In The
SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel, Appellant, v. **The Public Utilities Commission of Ohio,** Appellee.	:	Case No. 08-0367 Appeal from 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, *et al.*

MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE THE PUBLIC UTILITIES COMMISSION OF OHIO

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MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE
THE PUBLIC UTILITIES COMMISSION OF OHIO

INTRODUCTION

The Public Utilities Commission of Ohio (Commission) orders on appeal in this case do two reasonable things. The orders approve a rate stabilization plan (RSP or the plan) under which Duke Energy Ohio, Inc. (Duke, the company, or the utility) will make a standard service offer, under R.C. 4928.14, available to its customers. The plan is reasonably priced; in fact, it is less expensive than the market prices for power. The plan is subject to both market price testing and a review of cost components, and it avoids subsidies. The plan fully complies with all legal requirements. The orders fully explain the legal bases under which the Commission acted, the facts upon which it relied, and the

analytic process it used. The orders therefore fully comply with legal requirements and should be affirmed.

The second thing the orders on appeal do is make a determination about confidentiality of commercial agreements between certain affiliates and customers of Duke. Allegations were made by the various signatories that the agreements contained confidential trade secret information. The Commission determined that these documents should be held confidential for eighteen months. In response to a public records request, the Commission examined the documents, determined that certain classes of information did constitute trade secrets, and ordered that those be held confidential and the balance of the information be made public. The orders on appeal did not actually make the division of information but rather directed the parties to do so. In a subsequent order, not on appeal in this case, the Commission did make the actual division. The aspect of the decision on appeal concerning confidentiality has been superseded by this subsequent action, which is still ongoing.

Being entirely reasonable, the Commission orders below should be affirmed.

STATEMENT OF THE FACTS AND CASE

In 1999, the Ohio General Assembly enacted legislation to restructure the electric utility industry and provide for retail competition with respect to the generation component of electric service. Am. Sub. S.B. No. 3, 123rd General Assembly (June 22, 1999). Pursuant to this restructuring initiative, the Commission approved a transition

plan for Duke[1] on August 31, 2000. *In re Cincinnati Gas & Electric Co.*, Case Nos. 99-1658-EL-ETP, *et al.* (Opinion and Order at 61) (August 31, 2000), App. at 96.[2] The Commission permitted Duke a market development period (MDP) ending no earlier than December 31, 2005 for residential customers, and when twenty percent of the load of each other class switched to a certified supplier for its generation supply. *Id.* at 6, 61, App. at 41, 96.

The case below was initiated on January 10, 2003, when Duke filed an application to modify its nonresidential generation rates to provide for a competitive market option for rates following the termination of its MDP. *In re Cincinnati Gas & Electric Co.*, Case Nos. 03-93-EL-ATA, *et al.* (hereinafter "*Post-MDP Service Case*") (Opinion and Order at 5) (September 29, 2004), Appellant's App. at 75. On December 9, 2003, the Commission consolidated the case with three related proceedings[3] and requested that Duke file a rate stabilization plan to stabilize prices subsequent to termination of the MDP, while providing additional time for the competitive retail electric services market to develop. *Id.* On January 26, 2004, Duke filed its proposed RSP. *Id.* Many of the par-

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1 At the time, Duke was known as the Cincinnati Gas & Electric Company. Throughout this brief, the company will be referred to as Duke without regard to its legal name at any point in time. Case names, however, have not been altered in any way.

2 References to appellant's appendix (filed under seal) are denoted "Appellant's App. at ___;" references to appellant's supplement (volumes I and II filed under seal) are denoted "Appellant's Supp. at ___;" and references to appellee's appendix attached hereto are denoted "App. at ____."

3 *In re Cincinnati Gas & Electric Co.*, Case Nos. 03-2079-EL-AAM, 03-2080-EL-ATA, and 03-2081-EL-AAM (October 8, 2003).

ties to the case, not including appellant, submitted a stipulated RSP to the Commission on May 19, 2004. *Id.* at 7, Appellant's App. at 77.

A hearing was held, during which the parties offered evidence, either supporting or opposing the stipulation as well as Duke's original proposal. At the hearing, Consumers' Counsel (OCC or appellant) made an oral motion to compel discovery of side agreements between Duke and other parties to the stipulation. This was denied on dual grounds of privilege and relevance. On September 29, 2004, the Commission approved the stipulated RSP with modifications. *Id.* at 37-38, Appellant's App. at 107-108. Duke, in an application for rehearing filed on October 29, 2004, proposed further modifications to the stipulated RSP. *Post-MDP Service Case* (Entry on Rehearing at 7-9) (November 23, 2004), Appellant's App. at 118-120. On November 23, 2004, the Commission granted Duke's rehearing application in part, finding that Duke's proposed modifications were reasonable, and making certain further revisions. *Id.* at 9-13, 20, Appellant's App. at 120-124, 131. The Commission approved Duke's collection of the infrastructure maintenance fund (IMF) component at issue in the present appeal and upheld the attorney examiners' denial of OCC's motion to compel discovery. OCC's application for rehearing was denied. *Id.* at 21, Appellant's App. at 132.

OCC appealed and the Court issued its opinion on November 22, 2006, upholding the Commission's resolution of most issues, but also holding that the Commission "failed to comply with R.C. 4903.09 by not providing record evidence and sufficient reasoning when it modified its order on rehearing" and "abused its discretion when it denied dis-

covery regarding alleged side agreements." *Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 323, 856 N.E.2d 213, 236 (2006). The case was remanded. *Id.*

On November 29, 2006, the Commission directed Duke to disclose the information sought by OCC. *Post-MDP Remand Case* (Order on Remand at 6) (October 24, 2007), Appellant's App. at 14.[4] OCC subsequently requested and was provided with copies of agreements between certain affiliates and customers of Duke. *Id.* at 7-8, Appellant's App. at 15-16. The information was provided subject to numerous motions for protective orders requesting that the information be kept confidential. *Id.* at 8-9, Appellant's App. at 16-17.

A hearing was held, beginning on March 19, 2007. *Id.* at 9, Appellant's App. at 17. The side agreements and related information were offered and admitted into evidence, in addition to the testimony of witnesses for OCC, Duke, and the Commission's staff. Following the hearing, initial and reply briefs were submitted. *Id.* The Commission considered the entire record and pleadings before it, both pre- and post-remand, and issued an order on remand[5] on October 24, 2007. As required by the Court, the Commis-

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4 The remand proceedings in Case No. 03-93-EL-ATA *et al.* will be referred to as the "Post-MDP Remand Case" for the sake of simplicity and consistency with the appellant's brief. The Post-MDP Service Case and the Post-MDP Remand Case are the same case.

5 On December 14, 2006, the case was consolidated with proceedings pertaining to various riders associated with Duke's RSP. The Commission, however, chose to bifurcate the remand and rider issues. Separate hearings were held and, in its order on remand, the Commission addressed only the issues remanded to it by the Court. *Post-MDP Remand Case* (Order on Remand at 8) (October 24, 2007), Appellant's App. at 16. The rider issues were addressed in another order, which is also the subject of an appeal by OCC in Case No. 08-0466.

sion thoroughly considered the side agreements offered by OCC as evidence relevant to the issue of the integrity and openness of the parties' bargaining in reaching the stipulated RSP. *Id.* at 20-21, Appellant's App. at 28-29. The Commission concluded that there was insufficient evidence to support a finding that the parties engaged in serious bargaining and rejected the stipulated RSP. *Id.* at 27, Appellant's App. at 35.

In need of a substitute for the stipulated RSP to comply with R.C. 4928.14, the Commission was compelled to review Duke's RSP, as originally proposed in its application and subsequently modified by Duke prior to the 2004 hearing. *Id.* at 28, Appellant's App. at 36. After a comprehensive review of the record, the Commission approved Duke's RSP with modifications, explaining completely its rationale for doing so. The Commission concluded that the RSP achieved a proper balance in the determination of market-based, post-MDP rates and fully complied with the statutory requirements for establishing such rates. *Id.* at 41, Appellant's App. at 49. The approved RSP included an IMF component, which the Commission thoroughly explained as a reasonable market-based charge to compensate for the pricing risk incurred by Duke in its provision of statutory provider-of-last-resort service. *Id.* at 37, Appellant's App. at 45.

In its order on remand, the Commission also addressed confidentiality. On March 19, 2007, during the hearing, the attorney examiners granted all of the numerous motions for protective orders for a period of eighteen months from that date, on the condition that the Commission would modify them as appropriate. *Id.* at 10, Appellant's App. at 18. On July 26, 2007, the Commission's chairman received a public records request for certain information subject to the protective orders. *Id.* At that point, the attorney examin-

ers sought, and several parties filed, memoranda addressing the confidentiality of the documents. *Id.* Following an *in camera* inspection of the documents, the Commission, in its order on remand, concluded that some of the information constituted trade secrets and ordered that the documents be redacted in accordance with its findings. *Id.* at 17, Appellant's App. at 25.

OCC filed an application for rehearing of the Commission's order on remand on November 23, 2007. *Post-MDP Remand Case* (Entry on Rehearing at 2) (December 19, 2007), Appellant's App. at 55. On December 19, 2007, the Commission denied OCC's rehearing application. *Id.* at 14, Appellant's App. at 67. OCC, on February 19, 2008, appealed.

ARGUMENT

Proposition of Law No. I:

> **After its market development period, an electric distribution utility in this state shall provide its 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. Ohio Rev. Code Ann. § 4928.14(A) (Anderson 2008).**

A. History

Given the complicated procedural history of this case, and the largely misdirected arguments of the appellant and *amicus curiae*, it is necessary to return to the most basic

aspect of the case. The fundamental duty of the Commission in the case below, from the beginning of the case below, was to determine whether the mechanism proposed by the utility for providing standard offer service complied with R.C. 4928.14. The orders now before the Court are the Commission's second effort to do this.

Initially, the Commission was presented with a partial stipulation that laid out the company proposal for compliance with R.C. 4928.14 and indicated the agreement of many, but not all, parties to the case. The Commission reviewed that stipulation under its usual standard, using what is termed the "three part test." This test has been used by the Commission for many years and has been approved by this Court. *Industrial Energy Consumers of Ohio Power Co. v. Pub. Util. Comm'n*, 68 Ohio St. 3d 559, 629 N.E.2d 423 (1994). Using this test, the Commission determined that the stipulation, with some modifications, passed the test and represented a reasonable resolution, and approved the stipulation. Rehearing applications were filed, some of which were granted by the Commission resulting in changes to the details of the proposal.

This initial resolution of the case was appealed to this Court, which remanded the case to the Commission to justify the changes made on rehearing and also to provide the appellant with discovery of certain side agreements that had been denied by the Commission. The discovery was provided and hearings ensued. This hearing had a significant impact on the case and eliminated the applicability of the "three part test."

As this Court is well aware, the first prong of the "three part test" is a determination of whether the settlement is the product of serious bargaining among capable, knowledgeable parties. The tacit assumption of this prong is that, if individual groups

having particular interests have bargained for a stipulated outcome, that outcome must reflect a reasonable resolution for all groups having similar interests. The record developed in the remanded proceedings indicates that this assumption does not hold. It is not possible for the Commission, in this case, to infer, solely because some members of a rate class, industrial or residential, agreed to the stipulation, that the stipulation is a reasonable resolution for other members of the rate class. Failing this prong of the test, the stipulation was rejected by the Commission.

Having now rejected the basis for its earlier decision, the Commission had to turn back to its original charge: the review of a proposal for a standard service offer. The Commission still had before it the components of the company proposal and it had to review these components to determine whether, standing on their own merit, these components would comply with R.C. 4928.14. The Commission had no choice. This is the structure of R.C. 4928.14. The company proposes and the Commission accepts or rejects. Ohio Rev. Code Ann. § 4928.14(A) (Anderson 2008), App. at 22. Further, there must be a standard service offer. The Commission did its duty and reviewed each component of the plan. These components will be discussed in the following sections.

B. The Little G Component (little g)

When the bundled rates of then Cincinnati Gas and Electric Company were unbundled into the rates that were then frozen for the market development period (MDP), the portion of those rates that was intended to reflect the embedded payment for the company's then-existing generating plant and fuel costs, less stranded cost payments, was

termed "little g." *Post-MDP Remand Case* (Order on Remand at 29) (October 24, 2007), Appellant's App. at 37. Customers of the company have been paying this component since 2000. It is certainly a proper basis of a market charge. *Id.* at 30, Appellant's App. at 38. Customers who shopped paid none of it; that is to say, the charge was *avoidable* by shoppers. The company proposed to continue collecting eighty-five percent of this charge only from those customers who continued to purchase energy from the company but to shift the other fifteen percent to an unavoidable charge called the RSC.

The Commission rejected the shift, reasoning that all of the costs in little g were historic costs associated with taking service and should be paid only by those taking service. *Id.* at 35, Appellant's App. at 43. This change is significant in that it is a strong incentive, promoting competition. Under the Commission's orders, those who buy their power elsewhere do not pay little g.

C. Fuel and Purchased Power (FPP)

While little g provides a reasonable base to calculate costs associated with the company's generation service, the Commission recognized that things have changed since the little g was established. To the extent that there are fuel, purchased power, and emission allowance costs above and beyond those included in the little g baseline, the company can collect those through the FPP component. This item would be subject to review and annual adjustment. In fact, this component was already set, in a different Commission case, without any objection by any party. *In re Cincinnati Gas & Electric Co.*, Case No. 05-806-EL-UNC (Opinion and Order at 4-5) (February 6, 2006), App. at

107-108. Because the charge benefits only those who consume power from Duke currently, the FPP is avoidable by any customer who buys power elsewhere.

D. Annual Adjustment Component (AAC)

Cost aspects of generation, other than fuel and purchased power, have changed since 1999 as well. Some of these are encompassed in the AAC. This component captures changes in environmental compliance (not including emission allowances), homeland security, and taxes related to the old company-owned generating plant. *Post-MDP Remand Case* (Order on Remand at 33) (October 24, 2007), Appellant's App. at 41. Being associated with the production of power currently, the AAC is a generation charge. *Post-MDP Remand Case* (Entry on Rehearing at 4) (December 19, 2007), Appellant's App. at 57. To assure that there is no double counting, a baseline for the amount of these costs already encompassed in little g as of the year 2000 has been established and only incremental amounts spent above the year 2000 levels may be included in the AAC. *Post-MDP Remand Case* (Order on Remand at 33-34) (October 24, 2007), Appellant's App. at 41-42. Because these costs benefit those who buy power from Duke currently, the AAC is avoidable by those customers who buy their power from another supplier. *Id.* at 34, Appellant's App. at 42. This is consistent with this Court's approval of a similar component in the RSP for Dayton Power and Light Company. *Id.* (discussing *Consumers' Counsel v. Pub. Util. Comm'n*, 114 Ohio St. 3d 340, 872 N.E.2d 269 (2007)).

E. System Reliability Tracker (SRT)

Having enough generating capacity to meet the immediate needs is not sufficient. To achieve system reliability, there must be sufficient reserves to meet the contingencies that may arise. The SRT collects the cost for maintaining these reserves. *Id.* at 32, Appellant's App. at 40.

Demand from existing customers can, and frequently does, exceed previous system peaks. More significantly, customers who previously bought their electricity from other suppliers may return as customers of the utility without warning.[6] This problem would be most acute when competitive suppliers fail due to extremely tight supplies of electricity. Having reserves will assure that the utility will be able to supply power (although having the reserves does not necessarily guarantee the price of that power) in extreme circumstances to those who have a right to buy it. Without these reserves, there could be situations where power could not be delivered. Thus, these reserves are necessary for stability and continuity of electric service for everyone who uses electricity, whether they buy it from the utility or a competitive supplier today.

Because the maintenance of reserves benefits everyone who uses electricity, everyone pays the SRT. It is unavoidable for the very simple reason that the need for the reserves is an unavoidable aspect of electricity usage. The collection of the costs of system reserves through an unavoidable charge has already been accepted by this Court. *Id.* (discussing *Constellation New Energy, Inc. v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530,

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[6] Customers have a statutory right to return to the standard service offer. Ohio Rev. Code Ann. § 4928.14(C) (Anderson 2008), App. at 22.

820 N.E.2d 885 (2004)). The actual level of, and the means to calculate, the SRT were determined in a different Commission proceeding,[7] which was resolved by the adoption of an unopposed stipulation. *Id.*

It should be noted that there is one exception to the SRT. Those industrial or commercial customers, who commit not to return to the utility's service,[8] do not have to pay the SRT. *Id.* This exception exists for the very simple reason that those customers who will *never* return do not rely upon the utility's reserves. Such customers bear significant risks. Should their supplier fail, they will not be able to return to utility service and may be left without electricity at all. They are on their own to make sure that their lights do not go out. In exchange for bearing this risk, they pay no SRT.

F. Infrastructure Maintenance Fund (IMF)

This brings us to the last component, the IMF. To understand the IMF, it is necessary to understand both what is really being proposed by the company and what might have been. The company has agreed to provide power at a constrained price over a period of years. While the company could have simply moved to a straight market price for its power, it offered to sell its power within the constraints of this plan instead. To the extent that there is a gulf between the stabilized price available under this plan and the day-to-day, hour-by-hour fluctuations in the market price for power, the company is

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7 *In re Cincinnati Gas & Electric Co.*, Case No. 05-724-EL-UNC (Opinion and Order) (November 22, 2005), App. at 98-103.

8 This is to say that these customers have waived their statutory right to return to the standard service offer under R.C. 4928.14(C).

exposed to a large price risk. *Id.* at 36-38, Appellant's App. at 44-46. Its stabilized price might be very much lower than the price the company might have gotten by simply participating in the market. Indeed, the record shows that the stabilized price, including the IMF, has resulted in a cost of electricity that has been very reasonable compared to the fluctuating market. *Id.* at 36 n.12, Appellant's App. at 44. The record shows just how large a risk the company absorbed. Over the term of the plan, the rates paid by customers have been twenty-eight percent below average market prices. *Id.* at 40 (discussing testimony of Rose), Appellant's App. at 48. The IMF is the price paid for stability and predictability, in the words of the Commission "to compensate for the pricing risk incurred by Duke in its provision of statutory POLR service." *Id.* at 37, Appellant's App. at 45. It has been a truly excellent bargain for customers.

The IMF, then, is the key component that brings this plan into statutory compliance. R.C. 4928.14 requires that the standard service offer be market-based, and that is the function of the IMF. The IMF moves the price paid for electricity from the old, low cost-based system toward, but not to, the new, higher, market price. The other components of the rate act as partial proxies for portions of the forces that drive market prices. *Id.* at 36-37, Appellant's App. at 44-45. For example, changes in fuel prices would tend to influence market prices for power. Thus, a mechanism like the FPP would act as a proxy for market forces to the extent of the relationship between fuel and market price. Such proxies are incomplete. The record in this case shows that the Duke price under this plan, including the IMF and the various price-of-production components, is still below the price levels seen in the market. *Id.* at 40 (discussing testimony of Rose),

Appellant's App. at 48. Clearly, the current electricity market sustains prices above Duke's cost of production.

G. Summary

Having rejected the stipulation that had formed the basis for the Commission's order in the earlier proceedings, the Commission had to review the record to determine if there was a plan that would meet the requirements of R.C. 4928.14. The Commission did so. Despite the procedural infirmities that were fatal to the stipulation, the statute still requires a standard service offer. To accomplish this, the Commission examined each component of the plans proposed and gathered those it found reasonable into a coherent plan. Without relying on the now rejected stipulation, the Commission fashioned a reasonable plan, supported by the record in the case, and approved it. Having fulfilled its legal duty, the Commission orders should be upheld.

Proposition of Law No. II:

> **The purpose of R.C. 4903.09 is to provide the Court with sufficient details to enable it to determine how the Commission reached its decision. *Allnet Communications Services v. Pub. Util. Comm'n*, 70 Ohio St. 3d 202, 209, 638 N.E.2d 516, 521 (1994); *MCI Telecommunications Corp. v. Pub. Util. Comm'n*, 38 Ohio St. 3d 266, 270, 527 N.E.2d 777, 781 (1988); *Gen. Tel. Co. v. Pub. Util. Comm'n*, 30 Ohio St. 2d 271, 285 N.E.2d 34 (1972).**

In its second proposition of law, OCC attacks the infrastructure maintenance fund component as unsupported and anti-competitive. The facts are to the contrary.

A. The infrastructure maintenance fund is supported in the record.

At the time the case below began, Duke had the ability to sell all of its power at the highest price the market would bear. Electricity is a competitive service by statute. Ohio Rev. Code Ann. § 4928.03 (Anderson 2008), App. at 19. The Commission does not regulate competitive services, with certain limitations. The law is:

> On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric utility or electric services company shall not be subject to supervision and regulation ... by the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except section 4905.10, division (B) of 4905.33, and sections 4905.35 and 4933.81 to 4933.90; except sections 4905.06, 4935.03, 4963.40, and 4963.41 of the Revised Code only to the extent related to service reliability and public safety; and except as otherwise provided in this chapter.

Ohio Rev. Code Ann. § 4928.05(A)(1) (Anderson 2008), App. at 19. Any electric utility could sell its power to any buyer at any time. Traditional ratepayers no longer had any right to the output of the facilities owned by the local utility. Customers could shop where they chose and utilities could sell where they chose.

This is not the end of the story. The law also stated that an electric distribution utility must provide a standard service offer, covering all competitive services necessary to maintain essential electric service. Ohio Rev. Code Ann. § 4928.14(A) (Anderson 2008), App. at 22. While the standard service offer must be market-based, the utility must also offer a competitively bid option. For a utility that has chosen, as is its right, to sell its electricity to the highest bidder, the distinction made in the statute makes no prac-

tical difference. A utility that has already sold all of its self-generated power must go to the market to buy more to sell to its standard service customers.[9] Thus, whether this acquisition is characterized as "market-based" or "competitively bid" matters little. The same power will be obtained at a market-determined price. Under this provision, customers have a right to power provided by the utility but they no longer have a right to power from the utility's plants at a price determined on the basis of the cost of production. Rather, the price of this power is either to be determined with reference to the market or to be competitively bid in the market.

This then is the appellant's fundamental misunderstanding: Appellant's arguments tacitly assume that customers have a right to power at the utility's cost to produce that power. Contrary to that assumption, the standard service offer is a competitive service. *Elyria Foundry Co. v. Pub. Util. Comm'n*, 114 Ohio St. 3d 305, 316, 871 N.E.2d 1176, 1188 (2007). The price of standard service must still be reasonable; that is the purpose of the Commission's review under R.C. 4928.14. *Post-MDP Remand Case* (Order on Remand at 36-37) (October 24, 2007), Appellant's App. at 44-45. But the referent has changed. Under the old cost-of-service regime, the price of power had to be reasonable with reference to the cost of production. *See* Ohio Rev. Code Ann § 4909.15 (Anderson 2008), App. at 13-16. Under the new regulatory regime, the price must be reasonable

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9 The same is true, although to a lesser extent, for a company that is short of capacity, that is to say, one that does not control a sufficient amount of generating facilities to supply its current obligations.

with reference to the market. *See* Ohio Rev. Code Ann. § 4928.14 (Anderson 2008), App. at 22-23.

During the market development period, utilities generally, and Duke specifically, had been charging essentially old cost of production calculated rates. Rates during this period were the unbundled result of earlier rate case determinations that were based on the cost of production. Ohio Rev. Code Ann. § 4928.34 (Anderson 2008), App. at 26-28. Market prices, although inherently variable, have been and remain higher than this. *Post-MDP Remand Case* (Order on Remand at 40) (October 24, 2007), Appellant's App. at 48. The end of the MDP meant the end of these low, stable, historic rates and the beginning of high and unstable rates. The Commission is charged to ensure that customers have access to reasonably priced power and power priced with the predictability that customers want. Ohio Rev. Code Ann. § 4928.02(A), (B) (Anderson 2008), App. at 18. Action was required to balance these competing interests.

The Commission was faced with a variety of components (ignoring the IMF for the moment) that took the historic cost of production (little g) and increased it for certain specified changes in cost, fuel, purchased power, environmental costs, capacity reserves, etc. While *in toto* these components may have approximated a more current cost of production for Duke's electricity, they reflected nothing to compensate Duke for having given up the ability to go to market pricing for its power.

This then is the purpose of the IMF. It is the payment to compensate Duke for giving up its right to sell at the price the market would bear. Because Duke was willing to offer power to customers at a relatively stable price (the total of all the components,

including the IMF) under the RSP for a period of years, it took on the risk that the stabilized price would be lower than what it might otherwise have obtained through market-based sales. It is the IMF that moves this rate stabilization mechanism from cost of production toward, but not to, the full market price.

The Commission explained this clearly. After having rejected the company proposal for a component termed RSC, the Commission stated:

> 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*." [Citation omitted]. 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.*" [Citation omitted.] *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.

Post-MDP Remand Case (Order on Remand at 35-36) (October 24, 2007) (emphasis added), Appellant's App. at 43-44. Having determined that there is a pricing risk as a matter of fact, the next necessity was to determine what charge there should be to compensate for it.

A charge is reasonable or unreasonable only in comparison to the alternative. How much should be paid to avoid going to a full market price should be compared with that market price. Market pricing is the alternative to this RSP. Cost of production is not an available alternative. The Commission discussed this, saying:

> 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 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.

Post-MDP Remand Case (Order on Remand at 36-37) (October 24, 2007), Appellant's App. at 44-45. The proper comparison is to the market, because that is the alternative and that is the comparison the Commission made. It said:

> 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.

Post-MDP Remand Case (Order on Remand at 36 n.12) (October 24, 2007), Appellant's App. at 44. The record contains the evidence of market prices that the Commission considered, specifically:

> 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. [Citations omitted]. 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. [Citations omitted.] 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. [Citation omitted.]

Post-MDP Remand Case (Order on Remand at 40) (October 24, 2007), Appellant's App. at 48. Thus, the record evidence shows both that the projected rate stabilization price, which includes the IMF, would be lower than full market rates and that this turned out to be true in application as well. Because the rate stabilized price is lower than the market

price, it must be reasonable and the Commission so found. *Id.* at 36 n.12, Appellant's App. at 44.

Thus, the Commission's order below fully reviews the evidence, finds the ultimate facts upon which the order is based, and fully sets forth the reasons therefor, giving the Court sufficient details to determine how the Commission reached its decision. This is the test for compliance with R.C. 4903.09 and the Commission has fulfilled it. The Commission orders should, therefore, be affirmed.

B. The rate stabilization plan is pro-competitive.

OCC criticizes the infrastructure maintenance fund as anti-competitive. This is quite literally untrue. The IMF is an unavoidable charge (for residential customers); that is to say, all residential customers pay it regardless of from whom they purchase electricity. Unavoidable charges are irrelevant to the decision whether to buy from your local utility or from someone else. A customer pays the charge regardless of the decision made. If there were no unavoidable charge, again there would be no differential impact on the shopping decision; neither a shopper nor a utility customer would pay. The presence or absence of an unavoidable charge is competitively irrelevant.

Appellant's alternative argument is that the IMF should be avoidable. The avoidability determination is not made based on whim or the desire to achieve some predetermined market share. Avoidability is determined by whether the cost, expense, or risk that occasioned the charge in the first place can be eliminated or avoided, based on something that the customer does. The IMF charge is an excellent example of this principle.

As discussed in section A of this proposition of law, the IMF is a charge to compensate the company for its price risk, which is created by its obligation to provide power at a fixed price over a term of years, when the variable market price may be much higher. *Post-MDP Remand Case* (Order on Remand at 35-36) (October 24, 2007), Appellant's App. at 43-44. The corollary to this risk is that the customer has the benefit of the company's obligation. For customers who buy from the utility, the benefit is immediate; they pay the stabilized price today. For customers who buy from another supplier, they have the benefit of knowing that they can return to the favorably priced, stabilized rate at any time. The shopping customer has the benefit of that option, exercisable at any time.

Because all customers, whether they shop or not, receive the benefit of the company's obligation to provide power at a stabilized price, they all pay the costs of sustaining that offer: the IMF. The Commission explained this, saying:

> 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. [Citation omitted]. 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. [Citation omitted].

Post-MDP Remand Case (Order on Remand at 37-38) (October 24, 2007), Appellant's App. at 45-46. Those who benefit pay. The rule is simple.

The inverse is also true. Those who do not benefit do not pay. Industrial or commercial customers who waive their right to return to the standard service offer, with its favorable, stabilized price, do not pay the IMF. These customers have given up their option to return to the standard service offer and, because of this waiver, impose no price risk on the utility. Because such customers impose no price risk on the utility, and the IMF is intended to compensate for price risk, no payment is required from them. The Commission explained this, saying:

> 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.

Post-MDP Remand Case (Order on Remand at 38) (October 24, 2007), Appellant's App. at 46. The obligation to pay tracks the imposition[10] of the costs.

Thus, the avoidability of the IMF has been determined by the factual situation. Where there is a cost, there is a payment. Where there is no cost, there is no payment.

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10 We do not suggest that the obligation to provide POLR service arises from some action on the part of customers. To the contrary, the POLR obligation and its availability to all customers arises from statute. Ohio Rev. Code Ann. § 4928.14 (Anderson 2008), App. at 22-23. It is available to all without the need for any action on the customer's part.

OCC would argue against this rational system and say that the IMF should be avoidable in the name of "competition." In reality, this would harm competition by creating a subsidy when the policy of the state is to bar subsidies. Ohio Rev. Code Ann. § 4928.02(G) (Anderson 2008), App. at 18. Shopping customers who may return to the stabilized standard service offer have the benefit of that option. If they do not have to pay for this benefit, their shopping is being subsidized.[11] This is anti-competitive and the Commission properly refused to require it.

The simple existence of the RSP is a boon for competition. The plain fact is that shopping is risky. Alternative suppliers can breach agreements, go bankrupt, arbitrarily raise prices, and take other negative actions. Customers can face these risks, secure in the knowledge that they can return to the safe harbor of the stabilized price of the standard service offer. No bridges need be burned to shop.

OCC points to the reduced percentage of customers who are shopping now versus 2004. Appellant claims this is attributable to Duke's anti-competitive activities. This is false. The record shows that the standard service offer is cheaper than market prices for power. *Post-MDP Remand Case* (Order on Remand at 40) (October 24, 2007), Appellant's App. at 48. Customers are recognizing a good deal and acting on it. No illegal activities are required to explain this. That customers are able both to recognize a favorable offer and to act on that recognition is a sign of strength in the market, not failure.

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[11] It is unclear by whom such customers would be subsidized. Arguably, the subsidy could come either from Duke's shareholders or from non-shopping customers. It does not matter for these purposes, as all subsidies are harmful to the development of a rational market.

The Commission is not charged to create a market where players achieve some foreordained market share. Rather, the objective is to have a marketplace where customers can act on their preferences. It is apparent that customers are doing this very thing. That is a sign of health, not sickness.

In sum, the IMF is a rational charge imposed on the correct customers. It is entirely competitively neutral. The RSP, of which it is the pivotal part, is itself highly pro-competitive and the Commission's orders approving it should be affirmed.

Proposition of Law No. III:

> **The Commission lawfully and reasonably considered the side agreements in accordance with the Court's remand orders. Ohio Rev. Code Ann. § 4903.13 (Anderson 2008).**

R.C. 4903.13 provides that an order of the Commission "shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable." Ohio Rev. Code Ann. § 4903.13 (Anderson 2008), App. at 13. Interpreting this statutory standard, the Court has consistently stated that it will uphold an order of the Commission "where the record contains sufficient probative evidence to show that the commission's determination is not manifestly against the weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty." *Dayton Power & Light Co. v. Pub. Util. Comm'n*, 4 Ohio St. 3d 91, 94, 447 N.E.2d 733, 735 (1983); *see also AT&T Communications of Ohio, Inc. v. Pub. Util. Comm'n*, 88 Ohio St. 3d 549, 555, 728 N.E.2d 371, 376 (2000); *MCI Telecommunications Corp. v. Pub.*

Util. Comm'n, 38 Ohio St. 3d 266, 268, 527 N.E.2d 777, 780 (1988); *Ohio Edison Co. v. Pub. Util. Comm'n*, 63 Ohio St. 3d 555, 556, 589 N.E.2d 1292, 1294 (1992); *City of Columbus v. Pub. Util. Comm'n*, 58 Ohio St. 2d 103, 104, 388 N.E.2d 1237, 1238 (1979).

OCC, as the appellant, bears the heavy burden of showing that the Commission's orders are against the manifest weight of the evidence or are clearly unsupported by the record. *AK Steel Corp. v. Pub. Util. Comm'n*, 95 Ohio St. 3d 81, 86, 765 N.E.2d 862, 867 (2002). In matters concerning the Commission's special expertise and the exercise of discretion, the Court generally defers to the Commission's judgment. *Constellation NewEnergy, Inc. v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530, 541, 820 N.E.2d 885, 895 (2004); *Cincinnati Bell Tel. Co. v. Pub. Util. Comm'n*, 92 Ohio St. 3d 177, 180, 749 N.E.2d 262, 264 (2001); *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm'n*, 51 Ohio St. 3d 150, 154, 555 N.E.2d 288, 292 (1990). Regarding evidentiary matters, the Court has consistently declined to supplant the Commission's judgment. *AK Steel Corp. v. Pub. Util. Comm'n*, 95 Ohio St. 3d 81, 84, 765 N.E.2d 862, 866 (2002); *Cincinnati Bell Tel. Co. v. Pub. Util. Comm'n*, 92 Ohio St. 3d 177, 179-80, 749 N.E.2d 262, 264-65 (2001).

