

IN THE SUPREME COURT OF OHIO

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

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MOTION FOR A STAY OF EXECUTION  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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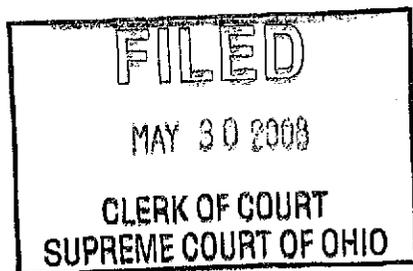
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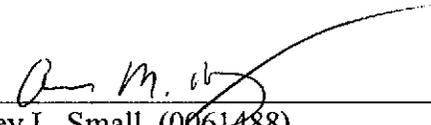
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Support, the requested Stay of Execution should be granted to avoid irreparable harm to those paying this charge, the customers of Duke Energy Ohio, Inc. ("Company" or "Duke Energy," including its predecessor, the Cincinnati Gas and Electric Company).

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**IN THE SUPREME COURT OF OHIO**  
**On Appeal from the Public Utilities Commission of Ohio**

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

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

**A. Prefatory Comments**

The Order of the Public Utilities Commission of Ohio (“PUCO” or “Commission”) unlawfully and unreasonably provided Duke Energy with an unsupported Infrastructure Maintenance Fund (“IMF”) that is being collected from customers. The Commission granted Duke Energy’s request to collect the IMF charges despite the Court’s order to the Commission, particularly with regard to the IMF, that modifications to post-market development rates can only be imposed on customers if properly supported in the record.<sup>1</sup> The Commission granted

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<sup>1</sup> *Ohio Consumers’ Counsel v. Pub. Util. Comm.* (2007), 111 Ohio St.3d 300, 2006-Ohio-5789 (“*Consumers’ Counsel 2006*”) at ¶95.

Duke Energy's request to collect the IMF charges even though Duke Energy has not provided record evidence that the IMF charges are based upon costs not recovered through other charges.

The OCC first sought a stay from the PUCO, by motion filed on February 15, 2008. The PUCO has not ruled on OCC's motion.

The IMF charge will be collected from customers at least through 2008. The IMF may be collected beyond 2008 under a provision in newly enacted R.C. 4928.143(C)(2)(b) (Stay Appx. at 25). That statute allows for the continuation of the most recent standard service offer, including the current rate stabilization plan, until a new rate plan is in effect.

#### **B. Procedural History of the Cases**

On January 10, 2003, the Company filed an application ("January 2003 Application"<sup>2</sup>) 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.<sup>3</sup> Numerous parties and the Commission's staff ("Staff") filed comments on the Company's proposals in March and April 2003.

On December 9, 2003, during the first proceeding before the first appeal to this Court on the IMF charges, 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

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<sup>2</sup> The January 2003 Application initiated Case No. 03-93-EL-ATA.

<sup>3</sup> January 2003 Application at 1.

CG&E file a rate stabilization plan as part of these proceedings, for the Commission's consideration.<sup>4</sup>

The Entry also set a procedural schedule.

On January 26, 2004, the Company filed another application ("January 2004 Application"). The January 2004 Application proposed that the Commission 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 that the Company submitted for approval in response to the Commission's request on December 9, 2003.<sup>5</sup>

The Commission's Order in the *Post-MDP Service Case* was issued on September 29, 2004. 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, or iii) approve a new rate plan ("New Proposal") that was proposed for the first time in the Company's Application for Rehearing. In a November 23, 2004 Entry on Rehearing, the PUCO adopted (in principal part) the New Proposal.

The OCC initiated its appeal in the *Post-MDP Service Case* on May 23, 2005. The Court issued its opinion on November 22, 2006. The Court held, among other matters, that the PUCO erred by failing to properly support modifications to post-MDP rates in the PUCO's November Entry on Rehearing.<sup>6</sup> The Court remanded the case for additional consideration by the Commission.

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<sup>4</sup>*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 Nos. 03-93-EL-ATA, et al, ("Post-MDP Service Case") Entry, 5 (December 9, 2003) (Stay Appx. at 1).

<sup>5</sup> January 2004 Application at 8.

<sup>6</sup> *Consumers' Counsel 2006* at ¶95.

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 pre-hearing conference be held on December 14, 2006.<sup>7</sup> 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.

The Remand Order reinstated all of the Commission’s previous standard service offer determinations for residential customers that were set before these cases were appealed, including the IMF charge.<sup>8</sup> The OCC submitted an Application for Rehearing on November 23, 2007. The Commission rejected the OCC’s assignments of error in an Entry on Rehearing dated December 19, 2007.

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<sup>7</sup> Entry 3, ¶7 (November 29, 2006). The proceedings on remand will be referred to as the “*Post-MDP Remand Case*” for clarity of presentation even though a single record exists for the portions of the case designated the *Post-MDP Service Case* and the *Post-MDP Remand Case*. (Stay Appx. at 7).

<sup>8</sup> The generation component charges that resulted from the *Post-MDP Service Case* were listed in OCC-sponsored testimony. Merit Brief By Appellant, The Office of the Ohio Consumers’ Counsel, Supplement by Appellant (Vol. II) at 56 (Hixon).

## **II. LAW REGARDING A STAY OF EXECUTION**

### **A. Authority for a Stay of Execution**

R.C. 4903.16 provides for the issuance of a stay of execution regarding the Commission's final orders:

A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained.

The OCC's three-day notice to the Commission is attached hereto as Exhibit C.

Interpreting this statute, this Court stated:

[I]t is clear that the General Assembly intended that a public utility shall collect the rates set by the Commission's order, giving however, to any person who feels aggrieved by such order a right to secure a stay of the collection of the new rates after posting a bond.<sup>9</sup>

The application of the Court's authority to stay an order of the PUCO will be further explained below.

### **B. The Court's Authority to Establish Trustee Accounts**

R.C. 4903.17 also authorizes this Court to:

By order direct the public utility or railroad affected to pay into the hands of a trustee to be appointed by the court, to be held until the final determination of the proceeding, under such conditions as the court prescribes, all sums of money collected in excess of the sums payable if the order or decision of the commission had not been stayed or suspended.

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<sup>9</sup> *Keco Industries, Inc. v. Cincinnati and Suburban Bell Tel. Co.* ("Keco") (1957), 166 Ohio St. 254.

And R.C. 4903.18 authorizes this Court to order the affected public utility:

To keep such accounts, verified by oath as are, in the judgment of the commission, sufficient to show the amounts being charged or received by such public utility or railroad in excess of the charges allowed by the order or decision of the commission, together with the names and addresses of the corporations or persons to whom overcharges will be refundable in case the charges made by the public utility or railroad pending review are not sustained by the supreme court.

This Court has previously directed utilities to deposit money into interest-bearing accounts rather than posting a bond as a condition for receiving a stay from a PUCO order. In *Ohio Consumers' Counsel v. Public Utilities Commission of Ohio* ("*Ohio Consumers' Counsel 1985*"), this Court ordered the Cincinnati Gas and Electric Company ("CG&E") to deposit funds in an interest-bearing account consistent with R.C. 4903.17 and to keep an accounting of those funds consistent with R.C. 4903.18 when it granted OCC's motion to stay the related issue under R.C. 4903.16.<sup>10</sup>

In *Columbus & Southern Ohio Electric Co. v. Public Utilities Commission of Ohio*, this Court granted Columbus & Southern Ohio Electric Co.'s (C&SOE's) motion for a stay of execution of a PUCO order on rehearing.<sup>11</sup> On granting the stay, this Court ordered C&SOE, under the provisions of R.C. 4903.17, to deposit all monies collected in excess of the charges allowed by the order on rehearing into an interest-bearing account with the Clerk of Court as trustee.<sup>12</sup> When this Court affirmed the PUCO's order on rehearing, it ordered that the funds in the interest-bearing account be distributed to C&SOE's customers under R.C. 4903.19 (Stay Appx at 21).<sup>13</sup>

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<sup>10</sup> *Office of Ohio Consumers' Counsel v. Public Utilities Commission of Ohio*, S.Ct. Case No. 85-390 ("*Office of Consumers Counsel 1985*"), Order (May 8, 1985) (Stay Appx. at 11).

<sup>11</sup> S.Ct. Case No. 83-461, Entry at 1 (March 23, 1983) (Stay Appx. at 14).

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

<sup>13</sup> *Columbus & Southern Ohio Electric Co. v. Public Utilities Commission of Ohio* (1984), 10 Ohio St. 3d 12 at 16.

Likewise, in *Cincinnati Bell Telephone Co. v. Public Utilities Commission of Ohio*, this Court granted Cincinnati Bell a stay of the PUCO's order on rehearing on the condition that Cincinnati Bell pay into a trust account all charges in excess of those allowed by the Commission's order.<sup>14</sup> As in *Columbus & Southern Ohio Electric Co.*, when this Court approved the Commission's order, it directed that the funds in the trust account be returned to customers pursuant to R.C. 4903.19.<sup>15</sup>

### C. The Public Office Exemption to the Bond Requirement

R.C. 4903.16 requires that all appellants "execute an undertaking," or post a bond, in order to obtain a stay from a PUCO order. But as Judge Herbert in his dissent pointed out in *Columbus v. Public Utilities Commission of Ohio*,<sup>16</sup> "R.C. 4903.16 should be read *in pari materia* with Section 2505.12 (Stay Appx. at 16)." R.C. 2505.12, which provides an exemption for state appellants from bond-posting requirements, supersedes R.C. 4903.16 as a matter of statutory interpretation.

Under the guidance of R.C. 1.51 (Stay Appx at 15), it can be seen that R.C. 2505.12 supersedes R.C. 4903.16 in not requiring state appellants to post bonds. R.C. 1.51 provides:

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, **unless the general provision is the later adoption** and the manifest intent is that the general provision prevail.<sup>17</sup>

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<sup>14</sup> S.Ct. Case No. 83-392, Entry (March 16, 1983) (Stay Appx. at 14).

