IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel,)) Appellant, et al.,)) v.)) The Public Utilities Commission) of Ohio,)) Appellee.)	Case No. 08-0466 Appeal from the 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

MOTION TO SEAL CONTENTS OF MERIT BRIEF AND ASSOCIATED FILINGS PENDING RESOLUTION OF CONFIDENTIALITY ISSUES ON APPEAL
BY
APPELLANT,
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
(ATTACHMENT 2 OF 3)

FILED

JUN 02 2008

CLERK OF COURT
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

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	)	
Appellant,	)	
	)	Appeal from the Public
v.	)	Utilities Commission of Ohio
	)	Case Nos. 06-1068-EL-UNC,
	)	05-725-EL-UNC, 06-1069-
The Public Utilities Commission	)	EL-UNC, 05-724-EL-UNC,
of Ohio,	)	06-1085-EL-UNC
	)	
Appellee.	)	

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	)	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
	)	
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NOTICE OF APPEAL
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Appellant, the Office of the Ohio Consumers' Counsel, pursuant to R.C. 4903.11, R.C. 4903.13, and S. Ct. Prac. R. II (3)(B), hereby gives notice to the Supreme Court of Ohio and to the Public Utilities Commission of Ohio ("Appellee" or "PUCO") of this appeal to the Supreme Court of Ohio from Appellee's Order entered in its Journal on November 20, 2007 and Appellee's Entry on Rehearing entered in its Journal on January 16, 2008 in consolidated cases (each docket designation noted in the caption above) before the PUCO. The Order was issued in cases that were consolidated with cases that were heard on remand from this Court's decision in an appeal by Appellant. *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789.

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

On December 20, 2007, Appellant timely filed an Application for Rehearing from the November 20, 2007 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 Appellee's Journal on January 16, 2008.

Appellant files this Notice of Appeal, complaining and alleging that Appellee's November 20, 2007 Order and January 16, 2008 Entry on Rehearing result in a final order that is unlawful and unreasonable, and that Appellee erred as a matter of law, in the following respects that were raised in Appellant's Application for Rehearing:

A. The Commission's Order is unreasonable and unlawful because the Commission failed to determine that certain entities had no standing in these cases and the Order relies upon statements of support by those entities.

B. The Commission's 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.

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

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

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

WHEREFORE, Appellant respectfully submits that the Appellee's November 20, 2007 Opinion and Order and January 16, 2008 Entry on Rehearing are unreasonable and unlawful, and should be reversed, vacated, or modified. These cases should be remanded to Appellee with instructions to correct the errors complained of herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal of the Office of the Ohio Consumers' Counsel was served upon the Chairman of the Public Utilities Commission of Ohio by leaving a copy at the office of the Chairman in Columbus and upon others mentioned below (including all parties of record) by electronic service and regular U.S. Mail, postage prepaid, this 3rd day of March 2008.

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CERTIFICATE OF FILING

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

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

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.

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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.

---

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.

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

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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.)

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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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(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

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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

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ORDER ON REMAND

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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) Tests for Trade Secrets

(1) Independent Economic Value

a. Arguments

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

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

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

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

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

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

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

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

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

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

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

b. Resolution

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

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

It is clear to us, from our review of the information, that at least certain portions of the documents would indeed meet this portion of the definition of trade secrets. We agree with the parties seeking protective treatment that certain portions of the material in question have actual or potential independent economic value derived from their not being generally known or ascertainable by others, who might derive economic value from their disclosure or use. Specifically, we find that the following information has actual or potential independent economic value from its being not generally known or ascertainable: customer names, account numbers, customer social security or employer identification numbers, contract termination dates or other termination provisions, financial consideration in each contract, price of generation referenced in each contract, volume of generation covered by each contract, and terms under which any options may be exercisable.

(2) Efforts to Maintain Secrecy

a. Arguments

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

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

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

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

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

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

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

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

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

b. <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. Supreme Court of Ohio Remand

1. Background

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

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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) Seriousness of Bargaining in Light of Side Agreements

(1) General Rule Concerning Evaluation of Stipulations

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

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

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

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

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

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

(2) Supreme Court Review

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

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

(3) Impact of Side Agreements on Serious Bargaining

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

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

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

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

a. Timing of Side Agreements

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

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

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

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

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

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

b. Support Provisions

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

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) <u>Legal Standard for Adoption of RSP</u>

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) RSP Proposal: Provider of Last Resort Charge

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

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

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

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

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

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

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

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

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

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

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

b. Other Specified Costs

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

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

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

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

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

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

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

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

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

c. Rate Stabilization Charge

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

d. POLR Risk Costs

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

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

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

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

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

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

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

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

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

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

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

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

(3) RSP Proposal: Other Provisions

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

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

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

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

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

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

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

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

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

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

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

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

(4) RSP Proposal: Statutory Compliance

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

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

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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

FILE

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

Consolidated Duke Energy Ohio, Inc., Rate Stabilization Plan Remand and Rider Adjustment Cases	)	Case Nos. 03-93-EL-ATA 03-2079-EL-AAM 03-2081-EL-AAM 03-2080-EL-ATA 05-724-EL-UNC 05-725-EL-UNC 06-1068-EL-UNC 06-1069-EL-UNC 06-1085-EL-UNC

ENTRY

The attorney examiner finds:

(1) In *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify Its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period,* Case No. 03-93-EL-ATA *(RSP Case),* this Commission authorized Duke Energy Ohio (DE-Ohio)[1] to establish a rate stabilization plan and, as a part of that plan, to recover various costs through identified riders. The Commission's entry on rehearing, *inter alia,* modified or created various riders, as part of the rate stabilization plan.

(2) On appeal of that Commission decision, the Ohio Supreme Court remanded the proceedings to the Commission, requesting, *inter alia,* that the Commission provide additional record evidence and sufficient reasoning to support the modification of its opinion and order on rehearing. *Ohio Consumers' Counsel v. Pub. Util. Comm.,* 111 Ohio St.3d 300, 2006-Ohio-5789.

(3) On November 29, 2006, the attorney examiner issued an entry, finding "that a hearing should be held in the remanded *RSP Case,* in order to obtain the record evidence required by the court."

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

(4) On December 14, 2006, a prehearing conference was held in these proceedings. At that conference, the examiners indicated that they would address various issues, including the schedule for the completion of discovery, the filing of testimony, and the date of the hearing.

(5) Based on the discussion of the various parties at the prehearing conference, the examiner finds that the following schedule should be established:

(a) The last date for serving written discovery requests should be Thursday, February 22, 2007. The parties are reminded that discovery responses are to be made no later than ten days after the requests are served. (Prehearing Tr. at 34-36.)

(b) Testimony of witnesses on behalf of DE-Ohio shall be filed no later than Wednesday, February 28, 2007.

(c) Testimony of witnesses on behalf of staff and intervenors shall be filed no later than Friday, March 9, 2007.

(d) Any depositions that are intended to be used in the hearing shall be filed no later than the start of the hearing, unless otherwise authorized by the examiner.

(6) In order to allow for the an orderly presentation of testimony regarding a variety of connected issues, the examiner finds that the hearing should be structured to consider, first, the Ohio Supreme Court's remand of the *RSP Case*. Following the completion of that portion of the proceeding, the hearing will be recessed to allow the parties to prepare more effectively for the next phase of the hearing. The second portion of the hearing will address all issues relating to Case Nos. 05-724-EL-UNC, 05-725-EL-UNC, 06-1068-EL-UNC, 06-1069-EL-UNC, and 06-1085-EL-UNC.

(7) Therefore, the first phase of the hearing in these consolidated cases shall commence on Monday, March 19, 2007, and the second phase on Tuesday, April 10, 2007, both at 10:00 a.m., in Hearing Room 11-

C, at the offices of the Commission, 180 East Broad Street, Columbus, Ohio 43215.

(8) Parties should also be aware that the schedule previously established in certain of these consolidated cases with regard to the filing of responses to motions will continue to apply. Specifically, in the *RSP Case*, the examiner ordered as follows:

> In light of the timetable in these matters, the attorney examiner also requires that, in the event that any motion is made in this case, any memorandum contra shall be required to be filed within seven days after the service of such motion, and any reply memorandum within three days after the service of a memorandum contra. Paragraph (B) of Rule 4901-1-07, Ohio Administrative Code, which permits three additional days to take action if service is made by mail, will not apply.

RSP Case, Entry (February 18, 2004).

(9) The examiner also notes that, on January 2, 2007, Duke Energy Retail Sales LLC (DERS) filed a document entitled "Duke Energy Retail Sales Memorandum Contra to the Ohio Consumers' Counsel's Motion to Strike Duke Energy Retail Sales Motion to Quash the Two Subpoena Duces Tecum Filed by the OCC and Motion to Intervene on a Limited Basis" (memorandum contra). The Office of the Ohio Consumers' Counsel (OCC) had filed subpoenas directed at DERS, to which DERS had filed a motion to quash. OCC had responded with, among other things, a motion to strike that motion to quash. In responding, on January 2, 2007, to the motion to strike, DERS stated that "[i]n the event that the Commission determines that DERS is not permitted to advance its motion to Quash as a nonparty, DERS moves this honorable Commission for leave to intervene in these cases for the limited purpose of protecting the confidential material sought by OCC through discovery." (Memorandum contra at 2-3.) Later in the document, DERS specifically conditioned its intervention on the ruling regarding its motion to quash. DERS explained that "if the Commission denies OCC's motion to Strike DERS's Motion to Quash, DERS need not intervene in these proceedings." (Memorandum contra at 15.) By entry of January 2, 2007, the examiner denied OCC's motion to strike the motion to

quash. Therefore, the examiner finds that DERS's motion to intervene is, by its own explicit terms, moot.

