

**IN THE SUPREME COURT OF OHIO**

THE OFFICE OF THE OHIO	:	
CONSUMERS' COUNSEL,	:	Case No. 08-367
	:	
Appellant,	:	Second Appeal from the Public
v.	:	Utilities Commission of Ohio
	:	Cases No. 03-93-EL-ATA
	:	03-2079-EL-AAM
THE PUBLIC UTILITIES	:	03-2080-EL-ATA
COMMISSION OF OHIO,	:	03-2081-EL-AAM
	:	
Appellee.	:	

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**THE MERIT BRIEF OF  
INTERVENING APPELLEES  
CINERGY CORP.  
AND DUKE ENERGY RETAIL SALES, LLC**

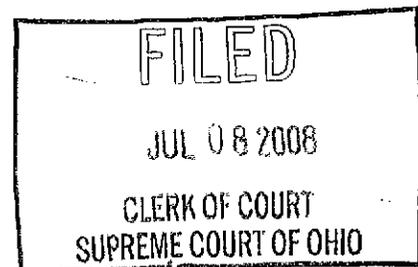
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## TABLE OF CONTENTS

TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	v
INTRODUCTION AND STATEMENT OF FACTS.....	1
A. Duke Energy Retail Sales, LLC .....	2
B. Duke Energy Ohio's Rate Stabilization Plan Case .....	3
C. Duke Energy Ohio's RSP Case On Remand .....	6
1. Cinergy and DERS' Responses to OCC's Subpoena .....	8
a. The "Direct Serve" Contracts Between DERS And Consumers of Competitive Retail Electric Service .....	9
b. The Option Agreements Between DERS and Potential Consumers of Competitive Retail Electric Service .....	11
c. The Agreement To Replace Another CRES Provider's Service At The End Of That Provider's Contract.....	13
d. The Cinergy Agreements .....	13
2. OCC's Decision To Exploit The Agreements To Its Own Ends ...	14
3. The Hearing On Remand .....	15
4. The Commission Rejected The Stipulation Due To The Existence Of The Contracts.....	17
5. The Commission Imposed Its Own Price Solutions After Rejecting The Stipulation.....	18
LAW AND ARGUMENT	
A. The Standard of Review .....	19

B. OCC's Proposed Proposition of Law No. 1 Is Incorrect. A Correct Proposition of Law Addressing The Arguments It Raises Is:

Unless Proscribed By A Reviewing Court's Express Instruction, Quasi-Judicial Tribunals, Including the Commission, Have Inherent Authority To Determine The Nature of the Proceeding That Will Take Place On Remand, To Make Determinations Upon The Relevance And Admissibility of Evidence When Additional Evidentiary Hearings Are Granted, and To Decide What Weight To Give That Evidence ..... 20

C. OCC's Proposed Proposition of Law No. 2 Is Incorrect. A Correct Proposition of Law Addressing The Arguments It Raises Is:

The Public Utilities Commission of Ohio Acts Within Its Discretion When It Rejects A Stipulation Submitted By The Parties Because The Commission Has Doubts Regarding The Integrity Of The Bargaining Process From Which The Stipulation Emerged And Instead Resolves A Case Based Upon Its Own Review Of All The Evidence Before It ..... 27

D. OCC's Proposed Proposition of Law No. 3 Is Incorrect. A Correct Proposition of Law Addressing The Arguments It Raises Is:

The Public Utilities Commission Of Ohio Appropriately Balances Its Obligations Under Ohio's Public Records Law With Its Obligations Under Ohio Laws Regarding "Trade Secret Information" When It Conducts An In Camera Review Of Documents And Then Orders That Those Documents Be Placed In the Public Record After Trade Secret Information Is First Redacted ..... 28

CONCLUSION ..... 34

## TABLE OF AUTHORITIES

### CASES

<i>AAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.</i> (1990), 50 Ohio St.3d 157, 553 N.E.2d 597.....	22
<i>AK Steel Corp. v. Pub. Util. Comm'n</i> , 95 Ohio St.3d 81, 2002-Ohio-1735, 765 N.E.2d 862 .....	2
<i>Constellation NewEnergy, Inc. v. Publ. Util. Comm'n</i> , 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885 .....	19, 23
<i>Lehigh Val. R. Co. v. Rainey</i> , 112 F. 487 (E.D. Pa. 1902) .....	25
<i>Monongahela Power Co. v. Pub. Util. Comm'n</i> , 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921 .....	19, 20
<i>Ohio Consumers' Counsel v. Pub. Util. Comm'n</i> (1979), 58 Ohio St.2d 108, 110, 388 N.E.2d 1370.....	20
<i>Ohio Consumers' Counsel v. Pub. Util. Comm'n</i> , 110 Ohio St.3d 394, 2006-Ohio-4706, 853 N.E.2d 1153 .....	23
<i>Ohio Consumers' Counsel v. Pub. Util. Comm'n</i> , 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213 .....	5, 6, 23, 34
<i>Ohio Consumers' Counsel v. Pub. Util. Comm'n</i> , 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269 .....	23
<i>Ohio Edison Co. v. Pub. Util. Comm'n</i> (1997), 78 Ohio St.3d 466,678 N.E.2d 922.....	19
<i>State ex rel. Allright Parking of Cleveland v. Cleveland</i> (1992), 63 Ohio St.3d 772, 591 N.E.2d 708 .....	31
<i>State ex rel. Besser v. Ohio State</i> (2000), 89 Ohio St.3d 396, 2000-Ohio-207, 732 N.E.2d 373 .....	31
<i>State ex rel. Village of Chagrin Falls v. Geauga Cty. Bd. of Comm'rs</i> , 96 Ohio St.3d 400, 2002-Ohio-4906, 775 N.E.2d 512 .....	21
<i>Superior Metal Products, Inc. v. Admn. OBES</i> , 41 Ohio St.2d 143, 324 N.E.2d 179.....	20, 21

**STATUTES**

R.C. §149.011 ..... 29  
R.C. §149.43 ..... 30, 31  
R.C. §1333.61 ..... 29  
R.C. §1333.61(D) ..... 29, 31  
R.C. §4901.12 ..... 30, 31  
R.C. §4905.07 ..... 30, 31  
R.C. §4928.02 ..... 1  
R.C. §4928.06 ..... 1  
R.C. §4918.17 ..... 26  
5 U.S.C. §552(b)(4) ..... 29  
18 U.S.C. §1905 ..... 29

**RULES AND REGULATIONS**

Ohio Admin. Code §4901:1-20-16 ..... 26  
Ohio Admin. Code §4901-1-24 ..... 30

**COMMISSION ORDERS**

*In the Matter of the Application of Cinergy Retail Sales, LLC for Certification as a Retail Generation Providers and Power Marketers of Retail Electric Supplier in Ohio,*  
Case No. 04-1323-EL-CRS ..... 3

*In the Matter of the Application of Rapid Transmit Technology Inc. for a Certificate of Public Convenience and Necessity,*  
Case No. 99-890-TP-ACE ..... 31

*In re Joint Application of SBC Communications, Inc. for Consent and Approval of a Change of Control,*  
Case No. 98-1082-TP-AMT ..... 22

*In the Matter of Cinergy Corp. on Behalf of The Cincinnati Gas & Electric Company and Deer Holding Corp. for Consent and Approval of a Change of Control of The Cincinnati Gas & Electric Company,*  
Case No. 05-732-EL-MER ..... 2, 12

**MISCELLANEOUS AUTHORITIES**

73A CJS Public Administrative Law and Procedure §466 ..... 21  
15A Am. Jur. 2d Compromise and Settlement §5 ..... 22

## I. INTRODUCTION AND STATEMENT OF FACTS

The true inception of this case occurred in 1999, when the Ohio General Assembly determined that the public interest required the restructuring of electric services throughout the State of Ohio.<sup>1</sup> To that end, the General Assembly adopted Am. Sub. S.B. No. 3 (SB3). That bill mandated the end of comprehensive regulation of the electric industry by the State, following a relatively short transition period in which all electric utilities doing business within Ohio were to cease providing electric energy service as an integrated whole. At the end of that period of transition, electric energy service would be broken into three separate component parts – generation (or G), transmission (or T), and distribution (or D). Only T and D would remain regulated by the Public Utilities Commission of Ohio (Commission), and these services would be provided by the historic investor owned utilities, sometimes referred to informally as the wires company.

