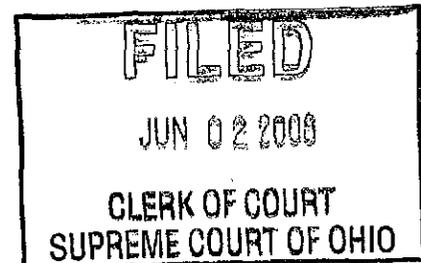


IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel,	)	Case No. 08-0466
)	
Appellant, et al.,)	
	)	Appeal from the Public
v.	)	Utilities Commission of Ohio
	)	Case Nos. 06-1068-EL-UNC, 05-
The Public Utilities Commission	)	725-EL-UNC, 06-1069-EL-UNC,
of Ohio,	)	05-724-EL-UNC. 06-1085-EL-UNC
)	
Appellee.)	

**MOTION TO SEAL CONTENTS OF MERIT BRIEF AND ASSOCIATED FILINGS
PENDING RESOLUTION OF CONFIDENTIALITY ISSUES ON APPEAL
BY
APPELLANT,
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
(ATTACHMENT 1 OF 3)**



IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel,)	)	Case No. 08-0466
)	
Appellant, et al.,)	
	)	Appeal from the Public
v.	)	Utilities Commission of Ohio
	)	Case Nos. 06-1068-EL-UNC, 05-
The Public Utilities Commission	)	725-EL-UNC, 06-1069-EL-UNC,
of Ohio,	)	05-724-EL-UNC. 06-1085-EL-UNC
)	
Appellee.)	

**MERIT BRIEF
BY
APPELLANT,
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
(PUBLIC VERSION)**

Janine L. Migden-Ostrander
(Reg. No. 0002310)
Consumers' Counsel

Nancy H. Rogers
(Reg. No. 0002375)
Attorney General of Ohio

Jeffrey L. Small, Counsel of Record
(Reg. No. 0061488)
Ann M. Hotz
(Reg. No. 0053070)
Assistant Consumers' Counsel

Duane W. Luckey
(Reg. No. 0023557)
Section Chief
Stephen A. Reilly, Counsel of Record
(Reg. No. 0019267)
Werner L. Margard, III
(Reg. No. 0024858)
Assistant Attorney General

10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 (T)
(614) 466-9475 (F)
small@occ.state.oh.us
hotz@occ.state.oh.us

180 East Broad Street
Columbus, Ohio 43215-3793
(614) 644-8698 (T)
(614) 644-8764 (F)
duane.luckey@puc.state.oh.us
stephen.reilly@puc.state.oh.us
Werner.margard@puc.state.oh.us
*Attorneys for Appellee
Public Utilities Commission of Ohio*

*Attorneys for Appellant
Office of the Ohio Consumers' Counsel*

Colleen Mooney, Counsel of Record
(Reg. No. 0015668)
David Rinebolt

Ohio Partners for Affordable Energy
1431 Mulford Road
Columbus, Ohio 43212
(614) 488-5739 (T)
(614) 425-8862 (F)
cmooney2@columbus.rr.com
drinebolt@aol.com

*Attorneys for Appellant
Ohio Partners for Affordable Energy*

Paul A. Colbert, Counsel of Record
(Reg. No. 0058582)
Associate General Counsel
Duke Energy Ohio, Inc.
155 East Broad Street, 21st Floor
Columbus, Ohio 43215
(614) 221-7551 (T)
(614) 221-7556 (F)
paul.colbert@duke-energy.com

Rocco D'Ascenzo
(Reg. No. 0077651)
Counsel
139 East Fourth Street, 29 At. II
Cincinnati, Ohio 43215
(513) 419-1852 (T)
(513) 419-1846 (F)
rocco.d'ascenzo@duke-energy.com

*Attorneys for Intervening Appellee,
Duke Energy Ohio, Inc.*

TABLE OF CONTENTS

	Page
I. HISTORY OF THE CASE AND INTRODUCTION	1
A. Introduction.....	1
B. Standard of Review.....	2
C. Statement of Facts.....	2
1. The early history of consolidated cases	2
2. History of these cases after remand by the Court	4
a. Consolidation of cases and later bifurcation of issues into two phases.....	4
b. Pre-PUCO Order Agreements.....	7
c. Pre-Rehearing Agreements	14
d. Implementation of the Pre-Rehearing Agreement provisions and the option agreements	18
e. The Remand Order.....	24
f. The Rider Order	25
II. ARGUMENT	26
Proposition of Law No. 1:	
The Commission’s Rider Order Is Unreasonable And Unlawful Because The Commission Relied Upon the Participation of Certain Entities Who Had No Standing In These Cases	26
Proposition of Law No. 2:	
The Commission’s Rider Order Is Unreasonable And Unlawful Because The Commission Failed To Properly Apply The Test For Approval Of A Partial Stipulation. <i>Consumers Counsel v. Pub. Util. Comm.</i> , (1992), 64 Ohio St. 3d 123, 125.	28
A. The Standard for Judging Partial Stipulations	28

TABLE OF CONTENTS cont'd.

	Page
B. Application of the Standard for Judging Partial Stipulations.	30
1. The settlement was not the product of serious bargaining.....	30
2. The settlement package does not benefit the public interest.....	37
3. The settlement package violates important regulatory policies and practices	42
III. CONCLUSION.....	45
CERTIFICATE OF SERVICE.....	46

TABLE OF AUTHORITIES

Page

Cases

<i>Cleveland Electric Illuminating Co. v. Public Util. Comm.</i> (1996), 76 Ohio St.3d 521	2
<i>Consumers' Counsel v. Pub. Util. Comm.</i> , (1992), 64 Ohio St.3d 123, 125	28
<i>Grafton v. Ohio Edison</i> (1996), 77 Ohio St.3d 102	2
<i>Industrial Energy Consumers of Ohio Power Co. v. Public Util. Comm.</i> (1994), 68 Ohio St.3d 559, 563; 629 N.E.2d 423, 427; 1194-Ohio-435	2
<i>Ohio Consumers' Counsel v. Public Util. Comm.</i> , 111 Ohio St.3d 300, 2006-Ohio-5789.....	1
<i>Time Warner AxS v. Pub. Util. Comm.</i> (1996), 75 Ohio St.3d 229, 234, 661 N.E.2d 1097	29,30,37,42

Entries and Orders of the Public Utilities Commission of Ohio

<i>In the Matter of the Application of Duke Energy Ohio, Inc., to Modify its Fuel and Economy Purchases Power Component of its Market-based Standard Service Offer, Case No. 06-1068-EL-UNC, et al., Entry on Rehearing (January 16, 2008)</i>	5,25,27,34,35
<i>In the Matter of the Application of Duke Energy Ohio, Inc., to Modify its Fuel and Economy Purchases Power Component of its Market-based Standard Service Offer, Case No. 06-1068-EL-UNC, et al., Opinion and Order ("Rider Order") (November 20, 2007)</i>	passim
<i>In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period, Case Nos. 03-93-EL-ATA, et al., Order on Remand ("Remand Order") (October 24, 2007)</i>	passim

TABLE OF AUTHORITIES cont'd.

Page

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
PUCO Case No. 03-93-EL-ATA, et al.,
Entry (February 1, 2007).....5

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
PUCO Case No. 03-93-EL-ATA, et al.,
Entry on Rehearing (November 23, 2004).....4,18,39,40,43

In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period,
Case Nos. 03-93-EL-ATA, et al.,
Opinion and Order (“Post-MDP Service Order”) (September 29, 2004)..... 3,4,15,43

In the Matter of the Restatement of the Accounts and Records of The Cincinnati Gas & Electric Company, The Dayton Power and Light Company, and Columbus & Southern Ohio Electric Company
PUCO Case No. 84-1187-EL-UNC
Opinion and Order (November 26, 1985).....30

Statutes

R.C. 4903.22126,27

R.C. 4911.1533

R.C. 4928.1439

Administrative Rules

Ohio Adm. Code 4901-1-1026,27

Ohio Adm. Code 4901-1-1126,27

TABLE OF AUTHORITIES cont'd.

	Page
Ohio Adm. Code 4901-1-12	27
Ohio Adm. Code 4901-1-13	26
Ohio Adm. Code 4901-1-35-02	6

APPENDIX
TABLE OF CONTENTS

	Page
<i>Ohio Consumers' Counsel v. Public Utilities Commission of Ohio</i> , S.Ct. Case No. 08-0466, Notice of Appeal (March 5, 2008).....	1
<i>In the Matter of the Application of Duke Energy Ohio, Inc., to Modify its Fuel and Economy Purchases Power Component of its Market-based Standard Service Offer</i> , Case No. 06-1068-EL-UNC, et al., Opinion and Order ("Rider Order") (November 20, 2007)	8
<i>In the Matter of the Application of Duke Energy Ohio, Inc., to Modify its Fuel and Economy Purchases Power Component of its Market-based Standard Service Offer</i> , Case No. 06-1068-EL-UNC, et al., Entry on Rehearing (January 16, 2008)	39
<i>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</i> PUCO Case No. 03-93-EL-ATA, et al., Order on Remand ("Remand Order") (October 24, 2007)	52
<i>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</i> PUCO Case No. 03-93-EL-ATA, et al., Entry (February 1, 2007).....	97
<i>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</i> PUCO Case No. 03-93-EL-ATA, et al., Opinion and Order ("Post-MDP Service Order") (September 29, 2004)	101
<i>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</i> PUCO Case No. 03-93-EL-ATA, et al., Entry on Rehearing (November 23, 2004).....	144

APPENDIX
TABLE OF CONTENTS cont'd.