<sup>15</sup> *Cincinnati Bell Telephone Company v. Public Utilities Commission of Ohio* (1984), 12 Ohio St.3d 280 at 290 ("*Cincinnati Bell*").

<sup>16</sup> *City of Columbus v. Public Utilities Commission of Ohio*, (1959), 170 Ohio St. 105 at 112.

<sup>17</sup> Emphasis added.

The relevant provision under R.C. 2505.12<sup>18</sup> was adopted later than the special provision of R.C. 4903.16.<sup>19</sup> Therefore, R.C. 2505.12 prevails over R.C. 4903.16, even though R.C. 2505.12 is a general statute and R.C. 4903.16 is a special or local provision. The relevant provision of R.C. 2505.12 was enacted in 1935 and the relevant provision of R.C. 4903.16 was enacted in 1913. Therefore, the bond-posting exemption for state officers in R.C. 2505.12 was enacted 22 years later than the bond-posting requirement in R.C. 4903.16. It follows that under R.C. 2505.12, the OCC is not required to post a supersedeas bond because it acts in a representative capacity as a public officer of the State.

R.C. 2505.12 mandates that a public officer is not required to post a supersedeas bond when acting in a representative capacity for the State. R.C. 2505.12 provides:

An appellant is **not required to give a supersedeas bond** in connection with any of the following:

(A) An appeal by any of the following:

\* \* \*

(3) Any public officer of the state or of any of its political subdivisions who is suing or is sued solely in the public officer's representative capacity as that officer.<sup>20</sup>

According to R.C. 4911.06 (Stay Appx. at 24), the Consumers' Counsel "shall be considered a state officer \* \* \*."<sup>21</sup> Furthermore, according to R.C. 4911.02(B)(1) (Stay Appx at 23) and R.C. 4911.02(B)(2)(c) (Stay Appx at 23), the Consumers' Counsel "may sue or be sued" and may "institute, intervene in, or otherwise participate in proceedings in both state and federal courts \* \* \* on behalf of the residential consumers."<sup>22</sup> In filing a request for a stay of execution,

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<sup>18</sup> The public officer provision of R.C.2505.12 was enacted in 1935 through H.B. 42 as Section 12223-12 of the General Code.

<sup>19</sup> The bond-posting requirement of R.C. 4903.16 was passed in 1913 though H.B. 582, Section 548 §37.

<sup>20</sup> R.C. 2505.12 (emphasis added).

<sup>21</sup> R.C. 4911.06.

<sup>22</sup> R.C. 4911.02.

the Consumers' Counsel meets the standard of R.C. 2505.12. Thus, the Consumers' Counsel should not be required to post a supersedeas bond. In fact, the Court has even granted a stay for an entity other than a public officer without requiring that a bond be posted by the appellant<sup>23</sup> and, as stated above, the Court previously granted OCC a stay, with a trust account.<sup>24</sup>

**III. IN AN APPEAL FROM THE PUBLIC UTILITIES COMMISSION OF OHIO TO THE SUPREME COURT, THE COURT WILL SUSTAIN A MOTION FOR A STAY WHERE THE PARTY COMPLAINING APPLIES FOR A STAY OF THE COMMISSION'S ORDER AND THE EFFECT OF THE STAY WILL PREVENT IRREPARABLE HARM TO THE CUSTOMERS AFFECTED BY THE COMMISSION'S ORDER WHILE THE APPEAL IS PENDING.**

**A. Standard for Stay of Execution**

The above proposition is taken from *Travis v. Pub. Util. Comm.*<sup>25</sup>. OCC meets the elements under *Travis* for issuance of a stay—being timeliness and a recognition that reversal would affect the matter at issue, in this case, preventing irreparable harm. OCC is timely because this Motion is filed after OCC filed its notice of appeal, while the charge at issue is being collected from customers, and after having given, by motion, the PUCO the opportunity to grant a stay (but with no ruling by the PUCO). OCC will explain the imperative to prevent irreparable harm below. OCC also meets the criteria that typically are applicable to actions for stay, which include additional elements beyond those in *Travis*.

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<sup>23</sup> In *MCI Telecommunications Corp. v. Public Utilities Commission of Ohio*. (1987), 31 Ohio St.3d 604, a stay was granted in a utility case by the Ohio Supreme Court without the posting of a bond despite the fact that the appellant was not a public entity.

<sup>24</sup> *Office of Ohio Consumers' Counsel v. Public Utilities Commission of Ohio* ("Office of Consumers Counsel 1985"), S.Ct. Case No. 85-390, Order (May 8, 1985).

<sup>25</sup> *Travis v. Pub. Util. Comm.* (1931), 123 Ohio St. 355 at 358-359.

The applicable statutes do not set forth the factors the Court should consider in determining whether to suspend the operation of an administrative order; however, those factors have been refined by the courts. Those factors are: (1) whether appellant has shown a strong or substantial likelihood or probability of success on the merits; (2) whether appellant has shown that it will suffer irreparable injury; (3) whether the issuance of a stay will cause harm to others; and (4) whether the public interest would be served by granting a stay.<sup>26</sup>

“Although *Virginia Petroleum Jobbers* involved a motion to stay an administrative order, the factors enumerated therein also apply to motions for preliminary injunctions \* \* \*.”<sup>27</sup> The standards which should guide the decision to grant a preliminary injunction have been often stated. The movant must show a substantial likelihood of success, and that irreparable harm would flow from denial of the injunction. In addition, the trial judge must consider the inconvenience that an injunction would cause the opposing party, and must weigh the public interest as well.<sup>28</sup>

As discussed above, the general standards governing both stays and injunctions have been consistently applied and widely accepted. There is, however, little guidance on the question of when a stay should be granted in appeals involving the PUCO. In his dissent in *MCI Telecommunications Corp. v. Pub. Util. Comm.*,<sup>29</sup> Justice Douglas stated:

R.C. 4903.16 does not detail under what circumstances a stay should be granted or, conversely, denied. Research indicates that this court has never enunciated

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<sup>26</sup> Id. See, e.g., *Virginia Petroleum Jobbers Assn. v. FPC* (1958), 104 U.S. App. D.C. 106, 259 F. 2d 921; see also *Hilton v. Brauskil* (1987) 481 U.S. 770 (“It is therefore logical to conclude that the general standards governing stays of civil judgments should also guide courts when they must decide whether to release a habeas petitioner pending a state’s appeal \* \* \*.”).

<sup>27</sup> *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.* (1977), 182 U.S. App. D.C. 220, 559 F. 2d 841.

<sup>28</sup> *A Quaker Action Group, et al. v. Walter J. Hickel, et al.* (1969), 137 U.S. App. D.C. 176, 421 F. 2d 1111.

<sup>29</sup> *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 31 Ohio St.3d 604.

criteria detailing the circumstances and conditions upon which a stay will be granted.<sup>30</sup>

Justice Douglas relied upon the same four standards for considering a motion for a stay. His standards were:

1. Whether the seeker of the stay has made a strong showing of the likelihood prevailing on the merits.
2. Whether the party seeking the stay has shown that without a stay irreparable harm will be suffered;
3. Whether or not, if the stay is issued, substantial harm to other parties would result;
4. Above all, where lies the interest of the public.<sup>31</sup>

The OCC's Motion for Stay of Execution is reasonable and should prevail under the aforementioned standards or under any other reasonable standards.

**1. The OCC is likely to prevail on the merits.**

OCC is likely to prevail on the merits because, for the following reasons, the PUCO's order is unlawful and unreasonable. As explained in the Appellant's Brief that OCC filed on May 19, 2008, the order is a violation of the law and contrary to this Court's previous decision.

In *Consumers' Counsel 2006*, the Court was concerned that "the infrastructure-maintenance fund may be some type of surcharge and not a cost component."<sup>32</sup> 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 of the *Post-MDP Remand Case*. The IMF component of Duke Energy's standard service offer is vague, ambiguous, and duplicative of other charges, and finds no basis of support from the testimony in these cases.<sup>33</sup>

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<sup>30</sup> *Id.* at 605, 606.

<sup>31</sup> *Id.* at 606.

<sup>32</sup> *Consumers' Counsel 2006* at ¶30.

<sup>33</sup> Merit Brief By Appellant, The Office of the Ohio Consumers' Counsel, Supplement by Appellant (Vol. II) at 546 (Talbot).

The Court determined that the Commission violated R.C. 4903.09 (Stay Appx. at 17) when it approved certain charges in the *Post-MDP Service Case* “without record evidence and without setting forth any basis for the decision.”<sup>34</sup> 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.<sup>35</sup> The Remand Order purports to return to, and judge for purposes of setting standard service generation offers, the Company’s “RSP application, as filed on January 26, 2004, and subsequently modified by Duke Energy prior to the initial hearing in these proceedings.”<sup>36</sup> 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 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.<sup>37</sup> 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.<sup>38</sup> The ancestry claimed by Duke Energy for the IMF is incorrect: the sole successor to the charge for the

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<sup>34</sup> Consumers’ Counsel 2006 at ¶27.

<sup>35</sup> *Id.* at ¶30.

<sup>36</sup> Remand Order at 28.

<sup>37</sup> Merit Brief By Appellant, The Office of the Ohio Consumers’ Counsel, Supplement by Appellant (Vol. II) at 730 (“The IMF was previously embedded in the reserve margin component of the Stipulated AAC price of \$52,898,560.”) (Steffen).

<sup>38</sup> *Id.* at 540 (Talbot).

Reserve Margin under the Stipulation Plan is the system reliability tracker (“SRT”). The Commission appears to agree, concluding from the history of the “carve[ ] out”<sup>39</sup> 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.

