

IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel,) Case No. 08-0466  
)  
Appellant, et al., )  
)  
v. ) Appeal from the Public  
) Utilities Commission of Ohio  
) Case Nos. 06-1068-EL-UNC, 05-  
The Public Utilities Commission ) 725-EL-UNC, 06-1069-EL-UNC,  
of Ohio, ) 05-724-EL-UNC. 06-1085-EL-UNC  
)  
)  
Appellee. )

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**MOTION TO SEAL CONTENTS OF REPLY BRIEF AND ASSOCIATED FILINGS  
PENDING RESOLUTION OF CONFIDENTIALITY ISSUES ON APPEAL  
BY  
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THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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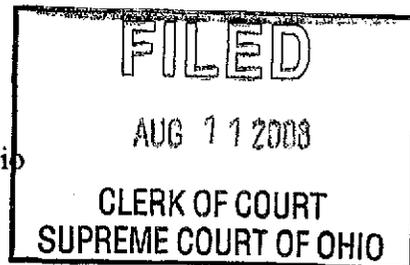
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**TABLE OF CONTENTS**

	<b>Page</b>
I. INTRODUCTION.....	1
II. ARGUMENT .....	2
III. CONCLUSION.....	3
CERTIFICATE OF SERVICE .....	5

ATTACHMENT

REPLY BRIEF AND REPLY APPENDIX (Public Version)

## I. Introduction

This case is the appeal of the above-captioned cases before the Public Utilities Commission of Ohio (“PUCO” or “Commission”) which is closely associated with the appeal in S.Ct. Case No. 08-0367 (“*Remand Appeal*”). Among other matters, this appeal and the *Remand Appeal* share a common record.

The applicant in the cases below is Duke Energy Ohio, Inc. (“Duke Energy” or “Company,” formerly known as “CG&E”). This appeal resulted from a Commission order in cases consolidated with other PUCO cases that were reversed (in part) and remanded from the Supreme Court of Ohio in November 2006. *Ohio Consumers’ Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 (“*Consumers’ Counsel 2006*”). The subsequent history on remand involved discovery by the Office of the Ohio Consumers’ Counsel (“OCC” or “Appellant”) and the presentation of extensive evidence regarding side agreements that were made available to OCC only after the Court ruled that the PUCO had erred in denying OCC access to the information. One of the propositions of law in the *Remand Appeal* relates to the failure of the PUCO to make public the information that were withheld from public view.<sup>1</sup> The instant appeal also involved the testimony of a Commission-appointed auditor and associated exhibits and transcripts, some of which were deemed confidential in the cases below (a status that is not the subject of the *Remand Appeal* or the instant appeal).

Significant provisions in the documents submitted as part of the record were shielded from entering the public domain as the result of the PUCO’s order in the *Remand Appeal*. That Order on Remand stated that confidential treatment would be provided regarding “customer

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<sup>1</sup> *Remand Appeal*, OCC Notice of Appeal at 3, ¶1C (“withholds information from the public”) (February 19, 2008).

names, . . . contract termination dates or other termination provisions, financial consideration in each contract, price of generation referenced in each contract, volume of generation covered by each contract, and terms under which any options may be exercisable.”<sup>2</sup> The contracts at issue also involve affiliates of Duke Energy as well as parties to the cases below (and members of organizations that were parties). The discussion of this information in documents such as briefs and applications for rehearing was the subject of Commission instructions to file under seal and provide redacted versions for the public docket.

## **II. Argument**

The Supreme Court’s rules are instructive regarding the treatment of documents filed with the Court:

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

Sup.Ct.Prac.R. XIV(1)(B). Portions of the record in the cases below were sealed, as stated above, by the PUCO. Also, the OCC entered into protective agreements with Duke Energy, two of its affiliates, and two other parties as part of the discovery process in order to speed the discovery process. Those agreements provide that the OCC will make filings in these cases (including any appeal to the Supreme Court) under seal if documents are used with respect to which the counterparties have made claims regarding confidentiality.

The OCC’s submissions on June 2, 2008 -- the OCC’s Merit Brief, Appendix, and Supplement -- all contained documents or descriptions of documents that are subject to, at least in part, the order of the PUCO regarding the sealed portion of the record. The OCC’s Reply

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<sup>2</sup> *In re Duke Energy Post-MDP Service Case*, Case No. 03-93-EL-ATA, et al., Order on Remand at 15 (attached to OCC Notice of Appeal filed February 19, 2008 in the *Remand Appeal*).

Brief and Reply Appendix also contain such material. The OCC submits this Motion to Seal regarding its Reply Brief and Reply Appendix contemporaneously with the filing of the Reply Brief and Reply Appendix under seal. The OCC requests appropriate treatment for sealing of these filings pending resolution of this case regarding the extent to which Ohio's law regarding trade secrets applies to the record in the cases below.

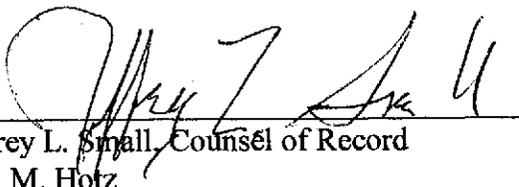
The OCC realizes the difficulties presented by the presentation of a case that involves a dispute regarding the confidential treatment of documents before the Court (itself a public office). To assist the Court in this process, including preparation by members of the Court and its staff for deliberations in this appeal (including oral argument), the OCC attaches to this Motion to Seal redacted versions of the OCC's Reply Brief and Reply Appendix. The redacted versions show the degree to which information has been released to the public as part of the PUCO's Docketing Information System as of the date of this filing.

### **III. Conclusion**

For the foregoing reasons, and pursuant to the Court's rules of practice, the OCC requests that its Motion to Seal be granted subject to any later decision by the Court that the information should be released to the public domain and that the PUCO's decision to the contrary should be reversed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion to Seal by the Office of the Ohio Consumers' Counsel was served upon the below-listed counsel by regular U.S. Mail, prepaid, this 11<sup>th</sup> day of August, 2008.

  
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REPLY BRIEF AND REPLY APPENDIX  
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**TABLE OF CONTENTS**

	<b>Page</b>
I. INTRODUCTION .....	1
II. ARGUMENT .....	2
Proposition of Law No. 1: .....	2
The Commission’s Rider Order Is Unreasonable And Unlawful Because The Commission Relied Upon the Participation Of Certain Entities Who Had No Standing In These Cases. ....	2
Proposition of Law No. 2: .....	7
The Commission’s Rider Order Is Unreasonable And Unlawful Because The Commission Failed To Properly Apply The Test For Approval Of A Partial Stipulation. Consumers’ Counsel v. Public Util. Comm. (1992), 64 Ohio St. 3d 123, 125. ....	7
A. The Standard for Judging Partial Stipulations .....	7
B. Application of the Standard for Judging Partial Stipulations.....	8
1. The settlement was not the product of serious bargaining.....	8
a. The PUCO ignored this Court’s recent directive regarding the test for whether “serious bargaining” took place. ....	8
b. The PUCO failed to properly consider whether the settlement involved “capable, knowledgeable parties.” .....	12
2. The settlement package does not benefit the public interest.....	15
3. The settlement package violates important regulatory policies and practices.....	18
III. CONCLUSION.....	20
CERTIFICATE OF SERVICE .....	21

**TABLE OF AUTHORITIES**

**Page**

**Cases**

*Constellation NewEnergy, Inc. v. Public Util. Comm.*,  
104 Ohio St.3d 530, 2004-Ohio-6767 .....7

*Consumers' Counsel v. Public Util. Comm.* (1992),  
64 Ohio St.3d 123, 125 .....7

*LeRoux's Billye Supper Club v. Ma* (1991),  
77 Ohio App.3d 417 .....10

*Ohio Consumers' Counsel v. Public Util. Comm.*,  
111 Ohio St.3d 300, 2006-Ohio-5789..... passim

*Sanderson Farms, Inc. v. Gasbarro*,  
2004-Ohio-1460 .....10

*State ex rel. Kline v. Carroll*,  
96 Ohio St.3d 404, 2002-Ohio-4849 .....4

*Time Warner AxS v. Public Util. Comm.* (1996),  
75 Ohio St.3d 229, 234, 661 N.E.2d 1097 .....12,18

*Toledo Coalition for Safe Energy v. Public Util. Comm.* (1982),  
69 Ohio St.2d 559 .....2

**Entries and Orders of the Public Utilities Commission of Ohio**

*In the Matter of the Application of Duke Energy Ohio, Inc., to Modify its Fuel and Economy Purchases Power Component of its Market-based Standard Service Offer*,  
Case No. 06-1068-EL-UNC, et al.,  
Entry on Rehearing (January 16, 2008) .....6

*In the Matter of the Application of Duke Energy Ohio, Inc., to Modify its Fuel and Economy Purchases Power Component of its Market-based Standard Service Offer*,  
Case No. 06-1068-EL-UNC, et al.,  
Opinion and Order ("Rider Order") (November 20, 2007) ..... passim

*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 Nos. 03-93-EL-ATA, et al., Order on Remand (“Remand Order”) (October 24, 2007) .....1,10*

*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 Nos. 03-93-EL-ATA, et al., Entry (November 30, 2006) .....5*

*In the Matter of the Application of Columbus Southern Power Company And Ohio Power Company for Authority to Recover Costs Associated with the Ultimate Construction and Operation of an Integrated Gasification Combined Cycle Electric Generating Facility, Case No. 05-376-EL-UNC, Opinion and Order (April 10, 2006) .....5*

*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., Entry on Rehearing (November 23, 2004).....18*

*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 Nos. 03-93-EL-ATA, et al., Opinion and Order (“Post-MDP Service Order”) (September 29, 2004) .....17,19*

*In the Matter of the Restatement of the Accounts and Records of The Cincinnati Gas & Electric Company, The Dayton Power and Light Company, and Columbus & Southern Ohio Electric Company, Case No. 84-1187-EL-UNC, Opinion and Order (November 26, 1985).....13*

**Statutes**

R.C. 4901.13 .....2

**Administrative Rules**

Ohio Adm. Code 4901-1-10 .....3

Ohio Adm. Code 4901-1-11 .....3

**REPLY APPENDIX (R. APPX.)**  
**TABLE OF CONTENTS**

**Page**

*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 Nos. 03-93-EL-ATA, et al., Transcript Remand Rider Vol. I (selected pages) (April 10, 2007).....1*

*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 Nos. 03-93-EL-ATA, et al., Transcript Remand Rider Prehearing (selected pages) (December 14, 2006).....5*

*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 Nos. 03-93-EL-ATA, et al., Entry ("Remand Order") (November 30, 2006) .....10*

*In the Matter of the Application of Columbus Southern Power Company And Ohio Power Company for Authority to Recover Costs Associated with the Ultimate Construction and Operation of an Integrated Gasification Combined Cycle Electric Generating Facility, Case No. 05-376-EL-UNC, Opinion and Order (April 10, 2006) .....14*

*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 Nos. 03-93-EL-ATA, et al., PWC Memorandum in Support of Alternative Proposal, (November 8, 2004).....38*

## I. INTRODUCTION

In its Order dated October 24, 2007 (“Rider Order” in the “*Rider Case*”) (Appx. 8.), the Public Utilities Commission of Ohio (“PUCO” or “Commission”) considered a rate plan proposed by Duke Energy Ohio, Inc. (“Duke Energy” or “Company,” formerly known as “CG&E”). The OCC appealed an earlier, closely related case (“*Post-MDP Service Case*”) that resulted in this Court’s decision in November 2006 and remand to the Commission for further consideration. *Ohio Consumers’ Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 (“*Consumers’ Counsel 2006*”).

The rate plan at issue in the *Post-MDP-Service Case* was the subject of the first phase of hearings. The first phase resulted in an order (“Remand Order in the “*Remand Case*”) that rejected a stipulation (“2004 Stipulation”) based upon the expanded record on remand.<sup>1</sup> In the Rider Order regarding the second phase of the hearings, however, the PUCO denied any possible connection between side deals presented in testimony by the Office of the Ohio Consumers’ Counsel (“OCC”) and the support shown by certain parties for Duke Energy’s generation rate proposals.<sup>2</sup> Duke Energy’s proposals were contained in a stipulation (“2007 Stipulation”) that involved setting rate levels for the Company’s Fuel and Economy Purchased Power (“FPP”) tracker, System Reliability Tracker (“SRT”), and Annually Adjusted Component (“AAC”) charges that were conceptually approved in 2004.