Page

Rules

Ohio Adm. Code 4901-1-10	165
Ohio Adm. Code 4901-1-11	166
Ohio Adm. Code 4901-1-12	168
Ohio Adm. Code 4901-1-13	170
Ohio Adm. Code 4901-1-35-02	171

Statutes

R.C. 4903.221	172
R.C. 4911.15	173
R.C. 4928.14	174

<i>In the Matter of the Application of Duke Energy Ohio, Inc., to Modify its Fuel and Economy Purchases Power Component of its Market-based Standard Service Offer, Case No. 06-1068-EL-UNC, OCC's Application for Rehearing (Public Version) (December 21, 2007)</i>	175
---	-----

I. HISTORY OF THE CASE AND INTRODUCTION

A. Introduction

The Office of the Ohio Consumers' Counsel ("OCC") represents over 600,000 residential utility customers of Duke Energy Ohio, Inc. ("Duke Energy" or "Company," formerly known as "CG&E") in this appeal of the above-captioned cases before the Public Utilities Commission of Ohio ("PUCO" or "Commission"). The OCC appealed an earlier, closely related case that resulted in this Court's decision in November 2006 and remand to the Commission for further consideration. *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 ("*Consumers' Counsel 2006*"). The subsequent history on remand involved consolidation of the PUCO cases on remand ("*Remand Case*") and the PUCO cases that are the subject of the instant appeal ("*Rider Case*," combined with the *Remand Case*, the "*Post-MDP Remand Case*"), discovery by the OCC, and the presentation of extensive evidence regarding side agreements the Company entered into to remove opposition to its proposed generation charges. Four years after a flurry of side negotiations took place outside the view of the OCC and the public and two years after the oral argument in the OCC's first appeal, *the Commission denies any possible connection between the side deals and the support shown for the generation rate proposals of Duke Energy*. Only action by this Court can provide the reasonable result for consumers that follows from Ohio law, including this Court's decision in *Consumers' Counsel 2006*.

The *Rider Case* was, like the case appealed in *Consumers' Counsel 2006*, resolved by the PUCO's approval of a stipulation. The stipulation at issue in the instant appeal ("*2007 Stipulation*") involved setting levels for the Company's Fuel and Economy Purchased Power ("*FPP*") tracker, System Reliability Tracker ("*SRT*"), and Annually Adjusted Component

“AAC”) charges that were originally approved in 2004. Serious negotiation of a stipulation in the *Rider Case* could only take place with parties to the cases that represented customers who bear the full brunt of the rate increases and that had not otherwise been “captured” by the Company by means of other financial arrangements. Such serious negotiation did not take place regarding the 2007 Stipulation.¹ The Court should reject the PUCO’s adoption of the 2007 Stipulation.

B. Standard of Review

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

C. Statement of Facts

1. The early history of consolidated cases

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

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

¹ Joint Remand Rider Ex. 1 (2007 Stipulation) (OPAE Supp. 1.).

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

The parties who did not execute the Stipulation were permitted a very short period during which they could inquire into the Stipulation by means of discovery. The OCC sought copies of all side-agreements between Duke Energy and other parties in these cases, and the Company refused to provide copies of such agreements. The first witness appeared at hearing on May 20, 2004 (based on pre-filed testimony not related to the 2004 Stipulation). The OCC began the hearing on May 20, 2004 with an oral Motion to Compel Discovery of side agreements. The Motion to Compel Discovery was denied. *Consumers’ Counsel 2006* at ¶6.

The Commission’s Order in the consolidated cases that began in 2003 (“Post-MDP Service Order,” Appx. 101., in the “*Post-MDP Service Case*”) was issued on September 29, 2004, which approved the May 19, 2004 Stipulation with some conditions. The Order evaluated the Commission’s three goals used in the evaluation of post-MDP rate plans: rate stability for

customers, financial stability for the company, and encouragement of competition.² Several parties, including Duke Energy and the OCC, filed applications for rehearing on October 29, 2004. The Company asked the PUCO to either i) approve its original CMO proposal; ii) approve the Stipulation without conditions or modifications, or iii) approve a new rate plan (“New Proposal”), proposed for the first time in the Company’s Application for Rehearing. In a November 23, 2004 Entry on Rehearing (Appx. 144.), the PUCO adopted (in principal part) the New Proposal without any hearing regarding the Company’s new proposals for rates.

The duration of the PUCO cases captioned above -- the first of which began in January 2003 -- is partly the result of an appeal of the *Post-MDP Service Case* and remand by the Supreme Court of Ohio (“Court”) in *Consumers’ Counsel 2006*. The OCC initiated its first appeal on May 23, 2005. The Court issued its opinion on November 22, 2006. The Court stated that the “commission abused its discretion in barring discovery of side agreements.” *Consumers’ Counsel 2006* at ¶94. The Court also stated that the “portion of the commission’s first rehearing entry approving CG&E’s [now Duke Energy’s] alternative proposal is devoid of evidentiary support.” *Consumers’ Counsel 2006* at ¶28.

2. History of these cases after remand by the Court

a. Consolidation of cases and later bifurcation of issues into two phases

The *Post-MDP Service Case* and the *Post-MDP Remand Case* are the same case having a single record at the PUCO. The separate designations help to distinguish the proceedings that resulted in the PUCO’s decision in 2004/2005 from the subsequent decisions reached in 2007/2008. The cases that were initially consolidated in 2004 were further consolidated, on

² *Post-MDP Service Case*, Order at 15, (September 29, 2004) (Appx. 117.).

remand from the Court, with the above-captioned “Rider” cases in a prehearing conference.³ The above-captioned “Rider” cases were heard, briefed, and decided separately as a second phase of the bifurcated *Post-MDP Remand Case* hearings, but a single evidentiary record exists that is applicable to the ultimate decisions in all the consolidated cases.⁴ For this reason, the history of the *Post-MDP Service Case* is important to the decision in this appeal.

On February 1, 2007, the *Post-MDP Remand Case* was set for hearing in two phases, the first of which would address the framework for post-MDP rates (i.e. the *Remand Case*) and the second of which would address specific post-MDP charges (i.e. the *Rider Case*).⁵ The hearing on the first phase was conducted in three days, beginning on March 19, 2007, was briefed in April 2007, and was the subject of the Order on Remand dated October 24, 2007 (“Remand Order,” Appx. 52.). The hearing on the second phase was conducted in two days, beginning on April 19, 2007, was briefed in May and June 2007, and was the subject of an Opinion and Order dated November 20, 2007 (“Rider Order,” Appx. 8.). The decisions in the Rider Order and the subsequent Entry on Rehearing dated January 16, 2008 are the subject of the instant appeal.

The OCC presented extensive evidence regarding side agreements the Company entered into that removed opposition by large customers to the Company’s proposals that affected other customers, and presented evidence on the subject of Duke Energy’s failure to support its standard service offer rate proposals. The key testimony of OCC Witness Hixon emphasized an important connection between the side agreements and the *Post-MDP Service Case*:

³ *Rider Case*, Rider Order at 6 (“consolidated” [a]t the prehearing”) (Appx. 13.). The consolidation was memorialized in a transcript of the prehearing conference. Tr. Remand Rider Prehearing at 17-18 and 33 (December 14, 2006) (Supp. 719 and 723.).

⁴ Exhibits introduced in the first phase of the proceedings after remand from the Court (i.e. the *Remand Case*) contain the word “Remand,” while the exhibits introduced in the second phase (i.e. the *Rider Case*) contain the words “Remand Rider.”

⁵ *Post-MDP Remand Case*, Entry at 2 (February 1, 2007) (Appx. 98.).

[REDACTED]

[REDACTED]

The “Rider” portion of the hearing featured the submission of the financial and management performance report (“Auditor’s Report”) prepared by Energy Ventures Analysis, Inc. (“EVA”), as assisted by Larkin & Associates, PLLC (“Larkin”), at the Commission’s request for the audit period July 1, 2005 through June 30, 2006.⁸ Mr. Seth Schwartz of EVA and Mr. Ralph Smith of Larkin supported the results of the Auditor’s Report in their live testimony. The Auditor’s Report states that the Commission requested that EVA “follow the general guidance that had been provided for the Electric Fuel Component audits” from the formerly applicable Ohio Administrative Rules and that the Auditor was also guided by the contents of a stipulation that followed EVA’s submission of an earlier report on October 7, 2005.⁹

⁶ [REDACTED]

⁷ [REDACTED]

⁸ Auditor’s Report at 1-1 (Supp. 502.).

⁹ Id. at 1-3 through 1-4 (Supp. 503-504.).

The second day of the hearing for Phase II convened on April 19, 2007 and largely dealt with the subject of the 2007 Stipulation. The subject of the 2007 Stipulation was the level of FPP, SRT, and AAC charges in rates as well as the treatment of the Auditor's recommendations, some of which were rejected in the 2007 Stipulation. Representatives of People Working Cooperatively ("PWC") and the Ohio Hospital Association ("OHA") authorized the execution of the 2007 Stipulation even though neither entity moved to intervene in the Rider cases. Also, a representative of the Ohio Energy Group ("OEG") similarly authorized that group's execution of the 2007 Stipulation even though OEG did not move to intervene in Case No. 06-1085-EL-UNC concerning AAC charges.

b. Pre-PUCO Order Agreements

OCC Witness Hixon described five side agreements bearing dates from May 19, 2004 to July 7, 2004, referred to in her testimony as "Pre-PUCO Order Agreements,"¹⁰

that involved customers who were parties to the *Post-MDP Service Case* [REDACTED] ("Customer Parties").¹¹ The Customer Parties who were involved in the side agreements were [REDACTED]¹²

[REDACTED]¹³, [REDACTED]

[REDACTED]¹⁴ [REDACTED]¹⁵ [REDACTED]¹⁶

¹⁰ OCC Remand Ex. 2(A) at 11 (Supp. 14.).

¹¹ Id. The side agreements are attached to Ms. Hixon's testimony as BEH Attachments 2-6 (Supp. 2.).

¹² [REDACTED]
¹³ [REDACTED]
¹⁴ [REDACTED]
¹⁵ [REDACTED]
¹⁶ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁷ The 2004 Stipulation proposed post-MDP pricing based upon a bypassable price to compare and a non-bypassable provider of last resort (“POLR”) charge made up of a rate stabilization charge (“RSC”) and the first of the proposed annually adjusted components (“AAC1”).¹⁸ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁹ [REDACTED]²⁰ [REDACTED]

[REDACTED]

[REDACTED]²¹ [REDACTED]

[REDACTED]²² [REDACTED]

[REDACTED]²³

The supplemented record also reveals that the City of Cincinnati (“City”) -- an intervenor in the *Post-MDP Service Case* that withdrew from the cases on July 13, 2004 without filing a

¹⁷ [REDACTED]

¹⁸ Joint Ex. 1 at ¶3 and ¶8 (2004 Stipulation) (Supp. 675-677 and 684). The annually adjusted component was redefined in the Company’s Application for Rehearing.