OCC has failed to sustain its heavy burden and the Commission's orders should be affirmed.

A. The Commission fully complied with the Court's orders on remand by compelling disclosure of the side agreements sought by OCC. *Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 856 N.E.2d 213 (2006).

The Court's instructions to the Commission on remand were clear. The Commission fully complied and its orders should be upheld.

The proceedings at issue in this case concern Duke's RSP, which was filed at the request of the Commission in order to stabilize prices following the termination of the market development period (MDP) and allow additional time for the competitive market to grow. In 2005, OCC challenged the Commission's orders, which adopted the stipulated RSP with various modifications, in this Court. Although the Court upheld the Commission's resolution of most of the issues raised by OCC, the Court held that the Commission had "abused its discretion when it denied discovery regarding alleged side agreements." *Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 323, 856 N.E.2d 213, 236 (2006). OCC had requested copies of all agreements between Duke and other current or past parties to the proceedings, entered into on or after January 26, 2004, and moved, at the hearing regarding Duke's stipulated RSP, for an order compelling production. *Id.* at 319, 856 N.E.2d at 233. The attorney examiners denied the motion on the basis of the Commission's prior determinations that side agreements are privileged as well as irrelevant to its consideration of the reasonableness of stipulations. *Id.* The Commission affirmed, on the same basis, the attorney examiners' denial of OCC's motion. *Id.*

On appeal, the Court upheld the "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 reasonable test," which has been adopted by the Commission and endorsed by the

Court for the purpose of evaluating stipulations.[12] *Id.* The Court, however, determined that the information sought by OCC could be relevant in terms of the first prong of the reasonableness test (*i.e.*, whether the settlement was a product of serious bargaining among capable, knowledgeable parties).[13] *Id.* The Court found that the Commission erred on that basis and thus remanded the case, instructing the Commission to compel disclosure of the side agreements sought by OCC. *Id.* at 319, 323, 856 N.E.2d at 233, 236.

Just one week later, on November 22, 2006, the Commission's attorney examiners directed Duke to disclose the side agreements and related information to OCC. *Post-MDP Remand Case* (Order on Remand at 6) (October 24, 2007), Appellant's App. at 14. OCC subsequently sought copies of agreements between certain affiliates and customers of Duke. *Id.* at 7-8, Appellant's App. at 15-16. The information was provided to the appellant who introduced it into the record at the hearing that commenced on March 19, 2007. *Id.* at 8-9, Appellant's App. at 16-17. At the hearing, testimony was offered by witnesses for OCC, Duke, and the Commission's staff. *Id.* at 9, 24, Appellant's App. at

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12 Under the reasonableness test, the Commission reviews a stipulation to determine whether (1) it is the product of serious bargaining among capable, knowledgeable parties; (2) as a package, it benefits ratepayers and the public interest; and (3) it violates any important regulatory principle or practice. The reasonableness test has been endorsed by the Court as an efficient and proper means to evaluate the reasonableness of less than unanimous settlements. *AK Steel Corp. v. Pub. Util. Comm'n*, 95 Ohio St. 3d 81, 82-83, 765 N.E.2d 862, 864 (2002); *Industrial Energy Consumers of Ohio Power Co. v. Pub. Util. Comm'n*, 68 Ohio St. 3d 559, 561, 629 N.E.2d 423, 425-26 (1994); *Consumers' Counsel v. Pub. Util. Comm'n*, 64 Ohio St. 3d 123, 126, 592 N.E.2d 1370, 1373 (1992).

13 The Court also determined that side agreements are not privileged from discovery.

17, 32. The parties were offered the opportunity to file initial and reply briefs. *Id.* at 9, Appellant's App. at 17.

In its order on remand, the Commission addressed the Court's remand orders. *Id.* at 20-21, Appellant's App. at 28-29. The Commission noted that, in addition to the mandate to compel disclosure of the side agreements, the Court specifically advised 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." *Id.* at 21 (quoting *Consumers' Counsel*, 111 Ohio St. 3d at 320, 856 N.E.2d at 234), Appellant's App. at 29. The Commission thus carefully considered, as directed by the Court, the impact of the side agreements on the parties' bargaining. *Id.* at 24-27, Appellant's App. 32-35. The Commission concluded, based on the expanded record of the case and its review of the side agreements, that there was a sufficient basis upon which to question whether the parties engaged in serious bargaining. *Id.* at 27, Appellant's App. at 35. The Commission found 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." *Id.* As a result of this finding, the Commission rejected the stipulated RSP. *Id.*

The Commission has fully complied with the Court's remand orders. Its actions since the Court's remand of the case have gone above and beyond what was required by the Court. In accordance with the Court's explicit instructions, the Commission compelled Duke to disclose the information sought by OCC. OCC subsequently sought addi-

tional information from Duke's affiliates and the Commission compelled the disclosure of that information. Over Duke's objections, OCC was permitted to introduce the discovered information at the hearing and to offer the testimony of its witnesses with regard to that information. After extensive briefing and consideration of the entire, expanded record in the proceedings, the Commission carefully evaluated the information as it pertained to the question of whether the parties engaged in serious bargaining in the process of negotiating the stipulated RSP. The Commission concluded that they had not. In short, the Commission did exactly what the Court required it to do, if not more.

OCC argues that the Commission did not make determinations based upon the evidence offered by OCC. This argument is without merit. The Commission's order on remand thoroughly documents the Commission's consideration of the evidence. *Post-MDP Remand Case* (Order on Remand at 24-27) (October 24, 2007), Appellant's App. at 32-35. The Commission considered the side agreements and the testimony of OCC witness Hixon as relevant to the question of whether the parties engaged in serious bargaining in executing the stipulated RSP. *Id.* This is precisely what the Court required when it stated that the Commission "must determine whether there exists sufficient evidence that the stipulation was the product of serious bargaining." *Consumers' Counsel*, 111 Ohio St. 3d at 321, 856 N.E.2d at 234. The Commission concluded that there was in fact insufficient evidence to support a finding of serious bargaining and, therefore, rejected the stipulated RSP. *Post-MDP Remand Case* (Order on Remand at 27) (October 24, 2007), Appellant's App. at 35. OCC got the information that it wanted, was able to use it

at the hearing, and the Commission accepted OCC's argument that the information showed that the stipulation should be rejected.

OCC has failed to sustain its burden of showing that the Commission acted unlawfully or unreasonably in considering the evidence of side agreements for the only question to which such evidence is relevant: whether the parties engaged in serious bargaining. The Commission did exactly what the Court required it to do and its orders should be affirmed.

B. The Commission properly limited its consideration of the side agreements as relevant only to the question of whether the parties engaged in serious bargaining. *Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 856 N.E.2d 213 (2006).

OCC argues at great length that the Commission did not consider all uses of the discovery required by the Court. The side agreements and related documents that OCC obtained through discovery were fully considered by the Commission as they related to the question of whether the parties engaged in serious bargaining. The Commission was not required – by the Court's remand orders or otherwise – to consider the side agreements as evidence relevant to any other issue.

The Commission has consistently determined, and the Court affirmed, that side agreements among parties to proceedings before the Commission are irrelevant to its resolution of those proceedings. *See Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 320-21, 856 N.E.2d 213, 234 (2006); *Consumers' Counsel v. Pub. Util. Comm'n*, 110 Ohio St. 3d 394, 397-98, 853 N.E.2d 1153, 1157-58 (2006); *Constellation NewEnergy, Inc. v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530, 533-34, 820 N.E.2d 885,

889 (2004). Side agreements quite simply fall outside the scope of proceedings before the Commission. With the exception of their relevance to the question of whether the parties engaged in serious bargaining in executing a stipulation, as addressed by this Court in OCC's first appeal, side agreements are irrelevant. The Commission found no differently in the proceedings at issue in this case. Its order on remand is consistent with established precedent, which OCC ignores.

OCC argues that the Commission should have considered evidence pertaining to the side agreements outside the scope of the stipulation. But the Court's consideration of OCC's request for discovery of the side agreements and its remand instructions to the Commission specifically pertained to the stipulated RSP. 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." *Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 320, 856 N.E.2d 213, 234 (2006). The Court made absolutely no mention of other potential uses[14] for this type of evidence. Rather, the Court recognized the Commission's past practice of determining that side agreements are irrelevant. *Id.* at 320-21, 856 N.E.2d at 234.

In fact, the Court noted that the Commission "may, if necessary, decide any issues pertaining to admissibility of [the side agreements sought by OCC]." *Id.* at 323, 856 N.E.2d at 236. This guidance is consistent with the Court's recognition that the Commis-

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[14] In this situation, there are no other uses for this information. The RSP stands on its own merits.

sion and other administrative agencies have discretion in admitting evidence. *Bd. of Educ. for Orange City School Dist. v. Cuyahoga Cty. Bd. of Revision*, 74 Ohio St. 3d 415, 416, 659 N.E.2d 1223, 1224 (1996); *Akron v. Pub. Util. Comm'n*, 5 Ohio St. 2d 237, 243, 215 N.E.2d 366, 371 (1966). Despite OCC's claim that the Commission did not consider other uses of the evidence, the Commission did in fact contemplate each of the issues raised by OCC. The Commission, however, properly recognized that the side agreements, according to the Court, are relevant to the current proceedings only in terms of the bargaining that occurred in the process of negotiating the stipulated RSP. *Post-MDP Remand Case* (Order on Remand at 20) (October 24, 2007), Appellant's App. at 28

The Commission decided only those issues that were specifically remanded to it by the Court. *Id.* The Commission limited its review of the record accordingly, explaining the reasoning for its decision not to consider issues that are ancillary to the Court's remand orders. Because the Commission reasonably determined that the evidence introduced by OCC was not relevant to its consideration of any issue other than whether the parties engaged in serious bargaining, the Commission should be affirmed.

C. The Commission properly decided not to consider issues, raised by the parties after the Court's remand orders, that are ancillary to the RSP proceedings. *Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 856 N.E.2d 213 (2006).

OCC argues that the Commission did not consider issues of alleged discriminatory pricing, corporate separation violations, and discounted transition charges that it believes are suggested by the evidence of side agreements. As discussed above, the Commission thoroughly and properly considered the side agreements with respect to their impact on

the parties' bargaining. *Post-MDP Remand Case* (Order on Remand at 24-27) (October 24, 2007), Appellant's App. at 32-35. The Commission further stated that ancillary issues, raised after the Court's remand of the case to the Commission, would not be considered in its order on remand. *Id.* at 20, Appellant's App. at 28. The side agreements were not before the Commission for approval and, therefore, did not present any matters for the Commission to adjudicate. The issues raised by OCC are secondary to the entire point of these proceedings and this is not the proper case in which to raise them.

The purpose of the proceedings has always been to establish Duke's RSP, which was filed at the request of the Commission in order to stabilize prices following the termination of the MDP. The proceedings are governed by R.C. 4928.14, which provides:

> After its market development period, an electric distribution utility in this state shall provide consumers, on a comparable and non-discriminatory 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.

Ohio Rev. Code Ann. § 4928.14(A) (Anderson 2008), App. at 22. OCC, however, attempts to alter the course of these proceedings by raising issues that have no relation to the RSP. The side agreements can in no way alter the terms of the RSP. *See Constellation NewEnergy, Inc. v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530, 534, 820 N.E.2d 885, 889 (2004). The RSP, on its face, either provides consumers, on a comparable and nondiscriminatory basis, with a market-based standard service offer or it does not. Here,

the Commission evaluated Duke's proposed RSP on its face to determine whether the requirements of R.C. 4928.14 were satisfied. They were. The Commission concluded that Duke's RSP, with the Commission's ordered modifications, "offer[s] all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service," on a comparable and non-discriminatory basis. *Post-MDP Remand Case* (Order on Remand at 41) (October 24, 2007), Appellant's App. at 49.

The Court has recognized that, absent ambiguity, the four corners of a document control its meaning and application. *See, e.g., Linko v. Indemnity Ins. Co. of N. America*, 90 Ohio St. 3d 445, 450, 739 N.E.2d 338, 343 (2000) (concluding that the four corners of an insurance agreement controlled in determining whether a waiver was knowingly and expressly made). Side agreements, therefore, have no effect on the meaning of the terms of Duke's RSP and are not germane to its enforceability. The terms of side agreements, other than their bearing on bargaining, are simply irrelevant to the Commission's evaluation of the RSP presented to it for review and adjudication. The four corners of the RSP control and necessarily limit what the Commission must approve and enforce.

The Commission accomplished what it was required to do in these proceedings. It thoroughly reviewed Duke's RSP, adopting it with modifications to ensure that Duke's market-based standard service offer is available on a comparable and nondiscriminatory basis as required by R.C. 4928.14. The issues raised by OCC are simply beyond the scope of the present case. The Court has long recognized that the Commission enjoys broad discretion in managing its proceedings. *Weiss v. Pub. Util. Comm'n*, 90 Ohio St.

3d 15, 19, 734 N.E.2d 775, 780 (2000) ("It is well-settled that pursuant to R.C. 4901.13, the commission has the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business." (quoting *Toledo Coalition for Safe Energy v. Pub. Util. Comm'n*, 69 Ohio St. 2d 559, 560, 433 N.E.2d 212, 214 (1982))). The Commission exercised its discretion in this case by reasonably concluding that the issues raised by OCC were ancillary to the proceedings before it. The Commission's decision does not in any way prohibit OCC from raising its concerns in a proper complaint proceeding.

Further, the Court, in its remand orders, advised the Commission that it "may, if necessary, decide any issues pertaining to the admissibility" of the discovered side agreements. *Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 323, 856 N.E.2d 213, 236 (2006). Consistent with its role as fact finder, the Commission retained its discretion not only to determine whether to admit exhibits and testimony into evidence, but also to determine how such evidence is relevant (*i.e.*, for what purposes) and how it should be considered in reaching its conclusions. Here, the Commission determined that the evidence of side agreements is relevant only to the question of whether the parties engaged in serious bargaining in executing the stipulated RSP. Thus, the Commission appropriately exercised its discretion in determining the admissibility of the evidence of side agreements and in limiting the purpose for which the evidence was admit-

ted. OCC's argument that the Commission did not abide by the Court's remand instructions in this respect is just wrong.[15]

If OCC believes that Duke has violated a statute or rule, OCC's proper recourse is to file a complaint pursuant to the proper statute and make its case. *See, e.g.*, Ohio Rev. Code Ann. § 4928.16 (Anderson 2008) (providing for complaint proceedings), App. at 23-24; Ohio Rev. Code Ann. § 4928.18 (Anderson 2008) (same), App. at 24-25. This case is a proceeding under R.C. 4928.14 to establish Duke's RSP. But OCC does not contend that the RSP itself is discriminatory or in violation of any statute or rule. OCC needs to make its arguments and present its evidence in the proper case. The purpose of the present proceedings is not to address all wrongs, whether real or imaginary. Rather, the purpose of this case has always been to establish Duke's market-based standard service offer and, at this particular phase of the proceedings, to comply with the Court's remand orders.

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15 Even assuming that the Commission did in some way fail to follow the Court's remand orders, OCC has presented no evidence that Duke has violated any statute or rule. All but one of the side agreements that OCC addresses involve Duke's affiliates; Duke is not a party to the agreements. *Post-MDP Remand Case* (Order on Remand at 7) (October 24, 2007), Appellant's App. at 15. The agreements are competitive contracts between the affiliates and their customers. Competitive retail affiliates of utilities are permitted to sell electricity by law, Ohio Rev. Code Ann. § 4928.05(A) (Anderson 2008), App. at 19, and economic reality dictates that they must sell below Duke's standard service offer. The agreements between the affiliates and their customers reflect a positive development in the market. Further, OCC presented no evidence that Duke's customers are paying a standard service offer price that is different than the price approved by the Commission.

OCC also seems to forget that Duke operates under a corporate separation plan, approved by the Commission in a prior case, which requires in part that Duke conduct business pursuant to its affiliate agreements and maintain a cost allocation manual documenting shared employees, all of which may be audited by the Commission. OCC makes no direct allegation that Duke operates in violation of its corporate separation plan or exceeds the boundaries of its affiliate agreements or cost allocation manual.

If OCC believes that the Commission should consider the side agreements outside the context of the stipulated RSP, OCC has other means available and should pursue its arguments at the proper time and in the proper proceedings. For the present, OCC has failed to sustain its burden. The Commission acted lawfully and reasonably and should be affirmed.

Proposition of Law No. IV:

> **The Commission lawfully and reasonably protected the confidentiality of documents containing trade secrets. Ohio Rev. Code Ann. § 4903.13 (Anderson 2008).**

OCC argues that the Commission erred when it ordered redactions of certain portions of side agreements and related information. Again, OCC has failed to sustain its heavy burden of demonstrating that the Commission's orders are unlawful or unreasonable. The Commission should be affirmed.

A. OCC has failed to show the prejudicial effect of the Commission's orders. *Elyria Foundry Co. v. Pub. Util. Comm'n*, 114 Ohio St. 3d 305, 311, 871 N.E.2d 1176, 1184 (2007); *Tongren v. Pub. Util. Comm'n*, 85 Ohio St. 3d 87, 92, 706 N.E.2d 1255, 1259 (1999).

This Court will not reverse an order of the Commission unless the party seeking reversal demonstrates the prejudicial effect of the order. *Elyria Foundry Co. v. Pub. Util. Comm'n*, 114 Ohio St. 3d 305, 311, 871 N.E.2d 1176, 1184 (2007); *Tongren v. Pub. Util. Comm'n*, 85 Ohio St. 3d 87, 92, 706 N.E.2d 1255, 1259 (1999). OCC has failed to demonstrate how it has been prejudiced by the Commission's orders. In fact, OCC makes no attempt at all to show any harm to itself.

Following the Court's remand, the Commission compelled full disclosure of the side agreements and related information sought by OCC. Copies of the side agreements were promptly provided to all of the parties, including OCC, well in advance of the hearing. Although portions of the documents were subject to protective orders granted at the hearing, OCC had full use of the documents at the hearing and offered them into evidence. Because OCC was at no time denied the side agreements and related documents, but rather has enjoyed complete access to the information in the record, it has failed to demonstrate any prejudicial effect of the Commission's orders. OCC had the information and thus there has simply been no harm to it.

B. OCC has failed to invoke the Court's original jurisdiction by filing a mandamus action. Ohio Rev. Code Ann. § 149.43(C)(1) (Anderson 2008); *State ex rel. McGowan v. Cuyahoga Metropolitan Housing Authority*, 78 Ohio St. 3d 518, 520, 678 N.E.2d 1388, 1389 (1997).

OCC further seeks, unlawfully, to stretch the scope of these proceedings. This is not a proper case in which to challenge the Commission's ordered redactions. OCC argues that the Ohio Public Records Act was violated and yet OCC attempts to circumvent that very statute. If a requestor of public records believes that records have been wrongly withheld or redacted, the proper and exclusive remedy is for the records requestor to seek a writ of mandamus. Ohio Rev. Code Ann. § 149.43(C)(1) (Anderson 2008), App. at 8; *State ex rel. McGowan v. Cuyahoga Metropolitan Housing Authority*, 78 Ohio St. 3d 518, 520, 678 N.E.2d 1388, 1389 (1997). Presumably because it has not been denied any records as discussed above, OCC has taken no steps to invoke this

Court's original jurisdiction by filing a mandamus action. Because it has failed to invoke the Court's jurisdiction, OCC has no remedy in this case.

C. The Commission properly and lawfully protected confidential information.

Except as provided in the Ohio Public Records Act, all facts, information, documents, and records in the possession of the Commission are generally public records.[16] *See* Ohio Rev. Code Ann. §§ 4901.12, 4905.07 (Anderson 2008), App. at 12, 13. The Ohio Public Records Act exempts from disclosure records that must not be released under state or federal law. Ohio Rev. Code Ann. § 149.43(A)(1)(v) (Anderson 2008), App. at 2. Trade secrets are exempt from disclosure under this "state or federal law" exception. *State ex rel. Besser v. The Ohio State University*, 89 Ohio St. 3d 396, 399, 732 N.E.2d 373, 377 (2000); *see also* Ohio Admin. Code § 4901-1-24(D) (Anderson 2008) (stating that the Commission may protect the confidentiality of documents containing trade secrets), App. at 29. A "trade secret" is defined as information[17] that "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 "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Ohio Rev. Code Ann. § 1333.61(D) (Anderson 2008), App. at 12.

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16 Disclosure must also be consistent with the purposes of Title 49 of the Revised Code. Ohio Rev. Code Ann. §§ 4901.12, 4905.07 (Anderson 2008), App. at 12, 13.

17 "Information" includes but is not limited to "any business information or plans, financial information, or listing of names, addresses, or telephone numbers." Ohio Rev. Code Ann. § 1333.61(D) (Anderson 2008), App. at 12.

Many motions for orders protecting the confidentiality of various documents were filed by several parties during the course of the remanded proceedings. *Post-MDP Remand Case* (Order on Remand at 10) (October 24, 2007), Appellant's App. at 18. Pursuant to the Commission's usual practice, the attorney examiners, on the first day of the hearing, granted all of the pending motions for protective orders for a period of eighteen months from that date, provided that such orders would be modified by the Commission as necessary. *Id.*; *see* Ohio Admin. Code § 4901-1-24(D)-(F) (Anderson 2008), App. at 29-30. A public records request for some of the information subject to the protective orders was subsequently received by the Commission's chairman. *Post-MDP Remand Case* (Order on Remand at 10) (October 24, 2007), Appellant's App. at 18. At that point, six of the parties, including OCC, filed memoranda addressing the confidentiality of the documents in response to a request from the attorney examiners. *Id.* Following an *in camera* inspection of the documents,[18] the Commission determined that some of the information constituted trade secrets.[19] *Id.* at 17, Appellant's App. at 25. It ordered that the documents be redacted to protect the trade secrets. *Id.*

The Commission properly applied the two-part "trade secret" definition in reviewing the side agreements and related information obtained by OCC through discovery.

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18 An *in camera* inspection is the "best procedure" to determine whether information is exempt from disclosure. *State ex rel. Allright Parking of Cleveland, Inc. v. Cleveland*, 63 Ohio St. 3d 772, 776, 591 N.E.2d 708, 711 (1992).

19 With regard to the purposes of Title 49, the Commission noted that it has a statutory duty to protect the confidentiality of competitive retail electric service suppliers' information. *Post-MDP Remand Case* (Order on Remand at 17) (October 24, 2007) (citing Ohio Rev. Code Ann. §§ 4928.02, 4928.06(F) (Anderson 2008), App. at 18, 21-22), Appellant's App. at 25.

Regarding the first prong of the definition of a "trade secret," the Commission specifically found 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. *Id.* at 15, Appellant's App. at 23.

With respect to the second prong of the definition, the Commission found that the parties seeking confidential treatment had sought, at all times, to protect the confidentiality of the documents, treating them as proprietary, confidential business information. *Id.* at 16-17, Appellant's App. at 24-25. Aside from the information specifically identified by the Commission as deriving independent economic value from being not generally known or ascertainable, the Commission ordered the parties to disclose all other information. *Id.* at 17, Appellant's App. at 25. In order to protect the trade secrets while making everything else available to the public, the Commission ordered the parties to redact the specified trade secrets and to file the redacted documents in the docket. *Id.* The Commission found that the documents could be redacted without rendering them incomprehensible or meaningless. *Id.*

OCC argues that the Commission merely relied on the memoranda filed by the parties in reaching its conclusions. The Commission, however, explicitly reached those conclusions based on its own *in camera* inspection of all of the documents. *Post-MDP Remand Case* (Order on Remand at 17) (October 24, 2007) ("Based on our *in camera*

review of the documents in question, we believe that they can be redacted to shield the trade secret information."), Appellant's App. at 25. After a thorough examination of the side agreements and related documents, the Commission concluded that certain information contained in the documents satisfied the two-part "trade secret" definition. Although the Commission reviewed in its order on remand the arguments asserted by the parties in their memoranda, the Commission's conclusions were based on its own *in camera* inspection of all of the materials in question.

OCC argues that the Commission wrongly withheld information but offers no explanation as to why it disagrees with the Commission's conclusion that certain, specified information satisfies the "trade secret" definition.[20] Instead, OCC finds fault with the arguments raised by the various parties in their memoranda. But the Commission merely summarized the arguments of the parties, including OCC's, in its order on remand. The Commission reached its own conclusions on the basis of its *in camera* review of the documents themselves.

OCC's arguments are also premature. Subsequent to the orders at issue in this appeal, the Commission conducted an extensive review of the parties' redactions. The

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[20] OCC agrees with the Commission that account numbers and customer social security and employer identification numbers should be redacted but does not explain why it believes that the other information identified by the Commission as "trade secrets" should not be redacted.

OCC also has no objection to the redaction of five agreements that do not involve Duke or its affiliates. OCC misses the point of the entire redaction exercise. The Commission did not order the redaction of the agreements on the basis of the identities of the parties to the agreements; rather, it ordered redactions based on the type of information contained within the agreements and whether that information satisfied the statutory definition of a "trade secret."

Commission found that many of the redactions did not comply with its order on remand. *Post-MDP Remand Case* (Entry at 4) (May 28, 2008), App. at 115. For that reason, the Commission created its own redacted documents that abide by its order. *Id.* These Commission-redacted documents will be publicly filed in the docket subject to any timely applications for rehearing that may be filed by the parties pursuant to R.C. 4903.10. *Id.* at 5, App. at 116. Because the timeframe for rehearing applications has not yet expired,[21] the redaction process is not yet complete and thus OCC's arguments have been prematurely raised.

The Commission has lawfully and reasonably protected the confidentiality of documents containing trade secrets. The Commission's orders should be affirmed.

CONCLUSION

As has been shown, the Commission approved a reasonable plan under which Duke would provide favorably priced power to customers in compliance with R.C. 4928.14. The plan fully complies with all legal requirements and is supported by record evidence. The Commission has provided a full airing of its analysis.

In addition, as a procedural matter, the Commission determined that certain classes of information constituted trade secrets and directed the parties to redact those kinds of information from the record. In a later order, not on appeal in this case, the Commission actually created its own redacted documents. The separation having now

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[21] The documents will be released on July 8, 2008 unless an application for rehearing is filed. *Post-MDP Remand Case* (Entry at 2) (June 4, 2008), App. at 120.

been accomplished through a later order, review of this aspect of the decision is premature.

Having fully complied with all legal requirements, the Commission orders should be affirmed.

Respectfully submitted,

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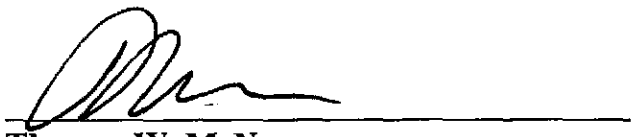

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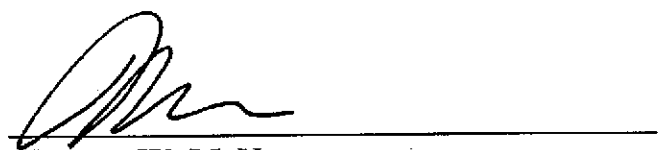
PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Merit Brief** submitted on behalf of Appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, this 7th day of July, 2008.



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149.43 Availability of public records for inspection and copying.

(A) As used in this section:

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

(a) Medical records;

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

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

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

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

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

(g) Trial preparation records;

(h) Confidential law enforcement investigatory records;

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

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

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

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

(m) Intellectual property records;

(n) Donor profile records;

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

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

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

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

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

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

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

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

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

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

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

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

(2) "Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to

the extent that the release of the record would create a high probability of disclosure of any of the following:

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

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

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

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

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

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

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

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

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

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

assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT resides;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(B)(1) Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time. If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make

available all of the information within the public record that is not exempt. When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction.

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

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

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

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

(6) If any person chooses to obtain a copy of a public record in accordance with division (B) of this section, the public office or person responsible for the public record may require that person to pay in advance the cost involved in providing the copy of the public record in accordance with the choice made by the person seeking the copy under this division. The public

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

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

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

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

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

(9) Upon written request made and signed by a journalist on or after December 16, 1999, a public office, or person responsible for public records, having custody of the records of the agency employing a specified peace officer, parole officer, prosecuting attorney, assistant prose-

cuting attorney, correctional employee, youth services employee, firefighter, or EMT shall disclose to the journalist the address of the actual personal residence of the peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT and, if the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's spouse, former spouse, or child is employed by a public office, the name and address of the employer of the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's spouse, former spouse, or child. The request shall include the journalist's name and title and the name and address of the journalist's employer and shall state that disclosure of the information sought would be in the public interest.

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

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

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

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

existence of this injury shall be conclusively presumed. The award of statutory damages shall be in addition to all other remedies authorized by this section.

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

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

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

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

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

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

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

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

(i) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in

accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

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

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

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

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

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

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

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

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

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

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

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

1333.61 Uniform trade secrets act definitions.

As used in sections 1333.61 to 1333.69 of the Revised Code, unless the context requires otherwise:

(A) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.

(B) "Misappropriation" means any of the following:

(1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means;

(2) Disclosure or use of a trade secret of another without the express or implied consent of the other person by a person who did any of the following:

(a) Used improper means to acquire knowledge of the trade secret;

(b) At the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret that the person acquired was derived from or through a person who had utilized improper means to acquire it, was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or was derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use;

(c) Before a material change of their position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

(C) "Person" has the same meaning as in division (C) of section 1.59 of the Revised Code and includes governmental entities.

(D) "Trade secret" means information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, 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.

4901.12 All proceedings public records.

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

4903.09 Written opinions filed by commission in all contested cases.

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

4903.13 Reversal of final order - notice of appeal.

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.

The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

4905.07 Information and records to be public.

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

4909.15 Fixation of reasonable rate.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) The amount of any tax credits granted to an electric light company under section 5727.391 of the Revised Code for Ohio coal burned prior to January 1, 2000, shall not be retained by the company, used to fund any dividend or distribution, or utilized for any purposes other than the defrayal of the allowable operating expenses of the company and the defrayal of the allowable expenses of the company in connection with the installation, acquisition, construction, or use of a compliance facility. The amount of the tax credits granted to an electric light company under that section for Ohio coal burned prior to January 1, 2000, shall be returned to its customers within three years after initially claiming the credit through an offset to the company's rates or fuel component, as determined by the commission, as set forth in schedules filed by the company under section 4905.30 of the Revised Code. As used in division (A)(4)(c) of this section, "compliance facility" has the same meaning as in section 5727.391 of the Revised Code.

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

(C) The test period, unless otherwise ordered by the commission, shall be the twelve-month period beginning six months prior to the date the application is filed and ending six months subsequent to that date. In no event shall the test period end more than nine months

subsequent to the date the application is filed. The revenues and expenses of the utility shall be determined during the test period. The date certain shall be not later than the date of filing.

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

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

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

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

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

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

4909.18 Application to establish or change rate.

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

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

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

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

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

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

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

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

4928.02 State policy.

It is the policy of this state to do the following throughout this state beginning on the starting date of competitive retail electric service:

(A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;

(B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;

(C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities;

(D) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service;

(E) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote effective customer choice of retail electric service;

(F) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;

(G) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa;

(H) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power;

(I) Facilitate the state's effectiveness in the global economy.

4928.03 Identification of competitive services and noncompetitive services.

Beginning on the starting date of competitive retail electric service, retail electric generation, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers. In accordance with a filing under division (F) of section 4933.81 of the Revised Code, retail electric generation, aggregation, power marketing, or power brokerage services supplied to consumers within the certified territory of an electric cooperative that has made the filing are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers.

Beginning on the starting date of competitive retail electric service and notwithstanding any other provision of law, each consumer in this state and the suppliers to a consumer shall have comparable and nondiscriminatory access to noncompetitive retail electric services of an electric utility in this state within its certified territory for the purpose of satisfying the consumer's electricity requirements in keeping with the policy specified in section 4928.02 of the Revised Code.

4928.05 Extent of exemptions.

(A)(1) On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric utility or electric services company shall not be subject to supervision and regulation by a municipal corporation under Chapter 743. of the Revised Code or by the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except section 4905.10, division (B) of 4905.33, and sections 4905.35 and 4933.81 to 4933.90; except sections 4905.06, 4935.03, 4963.40, and 4963.41 of the Revised Code only to the extent related to service reliability and public safety; and except as otherwise provided in this chapter. The commission's authority to enforce those excepted provisions with respect to a competitive retail electric service shall be such authority as is provided for their enforcement under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter.