Appeals were taken from the Rider Order by the OCC and the Ohio Partners for Affordable Energy (“OPAE”), appellants in this case. The OCC herein replies to the Merit Briefs filed by the Appellee PUCO and Intervening Appellee Duke Energy.

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<sup>1</sup> Remand Order at 27 (Appx. 78.).

<sup>2</sup> Rider Order at 27 (Appx. 34.).

## II. ARGUMENT

### Proposition of Law No. 1:

#### **The Commission's Rider Order Is Unreasonable And Unlawful Because The Commission Relied Upon the Participation Of Certain Entities Who Had No Standing In These Cases.**

This first proposition of law contests the PUCO's "reli[ance] upon the[ ] participation [of People Working Cooperatively, or "PWC," and the Ohio Hospital Association, or "OHA"] in adopting the [2007] [S]tipulation" (as well as others that did not intervene in the cases below) when those corporate entities failed to intervene in the cases subject to this appeal.<sup>3</sup> The PUCO argues that it should be entitled, as a matter of discretion in conducting its hearings, to rely upon grants of intervention dating back to 2004 in related cases and that the OCC should have lodged its protests earlier. Both arguments should be rejected.

The PUCO claims that it agrees with the OCC regarding the "importance of intervention in Commission proceedings."<sup>4</sup> Thereafter the PUCO asserts that the Commission has broad discretion to conduct its hearings and that this includes dispensing with "unnecessary interventions by each party."<sup>5</sup> The PUCO quotes *Toledo Coalition for Safe Energy v. Public Util. Comm.* (1982), 69 Ohio St.2d 559, 560: "It is well settled that pursuant to R.C. 4901.13, the commission has the discretion to decide how . . . it may best proceed to manage and expedite

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<sup>3</sup> PUCO Merit Brief at 12. As pointed out by the OCC, OEG did not intervene in Case No. 06-1085-EL-UNC concerning AAC levels. OCC Merit Brief at 26. The PUCO does not specifically mention this failure on the part of OEG. Duke Energy makes the same mistake. Company Merit Brief at 6 ("two of the signatories").

<sup>4</sup> PUCO Merit Brief at 11. Thereafter, the PUCO also agrees with the statement in the OCC's Merit Brief that "[a] request to intervene is not an empty gesture." OCC Merit Brief at 26; repeated without attribution to the OCC, PUCO Merit Brief at 11.

<sup>5</sup> PUCO Merit Brief at 11. Statements regarding PUCO discretion are located throughout the PUCO's Proposition of Law II. PUCO Merit Brief at 11-15.

the orderly flow of its business . . . .”<sup>6</sup> The PUCO exercised its discretion under R.C. 4901.13 (PUCO Appx. 1.) -- under which the Commission “may adopt and publish rules to govern its proceedings” -- by promulgating Ohio Adm. Code 4901-1-11 (Appx. 166.) governing intervention in proceedings. Ohio Adm. Code 4901-1-11(C) (Appx. 166.) states that “[a]ny person desiring to intervene in a proceeding *shall* file a motion to intervene with the commission, and shall *serve* it upon all parties . . . .” The Commission also promulgated Ohio Adm. Code 4901-1-10 (Appx. 165.), which sets out who is a party to a Commission proceeding. That rule requires that a person who is not an applicant or a respondent be “granted leave to intervene under rule 4901-1-11” or be “*expressly made a party* by order of the commission.”<sup>7</sup> The PUCO decided the manner in which it regulates standing as part of its rules, but violated those rules in the cases below.

The situation faced by the City of Cincinnati (“City”) in the consolidated cases illustrates the importance of the PUCO’s rules that organize practice before the Commission. The City moved to intervene in the *Post-MDP Service Case* on April 21, 2004.<sup>8</sup> The City withdrew from the *Post-MDP Service Case* on July 13, 2004 without any Commission ruling on its Motion to Intervene and without any documented participation other than the execution of a side deal with the Company that provided the City with \$1 million and required the City’s withdrawal from the *Post-MDP Service Case*.<sup>9</sup> Similarly, the City did not participate in the above-captioned cases (i.e. the *Rider Case*) other than moving to intervene on February 21, 2007 and signing the 2007

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<sup>6</sup> PUCO Merit Brief at 14. Ironically, the case cited upheld the PUCO’s denial of a motion to intervene by a small non-profit corporation, whose members actually consisted of residential customers, and recognized the OCC as the representative of residential customers.

<sup>7</sup> Emphasis added. The PUCO quotes Ohio Adm. Code 4901-1-10(A), including the words “expressly made a party by order of the Commission,” without any apparent concern for the Commission’s failure to comply with the terms of the rule. PUCO Brief at 11.

<sup>8</sup> *Post-MDP Service Case*, City Motion to Intervene (April 21, 2004) (Supp. 736.).

<sup>9</sup> OCC Remand Ex. 6 at ¶4 (OPAE Supp. 17.).

Stipulation. The intervention was targeted, and stated that “the City is not seeking involvement in remanded case 03-93 or any of the ‘phase I’ issues associated with the remand proceeding . . . .”<sup>10</sup> Any broader intervention into all the consolidated cases would have risked violation of the terms of the City’s agreement (“City Agreement”) with Duke Energy and the City’s \$1 million settlement payment. The City appears to have relied upon the Commission’s rules, the rules relied upon by the OCC in its first proposition of law, that would not make the City a party to all cases simply because the cases were consolidated.

Despite the PUCO’s rules to the contrary, the PUCO claims that it was “wellknown to OCC” that consolidation would make PWC and OHA parties in the *Rider Case*.<sup>11</sup> The PUCO cites the OCC’s support for consolidation of the *Remand Case* and *Rider Case* as support for its “wellknown” argument.<sup>12</sup> Duke Energy argues similarly, adding that “OCC is [therefore] precluded from arguing that certain parties improperly participated in some of the cases.”<sup>13</sup> Case consolidation promised important organizational features that included such matters as the efficient and effective presentation of evidence. For example, the side agreements that were entered into the record in the *Remand Case* are important for a complete understanding of the results in the *Rider Case* and provide the context in which to judge that the case outcome does not serve the public interest.<sup>14</sup> The OCC’s support for consolidation did not involve any argument on the issue of standing, and could not have involved the matter of standing under the Commission’s rules. The OCC is not precluded from making an argument that is based upon the

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<sup>10</sup> City of Cincinnati Motion to Intervene at 2-3 (February 21, 2007) (PUCO Sec. Supp. 122-123.).

<sup>11</sup> PUCO Merit Brief at 13.

<sup>12</sup> *Id.*

<sup>13</sup> Company Merit Brief at 7, citing *State ex rel. Kline v. Carroll*, 96 Ohio St.3d 404, 2002-Ohio-4849 at ¶27.

<sup>14</sup> OCC Merit Brief at 28-44; OPAE Merit Brief at 6-25.

application of the rules of the forum before which the OCC appeared, and nothing in the case cited by Duke Energy states otherwise.<sup>15</sup>

The PUCO argues, in support for its “wellknown” argument, that the OCC did not object to party status for PWC and OHA until post-hearing reply briefs were filed.<sup>16</sup> For instance, the PUCO faults the OCC for not “object[ing] to the inclusion of PWC or OHA as signatory parties when the evidentiary hearing began on the stipulation.”<sup>17</sup> The PUCO fails to mention any practical result that the OCC could have achieved from such an objection. Similarly, nothing practical could have resulted from objection to the involvement of PWC and OHA counsel in the hearing for the *Rider Case*. When present, counsel for PWC and OHA were *completely inactive* during the presentation of witnesses and the introduction of documentary evidence.

The Commission has opined on whether a party is entitled to wait until its post-hearing pleadings to raise legal arguments, and the PUCO’s order on that issue conflicts with the PUCO’s argument in its Merit Brief that faults the OCC for its failure to “seek an interlocutory appeal.”<sup>18</sup> Even under circumstances where an adverse ruling is received regarding an attorney examiner’s ruling, the Commission has held that a party is not precluded from raising the issue after the hearing has concluded.<sup>19</sup> Of course, the procedural problem in this instance is that *no ruling was made* regarding the party status of PWC and OHA during the hearing to which the

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<sup>15</sup> The OCC responded, along with others, to a proposal to consolidate that was initiated by the attorney examiner. Entry at 3, ¶7 (November 30, 2006) (R. Appx. 12.) (“examiner proposes that a single hearing be held in all of these proceedings”).

<sup>16</sup> PUCO Merit Brief at 14.

<sup>17</sup> Id. at 13.

<sup>18</sup> Id. at 14.

<sup>19</sup> *In re AEP IGCC Proposal*, Case No. 05-376-EL-UNC, Order at 9 (April 10, 2006) (R. Appx. 22.).

OCC could object.<sup>20</sup> The PUCO's Merit Brief does not argue with the OCC's statement of this fact.<sup>21</sup>

The PUCO's final argument regarding its "wellknown" argument is that the OCC raised its objection to the treatment of PWC and OHA as parties and the Commission "reaffirmed PWC's party status."<sup>22</sup> "Reaffirmed" is apparently another reference to the Commission's consolidation of the *Remand Case* and *Rider Case*, an act that by itself did not provide PWC and OHA standing in the *Rider Case*. This final argument, therefore, is nothing more than a statement of the result in the *Rider Order* and the subsequent *Entry on Rehearing* that is the subject of the OCC's instant appeal.

The present circumstances illustrate the importance of the intervention process. The *Rider Order* states that "[r]esidential consumers were represented by PWC" in negotiations over the rates provided for in the 2007 Stipulation.<sup>23</sup> PWC expressed disinterest in the *Rider Case*.<sup>24</sup> As stated in its Motion to Intervene in the *Post-MDP Service Case* during 2004, relied upon by the PUCO in its Merit Brief,<sup>25</sup> PWC is "a small, non-profit organization \* \* \* [whose] mission is to provide essential repairs and services so that homeowners can remain in their homes. . . ."<sup>26</sup> PWC did not make any statement regarding the representation of residential consumers against which the OCC could argue.

The circumstances of this case demonstrate that a request to intervene is not an empty gesture, and the Commission should not have relied upon the positions stated by persons who

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<sup>20</sup> OCC Merit Brief at 27.

<sup>21</sup> Also, Duke Energy does not argue with the OCC's statement of fact.

<sup>22</sup> PUCO Merit Brief at 14.

<sup>23</sup> *Rider Order* at 27 (Appx. 34.).

<sup>24</sup> OCC Merit Brief at 35-36.

<sup>25</sup> PUCO Merit Brief at 12.

<sup>26</sup> *Post-MDP Service Cases*, PWC Motion to Intervene at 2 (March 9, 2004) (OPAE Supp. 15.).

were not parties to the Commission's proceedings and who did not follow the Commission's rules. The Court should reject the PUCO's result in the *Rider Case*.

**Proposition of Law No. 2:**

**The Commission's Rider Order Is Unreasonable And Unlawful Because The Commission Failed To Properly Apply The Test For Approval Of A Partial Stipulation. Consumers' Counsel v. Public Util. Comm. (1992), 64 Ohio St. 3d 123, 125.**

**A. The Standard for Judging Partial Stipulations**

The 2007 Stipulation, filed just prior to the second (i.e. the "Rider") phase of the Commission's proceedings, is the subject of the OCC's second proposition of law and the PUCO's third proposition of law.<sup>27</sup> The Court in *Consumers' Counsel 2006*, among numerous other cases, considered whether a just and reasonable result was achieved with reference to criteria adopted by the Commission in evaluating settlements. Regarding such a stipulation: "1) It must be a product of serious bargaining among capable, knowledgeable parties; 2) It must, as a package, benefit ratepayers and the public interest; and 3) It must not violate any important regulatory principle or practice."<sup>28</sup> The greater clarity brought to the evaluation of stipulations by this Court in *Consumers Counsel 2006* was quickly discarded by the PUCO in the evaluation of the 2007 Stipulation, a stipulation and PUCO evaluation that are closely connected with the OCC's appeal that resulted in *Consumers Counsel 2006*.

The Rider Order and the PUCO's Merit Brief fail to properly evaluate the 2007 Stipulation which violates the criteria set out by the Commission and the Ohio Supreme Court.

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<sup>27</sup> Joint Remand Rider Ex. 1 (2007 Stipulation) (April 9, 2007) (OPAE Supp. 1.).

<sup>28</sup> *Consumers' Counsel 2006* at ¶86, citing *Constellation NewEnergy, Inc. v. Public Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767 at ¶8.

