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

Office of the Ohio Consumers' Counsel and Ohio Partners for Affordable Energy, Appellants, v. The Public Utilities Commission of Ohio, Appellee.	)	Case No. 08-0466 Appeal from the Public Utilities Commission of Ohio Public Utilities Commission of Ohio Case No. 05-725-EL-UNC 06-1068-EL-UNC 06-1069-EL-UNC 06-1085-EL-UNC

APPENDIX TO THE MERIT BRIEF OF APPELLANT, OHIO PARTNERS FOR AFFORDABLE ENERGY

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APPENDIX TO MERIT BRIEF
TABLE OF CONTENTS

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Ohio Partners for Affordable Energy, Appellant, v. The Public Utilities Commission of Ohio, Appellee.	)	Case No. ____ PUCO Appeal from the Public Utilities Commission of Ohio 08-0466 Public Utilities Commission of Ohio Case Nos. 06-1068-EL-UNC, 05-725-EL-UNC, 06-1069-EL-UNC, 05-724-EL-UNC, 06-1085-EL-UNC

NOTICE OF APPEAL OF APPELLANT, OHIO PARTNERS FOR AFFORDABLE ENERGY

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Notice of Appeal of Appellant, Ohio Partners for Affordable Energy

Appellant, Ohio Partners for Affordable Energy, pursuant to R.C. §§4903.11 and 4903.13 and S. Ct. Prac. R. II(3)(B), hereby gives notice to the Supreme Court of Ohio and to the Public Utilities Commission of Ohio ("Appellee" or "PUCO") of this appeal to the Supreme Court of Ohio from Appellee's Opinion and Order entered in its Journal on November 20, 2007 and its Entry on Rehearing entered in its Journal on January 16, 2008 in the above-captioned consolidated cases before the PUCO.

Appellant, Ohio Partners for Affordable Energy, is an Ohio corporation engaged in advocating for affordable energy policies for low and moderate income Ohioans. Appellant, on behalf of low income customers and the nonprofit agencies that provide these customers with bill payment assistance and energy efficiency services, was a party of record in the above-captioned PUCO cases.

On December 20, 2007, Appellant timely filed an Application for Rehearing from the November 20, 2007 Opinion and Order pursuant to R.C. §4903.10. Appellant's Application for Rehearing was denied with respect to the issues raised in this appeal by an Entry on Rehearing entered in the Appellee's Journal on January 16, 2008.

Appellant complains and alleges that Appellee's November 20, 2007 Opinion and Order and January 16, 2008 Entry on Rehearing are unlawful, unjust and unreasonable, and the Appellee erred as a matter of law, in the following respects that were raised in Appellant's Application for Rehearing:

1. The Commission acted unreasonably and unlawfully when it found that the stipulation and recommendation filed on April 9, 2007 in these cases is the product of serious bargaining among the parties.
2. Given the stipulation's treatment of returns on construction work in progress ("CWIP"), the Commission acted unreasonably and unlawfully when it found that the stipulation benefits ratepayers, serves the public interest, and does not violate any important regulatory principle or practice.
3. Given the stipulation's treatment of the use of DENA assets, the Commission acted unreasonably and unlawfully when it found that the stipulation benefits ratepayers, serves the public interest, and does not violate any important regulatory principle or practice.
4. The Commission acted unreasonably and unlawfully when it found that the stipulation benefits ratepayers, serves the public interest, and does not violate any important regulatory principle or practice when the stipulation fails without sufficient reason to adopt the recommendations of the management/performance auditor.

Wherefore, Appellant respectfully submits that the Appellee's November 20, 2007 Opinion and Order and January 16, 2008 Entry on Rehearing are unlawful, unjust and unreasonable and should be reversed. The case should be remanded to the Appellee with instructions to correct the errors complained of herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal of Ohio Partners for Affordable Energy was served upon the Chairman of the Public Utilities Commission of Ohio by leaving a copy at the office of the Chairman in Columbus and regular U. S. mail, postage prepaid, upon all parties to the proceedings below this 11th day of March 2008.

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CERTIFICATE OF FILING

I certify that this Notice of Appeal has been filed with the docketing division of the Public Utilities Commission of Ohio in accordance with sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code.

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its System Reliability Tracker Market Price.	)))	Case No. 05-724-EL-UNC
In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Fuel and Economy Purchased Power Component of its Market-Based Standard Service Offer.	)))))	Case No. 05-725-EL-UNC
In the Matter of the Application of Duke Energy Ohio, Inc., to Modify its Fuel and Economy Purchased Power Component of its Market-Based Standard Service Offer.	))))	Case No. 06-1068-EL-UNC
In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its System Reliability Tracker.	)))	Case No. 06-1069-EL-UNC
In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set the Annually Adjusted Component of its Market-Based Standard Service Offer.	))))	Case No. 06-1085-EL-UNC

ENTRY ON REHEARING

The Commission finds:

(1) On November 20, 2007, the Commission issued an opinion and order in the above-captioned cases, approving a stipulation and recommendation (stipulation) signed by Duke Energy Ohio, Inc. (Duke); the staff of the Commission; Ohio Energy Group (OEG); Ohio Hospital Association (OHA); the city of Cincinnati (city); and People Working Cooperatively (PWC). These cases involved, in part, the setting of rates for riders for the recovery of certain of expenses associated with Duke's rate stabilization plan (RSP), first approved by the Commission 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). The Office of the Ohio Consumers' Counsel (OCC) and Ohio Partners for Affordable Energy (OPAE) opposed the stipulation. The riders involved in the above-captioned cases include: (1) the fuel and purchased power (FPP) rider, which is intended to allow Duke to recover the costs associated with its purchase of fuel for its generating stations, emission allowances, and economy purchased power to meet its load; (2) the system reliability tracker (SRT) rider, which is intended to allow Duke to recover the costs it incurs in maintaining a reserve margin for switched and non-switched load; and (3) the annually adjustable component (AAC),which is intended to allow Duke to recover its incremental costs associated with homeland security, taxes, and environmental compliance.

(2) 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.

(3) On December 21, 2007, OCC and OPAE filed applications for rehearing. Duke filed a memorandum contra both applications for rehearing, on December 31, 2007.

(4) In its application for rehearing, OPAE raises four assignments of error. OPAE's first assignment of error suggests that the Commission acted unreasonably and unlawfully when it found that the stipulation was the product of serious bargaining among the parties. OPAE argues that, contrary to the Commission's finding, serious bargaining did not take place at the settlement negotiations for the stipulation. OPAE contends that the Supreme Court has already confirmed that attendance and discussion at settlement negotiations does not satisfy the criterion the serious bargaining take place. OPAE claims that the Commission ignored the Supreme Court's determination that the Commission must look beyond the stipulation to determine if serious bargaining has taken place. OPAE argues that the question is whether there are side agreements undermining the settlement process. OPAE reasons that the evidence on remand in the RSP case, demonstrating that the side agreements affected the signatory parties to the stipulation, was ignored by the Commission on remand. OPAE claims that the stipulation is simply the furtherance of the side agreements that benefit a

handful of customers at the expense of whole classes of customers. OPAE points out that the stipulation was submitted by Duke and five other parties, all of whom supported the stipulation filed in the RSP case. OPAE argues that the city of Cincinnati is acting as a customer of Duke and not as a representative of the residential class and, in addition, suggests that its support can be seen as a product of its separate side agreement with Duke. OPAE also contends that PWC represents the interest of consumers only to the extent that those interests coincide with the funding PWC receives from Duke for is projects. OPAE argues that OEG and OHA, which support the stipulation, also had side agreements with Duke that could have influenced their support for the stipulation. Further, OPAE argues that this is also true of IEU, although it did not sign the stipulation. According to OPAE, it and OCC, both of whom oppose the stipulation, are the two parties representing the vast majority of Duke's customers. (OPAE application for rehearing at 7-14.)

(5) Duke, in its memorandum contra, disagrees with OPAE's contention that the existence of side agreements in the RSP case makes certain signatory parties' support suspect. Duke argues that there is no requirement that each party come to the negotiating table with the same interests. After detailing the positions and backgrounds of various parties, Duke asserts that each party, whether a signatory or not, fully participated in negotiation of the stipulation. Duke also points out that parties to side agreements in the RSP case are not exempted from paying increases in the FPP, SRT, or AAC riders and that those side agreements make no mention of the above-captioned cases. (Duke memorandum contra at 17-21.)

(6) We find no merit to OPAE's first assignment of error. Many of these arguments were raised by OPAE and discussed by the Commission in its opinion and order. We found that the stipulation was the product of serious bargaining by knowledgeable parties. We noted that all parties were invited to all negotiations. There was no evidence provided by OPAE to the contrary. We also found that the stipulation was either supported or not opposed by representatives of each stakeholder group. Residential consumers were represented by PWC and the city, OEG represented manufacturing consumers, and OHA represented commercial interests. OMG and Dominion did not oppose the stipulation and were involved in negotiations. As we

noted, the lack of agreement to the stipulation by two parties in this case should not cause the entire stipulation to be rejected as if serious bargaining had not occurred. We also found that, while the stipulation in the RSP case was impacted by the side agreements, there were no such connections between any side agreements and the stipulation in these cases. As to OPAE's contention that the city's support for the stipulation "can be seen as a product of its separate side agreement with Duke" or that OEG and OHA, both of which supported the stipulation, also had side agreements with Duke that could have influenced their support for the stipulation, we find no evidence for either claim. We also note that, contrary to OPAE's assertion that the existence of side agreements in a separate proceeding might inappropriately "affect" the parties to the stipulation in these cases, the Supreme Court of Ohio, on which OPAE was relying, was, on appeal of the RSP case, considering the impact of undisclosed side agreements on the fairness of the bargaining process. In the present circumstance, those same side agreements were fully known to all parties. As to OPAE's claim that PWC represents the interests of consumers only to the extent that those interests coincide with the funding PWC receives from Duke for its projects, we find no proof and no merit. OPAE's first assignment of error will be denied.

(7) OPAE's second assignment of error provides that, given the stipulation's treatment of returns on construction work in progress (CWIP), the Commission acted unreasonably and unlawfully when it found that the stipulation benefits ratepayers, serves the public interest, and does not violate any important regulatory principle or practice. OPAE argues that the stipulation fails to benefit ratepayers and the public interest and violates important regulatory practice and principles by allowing for the recovery of a return on CWIP through Duke's AAC. OPAE asserts that this approach is contrary to the findings of the auditor and results in unreasonable AAC charges. According to OPAE, a return on CWIP would not be allowed in ratemaking proceedings because such proceedings require that any CWIP be at least 75 percent complete before the Commission would consider allowing a return, a fact not demonstrated by Duke. OPAE also argues that the current regulatory paradigm does not provide any assurance of lower capital costs for customers at a future date, noting that, under a traditional regulatory paradigm, *after construction is complete, the customers have a claim that* the return on CWIP will provide lower capital costs at a future

date when the plant is in service. OPAE contends that the AAC has no place in the market environment and that traditional regulatory practices can and should be used to ensure reasonable standard service offer rates. OPAE argues that there is no market for retail electric generation to serve Ohio's residential and small commercial customers and, therefore, no reason why standards for CWIP should not apply. (OPAE application for rehearing at 14-17.)

(8) Duke asserts that the limitation on earning a return on CWIP does not apply to competitive retail electric service. (Duke memorandum contra at 23.)

(9) We find no merit to this assignment of error. Again, many of these same arguments were made by OPAE on brief and were considered by the Commission in our opinion and order. As we noted in our September 29, 2004, opinion and order, there was no discussion regarding a return on CWIP in the RSP's establishment of the AAC. However, we based our determination in part on Duke's supplied calculations. We noted that the Attachment JPS-4 to the testimony of John Steffen clearly showed CWIP as a factor in the AAC, with no reference to percentage completion. We also found that, in the present market environment, ratemaking standards, such as the limitation on earning a return on CWIP, are not dispositive. Therefore, we found that the stage of completion of CWIP should not, under these specific circumstances, be a bar to Duke's earning a return on CWIP. In our opinion and order, we fully considered OPAE's and other parties' arguments that CWIP should be treated in these cases as is normally done with rate proceedings, i.e., to permit a return on CWIP when projects are 75 percent complete. OPAE has raised nothing new in this assignment of error. OPAE's second ground for rehearing will be denied.

(10) In its third assignment of error, OPAE claims that the Commission acted unreasonably and unlawfully in its treatment of the use of Duke Energy North America (DENA) assets. OPAE contends that the Commission's opinion and order does not provide a reasonable method to set the price for the capacity from the DENA assets and, therefore, that the Commission has not provided adequate protection for ratepayers against Duke potentially overcharging for capacity from the DENA assets. OPAE also claims that the use of broker quotes or third-party

transactions to arrive at a market price is inadequate because there are usually very few broker quotes and there is a limited market. OPAE urges that the guidelines for formulating a price for the DENA assets need to be more stringent, with a greater number of bids and a price cap. (OPAE application for rehearing at 17-19.)

(11) We find no merit to OPAE's third assignment of error. In our opinion and order, we found that the pricing mechanism for the DENA assets proposed in the stipulation was reasonable. We also noted that, while the market for capacity is not mature, the witness for Duke, Mr. Whitlock, provided testimony that he would likely be able to get multiple broker quotes for determining market prices. As to OPAE's claim that the pricing of DENA assets is flawed, we find no basis for this argument. We noted that the stipulation provides two different mechanisms for setting a price and also allows for the possibility that Commission staff might agree to a different system in appropriate circumstances. Further, we must not lose sight of the fact that Duke's use of the DENA assets is to be on an emergency basis only and will be subject to audit by the Commission. Therefore, we continue to believe that the method established by the stipulation for establishing prices for DENA assets is reasonable. OPAE's third ground for rehearing will be denied.

(12) Finally, in its fourth ground for rehearing, OPAE contends that the Commission acted unreasonably and unlawfully when it approved the stipulation, even though the stipulation failed, without sufficient reason, to adopt the recommendations of the management/performance auditor. In this regard, OPAE specifically references the auditor's recommendations regarding use of DENA assets, allowance of a return on CWIP, and cessation of Duke's active management. OPAE argues that the Commission should have rejected the stipulation to the extent that it allowed Duke to ignore such recommendations.

(13) In our November 20, 2007 opinion and order, we considered all of these issues and all of the arguments made by the parties. The fact that our decision did not fully accept the findings of the auditor on any of these issues does not, in and of itself, render such decisions to be unlawful or unreasonable. OPAE's fourth ground for rehearing will be denied.

(14) In its application for rehearing, OCC raises four assignments of error. OCC's first assignment of error states 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 issue(s) and to base [its] conclusion upon competent evidence" in violation of case law and Section 4903.09, Revised Code. This assignment of error is broken down into three subparts:

(a) The auditor's report should be followed regarding FPP charges.

(b) Capacity costs should be based on actual costs, which exclude charges related to the DENA assets at this time.

(c) The order fails to eliminate additional AAC charges requested by Duke without any evidentiary basis.

(15) As to the first general assignment of error, there is no evidence that the Commission failed to permit a full hearing upon all subjects pertinent to the issues. OCC was permitted to introduce any evidence and sponsor any witnesses it deemed relevant, cross-examine any other party's witnesses, and make any legal argument it deemed relevant. A claim by OCC that a full and fair hearing was not conducted is dubious absent any specific examples of just how a full hearing on all subjects was not permitted. As to OCC's claim that the opinion and order was not supported by competent evidence, we find no merit.

(16) With regard to the first subpart of its first assignment of error, OCC claims that the Commission should have ordered Duke to follow the auditor's recommendations regarding its coal management policies. These recommendations concern the adoption of traditional utility procurement strategies related to the procurement of coal and emission allowances, the cessation of Duke's active management of coal and the development of portfolio strategy for coal purchases. OCC argues that Duke should develop a portfolio approach to the purchase of coal and, as support for its argument, it cites to the auditor's report that states that Duke has passed up attractive coal contracts, resulting in increased FPP charges. OCC also claims that the recommendation for Duke to adopt a traditional utility

procurement strategy for its coal purchases was supported by the auditor and it urges the Commission not to dismiss this expert opinion. Further, OCC argues that the order failed to address an issue raised by OCC regarding the recommendation by the auditor that, as long as the FPP is in effect, coal suppliers should not be required to allow the resale of their coal for the offers to be considered. OCC argues that the Commission should have adopted the recommendation of the auditor that Duke permit the consideration of bids from bidders who seek to limit the resale of their coal. (OCC application for rehearing at 5-9.)

