records provided to, statements made by review board members during meetings of, and all work products of a child fatality review board acting under sections 307.621 to 307.629 of the Revised Code, other than the report prepared pursuant to section 307.626 of the Revised Code;

(t) Records provided to and statements made by the executive director of a public children services agency or a prosecuting attorney acting pursuant to section 5153.171 of the Revised Code other than the information released under that section;

(u) Test materials, examinations, or evaluation tools used in an examination for licensure as a nursing home administrator that the board of examiners of nursing home administrators administers under section 4751.04 of the Revised Code or contracts under that section with a private or government entity to administer;

(v) Records the release of which is prohibited by state or federal law;

(w) Proprietary information of or relating to any person that is submitted to or compiled by the Ohio venture capital authority created under section 150.01 of the Revised Code;

(x) Information reported and evaluations conducted pursuant to section 3701.072 of the Revised Code;

(y) Financial statements and data any person submits for any purpose to the Ohio housing finance agency or the controlling board in connection with applying for, receiving, or accounting for financial assistance from the agency, and information that identifies any individual who benefits directly or indirectly from financial assistance from the agency;

(z) Records listed in section 5101.29 of the Revised Code.

(2) "Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:

(a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;

(b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness's identity;

(c) Specific confidential investigatory techniques or procedures or specific investigatory work product;

(d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

(3) "Medical record" means any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment.

(4) "Trial preparation record" means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.

(5) "Intellectual property record" means a record, other than a financial or administrative record, that is produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, and that has not been publicly released, published, or patented.

(6) "Donor profile record" means all records about donors or potential donors to a public institution of higher education except the names and reported addresses of the actual donors and the date, amount, and conditions of the actual donation.

(7) "Peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT residential and familial information" means any information that discloses any of the following about a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT:

(a) The address of the actual personal residence of a peace officer, parole officer, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT, except for the state or political subdivision in which the peace officer, parole officer, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT resides;

(b) Information compiled from referral to or participation in an employee assistance program;

(c) The social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of, or any medical information pertaining to, a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT;

(d) The name of any beneficiary of employment benefits, including, but not limited to, life insurance benefits, provided to a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT by the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's employer;

(e) The identity and amount of any charitable or employment benefit deduction made by the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's employer from the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's compensation unless the amount of the deduction is required by state or federal law;

(f) The name, the residential address, the name of the employer, the address of the employer, the social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of the spouse, a former spouse, or any child of a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT;

(g) A photograph of a peace officer who holds a position or has an assignment that may include undercover or plain clothes positions or assignments as determined by the peace officer's appointing authority.

As used in divisions (A)(7) and (B)(9) of this section, "peace officer" has the same meaning as in section 109.71 of the Revised Code and also includes the superintendent and troopers of the state highway patrol; it does not include the sheriff of a county or a supervisory employee who, in the absence of the sheriff, is authorized to stand in for, exercise the authority of, and perform the duties of the sheriff.

As used in divisions (A)(7) and (B)(5) of this section, "correctional employee" means any employee of the department of rehabilitation and correction who in the course of performing the employee's job duties has or has had contact with inmates and persons under supervision.

As used in divisions (A)(7) and (B)(5) of this section, "youth services employee" means any employee of the department of youth services who in the course of performing the employee's job duties has or has had contact with children committed to the custody of the department of youth services.

As used in divisions (A)(7) and (B)(9) of this section, "firefighter" means any regular, paid or volunteer, member of a lawfully constituted fire department of a municipal corporation, township, fire district, or village.

As used in divisions (A)(7) and (B)(9) of this section, "EMT" means EMTs-basic, EMTs-I, and paramedics that provide emergency medical services for a public emergency medical service organization. "Emergency medical service organization," "EMT-basic," "EMT-I," and "paramedic" have the same meanings as in section 4765.01 of the Revised Code.

(8) "Information pertaining to the recreational activities of a person under the age of eighteen" means information that is kept in the ordinary course of business by a public office, that pertains to the recreational activities of a person under the age of eighteen years, and that discloses any of the following:

(a) The address or telephone number of a person under the age of eighteen or the address or telephone number of that person's parent, guardian, custodian, or emergency contact person;

(b) The social security number, birth date, or photographic image of a person under the age of eighteen;

(c) Any medical record, history, or information pertaining to a person under the age of eighteen;

(d) Any additional information sought or required about a person under the age of eighteen for the purpose of allowing that person to participate in any recreational activity conducted or sponsored by a public office or to use or obtain admission privileges to any recreational facility owned or operated by a public office.

(9) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(10) "Post-release control sanction" has the same meaning as in section 2967.01 of the Revised Code.

(11) "Redaction" means obscuring or deleting any information that is exempt from the duty to permit public inspection or copying from an item that otherwise meets the definition of a "record" in section 149.011 of the

Revised Code.

(12) "Designee" and "elected official" have the same meanings as in section 109.43 of the Revised Code.

(B)(1) Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time. If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt. When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction.

(2) To facilitate broader access to public records, a public office or the person responsible for public records shall organize and maintain public records in a manner that they can be made available for inspection or copying in accordance with division (B) of this section. A public office also shall have available a copy of its current records retention schedule at a location readily available to the public. If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably identify what public records are being requested, the public office or the person responsible for the requested public record may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties.

(3) If a request is ultimately denied, in part or in whole, the public office or the person responsible for the requested public record shall provide the requester with an explanation, including legal authority, setting forth why the request was denied. If the initial request was provided in writing, the explanation also shall be provided to the requester in writing. The explanation shall not preclude the public office or the person responsible for the requested public record from relying upon additional reasons or legal authority in defending an action commenced under division (C) of this section.

(4) Unless specifically required or authorized by state or federal law or in accordance with division (B) of this section, no public office or person responsible for public records may limit or condition the availability of public records by requiring disclosure of the requester's identity or the intended use of the requested public record. Any requirement that the requester disclose the requestor's identity or the intended use of the requested public record constitutes a denial of the request.

(5) A public office or person responsible for public records may ask a requester to make the request in writing, may ask for the requester's identity, and may inquire about the intended use of the information requested, but may do so only after disclosing to the requester that a written request is not mandatory and that the requester may decline to reveal the requester's identity or the intended use and when a written request or disclosure of the identity or intended use would benefit the requester by enhancing the ability of the public office or person responsible for public records to identify, locate, or deliver the public records sought by the requester.

(6) If any person chooses to obtain a copy of a public record in accordance with division (B) of this section, the public office or person responsible for the public record may require that person to pay in advance the cost

involved in providing the copy of the public record in accordance with the choice made by the person seeking the copy under this division. The public office or the person responsible for the public record shall permit that person to choose to have the public record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it, or upon any other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of the public office or person responsible for the public record. When the person seeking the copy makes a choice under this division, the public office or person responsible for the public record shall provide a copy of it in accordance with the choice made by the person seeking the copy. Nothing in this section requires a public office or person responsible for the public record to allow the person seeking a copy of the public record to make the copies of the public record.

(7) Upon a request made in accordance with division (B) of this section and subject to division (B)(6) of this section, a public office or person responsible for public records shall transmit a copy of a public record to any person by United States mail or by any other means of delivery or transmission within a reasonable period of time after receiving the request for the copy. The public office or person responsible for the public record may require the person making the request to pay in advance the cost of postage if the copy is transmitted by United States mail or the cost of delivery if the copy is transmitted other than by United States mail, and to pay in advance the costs incurred for other supplies used in the mailing, delivery, or transmission.

