

IN THE SUPREME COURT OF OHIO

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

MERIT BRIEF OF INTERVENING APPELLEE DUKE ENERGY OHIO, INC.

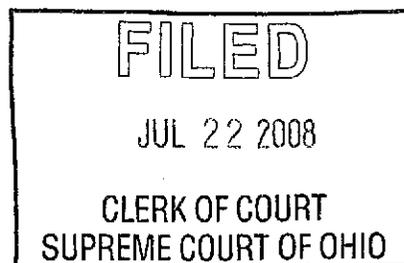
Paul A. Colbert
(Reg. No. 0058582)
Counsel of Record
Associate General Counsel
Duke Energy Ohio, Inc.
155 East Broad Street
Columbus, Ohio 43215
(614) 221-7551 (telephone)
(614) 221-7556 (fax)
Paul.Colbert@duke-energy.com

Rocco D'Ascenzo
(Reg. No. 0077651)
Duke Energy Ohio, Inc.
Senior Counsel
139 East Fourth Street, 25 At. II
Cincinnati, Ohio 45201-0960
(513) 419-1852 (telephone)
(513) 419-1846 (fax)

Elizabeth A. McNellie
(Reg. No. 0046534)
Baker & Hostetler LLP
65 East State Street, Suite 2100
Columbus, Ohio 43215
(614) 228-1541 (telephone)
(614) 462-2616 (fax)
emcnellie@bakerlaw.com

Nancy H. Rogers
Ohio Attorney General
(Reg. No. 0002375)
Duane W. Luckey
(Reg. No. 0023557)
Section Chief
Thomas W. McNamee
(Reg. No. 0017352)
Counsel of Record
Sarah J. Parrot
(Reg. No. 0082197)
Assistant Attorneys General
Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, Ohio 43215
(614) 466-4397 (telephone)
(614) 644-8764 (fax)
Duane.Luckey@puc.state.oh.us
Thomas.McNamee@puc.state.oh.us
Sarah.Parrot@puc.state.oh.us

Counsel for Appellee
The Public Utilities Commission of Ohio



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

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

Jeffrey L. Small
(Reg. No. 0061488)
Counsel of Record

Ann M. Hotz
(Reg. No. 0053070)
Assistant Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 (telephone)
(614) 466-9475 (fax)
small@occ.state.oh.us

**Counsel for Appellant,
The Office of the Ohio Consumers'
Counsel**

Colleen L. Mooney
(Reg. No. 0015668)
David C. Rinebolt
(Reg. No. 0073178)
Ohio Partners for Affordable Energy
1431 Mulford Road
Columbus, Ohio 43212
(614)488-5739 (telephone)
(419)425-8862 (fax)
cmooney2@columbus.rr.com
drinebolt@aol.com

**Counsel for Appellant,
Ohio Partners for Affordable Energy**

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I. INTRODUCTION

The Order of the Public Utilities Commission of Ohio (Commission) setting rates for riders for the recovery of certain expenses associated with the rate-stabilization plan market-based standard service offer (MBSSO) of Appellee Duke Energy Ohio, Inc. (DE-Ohio) is based on probative evidence and should be affirmed. The Commission based its determination on its acceptance of a stipulation and consideration of the entire record. The Commission had before it a wealth of record evidentiary support, as well as several confidential commercial contracts (improperly described as “side agreements” by the Appellants) in such consideration. Having considered all such evidence, including the alleged “side agreements,” the Commission rightfully concluded that the stipulation in question was the result of serious bargaining, was in the public interest, and did not violate any important regulatory principle. The Appellants provide no meaningful basis to reject the Commission’s Order, much less overcome their heavy burden of demonstrating that the Commission’s determination is against the manifest weight of the evidence or is clearly unsupported by the record.

The Order that Appellants ask this Court to review sets prices for riders and the audits of those prices for the Commission-approved components of DE-Ohio’s MBSSO. This so-called “Rider Case” follows closely, in time, the appeal of the so-called “Remand Case,” or “MBSSO Case,” involving the Commission’s Order originally approving DE-Ohio’s MBSSO price.¹ The Commission’s Order in the Rider Case accepted a Stipulation (2007 Stipulation) of some of the parties before the Commission. Appellants argue that the Commission erred in accepting this Stipulation as its Order, although Appellants do not clearly identify the ultimate relief they seek.

¹ *In re DE-Ohio’s MBSSO*, Case No.03-93-EL-ATA, et al.; *Ohio Consumers’ Counsel v. Pub. Util. Comm’n.*, No. 08-0367 (Ohio).

In 2006, this Court, upon review of the initial Order regarding DE-Ohio's MBSSO, for the first time, allowed discovery of "separate, undisclosed agreements" between parties to a stipulation on the basis that they may be relevant to the determination of whether the stipulation was the result of "serious bargaining."² After DE-Ohio produced such a contract and other contracts with DE-Ohio-affiliated entities were produced and were reviewed by the Commission in evaluating the 2007 Stipulation, the Commission made the factual determination that the 2007 Stipulation was the result of "serious bargaining."³ The Commission also found that the 2007 Stipulation benefits ratepayers and the public interest and does not violate any important regulatory practice or principle.⁴ Appellants cannot demonstrate why this determination is against the manifest weight of the evidence.

II. STATEMENT OF THE CASE

While the Remand Case was pending before this Court, DE-Ohio applied for increases to certain riders contained within its MBSSO.⁵ As a result, the Remand Case was sent back to the Commission close in time to the opening of the Rider Case. Based on the request of Ohio

² *Ohio Consumers' Counsel v. Pub. Util. Comm'n.*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, at ¶86.

³ *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its System Reliability Tracker Market Price, et al.*, Case No. 05-724-EL-UNC, et al., (Opinion and Order, at 27) (Nov. 20, 2007) (OCC App. at 34).

⁴ *Id.* at 28-29 (OCC App. at 35-36).

⁵ Throughout DE-Ohio's Merit Brief references to: (1) OCC's Appendix shall be "OCC App. at ---"; (2) OCC's Supplement shall be "OCC Supp. at ---"; (3) OPAE's Appendix shall be "OPAE App. at ---"; (4) OPAE's Supplement shall be "OPAE Supp. at ---"; (5) Staff's Appendix shall be "Staff App. at ---"; (6) Staff's Supplement shall be "Staff - Supp. at ---"; (7) DE-Ohio's Appendix shall be "DE-Ohio App. at ---"; (8) DE-Ohio's Supplement shall be "DE-Ohio Supp. at ---"; (9) Record shall be "Rec. at ---"; and (10) Transcripts shall be "Tr. - at ---".

Consumers' Counsel (OCC), the Rider and Remand Cases were consolidated, although ultimately separate hearings were held.⁶

In the original Remand Case, OCC made only one request for "side agreements." On May 18, 2004, OCC made its first discovery request for contracts between DE-Ohio and Parties to the MBSSO proceedings (Parties). OCC's discovery request was narrowly framed to request only DE-Ohio's agreements with Parties. Had DE-Ohio responded to OCC's request, only the February 4, 2004, contract with the City of Cincinnati would have been responsive to OCC's request. That contract was passed by the Cincinnati City Council and available to OCC through public records.

On August 24, 2006, (almost three months prior to this Court's decision of OCC's MBSSO appeal) DE-Ohio's affiliate, Duke Energy Retail Sales (DERS), publicly filed its financial statements with the Commission as part of its certification proceeding as a competitive retail electric service (CRES) provider.⁷ The DERS financial statements made public DERS's "Option Premium Expense."⁸

Shortly after this Court issued its November, 2006, remand decision, DE-Ohio, on December 7, 2006, voluntarily filed a letter with the Commission identifying its only agreement with a Party and stating that it was aware of confidential commercial contracts between its affiliates and Parties.⁹ Although DE-Ohio did not believe that such confidential commercial

⁶ *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its System Reliability Tracker Market Price, et al.*, Case No. 05-724-EL-UNC, et al., (Opinion and Order, at 6) (Nov. 20, 2007) (OCC App. at 13).

⁷ *In re DERS's Recertification*, Case No. 04-1323-EL-CRS (Renewal Application, at Ex. C-3, at Statement of Income for the year ended December 31, 2005, and Budgeted Statement of Income for the year ended December 31, 2006) (Aug. 24, 2006) (DE-Ohio App. at 4-8).

⁸ *Id.*

⁹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, et al., (Letter from DE-Ohio to the Commission) (December 7, 2006) (DE-Ohio Supp. at 1-2).

contracts were relevant to the Commission's consideration and were well beyond the scope of discovery previously sought by OCC, DE-Ohio made their existence known to all Parties.

OCC then issued new subpoenas to DERS, seeking all agreements between DERS and any customer of Cincinnati Gas & Electric (CG&E), and to Cinergy Corp. (Cinergy), seeking all agreements between Cinergy and any Party to the MBSSO case.¹⁰ On DERS's motion to quash, the Attorney Examiner ruled that OCC's demand for all agreements between DERS and any customer of CG&E was too broad.¹¹ Despite this ruling, and despite the fact that DE-Ohio had complied with this Court's requirement to produce "separate, undisclosed agreements" between parties to a stipulation, the Attorney Examiner ordered DERS and Cinergy to produce all agreements between it and any Party to the MBSSO Case.¹² Although DERS and Cinergy were not Parties to the MBSSO Case and are not utilities, they produced confidential commercial contracts, terminated commercial contracts, business analyses, internal correspondence, financial analyses, business operations data, and other sensitive and trade secret information, in compliance with the Attorney Examiner's order. All of this information was produced prior to the last two of the three settlement conferences that resulted in the 2007 Stipulation.¹³

Just prior to the hearing on the Rider Case, on April 9, 2007, several of the Parties reached the 2007 Stipulation. After hearing and review by the Commission, that 2007

¹⁰ CG&E's name was changed to DE-Ohio following a merger between Cinergy Corp. and Duke Energy. The Commission 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, et al.

¹¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, et al., (Entry, at 4) (Jan. 2, 2007) (DE-Ohio App. at 12).

¹² *Id.*

¹³ See *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, et al., (DE-Ohio Remand Rider Ex. 6 (Testimony of Paul G. Smith, at 5)) (April 6, 2007) (DE-Ohio Supp. at 3-4).

Stipulation was adopted as an Order of the Commission on November 20, 2007.¹⁴ The Order was confirmed by the Commission in an Entry on Rehearing on January 16, 2008.¹⁵ Appellants OCC and Ohio Partners for Affordable Energy (OPAE) appeal from that Order.

III. STANDARD OF REVIEW

As this Court has recently reiterated:

A PUCO order will be reversed, vacated, or modified by this court only when, upon consideration of the record, the court finds the order to be unlawful or unreasonable. R.C. 4903.13. See also *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶50. “ ‘[T]his court will not reverse or modify a PUCO decision as to questions of fact where the record contains sufficient probative evidence to show the PUCO’s determination is not manifestly against the weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty.’ ” *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, ¶29, quoting *AT & T Communications of Ohio, Inc. v. Pub. Util. Comm.* (2000), 88 Ohio St.3d 549, 555, 728 N.E.2d, 371. The appellant bears the burden of demonstrating that the PUCO’s decision is against the manifest weight of the evidence or is clearly unsupported by the record. *Id.* Furthermore, the court will not reverse a commission order absent a showing by the appellant that it has been or will be harmed or prejudiced by the order. *Myers v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 299, 302, 595 N.E.2d 873.

The 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.* (1997), 78 Ohio St.3d 466, 469, 678 N.E.2d 922. The court has explained that it may rely on the expertise of a state agency interpreting a law where “highly specialized issues” are involved and “where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly.” *Consumers’ Counsel v. Pub. Util.*

¹⁴ *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its System Reliability Tracker Market Price, et al.*, Case No. 05-724-EL-UNC, et al., (Opinion and Order) (Nov. 20, 2007) (OCC App. at 8-38).

¹⁵ *In the Matter of the Application of Duke Energy Ohio, Inc. to Adjust and Set its System Reliability Tracker Market Price, et al.*, Case No. 05-724-EL-UNC, et al., (Entry on Rehearing) (January 16, 2008) (OCC App. at 39-51).

Comm. (1979), 58 Ohio St.2d 108, 110, 12 O.O.3d 115, 388 N.E.2d 1370.¹⁶

Under the appropriate standard of review, as stated above, the Order of the Commission must be affirmed.

IV. ARGUMENT

Proposition Of Law No. 1 –

The Commission Accurately Determined That Participation In The 2007 Stipulation By Entities That Were Made Parties To The Rider Case By Its Consolidation With The Remand Case Does Not Make The Commission's Order In The Rider Case Unreasonable Or Unlawful.

Appellant OCC's propositions of law begin with the argument that two of the signatories to the 2007 Stipulation were not Parties to cases below and lacked standing to participate in these cases.¹⁷ The Commission, however, was correct in finding that both PWC and OHA were made Parties to the Rider Case when it was consolidated with the Remand Case.¹⁸

In an Entry dated November 23, 2006, and affirmed by an Order from the bench during a pre-hearing conference held December 14, 2006, the Remand and Rider Cases were consolidated before the Commission.¹⁹ At the December 14, 2006, prehearing conference, the Attorney

¹⁶ *Elyria Foundry Co. v. Pub. Util. Comm'n*, 118 Ohio St.3d 269, 2008-Ohio-2230, 888 N.E.2d 1055, at ¶12-13.

¹⁷ OCC attempts to argue for the first time *on appeal* that OEG did not intervene in one of the matters before this Court. OCC waived any argument regarding OEG because it did not raise this issue in its Application for Rehearing. See, e.g., *Ohio Consumers' Counsel v. Pub. Util. Comm'n* (2007), 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, at ¶40. Moreover, any argument that an entity that was a party to all the proceedings save one should be excluded from signing the Stipulation resolving all matters and that the Commission should, as a result of that signature, reject the Stipulation is without merit.