¹⁹ [REDACTED]

²⁰ [REDACTED]

²¹ [REDACTED]

²² [REDACTED]

brief -- entered into an agreement with Duke Energy (the "City Agreement," OPAE Supp. 17.). The side agreement, executed on June 14, 2004 and entitled "Settlement Agreement" provided the City with \$1 million and required the City to withdraw from the *Post-MDP Service Case*.²⁴ According to the City Agreement, the City's million dollar side agreement would terminate if the "Commission, in Case No. 03-93-EL-ATA [i.e. the *Post-MDP Service and Remand Cases*] or a related case necessary to carry out the terms and conditions of the Stipulation and Recommendation filed in that case [e.g. the Rider cases], issues an order unacceptable to CG&E [now called Duke Energy]."²⁵ The City did, in fact, withdraw from the *Post-MDP Service Case*.

Duke Energy and two of its affiliated companies entered into the Pre-PUCO Order Agreements and the City Agreement with the Customer Parties. Duke Energy (i.e. then known as CG&E) was a named party in the City Agreement.²⁶ Cinergy Corp. was a named party in the agreements [REDACTED]²⁷ [REDACTED]²⁸ Duke Energy Retail Sales ("DERS"), formerly known as Cinergy Retail Sales ("CRS"), was a named party in the agreements with [REDACTED]

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

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

²³ [REDACTED]

²⁴ OCC Remand Ex. 6 at ¶4 (OPAЕ Supp. 17).

²⁵ OCC Remand Ex. 6 at ¶6 (OPAЕ Supp. 18.).

²⁶ Id. at 3 (OPAЕ Supp. 19.).

²⁷ [REDACTED]

²⁸ [REDACTED]

The natures of the three Duke-affiliated companies that entered into agreements with Customer Parties are contained within the record. Duke Energy, formerly the Cincinnati Gas and Electric Company, was the applicant in the cases before the Commission and had the rights and obligations afforded electric distribution utilities in Ohio. It owns generating plants. Duke Energy employs workers to run its operating company functions such as generating electricity in power plants.²⁹ However, its professional and administrative services are provided by employees of an affiliated service corporation (“Shared Services”³⁰) that also provides professional services to a wide range of Duke-affiliated companies. The corporate titles for executive and other positions at Duke Energy and its affiliated companies, including the president of Duke Energy, are held by Shared Services employees.³¹

DERS, referred to in the side agreements by the pre-merger name of Cinergy Retail Sales (and oftentimes referred to in agreements as “Cinergy,” which should not be confused with Cinergy Corp.), is one of the Duke-affiliated companies that also uses the professional services provided by Shared Services.³² DERS was organized in 2003 but was not certified as a competitive retail electric service (i.e. CRES) provider in Ohio until October 7, 2004,³³


DERS has no employees,³⁴ no revenue, and no customers.³⁵ DERS lacks any indicia of a going

²⁹ OCC Remand Ex. 9 at 36 (Ficke) (Supp. 631.).

³⁰ OCC Remand Ex. 8 at 10 (Ziolkowski) (Supp. 614.); OCC Remand Ex. 9 at 10-11 (Ficke) (Supp. 619-620.); Company Remand Ex. 3 at 1 (Steffen) (Supp. 653.).

³¹ See, e.g., OCC Remand Ex. 9 at 11 (Ficke) (Supp. 620.).

³² OMG Remand Ex. 4 at 30-31 (Whitlock) (Supp. 647.).

³³ OCC Remand Ex. 2(A) at 12 (Supp. 15.).

³⁴ OMG Remand Ex. 4 at 30 (Whitlock) (Supp. 647.).

³⁵ OMG Remand Ex. 4 at 61 (Whitlock) (Supp. 16.). The information filed by DERS with the Commission in Case No. 04-1323-EL-CRS provided financial statements for 2005, a period before Mr. Whitlock’s involvement with DERS, that shows no revenues. OCC Remand Ex. 2(A), BEH Attachment 22 (Supp. 487).

concern.³⁶

[REDACTED]

[REDACTED]³⁷ Duke Energy Corporation is the parent of Cinergy Corp.³⁸ [REDACTED]

[REDACTED]

Three individuals within the Duke-affiliated companies figure prominently in each of the Pre-PUCO Order Agreements. Each of the Pre-PUCO Order Agreements, regardless of which Duke-affiliate was named, was executed by Duke Energy (formerly CG&E) trial counsel in his title within the Company:³⁹

Paul A. Colbert, Senior Counsel
The Cincinnati Gas & Electric Company
155 East Broad Street, Columbus, Ohio 43215

[REDACTED]

[REDACTED]⁴⁰ [REDACTED]

[REDACTED]

³⁶ See, e.g., OMG Remand Ex. 4 at 29-33, 48-55 (Supp. 646-647, 648-650.). The president of DERS, Charles Whitlock, stated that there is no person serving a customer contact function for DERS (id. at 50, Supp. 649.). DERS does not have enabling (i.e. trading) agreements. Id. at 54-55 (Supp. 650.). The position of CEO appears to be vacant. Id. at 29 (Supp. 646.). In response to a question about employees of the Duke-affiliated companies, Mr. Whitlock stated: "I've got to be candid with you, man, I barely know who I work for." Id. at 48-49 (Supp. 648.). Financial statements for DERS taken from the DERS filings at the PUCO list a few inter-corporate items and an expense line for "Option Premium Expense" related to the agreements analyzed by OCC Witness Hixon. OCC Remand Ex. 2(A), Attachment 22 (Supp. 489-490.).

³⁷ [REDACTED]

³⁸ OCC Remand Ex. 2(A) at 13 (Supp. 16.).

³⁹ OCC Remand Ex. 2(A), BEH Attachments 2-6 (Supp. 81-110.).

⁴⁰ [REDACTED]

[REDACTED]⁴¹ [REDACTED] Mr. Ficke's

discussion of the [REDACTED] negotiating process is as follows:⁴²

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

A. In this time frame, sure.

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

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

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

A. I may have.

[REDACTED]

A. Yes.

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

A. No.

Mr. Ficke was involved in the negotiations with [REDACTED]⁴³ He stated that he was "less involved"

in the agreement with [REDACTED]⁴⁴ [REDACTED]

[REDACTED]⁴⁵

[REDACTED]

⁴¹ [REDACTED]

⁴² OCC Remand Ex. 9 at 26-27 (Ficke) (Supp. 627-628.). When asked if a CG&E representative was involved in negotiating agreements [REDACTED], Mr. Ficke responded: "I was involved in it." Id at 36 (Supp. 631.).

⁴³ Id. at 77-80 ("I reviewed drafts of the documents," id at 77) (Supp. 641.).

⁴⁴ Id. at 82 (Ficke) (Supp. 643A).

⁴⁵ [REDACTED]

[Redacted]

[Redacted] 46 [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted] 47 [Redacted]

[Redacted] 48 [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted] 49 [Redacted]

[Redacted]

[Redacted] 50 [Redacted]

[Redacted] 51 [Redacted]

46 [Redacted]
47 [Redacted]
48 [Redacted]
49 [Redacted]
50 [Redacted]
51 [Redacted]

[REDACTED]

[REDACTED]⁵² [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁵³ [REDACTED]

[REDACTED]⁵⁴ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁵⁵ [REDACTED]

[REDACTED]

[REDACTED]

c. Pre-Rehearing Agreements

The Commission’s evaluation of the terms of the 2004 Stipulation, largely in areas outside the core scope of Duke Energy’s post-MDP pricing proposals for generation service, changed the course of the Company’s plans and those of its fellow stipulating parties. The Commission’s Post-MDP Service Order on September 29, 2004 (Appx. 101.) increased the percentage of nonresidential shopping customers who could avoid the RSC⁵⁶ in an environment where switch rates were declining,⁵⁷ adjusted provisions for the AAC1 charge (making it depend on “legitimate expenses,”⁵⁸ reduced the pass-through of costs because “CG&E may be

⁵² [REDACTED]
⁵³ [REDACTED]
⁵⁴ [REDACTED]
⁵⁵ [REDACTED]

⁵⁶ *Post-MDP Service Case*, Order at 19 (September 29, 2004) (Appx. 121.).

⁵⁷ *Id.* at 23 (Appx. 125.).

⁵⁸ *Id.* at 32 (Appx. 134.).

recovering some percentage of these costs through off-system sales,⁵⁹ and left undetermined the degree to which it could be bypassed⁶⁰), eliminated a deferral that would increase later distribution rates for residential customers,⁶¹ prohibited a provision in the 2004 Stipulation that would require “any consumers to waive their statutory POLR rights,”⁶² and refused to “allow the RTC [Regulatory Transition Charge] collection from residential consumers to be extended beyond 2008.”⁶³

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

[REDACTED]

[REDACTED]⁶⁴ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁶⁵

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

[REDACTED] referred to in her testimony as “Pre-Rehearing Agreements,”⁶⁶ [REDACTED]

[REDACTED]⁶⁷

[REDACTED]

[REDACTED]

⁵⁹ Id.

⁶⁰ Id.

⁶¹ Id. at 35 (Appx. 137.).

⁶² Id.

⁶³ Id. at 36 (Appx. 138.).

