

IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel, : **No. 08-0367**
: :
: :
Appellant, : Appeal from the Public
: Utilities Commission of
v. : Ohio Case Nos.
: 03-93-EL-ATA
The Public Utilities Commission : 03-2079-EL-AAM
of Ohio, : 03-2081-EL-AAM
: 03-2080-EL-ATA
Appellee. :

**MOTION TO SEAL CONTENTS OF MERIT BRIEF AND
ASSOCIATED FILINGS BY INTERVENING
APPELLEE DUKE ENERGY OHIO, INC.**

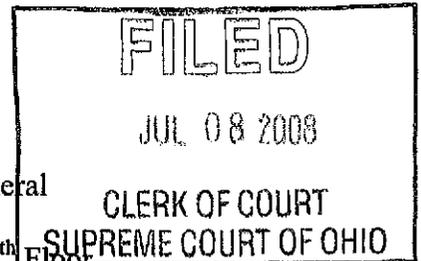
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I. Introduction

On January 10, 2003, in response to Am. Sub. S.B. No. 3 (“SB 3”) and its prior electric transition plan case, Intervening Defendant, Duke Energy Ohio, Inc., formerly The Cincinnati Gas & Electric Company (“DE-Ohio”) filed an application to modify its generation rates and establish a competitive-bid service option, also known as a market based standard service offer (“MBSSO”).¹ Subsequently, the Public Utilities Commission of Ohio (“PUCO” or “Commission”) asked DE-Ohio to file a new MBSSO, in the form of a rate stabilization (“RSP”) plan. Hearings on the RSP case were thereafter initiated. However, the hearings concluded when a Stipulation resolving the RSP case was presented to the PUCO.

On September 29, 2004, the PUCO purported to approve the Stipulation, but not without making substantial changes. DE-Ohio and other Parties to the proceeding requested rehearing. After rehearing, the PUCO issued an Entry on Rehearing on November 24, 2004, in which it further revised DE-Ohio’s RSP. The Ohio Consumers’ Counsel (“OCC”), a party to the RSP case, sought review from this Court of the PUCO’s November 2004 Entry.

On November 22, 2006, the Court remanded the case for the limited purposes of permitting discovery of certain documents, the production of which was not previously compelled by the PUCO, and of having the PUCO articulate the basis for its November 2004 decision.²

On remand, the PUCO allowed full discovery of agreements involving not only DE-Ohio, but its affiliates, Cinergy Corp. and Duke Energy Retail Sales, LLC (“DERS”).

¹ See Case No. 03-93-EL-ATA.

² See, *Ohio Consumers’ Counsel v. PUCO*, 2006-Ohio 5789.

Many of the documents subject to the OCC's discovery requests undeniably contain confidential, business-sensitive, and proprietary information. Indeed, the documents reflect the terms and conditions pursuant to which competitive contracts were executed, including, but not limited to, pricing and quantity information, financial consideration, and contract terms. Additionally, the documents identify customer-sensitive details, such as names, account numbers, social security numbers, and tax identification numbers. Because of the confidential nature of the information set forth in the requested documents and in order to ensure that the documents' contents were not publicly disclosed, the parties entered into protective agreements.

During the course of the proceedings on remand, the PUCO declared that the contents of the agreements involving DE-Ohio, Cinergy, or DERS were indeed confidential. Properly balancing the need to protect the confidential information with the requirement that Commission proceedings be conducted in the open, the PUCO ordered redaction of the confidential material. Similar redaction of deposition testimony and other submissions in which the confidential information was discussed also occurred.

Following a full (second) evidentiary hearing, the PUCO found that the Stipulation it maintained had been previously approved (after substantial modification) may not have resulted from serious bargaining between the parties.³ The PUCO then independently reviewed the components of DE-Ohio's MBSSO price, which had been proposed in lieu of the RSP. With minor revision, the PUCO approved the MBSSO. On or about February 29, 2008, the OCC again appealed to this Court.

³ *In re* DE-Ohio's MBSSO, Case No. 03-93-EL-ATA, et al. (Order on Remand at 27) (October 24, 2007).

The issues raised on appeal necessarily involve the confidential information incorporated into various agreements and further discussed in depositions and other filings. Indeed, the OCC contends, among other things, that the PUCO committed reversible error when it set aside the Stipulation because of the confidential agreements and thereafter independently assessed the evidence before it. To ensure that that confidential information remains rightfully shielded from public disclosure, DE-Ohio now moves this Court to permit the filing of its merit brief under seal.

II. Argument

The Rules of Practice before the Supreme Court provide that:

[d]ocuments filed with the Supreme Court shall be treated as public records unless they have been sealed pursuant to a court order or are the subject of a motion to seal pending in the Supreme Court.⁴

As previously discussed, the OCC's appeal concerns, in part, the documents that have been designated by the PUCO as containing confidential information. As a result, De-Ohio's merit brief necessarily contains references to and discussion of this confidential information. And its brief is also supported by exhibits that are the subject of confidentiality agreements and have been ordered redacted by the PUCO.

Pursuant to the confidentiality agreements, any filings that refer to or discuss or are otherwise supported by confidential information must be made under seal. Such a filing – under seal – is further consistent with the PUCO's order to redact the admittedly confidential information. Therefore, to honor the prior confidentiality agreements and protect the proprietary, business-sensitive nature of the documents at issue, DE-Ohio respectfully requests that its merit brief be filed under seal.

III. Conclusion

⁴ Ohio S. Ct. Prac. RULE XIV.

Respectfully submitted,



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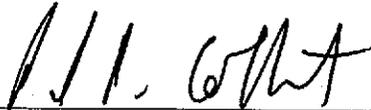
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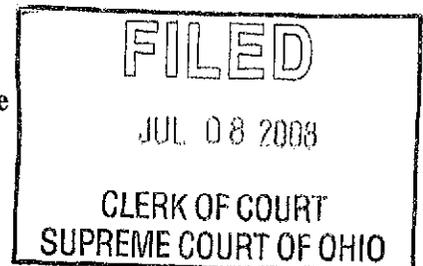
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MERIT BRIEF OF INTERVENING APPELLEE, DUKE ENERGY OHIO, INC.

I. INTRODUCTION:

In 1999, the Ohio General Assembly passed legislation restructuring the provision of competitive retail electric generation service in Ohio.¹ The General Assembly required the Public Utilities Commission of Ohio (Commission) to supervise the transition to this restructured environment. In fulfilling the requirement to transition to a competitive market environment, Duke Energy Ohio filed its application to establish a market-based standard service offer (MBSSO) on January 10, 2003.² Thereafter, the Commission requested, by Entry dated December 9, 2003, that DE-Ohio file a “rate stabilization plan” (RSP) MBSSO.³ DE Ohio filed its RSP MBSSO on January 26, 2004.⁴

After extensive discovery and discussions with all Parties, including the Ohio Consumers’ Counsel (OCC), DE-Ohio and many, but not all, of the other parties in the case reached a settlement regarding DE-Ohio’s RSP MBSSO (Stipulation) and offered

¹ 1999 Ohio SB 3. References to the Record will be “Rec. at ---.” References to OCC’s Appendix and Supplement will be “App. at ---“ and Supp. at ---“ respectively. References to DE-Ohio’s Appendix and Supplement will be “DE-Ohio’s App. at ---“ and DE-Ohio’s Supp. at ---, “ respectively.

² *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA, *et al*, (Application) (January 10, 2003), DE-Ohio’s Supp at 1, Rec. at ICN 1 at 1.

³ *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA, *et al*, (Entry at 5) (December 9, 2003), DE-Ohio’s App. at 5, Rec. at ICN 61 at 5.

⁴ *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA, *et al*, (DE-Ohio’s response to Commission Request for and RSP) (January 26, 2004), DE-Ohio’s Supp. at 3, Rec. at ICN 64.

the Stipulation to the Commission for approval.⁵ After extensive hearings regarding the Stipulation, the Commission significantly amended and then approved, the amended Stipulation as DE-Ohio's MBSSO in its Opinion and Order issued September 29, 2004.⁶ DE-Ohio and the OCC filed for rehearing and in a November 23, 2004, Entry on Rehearing,⁷ the Commission approved a significantly modified MBSSO applicable to DE-Ohio. OCC appealed the Commission's Entry on Rehearing to the Court, which remanded the case back to the Commission on two grounds: (1) to permit additional discovery; and (2) to require the Commission to further explain certain of its rulings and to cite the record evidence upon which it relied.⁸

On remand, the Commission: (1) permitted extensive additional discovery; (2) permitted OCC to move the discovery into the record as evidence; (3) held a hearing considering all issues raised by all Parties; (4) considered the old and new evidence *de novo*; (5) rejected the Stipulation previously submitted and amended; (6) modified and approved DE-Ohio's MBSSO based upon all the evidence and without regard to the now-rejected Stipulation; and (7) cited the evidence and stated the reasoning upon which the Commission based its decision (Order on Remand).

Although the Commission satisfied the Court's requirements on remand, OCC has again appealed the Commission's determination of DE-Ohio's MBSSO price. OCC makes four incorrect arguments, asking the Court to find improper conduct by DE-Ohio

⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al*, (Stipulation) (May 19, 2004), Supp. at 748, Rec. at ICN 160.

⁶ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al*, (Opinion and Order) (September 29, 2004), App. at 69, Rec. at ICN 206.

⁷ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al*, (Entry on Rehearing) (November 23, 2004), App. at 112, Rec. at ICN 229.

⁸ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 323, 856 N.E.2d 213, 236 (2006). DE-Ohio's App. at 47.

that it did not ask the Commission to find in the case below, and seeking to set aside DE-Ohio's MBSSO price.⁹

OCC's first argument is set forth in its "Statement of Facts." OCC argues that DE-Ohio and its affiliates, Duke Energy Retail Sales (DERS) and Cinergy Corp. (Cinergy), conspired with each other "to carry out the common purpose" of achieving support for the Stipulation to ensure a higher MBSSO price than it could otherwise achieve to the detriment of residential customers.¹⁰ To make this argument, OCC relies entirely upon limited evidence ignoring conflicting evidence presented by others. Indeed, it ignores conflicting evidence presented by its own witnesses on cross-examination and direct testimony. Importantly, OCC failed in the proceeding on remand before the Commission to raise many of the allegations it now makes.