It is, therefore,

ORDERED, That the schedule for discovery, the filing of testimony and depositions, and the hearing be established in accordance with this entry. It is, further,

ORDERED, That the parties comply with the schedule for the filing of responses to motions, as set forth in finding (8). It is, further,

ORDERED, That the motion to intervene by DERS be considered as moot. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record in these proceedings.

THE PUBLIC UTILITIES COMMISSION OF OHIO

By: Jeanne W. Kingery
Attorney Examiner

RRG;geb

Entered in the Journal
FEB 0 1 2007

Reneé J. Jenkins
Secretary

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

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

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

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

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

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

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

- eliminating the cap on the increases in the annually avoidable component of the price (see page 32),

- increasing the percentage of nonresidential shopping customers who may avoid paying the rate stabilization charge from 25 percent to 50 percent (see page 19),

- requiring Commission approval for all increases in the amount of recovery of fuel and economy power purchases (see page 17),

- allowing the deferral of certain 2004 and 2005 distribution expenses only with regard to nonresidential consumers and not residential consumers (see pages 34-35),

- requiring that CG&E comply with the terms of the Commission's order approving the stipulation in CG&E's electric transition plan (Case No. 99-1658-EL-ETP, et al.) such that residential consumers pay regulatory transition charges only through 2008 and receive a five percent discount on generation charges through 2005 (see pages 36-37),

- requiring the calculation of the incremental cost of power, for purposes of the price to be paid by nonresidential shopping customers upon their return to CG&E, on the basis of costs incurred only by CG&E, not by its affiliates (see page 35),

- prohibiting CG&E from requiring nonresidential consumers to waive their statutory provider of last resort rights (see page 35),

- providing that, if CG&E does not implement the stipulation as modified, CG&E will be required to establish full corporate separation (see page 34), and

- modifying the 90-day notice requirement regarding CRES contracts for purposes of avoiding the rate stabilization charge (see page 20).

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

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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:

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Jim Petro, Attorney General of the State of Ohio, Duane W. Luckey, Senior Deputy Attorney General, by Messrs. Werner L. Margard and Thomas McNamee, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Commission.

Janine L. Migden-Ostrander, Ohio Consumers' Counsel, by Mr. Jeffrey L. Small, Ms. Ann M. Hotz, and Mr. Larry S. Sauer, Assistant Consumers' Counsels, Office of Consumers' Counsel, 10 West Broad Street, Suite 1800, Columbus, Ohio 43215, on behalf of residential utility consumers of The Cincinnati Gas & Electric Company.

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Vorys, Sater, Seymour & Pease LLP, by Messrs. M. Howard Petricoff, Stephen M. Howard, W. Jonathan Airey, Jeffrey R. Becker, and William S. Newcomb, 52 East Gay Street, PO Box 1008, Columbus, Ohio 43215, on behalf of Constellation NewEnergy, Inc., Constellation Power Source, Inc., MidAmerican Energy Company, Strategic Energy, LLC, and WPS Energy Services, Inc.

McNees, Wallace & Nurick, by Mr. Samuel C. Randazzo, Ms. Lisa G. McAlister, and Mr. Daniel Neilsen, 21 East State Street, 17th Floor, Columbus, Ohio 43215, on behalf of Industrial Energy Users-Ohio.

Boehm, Kurtz & Lowry, by Messrs. Michael L. Kurtz and David F. Boehm, 36 East Seventh Street, Suite 1510, Cincinnati, Ohio 45202, on behalf of the Ohio Energy Group, Inc., The Kroger Co. and AK Steel Corporation.

David C. Rinebolt, Executive Director and Counsel, Post Office Box 1793, Findlay, Ohio 45840, on behalf of Ohio Partners for Affordable Energy.

Christensen, Christensen & Devillers, by Ms. Mary W. Christensen, 401 North Front Street, Suite 350, Columbus, Ohio 43215, on behalf of People Working Cooperatively.

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 city of Cincinnati and The Ohio Manufacturers' Association.

Legal Aid Society of Cincinnati, by Mr. Noel M. Morgan, 215 East Ninth Street, Suite 200, Cincinnati, Ohio 45202, on behalf of Communities United for Action.

Bell, Royer & Sanders Co., LPA, by Mr. Barth E. Royer and Ms. Judith B. Sanders, 33 South Grant Avenue Columbus, Ohio 43215, on behalf of Dominion Retail , Inc.

Mr. Arthur. E. Korkosz, Senior Attorney, FirstEnergy Solutions Corp., 76 South Main Street, 18th Floor, Akron, Ohio 44308, on behalf of FirstEnergy Solutions Corp.

Mr. Craig G. Goodman, 3333 K Street N.W., Suite 110, Washington, D.C. 20007, on behalf of National Energy Marketers Association.

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

Mr. Shawn P. Leyden, Esq., Vice President and General Counsel, 80 Park Plaza, 19th Floor, Newark, NJ 07102, on behalf of PSEG Energy Resources & Trade LLC.

Murdock Goldenberg Schneider & Groh, L.P.A., by Mr. Theodore J. Schneider, 700 Walnut Street, Suite 400, Cincinnati, Ohio 45202, on behalf of Cognis Corp.

I. HISTORY OF THE PROCEEDINGS

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

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

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

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

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

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

On October 8, 2003, CG&E filed three additional, related cases. In *In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Modify Current Accounting Procedures for Certain Costs Associated with the Midwest Independent Transmission System Operator,* Case No. 03-2079-EL-AAM (03-2079), CG&E requests authority to modify current accounting procedures to allow it to defer incremental costs related to its participation in the Midwest Independent Transmission System Operator (MISO). In *In the Matter of the Application of The Cincinnati Gas & Electric Company for authority to Modify Current Accounting Procedures for Capital Investment in its Electric Transmission and Distribution System and to Establish a Capital Investment Reliability Rider to be Effective after the Market Development Period,* Case Nos. 03-2080-EL-ATA (03-2080) and Case No. 03-2081-EL-AAM (03-2081), CG&E requests authority (a) to modify its current accounting procedures to allow it to defer incremental costs related to its net capital investment in electric transmission and distribution facilities, where that investment was made between January 1, 2001, and the date when such investment is reflected in the company's base rates, together with a carrying charge, and (b) to establish a capital investment rider to recover those deferred transmission and distribution facilities capital investments after the end of the MDP.

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

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

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

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

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

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

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

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

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

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

II. SUMMARY OF THE STIPULATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. CRITERIA FOR EVALUATING STIPULATIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Basic Analysis

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

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

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

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

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

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

2. <u>Commission Goals for Rate Stabilization Plans</u>

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

a. Rate Certainty

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

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

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

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

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

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

b. Financial Stability of CG&E

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

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

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

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

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

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

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

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

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

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

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

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

1. Compliance with Applicable Law

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

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

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

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

Section 4928.14, Ohio Revised Code.

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

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

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

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

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

Section 4928.17(A), Ohio Revised Code.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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11 Joint Exhibit 1 at 13.

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

13 Tr. IV at 95-96.

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

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

(d) Is the Stipulation Discriminatory?

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

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

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

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

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

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

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

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

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

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

(1) Reserve Capacity

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

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

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

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

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

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

(2) <u>System for Determining Increases to AAC</u>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Compliance with ETP Stipulation

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

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

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

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

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

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

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

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

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

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

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

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

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

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

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

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

It is, therefore,

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

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

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

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

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

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

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Judith A. Jones

Donald L. Mason

Clarence D. Rogers, Jr.

JWK/SEF;geb

Entered in the Journal
SEP 2 9 2004

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

CONCURRING OPINION OF CHAIRMAN ALAN R. SCHRIBER

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

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

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

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

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

Alan R. Schriber, Chairman

Entered in the Journal
SEP 29 2004

Reneè J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY ON REHEARING

The Commission finds:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It is, therefore,

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

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

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

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

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

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Judith A. Jones

Donald L. Mason

Clarence D. Rogers, Jr.

JWK/SEF;geb

Entered in the Journal
NOV 2 3 2004

Reneé J. Jenkins
Secretary

4901-1-10 Parties.

(A) The parties to a commission proceeding shall include:

(1) Any person who files an application, petition, long-term forecast report, or complaint.

(2) Any public utility, railroad, or private motor carrier against whom a complaint is filed.

(3) Any public utility, railroad, or private motor carrier whose rates, charges, practices, policies, or actions are designated as the subject of a commission investigation.

(4) Any person granted leave to intervene under rule 4901-1-11 of the Administrative Code.

(5) Any municipal corporation which has enacted an ordinance which is subsequently challenged in a complaint filed under section 4909.34 of the Revised Code.

(6) Any person cited for failure to maintain liability insurance as required by section 4921.11 or 4923.08 of the Revised Code.

(7) Any other person expressly made a party by order of the commission.

(B) If any public utility, railroad, or private motor carrier referred to in paragraph (A)(2) or (A)(3) of this rule is operated by a receiver or trustee, the receiver or trustee shall also be made a party.