On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric cooperative shall not be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except as otherwise expressly provided in sections 4928.01 to 4928.10 and 4928.16 of the Revised Code.

(2) On and after the starting date of competitive retail electric service, a noncompetitive retail electric service supplied by an electric utility shall be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter, to the extent that authority is not preempted by federal law. The commission's authority to enforce those provisions with respect to a noncompetitive retail electric service shall be the authority provided under those chapters and this chapter, to the extent the authority is not preempted by federal law.

The commission shall exercise its jurisdiction with respect to the delivery of electricity by an electric utility in this state on or after the starting date of competitive retail electric service so as to ensure that no aspect of the delivery of electricity by the utility to consumers in this state that consists of a noncompetitive retail electric service is unregulated.

On and after that starting date, a noncompetitive retail electric service supplied by an electric cooperative shall not be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except sections 4933.81 to 4933.90 and 4935.03 of the Revised Code. The commission's authority to enforce those excepted sections with respect to a noncompetitive retail electric service of an electric cooperative shall be such authority as is provided for their enforcement under Chapters 4933. and 4935. of the Revised Code.

(B) Nothing in this chapter affects the authority of the commission under Title XLIX [49] of the Revised Code to regulate an electric light company in this state or an electric service supplied in this state prior to the starting date of competitive retail electric service.

4928.06 Commission to ensure competitive retail electric service.

(A) Beginning on the starting date of competitive retail electric service, the public utilities commission shall ensure that the policy specified in section 4928.02 of the Revised Code is effectuated. To the extent necessary, the commission shall adopt rules to carry out this chapter. Initial rules necessary for the commencement of the competitive retail electric service under this chapter shall be adopted within one hundred eighty days after the effective date of this section. Except as otherwise provided in this chapter, the proceedings and orders of the commission under the chapter shall be subject to and governed by Chapter 4903. of the Revised Code.

(B) If the commission determines, on or after the starting date of competitive retail electric service, that there is a decline or loss of effective competition with respect to a competitive retail electric service of an electric utility, which service was declared competitive by commission order issued pursuant to division (A) of section 4928.04 of the Revised Code, the commission shall ensure that that service is provided at compensatory, fair, and nondiscriminatory prices and terms and conditions.

(C) In addition to its authority under section 4928.04 of the Revised Code and divisions (A) and (B) of this section, the commission, on an ongoing basis, shall monitor and evaluate the provision of retail electric service in this state for the purpose of discerning any noncompetitive retail electric service that should be available on a competitive basis on or after the starting date of competitive retail electric service pursuant to a declaration in the Revised Code, and for the purpose of discerning any competitive retail electric service that is no longer subject to effective competition on or after that date. Upon such evaluation, the commission periodically shall report its findings and any recommendations for legislation to the standing committees of both houses of the general assembly that have primary jurisdiction regarding public utility legislation. Until 2008, the commission and the consumer's counsel also shall provide biennial reports to those standing committees, regarding the effectiveness of competition in the supply of competitive

retail electric services in this state. In addition, until the end of all market development periods as determined by the commission under section 4928.40 of the Revised Code, those standing committees shall meet at least biennially to consider the effect on this state of electric service restructuring and to receive reports from the commission, consumers' counsel, and director of development.

(D) In determining, for purposes of division (B) or (C) of this section, whether there is effective competition in the provision of a retail electric service or reasonably available alternatives for that service, the commission shall consider factors including, but not limited to, all of the following:

(1) The number and size of alternative providers of that service;

(2) The extent to which the service is available from alternative suppliers in the relevant market;

(3) The ability of alternative suppliers to make functionally equivalent or substitute services readily available at competitive prices, terms, and conditions;

(4) Other indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of suppliers of services.

The burden of proof shall be on any entity requesting, under division (B) or (C) of this section, a determination by the commission of the existence of or a lack of effective competition or reasonably available alternatives.

(E)(1) Beginning on the starting date of competitive retail electric service, the commission has authority under Chapters 4901. to 4909. of the Revised Code, and shall exercise that authority, to resolve abuses of market power by any electric utility that interfere with effective competition in the provision of retail electric service.

(2) In addition to the commission's authority under division (E)(1) of this section, the commission, beginning the first year after the market development period of a particular electric utility and after reasonable notice and opportunity for hearing, may take such measures within a transmission constrained area in the utility's certified territory as are necessary to ensure that retail electric generation service is provided at reasonable rates within that area. The commission may exercise this authority only upon findings that an electric utility is or has engaged in the abuse of market power and that that abuse is not adequately mitigated by rules and practices of any independent transmission entity controlling the transmission facilities. Any such measure shall be taken only to the extent necessary to protect customers in the area from the particular abuse of market power and to the extent the commission's authority is not preempted by federal law. The measure shall remain the commission, after reasonable notice and opportunity for hearing, determines that the particular abuse of market power has been mitigated.

(F) An electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code shall provide the commission with such information, regarding a competitive retail electric service for which it is subject to certification, as the commission considers necessary to carry out this chapter. An elec-

tric utility shall provide the commission with such information as the commission considers necessary to carry out divisions (B) to (E) of this section. The commission shall take such measures as it considers necessary to protect the confidentiality of any such information.

The commission shall require each electric utility to file with the commission on and after the starting date of competitive retail electric service an annual report of its intrastate gross receipts and sales of kilowatt hours of electricity, and shall require each electric services company, electric cooperative, and governmental aggregator subject to certification to file an annual report on and after that starting date of such receipts and sales from the provision of those retail electric services for which it is subject to certification. For the purpose of the reports, sales of kilowatt hours of electricity are deemed to occur at the meter of the retail customer.

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.

4928.16 Commission jurisdiction.

(A)(1) The public utilities commission has jurisdiction under section 4905.26 of the Revised Code, upon complaint of any person or upon complaint or initiative of the commission on or after the starting date of competitive retail electric service, regarding the provision by an electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code of any service for which it is subject to certification.

(2) The commission also has jurisdiction under section 4905.26 of the Revised Code, upon complaint of any person or upon complaint or initiative of the commission on or after the starting date of competitive retail electric service, to determine whether an electric utility has violated or failed to comply with any provision of sections 4928.01 to 4928.15, any provision of divisions (A) to (D) of section 4928.35 of the Revised Code, or any rule or order adopted or issued under those sections; or whether an electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code has violated or failed to comply with any provision of sections 4928.01 to 4928.10 of the Revised Code regarding a competitive retail electric service for which it is subject to certification or any rule or order adopted or issued under those sections.

(3) If a contract between a mercantile commercial customer and an electric services company states that the forum for a commercial dispute involving that company is through a certified commercial arbitration process, that process set forth in the contract and agreed to by the signatories shall be the exclusive forum unless all parties to the contract agree in writing to an amended process. The company shall notify the commission for informational purposes of all matters for which a contract remedy is invoked to resolve a dispute.

(4) The commission, by rule adopted pursuant to division (A) of section 4928.06 of the Revised Code, shall adopt alternative dispute resolution procedures for complaints by nonmercantile, nonresidential customers, including arbitration through a certified commercial arbitration process and at the commission. The commission also by such rule may adopt alternative dispute resolution procedures for complaints by residential customers.

(B) In addition to its authority under division (C) of section 4928.08 of the Revised Code and to any other remedies provided by law, the commission, after reasonable notice and opportunity for hearing in accordance with section 4905.26 of the Revised Code, may do any of the following:

(1) Order rescission of a contract, or restitution to customers including damages due to electric power fluctuations, in any complaint brought pursuant to division (A)(1) or (2) of this section;

(2) Order any remedy or forfeiture provided under sections 4905.54 to 4905.60 and 4905.64 of the Revised Code upon a finding under division (A)(2) of this section that the electric utility has violated or failed to comply with any provision of sections 4928.01 to 4928.15, any provision of divisions (A) to (D) of section 4928.35 of the Revised Code, or any rule or order adopted or issued under those sections. In addition, the commission may order any remedy provided under section 4905.22, 4905.37, or 4905.38 of the Revised Code if the violation or failure to comply by an electric utility related to the provision of a noncompetitive retail electric service.

(3) Order any remedy or forfeiture provided under sections 4905.54 to 4905.60 and 4905.64 of the Revised Code upon a finding under division (A)(2) of this section that the electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code has violated or failed to comply, regarding a competitive retail electric service for which it is subject to certification, with any provision of sections 4928.01 to 4928.10 of the Revised Code or any rule or order adopted or issued under those sections.

(C)(1) In addition to the authority conferred under section 4911.15 of the Revised Code, the consumers' counsel may file a complaint under division (A)(1) or (2) of this section on behalf of residential consumers in this state or appear before the commission as a representative of those consumers pursuant to any complaint filed under division (A)(1) or (2) of this section.

(2) In addition to the authority conferred under section 4911.19 of the Revised Code, the consumers' counsel, upon reasonable grounds on and after the starting date of competitive retail electric service, may file with the commission under section 4905.26 of the Revised Code a complaint for discovery if the recipient of an inquiry under section 4911.19 of the Revised Code fails to provide a response within the time specified in that section.

(D) Section 4905.61 of the Revised Code applies to a violation by an electric utility of, or to a failure of an electric utility to comply with, any provision of sections 4928.01 to 4928.15, any provision of divisions (A) to (D) of section 4928.35 of the Revised Code, or any rule or order adopted or issued under those sections.

4928.18 Jurisdiction and powers of commission concerning utility or affiliate.

(A) Notwithstanding division (D)(2)(a) of section 4909.15 of the Revised Code, nothing in this chapter prevents the public utilities commission from exercising its authority under Title XLIX [49] of the Revised Code to protect customers of retail electric service supplied by an

electric utility from any adverse effect of the utility's provision of a product or service other than retail electric service.

(B) The commission has jurisdiction under section 4905.26 of the Revised Code, upon complaint of any person or upon complaint or initiative of the commission on or after the starting date of competitive retail electric service, to determine whether an electric utility or its affiliate has violated any provision of section 4928.17 of the Revised Code or an order issued or rule adopted under that section. For this purpose, the commission may examine such books, accounts, or other records kept by an electric utility or its affiliate as may relate to the businesses for which corporate separation is required under section 4928.17 of the Revised Code, and may investigate such utility or affiliate operations as may relate to those businesses and investigate the interrelationship of those operations. Any such examination or investigation by the commission shall be governed by Chapter 4903. of the Revised Code.

(C) In addition to any remedies otherwise provided by law, the commission, regarding a determination of a violation pursuant to division (B) of this section, may do any of the following:

(1) Issue an order directing the utility or affiliate to comply;

(2) Modify an order as the commission finds reasonable and appropriate and order the utility or affiliate to comply with the modified order;

(3) Suspend or abrogate an order, in whole or in part;

(4) Issue an order that the utility or affiliate pay restitution to any person injured by the violation or failure to comply;

(D) In addition to any remedies otherwise provided by law, the commission, regarding a determination of a violation pursuant to division (B) of this section and commensurate with the severity of the violation, the source of the violation, any pattern of violations, or any monetary damages caused by the violation, may do either of the following:

(1) Impose a forfeiture on the utility or affiliate of up to twenty-five thousand dollars per day per violation. The recovery and deposit of any such forfeiture shall be subject to sections 4905.57 and 4905.59 of the Revised Code.

(2) Regarding a violation by an electric utility relating to a corporate separation plan involving competitive retail electric service, suspend or abrogate all or part of an order, to the extent it is in effect, authorizing an opportunity for the utility to receive transition revenues under a transition plan approved by the commission under section 4928.33 of the Revised Code.

Corporate separation under this section does not prohibit the common use of employee benefit plans, facilities, equipment, or employees, subject to proper accounting and the code of conduct ordered by the commission as provided in division (A)(1) of this section.

(E) Section 4905.61 of the Revised Code applies in the case of any violation of section 4928.17 of the Revised Code or of any rule adopted or order issued under that section.

4928.34 Determinations for approval or prescribing of plan.

(A) The public utilities commission shall not approve or prescribe a transition plan under division (A) or (B) of section 4928.33 of the Revised Code unless the commission first makes all of the following determinations:

(1) The unbundled components for the electric transmission component of retail electric service, as specified in the utility's rate unbundling plan required by division (A)(1) of section 4928.31 of the Revised Code, equal the tariff rates determined by the federal energy regulatory commission that are in effect on the date of the approval of the transition plan under sections 4928.31 to 4928.40 of the Revised Code, as each such rate is determined applicable to each particular customer class and rate schedule by the commission. The unbundled transmission component shall include a sliding scale of charges under division (B) of section 4905.31 of the Revised Code to ensure that refunds determined or approved by the federal energy regulatory commission are flowed through to retail electric customers.

(2) The unbundled components for retail electric distribution service in the rate unbundling plan equal the difference between the costs attributable to the utility's transmission and distribution rates and charges under its schedule of rates and charges in effect on the effective date of this section, based upon the record in the most recent rate proceeding of the utility for which the utility's schedule was established, and the tariff rates for electric transmission service determined by the federal energy regulatory commission as described in division (A)(1) of this section.

(3) All other unbundled components required by the commission in the rate unbundling plan equal the costs attributable to the particular service as reflected in the utility's schedule of rates and charges in effect on the effective date of this section.

(4) The unbundled components for retail electric generation service in the rate unbundling plan equal the residual amount remaining after the determination of the transmission, distribution, and other unbundled components, and after any adjustments necessary to reflect the effects of the amendment of section 5727.111 of the Revised Code by Sub. S.B. No. 3 of the 123rd general assembly.

(5) All unbundled components in the rate unbundling plan have been adjusted to reflect any base rate reductions on file with the commission and as scheduled to be in effect by December 31, 2005, under rate settlements in effect on the effective date of this section. However, all earnings obligations, restrictions, or caps imposed on an electric utility in a commission order prior to the effective date of this section are void.

(6) Subject to division (A)(5) of this section, the total of all unbundled components in the rate unbundling plan are capped and shall equal during the market development period, except as specifically provided in this chapter, the total of all rates and charges in effect under the applicable bundled schedule of the electric utility pursuant to section 4905.30 of the Revised Code in effect on the day before the effective date of this section, including the transition charge determined under section 4928.40 of the Revised Code, adjusted for any changes in the taxation

of electric utilities and retail electric service under Sub. S.B. No. 3 of the 123rd general assembly, the universal service rider authorized by section 4928.51 of the Revised Code, and the temporary rider authorized by section 4928.61 of the Revised Code. For the purpose of this division, the rate cap applicable to a customer receiving electric service pursuant to an arrangement approved by the commission under section 4905.31 of the Revised Code is, for the term of the arrangement, the total of all rates and charges in effect under the arrangement. For any rate schedule filed pursuant to section 4905.30 of the Revised Code or any arrangement subject to approval pursuant to section 4905.31 of the Revised Code, the initial tax-related adjustment to the rate cap required by this division shall be equal to the rate of taxation specified in section 5727.81 of the Revised Code and applicable to the schedule or arrangement. To the extent such total annual amount of the tax-related adjustment is greater than or less than the comparable amount of the total annual tax reduction experienced by the electric utility as a result of the provisions of Sub. S.B. No. 3 of the 123rd general assembly, such difference shall be addressed by the commission through accounting procedures, refunds, or an annual surcharge or credit to customers, or through other appropriate means, to avoid placing the financial responsibility for the difference upon the electric utility or its shareholders. Any adjustments in the rate of taxation specified in 5727.81 of the Revised Code section shall not occur without a corresponding adjustment to the rate cap for each such rate schedule or arrangement. The department of taxation shall advise the commission and self-assessors under section 5727.81 of the Revised Code prior to the effective date of any change in the rate of taxation specified under that section, and the commission shall modify the rate cap to reflect that adjustment so that the rate cap adjustment is effective as of the effective date of the change in the rate of taxation. This division shall be applied, to the extent possible, to eliminate any increase in the price of electricity for customers that otherwise may occur as a result of establishing the taxes contemplated in section 5727.81 of the Revised Code.

(7) The rate unbundling plan complies with any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

(8) The corporate separation plan required by division (A)(2) of section 4928.31 of the Revised Code complies with section 4928.17 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

(9) Any plan or plans the commission requires to address operational support systems and any other technical implementation issues pertaining to competitive retail electric service comply with any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

(10) The employee assistance plan required by division (A)(4) of section 4928.31 of the Revised Code sufficiently provides severance, retraining, early retirement, retention, outplacement, and other assistance for the utility's employees whose employment is affected by electric industry restructuring under this chapter.

(11) The consumer education plan required under division (A)(5) of section 4928.31 of the Revised Code complies with section 4928.42 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

(12) The transition revenues for which an electric utility is authorized a revenue opportunity under sections 4928.31 to 4928.40 of the Revised Code are the allowable transition costs of the utility as such costs are determined by the commission pursuant to section 4928.39 of the Revised Code, and the transition charges for the customer classes and rate schedules of the utility are the charges determined pursuant to section 4928.40 of the Revised Code.

(13) Any independent transmission plan included in the transition plan filed under section 4928.31 of the Revised Code reasonably complies with section 4928.12 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code, unless the commission, for good cause shown, authorizes the utility to defer compliance until an order is issued under division (G) of section 4928.35 of the Revised Code.

(14) The utility is in compliance with sections 4928.01 to 4928.11 of the Revised Code and any rules or orders of the commission adopted or issued under those sections.

(15) All unbundled components in the rate unbundling plan have been adjusted to reflect the elimination of the tax on gross receipts imposed by section 5727.30 of the Revised Code.

In addition, a transition plan approved by the commission under section 4928.33 of the Revised Code but not containing an approved independent transmission plan shall contain the express conditions that the utility will comply with an order issued under division (G) of section 4928.35 of the Revised Code.

(B) Subject to division (E) of section 4928.17 of the Revised Code, if the commission finds that any part of the transition plan would constitute an abandonment under sections 4905.20 and 4905.21 of the Revised Code, the commission shall not approve that part of the transition plan unless it makes the finding required for approval of an abandonment application under section 4905.21 of the Revised Code. Sections 4905.20 and 4905.21 of the Revised Code otherwise shall not apply to a transition plan under sections 4928.31 to 4928.40 of the Revised Code.

4901-1-24 Motions, for protective orders.

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

(1) Discovery not be had.

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

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

(4) Certain matters not be inquired into.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(G) The requirements of this rule do not apply to information submitted to the commission staff. However, information submitted directly to the legal director, the deputy legal director, or the attorney examiner that is not filed in accordance with the requirements of para-

graph (D) of this rule may be filed with the docketing division as part of the public record. No document received via facsimile transmission will be given confidential treatment by the commission.

SUMMARY OF
THE COMMISSION'S OPINION AND ORDER OF AUGUST 31, 2000
IN THE CINCINNATI GAS & ELECTRIC COMPANY
ELECTRIC TRANSITION PLAN CASE
CASE NO. 99-1658-EL-ETP 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). Governor Bob Taft signed this legislation (SB3) on July 6, 1999 and most provisions of SB3 became effective on October 5, 1999. Section 4928.31, Revised Code, required each electric utility to file with the Commission a transition plan for the company's provision of retail electric service in the state of Ohio.

On December 28, 1999, Cincinnati Gas & Electric Company filed its transition plan, as well as applications for tariff approval and accounting authority. On May 8, 2000, a stipulation and recommendation on CG&E's transition plan (CG&E Ex. 60) was filed on behalf of CG&E, the staff, Ohio Consumers' Council, Ohio Council of Retail Merchants, Industrial Energy Users-Ohio, Kroger Company, The Ohio Manufacturers' Association, National Energy Marketers Association, New Energy Midwest, LLC, WPS Energy Services, Inc., Enron Energy Services, Inc., Dynegy, Inc, Cincinnati/Hamilton County Community Action Agency, Supporting Council of Preventive Effort, The Ohio Hospital Association, People Working Cooperatively, Exelon Energy, Strategic Energy, Columbia Energy Services Corp., Columbia Energy Power Marketing Corp., Mid-Atlantic Power Supply, city of Cleveland, and American Municipal Power-Ohio. Stand Energy Corp., and Local Union 1347 International Brotherhood of Electrical Workers, AFL-CIO subsequently signed the stipulation. Also on May 8, 2000, a stipulation on CG&E's employee assistance plan was filed on behalf of CG&E, the staff, Industrial Energy Users-Ohio, The Ohio Council of Retail Merchants, AK Steel, Kroger Company, The Ohio Manufacturers' Association, The Ohio Hospital Association, Columbia Energy Services Corp., Columbia Energy Power Marketing Corp., Exelon Energy, Strategic Energy, Mid-Atlantic Power Supply Assoc., Ohio Consumers' Council, New Energy Midwest, LLC, WPS Energy Services, Inc., and Enron Energy Services, Inc. A third stipulation on CG&E's independent transmission plan was filed on May 8, 2000, on behalf of CG&E, staff, Ohio Consumers' Council, The Ohio Council of Retail Merchants, Industrial Energy Users-Ohio, Kroger Company, The Ohio Manufacturers' Association, New Energy Midwest LLC, WPS Energy Services, Inc., Enron Energy Services, Inc., Dynegy, Inc., and The Ohio Hospital Association. The evidentiary hearings were held on May 30, and June 1, 2, 5, 6, 8, and 14, 2000. A local public hearing was held on June 8, 2000, in Cincinnati, Ohio.

In the opinion and order, the Commission is approving the agreements submitted by the various parties listed above with certain modification regarding the operational support plan. The Commission found that the terms of the agreements, considered in their totality, advance the public interest and provide substantial benefits to all customer classes. The stipulations provide for extended rate freezes, rate reductions,

flexibility for larger contract customers not otherwise available, low income energy efficiency grants and, as a result of shorter, defined transition periods for CG&E, significant risks with respect to its ability to recover transition costs. The stipulations, among other things: provide a five-percent reduction of CG&E's generation component for residential rate schedules; waive the switching fee for the first 20 percent of residential customers that switch to a certified supplier during the market development period; create shopping credits that facilitate the development of the retail marketplace; maintain for five years the market development period, including a rate cap, to the residential customers, irrespective of the number that switch; continue support for energy efficiency and weatherization services to low-income persons by maintaining certain existing contracts valued at approximately $4 million for five years; commit CG&E to work with other regions, RTO/ISO groups and transmission level customers to develop and implement specific proposals to address reciprocity and interface/seams issues; and offer to customers with contracts approved pursuant to Section 4905.31, Revised Code, who would otherwise be on the primary distribution, transmission, or lighting rate schedules, a one-time right, through December 31, 2001, to cancel any such contract without penalty, provided that the customer remains a distribution customer of CG&E.

The Commission also determined that CG&E's transition plan filing, as amended by the settlement agreements, is in compliance with the statutory requirements contained in SB3. By approving the stipulations, the Commission also authorizes certain accounting treatments for CG&E to create the necessary regulatory assets, defer costs, and recover those costs through a regulatory transition charge.

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

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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 Case No. 99-1659-EL-ATA Case No. 99-1660-EL-ATA Case No. 99-1661-EL-AAM Case No. 99-1662-EL-AAM Case No. 99-1663-EL-UNC

OPINION AND ORDER

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

APPEARANCES:

James B. Gainer, Paul A. Colbert, John J. Finnigan, Jr., and Michael J. Pahutski, 139 East Fourth Street, Room 25 ATII, Cincinnati, Ohio 45202, and Baker & Hostetler, by Michael D. Dortch and Brian T. Johnson, 65 East State Street, Suite 2100, Columbus, Ohio 43215, on behalf of Cincinnati Gas & Electric Company.

Betty D. Montgomery, Attorney General of the State of Ohio, Duane W. Luckey, Section Chief, by Thomas W. McNamee and Stephen Nourse, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215-3793, on behalf of the staff of the Public Utilities Commission of Ohio.

Boehm, Kurtz & Lowry, by Michael J. Kurtz, 36 East Seventh Street, Suite 2110, Cincinnati, Ohio 45202, on behalf of The Kroger Company.

Chester, Willcox & Saxby, by Jeffrey L. Small, 17th South High Street, Suite 900, Columbus, Ohio 43215, on behalf Ohio Council of Retail Merchants, and by John W. Bentine, on behalf of the city of Cleveland and The American Municipal Power-Ohio, Inc.

McNees, Wallace & Nurick, by Samuel C. Randazzo, Gretchen J. Hummel, and Kimberly J. Wile, Fifth Third Center, 21 East State St., Suite 1799, Columbus, Ohio 43215, on behalf of The Industrial Energy Users-Ohio.

Boehm, Kurtz & Lowry, by David F. Boehm, 36 East Seventh Street, Suite 2110, Cincinnati, Ohio 45202, on behalf of AK Steel Corporation.

David C. Rinebolt, PO Box 1793, Findlay, Ohio 45839-1793, on behalf of Ohio Partners for Affordable Energy.

Sutherland, Asbill & Brennan LLP, by Paul F. Forshay and Keith McCrea, 1275 Pennsylvania Avenue, NW, Washington, DC 20004-2415, on behalf of Shell Energy Services Co., LLC.

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Robert S. Tongren, Ohio Consumers' Counsel, by Evelyn R. Robinson-McGriff and Werner L. Margard, III, Assistant Consumers' Counsels, 10 W. Broad St., Suite 1800, Columbus, Ohio 43215-3485, on behalf of the residential consumers of The Cincinnati Gas & Electric Company.

Craig Goodman, 3333 K Street, N.W., Suite 425, Washington, D.C. 20007 and John & Hengerer, by Joelle Ogg, 1200 17th Street, NW, Suite 600, Washington, D.C. 20036, on behalf of the National Energy Marketers Association.

Thompson, Hine and Flory, by Robert P. Mone and Scott A. Campbell, 10 West Broad Street, Suite 700, Columbus, Ohio 43215, on behalf of the Ohio Rural Electric Cooperatives, Inc. and Buckeye Power, Inc.

Vorys, Sater, Seymour & Pease, by M. Howard Petricoff, 52 East Gay Street, PO Box 1008, Columbus, Ohio 43216-1008, on behalf of Enron Energy Services, Inc.; New Energy Midwest, LLC; WPS Energy Services, Inc.; and Dynegy, Inc., and Janine L. Migden, 400 Metro Place North, Suite 310, Dublin, Ohio 43017-3375, on behalf of Enron Energy Services, Inc.

Judith A. Phillips, 1077 Celestial Street, Suite 110, Cincinnati, Ohio 45202, on behalf of Stand Energy Corporation.

Ellis Jacobs, 333 W. First Street, Suite 500, Dayton Ohio 45402, on behalf of the Supporting Council of Preventive Effort and Cincinnati/Hamilton County Community Action Agency.

Bell, Royer & Sanders Co., LPA, by Langdon D. Bell, 33 South Grant Avenue, Columbus, Ohio 43215-3927, on behalf of the Greater Cleveland Growth Association.

Snyder, Rakay & Spicer, by Gary A. Snyder, 316 Talbot Tower, Dayton, Ohio 45402, on behalf of Local Union 1347, International Brotherhood of Electrical Workers, AFL-CIO.

Richard L. Sites, 155 East Broad Street, Columbus, Ohio 43215-3620, on behalf of The Association for Hospitals and Health Systems, dba Ohio Hospital Association.

Bruce Weston, 169 West Hubbard Avenue, Columbus, Ohio 43215, on behalf of People Working Cooperatively.

William M. Ondrey Gruber, 2714 Leighton Road, Shaker Heights, Ohio 44120, and Vicki L. Deisner, 1207 Grandview Avenue, Room 201, Columbus, Ohio 43212-3449, on behalf of the Ohio Environmental Council.

Jodi M. Elsass-Locker, Assistant Attorney General, 77 South High Street, 29th Floor, Columbus, Ohio 43215 and Maureen Grady, 369 South Roosevelt Avenue, Columbus, Ohio 43209, on behalf of the Ohio Department of Development.

I. HISTORY OF THE PROCEEDINGS

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 Bell No. 3 of the 123rd General Assembly). Governor Bob Taft signed this legislation (hereinafter SB3) on July 6, 1999, and most provisions of SB3 became effective on October 5, 1999. Section 4928.31, Revised Code, requires each electric utility to file with the Commission a transition plan for the company's provision of retail electric service in Ohio. The plan must include a rate unbundling plan, a corporate separation plan, a plan to address operational support systems and any other technical implementation issues related to competitive retail electric service, an employee assistance plan, and a consumer education plan. On December 28, 1999, Cincinnati Gas & Electric Company (CG&E or the Company) filed its transition plan, appendices, schedules, testimony, and supplemental information, pursuant to SB3. On January 7, 2000, CG&E held a technical conference with interested parties on its consumer education plan and employee assistance plan.[1] Between January 26, 2000, and February 14, 2000, various parties filed objections to CG&E's transition plan filings. By entry of February 1, 2000, an additional technical conference was held on February 24, 2000. By entry of March 2, 2000, a second prehearing conference was scheduled for May 11, 2000, and the hearing was scheduled for May 22, 2000. At the request of the parties, the hearing was continued to May 30, 2000. Supplemental testimony was filed by CG&E on May 1 and 3, 2000. CG&E filed a second supplemental testimony of its witnesses on May 17, 2000. AK Steel Corporation (AK Steel), Buckeye Power, Inc. (Buckeye), and Ohio Rural Electric Cooperatives (OREC) filed testimony on May 24, 2000. Pursuant to Section 4928.32(B), Revised Code,

1 Also on January 21 and 25, 2000, CG&E held technical conferences on its operational support plan and rate unbundling plan. Between February 3 and 14, 2000, CG&E held technical conferences on the transition revenue, corporate separation, independent transmission, and shopping incentive portions of its transition plan.

the Staff Report of Exceptions and Recommendations (Staff Report) was filed on March 28, 2000.

Intervention was granted in this proceeding to the following parties: Kroger Company; The Ohio Council of Retail Merchants; Industrial Energy Users-Ohio; AK Steel; Ohio Partners for Affordable Energy; Shell Energy Services Company, LLC (Shell); The Ohio Manufacturers' Association; Ohio Consumers' Council; National Energy Marketers Association; OREC; Buckeye Power, Inc.; New Energy Midwest, LLC; WPS Energy Services, Inc., Dynegy, Inc.; Enron Energy Services, Inc.; Stand Energy Corporation; PP&L Energy Plus Co.; Exelon Energy; Strategic Energy; Columbia Energy Services Corp.; Columbia Energy Power Marketing Corp.; Mid-Atlantic Power Supply Association; The Cincinnati/Hamilton County Community Action Agency; The Supporting Council of Preventive Effort; Local Union 1347, International Brotherhood of Electrical Workers, AFL-CIO; The Association for Hospitals and Health Systems, d.b.a. The Ohio Hospital Association; American Municipal Power-Ohio, Inc.; People Working Cooperatively; Ohio Environmental Council, Ohio Department of Development (ODOD); and Greater Cleveland Growth Association.[2]

On May 8, 2000, a stipulation and recommendation on CG&E's transition plan (CG&E Ex. 60) was filed on behalf of CG&E; the staff, Ohio Consumers' Council; Ohio Council of Retail Merchants; Industrial Energy Users-Ohio; Kroger Company; The Ohio Manufacturers' Association; National Energy Marketers Association; New Energy Midwest, LLC; WPS Energy Services, Inc.; Enron Energy Services, Inc.; Dynegy, Inc.; Cincinnati/Hamilton County Community Action Agency; Supporting Council of Preventive Effort; The Ohio Hospital Association; People Working Cooperatively; Exelon Energy; Strategic Energy; Columbia Energy Services Corp.; Columbia Energy Power Marketing Corp.; Mid-Atlantic Power Supply; city of Cleveland; and American Municipal Power-Ohio. Stand Energy Corp. and Local Union 1347, International Brotherhood of Electrical Workers, AFL-CIO, subsequently signed the stipulation. Also on May 8, 2000, a stipulation on CG&E's employee assistance plan was filed on behalf of CG&E; the staff; Industrial Energy Users-Ohio; The Ohio Council of Retail Merchants; AK Steel, Kroger Company; The Ohio Manufacturers' Association;, The Ohio Hospital Association; Columbia Energy Services Corp.;, Columbia Energy Power Marketing Corp.; Exelon Energy; Strategic Energy; Mid-Atlantic Power Supply Assoc.; Ohio Consumers' Council; New Energy Midwest, LLC; WPS Energy Services, Inc.; and Enron Energy Services, Inc. A third stipulation on CG&E's independent transmission plan was filed on May 8, 2000, on behalf of CG&E; staff; Ohio Consumers' Council; The Ohio Council of Retail Merchants; Industrial Energy Users-Ohio; Kroger Company; The Ohio Manufacturers' Association; New Energy Midwest, LLC; WPS Energy Services, Inc.; Enron Energy Services, Inc.; Dynegy, Inc.; and The Ohio Hospital Association.

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2 PP&L EnergyPlus Co. was granted intervention in these proceedings but filed a notice of withdrawal on March 13, 2000. The motions to intervene on behalf of FirstEnergy, Ohio Edison, Cleveland Electric Illuminating Company, and Toledo Edison were denied on March 23, 2000.