Second, OCC alleges that the Commission made legal errors because it disagrees with the Commission's interpretation and evaluation of the record evidence. According to OCC, the Commission erred because it did not find: (1) DE-Ohio's MBSSO price is discriminatory; (2) DE-Ohio violated corporate separation rules; and (3) DE-Ohio unlawfully discounted regulatory transition charges.¹¹ The Commission's Order on Remand, however, based upon a review of all of the evidence, including the confidential commercial contracts submitted by OCC on remand, properly declined OCC's request to investigate allegations, such as Corporate Separation and Code of Conduct violations, and prescribed the price for DE-Ohio's MBSSO.¹²

⁹ OCC's Merit Brief.

¹⁰ *Id.* at 12.

¹¹ *Id.* at 25-36.

¹² *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (Order on Remand at 20) (October 24, 2007), App. at 28, Rec. at ICN 473 at 20.

Third, OCC alleges that the Commission failed to permit a full hearing. This position is hard to comprehend. The Commission held a full evidentiary hearing without limiting the issues presented by the Parties.¹³ The Commission permitted OCC to fully litigate any issue it raised through the presentation of any evidence it wished to submit. In fact, the Commission permitted OCC to raise issues and present evidence well beyond that required by the Court in its order remanding the case to the Commission. OCC's real complaint is that the Commission disagreed with OCC and did not eliminate the Infrastructure Maintenance Fund (IMF) and did not make all charges avoidable.¹⁴ The record evidence, as cited by the Commission in its Order on Remand, fully supports the IMF and unavoidable charges. As the Court has held in several other cases, absent a decision against the manifest weight of the evidence, this Court will not substitute its judgment for that of the Commission.¹⁵

Fourth, OCC disagrees with the Commission's ruling that utilities and non-regulated utility affiliates should be permitted to keep commercially sensitive and confidential trade secret information out of the public domain. OCC alleges that the Commission overstepped its authority by permitting redactions to maintain trade secret information contained in record evidence. On remand, all parties, including OCC, had unrestricted access to the protected material subject to negotiated protective agreements or Commission directive. The information in question was provided to the Commission

¹³ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (Order on Remand at 28) (October 24, 2007), App. at 36, Rec. at ICN 473 at 28.

¹⁴ OCC's Merit Brief at 37-43.

¹⁵ *Elyria Foundry Company v. Pub. Util. Comm'n*, 2008 Ohio 2230 at ¶ 12, 2008 Ohio LEXIS 1212 at ¶ 12 (2008); *Industrial Energy Users-Ohio v. Pub. Util. Comm'n*, 117 Ohio St. 3d 486, 489, 885 N.E.2d 195, 199 (2008); *MCI Telecommunications Corporation v. Pub. Util. Comm'n*, 32 Ohio St. 3d 306, 310, 513 N.E.2d 337, 342 (1987). DE-Ohio's App. at 17.

for its consideration under seal. In its Order on Remand approving DE-Ohio's MBSSO price, the Commission considered all evidence, including the protected confidential material OCC continually seeks to put into the public domain.

On remand, the Commission approved DE-Ohio's MBSSO price based upon record evidence, including but not limited to existing market prices and found it to be reasonable. It did this after expressly rejecting the 2004 Stipulation. The Commission's approval of DE-Ohio's MBSSO price was, therefore, not based upon the existence of protected trade secret information in the record. However, sensitive business models and competitive market positions of DE-Ohio's affiliates and customers are at stake. The Commission's Order on Remand strikes the appropriate balance between the public's right to know and a private party's right to protect competitively sensitive information. Once again OCC simply disagrees with the Commission's interpretation of the facts. OCC does not raise any arguments that suggest that the Commission's decision is against the manifest weight of the evidence.

In addressing the relevant issues remanded to it by this Court, the Commission exercised abundant caution, chose to reopen its hearing process, permitted all parties, including OCC, to submit additional evidence without restriction, and considered all of the record evidence, old and new, before issuing its Order on Remand. As required by the Court, the Commission has now thoroughly supported its findings with reasoning and evidence. Under these circumstances, the Court should deny OCC's appeal and uphold the Commission's Remand Order.

II. STATEMENT OF THE CASE:

On January 10, 2003, pursuant to R.C. 4928.14, DE-Ohio filed its application before the Commission to establish its MBSSO.¹⁶ The initial application was never acted upon by the Commission. The Commission was concerned about a lack of development of the competitive wholesale electric market and the ability of the wholesale market to support the competitive retail electric service market.¹⁷ The Commission, therefore, instructed DE-Ohio to file a “rate stabilized” MBSSO.¹⁸

As requested, DE-Ohio filed such a plan on January 26, 2004.¹⁹ The initial RSP MBSSO price was made up of two basic components, an avoidable price to compare, and an unavoidable component representing the price for DE-Ohio to fulfill its statutory obligation to serve as a provider of last resort (POLR). Over the course of the proceedings, the pricing formula evolved such that the price-to-compare and the POLR components were calculated through a series of price components. The evidentiary support for the price to compare and POLR components included the various costs, risks, and prices necessary to provide each service. The Commission issued its original Opinion and Order in these cases on September 29, 2004.²⁰

¹⁶ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (Application) (January 10, 2003), DE-Ohio's Supp. at 1, Rec. at 1; Ohio Rev. Code Ann. §4928.14 (Baldwin 2007), App. at 160.

¹⁷ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (Entry at 5) (December 9, 2003), DE-Ohio's App. at 5, Rec. at ICN 61 at 5.

¹⁸ *Id.*

¹⁹ *In re DE-Ohio MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Response to Request of the Commission to File an RSP) (January 26, 2004), DE-Ohio's Supp. at 3, Rec. at ICN 64.

²⁰ *DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (Opinion and Order) (September 29, 2004), App. at 69, Rec. at ICN 206.

DE-Ohio and OCC each filed an Application for Rehearing. DE-Ohio proposed an alternative to the Commission's Opinion and Order, based upon the record evidence, as part of its Application for Rehearing.²¹ The Alternative Proposal renamed price components, and broke some components into parts, but did not contain any new price concepts.

On November 23, 2004, the Commission issued its Entry on Rehearing substantially modifying DE-Ohio's Alternative Proposal.²² DE-Ohio did not oppose the Entry on Rehearing. OCC appealed the Commission's Opinion and Order establishing DE-Ohio's MBSSO price. Following briefing and argument the Court remanded to the Commission for further proceedings on two procedural issues.²³ The Court ordered the Commission to: (1) state its reasoning and cite record evidence in support of changes the Commission made in its November 23, 2004, Entry on Rehearing; and (2) grant OCC previously denied discovery.

OCC's Statement of Facts alleges that DE-Ohio and its affiliates withheld purported "side agreements" from OCC and the Commission that, if known, would have changed the course of the proceedings in 2004.²⁴ The existence or non-existence of the confidential commercial contracts, however, has no bearing on the Commission's determination as to whether DE-Ohio's MBSSO is reasonable. On remand, after reviewing all of the evidence, including the confidential commercial contracts submitted

²¹ *DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al*, (DE-Ohio's Application for Rehearing at 4-6) (October 29, 2004), DE-Ohio's Supp. at 37-39, Rec. at ICN 210 at 4-6.

²² *DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al*, (Entry on Rehearing) (November 23, 2004), App. at 112, Rec. at ICN 229..

²³ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 323, 856 N.E.2d 213, 236 (2006). DE-Ohio's App. at 47.

²⁴ OCC's Merit Brief at 3-4.

to the Commission for review, the Commission approved DE-Ohio's MBSSO price with modifications to the avoidability of certain charges by customers who switch to competitive service. The Commission's Order on Remand complied with the Court's remand order and is supported by the manifest weight of the evidence.

OCC's "Statement of Facts" inaccurately recites the record evidence and the Court's holding remanding the case to the Commission. In each instance OCC relies exclusively on selected quotes of three witnesses taken out of context or the direct testimony of its witnesses, each of whom was discredited on cross-examination at the hearing before the Commission. DE-Ohio will address OCC's inaccurate description of the evidence in its argument below. In short, OCC's flawed "Statement of Facts" lacks credibility because the Commission determined DE-Ohio's appropriate MBSSO price independent of any stipulated settlement of the case and with full knowledge of all of the confidential commercial contracts between DE-Ohio or its affiliates and Parties to the proceedings.

Further, OCC, in its "Statement of Facts," purports to know that the Court was concerned that the IMF may be a surcharge rather than a cost-based charge when it issued its November 22, 2006, decision.²⁵ OCC further assumes, based on a single sentence in the Court's order, that a surcharge is improper. The quote relied upon by OCC is "In that respect, the infrastructure-maintenance fund may be some type of surcharge and not a cost component."²⁶ OCC misplaces its reliance on this single sentence of a paragraph taken out of context from the Court's decision. The sentence is but one sentence in a paragraph where the Court discusses the need for the Commission to cite evidence and

²⁵ *Id.* at 24.

²⁶ *Id.*

reasoning in support of its decision.²⁷ The full paragraph of the Court's holding is as follows:

CG&E claims that the infrastructure-maintenance fund, together with the system reliability tracker, represented the reserve capacity charge previously set forth in the stipulation as part of the annually adjusted component. Although this may be true, *we have found nothing in the commission's first rehearing entry to support that assertion.* Under the commission's rehearing entry, CG&E's costs for maintaining adequate reserve capacity are now covered by the system-reliability tracker. *The commission did not mention the infrastructure-maintenance fund -- which is intended to compensate CG&E for committing its generation capacity to serve consumers who choose the market-based standard service offer through 2008 -- in the context of maintaining adequate reserve capacity requirements.* In that respect, the infrastructure-maintenance fund may be some type of surcharge and not a cost component. *Without explanation from the commission, however, we cannot know for certain.* In any event, even if we accepted CG&E's claim as true, *that would not excuse the commission from its statutory obligation to justify its orders.*²⁸

The Court's holding does not state, or otherwise imply, that the IMF is a surcharge, or that there is anything wrong with a surcharge. Rather, the "Statement of Facts" presented by OCC routinely mischaracterizes the record evidence as it does the Court's prior decision. The record evidence demonstrates that the Commission followed the Court's directives on remand. The Commission's Order on Remand properly sets forth the Commission's reasoning and cites to the appropriate record evidence. In short, the Commission's Order on Remand is supported by the manifest weight of the record evidence and, therefore, should be upheld.