Any public office may adopt a policy and procedures that it will follow in transmitting, within a reasonable period of time after receiving a request, copies of public records by United States mail or by any other means of delivery or transmission pursuant to this division. A public office that adopts a policy and procedures under this division shall comply with them in performing its duties under this division.

In any policy and procedures adopted under this division, a public office may limit the number of records requested by a person that the office will transmit by United States mail to ten per month, unless the person certifies to the office in writing that the person does not intend to use or forward the requested records, or the information contained in them, for commercial purposes. For purposes of this division, "commercial" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

(8) A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.

(9) Upon written request made and signed by a journalist on or after December 16, 1999, a public office, or person responsible for public records, having custody of the records of the agency employing a specified peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT shall disclose to the journalist the address of the actual personal residence of the peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT and, if the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's spouse, former spouse, or child is employed by a public office, the name and address of the employer of the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional

employee's, youth services employee's, firefighter's, or EMT's spouse, former spouse, or child. The request shall include the journalist's name and title and the name and address of the journalist's employer and shall state that disclosure of the information sought would be in the public interest.

As used in this division, "journalist" means a person engaged in, connected with, or employed by any news medium, including a newspaper, magazine, press association, news agency, or wire service, a radio or television station, or a similar medium, for the purpose of gathering, processing, transmitting, compiling, editing, or disseminating information for the general public.

(C)(1) If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, that awards court costs and reasonable attorney's fees to the person that instituted the mandamus action, and, if applicable, that includes an order fixing statutory damages under division (C)(1) of this section. The mandamus action may be commenced in the court of common pleas of the county in which division (B) of this section allegedly was not complied with, in the supreme court pursuant to its original jurisdiction under Section 2 of Article IV, Ohio Constitution, or in the court of appeals for the appellate district in which division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution.

If a requestor transmits a written request by hand delivery or certified mail to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office or person responsible for the requested public records, except as otherwise provided in this section, the requestor shall be entitled to recover the amount of statutory damages set forth in this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section.

The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars. The award of statutory damages shall not be construed as a penalty, but as compensation for injury arising from lost use of the requested information. The existence of this injury shall be conclusively presumed. The award of statutory damages shall be in addition to all other remedies authorized by this section.

The court may reduce an award of statutory damages or not award statutory damages if the court determines both of the following:

(a) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(b) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(2)(a) If the court issues a writ of mandamus that orders the public office or the person responsible for the public record to comply with division (B) of this section and determines that the circumstances described in division (C)(1) of this section exist, the court shall determine and award to the relator all court costs.

(b) If the court renders a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, the court may award reasonable attorney's fees subject to reduction as described in division (C)(2)(c) of this section. The court shall award reasonable attorney's fees, subject to reduction as described in division (C)(2)(c) of this section when either of the following applies:

(i) The public office or the person responsible for the public records failed to respond affirmatively or negatively to the public records request in accordance with the time allowed under division (B) of this section.

(ii) The public office or the person responsible for the public records promised to permit the relator to inspect or receive copies of the public records requested within a specified period of time but failed to fulfill that promise within that specified period of time.

(c) Court costs and reasonable attorney's fees awarded under this section shall be construed as remedial and not punitive. Reasonable attorney's fees shall include reasonable fees incurred to produce proof of the reasonableness and amount of the fees and to otherwise litigate entitlement to the fees. The court may reduce an award of attorney's fees to the relator or not award attorney's fees to the relator if the court determines both of the following:

(i) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(ii) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records as described in division (C)(2)(c)(i) of this section would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(D) Chapter 1347. of the Revised Code does not limit the provisions of this section.

(E)(1) To ensure that all employees of public offices are appropriately educated about a public office's obligations under division (B) of this section, all elected officials or their appropriate designees shall attend training approved by the attorney general as provided in section 109.43 of the Revised Code. In addition, all public offices shall adopt a public records policy in compliance with this section for responding to public records requests. In adopting a public records policy under this division, a public office may obtain guidance from the model public records policy developed and provided to the public office by the attorney general under section 109.43 of the Revised Code. Except as otherwise provided in this section, the policy may not limit the number of public records that the public office will make available to a single person, may not limit the number of public records that it will make available during a fixed period of time, and may not establish a fixed period of time before it will respond to a request for inspection or copying of public records, unless that period is less than eight hours.

(2) The public office shall distribute the public records policy adopted by the public office under division (E)(1) of this section to the employee of the public office who is the records custodian or records manager or otherwise has custody of the records of that office. The public office shall require that employee to acknowledge receipt of the copy of the public records policy. The public office shall create a poster that describes its public records policy and shall post the poster in a conspicuous place in the public office and in all locations where the public office has branch offices. The public office may post its public records policy on the internet web site of the public office if the public office maintains an internet web site. A public office that has established a manual or handbook of its general policies and procedures for all employees of the public office shall include the public records policy of the public office in the manual or handbook.

(F)(1) The bureau of motor vehicles may adopt rules pursuant to Chapter 119. of the Revised Code to reasonably limit the number of bulk commercial special extraction requests made by a person for the same records or for updated records during a calendar year. The rules may include provisions for charges to be made for bulk commercial special extraction requests for the actual cost of the bureau, plus special extraction costs, plus ten per cent. The bureau may charge for expenses for redacting information, the release of which is prohibited by law.

(2) As used in division (F)(1) of this section:

(a) "Actual cost" means the cost of depleted supplies, records storage media costs, actual mailing and alternative delivery costs, or other transmitting costs, and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services.

(b) "Bulk commercial special extraction request" means a request for copies of a record for information in a format other than the format already available, or information that cannot be extracted without examination of all items in a records series, class of records, or data base by a person who intends to use or forward the copies for surveys, marketing, solicitation, or resale for commercial purposes. "Bulk commercial special extraction request" does not include a request by a person who gives assurance to the bureau that the person making the request does not intend to use or forward the requested copies for surveys, marketing, solicitation, or resale for commercial purposes.

(c) "Commercial" means profit-seeking production, buying, or selling of any good, service, or other product.

(d) "Special extraction costs" means the cost of the time spent by the lowest paid employee competent to perform the task, the actual amount paid to outside private contractors employed by the bureau, or the actual cost incurred to create computer programs to make the special extraction. "Special extraction costs" include any charges paid to a public agency for computer or records services.

(3) For purposes of divisions (F)(1) and (2) of this section, "surveys, marketing, solicitation, or resale for commercial purposes" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

Effective Date: 02-12-2004; 04-27-2005; 07-01-2005; 10-29-2005; 03-30-2007; 2006 HB9 09-29-2007; 2008 HB214 05-14-2008

4901.12 All proceedings public records.

Except as provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX [49] of the Revised Code, all proceedings of the public utilities commission and all documents and records in its possession are public records.

Effective Date: 09-17-1996

4903.09 Written opinions filed by commission in all contested cases.

In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

Effective Date: 10-26-1953

4905.07 Information and records to be public.

Except as provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX [49] of the Revised Code, all facts and information in the possession of the public utilities commission shall be public, and all reports, records, files, books, accounts, papers, and memorandums of every nature in its possession shall be open to inspection by interested parties or their attorneys.