The evidentiary hearings were held on May 30, and June 1, 2, 5, 6, 8, and 14, 2000. CG&E filed its rebuttal testimony on June 12, 2000. A local public hearing was held on June 8, 2000, in Cincinnati, Ohio. Initial briefs were filed on July 5, 2000, by CG&E, staff, AK Steel, Buckeye and OREC collectively, Shell, People Working Cooperatively, Ohio Consumers' Council, and Industrial Energy Users-Ohio. Reply briefs were filed on July 19, 2000, by CG&E, Staff, Shell, AK Steel, and Buckeye and OREC.

II. SUMMARY OF THE STIPULATIONS

A. The Transition Plan Stipulation

CG&E's transition plan stipulation provides, among other things, that:

(1) CG&E agrees to eliminate the $563 million of generation transition charge (GTC) recovery proposed in its transition plan.

(2) Approval of the stipulation shall be deemed to grant to CG&E accounting authority to create the necessary regulatory assets and defer costs and recover, through a regulatory transition charge (RTC), the following regulatory assets, including but not limited to existing regulatory asset balances on CG&E's books as of December 31, 2000, deferral of transition implementation costs, deferral of purchased power costs sufficient to maintain an adequate operating reserve margin as determined by CG&E, deferral of the litigation cost reimbursement, deferral of the Ohio Excise Tax overlap, and deferral or adjustment to the amortization schedule to reflect the effects of any shopping incentive. CG&E will not seek rate recovery of any costs deferred pursuant to such accounting authority that are not recovered through the RTC. During the market development period (MDP), for accounting purposes, there exists an implied residual RTC (unbundled generation charge less the shopping credit provided to customers). All regulatory assets created and recovered pursuant to this stipulation are in compliance with the requirements of Sections 4928.39 and 4928.40, Revised Code.

(3) There will be no further netting or adjustment of any kind to CG&E's transition cost recovery, including but not limited to any adjustment of RTC rates, or shopping credits through 2010, related to the sale, lease, or transfer by CG&E, or any of its affiliate, of any generating asset.

(4) CG&E will not end the MDP for residential customers prior to December 31, 2005.

(5) CG&E may end the MDP for all customer classes, except for the residential class, when 20 percent of the load of such class switches the purchase of its generation supply to a certified supplier. This provision is effective only to the extent that CG&E does not possess as an affiliate a retail electric generation provider, selling commodity generation at retail. This paragraph also requires that CG&E measure switching by kilowatt-hour (kWh) for the residential class, and average demand for all other customers. At the end of the MDP for each non-residential rate schedule, the rate freeze on non-switching customers and the rate freeze for transmission, distribution, and ancillary service on switching customers will end. The shopping credit established at the time of exercising choice for switching customers will continue as a credit on the bills of such switching customers through December 31, 2005, and will not be affected by the end of the MDP; and the RTC will be collected from all non-residential customers pursuant to the stipulation through December 31, 2010.

(6) CG&E will make the RTC charge load factor sensitive for rate classes billed on demand/energy rates. The RTC rate design will include a declining block structure where the first kWh per kW of billing demand will recover the RTC charge to the maximum extent possible.

(7) The parties agree with and adopt CG&E's independent transmission plan stipulation and CG&E's employee assistance plan stipulation.

(8) CG&E's exempt wholesale generator (EWG) is prohibited from selling power to an affiliate for resale at retail in CG&E's service territory, except through CG&E's requirements commodity service agreement (RCSA) and is prohibited from selling to an affiliate certified supplier on more favorable prices or terms than CG&E sells to a non-affiliate certified supplier. The information regarding the sales or transfers of power and ancillary services by the EWG to an affiliate shall be simultaneously posted with the execution

of any agreement for the sale or transfer on a publicly available electronic bulletin board. These provisions do not apply during the MDP to wholesale sales of power and ancillary services from the EWG to CG&E for CG&E standard offer customers under the RCSA. Approval of the stipulations constitutes a finding of fact by the Commission of the items necessary for the Federal Energy Regulatory Commission (FERC) to approve CG&E's EWG and RCSA. Namely: that the transaction under the RCSA will benefit consumers; does not violate any state law; would not provide the EWG any unfair competitive advantage by virtue of its affiliation with CG&E; and is in the public interest. Also, with respect to the transfer of CG&E generation assets to an EWG, allowing such generation assets to be an eligible facility for EWG ownership: will benefit consumers; is in the public interest; and does not violate state law.

(9) The following rates and terms, which reflect a five-percent reduction of CG&E's generation component, including RTC, shall be approved for the customers on residential rate schedules: the shopping credit on the bills of switching customers for the first 20 percent of the load per class for the calendar years 2001-2005 will be 5.0000 cents/kWh. The shopping credit on the bills of switching customers after 20 percent of the load per class switches for the calendar years 2001-2005 will be 3.9407 cents/kWh. For the calendars years 2006-08 all residential customers will pay an RTC rider of 0.6114 cents/kWh. Residential customers will pay no RTC after December 31, 2008. The kWh associated with Percentage of Income Payment Program (PIPP) customers will not be included in the determination of the first 20 percent of the switching customers' load per class. CG&E's EWG will not bid to supply the CG&E PIPP customers if such customers are aggregated and bid out as a group.

(10) The shopping credit for secondary distribution small is established as 5.3601 cents/kWh through December 31, 2005, for the first 20 percent of load that switch, and 4.5438 cents/kWh through December 31, 2005, for the remaining 80 percent. The RTC for secondary distribution small is established as 0.9499 cents/kWh from the end of the MDP through December 31, 2010. The shopping credit for secondary distribution large is established as 4.8145 cents/kWh through December 31, 2005, for the first 20 percent that

switch, and 4.2460 cents/kWh through December 31, 2005, for the remaining 80 percent. The RTC for secondary distribution large is established as 0.6719 cents/kWh from the end of the MDP through December 31, 2010. Secondary distribution small and secondary distribution large customers also have an identifiable shopping credit and RTC through December 31, 2010.

(11) The shopping credit for primary distribution is established as 3.8877 cents/kWh through December 31, 2005, for the first 20 percent that switch, and 3.5145 cents/kWh through December 31, 2005, for the remaining 80 percent. The RTC for primary distribution is established as 0.4562 cents/kWh from the end of the MDP through December 31, 2010. The shopping credit for transmission is established as 3.27 cents/kWh through December 31, 2005, for the first 20 percent that switch, and 3.0322 cents/kWh through December 31, 2005, for the remaining 80 percent. The RTC for transmission is established as 0.3043 cents/kWh from the end of the MDP through December 31, 2010. The shopping credit for lighting is established as 3.0057 cents/kWh through December 31, 2005, for the first 20 percent that switch, and 2.8272 cents/kWh through December 31, 2005, for the remaining 80 percent. The RTC for lighting is established as 0.2290 cents/kWh from the end of the MDP through December 31, 2010. Customers with contracts approved pursuant to Section 4905.31, Revised Code, who would otherwise be on the primary distribution, transmission, or lighting rate schedules shall have a one-time right through December 31, 2001, to cancel any such contract without penalty, provided that the customer remains a distribution customer of CG&E.

(12) CG&E will maintain certain of its existing contracts with providers of energy efficiency and weatherization contracts until December 31, 2005.

(13) The Universal Service Fund (USF) Rider and the Energy Efficiency Revolving Loan Fund Rider will be determined by the ODOD and approved by the Commission.

(14) CG&E agrees to accept any resolution of issues agreed to by all Operational Support Planning for Ohio Taskforce (OSPO) working group participants and to incorporate any such

changes in its transition plan except with respect to the following: CG&E will establish new minimum stay rules for residential customers; CG&E will amend its open access transmission tariff to add a new schedule for retail energy imbalance service; CG&E commits to use its best efforts to take the actions necessary to purchase supplier accounts receivable and to provide consolidated bill ready billing and supplier consolidated billing; and CG&E agrees to revise the collateral computation that it will use for establishing a certified supplier's creditworthiness. In addition, large commercial and industrial customers who return to CG&E's standard service offer other than through certified supplier default must provide at least 90-days advance notice to CG&E if they are planning to return to CG&E's standard service offer between May 1 and October 31 of each calendar year.

(15) CG&E will waive the switching fee for the first 20 percent of residential customers that switch the purchase of generation supply to a certified supplier during the MDP.

(16) CG&E will establish a technical task force to resolve ongoing technical issues that may arise due to restructuring implementation.

(17) CG&E will pay $1.5 million in litigation reimbursement to the active intervenor signatory parties.

(18) The parties agree that the stipulation is conditioned upon adoption in its entirety by the Commission without material modification by the Commission and, if the Commission rejects or modifies all or any part of this stipulation or imposes 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 file an application for rehearing or terminate and withdraw from the stipulation.

B. The Independent Transmission Plan (ITP) Stipulation

On May 8, 2000, CG&E filed its ITP stipulation. CG&E's ITP stipulation provides that:

(1) The sum of CG&E's transmission and distribution rates shall remain frozen during the MDP such that if CG&E's

unbundled transmission rate increases, its unbundled distribution rate shall decrease by the inverse amount. CG&E will also perform and file a FERC seven-factor test by March 31, 2001.

(2) Until the Midwest Independent System Operator (MISO) becomes operational, CG&E and its affiliates shall provide for transmission service for both affiliates and non-affiliates on the same terms and conditions, consistent with Open Access Same-Time Information System (OASIS) and FERC Standards of Conduct. CG&E will also provide distribution service only under the rates, terms and conditions stated in its distribution tariffs.

(3) A transmission customer receiving retail commodity service will have the same priority for requesting and receiving network transmission service as an existing network customer under CG&E's open access transmission tariffs (OATT).

(4) Retail customers or their certified suppliers who take 138 kV transmission service are entitled to receive either network or firm point-to-point transmission service or any other transmission service for which the customer is eligible.

(5) CG&E agrees to participate in the collaborative process under FERC Order 2000, 89 FERC Section 61,285, to discuss integrating the facilities of the transmission-owning utilities in Ohio so as to achieve the objectives listed in Rule 4901:1-20-17(B)(3), O.A.C., and Section 4928.12, Revised Code. To the extent not resolved in the Commission proceeding: *In the Matter of the Commission's Investigation Into the Adequacy and Availability of Electric Power for the Summer Months of 2000 from Ohio's Investor-Owned Electric Utility Companies,* Case No. 00-617-EL-COI, CG&E will enter into a joint stipulation with all of the other transmission-owning utilities in Ohio to submit the subject of how to achieve the objectives listed in Rule 4901:1 -20-17(B)(3), O.A.C., and related issues to a separate joint Commission hearing dealing solely with that subject as part of their respective transition plan application proceedings; or if such other transmission-owning utilities will not so agree, to jointly request, together with all of the other intervenors in this case, that the Commission order the other transmission-owning utilities to participate in such a hearing. CG&E will also participate in a statewide collaborative process to resolve

the transmission seams issues in Ohio to effectuate the policy objectives of Section 4928.12, Revised Code.

C. The Employee Assistance Plan (EAP) Stipulation

On May 8, 2000, CG&E filed its EAP stipulation. No parties oppose the EAP stipulation. The EAP stipulation provides that:

(1) CG&E's EAP, as originally filed in this case, be found to comply with Section 4928.31, Revised Code, and Rule 4901:1-20-03, O.A.C., Appendix C.

(2) The parties who intervened in CG&E's transition plan proceeding withdraw all of their preliminary objections relating to CG&E's EAP. Specifically, Coalition for Choice in Electricity (CCE)[3] withdraws preliminary objections Section D, including D-1 through D-3, and Industrial Energy Users-Ohio, Cincinnati/Hamilton County Community Action Agency and Supporting Council of Preventive Effort withdraw their adoption of CCE's preliminary objections Section D

(3) To the extent that the parties have representatives serving on the electric employee assistance advisory board established under Section 4928.431, Revised Code, the parties agree that their representatives will recommend to the Commission that the Commission approve CG&E's EAP.

(4) The parties agree that nothing herein resolves or waives any party's right to present evidence and arguments in these cases regarding CG&E's request to recover costs associated with employee assistance incurred under CG&E's EAP, in accordance with Section 4928.39, Revised Code.

[3] CCE is composed of The Ohio Manufacturers' Association, The Industrial Energy Users-Ohio, The Ohio Council of Retail Merchants, Ohio Partners for Affordable Energy, Enron Energy Services, Inc., Supporting Council of Preventative Effort, Corporation of Ohio Appalachian Development, New Energy Midwest, LLC, Greater Cleveland Growth Assoc., Ashtabula County Community Action Agency, and WPS-Energy Services, Inc.

III. COMMISSION REVIEW OF THE STIPULATIONS, CG&E'S TRANSITION PLAN COMPLIANCE WITH SECTION 4928.34, REVISED CODE, AND ISSUES RAISED BY PARTIES OPPOSING THE STIPULATIONS.

A. CG&E's Operations Support Plan (OSP)

On November 30, 1999, the Commission issued an entry in Case No. 99-1141-EL-ORD, directing Ohio's investor-owned electric utilities and interested stakeholders to participate in a taskforce for the development of uniform business practices and electronic data interchange (EDI) standards. Pursuant to this directive, the Commission's staff created the OSPO taskforce. On May 15, 2000, numerous OSPO participants filed a *pro forma* certified supplier tariff (*pro forma* tariff) and a stipulation (OSPO stipulation) in each utility's transition plan case. The *pro forma* tariff contains a number of service regulations on which the parties were able to agree. These relate to: supplier registration and credit requirements, end-use customer enrollment process, end-use customer inquiries and requests for information, metering services and obligations, load profiling and scheduling, transmission scheduling agents, confidentiality of information, voluntary withdrawal by a competitive retail electric service (CRES) provider, liability, and alternative dispute resolution. In the OSPO stipulation, the parties specifically request the Commission to resolve issues in four general areas: (1) energy imbalance service, (2) minimum stay requirements for residential and small commercial customers returning to standard offer service, (3) consolidated billing and purchase of receivables, and (4) adoption of EDI standards. On May 18, 2000, the Commission issued an entry initiating a generic docket (Case No. 00-813-EL-EDI) to establish procedures for parties desiring to file comments and reply comments regarding the OSPO stipulation and *pro forma* tariff. On July 20, 2000, the Commission issued a finding and order approving the OSPO stipulation and resolving the four issues left unresolved.

Under the transition plan stipulation in this case, CG&E agrees to incorporate into its transition plan, the OSPO stipulation and *pro forma* tariff with exception of certain terms that the stipulating parties have agreed will apply to CG&E. These terms include: (1) the establishment of new minimum stay rules for residential customers; (2) amendments to CG&E's open access transmission tariff to add a new schedule for retail energy imbalance service; (3) using CG&E's best efforts to take the actions necessary to purchase certified supplier accounts receivable and to provide consolidated bill ready billing and supplier consolidated billing; and (4) agreeing to revise the collateral computation that it will use for establishing a certified supplier's creditworthiness. Shell contends that allowing CG&E to exempt these four areas from compliance with the OSP stipulation will undermine the entire OSP process, preclude universal practices that the Commission tried to establish through the OSP task force, and will deter the development of effective competition.

Under CG&E's minimum stay requirement, during the MDP, a residential customer who takes generation service from CG&E for any part of the period May 15

through September 15 (the stay out period) must remain a standard offer customer through May 14 of the following year before such customer may elect to switch to another supplier, provided that: (1) customers may switch suppliers at any time if they have not previously switched; (2) following the stay out period through the following May 14, returning customers may switch to another supplier at any time for the remainder of the MDP; and (3) during the first year of the MDP, residential customers returning to CG&E's standard offer service will not be subject to a minimum stay. Further, if a certified supplier defaults, an end-use customer has a one billing cycle time period in which to select another certified supplier. If the end-use customer fails to select another certified supplier by the end of one billing cycle, the end-use customer will remain on CG&E's standard service offcer and be subject to any applicable minimum stay requirement.

Shell contends that CG&E's proposed minimum stay requirement violates SB3, as it contends SB3 contemplates no limitation on a residential customer's freedom of movement between service options even if those movements involve a return to standard offer service. Shell also claims that CG&E's minimum stay provision could remove large numbers of such consumers from the competitive market place for substantial periods of time and reduce competition.

With respect to the issue of CG&E's minimum stay requirements, we defer to our ruling in our July 19, 2000 finding and order in *In the Matter of the Establishment of Electronic Data Exchange Standards and Uniform Business Practices for the Electric Utility Industry*, Case No. 00-813-EL-EDI (hereafter 00-813). In that order, we approved the use of minimum stay requirements conditioned upon the development of a market-based "come and go" rate alternative service. See page 13 of our finding and order in 00-813. We also prohibited the imposition of a mandatory stay when a customer defaults to the utility's standard offer service due to the default of the supplier of electricity. We also established a uniform penalty free return to standard offer service policy and a uniform period throughout Ohio in which companies can impose a summer/stay period of May 16th through September 15th. Accordingly, the Commission will approve the stipulation's treatment of minimum stay requirements conditioned upon certain modification so that CG&E's minimum stay requirements are in compliance with our order in 00-813 and any entry on rehearing therefrom.[4]

Shell also objected to CG&E's retail energy imbalance service proposal, which it argues would create a narrow energy imbalance bandwidth for transmission scheduling agents. Shell contends that these bandwidths present an intolerable approach to energy imbalances for those transmission-scheduling agents trying to serve weather sensitive residential loads. Shell claims that the stipulation's energy imbalance service

[4] We note that on August 24, 2000, CG&E filed a request for exception in these proceedings regarding minimum stay requirements. Inasmuch as the issue raised in that request are the same issues raised in the company's application for rehearing in 00-813, the Commission will address the issues in the entry on rehearing.

proposal would achieve an anticompetitive outcome the Commission should avoid, namely, imbalances as an increasing source of penalty costs for residential marketers and an increasing revenue source for CG&E.

Under the transition plan stipulation, CG&E will amend its OATT to add a new schedule for retail energy imbalance service. In addition, CG&E will amend its OATT application procedures to allow a "description of purchased power designated as network resource including source control area location, transmission arrangements and delivery point(s) to the transmission provider's transmission system." CG&E will also amend its OATT to allow transmission customers to designate new resources on a day-ahead basis, provided that there exists available transfer capacity, that it is subject to the approval of the transmission provider, and that the transmission customer relinquishes network transmission rights to a designated resource once a new resource is designated.

On this issue, only Shell is actively opposing the CG&E transition case stipulation while the other intervening marketers signed the CG&E transition case stipulation. Further, Shell offered no evidence at hearing to support its position. We believe that CG&E's proposal for energy imbalances is reasonable. As we noted in 00-318, although a single standard for operations is a goal which we would hope to eventually achieve in Ohio, we recognize that a great many differences currently exist between the electric utilities, who have traditionally operated in isolation with their own unique computer systems and processes, and that some differences will need to be accepted by suppliers if Customer Choice is to become a reality on January 1, 2001. We also considered the fact that each utility will only need to have an energy imbalance mechanism until its transmission assets become part of a functioning RTO, at which time, the RTO would become responsible for energy imbalance service. Since CG&E is anticipated to be in an RTO by 2001, we do not believe that uniformity with all the other utilities in the interim is crucial to the development of the Ohio choice market with the changes to CG&E's OATT set forth in the stipulation. Therefore, we do not find CG&E's energy imbalance service proposal to be anticompetitive.

Shell also raised an issue related to CG&E's proposal for consolidated billing. Under the OSP, CG&E will use its best efforts in taking the actions necessary to implement purchasing of supplier accounts receivable by June 1, 2001, to implement consolidated bill ready billing by January 1, 2002, and to implement supplier consolidated billing by June 1, 2002. These provisions are based on CG&E's best efforts and do not require CG&E to take any action that would hinder or delay the implementation of the competitive framework necessary to facilitate customer choice in its service territory. Further, the implementation of these billing functions is not contingent upon the Commission making a determination under Section 4928.04, Revised Code, with respect to the unbundling of the billing function, but shall proceed independent of any supplier compensation or CG&E credit for such billing service.

Shell contends that the transition plan stipulation makes no provision for a billing credit from CG&E in the event that a customer decides to take its billing services from a third party. Shell argues that it intends to perform consolidate billing for its customers and that permitting a year lag between implementation of utility and supplier consolidated billing would place Shell at a competitive disadvantage against those marketers that rely on CG&E's billing functions. Shell also complains that the consolidated billing proposals would preclude marketers from establishing a communication link in order to build supplier name recognition and consumer loyalty.

As we determined in 00-813, we have adopted a target date for consolidate bill-ready billing by no later than June 1, 2002, and a target date for supplier consolidated billing by July 1, 2002. Having determined these dates are reasonable and the fact that CG&E's proposal agrees to dates earlier, we find the stipulated target dates by CG&E are reasonable.

Shell contends that CG&E's OSP would impose additional collateral requirements on third-party suppliers beyond those adopted in the OSP *pro forma* tariff. Shell contends that the proposed collateral calculation relies too heavily on CG&E-generated usage estimates which, in the case of new market entrants, would amount to guess work. Shell argues that it is unclear how parties could verify either the shopping credit calculations or pricing data used by CG&E to establish these additional collateral obligations. Also, Shell claims that there is no support for why such additional collateral is needed.

CG&E notes that its OSP provides for implementing a collateral calculation that will be applicable to certified suppliers who serve retail customers in CG&E's service territory and is intended to cover CG&E's risk as the default supplier. CG&E will calculate the amount of collateral to cover its risk as the default supplier by multiplying 45 days of CG&E's estimate of the summer usage of the certified supplier's customers by a price set at the highest monthly average megawatt hour price for CG&E off-system purchased power from the prior summer less the average shopping credit that CG&E will receive due to the defaulting certified supplier's customers returning to CG&E's standard service offer.

On this issue, Shell offered no evidence to support its position. On review, we find CG&E's proposal quantifiable and not, as suggested by Shell, mere guess work. We also find that a collateral calculation applicable to certified suppliers who serve retail customers in CG&E's service territory will cover CG&E's risk as the default supplier. Finally, CG&E will be expected to be able to verify its charges to any affected certified supplier or retail customer upon request.

Based on our findings above, we believe the company's operational support plan set forth in the stipulation, subject to modification to comply with 00-813, is reasonable and appropriately addresses operational support systems and technical implementation procedures. Accordingly, we find the transition plan meets the statutory requirements of Section 4928.34(A)(9), Revised Code. We also note that CG&E's transition plan filing included a proposed billing format. The Commission directs the staff to finalize a bill format which includes a "price to compare" (which is the price for an electric supplier to beat in order for the customer to save money) for residential and small commercial customers. As part of our approval of CG&E's transition plan, the company must meet staff's requirements regarding billing format.

B. CG&E's Unbundling Plan

Section 4928.31(A)(1), Revised Code, requires that the filed transition plans contain a rate unbundling plan that separates existing, bundled utility rates into their component parts consistent with the provisions of Section 4928.34(A), Revised Code, and applicable Commission rules. Discussed below are the various requirements regarding unbundling contained in Section 4928.34(A), Revised Code, CG&E's plans for unbundled rates, and AK Steel's objections.

Provisions of Section 4928.34(A), Revised Code

1. Unbundled Transmission Component (Section 4928.34(A)(1), Revised Code)

Under this section, the Commission must determine whether the unbundled components for the electric transmission component of retail electric service equal the tariff rates determined by the FERC in effect on the date of approval of the transition plan. The unbundled transmission component must include a sliding scale of charges to ensure that refunds determined or approved by the FERC are flowed through to retail electric customers.

CG&E states that all stipulating parties have agreed that CG&E's rate unbundling plan satisfies the statutory requirements of Section 4928.34(A)(1), Revised Code (CG&E Ex. 60 at 3, 5, 6). As described by CG&E witness John P. Steffen, CG&E developed its unbundled transmission and ancillary services rates from CG&E's current FERC approved OATT (CG&E Ex. 12 at 8, 16-18). CG&E's proposed unbundled transmission rates are set out in Schedules UNB-1, UNB-7.1 and UNB-7.2 (CG&E Ex. 23). Consistent with Section 4928.34(A)(1), Revised Code, and Rule 4901:1-20-03, App. A, Part (C)(2), O.A.C., these unbundled components reflect the OATT rates approved by FERC, which rates are currently in effect and are not subject to refund (CG&E Ex. 12 at 7).

Consistent with Rule 4901:1-20-03, App. A, Part (C)(2)(a), O.A.C., CG&E has unbundled and set out as separate components in its proposed tariffs, Schedules UNB-1,

7.1 and 7.2, the following ancillary services: (1) Scheduling, System Control and Dispatch, (2) Reactive Supply and Voltage Control, (3) Regulation and Frequency Control, (4) Spinning Reserve, and (5) Supplemental Reserve (CG&E Ex. 23). The rates for these services are based on the FERC rates currently in effect (CG&E Ex. 12 at 7).

2. Unbundled Distribution Component (Section 4928.34(A)(2), Revised Code)

This section requires that the unbundled components for retail electric distribution service in the rate unbundling plan equal the difference between the costs attributable to the Company's transmission and distribution rates based on the Company's most recent rate proceeding, and the tariff rates for electric transmission service determined by the FERC under division (A)(1) of this section.

CG&E states that, consistent with Section 4928.34(A)(2), Revised Code, and Rule 4901:1-20-30, App. A, Part (C)(3), O.A.C., the unbundled distribution rate component developed by CG&E is the difference between the sum of the transmission and distribution components of rates in effect on October 5, 1999, as further adjusted to reflect the effect of tax changes attributable to amendment of Section 5727.111, Revised Code, by SB3 and the unbundled transmission rate determined pursuant to Section 4928.34(A)(1), Revised Code (CG&E Ex. 12 at 7). CG&E functionalized costs to generation, distribution, transmission and other costs (CG&E Ex. 12 at 9-11). As with the unbundled transmission rate components, the resultant distribution rates are set out in Revised Schedules UNB-1, UNB-7.1 and UNB-7.2[5] (CG&E Ex. 23).

3. Other Unbundled Components (Section 4928.34(A)(3), Revised Code)

This section requires that all other unbundled components required by the Commission in the rate unbundling plan must equal the costs attributable to the particular service, as reflected in the Company's schedule of rates and charges.

CG&E contends that, consistent with the provisions of Section 4928.34(A)(3), Revised Code, and Rule 4901:1-20-03, App. A, Part (C)(4), O.A.C., existing rates are unbundled to separate out certain components to be reflected in several riders for CG&E. The stipulations provide for a Universal Service Fund (USF) Rider and an Energy Efficiency Revolving Loan Fund (EERLF) Rider set out in Sections 4928.51 and 4928.61, Revised Code, for CG&E (CG&E Ex. 60 at 15). On July 13, 2000, ODOD filed an application with the Commission pursuant to Sections 4928.52 and 4928.62, Revised Code, regarding the establishment of USF and EERLF riders. ODOD has determined that the USF rider should be $0.0002442/kWh and that the EERLF rider should be

5 In the case of customers on special contracts, the charges for distribution, transmission, ancillary services, kWh tax, the universal service fund, and the energy efficiency fund are those charges that would apply if the customer were served on an applicable rate schedule (CG&E Ex. 23, at UNB-7.1 at 17-19).

$0.00010758/kWh. Attached to the application were supporting calculations to justify the riders. ODOD has allocated to CG&E $4,900,898 of the total $64.6 million annual target for USF funding and $2,159,262 of the total $15 million annual target for EERLF funding (ODOD application, attachments D and E). In its application, as amended on July 17, 2000, ODOD has requested that the USF rider take effect September 1, 2000, and the EERLF take effect January 1, 2001, both on a bills rendered basis.

4. Unbundled Generation Component (Section 4928.34(A)(4), Revised Code)

Prerequisite (A)(4) requires that the unbundled components for retail electric generation service in the rate unbundling plan must equal the residual amount remaining after the determination of the transmission, distribution, and other unbundled components, and after any tax related adjustments as necessary to reflect the effects of the amendment of Section 5727.111, Revised Code.

CG&E states that consistent with the provisions of Section 4928.34(A)(4), Revised Code, the component for retail electric service in CG&E's unbundled rates is the residual amount remaining after determination of the transmission, distribution, and other unbundled components, as further adjusted to reflect the effect of tax changes attributable to amendment of Section 5727.111, Revised Code, by SB3. CG&E states that, as required by Section 4928.40(C), Revised Code, CG&E has calculated a five percent reduction in the unbundled generation component for residential customers. CG&E and the parties to the stipulations have agreed to such an adjustment for residential customers (CG&E Ex. 50 at 11-12). CG&E states that, under the stipulations, it has agreed to forego its statutory right to seek reduction of this discount during the MDP because all shopping credits have been set and fixed during the MDP and are not subject to adjustment (CG&E Ex. 60 at 11-13).

5. Cap on Unbundled Components (Section 4928.34(A)(6), Revised Code)

This provision requires that the total of all unbundled components is capped and, during the MDP, will equal the total of rates in effect on the day before the effective date of SB3. The cap will be adjusted for changes in taxes, the USF rider, and the temporary rider under Section 4928.61, Revised Code.

CG&E argues that consistent with Section 4928.34(A)(6), Revised Code, and Rule 4901:1-20-03, App. A, Parts (C)(5)(b) and (D), O.A.C., the total of all unbundled components of the CG&E's unbundled rates are capped, with limited statutory exceptions, during the MDP. CG&E contends that the total of all unbundled components of existing rates equals the rates and charges of the bundled components except for adjustments to reflect changes in taxation effected by SB3, the USF and EERLF riders (CG&E Ex. 12 at 11-12). Further, CG&E states that it initially unbundled existing rates to reflect components representing its transition charges, including separation of RTC and GTC

(CG&E Ex. 12 at 31-40; and CG&E Ex. 23 at UNB-1, UNB-7.1). However, the stipulations have substantially modified the originally proposed unbundled rates for RTC and GTC (CG&E Ex. 60 at 11-14). The result of the stipulations is that CG&E is no longer requesting any GTC recovery or generation-related cost deferrals to the next rate case. Instead, CG&E is requesting an RTC that reflects new and existing regulatory assets approved by the Commission.

6. Compliance with Commission Rules (Section 4928.34(A)(7), Revised Code)

This section requires the rate unbundling plan to comply with any rules adopted by the Commission under division (A) of Section 4928.06, Revised Code[6]. The rules adopted by the Commission regarding unbundling of rates are set forth in Rule 4901:1-20-03, O.A.C., Appendix A. The portions of the Appendix that address the unbundling of separate rate components are covered in the discussion above of the various rate unbundling provisions included in the Company's plan, as amended by the stipulation.

CG&E's compliance with the provisions of Parts (A) through (D) of Appendix A is discussed in the immediately preceding sections, which address the unbundling of the separate rate components. Compliance with Parts (E), (F) and (G) are addressed by CG&E witnesses Steffen, Morris, Jett, and Pefley and are supported by the UNB schedules, the OSP stipulation in 00-813, and the transition plan stipulation.

7. Elimination of Gross Receipt Tax Effect (Section 4928.34(A)(15), Revised Code)

This Section requires that all unbundled components be adjusted to reflect the elimination of the gross receipts tax imposed by Section 5727.30, Revised Code.

CG&E states that the stipulations permit CG&E to defer and recover through the RTC the financial reporting impact of the Ohio excise tax overlap (CG&E Ex. 60 at 6; and CG&E Ex. 77 at 4). CG&E believes that this mechanism is envisioned by, and consistent with, the requirements of Section 4928.34(A)(6), Revised Code, which, in part, provide that the effect on customer rates resulting from such tax overlap "shall be addressed by the Commission through accounting procedures, refunds, or an annual surcharge or credit to customers, or through other appropriate means, to avoid placing the financial responsibility for the difference upon the electric utility or its shareholders."

6 Section 4928.06, Revised Code, directs the Commission to enact rules to effectuate commencement of competitive retail electric service. The Commission has enacted rules in compliance with this statute through its various generic rule proceedings.

AK Steel's Objections to CG&E's Unbundling Plan

AK Steel's primary objection to CG&E's unbundling plan is that CG&E's functional cost-of-service study that is used to unbundle retail rates assigns distribution costs to transmission service voltage customers (rate Schedule TS) who do not use the distribution system. AK Steel states that CG&E's unbundling analysis is based on the CG&E's cost-of-service study submitted by CG&E in its most recent electric rate case in 1992, Case No. 92-1464-EL-AIR (Tr. I at 8). This study is presented in Schedule UNB-4 of the Company's filing in this case.

AK Steel states that, as a result of the unbundling analysis required by SB3 and the Commission's regulations, the original cost-of-service study had to be unbundled and functionalized into distribution, transmission, and generation cost functions. Some of the expenses and plant accounts in the original 1992 cost of service study were already reflected on a functionalized basis. For example, direct production plant, distribution plant, and transmission plant were separately identified in the cost-of-service study and allocated to customer classes on a functionalized basis. Other costs, however, such as administrative and general expenses (A&G) were not functionalized in the original study, since there was no need to do so in order to produce bundled rates. To fully functionalize all costs, in order to develop unbundled rates, AK Steel contends it was necessary for the Company to develop a functional analysis of the remaining expenses and plant accounts; principally, A&G expenses, general and intangible (G&I) plant, common plant, and property taxes.