²⁷ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 307-308, 856 N.E.2d 213, 223-224 (2006). DE-Ohio's App. at 38-39.

²⁸ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 307-308, 856 N.E.2d 213, 223-224 (2006) (*emphasis added*). DE-Ohio's App. at 39.

III. ARGUMENT:

I. The Commission followed the Court's directive set forth in its November 22, 2006, Decision and permitted additional discovery, properly considered all of the record evidence, and upheld DE-Ohio's MBSSO price.

OCC relies upon allegations of conspiracy raised in its "Statement of Facts" as a basis for the allegations it makes throughout its Merit Brief. In this proposition of law DE-Ohio will respond to such unfounded allegations in Part A below. The bases for OCC's conspiracy allegations are selected portions of the record taken out of context. DE-Ohio will discuss the entirety of the record. Also in this proposition of law DE-Ohio will respond to OCC's first proposition of law, which is simply an unfounded allegation that the Commission failed to follow the Court's directives on remand.

On remand, the Commission, as directed by the Court, permitted OCC to engage in broad discovery, admitted new evidence into the record and considered the entire record in rendering its Order on Remand.²⁹ The Commission has set forth the record evidence and the reasoning that it relied upon to fashion its Order on Remand, and modified DE-Ohio's MBSSO price based upon the record.³⁰ The Commission fully complied with the Court's directives in *OCC v Pub. Util. Comm'n*.

OCC argues that the Commission failed to meet the obligations imposed upon it by the Court. OCC is incorrect. OCC's present appeal is fundamentally a disagreement with the Commission's interpretation and weighting of the record evidence. The record demonstrates the Commission fully complied with the Court's directive.

²⁹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al*, (Order on Remand at 28) (October 24, 2007), App. at 36, Rec. at ICN 473 at 28.

³⁰ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al*, (Order on Remand) (October 24, 2007), App. at 9, Rec. at ICN 473.

On remand the Commission permitted OCC broad discovery without limiting the purpose for which OCC might use the discovery. Ultimately, OCC chose to present a case that asked the Commission to investigate DE-Ohio and its affiliates, but did not accuse DE-Ohio or its affiliates of wrongdoing.³¹ OCC also asked the Commission to lower DE-Ohio's MBSSO price, and sought to make the entire price avoidable by all customers. After reviewing all of the evidence, the Commission disagreed with OCC, declined to investigate DE-Ohio and its affiliates and, with some modifications, upheld DE-Ohio's MBSSO price. Such a finding was well within the Commission's discretion granted by the Court on remand.

OCC also argues that the Commission erred because it failed, based on the evidence presented by OCC, to find corporate separation violations, discriminatory pricing, and unlawful discounting of transition charges.³² OCC argues this is a legal issue for the Court's consideration because the Commission failed to consider all of the evidence presented and come to the conclusion demanded by OCC.³³ OCC begins its argument with innuendo and misstatements of the evidence and law in its Statement of Facts. OCC's argument is untenable. The Court should deny its appeal and affirm the Commission's Order on Remand.

A. OCC incorrectly alleges that DE-Ohio and its affiliates conspired to keep information from the Commission in an effort to increase its MBSSO price.

OCC attempts to color the Commission's Order on Remand as inconsistent with the record evidence, and persuade the Court that DE-Ohio and its affiliates committed

³¹ *DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al*, (Tr. III at 105, 142-143) (filed April 4, 2007 for hearing held March 21, 2007), DE-Ohio's Supp at 84, 85-86, Rec. at Remand Tr. III at Trans. April 4, 2007, at 105, 142-143.

³² OCC's Merit Brief at 28.

³³ *Id.* at 25-37.

bad acts that influenced the Commission approved MBSSO price. OCC's statements are incorrect and misleading.

OCC first states that it "sought copies of all side agreements between Duke Energy and other parties to these cases...."³⁴ Later, OCC claimed that it "presented extensive evidence regarding side agreements the Company entered into that removed opposition by large customers to the Company's proposals...."³⁵ OCC's statement is simply not true. OCC previously defined "Duke Energy" or "Company" to mean DE-Ohio.³⁶ But, DE-Ohio entered into only one contract, a public contract with the City of Cincinnati. OCC is now referring to confidential commercial contracts entered into by DERS and Cinergy, affiliates of DE-Ohio, but most certainly not DE-Ohio. The Court should not be misled by OCC's implication that DE-Ohio entered into agreements to remove opposition; DE-Ohio did not enter into any such agreements.

Next, OCC presents as fact, the testimony of its witness Ms. Hixon to incorrectly assert a connection between the alleged "side agreements" entered into by DERS and Cinergy and DE-Ohio's MBSSO price approved by the Commission.³⁷ OCC's witness alleges such a pricing connection regarding three sets of "side agreements:" (1) Pre-PUCO Order Agreements; (2) Pre-Rehearing Agreements; and (3) Option Agreements.³⁸

In alleging improper conduct, such as reimbursement of various MBSSO price components, relative to each set of "side agreements" OCC ignores: (1) the valid

³⁴ *Id.* at 3.

³⁵ *Id.* at 5.

³⁶ *Id.* at 1.

³⁷ *Id.* at 5.

³⁸ *Id.* at 6, 13, 17.

consideration contained in the agreements;³⁹ (2) its own witness testified that using the Commission approved MBSSO price as a baseline to determine the contract price is a reasonable pricing methodology;⁴⁰ (3) the fact that its witness admitted she is not an expert regarding the price of options and attempted no analysis to determine the reasonableness of the option price paid by DERS to its customers;⁴¹ (4) the fact that the Commission held that all confidential commercial contracts negotiated after the Commission's September 29, 2004, Stipulation were irrelevant to the negotiating process;⁴² and (5) that the Commission rejected the Stipulation, as requested by OCC, reviewed the evidence *de novo*, including the confidential commercial contracts, and approved DE-Ohio's MBSSO price.⁴³ The Commission substantially modified DE-Ohio's MBSSO price, terms, and conditions significantly from the Stipulation originally considered at hearing and the Alternative proposal made by DE-Ohio on rehearing. The Court should not be misled by OCC's omission of such facts and findings in its Statement of Facts.

³⁹ *DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (OCC Remand Ex. 2A at BEH Attachments 2-12, 17) (March 9, 2007), Supp at 81-112, 115-145, 161-474, Rec. at Conf. Testimony of Beth Hixon, April 4, 2007, at Attachments 2-12, 17.

⁴⁰ *DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (Tr. III at 33-37) (filed April 4, 2007 for hearing held March 21, 2007), DE-Ohio's Supp at 87-93, Rec. at Remand Tr. III at Trans. April 4, 2007, at 33-37. Note conf. 36, 37.

⁴¹ *DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (Tr. III at 118-132) (filed April 4, 2007 for hearing held March 21, 2007), DE-Ohio's Supp at 94-108, Rec. at Remand Tr. III at Trans. April 4, 2007, at 118-132.

⁴² *DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (Order on Remand at 26) (October 24, 2007), App. at 34, Rec. at ICN 473 at 26.

⁴³ *DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (Order on Remand at 28) (October 24, 2007), App. at 36, Rec. at ICN 473 at 28.

OCC also attempts to convince the Court that the record evidence demonstrates that DERS is not a going concern.⁴⁴ The basis of OCC's assertion is the testimony of Mr. Whitlock, the President of DERS, called as a witness by OCC.⁴⁵ Once again OCC ignores the following facts: (1) the very testimony upon which it relies demonstrates that DERS has a CEO and President;⁴⁶ (2) the Commission's official records show that the Commission certified DERS in Case No. 04-1323-EL-CRS on October 7, 2004, and also recertified it on October 3, 2006, in the same case docket;⁴⁷ (3) before the Commission may certify a CRES provider it must provide extensive financial data to the Commission and the Commission must determine that the CRES provider has the financial, managerial, and technical expertise to provide competitive retail electric service;⁴⁸ and (4) the record evidence shows that DERS was created in 2003 to participate in auctions in deregulated states,⁴⁹ did participate in New Jersey's auction process and performed analysis necessary to participate in Illinois's auction process.⁵⁰

OCC also insinuates some improper collusion among DE-Ohio, DERS, and Cinergy to effectuate the 2004 Stipulation through Duke Energy Shared Service

⁴⁴ OCC's Merit Brief at 9.

⁴⁵ *Id.*

⁴⁶ *DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (OMG Remand Ex. 4 at 30) (filed February 13, 2007, for deposition held January 9, 2007), Supp. at 723, Rec. at Trans., for Deposition of Charles Whitlock at 30.

⁴⁷ *In re DERS Certification*, Case No. 04-1323-EL-CRS (Certificate) (October 7, 2004); *In re DERS Certification*, Case No. 04-1323-EL-CRS (Renewal Certificate) October 3, 2006).

⁴⁸ Ohio Rev. Code Ann. § 4928.08 (Baldwin 2008), DE-Ohio's App. at 48; OHIO ADMIN. CODE ANN. § 4901:1-24-04 (Baldwin 2008), DE-Ohio's App. at 50.

⁴⁹ *In re CG&E's MBSSO*, Case No. 03-93-EL-ATA (OMG Remand Ex. 4 at 57-63) (filed February 13, 2007, for deposition held January 9, 2007), DE-Ohio's Supp. at 109-117, Rec. at Trans., for Deposition of Charles Whitlock at 57-63.