## **B. Application of the Standard for Judging Partial Stipulations**

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

The Rider Order and the PUCO's Merit Brief misapply the first criterion for the evaluation of stipulations. The PUCO's evaluation of the 2007 Stipulation ignored this Court's recent directive regarding the test for whether "serious bargaining" took place and failed to properly consider whether the settlement involved "capable, knowledgeable parties." The latter failure included PUCO reliance upon support for the 2007 Stipulations by entities that were not parties to the cases and that did not represent the interests stated in the Rider Order.

#### **a. The PUCO ignored this Court's recent directive regarding the test for whether "serious bargaining" took place.**

The Rider Order fails to provide an analysis of the 2007 Stipulation that comports with this Court's decision in *Consumers Counsel 2006*. The Court stated:

The Commission cannot rely merely on the terms of the stipulation but, rather, must determine whether there exists sufficient evidence that the stipulation was the product of serious bargaining. Any such concessions or inducements apart from the terms agreed to in the stipulation might be relevant to deciding whether negotiations were fairly conducted.<sup>29</sup>

Serious bargaining cannot occur between parties whose interests are aligned (or between parties whose interests do not conflict) while ignoring the positions of parties whose interests conflict with those of the Company. The PUCO's Rider Order stated:

[T]here is no argument that there was a similar connection to the [2007] [S]tipulation we are considering today. The signatory parties to this [2007] [S]tipulation specifically confirmed that there were no side agreements related to this [2007] [S]tipulation.<sup>30</sup>

The record, however, contains an extensive array of agreements between many of the signatories (or members of signatories) to the 2007 Stipulation and the Duke-affiliated companies that were

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<sup>29</sup> *Consumers' Counsel 2006* at ¶86.

<sup>30</sup> Rider Order at 27 (Appx. 34.).

instrumental in providing the support for the 2007 Stipulation. The Rider Order totally dismisses the arguments by the OCC and OP&E that these side agreements have a bearing on the above-captioned cases.

The PUCO's Merit Brief emphasizes the motions to intervene (but not subsequent case involvement) submitted in 2004 by signatories to the 2007 Stipulation. The PUCO's Merit Brief fails to address *any* of the OCC's arguments regarding concessions and inducements outside the terms of the 2007 Stipulation that are important to the proper application of the first criterion for the evaluation of a stipulation.

The PUCO's Merit Brief argues its case against an effective evaluation of the impact of the side agreements on developing the 2007 Stipulation:

The Commission found that the agreements relied on by OCC and OP&E did not contain any provision requiring anyone to support, or become a signatory to, the [2007] [S]tipulation involved in this case. This is a distinguishing feature between the April 9, 2007 stipulation in this case and the one parties submitted on May 19, 2004. . . .<sup>31</sup>

The City Agreement with Duke Energy, the example raised in the OCC's Application for Rehearing (Appx. 206.), provided that the City's \$1 million Settlement Agreement would terminate if the "Commission, in Case No. 03-93-EL-ATA [the rate plan case] *or a related case necessary to carry out the terms and conditions of the Stipulation and Recommendation filed in that case*, issues an order unacceptable to CG&E."<sup>32</sup> The related "rider cases" were referred to in

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<sup>31</sup> PUCO Merit Brief at 22 (citation omitted). Duke Energy relies upon this Commission statement that side agreements "do not include any language regarding [the case numbers in the *Rider Case*]." Duke Merit Brief at 10.

<sup>32</sup> OCC Remand Ex. 6 at ¶6 (OP&E Supp. 18.). Duke Energy is wrong that the City Agreement "does not require the City to take any position with regard to the 2007 Stipulation." Company Merit Brief at 14. The Company argues that case developments after the filing of the 2004 Stipulation, after which Duke Energy did not demand its \$1 million back as it defended the PUCO's ultimate decision, shows that the City was under no threat. Company Merit Brief at 14. Had the City changed sides in the rate plan cases and *opposed* Duke Energy's rate proposals, the Company's response would likely have been different.

the 2004 City Agreement, but their case numbers were unknown and unknowable at the time the City Agreement was executed.

The difference between the Commission's determination that the 2004 settlement negotiations were tainted by the side agreements (i.e. in the Remand Order at 27 (Appx. 78.) ("inevitable conclusion")) and the Commission's determination that the 2007 negotiations were beyond reproach hinges, in part, on the inability of signatories to explicitly state unknowable case numbers for future cases. The Commission's "distinguishing feature" upon which it relies for not considering the side agreements trivializes the need for the evaluation of concessions and inducements that is supported by *Consumers' Counsel 2006*.

The Company argues that the side agreements containing refunds for charges that were set in the Rider Case involved DERS and not Duke Energy.<sup>33</sup> Under the circumstances revealed in the testimony of OCC Witness Hixon, as extensively reviewed in the OCC's Merit Brief, the Court should "pierce the corporate veil" and attribute the DERS agreements to Duke Energy. The "alter ego doctrine" supports such a result, which requires that the entities "are fundamentally indistinguishable."<sup>34</sup> To begin with, the DERS side agreements [REDACTED]

[REDACTED]<sup>35</sup> Documented negotiations state that they concerned Duke Energy's rate plan

<sup>33</sup> Company Merit Brief at 11. The Company also faults the OCC for not intervening to oppose the certification of DERS that was "recertified . . . on October 3, 2006." Company Merit Brief at 12. The OCC was denied the discovery that could have revealed the use of DERS to settle the *Post-MDP Service Case* until after the *Consumers' Counsel 2006* was issued in November 2006.

<sup>34</sup> See, e.g., *Sanderson Farms, Inc. v. Gasbarro*, 2004-Ohio-1460 at ¶26, quoting *LeRoux's Billye Supper Club v. Ma* (1991), 77 Ohio App.3d 417, 422-423.

<sup>35</sup> [REDACTED]

and resulted in side agreements that [REDACTED].<sup>36</sup> The boundary between Duke Energy and DERS does not exist.

Additionally, the [REDACTED]

[REDACTED]<sup>37</sup> [REDACTED]

[REDACTED]<sup>38</sup> The side agreements with DERS contain numerous [REDACTED]<sup>39</sup> The

representatives of DERS did not identify which entity they represented (violations of the PUCO's corporate separation rules).<sup>40</sup> This matter is documented by such evidence as counselor

[REDACTED]

[REDACTED]<sup>41</sup> This matter is also documented by testimony regarding [REDACTED]

[REDACTED]

[REDACTED]<sup>42</sup> The activities of DERS are attributable to Duke Energy since the corporations are "fundamentally indistinguishable." The side agreements should be attributed to Duke Energy.

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<sup>36</sup> OCC Merit Brief at 12-13.

<sup>37</sup> OCC Merit Brief at 11-13.

<sup>38</sup> Id. at 11.

<sup>39</sup> Id. at 13-14.

<sup>40</sup> Id. at 11 (corporate counsel) and 20 (negotiations with customer).

<sup>41</sup> Id. See, e.g., [REDACTED]

[REDACTED]

<sup>42</sup> OCC Merit Brief at 20.

**b. The PUCO failed to properly consider whether the settlement involved “capable, knowledgeable parties.”**

The case record reveals many side agreements and communications regarding their negotiation, and these side negotiations dictated the course of the proceedings in 2007 concerning the riders proposed by Duke Energy. The PUCO’s Merit Brief myopically states: “OCC and OPAE do not dispute that all parties, including themselves, were invited to all negotiations. Everyone had the opportunity to participate.”<sup>43</sup> The Company similarly argues that “[n]either appellant . . . claims that the negotiations over the 2007 Stipulation were unfair.”<sup>44</sup> *The OCC was not invited to all negotiations*, the most important of which were the sessions at which the side agreements were negotiated that guaranteed that parties such as the City would agree to the terms of the 2007 Stipulation. The PUCO’s argument again fails to recognize that the negotiations that produced concessions and inducements, documented in the side agreements entered into the record, were key to Duke Energy’s ability to obtain signatures on its stipulation.

As noted previously, the entities asked again to execute a Duke Energy-dictated stipulation (i.e. the 2007 Stipulation) included non-parties to one or all of the cases (i.e. PWC, OHA, and the Ohio Energy Group, or “OEG”). The OCC and OPAE were not simply unsuccessful “in obtaining a result with which they could agree,”<sup>45</sup> but were rebuffed in each and every effort to modify the flaws in the 2007 Stipulation.<sup>46</sup> The settlement process dominated by

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<sup>43</sup> PUCO Merit Brief at 18.

<sup>44</sup> Company Merit Brief at 10.

<sup>45</sup> Rider Order at 27 (Appx. 34.).

<sup>46</sup> For instance, the OCC’s observations regarding the weak consumer protections in paragraph 8 of the 2007 Stipulation went unheeded. The hastily executed stipulation led to a cross-examination of Duke Energy Witness Whitlock by the Assistant Attorney General that revealed a disagreement between the Staff and Duke Energy. See OCC Remand Rider Ex. 2 at 3 (Haugh Supplemental). The 2007 Stipulation, therefore, lacked the balance that concerns the Court regarding the partial settlement standard set forth in *Consumers’ Counsel 1992*. See, e.g., *Time Warner AxS v. Public Util. Comm.* (1996), 75 Ohio St.3d 229, 234, 661 N.E.2d 1097.

Duke Energy resulted in one instance with an attempt by the PUCO Staff to retreat from the contents of paragraph 8 of the 2007 Stipulation. The change in course took place in the hearing. The Staff's counsel, disquieted by Duke Energy Witness Whitlock's response to the OCC's cross-examination, suggested to Mr. Whitlock that discussions surrounding the adoption of paragraph 8 supported a different result than the witness's reading of the 2007 Stipulation itself.<sup>47</sup> The end result was an additional agreement involving only Duke Energy and the PUCO that changed the contents of paragraph 8.<sup>48</sup>

The diversity of interests that the Commission has found supports the reasonableness of a settlement package<sup>49</sup> was missing in the *Rider Case*.<sup>50</sup> The diversity of interests that is relied upon by the PUCO in the Rider Order<sup>51</sup> and in its Merit Brief<sup>52</sup> does not exist when only the actual participants in the Rider Case are considered, and no representative of the residential class is a signatory. The PUCO, hard pressed to find support for the 2007 Stipulation, partly found diverse support based upon non-opposition by parties such as IEU.<sup>53</sup> [REDACTED]

[REDACTED] is a *negative* statement about the 2007 Stipulation, not a sign of diverse support.

<sup>47</sup> Tr. Remand Rider Vol. I at 157 (April 10, 2007) (Whitlock) (R. Appx. 4.).

<sup>48</sup> The terms of the separate agreement were accepted by the Commission. Rider Order at 12 (Appx. 19.), citing OCC Remand Rider Ex. 3 (OPAE Supp. 11-13.).

<sup>49</sup> See PUCO Merit Brief at 17. See also, *In re Restatement of Accounts and Records of CG&E, DP&L, and CSOE*, Case No. 84-1187-EL-UNC, Order at 7 (November 26, 1985) (Supp. 748.).

<sup>50</sup> Duke Energy ignores the PUCO's reliance on a diversity of interests, stating that the Rider Order would not "be different had PWC and OHA . . . been excluded from signing the 2007 Stipulation." Company Merit Brief at 7. Thereafter, Duke Energy itself relies upon the Commission's "factual finding . . . that there was a diversity of interests in support of the 2007 Stipulation." *Id.* at 15.

<sup>51</sup> *Rider Case*, Rider Order at 27 ("each stakeholder group") (Appx. 34.).

<sup>52</sup> PUCO Merit Brief at 20-21.

<sup>53</sup> PUCO Merit Brief at 20, quoting Rider Order at 27 (Appx. 34.).

The capability and knowledge of the City and PWC about issues in these cases, entities the PUCO asserts “represented” residential customers, is not demonstrated in these cases.<sup>54</sup> The entire record in these cases, stretching back to January 2003, is nearly devoid of activity on the part of the City and PWC. As noted in the PUCO Merit Brief, both intervened in 2004.<sup>55</sup> The City intervened out of time in 2004 and soon afterward withdrew from the rate plan cases.<sup>56</sup> The City entered a “special appearance” in a status conference held on December 14, 2006 to oppose the OCC’s efforts to obtain documents from Duke Energy that involved the City.<sup>57</sup> At that same status conference, PWC opposed the consolidation of the *Remand Case* and the *Rider Case* that was favored by the OCC. Thereafter, the City (but not PWC) intervened in the *Rider Case*. Both the City and PWC received payments by Duke Energy, and the only notable feature of their involvement in Duke Energy’s proposed rate plans was their execution of both the 2004 Stipulation and the 2007 Stipulation.