The duplication of capacity charges that customers must pay is evident from the Company’s inability to distinguish the IMF charge from the RSC charge when OCC inquired about the Company’s support for capacity-related charges in the Company’s standard service offer rates. OCC Witness Talbot concluded that “the basis for the IMF charge seems to be similar, if not identical, to that of the RSC charge.”<sup>40</sup> 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”<sup>41</sup> and that “[t]here is no assurance that these charges are not duplicative.”<sup>42</sup>

**2. Irreparable harm will be suffered in the absence of a stay.**

Duke Energy’s residential customers will be irreparably harmed by the continuing imposition of the IMF charge while this case is pending before the Court. This appeal will not likely be resolved for many months, with the time for due consideration required by the Court. (OCC’s recent appeals, in Cases 2005-946 and 2005-518, that resulted in the Court’s decision to remand required approximately 18 months for resolution.) The IMF charge will be collected

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<sup>39</sup> Remand Order at 32.

<sup>40</sup> Merit Brief By Appellant, The Office of the Ohio Consumers’ Counsel, Supplement by Appellant (Vol. II) at 536 (Talbot).

<sup>41</sup> Id. at 540.

<sup>42</sup> Id.

from customers at least through 2008. The IMF may be collected beyond 2008 under a provision in newly enacted R.C. 4928.143(C)(2)(b) that allows for the continuation of the rate stabilization plan until a new rate plan is in effect.

Moreover, it is unlikely there will be an opportunity for a refund of such IMF charges if OCC prevails in this appeal. R.C. 4905.32 (Stay Appx. at 22) states:

No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firm, and corporations under like circumstances for like or substantially similar, service.<sup>43</sup>

This statute was interpreted in *Keco Industries, Inc. v. Cincinnati and Suburban Bell Tel. Co.*, 166 Ohio St. 254 (1957):

Under this section a utility has no option but to collect the rates set by the Commission and is clearly forbidden to refund any part of the rate collected.<sup>44</sup>

Without a stay of execution, the continuing imposition of the IMF charge will cause Duke Energy's residential customers to suffer irreparable harm even in the likely event that the OCC prevails on the merits.

The Court should order a Stay of Execution in order to prevent the irreparable harm that would occur to Duke Energy's customers if the Company collects the IMF charges without the possibility of a refund and this Court later determines that the IMF charges were unlawful. Rather than allowing Duke Energy to retain the IMF charges it collects, pending this Court's decision, this Court should appoint a trustee to whom Duke Energy must pay the IMF charge until the Court has made its decision as provided for under R.C. 4903.17. If the Court considers it appropriate, the Court additionally, under R.C. 4903.18, can order Duke Energy to maintain an

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<sup>43</sup> R.C. 4905.32.

<sup>44</sup> *Keco* at 257.

account and the names and addresses of the persons to whom overcharges will be refundable by the trustee in the event the charges made by the public utility pending review are not sustained by this Court.

**3. If the stay is issued, substantial harm to other parties will not result.**

The law and this case offer the Court the opportunity to grant the stay and prevent the irreparable harm to Duke Energy's residential customers as described above. The Court should not be concerned that, in balancing the potential harms to customers against the potential harm to Duke Energy, the Company will suffer substantial harm. Duke Energy will not suffer substantial harm.

R.C. 4903.17 allows this Court to appoint a trustee to whom Duke Energy may pay the IMF charges to be held until the Court completes its decision on the lawfulness of the IMF charges. If the Court determines that the IMF charges are lawful, then the trustee will return the IMF charges to Duke Energy and the Company will be made whole.

**4. The public interest is served by issuance of a stay.**

The public interest is served by protecting customers from paying IMF charges, never to be refunded. The public interest is especially well served in this matter where the Court already expressed its skepticism about the IMF upon OCC's first appeal and where this second appeal substantiates that skepticism after the PUCO's Remand Order did not provide the justification for the charge that the Court expected before the PUCO could allow continued collection from customers. The injustice of the collection of the IMF, without refund to customers in the event of reversal, can be avoided without harm to Duke Energy under R.C. 4903.17.

**IV. THE SUPREME COURT SHOULD DIRECT DUKE ENERGY “TO PAY INTO THE HANDS OF A TRUSTEE \* \* \* ALL SUMS OF MONEY COLLECTED [BY DUKE ENERGY] IN EXCESS OF THE SUMS PAYABLE IF THE ORDER OR DECISION OF THE COMMISSION HAD NOT BEEN STAYED.” R.C. 4903.17.**

The Court should rely on R.C. 4903.17 as it has done previously when granting a motion to stay a PUCO order. R.C. 4903.17 authorizes the Court to direct Duke Energy to pay into the hands of a trustee the contested charges that are the subject of a stay when it grants OCC’s Motion to Stay the IMF charges. Under R.C. 4903.17, Duke Energy should pay the IMF charges into an interest-bearing account as the Company collects the charges from customers until the Court makes a decision about the lawfulness of the IMF charges.

As mentioned previously, the applicable law allows this Court to require utilities to pay contested charges into a trust account pending the Court’s decision on a stayed PUCO decision. In *Ohio Consumers’ Counsel v. Public Utilities Commission of Ohio*, this Court protected the interest of the utility’s customers by granting OCC’s requested stay and directing CG&E to deposit the post in-service allowance for funds used during construction into a trust account.<sup>45</sup> The circumstances of this Motion to Stay are almost identical to the circumstances in the *Ohio Consumers’ Counsel 1985* case.

In the *Ohio Consumers’ Counsel 1985*, case the Court protected the interests of the utility customers by keeping in a trust account the payment of the post in-service allowance for funds used during construction. In that case the Court’s decision to use a trust account would have provided a way to return customers’ funds to them in the event the Court had reversed the PUCO’s decision, thereby protecting customers against irreparable harm. This same protection is needed in this case to result in just and reasonable rates. If the Court holds again that the PUCO

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<sup>45</sup> *Ohio Consumers’ Counsel 1985*, S.Ct. Case No. 85-390, Order at 1 (May 8, 1985).

did not have sufficient evidence on record to support the IMF charges, the customers will only be refunded the IMF charges if they are deposited in a trust account.

In *Columbus & Southern Ohio Electric Co. v. Public Utilities Commission of Ohio* (“*Columbus & Southern*”) this Court protected the interests of a utility by agreeing to Stay a PUCO decision that reduced, by \$73,400,000, the charges that the Columbus & Southern Ohio Electric Co. (C&SOE) was permitted to collect from customers for a Zimmer nuclear plant construction work in progress allowance.<sup>46</sup> Rather than ordering C&SOE to pay a bond, the Court ruled as follows:

Pursuant to R.C. 4903.17, appellant was ordered to deposit the sums of money collected in excess of those allowed by the entry on rehearing in an interest bearing account in a financial institution in the state of Ohio under the supervision of the Clerk of this court as trustee, pending the outcome of this appeal.<sup>47</sup>

The IMF charges in this case are similar to the construction work in progress allowance charges in the *Columbus & Southern* case in that both charges are being contested in the Ohio Supreme Court. The only difference is that in this case the PUCO authorized the utility to collect the charges that the consumers’ advocate is appealing whereas in *Columbus & Southern* the PUCO ordered the utility to cease collecting certain costs and the utility appealed. There is no reason to treat the two circumstances differently. Nothing in either 4903.16 or 4903.17 limits, to a particular type of party, who can ask for a stay or who can ask the Court to establish a trust account. In fact, as mentioned above in the *Ohio Consumers’ Counsel 1985* case, this Court has granted a stay to OCC with the order to the utility to deposit the contested charges in a trust account, and should do so in this case.

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<sup>46</sup> *Columbus & Southern* (1984), 10 Ohio St.3d 12 at 13.

<sup>47</sup> *Id.*

In the another similar case, *Cincinnati Bell Telephone Company v. Public Utilities Commission of Ohio* (“*Cincinnati Bell*”),<sup>48</sup> the PUCO granted Cincinnati Bell Telephone’s (“CBT”) Motion to Stay the PUCO’s implementation of rates. Again the stay was granted contingent upon the utility’s payment into a trust account charges that were in excess of those allowed by the rehearing order.<sup>49</sup> Again the *Cincinnati Bell* case circumstances are similar to those in this case, except that the utility, rather than the customers, asked for the stay. As discussed above, there is no reason in law or in equity to forgo for customers the same protections provided utilities.

**V. THE NEED, IF ANY, FOR SURETY TO MEET “THE SATISFACTION OF THE CLERK OF THE SUPREME COURT” IS MET WHERE THE APPEAL IS BY A PUBLIC OFFICE OF THE STATE WITH A PUBLIC OFFICER AND WHERE THERE IS A TRUST ACCOUNT FOR COLLECTION OF THE CHARGES OR THE CHARGES ARE SUBJECT TO REFUND BY THE PUBLIC UTILITY.**

R.C. 4903.16 requires:

An appellant to execute an undertaking, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of\* \* \* in the event such order is sustained.

Consistent with its rulings in the *Ohio Consumers’ Counsel 1985* and the *Columbus & Southern* and *Cincinnati Bell* cases, this Court should grant OCC’s Motion for a Stay without requiring an undertaking other than the arrangement of a trust account. OCC explained above the reasons why it is not required to execute an undertaking in order for the Court to grant the stay.

If the contested IMF collections are paid into an interest-bearing account as they are collected from customers, then neither the utility nor the customers will be harmed or will suffer

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<sup>48</sup> *Cincinnati Bell* (1984), 12 Ohio St. 3d 280.

<sup>49</sup> *Id.* at 281.

“damages” while the controversy is being resolved. On the other hand, if OCC is not granted the stay and the PUCO decision is not upheld, then the customers will be irreparably harmed, as described above. The General Assembly provided for a means to prevent that irreparable harm under R.C. 4903.17 and 4903.18. The Court should make use of these statutory provisions, which are designed to protect both the rights of the consumers and of the public utilities pending a decision by this Court.