AK Steel argues that, although CG&E's functional cost analysis is based on the 1992 cost-of-service study (UNB Schedule 4), AK Steel witness Baron testified that CG&E has erred in the development of its unbundled distribution, transmission and generation costs because it has inappropriately functionalized A&G expenses, property taxes, G&I plant, and common plant. AK Steel believes that the errors associated with this misfunctionalization produce unjust and unreasonable rates, particularly for the transmission service class (AK Steel Ex. 13 at 41). For example, AK Steel contends that CG&E has produced unbundled tariffs for the transmission service voltage class that include a distribution charge when there are no distribution costs associated with serving this class (Tr. I at 71). CG&E's proposed unbundled tariff for Rate Schedule TS reflects a charge of $0.502 per kW for distribution service. According to AK Steel, the distribution rate for Rate Schedule TS should be $0 (AK Steel Ex. 13 at 9).

AK Steel contends that in the 1992 cost-of-service study there were 34 customers taking service on Rate Schedule TS. Those customers were assigned $15,746 of net distribution plant costs, exclusively associated with meters. No such equipment (other than $15,746 of meters) is required to serve the 34 TS customers. In its unbundling analysis, CG&E assigned $473,979 to Rate Schedule TS for G&I plant associated with distribution (Tr. I at 72). The Company assigned $473,979 of G&I plant to support a distribution investment of $15,746 (Tr. I at 73). According to AK Steel, this amounts to a G&I support ratio of 30 times the underlying distribution net plant. AK Steel further

argues that CG&E only assigned $361,244 of general and intangible plant to the Secondary Distribution Small customer class to support over $27 million in distribution net plant (Tr. I at 73). The G&I support ratio for this class is .013 or 1.3 percent.

AK Steel asserts that similar implausible results are produced in the Company's analysis of A&G expenses that support distribution costs. In the development of its unbundled rates in this proceeding, the Company has assigned $485,569 of customer account expense to rate schedule TS to service 34 transmission service customers (Tr. I at 6-12). At the same time, the Company has assigned $370,077 to the Secondary Distribution Small class to support customer billing for 31,000 customers (Tr. I at 79). AK Steel argues further that, in CG&E's unbundling analysis, the Company has calculated that $2,231,007 of property taxes (out of this $6.2 million total) is associated with distribution property for Rate TS, even though it only has $15,746 of net distribution plant that is associated with meters. According to witness Baron, the underlying allocation of costs that is reflected in current bundled rates (from the 1992 cost of service study) is the appropriate source to functionalize costs for use in unbundling in this proceeding. AK Steel requests that CG&E's unbundling and functional cost analysis be rejected.

AK Steel also argues that, should the Commission find that CG&E is entitled to receive regulatory transition costs, these charges must be allocated on a cost-of-service basis.

Commission Conclusion

CG&E and our staff argue that AK Steel's arguments against the Company's rate unbundling plan are without merit. After reviewing the arguments, the Commission agrees. As testified to by Company witness Steffen, CG&E began its rate unbundling with its current transmission and distribution revenue requirements which were computed based upon a functionalization review of the cost-of-service study in CG&E's last rate case, Case No. 92-1464-EL-AIR (CG&E Ex. 12 at 8-9). The revenue requirements were adjusted for the effects of SB3 tax changes. Following the formula set forth in SB3, CG&E subtracted the transmission component revenue requirement, determined by applying FERC tariff rates pursuant to Section 4928.34(A)(2), Revised Code, from the combined transmission and distribution revenue requirement, to arrive at the unbundled distribution component revenue requirement (CG&E Ex. 23 at UNB-6.1 at 11). Company witness Steffen, at hearing, stated that the unbundled costs are a direct result of following the statutory requirements of SB3 (Tr. I at 75).

We find that the unbundling plan agreed to by the parties to the transition plan stipulation is reasonable and consistent with Section 4928.34, Revised Code. To adopt AK Steel's position would result in altering the cost allocations established in the 1992 rate proceeding and shift costs among the different rate classes in a manner not intended by the legislation. Adoption of AK Steel's recommendations could result in rates for certain classes that may exceed the statutory cap set forth in Section 4928.34(A)(6), Revised Code. The evidence of record shows that the unbundling plan

proposed by the Company follows the intent of Section 4928.34, Revised Code. In unbundling the rates for each customer class, the Company had to follow the requirements of SB3, which not only dictated the unbundled transmission rate to be a FERC rate, but also necessitated the use of the CG&E 1992 cost-of-service study. Although certain allocations of costs may appear to be incongruous, we find that CG&E has followed the statutory scheme in unbundling its rates. Further, one of the purposes of this proceeding is to establish unbundled rates based on the already adopted cost-of-service study, not to alter that study or to determine whether a more appropriate allocation of costs should be used to unbundle rates. To do so would clearly be inconsistent with the mandate of Section 4928.34(A)(6), Revised Code, which requires the unbundling of the rates in effect on the day before the effective date of SB3. We also find that the transition charges for each class proposed in the stipulation reflect the cost allocations from the Company's last rate case and, accordingly, are based on the 1992 cost-of-service study. Therefore, we find such allocation of regulatory transition costs to be reasonable.

With regard to the establishment of the USF and EERLF riders, we note the Commission by entry issued on August 17, 2000 approved a USF rider for CG&E of $0.0002442/kWh effective September 1, 2000, and a EERLF rider of $0.00010758/kWh effective January 1, 2001.

After reviewing the testimony and exhibits submitted by CG&E that support the proposed unbundled rates, and having considered and rejected the objections and arguments raised by AK Steel, we find that the Company has satisfied the statutory requirements for the unbundling of rates set forth in divisions (A)(1) to (7), (15) of Section 4928.34, Revised Code.

C. Transition Revenues

Section 4928.34 (A)(12), Revised Code, requires that the transition revenues authorized under Sections 4928.31 to 4928.40, Revised Code, must be the allowable transition costs of the Company pursuant to Section 4928.39, Revised Code, and that the transition charges for customer classes and rate schedules are the charges under Section 4928.40, Revised Code. Section 4928.39, Revised Code, requires the Commission to determine the total allowable amount of the Company's transition costs to be received by the Company as transition revenues. Such transition costs must meet the following criteria:

(1) The costs were prudently incurred.

(2) The costs are legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state.

(3) The costs are unrecoverable in a competitive market.

(4) The utility would otherwise be entitled an opportunity to recover the costs.

Section 4928.40(A), Revised Code, provides, among other things, that a company may create additional regulatory assets, with notice and an opportunity to be heard through an evidentiary hearing, as long as the company does not increase the level of regulatory transition charges above those contained in the company's existing rates.

CG&E's request for transition cost recovery in its original transition plan filing totaled $1.518 billion, including carrying charges of $311 million, and deferral and recovery of $280 million of transition implementation costs, including carrying charges, until its next distribution rate case (CG&E Ex. 65 at Ex. WPLJP-8a). CG&E's request included $563 million of generation plant transition costs (CG&E Ex. 13 at 12). Furthermore, CG&E sought the right to modify its request for transition revenues for the costs of power purchased to provide reliable service.

According to CG&E, the stipulations significantly modify and reduce CG&E's request for transition cost recovery to $884 million plus carrying costs and purchased power deferrals necessary to maintain an adequate operating reserve margin (CG&E Ex. 77 at 4-5, Ex. LJP-R-1, Ex. LJP-R-2). The transition plan stipulation provides CG&E with no GTC recovery and places the electricity market price risk entirely on CG&E. The stipulations do provide CG&E recovery of previously approved regulatory assets totaling $401 million and new regulatory assets totaling at least $483 million (CG&E Ex. 60 at 6-7; CG&E Ex. 50 at Ex. JPS-SUP-5; and CG&E Ex. 77 at Ex. LJP-R-2).

CG&E states that the difference between CG&E's original request for $364 million of previously approved regulatory assets and the request, as modified by the stipulations, of $401 million is broken down as follows: $26,571 for grossed-up carrying charges recommended by staff in its Staff Report; an adjustment of $1,548,386 for regulatory liabilities for three percent and four percent investment tax credit related to generation; an adjustment to the Statement of Financial Accounts Standards (SFAS) 109 balance of $27,299,428 to properly reflect IRS normalization rules; an adjustment to restore the regulatory asset balance previously reduced by CG&E due to staff's recommendation F-9 on page 30 of the Staff Report for franchise and municipal taxes; and an update from estimated to December 31, 1999 year end balances (CG&E Ex. 50 at 43-44, and Ex. JPS-SUP-5).

The new regulatory assets requested include the $115 million, before carrying costs, of transition implementation costs for which CG&E originally sought deferral,

and deferral of the shopping incentive, Ohio excise tax overlap, and purchased power costs[7] (CG&E Ex. 12 at JPS-5; CG&E Ex. 60 at 6-7, and CG&E Ex. 77 at 3-5, LJP-R-1).

Set forth below are the issues and objections raised by AK Steel and Shell to the establishment of regulatory transition charges and the recovery of transition revenues as proposed by the parties to the transition plan stipulation.

1. Stranded Generation Benefits

AK Steel argues that, while CG&E has withdrawn its claim for GTC and now claims only RTC costs, an analysis of the generation costs shows that CG&E has stranded generation benefits which must be "netted" against any RTC claimed by the CG&E. AK Steel argues that stranded benefits occur when unregulated market prices will be so high as to provide excessive returns on the investments made under regulation. According to the testimony of AK Steel witness Falkenberg, these stranded benefits amount to $957 million (AK Steel Ex. 15 at 64). Mr. Falkenberg testified that when only three mistakes in the CG&E study were corrected, the Company had stranded generation benefits (*Id.* at 49).

Mr. Falkenberg also took issue with CG&E's market price model used to determine the value of generation assets. Mr. Falkenberg developed an independent market price and stranded cost forecast that was substantially different from that developed by CG&E witness Pifer. Mr. Falkenberg testified that only three variables are key in the determination of market price forecasts. They are: (1) fuel prices; (2) cost of new capacity; and (3) reserve margins (*Id.* at 10). Mr. Falkenberg testified that recent natural gas prices from futures contracts and current trading illustrates that gas prices used in CG&E forecast are simply too low.

With regard to forecasting cost and performance of new merchant plants, Mr. Falkenberg pointed out that Dr. Pifer's study erred in its computation of the real fixed charge rate, the variable that determines the annual cost of ownership of new plants, and has a direct impact on market prices. Mr. Falkenberg contends that Dr. Pifer's forecast understates these costs by 16 percent (AK Steel Ex. 15 at 38). Mr. Falkenberg contends that this mistake alone overstates CG&E's stranded costs by $183 million in Dr. Pifer's study (*Id.* at 39).

On the subject of reserve margins, Mr. Falkenberg presented a forecast premised on a 15 percent reserve margin, a level Mr. Falkenberg considers reasonable and the

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7 The $115 million of new regulatory assets includes $3 million for Transition Plan Case expense, $50,000 for the Commission Transition Cost Consultant, $4.6 million for the Commission mandated Consumer Education Program costs, $65 million for upgrades to CG&E's information and customer service systems, $15 million of otherwise unrecoverable costs associated with the MISO, and $28 million of costs to establish the EWG (CG&E Ex. 12 at Ex. JPS-5).

consensus of experts' opinions (AK Steel Ex. 15). This is in contrast to Dr. Pifer's Energy Only (no reserve margin) market concept. Mr. Falkenberg argues that Dr. Pifer's analysis suggests that reliability will be just fine as reserve margins drop to two percent in the years ahead.

Beyond the market price model, AK Steel argues that CG&E ignores the plants that, even under its own calculations, have stranded benefits. According to Dr. Pifer's study, only the Zimmer and Woodsdale combustion turbine generators have stranded costs. Mr. Falkenberg calculated what he believes to be stranded generation benefits of $957 million as summarized on AK Steel Ex. 8. AK Steel argues that Section 4928.39, Revised Code, requires the transition cost must be "legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service." AK Steel contends that any regulatory transition costs the Commission approves would have to be netted against stranded generation benefits.

Another problem with the Company's forecast, according to AK Steel, is that CG&E witness Speyer uses a carbon tax on coal that he presumes will add more than a billion dollars in costs to the CG&E generators. Mr. Falkenberg testifies that this assumption is speculative and biased inasmuch as no one knows what the U.S. Senate will do about global warming, or if the utility industry will even be affected (AK Steel Ex. 15 at 7-8 and 41-48). As a result, AK Steel contends that the CG&E study overstates stranded costs by $350 million (AK Steel Ex. 15 at 48). AK Steel argues that, if these mistakes and other biases were corrected, the CG&E study would replicate the results of Mr. Falkenberg's study that shows the Company has $957 million in stranded benefits (AK Steel Ex. 8).

Shell supports AK Steel's arguments regarding stranded generation benefits. Shell argues in its objection and on brief that the stipulation's approach to transition costs fails to demonstrate that the amount of stranded costs recovered (whatever it might be) is a "net" figure, *i.e.*, the result of considering both losses and gains realized as a result of transitioning to a competitive market place. Shell disagrees with CG&E's position that, because SB3 does not make reference to transition benefits or negative transition costs, there is no legal requirement for such an offset. Further, Shell disagrees with CG&E's position that the word "net" in SB3 does not imply offsetting market valuations below book value on some plants with market valuations above book value on others. Shell argues that the testimony of Mr. Falkenberg illustrates that, far from having stranded generation costs, the market value of CG&E's generation portfolio substantially exceeds its book value, thereby providing the utility a market premium. Shell argues that the stipulation fails to satisfy one of the statute's fundamental criteria for transition cost approval, provides a potential windfall to CG&E in the form of generation premiums and inflated transition cost recoveries, and dramatically disadvantages ratepayers.

Shell also argues that the stipulation, if approved, would deny ratepayers a share of the market premium associated with generation assets. According to Shell, these generation assets have a book value of approximately $1.59 billion (Shell Brief at 39). Shell contends that, if CG&E transferred these assets to an EWG, it would substantially harm ratepayers by denying them any share of the market premium associated with this portfolio of generation assets. Shell argues that in originally valuing its generation assets for GTC purposes, CG&E relied on unrealistically low projections of future wholesale power market prices which is the most significant factor in valuing generation assets. Shell states that, from a review of Company Ex. 33, Ex. HWP-2, 1 of 1, the firm power price assumed in 2001 by CG&E's analysis contrasts sharply with CG&E's own recent purchase power costs of $0.0297 in 1998 and $0.0334 in 1999. Shell believes that a wholesale market price substantially higher than that utilized by CG&E is needed to adequately value the utility's generation portfolio. Shell submits that by simply employing a wholesale market price projection more in keeping with CG&E's own actual recent experience in wholesale power markets would greatly reduce, if not eliminate completely, the supposedly uneconomic generation costs identified by CG&E's analysis. Shell also contends that CG&E's analysis contains several other dubious assumptions that, when corrected, produce even larger stranded benefits. For example, CG&E discounts the projected earnings streams for its generating plants using a 13.63 percent equity cost and a capital structure comprised of 49 percent equity and 51 percent debt. Another questionable assumption, according to Shell, concerns the retirement dates for the Beckjord, Conesville, Stuart, and Zimmer generating plants. CG&E owns each of these plants in partnership with American Electric Power's (AEP) subsidiary, Columbus Southern Power Company. CG&E has assumed much earlier retirement dates than those that were assumed by AEP's Transition Plan filing (Case Nos. 99-1729-EL-ETP and 99-1730-EL-ETP).

CG&E disputes the finding of Mr. Falkenberg and disagrees with the arguments raised by AK Steel and Shell. CG&E contends that Mr. Falkenberg's future fuel price assumptions lack reliability. CG&E argues the single most significant variable in the forecast is future natural gas prices. CG&E states that low price gas forecasts tend to increase the calculated stranded costs, while high price gas forecasts tend to decrease stranded costs.

CG&E states that Mr. Falkenberg relies upon the Energy Information Agency's (EIA) Annual Energy Outlook, 2000 (AEO 2000) forecast as his sole source of fuel price information. CG&E argues that there are several other more credible fuel forecasts. Each of the other forecasts project lower future fuel prices than AEO 2000. CG&E also contends that Mr. Falkenberg did nothing to compare AEO 2000 to the other various forecasts that are credible, or even to evaluate the historical accuracy of any of these forecasts (Tr. IV at 149, 156). Additionally, both AEO 2000 and AEO 1999 demonstrate that EIA's forecasts tend to be considerably higher than other fuel forecasts that Mr.

Falkenberg himself concedes are credible (*Id.* at 150-154, CG&E Ex. 73 at 99). EIA's average forecast price at the wellhead demonstrated an average absolute percentage forecast error of 72.2% (Tr. IV at 160-164; and CG&E Ex. 67 at 81, 84, 90).

CG&E argues that Mr. Falkenberg's market structure assumption is equally biased, and ignores the laws of economics altogether. As an economist, Dr. Pifer assumed that market forces, the laws of supply and demand, will ultimately determine the price at which electricity will be sold in the future, and that this price will reflect whatever reserve capacity market participants are willing to pay. Mr. Falkenberg, however, opines that these economic market forces should be ignored, and instead asserts that a 15 percent reserve margin must be factored into the market structure analysis. CG&E argues that the effect of Mr. Falkenberg's 15 percent reserve requirement assumption is that prices, and thus utility income, are assumed to be higher than the economic laws of supply and demand would otherwise dictate (Tr. IV at 178).

CG&E asserts that Mr. Falkenberg did not evaluate the risk of future environmental regulation as it relates to the potential increased costs of NOx, SO2, PM 2.5, or Mercury regulations. Mr. Falkenberg evaluated only the risk of future tightened CO2 restriction resulting from implementation of the Kyoto protocols currently under consideration by the U.S. Senate to reduce greenhouse gases (*Id.* at 127-129, 168). CG&E contends that Mr. Falkenberg has assumed that no increased environmental regulation, of any sort, is likely, despite his failure to evaluate what these other environmental regulations might be. CG&E also notes that Mr. Falkenberg himself concedes that, by comparison to EIA, Mr. Speyer's use of a $10 per ton figure is conservative. CG&E argues that Mr. Falkenberg's testimony regarding the existence and amount of stranded costs, or stranded benefits, is simply not credible and should be ignored.

With regard to the issue of netting of market premiums against transition costs raised by Shell and AK Steel, CG&E argues that SB3 provides it an opportunity to recover its revenue requirement through the transition charge from customers that choose to switch electric suppliers and that the netting recommendation contradicts the ratemaking statutes in effect and newly created SB3. Under the framework of these laws, unbundled rates plus transition charges must give CG&E the same opportunity to collect its revenue requirement as CG&E has under its current bundled rates. CG&E argues that, by basing its transition charge on the net market value of all of CG&E generation assets as proposed by AK Steel and Shell, the Commission would be denying CG&E an opportunity to collect its revenue requirement associated with the Commission approved book value of assets from CG&E's last rate case and with previously approved regulatory assets. CG&E also contends that, although it is not requesting to recover any GTC as part of the stipulation, that amount was fully netted (CG&E Ex. 22 at HWP-5 at 6; CG&E Ex. 13 at LJP-1; and CG&E Ex. 50 at JPS-SUP-6).

After considering the arguments raised above, the Commission comes to the conclusion that CG&E has put forth sufficient evidence to support its argument that

there are no stranded generation benefits that should offset the regulatory transition cost proposed by the stipulations. The Commission finds that Dr. Pifer's market forecast for electric power and future fuel price forecasts is reasonable. Dr. Pifer based his future fuel prices on a broader based analysis than that used by Mr. Falkenberg and, therefore, should have a greater degree of reliability. Further, the record shows that the EIA has had problems with accurately forecasting coal and natural gas prices used in its Annual Energy Outlook. We also believe Dr. Pifer's market structure assumptions are reasonable. Dr. Pifer assumed that market forces, the laws of supply and demand, will ultimately determine the price at which electricity will be sold in the future, and that this price will reflect whatever reserve capacity for which market participants are willing to pay. The use of a 15 percent reserve margin used by Mr. Falkenberg is unlikely to hold true in a competitive market. We further find that changes in environmental regulation that could occur may have an affect on market forecasts and should appropriately be considered as Mr. Speyer has done. From the evidence presented, Mr. Speyer's estimated costs of environmental compliance is conservative and not unreasonable.

With regard to the issue of "netting" stranded generation benefits, believed to exist by AK Steel and Shell, with stranded regulatory costs, the Commission finds that the stipulation provides an equitable resolution of this matter. The Company has agreed to forego asserting a claim for stranded generation costs that they calculate on brief to be approximately be $470 million on a netted basis (CG&E Reply Brief at 22; CG&E Ex. 22 at HWP-5 at 6; CG&E Ex. 13 at LJP-1 at footnote 3; and CG&E Ex. 50 at JPs-SUP-6). Further, the parties to the stipulation have agreed, based on all the terms and conditions that are set forth in the stipulation, that there is no further netting or adjustments of any kind to CG&E's transition cost recovery that are necessary (CG&E Ex. 60 at 7). Additionally as discussed above, the Commission does not agree with Mr. Falkenberg's stranded benefit analysis and, therefore, cannot find that there are stranded benefits that exceed the amount of the GTC that CG&E has agreed to forego recovery of as part of the stipulation. Based upon the above finding, the Commission finds that there are no stranded generation benefits that should offset the regulatory transition cost proposed by the transition plan stipulation.

2. Existing Regulatory Assets

AK Steel takes exceptions with a number of accounting treatments used by CG&E in calculating its existing regulatory assets to be recovered in its RTC. AK Steel argues that the Company mischaracterized the accumulated deferred income taxes (ADIT) as a component of the GTC rather than the RTC. According to AK Steel witness Kollen, the ADIT is a regulatory liability that should be subtracted from regulatory assets and provided to ratepayers through a reduced RTC rather than the GTC (AK Steel Ex. 14 at 21). Mr. Kollen also states that the FERC Uniform System of Accounts classifies ADIT as a "Deferred Credit," not as "Utility Plant" and, therefore, CG&E accounting is not consistent with the FERC accounting standards. AK Steel argues that

the Commission should recognize the Company's ADIT associated with all its generating units as a regulatory liability and reduce the Company's regulatory asset transition cost claim to be recovered through the RTC, regardless of whether the Commission accepts or rejects the stipulation.

AK Steel also argues that the SFAS 109 regulatory tax assets and liabilities must be stated on a net present value basis because there are no carrying costs associated with these future taxes under existing cost-based regulation (AK Steel Ex. 14 at 25). Further, AK Steel takes issue with the Company's proposal to include in the distribution component of unbundled rates a hypothetical SFAS 109 regulatory asset for municipal and franchise tax temporary differences the Company projects will exist in 2002. AK Steel argues that the Company has acknowledged that it will not record and is not required to record such a regulatory asset at December 31, 2000 (AK Steel Ex. 14 at 25-26). Thus, according to AK Steel, it would be absurd to allow the Company to create a hypothetical SFAS 109 regulatory asset at December 31, 2000, that will not exist at that date and then to recover this hypothetical cost from ratepayers in the distribution component of unbundled rates.

AK Steel also disagrees with the Company's excess deferred income tax (EDIT) and the related SFAS 109 tax benefits. The Company has removed the entirety of the EDIT tax benefits from the ADIT component of its net book value computations; thereby increasing its generation transition costs claims. AK Steel argues that the EDIT amounts represent taxes prepaid by ratepayers at tax rates higher than they are currently. Historically, these EDIT prepaid taxes benefits were amortized back to ratepayers over the remaining lives of the underlying assets. The Company removed EDIT benefits of $11.378 million (AK Steel Ex. 14 at 28). In addition, AK Steel argues that the removal of the EDIT regulatory liability from the ADIT utilized by the Company in its SFAS 109 regulatory asset computations improperly increased the Company's SFAS 109 regulatory asset transition cost claim by $19.186 million on a nominal dollar basis, or $8.068 million on a net present value basis (AK Steel Ex. 14 at 28). AK Steel contends that the EDIT and the related SFAS 109 tax benefits belong to ratepayers pursuant to existing cost-based regulation (AK Steel Ex. 14 at 29 and Tr. VI at 33-34). According to AK Steel, the Commission should reject the Company's attempt to unilaterally appropriate these regulatory liabilities in order to increase its claimed regulatory asset transition costs.

Similar to the EDIT, AK Steel argues that the Company failed to reduce its regulatory or generation transition cost claims by the net present value of its investment tax credit (ITC) amounts. AK Steel argues that the ITC and the related SFAS 109 tax benefits belong to ratepayers pursuant to existing cost-based regulation (AK Steel Ex. 14 at 35 and Tr. VI at 33-34). AK Steel requests the Commission reject the Company's attempt to unilaterally appropriate these regulatory liabilities in order to increase its claimed regulatory asset transition costs.

AK Steel also argues that there will be no normalization violation if the Commission provides the ADIT, EDIT, ITC, and related SFAS 109 regulatory liability tax benefits to ratepayers through the RTC. Mr. Kollen stated that the normalization requirements of the Internal Revenue Code of 1986, as further described in the IRS regulations and as further interpreted for specific taxpayers in the IRS Private Letter Rulings, provide that there is no normalization violation if such ADIT benefits are provided to ratepayers no more rapidly than the time period over which the underlying costs are recovered through regulated rates. All transition costs allowed by the Commission in this proceeding will be recovered in ten years or less which is more than the recovery of generation transition costs of five years or less under a GTC.

Lastly, AK Steel requests that, if the Company sells its generating assets, then the related SFAS 109 amounts will be reversed (eliminated) from the balance sheet, with no gain or loss recognized. Thus, the unamortized SFAS 109 regulatory asset transition cost balance as of the date of the sale should be removed from the RTC. The Commission should establish this treatment in its order in this proceeding in order to assure that ratepayers are not penalized in the event of a sale of the generating assets (AK Steel Ex. 14 at 18-19).

CG&E witness Mr. Hriszko disagrees with Mr. Kollen's characterization of the ADIT. Mr. Hriszko testified that the IRS views ADIT as an interest-free loan from the federal government (CG&E Ex. 76 at 3). Similarly, Mr. Kollen's treatment of EDIT balances in the Company's SFAS 109 computation cannot be justified according to CG&E. Congress established specific rules concerning how the benefits of EDIT were to be shared between ratepayers and shareholders. CG&E argues that these rules would be violated by the treatment that Mr. Kollen proposes (*Id.* at 8). Mr. Hriszko states in his rebuttal testimony, that the adjustments that Mr. Kollen proposes violate the tax normalization rules. The IRS has ruled that, where the cost of property is no longer included in the calculation of cost of service for ratemaking purposes, the inclusion of tax benefits from such property is a violation of the tax normalization rules (CG&E Ex. 71 at 31). CG&E believes it is clear that the Ohio General Assembly has directed this Commission to resolve deregulation issues now so that deregulation of the generation market occur within Ohio no later than January 1, 2001. Thus, according to CG&E, the Ohio General Assembly clearly contemplated that the current IRS position regarding tax treatments of these items would control, and that CG&E would necessarily set its regulatory asset balances recognizing the existing position of the IRS.

CG&E disagrees with Mr. Kollen's treatment of SFAS 109 regulatory asset for municipal and franchise tax temporary differences. CG&E argues that Section 4928.34 (A)(6), Revised Code, expressly allows the Company to recover costs associated with statutory tax changes and that it is following the recommendation for collection of such assets set forth in the Staff Report.

The Commission finds that $401.4 million for jurisdictional regulatory assets quantified by CG&E witness Steffen is reasonable and based upon the Staff Report adjustments to the Company's original transition plan filing (CG&E Ex. 50 at JPS-SUP-5 at 1). We find that the tax-related adjustments to these regulatory assets proposed by AK Steel witness Kollen would not be in keeping with the tax normalization rules established by the IRS. As Mr. Hriszko testified, Mr. Kollen's proposal would decouple tax attributes from the assets that generated the tax attributes, namely generation plants. By offsetting these tax attributes against regulatory assets, a pattern would be established that would return these tax attributes to the ratepayer over a period of time that is different than the period of time over which the tax attributes would normally reverse (CG&E Ex. 76 at 2). Accordingly, we will not adopt the adjustments to the RTC proposed by Mr. Kollen above. The Commission has already approved $401 million of CG&E's regulatory assets and, therefore, found that amount prudent. The testimony of CG&E witnesses Steffen and Pefley support findings that such transition costs were prudently incurred; legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service; are unrecoverable in a competitive market, and that the utility would otherwise be entitled an opportunity to recover the costs.

3. CG&E's Request to Defer and Recover Certain Costs as Regulatory Assets

The parties to the transition plan stipulation have requested accounting authority to create the necessary regulatory assets, defer the costs of those assets, and recover them through an RTC. Such costs are associated with purchased power, litigation of this proceeding, establishing an EWG, and shopping incentives, among others. AK Steel contends that many of the items in the stipulation that CG&E seeks to have accounting authority to defer and recover as regulatory assets do not meet the criteria established for transition costs under Section 4928.39, Revised Code, as discussed above. Set forth below are the objections raised by AK Steel and Shell, the responses to those objections, and the Commission's findings.

Objections of AK Steel and Shell

One of the costs which CG&E is asking to be deferred as a transition cost is purchased power costs sufficient to maintain an adequate operating reserve margin as determined by CG&E. AK Steel argues that CG&E does not show anywhere in its transition plan filing or stipulation the amount of money claimed, forecasted, or desired for purchased power. AK Steel also argues that, since the 1999 fuel and purchased power costs, including the summer 1999 price spikes, are already being recovered in the EFC, a separate deferral of purchased power costs clearly would be a double and improper recovery. AK Steel witness Baron testified that there is no basis to determine that these costs are prudently incurred. Neither are these purchased power costs directly assignable or allocable to retail electric generation service provided to electric consumers who shop. Under the stipulation, deferred purchased power expenses will be charged to all

ratepayers through the RTC, both those who shop and those who remain CG&E customers. AK Steel witness Baron believes that, under traditional standard ratemaking methodologies, shopping customers who do not impose any purchased power expenses on CG&E should not be assigned these costs, contrary to the stipulation.

AK Steel next takes issue with CG&E's proposals to pay $1.5 million in litigation reimbursement to be shared, and agreed upon, by, and among, active intervenor signatory parties to the stipulation. The intervenors are given voting rights to be used to disburse the money with agreement of 75 percent of the active parties constituting a binding vote as to reimbursement. AK Steel argues that this proposal is inappropriate and illegal and does not comply with Section 4928.39, Revised Code. AK Steel further asserts that the costs are not prudently incurred, because the Company is not obligated or required in any case to pay the legal fees of its opponents but only its own legal fees. AK Steel knows of no past precedent to allow a public utility to pass on to its ratepayers the legal costs of intervenors.

AK Steel's third issue concerns the deferral and recovery of $28 million associated with CG&E's plan to sell off all its generating units to an affiliated EWG. The costs are for start up and debt financing and refinancing (Tr. I at 52). AK Steel witness Kollen testified that these costs are discretionary and are not required by SB3. Thus, the costs cannot be considered just and reasonable transition costs as a threshold matter. Further, Mr. Kollen contends that the costs to establish an EWG are not directly assignable or allocable to retail electric generation service inasmuch as it is not a retail service (AK Steel Ex. 13 at 36). AK Steel further argues that CG&E may not incur most of these costs if CG&E is able to release the generation assets from its existing first mortgage obligations without having to redeem the first mortgage bonds. AK Steel claims that this would save the Company $22.5 million dollars of the $28 million dollars requested for EWG transaction costs (Tr. III at 40).

AK Steel's final issue in this area concerns the overstatement of deferred shopping incentive transition costs and its affect on the determination of whether the Company will over recover transition cost over the next ten years. AK Steel disputes CG&E 's quantification of the level of transition revenues and transition costs that would be recovered as result of the stipulation. CG&E submitted the testimony of witness Pefley to show the level of transition costs that the Company will actually recover as a result of the stipulation (CG&E Ex. 77, LJP-R-2). Based on this analysis, the Company claims that it will under-recover approximately $153 million through the year 2010 under the Stipulation (Tr. VI at 2). Among the costs included in the Company's analysis are the amounts for regulatory assets claimed by CG&E in its original filing and supplemental filings ($401.4 million), as well as $115.6 million of implementation costs, $34.5 million of Ohio excise tax overlap, and shopping incentives of $333 million.

AK Steel witness Baron developed an analysis that estimates the level of RTC revenue recovery on a present-value basis. Mr. Baron calculated that the Company will recover RTC revenues of $651,257,591 on a present-value basis if the stipulation is approved and implemented by the Commission (AK Steel Ex. 13 at 67). This $651 million revenue amount far exceeds the regulatory assets that the Company has claimed in its filing ($401 million) or the regulatory assets that AK Steel witness Kollen has developed for CG&E ($12 million) (AK Steel Ex. 13 at 67).