Neither the City nor PWC presented a witness at any hearing, cross-examined a witness, or raised an objection during the hearings. Neither the City nor PWC filed a brief, motion, or memorandum during the more than five years since the Company’s initial rate plan filing, with the exception of PWC’s efforts to strike portions of the briefs filed by OPAE and the OCC and

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<sup>54</sup> Rider Order at 27 (Appx. 34.).

<sup>55</sup> PUCO Merit Brief at 19.

<sup>56</sup> Id. The late entry of the City is noted in the Entry cited by the PUCO. Entry at 4 (May 13, 2004) (PUCO Sec. Supp. 91.).

<sup>57</sup> Duke Energy incorrectly states that it “identif[ied] its only agreement with a Party.” Company Merit Brief at 3. At the status conference in December 2006, the OCC moved to compel additional agreements involving the City that were within the bounds of the OCC’s 2004 discovery request. Tr. Remand Rider Prehearing at 47 (December 14, 2006) (R. Appx. 6.). The Company later turned these documents over to the OCC as the result of the attorney examiners’ decision. Id. at 60-61 (R. Appx. 8-9.).

PWC's three page statement in support for Duke Energy's *post-Order* proposal in 2004.<sup>58</sup>

PWC's understanding of the *Rider Case* was stated by its counsel: "Parties intervene because they want something from the Commission process and usually that outcome involves money."<sup>59</sup>

The focus of the City and PWC, based upon the record,<sup>60</sup> was not on the representation of residential customers or on the contents of the Duke Energy's rate plan proposals. During the five-year history in the record, neither the City nor PWC showed any capability or knowledge concerning the fuel, reserve capacity, or environmental compliance and related matters that are the subject matter of the *Rider Case*.

The circumstances of these cases, and of the signatories to the 2007 Stipulation, demonstrate that the partial settlement was reached without serious bargaining that involved capable, knowledgeable parties. The Commission's conclusions to the contrary<sup>61</sup> were error.

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

The settlement package stated in the 2007 Stipulation does not provide a benefit to ratepayers or serve the public interest. Instead of adopting Duke Energy's provisions stated in the 2007 Stipulation, the Commission should have adopted the recommendations of the Auditor (the PUCO's technical expert) regarding the FPP ("fuel and economy purchased power") and the SRT ("system reliability tracker"), and should have rejected the treatment given to the AAC ("annually adjusted component") that was the subject of the OCC's expert testimony.

The 2007 Stipulation states that an Auditor's recommendation "shall be withdrawn,"

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<sup>58</sup> PWC Memorandum in Support of Alternative Proposal (November 8, 2008) (R. Supp. 38.). PWC states that it "is a more recent participant in Commission matters, having been a party in only CG&E's ETP proceeding." *Id.* at 2 (R. Supp. 39.).

<sup>59</sup> *Rider Case*, PWC Motion for Extension of Time to File Reply Brief, Phase II, Attachment at 6 (June 1, 2007) (Supp. 550.).

<sup>60</sup> The PUCO's discussion of "evidence" related to the motivations of the City and PWC ignore the evidence in the form of statements by their representatives. PUCO Merit Brief at 25.

<sup>61</sup> *Rider Case*, Rider Order at 25-27 (Appx. 32-34.).

referring to the second major management audit recommendation.<sup>62</sup> The Audit Report states that Duke Energy should adopt a normal portfolio approach to the procurement of coal and emission allowances.<sup>63</sup> In its place, Duke Energy diverted serious consideration of the procurement practices criticized by the EVA auditor by offering “meet[ings] to discuss the terms and conditions under which DE-Ohio may purchase and manage coal assets, emission allowances, and purchased power for the period after December 31, 2008 [after the end of the rate plan]” in order to “make a recommendation . . . for consideration no later than the next FPP audit.”<sup>64</sup> Additional “meetings” bear no connection to the PUCO’s claimed effort to “promote a competitive environment under R.C. Chapter 4928.”<sup>65</sup> Typical of Duke Energy’s approach to discussions, the 2007 Stipulation approved by the PUCO provides for discussions only between stipulating parties (i.e. not including the OCC or OP&E).<sup>66</sup>

The eighth provision in the 2007 Stipulation presented the most public controversy at hearing because the PUCO Staff realized that it had not carefully considered the consequences of Duke Energy’s terms for the 2007 Stipulation.<sup>67</sup> Alternative language was provided late in the hearing process.<sup>68</sup> Both the original language and the later “Clarification” provide that the

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<sup>62</sup> Joint Remand Rider Ex. 1 at 5, ¶2 (2007 Stipulation) (OP&E Supp. 4.).

<sup>63</sup> PUCO Ordered Remand Rider Exhibit 1 at 1-9 (Auditor’s Report) (Supp. 510.) (“EVA recommends that DE-Ohio adopt traditional utility procurement strategies related to the procurement of coal and emission allowances.”).

<sup>64</sup> Joint Remand Rider Ex. 1 at 5, ¶3 (2007 Stipulation) (OP&E Supp. 4.).

<sup>65</sup> PUCO Merit Brief at 26.

<sup>66</sup> 2007 Stipulation at 5, ¶3 (OP&E Supp. 4.). “Parties” is used earlier in the document, and refers to the signatories. See, e.g., 2007 Stipulation at 2 (OP&E Supp. 2.) (“the Parties stipulate, agree and recommend”).

<sup>67</sup> See, e.g., Tr. Remand Rider Vol. I at 157 (April 10, 2007) (Whitlock) (R. Appx. 4.) (cross-examination by Staff’s attorney Reilly). The 2007 Stipulation was apparently executed hastily and without complete agreement between those persons who executed the agreement. The PUCO Merit Brief refers to the process as “expeditious resolution.” PUCO Merit Brief at 27.

<sup>68</sup> OCC Remand Rider Ex. 3 (OP&E Supp. 11-13.). The additional agreement is labeled an OCC exhibit because it was used in cross-examination of a Company witness by counsel for the OCC.

Auditor's "recommendation 6 on page 1-10 of the . . . Audit[or's] Report . . . is inapplicable."<sup>69</sup> The Auditor's recommendation would have excluded, for purposes of calculating SRT charges, the use of the generating plants obtained by Duke Energy as part of the merger during 2006 (referred to as the "DENA Assets") that resulted in the name change from CG&E to Duke Energy. In its place, the Company proposed to charge for capacity from the DENA Assets based upon agreement with the PUCO Staff "prior to DE-Ohio's purchase of such capacity."<sup>70</sup> This, the PUCO Merit Brief claims, "sets a pricing mechanism."<sup>71</sup> The procedure presents a danger to customers of unreasonably high charges associated with using *Company-owned generation* that has little or no connection with transactions in a "competitive environment."<sup>72</sup>

The controversy in these cases regarding AAC charges was whether the Company could charge customers a return on unfinished generation plant (commonly referred to as construction work in progress, or "CWIP") as part of the AAC. The OCC proposed to exclude a return on CWIP, consistent with the PUCO's earlier decision that only "expenses" (not a return on plant) would be included in the AAC.<sup>73</sup> The PUCO's departure from both its past determination of the issue and from any standard previously used by the PUCO to determine rates for electric service does not provide an "alternative regulation to promote a competitive environment"<sup>74</sup> but simply provides an arbitrary new administratively determined rate that provides the high rates demanded

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<sup>69</sup> Joint Remand Rider Ex. 1 at 7, ¶8 (2007 Stipulation) (OPAE Supp. 6.), also OCC Remand Rider Ex. 3 at 2 (OPAE Supp. 12.) ("Clarification" document).

<sup>70</sup> *Id.*

<sup>71</sup> PUCO Merit Brief at 30.

<sup>72</sup> PUCO Merit Brief at 26. Company Witness Smith agreed that the word "purchases" in paragraph eight of the 2007 Stipulation is inappropriate under circumstances where the generating facilities are owned by the Company. Tr. Remand Rider Vol. II at 95 (April 19, 2007) (Smith) (Supp. 526.).

<sup>73</sup> OCC Remand Rider Ex. 1 at 9 (OPAE Supp. 30.), quoting *Post-MDP Service Case*, Post-MDP Service Order at 32 (September 29, 2004) (Appx. 134.).

<sup>74</sup> PUCO Merit Brief at 26.

by Duke Energy.<sup>75</sup>

The broad public interest was not served by approval of the 2007 Stipulation. Instead, the Commission should have ordered the Company to comply with all the recommendations contained in the report of its expert Auditor (i.e. regarding the FPP and SRT charges) and the OCC-sponsored testimony (i.e. regarding the AAC charge).

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

The 2007 Stipulation violates important regulatory policies and practices. As discussed previously, the settlement was reached by involving entities who had no standing in the cases identified in the caption of the 2007 Stipulation.

This Court has rejected Commission approval of stipulations that do not balance important, competing interests. *Time Warner AxS v. Public Util. Comm.* (1996), 75 Ohio St.3d 229, 234, 661 N.E.2d 1097. In *Time Warner*, the Court warned against Commission practices that excluded customer classes. The “negotiation process” referred to in the PUCO’s Merit Brief<sup>76</sup> amounted to distributing Duke Energy’s terms to the City and PWC for their execution as “representatives” of residential customers, entities whose only other noteworthy participation in the Rider Case was their early attempts in the pre-hearing conference to impede the OCC’s efforts to develop the record.<sup>77</sup> Despite the warning in *Time Warner*, the Commission used the City and PWC as a means by which the residential class could be excluded from settlement in the *Rider Case*.

The fifth paragraph in the 2007 Stipulation addresses the calculation of the AAC (OPAE Supp. 5.), and adoption of that provision violates a traditional regulatory policy and practice.

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<sup>75</sup> *Post-MDP Service Case*, Entry on Rehearing at 10 (November 23, 2004) (Appx. 153.).

<sup>76</sup> PUCO Merit Brief at 37.

<sup>77</sup> OCC Merit Brief at 33-34 (City) and 35-36 (PWC).

That paragraph fails to recognize the Commission's earlier statements that AAC calculations would consider Company "expenses."<sup>78</sup> The PUCO Merit Brief contains no response to the OCC's argument. Also, the PUCO Merit Brief fails to explain why the Commission instructed the EVA Auditor to use the previously effective provisions regarding electric fuel component cases in the evaluation of Company practices as they related to the FPP,<sup>79</sup> while the calculation of the AAC completely ignores previously effective provisions regarding "CWIP." Commission "flip-flops" and inconsistencies on rate determination matters should be avoided.

The PUCO's Merit Brief contains the disturbing statement that the PUCO does not see how "actions under a prior stipulation affect the evaluation of the current [2007] [S]tipulation."<sup>80</sup> Part of the evaluation of a stipulation, as thoroughly briefed in this appeal, is the evaluation of the negotiation process. That process works for the benefit of the public when parties are well informed and the negotiating table is not unfairly tipped.

The controversy over the "prior stipulation" -- a stipulation in PUCO Case No. 05-724-EL-UNC regarding SRT charges ("SRT Stipulation," OPAE Supp. 64.) -- is that the terms of the SRT Stipulation were violated by Duke Energy. The SRT Stipulation, part of which is quoted in the Rider Order,<sup>81</sup> required Duke Energy to submit an application "for approval of the SRT market price associated with such DENA Asset(s)" and to "provide OCC with workpapers and other data supporting the use of DENA Assets . . . ."<sup>82</sup> Duke Energy ignored its responsibilities to provide the representative of residential customers an early opportunity to prepare for further

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<sup>78</sup> OCC Remand Rider Ex. 1 at 9 (OPAЕ Supp. 30), quoting *Post-MDP Service Case*, Post-MDP Service Order at 32 (September 29, 2004) (Appx. 134.).

<sup>79</sup> PUCO Ordered Remand Rider Exhibit 1 at 1-2 through 1-3 (Auditor's Report) (Supp. 503-504.).

<sup>80</sup> PUCO Merit Brief at 40.

<sup>81</sup> *Rider Case*, Rider Order at 17 (Appx. 24.).

<sup>82</sup> OCC Remand Rider Ex. 4 at 5, ¶8 (OPAЕ Supp. 68.).

Duke Energy proposals.<sup>83</sup> The outcome of a flawed negotiating process, as emphasized elsewhere in this Reply Brief and in *Consumers' Counsel 2006*, is a flawed stipulation.