¹⁸ *In the Matter of the Application of Duke Energy Ohio, Inc. to Adjust and Set its System Reliability Tracker Market Price, et al.*, Case No. 05-724-EL-UNC, et al., (Entry on Rehearing, at 11, ¶27) (January 16, 2008) (OCC App. at 49).

¹⁹ *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its System Reliability Tracker Market Price, et al.*, Case No. 05-724-EL-UNC, et al., (Opinion and Order, at 6) (Nov. 20, 2007) (OCC App. at 13).

Examiners decided that each attorney for all Parties would be noticed in all proceedings,²⁰ hence negating any claim that the Commission's decision to include PWC and OHA as Parties was somehow "ex post facto."²¹

Significantly, OCC argued below for the inclusion of all parties and supported consolidation of the cases.²² DE-Ohio initially opposed consolidation, but subsequently agreed on the basis that the purpose of consolidation was to move the cases quickly to conclusion.²³ Having argued in favor of consolidation below, Appellant OCC is precluded from arguing that certain parties improperly participated in some of the cases.²⁴ All of the Parties intervened in at least one of the consolidated cases and participated in all of the cases after consolidation. No basis exists to undo the designation of PWC and OHA as Parties.

Furthermore, OCC makes no argument, nor could it, that the Order from the Commission would be different had PWC and OHA been made to intervene formally, or had they been excluded from signing the 2007 Stipulation. OCC instead argues that it was deprived of its opportunity to object to the intervention of these parties, but never explains on what basis it could be concluded that PWC and OHA were proper Parties to the Remand Case — where intervention was permitted — but not the Rider Case. More importantly, the removal of those Parties from the 2007 Stipulation does not impact the final Order of the Commission. Without a showing of prejudice, this Court repeatedly has declined to reverse an order of the

²⁰ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, et al. (Tr. at 81-83 (December 14, 2006, Prehearing Conference)) (January 8, 2007) (DE-Ohio Supp. at 8-10).

²¹ OCC Merit Brief at 27.

²² *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, et al. (Tr. at 22-23 (December 14, 2006, Prehearing Conference)) (January 8, 2007) (DE-Ohio Supp. at 5-7).

²³ *Id.*

²⁴ Cf., e.g., *State ex rel. Kline v. Carroll*, 96 Ohio St.3d 404, 2002-Ohio-4849, 775 N.E.2d 517, at ¶27.

Commission.²⁵ Therefore, this Court should decline Appellant OCC's request to invalidate the Order of the Commission based on the participation of PWC and OHA.

Proposition Of Law No. 2 –

When The Commission Has All Potentially Relevant Information, The Commission's Determination That "Serious Bargaining" Occurred Is A Factual Finding That Will Not Be Reversed Unless The Finding Is Against The Manifest Weight Of The Evidence.

As Appellants concede, this Court has approved the long-standing approach of the Commission in assessing stipulations proposed to the Commission:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?
2. Does the settlement, as a package, benefit ratepayers and the public interest?
3. Does the settlement package violate any important regulatory principle or practice?²⁶

Appellants ask this Court to reverse the Order of the Commission based on Appellants' disagreement with the factual finding of the Commission that the 2007 Stipulation was the result of "serious bargaining." Here, unlike the situation involving the 2004 Stipulation, all agreements — including those outside the directive of this Court — were fully disclosed to the Commission when it made its factual determination that serious bargaining occurred. Therefore, no question exists whether the Commission made its finding with all of the potentially relevant information before it. Consequently, in the absence of a showing that the Commission's factual finding of "serious bargaining" is against the manifest weight of the evidence, the Order of the Commission must be affirmed.

²⁵ See, e.g., *Myers v. Pub. Util. Comm'n* (1992), 64 Ohio St.3d 299, 302, 595 N.E.2d 873, 876.

²⁶ *Ohio Consumers' Counsel v. Pub. Util. Comm'n* (1992), 64 Ohio St.3d 123, 126, 592 N.E.2d 1370, 1373.

This Court's directive upon remand of the Commission's Order in DE-Ohio's MBSSO case was that the Commission must compel discovery of any "undisclosed" agreements that may exist between DE-Ohio and the Parties to the 2004 Stipulation.²⁷ This Court reached this conclusion because "concessions or inducements apart from the terms agreed to in the stipulation *might* be relevant to deciding whether *negotiations* were fairly conducted."²⁸ The Court did not find that the existence of agreements would taint a stipulation, but rather directed the Commission to allow discovery of these agreements and to review them to ensure that serious bargaining did, in fact, occur.

The Commission followed this directive. It ordered production of the requested contracts, plus contracts with affiliated companies. More importantly, the Commission had these contracts before it when it made the factual determination that "serious bargaining" occurred. The Commission followed the correct legal standard and weighed the evidence before it. No legal issue is implicated that would cause this Court to conduct a *de novo* review. Therefore, the correct standard of review requires Appellants to show that the determination of the Commission that the 2007 Stipulation was the result of "serious bargaining" was against the manifest weight of the evidence.

A. The Factual Finding Of "Serious Bargaining" Is Not Against The Manifest Weight Of The Evidence.

Rather than reflecting a decision against the manifest weight of the evidence, the record below shows substantial evidence that "serious bargaining" did occur. All of the contracts at issue were made known to all of the Parties during the bargaining process. Appellants nevertheless twist the opinion of this Court in the Remand Case in an attempt to label all non-

²⁷ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, at ¶86.

²⁸ *Id.* (emphasis added).

Stipulation agreements between Parties and any related entities to the Stipulation as a *per se* violation of the serious-bargaining prong of the review for stipulations. This position overstates the position of this Court in the Remand Case and is not a correct statement of the law.

This Court's decision expressed concerns about the potential impact of undisclosed agreements on the fairness of *the negotiations*.²⁹ Neither Appellant, however, claims that the negotiations over the 2007 Stipulation were unfair — because they cannot. After remand, the agreements were all produced (including agreements with DE-Ohio-related entities), negotiations proceeded with all invited to participate (with full knowledge of the terms of the contracts), and a Stipulation was reached by some of the Parties. As a result, as the Commission found, none of the concern about non-disclosure during the negotiation exists and no unfair *bargaining* could have occurred.³⁰ Full disclosure prior to the entry of the 2007 Stipulation addresses the concerns of the Court reflected in its decision.³¹

To the extent that Appellants are arguing that the agreements impacted the motivations of the Parties *signing* the 2007 Stipulation, that allegation, although not germane to the issue of *bargaining*, was considered and rejected by the Commission. The Commission correctly found that the contracts about which OCC and OPAE complain do not include any language regarding Case Nos. 05-725-EL-UNC, 06-1069-EL-UNC, 06-1068-EL-UNC and 06-1085-EL-UNC.³² Furthermore, none of the contracts referred to by Appellants prevent any of the signatories to the

²⁹ Id.

³⁰ *In the Matter of the Application of Duke Energy Ohio, Inc. to Adjust and Set its System Reliability Tracker Market Price, et al.*, Case No. 05-724-EL-UNC, et al., (Entry on Rehearing, at 4, ¶6) (January 16, 2008) (OCC App. at 42).

³¹ See *id.*; *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, at ¶86.

³² See *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its System Reliability Tracker Market Price, et al.*, Case No. 05-724-EL-UNC, et al., (Opinion and Order, at 27) (Nov. 20, 2007) (OCC App. at 34).

Stipulation from paying increases in the riders that were at issue and, therefore, do not contain any “concessions or inducements” to enter into the 2007 Stipulation. Rather, the contracts at issue are option contracts between DERS — not DE-Ohio — and some of the Parties to the 2007 Stipulation and a public contract with the City of Cincinnati. The contracts do not prohibit any party from taking a position contrary to DE-Ohio’s position regarding the MBSSO Riders. As a result, the Commission properly found that the existence of these contracts did not prevent serious bargaining in reaching the terms of the 2007 Stipulation.³³

Appellants, however, argue that the Commission is wrong because the contracts “insulated” some of the participants from payment of the rider charges. This argument, taken to its logical conclusion, proves too much. Specifically, if the existence of a contract for electricity based on discounts to known riders (which is a common pricing mechanism) were sufficient to “taint” the bargaining process, all market participants would need to disclose such contracts, regardless of whether the market participants were an affiliate of a utility or a party to the case — or not. Moreover, in making this argument, Appellants are factually incorrect. Rather than address the facts, however, Appellants attempt to create an air of conspiracy that simply does not exist, and claim that the option contracts are merely elaborate efforts to “buy off” Parties to the 2007 Stipulation.

First, Appellants attempt to confuse the issue by treating DE-Ohio, DERS, and Cinergy as if they were one company. They are not one company. Although affiliated, they are separate entities with separate business objectives. DE-Ohio is a public utility and charges MBSSO

³³ The Commission reached a different conclusion in the Remand Case where it decided to reject the 2004 Stipulation based, in part, on different agreements than those at issue here, that were not disclosed before the 2004 Stipulation was reached. *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA, et al. (Order on Remand, at 27) (Oct. 24, 2007) (OCC App. at 78). Therefore, the Commission reviewed the agreements at issue here and simply made the factual determination that they did not negate serious bargaining.

prices approved by the Commission to all consumers. No consumer pays any price to DE-Ohio other than the Commission-approved, tariffed price. DERS is a CRES provider certified by the Commission to sell competitive retail electric services throughout Ohio. Cinergy is a holding company with a number of affiliates including DE-Ohio and DERS. DERS entered into confidential commercial contracts with consumers that were also Parties to DE-Ohio's Rider Case for business reasons distinct to DERS.³⁴

In an effort to claim that the option contracts are merely a "cover" for some improper activity, Appellants also allege that DERS is not an ongoing concern.³⁵ But, again, Appellants ignore the public record and the evidence. The Commission certified DERS in Case No. 04-1323-EL-CRS on October 7, 2004, and recertified it on October 3, 2006, in the same case docket.³⁶ Before the Commission may certify a CRES provider, the Commission *must* determine that the CRES provider has the financial, managerial, and technical expertise to provide competitive retail electric service.³⁷ DERS was required to provide extensive financial data to the Commission to show that it is an ongoing concern with sufficient financial resources to operate.³⁸ Appellants did not intervene in Case No. 04-1323-EL-CRS, and did not challenge the Commission's approval of DERS's status. Thus, despite Appellants' protestations to the contrary, the evidence shows that DERS is an ongoing concern utilizing service-company employees and with its own business plan.

³⁴ After reviewing all of the confidential commercial contracts and the pleadings of numerous Parties, the Commission properly declined to further investigate the allegation that corporate separation had been violated. *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, et al. (Order on Remand, at 20) (October 24, 2007) (OCC App. at 71).

³⁵ OCC's Merit Brief at 9-11.

³⁶ *In re DERS Certification*, Case No. 04-1323-EL-CRS (Certificate) (October 7, 2004) (DE-Ohio App. at 14-15); *In re DERS Certification*, Case No. 04-1323-EL-CRS (Renewal Certificate) (October 3, 2006) (DE-Ohio App. at 16-17).

³⁷ R.C. 4928.08. (DE-Ohio App. at 2).

³⁸ Ohio Adm.Code 4901:1-24-04 (DE-Ohio App. at 2-3).

The option contracts require DERS to pay the customer for the option to supply it with electricity if electricity meets a specified market price.³⁹ OCC also ignored this during the presentation of its case. What the record demonstrates is the payment of valid consideration for an option. Significantly, because the option contracts are with DERS, all Parties to those contracts pay DE-Ohio the full Commission-approved MBSSO price; the costs of these options, no matter how the amounts are set, are absorbed by the shareholders of Duke Energy Corporation. OCC also discusses a contract between Cinergy and a party to the Remand Case before the Commission, but not the Rider Case at issue in this appeal. Significantly, this party was not even a party to the 2007 Stipulation.⁴⁰ How this contract could impact “serious bargaining” over the 2007 Stipulation is never explained. Despite Appellant’s admonitions to the contrary, there is nothing wrong with such agreements, and, as the Commission found and the evidence supports, such agreements do not mean that serious bargaining did not occur.⁴¹

³⁹ *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA, et al., (OCC Remand Ex. 2A (Hixon Testimony, at 50-52)) (OCC Supp. at 53-55).

⁴⁰ *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA, et al., (Stipulation) (April 9, 2007) (OPAE Supp. at 8); see also OCC Merit Brief at 19.

⁴¹ To further insinuate wrongdoing, OCC relies upon an e-mail from a Duke Energy Services Company employee who works in the rates department for the various Duke Energy operating companies, primarily DE-Ohio. OCC’s Merit Brief at 22-24. Once again OCC is intent upon revealing only half the story to the Court. The e-mail in question, fully reprinted in OCC’s Brief, was sent by an employee as an explanation of payments by DERS to its customers that the rates department was processing as part of DE-Ohio’s billing obligation to all CRES providers, including DERS. See *In re CG&E’s MBSSO*, Case No. 03-93-EL-ATA, at al., (DE-Ohio Remand Ex. 3 (Second Supplemental Testimony of John P. Steffen, at 37)) (February 28, 2007) (DE-Ohio Supp. at 11-12). The e-mail was requested by another employee who did not understand the nature of the payments made on behalf of DERS.

Unfortunately, the composer of the e-mail was not part of DE-Ohio’s MBSSO negotiating team, did not participate in such negotiations, performed only isolated analytics regarding settlement proposals, and did not even know of the existence of the option contracts which are at issue in this case. OCC offers the e-mail as fact, when the writer’s testimony plainly indicates he was mistaken regarding his understanding of the contracts. Thus, OCC knows that the e-mail does not present correct statements, but continues to offer it as factual evidence of wrongdoing.