(17) In response, Duke points out that, rather than arguing its lack of opportunity to litigate this issue, OCC is actually urging the Commission to require Duke to adopt the auditor's recommendation. Duke contends that the auditor's recommendation is not binding on the Commission or the parties. It also stresses that the evidence showed that Duke's active management has not increased costs and has not inhibited the audit process. In addition, Duke noted that shareholders, not customers, absorb transaction costs related to active management.

(18) We find no merit to this assignment of error. In our consideration of the stipulation, we reviewed all of the evidence, including the auditor's recommendations. We balanced the traditional utility strategies for the procurement of coal and emission allowances versus Duke's active management of coal and determined that Duke's active management of coal was reasonable. Short of claims that we should have followed the auditor's recommendations because OCC thinks we should have, OCC has identified no new evidence in the record that we have not considered. With regard to the auditor's recommendation that Duke permit the consideration of bids from bidders who seek to limit the resale of their coal, this recommendation was considered by us in our opinion and order. We note that testimony at the hearing showed that Duke does not require the ability to resell coal as a condition to its purchase and it does not exclude an offer from consideration if the supplier does not permit resale. (Duke Rem. Rider Ex. 2, at 9.) We would clarify that Duke's standard request for proposals should not prohibit bids from suppliers who do not allow resale.

(19) The second subpart to OCC's first assignment of error asserts that capacity costs should not include charges related to the DENA

assets at this time. OCC claims that the order unreasonably rejects the auditor's recommendations, citing the Commission's lack of concern over Duke's non-compliance with prior orders and its acceptance of the proposed pricing mechanism. OCC claims that the original stipulation in the SRT proceeding required Duke to submit an application for approval of the SRT market price associated with DENA assets and to provide OCC with work papers and other data supporting the use of DENA assets. OCC claims that it was provided no information other than that which was sought by the OCC in ordinary discovery. OCC contends that use of broker quotes or third-party transaction prices would not result in customers benefitting from the most reasonably priced capacity available. OCC also argues that allowing the DENA generation to be priced based on a method agreed to by Duke and the staff gives those two parties the opportunity to enter into negotiations and make decisions without the involvement of other parties in these cases. (OCC application for rehearing at 9-13.)

(20) Duke submits that the requirements of SRT stipulation have been met, as it has applied for Commission approval, has supplied all work papers to OCC, and will, in the event DENA assets are used, provide detailed information to OCC as required by the SRT stipulation. Duke stresses that reasonably priced generation options are critical for meeting capacity requirements in an emergency. The stipulation, according to Duke, sets forth pricing methodologies and defines the circumstances under which DENA assets could be used. This allows subsequent auditors the ability to audit any DENA transactions, Duke explains. (Duke memorandum contra at 10-12.)

(21) We find no merit to this assignment of error. First, we would note that, rather than having any "lack of concern over the Company's non-compliance with prior orders," as claimed by OCC, we found, in our opinion and order, that the process that has been followed in this proceeding has complied with the substance of our prior orders. We find nothing in what OCC has raised on rehearing to warrant a different finding. With regard to OCC's claims concerning the substance of the pricing mechanism, we also find no merit. Under the terms of the proposal, Duke is required to give notice of its intent to use the DENA assets and, thereafter, to allow discovery of relevant facts by interested parties and to provide sufficient detail to allow

analysis of the reasonableness of its proposal. (Opinion and Order at 20.) This ground for rehearing will be denied.

(22) The third subpart to OCC's first assignment of error asserts that a return on CWIP should not be included in the AAC charges. This assignment of error was similarly set forth by OPAE and was discussed above and rejected by the Commission. This ground for rehearing will be denied.

(23) OCC's second assignment of error states that the Commission's order is unreasonable and unlawful because the Commission improperly delegated its duties to the Company and the Commission's staff. OCC points to the language in the Commission's order that "Duke work with staff to determine a reasonable period over which the amounts authorized by this opinion and order should be trued-up." OCC claims that such a directive unreasonably delegates the Commission's decision-making responsibilities and the Commission should make these decisions regarding the adjustment of rates based on a record developed in these cases. OCC also argues that the order fails to clearly define the Commission's treatment of interest charges that could be associated with any true-up.

(24) Duke notes that any bill credit would have to be reflected in tariffs, subject to Commission approval. Thus, it says, the Commission has ceded no authority. (Duke memorandum contra at 15.)

(25) We find no merit to this assignment of error. Our directive to Duke, on page 30 of the opinion and order, was that it work with staff to determine a reasonable period over which the amount authorized by this opinion and order should be trued-up and collected. The Commission has only directed Duke to work with staff to determine the period of time for such calculations. Nothing in this directive authorizes any entity, other than the Commission, to determine the amount of said true-ups or the amounts to be collected. Furthermore, nothing in this directive cedes any review of any such amounts, since final tariffs must still be approved by the Commission. This ground for rehearing will be denied.

With regard to interest charges associated with the AAC true-up, we note that the stipulation in these proceedings provides for Duke to *forego* the collection of interest on the trued-up AAC charges. To the extent that our opinion and order in these cases was unclear, we would clarify that this aspect of the stipulation should be implemented. Duke's agreement to forego the imposition of carrying charges was part of the basis for our conclusion that the stipulation benefitted ratepayers and was in the public interest. Therefore, although collection of trued-up AAC amounts by December 31, 2007, was not possible by the time the opinion and order was issued, our order did not permit Duke to collect any carrying charges on the AAC true-up.

(26) In its third assignment of error, OCC argues that the Commission's order is unreasonable and unlawful because the Commission failed to determine that certain entities had no standing in these cases. OCC claims that the Commission erred by basing its approval of the stipulation on the support by PWC, which represented residential customers, because PWC did not have standing in these proceedings. OCC claims that PWC and OHA never formally intervened in these proceedings and, therefore, are not parties to these proceedings. Further, OCC argues that it was deprived the opportunity to state its objection to any characterization that PWC represented residential customer in rate-setting matters. (OCC application for rehearing at 19-21.)

(27) At the initiation of the rider phase of the remand portion of these proceedings, the attorney examiners consolidated these cases with the cases that had been remanded from the Supreme Court. Thus, parties in the remanded RSP case were also parties to the rider proceedings that were consolidated with the RSP case. As such we find no merit to OCC's third assignment of error. It will be denied.

(28) Finally, OCC's fourth assignment of error asserts that the Commission's opinion and order is unreasonable and unlawful because the Commission failed to properly apply the test for approval of a partial stipulation. This assignment of error is broken down into three subparts. First, OCC claims that the settlement was not the product of serious bargaining. This same argument was made by OPAE. OCC claims that the option agreements that were discussed in the order on remand in the RSP case provide some of the signatory parties with protections against the increases that are the subject of the rider phase of these proceedings. OCC also contends that neither the city of Cincinnati nor PWC represents residential interests in these

proceedings and that they were not knowledgeable parties. OCC argues that the city did not appear at the hearings, did not file a brief, and has not demonstrated any knowledge of the issues in the rider cases. Therefore, OCC states, serious bargaining did not take place between Duke and the city in these cases. OCC also argues that PWC is not a party to these proceedings and, therefore, that no representatives of residential consumers were included in the stipulation.

(29) As with the similar arguments of OPAE, we find no merit in this assignment of error. As we noted in the opinion and order in these cases, there was no connection between the side agreements that had been negotiated prior to our decision in the RSP case and the stipulation filed in these cases. In addition, the signatory parties to the stipulation filed in these cases specifically confirmed that there were no side agreements related to the stipulation in these cases. As to OCC's contention that because the city of Cincinnati did not appear at a hearing nor file a brief means that it did not seriously bargain, we find no merit. We found that the city was a knowledgeable party during the initial phase of these cases. We have no basis to find that they have suddenly become less knowledgeable simply because they did not attend the hearings in these cases. On that basis, we would have to disqualify other, seemingly knowledgeable, parties. Similarly, the decision whether to file a brief in these cases should not constitute a bar to qualify as a knowledgeable party. We would also note that OCC has not demonstrated that it is privy to all of the discussions that may have occurred between the city and Duke and, therefore, it has no basis to state that serious bargaining did not take place between Duke and the city. As to PWC's party status in these proceedings, we have previously discussed this matter. This ground for rehearing will be denied.

(30) OCC's second subpart to this assignment of error is that the settlement package does not benefit the public interest. OCC claims that the Commission should have adopted the recommendations of its auditor and rejected the treatment given to the AAC. These same arguments were made by OCC in its post-hearing brief in these proceedings and were fully considered by the Commission. This ground for rehearing will be denied.

(31) Finally, OCC claims that the settlement package violates important regulatory policies and practices. OCC raises nothing new in this assignment of error that was not previously

considered by the Commission. This ground for rehearing will be denied.

It is, therefore,

ORDERED, That OCC's and OPAE's applications for rehearing be denied. It is, further,

ORDERED, That copies of this entry on rehearing be served upon 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

SEF/JWK:geb

Entered in the Journal
JAN 16 2008

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In The Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its System Reliability Tracker Market Price.	)))	Case No. 05-724-EL-UNC
In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Fuel and Economy Purchased Power Component of its Market-Based Standard Service Offer.	)))))	Case No. 05-725-EL-UNC
In the Matter of the Application of Duke Energy Ohio, Inc., to Modify its Fuel and Economy Purchased Power Component of its Market-Based Standard Service Offer.	))))	Case No. 06-1068-EL-UNC
In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its System Reliability Tracker.	)))	Case No. 06-1069-EL-UNC
In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set the Annually Adjusted Component of its Market-Based Standard Service Offer.	))))	Case No. 06-1085-EL-UNC

OPINION AND ORDER

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

APPEARANCES

Paul A. Colbert, Senior Counsel, and Rocco D'Ascenzo, Counsel, 139 East Fourth Street, Cincinnati, Ohio 45201, on behalf of Duke Energy Ohio, Inc. (formerly known as the Cincinnati Gas & Electric Company).

McNees, Wallace & Nurick, by Daniel J. Neilsen, Fifth Third Center, Suite 1700, 21 East State Street, 17th Floor, Columbus, Ohio 43215, on behalf of Industrial Energy Users-Ohio.

Boehm, Kurtz & Lowry, by David Boehm, 1500 URS Center, 36 East Seventh Street, Cincinnati, Ohio 45202, on behalf of Ohio Energy Group and AK Steel.

Boehm, Kurtz & Lowry, by Kurt J. Boehm, 1500 URS Center, 36 East Seventh Street, Cincinnati, Ohio 45202, on behalf of Ohio Energy Group.

Bricker & Eckler LLP, by Sally W. Bloomfield and Thomas J. O'Brien, 100 South Third Street, Columbus, Ohio 43215, on behalf of the city of Cincinnati.

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

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

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.

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

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.

Richard L. Sites, General Counsel, 155 East Broad Street, 15th Floor, Columbus, Ohio 43215, on behalf of the Ohio Hospital Association.

OPINION

I. HISTORY OF THE PROCEEDINGS

The above-captioned consolidated cases (rider cases) all relate to certain riders that are charged by Duke Energy Ohio, Inc., (Duke)[1] and were instituted as part of our approval of Duke's rate stabilization plan (RSP) 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). As these rider cases and the RSP case are inextricably connected, we will begin our discussion with a review of the history of the RSP case.

A. History of Associated RSP Case

On June 22, 1999, the Ohio General Assembly passed legislation[2] 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, to be effective during the market development period.[3]

On January 10, 2003, Duke filed an application for approval of rates subsequent to the market development period, together with three related matters. A stipulation and recommendation was filed by several of the parties in those proceedings. On September 29, 2004, the Commission issued its opinion and order approving that stipulation with certain modifications. The stipulation provided for the establishment of an RSP for Duke, governing 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). Following the filing of applications for rehearing, the Commission issued entries on rehearing that made various modifications to the approved stipulation.

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1 Duke was, previously, 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.

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

3 *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 toTtransfer its Generating Assets to an Exempt Wholesale Generator,* Case No. 99-1658-EL-ETP *et al.*

The Ohio Consumers' Counsel (OCC) appealed the decision to the Supreme Court of Ohio, raising seven claimed errors. The 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 decisions on most issues, but remanded the proceedings to the Commission with regard to two issues.

Following a hearing on remand, the Commission issued its order on remand, on October 24, 2007. That order had the effect of modifying certain aspects of Duke's RSP, including certain of the authorized riders, while allowing other portions of the RSP to remain virtually unchanged. The extent and impact of these changes will be discussed in detail below.

B. History of Duke RSP Riders

The Commission's order on remand found that the RSP would produce reasonably priced electric service and would meet other statutory requirements. As a part of that RSP, the Commission approved the establishment of riders for the recovery of certain of expenses. The setting of rates for those riders and the audit of rates under those riders are the bases for the cases now under consideration. We will proceed, at this point, to discuss the procedural history of each of those riders in more detail.

1. Initiation of FPP Cases

The fuel and purchased power rider (FPP) is intended to allow Duke to recover the costs associated with its purchases of fuel for its generating stations, emission allowances, and economy purchased power to meet its load. Two of these consolidated cases relate to the FPP: On September 1, 2006, Duke filed its application for our review of the FPP rates charged between July 1, 2005, and June 30, 2006, in *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Fuel and Economy Purchased Power Component of Its Market-Based Standard Service Offer*, Case No. 05-725-EL-UNC (FPP review case). On August 29, 2006, Duke initiated the other FPP-related case, *In the Matter of the Application of Duke Energy Ohio, Inc., to Modify its Fuel and Economy Purchased Power Component of Its Market-Based Standard Service Offer*, Case No. 06-1068-EL-UNC, serving as a repository for Duke's filing of periodic FPP reports (FPP filing case).

2. Initiation of SRT Cases

The system reliability tracker (SRT) is intended to recover costs that Duke incurs in maintaining a reserve margin for switched and non-switched load. Two of these consolidated cases relate to the SRT: On September 1, 2006, Duke filed an application to commence the audit of its SRT, 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 (SRT review case). The review of the SRT consisted of two separate components. The first is an audit by Commission staff of the accuracy of the SRT calculations. The staff report that stemmed from that audit, covering the period from January 1, 2005, through May 31, 2006, was filed on December 4, 2006. The second component of the SRT review case is a prudence review of the period from January 1, 2006, through June 30, 2006, completed by Energy Ventures Analysis, Inc., in compliance with the stipulation previously adopted by the Commission in this proceeding and was filed on October 12, 2006. The second of the cases that relates to the SRT is *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its System Reliability Tracker Market Price*, (SRT approval case) filed on September 1, 2006, asking the Commission to approve Duke's resource plan for 2007 and, as a consequence, the SRT charges that would stem from it. Duke also asked, in that application, that we approve its filing of quarterly updates to the SRT charges.

3. Initiation of AAC Case

The annually adjustable component (AAC) is intended to recover Duke's incremental costs associated with homeland security, taxes, and environmental compliance. One of these consolidated cases relates to the AAC: In *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set the Annually Adjusted Component of its Market Based Standard Service Offer*, Case No. 06-1085-EL-UNC, (AAC case) Duke filed an application on September 1, 2006, asking the Commission to approve its AAC charge for calendar year 2007.

4. Continuing Consolidated Procedural History

At the prehearing on December 14, 2006, the remanded RSP cases were consolidated with proceedings regarding various riders associated with Duke's RSP and various procedural matters were addressed. Although consolidated, the examiners ordered, on February 1, 2007, that the hearing would be bifurcated to hear remanded RSP issues first and rider-related issues later. The rider phase was scheduled to commence on April 10, 2007. On April 9, 2007, a stipulation signed by Duke, Commission staff, Ohio Energy Group (OEG), Ohio Hospital Association (OHA), city of Cincinnati, and People Working Cooperatively, Inc. (PWC) was filed in the above-captioned cases. OCC and Ohio Partners for Affordable Energy (OPAE) opposed the stipulation.