The Court also granted a stay without requiring an undertaking in *MCI Telecommunications, Corporation v. Public Utilities Commission of Ohio*.<sup>50</sup> Accordingly, the Court has protected the interests of parties requesting a stay from a PUCO decision without requiring an undertaking. For this reason, this Court should again protect customers from irreparable harm by granting a stay without requiring an undertaking and without a need for surety.

## VI. CONCLUSION

Duke Energy’s residential customers will be irreparably harmed in the absence of a stay. If Duke Energy continues to wrongfully collect the IMF charge without a stay of the PUCO’s order, then residential customers can likely never be made whole due to the provision against refunds established in *Keco*.

A supersedeas bond is not required in this case because OCC is acting in a representative capacity as a public officer under R.C. 2505.12, which was enacted after R.C. 4903.16 and therefore supersedes R.C. 4903.16. Moreover, if the Court orders Duke Energy to pay the

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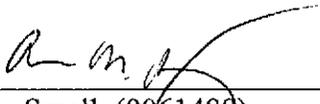
<sup>50</sup> *MCI Telecommunications, Corporation v. Public Utilities Commission of Ohio* (1987), 31 Ohio St. 3d 604.

collected IMF charges into an interest-bearing trust account as permitted under R.C. 4903.17, then Duke Energy will not be harmed should the Court sustain the IMF charges.

Therefore, the law and the public interest are served by granting OCC's motion for a stay.

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 Nonresidential Generation Rates to )  
Provide for Market-Based Standard Service ) Case No. 03-93-EL-ATA  
Offer Pricing and to Establish an Alternative )  
Competitive-Bid Service Rate Option Sub- )  
sequent to the Market Development Period. )

In the Matter of the Application of The )  
Cincinnati Gas & Electric Company for )  
Authority to Modify Current Accounting ) Case No. 03-2079-EL-AAM  
Procedures for Certain Costs Associated with )  
the Midwest Independent Transmission )  
System Operator. )

In the Matter of the Application of The )  
Cincinnati Gas & Electric Company for )  
Authority to Modify Current Accounting )  
Procedures for Capital Investment in its ) Case No. 03-2081-EL-AAM  
Electric Transmission and Distribution System ) Case No. 03-2080-EL-ATA  
and to Establish a Capital Investment )  
Reliability Rider to be Effective after the )  
Market Development Period. )

ORDER ON REMAND

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### ORDER ON REMAND

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:

Paul A. Colbert, Senior Counsel, John J. Finnigan, Jr., Senior Counsel, and Rocco D'Ascenzo, Counsel, 139 East Fourth Street, P.O. Box 960, Cincinnati, Ohio 45202, on behalf of Duke Energy Ohio, Inc. (formerly known as the Cincinnati Gas & Electric Company).

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.

Janine L. Migden-Ostrander, Ohio Consumers' Counsel, by Jeffrey L. Small, Ann M. Hotz, and Larry S. Sauer, Assistant Consumers' Counsel, Office of Consumers' Counsel, 10 West Broad Street, Suite 1800, Columbus, Ohio 43215, on behalf of the residential utility customers of Duke Energy Ohio, Inc.

Vorys, Sater, Seymour & Pease LLP, by M. Howard Petricoff and Stephen M. Howard, 52 East Gay Street, PO Box 1008, Columbus, Ohio 43215, on behalf of the Ohio Marketers' Group, comprised of Constellation NewEnergy, Inc.; MidAmerican Energy Company; Strategic Energy, LLC; and Integrys Energy Services, Inc. (formerly known as WPS Energy Services, Inc.).

McNees, Wallace & Nurick LLC, by Samuel C. Randazzo, Daniel J. Neilsen, and Joseph M. Clark, 21 East State Street, 17<sup>th</sup> Floor, Columbus, Ohio 43215, on behalf of Industrial Energy Users-Ohio.

Boehm, Kurtz & Lowry, by David F. Boehm and Michael L. Kurtz, 1500 URS Center, 36 East Seventh Street, Cincinnati, Ohio 45202, on behalf of the Ohio Energy Group, Inc.

Boehm, Kurtz & Lowry, by Michael L. Kurtz, 1500 URS Center, 36 East Seventh Street, Cincinnati, Ohio 45202, on behalf of the Kroger Co.

David C. Rinebolt and Colleen Mooney, 231 West Lima Street, Findlay, Ohio 45840, on behalf of Ohio Partners for Affordable Energy.

Christensen, Christensen, Donchatz, Kettlewell & Owens, LLP, by Mary W. Christensen, 100 East Campus View Boulevard, Suite 360, Columbus, Ohio 43235, on behalf of People Working Cooperatively, Inc.

Bell & Royer Co., LPA, by Barth E. Royer, 33 South Grant Avenue, Columbus, Ohio 43215, on behalf of Dominion Retail, Inc.

Richard L. Sites, General Counsel, 155 East Broad Street, 15<sup>th</sup> Floor, Columbus, Ohio 43215, and Bricker & Eckler LLP, by Ms. Sally W. Bloomfield and Mr. Thomas J. O'Brien, 100 South Third Street, Columbus, Ohio 43215, on behalf of the Ohio Hospital Association.

Marc Dann, Attorney General of the State of Ohio, Duane W. Luckey, Section Chief, Thomas W. McNamee, Werner L. Margard III, and Stephen P. Reilly, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Commission.

## OPINION:

### I. HISTORY OF THE PROCEEDINGS

On June 22, 1999, the Ohio General Assembly passed legislation<sup>1</sup> 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).<sup>2 3</sup> 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

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<sup>1</sup> Amended Substitute Senate Bill No. 3 of the 123<sup>rd</sup> General Assembly.

<sup>2</sup> *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.

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

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<sup>4</sup> 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.<sup>5</sup>

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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<sup>5</sup> 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 OP&E, 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, OP&E, and Cinergy and DERS, filed April 27, 2007.

(b) Legal Issues Relating to Confidentiality

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 OP&E. 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.<sup>6</sup>

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. Supreme Court of Ohio Remand

### 1. Background

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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<sup>6</sup> 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<sup>7</sup> 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.

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<sup>7</sup> 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.<sup>8</sup> 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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<sup>8</sup> 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 OP&E, "[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." (OP&E remand reply at 2.) Similarly, OM&G 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. (OM&G 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.<sup>9</sup>

#### 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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<sup>9</sup> 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.<sup>10</sup> 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

<sup>10</sup> 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<sub>2</sub> emission allowances and the promise that neither NO<sub>x</sub> emission allowance costs nor NO<sub>x</sub> 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) RSP Proposal: Provider of Last Resort Charge

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. Reserve Margin Costs

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.<sup>11</sup>

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<sup>11</sup> 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.)<sup>12</sup> 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.<sup>13</sup> 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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<sup>13</sup> *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.<sup>14</sup> 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.

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<sup>14</sup> 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.

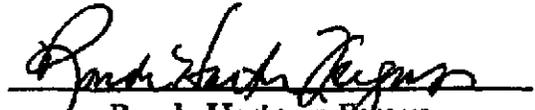
THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman



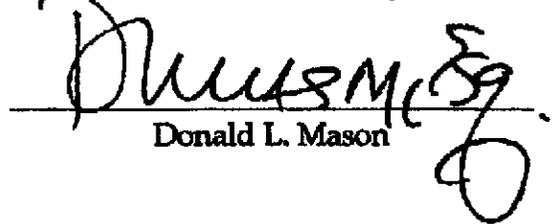
Paul A. Centolella



Ronda Hartman Fergus



Valerie A. Lemmie



Donald L. Mason

JWK/SEF:geb

Entered in the Journal

OCT 24 2007



Renee J. Jenkins  
Secretary



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 within 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).<sup>2</sup>
- (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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<sup>2</sup> 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) OPAAE sets forth two grounds for rehearing:

- (a) In its first assignment of error, OP&AEE 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, OP&AEE 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, OP&AEE 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. OP&AEE 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. (OP&AEE 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) OP&AEE 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, OP&E 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. (OP&E 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, OP&E insists that the stipulation remained in effect prior to the issuance of the order on remand. OP&E 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. (OP&E 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 OP&E be denied. It is, further,

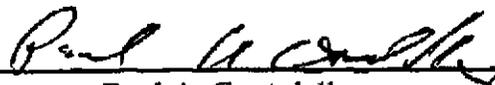
ORDERED, That Duke's fifth ground for rehearing be granted as set forth in Finding (11) for further consideration of the matters specified therein and that the remainder of Duke's application for rehearing be granted in part and denied in part. It is, further,

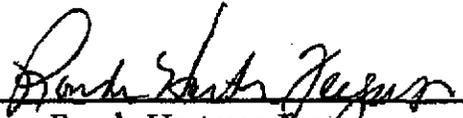
ORDERED, That the applications for rehearing by IEU be granted in part and denied in part. It is, further,

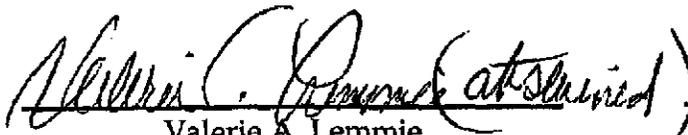
ORDERED, That a copy of this entry on rehearing be served upon all parties of record.