(C) Except for purposes of rules 4901-1-02, 4901-1-03, 4901-1-04, 4901-1-05, 4901-1-06, 4901-1-07, 4901-1-12, 4901-1-13, 4901-1-15, 4901-1-18, 4901-1-26, 4901-1-30, 4901-1-31, 4901-1-32, 4901-1-33, and 4901-1-34 of the Administrative Code, the commission staff shall not be considered a party to any proceeding.

Effective: 05/07/2007

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

Promulgated Under: 111.15

Statutory Authority: 4901.13

Rule Amplifies: 4901.13, 4903.221, 4935.04(G)

Prior Effective Dates: 3/1/81, 12/25/87

4901-1-11 Intervention.

(A) Upon timely motion, any person shall be permitted to intervene in a proceeding upon a showing that:

(1) A statute of this state or the United States confers a right to intervene.

(2) The person has a real and substantial interest in the proceeding, and the person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, unless the person's interest is adequately represented by existing parties.

(B) In deciding whether to permit intervention under paragraph (A)(2) of this rule, the commission, the legal director, the deputy legal director, or an attorney examiner shall consider:

(1) The nature and extent of the prospective intervenor's interest.

(2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case.

(3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings.

(4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.

(5) The extent to which the person's interest is represented by existing parties.

(C) Any person desiring to intervene in a proceeding shall file a motion to intervene with the commission, and shall serve it upon all parties in accordance with rule 4901-1-05 of the Administrative Code. The motion shall be accompanied by a memorandum in support, setting forth the person's interest in the proceeding. The same procedure shall be followed where a statute of this state or the United States confers a right to intervene.

(D) Unless otherwise provided by law, the commission, the legal director, the deputy legal director, or the attorney examiner may:

(1) Grant limited intervention, which permits a person to participate with respect to one or more specific issues, if the person has no real and substantial interest with respect to the remaining issues or the person's interest with respect to the remaining issues is adequately represented by existing parties.

(2) Require parties with substantially similar interests to consolidate their examination of witnesses or presentation of testimony.

(E) A motion to intervene will not be considered timely if it is filed later than five days prior to the scheduled date of hearing or any specific deadline established by order of the commission for purposes of a particular proceeding.

(F) A motion to intervene which is not timely will be granted only under extraordinary circumstances.

Effective: 05/18/2007

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

Promulgated Under: 111.15

Statutory Authority: 4901.13

Rule Amplifies: 4901.13, 4903.221

Prior Effective Dates: 1/20/63, 3/1/81, 6/1/83, 7/18/85, 12/25/87, 4/20/01

4901-1-12 Motions.

(A) All motions, unless made at a public hearing or transcribed prehearing conference, or unless otherwise ordered for good cause shown, shall be in writing and shall be accompanied by a memorandum in support. The memorandum in support shall contain a brief statement of the grounds for the motion and citations of any authorities relied upon.

(B) Except as otherwise provided in paragraphs (C) and (F) of this rule:

(1) Any party may file a memorandum contra within fifteen days after the service of a motion, or such other period as the commission, the legal director, the deputy legal director, or the attorney examiner requires.

(2) Any party may file a reply memorandum within seven days after the service of a memorandum contra, or such other period as the commission, the legal director, the deputy legal director, or the attorney examiner requires.

(C) Any motion may include a specific request for an expedited ruling. The grounds for such a request shall be set forth in the memorandum in support. If the motion requests an extension of time to file pleadings or other papers of five days or less, an immediate ruling may be issued without the filing of memoranda. In all other situations, the party requesting an expedited ruling may first contact all other parties to determine whether any party objects to the issuance of such a ruling without the filing of memoranda. If the moving party certifies that no party objects to the issuance of such a ruling, an immediate ruling may be issued. If any party objects to the issuance of such a ruling, or if the moving party fails to certify that no party has any objection, any party may file a memorandum contra within seven days after the service of the motion, or such other period as the commission, the legal director, the deputy legal director, or the attorney examiner requires. No reply memoranda shall be filed in such cases unless specifically requested by the commission, the legal director, the deputy legal director, or the attorney examiner.

(D) All written motions and memoranda shall be filed with the commission and served upon all parties in accordance with rule 4901-1-05 of the Administrative Code.

(E) For purposes of this rule, the term "party" includes all persons who have filed motions to intervene which are pending at the time a motion or memorandum is to be filed or served.

(F) Notwithstanding paragraphs (B) and (C) of this rule, the commission, the legal director, the deputy legal director, or the attorney examiner may, upon their own motion, issue an expedited ruling on any motion, with or without the filing of memoranda, where the issuance of such a ruling will not adversely affect a substantial right of any party.

(G) The presiding hearing officer may direct that any motion made at a public hearing or transcribed prehearing conference be reduced to writing and filed and served in accordance with this rule.

(H) A motion for a hearing on a long-term forecast report under division (D)(3) of section 4935.04 of the Revised Code shall be filed within forty-five days of the filing of the report.

Effective: 05/07/2007

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

Promulgated Under: 111.15

Statutory Authority: 4901.13

Rule Amplifies: 4901.13, 4901.18, 4935.04

Prior Effective Dates: 3/1/81, 12/25/87, 4/20/01

4901-1-13 Continuances and extensions of time.

(A) Except as otherwise provided by law, and notwithstanding any other provision in this chapter, continuances of public hearings and extensions of time to file pleadings or other papers may be granted upon motion of any party for good cause shown, or upon motion of the commission, the legal director, the deputy legal director, or an attorney examiner.

(B) A motion for an extension of time to file a document must be timely filed so as to permit the commission, legal director, deputy legal director, or attorney examiner sufficient time to consider the request and to make a ruling prior to the established filing date. If two or more parties have similar documents due the same day and a party intends to seek an extension of the filing date, the moving party must file its motion for an extension sufficiently in advance of the existing filing date so that other parties who might be disadvantaged by submitting their filing prior to the movant submitting its filing will not be disadvantaged. If two or more parties have similar documents due the same day and the motion for an extension is filed fewer than five business days before the document is scheduled to be filed, then the moving party, in addition to regular service of the motion for an extension, must provide a brief summary of the request to all other parties orally, by facsimile transmission, or by electronic message by no later than five-thirty p.m. on the day the motion is filed.

(C) A copy of any written ruling granting or denying a request for a continuance or extension of time shall be served upon all parties to the proceeding.

(D) Nothing in this rule restricts or limits the authority of the presiding hearing officer to issue oral rulings during public hearings or transcribed prehearing conferences.

Effective: 05/07/2007

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

Promulgated Under: 111.15

Statutory Authority: 4901.13

Rule Amplifies: 4901.13, 4901.18

Prior Effective Dates: 3/1/81, 12/25/87, 4/20/01

4901:1-35-02 Purpose and scope.

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

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

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

HISTORY: Eff. 5-27-04

Rule promulgated under: RC 111.15

Rule authorized by: RC 4928.06, 4928.14

Rule amplifies: RC 4928.14

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

4903.221 Intervention by party who may be adversely affected by commission proceeding.

Any other person who may be adversely affected by a public utilities commission proceeding may intervene in such proceeding, provided:

(A) That such other person files a motion to intervene with the commission no later than:

(1) Any specific deadline established by order of the commission for purposes of a particular proceeding; or, if no such deadline is established;

(2) Five days prior to the scheduled date of hearing.

The public utilities commission may, in its discretion, grant motions to intervene which are filed after the deadlines set forth in divisions (A)(1) and (2) of this section for good cause shown.

(B) That the commission, in ruling upon applications to intervene in its proceedings, shall consider the following criteria:

(1) The nature and extent of the prospective intervenor's interest;

(2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;

(3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings;

(4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.

Effective Date: 01-11-1983

4911.15 Counsel may represent residential consumer or municipal corporation.

The consumers' counsel, at the request of one or more residential consumers residing in, or municipal corporations located in, an area served by a public utility or whenever in his opinion the public interest is served, may represent those consumers or corporations whenever an application is made to the public utilities commission by any public utility desiring to establish, modify, amend, change, increase, or reduce any rate, joint rate, toll, fare, classification, charge, or rental.

The consumers' counsel may appear before the public utilities commission as a representative of the residential consumers of any public utility when a complaint has been filed with the commission that a rate, joint rate, fare, toll, charge, classification, or rental for commodities or services rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted by the utility is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of the law.

Nothing in Chapter 4911. of the Revised Code shall be construed to restrict or limit in any manner the right of a municipal corporation to represent the residential consumers of such municipal corporation in all proceedings before the public utilities commission, and in both state and federal courts and administrative agencies on behalf of such residential consumers concerning review of decisions rendered by, or failure to act by, the public utilities commission.

Effective Date: 06-12-1980

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

FILE

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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 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 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 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 Standard Service Offer.	)	Case No. 06-1085-EL-UNC

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2007 DEC 20 PM 4: 34
PUCO

PUBLIC VERSION
(REDACTED)

APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential consumers of Duke Energy Ohio, Inc. ("Company" or "Duke Energy," including its predecessor, The Cincinnati Gas and Electric Company) and pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35(A), applies for rehearing of the Opinion and Order ("Order") issued by the Public Utilities Commission of Ohio ("PUCO" or

"Commission") on November 21, 2007 in the above-captioned cases. The OCC submits that the Commission's Remand Order is unreasonable and unlawful in the following particulars:

A. The Commission's Remand Order is unreasonable and unlawful because the Commission failed, as a quasi-judicial decision-maker, to "permit a full hearing upon all subjects pertinent to the issues(s), and to base [its] conclusion upon competent evidence" in violation of case law and R.C. 4903.09. *City of Bucyrus v. State Dept. of Health*, 120 Ohio St. 426, 430.