⁵⁰ *In re CG&E's MBSSO*, Case No. 03-93-EL-ATA (OMG Remand Ex. 4 at 56-57) (filed February 13, 2007, for deposition held January 9, 2007), Supp. at 726, Rec. at Trans., for Deposition of Charles Whitlock at 56-57.

employees.⁵¹ Once again OCC ignores the facts. DE-Ohio admits that employees of Duke Energy Shared Services perform work for DE-Ohio, DERS, Cinergy, and other affiliates, including work on the various confidential commercial contracts that are the subject of OCC's concern. OCC, however, ignores the fact that DE-Ohio is expressly permitted to utilize such Shared Services employees for such functions.⁵²

Pursuant to O.A.C. 4901:1-20-16 DE-Ohio must maintain a Cost Allocation Manual (CAM) and file it with the Commission every six months.⁵³ DE-Ohio must identify all classes of employees that may work for multiple affiliates in the CAM, including the attorney, regulatory, and rates employees of which OCC complains.⁵⁴ The Commission must audit DE-Ohio's CAM on a biennial schedule.⁵⁵ The Commission has never found a violation of the Code of Conduct rules set forth in O.A.C. 4901:1-20-16 and OCC expressly declined to accuse DE-Ohio, DERS, or Cinergy of such a violation in the cases below.⁵⁶ It is disingenuous for OCC to suggest such violations through innuendo contained in its Statement of facts.

OCC continues its misleading Statement of Facts by attacking the Cinergy confidential commercial contract as one "devoid of any pretense regarding a purpose other than purchasing support for Duke Energy's New Proposal and to defeat development of the competitive market for generation service by retaining ... as a

⁵¹ OCC's Merit Brief at 9-12.

⁵² OHIO ADMIN. CODE ANN. § 4901:1-20-16 (Baldwin 2008), App. at 133-139.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (Tr. III at 105, 142-143) (filed April 4, 2007 for hearing held March 21, 2007), DE-Ohio's Supp at 84, 85-86, Rec. at Remand Tr. III at Trans. April 4, 2007, at 105, 142-143.

customer of Duke Energy.”⁵⁷ Once again, OCC ignores the evidence that it placed in the record concerning the Cinergy confidential commercial contract. OCC’s witness, Mr. Ficke, the former President of DE-Ohio and a former Vice President of Cinergy, testified that Cinergy entered the contract in an attempt to develop a cogeneration project with the customer and another unregulated affiliate and to maintain jobs in the Cincinnati community.⁵⁸ Cinergy did not deny asking the customer to support the DE-Ohio Stipulation and the customer agreed. There is no O.A.C. 4901:1-20-16 violation that results from the Cinergy contract. OCC implies otherwise by omitting relevant testimony from its recitation of the facts.

OCC also relies upon an e-mail by a Duke Energy Shared Service employee working primarily in the DE-Ohio rates department as the factual predicate for seeking an order from the Court that DE-Ohio violated O.A.C. 4901:1-20-16.⁵⁹ OCC neglects to inform the Court that the employee’s testimony, introduced by OCC, states that he did not know of the existence of the option contracts, was not part of the negotiating team, and was not aware of the negotiating strategy.⁶⁰ In other words, the employee engaged in conjecture without knowledge of the context or the facts. Specifically, in response to questions posed by OCC counsel Mr. Small, the employee answered:

Q. So you did know the general nature of the agreements.

⁵⁷ OCC’s Merit Brief at 19.

⁵⁸ *DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA *et al*, (OCC Remand Ex. 9 at 74-76) (filed March 15, 2007, for deposition held February 20, 2007), Supp. at 704-706, Rec. at Conf. Deposition Transcript of Greg Ficke at 74-76.

⁵⁹ OCC’s merit Brief at 21-23.

⁶⁰ *In re CG&E’s MBSSO*, Case No. 03-93-EL-ATA (OCC Ex. 8 at 39-42) (filed March 15, 2007, for deposition held February 20, 2007), DE-Ohio’s Supp. at 121-126, Rec. at Conf Deposition Transcript of Jim Ziolkowski at 39-42.

A. [REDACTED]

Q. Do I understand it, then, that you understood that, as you state, Cinergy entered into negotiations with the large customers, and you also understood that [REDACTED]

A. I had seen the [REDACTED] agreements, *but I had never seen any option agreements, nor did I even know that they existed.*

Q. But you were aware that there were references, for instance in e-mails and so forth, to [REDACTED]

A. I had oftentimes seen the term and used the term [REDACTED]

Q. And did you connect them with this next round of negotiations that you mentioned here, that Cinergy entered into negotiations with each of the parties? Did you connect those two things?

A. My job -- my job each month and each quarter in 2006 was to [REDACTED] and I assume that something had gone on during late-2004, *but I wasn't a party to those negotiations*, so I didn't know what, and -- [REDACTED]

Thus, OCC knows that the e-mails contains misinformed opinion that is contradicted by other evidence but continues to offer it as factual evidence of wrongdoing. OCC's reliance on the e-mail, therefore, is misplaced.

⁶¹ *In re CG&E's MBSSO*, Case No. 03-93-EL-ATA (OCC Remand Ex. 8 at 40-41) (filed March 15, 2007, for deposition held February 20, 2007), DE-Ohio's Supp. at 124-125, Rec. at Conf Deposition Transcript of Jim Ziolkowski at 40-41.

B. The Commission considered all of the evidence to arrive at its Order on remand.

OCC argues that the Commission improperly limited its consideration of the evidence presented by OCC.⁶² Specifically, OCC alleges that the Commission failed to give full consideration to new evidence as to whether there was serious bargaining among the Parties leading to the Stipulation filed in the proceeding before the Commission.⁶³ But, the Court neither limited the Commission's consideration of the evidence resulting from its November 22, 2006, holding nor encouraged the Commission to consider all possible issues. Instead, the Court held that after disclosure of the discovery "the commission may, if necessary, decide any issues pertaining to the admissibility of that information."⁶⁴ Thus, the Court recognized the Commission's discretion to admit, and ultimately to consider additional evidence.⁶⁵

The issue of serious bargaining was the only issue, relative to additional discovery, referenced by the Court.⁶⁶ It was, therefore, natural that the Commission addressed and decided the issue of serious bargaining in light of the additional discovery conducted by OCC that resulted in the admission of additional record evidence.⁶⁷ DE-

⁶² *In re CG&E's MBSSO*, Case No. 03-93-EL-ATA (OCC Remand Ex. 8 at 39-42) (filed March 15, 2007, for deposition held February 20, 2007), DE-Ohio Supp. at 123-126, Rec. at Conf Deposition Transcript of Jim Ziolkowski at 39-42.

⁶³ *In re CG&E's MBSSO*, Case No. 03-93-EL-ATA (OCC Remand Ex. 8 at 26) (filed March 15, 2007, for deposition held February 20, 2007), Supp. at 673, Rec. at Conf Deposition Transcript of Jim Ziolkowski at 26.

⁶⁴ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, (2006) 111 Ohio St. 3d 300, 323, 856 N.E.2d 213, 236.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (Order on Remand at 27) (October 24, 2007), App. at 35, Rec. at ICN 473 at 27.

Ohio notes that the Commission decided this issue in favor of OCC and expressly rejected the Stipulation.⁶⁸

The Commission fully analyzed and utilized the new evidence regarding its determination of DE-Ohio's MBSSO price. It did so despite its holding rejecting the Stipulation because it could not determine whether there was serious bargaining among the Parties. Although the Commission found that the Court's "directive is no longer expressly applicable, as we have now found that the stipulation should not have been adopted," it also decided to "review the reasonableness of the RSP application in *light of the record evidence developed both in the initial hearing and in the hearing on remand...*"⁶⁹ Thus, contrary to OCC's assertion, the Commission expressly considered all of the evidence, including the new record evidence submitted by OCC, without limiting the purpose for which it considered such evidence. In fact, the Commission's stated purpose was the full reconsideration of DE-Ohio's MBSSO price (also known as DE-Ohio's RSP). The Court should affirm the Commission's Order on Remand because the Commission has fully considered the record evidence.

C. The record evidence supports the Commission's decision not to investigate ancillary issues raised by OCC such as allegations that DE-Ohio violated corporate separation rules, that DE-Ohio's MBSSO price is discriminatory, or that it has unlawfully discounted its price.

OCC asks this Court to determine that DE-Ohio, and its affiliates, violated corporate separation rules, engaged in price discrimination by improperly discounting DE-Ohio's price through the contractual obligations of its affiliates, and that the

⁶⁸ *Id.*

⁶⁹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (Order on Remand at 28) (October 24, 2007), App. at 36, Rec. at ICN 473 at 28 (emphasis added).

affiliates' contractually obligated payments are unlawful discounts.⁷⁰ OCC raised these issues for the first time on remand to the Commission.

OCC improperly asserts that the Court's November 22, 2006, holding compelled the Commission to consider issues regarding discrimination, corporate separation, and regulatory transition charge discounts.⁷¹ It did not. OCC did not file a motion for the Commission to consider these issues; instead, OCC sponsored testimony that asked the Commission to conduct an investigation regarding these issues, but expressly stated that it was not making any accusation of wrongdoing.⁷²

Specifically, in response to questions by attorneys representing DE-Ohio, DERS, and Cinergy, OCC's witness testified that she was not accusing DE-Ohio or its affiliates of improper conduct, but merely asking the Commission to investigate:

Q. And you are not making any specific accusation or finding of wrongdoing—of violation of any of these Administrative Code Sections, are you?

A. No, As I say in my testimony, I am asking the Commission to consider looking into and investigating the activities related to side agreements in light of these Commission Rules....

Q... You are not alleging that Cinergy Corporation has violated the corporate separation regulations of this Commission at all, are you?

A. My testimony is as I have explained before, is that I think the Commission should investigate the transactions and review them. I have not alleged any violation.

⁷⁰ OCC's Merit Brief at 25-37.

⁷¹ *Id.* at 26.

⁷² *DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (Tr. III at 105, 142-143) (filed April 4, 2007 for hearing held March 21, 2007), DE-Ohio's Supp at 84, 85-86, Rec. at Remand Tr. III at Trans. April 4, 2007, at 105, 142-143.