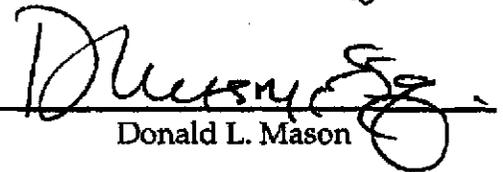
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Alan R. Schriber, Chairman

  
Paul A. Centolella

  
Ronda Hartman Fergus

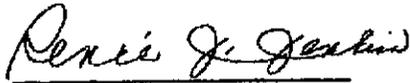
  
Valerie A. Lemmie

  
Donald L. Mason

JWK/SEF;geb

Entered in the Journal

DEC 19 2007



Renee J. Jenkins  
Secretary



## Office of the Ohio Consumers' Counsel

Your Residential Utility Advocate

Janine L. Migden-Ostrander  
Consumers' Counsel

May 23, 2008

*Via Hand Delivery*  
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180 East Broad Street, 9<sup>th</sup> Floor  
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PUCO

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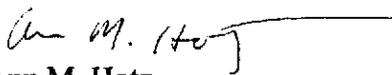
Re: *Office of the Ohio Consumers' Counsel v. Public Utilities Commission*,  
Supreme Court Case No. 08-0367

(PUCO cases below: 03-93-EL-ATA, 03-2079-EL-AAM, 03-2081-EL-AAM,  
and 03-2080-EL-ATA)

Dear Counsel for the PUCO:

Without waiving or conceding any arguments with respect to the notice provision in R.C. 4903.16, the Office of the Ohio Consumers' Counsel ("OCC") gives notice to the Public Utilities Commission of Ohio ("PUCO" or "Commission") regarding OCC's intent to file a motion at the Supreme Court of Ohio, on or after May 27, 2008, for a stay of the Commission's Order on Remand that authorized Duke Energy Ohio, Inc. ("Duke"), in the above-referenced PUCO cases, to collect the Infrastructure Maintenance Fund ("IMF") charges from customers. On February 15, 2008, OCC filed a motion for the PUCO to stay the Order on Remand, and the PUCO has not ruled on that motion. In the absence of a stay, the Commission's Order on Remand granting Duke the authority to collect the IMF charges is continuing to irreparably harm Duke's residential customers.

Sincerely,

  
Ann M. Hotz  
Assistant Consumers' Counsel

cc: Parties to PUCO Case 03-93-EL-ATA, et al.

**IN THE SUPREME COURT OF OHIO**

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

---

**MOTION FOR A STAY OF EXECUTION  
APPENDIX  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

---

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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 Nonresidential Generation Rates to  
Provide for Market-Based Standard Service  
Offer Pricing and to Establish an Alternative  
Competitive-Bid Service Rate Option Sub-  
Sequent 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  
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Case No. 03-2081-EL-AAM  
Case No. 03-2080-EL-ATA

In the Matter of the Commission's  
Promulgation of Rules for the Conduct of a  
Competitive Bidding Process for Electric  
Distribution Utilities Pursuant to Section  
4928.14, Revised Code.

Case No. 01-2164-EL-ORD

ENTRY

The Commission finds:

- (1) The applicant, The Cincinnati Gas & Electric Company (CG&E), is a public utility as defined in Section 4905.02, Revised Code, and, as such, is subject to the jurisdiction of this Commission.
- (2) On January 10, 2003, CG&E filed an application (pricing application), in Case No. 03-93-EL-ATA (pricing case), to modify its non-residential generation rates to provide for market-based standard service offer (MBSSO) pricing and to establish an alternative competitive-bid process (CBP) subsequent to the end of the market development period (MDP). Through its pricing application, CG&E intends to offer a retail market-based generation rate to non-residential end-use customers that do not switch to a competitive retail electric service (CRES) provider or the CBP for their generation service. CG&E's proposed CBP will provide non-residential

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end-use customers with another option in addition to the MBSSO through a competitive offering by a CRES provider.

- (3) A technical conference was held on February 12, 2003, to allow interested persons the opportunity to better understand CG&E's pricing application. Interested persons and the Commission's staff (staff) also were provided the opportunity to file comments and reply comments and to propose alternative methodologies to CG&E's application.
- (4) Motions to intervene in the pricing case were filed by The Kroger Co.; Industrial Energy Users-Ohio (IEU-Ohio); AK Steel Corporation (AK Steel); General Electric Company; Constellation NewEnergy, Inc.; MidAmerican Energy Company; Ohio Consumers' Counsel (OCC); Strategic Energy, LLC; Dominion Retail, Inc.; Energy America, LLC; Duke Realty (Duke); Ohio Partners for Affordable Energy (OPAE); and National Energy Marketers Association (NEMA) (collectively, intervenors). As the Commission finds that CG&E's pricing application may have a direct effect on the MBSSO and CBP for all CG&E customers and that the intervenors have set forth valid reasons for intervention, all of the motions to intervene filed by the intervenors will be granted. Motions for admission *pro hac vice* were filed to admit Craig G. Goodman and David C. Rinebolt to practice before the Commission in the pricing case. These motions will also be granted.
- (5) Comments and/or reply comments regarding the pricing application, and/or proposed alternative methodologies, were filed by all of the intervenors other than Duke, as well as by staff, CG&E, The Dayton Power & Light Company, and Eagle Energy, LLC (collectively, commenters).
- (6) OCC, IEU-Ohio, AK Steel, and OPAE, have filed motions to dismiss CG&E's pricing application or, alternatively, to set the matter for hearing pursuant to Section 4909.18, Revised Code, or to stay the matter until the Commission completes its rulemaking in In the Matter of the commission's Promulgation of Rules for the conduct of a Competitive Bidding Process for Electric Distribution Utilities Pursuant to Section 4928.14, Revised Code, Case No. 01-2164-EL-ORD (rulemaking proceeding). OCC also requests that the Commission consolidate CG&E's pricing application with the rulemaking proceeding. These parties and several other parties filing comments argue that CG&E's pricing application should be dismissed or stayed until the Commission has considered the comments filed in the rulemaking proceeding and has established proper procedures for the development of MBSSOs and CBPs. They argue that it would be premature to go forward with CG&E's application before rules are approved. In addition, all commenters, including staff, believe that CG&E's pricing application is contrary to electric restructuring public policy objectives set forth in Section

4928.02, Revised Code, and that the pricing application produces results that are unreasonable and unlawful. It is also asserted that certain proposed riders affect customers who would not take service through MBSSO or CBP and, therefore, constitute an increase in rates. Further, certain commenters argue that the application would eliminate the ability of residential customers to be bid as a part of a pool that includes non-residential customers, eliminating the potential for maximum savings under the CBP. The commenters that oppose the pricing application request that the Commission find that the pricing application may be unjust and unreasonable and set the matter for hearing if the Commission does not dismiss the pricing application.

- (7) Staff recommends, in its comments, that the Commission hold a hearing on the pricing application inasmuch as it appears to staff that the pricing application appears to be unjust and unreasonable. Staff believes that CG&E's pricing application should not be accepted because its MBSSO is intrinsically anti-competitive. Staff believes that approval of the pricing application would essentially allow CG&E to provide service in the same manner as a CRES provider and that CG&E should not actively compete as a CRES provider within the operational and legal structure of a public utility. Staff also notes that the prerequisite market institutions for the MBSSO are not yet in place. Staff argues that CG&E is seeking approval of a market tracking mechanism which is specific to the wholesale market as it exists today; however, this market is not sufficiently developed to provide confidence in any tracking methodology. Staff also agrees with the various commenters who believe that the pricing application is premature inasmuch as the Commission is still considering MBSSO and CBP rules. Staff also asserts that certain of the costs to be recovered through the proposed tariffs have not been justified.
- (8) After considering all the motions and comments filed, the Commission believes that the motions to dismiss CG&E's pricing application should be denied. However, staff and the commenters have raised many issues that merit holding a hearing on CG&E's pricing application. It appears that the pricing application may be unjust and unreasonable and that, pursuant to Section 4909.18, Revised Code, a hearing should be held. The Commission also believes that, in light of the current status of the rulemaking proceeding, it would not be premature and counterproductive to hold a hearing prior to the completion of that proceeding. The Commission further finds that OCC's request to consolidate the pricing case with the rulemaking procedure should also be denied as it would only unnecessarily complicate the rulemaking proceeding.

- (9) On October 8, 2003, CG&E filed an application (MISO costs application), in Case No. 03-2079-EL-AAM (MISO costs case), to permit it to defer Schedule 10 Federal Energy Regulatory Commission (FERC) costs and costs assessed by the Midwest Independent System Operator (MISO) pursuant to schedules 16 and 17 of its Open Access Transmission Tariff, also approved by FERC. Through its MISO costs application, CG&E states that it hopes to be able to recover certain costs in order to provide it with the incentive to maintain a sufficient level of capital investment necessary to maintain reliable transmission and distribution.
- (10) On October 8, 2003, CG&E also filed an application (capital investment application), in Case No. 03-2081-EL-AAM, to permit it to defer capital investments made during the market development period in its transmission and distribution system and, in Case No. 03-2080-EL-ATA, to establish a rider to recover such capital investments made after the market development period (collectively, capital investment cases). CG&E states that it intends, through the capital investment cases, to facilitate the operation of a reliable transmission and distribution system by removing the disincentives to capital investment which were created by frozen rates.
- (11) On October 23, 2003, and November 4, 2003, The Ohio Energy Group (OEG) and OCC, respectively, filed motions to intervene in both the MISO costs case and the capital investment cases. As these cases could have an impact on customers' rates, and OEG and OCC have set forth valid reasons for intervention, these motions will be granted.
- (12) OEG and OCC also filed motions to dismiss the MISO costs application and the capital investment application. OCC argues that the Commission has no authority to grant CG&E's requests and that the MISO costs application and the capital investment application are inconsistent with the statewide electric transition framework, with the stipulation CG&E signed to settle its electric transition plan case,<sup>1</sup> and with the distribution and transmission rate cap established for the MDP. Similarly, OEG contends that these applications violate statutory provisions establishing a transmission and distribution rate cap during the MDP, that the applications are attempts to engage in single-issue ratemaking and, with regard to the capital investment application, that the proposed rider is counter to the statutory framework for ratemaking.
- (13) The Commission, after due consideration of OEG's and OCC's motions to dismiss the MISO costs application and the capital investment application, finds that the motions should be denied.