⁶⁴ [REDACTED]

⁶⁵ [REDACTED]

⁶⁶ [REDACTED]

⁶⁷ [REDACTED]

[REDACTED]

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

[REDACTED]

68 [REDACTED]

69 [REDACTED]

70 [REDACTED]

71 [REDACTED]

[Redacted] 72

[Redacted] 73

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted] 74

[Redacted] 75

[Redacted]

[Redacted]

[Redacted] 76

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted] 77

72 [Redacted]

73 [Redacted]

74 [Redacted]

75 [Redacted]

76 [Redacted]

77 [Redacted]

[Redacted]

[REDACTED]

[REDACTED]

[REDACTED]⁷⁸

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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

The option agreements were entered into “by CRS [re-designated DERS] with individual customers who were the Customer Parties in the Pre-Rehearing Agreements [REDACTED]

[REDACTED]” and were “entered into after the PUCO’s November 23, 2004

Entry on Rehearing, during the period [REDACTED]⁷⁹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁷⁸ [REDACTED]

⁷⁹ OCC Remand Ex. 2(A) at 48 (Supp. 51.).

[REDACTED]

[REDACTED]⁸⁰

Second, another set of customers received favored treatment over other customers

[REDACTED]. One example of such favored treatment is the City Agreement, according to which the City received \$1 million and agreed to withdraw from the *Post-MDP Service Case*.⁸¹

[REDACTED]

[REDACTED]⁸²

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁸³

[REDACTED]⁸⁴

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

80 [REDACTED]

81 Company Remand Ex. 3 at 33 (Supp. 654.).

82 [REDACTED]

83 [REDACTED]

84 [REDACTED]

[REDACTED]

[REDACTED]⁸⁵

[REDACTED]

[REDACTED]

[REDACTED]⁸⁶ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁸⁷ Despite this incorrect belief -- demonstrated by the fact that CRS (now DERS) has no customers and no revenues⁸⁸ [REDACTED]

[REDACTED]

[REDACTED]⁸⁹ [REDACTED]

[REDACTED]⁹⁰ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁹¹

The twenty-two option agreements that are attached to OCC Witness Hixon's testimony⁹²

[REDACTED]

⁸⁵ [REDACTED]

⁸⁶ [REDACTED]

⁸⁷ [REDACTED]

⁸⁸ OMG Remand Ex. 4 at 61 (Whitlock) (Supp. 651.). The information filed by DERS with the Commission in Case No. 04-1323-EL-CRS provided financial statements for 2005, a period before Mr. Whitlock's involvement with DERS, that shows no revenues. OCC Remand Ex. 2(A), BEH Attachment 22 (Supp. 487.).

⁸⁹ [REDACTED]

⁹⁰ [REDACTED]

⁹¹ [REDACTED]

⁹² [REDACTED]

[REDACTED] 93 [REDACTED]

[REDACTED] 94

[REDACTED]

[REDACTED] 95

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 96 [REDACTED]

[REDACTED]

[REDACTED] 97 [REDACTED]

[REDACTED]

[REDACTED] 98 [REDACTED]

[REDACTED]

[REDACTED] 99 [REDACTED]

[REDACTED]

93	[REDACTED]
94	[REDACTED]
95	[REDACTED]
96	[REDACTED]
97	[REDACTED]
98	[REDACTED]
99	[REDACTED]

100

101

The lineage of the option agreements and option payments was provided by James Ziolkowski.¹⁰² Mr. Ziolkowski is a Rate Supervisor for Shared Services, and he testified in the *Post-MDP Service Case* regarding the Company's CMO proposal.¹⁰³ His responsibilities include answering rate-related questions for both Company representatives and consumers.¹⁰⁴ His understanding of the background for electric restructuring and the history of the *Post-MDP Service Case* is extensive.¹⁰⁵ In May 2006, [REDACTED] [REDACTED] about the "concept behind the CRES payments" of approximately \$22 million annually.¹⁰⁶ [REDACTED] to Mr. Ziolkowski because "[he] and [REDACTED] are the only ones [he was] aware of who kn[e]w this stuff."¹⁰⁷ Mr. Ziolkowski's response was as follows:¹⁰⁸

Here is the history behind the so-called "CRES" payments:

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

100

101

¹⁰² The identity of the author of the main contents of BEH Attachment 21 was revealed in the PUCO's public docket as part of new redactions submitted on January 23, 2008. The redacted version of OCC Witness Hixon's testimony submitted to the Court are the same as those filed in the PUCO's public docket by Duke Energy.

¹⁰³ Company Ex. 5 (Ziolkowski) (Supp. 656.); OCC Remand Ex. 8 at 7 (Ziolkowski) (Supp. 613.).

¹⁰⁴ Company Ex. 5 at 2 (Supp. 661.).

105

¹⁰⁶ OCC Remand Ex. 2(A), BEH Attachment 21 at Bates stamp 647 (Supp. 486.).

¹⁰⁷ Id., Bates stamp 646 (Supp. 485.).

¹⁰⁸ Id. at Bates stamp 645-646 (Supp. 484-485.).

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

CG&E (Duke Energy Ohio) filed its RSP (know as the Electric Reliability and Rate Stabilization Plan, ERRSP) during the first half of 2004. A number of large customers, some represented by industry groups, intervened in the filing. The interveners represented a roadblock, however. To eliminate this roadblock and prevent a formal hearing, CG&E negotiated special conditions with the interveners and ultimately reached agreements with them.

The original settlement agreement with the interveners called for Cinergy to form a "CRES" (Certified Retail Electric Supplier - the State of Ohio must certify all retail electric providers in terms of creditworthiness, etc.). The Cinergy CRES was to provide generation service for the interveners at pre-specified, contractual rates. At the last minute (i.e. December 2004), Cinergy's top management decided that the CRES settlement was too risky, and Cinergy essentially decided not to follow through with the contract. To prevent lawsuits for breach of contract, Cinergy entered into negotiations with each of the parties and agreed to make monthly or quarterly payments in lieu of offering generation service from the CRES.

So as you can see, the "CRES" customers are actually full-requirement customers of Duke Energy Ohio, but they receive payment from the Company instead of receiving generation service from the Cinergy CRES (the Cinergy CRES does not have any retail customers, [REDACTED]).

The payments for each group of the "CRES" customers differ from each other. Generally speaking, the contracts with each group specify that the customers belonging to that group will receive refunds of various RSP riders (e.g., Rider AAC, Rider FPP, Rider IMF, Rider SRT, etc.). Each month or quarter, I prepare statements that show the amount of money that is to be refunded to each customer, and the payments are made from the CBU's (non-regulated generation) budget.

These payments will last through [REDACTED] at which point the ERRSP will terminate.

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

Hope this helps.

The message from the Company insider is detailed and clear: “CG&E negotiated special conditions with interveners” who “represented a roadblock,” and “top management decided that the CRES settlement was too risky.”¹⁰⁹ Mr. Ziolkowski explained that “risky” referred to serving “large industrials at a fixed price given the volatile market conditions.”¹¹⁰ Therefore, “Cinergy top management” did not intend that a direct supply relationship exist between any of the affiliated companies and Customer Parties. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

e. The Remand Order

The *Post-MDP Remand Case* was briefed in April 2007. The Remand Order was issued on October 24, 2007 (Appx. 52.), and the Entry on Rehearing was issued on December 19, 2007. In the Remand Order, the PUCO concluded that “[b]ased on the expanded record of this case and our review of the side agreements, we now reach the inevitable conclusion that there is a sufficient basis to question whether the parties engaged in serious bargaining and, therefore, that we should not have adopted the stipulation.”¹¹¹ The PUCO stated in the Remand Order that components of Duke Energy’s rate plan must be reviewed in light of “events that have transpired since the application was filed and the decisions made by this Commission in related proceedings.”¹¹²

¹⁰⁹ Id.

¹¹⁰ OCC Remand Ex. 8 at 35 (Ziolkowski) (Supp. 615.).

¹¹¹ Remand Order at 27 (Appx. 78.).

¹¹² Id. at 34 (Appx. 85.).

The Remand Order reinstated all of the Commission's previous standard service offer determinations regarding the components of generation rates that were set before these cases were appealed.¹¹³

f. The Rider Order

The Rider Order approved the 2007 Stipulation. (Appx. 37.). Signatories to the 2007 Stipulation were Duke Energy, the PUCO Staff, OEG, OHA, the City, and PWC. The OCC's arguments regarding the absence of meaningful support for the 2007 Stipulation were side-stepped by the Commission. The Rider Order stated "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"¹¹⁴ The Commission stated that "[w]hile we did find that . . . [side] agreements impacted the stipulation in the RSP case [i.e. the 2004 Stipulation] by means of provisions requiring support of that stipulation, *there is no argument* that there was a similar connection to the [2007] [S]tipulation we are considering today."¹¹⁵ The Entry on Rehearing, dated January 16, 2008, did not address the OCC's further argument on rehearing, based upon extensive record evidence, that the foundation of the stated support for the 2007 Stipulation was the side agreements entered into during, or in connection with, the 2004 *Post-MDP Service Case*.¹¹⁶

¹¹³ The generation component charges that resulted from the *Post-MDP Service Case* were listed in OCC-sponsored testimony. OCC Remand Ex. 2(A) at 53 (Supp. 56.).

¹¹⁴ Rider Order at 27 (Appx. 34.).

¹¹⁵ *Id.* (emphasis added).

¹¹⁶ OCC Application for Rehearing at 23-29 (December 20, 2007) (Appx. 202-208.). Among other support, the OCC pointed out the provisions of the City Agreement (executed by a Cincinnati representative who is currently a sitting Commissioner) which states that a \$1 million payment is dependent upon CG&E's satisfaction with the results of cases regarding the level of rider charges. *Id.* at 26-27 (Appx. 205-206.).

II. ARGUMENT

Proposition of Law No. 1:

The Commission's Rider Order Is Unreasonable And Unlawful Because The Commission Relied Upon the Participation Of Certain Entities Who Had No Standing In These Cases.

At its beginning, the Rider Order states the "APPEARANCES" and thereafter considers the support of signatories to the 2007 Stipulation. Two of those signatories -- PWC and OHA -- never moved to intervene in the above-captioned cases and did not file timely briefs.¹¹⁷ These entities were not parties to the above-captioned cases and had no standing in the PUCO proceedings. OEG, an organization of industrial customers, did not intervene in Case No. 06-1085-EL-UNC concerning AAC levels and is not a party to that case. The Commission improperly relied upon support for the 2007 Stipulation by non-parties.