SB3 contemplated that Ohio consumers would be given the opportunity to purchase the G portion of electric service from any number of largely unregulated providers, referred to as Competitive Retail Electric Service (CRES) providers<sup>2</sup>, at prices determined by market forces rather than through regulation. The electric distribution utilities, such as Duke Energy Ohio (DE-Ohio), were also legally obligated to stand ready to provide "G" services to all its customers through a market-based standard service offer (MBSSO) in the event the customer chose not to purchase service through a CRES

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<sup>1</sup> Ohio Rev. Code §4928.02.

<sup>2</sup> Although not regulated by the Commission in the same sense as traditional, investor owned utilities, CRES providers are required to demonstrate their managerial, financial, and technical ability to perform their functions to the Commission, and obtain a Certificate of Public Convenience from the Commission, before providing service to consumers. Ohio Rev. Code §4928.06.

provider, or in the event that a particular CRES provider chosen by a customer should default on its obligations to the customer.

In response to SB3, the Cincinnati Gas & Electric Company<sup>3</sup> (CG&E), now known as DE-Ohio, filed an electric transition plan case, Case No. 99-1658-EL-ETP (the ETP Case) with the Commission. Among other things, the ETP plan provisions called for CG&E to "spin off" its generation assets to an unregulated affiliate which would then sell "G" into the market for purchase and resale by CRES providers and by CG&E itself, at a price subject to supply and demand. At the end of the ETP case, the Commission approved CG&E's transition plan. This Court later upheld on appeal the Commission's Entries and Orders approving CG&E's transition plan.<sup>4</sup>

**A. Duke Energy Retail Sales, LLC.**

As part of its preparations for the end of its transition period and the anticipated new competitive market for electric services, CG&E's corporate parent, Cinergy Corp. (Cinergy), formed Cinergy Retail Sales, LLC (now known as Duke Energy Retail Sales, LLC (DERS)), by filing articles of incorporation with the Delaware Secretary of State on December 15, 2003. On January 28, 2004, DERS registered with the Office of the Ohio Secretary of State as a foreign corporation authorized to do business within the State of Ohio.

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<sup>3</sup> CG&E's name was changed to DE-Ohio following a merger between Cinergy Corp. and Duke Energy. The Commission's approved that merger in *In the Matter of the Application of Cinergy Corp. on behalf of The Cincinnati Gas & Electric Company and Deer Holding Corp. for Consent and Approval of a Change of Control of The Cincinnati Gas & Electric Company*. Case No. 05-732-EL-MER. In this brief, Cinergy and DERS will refer to the utility as CG&E prior to the merger, and as DE-Ohio post merger.

<sup>4</sup> *AK Steel Corp. v. Pub. Util. Comm'n*, 95 Ohio St.3d 81, 2002-Ohio-1735\_\_\_\_\_, 765 N.E.2d 862.

On August 23, 2004, DERS filed an application with the Commission seeking authority to provide CRES within the State of Ohio.<sup>5</sup> The Commission approved DERS' application, and issued Certificate No. 04-124(1) to DERS on October 7, 2004 – nearly three months before the end of CG&E's non-residential market development period – thereby authorizing DERS to provide retail G, power marketing, power brokerage, aggregation, and all other services declared competitive by the General Assembly or by Orders of the Commission to consumers within the State of Ohio.<sup>6</sup>

**B. Duke Energy Ohio's Rate Stabilization Plan Case.**

Pursuant to SB3 and the Commission's Orders in its ETP Case, CG&E's non-residential market development period would end December 31, 2004 and its residential market development period one year later. In anticipation of those events, CG&E initiated Case No. 03-93-EL-ATA before the Commission on January 10, 2003, when it filed an application to modify its non-residential generation rates to provide an MBSSO to its customers, and to establish a competitive-bid service rate option (CBP), all as contemplated by S.B. 3.

On December 9, 2003, the Commission issued an entry in which, among other things, it expressed concern that the competitive retail market for electric generation service was not developing as rapidly as the Commission had expected when it issued its entries and orders in CG&E's ETP case.<sup>7</sup> The Commission therefore asked CG&E to file

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<sup>5</sup> *In the Matter of the Application of Cinergy Retail Sales, LLC for Certification as a Retail Generation Providers and Power Marketers of Retail Electric Supplier in Ohio*, Case No. 04-1323-EL-CRS.

<sup>6</sup> Throughout its merit brief, OCC attempts to suggest that agreements entered into by DERS cannot be legitimate because DERS had not received Commission certification at the time it entered into those agreements. Its insinuations have no merit. None of the agreements required DERS to perform in the absence of Commission certification.

<sup>7</sup> *In the Matter of the Application of the CG&E to Modify its Nonresidential Generation Rates to Provide for Market Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid*

a plan in which CG&E would agree to protect Ohio consumers against the sort of breath-taking increases in the price of electric generation that have occurred in other states that have introduced market-based pricing of electric service. Specifically, the Commission asked CG&E to propose a rate stabilization plan (RSP) MBSSO that would satisfy three different and in some ways competing goals:

- (1) Provide rate certainty for consumers,
- (2) provide financial stability for the utility, and
- (3) provide for the further development of competitive markets.

CG&E complied with the Commission's request by filing an RSP MBSSO.<sup>8</sup> Among other things, Duke proposed a "frozen" charge for G, but also proposed that it be allowed to impose a charge for providing "Provider of Last Resort" (POLR) services. Because it was being asked to provide rate certainty to consumers within its service territory, CG&E also sought Commission orders allowing it to retain ownership of its generation assets as part of its plan.<sup>9</sup>

Hearings on CG&E's RSP MBSSO began in mid-May, 2004. On the third day of the hearings, CG&E submitted a stipulation supported by CG&E, the Commission's Staff, and by ten intervening entities or interest groups.<sup>10</sup> Two intervenors, the Ohio

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*Service Rate Option Subsequent to the Market Development Period*, Case Nos. 03-93-EL-ATA, 03-2079-EL-AAM, 03-2080-EL-ATA, 03-2081-EL-AAM, and 01-2164-EL-ORD, Entry, December 9, 2003, ¶14.

<sup>8</sup> *In the Matter of the Application of the Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Case No. 03-93-EL-ATA, et al. (hereafter, Case No. 03-93 et al.), The Cincinnati Gas & Electric Company's Filing in Response to the Request of the Public Utilities Commission of Ohio To File A Rate Stabilization Plan (Jan. 26, 2004).

<sup>9</sup> *Id.*, pp. 10 and 14.

<sup>10</sup> First Energy Solutions (FES), Dominion Retail (Dominion), Green Mountain Energy (GME), Kroger Co. (Kroger), Cognis Corp. (Cognis), People Working Cooperatively (PWC), Communities for Action (CA), Industrial Energy Users – Ohio (IEU-Ohio), the Ohio Energy Group (OEG), and the Ohio Hospital Association (OHA) all supported the May 20, 2004 stipulation. See, Stipulation, Case No. 03-93 et al. (May 19, 2004.)

Consumers' Counsel (OCC) and Ohio Marketer's Group (OMG), opposed terms within the stipulation. When hearings resumed on May 20, 2004, to consider the stipulation, OCC sought an order to compel the production of any agreements between CG&E and any party to the proceedings.<sup>11</sup> OCC's motion to compel was denied by the Attorney Examiners.<sup>12</sup>

On September 29, 2004, the Commission issued an Entry in which it approved the stipulation in CG&E's RSP MBSSO case, although the Commission significantly modified certain of its terms.<sup>13</sup> CG&E and others sought rehearing of the Commission's modifications to the stipulation, and on November 24, 2004 the Commission issued an Entry on Rehearing in which it adopted certain changes to its September Entry. CG&E subsequently amended its tariffs in order to implement an RSP consistent with the Commission's November 24, 2004 Entry on Rehearing.

OCC appealed to this Court from the Commission's September 29, 2004, and November 24, 2004, Entries. On November 22, 2006, this Court issued its opinion in *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213. This Court upheld the Commission's decision against numerous assignments of error. The Court found merit, however, regarding two of OCC's assignments of error.