AK Steel argues that, of all the costs included in the Company's analysis that it relies on to support the stipulation, the $333 million of shopping incentives is the most unreasonable. AK Steel defines a shopping credit as the additional amount of payment necessary to induce a customer to leave the incumbent utility (CG&E) and use an alternative supplier. AK Steel argues that the Company uses this exaggerated shopping incentive quantification to argue that the stipulation produces transition revenues that are lower than its claimed transition costs. AK Steel argues that CG&E has calculated shopping incentives for the first 20 percent of customers in each customer class based on a comparison of the shopping credits paid to such customers and the Company's estimated market price, as developed by CG&E's witness Pifer.

AK Steel argues that when the shopping incentive quantification used by CG&E is corrected to reflect the actual shopping incentives provided to the first 20 percent of each customer class, the Company's analysis falls apart. Mr. Baron developed the shopping incentives using the difference between the RTC that all customers will pay and the RTC net of shopping incentives that is offered to the first 20 percent of each rate class. AK Steel argues that using this interpretation of the shopping incentive produces a shopping incentive cost to CG&E of $135.8 million, instead of the Company's $333 million amount. When this value is substituted into Ms. Pefley's analysis of transition costs, it shows that CG&E will actually overrecover $425.7 million by the end of the ten-year transition period (AK Steel Ex. 20). Shell supports AK Steel's position the shopping incentive-related transition costs are overstated. Due to unrealistically low average energy prices used in the Company's calculations, Shell argues that shopping incentive-related transition costs are inflated.

Shell also takes the position that the new regulatory assets have yet to be incurred and, therefore, were not prudently incurred as required by SB3. Shell also believes that SB3 leads to the inescapable conclusion that the regulatory asset portion of the RTC charge must reflect only CG&E's previously approved regulatory assets, and that newly approved regulatory assets must be recovered within the parameters of that RTC charge. Because the stipulation would premise its RTC charge on both existing and new regulatory assets, Shell believes it violates SB3.

Shell also argues that the stipulation's request for new regulatory assets fails to satisfy SB3 in several additional respects. The proposed new regulatory assets for purchased power costs, payment of other parties' litigation costs, and the effects of any

shopping incentive simply do not fall within the parameters of "regulatory assets" as defined by SB3. If anything, many of these costs, such as EWG set-up costs ($28 million) MISO costs ($15 million) and System & Business Processes ($65 million) contained in the transition implementation costs, and future purchased power costs represent the type of "going forward" costs related to the future conduct of CG&E's business that regulatory agencies consistently have refused to include in stranded cost calculations.

CG&E and Staff Responses

CG&E argues that it will incur costs associated with purchasing power to maintain an adequate reserve margin as it meets the needs of its customers who take service under CG&E's standard offer service. These costs are directly assignable to retail electric generating service. Because the mechanism to recover these costs, the RTC, is fixed by the stipulation, CG&E will have the incentive to prudently manage these costs. Additionally, these costs will be recorded on the Company's books and will be verifiable by the Commission. CG&E further argues that, since these costs will be incurred to provide regulated generation service under fixed rates, there is clearly no possible recovery through the market.

With regard to litigation costs, CG&E's argues that the limited payment of these expenses is prudent inasmuch as the Company would have spent far more on its own if the case was fully litigated. CG&E believes that, given the number of parties and witnesses, the $1.5 million is not an unreasonable sum of money nor improper to provide as part of a settlement offer. CG&E notes that the Commission will have access to the company's books and records to verify that CG&E has incurred these expenses.

CG&E also disagrees with AK Steel's EWG arguments. The Company argues that these costs are appropriately recovered under Section 4928.39, Revised Code. CG&E views these cost as the most pragmatic and economical way to comply with the Corporate Separation Plan required by Section 4928.17, Revised Code. CG&E states that it will take all measures to minimize costs of the transfer and the amount proposed to be recover represents the expected costs to accomplish this task (CG&E Ex. 39 at Ex. LJP-SUP-1, 3 and 5). CG&E states that it will record and defer the actual costs incurred, and make its books and records available the Commission for review.

CG&E asserts that Mr. Baron has mischaracterized the shopping incentive and the associated cost. Mr. Baron calculates the cost to be the difference between the shopping credit that CG&E proposes to the first 20 percent of customers who switch and the shopping credit offered to the remaining 80 percent of customers (Tr. VI at 72). This computation reflects the cost that CG&E will incur to induce 20 percent of its customers to switch. CG&E disagrees with this analysis. CG&E believes that customers will be induced to switch only if they can obtain real savings or value. The measure of this

value, or inducement, will be the difference between the amount the customer is credited by CG&E for not taking generation from CG&E, and the amount the customer must pay to an alternative supplier for retail generation. According to Ms. Pefley, the inducement, or incentive to shop, is simply the difference between CG&E's shopping credit and the market price (CG&E Ex. 77 at Ex. No. LJP-R-2 at 4-5).

The staff supports the arguments made by CG&E regarding the deferral and recovery of regulatory transition costs. Because CG&E has agreed to a fixed RTC rider rate, it bears a risk of never recovering a certain portion of the deferrals based upon future, unknown, and presently unknowable market conditions. Mr. Baron's concern, of allowing CG&E to "defer purchase power costs sufficient to maintain an adequate operating reserve margin," is more an academic difference than a real issue according to staff. The stipulation does not provide any separate rate recovery of the accounting deferrals but merely provides accounting flexibility to the Company. It does not reduce the Company's risk of recovery, nor guarantee it a fixed and excessive stream of revenue. The staff notes that CG&E has waived the right to seek any rate recovery of any costs deferred pursuant to such accounting authority that are not recovered through the RTC (CG&E Ex. 60 at 6).

Staff further points out that, in Section 4928.40(b)(2), Revised Code, satisfactory shopping incentive results are referred to as one cause for the Commission to consider ending the MDP. Staff contends that the transition charges shall be structured to provide shopping incentives to customers sufficient to encourage the development of effective competition in the supply of retail electric generation service (Section 4928.40, Revised Code). Staff believes that CG&E's deferral and recovery of reasonable shopping incentives provides the room for competing marketers to enter and create a viable and competitive market.

The staff also believes that the establishment of a EWG is a reasonable method both of ensuring corporate separation and of compensating CG&E for their compliance with Section 4928.17(A), Revised Code.

Commission Conclusion

The Commission finds that the costs of the new regulatory assets discussed above meet the requirements of Section 4928.39, Revised Code, and can be deferred for recovery through the RTC. We believe the record demonstrates that the costs subject to recovery are prudently incurred, are directly assignable to retail electric generation service provided to electric customers in this state, not recoverable in a competitive market, and would otherwise have been recoverable. Inasmuch as purchased power costs will be incurred to provide regulated generation service under fixed rates, it is reasonable to recover future costs of purchased power through the RTC. Further, we believe the Company would have spent far more on litigation if it had to fully litigate

the case. The payment of other parties' legal costs under terms of this stipulation, although unique, is not unreasonable taking into account the full parameters of this case.

With respect to the recovery of EWG transition costs, the Commission finds that these costs are attributable to electric restructuring and the provision of retail electric generation service. We believe Mr. Kollen takes a too restrictive position regarding this requirement. We further find that the Company has adequately supported its projected costs of transferring its generation assets through the testimony of witness Pefley (CG&E Ex. 39).

Regarding the issue of the cost of shopping credits, SB3 permits the Commission to authorize shopping incentives in order to induce at least 20 percent of customers in each customer class to shop (Section 4928.40(A), Revised Code). The Company has projected the cost to be $333 million as opposed to $135.8 million calculated by Mr. Baron. The stipulation provides CG&E the accounting authority to create the necessary regulatory assets and defer and recover deferrals or adjustments to the amortization schedules to reflect the effect of any shopping incentives (CG&E Ex. 60 at 6). The Company argues the measure of this value, or inducement, will be the difference between the amount the customer is credited by CG&E for not taking generation from CG&E, and the amount the customer must pay to an alternative supplier for retail generation. According to Ms. Pefley, the inducement, or incentive to shop, is simply the difference between CG&E's shopping credit and the market price. The Commission finds this approach to arrive at the amount of deferred costs is reasonable and in keeping with the stipulation. The stipulation addresses the effects of any shopping incentives, not just those related to the first 20 percent of customers that switch. We further note, as pointed out by our staff, that the stipulation does not provide any separate rate recovery of the accounting deferrals but merely provides accounting flexibility to the Company. It does not reduce CG&E's risk of recovery, nor guarantee it a fixed and excessive stream of revenue. Accordingly, we are not persuaded by the arguments raised by AK Steel and Shell on this issue.

The Commission would also like to note that, inasmuch as the transition plan stipulation is a compromise involving a balancing of competing positions and does not necessarily reflect the views which one or more of the parties to the stipulation would have taken if these issues had been fully litigated, our approval of these new regulatory assets does not necessary reflect what the Commission's position would have been had not the issue been part of an all encompassing stipulation. Accordingly, our decision to accept the creation and accounting treatment of the new regulatory assets creates no precedent for any other transition plan proceeding. We further note that, although the stipulation provides for the opportunity to recover the cost of various newly created regulatory assets, CG&E 's analysis shows that at the end of 2010 the unrecovered balance of generation-related regulatory assets is projected to be approximately $153 million (CG&E Ex. 77 at LJP-R-2 at 1). The recovery mechanism for thes

costs provides protection to consumers and supports the reasonableness of approving the creation of these new regulatory assets.

4. Transition Costs Compliance with Statutory Requirements

Shell argues that the stipulation's treatment of regulatory transition costs violates SB3 in a variety of fundamental respects. Shell states that the Commission must determine the total allowable amount of the transition costs of the utility to be received as transition revenues and that these costs must meet the standards of Section 4928.39 (A) through (D), Revised Code. Shell contends that the stipulation's treatment of transition costs violates each of the foregoing statutory provisions.

Shell contends that nowhere does the stipulation purport to identify the maximum level of transition costs authorized for recovery by CG&E. In fact, the stipulation makes plain that its proposed transition revenue recovery is "not limited to" the regulatory assets it identifies. AK Steel argues that CG&E has failed to provide (a) the amount of its transition revenues; (b) the amount of its transition costs; and (c) proof that its transition revenues equal its transition costs.

AK Steel asserts that, under the stipulation, there is no mechanism to track the RTC revenue recovery and to compare the RTC revenues to the revenue requirement of the allowed regulatory asset transition costs. Thus, AK Steel claims that the RTC recovery will be excessive because it will not terminate once the Company has recovered the allowed costs, but rather will extend for the maximum ten-year RTC recovery period, eight years for residential customers. AK Steel argues that such a result is inconsistent with the statutory requirements. Pursuant to Section 4928.34(12), Revised Code, AK Steel contends that the Company may not recover more than its allowed transition costs.

Shell also takes exception to Ms. Pefley's rebuttal testimony which suggests that, even if purchase power costs are excluded, a $153 million shortfall still exists between CG&E's RTC revenues under the stipulation and its likely transition costs. Shell argues that Ms. Pefley's numbers are unreliable, as they rest on inappropriate assumptions concerning kWh sales levels, market prices, switching rates, and carrying charges. All of these inappropriate assumptions serve either to decrease CG&E's RTC revenues or to increase its RTC costs, thereby producing the revenue "gap" about which Ms. Pefley complains. Shell contends that, when these erroneous premises are corrected, the results strongly suggest that, in fact, CG&E would take in far more in RTC revenues under the stipulation than it would incur in RTC costs.

Shell contends that Ms. Pefley's transition cost figures are still further inflated by the high carrying charge she imputes. CG&E's calculations assume an RTC carrying charge equal to the utility's full authorized pre-tax rate of return of 14.23 percent (Company Ex. 77 Ex. LJP-R-2 at 1 of 5). In light of the non-bypassable, guaranteed nature of RTC collections, Shell states that CG&E does not face the same level of business

risk with respect to their collection as applies to other aspects of its regulated business. Additionally, Shell claims that other jurisdictions that have considered this matter have had no difficulty concluding that such transition costs merit a carrying charge closer to the utility's cost of debt than its overall rate of return.

CG&E argues that the rebuttal testimony of Ms. Pefley demonstrates that the Company's recovery of transition costs through the RTC will fall $153 million short of the transition costs that CG&E has shown exist (CG&E Ex. 77 at LJP-R-2 at 1). Further, CG&E points out that the stipulation imposes the risk of a shortfall upon CG&E rather than the consumers. Further, CG&E states that it has used a carrying charge of 14.23 percent because that is the authorized rate of return from its last rate case.

As discussed previously in this order, the Commission finds that existing and new regulatory assets for which the stipulation requests recovery through the RTC are reasonable and do not violate the various provisions of SB3. Although not all of the regulatory transition costs are calculable to the penny at this point in time, Company witness Pefley has provided a reasonable accounting of what the amounts of transition cost are or are projected to become. The stipulation does provide CG&E recovery of previously approved regulatory assets totaling $401 million and new regulatory assets estimated to total at least $483 million (CG&E Ex. 60 at 6-7; CG&E Ex. 50 at Ex. JPS-SUP-5; and CG&E Ex. 77 at Ex. LJP-R-2). It is clear from SB3 that the Commission is authorized to permit the creation of, or amortization of, additional regulatory assets. Therefore, we do not buy into the argument the transition regulatory assets must already be in existence to be prudently incurred (Section 4928.40(A), Revised Code).

Further, Ms Pefley filed rebuttal testimony to support the reasonableness of the amount of transition costs to be recovered through the RTC. Based on a present value of RTC revenue of $517 million, calculated using Mr. Baron's methodology and a pre-tax authorization rate of return, and comparing it to $552 million of transition costs allowed to be recovered based on the stipulation, not including shopping credit costs, purchased power costs, and appropriate carrying charges, CG&E demonstrates that it is not likely that it will over recover all of its regulatory transition costs through the RTC rider (CG&E Ex. 77 at 4 and 5).

We also note that the Company is only entitled to an opportunity to collect its transition charges and that there is no precise arithmetic guarantee under Section 4928.34(A)(12), Revised Code. Many factors will come into play in the future that will determine whether the Company will under- or overrecover all of its approved transition costs. Consequently, we do not believe that the stipulation is unreasonable or in violation of Section 4928.34(A)(12), Revised Code, because the stipulation does not guarantee that the Company will recover no more than the projected transition costs. With the considerable number of parties that have agreed to the stipulation, the

Commission can conclude that the recovery of transition costs established by the stipulation is reasonable and will not lead to any significant overrecovery of transition costs.

D. Transition Plan Stipulation's Compliance with Sections 4905.33, 4905.35, 4928.37 and 4928.40, Revised Code

As discussed in our summary of the stipulations, the shopping credits for each customer class set forth in the stipulation are higher for the first 20 percent of the load of that customer class that switch to an electric energy marketer. Further, the RTC for residential customers ends at December 31, 2008, as opposed to December 31, 2010, for other customers. The stipulation also provides for a MDP for residential customers of five years while the MDP for other classes could end sooner than five years.

AK Steel contends that these provisions of the stipulation are unreasonable and in violation of Sections 4905.33 and 4905.35, Revised Code. Section 4905.35, Revised Code, provides in relevant part as follows:

> (A) No public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation ...or subject any person, firm, corporation ...to any undue or unreasonable prejudice.

Section 4905.33, Revised Code, provides in relevant part:

> No public utility shall directly or indirectly, or by any special rate, rebate, drawback, or other device or method, charge, demand, collect, or receive from any person, firm, or corporation a greater or lesser compensation for any services rendered, or to be rendered, except as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4925. of the Revised Code, than it charges, demands, collects, or receives from any other person, firm, or corporation for doing a like and contemporaneous service under substantially the same circumstances and conditions.

Objections of AK Steel and Shell

AK Steel states that the shopping credit, although nowhere found in SB3, represents the number, on average, of the cost of power, below which it pays a customer on the Standard Service Offer (SSO) to begin shopping. AK Steel argues that the stipulation's offer of enhanced shopping credits to some customers at the expense of similar customers in similar circumstances is discriminatory. Further, AK Steel contends that the effect is far worse as to non-residential customers, because CG&E may cancel the MDP and, thus, the availability of the SSO as soon as there exists 20 percent shopping

by load in a rate class. AK Steel believes that it is to CG&E's distinct economic advantage to cancel the MDP as soon as a class achieves 20 percent load switching even though the remaining 80 percent lose the safe harbor of the SSO. AK Steel contends that significant preference or advantage based upon a place in a queue is unreasonable and unjust and that no rational justification can be found to charge different rates to the same class of customers based on the ability to get into a line first.

AK Steel also argues that CG&E has bestowed upon the residential class benefits that it has not deemed to confer on the non-residential customers. While non-residential customers may be expelled from the SSO whenever the first 20 percent of the customer load of the class switch, the residential customers have the security of the SSO until December 31, 2005. AK Steel believes this is a considerable advantage since it secures them against the vagaries of the market place for five years regardless of whether 20 percent load switching as occurred or not. Further, AK Steel argues that the reduced RTC recovery period for residential customers is discriminatory since it means an underpayment by the residential customers of their share of the RTC.

AK Steel also argues that these provisions concerning shopping credits also violate Sections 4928.37 and 4928.40, Revised Code, because they permit certain customers to by-pass the non-bypassable RTC and create a RTC of less than zero for the first 20 percent of residential customers.

Shell also takes issue with the provision of the stipulation that would permit the Company to end the MDP for non-residential customers prior to December 31, 2005. Specifically, Section 5 of the stipulation would grant CG&E the authority to end the MDP, at its sole option, if (1) 20 percent load switching by class has occurred, (2) CG&E provides notice to the Commission, and (3) CG&E does not have a certified supplier affiliate in its service territory. Shell argues that, because CG&E has indicated it has no intention of establishing a retail marketing affiliate and the notice provision is purely ministerial, CG&E's exercise of this requested discretion would turn on the level of non-residential customer switching. Shell states that, under SB3, a utility's application to end the MDP must demonstrate either that there is 20 percent switching rate by the customer class, or there exists effective competition in the utility's service territory (Section 4928.40 (B) (2), Revised Code). Shell contends that the Commission cannot authorize an early termination to the MDP unless it finds either of the requisite threshold circumstances to exist, something it obviously cannot do now, prior to the commencement of the MDP. Shell argues that the stipulation's request for "up front" authorization to end the MDP seeks to strip the Commission of this flexibility and hand over to CG&E the authority to determine whether circumstances warrant early termination. In Shell's view, the stipulation's proposal concerning early termination of the MDP is unlawful, represents ill-conceived policy, and should be rejected.

Reponses of CG&E and Staff

CG&E disagrees with the arguments made by AK Steel and Shell. The Company asserts that all customers have an equal opportunity to shop and that CG&E exercises no influence over which customers will be among the first 20 percent of load to switch. CG&E also points out that Section 4905.33, Revised Code, recognizes circumstances where preferences may be given pursuant to statutory authority, and Section 4905.35, Revised Code, only prohibits undue or unreasonable preferences. CG&E cites Section 4928.40(A), Revised Code, which permits the Commission to authorize shopping incentives to induce 20 percent switching, to support its argument that the shopping incentives provided are reasonable and permissible by law. With respect to the difference in the MDP and RTC recovery periods among the various classes of customers, CG&E argues that residential customers are not similarly situated to commercial and industrial customers in a competitive context. Further, CG&E points out that any underrecovery of RTC due to the treatment of residential customers within the stipulation is absorbed by CG&E and that CG&E has shown it will underrecover transition costs of approximately $153 million (CG&E Ex. 77 at 2).

CG&E also disagrees that the RTC is being by-passed or is established at below zero. CG&E states that it has shown through the testimony of witness Pefley that all customers pay an undiscounted RTC which is offset by a shopping incentive (CG&E Ex. 65 at Ex. LJP-Sup-8; and CG&E Ex. 77 at LJP-R-2 at 3). CG&E argues that SB3 requires the Commission to consider offsetting the RTC with shopping incentives.

The staff takes the position that shopping incentives are legitimate regulatory tools designed to promote competition. Staff believes that the structure of the shopping credits, MDPs, and the RTC recovery periods are consistent with the regulatory intent of SB3.

Commission Conclusion

The Commission finds that the structure of the shopping credits, MDPs, and the RTC recovery periods do not violate Sections 4905.33 and 4905.35, Revised Code. Clearly, Sections 4928.37(B) and 4928.40(A), Revised Code, provide the Commission with the authority to approve the shopping incentives set forth in the stipulation. Although customers who take the early initiative to shop for an alternative supplier of generation will benefit from their actions, this does not amount to undue preference nor create a case of discrimination. All customers will have an equal opportunity to take advantage of the shopping incentives. The Commission cannot conceive of a mechanism that provides customers with more of an incentive to shop than those created by the stipulation. The Commission also finds that Section 4928.40(A), Revised Code, authorizes the Commission to set the recovery of the costs associated with regulatory assets up to December 31, 2010. The Commission does not find it discriminatory

to have two different periods for the recovery of the RTC, one for residential customers and one for non-residential customers, inasmuch as the rates, incentives, and shopping credits vary between the various customer classes.

We also believe that, inasmuch as SB3 permits the Commission to authorize the end of a MDP prior to December 1, 2005 if there is a 20 percent switching rate by a particular class of customer, the approval of such through this order as part of the stipulation is not unreasonable nor contradictory to Section 4928.40(B), Revised Code. Further, we do not believe that the development of a shopping incentive should be viewed as creating an RTC of less than zero or that it permits the RTC to be by-passed. We view the two as separate provisions of the SB3.

E. Shopping Credits

Section 4928.40, Revised Code, provides for the establishment of shopping incentives to induce customers to switch to a certified supplier to obtain their generation supply. The goal of the incentive is to achieve at least a 20 percent switching rate by December 31, 2003. CG&E states that the stipulation creates such shopping incentives by granting shopping credits greater than the projected market price of power. Per the stipulation, such credits are equal to or greater than CG&E's unbundled generation component to the first 20 percent of customers that switch to a certified supplier to obtain their generation supply (CG&E Ex. 60 at 11-14).

Shell argues that the stipulation's shopping credits would not spur the level of switching sought by SB3 and the Commission's rules, particularly among residential ratepayers. Shell's position is that, once a marketer adds on to the wholesale price of power such costs as line loss, advertising, other customer acquisition costs, collection costs, reserves for bad debt, accounts payable, customer call centers, office overheads, and the marketer profit, there will be no margin left to provide the customer a savings off of the $0.05 shopping credit provided the first 20 percent of residential customers who shop. Thus, according to Shell, during the MDP's crucial initial stages, when CG&E's service territory first opens to competition, the stipulation's proposed $0.05 shopping credit would force residential marketers to either offer no significant consumer savings or to do so at a loss. Shell also contends that assuming, for argument's sake, that the initial $0.05 credit did induce a 20 percent residential switch rate by the midpoint of the MDP, the prospect for further customer switching would vanish under the subsequent $0.0394 shopping credit provided the remaining 80 percent of residential customers.

Shell argues that, in short, the fact that the stipulation's proposed shopping credits exceed CG&E's unbundled generation charge has no bearing on whether they merit approval by this Commission. Instead, Shell maintains that the Commission must assess whether those credits would produce the effective competition and competitive choice sought by SB3. Shell claims that CG&E's attempt to mask the deficiency of the

stipulation's shopping credits through a simplistic comparison to those offered by Duquesne Light Company misses the mark. Unlike CG&E, Duquesne Light Company did more to promote competition than merely provide shopping credits. Shell believes that CG&E should actually provide a certain amount of generation capacity at a predetermined price to those retail suppliers competing to serve its market.

In conclusion, Shell argues that the stipulation's residential shopping credits are wholly inadequate for accomplishing the level of switching and effective competition sought by SB3 and the Commission should reject them. Alternatively, Shell claims that, if the Commission finds that providing generation capacity is not well suited for the CG&E system, the Commission, at a minimum, should increase substantially the stipulation's residential shopping credits. In this regard, Shell recommends increasing the credit to $0.055 per kWh for the entire MDP. This enhanced initial shopping credit, according to Shell, would have a much greater chance of engendering immediate, vigorous third-party participation in the CG&E residential market than the stipulation's inadequate $0.05 credit.

Shell also takes issue with Section 3 of transition plan stipulation that provides:

> There will be no further netting or adjustments of any kind to CG&E's Transition Cost recovery, including but not limited to any adjustment of RTC rates, or shopping credits through 2010, related to the sale, lease or transfer by CG&E, or any of its affiliates, of any generating assets.

Shell argues that this provision represents a blatant attempt to tie the Commission's hands regarding future actions it might take to protect and encourage the emerging competitive market place in light of unanticipated market conditions. Shell believes that this provision of the stipulation is in conflict with Section 4928.40 (B) (1), Revised Code, which permits the Commission to conduct a periodic review no more often than annually and, as it determines necessary, adjust the transition charges of the electric utility as initially established or subsequently adjusted. Moreover, Shell argues that the Commission is specifically permitted to adjust the regulatory asset component of a utility's regulatory transition charge on a prospective basis after December 31, 2004, or earlier in conjunction with approval of an early termination date for the MDP (Section 4928.39 (D), Revised Code). Shell argues that the acceptance of Section 3 of the stipulation would negate the Commission's broad authority to safeguard retail competition during the MDP and should be rejected.

CG&E's argues that its plan for shopping incentives filed with its transition plan describes numerous studies conducted by CG&E in developing a switching forecast (CG&E Ex. 8 at 2–15; and CG&E Ex. 16 at 6–27). These studies include residential customer satisfaction studies, commercial and industrial satisfaction studies, an image tracking study, and a market forecast study (CG&E Ex. 16 at 6). CG&E contends that an

analysis of these studies reveals that, with certified suppliers offering as little as two percent value over CG&E's standard service offer, 22.7 percent of residential load, 52.1 percent of commercial load, 89.5 percent of industrial load, and 69 percent of governmental load are projected to switch to certified suppliers by the end of 2003 (CG&E Ex. 16 at 25, 27). CG&E asserts that these projections far exceed the switching targets specified in Section 4928.40(A), Revised Code. However, CG&E contends that with the stipulated shopping credits, the customers who switch will receive far greater than two percent added value, based on projected retail market prices, and the first 20 percent of the customers who switch will receive even greater incentives.

CG&E also points out that Shell's use of CG&E's wholesale power purchases in 1998 does not reflect properly the wholesale price of power in the future. CG&E asserts that much of this power was purchased during peak periods when prices were high. CG&E argues that it is more appropriate to look forward to projected retail market prices (CG&E Ex. 77 at LJP-R-2 at 4).

The Commission finds that the stipulation provides appropriate shopping incentives to achieve a 20 percent load switching contemplated by Section 4928.40(A), Revised Code. We believe CG&E's forward looking wholesale prices of power used to estimate future retail power markets are more appropriate than CG&E purchased power costs from past years. Further, the record lacks sufficient evidence to support Shell's recommendation of a shopping credit of $0.055 per kWh. The stipulation's $0.05 shopping credit for the first 20 percent of residential customer load that switches exceeds the unbundled rate for generation and, therefore, should help ensure that residential customers have an incentive to shop. The first 20 percent load switched from the remaining customer classes will also have an adequate incentive to shop inasmuch as shopping credits will equal 100 percent of the unbundled generation rate. We believe that these significant shopping incentives will effectively foster early competition by providing significant motivation to customers to switch retail generation suppliers.

With regard to Section 3 of the stipulation, the Commission does not believe that this provision is in conflict with Section 4928.40(B)(1), Revised Code. This section of the Revised Code permits the Commission to conduct a periodic review no more often than annually and, as it determines necessary, adjust the transition charges of the electric utility as initially established or subsequently adjusted. It does not require such reviews or adjustments. We believe that the stipulation establishes reasonable transition charges, shopping credits, and incentives for customers to shop. We do not believe that Section 3 negates the Commission's broad authority to safeguard retail competition during the MDP. Various sections of SB3 give the Commission the continued oversight to monitor the progress of competitive retail electric services, to take action where necessary, and to promote the policies of the state of Ohio set forth in Section 4928.02, Revised Code.

F. CG&E's Corporate Separation Plan (CSP)

CG&E proposed a CSP that it contends meets all the requirements set forth in Sections 4928.17 and 4928.06, Revised Code, and the Commission's rules on utilities' code of conduct. No parties opposed CG&E's CSP. Under its plan, effective January 1, 2001, CG&E will not offer non-tariffed products and services and it will transfer any such products and services to a fully separated affiliate (CG&E Ex. 57 at 2). Additionally, CG&E's CSP provides for the transfer of its generating assets to an EWG and, according to the plan, CG&E will complete the transfer by no later than December 31, 2004 (CG&E Ex. 57 at 3). CG&E's CSP also describes the mechanisms that CG&E will utilize to ensure that CG&E institutes proper accounting procedures for affiliate transactions (CG&E Ex. 57 at 4-5). CG&E's CSP includes provisions related to structural safeguards, separate accounting, financial arrangements, complaint procedures, education and training, the policy statement, internal compliance monitoring, and a detailed listing of CG&E's electric services. As described in the testimony of Paul G. Smith, CG&E will implement a cost allocation manual, pursuant to Rules 4901:1-20-16(G)(1)(a) and (b) and 4901:1-20-16(J), O.A.C. (CG&E Ex. 14 at 5). CG&E will also only share employees, facilities, and services in accordance with its SEC-approved service agreements, pursuant to Rule 4901:1-20-16(G)(1)(c), O.A.C. (CG&E Ex. 37 at 3). Under its proposal, CG&E will keep its books, records, and accounts separate from those of its affiliates pursuant to Rule 4901:1-20-16(G)(2), O.A.C. (CG&E Ex. 14 at 6). CG&E will also follow the Commission's rules on financial arrangements to preserve the financial independence of CG&E from its affiliates pursuant to Rule 4901:1-20-16(G)(3), O.A.C. (CG&E Ex. 14 at 7).

CG&E's filing includes an affiliate code of conduct that complies with the Commission's rules. According to the Company's proposal, CG&E is prohibited from releasing any proprietary customer information to an affiliate without the prior authorization of the customer (CG&E Ex. 37 at Ex. PGS-1 at 2). Furthermore, CG&E's affiliate code of conduct requires CG&E to make customer lists available on a nondiscriminatory basis to all nonaffiliated and affiliated certified retail electric competitors transacting business in its service territory (*Id.* at 1). CG&E's affiliate code of conduct stipulates that the Company shall treat as confidential all information obtained from any certified supplier of retail electric service and that the Company shall not tie the provision of regulated services to the taking of any goods and/or services from CG&E's affiliates. CG&E maintains that its code of conduct ensures that anticompetitive subsidies will not flow 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 (*Id.* at 6).

CG&E notes that Section 4928.17(C), Revised Code, provides that "for good cause, the Commission may issue an order approving a corporate separation plan that does not comply with Section 4928.17(A)(1), Revised Code, but complies with such functional separation requirements as the Commission authorizes to apply for an interim period. Further, CG&E states that the Commission's corporate separation rules require the utility to show good cause for selecting an interim functional separation

plan. CG&E believes that it has met this burden through its corporate separation financing plan. CG&E notes that its corporate separation financing plan provides for a program to complete the transfer of its generating assets to an EWG by December 31, 2004, and it describes the expected costs CG&E would incur if it is forced to transfer its generating assets to the EWG by December 31, 2000. It is CG&E's intention to achieve the transfer of assets to the EWG at the lowest cost practicable by seeking to minimize the transaction costs, including tax obligations; minimize the expenditures related to the recapitalization of CG&E; and optimize the capital structure of CG&E. CG&E's ability to minimize its transaction costs will turn on three key issues: (1) what steps CG&E must take to adjust its capital structure as a result of the corporate separation plan; (2) whether it can release the generation from the mortgage without having to redeem the first mortgage bonds; and (3) whether it can eliminate or minimize the tax obligations which may arise from the transfer (*Id.* at 3). CG&E is undertaking the process of seeking to release the generation assets from its existing first mortgage lien obligations (*Id.* at 3). CG&E expects this process to take at least six to nine months (*Id.* at 3). While CG&E hopes that it can achieve this release, there can be no assurance that CG&E will be fully successful. In the event CG&E is unsuccessful, it may have to pursue other means to release the properties, as described in CG&E's Corporate Separation Financing Plan.

CG&E has presented a corporate separation plan for Commission approval pursuant to Section 4928.17(C), Revised Code. CG&E has indicated that, if it is forced to transfer its generating assets to the EWG by December 31, 2000, it will incur significant costs. Since the corporate separation plan does not provide for complete separation by December 31, 2000, in order for this Commission to approve an interim plan the company must show "good cause" pursuant to Section 4928.17(C), Revised Code. This section provides that an interim plan must be consistent with such functional separation requirements as is authorized for the interim period, and that the plan must provide for ongoing compliance with the policy set out in Section 4928.02, Revised Code. Section 4928.17(A)(2), Revised Code, also requires that all plans satisfy the public interest in preventing unfair competitive advantage and abuse of market power. The plan must also be sufficient to ensure that no undue preference or advantage is extended to or received by the competitive retail affiliate from the utility affiliate (Section 4928(A)(3), Revised Code). The Commission's rules also address interim plans and require that such plans set out a detailed timeline of progression to full structural separation, and that they be subject to periodic Commission review (Rule 4901:1-20-16(G)(1)(d), O.A.C.).