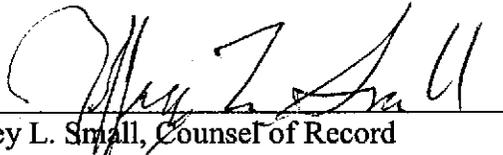
The PUCO's Rider Order, by its lack of concern over Duke Energy's failure to meet its obligations under a previously approved stipulation, encourages non-compliance with Commission orders and discourages efforts to settle cases before the Commission. The PUCO's Merit Brief states that "OCC's opinions of Duke and its reactions to events are not regulatory principles."<sup>84</sup> However, the Commission should consider non-compliance with stipulations and the violation of the Commission's orders to be important to the PUCO's effective resolution of cases and the regulation of utilities. Effective regulation is an important regulatory principle.

### III. CONCLUSION

This Court should reverse, vacate, or modify the PUCO's decision and remand this case to the PUCO with instructions to correct the Commission's errors.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER  
OHIO CONSUMERS' COUNSEL

By: 

Jeffrey L. Small, Counsel of Record  
Ann M. Hotz

Attorneys for Appellant  
Office of the Ohio Consumers' Counsel

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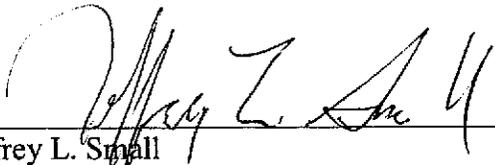
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<sup>83</sup> OCC Merit Brief at 44.

<sup>84</sup> PUCO Merit Brief at 40.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Reply Brief (Public Version) by the Office of the Ohio Consumers' Counsel was served upon the below-listed counsel by regular U.S. Mail, prepaid, this 11<sup>th</sup> day of August, 2008.

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

**PARTIES OF RECORD**

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**Ohio Partners for Affordable Energy**

Paul Colbert  
Rocco D'Ascenzo  
Duke Energy Ohio, Inc.  
155 E. Broad Street, 21<sup>st</sup> Floor  
Columbus, OH 43215

**Duke Energy Ohio**

**IN THE SUPREME COURT OF OHIO**

The Office of the Ohio Consumers' Counsel,	)	Case No. 08-0466
	)	
Appellant, et al.,	)	
	)	Appeal from the Public
v.	)	Utilities Commission of Ohio
	)	Case Nos. 06-1068-EL-UNC, 05-
The Public Utilities Commission	)	725-EL-UNC, 06-1069-EL-UNC,
of Ohio,	)	05-724-EL-UNC. 06-1085-EL-UNC
	)	
Appellee.	)	

---

**REPLY APPENDIX  
BY  
APPELLANT,  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL  
(PUBLIC)**

---

**IN THE SUPREME COURT OF OHIO**

The Office of the Ohio Consumers' Counsel,	)	Case No. 08-0466
	)	
Appellant, et al.,	)	
	)	Appeal from the Public
v.	)	Utilities Commission of Ohio
	)	Case Nos. 06-1068-EL-UNC, 05-
The Public Utilities Commission	)	725-EL-UNC, 06-1069-EL-UNC,
of Ohio,	)	05-724-EL-UNC. 06-1085-EL-UNC
	)	
Appellee.	)	

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**REPLY APPENDIX  
BY  
APPELLANT,  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL  
(PUBLIC VERSION)**

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BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

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

- - -

PROCEEDINGS

before Ms. Jeanne Kingery and Mr. Scott Farkas,  
Hearing Examiners, at the Public Utilities Commission  
of Ohio, 180 East Broad Street, Room 11-C, Columbus,  
Ohio, called at 10:00 a.m. on Tuesday, April 10,  
2007.

- - -

REMAND RIDER - VOLUME I

- - -

ARMSTRONG & OKEY, INC.  
185 South Fifth Street, Suite 101  
Columbus, Ohio 43215-5201  
(614) 224-9481 - (800) 223-9481  
Fax - (614) 224-5724

- - -

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**pages omitted**

1 BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

2 ---

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4 In the Matter of Duke : Case No.  
Energy Ohio : 03-93-EL-ATA

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8 PROCEEDINGS

9 Before Jean Kingery and Scott Farkas, Attorney

10 Examiners, held at the offices of the Public

11 Utilities Commission of Ohio, 180 East Broad

12 Street, Room 1247, Columbus, Ohio, on Thursday,

13 December 14, 2006, at 10:00 A.M.

14

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21 Armstrong & Okey, Inc.  
185 S. Fifth Street, Suite 101

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**pages omitted**

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The )  
Cincinnati Gas & Electric Company to Modify )  
Its Nonresidential Generation Rates to )  
Provide for Market-Based Standard Service ) Case No. 03-93-EL-ATA  
Offer Pricing and to Establish an Alternative )  
Competitive-Bid Service Rate Option Sub- )  
Sequent to the Market Development Period. )

In the Matter of the Application of The )  
Cincinnati Gas & Electric Company for )  
Authority to Modify Current Accounting ) Case No. 03-2079-EL-AAM  
Procedures for Certain Costs Associated with )  
the Midwest Independent Transmission )  
System Operator. )

In the Matter of the Application of The )  
Cincinnati Gas & Electric Company for )  
Authority to Modify Current Accounting )  
Procedures for Capital Investment in its ) Case No. 03-2081-EL-AAM  
Electric Transmission and Distribution System ) Case No. 03-2080-EL-ATA  
And to Establish a Capital Investment )  
Reliability Rider to be Effective after the )  
Market Development Period. )

In the Matter of the Application of The )  
Cincinnati Gas & Electric Company to Modify )  
its Fuel and Economy Purchased Power ) Case No. 05-725-EL-UNC  
Component of its Market-Based Standard )  
Service Offer. )

In the Matter of the Application of Duke )  
Energy Ohio, Inc., to Adjust and Set its ) Case No. 06-1069-EL-UNC  
System Reliability Tracker. )

In the Matter of the Application of Duke )  
Energy Ohio, Inc., to Adjust and Set its ) Case No. 05-724-EL-UNC  
System Reliability Tracker Market Price. )

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In the Matter of the Application of Duke )  
 Energy Ohio, Inc., to Adjust and Set the ) Case No. 06-1085-EL-UNC  
 Annually Adjusted Component of its Market )  
 Based Standard Service Offer. )

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)<sup>1</sup> to establish a rate stabilization plan and, as a part of that plan, to recover various costs through identified riders.
- (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. The entry on rehearing, *inter alia*, modified or created various riders, as part of the rate stabilization plan.
- (3) Adjustments to certain of the riders established through the RSP case are currently pending before the Commission. Specifically, the fuel and economy purchased power component (FPP) is being considered in Case No. 05-725, the system reliability tracker component (SRT) is being considered in Case Nos. 06-1069 and 05-724, and the annually adjusted component (AAC) is being considered in Case No. 06-1085, all as captioned above.
- (4) In the FPP and SRT proceedings, testimony of staff and the intervenors is scheduled to be filed on November 29, 2006. The examiner has previously determined that a hearing should be held, but a date for that hearing has not been established.

<sup>1</sup> 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.

- (5) In the AAC case, testimony of staff and intervenors was scheduled to be filed on November 28, 2006. A hearing is currently scheduled to be held on December 5, 2006.
- (6) The examiner finds that, in light of the Supreme Court's remand of the RSP case, testimony should not be filed at this time in the FPP and SRT proceedings, and the hearing in the AAC proceeding should be continued until a date to be determined.
- (7) In addition, the examiner finds that a hearing should be held in the remanded RSP case, in order to obtain the record evidence required by the court. At this time, a prehearing conference should be scheduled to discuss the procedure for the hearing in the remanded RSP case, as well as the FPP, SRT, and AAC proceedings. For purposes of discussion, the examiner proposes that a single hearing be held in all of these proceedings and that testimony by Duke be filed first, followed by a review period and subsequent testimony by intervenors and staff.
- (8) The prehearing conference in these proceedings should be held at 10:00 a.m. on Thursday, December 14, 2006, in the legal conference room on the 12<sup>th</sup> floor of the offices of the Commission, 180 East Broad Street, Columbus, Ohio 43215.
- (9) The court's opinion in the RSP case also held that the Commission should have compelled disclosure of side agreements requested in discovery by the Office of the Ohio Consumers' Counsel (OCC). Therefore, the examiner finds that Duke should, as ordered by the court, disclose to OCC the information requested with regard to side agreements.

It is, therefore,

ORDERED, That testimony in the FPP and SRT proceedings not be filed, until further notice. It is, further,

ORDERED, That the hearing, currently scheduled for December 5, 2006, in the AAC proceeding be continued. It is, further,

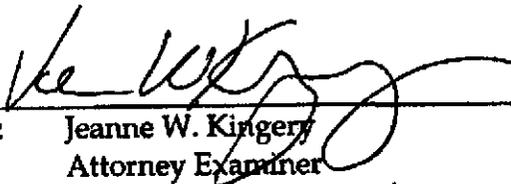
ORDERED, That a prehearing conference be held on Thursday, December 14, 2006, as set forth in finding (8). It is, further,

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ORDERED, That Duke shall disclose to OCC the information requested in discovery with regard to side agreements. It is, further,

ORDERED, That a copy of this entry be served upon Energy Ventures Analysis, Inc., and all parties of record in these proceedings.

THE PUBLIC UTILITIES COMMISSION OF OHIO

  
By: Jeanne W. Kingery  
Attorney Examiner

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Entered in the Journal

NOV 29 2008



Renee J. Jenkins  
Secretary

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of )  
Columbus Southern Power Company and )  
Ohio Power Company for Authority to )  
Recover Costs Associated with the Ultimate ) Case No. 05-376-EL-UNC  
Construction and Operation of an )  
Integrated Gasification Combined Cycle )  
Electric Generating Facility. )

OPINION AND ORDER

The Public Utilities Commission of Ohio (Commission), having considered the testimony and all other evidence presented in this matter and relevant provisions of the Revised Code, hereby issues its Opinion and Order.

APPEARANCES

Marvin I. Resnik and Sandra K. Williams, 1 Riverside Plaza, Columbus, Ohio 43215-2373; and Daniel Conway, Porter, Wright, Morris & Arthur, 41 South High Street, Columbus, Ohio 43215, on behalf of Columbus Southern Power Company and Ohio Power Company.

Jim Petro, Attorney General of the state of Ohio, Duane W. Luckey, Senior Deputy Attorney General, Steven T. Nourse, Werner L. Margard III, and Thomas W. McNamee, Assistant Attorneys General, 180 East Broad Street, 9<sup>th</sup> Floor, Columbus, Ohio 43215, on behalf of the Staff of the Public Utilities Commission of Ohio.

Janine L. Migden-Ostrander, Ohio Consumers' Counsel, Kimberly J. Bojko and Jeffery L. Small, Assistant Consumers' Counsel, 10 West Broad Street, Suite 1800, Columbus, Ohio 43215-3485, on behalf of the residential customers of Columbus Power Company and Ohio Power Company.

Kathy J. Kolich, 76 South Main Street, Akron, Ohio 44308, on behalf of FirstEnergy Solutions Corporation.

Samuel C. Randazzo and Lisa Gatchell McAlister, McNees Wallace & Nurick LLC, Fifth Third Center, 21 East State Street, Suite 1700, Columbus, Ohio 43215-4228, on behalf of Industrial Energy Users-Ohio.

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John W. Bentine, Joseph C. Pickens and Bobby Singh, Chester, Wilcox & Saxbe, LLP, 65 East State Street, Suite 1000, Columbus, Ohio 43215, on behalf of American Municipal Power-Ohio, Inc.

Sally W. Bloomfield and Thomas J. O'Brien, Bricker & Eckler LLP, 100 South Third Street, Columbus, Ohio 43215-4291; and Joseph Condo, Calpine Corporation, 250 Parkway Drive, Suite 380, Lincolnshire, Illinois 60069, on behalf of Calpine Corporation.

M. Howard Petricoff, Stephen Howard and Michael Settineri, Vorys, Sater, Seymour and Pease LLP, 52 East Gay Street, Columbus, Ohio 43216-1008, on behalf of Constellation Generation Group, LLC, Constellation Energy Commodities Group, Inc., Constellation NewEnergy Inc., and Beard Generation, LLC.

Michael D. Dortch, Baker & Hostetler, Capitol Square, 65 East State Street, Suite 2100, Columbus, Ohio 43215-4260, on behalf of General Electric Company, GE Energy (USA), LLC, Bechtel Corporation, and Bechtel Power Corporation.

David C. Rinebolt, 237 South Main Street, 4<sup>th</sup> Floor, Suite 5, P.O. Box 1793, Findlay, Ohio 45839-1793, on behalf of Ohio Partners for Affordable Energy.