   1. The Auditor's Report should be followed regarding FPP Charges.

   2. Capacity costs should be based on actual costs, which excludes charges related to the DENA Assets at this time.

   3. The Order fails to eliminate additional "AAC" charges requested by the Company without any evidentiary basis.

B. The Commission's Order is unreasonable and unlawful because the Commission improperly delegated its duties to the Company and the Commission's Staff.

C. The Commission's Order is unreasonable and unlawful because the Commission failed to determine that certain entities had no standing in these cases.

D. The Commission's 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.

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

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

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

The reasons for granting this Application for Rehearing are set forth in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. HISTORY OF THE CASE AND INTRODUCTON

A. Introduction

The OCC's Application for Rehearing and briefs in the "Remand Cases," Case Nos. 03-93-EL-ATA, et al., identified the parties who supported the proposals offered by Duke Energy in the Remand Cases (heard in "Phase I" of the cases consolidated with the above-captioned cases).[1] Those parties supporting Duke's proposals remained essentially the same in the above-captioned cases (the subject of "Phase II" of the hearings). This situation further demonstrates the importance of evidence regarding the side deals between the Duke-affiliated companies and parties or members of parties to these proceedings. The impact of those side deals is documented, among other places, in the Commission's Order on Remand in the cases that were consolidated with the above-captioned cases.[2]

Serious negotiation of a stipulation regarding the Company's Fuel and Purchased Power ("FPP") tracker, System Reliability Tracker ("SRT"), and Annually Adjusted Component ("AAC") charges could only take place with parties that represent customers who bear the full brunt of the rate increases and that have not otherwise been "captured" by the Company by means of other financial arrangements. Such serious negotiation did not take place regarding the stipulation entered into by parties and filed on April 9, 2007 ("2007 Stipulation," Joint Remand Rider Ex. 1[3]).

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[1] *In re Post-MDP Generation Service Cases*, Case Nos. 03-93-EL-ATA, et al., OCC Application for Rehearing (November 23, 2007). For notational convenience, the portions of the case before and after the Court's deliberations are cited separately. The proceedings prior to the appeal are referred to, collectively, as the "*Post-MDP Service Case.*" The proceedings after the appeal are referred to, collectively, as the "*Post-MDP Remand Case.*" The *Post-MDP Remand Case* was separated in some respects into Phase I and Phase II (the latter the subject of the Order dated November 20, 2007).

[2] *In re Post-MDP Remand Case*, Order on Remand at 27 (October 24, 2007) ("inevitable conclusion").

[3] The cases consolidated to form the *Post-MDP Service Case* were further consolidated with the above-captioned "Rider" cases. Order at 6. A single evidentiary record exists that is applicable to the ultimate decisions in all the consolidated cases, including those that were originally consolidated with Case No. 03-93-EL-ATA, even though the above-captioned cases were heard, briefed, and decided separately in Phase II of the hearings. Exhibit references to the portion of the proceedings in Phase I after remand from the Court contain the word "Remand" to distinguish them from other exhibits. Exhibit references to the portion of the proceedings in Phase II after remand from the Court contain the words "Remand Rider."

B. Burden of Proof

The burden of proof in these cases rests upon Duke Energy, and the OCC does not bear any burden of proof in these cases. In a hearing regarding a proposal that does not involve an increase in rates, R.C. 4909.18 provides that "the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility." In a hearing regarding a proposal that does involve an increase in rates, R.C. 4909.19 provides that, "[a]t any hearing involving rates or charges sought to be increased, the burden of proof to show that the increased rates or charges are just and reasonable shall be on the public utility." In the following sections, the OCC will explain how Duke Energy failed to prove that its post-MDP pricing proposals should have been adopted by the Commission.

C. Procedural History for These Cases

As stated in the Order, these cases were consolidated with the proceedings regarding the remand from the Court in a transcribed prehearing conference held on December 14, 2006.[4] That prehearing conference was attended by counsel for People Working Cooperatively ("PWC") who stated a lack of interest in the above-captioned cases and a desire that these cases not be consolidated with those on remand. The prehearing conference was not attended by other parties to the *Post-MDP Service Case*, which included the Ohio Hospital Association ("OHA"). Neither PWC nor OHA moved to intervene in the above-captioned cases, and neither is a party. Counsel for the Ohio Energy Group ("OEG") attended the prehearing conference, but OEG did not intervene in

[4] Order at 6.

Case No. 06-1085-EL-UNC that deals with the AAC portion of Duke Energy's proposed standard service offer.

Phase II of the hearings featured the submission of the Auditor's Report prepared by Energy Ventures Analysis, Inc. ("EVA"), as assisted by Larkin & Associates. Mr. Seth Schwartz of EVA and Mr. Ralph Smith of Larkin & Associates ("Larkin") supported the results of the Auditor's Report in their live testimony on April 10, 2007. The Audit's Report was prepared by EVA and Larkin for the audit period July 1, 2005 through June 30, 2006.[5]

The second day of the hearing for Phase II convened on April 19, 2007, and largely dealt with the 2007 Stipulation. Although not parties to the case, PWC and OHA both instructed counsel for the PUCO Staff to execute the 2007 Stipulation on their behalf. Also, OEG gave similar instructions even though it did not move to intervene in Case No. 06-1085-EL-UNC.

The Commission's Order in the above-captioned cases was issued on November 20, 2007, and is the subject of the instant Application for Rehearing.

[5] PUCO Ordered Remand Rider Exhibit 1 at 1-1 (Auditor's Report).

II. ARGUMENT

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

1. The Auditor's Report should be followed regarding FPP charges.

The Commission has placed in effect a process by which management audits are conducted regarding the costs that are included to arrive at the FPP and SRT charges. The Commission undertook this evaluation because "[i]t is not in the public interest to cede this review."[6] During the hearing, at which an OCC witness supported a similar process regarding AAC charges,[7] the cost of audits was raised by Duke Energy.[8] The Commission has exerted considerable effort to review Duke Energy's management of generation costs by means of obtaining technical advice from outside experts, and costs undeniably exist in connection with such audits. The recommendations of the experts hired by the PUCO, submitted on the record in these cases, should be heeded and not ignored in favor of the intransigent policies of Duke Energy.

The audit of Duke Energy's practices revealed that the Company's treatment of matters that affect the FPP calculation has needlessly raised costs. The Auditor's Report, entered into the record as PUCO Ordered Remand Rider Ex. 1, contained major

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[6] *Post-MDP Service Case*, Entry on Rehearing at 10 (November 23, 2004).

[7] OCC Remand Rider Ex. 1 at 5 (Haugh).

[8] See, e.g., Tr. Remand Rider Vol. II at 58 (April 19, 2007) (Haugh).

recommendations regarding Duke Energy's transactions that affect FPP charges that were rejected as the result of the PUCO's approval of the Stipulation. The recommendations rejected by Duke Energy, and therefore by the Commission in its Order, concern the adoption of "traditional utility procurement strategies related to the procurement of coal and emission allowances" (i.e. cease active management of such procurements) and the development of "portfolio strategy such that [Duke Energy] purchases coal through a variety of short, medium and long-term agreements with appropriate supply and supplier diversification with credit-worthy counterparties."[9] The Order mentions these two issues, but does not address another issue raised by the OCC regarding the recommendation by EVA "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."[10] These three recommendations should be adopted by the Commission based on the record in these cases.

As noted in the Order, EVA's Seth Schwartz supported the recommendation that Duke Energy adopt a traditional utility procurement strategy for its coal purchases.[11] As stated in the Order, Mr. Swartz testified that the Company failed to "demonstrate whether the [active management] approach was a lower-cost approach."[12] The Company has the burden of proof, which has not been met under these circumstances. In further support for the Auditor's position, the Company's only argument is that an approach that is

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[9] PUCO Ordered Remand Rider Exhibit 1 at 1-9 through 1-10 (Auditor's Report).

[10] Id. at 1-10.

[11] Order at 13.

[12] Id. at 14, citing Tr. Vol. Remand Rider I at 69-70.

appropriate for a regulatory environment is not appropriate for a deregulated environment.[13] On cross examination, the Auditor stated his [redacted][14] It is, therefore, unreasonable for Duke Energy to approach the purchase of coal by means other than it uses for its utilities that are in a fully regulated situation. The PUCO should not dismiss the expert opinion that was obtained at the behest of the Commission.

Related to the "active management" issue -- but subject to a separate EVA recommendation that is not mentioned in the Order -- EVA recommended that Duke Energy permit the consideration of bids from bidders who seek to limit the resale of their coal.[15] The Company should follow this recommendation because it opens up additional opportunities to obtain low-cost bids. [redacted][16] Duke Energy's defense of its practice is disingenuous. Company Witness Whitlock stated that "DE-Ohio does *include the resale of coal as a condition on its RFPs* but does not exclude an offer from consideration if the supplier will not permit the resale of coal."[17] Suppliers who desire to place restrictions on the resale of coal should not be told not to bid, and any

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[13] Order at 14.

[14] Tr. Vol. Remand Rider Vol. I at 106 (April 10, 2007) (Auditor).

[15] PUCO Ordered Remand Rider Exhibit 1 at 1-10 (Auditor's Report).