The only potentially relevant non-option agreement is an agreement between the City of Cincinnati and Cincinnati Gas & Electric.⁴² Significantly, this contract does not require the City to take any position with regard to the 2007 Stipulation. Appellants, however, argue that the City was somehow compelled to support the 2007 Stipulation because the contract states that the contract could be terminated if the Commission issues an Order in Case No. 03-93-EL-ATA (the MBSSO case) “or a related case necessary to carry out the terms and conditions of the [2004] Stipulation” that is “unacceptable to CG&E.”⁴³

The Commission appropriately rejected this argument. This contract, because it is with the City, had *always* been a matter of public record, so any “suspicions” about the City’s position could have been fleshed out during settlement negotiations and considered by the Commission in its review of the 2007 Stipulation. In addition, the “threat” of CG&E’s termination of the contract based upon the City’s failure to support the 2007 Stipulation rings hollow when one considers that the contract was not terminated when DE-Ohio first determined that the 2004 Stipulation had been rejected, long prior to the commencement of negotiations concerning the 2007 Stipulation. Given that the contract remained in place while the 2004 Stipulation was rejected, “pressure” on the City to support the 2007 Stipulation does not exist.

Furthermore, the fact that all of the signatories to the 2007 Stipulation were involved with the hearing and negotiations speaks to their motivation in bargaining. If, in fact, the Parties were “protected” from the outcome of the 2007 Stipulation, with no contractual requirement to support it, no incentive would have existed for them to be involved in the process at all. As the option contracts make clear, support of the 2007 Stipulation is not consideration for the agreements.

⁴² *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA, et al., (OCC Remand Ex. 6) (OPAE Supp. at 17-19).

⁴³ OCC Merit Brief at 9.

Therefore, the fact that the Parties to the 2007 Stipulation remained active in the negotiations and hearings demonstrates that each had an interest to protect, and engaged in serious bargaining. Therefore, the Commission's factual determination that the 2007 Stipulation was the result of serious bargaining is not against the manifest weight of the evidence, and the Commission's Order should be affirmed.

B. The Commission Correctly Determined That Appellants Do Not Have Veto Rights.

Appellants seek to create a right of "veto" of stipulations presented to the Commission by claiming that their lack of agreement should invalidate the 2007 Stipulation. Aside from the fact that such an outcome would prevent all partial stipulations, the Commission made a factual finding here that there was a diversity of interests in support of the 2007 Stipulation.⁴⁴ Aside from the question of whether the issue of "serious bargaining" can be determined by which parties eventually agreed to a stipulation, Appellants have not shown, and cannot show, that this finding is against the manifest weight of the evidence.

Ultimately, the Staff, DE-Ohio, the City, OEG, and OHA supported the 2007 Stipulation and only OCC and OPAE opposed it.⁴⁵ The 2007 Stipulation enjoyed support from a regulator representing a balanced interest of all Parties (Staff), a utility, residential representatives, and industrial and commercial customer representatives. In trying to paint the 2007 Stipulation as being the product of DE-Ohio and its "paid for" partners, Appellants ignore the fact that the

⁴⁴ *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its System Reliability Tracker Market Price, et al.*, Case No. 05-724-EL-UNC, et al., (Opinion and Order, at 27) (Nov. 20, 2007) (OCC App. at 34); *In the Matter of the Application of Duke Energy Ohio, Inc. to Adjust and Set its System Reliability Tracker Market Price, et al.*, Case No. 05-724-EL-UNC, et al., (Entry on Rehearing, at 3-4) (January 16, 2008) (OCC App. at 41-42).

⁴⁵ *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its System Reliability Tracker Market Price, et al.*, Case No. 05-724-EL-UNC, et al., (Opinion and Order, at 6) (Nov. 20, 2007) (OCC App. at 13).

Commission Staff was also a signatory to the 2007 Stipulation.⁴⁶ The Staff is involved in the day-to-day regulation of DE-Ohio and does not even arguably have any reason to blindly support any stipulation, let alone the one at issue here. The support of all of these Parties is strong evidence of serious bargaining among the Parties.

Appellants have not claimed, because they cannot, that the 2007 Stipulation is a regurgitation of DE-Ohio's position or that residential consumers are left without benefits. The 2007 Stipulation provided an added public benefit in that it required DE-Ohio to issue a credit related to a confidential settlement stemming from a defaulted coal-delivery contract in 2005 and in prior years.⁴⁷ This credit in the 2007 Stipulation was greater than (more than double) the amount recommended by a Commission-chosen Auditor, and was provided in a more expedited manner.⁴⁸ This credit mitigated and helped offset the totality of the price adjustment for the 2007 MBSSO rider components, which will be recovered through the remainder of the year.

By the terms of the 2007 Stipulation, all consumer classes — including residential consumers who were not even subject to the Company's MBSSO Rider Fuel and Economy Purchase Power (FPP) when the facts and circumstances occurred that necessitated the confidential contract settlement with a coal supplier — will share in the credit.⁴⁹ Accordingly, residential consumers receive a substantial benefit, in excess of what was recommended by the

⁴⁶ Id.

⁴⁷ Id. at 11 (OCC App. at 18).

⁴⁸ Compare *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, et al., (Commission Ordered Ex. 1A (Auditor's Report, at 1-9)) (October 12, 2006) (OCC Supp. at 502-510) with *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, et al., (Stipulation, at ¶1) (April 9, 2007) (OPAE Supp. at 3B).

⁴⁹ See *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its System Reliability Tracker Market Price, et al.*, Case No. 05-724-EL-UNC, et al., (Opinion and Order, at 11) (Nov. 20, 2007) (OCC App. at 18).

FPP auditor, through the terms of the very 2007 Stipulation that OCC is opposing.⁵⁰ This provision remained in the 2007 Stipulation at the insistence of PWC, the City of Cincinnati, and the Staff, over the objections of DE-Ohio. This provision demonstrates a compromise of interests and a benefit for residential consumers, despite OCC's lack of support. Finally, the 2007 Stipulation adopted almost all of the Auditor's and Staff's recommendations so that the FPP, System Reliability Tracker (SRT), and Annual Adjusted Component (AAC) market price components are set at a reasonable level for the benefit of the public.

Moreover, a finding of diversity of support for a partial stipulation is not required as a matter of law for the Commission to determine that it should adopt a partial stipulation as its final order. The cases cited by Appellant OPAE for this proposition are not on point.⁵¹ In those cases, the question was whether a stipulation that contained a provision that was contrary to law (i.e., failure to allow for alternate methods of pricing) could be valid in the absence of agreement by groups representing residential consumers.⁵² Here, the 2007 Stipulation contains no provision that is contrary to statute, and Appellants do not claim otherwise. Rather, OPAE merely claims that the Stipulation is a "sham,"⁵³ but points to no provision of the 2007 Stipulation that is "extra-legal" in the sense of being contrary to statute.⁵⁴

⁵⁰ Compare *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, et al., (Commission Ordered Ex. 1A (Auditor's Report, at 1-9)) (October 12, 2006) (OCC Supp. at 502-510) with *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, et al., (Stipulation, at ¶1) (April 9, 2007) (OPAE Supp. at 3B).

⁵¹ OPAE Merit Brief at 12-13 (citing *Constellation NewEnergy, Inc. v. Pub. Util. Comm'n*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885 and *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 109 Ohio St.3d 328, 2006-Ohio-2110, 847 N.E.2d 1184).

⁵² *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 109 Ohio St.3d 328, 2006-Ohio-2110, 847 N.E.2d 1184, at ¶18-19.

⁵³ OPAE Merit Brief at 14.

⁵⁴ *Id.*

Furthermore, Appellants' right-of-veto argument misconstrues the purpose of stipulations before the Commission. Stipulations that are reached are not binding on the Commission.⁵⁵ A stipulation can be modified or rejected by the Commission, after full consideration of the stipulation, evidence from its own experts, including Staff and retained experts, and evidence from parties who do not agree with the stipulation. The Commission had all of these resources before it when it adopted the 2007 Stipulation as its Order. The nature of contested stipulations is that some parties are not satisfied. That circumstance does not cause the Commission's adoption of a stipulation to be improper or unlawful.

C. Appellants Do Not Show Any Harm From The Commission's Order.

Appellants are also unclear in the remedy that they seek from this Court. Even as they state that they wish the Court to direct the Commission to disregard the 2007 Stipulation, neither Appellant makes any argument why an independently-created resolution of the Rider Case would yield a better or, in fact, a different Order. Moreover, the Commission's Order did not establish the existence of the riders themselves, but merely adjusted the levels of those riders to reflect, almost exclusively, DE-Ohio's increased costs through December, 2008. These amounts will have already been paid by retail customers and are not subject to revision.⁵⁶ For these reasons,

⁵⁵ *Office of Consumers' Counsel v. Pub. Util. Comm'n* (1992), 64 Ohio St.3d 123, 125-126, 592 N.E.2d 1370, 1373 (citing cases).

⁵⁶ The Appellants asked this Court to stay execution of the Commission's Order on remand setting the amounts paid by retail customers during 2008, and the Court denied the Appellants' motion on July 9, 2008. *07/09/2008 Case Assignments*, 2008-Ohio-3369. Customers therefore will continue to pay that rate throughout the calendar year. *Id.* Because "utility ratemaking by the Public Utilities Commission is prospective only," once amounts are paid, the rate becomes moot. See *Lucas County Comm'rs v. Pub. Util. Comm'n* (1997), 80 Ohio St.3d 344, 348, 686 N.E.2d 501, 504 ("The General Assembly has attempted to balance the equities by prohibiting utilities from charging increased rates during the pendency of commission proceedings and appeals, while also prohibiting customers from obtaining refunds of excessive rates that may be reversed on appeal. In short, retroactive ratemaking is not permitted under Ohio's comprehensive statutory scheme.") (citation and footnote omitted).

the exact nature of the relief sought by Appellants is less than clear. Appellants have failed to show any prejudice based on the Commission's Order resolving the 2007 Rider Case, and for this independent reason, the Order of the Commission must be affirmed.

Proposition Of Law No. 3 –

Rider Determinations Should Be Affirmed Unless They Are Contrary To Law, Against The Manifest Weight Of The Evidence, Or Violate Important Regulatory Policies.

Appellants' briefs, under the mantle of the "public interest," attack individual riders and — in the case of OCC's brief — paragraphs of the 2007 Stipulation on the basis that the Commission chose the outcome proposed in the 2007 Stipulation over recommendations of the Auditor or over testimony of OCC's own experts in setting the terms of its Order. In this regard, Appellants have failed to sustain their burden that the Commission's decision was "manifestly against the weight of the evidence and [that the Commission's Order was] so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty."⁵⁷

In short, each "complaint" about the 2007 Stipulation, and ultimately about the Order of the Commission, presents a disagreement with the outcome that ultimately is within the discretion of the Commission. Although the Appellants appear to be seeking to have this Court direct the Commission to reject the 2007 Stipulation, Appellants never explain what would be achieved by such an outcome or how their constituency would be benefited by such a result. The Order of the Commission should be affirmed.

A. FPP – "Fuel and Economy Purchased Power"

OCC's concern with the FPP rider is the method of accounting used by DE-Ohio with regard to its fuel purchases. Specifically, the Commission allowed the parties to defer this issue

⁵⁷ *Monongahela Power Co. v. Pub. Util. Comm'n*, 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, at ¶29.

without prejudice to any party's position by allowing DE-Ohio to continue with "active management" accounting until the issue is revisited during later audit and review.⁵⁸

OCC does not even attempt to argue that the Commission's decision with regard to FPP is against the weight of the evidence, but only that the adoption of the 2007 Stipulation language calling for additional meetings on the issue somehow demonstrates that the position of the Auditor "has substance."⁵⁹ Moreover, failure to adopt a recommendation of the Auditor does not mean that the recommendation was "ignored,"⁶⁰ only that it was not followed. The Commission reviewed the substantial evidence on this issue and accepted the terms of the 2007 Stipulation.⁶¹ Therefore, OCC does not provide this Court with any basis to reject the Commission's Order with regard to the FPP.

B. SRT – "System Reliability Tracker" – "DENA" Assets

Here, Appellants are concerned about a provision of the Order which allows for the possibility that DE-Ohio might, under emergency conditions, purchase electricity from generation plants owned by Duke Energy outside of Ohio.⁶² These former Duke Energy North America, LLC, (DENA) assets are generating assets that were held by Duke prior to its merger with Cinergy that are now owned by DE-Ohio, but are not committed to serve DE-Ohio

⁵⁸ See *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its System Reliability Tracker Market Price, et al.*, Case No. 05-724-EL-UNC, et al., (Opinion and Order, at 15) (Nov. 20, 2007) (OCC App. at 22).

⁵⁹ OCC Merit Brief at 38. Later in its Brief, OCC argues that this part of the stipulation is also somehow contrary to unnamed Commission policies and practices. *Id.* at 43. Presumably, OCC is making reference to pre-deregulation standards with regard to cost recovery. The Commission's directive to the Auditor to make use of previously used provisions for fuel cost recovery, and its later decision to continue study of alternative means of accounting does not mean that the Commission has ignored "important regulatory principles."

⁶⁰ *Id.* at 38.

⁶¹ *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its System Reliability Tracker Market Price, et al.*, Case No. 05-724-EL-UNC, et al., (Opinion and Order, at 13-15) (Nov. 20, 2007) (OCC App. at 20-22).

⁶² *Id.* at 12 (OCC App. at 19).

customers as part of DE-Ohio's MBSSO.⁶³ The legacy DENA assets have and continue to operate exclusively in the competitive wholesale electric market. No costs associated with the DENA assets have been passed through the SRT.⁶⁴

Appellants complain that the Commission's Order permits DE-Ohio to use legacy DENA capacity to fill an emergency short-capacity position.⁶⁵ This ability, however, is a reliability measure for the protection of customers. It is highly beneficial to consumers that all reasonably priced generation options are available and at DE-Ohio's disposal to meet capacity requirements, especially in an emergency. The need for available capacity options is especially true in the spot market, where prices can be exceptionally volatile and where a sudden capacity constraint coupled with a desperate need for capacity would likely expose consumers to high prices.⁶⁶ In the Order, the Commission adopted the agreed-upon methodology for determining a market price for the power purchased from the legacy DENA assets and under what limited circumstances DE-Ohio could include this capacity to meet short-term capacity needs.⁶⁷ The very nature of a capacity purchase in an emergency makes the market price unpredictable as the availability of capacity is simply unknown.