Effective Date: 09-17-1996

4905.35 Prohibiting discrimination.

(A) 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.

(B)(1) A natural gas company that is a public utility shall offer its regulated services or goods to all similarly situated consumers, including persons with which it is affiliated or which it controls, under comparable terms and conditions.

(2) A natural gas company that is a public utility and that offers to a consumer a bundled service that includes both regulated and unregulated services or goods shall offer, on an unbundled basis, to that same consumer the regulated services or goods that would have been part of the bundled service. Those regulated services or goods shall be of the same quality as or better quality than, and shall be offered at the same price as or a better price than and under the same terms and conditions as or better terms and conditions than, they would have been had they been part of the company's bundled service.

(3) No natural gas company that is a public utility shall condition or limit the availability of any regulated services or goods, or condition the availability of a discounted rate or improved quality, price, term, or condition for any regulated services or goods, on the basis of the identity of the supplier of any other services or goods or on the purchase of any unregulated services or goods from the company.

Effective Date: 09-17-1996

4909.18 Application to establish or change rate.

Any public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, or to modify, amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, shall file a written application with the public utilities commission. Except for actions under section 4909.16 of the Revised Code, no public utility may issue the notice of intent to file an application pursuant to division (B) of section 4909.43 of the Revised Code to increase any existing rate, joint rate, toll, classification, charge, or rental, until a final order under this section has been issued by the commission on any pending prior application to increase the same rate, joint rate, toll, classification, charge, or rental or until two hundred seventy-five days after filing such application, whichever is sooner. Such application shall be verified by the president or a vice-president and the secretary or treasurer of the applicant. Such application shall contain a schedule of the existing rate, joint rate, toll, classification, charge, or rental, or regulation or practice affecting the same, a schedule of the modification amendment, change, increase, or reduction sought to be established, and a statement of the facts and grounds upon which such application is based. If such application proposes a new service or the use of new equipment, or proposes the establishment or amendment of a regulation, the application shall fully describe the new service or equipment, or the regulation proposed to be established or amended, and shall explain how the proposed service or equipment differs from services or equipment presently offered or in use, or how the regulation proposed to be established or amended differs from regulations presently in effect. The application shall provide such additional information as the commission may require in its discretion. If the commission determines that such application is not for an increase in any rate, joint rate, toll, classification, charge, or rental, the commission may permit the filing of the schedule proposed in the application and fix the time when such schedule shall take effect. If it appears to the commission that the proposals in the application may be unjust or unreasonable, the commission shall set the matter for hearing and shall give notice of such hearing by sending written notice of the date set for the hearing to the public utility and publishing notice of the hearing one time in a newspaper of general circulation in each county in the service area affected by the application. At such hearing, the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility. After such hearing, the commission shall, where practicable, issue an appropriate order within six months from the date the application was filed.

If the commission determines that said application is for an increase in any rate, joint rate, toll, classification, charge, or rental there shall also, unless otherwise ordered by the commission, be filed with the application in duplicate the following exhibits:

(A) A report of its property used and useful in rendering the service referred to in such application, as provided in section 4909.05 of the Revised Code;

(B) A complete operating statement of its last fiscal year, showing in detail all its receipts, revenues, and incomes from all sources, all of its operating costs and other expenditures, and any analysis such public utility deems applicable to the matter referred to in said application;

(C) A statement of the income and expense anticipated under the application filed;

(D) A statement of financial condition summarizing assets, liabilities, and net worth;

(E) A proposed notice for newspaper publication fully disclosing the substance of the application. The notice shall prominently state that any person, firm, corporation, or association may file, pursuant to section 4909.19 of the Revised Code, an objection to such increase which may allege that such application contains proposals that are unjust and discriminatory or unreasonable. The notice shall further include the average percentage increase in rate that a representative industrial, commercial, and residential customer will bear should the increase be granted in full;

(F) Such other information as the commission may require in its discretion.

Effective Date: 01-11-1983

4928.02 State policy.

It is the policy of this state to do the following throughout this state beginning on the starting date of competitive retail electric service:

(A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;

(B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;

(C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities;

(D) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service;

(E) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote effective customer choice of retail electric service;

(F) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;

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

(H) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power;

(I) Facilitate the state's effectiveness in the global economy.

Effective Date: 10-05-1999

4928.14 Market-based standard service offer.

(A) 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, including a firm supply of electric generation service. Such offer shall be filed with the public utilities commission under section 4909.18 of the Revised Code.

(B) After that market development period, each electric distribution utility also shall offer customers within its certified territory an option to purchase competitive retail electric service the price of which is determined through a competitive bidding process. Prior to January 1, 2004, the commission shall adopt rules concerning the conduct of the competitive bidding process, including the information requirements necessary for customers to choose this option and the requirements to evaluate qualified bidders. The commission may require that the competitive bidding process be reviewed by an independent third party. No generation supplier shall be prohibited from participating in the bidding process, provided that any winning bidder shall be considered a certified supplier for purposes of obligations to customers. At the election of the electric distribution utility, and approval of the commission, the competitive bidding option under this division may be used as the market-based standard offer required by division (A) of this section. The commission may determine at any time that a competitive bidding process is not required, if other means to accomplish generally the same option for customers is readily available in the market and a reasonable means for customer participation is developed.

(C) After the market development period, the failure of a supplier to provide retail electric generation service to customers within the certified territory of the electric distribution utility shall result in the supplier's customers, after reasonable notice, defaulting to the utility's standard service offer filed under division (A) of this section until the customer chooses an alternative supplier. A supplier is deemed under this division to have failed to provide such service if the commission finds, after reasonable notice and opportunity for hearing, that any of the following conditions are met:

(1) The supplier has defaulted on its contracts with customers, is in receivership, or has filed for bankruptcy.

(2) The supplier is no longer capable of providing the service.

(3) The supplier is unable to provide delivery to transmission or distribution facilities for such period of time as may be reasonably specified by commission rule adopted under division (A) of section 4928.06 of the Revised Code.

(4) The supplier's certification has been suspended, conditionally rescinded, or rescinded under division (D) of section 4928.08 of the Revised Code.

Effective Date: 10-05-1999

4928.37 Receiving transition revenues.

(A)(1) Sections 4928.31 to 4928.40 of the Revised Code provide an electric utility the opportunity to receive transition revenues that may assist it in making the transition to a fully competitive retail electric generation market. An electric utility for which transition revenues are approved pursuant to sections 4928.31 to 4928.40 of the Revised Code shall receive those revenues through both of the following mechanisms beginning on the starting date of competitive retail electric service and ending on the expiration date of its market development period as determined under section 4928.40 of the Revised Code:

(a) Payment of unbundled rates for retail electric services by each customer that is supplied retail electric generation service during the market development period by the customer's electric distribution utility, which rates shall be specified in schedules filed under section 4928.35 of the Revised Code;

(b) Payment of a nonbypassable and competitively neutral transition charge by each customer that is supplied retail electric generation service during the market development period by an entity other than the customer's electric distribution utility, as such transition charge is determined under section 4928.40 of the Revised Code. The transition charge shall be payable by each such retail electric distribution service customer in the certified territory of the electric utility for which the transition revenues are approved and shall be billed on each kilowatt hour of electricity delivered to the customer by the electric distribution utility as registered on the customer's meter during the utility's market development period as kilowatt hour is defined in section 4909.161 of the Revised Code or, if no meter is used, as based on an estimate of kilowatt hours used or consumed by the customer. The transition charge for each customer class shall reflect the cost allocation to that class as provided under bundled rates and charges in effect on the day before the effective date of this section. Additionally, as reflected in section 4928.40 of the Revised Code, the transition charges shall be structured to provide shopping incentives to customers sufficient to encourage the development of effective competition in the supply of retail electric generation service. To the extent possible, the level and structure of the transition charge shall be designed to avoid revenue responsibility shifts among the utility's customer classes and rate schedules.