The hearing on the rider phase of the proceedings commenced on April 10, 2007, with testimony provided by Paul G. Smith, Charles R. Whitlock, and William Don Wathen, Jr., on behalf of Duke. Auditors Seth Schwartz and Ralph Smith also testified. Following a brief period for discovery related to the stipulation, the hearing continued on April 19, 2007, with testimony by OCC witness Michael P. Haugh and staff witnesses Tricia Smith, L'Nard E. Tufts, and Richard C. Cahaan. Initial briefs and reply briefs were filed by Duke, OCC, OPAE, and staff on May 17 and 30, 2007, respectively.

Certain of the parties argued over language contained in post-hearing briefs. On June 1, PWC filed a motion for an extension of time to file its reply brief, together with that brief. Its brief is dedicated to renewal of its prior motion, filed in the initial remand portion of these proceedings, intended to strike certain offensive language from OPAE's initial and reply briefs in phase one, as well as making a new motion to strike similar language in OPAE's initial brief and any similar language that OPAE might make in its reply in this rider phase. On June 6, 2007, OCC filed a memorandum contra PWC's motion for extension of time and contra the PWC's motion to strike. On June 8, 2007, OPAE filed its memorandum contra PWC's renewal of its motion to strike and, at the same time, filed its own motion to strike portion of Duke's reply brief that referred to settlement discussions. On June 11, 2007, PWC filed its reply to OCC's memoranda contra and its reply to OPAE's memorandum contra. On June 15, 2007, Duke filed a memorandum contra OPAE's motion to strike. On June 18, 2007, OPAE filed its reply to Duke's memorandum contra OPAE's motion to strike.

The Commission issued its order on remand in the remanded RSP phase of these proceedings, on October 24, 2007. The present opinion and order deals only with issues related to the rider proceedings.

II. DISCUSSION

A. FPP/SRT Audit Report

Energy Ventures Analysis, Inc., (EVA) was selected by the Commission to review the reasonableness of the FPP and the prudency of the SRT. Seth Schwartz testified that EVA, with its subcontractor, Larkin & Associates PLLC (Larkin), performed an audit that reviewed the fuel procurement activities underlying the FPP for the period beginning July 1, 2005, and ending June 30, 2006. The audit of the SRT covered the first six months of 2006. The auditors also evaluated Duke's proposed SRT for 2007.

While there were no specific statutory requirements that were applicable to the FPP, the auditors noted that the Commission had indicated that, in performing the FPP audit, it would be appropriate to follow the general guidance that had been provided for the electric fuel component audits. However, the auditors pointed out that there were major differences between the two types of audits. Among the differences, the auditors noted that electric fuel component audits included all costs, while the FPP audit was only intended to capture the difference between current and baseline costs. Second, the auditors indicated that the FPP audit related to only native customers and that it was for a period of up to four years, resulting in Duke viewing the related fuel and emission allowance commitments differently. A third difference related to the fact that, since Duke's last annual electric fuel component audit, Duke has operated as a deregulated entity with regard to distribution. (Comm. Ord. RR Ex. 1 at 1-2 to 1-3.)

Following its review of Duke's FPP, EVA made the following recommendations related to management of the FPP:

> (1) EVA recommends for the audit period that the company pass through the native load portion of the net margins associated with the trading of [Duke] coal assets purchased for delivery during the audit period except for those specifically excluded by paragraph D of the stipulation. . . . The margin from the re-sale of [certain identified] coal during the audit period was $959,626.
>
> (2) EVA recommends that [Duke] adopt traditional utility procurement strategies related to the procurement of coal and emission allowances and cease its "active management" of such procurements throughout the balance of the RSP period. Accordingly, [Duke] should develop and implement a portfolio strategy such that it purchases coal through a variety of short, medium, and long-term agreements with appropriate supply and supplier diversification with credit-worthy counterparties. EVA further recommends that [Duke] no longer seek to flatten its position on a daily basis.
>
> (3) EVA recommends that as long as the FPP is in effect coal suppliers should not be required to allow the resale of their coal for the offers to be considered.
>
> (4) EVA recommends that [Duke] initiate a study to report on the recurring overstatement of coal inventory at the Zimmer station.
>
> (5) EVA recommends that [Duke] present several alternate sensitivity analyses of key variables, i.e., emission allowance prices and market coal prices, in its transaction review and approval process.
>
> (6) EVA recommends that purchases of reserve capacity from its Duke Energy North America (DENA) assets should not be eligible for inclusion in the SRT, as is currently the case.

(Comm.-Ord. RR Ex. 1, at 1-9 to 1-10.)

Following its review of Duke's FPP, Larkin made the following recommendations related to financial aspects of the FPP:[4]

(1) . . . [D]uring the period July 2005 through June 2006, [Duke] plants were designated as "must run" units by MISO for reliability or voltage control reasons during a number of hours. Unless it has already been presented in another forum, the Commission may want to have [Duke] explain further how the "must run" generating unit designations are affecting the Company's fuel and purchased power costs that are includable in the FPP rider.

(2) As described in this chapter of the report, . . . [Duke's] objective for the term of the RSP is to *actively manage* its native load obligations on a daily basis. By actively managing the load and generation position, [Duke] attempts to smooth the FPP component of the RSP price and reduce the volatility of the customer's bill. However, the active management can add additional transactions and related transaction costs, and tends to create a much more complex and difficult to understand audit trail. Testing by Larkin of amounts being included in the FPP . . . suggest that the costs related to [Duke's] active management can ultimately be tracked to supporting documentation. However, because [Duke's] active management reflects a reaction to daily market changes, it can be very challenging to understand the reasoning for each active management transaction (e.g., where [Duke] is adjusting a position based on market or cost changes), and how it related to [Duke's] RSP load obligation position. For this reason, it is imperative that [Duke] maintain documentation not only of the costs being included in the FPP, but also of the reasons and support for the Company's active management decisions.

(3) [Duke] should analyze and document the net impact of its active management of FPP components and should report to the Commission and the parties to this docket concerning whether the added activity, including transaction costs of the additional activity, has resulted in increased or reduced FPP costs over time.

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4 With regard to the coverage of its audit, Larkin specifically noted that its work "does not involve an audit of financial statements, but rather is an attestation engagement involving verification of [Duke's] FPP that is conducted in accordance with attestation standards established by the American Institute of certified Public Accountants . . . ." (Comm.-Ord. RR Ex. 1, at 5-1, footnote 1.)

The Company implemented the FPP on January 1, 2005. The two-year period, 2005 and 2006, should be used for this analysis.

(4) Currently, the FPP is to be in place through December 31, 2008. Because of the potential for additional Reconciliation Adjustments occurring months or years after the FPP rates were charged, due to MISO invoice revisions or other factors, the Company and Commission should address whether a cut-off period is needed for RAs after 2008 and what that cut-off period should be. [Duke] has filed an application to extend the FPP beyond 2008; however, consideration of RAs after the FPP could cease application [sic] is nevertheless something that deserves consideration.

(5) [Duke] has made a number of changes to the specific costs that are included in the FPP by including its identified corrections and the effect of changed interpretations of FPP includible costs in its filed RA adjustments. [Duke's] quarterly FPP filings typically include a narrative discussion of the RA and that narrative identifies total amounts of changes and the RA components; however, the narratives filed for the RA adjustments could be improved by including a listing of the reasons for the changes by identifying and briefly describing significant changes and corrections that are being included in the RAs. . . .

(Comm.-Ord. RR Ex. 1, at 5-39 to 5-41.)

EVA also made three recommendations that related to Duke's SRT. Specifically, it "agrees with [Duke] that [it] should employ arrangements that include capacity commitments for more than one year." EVA also "believes that [Duke] should employ a portfolio strategy similar to what EVA is recommending for fuel . . . [and] should develop a portfolio of available instruments to manage the risk." Finally, EVA pointed out that it "does not support [Duke] in its request to purchase capacity from the legacy DENA assets . . .." (Comm.-Ord. RR Ex. 1, at 6-4 to 6-5.)

B. Stipulation

The stipulation filed in these proceedings is intended by the signatory parties to resolve all of the outstanding issues in this proceeding. It includes the following provisions:

(1) Duke will provide a credit to FPP customers in the quarterly FPP rider filing beginning July 1, 2007, and ending September 30, 2007, resulting from the settlement of coal contracts.

(2) The FPP auditor's recommendation 2 on page 1-9 of the Audit report dated October 12, 2006, that Duke discontinue its active management practices shall be withdrawn.

(3) The parties agree that Duke, staff, and interested parties will meet to discuss the terms and conditions under which Duke may purchase and manage coal assets, emission allowances, and purchased power for the period after December 31, 2008, including addressing the auditor's finding (6) that Duke is actively limiting purchased fuel and emission allowance commitments beyond December 31, 2008. On the basis of those discussions, the parties will use their best efforts to agree and make a recommendation regarding the purchase and cost recovery, after December 31, 2008, of coal, emission allowances, and purchased power for consideration no later than the next FPP audit.

(4) The parties agree that Duke's congestion costs shall be recovered through Rider FPP instead of Rider TCR, as approved in finding (26) of the Commission's December 20, 2006, entry in Case No. 03-93-EL-ATA et al. The congestion components to transfer to the FPP include congestion (day-ahead and real-time), losses (day-ahead and real-time) and firm transmission rights that were previously included on Schedule B of the TCR application.

(5) The parties agree that Duke's proposed Rider AAC calculation shall be adjusted in accordance with the staff corrected supplemental testimony of L'Nard E. Tufts, as shown on Attachment LET-1 included as Stipulation Attachment 2. Rider AAC revenue will be trued-up to January 1, 2007, such that the amount calculated to be recovered in 2007 will be recovered by December 31, 2007.

(6) The parties agree that Duke shall work with the staff to amend its bill format. Such amendments will be intended to reflect generation-related charges such as the FPP, SRT, and AAC in the generation portion of the customer bill. The parties also agree to simplify and standardize the monthly bill message regarding

updated rider charges and that the amendments will not result in additional programming or billing costs.

(7) The parties agree that Rider SRT will be updated with the first billing cycle of the month following Commission approval of this stipulation to recover Duke's projected 2007 planning reserve capacity purchases by year-end, with future quarterly filings to reconcile any projected over- or under-collection

(8) The parties agree that Duke may recover short-term capacity purchases from its generating assets formerly owned by DENA, through the SRT. Duke and staff are to agree on a pricing methodology prior to Duke's purchase of the capacity. The market price of such purchases shall be either (a) the midpoint of broker quotes received, or (b) the average price of third-party purchases transacted, or (c) an alternative agreed upon by Duke and staff. Duke's ability to maintain an offer of firm generation service to all consumers shall remain paramount. The parties agree that recommendation (6) on page 1-10 of the October 12, 2006 audit report (proposing that the Commission continue its policy that purchases of reserve capacity from DENA assets are not eligible for inclusion in the SRT) is inapplicable to the extent it is in conflict with this paragraph.

(9) The parties agree that Duke accepts all audit recommendations made in the Report of the Financial and Management/ Performance Audit of the Fuel and Purchased Power Rider of Duke Energy-Ohio, dated October 12, 2006, except as set forth in paragraphs (1) through (8) of the stipulation.

At the hearing, staff and Duke provided a clarification to the stipulation, intended to permit Duke to utilize its DENA capacity on an emergency, intermittent basis. According to the clarification, an emergency basis would exist where capacity to meet Duke's operational requirements is necessary with less than seven days' advance notice. Further, the clarification provides that Commission approval would be required where DENA capacity is needed to meet Duke's operational requirement with less than seven days' notice during two consecutive seven-day periods. (OCC RR Ex. 3.)

C. Disputed Issues

The stipulation addresses and adopts most of the auditors' recommendations. However, it differs in a few areas.

1. Issues Associated with Rider FPP

Two issues were raised by OCC regarding the FPP audit. One related to active management of Duke's portfolio and the second related to EVA's finding that Duke is limiting its commitments beyond the end of the RSP period.

(a) Active Management

The first issue involved EVA's second recommendation, in which EVA proposed that Duke eliminate its active coal management portfolio strategy. (Comm.-Ord. RR Ex. 1 at 1-9.) In its findings, EVA stated that Duke's continued active management of its coal supply was problematic for a number of reasons, including the lack of an audit trail and the lack of documentation that this is an economical way to manage its fuel, emission allowances (EAs), and purchased power supply. EVA reported that it told Duke that it should be prepared to provide an audit trail and demonstrate that its approach yielded a lower FPP cost. (Comm.-Ord. RR Ex. 1 at 1-8.) At the hearing, Seth Schwartz, on behalf of EVA, testified that Duke did not consider any sales to native load customers to be firm for a duration beyond December 31, 2008, and was reluctant to enter, or avoided entering, into any fuel contracts that would extend past that date with fixed prices. (Tr. I at 55.) Mr. Schwartz stated that the objective of active management is to match the commitment to sell power with the commitment to supply power, either by generation or by purchased power, and to supply the inputs necessary to generate power (fuel supply and associated EAs) as precisely as possible. In addition, he explained, under active management, Duke continues to reevaluate its position on a daily basis and, based upon the revaluation, either buys or sells commitments for fuel, purchased power, or EAs so that there is a daily balancing of commitments to sell power with commitments to supply power. He pointed out that the cost difference between the two is hedged.

Mr. Schwartz distinguished active management from activities under a portfolio management system, explaining that, in the portfolio management approach, there is not a real matching of the costs to supply generation with the future demand from all rate payer classes because that demand continues for an indefinite period and is not known. Instead, he stated, the fuel supply, EA supply, and purchased power supply are purchased under a series of contracts with varying lengths of commitments and varying terms and conditions. He pointed out that some portion is left unhedged at any given point in time. A second difference between the two approaches, according to Mr. Schwartz, is that the portfolio management system is not continually readjusted on a daily basis to true up the supply and demand. (*Id.* at 58.)

Mr. Schwartz also testified regarding various short and long-term coal purchases that Duke engaged in. He noted that EVA's recommendation that Duke employ a portfolio management strategy is also based on the fact that Duke's newer coal contracts do not extend past the end of December 2008. Therefore, he pointed out, Duke's portfolio was almost entirely purchased on a short-term and spot-basis, with almost nothing purchased for later than December 2008, at least with regard to firm pricing. (Tr. I at 92.) Finally, Mr. Schwartz testified that the documentation provided by Duke regarding its active management of coal was adequate to perform the audit, but did not demonstrate whether the approach was a lower-cost approach. (Tr. I at 69-70.)

According to Duke, EVA's recommendation is based on a preference for traditional regulated utility procurement strategies for fuel and EAs. Duke argues that such strategies and protocols, although relevant and appropriate for a fully regulated world, do not make sense in a deregulated environment where consumers may switch to a competitive retail electric service (CRES) provider at their pleasure, where a utility's load is not constant, and where a utility is responsible for its position in the marketplace. Duke claims that, through active management, it constantly reviews its position to be sure that all stakeholders are sitting in the most advantageous position in terms of price, inventory, and quality of fuel, explaining that it matches the cost of supplying generation to the demand for electricity and hedges any cost difference between generating electricity and purchasing power. (Duke Rider Reply Brief at 34-36.)

Mr. Charles Whitlock testified, on behalf of Duke, that the auditor's recommendation to abandon active management poses a substantial risk to consumers and delays the company's ability to react affirmatively to changing market factors. (Duke Rider Reply Brief at 36; Duke RR Ex. 2 at 6.) Mr. Whitlock explained that, if Duke locks in a price by purchasing coal on a date certain and the price subsequently falls while power prices increase, consumers can not benefit from coal purchases at the lower price. Similarly, he notes, if the price of coal rises while forward power prices decline, consumers cannot benefit from the sale of the coal at the higher price in the market. (Duke RR Ex. 2, at 6-7.) Mr. Whitlock contends that, because Duke "is not a regulated utility for the sale of electricity," it is not permitted to recover generation investments plus a reasonable return through the regulatory process, nor is it permitted to recover increases in many other costs. He noted that Rider FPP is fully avoidable by all consumers that purchase generation from a CRES provider and that traditional regulated utility practice is not appropriate for managing all of the risks inherent in a deregulated environment. (Duke RR Ex. 2, at 7).