[16] Id. at 2-11 (Auditor's Report).

[17] Company Remand Rider Ex. 2 at 9 (Whitlock Supplemental) (emphasis added).

other result would not result in acceptance of "all audit recommendations . . . except as set forth in paragraphs one through eight above."[18] Duke Energy should be specifically ordered to remove the restriction on the resale of coal from its requests for proposals and to select bids on a least cost basis.

EVA's recommendation that the Company should develop a portfolio approach to the purchase of coal essentially argues that [redacted]. The response to this evidence seems to accept this result by approving a provision within the 2007 Stipulation that provides for the "initiation of discussions."[19] The best that can result from the Order is the beginning of discussions that are too late to protect customers through the end of 2008, and a result that "[redacted][20] The result, therefore, is especially inconsistent "in light of pending legislation related to the post-RSP period."[21]

Company Witness Whitlock made an argument similar to that made by EVA and the OCC in his testimony regarding capacity purchases that are charged as part of the SRT:

> As I discussed earlier regarding economic management and balancing our resources earlier, DE-Ohio believes that it is beneficial to purchase capacity instruments for periods longer than a year and to do so would enable DE-Ohio to take advantage of

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[18] Joint Remand Rider Ex. 1 at 7-8 ("accepts all audit recommendations . . . except as set forth in paragraphs one through eight above").

[19] Order at 16.

[20] PUCO Ordered Remand Rider Exhibit 1 at 2-19 (Auditor's Report).

[21] Order at 16.

reliability and pricing opportunities in the market that would accrue to the benefit of MBSSO consumers.[22]

[redacted][23] [redacted] raises fuel costs, a policy that does not serve either Duke Energy or its customers.

Duke Energy should be ordered to follow EVA's recommendations regarding its coal management policies. The Commission should arrive at this result based upon the evidence in the record stemming from the Audit Report and related testimony, but also based upon the testimony of the Company's witnesses.

2. Capacity costs should not include charges related to the DENA Assets at this time.

The Auditor's Report contained the following major recommendation regarding Duke Energy's SRT charges:

> 6. EVA recommends that purchase of reserve capacity from DENA Assets should not be eligible for inclusion in the SRT, as is currently the case.[24]

The Order unreasonably rejects the Auditor's recommendation, stating the Commission's lack of concern over the Company's non-compliance with prior orders and its acceptance of the proposed pricing mechanism.[25] The Auditor's expert recommendation, solicited

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[22] Company Remand Rider Ex. 1 at 7 (Whitlock).

[23] PUCO Ordered Remand Rider Exhibit 1 at 2-19 (Auditor's Report).

[24] PUCO Ordered Remand Rider Exhibit 1 at 1-10 (Auditor's Report).

[25] Order at 20-21.

by the PUCO and made part of the record, should be accepted in the Order instead of being ignored.

The record displays a conflict between Duke Energy's demands as stated in the 2007 Stipulation and requirements stated in earlier proceedings. In PUCO Case No. 05-724-EL-UNC, the Commission adopted a stipulation filed on October 27, 2005 ("SRT Stipulation"[26]). The SRT Stipulation was entered into by Duke Energy, the OCC, and other parties who agreed in October 2005 to a number of provisions in Case No. 05-724-EL-UNC.[27] The SRT Stipulation, part of which is quoted in the Order,[28] 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 . . . ."[29]

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. The SRT Stipulation required much more than the discovery provided for in every proceeding.[30] The Order recognizes that the Company provided no information to the OCC in these

[26] The SRT Stipulation is reviewed in the Auditor's Report. PUCO Ordered Remand Rider Exhibit 1at 6-1 through 6-2 (Auditor's Report). The SRT Stipulation itself is an exhibit in the record. OCC Remand Rider Exhibit 4, in which it was stated that Duke Energy could not use the DENA Assets in its SRT calculations without an application to the Commission requesting approval. *In re Setting of SRT*, Case No. 05-724-EL-UNC, Order at 6 (November 22, 2005).

[27] OCC Remand Rider Ex. 4.

[28] Order at 17.

[29] Id. at 5, ¶8.

[30] R.C. 4903.082. The agreement in the SRT Stipulation is therefore meaningless unless more was required of Duke Energy than responding to OCC discovery requests after an application was filed.

cases other than that which was sought by the OCC in ordinary discovery.[31] The application did not contain the pricing proposal associated with the use of the DENA Assets, as required by the SRT Stipulation, and the Order documents that that Duke Energy did not even provide a proposed price in the late-negotiated 2007 Stipulation.[32] The substance of the Commission's order that adopted the SRT Stipulation was not followed.

The Auditor's Report states that Duke Energy "has not demonstrated that its native customers are paying more for capacity in the market than they would if DE-Ohio purchased capacity for the legacy DENA [plants].[33] That is, the Company has not met its burden of proof regarding the use of the DENA plants. The Auditor's Report discusses the alternatives available to Duke Energy:

> EVA agrees with DE-Ohio as to the types of capacity products it is considering and notes that this list may change over time. As a result, monitoring of the market for alternatives is appropriate. EVA supports the use of a [redacted] Further, and as noted below, [redacted] *** EVA agrees with DE-Ohio that is {sic, it} should employ arrangements that include capacity commitments for more than one year. In fact, it is not clear to EVA that DE-Ohio had previously been precluded from doing so. EVA believes that DE-Ohio should employ a portfolio strategy similar to what EVA is recommending for fuel.[34]

[31] Order at 20. The record, upon which the PUCO must base its decision, does not contain any information regarding the discovery process unless that information is contained in testimony.

[32] Id.

[33] PUCO Ordered Remand Rider Exhibit 1at 6-5 (Auditor's Report).

[34] Id. at 6-4 through 6-5.

EVA recommended the expansion of options applied by Duke Energy beyond the limited options selected by the Company's management.[35] The Order unreasonably adopts the Company's proposal to use the DENA Assets while completely ignoring the Auditor's expert advice regarding least-cost alternatives.

The Order approves the vague pricing proposal contained in the 2007 Stipulation. That document proposes 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.[36] The use of broker quotes or third party transaction prices would not deliver savings from "the most reasonably priced capacity available" that was promised by Company Witness Whitlock.[37] To the contrary, use of the DENA Assets presents the danger of unreasonably high charges that could result from the Company's determination of costs associated with *Company-owned generation*.[38] The third pricing mechanism, agreement with the PUCO Staff, amounts to providing Duke Energy and the PUCO Staff the opportunity to enter into negotiations without the involvement of other parties and for these two parties to the 2007 Stipulation to make decisions in these cases. As further explained later in this Application for Rehearing, the

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[35] Company Remand Rider Exhibit 2 at 11 (Whitlock Supplemental) ("[l]imiting the options . . . [which] can only increase the cost to consumers"). The opportunity presented by the DENA Assets appears to be limited. Although Company Witness Whitlock stated that the location of DENA Assets "should not exclude them from consideration for Rider STR capacity purchases" (Company Remand Rider Exhibit 2 at 14), Mr. Whitlock stated under cross examination that he did not know whether a MISO transmission study had been conducted to determine whether the DENA Assets located in the PJM footprint could qualify as a Designated Network Resource ("DNR") to meet MISO requirements. Tr. Vol. Remand Rider Vol. I at 141-142 (April 10, 2007) (Whitlock).

[36] Joint Remand Rider Ex. 1 at 7, ¶8 (2007 Stipulation).

[37] Company Remand Rider Ex. 2 at 11 (Whitlock Supplemental).

[38] Company Witness Smith agreed that the word "purchases" in paragraph 8 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).

Commission may not lawfully delegate such decision-making responsibilities, and any such decision would not be based upon the record in these cases.

The Commission should rely on the expert opinion of the Auditor and reinstate the PUCO's previous position that did not permit the calculation of the SRT based upon reserve capacity from DENA Assets.

3. A return on CWIP should not be included in the AAC charges.

The Order's inclusion of plant CWIP amounts in the AAC recognize that the Commission previously stated that a review would be undertaken regarding these charges.[39] Approval of the CWIP amounts, however, has been achieved by Duke Energy without undergoing any significant review of its underlying costs. The reasonableness of a return on CWIP for environmental plant in the AAC calculations is a matter that is not covered by Staff's inquiries. Asked whether he formulated an opinion regarding whether a return on such CWIP is an appropriate component of the AAC, Staff Witness Tufts stated that he "did not form an opinion and that's not part of [his] testimony."[40] Neither the Company nor the Staff provided any detail -- for example, of the percentage completion of environmental upgrades at Duke Energy's plants -- that might further inform the Commission regarding the Company's cost of providing service.

Without more detailed knowledge of the CWIP accounts, the calculations available to the Commission are provided in the testimony of Company Witness Wathen and OCC Witness Haugh. Mr. Wathen provides a calculation of 9.1 percent of "little g"

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[39] Order at 23.