Intervention in proceedings before the PUCO is governed by R.C. 4903.221 (Appx. 172.) and is the subject of Ohio Adm. Code 4901-1-11 (Appx. 166.). A request to intervene is not an empty gesture. R.C. 4903.221 states criteria that the Commission must consider when the matter of a party's participation in a case is placed at issue. Ohio Adm. Code 4901-1-11(C) (Appx. 166.) states that "[a]ny person desiring to intervene in a proceeding *shall* file a motion to intervene with the commission, and shall *serve* it upon all parties" The words used in the Commission's rules *require* action before a person may gain standing as a party.

Furthermore, Ohio Adm. Code 4901-1-10 (Appx. 165.) sets out who is a party to a Commission proceeding, and requires a person who is not an applicant or a respondent be

¹¹⁷ On June 1, 2007, PWC submitted a Motion for Extension of Time to File Reply Brief, Phase II, that did not comply with Ohio Adm. Code 4901-1-13(B) (Appx. 170.) regarding an extension of time. The motion to file a brief out of time was neither granted nor denied. PWC's pleading is best described as a renewed motion to strike, and the Rider Order discusses PWC's pleading in that context. Rider Order at 29 (November 20, 2007) ("dedicated to renewal of its prior motion . . . intended to strike") (Appx. 36.).

“granted leave to intervene under rule 4901-1-11” or be “*expressly made a party* by order of the commission.” The filing and service of a motion to intervene provide others the opportunity to oppose such an intervention request.¹¹⁸ The Commission stated in its Entry on Rehearing that “the attorney examiners consolidated these cases with the cases that had been remanded from the Supreme Court” and “[t]hus, parties in the remanded RSP case were also parties to the rider proceedings.” This after-the-fact response to the OCC’s challenge regarding the standing of signatories to the 2007 Stipulation, however, made no mention of persons being “expressly made a party” as required by Ohio Adm. Code 4901-1-10. PWC and OHA did not move do intervene in the cases below and were not expressly made a party in any document -- order, entry, transcript, etc. -- in the *Rider Case*, and these entities were therefore not parties to any of these cases. Likewise, OEG was never a party in Case No. 06-1085-EL-UNC regarding the determination of AAC charges, and OEG lacked standing to participate in that proceeding.

The present circumstances illustrate the importance of the intervention process, which might include opposition to a motion to intervene. The PUCO’s process of declaring *ex post facto* that an entity was a party is no process at all for the evaluation of intervention. The Rider Order states that “[r]esidential consumers were represented by PWC” in negotiations over the rates provided for in the 2007 Stipulation. PWC did not move to intervene, and no ruling under R.C. 4903.221 (Appx. 172.) regarding the “nature and extent” of PWC’s “interest” in the PUCO cases below. The OCC brought PWC’s failure to intervene to the Commission’s attention at the point when PWC sought to strike portions of the OCC’s Reply Brief after the Phase II hearing.¹¹⁹ The absence of a motion to intervene by PWC, however, deprived the OCC of the opportunity to

¹¹⁸ Ohio Adm. Code 4901-1-12(B)(1) (Appx. 168.).

¹¹⁹ OCC Memorandum Contra PWC’s Motion for Extension of Time to File Reply Brief, Phase II at 8 (June 6, 2007) (Supp. 537.).

state its objection to any characterization (had it been made) that PWC represents residential customers in rate-setting matters.

From its Motion to Intervene in the *Post-MDP Service Case* during 2004, PWC is “a small, non-profit organization * * * [whose] mission is to provide essential repairs and services so that homeowners can remain in their homes. . . .”¹²⁰ By extension of the Rider Order’s reliance on PWC as a representative of residential customers, every company would become a consumer advocate if it provides services to residential consumers. Such a result from the Rider Order is error, and is inimical to organized legal practice before the Commission. The circumstances of this case demonstrate that a request to intervene is not an empty gesture, and the Commission should not have relied upon the positions stated by persons who were not parties to the Commission’s proceedings and who did not follow the Commission’s rules. The Court should reject the PUCO’s result and only consider the positions taken in the *Rider Case* by actual parties.

Proposition of Law No. 2:

The Commission’s Rider Order Is Unreasonable And Unlawful Because The Commission Failed To Properly Apply The Test For Approval Of A Partial Stipulation. *Consumers’ Counsel v. Pub. Util. Comm.*, (1992), 64 Ohio St. 3d 123, 125.

A. The Standard for Judging Partial Stipulations

The 2007 Stipulation was filed just prior to the hearing on the Remand phase of the Commission’s proceedings.¹²¹ The standard of review for consideration of a partial stipulation has been discussed in a number of Commission cases and by the Ohio Supreme Court. See, e.g., *CG&E ETP Case*, PUCO Case No. 99-1212-EL-ETP, et al., at 65 (July 19, 2000).

¹²⁰ *Post-MDP Service Cases*, PWC Motion to Intervene at 2 (March 9, 2004) (OPAE Supp. 15.).

¹²¹ Joint Remand Rider Ex. 1 (2007 Stipulation) (April 9, 2007) (OPAE Supp. 1.).

Among other places, the Ohio Supreme Court has addressed its review of stipulations in *Consumers' Counsel v. Pub. Util. Comm.*, (1992), 64 Ohio St. 3d 123, 125 ("*Consumers' Counsel 1992*"). Citing *Akron v. Pub. Util. Comm.* (1978), 55 Ohio St.2d 155, 157, the Ohio Supreme Court stated in *Consumers' Counsel 1992* that:

The Commission, of course, is not bound to the terms of any stipulation; however, such terms are properly accorded substantial weight. Likewise, the commission is not bound by the findings of its staff. Nevertheless, those findings are the result of detailed investigations and are entitled to careful consideration.

In *Duff v. Pub. Util. Comm.* (1978), . . . in which several of the appellants challenged the correctness of a stipulation, we stated:

A stipulation entered into by the parties present at a commission hearing is merely a recommendation made to the commission and is in no sense legally binding upon the commission. The commission may take the stipulation into consideration, but must determine what is just and reasonable from the evidence presented at the hearing.¹²²

The negotiations of the 2007 Stipulation served narrow interests while broader interests were ignored. The Court is concerned with *actual* participation for representatives of all classes of customers in settlement discussions, including residential customers.¹²³ The 2007 Stipulation replaces recommendations contained in the Audit Report (i.e. recommendations prepared at the Commission's order) with Duke Energy recommendations that were supported by persons allied with Duke Energy as the result of deals struck in 2004. The result advanced by the 2007 Stipulation is not "just and reasonable."

The Court in *Consumers' Counsel 1992* considered whether a just and reasonable result was achieved with reference to criteria adopted by the Commission in evaluating settlements:

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

¹²² *Consumers' Counsel 1992* at 125.

¹²³ *Time Warner AxS v. Pub. Util. Comm.* (1996), 75 Ohio St.3d 229, 234, 661 N.E.2d 1097.

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?¹²⁴

The 2007 Stipulation violates the criteria set out by the Commission and the Ohio Supreme Court.

B. Application of the Standard for Judging Partial Stipulations

1. The settlement was not the product of serious bargaining.

The Rider Order misapplies the first criterion in *Consumers' Counsel 1992*. The first criterion asks whether “serious bargaining” over a settlement took place (i.e. achievable in an environment of sufficiently conflicting interests) between signatories that were “capable, knowledgeable parties” (i.e. well-positioned to negotiate the matters at issue). As stated above, the 2007 Stipulation was executed by signatories (i.e. PWC, OHA, and OEG) *who were not parties* to one or all of the cases consolidated in the *Rider Case*. The Commission has found that the presence of a *diversity of interests* provides strong support for the reasonableness of a settlement package.¹²⁵ That diversity was missing among the actual parties to the PUCO cases who executed the 2007 Stipulation. Additionally, the first criterion is not met for a number of reasons related to the interests and abilities of signatories to the 2007 Stipulation.

The Rider Order fails to provide a detailed analysis regarding whether there was sufficient conflict in the positions of the signatory parties to assure that serious bargaining occurred. Serious bargaining cannot occur between parties whose interests are aligned (or

¹²⁴ *Id.* at 126.

¹²⁵ *In re Restatement of Accounts and Records of CG&E, DP&L, and CSOE*, Case No. 84-1187-EL-UNC, Order at 7 (November 26, 1985) (Supp. 748.). The Court has stated its concern over *actual* participation for representatives of all classes of customers in settlement discussions, including residential customers. *Time Warner AxS v. Pub. Util. Comm.* (1996), 75 Ohio St.3d 229, 234, 661 N.E.2d 1097.

between parties whose interests do not conflict) while ignoring the positions of parties whose interests conflict with those of the Company. The consolidated record contains an extensive record of agreements between many of the signatories (or members of signatories) to the 2007 Stipulation and the Duke-affiliated companies. The Rider Order, however, totally dismisses the arguments by the OCC and OPAE that these side agreements have a bearing on the above-captioned cases. The PUCO stated:

[T]here is no argument that there was a similar connection to the [2007] [S]tipulation we are considering today. The signatory parties to this [2007] [S]tipulation specifically confirmed that there were no side agreements related to this [2007] [S]tipulation.¹²⁶

The record documents the extensive efforts taken by persons connected with cases that began in 2003 to prevent the Commission's review of side agreements: the assertions by these same persons that side agreements did not affect negotiations over the 2007 Stipulation are meaningless within the context of the five-year history of these cases. The Commission's refusal to consider the side agreements is reminiscent of the Commission's refusal to consider the possibility that side agreements affected the course of the *Post-MDP Service Case* in 2004.

Besides execution by Duke Energy and the PUCO Staff, the 2007 Stipulation was executed by OHA and OEG, and was not opposed by the Industrial Energy Users – Ohio (“IEU”).¹²⁷ Members of each of these organizations ██████████. The other signatories were the City of Cincinnati (“City”) and People Working Cooperatively (“PWC”).¹²⁸ The alleged broadness of the stated support for the 2007 Stipulation diminishes significantly after recognizing that *the City is the only non-Staff signatory that can claim that it properly*

¹²⁶ Rider Order at 27 (Appx. 34.).