<sup>1</sup> *In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan and for Authorization to Collect Transition Revenues, Case No. 99-1658-EL-ETP (ETP case).*

However, as OEG and OCC have raised a number of issues that make it appear that the MISO costs application and the capital costs application may be unjust and unreasonable, a hearing should be held. The Commission further finds that, as there may be issues which overlap among the pricing case, the MISO costs case and the capital investment case, these cases should be consolidated. In addition, the consolidation of these cases will help the Commission consider CG&E's electric operations on a more unified basis.

- (14) The Commission is concerned that the competitive retail market for electric generation has not developed as rapidly as was anticipated when it issued its opinion and order the ETP case. We have previously stated that we encourage electric utilities to consider the establishment of plans which will stabilize prices following the termination of their MDPs, and will allow additional time for competitive electric markets to grow.<sup>2</sup> As the competitive retail market for electric generation has not fully developed in the CG&E territory, the Commission finds it advisable that CG&E file a rate stabilization plan as part of these proceedings, for the Commission's consideration.
- (15) The Commission will establish the following procedural schedule for these proceedings:
  - (a) Monday, January 26, 2004 - CG&E is requested to file a proposed rate stabilization plan.
  - (b) Tuesday, February 24, 2004 - A technical and procedural conference will be held at 10:00 a.m., in hearing room 11-D, at the offices of the Commission.
  - (c) Tuesday, March 2, 2004 - This is the deadline for filing motions to intervene in these proceedings and for filing objections to CG&E's proposed rate stabilization plan.
  - (d) Thursday, March 25, 2004 - CG&E's testimony is due.
  - (e) Thursday, April 1, 2004 - Staff's testimony is due.
  - (f) Thursday, April 8, 2004 - This is the testimony due date for all other parties wishing to present testimony.
  - (g) Monday, April 19, 2004 - An evidentiary hearing will be held at 10:00 a.m., in hearing room 11-D, at the offices of the Commission.

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<sup>2</sup> *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, 9/2/2003, at 29).*

(16) A local public hearing will be held at a time and place to be determined by future entry.

It is, therefore,

ORDERED, That motions to intervene and motions for admission *pro hac vice*, as set forth in findings (4) and (11), be granted. It is, further,

ORDERED, That the motions to dismiss CG&E's pricing application and OCC's motion to consolidate the pricing case with Case No. 01-2164-EL-ORD be denied. It is, further,

ORDERED, That OEG's and OCC's motions to dismiss the MISO costs application and the capital costs application be denied. It is, further,

ORDERED, That Case Nos. 03-93-EL-ATA, 03-2079-EL-AAM, 03-2080-EL-ATA, and 03-2081-EL-AAM be consolidated. It is, further,

ORDERED, That the procedural schedule set forth in finding (15) be followed. It is, further,

ORDERED, That a copy of this entry 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

DEC 9 2003

Renee 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 ) Case No. 03-93-EL-ATA  
Offer Pricing and to Establish an Alternative )  
Competitive-Bid Service Rate Option Sub- )  
sequent to the Market Development Period. )

In the Matter of the Application of The )  
Cincinnati Gas & Electric Company for )  
Authority to Modify Current Accounting ) Case No. 03-2079-EL-AAM  
Procedures for Certain Costs Associated with )  
the Midwest Independent Transmission )  
System Operator. )

In the Matter of the Application of The )  
Cincinnati Gas & Electric Company for )  
Authority to Modify Current Accounting )  
Procedures for Capital Investment in its ) Case No. 03-2081-EL-AAM  
Electric Transmission and Distribution System ) Case No. 03-2080-EL-ATA  
And to Establish a Capital Investment )  
Reliability Rider to be Effective after the )  
Market Development Period. )

In the Matter of the Application of The )  
Cincinnati Gas & Electric Company to Modify )  
its Fuel and Economy Purchased Power ) Case No. 05-725-EL-UNC  
Component of its Market-Based Standard )  
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In the Matter of the Application of Duke )  
Energy Ohio, Inc., to Adjust and Set its ) Case No. 06-1069-EL-UNC  
System Reliability Tracker. )

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

000007

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In the Matter of the Application of Duke )  
 Energy Ohio, Inc., to Adjust and Set the ) Case No. 06-1085-EL-UNC  
 Annually Adjusted Component of its Market )  
 Based Standard Service Offer. )

ENTRY

The attorney examiner finds:

- (1) 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, et al. (RSP case), this Commission authorized Duke Energy Ohio (DE-Ohio)<sup>1</sup> to establish a rate stabilization plan and, as a part of that plan, to recover various costs through identified riders.
- (2) On appeal of that Commission decision, the Ohio Supreme Court remanded the proceedings to the Commission, requesting, *inter alia*, that the Commission provide additional record evidence and sufficient reasoning to support the modification of its opinion and order on rehearing. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789. The entry on rehearing, *inter alia*, modified or created various riders, as part of the rate stabilization plan.
- (3) Adjustments to certain of the riders established through the RSP case are currently pending before the Commission. Specifically, the fuel and economy purchased power component (FPP) is being considered in Case No. 05-725, the system reliability tracker component (SRT) is being considered in Case Nos. 06-1069 and 05-724, and the annually adjusted component (AAC) is being considered in Case No. 06-1085, all as captioned above.
- (4) In the FPP and SRT proceedings, testimony of staff and the intervenors is scheduled to be filed on November 29, 2006. The examiner has previously determined that a hearing should be held, but a date for that hearing has not been established.

<sup>1</sup> DE-Ohio was formerly known as the Cincinnati Gas & Electric Company. In this entry, it will be referred to as DE-Ohio, regardless of its name at the time being discussed. Case names, however, will not be modified.

- (5) In the AAC case, testimony of staff and intervenors was scheduled to be filed on November 28, 2006. A hearing is currently scheduled to be held on December 5, 2006.
- (6) The examiner finds that, in light of the Supreme Court's remand of the RSP case, testimony should not be filed at this time in the FPP and SRT proceedings, and the hearing in the AAC proceeding should be continued until a date to be determined.
- (7) In addition, the examiner finds that a hearing should be held in the remanded RSP case, in order to obtain the record evidence required by the court. At this time, a prehearing conference should be scheduled to discuss the procedure for the hearing in the remanded RSP case, as well as the FPP, SRT, and AAC proceedings. For purposes of discussion, the examiner proposes that a single hearing be held in all of these proceedings and that testimony by Duke be filed first, followed by a review period and subsequent testimony by intervenors and staff.
- (8) The prehearing conference in these proceedings should be held at 10:00 a.m. on Thursday, December 14, 2006, in the legal conference room on the 12<sup>th</sup> floor of the offices of the Commission, 180 East Broad Street, Columbus, Ohio 43215.
- (9) The court's opinion in the RSP case also held that the Commission should have compelled disclosure of side agreements requested in discovery by the Office of the Ohio Consumers' Counsel (OCC). Therefore, the examiner finds that Duke should, as ordered by the court, disclose to OCC the information requested with regard to side agreements.

It is, therefore,

ORDERED, That testimony in the FPP and SRT proceedings not be filed, until further notice. It is, further,

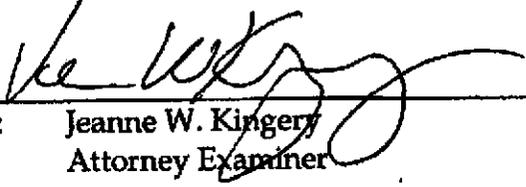
ORDERED, That the hearing, currently scheduled for December 5, 2006, in the AAC proceeding be continued. It is, further,

ORDERED, That a prehearing conference be held on Thursday, December 14, 2006, as set forth in finding (8). It is, further,

ORDERED, That Duke shall disclose to OCC the information requested in discovery with regard to side agreements. It is, further,

ORDERED, That a copy of this entry be served upon Energy Ventures Analysis, Inc., and all parties of record in these proceedings.

THE PUBLIC UTILITIES COMMISSION OF OHIO

  
By: Jeanne W. Kingery  
Attorney Examiner

geb P<sup>2</sup>

Entered in the Journal

NOV 29 2006

  
Renee J. Jenkins

Renee J. Jenkins  
Secretary

# The Supreme Court of Ohio Columbus

1985 TERM

To wit: May 8, 1985

Office of Consumers' Counsel, :  
Appellant, :

Case No. 85-390

v. :

O R D E R

Public Utilities Commission :  
of Ohio, :  
Appellee. :

This cause is pending before the Court on an appeal from the Public Utilities Commission of Ohio, and upon consideration of the application for stay of the Commission Order dated November 20, 1984 filed by the appellant pursuant to R.C. 4903.16,

IT IS ORDERED by the Court that said application be, and the same is hereby, granted subject to the provisions stated hereinbelow.

IT IS FURTHER ORDERED that collections, to date, and future collections of post in-service allowance for funds used during construction (AFUDC) be deposited in an Interest Bearing Account in a financial institution in the State of Ohio.

IT IS FURTHER ORDERED that, pursuant to R.C. 4903.17, James Wm. Kelly, Clerk of the Supreme Court of Ohio, be appointed Trustee of said Interest Bearing Account which he shall establish upon receipt of the first monies from the Cincinnati Gas and Electric Company and which he shall thenceforth supervise.

IT IS FURTHER ORDERED that monies representing post in-service AFUDC collected, to date, and future collections be deposited as directed by the Trustee.

IT IS FURTHER ORDERED that the Trustee shall, at regular intervals, file with this Court a report reflecting certain financial information on said Interest Bearing Account.

IT IS FURTHER ORDERED that the Trustee may require the Cincinnati Gas and Electric Company to keep records in a specified manner sufficient to show to whom the amounts are being charged or from whom amounts are being received.