Specifically, this Court directed the Commission to further explain and to support the many modifications it made to CG&E's proposed RSP MBSSO via reference to the

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<sup>11</sup> Transcript of Hearing, May 20, 2004, pp. 8-9.

<sup>12</sup> Id., pp.14-15.

<sup>13</sup> In fact, the Commission's alterations to the stipulation were so significant that at various times during the course of the litigation below, many parties, including both OCC and DE-Ohio, took the position that the Commission had actually rejected the stipulation. Cf. Case No. 03-93 et al., OCC's Memorandum Contra CG&E's Application for Rehearing at 3, fn. 3 (November 8, 2004) with Merit Brief filed on behalf of DE-Ohio, p. 6 (April 13, 2007.)

evidentiary record. Because intervening appellees DERS and Cinergy have no interests that are directly impacted by that issue, they will leave the issue to be addressed by their affiliate, DE-Ohio, during this appeal and will only indicate their support of DE-Ohio when it comes to a subject regarding the merits of the action below.

The second error identified by this Court however, ultimately affected the interests of DERS and Cinergy, directly. This Court concluded that the alleged existence of so-called "side agreements" between DE-Ohio (f/k/a CG&E) and other parties to the proceedings might have relevance to the narrow issue of whether the stipulation resulted from "serious bargaining among capable, knowledgeable parties" – the first element of the three part test the Commission employs in deciding whether or not to approve a stipulation submitted to it. As a result, the Court directed the Commission to allow OCC the discovery it had sought on May 20, 2004.<sup>14</sup> The Court remanded these matters to the Commission for further proceedings.<sup>15</sup>

### C. **Duke Energy Ohio's RSP Case On Remand.**

After this Court released its opinion, DE-Ohio promptly provided OCC with the only contract responsive to OCC's May, 2004, motion to compel by producing a February, 2004, contract between CG&E and the City of Cincinnati, Ohio.<sup>16</sup> While the City had briefly been a party to DE-Ohio's RSP MBSSO case, it had withdrawn early, without taking any positions, and without executing the stipulation.

OCC immediately recognized that nothing about this agreement – an agreement that, incidentally, had also already been publicly distributed – would allow it to argue that

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<sup>14</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶¶77-86.

<sup>15</sup> *Id.*, ¶95.

<sup>16</sup> Case No. 03-93 et al., Letter filed December 7, 2006, on behalf of DE-Ohio notifying the Commission and the parties that there is only one agreement responsive to the OCC's specific document request; OCC Remand Exhibit 6.

the bargaining between CG&E and the parties to the RSP MBSSO case had been influenced by any side agreement between a party and CG&E. However, in its letter providing notice that it had provided the requested "side agreements" to OCC, DE-Ohio also explained that while DE-Ohio was a party to only one such agreement, other agreements existed between DERS and parties to the RSP MBSSO case.<sup>17</sup> OCC therefore decided to expand the scope of its discovery by issuing subpoenas for all agreements between DERS and any customer of CG&E.

DERS opposed OCC's request through a motion to quash OCC's subpoena. In ruling upon that motion, the Attorney Examiner concluded<sup>18</sup> that OCC's demand for all agreements between DERS and any customer of CG&E was indeed too broad. Nonetheless, and even though the mandate of this Court had already been satisfied, the Attorney Examiner granted OCC expanded rights of discovery. DERS was therefore ordered to produce any agreements between it and any party to the RSP MBSSO case. Shortly after obtaining this ruling, OCC served a subpoena duces tecum upon Cinergy, seeking production of any agreements between Cinergy and any party to CG&E's RSP MBSSO case, as well.

DERS and Cinergy – non-parties and non-utilities – were ordered to produce confidential commercial contracts, terminated commercial contracts, business analysis, internal correspondence, financial analysis, business operations data, and similar sensitive and trade secret information. First DERS, and then Cinergy, entered into protective agreements with OCC and other parties for the purpose of permitting DERS and Cinergy to respond to the subpoenas while at the same time protecting information from further

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<sup>17</sup> Id.

<sup>18</sup> Case No. 03-93 et al., Entry, Jan. 2, 2007.

disclosure. DERS also sought to limit (to issues relevant to the pending cases) the purposes to which the parties to the case would be able to use material produced to them.

At roughly the same time, Cinergy and DERS moved to intervene in the case pending before the Commission.<sup>19</sup> Cinergy and DERS' only concern regarding any of these matters, at the time they initially sought intervention, was the protection of their commercial agreements from public disclosure. Accordingly, their requests for intervention were specifically limited to that purpose.

#### 1. **Cinergy and DERS' Responses to OCC's Subpoena.**

Confidential information belonging to them now seemingly protected by protective agreements, and intervention having been granted to them for the express purpose of allowing them to protect their confidential information, Cinergy produced two agreements to OCC, and DERS produced a total of thirty one agreements to OCC.

It is worth noting, before a discussion of these agreements, that had OCC issued its 2007 subpoenas to Cinergy and DERS in 2004 and had OCC's 2007 discovery demands upon DERS and Cinergy simply been granted at the time OCC moved to compel production from CG&E on May 20, 2004, Cinergy would have had no agreements to produce to OCC and OCC would have received exactly two agreements from DERS – a May 19, 2004, agreement between DERS and OEG; and a May 19, 2004 agreement, between DERS and the OHA. Thus, the only agreements produced to OCC by Cinergy, and twenty-nine of the thirty-one agreements produced to OCC by DERS, could not have been produced to OCC in response to its May 20, 2004, motion to compel

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<sup>19</sup> Case no. 03-93 et al., DERS' Feb. 2, 2007, Motion to intervene for the limited purpose of protecting its interest in contracts to which it is a party, and Cinergy's Feb. 2, 2007, Motion to intervene for the limited purpose of allowing it to protect certain confidential information.

for the simple reason that they did not exist until *after* the date the stipulation was filed with the Commission.<sup>20</sup>

**a. The "Direct Serve" Contracts Between DERS  
And Consumers of Competitive Retail Electric  
Service.**

It is not surprising that the agreements entered into by DERS concern DERS' efforts to secure customers for itself. In each such agreement, DERS and the counterparties to the agreements made economic decisions based upon publicly available information regarding the status of the Commission's RSP MBSSO case and the likely market for electric generation service in Ohio. In fact, much of the information upon which DERS acted – including the stipulation – was made part of the public record of CG&E's RSP MBSSO case.

In agreements reached between May, 2004, and November, 2004, DERS agreed to provide generation service to members of the industry groups that were opposing DE-Ohio's RSP MBSSO filing.<sup>21</sup> These industry groups are well known, and their members obviously view the price of G to be an item of considerable significance. Moreover, a number of the members of these groups offer load patterns that are very attractive to a CRES seeking market share. It can hardly be considered a surprise therefore that DERS – an entity seeking, and ultimately receiving, Commission certification as a CRES – would also seek to attract customers interested in rate alternatives.

Moreover, the industry groups, in opposing certain of CG&E's proposed riders to its RSP rates, suggested an obvious marketing strategy to any CRES following the case.

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<sup>20</sup> See, generally, Confidential Prepared Testimony of Beth E. Hixon, OCC Remand Exhibit no. 2, attachments 2-17 (the contracts themselves), and attachment 18 (Ms. Hixon's summary of her review of the DERS contracts, including the dates those contracts were entered into.)

<sup>21</sup> Id., attachments 2-5.

DERS used this information to its advantage by offering to provide service at a price to be determined through specified discounts to a recognized baseline – the CG&E rates that DERS expected the Commission to approve. All contracts entered into by DERS prior to the Commission's Entry and Order of September 29, 2004, therefore provide a price based upon the rates that DERS expected would be established when the Commission approved the stipulation. When the Commission extensively modified the terms of the stipulation however, DERS' contracts with its customers were, by their express terms, rendered void. As a result, DERS never performed, and no Ohio consumer ever sought the performance of, what OCC now refers to as "Pre-PUCO Order Agreements."