¹²⁷ IEU, while not a signatory to the 2007 Stipulation, made it publicly known that it did not oppose the agreement. Tr. Remand Rider Vol. II at 153 (April 19, 2007) (position statement by IEU Counsel Neilsen) (Supp. 527.).

¹²⁸ Joint Remand Rider Ex. 1 at 8-B (2007 Stipulation) (OPAE Supp. 8.).

intervened in all of the cases listed on the heading of the 2007 Stipulation. The interests of the City are, among other matters, limited to the City's geographic area. The diversity of interests that might provide support for the adoption of the 2007 Stipulation was missing.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹²⁹ [REDACTED]

[REDACTED]¹³⁰ [REDACTED]

[REDACTED]¹³¹ [REDACTED]

[REDACTED]¹³² [REDACTED]

[REDACTED]¹³³ [REDACTED]¹³⁴ [REDACTED]

[REDACTED]

[REDACTED]¹³⁵ The side agreements are

“related to this [2007] [S]tipulation”¹³⁶ by means of the insulation the agreements provided to selected customers regarding the increased rates that are addressed in the 2007 Stipulation. The legacy of the side agreements in the *Post-MDP Service Case* continues to show the lack of serious conflict between the positions of persons who executed the 2007 Stipulation.

¹²⁹ OCC Remand Ex. 2(A) (Supp. 1.).

¹³⁰ Id., BEH Attachment 17 (Bates stamp 89) (Supp. 249.).

¹³¹ Id.; see also OCC Remand Ex. 2(A) at 51 (Hixon) (Supp. 54.).

¹³² Id., BEH Attachment 17 (Bates stamp 11) (Supp. 171.).

¹³³ Id.; see also OCC Remand Ex. 2(A) at 52 (Hixon) (Supp. 55.).

¹³⁴ Id., BEH Attachment 17 (Bates stamp 44) (Supp. 204.).

¹³⁵ Id.; see also OCC Remand Ex. 2(A) at 52 (Hixon) (Supp. 55.).

¹³⁶ Rider Order at 27 (Appx. 34.).

The Commission stated in the Rider Order that the City and PWC “represented” the residential class of customers in negotiations over the 2007 Stipulation.¹³⁷ Pursuant to R.C. Chapter 4911, the OCC represents residential consumers residing in the area served by Duke Energy. The City and PWC did not represent residential customers in the manner contemplated by the first criterion for evaluating settlements, and neither were “capable, knowledgeable parties” as stated in the first criterion stated in *Consumers’ Counsel 1992*.

The City’s Motion to Intervene in the *Post-MDP Service Case* stated:

Cincinnati recently signed agreements with . . . CG&E . . . to deliver the electric power necessary for various city-owned and/or operated governmental facilities * * * [and] it is . . . clear that the City’s recently negotiated agreements with CG&E would be negatively affected to some significant, but as yet unknown, degree.¹³⁸

The City withdrew from the *Post-MDP Service Case* on July 13, 2004 without any documented participation other than the execution of a side deal with the Company that provided the City with \$1 million and required the City’s withdrawal from the *Post-MDP Service Case*.¹³⁹ The City submitted a Motion to Intervene in the above-captioned *Rider Case* (i.e. and not in the *Remand Case*) on February 21, 2007, again emphasizing the City’s operation of the City’s water utility and the Metropolitan Sewer District that is owned by Hamilton County.¹⁴⁰ The City’s only other activity even arguably connected with these cases was a “special appearance” at the status conference held on December 14, 2006 for the sole purpose of *opposing the efforts of the OCC* (i.e. the OCC, acting as the representative of residential customers) to obtain documents

¹³⁷ *Id.* Of course, the City is unable to represent any interest outside the limited geographic scope of operations, which are not as large as Duke Energy’s service area.

¹³⁸ *Post-MDP Service Case*, City Motion to Intervene at 2 (April 21, 2004) (Supp. 737.).

¹³⁹ OCC Remand Ex. 6 at ¶4 (OPAE Supp. 17.).

¹⁴⁰ *Post-MDP Remand Rider Case*, City Motion to Intervene at 2 (February 21, 2007) (Supp. 737.).

that involved the City.¹⁴¹ Counsel for the City did not appear at the hearings conducted in 2007, and did not file a brief.

The Entry on Rehearing demonstrates the Commission's strained efforts to shore up the weak support for the 2007 Stipulation. Regarding the City, the Entry on Rehearing states:

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.

* * *

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.¹⁴²

In its Rider Order, the Commission failed to recognize that the City *withdrew* from the *Post-MDP Service Case* in 2004 as a condition stated in the City Agreement.¹⁴³ The City did not move to intervene in those cases on remand (i.e. entry into the *Remand Case* would have violated the terms of the settlement in the City Agreement), but merely intervened in the *Rider Case*.¹⁴⁴ The City could not be "found . . . a knowledgeable party during the initial [Remand] phase of these cases" because the *City was not a party to those cases*. Finally, the Commission's statement that the OCC may have been excluded from important settlement discussions that involved the City is not only pure conjecture and without record evidence, but also conflicts with the Commission's statement that the OCC was not excluded from any settlement negotiations.¹⁴⁵

¹⁴¹ Tr. Remand Rider Prehearing at 49-50 (December 14, 2006) (Supp. 725-728.).

¹⁴² *Rider Case*, Entry on Rehearing at 12, ¶(29) (January 16, 2008) (Appx. 50.).

¹⁴³ *Post-MDP Service Case*, Notice of Withdrawal by the City of Cincinnati (July 13, 2004) (Supp. 733.). The City Agreement required the City's withdrawal. OCC Remand Ex. 6 at 1, ¶4 (OPAE Supp. 17.).

¹⁴⁴ *Rider Case*, City Motion to Intervene at 2 (February 21, 2007) (Supp. 737.).

¹⁴⁵ *Rider Case*, Rider Order at 27 ("It is clear that all parties were invited to all negotiation sessions."). (Appx. 34.).

The City's efforts have been limited to agreements between the City and the Company. The City has not demonstrated any knowledge of the issues in the above-captioned *Rider Case*, whether those affecting residential customers or any other customers. The City's interest in these cases is clear: its million dollar side agreement would terminate if the "Commission, in Case No. 03-93-EL-ATA or a related case necessary to carry out the terms and conditions of the Stipulation and Recommendation filed in that case, issues an order unacceptable to CG&E."¹⁴⁶ The City's execution of the 2007 Stipulation is, therefore, directly and explicitly linked to its side deal that also required the City's withdrawal from the *Post-MDP Service Case*.¹⁴⁷ The Commission's Entry on Rehearing did not address this demonstration in the OCC's Application for Rehearing, but merely repeated the PUCO's previous statement: "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 [2007] [S]tipulation filed in these cases."¹⁴⁸ Serious bargaining did not take place between Duke Energy and the City in the *Rider Case*, and the Commission did not seriously consider the record developed by the OCC on that point.

PWC's role in support of the 2007 Stipulation is even more questionable than that of the City. *PWC did not submit a motion to intervene* in the above-captioned cases (and did not timely file a brief). In the *Post-MDP Service Case*, PWC's motion to intervene (March 9, 2004) stated that PWC is "a small, non-profit organization * * * [whose] mission is to provide essential repairs and services so that homeowners can remain in their homes. . . ."¹⁴⁹ PWC's counsel appeared at the status conference conducted on December 14, 2006, stating that PWC opposed

¹⁴⁶ OCC Remand Ex. 6 at ¶6 (OPAE Supp. 17.).

¹⁴⁷ Id. at ¶4 (OPAE Supp. 17.).

¹⁴⁸ *Rider Case*, Entry on Rehearing at 12, ¶(29) (January 16, 2008) (Appx. 50.).

¹⁴⁹ *Post-MDP Service Cases*, PWC Motion to Intervene at 2 (March 9, 2004) (OPAE Supp. 15.).

the consolidation of the cases on remand with the Rider cases because PWC would not normally be interested in the Rider cases.¹⁵⁰ PWC counsel appeared for portions of the consolidated hearings, again stating to the Attorney Examiners that, “as you all know, People Working Cooperatively has limited interests in the case”¹⁵¹ The PUCO may not reasonably and legally rely upon the support by PWC -- which was not a party to the above-captioned cases -- as either a representative of residential customers or as a representative of any other interest.

The PUCO’s reliance in the Rider Order upon PWC’s support of the 2007 Stipulation is misplaced even if PWC had standing in these cases. PWC’s support for the 2007 Stipulation is best explained by its Motion to Intervene in the 2004 *Post-MDP Service Case* and its Motion to Strike regarding the OPAE’s brief. The 2004 Motion to Intervene states that PWC is concerned with home repairs,¹⁵² and the Motion to Strike explains PWC’s dependency on funds provided by Duke Energy.¹⁵³ PWC stated its interest: “Parties intervene because they want something from the Commission process and usually that outcome involves money.”¹⁵⁴ PWC’s “issues,” as reflected by its Motion to Strike, relate to its status as a recipient of the Company’s funding for its business of providing weatherization services. Like the City, PWC did not demonstrate that it was capable, knowledgeable, and serious about settling a conflicting view regarding the rate and related issues (involving millions of dollars that Ohio consumers are paying): issues that were the subject of the 2007 Stipulation.

¹⁵⁰ Tr. Remand Rider Prehearing at 25-27 (December 14, 2006) (Supp. 720-722.). PWC also supported efforts to shorten the time in which the OCC could develop its case. *Id.* at 71-72 (Supp. 729-730.).

¹⁵¹ Tr. Remand Vol. I at 19 (March 19, 2007) (Supp. 732.).

¹⁵² *Post-MDP Service Cases*, PWC Motion to Intervene at 2 (March 9, 2004) (OPAE Supp. 15.).

¹⁵³ *Rider Case*, PWC Reply Brief and Motion to Strike at 3-5 (April 27, 2007) (Supp. 558-560.).