IT IS FURTHER ORDERED that the Trustee be empowered to secure the advice and assistance of independent experts in the performance of certain duties.

IT IS FURTHER ORDERED that any fee, charge, expense or cost incurred as a result of the existence of said Interest Bearing Account shall be paid in such manner as further directed by the Court.

IT IS FURTHER ORDERED that said Interest Bearing Account shall continue to exist until final determination of this cause or until otherwise ordered by the Court.

*Frank D. Celebrezze*

FRANK D. CELEBREZZE  
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this 8th day of May, 1985.

JAMES WM. KELLY

CLERK

*Lawrence J. Jaccini*

DEPUTY

SC-8 (BLANK ENTRY)

BARRETT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

THE STATE OF OHIO, }  
City of Columbus. }

19.83. TERM

Columbus and Southern Ohio  
Electric Company,  
Appellant,

To wit: March 23, 1983

vs.

No. 83-461

The Public Utilities Commission  
of Ohio,  
Appellee.

ON MOTION FOR STAY

This cause is pending before the court on an appeal from the Public Utilities Commission of Ohio, and upon consideration of the application for stay, it is ordered by the court that this application be, and the same hereby is, granted, on the condition that the difference between the \$41.7 million order of November 5, 1982, and the \$28.171 million order of March 16, 1983, (\$13,529,000.00) be segregated as collected and deposited in an interest bearing account in a Financial Institution in the State of Ohio under the supervision of James Wm. Kelly, Trustee, Clerk of the Supreme Court of Ohio, as provided in R. C. 4903.17, until further order of the court.

I, JAMES Wm. KELLY, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.....Page.....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 23rd day of March, 19 83

JAMES WM. KELLY Clerk.

By.....Deputy.

## THE SUPREME COURT, JANUARY TERM, A. D. 1983

Wednesday 16th Day of March 19 83

✓83-392

Cincinnati Bell Inc.,  
Appellant,

Wednesday, March 16, 1983

v.

MOTION FOR STAY

Public Utilities Commission of Ohio,  
Appellee.

This cause is pending before the Court on an appeal from the Public Utilities Commission of Ohio, and upon consideration of the application for stay, it is ordered by the Court that this application be, and the same hereby is granted.

The bond is set at Eight Million Dollars (\$8,000,000.00) or in the alternative the company is to establish a trust or reserve fund in an interest bearing account supervised by the Supreme Court in a financial institution in this state and to deposit therein the charges collected in excess of that which have been established by the order of the Public Utilities Commission of Ohio appeal as herein.

✓82-1825

John G. Rust,  
Appellant,

Wednesday, March 9, 1983

v.

MOTION FOR AN ORDER DIRECTING  
THE COURT OF APPEALS FOR LUCAS  
COUNTY TO CERTIFY ITS RECORDJames M. Ruvolet,  
Appellee,

It is ordered by the Court that this motion is overruled, and the Court sua sponte dismisses the appeal for the reasons that no substantial constitutional question exists herein. It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Lucas County for entry.

✓82-940

The State of Ohio,  
Appellee,

Wednesday, March 16, 1983

v.

MOTION FOR LEAVE TO APPEAL FROM  
THE COURT OF APPEALS FOR WOOD  
COUNTYDonald D. Coates,  
Appellant.

It is ordered by the Court that this motion is overruled, and the Court sua sponte dismisses the appeal for the reasons that no substantial constitutional question exists herein. It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Wood County for entry.

✓82-1202

The State of Ohio,  
Appellee,

Wednesday, March 16, 1983

v.

MOTION FOR LEAVE TO APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA  
COUNTYAlvin B. Allen,  
Appellant.

It is ordered by the Court that this motion is overruled, and the Court sua sponte dismisses the appeal for the reasons that no substantial constitutional question exists herein. It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

✓82-1252

The State of Ohio,  
Appellee,

Wednesday, March 16, 1983

v.

MOTION FOR LEAVE TO APPEAL FROM  
THE COURT OF APPEALS FOR FRANKLIN  
COUNTYOsie Malone,  
Appellant.

It is ordered by the Court that this motion is overruled, and the Court sua sponte dismisses the appeal for the reasons that no substantial constitutional question exists herein. It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

✓82-1299

The State of Ohio,  
Appellee,

Wednesday, March 16, 1983

v.

MOTION FOR LEAVE TO APPEAL FROM  
THE COURT OF APPEALS FOR STARK  
COUNTYLarry Junior Miner,  
Appellant.

It is ordered by the Court that this motion is overruled, and the Court sua sponte dismisses the appeal for the reasons that no substantial constitutional question exists herein. It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Stark County for entry.

## **1.51 Special or local provision prevails as exception to general provision.**

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

Effective Date: 01-03-1972

**000015**

## **2505.12 No supersedeas bond required for certain appeals.**

An appellant is not required to give a supersedeas bond in connection with any of the following:

(A) An appeal by any of the following:

(1) An executor, administrator, guardian, receiver, trustee, or trustee in bankruptcy who is acting in that person's trust capacity and who has given bond in this state, with surety according to law;

(2) The state or any political subdivision of the state;

(3) Any public officer of the state or of any of its political subdivisions who is suing or is sued solely in the public officer's representative capacity as that officer.

(B) An administrative-related appeal of a final order that is not for the payment of money.

Effective Date: 07-11-2001

## **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

**000017**

## **4903.16 Stay of execution.**

A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained.

Effective Date: 10-01-1953

## **4903.17 Order in case of stay.**

The supreme court, in case it stays or suspends the order or decision of the public utilities commission in any matter affecting rates, joint rates, fares, tolls, rentals, charges, or classifications, may also by order direct the public utility or railroad affected to pay into the hands of a trustee to be appointed by the court, to be held until the final determination of the proceeding, under such conditions as the court prescribes, all sums of money collected in excess of the sums payable if the order or decision of the commission had not been stayed or suspended.

Effective Date: 10-01-1953

**000019**

## **4903.18 Order to keep excess accounts pending review.**

In case the supreme court stays or suspends any order or decision of the public utilities commission lowering any rate, joint rate, fare, toll, rental, charge, or classification, the commission, upon the execution and approval of the suspending bond required by section 4903.16 of the Revised Code, may require the public utility or railroad affected, under penalty of the immediate enforcement of the order or decision of the commission, pending review, to keep such accounts, verified by oath, as are, in the judgment of the commission, sufficient to show the amounts being charged or received by such public utility or railroad in excess of the charges allowed by the order or decision of the commission, together with the names and addresses of the corporations or persons to whom overcharges will be refundable in case the charges made by the public utility or railroad pending review are not sustained by the supreme court.

Effective Date: 10-01-1953

## **4903.19 Disposition of moneys charged in excess.**

Upon the final decision by the supreme court upon an appeal from an order or decision of the public utilities commission, all moneys which the public utility or railroad has collected pending the appeal, in excess of those authorized by such final decision, shall be promptly paid to the corporations or persons entitled to them, in such manner and through such methods of distribution as are prescribed by the court. If any such moneys are not claimed by the corporations or persons entitled to them within one year from the final decision of the supreme court, the trustees appointed by the court shall give notice to such corporations or persons by publication, once a week for two consecutive weeks, in a newspaper of general circulation published in Columbus, and in such other newspapers as are designated by such trustee, said notice to state the names of the corporations or persons entitled to such moneys and the amount due each corporation or person. All moneys not claimed within three months after the publication of said notice shall be paid by the public utility or railroad, under the direction of such trustee, into the state treasury for the benefit of the general fund. The court may make such order with respect to the compensation of the trustee as it deems proper.

Effective Date: 10-07-1977

000021

## **4905.32 Schedule rate collected.**

No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time.

No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service.

Effective Date: 10-01-1953

## **4911.02 Consumers' counsel - powers and duties.**

(A) The consumers' counsel shall be appointed by the consumers' counsel governing board, and shall hold office at the pleasure of the board.

(B)(1) The counsel may sue or be sued and has the powers and duties granted him under this chapter, and all necessary powers to carry out the purposes of this chapter.

(2) Without limitation because of enumeration, the counsel:

(a) Shall have all the rights and powers of any party in interest appearing before the public utilities commission regarding examination and cross-examination of witnesses, presentation of evidence, and other matters;

(b) May take appropriate action with respect to residential consumer complaints concerning quality of service, service charges, and the operation of the public utilities commission;

(c) May institute, intervene in, or otherwise participate in proceedings in both state and federal courts and administrative agencies on behalf of the residential consumers concerning review of decisions rendered by, or failure to act by, the public utilities commission;

(d) May conduct long range studies concerning various topics relevant to the rates charged to residential consumers.

Effective Date: 09-01-1976

**000023**

## **4911.06 Consumers' counsel considered state officer.**

The consumers' counsel shall be considered a state officer for the purpose of section 24 of Article II, Ohio constitution.

Effective Date: 09-01-1976

**000024**

► This document has been updated. Use **KEYCITE**.

Baldwin's Ohio Revised Code Annotated Currentness  
Title XLIX. Public Utilities  
    Chapter 4928. Competitive Electric Retail Service  
        General Provisions

→ **4928.143 Electric security plan**

(A) For the purpose of complying with section 4928.141 of the Revised Code, an electric distribution utility may file an application for public utilities commission approval of an electric security plan as prescribed under division (B) of this section. The utility may file that application prior to the effective date of any rules the commission may adopt for the purpose of this section, and, as the commission determines necessary, the utility immediately shall conform its filing to those rules upon their taking effect.

(B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20, division (E) of section 4928.64, and section 4928.69 of the Revised Code:

(1) An electric security plan shall include provisions relating to the supply and pricing of electric generation service. In addition, if the proposed electric security plan has a term longer than three years, it may include provisions in the plan to permit the commission to test the plan pursuant to division (E) of this section and any transitional conditions that should be adopted by the commission if the commission terminates the plan as authorized under that division.