⁶³ See *In the Matter of the Joint 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, et al., (Finding and Order, at 15) (Dec. 21, 2005) (DE-Ohio App. at 32).

⁶⁴ *In the Matter of the Application of the Cincinnati Gas & Electric Company To Adjust and Set its System Reliability Tracker Market Price*, Case No. 05-724-EL-UNC, (Opinion and Order) (Nov. 22, 2005) (DE-Ohio App. at 39-44).

⁶⁵ *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its System Reliability Tracker Market Price, et al.*, Case No. 05-724-EL-UNC, et al., (Opinion and Order, at 20-21) (Nov. 20, 2007) (OCC App. at 27-28).

⁶⁶ See *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, et al., (DE-Ohio Ex. 2 (Whitlock Testimony at 10-11)) (November 16, 2006) (OCC Supp. at 519-520).

⁶⁷ *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its System Reliability Tracker Market Price, et al.*, Case No. 05-724-EL-UNC, et al., (Opinion and Order, at 12) (Nov. 20, 2007) (OCC App. at 19).

The Commission has two definitive alternatives for pricing the DENA capacity at the time it is needed through the midpoint of broker quotes and an average of third-party purchases.⁶⁸ The Commission's Order also affords the ability to consider and agree upon additional reasonable pricing methodologies.⁶⁹

Moreover, the pricing methodologies set forth in the Order relative to the use of DENA capacity in the case of an emergency ensure the ability of the applicable SRT auditor to audit all DENA transactions occurring during the audit period. The pricing methodologies require DE-Ohio to maintain records of brokers' quotes and/or third party transactions, and, if necessary, impose a true-up. Thus, the Commission will have a record to assess the reasonableness of future DENA short-term capacity transactions. Therefore, Appellants are simply unable to show, and, in fact, have not attempted to show, how any constituency has been or could be harmed by this provision of the Order. Appellants' objections to this provision are premature as no harm could be caused by a provision that may never be invoked and is subject to review in the event that such a purchase becomes necessary.

Appellant OCC also argues that the portion of the Order allowing for the purchase of DENA asset-generation capacity in the event of an emergency should not be allowed because it is allegedly inconsistent with a promise that DE-Ohio made as part of a prior stipulation to provide information relative to the costs associated with DENA assets.⁷⁰ That stipulation, however, required DE-Ohio to provide this information if DE-Ohio sought to include DENA

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ OCC Merit Brief at 44.

asset generation as part of the SRT market price.⁷¹ DE-Ohio has not sought to include DENA legacy capacity in the SRT. Appellant OCC was provided all of the workpapers and other information regarding the use of the legacy DENA assets as planning reserves.⁷² Therefore, any suggestion that the adoption of the 2007 Stipulation violates a prior Order is erroneous and not grounds to invalidate the Rider Order.

C. AAC – “Annually Adjusted Component”

The issue raised with regard to the AAC involves a cost-recovery mechanism referred to as Construction Work in Progress (CWIP). OCC initially argues that the CWIP element of the AAC should have been excluded because without it, the cost of electricity would be less.⁷³ This argument provides no basis to conclude that the Commission’s Order is unlawful or unreasonable.

In a regulated world, a return on CWIP was limited to construction that was at least seventy-five percent complete.⁷⁴ Appellants and the Commission, however, recognize that this standard was repealed relative to competitive retail electric service by R.C. 4928.05. Appellants, therefore, argue that inclusion of cost recovery for assets that are not seventy-five percent complete violates “important regulatory principles,” based upon their claim that the existence of the RSP MBSSO re-institutes a regulated environment.

Rate stabilization, however, has not re-created regulation of electric prices. As this Court succinctly stated, “[i]t is well settled that the generation component of electric service is not

⁷¹ *In the Matter of the Application of the Cincinnati Gas & Electric Company To Adjust and Set its System Reliability Tracker Market Price*, Case No. 05-724-EL-UNC, (Opinion and Order) (Nov. 22, 2005) (DE-Ohio App. at 39-44).

⁷² *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its System Reliability Tracker Market Price, et al.*, Case No. 05-724-EL-UNC, et al., (Opinion and Order, at 20) (Nov. 20, 2007) (OCC App. at 27).

⁷³ OCC Merit Brief at 39.

⁷⁴ R.C. 4909.15 (Staff App. at 1).

subject to commission regulation,”⁷⁵ and “R.C. 4928.05 expressly removes competitive retail electric services from commission regulation.”⁷⁶ Like the Rider FPP, Rider AAC is part of DE-Ohio’s price-to-compare and is 100% avoidable to customers, including residential customers who leave DE-Ohio’s MBSSO and elect to take service from a CRES provider for their generation.⁷⁷ Rider AAC is a competitive charge component for retail electric generation service. Traditional regulatory policies, such as the seventy-five percent completion standard, no longer apply.⁷⁸ Rather, the Commission, in full command of the testimony presented to it and its expertise, weighed the relative interests of a de-regulated industry and the interest of ratepayers.⁷⁹ Appellants have provided this Court with no reason to conclude that the Commission’s policy conclusion is either unlawful or unreasonable such that the Rider Order should be rejected. For this reason, the Commission’s Order must be affirmed.

V. CONCLUSION

Ultimately, the Commission is charged with rendering orders that are lawful and reasonable. Stipulations are a means for parties to a contested proceeding to resolve their disputes and to make recommendations to the Commission as to what a reasonable and lawful outcome might be. The “serious bargaining” prong of the Commission’s review of a stipulation involves a factual determination that should not be reversed by this Court unless the findings of

⁷⁵ *Indus. Energy Users-Ohio v. Pub. Util. Comm’n*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195, at ¶20.

⁷⁶ *Id.*

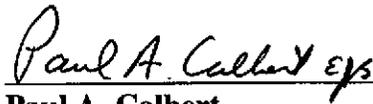
⁷⁷ *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA, et al. (Order on Remand, at 31-33) (October 24, 2007) (OCC App. 82-84).

⁷⁸ This position was specifically supported by Commission Staff. *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA, et al., (Staff Ex. 1 (Cahaan Testimony at 4-5)) (March 9, 2007) (Staff Sec. Supp. at 108-09).

⁷⁹ *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its System Reliability Tracker Market Price, et al.*, Case No. 05-724-EL-UNC, et al., (Opinion and Order, at 23) (Nov. 20, 2007) (OCC App. at 30).

the Commission are found to be contrary to the manifest weight of the evidence. Appellants cannot meet this heavy burden here and the Order of the Commission should be AFFIRMED.

Respectfully submitted,



Paul A. Colbert
(Reg. No. 0058582)
Counsel of Record
Associate General Counsel
Duke Energy Ohio, Inc.
155 East Broad Street
Columbus, Ohio 43215
(614) 221-7551 (telephone)
(614) 221-7556 (fax)
Paul.Colbert@duke-energy.com

Rocco D'Ascenzo
(Reg. No. 0077651)
Duke Energy Ohio, Inc.
Senior Counsel
139 East Fourth Street, 25 At. II
Cincinnati, Ohio 45201-0960
(513) 419-1852 (telephone)
(513) 419-1846 (fax)

Elizabeth A. McNellie
(Reg. No. 0046534)
Baker & Hostetler LLP
65 East State Street, Suite 2100
Columbus, Ohio 43215
(614) 228-1541 (telephone)
(614) 462-2616 (fax)
emcnellie@bakerlaw.com

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

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief and Appendix of Appellee DE-Ohio and a true copy of Appellee DE-Ohio's Supplement were served by regular U.S. mail, postage prepaid, upon the following, this 22nd Day of July, 2008:

Janine L. Migden-Ostrander
Jeffrey L. Small
Ann M. Hotz
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485

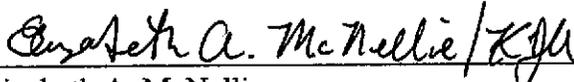
Counsel for Appellant,
The Office of the Ohio Consumers' Counsel

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

Counsel for Appellant,
Ohio Partners for Affordable Energy

Nancy H. Rogers
Ohio Attorney General
Duane W. Luckey
Section Chief
Thomas W. McNamee
Sarah J. Parrot
Assistant Attorneys General
Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, Ohio 43215

Counsel for Appellee
The Public Utilities Commission of Ohio


Elizabeth A. McNellie

APPENDIX

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4928.05 Extent of exemptions.

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

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

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

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

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

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

4929.08 Abrogation or modification of order.

(A) The public utilities commission has jurisdiction over every natural gas company that has been granted an exemption or alternative rate regulation under section 4929.04 or 4929.05 of the Revised Code. As to any such company, the commission, upon its own motion or upon the motion of any person adversely affected by such exemption or alternative rate regulation authority, and after notice and hearing and subject to this division, may abrogate or modify any order granting such an exemption or authority only under both of the following conditions:

(1) The commission determines that the findings upon which the order was based are no longer valid and that the abrogation or modification is in the public interest;

(2) The abrogation or modification is not made more than eight years after the effective date of the order, unless the affected natural gas company consents.

(B) After receiving an exemption or alternative rate regulation under section 4929.04 or 4929.05 of the Revised Code, no natural gas company shall implement the exemption or alternative rate regulation in a manner that violates the policy of this state specified in section 4929.02 of the Revised Code. Notwithstanding division (A) of this section, if the commission determines that a natural gas company granted such an exemption or alternative rate regulation is not in substantial compliance with that policy, that the natural gas company is not in compliance with its alternative rate plan, or that the exemption or alternative rate regulation is affecting detrimentally the integrity or safety of the natural gas company's distribution system or the quality of any of the company's regulated services or goods, the commission, after a hearing, may abrogate the order granting such an exemption or alternative rate regulation.

4901:1-24-04 Application process.

(A) An application for certification shall be made on forms supplied by the commission. The application forms shall provide for sufficient information to enable the commission to assess an applicant's managerial, financial, and technical capability to provide the service it intends to offer and its ability to comply with commission rules or orders adopted pursuant to Chapter 4928. of the Revised Code.

(B) The applicant shall complete the appropriate application form (e.g., retail electric generation provider, aggregator/power broker, or governmental aggregator) in its entirety and supply all required attachments, affidavits, and evidence of capability specified by the form at the time an application is filed.

(1) Retail electric generation providers, power marketers shall file general, technical, managerial, and financial information as set forth in the application. This information includes but is not limited to:

(a) Ownership and organizational descriptions.

(b) Managerial experience and capabilities and prior regulatory or judicial actions.

(c) Financial capability as depicted on publicly available information, balance sheets, and credit ratings.

(d) Technical ability and experience in scheduling and providing power under contract agreements.

(2) Aggregators/power brokers shall file general, managerial, and financial information as set forth in the application. This information includes but is not limited to:

(a) Ownership and organizational descriptions.

(b) Managerial experience in providing aggregation services, financial capability as depicted on publicly available information, and applicable credit ratings.

(3) Governmental aggregators shall file general information as set forth in the application. This information includes but is not limited to:

(a) Copies of its operational plans.

(b) Descriptions of experience.

(C) An applicant for certification or certification renewal shall file a completed and notarized original application signed by a principal officer of the applicant and ten conformed copies, including all supporting attachments and affidavits, with the commission's docketing division.

(1) The date that the commission's docketing division stamps an application received shall serve as the official filing date with the commission.

(2) In accordance with rule 4901:1-24-06 of this chapter, the commission may deny without prejudice any application that is not complete or does not include the attachments, documentation, and affidavits required by the application form.

(3) In accordance with this chapter, in instances where information and/or documentation required by these rules is not available at the time of filing an application, an applicant may substitute a notarized affidavit by an officer of the applicant stating that the applicant will file such information and/or documentation with the commission at least ten business days prior to offering or providing CRES to a customer in this state. The affidavit shall be accompanied by an explanation as to why such information is not available for inclusion with the application.

Exhibit C-3
"Financial Statements"

Attached are financial statements for accounting years 2005 & 2006. Also attached is an officer certification of these financial statements.

DUKE ENERGY RETAIL SALES, LLC

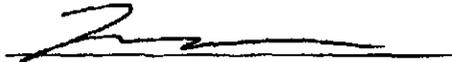
OFFICER CERTIFICATION OF FINANCIAL STATEMENT

LON C. MITCHELL, JR.

I, Lon C. Mitchell, Jr. do hereby certify that I am Vice President, Chief Financial Officer, and Treasurer of Duke Energy Retail Sales, LLC.

I further certify that I have reviewed the attached Financial Statements of Duke Energy Retail Sales, LLC, and that such Financial Statements are accurate and complete to the best of my knowledge, information and belief.

Dated this 22nd day of August, 2006.



Lon C. Mitchell
Vice President, Chief Financial Officer, Treasurer
Duke Energy Retail Sales, LLC

EXHIBIT C-3**Duke Energy Retail Sales LLC**
Balance Sheet
December 31, 2005**Assets**Accounts Receivable - affiliates \$ 4,245,431**Liabilities**

Accounts Payable - affiliates \$ 11,172,890

Accrued Taxes (710,115)

Other 3,023,158

Total Liabilities 13,485,933**Member's Equity**Retained (Deficit) (9,240,502)**Total Liabilities and Member's Equity** \$ 4,245,431.00

Duke Energy Retail Sales LLC
Statement of Income
For the year ended December 31, 2005

Revenues	\$ -
Operating Expenses	
Option Premium Expense	13,768,812
Administrative and General Expenses	259,460
Operating (Loss)	<u>(14,028,272)</u>
Interest Expense	147,549
(Loss) Before Taxes	<u>(14,175,821)</u>
Income Tax Expense (Benefit)	<u>(4,950,863)</u>
Net Income	<u>\$ (9,224,958)</u>

EXHIBIT C-3**Duke Energy Retail Sales LLC**
Budgeted Statement of Income
For the year ended December 31, 2006

Revenues	\$ -
Operating Expenses	
Option Premium Expense	22,247,000
Administrative and General Expenses	28,500
Operating (Loss)	<u>(22,275,500)</u>
Interest Expense	800,000
(Loss) Before Taxes	<u>(23,075,500)</u>
Income Tax Expense (Benefit)	<u>(8,076,425)</u>
Net Income	<u>\$ (14,999,075)</u>

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY

The attorney examiner finds:

- (1) In *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify Its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Case No. 03-93-EL-ATA, et al. (RSP case), this Commission authorized Duke Energy Ohio (DE-Ohio)¹ to establish a rate stabilization plan and, as a part of that plan, to recover various costs through identified riders. The Commission's entry on rehearing, *inter alia*, modified or created various riders, as part of the rate stabilization plan.
- (2) On appeal of that Commission decision, the Ohio Supreme Court remanded the proceedings to the Commission, requesting, *inter alia*, that the Commission provide additional record evidence and sufficient reasoning to support the modification of its opinion and order on rehearing. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 (*Consumers' Counsel*).
- (3) On November 29, 2006, the attorney examiner issued an entry, finding "that a hearing should be held in the remanded RSP case, in order to obtain the record evidence required by the court."