When CG&E filed its 2004 application for rehearing, DERS again acted upon the same marketing strategy and a similar assumption that the Commission would accept CG&E's alternative proposal regarding its RSP. As a result, during negotiations that occurred in November, 2004 – six *months* after the stipulation was filed – DERS employed the same concept it had employed during the summer of 2004. DERS offered potential customers prices based upon rates proposed by CG&E minus discounts based upon components of CG&E's proposed rates.<sup>22</sup> Again, however, the parties included provisions that would nullify the contracts if the anticipated rates were not approved and as a result, when the Commission rejected the alternatives proposed by CG&E in its application for rehearing, the "Pre-Rehearing Agreements" – to use the vernacular now employed by OCC – were also rendered void, and thus neither DERS nor any counterparty to the "Pre-Rehearing Agreements" ever performed, or even sought to enforce, those contracts.

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<sup>22</sup> Id., attachments 6-7, 9-12.

During the time frames involving both the "Pre-Commission Order Agreements" and the "Pre-Rehearing Agreements," CG&E's own proposals were of course matters of public record, its proposed price was a matter of public record, the elements of its price structure that were generating opposition were of public record, and any CRES pursuing market share and willing to accept the same level of market risk DERS was prepared to accept could offer prices based upon the same strategy pursued by DERS.

**b. The Option Agreements Between DERS and Potential Consumers of Competitive Retail Electric Service.**

When the Commission issued its November 24, 2004, Entry on Rehearing and rendered void the "Pre-Rehearing Agreements," DERS was forced to evaluate once again the market conditions and consider prices and terms upon which it might offer service to potential customers. This time, DERS concluded that the risks necessary to compete against the price and terms the Commission was insisting CG&E make available to the public were simply too great. DERS was therefore unwilling to use the same discount strategy a third time.

Nonetheless, DERS had at this point in time received certification as a CRES from the Commission, and DERS was therefore interested in securing customers should market conditions and/or the regulatory climate that would emerge from CG&E's RSP MBSSO (and that of other Ohio utilities) permit it to enter and compete in the marketplace.

DERS therefore executed a new strategy. It purchased options to serve customers, from those customers.<sup>23</sup> These option agreements would ensure DERS a significant place in the market should market economics or the regulatory regime allow it to profitably serve customers. The options also allowed DERS to limit the potential losses it might incur and, therefore, have a measure of control regarding the significant market risks to which CRES providers attempting to enter the market at the beginning of 2005 appeared to be exposed.

Ultimately, with the exception of a contract, (discussed next), between Constellation NewEnergy and DERS for the benefit of a customer, these option agreements are the only agreements between DERS and anyone that were not rendered void before they could become effective. Moreover, as the evidence below unequivocally shows, the balance sheet and income statements of DERS, and of DERS alone, reflect the costs of these options,<sup>24</sup> and thus the costs of these options are absorbed by the shareholders of Cinergy<sup>25</sup> and *not* by Ohio consumers paying the Commission-approved prices charged by DE-Ohio. Furthermore, DERS losses are clearly – and separately – recorded within Cinergy's 2003-2005 consolidated income tax returns, which were admitted into evidence as DE-Ohio Exhibits 24, 25, and 26. In 2005, for example, Cinergy reported total taxable income of \$2,141,893,689 (before net operating losses and

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<sup>23</sup> The option agreements were admitted into evidence as a single, consolidated exhibit, Attachment 17 to OCC Remand Exhibit 2. The individual option agreements themselves may be located within Appellant's Appendix, at pp. 161-174, 175-191, 192-209, 210-224, 225-238, 239-251, 252-264, 265-278, 279-292, 293-305, 306-318, 319-335, 336-350, 351, 363, 364-379, 380- 396, 397-410, 411-419, 420-433, 434-446, 447-460, and 461-474.

<sup>24</sup> Cross examination of Ms. Hixon, Transcript Vol. I, March 19, 2007, pp. 47-48, attachment 22, Exhibit C-3, Appellant's Appendix p. 487-490.

<sup>25</sup> These costs are now absorbed by the shareholders of Duke Energy, Inc., following the merger of Duke Energy, Inc. and Cinergy Corp., which the Commission approved in 2005. See *In the Matter of the Application of Cinergy Corp. on behalf of The Cincinnati Gas & Electric Company and Deer Holding Corp. for Consent and Approval of a Change of Control of The Cincinnati Gas & Electric Company*. Case No. 05-732-EL-MER.

other special deductions) on gross sales of \$5,277,823,691. Those figures included the contributions of CG&E (taxable income of \$706,512,476 on gross sales of \$2,705,807.820), Cinergy Retails Sales LLC n/k/a DERS (a taxable loss of \$14,156,280), and approximately eighty other then-existing subsidiaries of Cinergy.

DERS continues today to pay to maintain its option to serve these consumers. Should DERS conclude that the market has turned prohibitively less competitive, DERS can permit the agreements to expire. If on the other hand, market conditions lead DERS to conclude that it can move into the market, DERS expects to benefit from the customer base that it created.

**c. The Agreement To Replace Another CRES Provider's Service At The End Of That Provider's Contract.**

DERS' agreements involving one customer are a bit different than DERS' agreements with its other customers, because that customer was already a party to contracts with another CRES supplier through which it was receiving its generation needs. As a result, two of DERS' agreements provide that should one customer's CRES supply agreements end for any reason in 2006 or 2007, DERS would be entitled to provide service.<sup>26</sup> Should that customer's existing supply agreements end in 2008 as appeared more likely, DERS obtained the right to provide service to the customer, but only if it was prepared to meet whatever price the customer could obtain in the market.

**d. The Cinergy Agreements.**

As stated earlier, Cinergy was a party to two agreements responsive to OCC's expanded discovery demands.<sup>27</sup> Cinergy is not required to provide electric service under

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<sup>26</sup> Hixon Testimony, OCC Remand Exhibit 2, attachments 6 and 12.

<sup>27</sup> Hixon Testimony, OCC Remand Exhibit 2, attachments 5 and 11.

either agreement, nor is this agreement relevant to anything regulated by the Commission.

The first of the agreements was entered into more than two weeks after the 2004 stipulation was filed with the Commission and the second was entered into six months later. A Cinergy vice-president, also the president of CG&E, later testified that Cinergy viewed these two agreements as an infusion of economic development dollars to the Cincinnati area, and that Cinergy had entered into the agreements for multiple purposes, which included the assistance in addressing economic stresses to an existing customer of DE-Ohio and a potential customer of DERS, to obtain support for CG&E's stipulation, and to promote the co-generation products and services of still another of Cinergy's businesses, then known as Tri-Gen Solutions, Inc.<sup>28</sup>

## **2. OCC's Decision To Exploit The Agreements To Its Own Ends.**

Within one month of its receipt of the DERS and Cinergy agreements, and within one week of the date DERS and Cinergy were granted intervention in these cases, OCC breached the protective agreements it had entered into with DERS and DE-Ohio when it disseminated confidential information via email to persons not party to any protective agreement with DERS, Cinergy or DE-Ohio. This violation of the protective agreements prompted both DERS and DE-Ohio to issue letters warning OCC of its breach, and of the potential damage to DERS and DE-Ohio.<sup>29</sup>

At this point in time, issues surrounding the relevance of agreements to which affiliates of DE-Ohio, and the protection of confidential and trade secret information

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<sup>28</sup> Case No. 03-93 *et al*, deposition testimony of Mr. Greg Ficke, OCC Remand Exhibit 9, pp. 74-77.

<sup>29</sup> See Letters docketed March 7, 2007, asserting that OCC is in material breach of the protective agreements it signed with DERS and DE-Ohio.

contained within those agreements or other documents in which the agreements are discussed, began to dominate the various parties' positions regarding the merits of this case. Shortly after DERS' and DE-Ohio's letters were docketed, OCC issued a notice to DE-Ohio and to DERS that OCC had decided it intended to use the "Protected Materials in these proceedings in such a manner not provided for within the Protective Agreement."<sup>30</sup> OCC's position, thereafter, was that every single document provided to OCC should be part of the public record, without regard to the relevance of those documents, and without regard to the confidential business information contained within those documents. Disputes among the parties followed this declaration, involving numerous additional Motions for Protective Orders, Motions In Limine to Exclude the Agreements as Irrelevant, and numerous arguments regarding the relevancy and need to disclose information preceded the hearing on remand.