(2)(a) Notwithstanding division (A)(1)(b) of this section, the transition charge shall not be payable on electricity supplied by a municipal electric utility to a retail electric distribution service customer in the certified territory of the electric utility for which the transition revenues are approved, if the municipal electric utility provides electric transmission or distribution service, or both services, through transmission or distribution facilities singly or jointly owned or operated by the municipal electric utility, and if the municipal electric utility was in existence, operating, and providing service as of January 1, 1999.

(b) The transition charge shall not be payable on electricity supplied or consumed in this state except such electricity as is delivered to a retail customer by an electric distribution utility and is registered on the customer's meter during the utility's market development period or, if no meter is used, is based on an estimate of kilowatt hours used or consumed by the customer. However, no transition charge shall be payable on electricity that is both produced and consumed in this state by a self-generator.

(3) The transition charge shall not be discounted by any party.

(4) Nothing prevents payment of all or part of the transition charge by another party on a customer's behalf if that payment does not contravene sections 4905.33 to 4905.35 of the Revised Code or this chapter.

(B) The electric utility shall separately itemize and disclose, or cause its billing and collection agent to separately itemize and disclose, the transition charge on the customer's bill in accordance with reasonable specifications the commission shall prescribe by rule under division (A) of section 4928.06 of the Revised Code.

Effective Date: 10-05-1999

RULE 408. Compromise and Offers to Compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

[Effective: July 1, 1980.]

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

PUBLIC VERSION REDACTED

APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

Janine L. Migden-Ostrander
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November 23, 2007

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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
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PUBLIC VERSION REDACTED

APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential consumers of Duke Energy Ohio, Inc. ("Company" or "Duke Energy," including its predecessor The Cincinnati Gas and Electric Company) and pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35(A), applies for rehearing of the Order on Remand ("Remand Order") issued by the Public Utilities Commission of Ohio ("PUCO" or "Commission") on October 24, 2007 in the above-captioned cases. The OCC submits that the Commission's Remand Order is unreasonable and unlawful in the following particulars:

A. 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.

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

  2. 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.

  3. The Remand Order fails to eliminate the additional "AAC" charges that the Company requested, without any evidentiary basis for why customers should pay them.

B. 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, thereby permitting the devastation of the competitive market for generation service that could provide benefits for customers.

  1. 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.

  2. 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, and the discrimination has caused serious damage to the competitive market for generation service.

  3. The Remand Order fails to prohibit Duke Energy's violation of corporate separation requirements, which has caused serious damage to the competitive market for generation service that was intended to provide benefits to customers.

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4. The Remand Order fails to prohibit the [redacted], which has caused serious damage to the competitive market for generation service.

C. 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 reasons for granting this Application for Rehearing are set forth in the attached Memorandum in Support.

Respectfully submitted,

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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
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MEMORANDUM IN SUPPORT

I. HISTORY OF THE CASE AND INTRODUCTION

A. Introduction

These cases, on remand from the Supreme Court of Ohio, are important for their determination of, among other matters, the manner in which generation rates will be set for 600,000 residential utility customers and tens of thousands of other customers for the 2007-2008 period. The PUCO has important decisions to make about the rates residential customers and Ohio businesses will pay for generation service and the future of electric choice in areas served by Duke Energy. The General Assembly intended that the Commission would approve reasonable standard service offer rates as well as provide a real opportunity for customers to have competitive options to the generation rates provided by Duke Energy. The record supports the need for the Commission to take corrective actions that support reasonable prices and the development of the competitive market.

The issues presented in these cases require the Commission to make determinations on matters of law and policy. Serious problems exist in Duke Energy's proposals. In the absence of a competitive framework to protect customers, Duke Energy has submitted proposals to increase its standard service rates for generation service. Ohio law and sound public policy require the Commission to modify Duke Energy's pricing for the standard service offer rates that the Company proposes to charge its customers.

B. Remand from the Supreme Court of Ohio

The duration of some of the cases captioned above -- the first of which began in January 2003 -- is partly the result of an appeal of that portion of the case that concluded in 2004 (hereinafter, "*Post-MDP Service Case*") and remand by the Supreme Court of Ohio ("Court").[1] The matters addressed by the Court that necessitated the remand have been extensively discussed in pleadings regarding the appropriate scope for the hearings that followed the remand.[2] The Court stated that the "portion of the commission's first rehearing entry approving CG&E's [now Duke Energy's] alternative proposal is devoid

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

[2] See, e.g., Duke Energy's Motion for Clarification (December 13, 2006) and the OCC's Memorandum Contra Motion for Clarification (December 20, 2006).

of evidentiary support."[3] The Court also stated that the "commission abused its discretion in barring discovery of side agreements."[4]

The Office of the Ohio Consumers' Counsel ("OCC") presented extensive evidence regarding the missing support for Duke Energy's standard service offer rate proposals as well as the problems caused by side agreements the Company entered into with the intent of removing opposition by certain customers to its proposals that affected many other customers. The Commission should have acted upon this evidence and modified its previous entries and orders such that new standard service generation offers would result.

C. Burden of Proof

The burden of proof regarding the applications submitted in these cases rests upon Duke Energy. The posture of these cases -- in which various proposals for rate changes for components of standard service offers for 2007-2008 have been linked by consolidation with the remand of the underlying Case No. 03-93-EL-ATA, et. – does not alter the burden of proof.

The OCC does not bear any burden of proof in these cases. R.C. 4928.14(A) requires the filing of an application pursuant to R.C. 4909.18 regarding these cases. In a hearing regarding a proposal that does not involve an increase in rates, R.C. 4909.18 provides that "the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility." In a hearing regarding a proposal that does involve an increase in rates, R.C. 4909.19 provides that, "[a]t any hearing involving

[3] *Consumers' Counsel 2006* at ¶28.

[4] Id. at ¶94.

rates or charges sought to be increased, the burden of proof to show that the increased rates or charges are just and reasonable shall be on the public utility." In the following sections, the OCC will explain how Duke Energy has failed to prove that its post-MDP pricing proposals should be adopted without alteration by the Commission.

D. Procedural History of these Cases

On January 10, 2003, the Company filed an application ("January 2003 Application"[5]) containing proposals to provide a market-based standard service offer and to establish an alternative competitive bidding process for the period after the market development period for non-residential customers.[6] Numerous parties and the Commission's staff ("Staff") filed comments on the Company's proposals in March and April 2003.