¹⁵⁴ *Rider Case*, PWC Motion for Extension of Time to File Reply Brief, Phase II, Attachment at 6 (June 1, 2007) (Supp. 550).

For the purpose of residential customer representation, the Commission should *not* have relied upon the City, whose position was set as the direct result of the City's side agreement with Duke Energy in the *Post-MDP Service Case*, and should not rely upon a non-party to the Rider Case (i.e. PWC). The representative of residential customers, the OCC, was rebuffed in its efforts to correct even the obvious flaws in the 2007 Stipulation.¹⁵⁵ The diversity of interests that is referred to by the PUCO in the Rider Order¹⁵⁶ does not exist when only the actual participants in the Rider Case are considered, and no representative of the residential class is a signatory regardless of the number of signatories to the 2007 Stipulation that are considered.

The circumstances of these cases, and of the signatories to the 2007 Stipulation, demonstrate that the partial settlement was reached without serious bargaining that involved capable, knowledgeable parties. The Commission's conclusions to the contrary¹⁵⁷ were error.

2. The settlement package does not benefit the public interest.

The settlement package stated in the 2007 Stipulation does not provide a benefit to ratepayers or serve the public interest. Instead of adopting Duke Energy's provisions stated in the 2007 Stipulation, the Commission should have adopted the recommendations of the Auditor (the PUCO's technical expert) regarding the FPP ("fuel and economy purchased power") and the SRT ("system reliability tracker") and should have rejected the treatment given to the AAC ("annually adjusted component") that was the subject of the OCC's expert testimony.

¹⁵⁵ For instance, the OCC's observations regarding the weak consumer protections in paragraph 8 of the 2007 Stipulation went unheeded. The hastily executed stipulation led to a cross-examination of Duke Energy Witness Whitlock by the Assistant Attorney General that revealed a disagreement between the Staff and Duke Energy. See OCC Remand Rider Ex. 2 at 3 (Haugh Supplemental), citing Tr. Remand Rider Vol. I at 143 (Whitlock) (Supp. 523.). The 2007 Stipulation, therefore, lacked the balanced that concerns the Court regarding the partial settlement standard set forth in *Consumers' Counsel 1992*. See, e.g., *Time Warner AxS v. Pub. Util. Comm.* (1996), 75 Ohio St.3d 229, 234, 661 N.E.2d 1097.

¹⁵⁶ *Rider Case*, Rider Order at 27 ("each stakeholder group") (Appx. 34.).

¹⁵⁷ *Rider Case*, Rider Order at 25-27 (Appx. 32-34.).

The 2007 Stipulation states that an Auditor’s recommendation “shall be withdrawn,” referring to the second major management audit recommendation.¹⁵⁸ The Audit Report states that Duke Energy should adopt a normal portfolio approach to the procurement of coal and emission allowances.¹⁵⁹ In its place the 2007 Stipulation offered “meet[ings] to discuss the terms and conditions under which DE-Ohio may purchase and manage coal assets, emission allowances, and purchased power for the period after December 31, 2008 [after the end of the rate plan]” in order to “make a recommendation . . . for consideration no later than the next FPP audit.”¹⁶⁰ This provision in the 2007 Stipulation that provides for additional meetings concedes that the Auditor’s recommendation regarding coal and emission allowance procurement has substance, yet the Commission ignored the expert hired to provide the PUCO with objective guidance.

The 2007 Stipulation states that “DE-Ohio’s proposed Rider AAC Calculation shall be adjusted in accordance with the Staff corrected supplemental testimony of L’Nard E. Tufts.”¹⁶¹ The Company’s filings describe the AAC as the generation component “to recover costs associated with homeland security, taxes, and environmental compliance.”¹⁶² The controversy in these cases regarding AAC charges did not, however, involve Mr. Tufts’ work or a dispute regarding any accounting or mathematical calculations. The controversy in these cases was whether a return on unfinished generation plant (commonly referred to as construction work in progress, or “CWIP”) should be included in the AAC, a matter on which Staff Witness Tufts

¹⁵⁸ Joint Remand Rider Ex. 1 at 5, ¶2 (2007 Stipulation) (OPAE Supp. 4.).

¹⁵⁹ PUCO Ordered Remand Rider Exhibit 1at 1-9 (Auditor’s Report) (Supp. 510.) (“EVA recommends that DE-Ohio adopt traditional utility procurement strategies related to the procurement of coal and emission allowances.”).

¹⁶⁰ Joint Remand Rider Ex. 1 at 5, ¶3 (2007 Stipulation) (OPAE Supp. 4.).

¹⁶¹ Id. at 6, ¶5 (Supp. 5.).

¹⁶² OCC Remand Rider Ex. 1 at 4 (Haugh) (OPAE Supp. 25.), quoting Duke Energy’s Application for Rehearing in the *Post-MDP Service Case*.

stated no opinion.¹⁶³ The 2007 Stipulation provided for large increases in AAC charges for residential customers, from 6 percent of the adjusted, unbundled generation rate (i.e. adjusted to remove fuel, purchased power, and stranded costs) in 2006 to 9.1 percent of the adjusted generation rate in 2007.¹⁶⁴ Exclusion of the return on CWIP, as proposed by OCC Witness Haugh, would result in a 5.6 percent charge¹⁶⁵ as part of the PUCO's efforts "to consider the reasonableness of expenditures" in the AAC category.¹⁶⁶

The 2007 Stipulation states that "DE-Ohio shall work with the Staff to amend its bill format" "to reflect generation-related charges such as the FPP, SRT, and AAC, in the generation portion of the customer bill."¹⁶⁷ The proper placement of generation-related charges resulting from Company applications under R.C. 4928.14(A) was raised in the testimony of OCC Witness Haugh.¹⁶⁸ The agreement in the 2007 Stipulation that "such amendments will not result in additional programming or billing costs" is the correct result.¹⁶⁹ However, that result is not particularly gratifying as part of the settlement quid pro quo since the Company caused the problem when it prepared customer bills that did not recognize the Commission's determinations that these charges are generation in nature.¹⁷⁰

The eighth provision in the 2007 Stipulation presented the most obvious controversy at hearing, and remains an unsettled element regarding Duke Energy's intentions under the

¹⁶³ Tr. Remand Rider Vol. II at 35 (April 19, 2007) (Tufts) ("I did not form an opinion and that's not part of my testimony.") (Supp. 525.).

¹⁶⁴ OCC Remand Rider Ex. 1 at 4 (Haugh) (OPAE Supp. 25.).

¹⁶⁵ *Id* at 11 (OPAE Supp. 32.).

¹⁶⁶ *Post-MDP Service Case*, Entry on Rehearing at 10 (November 23, 2004) (Appx. 153.).

¹⁶⁷ Joint Remand Rider Ex. 1 at 6, ¶6 (2007 Stipulation) (OPAE Supp. 5.).

¹⁶⁸ OCC Remand Rider Ex. 1 at 16-18 (Haugh) (OPAE Supp. 37-39.).

¹⁶⁹ Joint Remand Rider Ex. 1 at 6, ¶6 (2007 Stipulation) (OPAE Supp. 5.).

¹⁷⁰ OCC Remand Rider Ex. 1 at 16-17 (Haugh) (OPAE Supp. 37-38.), citing Commission orders and entries. See, e.g., *Post-MDP Service Case*, Entry on Rehearing at 17 (November 23, 2004) (Appx. 160.).

agreement. The provision would render the Auditor's "recommendation 6 on page 1-10 of the . . . Audit[or's] Report . . . inapplicable."¹⁷¹ The Auditor's recommendation would have excluded, for purposes of calculating SRT charges, the use of the generating plants obtained by Duke Energy as part of the recent merger (referred to as the "DENA Assets") that resulted in the name change from CG&E to Duke Energy. In its place, the Company proposed to charge for capacity from the DENA Assets based upon broker quotes, prices for third-party transactions, or by a method acceptable to only the Company and the PUCO Staff.¹⁷² The use of broker quotes or third-party transaction prices would not deliver savings to customers from "the most reasonably priced capacity available" that was promised by Company Witness Whitlock.¹⁷³ To the contrary, use of the DENA Assets presents the danger of unreasonably high charges that could result from Duke Energy's own determination of the charges associated with using *Company-owned generation*.¹⁷⁴

The eighth paragraph in the 2007 Stipulation is weakly worded, resulting in inadequate protection for customers against the Company's overcharges.¹⁷⁵ As OCC Witness Haugh noted, a disagreement regarding the interpretation of the eighth paragraph broke out as early as the cross-examination of Company Witness Whitlock on April 10, 2007 which was just days after the settlement was executed. In Mr. Haugh's supplemental testimony filed on April 17, 2007, he observed that the Assistant Attorney General's cross-examination of Mr. Whitlock revealed Staff's more narrow interpretation of the eighth paragraph that would not permit the Company to

¹⁷¹ Joint Remand Rider Ex. 1 at 7, ¶8 (2007 Stipulation) (OPAE Supp. 6.).

¹⁷² Id.

¹⁷³ Company Remand Rider Ex. 2 at 11 (Whitlock Supplemental) (Supp. 520.).

¹⁷⁴ Company Witness Smith agreed that the word "purchases" in paragraph eight of the 2007 Stipulation is inappropriate under circumstances where the generating facilities are owned by the Company. Tr. Remand Rider Vol. II at 95 (April 19, 2007) (Smith) (Supp. 526.).

¹⁷⁵ See OCC Remand Rider Ex. 2 at 3-5 (Haugh Supplemental) (OPAE Supp. 50-52.).

calculate SRT charges based upon the repeated use of the DENA Assets.¹⁷⁶ The 2007 Stipulation was apparently executed hastily and without complete agreement between those persons who executed the agreement.