Duke also pointed out EVA's recommendation that Duke evaluate its position every 90 days, unless conditions deem otherwise. It argued that this recommendation is purely speculative as there is no definition of what EVA would consider to be an appropriate circumstance for a re-evaluation of a position sooner than 90 days. Duke believes that evaluation on a 90-day schedule would result in higher cost fuel and EAs, as Duke would then be unable to take advantage of market fluctuations. (Duke Rider Reply Brief at 36.) Duke witness Charles R. Whitlock testified that the benefit of active management is that Duke may make rational economic decisions based on the market price of coal, power, and emission allowances and reduce market price risk. He also pointed out that the auditor agreed that Duke's active management techniques have resulted in substantial savings for Rider FPP consumers. Mr. Whitlock summarized that active management limits the market risk and reduces volatility in Rider FPP. (Duke RR Ex. 2, at 8; Comm.-Ord. RR Ex. 1, at 2-14.)

With regard to the auditor's recommendation, in connection with its suggestion that Duke discontinue active management, that Duke should purchase coal through a variety of short-, medium-, and long-term agreements, Mr. Whitlock stated that Duke has short, medium, and long-term contracts in its portfolio with multiple suppliers. (Duke RR Ex. 2, at 9.)

Duke argues that its active management strategy has not increased costs to consumers, pointing out that Duke's shareholders absorb all transaction costs related to active management. (Duke Rider Reply Brief at 36-7; Tr. II at 72-78.) Duke also points out that active management has not hampered the Commission's ability to audit Duke's transactions. (Duke Rider Reply Brief at 36-7; Tr. II at 72-78.)

OPAE contends that there is no justification to disregard the auditor's recommendation on this issue and it asserts that the stipulation's provision that parties meet to discuss the problem is meaningless. According to OPAE, the Commission, in separate, ongoing proceedings, will consider issues such as the procurement of coal, EAs, and power in the post-2008 period. (OPAE Rider Brief at 19.) OPAE also noted that the auditor recommended that Duke present several alternative sensitivity analyses of key variables for EAs, coal prices, and purchased power transactions. It suggests that Duke should maintain detailed documentation of these items to enable the next FPP auditor to review prudency of incurred costs. (OPAE Rider Brief at 20.)

OCC also contends that there is no basis to disregard EVA's recommendation to discontinue Duke's active coal management practices. OCC asserts that Duke's active management should be discontinued. (OCC Rider Reply at 9.)

Based on the evidence, we find that it is reasonable to allow Duke to continue its active management of its coal, EA, and purchased power portfolio, as provided in the stipulation. Evidence of record convinces us that an active management approach allows Duke to take advantage of market fluctuations, thereby lowering the overall cost to customers. We note that certain transaction costs, including brokerage fees and certain accounting costs, were not contemplated when generation rates were established in Duke's last rate case and these costs are not passed on to customers through the FPP. In addition, we note that EVA was able to audit the transactions in question.

(b) Commitments Beyond RSP Period

The second FPP-related issue raised by opponents of the stipulation relates to whether Duke should *continue* to limit its commitments to the RSP period. EVA reported, in finding six of the audit report, that Duke "actively looks to limit commitments beyond the end of the RSP period. This strategy may increase the costs of both short-term and long-term procurements and certainly exposes [Duke] ratepayers to market volatility after 2008." (Comm.-Ord. RR Ex. 1, at 1-8.)

In response to this finding, the stipulation provides that the parties would meet to discuss the terms under which Duke might make purchases for the period following December 31, 2008. (Stipulation, para. 3.) On behalf of OCC, Mr. Michael Haugh testified that this provision of the stipulation fails to accomplish anything, as this issue is the subject of a separate Commission proceeding.[5]

Duke disagrees, noting that EVA made no recommendation with regard to this finding. Duke asserts that there is no reason to delay consideration of this issue and that discussions should begin immediately. (Duke Rider Brief at 7-8.)

OCC points to the auditor's second recommendation, which includes language suggesting that Duke should adopt traditional utility procurement strategies. (OCC Rider Reply Brief at 9.)

We find that the stipulation provision proposing the initiation of discussions relating to the post-RSP period is reasonable, especially in light of pending legislation relating to the post-RSP period. We do not believe that it would be appropriate for us to mandate any particular strategy at this juncture and on the basis of evidence before us.

2. Issue Associated with Rider SRT

As explained by Duke's witness, Paul Smith, Rider SRT recovers costs that Duke incurs in maintaining a 15 percent planning reserve margin for switched and non-switched load. Rider SRT is avoidable by non-residential consumers who agree to stay off Duke's system through 2008. (Duke RR Ex. 6, at 3.) Rider SRT was approved by the Commission in Case No. 04-1820-EL-ATA on an interim basis and the Rider SRT 2006 funding was approved by the Commission in case No. 05-724-EL-UNC. For 2006, Duke's Rider SRT was based on Duke's estimated cost of capacity products required to maintain at least a 15 percent reserve margin adjusted by the over-recovered 2005 Rider SRT costs to be refunded to non-residential customers.[6] Rider SRT is similar to Rider FPP in that it is

5 *In the Matter of the Application of Duke Energy Ohio, Inc. to Modify Its Market-Based Standard Service Offer*, Case No. 06-986-EL-UNC.

6 Residential customers were not covered by the SRT in 2005 and therefore are not eligible for the refund.

also subject to quarterly adjustments with an annual audit and true-up. 05-724 is Duke's annual review of its 2006 SRT and 06-1069 is Duke's application to establish and set its 2007 Rider SRT. (Duke RR Ex. 6 at 3.)

With regard to Rider SRT, the opponents to the stipulation raised an issue involving Duke's request to purchase capacity from the assets it obtained from Duke Energy North American LLC (DENA assets). Currently, DENA assets are not eligible for inclusion in the SRT, as the Commission previously approved a stipulation requiring approval of the Commission prior to using DENA assets as part of the SRT. *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 paragraph 8, that stipulation describes, *inter alia,* restrictions regarding Duke's use of DENA assets:

> [Duke] cannot use the DENA Assets as part of the SRT unless it receives Commission authorization to do so after [Duke] applies to the Commission for approval to include such DENA Asset(s) in the portfolio and for approval of the SRT market price associated with such DENA Asset(s). [Duke] shall provide OCC with workpapers and other data supporting the use of DENA Assets as part of the SRT and if any interested party is concerned about the use of DENA Assets in the SRT the Commission will hold a hearing.

In its audit in these proceedings, EVA reported that, in the first half of 2006, Duke satisfied its SRT requirements by purchasing almost all of its required capacity through regulatory capacity purchases. EVA noted that it agreed with Duke as to the types of capacity products it considered and also supports the use of a greater mix of products, similar to what Duke employed in 2005, rather than the heavy reliance on one type of product in 2006. EVA noted that, in its 2007 Rider SRT proposal, Duke is proposing a number of changes with respect to future capacity purchases in order to maintain its required reserve margin. According to EVA, Duke would like to purchase capacity instruments for periods longer than a year and it would like to purchase capacity from the DENA assets. EVA stated that it agreed with Duke that it should employ arrangements that include capacity commitments for more than one year. EVA also stated that Duke should employ a portfolio strategy similar to what EVA is recommending for fuel. (Comm.-Ord. RR Ex. 1, at 6-4 to 6-5.)

However, EVA opposed Duke's request to purchase capacity from the DENA assets, for several reasons. First, EVA stated that Duke has not demonstrated that its native customers are paying more for capacity in the market than they would if Duke purchased capacity from the DENA assets. Second, according to EVA, purchases from an affiliate are always problematic as they cause suspicion in the market and, potentially, reduce competitive offers. In addition, the existence of such offers puts a greater burden on the audit process. Finally, Duke would not be disadvantaged by this requirement, as DENA assets should be able to be sold at market prices. Duke should be indifferent to whether the legacy DENA assets are sold to Duke or on the open market. (Comm.-Ord. RR Ex. 1, at 6-5.)

OCC argues that the record does not support any change in the prohibition against charging for the DENA assets and that the auditor's recommendation should be followed by the Commission. OCC points to EVA's report that states that Duke has not demonstrated that its native customers are paying more for capacity in the market than they would if Duke purchased capacity for the DENA assets. (OCC Rider Brief at 11.) Similarly, OCC witness Haugh testified that Duke has not demonstrated that use of the DENA assets will provide benefits to customers. (OCC RR Ex. 1 at 15.) Mr. Haugh also explained that one reason for his opposition to the use of DENA assets was that, as admitted by Duke's witness, during situations when Duke would purchase capacity from the DENA assets, there are usually very few broker quotes. Thus, Mr. Haugh argued that the proposed pricing methodology does not provide proper protection for ratepayers. (OCC RR Ex. 2, at 4; Tr. I at 145.)

OCC also points to the auditor's report that states that affiliate transactions "are always problematic and make the market suspicious regarding pricing and potentially reducing competitive offers." According to OCC, Duke helped to create a problem by reducing the number of market participants through the Duke merger and its proposal to use the DENA assets may compound that problem by discouraging the remaining market. OCC also opposes affiliate transactions on the grounds that a company is always expected to act in its own best interests as opposed to the public interest and that such transactions put a greater burden on the auditor, the Commission and the audit process. (OCC Rider Brief at 13.)

OCC advocates the imposition of strict rules as to when the DENA assets can be used, such as only in an emergency situation where there are no other options. Mr. Haugh also indicated that guidelines for formulating a price for the DENA assets need to be stringent, such as a minimum number of broker quotes and transactions to determine the price of the DENA capacity, as well as a cap on the amount Duke is charging to the customers who are paying the SRT. (OCC RR Ex. 2, at 5.)

OPAE also opposes the use of DENA assets in the SRT. OPAE notes that, pursuant to the finding and order in *In the Matter of the Joint Application of Cinergy Corp., on Behalf of The Cincinnati Gas & Electric Company, and Duke Energy Holding Corp. for Consent and Approval of a Change of Control of The Cincinnati Gas & Electric Company*, Case No. 05-732-EL-MER, costs related to the transfer of the DENA assets may not be passed on to Ohio customers without prior approval of the Commission. OPAE also points out that the stipulation approved by the Commission with regard to SRT, discussed above, provides that Duke may not use the DENA assets to satisfy the SRT margin requirements without an application to the Commission requesting approval of a market price associated with the DENA assets. OPAE argues that Duke has not provided any market pricing mechanism in its application. OPAE also argues that Duke has not shown that customers are better off by Duke using DENA assets than they would be by Duke paying for capacity in the market. (OPAE Rider Brief at 14-15.)

OPAE asserts that Duke should be allowed to purchase capacity from the DENA assets in the future only in an emergency situation. (OPAE Brief at 16, 18.) [7] OPAE argues that the guidelines for formulating a price for the DENA assets need to be more stringent and agreed with OCC's contention that a minimum of three bids and offers from three separate brokers would be needed. (OPAE Rider Brief at 17.)

Staff supports Duke's use of DENA assets in a limited, emergency, situation. Staff argues that recovery of costs related to DENA assets does not violate any significant regulatory principle or practice. Staff specifically states that the stipulation would allow cost recovery when assets are used in emergency situations. With regard to pricing, Staff asserts that the stipulation provides protections in the face of a limited market, while benefitting customers during emergency circumstances. (Staff Reply Brief at 19-20.)

Duke points out that the auditor justifies its opposition to Duke's use of DENA capacity as a resource eligible for inclusion through the SRT on the base that affiliate transactions are difficult to audit and that a market price is difficult to verify. (Duke Rider Reply Brief at 37.) Duke claims that it is beneficial to its consumers that all reasonably priced generation options, including DENA assets, are available to meet the needs, especially in an emergency. In his testimony, Duke witness Charles Whitlock testified that the purpose of the SRT is to ensure adequate capacity to meet Duke's obligation as provider of last resort. This obligation requires Duke to maintain a 15 percent capacity reserve margin. Mr. Whitlock stated that there are limited assets located in the MISO footprint that meet MISO's designated network resource requirements and that consumers need to have access to every possible economic option of available generating assets. The risks to consumers are increasingly likely if Duke does not have access to market price capacity during a time of need. Mr. Whitlock also testified that, on a daily operational level, the ability to include the DENA assets makes sense since arbitrarily excluding specific generators from consideration can only increase the cost to consumers. Mr. Whitlock testified that the auditor's concern about the reduction of competitive bid offers is unwarranted. He indicated that the vast majority of competitive bidders are not aware of Duke's exclusion of DENA assets. He also testified that the auditor's position

7 We note that in a clarification to the stipulation in these cases, Duke and Staff attempted to clarify the circumstances under which an "emergency " would exist where DENA assets would be appropriately used. Witnesses testified as to the circumstances under which an emergency would exist. (Tr. II at 89-90, 94, 108.)

with respect to the size of the market and the ability to sell legacy DENA capacity in the market is dubious. He added that, if the Commission does not permit Duke to purchase capacity from its DENA assets to satisfy its Rider SRT obligations, Duke will continue to sell the capacity on the open market. (Duke RR Ex. 2, at 10-14.)

Duke contends that the need for available capacity options is especially strong in the day-ahead market, where a sudden capacity constraint coupled with a need for capacity would likely expose consumers to high prices. Duke also contends that the nature of a capacity purchase in an emergency makes the market price unpredictable, as the availability of capacity is unknown. Therefore, Duke contends that a capped market price in unreasonable. Duke asserts that the stipulation provides two alternatives for pricing the DENA capacity at the time it is needed, through the midpoint of broker quotes or an average of third-party purchases. Duke also argues that the next SRT auditor will be able to audit all DENA transactions properly because the pricing methodologies require Duke to maintain records of brokers' quotes and third-party transactions. (Duke Remand Reply Brief at 38.)

The issues in contention, relating to the recovery of costs of DENA capacity through the SRT, are the procedural compliance with prior orders, the clarity and meaning of the term "emergency," and the reasonableness of the proposed pricing mechanism. First, while we are aware that our prior orders required certain procedural steps to be taken before Duke might get approval for the recovery of the costs of using DENA capacity, we find that Duke has complied with the underlying intent of those procedural safeguards. The process that was instituted required Duke to give notice of its intent to use the DENA assets, to allow discovery of relevant facts by interested parties, and to provide sufficient detail to allow analysis of the reasonableness of its proposal. In this situation, all of those goals have been met. Notice was given, discovery was pursued, and details are available. While it is true that the stipulation does not include a proposed price, it does include a methodology for determining a price. We find that the process that has been followed in this proceeding has complied with the substance of our prior orders.

Although certain of the parties contend that the stipulation would allow use of the DENA assets in non-emergency situations, it is clear to us that this is not the case. The clarification of the stipulation, submitted at the hearing, specifically states that the stipulation "is intended to permit [Duke] to utilize its DENA capacity on an emergency, intermittent basis. An 'emergency' basis exists where capacity to meet [Duke's] operational requirements is necessary with less than seven days [*sic*] advance notice."

We find that the pricing mechanism proposed in the stipulation is reasonable. Although we are aware that the market for capacity is not mature, Mr. Whitlock did testify that he would likely be able to get multiple quotes. (Tr. I at 144-145.) In addition, we note that the stipulation provides two different mechanisms for setting a price and also allows for the possibility that Commission Staff might agree to a different system in appropriate circumstances. In light of the fact that Duke would likely be unable to obtain timely Commission approval of a DENA purchase in an emergency circumstance, the system established by the stipulation is a reasonable solution.

3. Issue Associated with Rider AAC

Rider AAC is defined as a component to recover incremental costs associated with homeland security, taxes, and environmental compliance. The charges under Rider AAC were established for calendar years 2005 and 2006 in the Commission's entry on rehearing in 03-93. For non-residential consumers, Rider AAC was set at an agreed market price of four percent of little g[8] for 2005 and eight percent of little g for 2006. For residential consumers, Rider AAC was not applicable in 2005, because these consumers continued to be in the market development period. After January 1, 2006, Rider AAC was set for residential consumers at a market price of six percent of little g. In 03-93, Duke was required to file an annual application to set its AAC price.