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

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- (4) On December 13 and 18, 2006, the Office of the Ohio Consumers' Counsel (OCC) filed motions for subpoena duces tecum, ordering the appearance of a witness representing Duke Energy Retail Sales, LLC (DERS), an affiliate of DE-Ohio, and the provision of, *inter alia*, agreements between customers of DE-Ohio and DERS or its affiliates.
- (5) On December 20, 2006, DERS filed objections and a motion to quash the subpoenas, as well as a motion for a protective order prohibiting discovery requests to DERS. Also on that date, DE-Ohio filed a motion for a protective order and a memorandum in support of the DERS motion to quash. On December 21, 2006, Industrial Energy Users-Ohio (IEU-Ohio) filed a memorandum in support of the DERS motion to quash and the DE-Ohio motion for a protective order.
- (6) On December 28, 2006,² OCC filed a responsive pleading, including a memorandum contra the DE-Ohio motion for a protective order and motions to strike the filings by DERS and IEU-Ohio.
- (7) The examiner will first address the motion by OCC to strike the supportive memorandum filed by IEU-Ohio. While OCC is correct that the Commission's procedural rules do not provide for the filing of memoranda in support of motions by other parties, those rules also do not prohibit such filings. Therefore, the examiner will not grant the motion to strike.
- (8) The next issue is DE-Ohio's motion for a protective order. DE-Ohio requests that the Commission prohibit all discovery in cases related to the remand of the RSP case, as it does not believe that any additional record evidence is required. The examiner has already issued an entry finding that a hearing should be held in the remanded RSP case, in order to obtain the record evidence required by the court. No interlocutory appeal of that ruling was filed by any party. The examiner finds that it is inappropriate to prohibit discovery in preparation for a hearing. Therefore, the motion by DE-Ohio for a protective order will be denied.
- (9) The final issue is the motion by DERS to quash the subpoenas, and the associated motion by OCC to strike that motion. OCC argues that the motion to quash should be stricken as it was filed by an entity that is not a party to the proceedings. OCC cites the

² Pursuant to Rule 4901-1-12, Ohio Administrative Code (O.A.C.), the legal director granted OCC a two-day extension of time to file its responsive pleading.

procedural rule, which provides for a "motion of any party . . ." Rule 4901-1-25(C), O.A.C. Although OCC is technically correct that the relevant rule uses the term "party" in its provision for motions to quash, the examiner does not believe that such language is intended to prohibit the filing of a motion to quash by anyone other than a party. As noted earlier, the rules are permissive, not prohibitive. An analogy can be made to the filing of a motion for a protective order by a person other than the one who filed a document. In that circumstance, this Commission has allowed a non-filing person to file a motion for a protective order, even though such filing is not strictly within the language of the rules. The Commission has stated that such requests should be considered based on the circumstances of each case, noting that persons who did not file the documents in question might nevertheless be harmed by the disclosure of information contained in them. *In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Electric Distribution Rates*, Case Nos. 05-59-EL-AIR, et al., Entry (August 10, 2005). In this case, we find it appropriate that the person subject to a subpoena be permitted to file a pleading objecting to the subpoena. In addition, the examiner finds that the wording in the rule is, in this circumstance, more appropriately interpreted as meaning that the examiner may quash a subpoena upon the motion of an affected person. Therefore, the examiner will deny the motion to strike the motion to quash.

- (10) Having determined that the motion to quash will not be stricken, it is now appropriate to consider the bases for such motion. DERS requests that the subpoenas be quashed on the grounds that they are outside the jurisdiction of the Commission, that they were not properly served, and that they are unduly burdensome and oppressive. The first two bases can be addressed simply. DERS attempts to argue that, because the Commission has only limited jurisdiction over DERS, the Commission has no power to issue subpoenas directed at DERS. This is incorrect. The Commission's subpoena power, found in Section 4901.18, Revised Code, and Rule 4901-1-21(F) and 4901-1-25, O.A.C., is not limited to subpoenas directed at entities over which the Commission has general supervisory jurisdiction. With regard to proper service, the examiner notes that OCC filed two motions for subpoenas, the second of which properly served CT Corporation, the agent for service of process on DERS. OCC pointed out this fact in its December 28, 2006, filing and, also, stated that it had communicated

that fact to counsel for DE-Ohio. The examiner will not quash the subpoenas on either of these two bases.

- (11) With regard to its third basis, that the subpoenas are oppressive and unduly burdensome, DERS makes several assertions.
- (a) First, DERS argues that the subpoenas request affiliate information that is not within its possession or control. The examiner agrees that the subpoenas should have been drafted to request only documents that are in the possession and control of DERS. Indeed, the final category of requested documents in the subpoenas is so limited.
 - (b) It also argues that the subpoenas are unreasonable broad, as they request information relating to agreements with all DE-Ohio customers. The examiner agrees that the subpoenas are overly broad in requesting copies of agreements with "customers" of DE-Ohio. In order to be relevant to these proceedings, the subpoenas will be limited such that each reference to "customers of" DE-Ohio will mean customers of DE-Ohio who are either current or past parties to these consolidated proceedings or affiliates or members of such current or past parties.
 - (c) DERS submits that the subpoenas are unreasonable as they seek confidential information without adequate protection. The examiner will not quash the subpoenas on this ground. DERS makes no statement that it has endeavored to arrange a satisfactory confidentiality agreement with OCC. Such arrangements are generally forthcoming.
 - (d) DERS asserts that the subpoenas are unreasonable, as they will impact the strategy of DERS and DE-Ohio in an unrelated civil proceeding. As the legal strategies of DERS or DE-Ohio in a civil proceeding are not relevant to these Commission proceedings, the examiner will not quash on this ground.
- (12) The motion to quash will, therefore, be granted in part and denied in part. Similarly, the motion for a protective order prohibiting the discovery of this information from an affiliate of DERS will be denied.

It is, therefore,

ORDERED, That the motion to strike the filing by IEU-Ohio be denied. It is, further,

ORDERED, That the motion by DE-Ohio for a protective order be denied. It is, further,

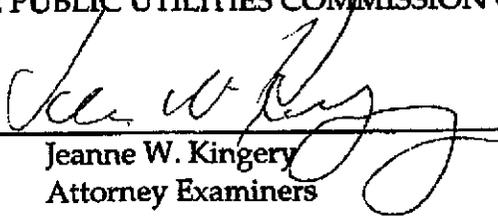
ORDERED, That the motion to strike the motion to quash be denied. It is, further,

ORDERED, That the motion to quash be granted in part and denied in part. It is further,

ORDERED, That the motion by DERS for a protective order be denied. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO



By: Jeanne W. Kingery
Attorney Examiners

geb 

Entered in the Journal

JAN 02 2007



Renee J. Jenkins
Secretary

PUBLIC UTILITIES COMMISSION OF OHIO

Certified as a Competitive Retail Electric Service Provider

Certificate Number:

04-124 (1)

Issued Pursuant to Case Number(s):

04-1323-EL-CRS

A certificate as a Competitive Retail Electric Service Provider is hereby granted to, **Cinergy Retail Sales, LLC** whose office or principal place of business is located at **139 E. Fourth, EA503, Cincinnati, OH 45202** to provide retail generation and power marketer services within the State of Ohio effective **September 23, 2004**.

The certification of competitive retail electric suppliers is governed by Section 4901:1-24-(01-13) of the Ohio Administrative Code, Section 4901:1-21-(01-15) of the Ohio Administrative Code, and Section 4928.08 of the Ohio Revised Code.

This Certificate is revocable if all of the conditions set forth in the aforementioned case(s) are not met.

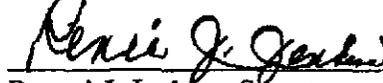
Subject to all rules and regulations of the Commission, now existing or hereafter promulgated.

Witness the seal of the Commission affixed at Columbus, Ohio.

Dated: 10/7/2004

By Order of

PUBLIC UTILITIES COMMISSION OF
OHIO



Renee J. Jenkins, Secretary
Betty McCauley, Acting Secretary
Mariruth C. Wright, Acting Secretary

Certificate Expires: September 23, 2006

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CRS AUTOMATIC CASE ACTION FORM

Case No. 04-1323-EL-CRS

Date Sent: 10-4-2004

Effective Date of Certificate: September 23, 2004

Certificate Expires: September 23, 2006

Company Name and Company Name d/b/a: Cinergy Retail Sales, LLC

Renewal

Action Needed:

Issue Certificate Number to: Cinergy Retail Sales, LLC at (address): 139 E. Fourth Street, EA503, Cincinnati, OH 45202

Certified To Provide the Following Services:

- Retail Generation
- Aggregation
- Power Marketer
- Power Broker
- Governmental Aggregation

Renew Certificate No. to

Revise Certificate No. to (check all applicable):

- Reflect name change from to
- Reflect address change from to
- Add new service offering to certificate:
 - Retail Generation
 - Aggregation
 - Power Marketer
 - Power Broker
 - Governmental Aggregation
- Correct Administrative Error
- Reflect Change of Ownership to:

Cancel Certificate No.

Protect Un-redacted copies until

Close Case File, Case Withdrawn at Applicant's Request

file

PUBLIC UTILITIES COMMISSION OF OHIO

Certified as a Competitive Retail Electric Service Provider

RENEWAL

Certificate Number:

04-124 (2)

Issued Pursuant to Case Number(s):

04-1323-EL-CRS

A certificate as a Competitive Retail Electric Service Provider is hereby granted to **Duke Energy Retail Sales, LLC** whose office or principal place of business is located at **139 E. Fourth, EA502, Cincinnati, OH 45202** to provide retail generation and power marketer services within the State of Ohio effective **September 23, 2006**.

The certification of competitive retail electric suppliers is governed by Section 4901:1-24-(01-13) of the Ohio Administrative Code, Section 4901:1-21-(01-15) of the Ohio Administrative Code, and Section 4928.08 of the Ohio Revised Code.

This Certificate is revocable if all of the conditions set forth in the aforementioned case(s) are not met.

Subject to all rules and regulations of the Commission, now existing or hereafter promulgated.

Witness the seal of the Commission affixed at Columbus, Ohio.

Dated: October 3, 2006

By Order of

PUBLIC UTILITIES COMMISSION OF OHIO

Mariruth C. Wright

Renee J. Jenkins, Secretary

Betty McCauley, Acting Secretary

Mariruth C. Wright, Acting Secretary

Certificate Expires: September 23, 2008

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CASE NUMBER: 04-1323-EL-CRS
CASE DESCRIPTION: DUKE ENERGY RETAIL SALES, LLC
DOCUMENT SIGNED ON: 10/3/2006
DATE OF SERVICE: 10/3/06 *mm*

PARTIES SERVED

PARTIES OF RECORD

ATTORNEYS

APPLICANTS

CINERGY CORP.
P.O. BOX 960, ROOM 25 AT 11
139 EAST FOURTH STREET
CINCINNATI, OH 45201-0960
Phone: 513-287-3601
Fax: 513-287-3810

SCHAFFER, ANITA
PARALEGAL
CINERGY CORP.
139 E. FOURTH ST. P.O.
BOX 960
CINCINNATI, OH 45201-
0960
Phone: (513) 287-3842

DUKE ENERGY RETAIL SALES, LLC, FKA CINERGY RETAIL
SALES, LLC MANAGER, SPECIAL PROJECTS
UMA NANJUNDAN
139 EAST FORTH STREET
EA 502
CINCINATTI, OH 45202
Phone: (513) 419-5394

* NONE

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Joint Application of)
Cinergy Corp., on Behalf of The)
Cincinnati Gas & Electric Company, and)
Duke Energy Holding Corp. for Consent) Case No. 05-732-EL-MER
and Approval of a Change of Control of)
The Cincinnati Gas & Electric Company.)

In the Matter of the Application of The)
Cincinnati Gas & Electric Company for)
Authority to Modify Current Accounting)
Procedures in Order to Defer Costs Incurred) Case No. 05-733-EL-AAM
in Order to Realize Cost Savings as a Result)
of the Merger Transaction.)

In the Matter of the Application of The)
Cincinnati Gas & Electric Company for)
Authority to Modify Current Accounting)
Procedures in Order to Defer Costs Incurred) Case No. 05-974-GA-AAM
in Order to Realize Cost Savings as a Result)
of the Merger Transaction.)

FINDING AND ORDER

The Commission finds:

- (1) On June 1, 2005, Deer Holding Corp. and Cinergy Corp. (Cinergy), on behalf of its subsidiary, the Cincinnati Gas & Electric Company (CG&E), jointly filed an application for the Commission's consent and approval of a change in the control of CG&E, and for (a) specific authority to implement a rate credit mechanism to share net merger savings with customers, (b) specific authority to modify current electric utility accounting procedures to defer merger-related transaction costs and costs to achieve merger savings, and (c) approval or acceptance of certain affiliate agreements necessitated by the merger, including a service company agreement. This application, together with the additional application and testimony filed on August 1, 2005, as referenced below, will be jointly referred to as the application.