(2) The plan may provide for or include, without limitation, any of the following:

(a) Automatic recovery of any of the following costs of the electric distribution utility, provided the cost is prudently incurred: the cost of fuel used to generate the electricity supplied under the offer; the cost of purchased power supplied under the offer, including the cost of energy and capacity, and including purchased power acquired from an affiliate; the cost of emission allowances; and the cost of federally mandated carbon or energy taxes;

(b) A reasonable allowance for construction work in progress for any of the electric distribution utility's cost of constructing an electric generating facility or for an environmental expenditure for any electric generating facility of the electric distribution utility, provided the cost is incurred or the expenditure occurs on or after January 1, 2009. Any such allowance shall be subject to the construction work in progress allowance limitations of division (A) of section 4909.15 of the Revised Code, except that the commission may authorize such an allowance upon the incurrence of the cost or occurrence of the expenditure. No such allowance for generating facility construction shall be authorized, however, unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Further, no such allowance shall be authorized unless the facility's construction was sourced through a competitive bid process, regarding which process the commission may adopt rules. An allowance approved under division (B)(2)(b) of this section shall be established as a nonbypassable surcharge for the life of the facility.

(c) The establishment of a nonbypassable surcharge for the life of an electric generating facility that is owned or

operated by the electric distribution utility, was sourced through a competitive bid process subject to any such rules as the commission adopts under division (B)(2)(b) of this section, and is newly used and useful on or after January 1, 2009, which surcharge shall cover all costs of the utility specified in the application, excluding costs recovered through a surcharge under division (B)(2)(b) of this section. However, no surcharge shall be authorized unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Additionally, if a surcharge is authorized for a facility pursuant to plan approval under division (C) of this section and as a condition of the continuation of the surcharge, the electric distribution utility shall dedicate to Ohio consumers the capacity and energy and the rate associated with the cost of that facility. Before the commission authorizes any surcharge pursuant to this division, it may consider, as applicable, the effects of any decommissioning, deratings, and retirements.

(d) Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service;

(e) Automatic increases or decreases in any component of the standard service offer price;

(f) Provisions for the electric distribution utility to securitize any phase-in, inclusive of carrying charges, of the utility's standard service offer price, which phase-in is authorized in accordance with section 4928.144 of the Revised Code; and provisions for the recovery of the utility's cost of securitization.

(g) Provisions relating to transmission, ancillary, congestion, or any related service required for the standard service offer, including provisions for the recovery of any cost of such service that the electric distribution utility incurs on or after that date pursuant to the standard service offer;

(h) Provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility. The latter may include a long-term energy delivery infrastructure modernization plan for that utility or any plan providing for the utility's recovery of costs, including lost revenue, shared savings, and avoided costs, and a just and reasonable rate of return on such infrastructure modernization. As part of its determination as to whether to allow in an electric distribution utility's electric security plan inclusion of any provision described in division (B)(2)(h) of this section, the commission shall examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.

(i) Provisions under which the electric distribution utility may implement economic development, job retention, and energy efficiency programs, which provisions may allocate program costs across all classes of customers of the utility and those of electric distribution utilities in the same holding company system.

(C)(1) The burden of proof in the proceeding shall be on the electric distribution utility. The commission shall issue an order under this division for an initial application under this section not later than one hundred fifty days after the application's filing date and, for any subsequent application by the utility under this section, not later than two hundred seventy-five days after the application's filing date. Subject to division (D) of this section, the commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. Additionally, if the commission\*so

approves an application that contains a surcharge under division (B)(2)(b) or (c) of this section, the commission shall ensure that the benefits derived for any purpose for which the surcharge is established are reserved and made available to those that bear the surcharge. Otherwise, the commission by order shall disapprove the application.

(2)(a) If the commission modifies and approves an application under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section or a standard service offer under section 4928.142 of the Revised Code.

(b) If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively.

(D) Regarding the rate plan requirement of division (A) of section 4928.141 of the Revised Code, if an electric distribution utility that has a rate plan that extends beyond December 31, 2008, files an application under this section for the purpose of its compliance with division (A) of section 4928.141 of the Revised Code, that rate plan and its terms and conditions are hereby incorporated into its proposed electric security plan and shall continue in effect until the date scheduled under the rate plan for its expiration, and that portion of the electric security plan shall not be subject to commission approval or disapproval under division (C) of this section, and the earnings test provided for in division (F) of this section shall not apply until after the expiration of the rate plan. However, that utility may include in its electric security plan under this section, and the commission may approve, modify and approve, or disapprove subject to division (C) of this section, provisions for the incremental recovery or the deferral of any costs that are not being recovered under the rate plan and that the utility incurs during that continuation period to comply with section 4928.141, division (B) of section 4928.64, or division (A) of section 4928.66 of the Revised Code.

(E) If an electric security plan approved under division (C) of this section, except one withdrawn by the utility as authorized under that division, has a term, exclusive of phase-ins or deferrals, that exceeds three years from the effective date of the plan, the commission shall test the plan in the fourth year, and if applicable, every fourth year thereafter, to determine whether the plan, including its then-existing pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. The commission shall also determine the prospective effect of the electric security plan to determine if that effect is substantially likely to provide the electric distribution utility with a return on common equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility. If the test results are in the negative or the commission finds that continuation of the electric security plan will result in a return on equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that will face comparable business and financial risk, with such adjustments for capital structure as may be appropriate, during the balance of the plan, the commission may terminate the electric security plan, but not until it shall have provided interested parties with notice and an opportunity to be heard. The commission may impose such conditions on the plan's termination as it considers reasonable and necessary to accommodate the transition from an approved plan to the more advantageous alternative. In the event of an electric security plan's termination pursuant to this division, the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan.

(F) With regard to the provisions that are included in an electric security plan under this section, the commission shall consider, following the end of each annual period of the plan, if any such adjustments resulted in excessive

earnings as measured by whether the earned return on common equity of the electric distribution utility is significantly in excess of the return on common equity that was earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. Consideration also shall be given to the capital requirements of future committed investments in this state. The burden of proof for demonstrating that significantly excessive earnings did not occur shall be on the electric distribution utility. If the commission finds that such adjustments, in the aggregate, did result in significantly excessive earnings, it shall require the electric distribution utility to return to consumers the amount of the excess by prospective adjustments; provided that, upon making such prospective adjustments, the electric distribution utility shall have the right to terminate the plan and immediately file an application pursuant to section 4928.142 of the Revised Code. Upon termination of a plan under this division, rates shall be set on the same basis as specified in division (C)(2)(b) of this section, and the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan. In making its determination of significantly excessive earnings under this division, the commission shall not consider, directly or indirectly, the revenue, expenses, or earnings of any affiliate or parent company.

(2008 S 221, eff. 7-31-08)

**R.C. § 4928.143, OH ST § 4928.143**

Current through 2008 File 81 of the 127th GA (2007-2008),  
apv. by 5/22/08, and filed with the Secretary of State by 5/22/08.

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(3) Effect of Extension of Time Upon Other Parties on the Same Side.

When one party receives an extension of time under division (B)(2) of this section, the extension shall apply to all other parties on that side.

**Section 4. Motions; Responses.**

(A) Unless otherwise prohibited by these rules, an application for an order or other relief shall be made by filing a motion for the order or relief. The motion shall state with particularity the grounds on which it is based. A motion to stay a lower court's decision pending appeal shall include relevant information regarding bond and be accompanied by a copy of the lower court's decision and any applicable opinion.

(B) If a party files a motion with the Supreme Court, any other party may file a memorandum opposing the motion within 10 days from the date the motion is filed, unless otherwise provided in these rules. A reply to a memorandum opposing a motion shall not be filed by the moving party. The Clerk shall refuse to file a reply to a memorandum opposing a motion, and motions to waive this rule are prohibited and shall not be filed.

(C) The Supreme Court may act upon a motion before the deadline for filing a memorandum opposing the motion if the motion is for a procedural order, including an extension of time to file a merit brief, or if the motion requests emergency relief and the interests of justice warrant immediate consideration by the Supreme Court. Any party adversely affected by the action of the Supreme Court may file a motion to vacate the action.

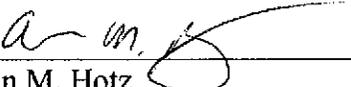
**Section 5. Frivolous Actions; Sanctions; Vexatious Litigators.**

(A) If the Supreme Court, *sua sponte* or on motion by a party, determines that an appeal or other action is frivolous or is prosecuted for delay, harassment, or any other improper purpose, it may impose, on the person who signed the appeal or action, a represented party, or both, appropriate sanctions. The sanctions may include an award to the opposing party of reasonable expenses, reasonable attorney fees, costs or double costs, or any other sanction the Supreme Court considers just. An appeal or other action shall be considered frivolous if it is not reasonably well-grounded in fact or warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

(B) If a party habitually, persistently, and without reasonable cause engages in frivolous conduct under section 5(A) of this rule, the Supreme Court may, *sua sponte* or on motion by a party, find the party to be a vexatious litigator. If the Supreme Court determines that a party is a vexatious litigator under this rule, the Court may impose filing restrictions on the party. The restrictions may include prohibiting the party from continuing or instituting legal proceedings in the Supreme Court without first obtaining leave, prohibiting the filing of actions in the Supreme Court without the filing fee or security for costs required by S.Ct.Prac.R. XV, or any other restriction the Supreme Court considers just.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion for Stay of Execution of the Office of the Ohio Consumers' Counsel was served upon all parties of record by hand-delivery or regular U.S. Mail this 30th day of May 2008.

  
\_\_\_\_\_  
Ann M. Hotz  
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Office of the Ohio Consumers' Counsel

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