Duke's 2007 proposed price for Rider AAC was filed in Case No. 06-1085-EL-UNC. (Duke RR Ex. 6, at 4.) Mr. William Don Wathen, Jr., testified on behalf of Duke with regard to the AAC. Mr. Wathen described how Rider AAC was calculated and applied in the first two years of the RSP and discussed the components that are included in the calculation of the proposed Rider AAC for 2007. (Duke RR Ex. 4 at 2.) Mr. Wathen testified that the current Rider AAC market price is insufficient to fully recover the costs eligible under the AAC, which include earning a return on and of the capital investment for environmental compliance equipment capital investment, operation and maintenance expenses and environmental reagent costs; tax rates due to changes in tax laws; and homeland security, costs including a return on and a return of capital and expenses. (Duke RR Ex. 4 at 4.) Mr. Wathen also testified that there are dozens of projects where Duke is proposing recovery of a return on construction work in progress (CWIP) through Rider AAC. (Tr. I at 162.)

There is one issue associated with the calculation of the AAC that was raised by OCC and OPAE. Specifically, the nonsignatory parties question whether a return on CWIP should be recovered through Rider AAC. According to OCC witness Haugh, Duke is looking to collect $73,818,962 from the AAC, which equates to a charge equal to 9.1 percent of little g. (OCC RR Ex. 1 at 5.) Mr. Haugh recommended that CWIP be removed from the return on environmental plant calculation, in order to set a more reasonable AAC charge (*Id.* at 8.)

8 "Little g" represents the result of removing the regulatory transition charges from the company's unbundled generation rate, referred to as Big G.

OCC supports the AAC calculations that exclude return on CWIP for environmental plant. OCC indicates that staff is accepting Duke's AAC calculations based on a return on 100 percent of CWIP for environmental plant with no showing by Duke regarding the percentage of completion of that plant. (OCC Rider Reply Brief at 15.) OCC notes that Staff witness Tufts states that he did not form an opinion on whether a return on CWIP is an appropriate component of the AAC. (Tr. II at 35.) According to OCC, no precedent exists for such calculations, which are traditionally based on a showing the plant is at least 75 percent complete. (OCC Rider Brief at 15-16.) OCC witness Haugh indicated that removing the CWIP portion of the environmental plant reduces the revenue requirement for the 2007 AAC to $45,246,994 and results in the AAC being set at 5.6 percent of little g. (OCC RR Ex. 1, at 11.) According to OCC, Duke fails to recognize the Commission's regulatory practice of allowing a return on CWIP only after an installation is 75 percent or more complete. OCC points out that calculation of the AAC and review of the underlying transactions were not within the scope of the auditor's report and that neither the staff nor Duke provided any detail of the percentage completion of environmental upgrades at Duke's plants. Rather, OCC explains, staff only investigated Duke's accounts regarding capital environmental plant additions and verified the existence of certain plant additions and did not complete a management audit related to the AAC. Hence, it argues, the reasonableness of a return on CWIP for environmental plant in the AAC calculation is not covered by staff's inquiries. In OCC's opinion, elimination of the return on CWIP is appropriate since customers may receive little or no benefit from the plant additions. (OCC Rider Brief at 14-16.)

OPAE contends that there is no justification for the inclusion of a return on CWIP in the AAC.[9] OPAE states that the Commission has not determined that a return on CWIP may be included in the AAC and the components of the AAC mention expenses, but do not describe the return on CWIP. OPAE also claims that the Commission did not approve a set formula for the calculation of the AAC but adopted a flexible approach, citing factors such as proven expenses and other factors that may be appropriate from time to time. (OPAE Rider Brief at 11.) OPAE argues that CWIP should be excluded from the revenue that Duke seeks to obtain through the AAC, noting that, in a traditional ratemaking proceeding, CWIP be required to be at least 75 percent complete before a return would be allowed. OPAE points out that Duke has made no such showing. OPAE also argues that under traditional regulatory treatment, Duke would be allowed to earn a return on CWIP during construction, but customers might pay less at a future date when the plant is in service. However, OPAE suggests, the current treatment provides no assurance of lower capital costs for customers at a future date. OPAE argues that, in a truly competitive market, a return on CWIP would not be earned at all and a return on the plant would not occur until a new plant is fully operational. (OPAE Rider Brief at 11-14.)

9 On page 11 of its initial brief, OPAE claims that the m/p auditor recommended that a return of CWIP be excluded from the AAC. The m/p auditor made no recommendations related to the AAC.

Staff disagrees with OCC's analogy to ratemaking principles, because those principles do not apply in this competitive environment. Staff referred to testimony of its witness, Mr. Cahaan, who testified in the remand phase of the hearing in these proceedings that the RSP is not cost-based ratemaking, but is a market-based standard service offer, and that the rate setting provisions of Section 4909, Revised Code, do not apply. (Staff RR Ex. 1, at 4-5.) According to Mr. Cahaan, traditional rate-case components, such as CWIP, are used differently in an RSP case than in a traditional rate case. In a rate case, he explained, individual components are evaluated individually and the "correct" determination of each item is presumed to generate a fair, reasonable, and sustainable solution and an appropriate balance of competing interests. In an RSP case, he continued, the assessment of individual components does not matter. Rather, Mr. Cahaan asserted, the important principle here is the balance among conflicting policy goals that include protecting consumers from a volatile, risky, and an imperfect market; assuring companies of financial stability; and encouraging the development of retail markets. (Staff Rider Brief at 7-11.)

Duke argues that a limitation on earning a return prior to attainment of a 75 percent completion level was statutorily eliminated by the legislature. Duke points out that CWIP was included in the initial support for the AAC, as a part of Duke's market price, as evidenced by supportive testimony of Mr. Wathen and by reference to Attachment JPS-4 to the testimony of Mr. Steffen in approval of the RSP, as well as by the fact that OCC's recommended change would result in a reduction of the total Rider AAC price to a level below what the Commission approved in 2004. Further, according to Duke, if it cannot recover a return on CWIP on its environmental investments, it will be forced to substitute emission allowances, more expensive low sulfur coal, and purchased power, in place of the scrubbers that are included in CWIP, in order to meet environmental requirements. It contends that those substitutes will directly affect the costs recovered through the FPP and will, therefore, directly affect the price for all consumers. Duke contends that, as long as its total price is within the range of prices available to consumers in the market and is just and reasonable, it is irrelevant what types of underlying costs are included in the price. (Duke Rider Reply Brief at 41-46.) Duke also notes that a management performance audit is not necessary, given the nature of the expenses recovered in Rider AAC. (Duke Rider Reply Brief at 46-49.)

In the Commission's September 29, 2004, opinion and order, we indicated that we would consider future AAC charges. There was no discussion regarding a return on CWIP in the AAC. However, in our approval of the AAC, we based our determination in part on Duke's supplied calculations. Attachment JPS-4 to the testimony of John Steffen clearly showed CWIP as a factor in the AAC, with no reference to percentage completion. We would note that, in the present market environment, ratemaking standards such as the limitation on earning a return on CWIP are not dispositive of the outcome in these proceedings. Therefore, we find that the stage of completion of CWIP should not, under these specific circumstances, be a bar to Duke's earning a return on CWIP. In addition, we would note that we do not find a management performance audit to be necessary at this time, based on the nature of the items being recovered under Rider AAC and based on the fact that we are monitoring Duke's activities in these spheres in the course of our periodic financial audits. However, we would also respond that just because Duke incurs a particular cost does not necessarily mean that such cost would be appropriate for recovery under any given rider. Duke should expect that its claimed costs may be reviewed for reasonableness.

D. Evaluation of the Stipulation

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. In reviewing the stipulation, our primary concern, however, is that the stipulation is in the public interest.

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 agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

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

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

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

The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. 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. *Indus. Energy*

Consumers of Ohio Power Co. v. Pub. Util. Comm. (1994), 68 Ohio St.3d 559 (citing *Consumers' Counsel, supra,* at 126).

1. Serious Bargaining

OPAE asserts that the stipulation is not balanced and does not represent the views of all customer classes that are parties to the proceedings. It explains that, in its view, the Supreme Court of Ohio has affirmed rate stabilization plans only on the basis of customer agreement in a stipulation, therefore arguing that customer support is critical. OPAE states that the stipulation has no support from marketers, residential customers, or any other customer group that will be subject to its terms. In making this claim, OPAE discounts the support of PWC, asserting that PWC is unconcerned about the impact of the stipulation on residential customers' bills. It also discounts the support of the city of Cincinnati, as it is a party to a side agreement that required support for the stipulation in Duke's RSP case (not this stipulation). Finally, it discounts the support of certain other customer groups on the basis of confidential agreements that arose in the context of Duke's RSP remand proceeding. (OPAE Rider Brief at 2-10.) OPAE asserts that special considerations in the form of side agreements may have allowed one or more parties to gain an unfair advantage in the bargaining process. (OPAE Rider Reply Brief at 4).

OCC similarly claims that the settlement was not the product of serious bargaining. OCC argues that its "participation in drafting an agreement would have provided credibility to the argument that serious bargaining took place over the 2007 Stipulation, but the OCC's efforts to correct even the obvious flaws in the document were entirely rebuffed." (OCC Rider Brief at 21.) OCC argues that the "legacy of the side agreements" discounts the conclusion that serious bargaining took place. (OCC Rider Brief at 22.) OCC also claims that the city of Cincinnati has not demonstrated any knowledge of the issues in these proceedings and the city's interest in these proceedings was to protect its side deal with Duke. Thus, OCC claims, there was no serious bargaining between Duke and Cincinnati. OCC also claims that PWC failed to demonstrate any knowledge of the issues in these cases and that its only interest in these cases was focused on maintaining the financial support for its narrow interests. (OCC Rider Brief at 22-23.) OCC also claims that many of the stipulating parties evidenced their lack of involvement by being uninterested in OCC's discovery activity, failing to participate in the hearing, and failing to file briefs. According to OCC, a party that declines to accept and review copies of documents that were important to these cases, is not "knowledgeable," regardless of the identity of that party. (OCC Rider Reply Brief at 6-7.)

Duke, on the other hand, contends that the stipulation was the product of serious bargaining, pointing to the fact that all of the parties, including the signatories to the stipulation, as well as those who chose not to sign the stipulation, were invited to, and participated in, the settlement discussions and have extensive experience before the Commission. Duke's witness, Paul Smith, specifically testified that all parties were invited to attend the three settlement discussion related to these matters, at which many issues were addressed. (Duke RR Ex. 6, at 5.) Specifically, Duke indicates that parties participating in settlement discussion represented all stakeholder groups, including residential, industrial, and commercial customers, as well as CRES providers. The parties so identified by Duke include OCC, OPAE, the city of Cincinnati, PWC, IEU, OEG, OHA, OMG, and Dominion, in addition to Duke and staff of the Commission. Duke emphasizes that the signatory parties also represent all stakeholder groups other than CRES providers and that no CRES provider opposed the stipulation. (Duke Rider Brief at 6.) Duke thus discounts OCC's and OPAE's claim that there was no serious bargaining because residential stakeholders did not support the stipulation, submitting that there was substantial support by residential representatives including PWC, which represents low income residential consumers who rely on programs funded by Duke for energy efficiency and weatherization, and the city of Cincinnati, which is the statutory representative of residential consumers within its municipal boundaries. (Duke Rider Reply Brief at 17-20.)

Duke also maintains that, during the settlement discussions, many positions were advocated and considered and were ultimately accepted or rejected by the negotiating parties. It proposes that few stipulations contain every demand by every party and necessarily include concessions made by parties to reach an acceptable resolution. Thus, it argues, the fact that many of the settlement positions of OCC and OPAE were rejected does not mean that serious bargaining did not take place. (Duke Rider Reply Brief at 14.)

Duke discounts OCC and OPAE's claims that OEG and OHA did not engage in serious bargaining because their members are parties to certain side agreements. Duke notes that nothing in those side agreements prohibits opposition to the increases resulting from Duke's applications in these cases. (Duke Rider Reply Brief at 22-23.) Duke also argues that there is no justification for OCC's and OPAE's claims that PWC only supported the stipulation because it has energy efficiency and weatherization contracts with Duke and because it seeks to maintain its funding from those contracts. Duke indicates that PWC is one of a number of energy efficiency and weatherization service providers to residential consumers in the Cincinnati area and that PWC competes against other providers for contracts that are awarded by a local organization that Duke does not control. (Duke Rider Reply Brief at 25.)

Staff asserts that all parties had an opportunity to participate fully in the settlement conferences at which many issues were addressed. (Staff Rider Brief at 5.) Addressing the first prong of the test, Staff further reasons that Mr. Haugh, testifying on behalf of OCC in opposition to the stipulation, did not question that serious bargaining among capable knowledgeable parties occurred, did not propose that the stipulation was suspect because OCC did not sign it, did not suggest that any stipulation signatory was influenced by a side agreement, and did not mention any such agreement. (Staff Rider Brief at 4-5; Staff Rider Reply Brief at 2-3.) Countering OCC's arguments, Staff also notes that it is not a prerequisite that any specific party, such as OCC or OPAE, must be a signatory to a stipulation in order for the Commission to find that serious bargaining occurred. Thus, argues staff, OCC's decision not to support the stipulation does not alter the fact that serious bargaining took place. (Staff Rider Reply Brief at 3.) Staff also suggests that, despite claims to the contrary by OCC, the city of Cincinnati or PWC has each been a party to these cases since their inception.

On the basis of the evidence before us, we conclude that the stipulation is the product of serious bargaining by knowledgeable parties. It is clear that all parties were invited to all negotiation sessions. The fact that some parties were uninterested in OCC's discovery issues, did not brief the issues following hearing, or did not participate in the manner in which non-signatory parties might have wished does not mean that those parties were uninvolved or unknowledgeable. These are parties that have closely followed many cases related to Duke's RSP and have been involved in many levels of discussion over a long period of time. We find them to be knowledgeable and informed parties. We will not demand any particular level of participation in the proceedings.

We also note, as pointed out by Duke, that the stipulation was either supported or not opposed by representatives of each stakeholder group. Residential consumers were represented by PWC and the city of Cincinnati, OEG represented manufacturing consumers, and OHA represented commercial interests. Also involved in the negotiations were IEU, OMG, and Dominion, none of which opposed the resultant document. OCC and OPAE, representing residential customers, were involved in the discussions, although they were not, apparently, successful in obtaining a result with which they could agree. Lack of agreement by two parties should not cause the entire stipulation to be rejected as if serious bargaining had not occurred. To do so would be to give those parties, in effect, veto power over the result.

Finally, we note the references by OCC and OPAE to certain agreements that related to Duke's RSP and their argument that those agreements impacted parties' ability to negotiate seriously with regard to the stipulation in these proceedings. While we did find that those agreements impacted the stipulation in the RSP case by means of provisions requiring support of that stipulation, there is no argument that there was a similar connection to the stipulation we are considering today. The signatory parties to this stipulation specifically confirmed that there were no side agreements related to this stipulation. (Tr. I at 12-17.)

2. Benefit to Ratepayers and the Public Interest

OCC claims that the stipulation does not benefit ratepayers or serve the public interest. OCC asserts that the stipulation does not address certain credits that the auditor recommended be flowed back to customers through the FPP. OCC also complains, in its briefs, about the stipulation's approach to procurement for the post-RSP period and active management of coal contracts, the treatment of congestion costs, the inclusion in the AAC of a return on CWIP, the location of certain charges on bills, the veracity of the apparent concession that Duke would not charge interest on AAC true-ups, the use of DENA assets in the SRT, and the acceptance by Duke of coal offers that do not allow resale. (OCC Rider Brief at 24-31; OCC Rider Reply Brief at 8-13.)