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- (2) Motions to intervene in these proceedings were filed, between June 3, 2005, and August 1, 2005, by Ohio Energy Group, Inc. (OEG); Industrial Energy Users-Ohio (IEU-Ohio); the Office of the Ohio Consumers' Counsel (OCC); Direct Energy Services, LLC (Direct Energy); the Kroger Co. (Kroger); Ohio Partners for Affordable Energy (OPAE); Mr. Albert E. Lane; ProLiance Energy, LLC; the Formica Corporation (Formica); the Ohio Association of School Business Officials; the Ohio School Boards Association; the Buckeye Association of School Administrators (collectively, the Schools); the city of Forest Park (Forest Park); the city of Cincinnati (Cincinnati); the city of Lebanon (Lebanon); Interstate Gas Supply, Inc. (Interstate); and American Municipal Power-Ohio, Inc. (AMP-Ohio). Memoranda contra the motions by IEU-Ohio, Lebanon, and AMP-Ohio were filed by CG&E. Replies were filed by AMP-Ohio and Lebanon. No motions for intervention have been granted.
- (3) By entry dated June 14, 2005, the Commission suspended approval of the application in these proceedings, ordered a stay of discovery, and invited interested persons to file comments and reply comments identifying issues which the commenters believed should be considered by the Commission.
- (4) On August 1, 2005, CG&E filed an application for authority to modify its gas accounting procedures in the same manner as its electric accounting procedures. Together with this additional application, CG&E filed testimony from ten witnesses, supporting and detailing its application as a whole. CG&E also moved to consolidate the application for approval of the merger, and the two applications for modification of accounting procedures. On that date, CG&E also filed a motion to change the caption to substitute Duke Energy Holding Corp. in place of Deer Holding Corp, in order to recognize a recent change in the corporate name. The motions for consolidation and caption change were granted by examiner entry of August 18, 2005.
- (5) On August 1 and September 1, 2005, comments and/or reply comments were filed, regarding the issues that should be considered by the Commission in these proceedings, by Mr. Lane; the Dayton Power & Light Company (DP&L); Formica, OCC, Direct Energy, IEU-Ohio, Cincinnati, the Schools, Stand Energy Corporation (Stand), OPAE, Lebanon, Interstate, AMP-

Ohio, OEG, CG&E, and Columbus Southern Power Company (CSP).

- (6) By entry dated October 26, 2005, the Commission ordered its staff to examine the application and the filed comments and to make recommendations to the Commission. The recommendations were to be filed by November 14, 2005. The Commission also invited interested persons to file comments and reply comments relating to the substance of staff's recommendations, by December 1 and December 8, 2005, respectively.
- (7) On November 14, 2005, staff filed its recommendations, as directed by the Commission. On the basis of its review of the comments received from interested persons, staff discusses seven issues. The issues discussed by staff relate to rate credits, reliability, customer service, affiliate transactions, the transfer of certain assets, MISO and RTO membership, and gas choice. The specific recommendations made by staff will be discussed in detail below.
- (8) Comments and reply comments in response to staff's recommendations were filed on November 21, December 1, and December 8, 2005, by Mr. Lane, AMP-Ohio, the Schools, Interstate, Lebanon, OPAE, OCC, Cincinnati, the applicants, Formica, OEG, IEU-Ohio, Direct Energy, OPAE, and Eagle Energy, LLC (Eagle). Correspondence relating to the application was filed by various school districts and by one consumer.
- (9) The change in control detailed in the application would be consummated through a series of transactions. The applicants state that Deer Holding Corp.¹ would acquire Cinergy in an all-stock transaction, following which both Cinergy and the current Duke Energy Corporation would be wholly owned subsidiaries of Deer Holding Corp. The application provides that Deer Energy Corp. would then be renamed "Duke Energy Corporation."
- (10) Jurisdiction for the Commission to review the application is provided under Section 4905.402, Revised Code. That section provides, in division (B), as follows:

¹ Subsequent to the filing of the application, Deer Holding Corp. changed its name to Duke Energy Holding Corp., as described in finding (4).

No person shall acquire control, directly or indirectly, of a . . . domestic electric utility or a holding company controlling a domestic electric utility unless that person obtains the prior approval of the public utilities commission under this section. To obtain approval the person shall file an application with the commission demonstrating that the acquisition will promote public convenience and result in the provision of adequate service for a reasonable rate, rental, toll, or charge. The application shall contain such information as the commission may require. If the commission considers a hearing necessary, it may fix a time and place for hearing. If, after review of the application and after any necessary hearing, the commission is satisfied that approval of the application will promote public convenience and result in the provision of adequate service for a reasonable rate, rental, toll, or charge, the commission shall approve the application and make such order as it considers proper.

For purposes of this statute, "control" is defined by division (A)(1) as

the possession of the power to direct the management and policies of a domestic electric utility or a holding company of a domestic electric utility, through the ownership of voting securities, by contract, or otherwise. . . . Control is presumed to exist if any person, directly or indirectly, owns, controls, holds the power to vote, or holds with the power to vote proxies that constitute, twenty per cent or more of the total voting power of the domestic company or utility or the holding company.

For purposes of this statute, "electric utility" is defined, by reference to Section 4928.01(A)(7),² Revised Code, and, thereby,

² Section 4905.402(A)(2), Revised Code, in defining the term "electric utility," actually refers to Section 4928.07, Revised Code. However, as that latter section makes no reference to a definition of this term, the Commission has determined that the reference was intended to be directed toward the seventh entry in the definition section under Chapter 4928, Revised Code.

to Section 4905.03, Revised Code, as an entity that is "engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state."

- (11) The Commission finds that CG&E is a domestic electric utility and that Cinergy is a holding company controlling a domestic electric utility under the terms of Section 4905.402, Revised Code. In addition, the Commission finds that proposed merger, as detailed in the application, would result in the acquisition by Duke Energy Holding Corp. (previously named Deer Holding Corp., as described in finding [4]) of one hundred percent of the stock of Cinergy Corp. Such acquisition will give Duke Energy Holding Corp. control of Cinergy. Thus, the proposed merger may be accomplished only upon the approval of the Commission pursuant to Section 4905.402, Revised Code.
- (12) Under the terms of the governing statute, we must, first, determine whether a hearing is necessary. The Commission has reviewed, in detail, the application, comments of various interested persons relating to the appropriate issues to be considered, the recommendations of staff, and the comments of interested persons addressing staff's recommendations. The Commission finds that a hearing is not necessary for us to consider fully the comments and arguments presented in this case, to consider the effects of the merger on the public, and to determine the appropriate resolution of the issues related to the application. Therefore, we also find that cause to grant intervention under Section 4903.221, Revised Code, has not been shown. Intervention is, therefore, denied with regard to all persons who filed motions for intervention.
- (13) The Commission is required to approve the merger if we find that it will promote public convenience and result in the provision of adequate service for a reasonable rate, rental, toll, or charge. In the discussion that follows, we will consider a series of issues relating to our evaluation of the merger. Following analysis of those issues, we will reach the ultimate determination of whether or not to approve the merger, as set forth in the application.

(14) Rate Credits

Application. The application proposes that Ohio retail customers be granted a rate credit, net of costs, in the total amount of \$14,674,900. According to the applicants' proposal, CG&E would be authorized to defer transaction costs and costs to achieve merger savings, and to amortize them over a five-year period. CG&E would, under applicants' proposal, return a percentage of those savings, net of costs of the merger, to customers over a five-year period. The applicants note that any additional actual cost savings for fuel and gas would be passed through to customers by means of the fuel and economy purchase power rider and the purchased gas adjustment clause, for electricity and gas, respectively. The merger savings would be allocated, under their plan, to rate classes based on the proportion of operation and maintenance expense in the cost of service study used in CG&E's most recent rate cases.

Staff Recommendations. Staff recommends that the methodology used for calculating a credit to be applied to customers' rates should be consistent with the methodology being used in other states which are reviewing the proposed merger. Based on staff's review of those other states' methodologies, and the application of a consistent calculation system, staff recommends that the total rate credit for Ohio retail customers be increased to \$35,785,700.

Staff also advises that the Commission require the applicants to allow that credit amount to be increased in the event that the applicants provide rate credits based on a larger percentage of merger savings in any other state that is reviewing this proposed merger (referred to as a "most favored nations" provision). In that event, staff recommends that such higher percentage be similarly applied in Ohio.

Finally, staff recommends that, if costs associated with the merger are to be deferred, staff should have an opportunity to investigate those deferred costs before any rate recovery is granted.

Comments - Applicants. In response to staff's recommendation in this area, the applicants state that they are willing to increase the available rate credit to \$35,785,700, consisting of merger savings related to regulated services in the same proportion as

provided in other states (totaling \$16,376,500 for electric distribution and \$4,167,700 for gas service) and a rate stabilization surcredit of \$15,241,500, intended to be a voluntary credit to facilitate economic development in a time of increasing rates. These amounts are proposed to be allocated as set forth in detail in the applicants' comments and credited to customers over a one-year period beginning on January 1, 2006, and ending on December 31, 2006. In addition, the applicants agree to staff's proposed "most favored nations" provision, by which the rate credit would be increased to match any higher percentage used to calculate credits to be provided in any other state in which merger approval has been requested. The applicants' agreement to these provisions is conditioned on (a) its new electric distribution rates being effective as of January 1, 2006, as previously approved,³ (b) the surcredit being reversed if the merger is not approved and consummated, and (c) the merger application being approved by the Commission no later than January 1, 2006. The applicants specifically commit to several ratemaking and accounting matters, including CG&E's sharing of anticipated merger savings, net of costs, regardless of whether or not such savings are actually achieved.

Comments – Other. OEG and IEU-Ohio support the staff's recommendation with regard to the appropriate level of the rate credit. OEG would, however, alter the allocation method and timing of the refund. IEU would also expand the Commission's review to include issues related to broader goals. The Schools, in their comments, argue that the amount of the rate credit cannot be appropriately ascertained without discovery and a hearing process. They also contend that staff's recommendations should have addressed the appropriate allocation of the credits between electric and gas operations and, also, should have addressed special needs relevant only to the schools. OP&E's comments discuss its belief that the merger savings should not be passed to customers on a net-of-costs basis. OP&E argues that merger costs should not be borne by customers, since ratepayers receive their

³ The rates are being considered in *In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Electric Distribution Rates*, Case No. 05-59, et al. Approval of the planned effective date for the new distribution rates was granted in *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Non-Residential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish a Pilot Alternative Competitively-Bid Service Rate Option Subsequent to the Market Development Period*, Case No. 03-93-EL-ATA, et al (RSP case).

benefits from the setting of base rates in appropriate proceedings. It contends that benefits in between rate cases go to the benefit of the companies, not the customers. OCC agrees that the rate credit should be increased over what was proposed, and agrees that Ohio ratepayers should get the same benefits that are granted in other states. Also, OCC agrees that accounting deferrals should be subject to subsequent review at such time as CG&E seeks recovery. However, OCC is concerned that the level of savings is still too low and still occurs over too long a period. Cincinnati questions whether a reasonable rate credit can be determined without discovery. Formica disputes staff's approach in attempting only to match other states' results and argues for a hearing process. Formica also disputes the level of savings that are appropriate. Eagle suggests a revised allocation system designed to aid certain classes of customers.

Commission Conclusion. The Commission believes that staff's recommendations, as modified by the applicants' comments, are appropriate under the current circumstances. However, the Commission will make four conditions to the modified recommendations. First, the amount of the rate credits actually distributed to retail customers is to be subject to true-up following December 31, 2006. To this end, CG&E is directed to submit to staff an accounting of all rate credits actually distributed to customers, by no later than January 16, 2007. Second, the Commission notes that, in their comments, applicants commit "to share the merger savings, net of merger costs . . . regardless of whether or not such savings are actually achieved." The Commission approves of this commitment. Third, the Commission directs the applicants to notify staff of the terms of approval of the merger granted by other states, within five days of such approval. Fourth, with regard to applicants' application for authority to defer any costs associated with the merger transaction for subsequent recovery, the Commission finds that, in the event that CG&E incurs merger-related expenses that are not netted against merger savings, CG&E may seek to demonstrate such costs in any appropriate test period. The application for authority to defer costs is therefore denied.

(15) Reliability

Application. Applicants state, in the application, that they are committed to providing reliable service to customers, at just and

reasonable rates. Applicants also assure that CG&E will continue to provide the same level of service it has historically achieved. They note that Cinergy has consistently exceeded each applicable target of the Commission electric service and safety (ESS) standards, set forth in Rule 4901:1-10, Ohio Administrative Code (O.A.C.), and that they anticipate that there will be no change to CG&E's provision of reliable and safe service after the merger. They also assert that the larger employee base of the merged companies will allow for a greater capability for mutual assistance and restoration during severe weather events in Ohio.

Staff Recommendations. Staff recommends that the Commission require CG&E to make certain expenditures if, after the merger and in each year through 2010, CG&E's service reliability results in a noticeable degradation in performance. For this purpose, staff would define "noticeable degradation" as a 20 percent negative effect on any two of the four service reliability indices reported by CG&E under Rule 4901:1-10-10, O.A.C., as compared with its performance on those indices in its reporting for the 2005 calendar year. In the event of such a "noticeable degradation" in any year from 2006 through 2010, staff recommends that CG&E would then be required to make expenditures in the amount of \$1.5 million (for each year that a noticeable degradation exists) above and beyond budgeted expenditures. These funds would be incorporated into an action plan, as outlined in Rule 4901:1-10-10, O.A.C., but would be in addition to amounts otherwise required in such a plan if one is required that year. The amounts so expended by CG&E would be for the benefit of distribution customers. CG&E would have the burden of proving that its expenditures meet these requirements.

The staff also stressed that nothing in the merger should be construed to limit the Commission's normal oversight of the emerging company. The staff stated that the automatic threshold is "in addition to the ongoing rules and regulations governing public utilities."