Q. So the answer is no, you have not alleged any violation by Cinergy Corporation, correct?

A. Correct, I have not alleged any violation.

Q. Thank you. I am going to ask the same question on behalf of Duke Energy Retail Sales. You are not alleging that Duke Energy Retail Sales has violated any regulation, corporate separation rules of this Commission, correct?...

A. With all the caveats that I gave to the first question, my testimony again is I have not alleged or found any violation.⁷³

Only after the hearing, and only in its Application for Rehearing, when DE-Ohio could no longer put on evidence to defend itself, did OCC ask the Commission to find specific conduct violations by DE-Ohio and its affiliates.⁷⁴ OCC based its request upon the same evidence upon which it was previously unwilling to make an accusation of impropriety.⁷⁵

OCC now seeks a determination by the Court that DE-Ohio and its affiliates violated Ohio law, even after the Commission was unwilling to so find after consideration of all the evidence presented by OCC. OCC's request is akin to seeking a discretionary appeal from the Court without submission of a jurisdictional pleading asserting the involvement of a constitutional issue or an issue of public or great general issue.⁷⁶ The failure to submit such a jurisdictional pleading is fatal to acceptance of the appeal. The Commission was correct to decline investigation of the issues improperly

⁷³ *Id.*

⁷⁴ *DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (OCC's Application for Rehearing at 2-3) (November 23, 2007), App at 166-167, Rec. at Conf. OCC Application for Rehearing at 2-3.

⁷⁵ *Id.*

⁷⁶ Supp. Ct. R. Prac. III § 1(B)(2), DE-Ohio's App. at 53-54.

raised by OCC.⁷⁷ Further, as discussed below, the record evidence does not support OCC's allegations.

OCC seeks to convince the Court that it produced such persuasive evidence that DE-Ohio violated Ohio's statutory prohibitions against discriminatory pricing, discounted pricing, and corporate separation protections before the Commission that the Court should find violations where the Commission was not even persuaded to investigate allegations of such violations.⁷⁸ OCC asks the Court to substitute its judgement for the Commission's to find such violations and amend DE-Ohio's carefully crafted and balanced MBSSO price approved by the Commission. The Commission's Order on Remand is supported by the manifest weight of the evidence. Like the Commission, the Court should reject OCC's baseless accusations that it did not assert at hearing and belatedly first presented to the Court on appeal.⁷⁹

1. The record does not support allegations of corporate separations violations.

OCC attempts to confuse the Court by treating DE-Ohio, DERS, and Cinergy, as if they were one company. They are not one company. Although affiliated, they are separate legal entities with separate business objectives. DE-Ohio is a public utility subject to the jurisdiction of the Commission. DERS is a CRES provider certified by the Commission to sell competitive retail electric services throughout Ohio.⁸⁰ Cinergy is a

⁷⁷ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Order on Remand at 20) (October 24, 2007), App. at 28, Rec. at ICN 473 at 20.

⁷⁸ OCC's Merit Brief at 25-37.

⁷⁹ *DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (Tr. III at 105, 142-143) (filed April 4, 2007 for hearing held March 21, 2007), DE-Ohio's Supp at 84, 85-86, Rec. at Remand Tr. III at Trans. April 4, 2007, at 105, 142-143.

⁸⁰ *In re DERS Certification*, Case No. 04-1323-EL-CRS (Certificate) (October 7, 2004); *In re DERS Certification*, Case No. 04-1323-EL-CRS (Renewal Certificate) (October 3, 2006).

holding company with a number of affiliates, including DE-Ohio and DERS. DERS and Cinergy entered confidential commercial contracts with consumers that were also Parties to DE-Ohio's MBSSO case for their own business reasons. After reviewing all of the confidential commercial contracts and the pleadings of numerous Parties, the Commission properly declined to further investigate the matter.⁸¹

OCC does not reveal to the Court which corporate separation rule DE-Ohio allegedly violated. Nevertheless, OCC listed several rules in its testimony supporting its request for an investigation before the Commission.⁸² First, OCC's witness suggested that the Commission investigate DE-Ohio's compliance with O.A.C. 4901:1-20-16(A).⁸³ That section requires DE-Ohio to file and operate pursuant to a Corporate Separation Plan approved by the Commission to assure that DE-Ohio gains no competitive advantage due to corporate affiliation.⁸⁴ The record shows that DE-Ohio is operating pursuant to its Corporate Separation Plan as ordered by the Commission.⁸⁵

Second, the OCC witness suggested that DE-Ohio may have violated O.A.C. 4901:1-20-16(D).⁸⁶ That section prohibits cross subsidies between DE-Ohio and its affiliates and requires DE-Ohio employees to work independently of affiliate

⁸¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Order on Remand at 20) (October 24, 2007), App. at 28, Rec. at ICN 473 at 20.

⁸² *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Remand Ex. 2A at 65-66) (March 9, 2007), Supp. at 68-69, Rec. at Conf. Testimony of Beth Hixon at 65-66.

⁸³ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Remand Ex. 2A at 65) (March 9, 2007), Supp. at 68, Rec. at Conf. Testimony of Beth Hixon at 65.

⁸⁴ OHIO ADMIN. CODE ANN. § 4901:1-20-16 (Baldwin 2008), App. at 133-139.

⁸⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Order on Remand at 39-40) (October 24, 2007), App. at 47-48, Rec. at ICN 473 at 39-40.

⁸⁶ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Remand Ex. 2A at 65-66) (March 9, 2007), Supp. at 68-69, Rec. at Conf. Testimony of Beth Hixon at 65-66.

employees.⁸⁷ The record evidence shows that the books and records of DE-Ohio and its affiliates are separately kept.⁸⁸ OCC does not complain that DE-Ohio's employees are improperly working for affiliates; instead it complains that Duke Energy Shared Service employees are working for DE-Ohio and affiliates.⁸⁹ Having shared service employees work for multiple affiliates, however, is expressly permitted.⁹⁰ As previously discussed, DE-Ohio is in compliance with the rule, including maintaining a CAM that lists the positions in the service company that may work for various affiliates.⁹¹

Similarly, OCC implied DE-Ohio's violation of O.A.C. 4901:1-20-16(G)(1)(c). That provision requires DE-Ohio and its affiliates to work independently by prohibiting the sharing of facilities and services if doing so would violate O.A.C. 4901:1-20-16(G)(4).⁹² Once again the evidence shows that DE-Ohio is in compliance. OCC witness Mr. Whitlock, DERS's President, testified that there is physical separation and significant training to prevent improper interaction among affiliates.⁹³ That the employee who wrote an e-mail upon which OCC relies did not even know of the existence of the confidential commercial contracts that he was asked about demonstrates the corporate separation between DE-Ohio and DERS.⁹⁴

⁸⁷ OHIO ADMIN. CODE ANN. § 4901:1-20-16 (Baldwin 2008), App. at 133-139.

⁸⁸ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (DE-Ohio Remand Ex. 3 at 36-37) (February 28, 2007), DE-Ohio's Supp. at 164-165, Rec. at ICN 355 at 36-37.

⁸⁹ OCC's Merit Brief at 10.

⁹⁰ OHIO ADMIN. CODE ANN. § 4901:1-20-16 (Baldwin 2008), App. at 133-139.

⁹¹ *Id.*

⁹² OCC's Merit Brief at 65.

⁹³ *In re CG&E's MBSSO*, Case No. 03-93-EL-ATA (OMG Remand Ex. 4 at 94-96) (filed February 13, 2007, for deposition held January 9, 2007), DE-Ohio's Supp. at 118-120, Rec. at Trans., for Deposition of Charles Whitlock at 94-96.

⁹⁴ *In re CG&E's MBSSO*, Case No. 03-93-EL-ATA (OCC Ex. 8 at 39-42) (filed March 15, 2007, for deposition held February 20, 2007), DE-Ohio's Supp. at 123-126, Rec. at Conf Deposition Transcript of Jim Ziolkowski at 39-42.

OCC's witness also referenced O.A.C. 4901:1-20-16 (G)(4)(e), (f), (g),⁹⁵ and (j) respectively. These rules prohibit DE-Ohio from: (1) requiring a customer to take regulated and unregulated services from DE-Ohio and affiliates; (2) subsidizing unregulated services and thus ensures competition; and (3) indicating a preference among suppliers. They also require shared employees to identify the affiliate on behalf of which they are providing representation.⁹⁶ The manifest weight of the record supports the Commission's holding.

None of the confidential commercial contracts prohibit a customer from switching to a CRES provider from DE-Ohio or *vice versa*.⁹⁷ The record evidence and public record indicates there are no cross subsidies between DE-Ohio and its affiliates.⁹⁸ There is no indication that DE-Ohio favored any provider including its own affiliates. The record does show that Duke Energy Shared Services employees, including attorneys and rate department personnel, negotiated the confidential commercial contract as permitted by O.A.C. 4901:1-20-16. The record evidence also shows that all signatories to the

⁹⁵ OCC's testimony references O.A.C. 4901:1-20-16(G)(4)(h) in error but was referencing O.A.C. 4901:1-20-16(G)(4)(g); *See, In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Remand Ex. 2A at 65-66) (March 9, 2007), Supp. at 68-69, Rec. at Conf. Testimony of Beth Hixon at 65-66.

⁹⁶ OHIO ADMIN. CODE ANN. § 4901:1-20-16 (Baldwin 2008), App. at 133-139.

⁹⁷ *DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (OCC Remand Ex. 2A at BEH Attachments 2-12, 17) (March 9, 2007), Supp at 81-112, 115-145, 161-474, Rec. at Conf. Testimony of Beth Hixon, April 4, 2007, at Attachments 2-12, 17.