[40] Tr. Remand Rider Vol. II at 35 (April 19, 2007) (Tufts).

based upon the inclusion of all CWIP, regardless of its state of completion.[41] As OCC Witness Haugh pointed out, this calculation takes advantage of the CWIP regulatory concept while completely ignoring regulatory practice for the evaluation of generation costs while plant additions are in progress.[42]

Mr. Haugh's calculation of 5.6 percent of "little g" excludes the return on CWIP from the calculation of the AAC.[43] Mr. Haugh explained that the elimination of a return on CWIP is consistent with Commission discretion regarding the treatment of CWIP for rate setting purposes. In the present situation, elimination of the return on CWIP is appropriate since customers may receive little or no benefit from the plant additions.[44]

Mr. Haugh's result is also consistent with the previous statements within the context of the *Post-MDP Service Case*, including the Commission's statement that the AAC should include "expenses."[45] The Company's proposed AAC in the 2004 Stipulation for purposes of charging market-based rates requested $60,172,508 out of a total calculation of $107,514,533.[46] The Commission's related finding resulted in only approval of $53,725,267,[47] a result that is inconsistent with Company Witness Wathen's calculations. The Order states that the PUCO originally "based [its] determination in part

[41] Company Remand Rider Ex. 4 at 11 (Wathen).

[42] OCC Remand Rider Exhibit 1 at 7 (Haugh).

[43] Id. at 11 (Haugh).

[44] Id. at 7.

[45] Id. at 9, quoting *Post-MDP Service Case*, Order at 32 (September 29, 2004).

[46] Id. at 8-9.

[47] Id.

on Duke's supplied calculations."[48] The history of these cases reveals, however, that the Commission never accepted the entirety of the Company's calculations and rejected the type of calculations presented by Company Witness Wathen. The Commission should return to its earlier reasoning and reduce the AAC charge.

The Company's argument regarding the AAC charge is inconsistent with the Company's representations regarding other generation charge components in the consolidated record.[49] As discussed above, [redacted][50]

Duke Energy should not be permitted to charge customers for plant CWIP amounts through the AAC in a manner that could only be justified by the assumption of long-term provision of generation service to its customers while [redacted] The AAC should not include amounts requiring customers to pay for CWIP.

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[48] Order at 23.

[49] The Remand Order again runs afoul of R.C. 4903.09 that requires that the Commission "shall file . . . finding of fact and written opinions setting forth the reasons prompting the decision arrived at, based upon said findings of fact." See also, *City of Bucyrus v. State Dept. of Health*, 120 Ohio St. 426, 430.

[50] These matters, along with evidentiary support that includes warnings from the Auditor, were extensively briefed in the *Rider Cases*. OCC Initial Post-Remand Brief, Phase II at 6-7.

B. The Commission's Order Is Unreasonable And Unlawful Because The Commission Impermissibly Delegated Its Duties To The Company And The Commission's Staff.

Portions of the Order give the appearance that the Commission adopted the 2007 Stipulation,[51] but the 2007 Stipulation cannot be carried out according to its literal terms due to the time that elapsed between the hearing and issuance of the Order. As an example, the 2007 Stipulation provides that FPP credits will be "included in the quarterly Rider FPP filing for the period beginning July 1, 2007, and ending September 30, 2007 . . . ."[52] That action is impossible as the result of an Order dated November 20, 2007. The Order's apparent resolution of this conflict is contained in its order that "Duke [Energy] work with staff to determine a reasonable period over which the amounts authorized by this Opinion and Order should be trued-up and collected."[53] This provision amounts to providing Duke Energy and the PUCO Staff the opportunity to enter into negotiations without the involvement of other parties and for these two parties to the 2007 Stipulation to make decisions in these cases. The Commission may not lawfully delegate such decision-making responsibilities, and any such decision cannot be based upon the record in these cases.

These cases ultimately rest upon the Commission's authority to approve standard service offer rates after a filing that is required by R.C. 4928.14(A). That division states

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[51] Order at 30 (November 20, 2007) ("the stipulation [is] approved and adopted").

[52] Joint Remand Rider Ex. 1 at 4 (2007 Stipulation).

[53] Order at 30. The Order appears to also intend for true-up and *crediting to customers*. Any other interpretation of the Order is unreasonable and unlawful based upon the absence of a record to support asymmetrical treatment of the provisions in the 2007 Stipulation. As stated earlier, the Order also illegally delegates the SRT pricing mechanism associated with use of the DENA Assets to the Company and the PUCO Staff. These two parties to the 2007 Stipulation may not legally be provided authority to implement agreements that have not undergone scrutiny by the PUCO itself.

that "[s]uch [a standard service offer] shall be filed with the public utilities commission under section 4909.18 of the Revised Code." Decisions regarding rates, pursuant to R.C. 4909.18, reside with the Commission. Pursuant to R.C. 4903.09, such a decision must state "the reasons prompting the decisions arrived at, based upon . . . findings of fact." In contravention with the requirements set forth in the Revised Code, the Order delegates decision-making to agreement between the Company and the PUCO's Staff, decisions that cannot be based on the record in this case because the provision in the 2007 Stipulation are out of date due to the timing of the Order.

The Commission resisted earlier attempts by Duke Energy (then CG&E) to determine rate matters by submissions to only the PUCO Staff and not to the Commission itself. In response to Duke Energy's proposals in its Application for Rehearing submitted in 2004, the Commission stated:

> The amendment to the stipulation, attached to CG&E's application for rehearing, details the involvement that it expects from the Commission in the determination of the appropriate levels for the SRT, the AAC, and the FPP in various years. * * * In all of these cases, the Commission finds that it is . . . necessary to clarify that the Commission, in its consideration of CG&E's expenditures in these categories, will continue to consider the reasonableness of expenditures. *It is not in the public interest to cede this review.*[54]

The matters raised in the Order and not definitely resolved must be decided by the Commission itself as a matter of sound policy as well as a matter of law.

Examples illustrate the importance of a complete Commission decision in these cases. As one example, the Order notes the "pending legislation relating to the electric

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[54] *Post-MDP Service Case*, Case Nos. 03-93-EL-ATA, et al., Entry on Rehearing at 9-10 (November 23, 2004).

industry,"[55] and that legislation (i.e. S.B. 221) recently passed the Ohio Senate containing a provision forming baseline rates based upon those rates in effect on February 1, 2008. Therefore, the manner of carrying out the "true-up" for 2007 could result in an actual true-up, or could result in a permanent increase in rates. The Commission, not Duke Energy and the PUCO Staff, should make the decisions regarding the adjustment of rates based upon a record developed in these cases.

Other matters of implementing the true-ups may remain in dispute without clear decisions by the Commission regarding implementation of true-ups that are the subject of the outdated provisions contained in the 2007 Stipulation. For instance, the Order mentions the OCC's observation that the 2007 Stipulation provides a true-up process without charging interest.[56] An appropriate interpretation of the 2007 Stipulation precludes the application of carrying charges that was previously the subject of a Commission Entry regarding interim rates for 2007.[57] The Order does not clearly state the Commission's treatment of interest charges. The OCC objects to the imposition of such charges to the extent that they result from the Order and the implementation of the Order by the Company and the PUCO Staff which cannot be based upon the record in these cases.

The proper authority for the approval of rates is the Commission, and not the Company or the Commission's Staff. A decision by the Commission on all matters before it in these cases will also resolve matters regarding the implementation of the

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[55] Order at 28.

[56] Order at 28. The observation is further explained regarding SRT and AAC charges is contained in the OCC's briefs. See, e.g., OCC Initial Post-Remand Brief, Hearing Phase II at 27 (May 17, 2007).

[57] Entry at 6 (December 20, 2006).

Order that remain unclear. Such a resolution must be based upon the record in these cases.

C. The Commission's Order Is Unreasonable And Unlawful Because The Commission Failed To Determine That Certain Entities Had No Standing In These Cases.

The Order states "APPEARANCES" at its beginning and unquestioningly 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.[58] These entities were not parties to the above-captioned cases and have no standing. OEG, which moved to intervene in all but Case No. 06-1085-EL-UNC, is not a party to that case and did not have standing in that case.

Intervention in proceedings before the PUCO is governed by R.C. 4903.221 and is the subject of Ohio Adm. Code 4901-1-11. 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) 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. The filing and service of a motion to intervene provide others the opportunity to oppose such an intervention request.[59] Party status also brings with it responsibilities such as the

[58] 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) 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 Order discusses PWC's pleading in that context. Order at 29 (November 20, 2007) ("dedicated to renewal of its prior motion . . . intended to strike").

[59] Ohio Adm. Code 4901-1-12(B)(1).

requirement to respond to discovery inquiries that might reveal the intervenor's interests. These requirements were not met in any of the above-captioned cases by PWC or OHA, and were not met regarding by OEG in Case No. 06-1085-EL-UNC.

The present circumstances illustrate the importance of the intervention process, which might include opposition to a motion to intervene. The Order states that "[r]esidential consumers were represented by PWC" in negotiations over the rates provided for in the 2007 Stipulation. 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.[60] The absence of a motion to intervene by PWC, however, deprived the OCC of the opportunity to state its objection to any characterization (had it been made) that PWC represents residential customers in rate-setting matters.[61] 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. . . ."[62] By extension of the Order's reliance on PWC as a representative of residential customers, every company would become a consumer advocate if it provides services to people who might be residential consumers. Such a result from the Order is error, and is inimical to organized legal practice before the Commission.

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[60] OCC Memorandum Contra PWC's Motion for Extension of Time to File Reply Brief, Phase II at 8 (June 6, 2007).

[61] The Commission also erred by accepting PWC as a representative of residential customers for purposes of supporting the 2007 Stipulation, which is examined further in later argument.

[62] *Post-MDP Service Cases*, PWC Motion to Intervene at 2 (March 9, 2004).

The OCC was improperly and illegally deprived of an opportunity to argue matters of standing regarding PWC, OHA, and OEG in the cases where they did not move to intervene.