OPAE, similarly, believes that the stipulation fails to benefit ratepayers and the public interest "by allowing the return on CWIP and the use of the DENA assets under inappropriate circumstances. (OPAE Rider Brief at 11-18, 19.)

Duke argues that the stipulation does benefit the public interest by furthering the Commission's goals for RSPs. It also points out that the stipulation requires Duke to issue a bill credit related to a defaulted coal delivery contract that is greater than the amount recommended by the auditor and in a more expedited manner. This credit, Duke asserts, will "mitigate and help offset the totality of the price adjustment for the 2007 MBSSO rider components . . .." Duke also notes that stipulation requires the immediate commencement of talks about future fuel purchases and clarifies ambiguity relating to its use of DENA assets in an emergency. Further, Duke points out that the stipulation adopts "almost all of the auditor's and Staff's recommendations . . .." Finally, it confirms that its "prices remain below the national average and well below states that have implemented unfettered auction pricing such as Illinois, Maryland, and New Jersey. In contrast, OCC's recommendations would result in higher prices as have occurred in those states." (Duke Rider Brief at 26-7; Duke Rider Reply Brief at 26-27.)

Staff also argues that the stipulation benefits ratepayers and serves the public interest. Staff's witness, Richard Cahaan, opined that the stipulation, as a package, benefits customers of Duke and serves the public interest. Specifically, he asserted that the first and fifth paragraphs, both of which directly involve revenues, represent reasonable compromises among the interested parties. He designates the remainder of the stipulation as addressing "process" matters: addressing how certain problems are to be solved. Staff, evaluating the arguments put forth by OCC and OPAE, advises the Commission that, while those parties may have wanted "more" than they got in the stipulation, "their desire for 'more' does not negate the benefits the Stipulation provides ratepayers and the ways the Stipulation benefits the public interest." (Staff Rider Brief at 5-7; Staff RR Ex. 3, at 2-3; Staff Rider Reply Brief at 9-10.)

We find that the proposed stipulation does benefit Duke ratepayers and serves the public interest. We believe it is to the benefit of ratepayers and the public to resolve these issues expeditiously and to address open issues such as the circumstances under which DENA assets might be used in an emergency. In addition, we find that, in light of pending legislation relating to the electric industry, capacity purchases for the post-RSP period should be the subject of mandatory discussions among the parties, as is provided in the stipulation. Finally, we note that the stipulation provides a greater bill credit in the FPP than was recommended by the auditor, and requires it to be refunded to customers in a more expeditious manner. This, too, is a benefit that would not be attainable outside of the stipulation.

3. Violation of Important Regulatory Principles or Practices

Duke and Commission staff conclude that the stipulation does not violate any important regulatory principle or practice. (Duke Rider Brief, *passim*; Duke Rider Reply Brief at 27-29; Staff Rider Brief at 7, 11; Staff Rider Reply Brief at 17, 18, 20.) On the other hand, the non-signatory parties make various arguments that stipulation does violate important regulatory principles and practices. These arguments have been discussed, and rejected, above. Any other issues not specifically discussed have been considered and will be denied.

E. Motions to Strike

As recited above, in the procedural history, both OPAE and PWC have filed motions to strike certain language in other parties' briefs. Similar motions were made in the remand phase of these consolidated proceedings. As we noted in the October 24, 2007, order on remand, the Commission will not strike arguments made by parties in these pleadings. However, again, the Commission will base its determination on record evidence and will ignore arguments that are not supported by evidence of record in these proceedings.

<u>FINDINGS OF FACT AND CONCLUSIONS OF LAW:</u>

(1) On October 24, 2007, the Commission issued its order on remand in the remanded RSP phase of these proceedings.

(2) The hearing on the rider phase of these proceedings was held on April 10 and 19, 2007.

(3) Initial briefs and reply briefs were filed by Duke, OCC, OPAE, and staff on May 17 and 30, 2007, respectively.

(4) On April 9, 2007, a stipulation signed by Duke, Commission staff, OEG, OHA, city of Cincinnati, and PWC was filed in the above-captioned cases. OCC and OPAE opposed the stipulation.

(5) It is reasonable to allow Duke to continue its active management of its coal, EA, and purchased power portfolio, as provided in the stipulation.

(6) The stipulation provision proposing the initiation of discussions relating to the post-RSP period is reasonable, especially in light of pending legislation relating to the post-RSP period.

(7) Duke has complied with the underlying intent of the procedural safeguards regarding the use of DENA assets.

(8) The stage of completion of CWIP should not be a bar to Duke's earning a return on CWIP.

(9) The stipulation is the product of serious bargaining by knowledgeable parties.

(10) The stipulation benefits Duke ratepayers and serves the public interest.

(11) The stipulation does not violate any important regulatory principle or practice.

(12) The Commission will not strike arguments made by parties in these pleadings.

It is, therefore,

ORDERED, That the stipulation be approved and adopted. It is, further,

ORDERED, That motions to strike, filed by PWC and OPAE, be denied. It is, further,

ORDERED, That any arguments not specifically discussed in this Opinion and Order be denied. It is, further,

ORDERED, That Duke work with staff to determine a reasonable period over which the amounts authorized by this Opinion and Order should be trued-up and collected. It is, further,

ORDERED, That Duke file revised tariffs to reflect the terms of this Opinion and Order. It is, further, ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Donald L. Mason

Abstain #05-724-EL-UNC

SEF/JWK:ct

Entered in the Journal

NOV 20 2007

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period.)	Case No. 03-93-EL-ATA
In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Modify Current Accounting Procedures for Certain Costs Associated with the Midwest Independent Transmission System Operator.)	Case No. 03-2079-EL-AAM
In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Modify Current Accounting Procedures for Capital Investment in its Electric Transmission and Distribution System and to Establish a Capital Investment Reliability Rider to be Effective after the Market Development Period.)	Case No. 03-2081-EL-AAM Case No. 03-2080-EL-ATA

ORDER ON REMAND

Table of Contents

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, 17th 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, 15th 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[1] requiring the restructuring of the electric utility industry and providing for retail competition with regard to the generation component of electric service (SB 3). Pursuant to SB 3, on August 31, 2000, the Commission approved a transition plan for Duke Energy Ohio, Inc., (Duke or company).[2] [3] In that opinion, the Commission, among other things, allowed Duke a market development period (MDP) ending no earlier than December 31, 2005, for residential customers and, with regard to each other customer class, ending when 20 percent of the load of each such class switched the purchase of its generation supply to a certified supplier. The transition plan opinion also granted Duke accounting authority to defer and recover a regulatory transition charge (RTC) that would continue through 2008 for residential customers and through 2010 for nonresidential customers.

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

On October 8, 2003, Duke filed three additional, related cases. In *In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Modify Current Accounting Procedures for Certain Costs Associated with the Midwest Independent Transmission System Operator*, Case No. 03-2079-EL-AAM (03-2079), Duke requested authority to modify

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

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

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

its current accounting procedures to allow it to defer incremental costs related to its participation in the Midwest Independent Transmission System Operator (MISO). In *In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Modify Current Accounting Procedures for Capital Investment in its Electric Transmission and Distribution System and to Establish a Capital Investment Reliability Rider to be Effective after the Market Development Period*, Case Nos. 03-2080-EL-ATA (03-2080) and Case No. 03-2081-EL-AAM (03-2081), Duke requested authority (a) to modify its current accounting procedures to allow it to defer incremental costs related to its net capital investment in electric transmission and distribution facilities, where that investment was made between January 1, 2001, and the date when such investment is reflected in the company's base rates, together with a carrying charge, and (b) to establish a capital investment rider to recover those deferred transmission and distribution facilities capital investments after the end of the MDP.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. DISCUSSION

A. Introductory Issues

1. Confidentiality

(a) Procedural Background Related to Confidentiality

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

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

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

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

(b) 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) <u>Tests for Trade Secrets</u>

(1) <u>Independent Economic Value</u>

a. <u>Arguments</u>

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. <u>Resolution</u>

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. <u>Resolution</u>

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

(d) Consistency with Purposes of Title 49

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

(e) Redaction

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

2. PWC Motions to Strike

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

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

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

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

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

1. <u>Background</u>

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

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

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

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

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

It should be noted that the side agreement issue is relevant to these cases, according to the court's opinion, only with regard to the serious bargaining prong of the Commission's analysis of stipulations and arose, therefore, as part of the September 29, 2004, opinion and order in these proceedings. The remand for lack of evidentiary support arose because of an issue first addressed in the Commission's November 23, 2004, entry on rehearing. Therefore, although the court discussed the lack of evidentiary support first, in this order on remand we find it critical to consider the issues in the order in which the errors were made.

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

2. Discovery Remand

(a) Consideration of Side Agreements

(1) Extent of Supreme Court's Directive

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

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

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

(2) <u>Continued Existence of Stipulation</u>

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

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

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

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

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

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

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

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

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

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

(b) <u>Seriousness of Bargaining in Light of Side Agreements</u>

(1) <u>General Rule Concerning Evaluation of Stipulations</u>

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) <u>Supreme Court Review</u>

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) <u>Impact of Side Agreements on Serious Bargaining</u>

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

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

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

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

a. Timing of Side Agreements

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

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

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

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

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

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

b. Support Provisions

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

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

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

c. Resolution Regarding Serious Bargaining

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

3. Evidentiary Support Remand

(a) Supreme Court's Directive

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

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

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

(b) Legal Standard for Adoption of RSP

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

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

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

(c) Consideration of RSP Proposal

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

(1) RSP Proposal: Generation Charge

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

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

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

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

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

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

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

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

a. 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.[11]

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

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

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

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

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

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

b. Other Specified Costs

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

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

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

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

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

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

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

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

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

c. Rate Stabilization Charge

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

d. POLR Risk Costs

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

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

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

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

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

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

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) <u>RSP Proposal: Other Provisions</u>

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

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

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

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

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

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

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

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

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

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

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

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

(4) <u>RSP Proposal: Statutory Compliance</u>

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

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

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

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

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

C. Associated Applications

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(15) Under Section 4928.14, Revised Code, Duke is required to provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a market-based standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service.

(16) Duke's RSP, as originally proposed in its application and modified by Duke and in this order on remand, provides consumers, on a comparable and nondiscriminatory basis within its certified territory, a market-based standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. The RSP appropriately balances goals of protecting consumers from risk, assuring Duke of some level of financial stability, and encouraging the development of the competitive market. Duke's RSP, as modified in this order on remand, should be approved.

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

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

ORDER:

It is, therefore,

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

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

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

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

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

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

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

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

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Donald L. Mason

JWK/SEF:geb

Entered in the Journal
OCT 2 4 2007

Reneé J. Jenkins
Secretary

4909.15 Fixation of reasonable rate.

(A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, shall determine:

(1) The valuation as of the date certain of the property of the public utility used and useful in rendering the public utility service for which rates are to be fixed and determined. The valuation so determined shall be the total value as set forth in division (J) of section 4909.05 of the Revised Code, and a reasonable allowance for materials and supplies and cash working capital, as determined by the commission.

The commission, in its discretion, may include in the valuation a reasonable allowance for construction work in progress but, in no event, may such an allowance be made by the commission until it has determined that the particular construction project is at least seventy-five per cent complete.

In determining the percentage completion of a particular construction project, the commission shall consider, among other relevant criteria, the per cent of time elapsed in construction; the per cent of construction funds, excluding allowance for funds used during construction, expended, or obligated to such construction funds budgeted where all such funds are adjusted to reflect current purchasing power; and any physical inspection performed by or on behalf of any party, including the commission's staff.

A reasonable allowance for construction work in progress shall not exceed ten per cent of the total valuation as stated in this division, not including such allowance for construction work in progress.

Where the commission permits an allowance for construction work in progress, the dollar value of the project or portion thereof included in the valuation as construction work in progress shall not be included in the valuation as plant in service until such time as the total revenue effect of the construction work in progress allowance is offset by the total revenue effect of the plant in service exclusion. Carrying charges calculated in a manner similar to allowance for funds used during construction shall accrue on that portion of the project in service but not reflected in rates as plant in service, and such accrued carrying charges shall be included in the valuation of the property at the conclusion of the offset period for purposes of division (J) of section 4909.05 of the Revised Code.

From and after April 10, 1985, no allowance for construction work in progress as it relates to a particular construction project shall be reflected in rates for a period exceeding forty-eight consecutive months commencing on the date the initial rates reflecting such allowance become effective, except as otherwise provided in this division.

The applicable maximum period in rates for an allowance for construction work in progress as it relates to a particular construction project shall be tolled if, and to the extent, a delay in the in-service date of the project is caused by the action or inaction of any federal, state, county, or municipal agency having jurisdiction, where such action or inaction relates to a change in a rule, standard, or approval of such agency, and where such action or inaction is not the result of the failure of the utility to reasonably endeavor to comply with any rule, standard, or approval prior to such change.

In the event that such period expires before the project goes into service, the commission shall exclude, from the date of expiration, the allowance for the project as construction work in progress from rates, except that the commission may extend the expiration date up to twelve months for good cause shown.

In the event that a utility has permanently canceled, abandoned, or terminated construction of a project for which it was previously permitted a construction work in progress allowance, the commission immediately shall exclude the allowance for the project from the valuation.

In the event that a construction work in progress project previously included in the valuation is removed from the valuation pursuant to this division, any revenues collected by the utility from its customers after April 10, 1985, that resulted from such prior inclusion shall be offset against future revenues over the same period of time as the project was included in the valuation as construction work in progress. The total revenue effect of such offset shall not exceed the total revenues previously collected.

In no event shall the total revenue effect of any offset or offsets provided under division (A)(1) of this section exceed the total revenue effect of any construction work in progress allowance.

(2) A fair and reasonable rate of return to the utility on the valuation as determined in division (A)(1) of this section;

(3) The dollar annual return to which the utility is entitled by applying the fair and reasonable rate of return as determined under division (A)(2) of this section to the valuation of the utility determined under division (A)(1) of this section;

(4) The cost to the utility of rendering the public utility service for the test period less the total of any interest on cash or credit refunds paid, pursuant to section 4909.42 of the Revised Code, by the utility during the test period.

(a) Federal, state, and local taxes imposed on or measured by net income may, in the discretion of the commission, be computed by the normalization method of accounting, provided the utility maintains accounting reserves that reflect differences between taxes actually payable and taxes on a normalized basis, provided that no determination as to the treatment in the rate-making process of such taxes shall be made that will result in loss of any tax depreciation or other tax benefit to which the utility would otherwise be entitled, and further provided that such tax benefit as redounds to the utility as a result of such a computation may not be retained by the company, used to fund any dividend or distribution, or utilized for any purpose other than the defrayal of the operating expenses of the utility and the defrayal of the expenses of the utility in connection with construction work.

(b) The amount of any tax credits granted to an electric light company under section 5727.391 of the Revised Code for Ohio coal burned prior to January 1, 2000, shall not be retained by the company, used to fund any dividend or distribution, or utilized for any purposes other than the defrayal of the allowable operating expenses of the company and the defrayal of the allowable expenses of the company in connection with the installation, acquisition, construction, or use of a compliance facility. The amount of the tax credits granted to an electric light company under that section for Ohio coal burned prior to January 1, 2000, shall be returned to its customers within three years after initially claiming the credit through an offset to the company's rates or fuel component, as determined by the

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commission, as set forth in schedules filed by the company under section 4905.30 of the Revised Code. As used in division (A)(4)(c) of this section, "compliance facility" has the same meaning as in section 5727.391 of the Revised Code.

(B) The commission shall compute the gross annual revenues to which the utility is entitled by adding the dollar amount of return under division (A)(3) of this section to the cost of rendering the public utility service for the test period under division (A)(4) of this section.

(C) The test period, unless otherwise ordered by the commission, shall be the twelve-month period beginning six months prior to the date the application is filed and ending six months subsequent to that date. In no event shall the test period end more than nine months subsequent to the date the application is filed. The revenues and expenses of the utility shall be determined during the test period. The date certain shall be not later than the date of filing.