⁹⁸ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (DE-Ohio Remand Ex. 3 at 36-37) (February 28, 2007), DE-Ohio's Supp. at 164-165, Rec. at ICN 355 at 36-37; *In re DERS Certification*, Case No. 04-1323-EL-CRS (Certificate) (October 7, 2004); *In re DERS Certification*, Case No. 04-1323-EL-CRS (Renewal Certificate) October 3, 2006).

confidential commercial contracts knew which DE-Ohio affiliate they were contracting with as the identity is clearly set forth in each contract.⁹⁹

In making these assertions DE-Ohio does not ignore the evidence relied upon by OCC regarding the involvement of Shared Service Company employees, a signatory line inadvertently marked on behalf of DE-Ohio (then CG&E), and certain e-mails between the contract signatories. DE-Ohio simply submits there was nothing untoward about the involvement of those Duke Energy Shared Service employees. Additionally, the company identification in the relevant contract overrides the inadvertent signature line and the e-mails such that all signatories understood the identity of the parties to the confidential commercial contracts.

Therefore, were OCC's allegations even relevant to the proceedings below to determine DE-Ohio's MBSSO price, which they are not because the Commission determined the MBSSO price *de novo* after rejecting the Stipulation, -- the record evidence supports the Commission's holding. The Court should deny OCC's appeal.

2. DE-Ohio's MBSSO price is not discriminatory.

OCC argues that the MBSSO price is discriminatory, and too high.¹⁰⁰ According to OCC, DERS and Cinergy paid certain customers through confidential commercial contracts and therefore DE-Ohio should reduce the MBSSO price to residential customers by the amount of those payments.¹⁰¹ But DE-Ohio's customers, including those who are a party to the contracts submitted by OCC, pay DE-Ohio the Commission

⁹⁹ *DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al*, (OCC Remand Ex. 2A at BEH Attachments 2-12, 17) (March 9, 2007), Supp at 81-112, 115-145, 161-474, Rec. at Conf. Testimony of Beth Hixon, April 4, 2007, at Attachments 2-12, 17.

¹⁰⁰ OCC's Merit Brief at 29.

¹⁰¹ *Id.* at 30.

approved MBSSO price. The confidential commercial contracts that so concern OCC have nothing to do with the validity or establishment of DE-Ohio's MBSSO price. OCC's allegations completely ignore the consideration between the contracting parties improperly and presume that payments DERS or Cinergy made in connection with the contracts should, and could have, been redirected to lower the MBSSO price of DE-Ohio's customers.¹⁰²

In each of the option contracts, the customer and DERS agreed upon terms for DERS to pay the customer a price in exchange for an option to serve the customer at an agreed upon strike price.¹⁰³ OCC ignored this fact during the presentation of its case. OCC's witness, Ms Hixon, admitted that she was not an expert on options, she did not perform any economic analysis in relation to the options, and has no opinion whether DERS overpaid, underpaid, or paid a reasonable amount for the options.¹⁰⁴ The record evidence shows that what OCC calls discriminatory payments to some customers, is simply valid consideration for an option. Even OCC's witness agreed that there is nothing wrong with an option contract to buy or sell electricity, such as those entered by DERS.¹⁰⁵

¹⁰² *DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al*, (OCC Remand Ex. 2A at BEH Attachments 2-12, 17) (March 9, 2007), Supp at 81-112, 115-145, 161-474, Rec. at Conf. Testimony of Beth Hixon, April 4, 2007, at Attachments 2-12, 17.

¹⁰³ *DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al*, (OCC Remand Ex. 2A at BEH Attachments 17) (March 9, 2007), Supp at 161-474, Rec. at Conf. Testimony of Beth Hixon, April 4, 2007, at Attachments 17.

¹⁰⁴ *DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al*, (Tr. III at 118-131) (filed April 4, 2007 for hearing held March 21, 2007), DE-Ohio's Supp at 94-107, Rec. at Remand Tr. III at Trans. April 4, 2007, at 118-131.

¹⁰⁵ *DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al*, (Tr. III at 121) (filed April 4, 2007 for hearing held March 21, 2007), DE-Ohio's Supp at 97, Rec. at Remand Tr. III at Trans. April 4, 2007, at 121.

Similarly, OCC ignores the record evidence demonstrating that Cinergy had reasonable business reasons to enter into the confidential commercial contract at issue in this case. Cinergy entered into such a contract in an effort to secure future business for an unregulated affiliate in the cogeneration business now known as Duke Energy Generation Services and to promote economic development and, in particular, the retention of jobs in the greater Cincinnati community.¹⁰⁶

OCC implies that some customers are paying less than others because such customers were fortunate enough to make a commercial arrangement with “Duke Energy.”¹⁰⁷ The truth is that all customers pay DE-Ohio the Commission-approved MBSSO price. And, there is nothing wrong with such confidential commercial contracts and the Commission is not required to find wrongdoing because of the existence of such contracts.

Ultimately, the contracts are simply irrelevant to these proceedings despite OCC’s contention that the Stipulation and the MBSSO price approved by the Commission were influenced by those confidential commercial transactions.¹⁰⁸ As the record shows, upon remand, the Commission rejected the Stipulation and considered all of the evidence *de novo*. Additionally, the Commission determined DE-Ohio’s MBSSO price after consideration of the new evidence developed during the remand proceedings.

3. The evidence demonstrates that neither DE-Ohio nor its affiliates improperly discounted Regulatory Transition Charges.

¹⁰⁶ *DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA *et al.*, (OCC Remand Ex. 9 at 72-73) (filed March 15, 2007, for deposition held February 20, 2007), DE-Ohio’s Supp. at 171-172, Rec. at Conf. Deposition Transcript of Greg Ficke at 72-73.

¹⁰⁷ Presumably, by “Duke Energy”, OCC means DE-Ohio, DERS, and Cinergy collectively.

¹⁰⁸ *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Order on Remand at 27) (October 24, 2007), App. at 35, Rec. at ICN 473 at 27.

OCC's claim that DE-Ohio and its affiliates improperly discounted Regulatory Transition Charges for customers who signed the confidential commercial contracts is equally without merit. Although it is legally permissible for a third party, such as a DE-Ohio affiliate, to pay Regulatory Transition Charges on behalf of a customer,¹⁰⁹ the record evidence demonstrates there was no such payment in this case. The Regulatory Transition Charges were not discounted for any customer as DE-Ohio collects the full Regulatory Transition Charge from each customer. References to DE-Ohio's MBSSO price in the confidential commercial option contracts do not imply otherwise. The contracts reflect the method for calculating the applicable option prices, including a reference to the use of DE-Ohio's MBSSO price as a factor (that is, the baseline) in determining the price for the option.¹¹⁰ DERS is not the only CRES provider that determines its price using DE-Ohio's MBSSO price as a baseline.¹¹¹ The use of DE-Ohio's MBSSO price as a baseline to determine the market price for competitive retail electric generation service, or options, is simply a reasonable price formula, nothing more and nothing less.

D. Even if the so called "side agreements" were relevant, OCC's reliance upon its own witnesses and evidence is misplaced.

In support of its position, OCC makes additional factual allegations that are contradicted by the record evidence. In an unsuccessful attempt to demonstrate that the alleged price discrimination and discounts have harmed the competitive retail electric

¹⁰⁹ Ohio Rev. Code Ann. § 4928.37 (Baldwin 2008), App. at 161-162.

¹¹⁰ *DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al*, (OCC Remand Ex. 2A at BEH Attachments 17) (March 9, 2007), Supp at 161-474, Rec. at Conf. Testimony of Beth Hixon, April 4, 2007, at Attachments 17.

¹¹¹ *In re Constellation*, Case No. 05-484-EL-CSS (Complaint at 3) (April 12, 2005), DE-Ohio's Supp. at 173.

service market OCC relies upon a calculation related to its Remand Exhibits 4 and 5 to conclude that but for the option agreements, non-residential switched load would have exceeded 20% in 2006, instead of less than 9%.¹¹² This contention is without merit.

OCC overstates expected switched load at June 30, 2006, by approximately 300%. Specifically, OCC divided *three months* of CRES provided sales data from OCC Remand Exhibit 5 into *one month* of data from Exhibit 4 (which has only monthly data, as indicated in its heading) thereby overstating expected switched load at June 30, 2006, by approximately a factor of three. Correcting that calculation by using a single month's data in both the numerator and denominator shows expected switched non-residential load at June 30, 2006, at about 7%, or approximately equivalent to the non-residential switched load that exists today.¹¹³

OCC makes additional errors regarding its interpretation of OCC Remand Exhibit 5. That exhibit is information provided by DE-Ohio in response to an OCC discovery request. It identifies the amount of switched load for those customers with contracts shown on BEH 2 through 12 and 17 for the three-month period ending June 1, 2004.¹¹⁴ It shows that many of those customers have never purchased generation from a CRES provider because those customers do not appear on OCC Remand Exhibit 5.¹¹⁵ It also

¹¹² *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Remand Ex. 4, 5), DE-Ohio Supp. at 180, Rec. at Remand TR. I filed April 3, 2007.

¹¹³ *Id.*

¹¹⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Remand Ex. 5), DE-Ohio Supp. at 188, Rec. at Remand TR. I filed April 3, 2007.

¹¹⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Remand Ex. 5), DE-Ohio's Supp. at 188, Rec. at Remand TR. I filed April 3, 2007; *DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (OCC Remand Ex. 2A at BEH Attachments 2-12, 17) (March 9, 2007), Supp at 81-112, 115-145, 161-474, Rec. at Conf. Testimony of Beth Hixon, April 4, 2007, at Attachments 2-12, 17 (Compare customers listed in contracts to those listed on OCC Remind Exhibit 5).

does not show the total load of the customers listed on OCC Remand Exhibit 5, only the switched load. For example, several customers had some switched load but most of their load has always remained with DE-Ohio. The accounts that remained with DE-Ohio are not displayed on the exhibit. The proper conclusion is to recognize that several customers with confidential commercial contracts have never switched, and that several customers who switched before entering into a confidential commercial contract remain switched despite having a contract.

When the proper math is done, OCC Remand Exhibits 4 and 5, combined with the testimony of DE-Ohio witness Bill Greene, show that the customers with contracts from DERS and Cinergy represented approximately 7% switched load in 2004 and continue to represent 7% switched load today.¹¹⁶ Therefore, the approximately 13% of switched non-residential load in 2004 that has returned to DE-Ohio did so for reasons having nothing to do with the contracts, such as the availability of a low MBSSO price.¹¹⁷ Ultimately, this is just another example of OCC's failure to properly represent the record evidence.