Comments – Applicants. The applicants agree with staff's recommendations regarding reliability. The applicants also agree that 2005 levels should be used as the reliability benchmark.

Comments – Other. Comments in response to the staff's reliability recommendations were also made by OEG, IEU-Ohio,

OCC, OP&E, and Cincinnati. OEG and IEU-Ohio both support staff's reliability recommendations. OP&E claims that staff's recommendations do not go far enough. It suggests that the Commission should include a condition that reliability may not decline and that, if it does decline, such resources as are necessary to reverse the trend must be devoted to the problem. OCC is concerned that the staff recommendations are unclear and do not address gas system reliability. OCC recommends that CG&E commit to maintain or improve the reliability of both its electric distribution network and natural gas distribution network if the merger is approved. OCC suggests that maximum allowable decline in performance should be five percent. OCC also indicates that the benchmark for reliability should be CG&E's mean reliability performance over the years 2001 through 2004, as measured by one of the Commission's reliability standards, since that standard takes into account both frequency and duration of outages. OCC argues that, in the event of a five percent decline, CG&E should undergo an audit of its policies, procedures, and resources supporting the maintenance and reliability of its electric distribution network. After such an audit, the Commission should initiate a proceeding that permits the staff, OCC, and others to comment on the findings of the audit and to suggest steps that should be taken by CG&E to restore reliability to pre-merger levels. OCC also believes that it should receive copies of all reliability reports filed with Commission. Cincinnati is concerned that staff's recommendation leaves open the possibility for unstable and unreliable customer care and utility service. Cincinnati contends that allowing a 20 percent negative effect in any two of the indices, as suggested by staff, is too low a standard.

Commission Conclusion. As noted by the applicants, "both Cinergy and Duke Energy take pride in their shared commitment to provide reliable utility service, and this dedication to reliability will continue to the benefit of all of CG&E's consumers." The Commission believes that any decline in electric distribution reliability is unacceptable. Unstable and unreliable customer care and utility service should not be the result of the merger. The Commission's authority to ensure service reliability will not be affected by this merger. If the Commission finds that reliability is diminishing, as compared with current levels, the Commission will have authority under current rules to take appropriate actions. Title 49 of the Revised Code also provides other avenues

for the commenters or other individuals to seek remedies if they are concerned that reliability is declining. The Commission reads staff's recommendations in these proceedings as merely providing a threshold at which automatic actions will occur. The Commission is not precluded from ordering CG&E to make additional expenditures to improve service quality. Therefore, the Commission adopts staff's recommendations with regard to electric service reliability.

With regard to CG&E's natural gas distribution network, the Commission would note that it recently approved the institution of a rider to fund the improvement or replacement of certain portions of CG&E's natural gas distribution network. In addition, as noted above, the merger will not impair the Commission's authority to ensure safe and reliable natural gas service.

(16) Customer Service

Application. In the application, it was noted that both Cinergy and Duke have long traditions of superior customer service and have been nationally recognized for their excellence. They noted that Cinergy was recognized for call center operational excellence and customer satisfaction under the J.D. Power and Associates Certified Call Center Program. The applicants claim that the current level of customer service will not change as a result of the merger.

Staff Recommendations. Staff makes two recommendations related to the continued performance of CG&E with respect to customer service issues after the merger. First, staff recommends that CG&E retain company officials in Ohio with the authority to resolve consumer complaints mediated by the Commission and its staff. Staff also recommends that the Commission have the ability to remotely monitor all Ohio-specific customer service calls, either from a location in Ohio or in a manner agreed to by staff.

Comments - Applicants. The applicants indicate that, at present, it is technologically infeasible for CG&E to enact real-time remote call monitoring that is specific to Ohio. The call center system currently used by CG&E allows customer service representatives to respond to Ohio, Kentucky, and Indiana calls but cannot

ensure Ohio-specific calls only. The applicants suggest that staff should audit Ohio calls using CG&E's recording technology. This would enable staff to review recorded calls on a random basis. Applicants also make several commitments related to customer service, including (a) providing a variety of customer programs and services that enable better customer management of energy bills, (b) having qualified and skilled customer service representatives available 24 hours a day, in order to respond to power outage calls, as well as continuing to provide access to online services and automated telephone service 24 hours a day, (c) having customer service representatives during core business hours to handle all types of customer inquiries, and (d) surveying customers regarding satisfaction.

Comments – Other. OPAE and Cincinnati filed comments in response to the staff's recommendations. OPAE argues that staff's recommendations fail to address additional customer service issues that will be caused by the merger. OPAE claims that out-of-state call center personnel are likely to be unfamiliar with Ohio-specific programs and consumer protection rules. As a result, OPAE recommends that the Commission should require CG&E to maintain Ohio call centers which are dedicated to the Ohio service territory. OPAE also requests that CG&E be required to retain its existing low-income program specialists, trained in the operation of the percentage income payment plan (PIPP) and related matters. Cincinnati claims that, under staff's recommendation, there would be too few officials available for handling consumer complaints and the resolution of such complaints would take too long.

Commission Conclusion. Upon review of staff's recommendations and the comments received, we find that staff's recommendations are appropriate. The applicants' proposed modification is not acceptable. We believe that retaining company officials in Ohio with the authority to resolve consumer complaints will ensure that complaints that are mediated by the Commission and its staff will be resolved in a timely fashion. Staff already has access to CG&E's recorded customer calls. CG&E shall provide access to a remote call center system that will allow staff to monitor live calls from a remote location and will ensure that customer service calls are handled in the most efficient manner. Until the technology to separate live calls based on the state of origin does exist, CG&E should work with staff to

provide staff with adequate measures to monitor live Ohio calls. In addition, CG&E's customer service commitments will ensure that responsive customer service remains a top priority after the merger.

(17) Affiliate Transactions

Application. In the application, the applicants confirm that CG&E will continue to operate as a public utility following the merger, and will continue to comply with Ohio law with regard to transactions with affiliates. As a part of that compliance, the applicants request approval of several agreements among various affiliates.⁴

Staff Recommendations. Staff opines that CG&E must be protected from potential adverse impacts of actions by affiliates or the holding company that results from the proposed merger. Staff states that existing laws and regulations will adequately insulate CG&E and Ohio ratepayers.

Comments – Applicants. The applicants commit that CG&E will protect against cross-subsidization in transactions with affiliates and, in addition, note that transactions between CG&E and its affiliates will remain subject to the Commission's ratemaking authority.

Comments – Other. OPAE notes that the proposed affiliate transactions may exacerbate the market power of CG&E that, it contends, has resulted in only marginal levels of shopping. OPAE indicates that the application contemplates increased affiliate transactions, including the wheeling of power among various entities. OPAE recommends that the Commission undertake a market power analysis of the proposal or develop conditions to mitigate the resultant market power. OCC urges vigilance by the Commission in its review of affiliate transactions and suggests the initiation of a Commission-ordered investigation in this area. IEU-Ohio concurs with staff's recommendations.

⁴ These agreements, listed in the application and in applicants' December 1, 2005, comments, comprise utility service agreement, services agreements, an operating companies service agreement, a money pool agreement, and a tax sharing agreement.

Commission Conclusion. The Commission agrees with staff's statement that CG&E, as a regulated public utility, must be protected against adverse actions by affiliates. The Commission notes that such protection is already provided under Ohio law and that the affiliates have committed to continue pricing services, under a variety of affiliate agreements, at fully embedded cost. Therefore, the Commission is satisfied that CG&E will be appropriately protected under the proposed merger. The Commission also finds that the proposed affiliate agreements are acceptable and should be approved.

(18) DENA Assets

Application. Testimony filed by the applicants in support of the proposed merger refers to the transfer to CG&E of certain generation assets that are located in the Midwest and currently owned by Duke Energy North America (DENA assets). In that testimony, the applicants explain that five natural gas-fired, combined-cycle plants (or, in one case, a partial interest therein), with a combined generating capacity of more than 3600 megawatts, would be transferred at book value. According to that testimony, revenues from the dispatch of the DENA assets do not meet the cash costs associated with their operation. However, the testimony notes that CG&E would enter into an arrangement to assure that the transfer would not impact CG&E.

Staff Recommendations. In CG&E's RSP case, the Commission allowed the creation of a system reliability tracker (SRT) and a fuel and purchased power tracker (FPP). Staff notes that in *In the Matter of the Application of The Cincinnati Gas & Electric Company To Adjust and Set its System Reliability Tracker Market Price, 05-724-EL-UNC*, the Commission approved a stipulation relating to the approval of the SRT rate. As a part of that stipulation, CG&E agreed that Commission approval would be required prior to any recovery in the SRT rider for the use of DENA assets. Likewise, Commission approval is required for the FPP rider. Therefore, staff opined that no further protection is necessary with regard to the DENA assets.

Comments – Applicants. In their comments, the applicants stress that generation is deregulated in Ohio, meaning that there is no generation rate base through which to pass costs related to the DENA assets on to customers. The applicants also note that

CG&E's market-based price for generation was approved by the Commission in the RSP case and can not, therefore, be changed by CG&E without Commission approval. Third, the applicants acknowledge that CG&E cannot pass costs related to the DENA assets through the SRT or the FPP without Commission approval since, with regard to both of those riders, the Commission regularly approves the level of recovery. In addition, the applicants point to the stipulation in the recent SRT case, noting that the Commission will hold a hearing if any interested party is concerned about use of DENA assets in the SRT. Finally, the applicants note that the SRT and FPP rates are limited to recovery of costs incurred in CG&E's "currently-owned generating units."

Comments – Other. The Schools suggest that significant issues remain with regard to the DENA assets, requiring discovery and a hearing. OCC believes that the DENA asset transfer will create significant risks for customers, based on the possibility that uneconomic power from those assets is used to supply CG&E's load associated with standard service offerings, with little corresponding benefit. OCC states that it is not assured that costs associated with the DENA assets will not be charged to residential customers and proposes a series of conditions designed to allay its concerns. Formica complains that there is insufficient evidence relating to the DENA assets and suggests that the applicants be required to demonstrate the prudence of the DENA asset transfer. IEU-Ohio urges the Commission to investigate the proposed transfer of DENA assets, the value of the transfer to the applicants, and any appropriate conditions, in order to ensure that customers will not be harmed. OPAE asserts that Ohio customers of CG&E should be held harmless from any costs associated with the DENA assets.

Commission Conclusion. The Commission has reviewed the RSP case, the SRT stipulation and the FPP rider currently under consideration in *In the Matter of the Regulation of the Fuel and Economy Purchased Power Component of The Cincinnati Gas & Electric Company's Market-Based Standard Service Offer*, Case No. 05-806-EL-UNC. The Commission finds that costs that may be related to the transfer of the DENA assets will not be able to be passed on to Ohio customers without the approval of the Commission. As subsequent approval would be required, the present case is not the appropriate forum in which to consider such costs.

(19) MISO and RTO Membership

Application. As part of the application, the applicants note that Cinergy is currently a member of the Midwest Independent Transmission System Operator, Inc. (MISO), a regional transmission organization (RTO), and that, after the merger, Cinergy's commitment to MISO will continue. Applicants note that the transaction will further the development of MISO because Cinergy and Duke will engage in power sales and will be purchasing transmission service to deliver power between and among their regulated public utility operating companies. They note that additional power transfers across MISO and PJM Interconnection, L.L.C. (PJM), which separate the Cinergy and Duke control areas, supports the continued success of MISO.

Staff Recommendations. In its recommendations, staff notes that CG&E is presently a member of MISO. Staff also notes that the existing Duke affiliates do not belong to any RTO. Staff supports CG&E's commitment to maintain its membership in MISO.

Comments - Applicants. The applicants do not address this issue in their comments.

Comments - Other. IEU-Ohio supports staff's recommendation with regard to Cinergy's membership in MISO, but urges the Commission to review the interaction of MISO and PJM in Ohio. IEU-Ohio raises a concern that the costs of RTO participation continue to grow and the elimination of the seams issues may not be occurring. OCC also suggests that any filing with the Federal Energy Regulatory Commission (FERC) regarding CG&E's membership in or withdrawal from an RTO should be contingent upon state regulatory approval.

Commission Conclusion. Under Section 4928.12(A), Revised Code, no entity shall own or control transmission facilities in Ohio unless the entity is a member of, and transfers control of those facilities to, one or more qualifying transmission entities. In addition, each such entity, under Section 4928.12(B), Revised Code, must meet nine requirements related to control of generation facilities, minimizing pancaked transmission rates, service reliability, governance, and insuring comparable and non-discriminatory transmission access and service. In the independent transmission plan developed in its electric transition

plan, CG&E elected to belong to MISO, which is an RTO approved by the FERC. *See In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan, Case No. 99-1658-EL-ETP, et al., Opinion and Order (August 31, 2000).* At that time, CG&E determined, in part, that membership in MISO best serves service reliability and would best meet the nine requirements of Section 4928.12, Revised Code. The Commission supports Cinergy's plan to maintain its RTO membership. We believe that any change in Cinergy's RTO membership after the merger should be considered carefully and that CG&E should provide details and justification for a change in RTO to the Commission in advance of such a change. Because Ohio is somewhat unusual in that two RTOs serve Ohio, we will continue to review the interaction of MISO and PJM to ensure that congestion among RTO members is limited, transmission constraints are addressed, pancaked transmission rates are minimized, and there is an open and competitive electric generation marketplace which eliminates barriers to entry.

(20) Gas Choice

Staff Recommendations. CG&E's gas choice program is intended to promote a diversity of suppliers of natural gas and increase the competitive market for natural gas. The gas choice program permits customers to choose, as their provider of natural gas, either CG&E or another competitive natural gas marketer. To date, participation in CG&E's choice program has not exceeded five percent of residential customers. Staff recommends that, within three months after the close of the merger, CG&E should arrange a collaborative workshop, including the staff, qualified marketers and other interested parties, to discuss issues related to CG&E's gas choice program. In addition, staff recommends that CG&E should purchase receivables of qualified natural gas marketers without a discount.