On December 9, 2003, the Commission issued an entry that stated:

> As the competitive retail market for electric generation has not fully developed in the CG&E [now Duke Energy] territory, the Commission finds it advisable that CG&E file a rate stabilization plan as part of these proceedings, for the Commission's consideration.[7]

The Entry also set a procedural schedule.

On January 26, 2004, the Company filed another application ("January 2004 Application"). The January 2004 Application asked the Commission to approve either the approach contained in the January 2003 Application (the "competitive market option," or "CMO") or a substitute plan ("ERRSP Plan") for pricing generation service

[5] The January 2003 Application initiated Case No. 03-93-EL-ATA.

[6] January 2003 Application at 1.

[7] Entry at 5 (December 9, 2003).

that the Company submitted for approval in response to the Commission's request on December 9, 2003.[8]

On March 22, 2004, the OCC moved to continue these cases until after the Staff prepared a report on its investigation. Among other matters, the OCC was concerned that discovery responses from Duke Energy stated that explanations of its applications would be forthcoming only in pre-filed testimony. An entry was issued on April 7, 2004 that extended the procedural schedule a few weeks and set these cases for hearing on May 17, 2004 and did not provide for a Staff report of investigation. Duke Energy submitted pre-filed testimony on April 15, 2004 in which it described its "revised ERRSP." The PUCO Staff filed testimony on April 22, 2004 and intervening parties, including the OCC, filed testimony on May 6, 2004.

The hearing 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 "Stipulation" filed on May 19, 2004[9]). Duke Energy, Staff, Dominion Retail, Green Mountain Energy, FirstEnergy Solutions, and other parties (including several large customers and membership organizations made up of large customers) executed the 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,

[8] January 2004 Application at 8.

[9] The Stipulation was later submitted and admitted as Joint Ex. 1.

the OCC and the Ohio Manufacturers Association representing broad customer groups,[10] and OPAE did not execute the 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 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.[11]

The Commission's Order in the *Post-MDP Service Case* 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.[12] 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.

[10] The Ohio Manufacturers Association stated in its Motion to Intervene that it is "the only statewide association exclusively serving manufacturers. It has more than 2,400 Ohio manufacturing companies as members." OMA Motion to Intervene at 2 (March 5, 2004).

[11] Tr. Vol. II at 8, line 4 though 15 (2004).

[12] Order at 15 (September 29, 2004). 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 . . . ." *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 at ¶44 ("*Consumers' Counsel 2006*").

In a November 23, 2004 Entry on Rehearing, the PUCO adopted (in principal part) the New Proposal. The Commission ordered the Company to submit filings with the Commission before Duke Energy could place certain of the rate increases in the New Proposal into effect.

The OCC initiated its appeal on May 23, 2005. The Court issued its opinion on November 22, 2006. The Court held that the PUCO erred by failing to properly support modifications to post-MDP rates in the PUCO's November Entry on Rehearing and erred by failing to compel the disclosure of side agreements.[13] The Court remanded the case for additional consideration by the Commission.

On November 29, 2006, the Attorney Examiner issued an Entry in the above-captioned cases that provided for a "hearing . . . to obtain the record evidence required by the court," and ordered that a prehearing conference be held on December 14, 2006.[14] The above-captioned cases were consolidated (i.e. constituting the *Post-MDP Remand Case*). A procedural Entry was issued on February 1, 2007 that, among other matters, set a cut-off date for discovery and a hearing date for March 19, 2007.

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 case was briefed in April 2007. The Remand Order in the above-captioned cases was issued on October 24, 2007.

[13] *Consumers' Counsel 2006* at ¶95.

[14] Entry 3, ¶(7) (November 29, 2006).

The Remand Order reinstated all of the Commission's previous standard service offer determinations that were set before these cases were appealed.[15] The Remand Order 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 Order[16] while these charges were previously bypassable for only the first twenty-five percent of residential customers.[17] Also, the Remand Order changed the infrastructure maintenance fund ("IMF") component in current rates to a fully bypassable charge for non-residential customers who provide certain assurances that they will not return to the Company's standard service offer rates.[18]

II. ARGUMENT

A. 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.

1. 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.

[15] 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 (Hixon).

[16] Remand Order at 34-35.

[17] OCC Remand Ex. 2(A) at 53 (Hixon).

[18] Remand Order at 38.

a. The IMF is 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."[19] 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 and case law that requires a decision upon competent evidence[20] -- 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 will be required to pay despite there being no basis or support from the testimony regarding the Stipulation Plan or any other testimony.[21] 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.

The Court determined that the Commission violated R.C. 4903.09 when it approved certain charges in the *Post-MDP Service Case* "without record evidence and without setting forth any basis for the decision."[22] 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.[23] The Remand Order purports to return to, and judge for purposes of setting standard service generation offers, the Company's "RSP

[19] Consumers' Counsel 2006 at ¶30.

[20] 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." See also, *City of Bucyrus v. State Dept. of Health*, 120 Ohio St. 426, 430.

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

[22] Id. at ¶27.

[23] Id. at ¶30.

application, as filed on January 26, 2004, and subsequently modified by Duke prior to the initial hearing in these proceedings."[24] The IMF was first proposed in the Company's later-filed Application for Rehearing, 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 object-driven, intended to reestablish customer payments 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.[25] 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.[26] 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. The Commission appears to agree, concluding from the history of the "carve[ ] out"[27] 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 an additional, non-bypassable IMF component to the POLR charge is unsupported.

[24] Remand Order at 28.

[25] 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.) (Steffen).

[26] OCC Remand Ex. 1, NHT Attachment 6 (quoted and analyzed in OCC Remand Ex. 1 at 42) (Talbot).

[27] Remand Order at 32.

The duplication of capacity charges that customers much 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* capacity."[28] The Company also states that "[t]he RSC is the Company charge for providing a stable market price over a prolonged period of time."[29] OCC Witness Talbot concluded that "the basis for the IMF charge seems to be similar, if not identical, to that of the RSC charge."[30] 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"[31] and that "[t]here is no assurance that these charges are not duplicative."[32]

b. 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."[33] The Company's justification for the IMF charge was also stated as follows: "[It] is compensation for its opportunity cost associated with committing its assets at first call to MBSSO load."[34] As

[28] Id., NHT Attachment 6 (quoted and analyzed in OCC Remand Ex. 1 at 42) (emphasis added) (Talbot).

[29] Id., NHT Attachment 12 (quoted and analyzed in OCC Remand Ex. 1 at 53) (Talbot).

[30] OCC Remand Ex. 1 at 38 (Talbot).

[31] Id. at 42.

[32] Id.

[33] Duke Energy Remand Ex. 3 at 25.

[34] 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.

OCC Witness Talbot explains, Duke Energy's arguments in support for such a charge are couched in terms of three concepts -- risk, reliability and opportunity cost -- that the Company misapplies.[35]

Regarding "risk," the apparent basis upon which the Remand Order approved the IMF charge,[36] the Company's claim that the standard service offer adds to its level of risk is not substantiated. 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."[37]

More fundamentally, Mr. Talbot points 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.[38]

The second concept on which the Company bases its claim for the IMF is opportunity cost. The evidentiary basis for the Company's claim in this area is non-

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[35] OCC Remand Ex. 1 at 37-42 (Talbot).

[36] Remand Order at 37.