- II. The Commission's holding retaining the IMF and unavoidable POLR charge is supported by the manifest weight of the evidence.**
- A. The Commission's Order on Remand properly approved the IMF as a component of DE-Ohio's MBSSO price.**

OCC argues that the IMF is a surcharge unsupported by evidence and, therefore, the Commission was legally obligated to eliminate that component of DE-Ohio's

¹¹⁶ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Remand Ex. 4 at 1), DE-Ohio's Supp. at 180, Rec. at Remand TR. I filed April 3, 2007; *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Remand 5 at 7), DE-Ohio's Supp. at 194, Rec. at Remand TR. I filed April 3, 2007; *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (DE-Ohio Ex. 4 at 4), DE-Ohio's Supp. at 202, Rec. at ICN 112 at 4.

¹¹⁷ *Id.*

MBSSO price.¹¹⁸ OCC's contention is based on assumptions that do not withstand scrutiny. First, OCC continues to imply that the Court has determined that a surcharge is improper by relying upon an out of context quote from the Court's November 22, 2006 Opinion.¹¹⁹ The Court, however, has not determined that a surcharge is improper and the Commission did not determine that the IMF is a surcharge.¹²⁰

The Commission determined the reasonableness of the IMF based upon the prevailing law and the record evidence. The Commission clearly stated that the IMF need not be a cost-based mechanism as the MBSSO is by statute, market-based.¹²¹ The Court has made the same determination, holding:

[T]hat retail electric-generation service *is competitive* and therefore *not subject to commission regulation*, and R.C. 4928.05 expressly removes competitive retail electric services from commission regulation. Moreover, R.C. 4928.14(A) requires an electric-distribution utility to provide a market-based standard service offer of all competitive retail electric services, including electric-generation service.¹²²

Next, the Commission recited the record evidence upon which it relied. Specifically, the Commission reviewed the evidence of DE-Ohio witness Mr. Steffen and OCC witness Mr. Talbot.¹²³ The Commission also considered arguments made by the

¹¹⁸ OCC's Merit Brief at 37.

¹¹⁹ *Id.*

¹²⁰ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 307-308, 856 N.E.2d 213, 223-224 (2006).

¹²¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Remand Ex. 5), DE-Ohio's Supp. at 188, Rec. at Remand TR. I filed April 3, 2007; *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Order on Remand at 37) (October 24, 2007), App. at 45, Rec. at ICN 473 at 37.

¹²² *Industrial Energy Users-Ohio v. Pub. Util. Comm'n*, 117 Ohio St. 3d 486, 490, 885 N.E.2d 195, 200, (2008) (emphasis added). DE-Ohio's App. at 24.

¹²³ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Order on Remand at 35-36) (October 24, 2007), App. at 43-44, Rec. at ICN 473 at 35-36.

Ohio Marketers Group (OMG).¹²⁴ The Commission noted that Mr. Steffen testified that the IMF is not cost-based, is compensation for the dedication of capacity and forgoing higher market capacity prices available from other market purchasers, and that it is a component of DE-Ohio's MBSSO.¹²⁵

The Commission also cited to Mr. Steffen's testimony at page 26 where Mr. Steffen testified that the IMF was originally part of the \$52 million that made up the reserve capacity component of the Annually Adjusted Component (AAC).¹²⁶ The Commission discussed OCC witness Mr. Talbot's testimony disputing that the IMF was ever part of the AAC, alleging it was a new charge, the AAC was compensation for existing capacity, and the IMF was not justified on any basis.¹²⁷ After examining the record evidence, the Commission stated its reasoning as follows:

We find that the terms proposed by Duke for the IMF, the rationale for which was supported on remand, are reasonable for determination of a market-based charge to compensate for the pricing risk incurred by Duke in its provision of statutory POLR service. Recognizing that this component is not cost-based, we note that it is not necessary, under Section 4928.14, Revised Code, for components of a market price to be based on cost.¹²⁸

¹²⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Order on Remand at 36-37) (October 24, 2007), App. at 44-45, Rec. at ICN 473 at 36-37.

¹²⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Order on Remand at 35-36) (October 24, 2007), App. at 43-44, Rec. at ICN 473 at 35-36.

¹²⁶ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Order on Remand at 35) (October 24, 2007), App. at 43, Rec. at 35; *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (DE-Ohio Remand Ex. 3 at 26) (February 28, 2007), Supp. at 730, Rec. at ICN 355 at 26.

¹²⁷ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Order on Remand at 36) (October 24, 2007), App. at 44, rec. at ICN 473 at 36.

¹²⁸ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Order on Remand at 36) (October 24, 2007), App. at 44, rec. at ICN 473 at 36.

Accordingly, the Commission did exactly what the Court directed it to do on remand: it provided “record evidence and sufficient reasoning” to sustain its Order on Remand.¹²⁹

B. The Commission correctly held that certain components of DE-Ohio’s MBSSO price are unavoidable POLR components.

OCC also objects to the Commission’s approval of the system reliability tracker (SRT) and IMF components of DE-Ohio’s MBSSO as unavoidable components.¹³⁰ Once again, the Commission considered the evidence and stated its reasoning and holding in its Order on Remand.¹³¹ The Commission again cited the testimony of DE-Ohio witness Mr. Steffen who testified that the Commission had previously increased avoidability to stimulate the competitive retail electric service market.¹³²

Similarly, the Commission examined the testimony of OCC witness Mr. Talbot who claimed that limited unavoidable charges may harm the competitive retail electric market.¹³³ Ultimately, the Commission held that because DE-Ohio is statutorily mandated to provide POLR service it is reasonable that POLR charges should be “unavoidable by any customer who may use that POLR service.”¹³⁴ The Commission

¹²⁹ *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 111 Ohio St. 3d 300, 323, 856 N.E.2d 213, 236 (2006).

¹³⁰ OCC’s Merit Brief at 42-44.

¹³¹ *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Order on Remand at 37-38) (October 24, 2007), App. at 45-46, Rec. at ICN 473 at 37-38.

¹³² *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Order on Remand at 37) (October 24, 2007), App. at 45, Rec. at 37; *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA, *et al.* (DE-Ohio Remand Ex. 3 at 30) (February 28, 2007), DE-Ohio’s Supp. at 158, Rec. at ICN 355 at 30.

¹³³ *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Order on Remand at 37) (October 24, 2007), App. at 45, Rec. at 37; *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Tr. II at 84-85), Supp. at 787-788, Rec. at Trans. II, filed April 3, 2007, at 84-85.

¹³⁴ *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Order on Remand at 38) (October 24, 2007), App. at 46, Rec. at ICN 473 at 38.

followed the Court's mandate by reviewing the evidence and stating its reasoning and holding.

Once again, however, OCC incorrectly relies upon evidence regarding the decline in switched load between 2004 and today as the support for the proposition that unavoidable charges and the confidential commercial contracts are anticompetitive.¹³⁵ First, OCC misconstrues its own evidence. As previously discussed in regard to OCC Remand Exhibits 4 and 5, the evidence demonstrates that load did not return to DE-Ohio as a result of the confidential commercial contracts because switched load associated with customers having such contracts has remained relatively constant.¹³⁶

Further, the record evidence reveals that only 3.8% of DE-Ohio's MBSSO price is unavoidable.¹³⁷ The obvious reason that switched load has returned to DE-Ohio is that DE-Ohio's price is low. To ensure rate stabilization of its MBSSO price, DE-Ohio is not permitted to adjust its price with the rest of the market, thereby keeping its price lower than market forces permit. Because CRES providers do not have POLR obligations or costs, DE-Ohio's POLR charges cannot affect the competitive market adversely. Distribution rates, charged exclusively by the electric distribution utility, do not affect the competitive market adversely for the same reason. It is hard to see how the POLR charge is excessive when it accounts for only 3.8% of DE-Ohio's MBSSO price.

¹³⁵ OCC's Merit Brief at 43-44.

¹³⁶ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OCC Remand Ex. 4 at 1), DE-Ohio's Supp. at 180, Rec. at Remand TR. I filed April 3, 2007; *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.* (OCC Remand Ex. 5 at 7), DE-Ohio's Supp. at 194, Rec. at Remand TR. I filed April 3, 2007; *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (DE-Ohio Ex. 4 at 4), DE-Ohio's Supp. at 202, Rec. at ICN 112 at 4.

¹³⁷ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Tr. II at 86), DE-Ohio's Supp. at 209, Rec. at Trans. II, filed April 3, 2007, at 86.

Second, as a matter of law, only electric distribution utilities have a POLR obligation.¹³⁸ The Court has already decided this issue in its Remand Decision holding that:

Under R.C. 4928.14(A) and (C), and electric distribution utility, such as CG&E [now DE-Ohio], has an obligation to ensure generation supply for customers not being served by a competitive retail electric service provider by offering a market-based standard service offer that establishes prices for that supply. The standard service offer would apply to customers who choose not to shop for an alternative supplier and to those who shop and return to CG&E [now DE-Ohio] for electric generation services.¹³⁹

In short, the Commission's determination that certain specified charges should be unavoidable is correct, and that determination is amply supported by the record. The Court, therefore, should reject OCC's claims.

III. The Commission properly ordered the protection of confidential material.

A. The Commission should keep all proprietary information confidential

The confidential and proprietary nature of the confidential commercial contracts previously discussed, as well as other information exchanged during discovery and obtained through depositions were the subject of numerous motions for protective orders filed by many of the Parties to the proceedings. At the outset of the remand hearing, the Commission's Attorney Examiners granted all of the various motions for protective orders.¹⁴⁰ The Attorney Examiners stated that the Motions would be granted for a period of eighteen months on the condition that the granting of those motions may be modified

¹³⁸ Ohio Rev. Code Ann. § 4928.14 (Baldwin 2008), App. at 160.

¹³⁹ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 316, 856 N.E.2d 213, 230 (2006). DE-Ohio's App. at 43.