D. The Commission's 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.

The 2007 Stipulation was filed just prior to the hearing on Phase II of these cases.[63] 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).

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.[64]

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[63] Joint Remand Rider Ex. 1 (2007 Stipulation).

[64] *Consumers' Counsel 1992* at 125.

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.[65] The 2007 Stipulation rejects many of the recommendations contained in the Audit Report that were supported in testimony by the Auditor. 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?

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?[66]

The OCC submits that the 2007 Stipulation, which "recommend[s] that the Public Utilities Commission of Ohio . . . approve the [2007 Stipulation]," violates the criteria set out by the Commission and the Ohio Supreme Court.[67] The Commission's erred when it failed to properly apply the test set out in *Consumers' Counsel 1992*.

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

[66] Id. at 126.

[67] Joint Ex. 1 at 2.

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

The Order misapplies the first criterion in *Consumers' Counsel 1992*. That first criterion asks whether the negotiations over a settlement took place in an environment of sufficient conflict (i.e. "serious bargaining") between signatories that were well-positioned to negotiate ("capable, knowledgeable parties"). These conditions were absent regarding the negotiation of the 2007 Stipulation.

The Order fails to provide a detailed analysis regarding whether there was sufficient conflict between the signatory parties. 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 Order, however, totally dismisses the arguments by the OCC and OPAE that these side agreements have a bearing on the above-captioned cases.

> [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.[68]

The record documents the extensive efforts taken by parties to these cases to prevent the Commission's review of side agreements, and the allegations that side agreements did not affect negotiations over the 2007 Stipulation should come as no surprise. The Commission's refusal to consider the side agreements, however, 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. That refusal ultimately required the additional hearings on remand.

[68] Order at 27.

The Commission's deliberations failed to consider the absence of significant conflict between the supporters of the 2007 Stipulation. The OCC Initial Brief, Phase I, and the OCC's Application for Rehearing regarding the Order on Remand demonstrated the narrow support for the 2004 Stipulation once the support of those connected with side deals is disregarded.[69] The 2007 Stipulation was again executed or has gone unopposed by Staff; OHA, OEG, and the Industrial Energy Users – Ohio ("IEU")[70] whose members [redacted] the City of Cincinnati ("City"); and People Working Cooperatively ("PWC").[71] The narrowness of the stated support for the 2007 Stipulation diminishes significantly after it is recognized that *the City is the only non-Staff signatory that can claim that it properly intervened in all of the cases listed on the heading of the 2007 Stipulation*. The OCC's efforts to correct even the obvious flaws in the document were entirely rebuffed.[72]

[redacted]

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[69] See, e.g., *Post-MDP Remand Case*, OCC Initial Post-Remand Brief, Phase I, at 37-38.

[70] 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).

[71] Joint Remand Rider Ex. 1 at 9 (2007 Stipulation).

[72] 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 I at 143 (Whitlock). 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.

[redacted].[73] [redacted][74] [redacted][75] [redacted][76] [redacted][77] [redacted][78] [redacted][79] The side agreements are "related to this [2007] [S]tipulation"[80] by means of the insulation they 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 signatory parties.

The remaining signatories to the 2007 Stipulation besides the Company and the PUCO Staff were the City and PWC -- signatories that the Order states represented the residential class of customers in negotiations over the 2007 Stipulation.[81] These entities

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[73] OCC Remand Ex. 2(A).

[74] Id., BEH Attachment 17 (Bate stamp 89).

[75] Id.; see also id. at 51 (Hixon).

[76] Id., BEH Attachment 17 (Bate stamp 11).

[77] Id.; see also id. at 52 (Hixon).

[78] Id., BEH Attachment 17 (Bate stamp 44).

[79] Id.; see also id. at 52 (Hixon).

[80] Order at 27.

[81] Order at 27.

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.[82]

The City withdrew from the *Post-MDP Service Case* on July 13, 2004 without any apparent 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.[83] The City submitted a Motion to Intervene in the above-captioned "Rider" cases (i.e. and not in the cases on remand) 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.[84] 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 OCC's efforts to obtain documents that involved the City[85] and the City's execution of the 2007 Stipulation. Counsel for the City did not appear at the hearings conducted in 2007, and did not file a brief.

[82] *Post-MDP Service Case*, City Motion to Intervene at 2 (April 21, 2004).

[83] OCC Remand Ex. 6 at ¶4.

[84] *Post-MDP Remand Rider Case*, City Motion to Intervene at 2 (February 21, 2007).

[85] Tr. at 49-50 (December 14, 2007).

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 cases, 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."[86] 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*.[87] Serious bargaining did not take place between Duke Energy and the City in the above-captioned cases. The City's course was set in 2004 when it entered into its side agreement with Duke Energy.

PWC's role in support of the 2007 Stipulation is 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 homeowner can remain in their homes. . . ."[88] PWC's counsel appeared at the status conference conducted on December 14, 2006, stating that PWC opposed the consolidation of the cases on remand with these Rider cases because PWC would not normally be interested in the Rider cases.[89] PWC

[86] OCC Remand Ex. 6 at ¶6.

[87] Id. at ¶4.

[88] *Post-MDP Service Cases*, PWC Motion to Intervene at 2 (March 9, 2004).

[89] Tr. at 25-27 and 72 (December 14, 2007).

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 . . . ."[90] The Order may not reasonably and legally rely upon the support by PWC -- which is not a party to the above-captioned cases -- as either a representative of residential customers or as a representative of any other interest.

The Order's reliance 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.[91] The 2004 Motion to Intervene states that PWC is concerned with home repairs,[92] and the Motion to Strike states PWC's dependency on funds provided by Duke Energy.[93] PWC stated its interest: "Parties intervene because they want something from the Commission process and usually that outcome involves money."[94] PWC's "issues," as reflected by its Motion to Strike, relate to its status as a recipient of the Company's funding. Like the City, PWC has not demonstrated that it is capable, knowledgeable, and serious about settling a conflicting view regarding the issues raised in the 2007 Stipulation.

[90] Tr. Vol. Remand Vol. I at 19 (March 19, 2007).

[91] PWC Motion to Strike (April 27, 2007).

[92] *Post-MDP Service Cases*, PWC Motion to Intervene at 2 (March 9, 2004).

[93] PWC Motion to Strike at 3-5 (April 27, 2007).

[94] PWC Motion for Extension of Time to File Reply Brief, Phase II, Attachment at 6 (June 1, 2007).

For the purpose of residential customer representation, the Commission should rely upon the OCC as the statutory representative of these customers.[95] For that purpose, the Commission should *not* rely 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 these Rider cases (i.e. PWC). The diversity of interests that is referred to in the Order[96] does not exist when only the actual participants in these Phase II cases 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 Order's conclusions to the contrary[97] 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 the 2007 Stipulation without alteration, the Commission should have adopted the recommendations of its technical expert regarding the FPP and the SRT and reject the treatment given to the AAC as stated above.

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[95] R.C. Chapter 4911.

[96] Order at 27 ("each stakeholder group").

[97] Order at 25-27.

Paragraph 2 of the 2007 Stipulation states that an EVA recommendation "shall be withdrawn," referring to the second major management audit recommendation.[98] EVA recommended that Duke Energy Ohio adopt a portfolio approach to the procurement of coal and emission allowances. Paragraph 3 of the 2007 Stipulation offers "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" in order to "make a recommendation . . . for consideration no later than the next FPP audit."[99] This provision for meetings in the 2007 Stipulation concedes that the EVA recommendation regarding coal procurement has substance.

Paragraph 5 of 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."[100] The controversy in these cases regarding AAC charges does not, however, involve Mr. Tufts' work or dispute regarding the manner in which any AAC calculations were carried out. The controversy in these cases is whether a return on CWIP should be included in the AAC, a matter on which Staff Witness Tufts stated no opinion.[101] The Commission should reject Paragraph 5 of the 2007 Stipulation and set the AAC charge at 5.6 percent of "little g" as supported in OCC Witness Haugh's

[98] Joint Remand Rider Ex. 1 at 5, ¶2.

[99] Id. at 5, ¶3.

[100] Id. at 6, ¶5. Construed literally, the 2007 Stipulation does not make a recommendation regarding AAC charges. Paragraph 5 states agreement regarding the Company's calculations, not the AAC charge. The Company's calculations having been adjusted by agreement between certain parties, the issue of whether to accept the inclusion of a return on CWIP remains unaddressed by the 2007 Stipulation.

[101] 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.").

testimony as part of the PUCO's efforts "to consider the reasonableness of expenditures" in the AAC category.[102]

Paragraph 6 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."[103] The proper placement of generation-related charges was raised in the testimony of OCC Witness Haugh.[104] The agreement that "such amendments will not result in additional programming or billing costs" is the correct result.[105] 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.[106] Paragraph 6 is also vague, referring to charges "*such as* the FPP, SRT, and AAC."[107] The RSC, SRT, IMF, and AAC -- all charges that resulted from the *Post-MDP Service Case* that dealt with standard service offer generation rates pursuant to R.C. 4928.14(A) -- were incorrectly stated and billed to customers as distribution charges when all these charges are part of the Company's charges for generation service.[108] The Company's post-hearing activities illustrate that implementation of Paragraph 6 is

[102] *Post-MDP Service Case*, Entry on Rehearing at 10 (November 23, 2004).