[37] Id. at 39 (Talbot).

[38] Id. at 38, 41, and 53 (Talbot). Regarding the testimony of Company Witness Steffen, Mr. Talbot stated that "Mr. Steffen does not provide a balanced assessment in which, absent the assurance of sales to standard service offer consumers, the Company would also be subject to 'price volatility in the energy and capacity markets.'" Id. at 41 (quoting Steffen's Second Supplemental Testimony at 27, Company Remand Ex. 3 at 27). Mr. Talbot also states that the testimony of Company Witness Meyer suffers from the same misrepresentation of the risk situation. Id. at 39 (referring to Company Remand Ex. 1 at 9).

existent. The Company has not performed any opportunity cost analysis,[39] 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.[40] The definition of the risks or costs for which the IMF is supposed to 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. Surely this is adequate for the purpose of assuring system reliability, and nothing more should be claimed for achieving this purpose. The SRT is the sole successor to the Reserve Margin component under the Stipulation Plan.

The proposed charges for the IMF have not been supported by Duke Energy, and are unreasonable. 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 IMF has no reasonable basis or rationale. The IMF is, as conjectured by the Court, "some type of

[39] OCC Remand Ex. 1 at 39 and 42, 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).

[40] See, e.g., OCC Remand Ex. 1 at 41 (Talbot).

surcharge and not a cost component."[41] The IMF should be removed from the Company's standard service offer charges so that customers do not pay an IMF charge.

2. 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 non-bypassable by residential customers who switch to CRES providers. In spite of the fact that all the standard service offer charges are generation-related, the IMF and the SRT remain non-bypassable (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.[42] Labeling a generation component "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.[43] Mr. Talbot explained that non-bypassable charges impose a barrier to competitive supply of generation service.[44] The entire removal of the IMF charge (which is, again, totally non-bypassable as the result of the Remand Order) would remove a barrier to competitive entry into the electricity marketplace.

[41] *Consumers' Counsel 2006* at ¶30.

[42] The Remand Order again runs afoul of R.C. 4903.09 that 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." See also, *City of Bucyrus v. State Dept. of Health*, 120 Ohio St. 426, 430.

[43] Tr. Vol. II at 84-85 (2007) (Talbot).

[44] OCC Remand Ex. 1 at 62-63 (Talbot).

During 2004, when the Commission held its last full hearing in this matter, 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.[45] The Commission's "competitiveness" test for approval of electric utility rate plans provided hope that Duke Energy's new standard service offer would usher in a period in which the competitive electricity market would further develop and mature to the benefit of customers. However, the switching statistics fell to 8.40, 0.36, and 2.32 percent for commercial, industrial, and residential customers by December 31, 2006.[46] 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 testimony.[47]

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. All generation charges should be bypassable by customers.

3. The Remand Order fails to eliminate the additional "AAC" charges that the Company requested for customers to pay, without any evidentiary basis for why customers should pay them.

The reasonableness of a return on construction work in progress ("CWIP") for environmental plant in the AAC calculations is a matter not addressed in the Remand Order and not covered by Staff's inquiries in the other cases that were heard along with

[45] 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)) (Hixon)).

[46]

[47] Remand Order at 34.

the cases on remand. Asked if he formulated an opinion regarding whether a return on such CWIP is an appropriate component of the AAC, Staff Witness Tufts stated that he "did not form an opinion and that's not part of [his] testimony."[48] Neither the Company nor the Staff provided any detail -- for example, of the percentage completion of environmental upgrades at Duke Energy Ohio's plants -- that might further inform the Commission regarding the Company's cost of providing service to customers. The result is lack of evidentiary support regarding the nature of a major portion of AAC charges.

Like the instruction to the management/performance Auditor that its audit should "follow the general guidance that had been provided for the Electric Fuel Component audits,"[49] the Commission should be interested in evaluating the Company's AAC cost submissions in light of past regulatory practice. Such practice considered only CWIP upgrades that were 75 percent or more complete before determining whether any return on CWIP should be included in rates.[50]

Mindful of the Commission's order regarding the "Rider" portion of the cases issued before the filing of this Application for Rehearing, the inclusion of plant CWIP amounts (for which there is no evidence as to when such plant investment will be in-service) in the AAC[51] is inconsistent with the Company's representations on other generation charge components in the consolidated record.[52] [redacted]

[48] Tr. Remand Rider Vol. II at 35 (April 19, 2007) (Tufts).

[49] PUCO Ordered Remand Rider Exhibit 1at 1-2 (Auditor's Report).

[50] OCC Remand Rider Ex. 1 at 6 (Haugh).

[51] *In re Duke Energy Rider Cases*, Case Nos. 05-724-EL-UNC, et al., Order at 21-24 (November 20, 2007) ("Rider Order" in the "*Rider Cases*").

[52] The Remand Order again runs afoul of R.C. 4903.09 that 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." See also, *City of Bucyrus v. State Dept. of Health*, 120 Ohio St. 426, 430.

[redacted][53] Duke Energy should not be permitted to charge customers for plant CWIP amounts through the AAC in a manner that could only be justified by the assumption of long-term provision of generation service to its customers while [redacted] The AAC should not include amounts requiring customers to pay for CWIP.

B. 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, thereby permitting the devastation of the competitive market for generation service that could provide benefits to customers.

1. 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.

The Remand Order limits consideration of evidence presented by the OCC in a manner that does not abide by the Court's directive in its remand. The Remand Order states:

> 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

[53] These matters, along with evidentiary support that includes warnings from the Auditor, were extensively briefed in the *Rider Cases*. OCC Initial Post-Remand Brief, Phase II at 6-7.

corporate separation violations and affiliate interactions, will be denied.[54]

The side agreements and related documents presented by the OCC were not admitted into the record for the limited purposes stated in the Remand Order. 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 again in the instant 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.[55] The Court stated in *Consumers' Counsel 2006* that it "recognize[s] the commission's duty and authority to enforce the competition-encouraging statutory scheme of S.B. 3 . . . ."[56] 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 departs from the remand decision when it limits the decision by the Court to holding that the Commission "erred in denying discovery under the first criterion [for the consideration of stipulations]."[57] The Ohio Supreme Court determined that the PUCO improperly barred side agreements as part of a "settlement privilege,"[58]

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[54] Remand Order at 20.

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

[56] *Consumers' Counsel 2006* at ¶44.

[57] Remand Order at 19.

[58] *Consumers' Counsel 2006* at ¶89.

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and specifically mentioned *one* relevant use of such information at trial regarding the test of settlement agreements.[59] 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 on appeal focused on the improper denial of discovery that was "reasonably calculated to lead to the discovery of other admissible evidence."[60] 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."[61] The argument, 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 (from which the OCC ultimately took its appeal) depended upon the stipulation filed in this case in May 2004.[62] However, *Consumers' Counsel 2006* also supports the use of settlement agreements under Evid. R. 408 for "several purposes."[63] Evid. R. 408 states that settlement proposals and agreements are "not admissible to prove liability for or invalidity of the claim or its

[59] Id. at ¶86.

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

[61] Id. at 33-34.

[62] *Consumers' Counsel 2006* at ¶46.

[63] Id. at ¶92.