¹⁴⁰ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Tr. I at 8-10) (March 19, 2007), DE-Ohio's Supp. at 211-213, Rec. at Trans. Tr. I, filed April 3, 2007, at 8-10.

if the Commission deems it appropriate.¹⁴¹ Ultimately, based upon well-known standards to maintain the confidentiality of trade secret information set forth by the Court and the Commission's own precedent, the Commission decided to maintain the confidential nature of information exchanged during these proceedings through appropriate redactions to the protected material.¹⁴²

The Commission examined its own precedent, recognizing "we understand that negotiated price and quantity terms can be sensitive information in a competitive environment," and properly protected the confidential material.¹⁴³ The Commission also examined the record evidence and determined that the protected material should be redacted as confidential trade secrets.¹⁴⁴

Specifically, the Commission: (1) reviewed all of the protected material;¹⁴⁵ (2) determined from the pleadings that all Parties with confidential materials made appropriate efforts to maintain the confidential nature of the material;¹⁴⁶ (3) determined based upon its review of the documents and the pleadings that the protected material included information of independent economic value that if released would be harmful to the Parties possessing the information;¹⁴⁷ and (4) addressed OCC's and Ohio Partners for

¹⁴¹ *Id.*

¹⁴² *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Order on Remand at 15, 17) (October 24, 2007), App. at 23, Rec. at ICN 473 at 15.

¹⁴³ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Order on Remand at 12, 17) (October 24, 2007), App. at 20, Rec. at ICN 473 at 12.

¹⁴⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Order on Remand at 15-17) (October 24, 2007), App. at 23-25, Rec. at ICN 473 at 15-17.

¹⁴⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Order on Remand at 15, 17) (October 24, 2007), App. at 23, Rec. at ICN 473 at 15.

¹⁴⁶ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Order on Remand at 16-17) (October 24, 2007), App. at 24-25, Rec. at ICN 473 at 16-17.

¹⁴⁷ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Order on Remand at 14) (October 24, 2007), App. at 24, Rec. at ICN 473 at 14.

Affordable Energy's (OPAE) arguments by severely limiting the redacted information to "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."¹⁴⁸

OCC argues that the Commission's analysis fails to meet the Court's test for trade secrets.¹⁴⁹ To the contrary, the Commission's findings meet each element of the Court's test. The protected information and the pleadings before the Commission demonstrate that the information is not known outside of the relevant business and has been closely guarded even from employees in the business. In fact, the record evidence shows that an employee relied upon by OCC to support its allegation of wrongful intent on the part of DE-Ohio and its affiliates, did not even know that the option contracts exist.¹⁵⁰ Additionally, the protected material itself, now before the Court under seal on Motion by OCC, expressly states the value of the contracts against competitors, the considerable effort through negotiation and otherwise to develop the information, and difficulty of competitors to duplicate the information due to the complexity of the subject matter. The Commission's holding that the information is trade secret is supported by the record evidence including the protected material itself.

¹⁴⁸ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Order on Remand at 15) (October 24, 2007), App. at 23, Rec. at ICN 473 at 15.

¹⁴⁹ OCC's Merit Brief at 46.

¹⁵⁰ *In re CG&E's MBSSO*, Case No. 03-93-EL-ATA (OCC Ex. 8 at 40-41) (filed March 15, 2007, for deposition held February 20, 2007), DE-Ohio's Supp. at 124-125, Rec. at Conf Deposition Transcript of Jim Ziolkowski at 40-41.

B. The Commission may properly protect trade secret information held by non-regulated businesses.

OCC attacks the Commission's Order on Remand regarding its holding redacting protected material by stating that DERS was not a CRES provider when it entered the first contracts and Cinergy was never a CRES provider.¹⁵¹ OCC's argument is demonstrably incorrect. To the extent that DERS and Cinergy were not regulated by the Commission, then each company was operating exclusively in a competitive environment. Of course, most businesses operate in competitive environments. It makes no difference that DERS was in the certification process that makes it partially regulated, or that Cinergy was never regulated. All of the protected material is part of, or derived from, competitively sensitive confidential commercial contracts entered into by businesses acting in competitive markets.

OCC also incorrectly argues that the Commission's Order on Remand holding that specified information is confidential trade secret is at odds with the Commission's holding that there is a question regarding the serious negotiation test for partial stipulations in these proceedings.¹⁵² Parties enter into settlements involving Commission proceedings at their own peril. The Commission is free to reject settlements on any reasonable grounds. Indeed, in these proceedings DE-Ohio has consistently argued that the Commission had rejected the Stipulation in its original Order dated September 29, 2004. The parties to contracts must place terms and conditions in the contracts that take into account Commission approval or rejection of a Stipulation that may affect the

¹⁵¹ OCC's Merit Brief at 47.

¹⁵² *Id.*

contracts. Similarly, a Stipulation before the Commission must be reasonable regardless of enforceable contracts that may be non-jurisdictional to the Commission. That is precisely what has happened in these proceedings. The parties to contracts outside the Commission's jurisdiction, except as such jurisdiction relates to CRES providers, entered contract terms that specified actions if the Commission approved or rejected the Stipulation. There is nothing wrong with taking such precautions and there is no conflict with the Commission's holdings redacting protected material.

Once again OCC argues that the Cinergy confidential commercial contract and employee e-mail are evidence that the Commission should have held that Cinergy and DERS entered the confidential commercial contracts for anticompetitive reasons.¹⁵³ But OCC, as previously discussed, ignores evidence that Cinergy entered its contract to gain co-generation business and to preserve jobs in the greater Cincinnati community and, that the employee who wrote the e-mail did not even know about the existence of the confidential commercial contracts and simply engaged in speculation about a subject in which he had no first-hand knowledge.¹⁵⁴ The Commission reviewed all of the protected material in the case, including the confidential commercial contracts and the testimony of Duke Energy Services Company employees submitted by OCC, and concluded that the redacted material is trade secret that should remain confidential. The Court should not

¹⁵³ *Id.* at 48.

¹⁵⁴ *DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (OCC Remand Ex. 9 at 72-73) (filed March 15, 2007, for deposition held February 20, 2007), DE-Ohio's Supp. at 171-172, Rec. at Conf. Deposition Transcript of Greg Ficke at 72-73; *In re CG&E's MBSSO*, Case No. 03-93-EL-ATA (OCC Ex. 8 at 40-41) (filed March 15, 2007, for deposition held February 20, 2007), DE-Ohio's Supp. at 124-125, Rec. at Conf. Deposition Transcript of Jim Ziolkowski at 40-41.

overturn the Commission simply because OCC disagrees with the Commission's interpretation of the record evidence.¹⁵⁵

C. The Commission properly redacted protected material related to the provision of competitive retail electric service or other non-regulated service.

OCC also makes the legally and factually incorrect argument that the protected material should be made public because "rate-setting in a regulatory environment is inherently a public process that produces rates that are published and accessible to others."¹⁵⁶ First, the Commission has authority to maintain the confidentiality of proprietary information in regulated cases.¹⁵⁷ The Commission routinely grants motions for protective orders pursuant to O.A.C. 4901-1-24.¹⁵⁸

In DE-Ohio's recent gas rate case, holding that it should grant DE-Ohio's motion for Protective Order, the Commission correctly observed:

The Commission recognizes that Ohio's public records law is intended to be liberally construed to ensure that governmental records are open and made available to the public, subject to only a few very limited and narrow exceptions. *State ex rel. Williams 07-589-GA-AIR, et al. V. Cleveland* (1992), 64 Ohio St.3d 544, 549. However, one of the exceptions is for trade secrets."

The same principle holds in this case. It does not matter if the entity seeking the protective order is regulated or unregulated, a CRES provider or a holding company. All that matters is that the information protected meets one of the exceptions permitting the

¹⁵⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (Order on Remand at 12-17) (October 24, 2007), App. at 20-25, Rec. at ICN 473 at 12-17.

¹⁵⁶ OCC's Merit Brief at 49.

¹⁵⁷ OHIO ADMIN. CODE ANN § 4901-1-24 (Baldwin 2008), App. at 140-142.

¹⁵⁸ *In re Peerless*, Case No. 08-611-TP-ACE (Entry) (June 13, 2008), DE-Ohio's App. at 54; *In re Onvoy*, Case No. 08-624-TP-ACE (Entry) (June 13, 2008), DE-Ohio's App. at 57; *In re DE-Ohio's Gas Rate Case*, (Case No. 07-589-GA-AIR *et al.*, (Opinion and Order at 4-5) (May 28, 2008), DE-Ohio's App. at 63-64.

Commission to protect the proprietary material. In this instance the trade secrets exception applies and the Commission made the proper factual findings to apply the exception.

It also makes no difference that the Commission must approve an electric distribution utility's MBSSO pursuant to the just and reasonable standard and jurisdictional parameters set by R.C. 4928.05.¹⁵⁹ Similarly, it makes no difference that the Commission is the regulatory agency charged with enforcing statutory competitive limitations and consumer protections.¹⁶⁰ What does matter is that the Commission permits the competitive retail electric service market to function and prosper without regulatory interference.

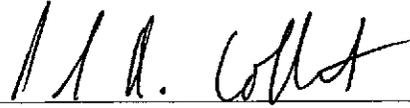
If the Commission cannot maintain the competitive trade secrets of utility affiliates, it is unlikely that such affiliates will participate in the competitive retail electric service market. If the Commission cannot protect the trade secrets of CRES providers, including the price terms included in their contracts, it is unlikely CRES providers will participate and innovate in the competitive retail electric service market. If the price terms of contracts entered by customers cannot be protected, it is unlikely that customers will participate in the competitive retail electric service market. The Court should not permit OCC to demand re-regulation of the competitive retail electric service market that the legislature has determined should be developed as a competitive market.

¹⁵⁹ Ohio Rev. Code Ann. §§ 4905.18, 4928.05, 4928.14 (Baldwin 2008), DE-Ohio's App. at 93, 95, App. at 97.

¹⁶⁰ Ohio Rev. Code Ann. §§ 4928.16, 4928.18 (Baldwin 2008), DE-Ohio's App. at 99, 101.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing pleading was served on the following either electronically or by first class U.S. mail, postage prepaid, upon the following, this 8th day of July, 2008.



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