David Boehm and Michael L. Kurtz, Boehm, Kurtz & Lowry, 36 East Seventh Street, Suite 1510, Cincinnati, Ohio 45202-4454, on behalf of Ohio Energy Group.

Thomas L. Rosenberg and Jessica L. Davis, Roetzel & Andress, LPA, National City Center, 155 East Broad Street, 12<sup>th</sup> Floor, Columbus, Ohio 43215, on behalf of the International Brotherhood of Electrical Workers Local #970, Ironworkers Local #787; the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada Local #168, Parkersburg-Marion Building and Construction Trades Council AFL-CIO.

Thomas Lodge, Thompson Hine, LLP, One Columbus, 10 West Broad Street, Suite 700, Columbus, Ohio 43215-3435, on behalf of Global Energy and Lima Energy Company.

Dane Stinson and William A. Adams, Bailey, Cavaliere, LLC, 10 West Broad Street, Suite 2100, Columbus, Ohio 43215, on behalf of Direct Energy Services, LLC.

Evelyn R. Robinson, 5450 Frantz Road, Suite 240, Dublin, Ohio 43016, on behalf of Green Mountain Energy Company.

OPINIONHistory of the Proceeding

On March 18, 2005, Columbus Southern Power Company (CSP) and Ohio Power Company (Ohio Power) (collectively AEP, AEP Companies or Companies) filed an application with the Commission for approval of a mechanism to recover the costs associated with the construction and operation of an integrated gasification combined cycle (IGCC) electric generation facility in Ohio. The Companies request approval of its proposed cost recovery mechanism to provide for the design, construction and operation of a 629<sup>1</sup> [net] megawatt (MW) electric generation facility in Meigs County, Ohio. The AEP Companies have concluded that the facility is necessary to allow the Companies to provide a firm supply of generation service to the Companies' Ohio customers. The Companies contend that they must be ready and able to provide firm, generation service to customers who have not selected a competitive retail electric service (CRES) provider and any customer who returns to the AEP Companies' service as a result of the CRES provider's default or at the customer's election. The Companies contend that the proposed IGCC facility will allow the companies to help meet their respective obligations as the provider of last resort (POLR). The Companies are proposing to recover the costs of the IGCC facility in three phases to continue throughout the commercial life of the facility. Further details of the Companies' proposal are provided below.

On April 12, 2005, a conference was held to develop the procedural schedule for this case. The procedural schedule was published by entry issued April 19, 2005. The procedural schedule was established as follows: the Companies' testimony was due by May 5, 2005; a technical conference was scheduled for May 16, 2005; motions to intervene were due by July 1, 2005; intervenor testimony was due to be filed by July 13, 2005; all discovery requests were to be submitted by the parties by no later than July 25, 2005; staff testimony was due by July 25, 2005; the Companies supplemental testimony was due by August 1, 2005; and the evidentiary hearing was scheduled to begin on August 8, 2005.

Motions to intervene were timely filed by Industrial Energy Users-Ohio (IEU); Ohio Energy Group (OEG); FirstEnergy Solutions Corporation (FirstSolutions); Ohio Consumers' Counsel (OCC); Calpine Corporation (Calpine); Global Energy and Lima Energy Company (jointly Lima Energy); International Brotherhood of Electrical Workers Local #970, Ironworkers Local #787; the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada Local #168, Parkersburg-Marion Building and Construction Trades Council AFL-CIO, (collectively the Unions); Direct Energy Services, LLC (Direct Energy); Beard Generation, LLC (Beard); Ohio Partners for Affordable Energy (OPAE); Constellation Generation

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<sup>1</sup> Subsequent to the filing of the initial application, the Companies revised the facility output from 600 MW to 629 MW. See Company Ex. 5-B at 4.

Group, LLC, Constellation Energy Commodities Group, Inc., and Constellation NewEnergy Inc. (jointly Constellation); and Green Mountain Energy Company (Green Mountain). All of the requests for intervention were granted. American Municipal Power-Ohio, Inc. (AMP-Ohio) filed a late request for intervention. Nonetheless, AMP-Ohio's request was granted. Pursuant to entry issued August 1, 2005, General Electric Company, GE Energy (USA), LLC, Bechtel Corporation, and Bechtel Power Corporation (jointly GE/Bechtel) were granted limited intervention in this matter for the purpose of protecting their interest in certain confidential and proprietary documents exchanged as a part of the discovery process.

On May 5, 2005, the AEP Companies filed testimony in support of the application. The AEP Companies filed the direct testimony of Kevin E. Walker (Company Ex. 1), J. Craig Baker (Companies Ex. 2), Bruce H. Braine (Companies Ex. 3), Michael J. Mudd (Companies Ex. 4), William M. Jasper (Companies Ex. 5), Philip J. Nelson (Companies Ex. 6), David M. Roush (Companies Ex. 7), and Stephen T. Haynes (Companies Ex. 8).

Pursuant to the procedural schedule, intervenor testimony was filed on July 15, 2005. OCC filed the direct testimony of Donald C. Lechnar (OCC Ex. 1) and Michael Haugh (OCC Exs. 2 and 2-A). Baard filed the direct testimony of John Baardson (Baard Ex. 1). Direct Energy filed the direct testimony of Mark R. Frye (Direct Energy Ex. 1). IEU filed the direct testimony of J. Bertram Solomon (IEU Ex. 24). Calpine filed the direct testimony of William J. Taylor, III (Calpine Ex. 1). OEG filed the direct testimony of Kevin C. Higgins (OEG Ex. 10 and OEG 10A). Staff filed, on July 25, 2005, the direct testimony of Kim Wissman (Staff Ex. 1), Klaus Lambeck (Staff Ex. 2), and Richard Cahaan (Staff Ex. 3).

By entry issued May 26, 2005, as supplemented by entry issued June 30, 2005, local public hearings were scheduled in CSP's and Ohio Power's service areas. Public hearings were held in Hilliard, Canton, and Pomeroy, Ohio. The AEP Companies published notice of the hearings and filed proof of publication (Companies Ex. 16). At the public hearing held in Hilliard on August 1, 2005, five witnesses offered testimony: two witnesses testified in opposition to the application, two witnesses testified in favor of the facility, and one witness made comments. A local public hearing was held on August 3, 2005 in Canton, Ohio. At the Canton hearing, three witnesses offered testimony: two persons who are opposed to the application and one person who is in favor of the project.

On August 4, 2005, a local public hearing was held in Pomeroy, Ohio, the same county as the proposed location for the IGCC facility. At the Pomeroy hearing there were over 100 people in attendance of which 30 offered testimony. Twenty-six witnesses testified in favor of the project and four witnesses raised environmental and safety concerns about the project. The witnesses offering testimony in support of the proposed facility included Senator Joyce Padgett and Representative Jimmy Stewart. Senator Padgett endorsed the construction and operation of the proposed facility for its beneficial

effect on the county, the State of Ohio, and the families and businesses in Meigs County and the surrounding areas. Senator Padgett also noted that the facility will support the Ohio coal industry and clean coal technology. Representative Stewart's testimony focused on the overall benefits of IGCC technology and the environmental advantages of IGCC. A statement by Representative Jennifer Garrison endorsing the construction of the IGCC facility was also offered into the record. Also offering testimony at the Pomeroy local hearing were numerous representatives and members of the skilled trades and labor unions in the area. The Unions strongly endorse this project for the 1,250-2,000 construction jobs and 125 permanent jobs that it will bring to the county and the benefit to the local economy.

The evidentiary hearing commenced on August 8, 2005 and continued each business day through August 16, 2005. At the conclusion of the hearing, the Companies and certain other parties to this proceeding had not reached a resolution regarding the recalling of witnesses (Tr. VII at 93). To that end, on September 6, 2005, OCC, IEU-Ohio and the Companies docketed late-filed exhibits in lieu of calling or recalling additional witnesses (Late filed OCC/IEU Exs. 1-2, 4-11, 14-15, 18-26, 28, 29, 31-38, 41 and 44-45). By entry issued September 7, 2005, all parties were directed that, unless the Commission received a motion in opposition to the late-filed exhibits, the exhibits would be admitted into the record. No party filed a motion in opposition to the late-filed exhibits. Initial briefs were filed by the parties on September 20, 2005. Reply briefs were filed by the parties no later than October 11, 2005.

On December 27, 2005, Direct Energy filed a request that the Commission take administrative notice of certain press releases by the AEP Companies. The press releases cited were those issued by the AEP Companies on December 15 and December 20, 2005 and the newspaper article carried by a Cincinnati newspaper, *The Enquirer*. The press releases and article discuss American Electric Power's earnings, 2006 projected earnings and the purchase of a natural gas generation facility. Direct Energy contends that the representations made in the article and press releases support the claims of Direct Energy and the other interveners as to the need for the proposed IGCC facility and the risk to Ohio's ratepayers.

On January 6, 2006, the Companies filed a memorandum contra the request for administrative notice. The AEP Companies ask that the Commission recognize that the nature of the activities noted in the press releases and article were known at the time of the hearing and referenced in the record (Tr. V at 204, 206). The Companies also note that the record in this case has been closed for almost four months.

The Commission agrees that it is improper to take administrative notice of the press releases and newspaper article at this time; the AEP Companies' earnings and the

purchase of a generating facility are issues that could have been addressed during the hearing. Accordingly, Direct Energy's request for administrative notice is denied.

Proprietary Information in this Proceeding

On July 14, 2005, OCC filed a motion to compel discovery and to permit the supplementation of OCC testimony. OCC claimed that the AEP Companies had not fully responded to OCC's request for the production of documents, pending the execution of a protective agreement. The Companies filed a memorandum contra OCC's motion. The Companies represented that OCC was given the opportunity to view any documents requested at the Companies' offices. On July 19, 2005, the Attorney Examiners held an off-the-record conference between OCC and the Companies to discuss the discovery dispute. At the end of the conference, the Attorney Examiners concluded that there were three classes of documents at issue in this discovery dispute: (a) documents which the AEP Companies claimed were confidential; (b) documents that contained or reflected information from GE/Bechtel;<sup>2</sup> and (c) critical energy infrastructure information (CEII), as determined by the Companies. As OCC and the Companies were informed at the conference, and as confirmed by entry issued July 21, 2005, the AEP Companies were ordered to provide, pursuant to the protective agreement attached to OCC's motion to compel, the documents the Companies claimed to be confidential, the GE/Bechtel documents and the CEII documents identified as responsive to OCC's requests for production of documents. Further, as to the CEII, OCC was directed to review the CEII documents at the Companies' offices to determine which documents were needed by OCC to prepare for the hearing.

On July 22, 2005, GE/Bechtel filed a motion to intervene in this case for the limited purpose of protecting certain confidential information. GE/Bechtel also filed an interlocutory appeal of the July 21, 2005 entry and a motion for protective order on July 26, 2005. On August 1, 2005, OCC filed a memorandum contra GE/Bechtel's motion for protective order and interlocutory appeal.

By entry issued August 1, 2005, the Attorney Examiners granted GE/Bechtel's motion to intervene. By the same entry, the Attorney Examiners granted GE/Bechtel's request for protective order by issuing a protective order that would protect the documents at issue unless and until OCC and GE/Bechtel executed a negotiated protective agreement. Further, to allow the case to continue in accordance with the schedule established, OCC and GE/Bechtel were directed to develop a proposal on the introduction of exhibits and the redaction of confidential and/or proprietary information. OCC and GE/Bechtel were informed that if they could not agree on the proprietary nature

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<sup>2</sup> GE/Bechtel is a third-party vendor with whom the Companies have contracted to provide certain engineering, procurement and construction services in relation to the proposed IGCC facility.

of information in the documents, the Attorney Examiners would conduct an in-camera review to determine the nature of the documents at issue.

On August 8, 2005, GE/Bechtel and the Companies each filed motions to maintain the confidentiality of their respective confidential documents and the testimony drawn therefrom. OCC subsequently filed a memorandum contra the motions of GE/Bechtel and AEP. During the hearing, on August 9, 2005, after an in-camera review of certain documents, the Attorney Examiners ruled that certain information provided to OCC by GE/Bechtel and AEP, and to other intervenors pursuant to a protective agreement, contained trade secrets and/or confidential or proprietary information that should be protected from public disclosure (Tr. II at 78-80). To avoid the delay of the hearing, the proceedings were periodically closed to facilitate the cross-examination of witnesses in regard to confidential matters. At the conclusion of the hearing, the Companies and GE/Bechtel were directed to review the confidential documents introduced into evidence in the case and to redact confidential and/or proprietary information and file the redacted documents in the public record. The redacted documents were then filed in the docket by the AEP Companies on August 30, 2005 and by GE/Bechtel on September 1, 2005.