(D) When the commission is of the opinion, after hearing and after making the determinations under divisions (A) and (B) of this section, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is, or will be, unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, that the service is, or will be, inadequate, or that the maximum rates, charges, tolls, or rentals chargeable by any such public utility are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall:

(1) With due regard among other things to the value of all property of the public utility actually used and useful for the convenience of the public as determined under division (A)(1) of this section, excluding from such value the value of any franchise or right to own, operate, or enjoy the same in excess of the amount, exclusive of any tax or annual charge, actually paid to any political subdivision of the state or county, as the consideration for the grant of such franchise or right, and excluding any value added to such property by reason of a monopoly or merger, with due regard in determining the dollar annual return under division (A)(3) of this section to the necessity of making reservation out of the income for surplus, depreciation, and contingencies, and;

(2) With due regard to all such other matters as are proper, according to the facts in each case,

(a) Including a fair and reasonable rate of return determined by the commission with reference to a cost of debt equal to the actual embedded cost of debt of such public utility,

(b) But not including the portion of any periodic rental or use payments representing that cost of property that is included in the valuation report under divisions (F) and (G) of section 4909.05 of the Revised Code, fix and determine the just and reasonable rate, fare, charge, toll, rental, or service to be rendered, charged, demanded, exacted, or collected for the performance or rendition of the service that will provide the public utility the allowable gross annual revenues under division (B) of this section, and order such just and reasonable rate, fare, charge, toll, rental, or service to be substituted for the existing one. After such determination and order no change in the rate, fare, toll, charge, rental, schedule, classification, or service shall be made, rendered, charged, demanded, exacted, or changed by such public utility without the order of the commission, and any other rate, fare, toll, charge, rental, classification, or service is prohibited.

(E) Upon application of any person or any public utility, and after notice to the parties in interest and opportunity to be heard as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code for other hearings, has been given, the commission may rescind, alter, or amend an order fixing any rate, fare, toll, charge, rental, classification, or service, or any other order made by the commission. Certified copies of such orders shall be served and take effect as provided for original orders.

Effective Date: 11-24-1999

4909.18 Application to establish or change rate.

Any public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, or to modify, amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, shall file a written application with the public utilities commission. Except for actions under section 4909.16 of the Revised Code, no public utility may issue the notice of intent to file an application pursuant to division (B) of section 4909.43 of the Revised Code to increase any existing rate, joint rate, toll, classification, charge, or rental, until a final order under this section has been issued by the commission on any pending prior application to increase the same rate, joint rate, toll, classification, charge, or rental or until two hundred seventy-five days after filing such application, whichever is sooner. Such application shall be verified by the president or a vice-president and the secretary or treasurer of the applicant. Such application shall contain a schedule of the existing rate, joint rate, toll, classification, charge, or rental, or regulation or practice affecting the same, a schedule of the modification amendment, change, increase, or reduction sought to be established, and a statement of the facts and grounds upon which such application is based. If such application proposes a new service or the use of new equipment, or proposes the establishment or amendment of a regulation, the application shall fully describe the new service or equipment, or the regulation proposed to be established or amended, and shall explain how the proposed service or equipment differs from services or equipment presently offered or in use, or how the regulation proposed to be established or amended differs from regulations presently in effect. The application shall provide such additional information as the commission may require in its discretion. If the commission determines that such application is not for an increase in any rate, joint rate, toll, classification, charge, or rental, the commission may permit the filing of the schedule proposed in the application and fix the time when such schedule shall take effect. If it appears to the commission that the proposals in the application may be unjust or unreasonable, the commission shall set the matter for hearing and shall give notice of such hearing by sending written notice of the date set for the hearing to the public utility and publishing notice of the hearing one time in a newspaper of general circulation in each county in the service area affected by the application. At such hearing, the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility. After such hearing, the commission shall, where practicable, issue an appropriate order within six months from the date the application was filed.

If the commission determines that said application is for an increase in any rate, joint rate, toll, classification, charge, or rental there shall also, unless otherwise ordered by the commission, be filed with the application in duplicate the following exhibits:

(A) A report of its property used and useful in rendering the service referred to in such application, as provided in section 4909.05 of the Revised Code;

(B) A complete operating statement of its last fiscal year, showing in detail all its receipts, revenues, and incomes from all sources, all of its operating costs and other expenditures, and any analysis such public utility deems applicable to the matter referred to in said application;

(C) A statement of the income and expense anticipated under the application filed;

(D) A statement of financial condition summarizing assets, liabilities, and net worth;

000101

(E) A proposed notice for newspaper publication fully disclosing the substance of the application. The notice shall prominently state that any person, firm, corporation, or association may file, pursuant to section 4909.19 of the Revised Code, an objection to such increase which may allege that such application contains proposals that are unjust and discriminatory or unreasonable. The notice shall further include the average percentage increase in rate that a representative industrial, commercial, and residential customer will bear should the increase be granted in full;

(F) Such other information as the commission may require in its discretion.

Effective Date: 01-11-1983

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4909.19 Publication - investigation.

Upon the filing of any application for increase provided for by section 4909.18 of the Revised Code the public utility shall forthwith publish the substance and prayer of such application, in a form approved by the public utilities commission, once a week for three consecutive weeks in a newspaper published and in general circulation throughout the territory in which such public utility operates and affected by the matters referred to in said application, and the commission shall at once cause an investigation to be made of the facts set forth in said application and the exhibits attached thereto, and of the matters connected therewith. Within a reasonable time as determined by the commission after the filing of such application, a written report shall be made and filed with the commission, a copy of which shall be sent by certified mail to the applicant, the mayor of any municipal corporation affected by the application, and to such other persons as the commission deems interested. If no objection to such report is made by any party interested within thirty days after such filing and the mailing of copies thereof, the commission shall fix a date within ten days for the final hearing upon said application, giving notice thereof to all parties interested. At such hearing the commission shall consider the matters set forth in said application and make such order respecting the prayer thereof as to it seems just and reasonable.

If objections are filed with the commission, the commission shall cause a pre-hearing conference to be held between all parties, intervenors, and the commission staff in all cases involving more than one hundred thousand customers.

If objections are filed with the commission within thirty days after the filing of such report, the application shall be promptly set down for hearing of testimony before the commission or be forthwith referred to an attorney examiner designated by the commission to take all the testimony with respect to the application and objections which may be offered by any interested party. The commission shall also fix the time and place to take testimony giving ten days' written notice of such time and place to all parties. The taking of testimony shall commence on the date fixed in said notice and shall continue from day to day until completed. The attorney examiner may, upon good cause shown, grant continuances for not more than three days, excluding Saturdays, Sundays, and holidays. The commission may grant continuances for a longer period than three days upon its order for good cause shown. At any hearing involving rates or charges sought to be increased, the burden of proof to show that the increased rates or charges are just and reasonable shall be on the public utility.

When the taking of testimony is completed, a full and complete record of such testimony noting all objections made and exceptions taken by any party or counsel, shall be made, signed by the attorney examiner, and filed with the commission. Prior to the formal consideration of the application by the commission and the rendition of any order respecting the prayer of the application, a quorum of the commission shall consider the recommended opinion and order of the attorney examiner, in an open, formal, public proceeding in which an overview and explanation is presented orally. Thereafter, the commission shall make such order respecting the prayer of such application as seems just and reasonable to it.

In all proceedings before the commission in which the taking of testimony is required, except when heard by the commission, attorney examiners shall be assigned by the commission to take such testimony and fix the time and place therefor, and such testimony shall be taken in the manner prescribed in this section. All testimony shall be under oath or affirmation and taken down and

000103

transcribed by a reporter and made a part of the record in the case. The commission may hear the testimony or any part thereof in any case without having the same referred to an attorney examiner and may take additional testimony. Testimony shall be taken and a record made in accordance with such general rules as the commission prescribes and subject to such special instructions in any proceedings as it, by order, directs.

Effective Date: 01-11-1983

4928.14 Market-based standard service offer.

(A) After its market development period, an electric distribution utility in this state shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a market-based standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. Such offer shall be filed with the public utilities commission under section 4909.18 of the Revised Code.

(B) After that market development period, each electric distribution utility also shall offer customers within its certified territory an option to purchase competitive retail electric service the price of which is determined through a competitive bidding process. Prior to January 1, 2004, the commission shall adopt rules concerning the conduct of the competitive bidding process, including the information requirements necessary for customers to choose this option and the requirements to evaluate qualified bidders. The commission may require that the competitive bidding process be reviewed by an independent third party. No generation supplier shall be prohibited from participating in the bidding process, provided that any winning bidder shall be considered a certified supplier for purposes of obligations to customers. At the election of the electric distribution utility, and approval of the commission, the competitive bidding option under this division may be used as the market-based standard offer required by division (A) of this section. The commission may determine at any time that a competitive bidding process is not required, if other means to accomplish generally the same option for customers is readily available in the market and a reasonable means for customer participation is developed.

(C) After the market development period, the failure of a supplier to provide retail electric generation service to customers within the certified territory of the electric distribution utility shall result in the supplier's customers, after reasonable notice, defaulting to the utility's standard service offer filed under division (A) of this section until the customer chooses an alternative supplier. A supplier is deemed under this division to have failed to provide such service if the commission finds, after reasonable notice and opportunity for hearing, that any of the following conditions are met:

(1) The supplier has defaulted on its contracts with customers, is in receivership, or has filed for bankruptcy.

(2) The supplier is no longer capable of providing the service.

(3) The supplier is unable to provide delivery to transmission or distribution facilities for such period of time as may be reasonably specified by commission rule adopted under division (A) of section 4928.06 of the Revised Code.

(4) The supplier's certification has been suspended, conditionally rescinded, or rescinded under division (D) of section 4928.08 of the Revised Code.

Effective Date: 10-05-1999

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Cincinnati Gas & Electric Company To Modify its Non-Residential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish a Pilot Alternative Competitively-Bid Service Rate Option Subsequent to Market Development Period.	Case No. 03-93-EL-ATA
In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its System Reliability Tracker Market Price.	Case No. 05-724-EL-UNC
In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Fuel and Economy Purchased Power Component of its Market-Based Standard Service Offer.	Case No. 05-725-EL-UNC
In the Matter of the Application of Duke Energy Ohio, Inc., to Modify its Fuel and Economy Purchase Power Component of its Market-Based Standard Service Offer.	Case No. 06-1068-EL-UNC
In the Matter of the Application of Duke Energy Ohio, Inc. to Adjust and Set its System Reliability Tracker Market Price.	Case No. 05-724-EL-UNC
In the Matter of the Application of Duke Energy Ohio, Inc. to Adjust and Set the Annually Adjusted Component of its Market-Based Standard Service Offer.	Case No. 06-1085-EL-UNC

APPLICATION FOR REHEARING OF
OHIO PARTNERS FOR AFFORDABLE ENERGY
AND MEMORANDUM IN SUPPORT

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231 W. Lima Street
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December 20, 2007

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Cincinnati Gas & Electric Company To Modify its Non-Residential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish a Pilot Alternative Competitively-Bid Service Rate Option Subsequent to Market Development Period.	)	Case No. 03-93-EL-ATA
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APPLICATION FOR REHEARING OF
OHIO PARTNERS FOR AFFORDABLE ENERGY
AND MEMORANDUM IN SUPPORT

TABLE OF CONTENTS

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Cincinnati Gas & Electric Company To Modify its Non-Residential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish a Pilot Alternative Competitively-Bid Service Rate Option Subsequent to Market Development Period.	)	Case No. 03-93-EL-ATA
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APPLICATION FOR REHEARING OF OHIO PARTNERS FOR AFFORDABLE ENERGY

Pursuant to R.C. §4903.10 and Ohio Adm. Code 4901-1-35, Ohio Partners for Affordable Energy ("OPAE") hereby applies to the Public Utilities Commission of Ohio ("Commission") for rehearing of the Commission's November 20, 2007 Opinion and Order in the above-captioned cases filed by The Cincinnati

Gas & Electric Company ("CG&E"), now Duke Energy Ohio, Inc. ("Duke"). The Commission's November 20, 2007 Opinion and Order is unreasonable and unlawful in the following respects.

1. The Commission acted unreasonably and unlawfully when it found that the stipulation and recommendation filed on April 9, 2007 in these cases is the product of serious bargaining among the parties.
2. Given the stipulation's treatment of returns on construction work in progress ("CWIP"), the Commission acted unreasonably and unlawfully when it found that the stipulation benefits ratepayers, serves the public interest, and does not violate any important regulatory principle or practice.
3. Given the stipulation's treatment of the use of DENA assets, the Commission acted unreasonably and unlawfully when it found that the stipulation benefits ratepayers, serves the public interest, and does not violate any important regulatory principle or practice.
4. The Commission acted unreasonably and unlawfully when it found that the stipulation benefits ratepayers, serves the public interest, and does not violate any important regulatory principle or practice when the stipulation fails without sufficient reason to adopt the recommendations of the management/performance auditor.

The reasons supporting OPAE's Application for Rehearing are set forth in the attached Memorandum in Support pursuant to Ohio Adm. Code 4901-1-35(A).

Respectfully submitted,

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BEFORE
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MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING

I. The Commission acted unreasonably and unlawfully when it found that the stipulation and recommendation filed on April 9, 2007 in these cases is the product of serious bargaining among the parties.

The Commission found that the stipulation filed April 9, 2007 in these cases was the product of serious bargaining by knowledgeable parties. Opinion and Order at 27. The Commission stated that all parties were invited to all negotiation sessions, had closely followed many cases related to Duke's rate plan, and had been involved in many levels of discussion over a long period of time. The Commission declared that there was no connection between the April 9, 2007 stipulation and the stipulation in Case No. 03-93-EL-ATA, et al. The Commission stated that the signatory parties to the April 9, 2007 stipulation confirmed that there were no side agreements related to the April 9, 2007 stipulation. Id. The Commission also found that the stipulation was supported by representatives of all stakeholder groups--residential consumers by People Working Cooperatively ("PWC") and the City of Cincinnati, industrial consumers by the Ohio Energy Group ("OEG"), and commercial interests by the Ohio Hospital Association ("OHA") and that other groups, such as marketers, did not oppose the stipulation. The Commission claimed that the Office of the Ohio Consumers' Counsel ("OCC") and OPAE were involved in the discussions and were not successful in obtaining a result to which they could agree but the lack of agreement by two parties should not cause the entire stipulation to be rejected as if serious bargaining had not occurred. According to the Commission, to do so would give those two parties veto power over the result. Id.

Contrary to the Commission's finding, serious bargaining among the parties did not take place at the settlement negotiations for the April 9, 2007 stipulation. The Supreme Court has already confirmed that attendance and discussion at settlement negotiations does not satisfy the criterion that serious bargaining take place. In remanding Case No. 03-93-EL-ATA, et al. to the Commission for further consideration, the Court questioned whether the existence of side agreements supports a finding that serious bargaining has taken place among parties to settlement discussions. *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 300. As the Court stated, if CG&E and one or more of the signatory parties to the stipulation agree to a side financial arrangement or some other consideration to sign the stipulation, that information would be relevant to a determination whether all parties engaged in serious bargaining. The existence of side agreements between CG&E and the signatory parties could be relevant to the integrity and openness of the negotiation process. Id. Any concessions or inducements apart from the terms agreed to in the stipulation have relevance when deciding whether the settlement negotiations were fairly conducted. If there were special considerations in the form of side agreements among the signatory parties, one or more parties may have gained an unfair advantage in the bargaining process, and the open settlement discussions are compromised. Id.

The Commission cites the signatory parties' statement that there were no side agreements related to the April 9, 2007 stipulation. The Commission has ignored the Supreme Court's finding that the Commission must look beyond the stipulation itself to determine if serious bargaining has taken place. The Commission cannot satisfy the Court's order with a narrow statement that there were no side agreements related to the one document. The question is whether there are side agreements undermining the settlement process. The question is whether any concessions or inducements apart from the terms agreed to in the stipulation result in the settlement negotiations being unfairly conducted. The evidence of record in the remand cases clearly demonstrates that the answer to these questions is affirmative.