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 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."[64] The list is not exhaustive. The agreements were used during the remand hearing to impeach the credibility of witnesses, and the anticompetitive effect of the agreements addressed the "competitiveness prong" of the Commission's three-part test regarding "rate stabilization plans."[65]

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] 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. The OCC could not be expected to lay out chapter and verse regarding how it might use agreements at trial without the OCC having access to the information, and the ruling in the Remand Order otherwise was legal error.

With the foregoing in mind, the Commission should evaluate the expanded record on remand and base its decision regarding the advisability and the legality of Duke Energy's proposals on that expanded record. In an effort to assist the Commission in that

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[64] Id.

[65] The competitiveness of "five competitive electric retail service providers," relied upon by the Ohio Supreme Court (*Consumers' Counsel 2006* at ¶56) is seriously undermined by the revelations in the case on remand. [redacted]

endeavor, the following sections again present the policy and legal basis that should require alteration of the Duke Energy rate plan considering the totality of that plan as it is more fully explained in the expanded record.

2. 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, and the discrimination has caused serious damage to the competitive market for generation service.

The total effect of the post-MDP generation pricing by the Company is discriminatory in favor of the Customer Parties (i.e. parties or members of groups that were parties, referred to collectively by OCC Witness Hixon as "Customer Parties"[66])

R.C. 4905.35 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.[67]

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

> After its market development period, an electric distribution utility in this state shall provide consumers, on a comparable and *nondiscriminatory* basis within its certified territory, a market-based standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers.[68]

The latter statute forms the backbone of what Duke Energy refers to as its "provider of last resort" obligation, but it also requires the Company to provide its services without discriminatory treatment of its customers. The statute furthers Ohio policy that requires

[66] OCC Remand Ex. 2(A) at 4 (Hixon).

[67] Emphasis added.

[68] Emphasis added.

"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. 4928.14(A) and (G).

[redacted][69]) [redacted][70] [redacted][71] [redacted][72] [redacted]

[redacted]

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[69] [redacted]

[70] DERS has discussed its payments to customers and the "effect such payments may have had on DE-Ohio's MBSSO price," citing aggregate payments of $13.8 million in 2005 and $22.2 million in 2006. DERS Memorandum Contra OCC's Motion to Strike DERS' Motion to Quash at 9 (January 2, 2007).

[71] [redacted]

[72] [redacted]

[73] [redacted]

[redacted][74]

[redacted][75] [redacted]

[redacted][76] 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. . . ."[77] [redacted]

[74] [redacted]

[75] See, e.g., Remand Order at 37.

[76] [redacted]

[77] Remand Order at 38.

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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.[78] The Commission held that the program violated R.C. 4905.35, 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.[79]

[redacted]

[redacted][80] [redacted][81] [redacted][82] [redacted][83] [redacted]

[78] *In re OCTA Complaint Against Ameritech*, Case No. 07-654-TP-CSS, Order at 4 (July 21, 1997).

[79] Id. at 5.

[80] [redacted]

[81] Id.

[82] [redacted]

[83] [redacted]

[redacted]

[redacted][84] [redacted]

> [redacted][85]

[redacted]

[84] Entry on Rehearing at 14 (November 23, 2004).

[85] OCC Remand Ex. 2(A) at 61-62 [illegible]

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[redacted][86] [redacted] During 2004, when the Commission held its last full hearing in this matter, 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.[87] It was hoped that Duke Energy's standard service offer would usher in a period in which the competitive electricity market would further develop and mature. In fact, the switching statistics had fallen to 8.40, 0.36, and 2.32 percent for commercial, industrial, and residential customers by December 31, 2006.[88]

The record provides evidence of the main source of the decline in switching levels. [redacted][89] [redacted]

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[86] [redacted]

[87] 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)) (Hixon)).

[88] [redacted]

[89] [redacted]

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[redacted][90] [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.

3. The Remand Order fails to prohibit Duke Energy's violation of corporate separation requirements, which has caused serious damage to the competitive market for generation service that was intended to provide benefits to customers.

The facts elicited by the OCC and presented in testimony in the *Post-MDP Remand Case* should have enlivened a discussion regarding the proper role of electric utility affiliates that has otherwise been left largely dormant since the early days of Ohio's restructuring of electric utility regulation. All electric utilities filed electric transition plans and committed to follow corporate separation rules. For instance, Ohio Adm. Code 4901:1-20-16(A) was adopted "so 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]

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90 [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), 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) 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]

In Ohio Adm. Code 4901:1-20-16(G)(4)(j), 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 [redacted][91] [redacted]

[91] [redacted]

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[redacted][92] [redacted][93]

The Commission'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 prevented fair competition from developing in areas served by Duke Energy.

4. The Remand Order fails to prohibit the [redacted] which has caused serious damage to the competitive market for generation service.

[redacted][94] [redacted][95] [redacted][96] [redacted]

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[92] [redacted]

[93] [redacted]

[94] [redacted]

[95] [redacted]

[96] [redacted]

[redacted][97] [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.

C. 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 Remand Order incorrectly reaches the conclusion that nearly all the information withheld from the public by means of redactions in the record is considered "trade secret information [maintained as] confidential."[98] The documents that the OCC asked the PUCO to disclose in the public domain were extensively discussed in the OCC's Memorandum Contra Motions for Protection submitted in these cases on March 13, 2007.

The OCC's Memorandum Contra Motions for Protection responded to motions by the Duke-affiliated companies and other parties that entered into agreements with those companies that sought to prevent public disclosure of certain documents that were obtained by the OCC in discovery. The ultimate rulings of the presiding officers, affirmed in principal part in the Remand Order, conflict with Ohio law and the prior decisions of the Commission.

R.C. 4901.12 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

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97 [redacted]

98 Remand Order at 17.

exceptions under R.C. 149.43. R.C. 149.43 is Ohio's public records law. R.C. 4905.07 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."[99]

Ohio Adm. Code 4901-1-24(D) requires of the PUCO that "[a]ny order issued under this paragraph shall *minimize* the amount of information protected from public disclosure."[100] 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, Revise Code) and as consistent with the purposes of Title 49 of the Revised Code. Ohio pubic 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].[101]

Faced with demands for "wholesale removal of the document from public scrutiny,"[102] the Commission reviewed several documents in the above-cited telephone case and

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[99] *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).

[100] Emphasis added.

[101] *In re MxEnergy, Inc.*, Case No. 02-1773-GA-CRS et al., Entry at (3) (September 7, 2004) (notations in original).

[102] Id. at 3.

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determined in each circumstance how documents could be redacted "without rendering the remaining document incomprehensible or of little meaning...."[103]

In violation of Ohio law as well as Commission precedent cited above, in these cases *nearly every word* in the disputed documents has been shielded from entering the public domain as the result of the Remand Order. 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" are rendered incomprehensible.[104] During the hearing, the same "wholesale" treatment was provided to all documents over which the mere claim of "confidentiality" was made by the Duke-affiliated companies and parties supporting the positions of those companies. The breadth of the redactions required by the Remand Order shows no significant effort to reduce the amount of information shielded from public scrutiny.

The Ohio Supreme Court has addressed the test for this claimed protection from disclosure under R.C. 149.43, 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

[103] Id.