We find that CG&E's proposed interim plan achieves the structural separation contemplated by Section 4928.17(A)(1), Revised Code, and the corresponding Commission rules. The Company has shown that it will incur significant costs if it is forced to transfer its generating assets to the EWG by December 31, 2000. We find that good cause exists to allow the separation as proposed by the company to occur by December 31, 2004, in that specific steps are set forth to insure the release of the subject properties

in that time frame. The plan provides for competitive retail electric service through a fully separated affiliate of the utility and includes separate accounting requirements and code of conduct necessary to effectuate the policy specified in Section 4928.02, Revised Code. The plan also satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power. The plan also is sufficient to ensure that the Company will not extend any undue reference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service or nonelectric produce or service. CG&E has provided a reasonable timeline for its transition to full structural separation. Therefore, the Company has met its burden of showing "good cause" for this Commission to approve the interim functional separation plan. We will closely monitor the implementation of the plan and take appropriate steps where we find competitive inequality, unfair competitive advantage, or abuse of market power. We believe that through the periodic Commission review of the interim separation plan, through auditing of the company's books and records, including the cost allocation manual, and the complaint process, this Commission can ensure that the corporate separation plan is implemented in accordance with the policy enunciated in SB3.

G. CG&E's Employee Assistance Plan (EAP)

CG&E's EAP was presented through the testimony of Richard L. Bond, CG&E's general manager of Compensation, Benefits and Human Resources Information System. Mr. Bond described CG&E's EAP including the programs for severance, retraining, retirement, retention, outplacement and other assistance that the company commits to provide to its employees whose employment is affected by electric industry restructuring (CG&E Ex. 17, 3). Mr. Bond contended that CG&E's EAP provides for all of the types of benefits described in Section 4928.31(A)(4), Revised Code, and that the EAP will be communicated to CG&E's eligible employees verbally and in writing (*Id.* at 3). He noted that CG&E has had experience with voluntary workforce reduction and voluntary severance plans and that a very substantial number of those employees who were eligible to participate in the plans took advantage of the plans' benefits (*Id.* at 5). Mr. Bond also testified that CG&E has no current plans to downsize its workforce during the MDP as a result of restructuring (*Id.* at 6). CG&E has requested no transition costs related to the EAP (CG&E Ex. 12 at Ex. JPS-5 at 1). No parties opposed CG&E's EAP or the EAP stipulation.

Pursuant to Section 4928.34(A)(10), Revised Code, the Commission finds that the Company's EAP sufficiently provides severance, retraining, early retirement, retention, outplacement, and other assistance for the Company's employees whose employment is affected by electric industry restructuring. As noted above, CG&E's EAP will be subject to negotiations with CG&E's unions and, in accordance with the EAP rules, we will continue to provide the Company flexibility in implementing the EAP.

H. CG&E's Education Plan

Section 4928.31(A)(5), Revised Code, requires each utility's transition plan to include a consumer education plan consistent with Section 4928.42, Revised Code. Section 4928.42, Revised Code, provides that, prior to the starting date of competitive retail electric service, the Commission shall prescribe and adopt a general plan by which each electric utility shall provide during its MDP consumer education on electric restructuring. Utilities are required to spend up to $16 million in the first year on consumer education within their certified service territories and an additional $17 million in decreasing amounts over the remaining years of the MDP. As part of its transition plan, CG&E filed an education plan, which was later amended. CG&E's amended education plan targets residential customers; small and mid-sized commercial customers; elected officials, community leaders, civic organizations, trade associations, and consumer groups; and large commercial and industrial customers. The amended plan also describes the methods, timelines, and spending that will be used for CG&E's education campaign. Further, CG&E's amended education plan included deferral of its expenditures on consumer education in CG&E's requested transition costs recovery. No parties opposed CG&E's amended education plan.

On November 30, 1999, the Commission issued rules for the electric transition plan proceedings, and adopted a general plan for electric utilities' consumer education in Case No. 99-1141-EL-ORD, *In the Matter of the Commission's Promulgation of Rules for Electric Transition Plans and of a Consumer Education Plan, Pursuant to Chapter 4928, Revised Code*. After the companies filed their transition plans, various intervenors filed preliminary objections. Separate staff reports were filed in each of the transition plan proceedings. In each staff report, the staff stated that the consumer education plans are consistent with the requirements issued by the Commission on November 30, 1999.[8] After reviewing all of the education plans filed in all of the transition cases and after considering the objections and comments submitted, we found in our July 20, 2000 finding and order in 99-1658-EL-ETP et al., CG&E's amended education plan to be in compliance with Section 4928.42, Revised Code, and we approved CG&E's education plan subject to three contingencies. First, we noted that, with regard to provisions for the funding of local community-based organizations (CBO), although we did not require funding of the CBOs, we did encourage CG&E to provide CBO funding. We also required CG&E to include an unaffiliated energy marketer representative on their advisory groups. Second, we required that the plans for CG&E include further details on how the territory-specific campaigns will be managed and operated, how materials and information will be disseminated, and how funds will be allocated to activities, as well as other matters. Further, we conditioned our approval on the Commission staff's continuing supervision of the general and territory-specific plans as further details are developed for each of the consumer education programs. With the

8 The staff's only recommendation was the inclusion of an energy marketer representative in the advisory group. CG&E was the only company to file an amended education plan that added an energy marketer representative to the advisory group.

conditions to CG&E's education plan set forth in our July 20, 2000 order, we find that CG&E's transition plan complies with Section 4928.31(A)(5), Revised Code.

I. Independent Transmission Plan (ITP)

Pursuant to Section 4928.12(A), Revised Code, no entity shall own or control transmission facilities (as defined by federal law) in Ohio as of the date of competitive retail electric service unless the entity is a member of, and transfers control of those facilities to, one or more qualifying transmission entities. Section 4928.12(B), Revised Code, sets forth nine requirements for a qualifying transmission entity must meet including: (1) the transmission entity is approved by FERC; (2) the transmission entity separates control of transmission facilities from control of generation facilities; (3) the transmission entity implements, to the extent reasonably possible, policies and procedures designed to minimize pancaked transmission rates within Ohio; (4) the transmission entity improves service reliability within Ohio; (5) the transmission entity provides for an open and competitive electric generation marketplace, eliminates barriers to market entry and precludes control of bottlenecked transmission facilities; (6) the transmission entity is of sufficient scope or otherwise increases economical supply options; (7) the transmission entity's governance structure is independent from transmission users; (8) the transmission entity satisfies customers' electricity requirements; and (9) the transmission entity maintains real-time reliability of the transmission system, ensures comparable and non-discriminatory transmission access and necessary services, minimizes congestion and addresses transmission constraints. CG&E states that the requirements of Section 4928.12(B), Revised Code, are substantially similar to the requirements established by the FERC for Independent System Operators (ISOs) in Order No.888[9] and for Regional Transmission Organizations (RTOs) in Order No. 2000.[10] CG&E asserts that an RTO approved under FERC's Order No. 2000 requirements will of necessity also satisfy the requirements of Section 4928.12(B), Revised Code.

CG&E witness John C. Procario (CG&E Exs. 20 and 54) sponsored and explained CG&E's ITP, which is Part G of CG&E's transition plan. Mr. Procario explained how CG&E believes the MISO and CG&E's participation in the MISO satisfies each of the requirements of Section 4928.12(B), Revised Code, as well as the more specific criteria set forth in Rule 4901:1-20-17, O.A.C. Mr. Procario indicated that CG&E will belong to the MISO and that the MISO is a transmission entity approved by FERC. He noted that FERC initially gave conditional approval to the MISO on September 16, 1998 (CG&E Ex. 20 at 9). The MISO transmission owners subsequently made a compliance filing and FERC issued an order approving the compliance filing on April 16, 1999, conditioned on a minor change that the MISO Transmission Owners made on May 17, 1999 (CG&E

9 FERC Stats. & Regs., ¶ 31,036 (1996)
10 FERC Stats. & Regs. ¶ 31,089 (2000).

Ex. 20 at 9-10). He indicated that the MISO still must make additional compliance filings within 60 days of becoming operational regarding filing and operating procedures and the MISO must also make a compliance filing arising from FERC's recent Order 2000 (CG&E Ex. 20 at 9; 89 FERC Section 61,285; Buckeye Ex. 2 at 22).

Mr. Procario indicated that the MISO will separate control of transmission facilities from control of generation facilities because the MISO will have functional control over transmission facilities (CG&E Ex. 20 at 14-15). Mr. Procario testified that the MISO also eliminates pancaked transmission rates within the MISO, by providing for non-pancaked zonal rates during a six-year transition period (CG&E Ex. 20 at 20). At the end of the six-year transition period, the progression to a single rate or combined rates will depend on how quickly states encompassed by the MISO adopt customer choice and the development of independent transmission companies (*Id.* at 22). Under the ITP stipulation, CG&E committed to participate in the collaborative process under FERC Order 2000 to discuss integrating the facilities of the transmission-owning utilities in Ohio. CG&E will also seek to enter into a joint stipulation with all of the other transmission-owning utilities in Ohio to submit the subject of how to achieve the objectives listed in Rule 4901:1-20-17(B)(3), O.A.C., and related issues to a separate joint Commission hearing dealing solely with that subject as part of their respective transition plan application proceedings. CG&E will also seek to jointly request, together with the intervenors in this case, that the Commission order the other transmission-owning utilities to participate in such a hearing. CG&E will also participate in a statewide collaborative process to resolve the transmission seams issues in Ohio.

Mr. Procario noted that the MISO improves service reliability within Ohio because the MISO will act as the security coordinator for the transmission facilities under its functional control (CG&E Ex. 20 at 24). In addition, the MISO will promote open competition because the MISO's transmission usage and availability will be publicly posted on OASIS in real time and the MISO's transmission rates will be calculated in a uniform manner and will also be publicly available (*Id.* at 29). Mr. Procario indicated that the MISO is of adequate size and scope to increase economical supply options. He noted that the MISO's scope and configuration is significant because the MISO would serve a 16-state area and span three reliability councils: MAIN, ECAR, and MAPP (CG&E Ex. 20 at 7). Mr. Procario also testified that the MISO has several structural features that provide for independent governance. The MISO's governing structure consists of an independent board of directors and an advisory committee. Any eligible transmission customer may join the MISO. The members elect the board of directors (CG&E Ex. 20 at 36, 37). The MISO provides for satisfaction of customer requirements because it provides non-discriminatory open access to the transmission system for all eligible transmission customers (CG&E Ex. 20 at 44). Finally, Mr. Procario noted that the MISO will provide for real-time reliability because it will have primary responsibility for short-term reliability of the grid's operation (CG&E Ex. 20 at 48).

We note that the transition plan stipulation and the ITP stipulation are designed to address the fact that, even if the MISO is fully approved by FERC by January 1, 2001, it will not be operational until some time later that year. The MISO is currently scheduled to become operational during 2001 (CG&E Ex. 20 at 10). CG&E respectfully requests that the Commission approve a deferral of CG&E's compliance with the ITP requirements until December 31, 2001, as the Commission is expressly authorized to do under Sections 4928.34(A)(13) and 4928.35(G), Revised Code.

Objections to CG&E's ITP

Buckeye, a non-profit electric generation and transmission cooperative, and OREC, a statewide association that represents the interests of Buckeye and its members, argue that CG&E's transition plan fails to meet the requirements of Section 4928. 12(B), Revised Code, because it fails to satisfy the requirement to minimize pancaked transmission rates in Ohio[11]. Buckeye and OREC contend that rate pancaking is a major obstacle to the development of workably competitive markets for electric generation service. According to Buckeye and OREC, CG&E has three options under SB3 to minimize transmission rate pancaking by January 1, 2001. In this case, Buckeye and OREC argue that CG&E has failed to make an adequate proposal in its transition plan under any of these three criteria to minimize pancaking and, therefore, its transition plan should be rejected (*Id.* at 6).

Buckeye and OREC contend that, under the first option, utilities can all be part of one transmission entity. Buckeye notes that CG&E is a member of the MISO, while three of the other four investor-owned utilities in Ohio, American Electric Power Company ("AEP"), FirstEnergy Corporation ("FirstEnergy"), and Dayton Power and Light Company ("DP&L"), plan to be members of the Alliance RTO. Buckeye and OREC agree that a merger of these two entities would maximize the reliability benefits and enhance competition. However, they claim that CG&E participated in discussions about merging the Midwest ISO and the Alliance RTO, but those discussions have been unsuccessful. Thus, Buckeye and OREC contend that, so long as CG&E remains in the MISO, and AEP, FirstEnergy, and DP&L are in the Alliance RTO, there will be a transmission "seam" in Ohio, and the requirement to minimize transmission rate pancaking will not be met. Under the second option, CG&E can enter into reciprocity agreements with other Ohio utilities to minimize pancaking of rates. Mr. Solomon explained in his direct testimony how such reciprocity agreements are established. Buckeye and OREC state, however, that CG&E acknowledged that it has never provided a reciprocity proposal for the other Ohio utilities to consider. Mr. Solomon argued that the failure of the MISO and the Alliance RTO to reach agreement on merging into a single RTO could result in the creation of at least two RTOs that would operate within Ohio (*Id.* at 7). The third option allows utilities to propose another means

[11] Rate pancaking occurs when each owner of a transmission system is allowed to add the transmission price to the cost of delivering energy.

to minimize rate pancaking. According to Buckeye and OREC, CG&E claims it is satisfying the third criteria because, under the stipulation, it is agreeing to participate in the collaborative process under FERC to resolve the transmission seams issues, and to participate in hearings at the Commission if other transmission owning utilities will not agree to work together (*Id.* at 18). Buckeye and OREC argue that, under this option, the utility must provide documentation to enable the Commission to determine whether it has met its burden (*Id.* at 19). They argue that CG&E has failed to provide documentation that would demonstrate that the MISO will minimize pancaked transmission rates. Further, Mr. Solomon contends that CG&E's ITP is only a promise to continue talking about pancaking and, therefore, CG&E's transition plan should be rejected.

Commission Conclusion

Pursuant to Section 4928.34(A)(13), Revised Code, as an alternative to approving an ITP that complies with Section 4928.12, Revised Code, the Commission may, for good cause shown, authorize a company "to defer compliance until an order is issued under division (G) of Section 4928.35 of the Revised Code." Upon review, we find that we will defer approval of CG&E's ITP. Our action is based, in part, because the Commission cannot determine, at this time, whether the Midwest ISO, in its present state, is compliant with the requirements of Section 4928.12, Revised Code. At this time, the MISO is not operational and is not projected to be operational until late 2001. Furthermore, CG&E's ITP does not, at this time, minimize pancaked transmission rates and there are no provisions in the stipulation that act to minimize pancaked transmission rates during the interim time period until the Midwest ISO is operational. We note that, under the stipulation in FirstEnergy Corp. (99-1212-EL-ETP et. al.,) the FirstEnergy Corp. operating companies agreed to reimburse any supplier serving retail customers within the operating companies' respective service areas for the cost of any associated transmission charges imposed by the Pennsylvania-New Jersey-Maryland Interconnect and/or by the Midwest ISO. No such provisions exist under the CG&E stipulation. Accordingly, for these reasons, the Commission will defer the approval of CG&E's ITP until such time as the activities set forth in paragraph 5 of the ITP stipulation have been explored to adequately address compliance with Section 4928.12, Revised Code, and Rule 4901:10-20-17(B)(3), O.A.C., regarding minimizing pancaked transmission rates. We will authorize CG&E to defer compliance with these provisions until an order is issued pursuant to Section 4928.34(A)(13), Revised Code.

J. Exempt Wholesale Generator (EWG)

Under section 8 of the transition plan stipulation, CG&E's EWG will be prohibited from selling power to an affiliate for resale at retail in CG&E's service territory, except through CG&E's RCSA, and it will be prohibited from selling to an affiliate certified supplier on more favorable prices or terms than CG&E sells to a non-affiliate certified supplier. The information regarding the sales or transfers of power and ancillary services by the EWG to an affiliate shall be simultaneously posted with the execution

of any agreement for the sale or transfer on a publicly available electronic bulletin board.

Shell objects to CG&E's treatment of the wholesale power price it would pay to the EWG. Shell claims that, by shielding the price paid to the EWG for the wholesale power resold as standard offer service, stipulation Section 8 would deprive the market place of pricing transparency regarding the EWG's dealings with an affiliate that likely would be its single largest customer during the MDP. Shell also contends that it would make it more difficult for competitors to discern anticompetitive price discrimination in favor of standard offer service. Shell argues that, even if a supplier did not purchase power from the EWG, the pricing information at issue would represent a significant part of the prevailing wholesale market, and would assist suppliers in assessing prices available from alternative wholesale power sources. According to Shell, withholding the EWG's standard offer-related pricing thus would distort the wholesale market pricing signals received by third-party suppliers, thereby producing uneconomic wholesale deals that, in turn, would make it more difficult for marketers to offer significantly lower prices to consumers. Shell contends that access to the wholesale prices paid the EWG by CG&E also would permit third parties and the Commission to monitor the excess generation revenues collected by CG&E under its frozen rate for standard offer generation service.

CG&E claims that Shell's first contention is wrong. It maintains that, under CG&E's RCSA, the price to be paid by CG&E to the EWG is set at the unbundled generation rate charged to CG&E's customers who have not switched and that these unbundled rates are delineated in CG&E's filed tariffs. Thus, the price charged by the EWG to CG&E is information available in public documents and simply not shielded. CG&E also finds Shell's arguments regarding suppliers purchasing power from the EWG as not credible. CG&E maintains that its RCSA sets the price to be paid by CG&E at the unbundled generation rate charged to CG&E's customers who have not switched and that these generation rates are set forth in its filed tariffs. CG&E also contends that it is required to report monthly data related to noncompetitive electric generation services to the Commission on a quarterly basis. It contends that this information is all that is needed to monitor CG&E's generation revenues. CG&E also argues that to allow suppliers to purchase power from the EWG at unbundled generation standard service offer rates would provide nothing more that a subsidy to CRES providers and should be rejected.

Upon review of the issues raised by Shell, we find that stipulation Section 8 to be reasonable. We agree with CG&E that, according to the stipulation, the price to be paid by CG&E to the EWG under CG&E's RCSA will be set at the unbundled generation rate charged to CG&E's customers who have not switched. This information will be available in CG&E's filed tariffs and will not be shielded. We also agree with CG&E on Shell's second argument regarding access to sufficient information in order to monitor CG&E's generation-related revenue. We believe that the rate information set

forth in CG&E's tariffs in conjunction with CG&E's reporting data on sales, billed revenues, and other monthly data will provide sufficient information in order to monitor CG&E's generation revenues. Finally, with regard to the issue of allowing suppliers, such as Shell, to purchase power from the EWG at unbundled generation standard service offer rates, the Commission finds that the stipulation provides adequate measures to promote competition and, therefore, does not believe it is necessary to mandate at what price suppliers can purchase power from the EWG.

IV. CRITERIA FOR EVALUATING STIPULATIONS

Rule 4901-1-30, Ohio Administrative Code, 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, at 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); *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14, 1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (March 30, 1004); *Ohio Edison Co.*, Case No. 91-698-EL-FOR et al. (December 30, 1993); *Cleveland Electric Illum. 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 547 (*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.*).

Based on our three-prong standard of review, we find that the first criterion, that the process involved serious bargaining by knowledgeable, capable parties, is met. Multiple bargaining sessions, open to all parties, took place before commencement of the hearings. The parties to these negotiations have been involved in many cases before the Commission, including a number of prior cases involving rate issues. Further, there have been few settlements in major cases before this Commission in which the overwhelming majority of intervenors either supported or do not oppose the resolution of issues presented by the stipulations.

The stipulations also meet the second criterion. The stipulated resolution of these cases is for many reasons advantageous and promotes the public interest. The stipulations establish a framework for transition to and development of a competitive electricity marketplace in an orderly fashion. The stipulations also remove significant uncertainty and continuing controversy which could delay the primary goal of these proceedings to create a functioning and effective retail market for the sale of electricity to CG&E customers and an orderly transition from the traditional regulatory environment to one of supplier and service choices. Further, the stipulations assure an aggressive transition to a functioning retail generation market and provides other significant economic benefits for consumers, some of which would otherwise have been subject to legal challenge by CG&E. These benefits take the form of extended rate freezes, rate reductions, flexibility for larger contract customers not otherwise available, low income energy efficiency grants and, as a result of shorter, defined transition periods for CG&E, significant risks with respect to its ability to recover transition costs. Additionally, through the availability of shopping credits and incentives, the stipulations enable marketers to compete and sell retail electricity. Some of these benefits include:

(1) Offers a five percent reduction of CG&E's generation component, including RTC, for residential rate schedules

(2) Creates shopping credits that facilitate the development of the retail marketplace.

(3) Waives the switching fee for the first 20 percent of residential customers that switch to a certified supplier during the MDP.

(4) Maintains for five years the MDP, including a rate cap, to the residential customers, irrespective of the number that switch.

(5) Continues support for energy efficiency and weatherization services to low-income persons by maintaining certain existing contracts valued at approximately $4 million for five years.

(6) Prohibits the Company's EWG from offering power or ancillary services incident to the delivery of power at prices and terms more favorable than those available to the non-affiliated electric suppliers.

(7) Offers to customers with contracts approved pursuant to Section 4905.31, Revised Code, who would otherwise be on the primary distribution, transmission, or lighting rate schedules, a one-time right, through December 31, 2001, to cancel any such contract without penalty, provided that the customer remains a distribution customer of CG&E.

(8) CG&E offers to make best efforts to implement consolidated bill-ready billing by January 1, 2002, and to implement supplier consolidated billing by June 1, 2002.

(9) CG&E commits to work with other regions, RTO/ISO groups and transmission level customers to develop and implement specific proposals to address reciprocity and interface/seams issues.

(10) CG&E commits to accept any resolution of issues agreed to by all OSPO working-group participants and to incorporate any such changes in its transition plan.

(11) CG&E offers to amend its OATT to add a new schedule for retail energy imbalance service, and will amend its OATT to allow transmission customers to designate new resources on a day-ahead basis, provided that there exists available transfer capacity that is subject to the approval of the transmission provider, and that the transmission customer relinquishes network transmission rights to a designated resource once a new resource is designated.

(12) CG&E offers to establish a technical task force to address and attempt to resolve technical and operational issues that may arise upon implementation of customer choice.

Adoption of the stipulations also reduces significantly the number of possible appeals, and provides additional lead time to put in place the mechanisms necessary to get the customer choice program up and running. Additional evidence that the public interest is served by the stipulations is found in the support offered by representatives of residential, commercial, and industrial customers, including OCC and the Commission's staff. As indicated above, the agreement provides that certain rates will be decreased and the prior rate plan freezes extended.

Finally, the stipulations meet the third criterion because they do not violate any important regulatory principle or practice. Indeed, the agreements balance the interests of a broad range of parties that represent a diverse spectrum of views. As indicated in the description of stipulations provided above, the stipulations provide substantial benefits to all customer classes and shareholders. Further, the policies of the state embodied in SB3 will be implemented more quickly and efficiently than would otherwise be possible.

V. PENDING MOTIONS

A. Interlocutory Appeal of Examiner's Ruling

On May 15, 2000, AK Steel filed a motion to compel discovery against CG&E to name and produce for deposition and other discovery all persons who have knowledge of any agreements, promises, payments, or inducements offered to any of the signatories to the transition plan stipulation filed in this case. Further, AK Steel requested that each such person be required to produce all letters, notes, agreements, tapes, and contracts discussing, proposing, promising, or agreeing to some inducement to a signatory. AK Steel argued that, according to the language in the stipulation, the stipulation and CG&E's filing in this case represent all of the facts and data upon which the signatories relied when agreeing to the stipulation. AK Steel contended that it has reason to believe that some or all of these assertions are untrue and it seeks to confirm or disprove its suspicion. AK Steel claimed that, if it were shown that some or all of the signatory parties to the stipulation were offered or promised special consideration in addition to the terms of the stipulation, it would impeach or contradict the fundamental assertions of the stipulation. AK Steel cited to Rule 4901-1-16(B), O.A.C., that provides that any party to a Commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. AK Steel argued that an intervenor inquiring into the reasonableness of a stipulation should not be prevented from discovering the motives and considerations provided to those who signed and supported the stipulation.

Also on May 15, 2000, CG&E filed a memorandum in opposition to AK Steel's motion to compel discovery. CG&E contended that AK Steel's motion is in direct conflict with the policy of the Commission to encourage settlement and is irrelevant to the proceeding. CG&E argued that the stipulation is a recommendation that is not legally binding upon the Commission. CG&E contended that the Commission must

conclude independently that, based on the evidence, the stipulation offers a just and reasonable resolution of the issues. CG&E claimed that the motives of the parties who signed the stipulation are irrelevant to the determination of the Commission's approval of the stipulation. CG&E also contended that the only result of an inquiry into any alleged side agreements among the parties could only be to approve or disapprove such alleged agreements, which is not relevant to the stipulation. CG&E also contended that public policy favors the compromise and settlement of disputes and the Commission recognizes the need to encourage settlement among parties.

The examiners assigned to this case issued an entry on May 19, 2000 ruling that AK Steel's motion should be denied. The examiners found that AK Steel failed to state what relevance the information it might discover through its motion to compel could have on the Commission's determination in this case. The examiners stated that the stipulations in these cases address the rates and services proposed in CG&E's transition plan and that the Commission's charge will be to determine if the stipulations and CG&E's transition plan are just and reasonable. The examiners also stated that motives of the parties in agreeing or not agreeing to sign the stipulation should not and will not affect the Commission's determination of the reasonableness of the stipulations and CG&E's transition plan. Consequently, the examiners believed that the discovery request of AK Steel was not relevant to the subject matter of the proceeding. The examiners further noted that evidence of the motives of parties in signing a stipulation is generally not admissible in a hearing.

On May 24, 2000, AK Steel filed an application for review and interlocutory appeal of the hearing examiners' May 19, 2000 discovery ruling. AK Steel argues that it was improper for the examiners to deny its motion to compel. AK Steel argues that the evidence adduced from the discovery would be relevant to whether the stipulations are discriminatory on their face and not in the public interest if it can be shown that CG&E has agreed to give special considerations to parties that signed on to the stipulations. AK Steel reiterates many of the same argument raised in its original motion to compel. On May 25, 2000, CG&E filed a memorandum in opposition to AK Steel's application for review.

Inasmuch as AK Steel's application for review has not been addressed prior to the issuance of this opinion and order, the Commission will address it at this time. The Commission affirms the ruling of the examiners for the reasons set forth in the examiner's May 19, 2000 entry. The Commission agrees that the information AK Steel seeks to discover will not lead to relevant information. The Commission will determine if the stipulation and CG&E's transition plan are just and reasonable. The transition plan and stipulation can not be modified by any private agreements not before the Commission. The motives of the parties in agreeing or not agreeing to sign the stipulation will not affect the Commission's determination of the reasonableness of the stipulation and CG&E's transition plan. Further, as noted by the examiners, the Commission's longstanding policy has been to encourage settlements in cases that

come before it. The Commission believes that its policy would not be advanced if one party in a case could require another party to disclose information on the motives toward settlement or force another party to produce all letters, notes, agreements, tapes, and contracts related to that settlement motivation. By granting AK Steel's motion, we would be forcing such disclosures.

Further, the Commission has the authority to verify CG&E's compliance with SB3, Title 49 of the Revised Code, and the Commission's rules, including the corporate separation requirements of the Commission's order and CG&E's corporate separation plan and applicable code of conduct. In addition, the Commission has authority to audit any transactions made by CG&E and its affiliates. This authority allows the Commission to prevent any improper subsidy or discriminatory treatment of customers. Accordingly, AK Steel's request that the Commission overturn the examiners' decision is denied.

B. Filing of Compliance Tariffs

On June 27, 2000, the CCE filed a motion for a "compliance tariff filing, service, review, and comment procedures.[12]" The motion states that, because of the broad-sweeping changes that will be subject to the provisions of the tariffs ultimately approved in these proceedings, it is necessary to allow interested parties adequate time to review and comment on the proposed tariffs prior to final approval. CCE requests that the Commission order each of the applicants in the transition plan cases to serve tariffs and associated work papers simultaneous with their filing with the Commission. CCE asks that a two-week period be provided after the date of receipt of the tariffs and work papers in order for intervenors to review the documents and submit comments to the Commission for its consideration prior to approval of the tariffs.

CCE's motion shall be granted, subject to modification. We believe that, instead of receiving formal filings with respect to CG&E's compliance tariffs, a more informal process will be beneficial to all interested parties. Accordingly, the Company and other interested parties should observe the following timelines for distributing and reviewing CG&E's proposed tariffs pursuant to this order: (1) within 14 days following the issuance of this order, CG&E should distribute (via electronic mail, fax, or overnight delivery) to all intervenors and the Commission's staff a working draft of its proposed compliance tariffs as well as associated work papers, and UNB schedules that reflect the rates embodied in the compliance tariffs; (2) within 14 days thereafter, interested parties should circulate (via electronic mail, fax, or overnight delivery) comments to the Company and the staff regarding the Company's working draft[13]; and (3) within 14 days thereafter, CG&E shall formally file its proposed tariffs in the form of an application for approval of compliance tariffs.

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12 This motion was jointly filed in all of the pending electric transition plan dockets.

13 Neither the working draft nor the informal comments are to be filed formally in the docket in this proceeding.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) On December 28, 1999, CG&E filed its transition plan, appendices, schedules, testimony, and supplemental information.

(2) Preliminary objections were filed between January 26, 2000, and February 14, 2000.

(3) On March 27, 2000, the Staff Report was filed. CG&E filed supplemental testimony on May 1, 3, and 17, 2000, and rebuttal testimony on June 12, 2000.

(4) Intervention was granted to a number of parties. On May 8, 2000, a stipulation and recommendation on CG&E's transition plan was filed by CG&E; the staff; Ohio Consumers' Council; Ohio Council of Retail Merchants; Industrial Energy Users-Ohio; Kroger Company; The Ohio Manufacturers' Association; National Energy Marketers Association; New Energy Midwest, LLC; WPS Energy; Enron Energy Services, Inc.; Dynegy, Inc.; Cincinnati/Hamilton County Community Action Agency; Supporting Council of Preventive Effort; The Ohio Hospital Association; ODOD; People Working Cooperatively; Exelon Energy; Strategic Energy; Columbia Energy Services Corp.; Columbia Energy Power Marketing Corp.; Mid-Atlantic Power Supply; city of Cleveland; and American Municipal Power-Ohio. Stand Energy Corp. and Local Union 1347, International Brotherhood of Electrical Workers, AFL-CIO subsequently signed the stipulation.

(5) Also on May 8, 2000, a stipulation on CG&E's employee assistance plan was filed on behalf of CG&E; the staff; Industrial Energy Users-Ohio; The Ohio Council of Retail Merchants; AK Steel Corporation; Kroger Company; The Ohio Manufacturers' Association; The Ohio Hospital Association; Columbia Energy Services Corp.; Columbia Energy Power Marketing; Exelon Energy; Strategic Energy; Mid-Atlantic Power Supply Assoc.; Ohio Consumers' Council; New Energy Midwest, LLC; WPS Energy Services, Inc.; and Enron Energy Services, Inc. A third stipulation on CG&E's independent transmission plan was filed on May 8, 2000, on behalf of CG&E; the staff; Ohio Consumers' Council; The Ohio Council of Retail Merchants; Industrial Energy Users-Ohio;

Kroger Company; The Ohio Manufacturers' Association; New Energy Midwest, LLC; WPS Energy Services, Inc.; Enron Energy Services, Inc.; Dynegy, Inc.; and The Ohio Hospital Association.

(6) Prehearing conferences were held on April 5, and May 11, 2000. The evidentiary hearings were held on May 30, June 1, 2, 5, 6, 8, and 14, 2000.

(7) A local public hearing was held in Cincinnati, Ohio on June 8, 2000.

(8) Pursuant to Section 4928.39, Revised Code, the total allowable transition costs for CG&E, as agreed to in the transition plan stipulation, are reasonable and include the recovery of $401.4 million of existing regulatory assets and projected $483 million of new regulatory assets, plus certain carrying costs and purchased power costs.

(9) The stipulation provides appropriate shopping incentives to achieve a 20 percent load switching contemplated by Section 4928.40 (A), Revised Code.

(10) CG&E's transition plan, as modified by the stipulations, satisfies the requirements of SB3, and is approved for the reasons and to the extent set forth herein.