In its initial brief, OCC argues that vast amounts of the record in this case have been sealed from public scrutiny in violation of Section 149.43, Revised Code, and Rule 4901-1-24(D), Ohio Administrative Code (O.A.C.). OCC notes that in Case No. 93-487-TP-ALT, *In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, entry issued November 25, 2003, the Commission acknowledged that:

All proceedings at the Commission and all documents and records in its possession are public records, except as provided in Ohio's public records law (Section 149.43, Revised Code) and as consistent with the purposes of Title 49 of the Revised Code. Ohio public records law is intended to be liberally construed to "ensure that governmental records be open and made available to the public and . . . are subject only to a few very limited and narrow exceptions." *State ex rel. Williams v. Cleveland* (1992), 64 Ohio St.3d 544, 549; *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.* (1997), 80 Ohio St.3d 513, 518.

OCC argues that the Companies and GE/Bechtel have been permitted the "wholesale" removal of documents from the public record. OCC argues that the AEP Companies' and GE/Bechtel's motions filed August 8, 2005 fail to specifically state the contents of each document that each company seeks to protect from public disclosure. OCC asserts that the AEP Companies and GE/Bechtel failed to meet their burden under Ohio law. Therefore, OCC concludes that the Attorney Examiners' ruling granting the Companies' and GE/Bechtel's requests for confidential treatment was in error and should be reversed (OCC Brief at 43-46).

AEP Companies argue that OCC's request to place in the public record the limited amount of confidential information protected under seal in this case overlooks the need to protect the proprietary and confidential information of third-party vendors against the public policy that favors public access to information presented to a public agency (Companies Reply Brief at 41-43). The Companies emphasize that the proposed power plant design relies on proprietary IGCC technology that GE/Bechtel, Battelle and Sargent & Lundy<sup>3</sup> seek to protect to retain the commercial value of their investments (*Id.* at 41).

The AEP Companies contend that, at the direction of the presiding Attorney Examiners, they, in consultation with Sargent & Lundy, Battelle and GE/Bechtel, reviewed all the exhibits and testimony included in the confidential portion of the record to reduce the amount of information under seal (*Id.* at 42). The Companies emphasize that releasing such information into the public record, as OCC requests, will have a chilling effect on the deployment of new technologies in Ohio. The Companies assert that significant effort has been expended to protect the confidential nature of certain information in the record and to minimize the confidential portion of the record. The Companies maintain that it is crucial that the Commission carefully balance the release of confidential, proprietary information owned by third-party vendors with the public record requirements for state agencies. For these reasons, the Companies ask that the Commission reject OCC's request to place the limited amount of protected information in the public record.

GE/Bechtel also opposes OCC's request. GE/Bechtel argues that OCC's request misrepresents the facts, is procedurally defective and ignores the exceptions to Ohio's public records law. GE/Bechtel also notes that OCC has mischaracterized the process implemented by the Attorney Examiners and failed to mention that an in-camera examination of the documents was conducted, and that GE/Bechtel, at the direction of the Attorney Examiners, examined the exhibits and the transcripts filed under seal and redacted any GE/Bechtel proprietary information from the documents and filed the redacted copies in the public record (GE/Bechtel Reply Brief at 3-4).<sup>4</sup>

GE/Bechtel further argues that OCC's request to place all documents and exhibits in the public record is untimely. According to GE/Bechtel, OCC's recourse was an interlocutory appeal of the Attorney Examiners' August 9 ruling in accordance with Rule 4901-1-15, O.A.C. GE/Bechtel states that, pursuant to Rule 4901-1-15, O.A.C., OCC had only five days after the August 9, 2005 ruling to file an appeal. GE/Bechtel reasons that

<sup>3</sup> Battelle and Sargent & Lundy performed various analyses for the AEP Companies in regards to the proposed IGCC facility.

<sup>4</sup> Furthermore, GE/Bechtel states that after the close of the hearing, the OCC identified an additional 45 exhibits that it demanded to be filed in the public record as late-filed exhibits. GE/Bechtel examined those exhibits and, consistent with the Attorney Examiners ruling, redacted confidential and proprietary information from copies of those exhibits. GE/Bechtel provided those redacted copies to both OCC and IEU-Ohio on September 1, 2005. OCC and IEU-Ohio subsequently filed those redacted copies as exhibits in the public record, and unredacted copies under seal, on September 6, 2005.

paragraph (A) of Rule 4901-1-15, O.A.C., is not applicable. GE/Bechtel argues that Rule 4901-1-15(A), O.A.C., applies, under the circumstances presented in this matter, when any party's motion for a protective order is denied. The motions of the AEP Companies and GE/Bechtel for protective orders were granted. GE/Bechtel acknowledges that pursuant to Rule 4901-1-15(B), O.A.C., OCC could seek to appeal the August 9, 2005 Attorney Examiners' ruling by requesting that the issue be certified to the Commission. GE/Bechtel notes OCC has not made any such request to certify the record. GE/Bechtel argues that, pursuant to Rule 4901-1-15(C), O.A.C., if OCC wished to take an interlocutory appeal, it was required to file an interlocutory appeal of the Attorney Examiners' August 9, 2005 ruling within five days.<sup>5</sup> Thus, GE/Bechtel reasons that OCC's request that the confidential information in this case become part of the public record is procedurally defective and should be denied.

Finally, GE/Bechtel posits that, contrary to OCC's claims, GE/Bechtel's July 26, 2005 and August 8, 2005 motions included the affidavits of GE/Bechtel representatives that: (1) detailed the nature and the kinds of information contained in the documents; (2) stated that GE/Bechtel protects the information at issue from disclosure, even internally; (3) noted that the information was provided to the AEP Companies pursuant to a protective agreement; (4) listed the protections undertaken by GE/Bechtel to prevent the disclosure of the information at issue; (5) discussed the value of the information to GE/Bechtel; and (6) stated the potential harm to GE/Bechtel if the information was known to the public. Thus, GE/Bechtel believes it presented sufficient information to justify its request to treat the information as proprietary trade secrets under Ohio law.

With respect to GE/Bechtel's procedural arguments, Rule 4901-1-15, O.A.C., does not require a party to file an interlocutory appeal to an attorney examiner's ruling. Paragraph (A) of the rule states that a party "may" file an interlocutory appeal; it does not require that one be filed. Further, paragraph (B) of the rule permits the filing of interlocutory appeals to certain rulings only if certified by the attorney examiner first. Accordingly, we find that Rule 4901-1-15, O.A.C., does not preclude OCC from raising the issue on brief. Lastly, we also note that the AEP Companies and GE/Bechtel were not requested to determine what information submitted under seal at the hearing would remain under seal until after the hearing had concluded. Accordingly, we find no merit to the procedural arguments made by GE/Bechtel.

With respect to the substantive issue, we find that the record in this case supports the Attorney Examiners' ruling that the documents filed under seal included proprietary trade secret information. First, the Commission notes that, pursuant to Section 4901.12,

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<sup>5</sup> Rule 4901-1-15(C), O.A.C., provides in part:

Any party wishing to take an interlocutory appeal from any ruling must file an application for review with the commission within five days after the ruling is issued.

Revised Code, except as provided in Section 149.43, Revised Code, and as consistent with the purposes of Title 49 of the Revised Code, all proceedings of the Commission and all documents and records in its possession are public records. Section 149.43(A), Revised Code provides that:

"Public record" means records kept by any public office ... "Public record" does not mean any of the following:

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

The Commission recognizes that Ohio's public records law is intended "to be liberally construed to ensure that governmental records be open and made available to the public and that public records are subject only to a few very limited and narrow exceptions." *State ex. rel Williams* at 549. However, one of the exceptions is for trade secrets. See Sections 1333.62 and 1333.63, Revised Code. Section 1333.61(D), Revised Code, defines trade secret as:

Information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

- (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use.
- (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>6</sup>

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<sup>6</sup> We recognize that the Ohio Supreme Court has adopted several factors to determine whether a trade secret claim meets the statutory definition in Section 1333.61(D), Revised Code. See *State ex. rel The Plain Dealer v. Ohio Dept. of Ins.*, at 524-525, citing *Pyromatics, Inc. v. Petruziello* (1983), 7 Ohio App.3d 131. *Pyromatics* states the factors are: (a) the extent to which the information is known outside the business; (b) the extent to which it is known to those inside the business, i.e., by the employees; (c) the precautions taken by the holder of the "trade secret" to guard against the secrecy of the information; (d) the savings effected and the value to the holder in having the information as against competitors; (e) the amount of effort or money expended in obtaining and developing the information; (f) the amount of time and expense it would take for others to acquire and duplicate the information.

The Commission finds that the Attorney Examiner's ruling and the confidential record developed in this case are consistent with Ohio public records law and Title 49. We note that in an effort to avoid further delay of the hearing and allow OCC an opportunity to cross-examine the Companies' witnesses, portions of the hearing were closed to any party that did not have a protective agreement, and subsequently the AEP Companies and GE/Bechtel were directed to review and redact the documents introduced into evidence that contained proprietary, trade secret information. Thus, the Commission concludes that the August 9, 2005 ruling is reasonable, in light of the fact that the hearing was in progress and the subsequent directive to the AEP Companies and GE/Bechtel to reduce the amount of proprietary information in the record. Accordingly, OCC's request to overturn the Attorney Examiners' August 9, 2005 ruling is denied. Furthermore, the documents filed under seal in this proceeding should remain under seal for 18 months after the issue date of this order.

#### Companies' Application

On March 18, 2005, Ohio Power and CSP filed an application for authority to recover costs associated with the construction and operation of an IGCC generating facility (Application). The Companies intend to use the output from this generating station to serve their POLR customers.

The Application proposes that all reasonably incurred costs related to the IGCC facility be recovered in three phases (App. at 5; Tr. I at 200). The first phase will recover preconstruction costs, such as engineering and scoping study. First phase cost recovery will be through a 12-month bypassable generation surcharge, set to commence in January 2006 (App. at 5-8). The surcharge would be applied to the Companies' standard service rate schedules approved in their rate stabilization plan proceeding (RSP) (*In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post Market Development Period Rate Stabilization Plan*, Case No. 04-169-EL-UNC, Opinion and Order [January 26, 2005]) (RSP Order). The surcharge is intended to recover the Companies' preconstruction costs; that is, costs incurred prior to the Companies entering into an engineering, procurement and construction (EPC) contract estimated to be \$23.7 million (Companies Ex. 5B, WMJ Ex. 4). The net of the over- and underrecovered revenues during Phase I will be subtracted from or added to the Construction Work in Process (CWIP) accounts for the IGCC facility which will be used in determining the IGCC Recovery Factor during Phase III (App. at 4, 5).

Phase II of the cost recovery mechanism also provides a bypassable temporary generation rate surcharge. Under the Companies' proposal, this surcharge would begin with the first billing cycle in 2007. The level of the surcharge would change each year, until the surcharge terminates after the last billing before the IGCC plant goes into commercial operation, which is currently estimated to occur in mid-2010 (Companies Ex. 2 at 5). Phase II costs are the carrying costs on the cumulative investment in the generating

facility (App. at 8). The carrying costs will include carrying costs deferred after the EPC contract is executed, which is expected to be in approximately July 2006, until the Phase II surcharges begin. As with the Phase I surcharges, the Phase II generation rate surcharges will be applied to the Commission-approved standard service rate schedules.

Phase III covers the operating life of the IGCC facility. Phase III costs are the actual capital costs, carrying costs and operating costs of the plant, all of which the Companies propose will be recovered through surcharges known as the IGCC Recovery Factor and IGCC Adjustment Factor. These surcharges will be included in the Companies' distribution rates once the plant is placed in commercial operation (App. at 10-11). The IGCC Recovery Factor will be based on a return of and a return on the investment in the IGCC facility as well as operating expenses, including fuel and consumables (Tr. I at 242). Under the Companies' proposal, the Commission would consider and approve the IGCC Recovery Factor after a hearing and the Companies' showing that it is reasonable. The IGCC Recovery Factor will be subject to future adjustment throughout Phase III for relevant changes, such as investment level, customer load, appropriate rate of return, life expectancy of the IGCC facility and operating expenses (Companies' Ex. 2, at 9).