[104] Remand Order at 15. The OCC does not object to the redaction of "account numbers, customer social security [and] employer identification numbers." Id. According to Ohio Adm. Code 4901:1-10-24, Duke Energy may not disclose account or social security numbers without proper authorization. While not applicable to Commission action, support for this rule under the circumstances of these cases might take the form of redaction of such information for the public files for an indefinite period of time (i.e. unless otherwise ordered). While the rule also does not apply to the OCC, the OCC made significant efforts to redact all identification numbers before distributing the testimony of OCC Witness Hixon to counsel for various parties. See, e.g., OCC Memorandum Contra Motions for Protection at 17 (March 13, 2007).

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.'[105]

The analysis of these factors was largely missing in the motions for protection that were submitted by the Duke-affiliated companies and other parties. Not surprisingly, therefore, such an analysis is also absent from the PUCO's Remand Order which repeats the conclusory statements made by parties to the agreements. The Remand Order does not mention the OCC's detailed analysis of the documents in question, which are incorporated herein from the OCC's Memorandum Contra Motions for Protection.

The Commission's rules require specificity from those that seek to keep information from the public record. Ohio Adm. Code 4901-1-24(D)(3) requires movants for confidentiality to file a pleading "setting forth the *specific* basis of the motion, including a *detailed* discussion of the need for protection from disclosure...."[106] The specificity required by law was missing from the pleadings submitted by the Duke-affiliated companies and the other parties that submitted motions for protection.[107] A remarkable feature of the motions by the Duke-affiliated companies and other parties was that they all failed to address the individual contents of the documents that these parties sought to conceal from the public. These parties therefore failed to meet their burden

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

[106] Emphasis added.

[107] The OCC's position is also supported by the terms of both the protective agreements entered into with various parties. See, e.g., DERS Motion for Protection, Attached Protective Agreement at 9 ("precise nature and justification for the injury").

under Ohio law. In its Order, the PUCO failed to conduct an analysis that would explain its decision to the public or to a court in review.[108]

The Remand Order appears to rely 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."[109] That allegation has previously been refuted by the OCC in its Memorandum Contra Motions for Protection,[110] [redacted][111] [redacted][112] [redacted][113] The documents must be analyzed individually to conform to the legal requirements stated above.

Public revelation of the side agreements would not reveal "marketing strategies" of any CRES provider that "would . . . be helpful to competitors."[114] [redacted]

[108] See *Trongren v. Public Util. Comm.* (1999), 85 Ohio St. 3d 87.

[109] Remand Order at 13.

[110] See, e.g., OCC Memorandum Contra Motion for Protection at 14 and 16.

[111] OCC Initial Post-Remand Brief, Hearing Phase I, at 39.

[112] [redacted]

[113] Id. at 38.

[114] Remand Order at 14.

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[redacted][115][redacted][117][redacted][118][redacted][119][redacted][120][redacted] The only "strategy"

[115] [redacted]

[116] [redacted]

[117] [redacted]

[118] [redacted]

[119] [redacted]

[120] [redacted]

that would be revealed by placing the unredacted side agreements into the public files is the strategy for settling the *Post-MDP Service Case*.

Parties to side agreements that reduce their electricity costs in a rate-setting proceeding no doubt "consider the material in question to have economic value from not being known by their competitors," as stated in the Remand Order.[121] Rate-setting in a regulatory environment, however, is inherently a public process that produces rates that are published and accessible to others (including competitors). 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 (as discussed more fully above). The *public* is not served, for instance, when [redacted] Illegal activity should be eliminated by the Commission, not propped up by concealing the illegality behind claims of "economic value" derived from the prohibited activity.

The Remand Order incorrectly states that "the parties advocating confidential treatment have sought, at all junctures, to keep this information confidential . . . ."[122] Information provided by the OCC has documented other situations on the record to the contrary. For instance, the OCC's Memorandum Contra Motions for Protection states

[121] Remand Order at 11. Some claims regarding the competitive advantage provided by secrecy do not withstand scrutiny on their face. For instance, [redacted]

[122] Remand Order at 16-17. DERS has, of course, discussed its payments to customers and the "effect such payments may have had on DE-Ohio's MBSSO price," citing aggregate payments of $13.8 million in 2005 and $22.2 million in 2006. DERS Memorandum Contra OCC's Motion to Strike DERS' Motion to Quash at 9 (January 2, 2007).

that Attachment 16 to the testimony of OCC Witness Hixon was "communicated by DERS without any designation that the information was confidential."[123] That fact can be easily confirmed by examination of Attachment 16 that does not bear any DERS designation of confidentiality as required pursuant to its protective agreement with the OCC. Other stark instances of the Duke-affiliated companies' failure to protect information (such as many pages of Ficke and Ziolkowski transcript information[124]) not properly protected from public view were exhibited during the hearing.[125] On rehearing, the Commission should reevaluate the detailed analysis of the documents provided by the OCC's Memorandum Contra Motions for Protection and the testimony of OCC Witness Hixon.

For these reasons, the Order incorrectly shielded from public view large amounts of information, and the decision should be corrected or modified upon rehearing to permit public scrutiny of the information.

[123] Memorandum Contra Motions for Protection at 18 (March 13, 2007).

[124] Remand Tr. Vol. I at 26-30 (March 19, 2007).

[125] Information has entered the public domain regardless of whether the Commission determines that it has sufficient evidence in the record to make this determination. The Commission has previously refused to state the legal procedure under which another government agency could release information in response to a public records request. In an order issued in 2006, the Commission specifically held that "the establishment of such a procedure, binding upon another government agency, is beyond . . . [the PUCO's] statutory authority." *In the Matter of the Review of Chapters 4901-, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685, Order at 33 (December 6, 2006). Furthermore, an Attorney Examiner recently refused to "limit the lawful exercise of OCC's judgment in response to a future public records request." *In the Matter of the Application of United Telephone Company of Ohio d/b/a Embarq For Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 49001:1-4, Ohio Administrative Code*, Case No. 07-760, Entry at 6 (August 10, 2007).

III. CONCLUSION

Two topics of fundamental importance to residential customers were covered by the remand from the Court: whether the Company's proposal for increasing rates in its Application for Rehearing filed in 2004 was supported by evidence and whether evidence of side financial arrangements should affect the outcome of these cases. The Order on Remand does not reasonably and lawfully deal with either of these matters. The statutory imperatives to provide benefits to Ohio consumers by means of nondiscriminatory and reasonably priced electric service has not been met as the result of the PUCO's handling of these two fundamental topics.

The Order was not supported by evidence submitted during the hearing in 2004, and the Company did not provide the additional evidence on remand in 2007 to support the level of its standard service charges to customers.

The competition that was intended under electric restructuring legislation has been seriously undermined by the side agreements. The dealings that helped settle the *Post-MDP Service Case* must cease in order to promote reasonable rates for all customers and to encourage competition.

Pursuant to R.C. 4903.10, the PUCO should abrogate and modify the Remand Order, consistent with the OCC's claims of error.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Application for Rehearing by the Office of the Ohio Consumers' Counsel* has been served upon the below-named persons (pursuant to the Attorney Examiners' instructions) via electronic transmittal this 23rd day of November 2007. The version labeled "Confidential Version" should be treated by counsel in the same manner in which confidential versions of the briefs were treated.

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I hereby certify that a copy of the foregoing Appendix of Appellant, 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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