It is, therefore,

ORDERED, That CG&E's transition plan and stipulations filed on April 17, 2000, and May 8, 2000, are approved, to the extent set forth in this opinion and order and subject to final approval of CG&E's compliance tariffs. It is, further,

ORDERED, That the tariff amendments and accounting authority requested by CG&E are approved in accordance with the discussion set forth in this opinion and order. It is, further,

ORDERED, That CG&E and other interested intervenors follow the timelines for informal review and comments with respect to the company's compliance tariffs, and that CG&E file an application for approval of its compliance tariffs in accordance with the directives set forth in 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

Ronda Hartman Fergus

Craig A. Glazer

Judith A. Jones

Donald L. Mason

SEF/RRG/vrm

Entered in the Journal
AUG 31 2000
A True Copy
Gary E. Vigorito
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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

APPEARANCES

Paul A. Colbert, Senior Counsel, Kate E. Moriarty, Assistant General Counsel, and Sheri L. Hylton, The Cincinnati Gas & Electric Company, 139 East Fourth Street, P.O. Box 960, Cincinnati, Ohio 45201, on behalf of the Cincinnati Gas & Electric Company.

Jim Petro, Attorney General of the State of Ohio, Duane W. Luckey, Senior Deputy Attorney General, by Thomas McNamee, Assistant Attorney General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission of Ohio.

Janine L. Migden-Ostrander, Ohio Consumers' Counsel, by Ann M. Hotz and Jeffrey L. Small, 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.

Vorys, Sater, Seymour & Pease LLP, by M. Howard Petricoff, 52 East Gay Street, PO Box 1008, Columbus, Ohio 43215, on behalf of Constellation NewEnergy, Inc.; Constellation Energy Commodities Group, Inc.; and Strategic Energy, LLC.

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

Craig I. Smith, 2824 Coventry Road, Cleveland, Ohio 44120, on behalf of Formica Corporation.

David C. Rinebolt, Executive Director and Counsel, 231 West Lima Street, P.O. Box 1793, Findlay, Ohio 45839, on behalf of Ohio Partners for Affordable Energy.

Boehm, Kurtz & Lowry, by David F. Boehm and Michael L. Kurtz, 36 East Seventh Street, Suite 1510, Cincinnati, Ohio 45202, on behalf of Ohio Energy Group.

I. HISTORY OF THE PROCEEDINGS

On September 29, 2004, the Commission issued its opinion and order in a proceeding which established a rate stabilization plan (RSP) for the Cincinnati Gas &

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Electric Company (CG&E). *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 RSP was designed to stabilize prices following the termination of CG&E's market development period, while allowing additional time for competitive electric markets to grow. As a part of the RSP, the Commission authorized CG&E to establish and charge a system reliability tracker (SRT) which would permit CG&E to flow through to customers the actual costs necessary to cover peak and reserve capacity requirements to maintain system reliability. In its November 23, 2004, entry on rehearing in the RSP case, the Commission required CG&E to file an annual application, no later than September 1 of each year, to establish the SRT for the following calendar year. Also in that entry on rehearing, the Commission clarified that the SRT was to be unavoidable during 2005 (except by shopping credit customers), but that the avoidability of the SRT in subsequent years would be determined in a case to be commenced by CG&E by the earlier of the implementation of MISO Day 2 (as that term was used in the entry on rehearing) or July 1, 2005, whichever occurred earlier.

On December 3, 2004, CG&E filed an application to approve its initial SRT, for the calendar year 2005. *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its System Reliability Tracker Component of its Market-Based Standard Service Offer*, Case No. 04-1820-EL-ATA (2004 SRT case). Following a subsequent amendment, the application in the 2004 SRT case was approved, on an interim basis only, subject to modification and subsequent true-up, on December 21, 2004. Final approval of the 2004 SRT application was issued on February 9, 2005.

On June 1, 2005, CG&E filed its application in the above-captioned case (2005 SRT application), seeking (1) approval of CG&E's 2006 resource plan and the consequent SRT price for the calendar 2006, (2) a determination of the avoidability of the SRT in years subsequent to 2005, and (3) authorization of quarterly adjustments to the SRT.

Several entities filed motions for intervention in this proceeding. Intervention was granted to Ohio Consumers' Counsel (OCC); Constellation NewEnergy, Inc. (CNE); Constellation Energy Commodities Group, Inc. (CECG); Strategic Energy, LLC (Strategic); Industrial Energy Users-Ohio; Ohio Energy Group, Inc. (OEG); Ohio Partners for Affordable Energy; and Formica Corporation (Formica).

A hearing was held on September 7 and 9, 2005. At the hearing, CG&E presented the testimony of three witnesses. Two witnesses testified on behalf of CNE, CECG, and Strategic. Staff of the Commission also presented one witness.

On October 27, 2005, several of the parties filed a joint stipulation and recommendation which purports to resolve all of the issues raised by the 2005 SRT application. All parties signed this stipulation, with two exceptions: Formica filed a letter, on November 3, 2005, stating that it would not oppose the stipulation. OEG filed a statement, on November 10, 2005, confirming that it would neither oppose the stipulation nor file a brief. No briefs were filed by any party.

II. SUMMARY OF THE STIPULATION

The stipulation is intended by the signatory parties to resolve all of the outstanding issues in the 2005 SRT case. It includes the following provisions:

(1) With regard to nonresidential customers, the SRT will be avoidable by any customer that signs a contract or provides a release agreeing to remain off CG&E's market-based standard service offer (MBSSO) service through December 31, 2008, and to return to the MBSSO service, if at all, at the higher of the RSP price or the hourly locational marginal pricing (LMP) market price, as set forth in the Commission's entry on rehearing in the RSP case.

(2) With regard to residential customers, the SRT will be unavoidable. All residential customers who purchase generation from a competitive supplier may return to CG&E's MBSSO at the RSP price.

(3) CG&E will calculate the SRT for the first quarter of 2006 using a planning reserve margin of 15 percent of the projected retail load not eligible to avoid the SRT on January 31, 2006. In its filing for the second quarter of 2006, CG&E will reconcile that calculation with the actual such load on January 31, 2006. CG&E's plan to purchase reserves of 15 percent of the retail load not eligible to avoid the SRT is deemed by the parties to be prudent. CG&E agrees to make purchases to achieve that reserve, keeping records sufficient for Commission staff audit, and will recover the associated costs from customers that do not avoid the SRT.

(4) CG&E will buy and sell reserve capacity as needed and as possible, crediting revenues to SRT customers and managing the reserve position to maintain a 15 percent reserve level for the projected standard service load, to the extent possible. Such management will include the acquisition and sale of capacity for non-residential consumers that leave or return to the MBSSO at the higher of the RSP price or the hourly LMP price. Management of the 2006 SRT will be subject to a prudence review by the Commission.

(5) The 2006 SRT will be adjusted and reconciled quarterly.

(6) The SRT costs will be divided into separate pools allocable to residential and nonresidential customers, with 42.382 percent of costs allocated to residential customers' pool, along with the same percentage of over-collections, under-recoveries, and credits from third-party sales. Shopping by nonresidential customers will not cause residential customers to pay any additional charges. Nonresidential customers will pay the remainder of SRT costs.

(7) SRT transactions shall be audited by Commission staff. The results of its audits shall be filed in the docket. Parties may request a hearing regarding such audit.

(8) With regard to certain specified assets, the parties agreed as follows: "To the extent that any assets owned by Duke Energy North America LLC (DENA Assets) are transferred to CG&E and CG&E proposes to use any such DENA Assets as part of the SRT portfolio, CG&E cannot use the DENA Assets as part of the SRT unless it receives Commission authorization to do so after CG&E 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). CG&E 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." The parties also noted, in a footnote, that "[n]othing herein shall be construed as the parties' consent for approval of the transfer of the DENA Assets to CG&E. All parties retain their legal rights with respect to the transfer of the DENA Assets to CG&E."

(9) All other terms of the 2005 SRT application should be approved.

III. 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 an agreement are accorded substantial weight. *See, Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, at 125 (1992), *citing Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155 (1978). This concept is particularly valid where the stipulation is unopposed by any party and resolves all issues presented 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., Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14, 1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (March 30, 1004); *Ohio Edison Co.*, Case No. 91-698-EL-FOR *et al.* (December 30, 1993); *Cleveland Electric Illum. 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. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559 (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.*).

After reviewing the stipulation and other evidence of record, we conclude that the stipulation, as a whole, represents a reasonable resolution of the issues presented in this proceeding. The stipulation appears to be the product of serious bargaining among knowledgeable, experienced parties; to benefit the public interest; and not to violate any important regulatory principle or practice. Accordingly, we find that the stipulation submitted in this case should be adopted and approved in its entirety.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) CG&E is an electric light company within the meaning of Sections 4905.03(A)(4) and 4928.01(A)(7), Revised Code, and, as such, is a public utility as defined by Section 4905.02, Revised Code, subject to the jurisdiction and supervision of the Commission. CG&E is also an electric distribution utility within the meaning of Section 4928.01(A)(6), Revised Code.

(2) On June 1, 2005, CG&E filed an application seeking approval of CG&E's 2006 resource plan and the consequent SRT price for the calendar 2006, a determination of the avoidability of the SRT in years subsequent to 2005, and authorization of quarterly adjustments to the SRT.

(3) The Commission conducted a public hearing in this proceeding on September 7 and 9, 2005, at its offices at 180 East Broad Street, Columbus, Ohio.

(4) A stipulation which would, if accepted by the Commission, resolve all of the issues in this case, was filed on October 27, 2005. That stipulation was signed by all but two of the parties to this case. Each of the other two parties confirmed that it would not oppose the stipulation.

(5) The Commission adopts, in its entirety, the stipulation presented by the parties to these proceedings.

ORDER

It is, therefore,

ORDERED, That the stipulation presented in this proceeding be adopted in its entirety. It is, further,

ORDERED, That CG&E file proposed tariffs reflecting the terms of this opinion and order within 10 days. 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
NOV 22 2005

Reneè J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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

APPEARANCES:

James B. Gainer, Associate General Counsel, Paul A. Colbert, Senior Counsel, and Rocco O. D'Ascenzo, Counsel, The Cincinnati Gas & Electric Company, 139 East Fourth Street, P.O. Box 960, Cincinnati, Ohio 45201, on behalf of the Cincinnati Gas & Electric Company.

Jim Petro, Attorney General of the State of Ohio, Duane W. Luckey, Senior Deputy Attorney General, by Stephen E. Reilly and Elizabeth Stephens, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission of Ohio.

Janine L. Migden-Ostrander, Ohio Consumers' Counsel, by Kimberly W. Bojko, Assistant Consumers' Counsel, 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.

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

OPINION:

I. HISTORY OF THE PROCEEDINGS

On September 29, 2004, the Commission issued its opinion and order in a proceeding that established a rate stabilization plan (RSP) for the Cincinnati Gas & Electric Company (CG&E). *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 RSP was designed to stabilize prices following the termination of CG&E's market development

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period, while allowing additional time for competitive electric markets to grow. As a part of the RSP, the Commission authorized CG&E to establish and charge a fuel and purchased power price component (FPP) which would permit CG&E to flow through to customers the actual costs necessary to cover fuel and economy purchased power costs, a reconciliation adjustment, a system loss adjustment and emission allowances (EAs), to the extent those costs are in excess of amounts authorized in CG&E's last electric fuel component proceeding. The Commission required CG&E to make periodic submissions to Commission staff for staff's review of the FPP proposed for each upcoming quarter. The Commission also required CG&E to file an annual application, no later than September 1 of each year, to review the preceding four quarters' FPP charges. On June 29, 2005, the Commission issued an entry determining that it should review the FPP charges for four-quarter periods ending June 30 of each year. Therefore, this first review is for a six-month period and the final review will be for an eighteen-month period.

On December 27, 2004, CG&E filed tariffs, establishing the FPP component for the first quarter of 2005. On April 22, 2005, CG&E filed a tariff amendment, setting the FPP rider charge for the second quarter of 2005. On June 14, 2005, the Commission ordered its staff to issue a request for proposals from auditors who would review the FPP rider calculation. On July 6, 2005, following receipt and evaluation of such proposals, the Commission selected Energy Ventures Analysis, Inc. (EVA), to serve as the auditor of the FPP for this proceeding. CG&E's application for review of the FPP charges for the first and second quarters of 2005 was filed on September 26, 2005.

Upon motions filed in this proceeding, the attorney examiner granted intervention to Ohio Consumers' Counsel (OCC) and Industrial Energy Users-Ohio (IEU). A hearing was held on November 1 and 2, 2005. At the hearing, CG&E presented the testimony of two witnesses. Two witnesses testified to support the Commission-ordered audit of the FPP. Staff of the Commission also presented one witness.

Briefs and reply briefs were filed by CG&E, OCC, IEU, and Commission staff on November 18, 21, and 28, 2005. On January 18, 2006, CG&E and staff filed a stipulation and recommendation (stipulation) resolving all issues in this proceeding. On January 19 and 27, 2006, IEU and OCC filed notices stating that they would not oppose the stipulation.

II. SUMMARY OF THE STIPULATION

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

A. The parties agree that, for each future FPP audit period, CG&E shall prepare (1) documentation of coal purchases, by plant, by supplier, by month, including coal quality and price; (2) documentation of coal contract performance summaries indicating tons ordered, tons

received, tons sold, tons shipped to synfuel plants, quality, quality deviations from contract specifications, and actions taken by the utility to address non-performance; and (3) documentation of generation, and coal burn, by plant, during each FPP audit period.

B. The parties agree that, as part of the next FPP audit, the FPP auditor will perform a complete review of the five high sulfur coal contracts entered into by CG&E during the FPP audit period of January 1, 2005, through June 30, 2005, but which were not provided to the auditor for review during the prior audit. Nothing in the stipulation will deprive any party of its rights with regard to such review.

C. The parties agree that CG&E will develop a methodology for allocating fuel costs or fuel contracts to the Union Light Heat & Power Company (ULH&P) following the transfer of certain of its generating units. That methodology will be reviewed in the next FPP audit.

D. The parties agree that all issues regarding pre-2005 coal contract sales are resolved by the stipulation and that no change to the FPP rate is necessary related to this issue. The parties also agree that no allocation, as between FPP customers and non-FPP customers, of the benefits and costs associated with such sales is necessary. This issue is resolved by the stipulation for the entire RSP period, from January 1, 2005, through December 31, 2008. The parties agree to discuss criteria for the equitable assignment of benefits and costs of CG&E's coal contract sales margins regarding contracts executed on or after January 1, 2005. If the parties are unable to agree upon such criteria, then the FPP auditor shall review the criteria in the next FPP audit. In addition, the FPP auditor shall review the application of such criteria and verify the equitable assignment to FPP customers of the benefits and costs of coal contract sales executed on or after January 1, 2005.

E. The parties agree that CG&E will fully document any intra-company coal transactions, including those that occurred during the FPP audit period of January 1, 2005, through June 30, 2005, and will receive the same type of management approvals as CG&E requires relative to the purchase of emission allowances from affiliates. The required documentation must show that intra-company purchases cost no more than the market alternatives.

F. The parties agree that CG&E's FPP customers will receive the benefits of the reduced fuel costs associated with Tyrone Synfuel, but not other revenues or costs associated with Tyrone Synfuel. The agreement with regard to this issue is intended to apply to the entire RSP period, from

January 1, 2005, through December 31, 2008, but does not apply to any other synfuel arrangements.

G. The parties agree that, as a resolution of a specified recommendation of the auditor, CG&E will economically manage fuel, power, and emission allowances forward for the balance of the RSP period.

H. The parties agree that CG&E shall not allocate any part of its December 31, 2004, SO_2 emission allowance bank to FPP customers. The agreement with regard to this issue is intended to resolve all issues related to the allocation of CG&E's December 31, 2004, SO_2 emission allowance bank for the entire RSP period of January 1, 2005, through December 3,1 2008.

I. The parties agree that CG&E will allocate EPA-allotted zero-cost SO_2 emission allowances on the basis of projected emissions, and add to the resulting allocation to FPP load an additional 16,421 zero-cost allowances for each of the years 2006, 2007, and 2008. This allocation is fixed as of the execution of the stipulation and will remain fixed for the duration of the RSP period ending December 31, 2008. The zero-cost SO_2 allowances to be allocated to FPP load is as follows: 2005, 61,121; 2006, 73,473; 2007, 69,844; and 2008, 62,588, not including the additional annual allocation of 16,421, as previously referenced. Including the additional annual allocation, the total zero-cost SO_2 allowances to be allocated FPP load is 2005, 61,121; 2006, 89,894; 2007, 86,265; and 2008, 79,009. The parties also agree that a two-inventory system, based on this allocation methodology, is appropriate. During the RSP, CG&E will actively forward manage SO_2 emission allowances for FPP load and non-FPP load separately, such that the FPP load and non-FPP load shall be assigned the benefits and/or costs of SO_2 emission allowance transactions that result from the active management of the respective inventories to ensure compliance with Environmental Protection Agency requirements for SO_2 emissions. In each FPP audit, the auditor may examine purchases and sales of SO_2 emissions allowances to ensure that the transactions were executed at fair market prices for FPP load. To the extent that purchases or sales for FPP and non-FPP load are made on the same business day, CG&E shall give the weighted-average price of all of the purchases or sales on that day to both FPP and non-FPP load.

J. The parties agree that neither NOx emission allowance costs, nor NOx emission allowance transaction benefits, will be included in the FPP

rates through the balance of the RSP Period, January 1, 2005, through December 31, 2008.

K. The parties agree that CG&E shall not recover costs of environmental reagents through the FPP. All costs of environmental reagents that have been included in the FPP rates shall be refunded to FPP customers through the RA adjustment in the April through June 2006 FPP rates. CG&E may recover the cost of such reagents through the annually adjusted component (AAC) of its market-based standard service offer rates. The parties agree to the following process and recover: CG&E shall include projected year 2007 environmental reagent costs in the application that CG&E may file to set the 2007 AAC rate. CG&E shall include projected year 2008 environmental reagent costs and a true-up adjustment for year 2007 actual costs in the application that it may file to set the 2008 AAC rate. The true-up adjustment associated with actual 2008 environmental reagent costs shall be refunded or collected during 2009. Such recovery shall be dependent upon the need for an incremental increase in the AAC based upon environmental reagents and other costs that CG&E may recover through the AAC pursuant to the Commission's opinion and order in the RSP case. Nothing in the stipulation prohibits any party from contesting the environmental reagent costs or their recovery in such future AAC cases.

L. The parties agree that there shall be no true up of CG&E's SO_2 and NOx emission allowance inventories, as was suggested in the audit report. Such inventories shall be assigned as set forth in the stipulation. With regard to SO_2 emission allowance auction proceeds, CG&E will allocate the proceeds in the same proportion as zero-cost SO_2 emission allowances are allocated. The SO_2 emission allowance allocation to FPP load is 33 percent for 2005, 88.2 percent for 2006, 84.2 percent for 2007, and 76.2 percent for 2008. There will be no allocation of NOx emission allowance auction proceeds.

M. The parties agree that CG&E shall comply with the FPP financial audit recommendations made in this case, to the extent that they are not inconsistent with the stipulation.

III. EVALUATION OF THE STIPULATION

Rule 4901-1-30, Ohio Administrative Code, authorizes parties to Commission proceedings to enter into a stipulation. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight. *See, Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, at 125 (1992), *citing Akron v. Pub. Util. Comm.*, 55 Ohio

St.2d 155 (1978). This concept is particularly valid where the stipulation is unopposed by any party and resolves all issues presented 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., *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14, 1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (March 30, 1004); *Ohio Edison Co.*, Case No. 91-698-EL-FOR *et al.* (December 30, 1993); *Cleveland Electric Illum. 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. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559 (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.*).

After reviewing the stipulation and other evidence of record, we conclude that the stipulation, as a whole, represents a reasonable resolution of the issues presented in this proceeding. The stipulation appears to be the product of serious bargaining among knowledgeable, experienced parties; to benefit the public interest; and not to violate any important regulatory principle or practice. Accordingly, we find that the stipulation submitted in this case should be adopted and approved in its entirety. We also find that the FPP rates charged during the audit period were fair, just, and reasonable in light of the terms of the stipulation. Any adjustment in the FPP rate which is required to be made as a result of our adoption of the stipulation must be reflected in the FPP rate in the next quarterly FPP filing. Compliance with this directive will be reviewed in the next annual FPP audit.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) CG&E is an electric light company within the meaning of Sections 4905.03(A)(4) and 4928.01(A)(7), Revised Code, and, as

such, is a public utility as defined by Section 4905.02, Revised Code, subject to the jurisdiction and supervision of the Commission. CG&E is also an electric distribution utility within the meaning of Section 4928.01(A)(6), Revised Code.

(2) On September 26, 2005, CG&E filed an application seeking the Commission's review of the fuel and purchased power component of CG&E's rates during the first and second quarters of 2005.

(3) The Commission conducted a public hearing in this proceeding on November 1 and 2, 2005, at its offices at 180 East Broad Street, Columbus, Ohio.

(4) A stipulation which would, if accepted by the Commission, resolve all of the issues in this case, was filed on January 18, 2006. That stipulation was signed by all but two of the parties to this case. One of the other two parties confirmed that it would not oppose the stipulation. The other party has not opposed the stipulation.

(5) The Commission adopts, in its entirety, the stipulation presented by the parties to these proceedings.

(6) The FPP rates charged during the audit period were fair, just, and reasonable in light of the terms of the stipulation. Any adjustment in the FPP rate which is required to be made pursuant to the stipulation must be reflected in the FPP rate in the next quarterly FPP filing. Compliance with this directive shall be reviewed in the next annual FPP audit.

ORDER:

It is, therefore,

ORDERED, That the stipulation presented in this proceeding be adopted in its entirety. It is, further,

ORDERED, That the FPP rate in the next quarterly FPP filing be adjusted as described in this opinion and order and that such adjustment be reviewed in the next annual audit. It is, further,

ORDERED, That CG&E file proposed tariffs reflecting the terms of this opinion and order within 10 days. 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

FEB 0 6 2008

Reneè J. Jenkins
Secretary

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 Commission finds:

(1) On November 22, 2006, the Supreme Court of Ohio issued its decision in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 300, 2006-Ohio-5789, remanding certain issues to the Commission for further consideration in Cases 03-93-EL-ATA, 03-2079-EL-AAM, 03-2081-EL-AAM, AND 03-2080-EL-ATA. The additional, above-captioned cases were subsequently consolidated with the remanded proceedings.

(2) In the course of the Commission's remand proceedings, certain information, including side agreements between parties to these proceedings, was obtained through discovery and was sought, by several of the parties to the proceedings, to be maintained as confidential. Thus, with regard to those side agreements and certain other information, numerous motions for protective orders were filed by various parties.

(3) On October 24, 2007, the Commission issued its order on remand in these consolidated proceedings. In our order, we discussed the motions for protective orders at great length, ultimately finding that certain of the information in the documents in question is within the definition of a trade secret and should, therefore, be the subject of a protective order:

> 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

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> 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.

Order on Remand at 15.

(4) As a part of that order, the Commission directed Duke Energy Ohio, Inc., (Duke) to work with the parties to the side agreements to prepare and file "a redacted version of the confidential information attached to the prefiled testimony of Ms. Hixon . . .." After that filing, each other party to the proceedings was to redact and file all other sealed documents that such party had previously filed with the Commission. Order on remand at 17. All redactions were to be limited to that information found by the Commission to be trade secret as outlined above in finding (3).

(5) On December 7, 2007, Duke filed its newly redacted documents. On January 23, 2008, Duke and its affiliates filed new redactions of the other documents that they had filed under seal, as did the office of the Ohio Consumers' Counsel (OCC). No other party filed the required new redactions. Following OCC's filing, various parties disputed OCC's assertions that Duke's redactions had failed to follow Commission directives. In addition, on February 13 and 14, 2008, Duke filed new versions of its proposed redactions of a number of documents previously included in its filings.

(6) In addition to the sealed documents discussed above, certain other documents have been maintained under seal pursuant to an attorney examiner entry issued on May 13, 2004. That protective order was

continued by entry of May 2, 2006. On September 17, 2007, Duke moved, once again, to continue the protective order. Duke asserts that the documents covered by its motion are still proprietary and that they are not actually "records" under the applicable definition. OCC filed a memorandum contra Duke's motion, on October 5, 2007, arguing that the motion was not properly supported and disagreeing with Duke's definitional argument. Duke replied on October 9, 2007, providing additional support for its need for continued confidentiality and restating its argument that documents provided to the Commission, but not used by the Commission in reaching its decision, are not public records.

(7) Duke asserts, with regard to the definition of "records" in Section 149.011, Revised Code, that the documents in question are not records because they were not received by the Commission "to document the organization, functions, policies, decision, procedures, operation, or other activities" of the Commission. Duke contends that a decision of the Supreme Court of Ohio supports this analysis through its finding that proprietary documents retain their confidential nature when they come into the possession of a public office. *State ex. Rel. Besser v. Ohio State University*, 87 Ohio St.3d 535 (2000).

(8) We disagree with Duke's reasoning. It is certainly true that confidential documents retain that nature even when they come into the possession of the Commission, as held by the court. However, that conclusion does not support a holding that documents that are filed with the Commission are not "records" simply because they did not form the basis of a Commission opinion. Duke made the determination, in 2004, that it wished to file these documents, which were responses to discovery requests. Such a filing was not required by Commission rules. Duke's motion for a protective order referenced a dispute between Duke and OCC concerning the handling of confidential documents. Duke's filing was intended to use the Commission's protective order as a part of the resolution of that dispute. In granting the requested protective order, the attorney examiner also resolved the dispute concerning terms of the parties' confidentiality agreement. Thus, even if Duke's argument regarding the definition of "records" in Section 149.011, Revised Code, is correct, which we are not here determining, it would not result in a conclusion that these documents did not document the decisions of

the Commission. They did document the background of the examiner's granting of a protective order.

(9) The Commission has completed an exhaustive review of all newly proposed redactions and, where parties did not file new redactions, the redactions originally proposed. The Commission's review also included the documents covered by the May 13, 2004, protective order and all other documents filed under seal in these consolidated cases. With regard to Duke's motion to extend the protective order that was first granted on May 13, 2004, we find that only a limited portion of the information in those documents remains a trade secret. With regard to documents filed under seal since the remand of these proceedings, many of the redactions proposed by the parties do not comply with our order regarding the categories of information that would be deemed a trade secret. Parties should understand that their actions caused the expenditure of substantial additional hours of work by numerous Commission employees. Should such behavior be repeated, the Commission may consider the imposition of civil forfeitures under Section 4905.54, Revised Code.

(10) We have created a new, Commission-redacted version of each document that was filed under seal in these consolidated proceedings. The redactions prepared by the Commission follow the general instructions delineated in the order on remand, with some important exceptions. Information that is or already has been made public cannot be treated as a trade secret under Section 1333.61, Revised Code. Thus, in a situation in which information might have fallen within the categories outlined in the order on remand but was released in a public filing by one of the parties, we will not protect that information where it clearly appears in other places in the same document or in other documents.

(11) In addition, we note, in this regard, that an e-mail, outlining the nature and certain details of the side agreements, was filed publicly by Duke and that such filing was discussed in a Cincinnati newspaper. As a result of that public release, the termination dates of the side agreements, the fact that the side agreements provide for the refund of riders, and the fact that the options agreements are full requirement contracts can no longer be considered trade secret information and, therefore, will not be treated as confidential. In addition, that e-mail referenced the level of financial impact to

Duke's affiliate that resulted from the option agreements. That information is, therefore, also no longer confidential.

(12) We would also point out that some of the proposed redactions sought to treat, as trade secrets, categories and information that our order on remand did not allow to be so treated. We find that, under the circumstances in these proceedings, names of trade groups, names of employees, and names of attorneys (unless the attorney name makes it possible to identify a customer) are not trade secrets. In addition, we find that, in these circumstances, items such as the payment of legal fees should not be treated as trade secrets. These items would not fall within the definition of a trade secret in Section 1333.61(D), Revised Code, as we discussed in our order on remand.

(13) Based on our analysis of the motions for protective orders, as discussed in the order on remand, and on our comprehensive review of the documents themselves, the motions for protective orders are granted in part and denied in part.

(14) The Commission-redacted documents will be filed publicly in these dockets on July 1, 2008, unless an application for rehearing is filed under Section 4903.10, Revised Code. Parties to these proceedings may contact the attorney examiners in order to receive an electronic copy (on a computer disk) of the documents, with highlighting to indicate the Commission's proposed redactions, which computer disk should be available no later than Friday, May 30, 2008. The parties should understand that this copy of the information must be treated under the same confidentiality restrictions that apply to any previous copies or versions of the information that they have previously obtained, regardless of the medium in which, or the party from whom, such information was conveyed. Therefore, the disks, and the information thereon, are not to be copied or transmitted in any way to any other person or entity. As has been the case through the remand process with regard to those parties who have not entered into confidentiality agreements with Duke or its affiliates relating to this information, such information is also not to be shared by any counsel with his or her client or with any other person or entity.

(15) If any party, after reviewing the Commission's redactions, chooses to file an application for rehearing, each asserted error should be specifically referenced and explained. For this purpose, the

Commission-redacted documents have been arranged on the disk in chronological order and all of the pages have been consecutively numbered at the top of the page. A table of contents, referencing Commission page numbers, has been prepared. Assignments of error should refer to such Commission page numbers and the specific text on such pages. Parties should not expect the Commission to locate additional similar instances of asserted errors. Assignments of error that do not use Commission page numbers or that are general in nature will be denied.

(15) Rule 4901-1-24(F), Ohio Administrative Code, provides that, "[u]nless otherwise ordered, any order prohibiting public disclosure . . . shall automatically expire eighteen months after the date of its issuance, and such information may then be included in the public record of the proceeding. A party wishing to extend a protective order beyond eighteen months shall file an appropriate motion at least forty-five days in advance of the expiration date of the existing order. The motion shall include a detailed discussion of the need for continued protection from disclosure."

(16) Although the information in question has been held in the confidential files of the Commission for some time, pending review, such information has now been fully reviewed. The Commission finds that it is appropriate in these particular circumstances to grant a protective order for a period lasting through January 1, 2011. Accordingly, on January 2, 2011, the Commission's docketing division shall release the information to the public. Any party seeking to extend the protection should file an appropriate motion, pursuant to the cited rule, setting forth in particularity what information should still be deemed to be a trade secret and why. Such a motion shall refer to the information in question based on the Commission page number, for reference purposes.

It is, therefore,

ORDERED, That the motions for protective orders be granted in part and denied in part. It is, further,

ORDERED, That the parties comply with the requirements of this entry. 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

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Cheryl L. Roberto

SEF/JWK:geb

Entered in the Journal
MAY 28 2008

Reneé J. Jenkins
Secretary

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
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	)	05-724-EL-UNC
	)	05-725-EL-UNC
	)	06-1068-EL-UNC
	)	06-1069-EL-UNC
	)	06-1085-EL-UNC

ENTRY

The Commission finds:

(1) On November 22, 2006, the Supreme Court of Ohio issued its decision in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 300, 2006-Ohio-5789, remanding certain issues to the Commission for further consideration in Cases 03-93-EL-ATA, 03-2079-EL-AAM, 03-2081-EL-AAM, AND 03-2080-EL-ATA. The additional, above-captioned cases were subsequently consolidated with the remanded proceedings.

(2) On May 28, 2008, the Commission issued an entry relating to numerous documents that were filed under seal in these cases. In that entry, among other things, the Commission stated that a computer disk, showing copies of Commission-redacted documents, would be available no later than Friday, May 30, 2008. The Commission also stated that those documents would be filed publicly in these dockets on July 1, 2008, unless an application for rehearing had been filed prior to that date. The Commission's goal was to allow parties approximately 30 days for their review of the Commission's redactions.

(3) Due to technical difficulties, the computer disk was not ready on the date promised. In order to allow the parties, as intended, approximately 30 days to review the Commission's redactions, the Commission will, through this entry, re-adopt all of the findings in the May 28, 2008, entry other than finding (14). Such findings are being re-adopted as if not previously considered.

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(4) In place of the language in finding (14) of the May 28, 2008, entry, the following provisions will apply: The Commission-redacted documents will be filed publicly in these dockets on July 8, 2008, unless an application for rehearing is filed under Section 4903.10, Revised Code. Parties to these proceedings may contact the attorney examiners in order to receive an electronic copy (on a computer disk) of the documents, with highlighting to indicate the Commission's proposed redactions. The parties should understand that this copy of the information must be treated under the same confidentiality restrictions that apply to any previous copies or versions of the information that they have previously obtained, regardless of the medium in which, or the party from whom, such information was conveyed. Therefore, the disks, and the information thereon, are not to be copied or transmitted in any way to any other person or entity. As has been the case through the remand process with regard to those parties who have not entered into confidentiality agreements with Duke or its affiliates relating to this information, such information is also not to be shared by any counsel with his or her client or with any other person or entity.

(5) The Commission's intention is that, if any party desires to file an application for rehearing with regard to the matters originally determined in the May 28, 2008, entry and re-adopted in the present entry, the deadline for filing such application for rehearing should be calculated on the basis of the present issuance date.

It is, therefore,

ORDERED, That all of the findings in the May 28, 2008, entry, other than finding 14, be re-adopted consistent with finding 3, herein. It is, further,

ORDERED, That the parties comply with the requirements of this entry. 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

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Cheryl L. Roberto

SEF/JWK:geb

Entered in the Journal
JUN 0 4 2008

Reneé J. Jenkins
Secretary