[103] Joint Remand Rider Ex. 1 at 6, ¶6.

[104] OCC Remand Rider Ex. 1 at 16-18 (Haugh).

[105] Joint Remand Rider Ex. 1 at 6, ¶6.

[106] OCC Remand Rider Ex. 1 at 16-17 (Haugh), citing Commission orders including the Entry on Rehearing dated November 23, 2004 in the Post-MDP Service Case.

[107] Joint Remand Rider Ex. 1 at 6, ¶6 (emphasis added).

[108] OCC Remand Rider Ex. 1, MPH Attachment 2 (Haugh).

imperiled[109] -- Duke Energy submitted a separate application in Case No. 07-1205-GE-UNC to change its bill format in an "end around" the Commission's Order.

Paragraph 7 states a minor concession on the part of Duke Energy by providing for the collection of "DE-Ohio's projected 2007 planning reserve capacity purchases by year-end," which would not require the payment of interest.[110] The Commission's Entry dated December 20, 2006 set the SRT at zero and provided for interest as part of the true-up following its decision in these cases.[111] Paragraph 5 of the 2007 Stipulation also refers to collections -- this time for the AAC -- trued-up "such that the amount calculated to be recovered in 2007, will be recovered by December 31, 2007" and does not include interest charges.[112] The Order states that it adopts the 2007 Stipulation provisions,[113] but does not explicitly state that interest charges will not be assessed. Combined with the delegation of tasks to the PUCO Staff, it is not clear that customers will benefit from the small concession that is contained in the 2007 Stipulation.[114]

Paragraph 8 of the 2007 Stipulation presented the most obvious controversy at hearing, and remains an unsettled element regarding Duke Energy's intentions under the

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[109] The Company's intentions regarding this new case are unknown, but the filing may undercut Duke Energy's agreement that bill format "amendments will not result in additional programming or billing costs." Joint Remand Rider Ex. 1 at 7, ¶6.

[110] Joint Remand Rider Ex. 1 at 7, ¶7.

[111] Entry at 6 (December 20, 2006).

[112] Joint Remand Rider Ex. 1 at 5, ¶5.

[113] Order at 30.

[114] Any check on proper implementation of the Order is also made difficult by Duke Energy's efforts to collaterally deal with the issues in these cases in other dockets. For instance, the SRT true-up (without supporting calculations) is contained in a stipulation filed in Case Nos. 07-723-EL-UNC, et al. on December 13, 2007. The bill format issues in these cases are also the subject of Case No. Case No. 07-1205-GE-UNC.

agreement. Paragraph 8 would render EVA's "recommendation 6 on page 1-10 of the . . . Audit[or's] Report . . . inapplicable."[115] EVA's recommendation would exclude the use of the DENA Assets for purposes of calculating the SRT. In its place, the Company proposes 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.[116] The use of broker quotes or third-party transaction prices would not deliver savings from "the most reasonably priced capacity available" that was promised by Company Witness Whitlock.[117] To the contrary, use of the DENA Assets presents the danger of unreasonably high charges that could result from the Company's determination of costs associated with *Company-owned generation*.[118]

Paragraph 8 is weakly worded and unable to protect customers from the Company's overcharges if Duke Energy is permitted to use the DENA Assets.[119] For instance, the 2007 Stipulation does not provide for Commission approval of an agreement reached between the Company and the PUCO Staff regarding charges for using the DENA Assets. Also, OCC Witness Haugh noted the apparent disagreement regarding the interpretation of paragraph 8 that broke out as early as the cross-examination of Company Witness Whitlock on April 10, 2007. In Mr. Haugh's supplemental testimony filed on

[115] Joint Remand Rider Ex. 1 at 7, ¶8.

[116] Id.

[117] Company Remand Rider Ex. 2 at 11 (Whitlock Supplemental).

[118] Company Witness Smith agreed that the word "purchases" in paragraph 8 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).

[119] See OCC Remand Rider Ex. 2 at 3-5 (Haugh Supplemental).

April 17, 2007, he observed that the Assistant Attorney General's cross-examination of Mr. Whitlock revealed Staff's more narrow interpretation of paragraph 8 that would not permit the Company to repeatedly use the DENA Assets.[120] The 2007 Stipulation was apparently executed hastily and without complete agreement between the stipulating parties.

Paragraph 9 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."[121] As noted above, Company Witness Whitlock testified that Duke Energy "does not exclude an offer from consideration if the [coal] supplier will not permit the resale of coal."[122] From that statement, the Company apparently believes it already complies with EVA's major recommendation 3 which states that "coal suppliers should not be required to allow the resale of their coal for the offers to be considered."[123] Company Witness Whitlock admits, however, that Duke Energy "include[s] the resale of coal as a condition on its RFPs."[124] That condition on the RFPs renders meaningless the Company's "agreement" in Paragraph 9 to consider bids that Duke Energy actively discourages and that the Company would consider non-complying with its RFPs. The Commission should reject

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[120] Id. at 3, citing Tr. Remand Rider I at 143 (Whitlock).

[121] Joint Remand Rider Ex. 1 at 7-8, ¶9.

[122] Company Remand Rider Ex. 2 at 9 (Whitlock Supplemental).

[123] PUCO Ordered Remand Rider Exhibit 1at 1-10 (Auditor's Report).

[124] Company Remand Rider Ex. 2 at 9 (Whitlock Supplemental).

the Company's subterfuge whereby it states agreement to an EVA recommendation but intends (in practice) the opposite result.

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 is not served by approval of the 2007 Stipulation.[125] Instead, the Commission should order the Company to comply with all the recommendations contained in the Auditor's Report and the OCC-sponsored testimony.

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

The 2007 Stipulation violates important regulatory policies and practices in more than one way. 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, entities that did not move to intervene in the above-captioned cases, should not have been involved in the negotiations and become signatories. Paragraph 5 addresses the calculation of the AAC, and OEG was not properly a party to Case No. 06-1085-EL-UNC whose topic is determination of the AAC. Inclusion of PWC as "representative" of residential customers, when it is neither a party nor interested in the rate-setting for residential customers, is another means by which the residential class has been completely excluded from settlement of the case.[126]

Paragraph 5 of the 2007 Stipulation addresses the calculation of the AAC, and adoption of that provision violates a traditional regulatory policy and practice. That

[125] *Time Warner AxS v. Pub. Util. Comm.* (1996), 75 Ohio St.3d 229, 234, 661 N.E.2d 1097 requires the balancing of important, competing interests.

[126] Id.

paragraph fails to recognize the Commission's earlier statements that AAC calculations would consider "expenses."[127] Commission policies and practices should be 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."[128] The Commission should have rejected Paragraph 5 of the 2007 Stipulation and set the AAC charge at 5.6 percent of "little g" as supported in OCC Witness Haugh's calculations and testimony.[129]

As stated above, Paragraph 8 of the 2007 Stipulation permits pricing of supply from DENA Assets based upon agreement between Duke Energy and the PUCO Staff. Such delegation of authority is illegal, was rejected by the Commission in 2004 based upon sound regulatory practice,[130] and should be rejected again.

Paragraph 8 also supports Duke Energy's breach of the SRT Stipulation as well as the Company's violation of the Commission's Order that adopted the SRT Stipulation in its entirety.[131] The Order's conclusion that the intent of the SRT Stipulation[132] was

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[127] OCC Remand Rider Ex. 1 at 9, quoting *Post-MDP Service Case*, Order at 32 (September 29, 2004).

[128] *Post-MDP Service Case*, Entry on Rehearing at 10 (November 23, 2004). 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.").

[129] OCC Remand Rider Exhibit 1 at 11 (Haugh).

[130] *Post-MDP Service Case*, Entry on Rehearing at 10 (November 23, 2004). The agreement of the PUCO Staff raises a legal issue, but that legal issue is linked to practical problems. The Commission acts by vote in open session. In contrast, it is not clear how the PUCO Staff would express its agreement with a Duke Energy proposal and the Order lends no clarity to the situation.

[131] *In re Setting of SRT*, Case No. 05-724-EL-UNC, Order at 6 (November 22, 2005).

[132] Order at 20.

served even though Duke Energy undertook no affirmative effort to comply with the SRT Stipulation encourages non-compliance with Commission orders and discourages efforts to settle cases before the Commission.[133]

The Commission should reconsider its decisions in light of the important regulatory policies and practices that are violated by adoption of the 2007 Stipulation.

III. CONCLUSION

The Commission's should not ignore the recommendations of the technical experts who reviewed the Company's policies and practices as requested by the PUCO. The Auditor's Report makes many recommendations regarding the manner in which the FPP and SRT should be dealt. OCC-sponsored testimony also supports the Auditor's recommendation that would continue the prohibition against including the cost of using DENA Assets in the calculation of SRT charges.

OCC-sponsored testimony also supports Commission review of the charges that Duke Energy proposes for the AAC charge. On rehearing the Commission should eliminate that portion of the proposed charge that can be attributed to a return on all CWIP.

The Commission should correct its legal errors, consistent with the arguments stated above.

[133] Order at 20.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Application for Rehearing by the Office of the Ohio Consumers' Counsel*, has been served upon the below-named persons via electronic transmittal this 20th day of December 2007. Counsel for parties who receive the confidential, redacted version of this pleading are reminded to treat its contents as required for the confidential versions of briefs and the applications for rehearing in Phase I of the proceedings.

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I hereby certify that a copy of the foregoing Appendix to the 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.

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