The ninth paragraph of the 2007 Stipulation is deceptive in its provision regarding Duke Energy's acceptance of "all audit recommendations made in the Report of the Financial and Management/ Performance Audit . . . except as set forth in paragraphs one through eight above."¹⁷⁷ A Company witness, Mr. Whitlock, testified that Duke Energy "does not exclude an offer from consideration if the [coal] supplier will not permit the resale of coal."¹⁷⁸ From that statement, the Company apparently believes it already complies with the Auditor's third major recommendation that "coal suppliers should not be required to allow the resale of their coal for the offers to be considered."¹⁷⁹ Company Witness Whitlock admitted, however, that Duke Energy "include[s] the resale of coal as a condition on its RFPs."¹⁸⁰ That condition on the RFPs renders meaningless the Company's "agreement" in the ninth paragraph to consider bids that Duke Energy considers non-complying with its RFPs. The Commission failed to reject the Company's thinly veiled subterfuge, exposed in the record, whereby Duke Energy stated agreement to an Auditor recommendation that it intends (in practice) to violate.

The 2007 Stipulation contains numerous faults that result from the narrow interests of those who fashioned the agreement and the haste with which the agreement was patched together. The broad public interest was not served by approval of the 2007 Stipulation. Instead, the Commission should have ordered the Company to comply with all the recommendations

¹⁷⁶ Id. at 3, citing Tr. Remand Rider Vol. I at 143 (Whitlock) (Supp. 523.).

¹⁷⁷ Joint Remand Rider Ex. 1 at 7-8, ¶9 (2007 Stipulation) (OPAE Supp. 6-7.).

¹⁷⁸ Company Remand Rider Ex. 2 at 9 (Whitlock Supplemental) (Supp. 518.).

¹⁷⁹ PUCO Ordered Remand Rider Exhibit 1 at 1-10 (Auditor's Report) (Supp. 511.).

¹⁸⁰ Company Remand Rider Ex. 2 at 9 (Whitlock Supplemental) (Supp. 518.).

contained in the report of its expert Auditor (i.e. regarding the FPP and SRT charges) and the OCC-sponsored testimony (i.e. regarding the AAC charge).

3. The settlement package violates important regulatory policies and practices.

The 2007 Stipulation violates important regulatory policies and practices. Most fundamentally, the settlement was reached by involving entities who had no standing in the cases identified in the caption of the 2007 Stipulation. OHA and PWC did not move to intervene in the *Rider Case*. OEG did not move to intervene in Case No. 06-1085-EL-UNC, whose topic is determination of the AAC, and OEG's participation and support for settlement provisions regarding AAC charges should not have been considered by the Commission (e.g. the fifth paragraph in the 2007 Stipulation addresses the calculation of the AAC, OP&E Supp. 5.).

This Court has rejected Commission approval of stipulations that do not balance important, competing interests. *Time Warner AxS v. Pub. Util. Comm.* (1996), 75 Ohio St.3d 229, 234, 661 N.E.2d 1097. In *Time Warner*, the Court warned against Commission practices that excluded customer classes. The Commission's Rider Order stated that PWC and the City "represented" residential customers, but neither actively participated in the *Rider Case* and both made early attempts in the pre-hearing conference to impede the OCC's efforts to develop the record. Despite the warning in *Time Warner*, the Commission used the signatures of PWC and City representatives as a means by which the residential class could be excluded from settlement in the *Rider Case*.¹⁸¹

The fifth paragraph in the 2007 Stipulation addresses the calculation of the AAC (OP&E Supp. 5.), and adoption of that provision violates a traditional regulatory policy and practice. That paragraph fails to recognize the Commission's earlier statements that AAC calculations

¹⁸¹ *Id.*

would consider Company “expenses.”¹⁸² Commission policies and practices should be used to guide the development of reasonable standard service offer rates. The Commission informed EVA that it should use the previously effective provisions regarding electric fuel component cases in the evaluation of Company practices as they related to the FPP.¹⁸³ Similar evaluation that would limit the amount of construction work in progress (CWIP) that could be included for calculating AAC (annually adjusted component) charges -- i.e. pursuant to regulatory practices that pre-dated electric restructuring in Ohio -- should have been recognized for the purpose of deciding which costs were appropriately associated with any capital expenditures. The Commission failed to observe limitations on CWIP that recognize the Commission’s regulatory policy.¹⁸⁴

Commission policies and practices should have been used to guide the development of reasonable standard service offer rates. The Commission failed to undertake the evaluation of AAC costs, in the PUCO’s words, “to consider the reasonableness of expenditures” in the AAC category because “[i]t is not in the public interest to cede this review.”¹⁸⁵ The Commission should have rejected the fifth paragraph in the 2007 Stipulation and set the AAC to a reasonable level.¹⁸⁶

¹⁸² OCC Remand Rider Ex. 1 at 9, quoting *Post-MDP Service Case*, Post-MDP Service Order at 32 (September 29, 2004) (Appx. 134.).

¹⁸³ PUCO Ordered Remand Rider Exhibit 1 at 1-2 through 1-3 (Auditor’s Report) (Supp. 503-504.).

¹⁸⁴ See, e.g., *Rider Case*, OCC Remand Rider Ex. 1 at 6-8 (OPAE Supp. 27-29.) and OCC Remand Rider Ex. 2 at 4 (Haugh Supplemental) (OPAE Supp. 51).

¹⁸⁵ *Post-MDP Service Case*, Entry on Rehearing at 10 (November 23, 2004) (Appx. 153.). Staff Witness Tufts did not formulate an opinion as to whether a return on CWIP was appropriate for standard service offer rates. Tr. Remand Rider Vol. II at 35 (April 19, 2007) (Tufts) (“I did not form an opinion and that’s not part of my testimony.”) (Supp. 525.).

¹⁸⁶ OCC Remand Rider Exhibit 1 at 11 (Haugh) (OPAE Supp. 32.).

The record displays a conflict between Duke Energy's demands as stated in the 2007 Stipulation and requirements from an earlier proceeding. In an earlier proceeding regarding SRT charges in PUCO Case No. 05-724-EL-UNC, the Commission adopted a stipulation filed on October 27, 2005 ("SRT Stipulation," OPAE Supp. 64.) that was entered into by Duke Energy, the OCC, and other parties.¹⁸⁷ The SRT Stipulation, part of which is quoted in the Rider Order,¹⁸⁸ required Duke Energy to submit an application "for approval of the SRT market price associated with such DENA Asset(s)" and to "provide OCC with workpapers and other data supporting the use of DENA Assets"¹⁸⁹ The hallmark of the SRT Stipulation provisions regarding the use of the DENA Assets was the ability of the OCC to review and analyze Duke Energy proposals at the before-the-application and application stages of the Company's proposals. Duke Energy did not provide such information to the OCC, rendering an OCC-negotiated agreement meaningless. The Rider Order recognizes that Duke Energy provided no information to the OCC in the *Rider Case* other than that which was sought by the OCC in ordinary discovery.¹⁹⁰

Besides not providing the OCC with early information on its proposals, the Company's application regarding SRT charges did not contain the pricing proposal associated with the use of the DENA Assets that was required by the SRT Stipulation.¹⁹¹ The Rider Order documents that Duke Energy did not even provide a proposed price in the late-negotiated 2007 Stipulation.¹⁹² The substance of the Commission's order that adopted the SRT Stipulation was not followed.

¹⁸⁷ The SRT Stipulation is reviewed in the Auditor's Report. PUCO Ordered Remand Rider Exhibit 1 at 6-1 through 6-2 (Auditor's Report) (Supp. 512-513.). The SRT Stipulation itself is an exhibit in the record. OCC Remand Rider Exhibit 4 (OPAE Supp. 64.).

¹⁸⁸ *Rider Case*, Rider Order at 17 (Appx. 24.).

¹⁸⁹ OCC Remand Rider Ex. 4 at 5, ¶8 (OPAE Supp. 68.).

¹⁹⁰ *Rider Case*, Rider Order at 20 (Appx. 27.).

¹⁹¹ OCC Remand Rider Ex. 4 at 5, ¶8 (OPAE Supp. 68.).

¹⁹² *Id.*

The Rider Order encourages non-compliance with Commission orders and discourages efforts to settle cases before the Commission, a matter that violates an important regulatory policy.¹⁹³

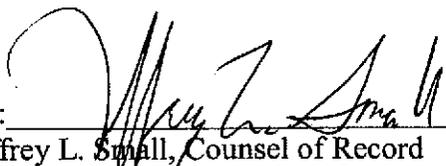
III. CONCLUSION

Four years after a flurry of side negotiations took place outside the view of the OCC and the public, the PUCO continues to deny the connection between the side deals and the support shown for the generation rate proposals of Duke Energy. The 2007 Stipulation was agreed to by the persons whose secret negotiations determined the results of the *Post-MDP Service Case* in 2004, and those negotiations also pre-determined the Rider Case in 2007. The Court should reject the PUCO's adoption of the 2007 Stipulation under these circumstances.

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

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
OHIO CONSUMERS' COUNSEL

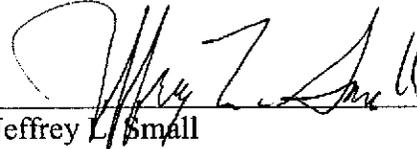
By: 
Jeffrey L. Small, Counsel of Record
Ann M. Hotz
Attorneys for Appellant
Office of the Ohio Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 (telephone)
(614) 466-9475 (facsimile)
small@occ.state.oh.us
hotz@occ.state.oh.us

¹⁹³ Id.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief by the Office of the Ohio Consumers' Counsel (Public Version) was served upon the below-listed counsel by regular U.S. Mail, prepaid, this 2nd day of June 2008.



Jeffrey L. Small
Counsel for Appellant,
Office of the Ohio Consumers' Counsel

PARTIES OF RECORD

Stephen A. Reilly
Duane W. Luckey
Werner L. Margard, III
Assistant Attorney General
180 East Broad Street
Columbus, Ohio 43215-3793

Public Utilities Commission of Ohio

Colleen Mooney
David Rinebolt
Ohio Partners for Affordable Energy
1431 Mulford Road
Columbus, Ohio 43212

Ohio Partners for Affordable Energy

Paul Colbert
Rocco D'Ascenzo
Duke Energy Ohio, Inc.
155 E. Broad Street, 21st Floor
Columbus, OH 43215

Duke Energy Ohio