### 3. The Hearing On Remand.

In response to the numerous Motions necessitated by OCC's notice that it intended to make every bit of information it could public, *and without objection by OCC*, the Commission's Hearing Examiners issued a bench ruling on the first morning of the hearing in which they held that the agreements would be admitted, provisionally, and that all pending motions for protective orders would be granted for a period of 18 months, provided that their orders might be modified by the Commission if it deemed it appropriate to do so. That ruling – repeated at nearly its full length due to its import – was transcribed as follows:

ATTORNEY EXAMINER: We have right now numerous pending motions for protective orders as well as a dispute that we

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<sup>30</sup> Case No. 03-93, et al., Exhibit B to March 2, 2007, Motion for protective order and memorandum in support filed by DERS.

are all aware of over the delivery of the unredacted testimony of Ms. Hixon. These matters as well as the relevance of side agreements to this ongoing litigation are all interconnected. We will deal with those matters now to the extent possible.

Underlying the motions for the protective orders and the question of the delivery of the testimony is the issue of the relevance of the side agreements. This is a substantive matter, and we believe can only be resolved by the Commission itself; therefore, for purposes of this hearing we will treat them as if they are relevant. The Commission will then be in a position to treat them appropriately in its opinion and order or order on remand.

The various motions for protective orders will be granted at this time for a period of 18 months from today on the condition that the granting of those protective orders may be modified by the Commission if it deems appropriate to do so in light of the actions that it takes.

With regard to Ms. Hixon's unredacted testimony, that document is now the subject of a protective order. When Ms. Hixon is cross-examined or when any other customer-specific questions are being asked of any other witnesses, the record will be sealed. We will allow attorneys for all parties to stay in the room. We will also allow the parties themselves to stay in the room if they already have the information that is being discussed or if they have a confidentiality agreement with both parties to the contract being discussed or if neither party to the contract being discussed objects to their remaining.

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Does anybody have any questions?

OCC'S COUNSEL, MR. SMALL: Yes, your Honor. I understand the instruction, and I have no problem with it. . . .<sup>31</sup>

As a result of this ruling, OCC was able to introduce all of the agreements and all information regarding those documents that OCC obtained during discovery into the record and, in addition, OCC was able to argue absolutely any position it chose to argue regarding that information. Moreover, neither OCC nor any other party can now

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<sup>31</sup> Case No. 03-93 et al, Hearing, Tr. Vol. I, (March 19, 2007) pp. 9-11.

complain that it was precluded from examining, through their counsel, any witness regarding any subject. Finally, information belonging to the parties was appropriately protected, at least pending re-examination of that information by the Commission. As a result, the Attorney Examiners' ruling allowed the hearing to be conducted without the potential of prejudice to any party.

**4. The Commission Rejected The Stipulation Due To The Existence Of The Contracts.**

Following three days of evidentiary hearings to supplement the record established prior to this Court's remand, the Commission entered its Order on Remand on October 24, 2007. The Commission's Order reveals the Commission did precisely as this Court directed. It explains in detail the basis upon which the Court modified DE-Ohio's RSP MBSSO. Moreover, it reveals that the Commission examined the DERS and Cinergy agreements and the events surrounding their execution, and it considered whether the existence of those agreements might have caused any of the signatory parties to refrain from seriously bargaining over the terms of the stipulation with DE-Ohio. The Commission carefully considered OCC's arguments that the side agreements were evidence of a lack of serious bargaining.<sup>32</sup> The Commission also considered the claims by the Duke Entities and the counterparties to the agreements that the agreements evidence nothing more than ordinary business transactions.

In the end, the Commission concluded that only the first group of contracts – those the OCC refers to as "Pre-PUCO Order" agreements – were relevant to the issue of the seriousness of the bargaining over the terms of the stipulation.<sup>33</sup> The Commission found both the "Pre-Rehearing Agreements" and the "Option Agreements" to be

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<sup>32</sup> Case no. 03-93 et al., Order on Remand, (Oct. 24, 2007), p. 24.

<sup>33</sup> Id. p. 26.

irrelevant to this issue, despite OCC's contention that the later agreements are "renegotiations" of the "Pre-PUCO Order" agreements because, even if OCC's position was correct, the Commission still believed the later agreements, entered into months after the stipulation had been submitted, could have no impact upon the seriousness of the bargaining over the terms that had been contained within the stipulation itself.<sup>34</sup>

Then, despite the arguments of those entities supporting the stipulation, and despite the fact that CG&E, n/k/a DE-Ohio was not a party to even one of the agreements before it, the Commission held in favor of OCC, concluding:

. . . [W]e find that the existence of side agreements, in which several of the signatory parties agreed to support the stipulation, raises serious doubts about the integrity and openness of the negotiation process related to that stipulation. Based on the expanded record of this case and our review of the side agreements, we now reach the inevitable conclusion that there is a sufficient basis to question whether the parties engaged in serious bargaining, and therefore, that we should not have adopted the stipulation. We now expressly reject the stipulation on such grounds.<sup>35</sup>

#### **5. The Commission Imposed Its Own Price Solutions After Rejecting The Stipulation.**

After rejecting the stipulation, the Commission independently reviewed each component of DE-Ohio's proposed MBSSO price. It decided, again, to accept DE-Ohio's position that a market price offered by DE-Ohio should reflect both the cost of G to DE-Ohio and DE-Ohio's statutory obligation to provide POLR service. It therefore included a component to reflect DE-Ohio's investment in embedded generation assets.<sup>36</sup> It included a component to reflect DE-Ohio's variable costs, but modified DE-Ohio's proposal so that DE-Ohio's proposed fuel and economy purchased power tracker must

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<sup>34</sup> Id.  
<sup>35</sup> Id.  
<sup>36</sup> Id. p. 29.

parallel that of DE-Ohio's previously approved FPP tracker.<sup>37</sup> The Commission then insisted upon again re-evaluating each element of DE-Ohio's POLR component,<sup>38</sup> and it modified the elements and the bypassability of the elements of DE-Ohio's POLR component as it, the Commission, saw fit.

After the Commission made minor changes to its Order on Remand in a subsequent Entry on Rehearing,<sup>39</sup> OCC appealed to this Court, and the Ohio Partners for Affordable Energy (OPAE) filed its amicus brief in support of OCC.

## II. LAW AND ARGUMENT

### A. The Standard of Review

Revised Code Section 4903.13 provides that Orders of the Commission shall be reversed, vacated, or modified only when, upon consideration of the record, this Court finds the order to be unlawful or unreasonable. *Constellation NewEnergy, Inc. v. Pub. Util. Comm'n*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, at ¶ 50. This Court will not reverse or modify a Commission decision as to questions of fact where the record contains sufficient probative evidence to show that the Commission's decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Monongahela Power Co. v. Pub. Util. Comm'n*, 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, at ¶ 29.

Although this Court has “complete and independent power of review as to all questions of law” in appeals from the commission, *Ohio Edison Co. v. Pub. Util. Comm'n* (1997), 78 Ohio St.3d 466, 469, 678 N.E.2d 922, it relies on the expertise of the

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<sup>37</sup> Id. p. 30.

<sup>38</sup> Id. p. 30-39.

<sup>39</sup> Case No. 03-93 et al., Entry on Rehearing, Dec. 19, 2007.

Commission in interpreting a law where highly specialized issues are involved and where agency expertise is of assistance in discerning the intent of the General Assembly. *Ohio Consumers' Counsel v. Pub. Util. Comm'n* (1979), 58 Ohio St.2d 108, 110, 388 N.E.2d 1370.