Comments – Applicants. In its comments, the applicants agree that CG&E will arrange a collaborative workshop within three months after the close of the merger, to discuss issues related to its gas choice program. They also state that they agree in principle with staff's recommendations. They agree to take the necessary steps to purchase the receivables of competitive natural gas marketers without a discount, but their agreement is

conditioned upon the Commission allowing CG&E to establish gas and electric uncollectible expense recovery mechanisms (riders) consistent with similar recovery mechanisms approved by the Commission for other utility companies.

Comments – Other. IGS raises a concern with staff's recommendation, claiming that it would not resolve the gas choice program issues and urging the Commission to conduct a hearing on structural issues in the competitive marketplace. Direct Energy urges the Commission to deny the merger application unless conditions can be imposed to ensure increased customer shopping in the gas choice program. It also urges the Commission to undertake a comprehensive review of CG&E's gas choice program. IEU-Ohio claims that, if uncollectible expense riders are going to be considered in this case, the customer classes affected by the proposal should be significantly narrowed such that the riders would not apply to large transportation customers. OP&E calls for a collaborative workshop to develop improvements to the company's gas choice program.

Commission Conclusion. We note that CG&E's gas choice program has not been as successful as the Commission had anticipated and that there is a myriad of reasons for the current state of customer shopping in CG&E's service territory. We also agree with staff that there are several issues associated with CG&E's gas choice program that are of concern to those involved in the program. We believe that the most logical approach to understanding the issues and to developing alternative strategies to resolve those issues is to hold a collaborative gas workshop. We therefore direct CG&E to hold such a collaborative workshop within three months of the approval of the merger. We encourage all affected parties to participate.

CG&E shall purchase receivables of competitive natural gas and electric marketers without a discount, as recommended by staff. In addition, the Commission finds that CG&E's request for gas and electric uncollectible expense recovery riders is reasonable. The riders will allow CG&E to recover the incremental gas and electric uncollectible expenses associated with disconnected or other final accounts, above the existing mechanisms for such recovery. This result is consistent with the Commission's approval of similar riders for other Ohio utilities. *In the Matter of*

the Joint Application of The East Ohio Gas Company d.b.a. Dominion East Ohio, Columbia Gas of Ohio Inc., Vectren Energy Delivery of Ohio, Northeast Ohio Natural Gas Corp., and Oxford Natural Gas Company for Approval of an Adjustment Mechanism to Recover Uncollectible Expenses, Case No. 04-1127-GA-UNC, Finding and Order (December 17, 2003); In the Matter of the Application of Pike Natural Gas Company for Approval, Pursuant to Section 4929.11, Revised Code, of Tariffs to Recover Uncollectible Expenses Pursuant to an Automatic Adjustment Mechanism and for Such Accounting Authority as May Be Required to Defer Uncollectible Expenses for Future Recovery Through Such Adjustment Mechanism, Case No. 04-1339-GA-UEx et al., Finding and Order (January 26, 2005) and Entry on Rehearing (March 16, 2005).

- (21) With regard to other issues and recommendations raised by other commenters but not addressed in this finding and order, the Commission finds that such issues and recommendations either are unrelated to our determination of whether the transaction proposed in the application meets the statutory standard or do not warrant adoption as part of these proceedings.
- (22) Section 4905.402, Revised Code, requires the Commission to approve the application if we find that the proposal "will promote public convenience and result in the provision of adequate service for a reasonable rate rental, toll, or charge." As indicated in the application, the proposed merger will result in significant benefits to CG&E's customers. The resultant company will enjoy operational synergies, will be a financially stronger company, and will control substantial generation resources. At the same time, CG&E will continue to own and operate all of its electric distribution and transmission facilities and its current commercial generating facilities. In addition, CG&E will continue to be subject to the Commission's oversight of its customer service, safety and reliability performance. The Commission therefore finds that the application for approval of the proposed merger, with the additional commitments made by the applicants in their comments, should be approved, subject to the modifications and conditions set forth in this finding and order. The Commission will notify FERC of its approval of the application and that it will not protest any application pending before FERC that relates to this merger.

- (23) On December 1, 2005, CG&E filed proposed tariff pages for Commission approval. The Commission finds that the rates, the terms and conditions, and the calculations set forth in the proposed tariffs should be approved. The new tariffs shall be effective on January 1, 2006, on a services-rendered basis.
- (24) On December 15, 2005, the applicants and Cincinnati, Kroger, the Schools, Ohio Energy, and Interstate filed a stipulation and recommendation (stipulation) entered into among themselves, which they claim resolves all issues in these proceedings, asking for Commission review and approval. The Commission has reviewed this filing and believes that its actual effect is to modify those entities' previously filed comments in these proceedings. The deadline for the filing of reply comments was December 8, 2005. The Commission has reviewed the substance of the document and would note that nothing therein would lead us to modify our findings in these proceedings. In addition, we would note that the document includes certain obligations by and between the applicants and Cincinnati. The document itself notes that jurisdiction over those matters would rest in the Hamilton County Court of Common Pleas. The Commission, therefore, sees no need for its approval of the stipulation.

It is, therefore,

ORDERED, That the application, with the additional commitments made by applicants in comments filed in this docket, be approved, subject to the modifications and conditions set forth in this finding and order. It is, further,

ORDERED, That CG&E's application for authority to modify its current accounting procedures to defer costs be denied. It is, further,

ORDERED, That the affiliate agreements by and between CG&E and its affiliates, as set forth in the application and in applicants' December 1, 2005, comments, be approved. It is, further,

ORDERED, That the motions for intervention filed in these proceedings be denied. It is, further,

ORDERED, That the approvals set forth in this finding and order do not constitute state action for the purposes of antitrust laws. It is not our intent to insulate CG&E from the

provisions of any state or federal laws which prohibit the restraint of free trade. It is, further,

ORDERED, That the proposed tariffs of CG&E are approved as filed on December 1, 2005. It is, further,

ORDERED, That the proposed tariffs be effective January 1, 2006, on a services-rendered basis. It is, further,

ORDERED, That CG&E is authorized to file in final form four complete copies of tariffs consistent with this finding and order. One copy shall be filed with this case docket, one copy shall be filed with the applicant's TRF docket and the remaining two copies shall be designated for distribution to the electricity division of the Commission's utilities department. The applicant shall also update its tariffs previously filed electronically with the Commission's docketing division. Such final filing shall be completed prior to January 1, 2006. It is, further,

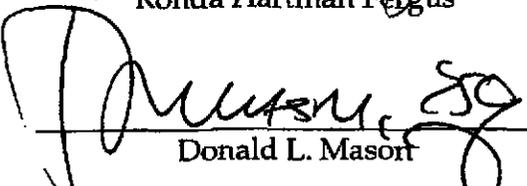
ORDERED, That a copy of this finding and order be served upon all interested persons, persons who have entered an appearance in these proceedings, parties of record, and the Federal Energy Regulatory Commission.

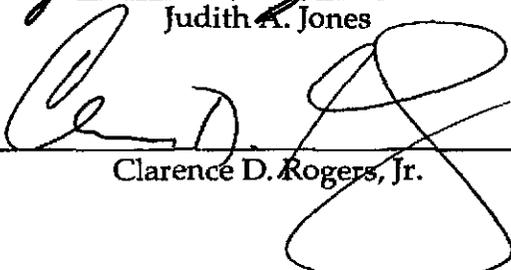
THE PUBLIC UTILITIES COMMISSION OF OHIO


Alan R. Schriber, Chairman


Ronda Hartman Fergus

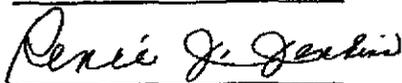

Judith A. Jones


Donald L. Masoff


Clarence D. Rogers, Jr.

JWK/SEF;geb

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Renee J. Jenkins
Secretary

Electric Company (CG&E). *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Case No. 03-93-EL-ATA, et al. (RSP case). The RSP was designed to stabilize prices following the termination of CG&E's market development period, while allowing additional time for competitive electric markets to grow. As a part of the RSP, the Commission authorized CG&E to establish and charge a system reliability tracker (SRT) which would permit CG&E to flow through to customers the actual costs necessary to cover peak and reserve capacity requirements to maintain system reliability. In its November 23, 2004, entry on rehearing in the RSP case, the Commission required CG&E to file an annual application, no later than September 1 of each year, to establish the SRT for the following calendar year. Also in that entry on rehearing, the Commission clarified that the SRT was to be unavoidable during 2005 (except by shopping credit customers), but that the avoidability of the SRT in subsequent years would be determined in a case to be commenced by CG&E by the earlier of the implementation of MISO Day 2 (as that term was used in the entry on rehearing) or July 1, 2005, whichever occurred earlier.

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

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

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

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

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

II. SUMMARY OF THE STIPULATION

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

- (1) With regard to nonresidential customers, the SRT will be avoidable by any customer that signs a contract or provides a release agreeing to remain off CG&E's market-based standard service offer (MBSSO) service through December 31, 2008, and to return to the MBSSO service, if at all, at the higher of the RSP price or the hourly locational marginal pricing (LMP) market price, as set forth in the Commission's entry on rehearing in the RSP case.
- (2) With regard to residential customers, the SRT will be unavoidable. All residential customers who purchase generation from a competitive supplier may return to CG&E's MBSSO at the RSP price.
- (3) CG&E will calculate the SRT for the first quarter of 2006 using a planning reserve margin of 15 percent of the projected retail load not eligible to avoid the SRT on January 31, 2006. In its filing for the second quarter of 2006, CG&E will reconcile that calculation with the actual such load on January 31, 2006. CG&E's plan to purchase reserves of 15 percent of the retail load not eligible to avoid the SRT is deemed by the parties to be prudent. CG&E agrees to make purchases to achieve that reserve, keeping records sufficient for Commission staff audit, and will recover the associated costs from customers that do not avoid the SRT.
- (4) CG&E will buy and sell reserve capacity as needed and as possible, crediting revenues to SRT customers and managing the reserve position to maintain a 15 percent reserve level for the projected standard service load, to the extent possible. Such management will include the acquisition and sale of capacity for non-residential consumers that leave or return to the MBSSO at the higher of the RSP price or the hourly LMP price. Management of the 2006 SRT will be subject to a prudence review by the Commission.
- (5) The 2006 SRT will be adjusted and reconciled quarterly.
- (6) The SRT costs will be divided into separate pools allocable to residential and nonresidential customers, with 42.382 percent of costs allocated to residential customers' pool, along with the same percentage of over-collections, under-recoveries, and credits from third-party sales. Shopping by nonresidential customers will not cause residential customers to pay any additional charges. Nonresidential customers will pay the remainder of SRT costs.

- (7) SRT transactions shall be audited by Commission staff. The results of its audits shall be filed in the docket. Parties may request a hearing regarding such audit.
- (8) With regard to certain specified assets, the parties agreed as follows: "To the extent that any assets owned by Duke Energy North America LLC (DENA Assets) are transferred to CG&E and CG&E proposes to use any such DENA Assets as part of the SRT portfolio, CG&E cannot use the DENA Assets as part of the SRT unless it receives Commission authorization to do so after CG&E applies to the Commission for approval to include such DENA Asset(s) in the portfolio and for approval of the SRT market price associated with such DENA Asset(s). CG&E shall provide OCC with workpapers and other data supporting the use of DENA Assets as part of the SRT and if any interested party is concerned about the use of DENA Assets in the SRT the Commission will hold a hearing." The parties also noted, in a footnote, that "[n]othing herein shall be construed as the parties' consent for approval of the transfer of the DENA Assets to CG&E. All parties retain their legal rights with respect to the transfer of the DENA Assets to CG&E."
- (9) All other terms of the 2005 SRT application should be approved.

III. EVALUATION OF THE STIPULATION

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

The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. See, e.g., *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14, 1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (March 30, 1004); *Ohio Edison Co.*, Case No. 91-698-EL-FOR et al. (December 30, 1993); *Cleveland Electric Illum. Co.*, Case No. 88-170-EL-AIR (January 30, 1989); *Restatement of Accounts and Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC (November 26, 1985). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (2) Does the settlement, as a package, benefit ratepayers and the public interest?

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

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

- (1) CG&E is an electric light company within the meaning of Sections 4905.03(A)(4) and 4928.01(A)(7), Revised Code, and, as such, is a public utility as defined by Section 4905.02, Revised Code, subject to the jurisdiction and supervision of the Commission. CG&E is also an electric distribution utility within the meaning of Section 4928.01(A)(6), Revised Code.
- (2) On June 1, 2005, CG&E filed an application seeking approval of CG&E's 2006 resource plan and the consequent SRT price for the calendar 2006, a determination of the avoidability of the SRT in years subsequent to 2005, and authorization of quarterly adjustments to the SRT.
- (3) The Commission conducted a public hearing in this proceeding on September 7 and 9, 2005, at its offices at 180 East Broad Street, Columbus, Ohio.
- (4) A stipulation which would, if accepted by the Commission, resolve all of the issues in this case, was filed on October 27, 2005. That stipulation was signed by all but two of the parties to this case. Each of the other two parties confirmed that it would not oppose the stipulation.
- (5) The Commission adopts, in its entirety, the stipulation presented by the parties to these proceedings.

ORDER

It is, therefore,

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

ORDERED, That CG&E file proposed tariffs reflecting the terms of this opinion and order within 10 days. It is, further,

ORDERED, That a copy of this opinion and order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman



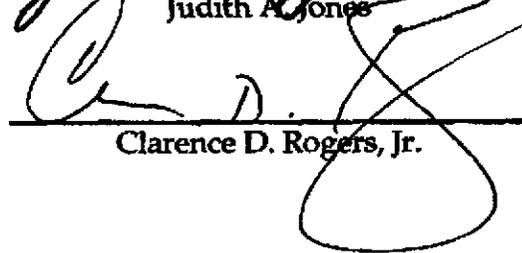
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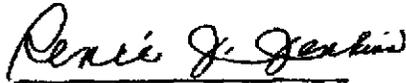


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