The Commission is wrong that there is no connection between the stipulation in Case No. 03-93-EL-ATA, et al., and the April 9, 2007 stipulation. The evidence on remand in Case No. 03-93-EL-ATA, et al., demonstrates that the side agreements affect the signatory parties to the April 9, 2007 stipulation. The evidence of the side agreements was essentially ignored by the Commission on remand. The Commission avoided a discussion of the concessions and inducements given to signatory parties and how those concessions and inducements undermined the settlement process. If the Commission had properly considered the evidence of the side agreements on remand, the Commission would have recognized the obvious connection between the stipulation rejected on remand and the April 9, 2007 stipulation. The April 9, 2007 stipulation is simply the furtherance of the side agreements that benefit a handful of customers at the expense of whole classes of customers. The April 9, 2007 stipulation was submitted by CG&E and five other parties, all of whom supported the Case No. 03-93-EL-ATA, et al. stipulation.

The City of Cincinnati signed the April 9, 2007 stipulation. The City of Cincinnati signed a settlement agreement with CG&E under which the City agreed to withdraw from Case No. 03-93-EL-ATA, et al. Under the agreement, CG&E provided the City with one million dollars ($1,000,000) in total consideration for certain amendments to three electricity agreements between CG&E and the City. OCC Remand Ex. 6. The settlement agreement was conditioned upon the City not opposing the stipulation filed in Case No. 03-93-EL-ATA. The settlement agreement also would terminate on the day that the Commission issues an order unacceptable to CG&E in carrying out the terms of the stipulation in Case No. 03-93-EL-ATA. Id. at 2. This provision could easily be

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The other signatory party, which the Commission cites as representing the residential class, is People Working Cooperatively ("PWC"). PWC operates demand-side management programs funded by CG&E. PWC's primary purpose in these proceedings is to assure that funding promised by CG&E will be continued and extended through the end of the market development period. PWC Motion to Strike (April 27, 2007). PWC represents the interests of consumers only to the extent that those interests coincide with the funding PWC receives from CG&E for its projects. Because PWC showed no concern for the impact of the stipulation on residential customer bills, its support for the stipulation should not be construed as support from the residential class.

It should also be noted that members of OEG and OHA have side agreements with Duke that could have influenced their support for the April 9, 2007 stipulation. The same is true of the Industrial Energy Users-Ohio, who did not sign the April 9, 2007 stipulation but are cited by the Commission as not opposing it.

The April 9, 2007 stipulation has no support from marketers, residential customers or any other customer group that will be subject to its terms. OCC, which, by statute, represents all residential customers, opposed the stipulation, as did OPAE, which has served as an advocate for residential and low-income customers since its founding in 1996. OPAE also represents the interests of its member agencies located in the CG&E service territories that are commercial customers of CG&E. It is ridiculous for the Commission to dismiss OCC and OPAE as simply two parties who failed to achieve a satisfactory result in the settlement process. OCC and OPAE are the two parties representing the vast majority of Duke's customers. They are the two parties representing customers without side agreements and without special inducements. They are the two parties representing customers who will actually pay all the charges set forth in the applications and stipulation. They are the parties actually concerned about the stipulation's terms. The Commission must heed the Supreme Court's warning. The signatory parties to the stipulation have concessions, inducements and special interests outside the terms of the stipulation; the signatory parties have no concern for the stipulated terms.

If the signatory parties are not subject to the terms of the stipulation, the stipulation cannot be the product of serious bargaining. Serious bargaining does not take place when the stipulation hardly affects the stipulating parties and when they have side agreements that undermine its terms. The April 9, 2007 stipulation is not the bargain made by the signatory parties; their agreements with Duke are elsewhere, where the Commission still refuses to look.

The Ohio Supreme Court has affirmed the Commission's rate stabilization plan concept solely on the basis of stipulations supported by a wide range of parties to the cases. In *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, the Court affirmed the Commission's finding in approving a rate plan on the basis of the reasonableness of a stipulation supported by all customer classes. As the Court stated in a subsequent case involving the rate plan of FirstEnergy Corp.:

> The absence of a stipulation signed by customer groups factually distinguishes this case from *Constellation*. In *Constellation* we also noted that "no entire customer class was excluded from settlement negotiations and that the following classes were represented and signed the stipulation: residential customers, low-income customers, commercial customers, industrial customers, and competitive retail electric service providers." When it enacted R.C. 4928.14, the General Assembly anticipated that at the end of the market-development period, customers would be offered both a market-based standard service as required by R.C. 4928.14(A) and service at a price determined through a competitive-bidding process as required by R.C. 4928.14(B); one very narrow exception contained in R.C. 4928.14(B) permits the commission to determine that a competitive-bidding process is not required. In *Constellation,* the customer groups, by stipulation, agreed to accept a market-based standard service offer and waive any right to a price determined by competitive bid. Those facts are not present in this case.

Ohio Consumers' Counsel v. Pub. Util. Comm., 2006-Ohio-2110 ¶18. The Court made it clear that the stipulation signed by a wide range of parties was the determining factor that allowed the Court to affirm the Commission's orders. The Court made a strong distinction between Commission orders that could be made pursuant to a stipulation supported by a wide range of parties and orders that could not be made absent such a stipulation. In the same opinion, the Court also stated:

> In contrast to the customer groups in *Constellation*, the customer groups here did not agree to the FirstEnergy rates, and most customer groups, including the OCC, which represents all residential customers, opposed them. Under these circumstances, the PUCO had no authority to adopt the rate-stabilization plan without also ensuring that a reasonable means for customer participation had been developed.

Id. ¶19.

In short, the Court has affirmed the Commission's rate stabilization orders on the basis of customer agreement in a stipulation. The Court has explicitly stated that such customer agreement is the determining factor in the Court's affirmation of the Commission's rate stabilization orders.

The April 9, 2007 stipulation clearly does not represent the views or satisfy the interests of the residential class or any other class. The Commission acted unlawfully and unreasonably when it found that serious bargaining took place among the parties when the stipulation is not an agreement representative of the customer classes and when the Commission failed to consider the extent to which the existence of the side agreements from the remanded case, Case No. 03-93-EL-ATA, et al. affected the signatory parties to the stipulation in these cases.

II. Given the stipulation's treatment of returns on Construction Work in Progress ("CWIP"), the Commission acted unreasonably and unlawfully when it found that the stipulation benefits ratepayers, serves the public interest, and does not violate any important regulatory principle or practice.

The Commission found that its approval of the annually adjusted component ("AAC") was based on Duke's calculations, which clearly showed CWIP as a factor in the AAC, with no reference to percentage completion. The Commission also found that, in the present market environment, ratemaking standards, such as the limitation on earning a return on CWIP, are not dispositive of the outcome in these proceedings. Therefore, the Commission found that the stage of completion of CWIP should not, under these specific circumstances, be a bar to Duke's earning a return on CWIP. Opinion and Order at 24.

The April 9, 2007 stipulation fails to benefit ratepayers and the public interest and violates important regulatory practice and principle by allowing for the recovery of a return on CWIP through Duke's AAC. The stipulation is also contrary to the recommendation of the management/performance auditor that a return on CWIP be excluded from the AAC. Commission-Ordered Ex. 1 at I-9.

The inclusion of a return on CWIP results in unreasonable AAC charges. First, a return on CWIP would not traditionally have been allowed in ratemaking proceedings. A revenue requirement determined through a traditional regulatory cost calculation would require that any CWIP be at least 75% complete before the Commission would consider allowing a return on it. Duke has not demonstrated that the CWIP portion of the environmental compliance net plant is or will be at least 75% complete (or any other percentage) during the time that the AAC is being collected.

Second, under a traditional regulatory paradigm, Duke might propose allowing a return on CWIP that customers would pay up front during plant construction. After construction is complete, the customers have a claim that the return on CWIP will provide lower capital costs at a future date when the plant is in service. The current regulatory paradigm does not provide any assurance of lower capital costs for customers at a future date.

The Commission states that the traditional regulatory treatment does not apply in the present market environment. In fact, the ACC itself has no place in the market environment. As OCC witness Michael P. Haugh pointed out, the "new" formula used by Duke to determine a market price for standard service generation simply seeks cost-based recovery that is similar to the traditional methodology for the treatment of CWIP, but without any limitation regarding the percentage of completion for additions to environmental plant and without any assurance of lower capital costs in the future. OCC Ex. R.R. 1 at 7. Duke is seeking for itself the best of both worlds: cost recovery using traditional revenue requirement methodology (such as CWIP) instead of a market approach, but disregard for traditional ratemaking rules governing cost recovery such as those that governed CWIP. Id. In a market environment, CWIP would not be earned at all. A return on the plant would not occur until the plant is fully operational. Thus, in a market environment, CWIP is inappropriate.

Under the circumstances of an application requesting recovery of a typically regulated concept such as CWIP, it is obvious that traditional regulatory practices can and should be used to ensure reasonable standard service offer rates, which must be filed pursuant to R.C. §4909.18 and conform to a just and reasonable standard. CWIP should be removed from the "Return on Environmental Plant" calculation in Duke's filing for purposes of setting a reasonable AAC charge in conformance with the just and reasonable standards of R.C. §4909.18. Mr. Haugh removed the $244,413,759 CWIP amount from the "Return on Environmental Plant" calculation of Duke witness Wathen's at Attachment WDW-2, Schedule 2. This reduces the "Pre-Tax Return" to $53,938,303 and reduces the "Total Environmental Compliance Increase" to $50,429,411. OCC Ex. R.R. 1 at 11. The removal of the CWIP portion of the Environmental Plant reduces the revenue requirement for the 2007 AAC to $45,246,994. Id.; MPH Attachment 1.

There is no "market environment" for retail electric generation to serve Ohio's residential and small commercial customers. Retail competition is non-existent for these customers in CG&E-Duke's service area. Therefore, any determination of a rider amount or overall generation price must necessarily involve a proxy for a market price. There is no reason why standards for CWIP should not apply; in fact, standards must be applied in order for the AAC to meet the just and reasonable standard required by R.C. §4909.18 for standard service offers.

III. Given the stipulation's treatment of the use of DENA assets, the Commission acted unreasonably and unlawfully when it found that the stipulation benefits ratepayers, serves the public interest, and does not violate any important regulatory principle or practice.

The Commission stated that, under the stipulation, the Duke Energy North America ("DENA") assets were to be used only on an emergency basis where capacity to meet Duke's operational requirements is necessary with less than seven days advance notice. Opinion and Order at 20. The Commission also found that the pricing mechanism proposed in the stipulation was reasonable. Id. at 21.

OCC witness Haugh testified that Duke has not demonstrated that use of the DENA assets benefits customers. The use of the DENA assets may result in system reliability tracker ("SRT") costs that do not provide reasonably-priced retail electric service for Ohio customers. OCC Ex. R.R. 1 at 15. Duke should be allowed to purchase capacity from the DENA assets only in an emergency situation and only if Duke demonstrates that the DENA assets clearly offered a better price or a better product for customers than that offered in the open market. The DENA capacity should be used only as a last resort and only if there is a pre-determined reasonable method to set the price for the capacity from the DENA assets. OCC Ex. R.R. 1 at 15-16.

The Commission's Opinion and Order does not provide a reasonable method to set the price for the capacity from the DENA assets. Therefore, the Commission has not provided adequate protection for ratepayers against Duke's overcharging for the DENA assets. The approved stipulation allows Duke to determine the "market price" by either using the midpoint of broker quotes, the average price of third-party transactions, or another method determined by Duke and the Staff. In reality, there are usually very few broker quotes. OCC R.R. Ex. 2 at 4. The problem with the stipulated method is that there is a limited market. If there are very few or no transactions, then there is only speculation about the market price. Given the lack of transactions in the capacity market, the market price for capacity would be determined with limited or no market data. This is not an acceptable solution for determining the market price of the DENA assets, nor does it provide a reasonable cost for capacity for Duke customers. OCC Ex. R.R. 1 at 14.

Contrary to the Commission, the guidelines for formulating a price for the DENA assets need to be more stringent. If there are limited broker quotes and transactions in the capacity market, there will be too much uncertainty regarding the true market price. The formula set forth in the April 9, 2007 stipulation should not be used unless there is a minimum number of broker quotes and transactions to determine the price of the DENA capacity. A minimum of three bids and offers from three separate brokers is needed, and a minimum of three third-party transactions should be required. Finally, when formulating a price, there needs to be a cap on the amount Duke is charging to the customers who are paying the SRT. The price should be capped at the median price Duke has paid for capacity during the time frame in which the emergency occurs. This cap should be implemented if any capacity from the DENA assets is used. OCC R.R. Ex. 2 at 6. Given that the price of capacity in a true emergency can be extremely high, there is good reason to cap the price.

The use of DENA assets should be limited only to an emergency situation and only if CG&E-Duke demonstrates that the DENA assets clearly offered a better price or a better product for customers than that offered in the open market. The DENA capacity should be used only as a last resort and only if there is a pre-determined reasonable method to set the price for the capacity from the DENA assets. The stipulated methodology to formulate a "market price" for the DENA assets does not provide proper protections for customers. The stipulation's treatment of the DENA assets is harmful to ratepayers and against the public interest; it also violates important regulatory principles and practices by allowing for the use of DENA assets and recovery of costs through the SRT without adequate limitations and safeguards.

IV. The Commission acted unreasonably and unlawfully when it found that the stipulation benefits ratepayers, serves the public interest and does not violate any important regulatory principle or practice when the stipulation fails without sufficient reason to adopt the recommendations of the management/performance auditor.

The April 9, 2007 stipulation proposed to accept some, but not all, of the management/performance auditor's recommendations. By presenting this suspect stipulation to the Commission, Duke was able to choose the audit recommendations that it was willing to implement, and ignore those that it chose to ignore. The Commission's approval of the stipulation unreasonably allowed Duke's preferences.

As discussed above, the stipulation ignored the management/performance auditor's recommendation to disallow the recovery of a return on CWIP. The stipulation also rejected the management/performance auditor's recommendation regarding the use of DENA assets. Commission-Ordered Ex. 1 at 6-5.

The stipulation disregarded other audit recommendations without any justification other than Duke's desire to disregard them. For example, the auditor recommended that Duke discontinue its active management practices and adopt a traditional utility procurement strategy related to the procurement of coal, emission allowances and forward power purchases. Id. at I-9. The April 9, 2006 stipulation stated that the auditor's recommendation that active management practices be discontinued will be withdrawn. Jt. Ex. R.R. 1 at 5. The Commission stated that the evidence of record convinced it that an active management approach allows Duke to take advantage of market fluctuations, thereby lowering the overall cost to customers. Opinion and Order at 15. The Commission did not adequately address the auditor's concern that active management be discontinued. There was no basis on the record to disregard the auditor's recommendation.

The auditor also recommended that Duke present several alternative sensitivity analyses of key variables (i.e., emission allowance prices and market coal prices) in its transaction review and approval process. Duke should maintain detailed documentation of all emission allowance prices, market coal prices, and power purchase transactions to enable the next auditor to review adequately the management of the procurement process for coal, emission allowances and power purchases. If the auditor discovers that Duke's management of the procurement process for coal, emission allowances, and power purchases has resulted in imprudently incurred costs, then those imprudent costs should be refunded to customers.

The Commission disregarded these audit recommendations as well as the auditor's recommendations to disallow the recovery of a return on CWIP, to place limits on the use and pricing for the DENA assets, and to cease active management. By disregarding these audit recommendations, the stipulation failed to benefit ratepayers and serve the public interest; the stipulation also violated important regulatory principles and practices. The Commission allowed Duke to select the audit recommendations that Duke wanted to follow, and ignore the recommendations that Duke disliked. The Commission should have rejected the stipulation to the extent that it allowed Duke to ignore without good cause the reasonable recommendations of the management/ performance auditor.

V. Conclusion

Wherefore, OPAE respectfully requests that the Commission grant OPAE's application for rehearing for the reasons set forth in the memorandum in support.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application for Rehearing and Memorandum of Support was served electronically upon the parties of record identified below on this 20th day of December 2007.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appendix to the Merit Brief of Appellant, Ohio Partners for Affordable Energy, was served upon all parties to this proceeding by hand delivery or regular U. S. Mail this 2nd day of June 2008.

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