As the appellant, OCC bears the heavy burden of demonstrating that the Commission's decision is against the manifest weight of the evidence, is clearly unsupported by the record, or that the Commission has erred in its application of law. *Monongahela Power Co. v. Public Utilities Comm'n*, 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, at ¶29. That burden is difficult to sustain because this Court finds it appropriate to defer to the Commission's judgment in matters that require the Commission to exercise its specialized expertise and discretion to determine factual matters of the sort at issue in this appeal. *Id.*

**B. OCC's Proposition of Law No. 1 Is Incorrect. A Correct Proposition of Law Addressing The Arguments It Raises Is:**

**Unless Proscribed By A Reviewing Court's Express Instruction, Quasi-Judicial Tribunals, Including the Commission, Have Inherent Authority To Determine The Nature And Scope of the Proceedings That Will Take Place on Remand, To Make Determinations Upon The Relevance And Admissibility of Evidence When Additional Evidentiary Hearings Are Granted, and To Decide What Weight To Give That Evidence.**

When a reviewing court remands a case to an administrative agency, the agency must, of course, comply with the mandate of the court. In the absence of specific direction from the reviewing court, the agency's jurisdiction is revived on remand, and the agency is to exercise its discretion to determine the scope of the matter before it, including whether to re-open the entire proceeding or whether it is sufficient to merely

permit rehearing on the matters remanded. *Superior Metal Products, Inc. v. Admn. OBES* 41 Ohio St.2d 143, 146, 324 N.E.2d 179, 181; *State ex rel. Village of Chagrin Falls v. Geauga Cty. Bd. Of Comm'rs* 96 Ohio St. 3d 400, 2002-Ohio-4906, 775 N.E.2d 512. See also, 73A CJS *Public Administrative Law and Procedure* §466.

Upon this Court's remand to the Commission, OCC attempted, repeatedly, to dictate the course of these proceedings by expanding them beyond their necessary scope and arguing about issues that it failed to support and which were immaterial, in any event, to the Commission's decision. OCC pursues this same tactic in this Court. It begins its argument to this Court with a proposition of law that is typically misdirected. OCC's first proposition of law reads in full as follows: "The Commission's Remand Order is unjust and unreasonable because it fails to prohibit discriminatory pricing and price elements in Side Agreements that violate Ohio statutes and rules."<sup>40</sup>

Even a cursory examination of this section of OCC's brief reveals that OCC fails to even address, let alone to demonstrate, that any of whatever OCC was referring to as "price elements" – presumably the various components of DE-Ohio's MBSSO price – are either discriminatory or violate any specific statute or regulation applicable to DE-Ohio in a post-SB3 world. Notwithstanding OCC's inclusion of "price elements" within its first proposed proposition of law, its first proposition of law does not concern price "elements" at all.<sup>41</sup>

OCC does complain of the "price," however. Here too, its proposition of law is unsupported. Although critical of the Commission-determined MBSSO price, OCC fails

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<sup>40</sup> Appellant OCC's Merit Brief, p. 25.

<sup>41</sup> In fact, the only specific "price element" upon which OCC focuses any specific criticism whatsoever at any point in its brief is the IMF, which is not addressed until OCC has moved on to its second proposition of law. Even then, OCC's criticism of the IMF is not based upon any particular statute or rule. Instead, OCC argues only that the IMF violates a regulatory concept, that of "cost based" regulation. SB3, of course, emphatically ended the era of cost based regulation in Ohio.

to urge a specific different price as a "correct price," or to present any specific argument showing what, precisely, is wrong with the price approved by the Commission. OCC merely asserts without support that a "correct" price would necessarily be lower than that approved by the Commission.

Finally, OCC complains through its proposition of law that the Commission's Order fails to prohibit "discrimination" "violations of corporate separation provisions," and "discounted" Regulatory Transition Charges by DE-Ohio. In this regard, OCC claims DE-Ohio's price is "discriminatory" because one industrial or commercial customer of DE-Ohio will be able to obtain a lower price than another DE-Ohio industrial or commercial customer receives. Since OCC is the *residential* consumers' advocate, and since OCC does not allege any differences between DE-Ohio's price to residential customers is discriminatory, it is entirely unclear, and OCC certainly does not explain, precisely why it perceives this issue to involve an injury to those it represents.

OCC simply seeks to exploit the existence of the "side agreements" by suggesting that such agreements are somehow sinister in nature. Despite OCC's efforts, it is the clear public policy of the State of Ohio to resolve differences amongst parties through agreements.<sup>42</sup> In fact, there is a long history to support the use of so called "side agreements" in aid of the settled resolutions of Commission proceedings.<sup>43</sup> Indeed, this Court has itself addressed issues surrounding "side agreements" in no fewer than four

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<sup>42</sup> *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 553 N.E.2d 597. See also, 15A Am. Jur. 2d Compromise and Settlement § 5 ("Public policy favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. Settlement agreements are encouraged by courts.")

<sup>43</sup> *In re Joint Application of SBC Communications, Inc. for Consent and Approval of a Change of Control*, Case No. 98-1082-TP-AMT, Entry, April 9, 1999.

recent opinions issued in appeals of SB3-related Commission decisions,<sup>44</sup> and in one of those appeals, *Ohio Consumers Counsel v. Comm'n*, 110 Ohio St. 3d 394, 2006-Ohio-4706, 853 N.E.2d 1153, it was the OCC itself which demanded that this Court direct the Commission to correct its "failure" to enforce a "side agreement" to which OCC was a party for the benefit of its constituency. Furthermore, in response to OCC's allegations below, DE-Ohio introduced evidence of other "side agreements" to which OCC was a party.<sup>45</sup> OCC certainly indicated no alarm concerning "discrimination" against the customers of the CRES entities whom OCC expected to bear the entire cost of updates to Dayton Power & Light's billing systems, or against customers and customer classes who would not receive the benefit of the \$500,000 fund controlled jointly by OCC and CG&E that was the subject of the OCC side agreement discussed on cross examination below.

Credible arguments that "side agreements" are an evil that must be prohibited by this Court or by the Commission being unavailable to it, OCC contends instead that the *specific* agreements in this case are offensive. OCC posits that these agreements demonstrate "discrimination" by DE-Ohio and "violations" by DE-Ohio and its affiliates of the corporate separation plan that the Commission approved in CG&E's ETP case (as since modified by Orders of the Commission).

Initially, OCC invites this Court to ignore the fact that neither discrimination nor corporate separation violations was ever the subject matter of the proceeding before the Commission. Instead, the matter before the Commission concerned DE-Ohio's RSP MBSSO and the determination of an appropriate RSP MBSSO price. Despite OCC's

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<sup>44</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269; *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213; *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 110 Ohio St. 3d 394, 2006-Ohio-4706, 853 N.E.2d 1153; *Constellation NewEnergy, Inc. v. Pub. Util. Comm'n*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885.

<sup>45</sup> Case No. 03-93 et al, Hearing Transcript Vol. III (Hixon cross examination), pp. 75-77.

injection of its allegations into the proceedings below at every opportunity, the Commission correctly concluded that OCC's allegations were, at best, "ancillary" to the scope of the proceeding.<sup>46</sup> There was little reason, therefore, for the Commission to be concerned in this proceeding with the issues that OCC wanted to discuss, and no reason to do so whatsoever once the Commission decided to reject the stipulation and to impose its own determinations regarding the appropriate model against which to consider DE-Ohio's price.

After asking the Court to ignore the irrelevancy of its charges of "discrimination" OCC next insists that the Court should hold that the Commission erred by failing to treat DE-Ohio, DERS, and Cinergy as one entity. OCC must do this, because the evidence below clearly shows that, except for the agreement with the City of Cincinnati, DE-Ohio is not a party to even one "side agreement."<sup>47</sup> The evidence further demonstrates that DE-Ohio, DERS, and Cinergy are separate entities that were created and exist for separate purposes, pursuing business strategies of their own. Further, the record evidence below fails to demonstrate that Cinergy and DERS, the Duke Entities which are parties to the agreements OCC presented to the Commission, entered into those agreements for any purposes but their own. Most significantly, the evidence shows that every customer of DE-Ohio pays to DE-Ohio the Commission-approved rates in return for service – including the Regulatory Transition Charges – and that neither DERS or any other Duke Entity has ever sought recovery of DERS' costs through Commission-approved rates.<sup>48</sup>

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<sup>46</sup> Case no. 03-93 et al., Order on Remand, (Oct. 24, 2007), p. 20; Entry on Rehearing (Dec. 19, 2007), pp. 8 and 9.

<sup>47</sup> See, generally, Hixon Testimony, OCC Remand Exhibit no. 2, attachments 2-17 and OCC Remand Exhibit no. 6.

<sup>48</sup> Case no. 03-93 et al., Hixon Cross Examination, Hearing Transcript Vol. III (March 21, 2007), p. 136.

Finally, even if the Court were concerned that some truth exists within OCC's allegations – and DERS and Cinergy certainly maintain that there is none – the Commission can certainly not be blamed for failing to pursue OCC's allegations within the proceedings below. OCC's accusations were, again, never the purpose of the proceedings below, and, despite OCC's best efforts, the Commission never found it necessary to resolve those accusations in order to resolve the issue that was before the Commission – DE Ohio's MBSSO price.

Setting these issues aside, however, the Commission certainly cannot be faulted for failing to do that which OCC *itself* failed to do – pursue its allegations. OCC merely used its expert, Ms. Beth Hixon, to introduce its theories regarding the subject of the "side agreements" into evidence. Although Ms. Hixon offered, on behalf of OCC, opinions regarding "connections" – some of which do indeed exist and some of which are sheer speculation – between all the agreements and the stipulation, she herself refused to opine that the agreements represented actual wrongdoing. Instead, she insisted that she was merely inviting Commission investigation of the agreements.<sup>49</sup>

Ms. Hixon, herself, recognized that the "direct serve" agreements were never performed. This is a significant concession, for as the Court stated in *Lehigh Val. R. Co. v. Rainey*, 112 F. 487 (E.D. Pa. 1902) (interpreting the Interstate Commerce Act) only discrimination in fact is actionable. Mere offers to discriminate, never carried into effect, cause no actual harm upon which claims can be maintained. Because the "direct serve" agreements were never performed, they provide no support to OCC's allegations of discrimination.

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<sup>49</sup> Id., p. 105.

Then, regarding the option agreements, Ms. Hixon was forced to admit that she saw nothing wrong in concept with option agreements to buy or sell electricity in a deregulated market.<sup>50</sup> She also admitted that she had no idea whether these particular agreements were underpriced, overpriced, or fairly priced.<sup>51</sup> She acknowledged that she had made no efforts to determine whether the option agreements were fairly or unfairly priced, and that she had failed to consider such matters as the length of term, total consumption, or load patterns of the customers, all of which would affect the price of the options.<sup>52</sup> She admitted she had no idea whether DERS was prepared to offer similar terms to others seeking service from a CRES provider, nor whether it had turned away any customer seeking such terms.<sup>53</sup>

Similarly, Ms. Hixon expressly admitted that she was not asserting that either DERS or Cinergy had violated the corporate separation requirements imposed by the Commission in DE-Ohio's ETP case or by Ohio law.<sup>54</sup> In fact, she emphatically stated on cross examination, regarding both Cinergy and DERS: "I have not alleged nor found any violations."<sup>55</sup>

On this record, OCC's demand that this Court reverse the Commission and remand for still further proceedings is without merit. OCC's allegations that the Commission unfairly limited OCC in its presentation of evidence and argument, that the contracts constitute price discrimination and violations of the corporate separation provisions of Ohio law, or an unlawful discounting of the Regulatory Transition Charge

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<sup>50</sup> Case No. 03-93 et al, Hearing Transcript Vol. III (Hixon cross examination), p. 121.

<sup>51</sup> Id., p. 129-130.

<sup>52</sup> Id., pp. 127-130.

<sup>53</sup> Id., p. 47.

<sup>54</sup> Ohio Revised Code §4928.17, Ohio Admin. Code §4901:1-20-16.

<sup>55</sup> Case No. 03-93 et al, Hearing Transcript Vol. III (Hixon cross examination), pp. 142-143, lines 13-14.

are simply "red herrings." The issue determined by the Commission is the reasonableness of DE-Ohio's RSP MBSSO price. The Commission examined the evidence before it, including the various contracts that OCC maintains constitute "side agreements." The Commission then imposed its own solution to the issue after rejecting the stipulation of the parties due to its concern that the "side agreements" might indeed have affected the bargaining process. OCC has demonstrated no error in that determination, and this Court should therefore affirm the Commission.

**C. OCC's Proposition of Law No. 2 Is Incorrect. A Correct Proposition of Law Addressing The Arguments It Raises Is:**

**The Public Utilities Commission of Ohio Acts Within Its Discretion When It Rejects A Stipulation Submitted By The Parties Because The Commission Has Doubts Regarding The Integrity Of The Bargaining Process From Which The Stipulation Emerged And Instead Resolves A Case Based Upon Its Own Review Of All The Evidence Before It.**

Repeating somewhat an argument raised in support of its first proposition of law, OCC maintains, for its second proposition of law, that the Commission failed to permit it a full hearing on the merits and to base its conclusions upon competent evidence. The record in this case demonstrates – unequivocally – that this contention is without merit. Instead, the record shows:

- On remand the OCC received all discovery it had requested prior to the remand,<sup>56</sup>
- Indeed, OCC obtained expanded rights of discovery when the case returned to the Commission from this Court;<sup>57</sup>
- Through the Attorney Examiner's ruling of March 19, 2007,<sup>58</sup> OCC succeeded in introducing into the record every document that it obtained through discovery that

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<sup>56</sup> Case No. 03-93, et al., OCC Remand Exhibit 6. See also, Letter filed December 7, 2006, on behalf of DE-Ohio notifying the Commission and the parties that there is only one agreement responsive to the OCC's specific document request.

<sup>57</sup> Case No. 03-93, et al., Entry, Jan. 2, 2007.

<sup>58</sup> Case No. 03-93, et al., Hearing, Tr. Vol. I, (March 19, 2007) pp. 9-11.

it wished to introduce into the record, over the objections of DERS, Cinergy, DE-Ohio, and other parties;

- The Commission considered OCC's evidence, including the "side agreements", at the time it rendered its decision<sup>59</sup>, and
- Relying upon the "Pre-PUCO Order agreements between DERS and parties to the RSP, the Commission *rejected* the stipulation expressly because the mere existence of the "Pre-Commission Order" agreements created doubt regarding the seriousness with which parties bargained over the terms of the stipulation.<sup>60</sup>

OCC's proposed proposition of law in which it suggests that it was denied a hearing or that the Commission's decision is somehow not based upon the evidence before it is utterly unsupportable.

Furthermore, neither the arguments raised by OCC nor by OP&E even address OCC's second proposed proposition of law. OCC instead argues that the IMF is a surcharge and that the needs of the competitive market demand greater bypassability of DE-Ohio's POLR charges. As DERS and Cinergy stated earlier within this brief, they will, in deference to this Court and in recognition of the fact that these issues do not directly impact them, merely indicate their full support of the position of DE-Ohio regarding the merits of these issues.

**D. OCC's Proposition of Law No. 3 Is Incorrect. A Correct Proposition of Law Addressing The Arguments It Raises Is:**

**The Public Utilities Commission Of Ohio Appropriately Balances Its Obligations Under Ohio's Public Records Law With Its Obligations Under Ohio Laws Regarding "Trade Secret Information" When It Conducts An In Camera Review Of Documents And Then Orders That Those Documents Be Placed In the Public Record After Trade Secret Information Is First Redacted.**

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<sup>59</sup> Case no. 03-93 et al., Order on Remand, (Oct. 24, 2007), p. 20; Entry on Rehearing (Dec. 19, 2007), pp. 8 and 9.

<sup>60</sup> Case no. 03-93 et al., Order on Remand, (Oct. 24, 2007), p. 26.

In support of its third proposition of law, OCC complains that the Commission erred when it ordered certain information redacted from the many documents that OCC insisted be placed in the public record of this matter. OPAE joins in the assertion that "excessive" information is being protected.

OCC's position is utterly devoid of merit. Moreover, OCC's truculent exploitation of this ancillary issue has imposed great expense on the parties, wasted resources of all parties and of the Commission, and is contributing to a business climate that is hostile toward a free and open exchange of information in Commission proceedings.

Ohio Revised Code section 1333.61(D) provides as follows:

'Trade secret' means information, including . . . 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."

Trade secret information is protected from disclosure under Ohio's Trade Secrets Act,<sup>61</sup> under Ohio's "Public Records Act,"<sup>62</sup> under the Federal Trade Secrets Act,<sup>63</sup> , and under the Federal Freedom of Information act.<sup>64</sup>

In recognition of its legal obligation to protect trade secret and similar information, the Commission adopted a rule, modeled after Rule 26 of the Ohio Rules of

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<sup>61</sup> Ohio Rev. Code §1333.61.

<sup>62</sup> Ohio Rev. Code §149.011.

<sup>63</sup> 18 U.S.C. §1905.

<sup>64</sup> 5 U.S.C. §552(b)(4).

Civil Procedure, which specifically addresses Motions for Protective Orders. Rule 24 of the Commission's Rules of Practice<sup>65</sup> provides as follows:

(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:

...

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

Ohio law also requires, of course, that the Commission must conduct its proceedings in the open. Ohio Revised Code §4901.12<sup>66</sup> and R.C. §4905.07<sup>67</sup> are but two examples of statutes which mandate that the Commission operate openly, and that documents and information introduced in its proceedings be made part of a public record. Even so, those sections, like Ohio's "Open Records Act"<sup>68</sup> itself, expressly acknowledge that the "open records" obligation is subject to and limited by the necessity of preserving confidential, proprietary, and trade secret information inviolate from public disclosure.

Faced with the sometimes competing dictates of these sections, the Commission has previously noted that:

It is necessary to strike a balance between competing interests. On the one hand, there is the applicant's interest in keeping certain

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<sup>65</sup> Ohio Admin. Code §4901-1-24.

<sup>66</sup> Ohio Rev. Code §4901.12 provides: "Except as provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX of the Revised Code, all proceedings of the public utilities commission and all documents and records in its possession are public records."

<sup>67</sup> Ohio Rev. Code §4905.07 provides: "Except as provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX 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."

<sup>68</sup> Ohio Rev. Code §149.43.

business information from the eyes and ears of its competitors. On the other hand, there is the Commission's own interest in deciding this case through a fair and open process, being careful to establish a record which allows for public scrutiny of the basis for the Commission's decision.<sup>69</sup>

The record in this case demonstrates the extraordinary care that the Commission expended to balance the competing public policies embodied in these statutes. When the Commission issued its Entry on Remand following the evidentiary hearings in May, 2007, it addressed the issue of confidential information first, before even the merits of the case. The Commission expressly considered the interplay between Ohio Revised Code sections 4901.12, 4905.07, 149.43, and 1333.61(D) as well as Rule 24 of its own rules of practice concerning protective agreements.<sup>70</sup> The Commission also evaluated this Court's opinions in *State ex rel. Besser v. Ohio State* (2000), 89 Ohio St. 3d 396, 2000-Ohio-207, 732 N.E.2d 373, and *State ex rel. Allright Parking of Cleveland v. Cleveland* (1992), 63 Ohio St. 3d 772, 591 N.E.2d 708, as those opinions concern the subject of confidential information that comes into the hands of a public entity.

After discussing the applicable legal standards at length, the Commission informed the parties that it had conducted an *in camera* review of the materials in question.<sup>71</sup> Employing the two prong test for trade secret information set forth in R.C. 1333.61(D), the Commission first concluded that certain portions of the information met the definition of trade secret information,<sup>72</sup> and then concluded that the parties to whom that information belonged had indeed endeavored to maintain the information as

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<sup>69</sup> *In the Matter of the Application of Rapid Transmit Technology Inc. for a Certificate of Public Convenience and Necessity*, Case No. 99-890-TP-ACE, Entry at 2-3 (Oct. 1, 1999).

<sup>70</sup> Case No. 03-93, Order on Remand, (Oct. 24 2007).

<sup>71</sup> Id., p. 12.

<sup>72</sup> Id., pp. 12-15.

confidential.<sup>73</sup> The Commission then explicitly found that the following items have actual or potential independent economic value from not being generally known or ascertainable to others:

- Customer names;
- Account numbers;
- Customer social security or employer identification numbers;
- Contract termination dates and other termination provisions;
- Financial consideration in each contract;
- Price of generation referenced in each contract;
- The volume of generation covered by each contract; and
- The terms upon which any option may be exercisable.<sup>74</sup>

The Commission next directed the Duke entities to work with the counterparties to the "side agreements" to prepare redacted versions of the contracts based upon the Commission's Order on Remand, and to file those redacted versions no later than 45 days after the Commission issued the Order on Remand.<sup>75</sup> Each party was then ordered to redact the materials each had introduced into the public record in order to conform with the Duke entities' redactions and in compliance with the Commission's Order on Remand, and to file those redacted documents with the Commission within 60 days after the Order on Remand. Finally, the Commission ordered that the redacted information be protected for eighteen months from March 19, 2007, the date protection was first granted by the Attorney Examiners.<sup>76</sup>

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<sup>73</sup> Id., pp. 15-17.

<sup>74</sup> Id., p. 15.

<sup>75</sup> Id., p. 17.

<sup>76</sup> Id.

As ordered by the Commission, DE-Ohio later submitted redactions which it, in good faith, believed to conform to the laws of this State and to the Commission's direction. In response to the redactions submitted by DE-Ohio, OCC launched still another assault on other parties' claims that information is entitled to protection. OCC simply filed its own version of the contracts under seal, redacting only what it chose. OCC then demanded the Commission reject DE-Ohio's version of the contracts and instead approve OCC's redactions of those documents, together with other OCC-redacted materials.

DE-Ohio and other parties once again had to seek protective orders from the Commission.<sup>77</sup> They also filed memoranda which opposed OCC's motion on the basis that OCC's redactions were incomplete, revealed trade secret information which did not belong to OCC, and that OCC's attack on protectable materials had evolved into an inherently unworkable demand that claims of confidentiality be contested upon a word-by-word basis through thousands and thousands of pages. Six days later, without waiting for a ruling by the Commission, the OCC filed its notice of appeal to this Court in which, among other things, OCC has accused the Commission of violating Ohio's public records laws.

Sadly, this incredible waste of resources continues, both before this Court and before the Commission. On May 28, 2008, the Commission issued still another Entry<sup>78</sup> addressing confidential and trade secret information. This time, the Commission granted in part, and denied in part, DE-Ohio's February 13, 2008, motion for protective order and the *Commission itself* filed yet another version of redactions within the record. The

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<sup>77</sup> Case No. 03-93 et al., Motions for Protective Orders filed Feb. 13 2008 by DE-Ohio, DERS, Cinergy and IEU-Ohio.

<sup>78</sup> Case no. 03-93 et al., Entry, May 28, 2008.

Commission then ordered the release of all information it had not redacted into the public record on July 1, 2008<sup>79</sup> unless a party filed a Motion for Rehearing regarding its May 28, 2008 Entry.<sup>80</sup> Unfortunately, due to certain mechanical errors in the Commission's redactions, DERS and Cinergy have indeed found it necessary to file an Application for Rehearing with the Commission to draw its attention to errors in the Commission's version of the redacted materials.

OCC's arguments regarding the Commission's treatment of confidential information do not address the categories of information that the Commission held protectable. OCC's arguments do not acknowledge that by redacting information, the Commission has strived to balance both its obligation to maintain the confidentiality of information and to promote the public record.

OCC simply demands that the contents of all documents be made public. OCC ignores the extraordinary efforts of the Commission and of all the parties to these cases to minimize the amount of information protected from public disclosure, while nonetheless preserving as confidential that information which the General Assembly has found deserving of protection. This Court should affirm the Commission and its Orders regarding claims of trade secret information.

### **III. CONCLUSION.**

For the foregoing reasons, this Court should ignore OCC's red herring arguments and affirm the Commission, which complied fully with the mandate this Court issued in *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d

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<sup>79</sup> Due to a technical difficulty with providing parties with copies of its redactions, the Commission subsequently modified the date Applications for Rehearing would be due to July 8, 2008. See Case No. 03-93 et al., Entry, June 4, 2008.

<sup>80</sup> Entry, May 28, 2008, pp. 4-5.

213, with its statutory obligation to review the MBSSO price offered by DE-Ohio, and with its obligation to balance the needs of open public records against the need to protect trade secret information.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Michael D. Dortch", with a long horizontal flourish extending to the right.

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served upon parties through their counsel, by depositing the same in the United States Mail, postage prepaid, addressed as follows, this 8th day of July 2008.

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