The IGCC Recovery Factor would be adjusted annually to reflect changes in the costs of fuel and consumables since the time it was last set, as well as any prior over- or underrecovery of actual fuel costs, including purchased power and consumables. Once an IGCC Recovery Factor is determined, it would be compared to the then-current Commission-approved standard service offer. Based on that comparison an IGCC Adjustment Factor would be calculated to reflect the revenue difference between the Recovery Factor and the then-current Commission-approved standard service offer (*Id.*). The IGCC Adjustment Factor will be either a charge (if there is a revenue deficiency) or credit (if there is a revenue surplus) to the Companies' Commission-approved distribution rate schedules. The IGCC Adjustment Factor would be revised throughout Phase III as the Commission approves changes to the Companies' standard service offer and to the IGCC Recovery Factor (*Id.* at 11, 12).

#### Jurisdiction Issues

The Companies argue that when enacting Senate Bill 3 (SB 3), the General Assembly contemplated that, even at the end of the five-year Market Development Period (MDP), not all customers will have switched to a competitive retail electric service ("CRES") provider for generation service. To provide a safety net for those customers, the General Assembly imposed the POLR generation service obligation on electric distribution utilities:

After its market development period, an electric distribution utility in this state shall provide consumers...a market-based standard service offer of all competitive retail electric services

necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. (Section 4928.14(A), Revised Code).

The General Assembly also provided a safety net for those customers who did switch to a CRES provider that subsequently failed to supply generation service to those customers. Those customers would default back to their electric distribution utility (EDU) for the provisions of generation service:

After the market development period, the failure of a supplier to provide retail electric generation service to customers within the certified territory of the electric distribution utility shall result in the supplier's customers, after reasonable notice, defaulting to the utility's standard service offer filed under division (A) of this section until the customer chooses an alternative supplier. (Section 4928.14(C), Revised Code).

The Companies aver that the Commission has recognized that Divisions (A) and (B) of Section 4928.14, Revised Code, require the Companies to fulfill POLR responsibilities after the MDP (RSP Order at 27). The Commission specifically noted in the RSP order that the Companies will be held as the POLR to consumers who either fail to choose an alternative supplier or who choose to return to them after taking service from another generation supplier (*Id.* at 37). Consistent with that obligation to serve, the AEP Companies assert that the Companies' responsibility extends beyond ensuring that they have the capacity to serve non-switching or returning customers whose requirements may be readily predicted, that they must also have sufficient capacity to meet unanticipated demand (*Id.*). The AEP Companies add that the Commission also has recognized that the EDU's POLR responsibility is one for which it incurs necessary costs and which warrants compensation. (RSP Order at 27; *In Re The Dayton Power and Light Co.*, Case No. 02-2779-EL-ATA, Opinion and Order, at page 28 (September 2, 2003); *In Re Ohio Edison Co et al.*, Case No. 03-2144-EL-ATA, Opinion and Order at pages 23-24 (June 9, 2004)).

The AEP Companies note that the Ohio Supreme Court (Court) has confirmed the EDU's POLR responsibility and the lawfulness of establishing a separate charge for recovering the costs of fulfilling that obligation (*Constellation NewEnergy, Inc. v. Pub. Util Comm'n*, 104 Ohio St. 3d 530 (2004)).

In the *Constellation NewEnergy* case, the Court considered the Commission's authorization of a "rate stabilization surcharge" ("RSS") that was imposed on all of a utility's customers. In affirming the Commission's order, the Court noted the Commission's explanation that the utility "will incur costs in its position as the provider of last resort ["POLR"], which costs would not be recoverable other than through the RSS . . .

[T]he Commission does find that the existence of POLR costs makes it reasonable to apply the RSS to all customers" (*Id.* at 539). The Court also included the following observation in footnote 5 as part of its discussion:

POLR costs are those costs incurred by [the electric distribution utility] for risks associated with its legal obligation as the default provider, or electricity provider, of last resort, for customers who shop and then return . . . for generation service (*Id.* at footnote 5).

CSP and Ohio Power argue that it follows that the Court's decision in *Constellation NewEnergy* not only confirms the Companies' POLR obligation but also confirms the Commission's authority to establish a charge on all customers for the costs associated with meeting that obligation (AEP Reply Brief at 4).

The Companies contend that the Commission recognized this inherent authority, in its Opinion and Order approving the Companies' RSP, to empower EDUs to secure sufficient capacity to meet their POLR obligations (AEP Reply Brief at 2).

The Companies postulate the proposition that the EDU's capacity resources that are necessary to fulfill an EDU's POLR obligation may include generation assets that the EDU owns or controls, and that support for that proposition is found in Section 4928.17(E), Revised Code. That provision generally allows the EDU to divest its generation assets without the requirement of Commission approval pursuant to the provisions of Title 49, Revised Code, that might have applied prior to SB 3's enactment, such as Section 4905.48, Revised Code. Section 4928.17(E), Revised Code, specifically notes that the relief from the Commission's jurisdiction is subject to those provisions of Title 49 "relating to the transfer of transmission, distribution, or ancillary service provided by such generating asset." (emphasis added). Therefore, according to AEP, Section 4928.17(E), Revised Code, confirms that there is no blanket requirement in SB 3 that the EDU may not own generation assets and that Section 4928.17(E), Revised Code, confirms that there are circumstances in which ownership and control of generation assets is necessary to support the EDU's distribution function (*Id.* at 36, 37).

AEP reasons that the Commission must have relied upon the law's flexibility when it encouraged the Companies to move forward with plans for the construction of an IGCC facility in Ohio (RSP Order at 37-38). In doing so, according to the Companies, the Commission must have recognized that it is appropriate for an EDU to have access to a portfolio of capacity and energy responses in order to meet its post-MDP POLR obligations. However, under SB 3 and the Companies' RSP, none of the existing generation assets that AEP owns is dedicated to meeting that POLR obligation beyond the end of 2005 except to the extent that the Companies have voluntarily done for 2006-2008 in order to fulfill their RSP commitments (*Id.* at 38).

AEP maintains that access to owned generation that is dedicated to the POLR task during periods subsequent to the RSP is an appropriate component of a portfolio of capacity and energy resources that the EDU uses to satisfy its POLR obligation. AEP further contends that, because it will be owned by the Companies, the commitment of the IGCC plant's output to serve its POLR loads is highly reliable, provides a long-term hedge against the volatility in both the availability and pricing of wholesale capacity and energy supplies, and thereby help to forestall or mitigate market imperfections, to the benefit of the Companies' retail customers (AEP Reply Brief at 18-20).

The Staff concurs that an EDU may own generating facilities in Ohio, but that EDU's do have a limitation if they also provide a competitive service. In that situation, they must have an approved corporate separation plan. Section 4928.17(A), Revised Code. Staff notes that AEP's corporate separation plan was approved as part of the RSP (RSP Order at 35 and RSP Rehearing Entry issued March 23, 2005 at 12). Therefore, Staff argues that since there is no bar to the AEP Companies owning generating plant regardless of whether that plant is used to provide competitive or noncompetitive services, there is similarly no bar to building a generating plant (Staff Reply Brief at 8).

The next issue, according to Staff, is the extent to which the Commission may regulate that plant. Staff asserts that Section 4928.03, Revised Code, does state that retail electric generation service is competitive and, therefore, not subject to Commission regulation, but that this case is not about regulating retail electric generation service. Staff postulates that AEP's application concerns the provision of ancillary services, necessary to support the distribution function. Staff notes that it is the Commission's obligation to assure reliable distribution service, and therefore, noncompetitive retail electric services remain subject to the regulation of this Commission. Section 4928.03, Revised Code. Noncompetitive retail electric services are defined as components of retail electric service which neither have been declared competitive by this Commission (and no services have been declared competitive) nor declared competitive by statute. Section 4928.01(B), Revised Code. Ancillary service is not listed as competitive by statute and has not been declared competitive by the Commission (*Id.*). Staff concludes that since ancillary service meets neither test for being competitive, it is a noncompetitive retail electric service subject to the continuing regulation of the Commission (*Id.* at 3-7).

Ancillary service, as a regulated service, is defined as follows:

"Ancillary service" means any function necessary to the provision of electric transmission or distribution service to a retail customer and includes, but is not limited to, scheduling, system control, and dispatch services; reactive supply from generation resources and voltage control service; reactive supply from transmission resources service; regulation service; frequency response service;

energy imbalance service; operating reserve-spinning reserve service; operating reserve-supplemental reserve service; load following; back-up supply service; real-power loss replacement service; dynamic scheduling; system black start capability; and network stability service. Section 4928.01(A)(1), Revised Code.

Staff contends that these ancillary services require generating plant and, therefore, SB 3 contemplated that the utility would provide services from generating plant at least until such time as the Commission found that the market conditions had developed sufficiently to allow a declaration of competitiveness (*Id.* at 4).

Many of the intervenors have argued that Section 4928.14, Revised Code, requires a market-based standard service offer (SSO) in the post MDP, and that precludes the Commission from approving the Companies' application (FirstSolutions Brief at 4-7; see also Calpine's Brief at 4, 5 and note 3; and Baard Brief at 5, 6). IEU argues that AEP's application seeks authority from the Commission to reestablish a utility-friendly form of cost-of-service rate regulation for the purposes of establishing prices under Section 4928.14, Revised Code. IEU contends that the Commission found in the AEP RSP case that cost-of-service regulation has been displaced by a statutory scheme that makes SSO prices subject to the market, not cost-of-service regulation. IEU adds that, in the RSP Order, the Commission held in favor of the Companies' position that the Commission is powerless to set SSO prices after considering the cost of providing SSO service, including a return on and of generating plant, even where there is no market or information on which the Commission may reasonably rely to establish SSO prices. IEU concludes that, notwithstanding the Commission's belief in IGCC technology, or its cost, the Commission does not have the authority to substitute its judgment for the judgment of the General Assembly, to re-write the law or to bypass the requirements of current law (IEU Brief at 9-13). OEG offers that the Companies have proposed to provide a SSO based on the cost of the IGCC plant plus the market price of electric power, not on the market price of electric power alone as Section 4928.14, Revised Code, requires (OEG Brief at 3, 4). Constellation's theory is that the Companies should be required to offer the output of the IGCC plant at market-based rates (Constellation Brief at 20).

The intervenors further assert that the Commission does not have the authority to provide for recovery of the costs of an IGCC plant. FirstSolutions argues that this limitation follows expressly from Section 4928.05(A), Revised Code, which provides that competitive retail electric service "shall not be subject to supervision and regulation...by the public utilities commission under Chapters 4901 to 4909...4935...of the Revised Code..." (FirstSolutions Brief at 9-11). OCC also makes this argument, adding that "[t]he general application of Chapter 4909, Revised Code, ratemaking applies to distribution rate cases, not to the regulation of the generation function" (OCC Brief at 10, 11; see also Direct Energy Brief at 6, 7). In addition, OCC contends that there is no specific authority in Ohio

law for the Commission to adopt the Companies' cost recovery proposal for the IGCC plant (OCC Brief at 16-19). Finally, OCC states that the Companies' corporate separation plan, established pursuant to the requirements of Section 4928.17, Revised Code, mandates that any provision of generation service be through a fully separated affiliate. OCC submits, that although the Commission has granted a temporary waiver of the requirement for AEP to structurally separate their generation and distribution functions, compliance with Section 4928.17, Revised Code, cannot be reconciled with the long-term ownership commitment and cost recovery by the Companies to the generating plant that is the subject of this application (*Id.* at 8, 9).

We believe that the arguments that the AEP Companies' proposal violates Section 4928.14, Revised Code, are not on point because they mischaracterize the Companies' application. The application is not proposing that the Commission use cost-of-service ratemaking to establish pricing for the SSO that Section 4928.14, Revised Code, requires at the end of the MDP; the Companies' Application has no impact on the determination of AEP's market-based SSO. The Commission will establish AEP's SSO in accordance with the market-based standard of Section 4928.14, Revised Code, independent from the cost-recovery mechanism that the Companies have proposed for the IGCC plant. The proposed IGCC Recovery Factor and the IGCC Adjustment Factor are for the stated purpose of recovery of the costs of the IGCC plant. The issue is where the Commission's jurisdiction to grant cost recovery for the plant lies.

While Section 4928.03, Revised Code, states that retail electric generation service is competitive and, therefore, not subject to Commission regulation, this Application is not about regulating retail electric generation service, but about providing the distribution ancillary services. These services are subject to Commission regulation, as being necessary to support the distribution function. It is the Commission's obligation to assure reliable distribution service under Section 4928.02(A), Revised Code, and noncompetitive retail electric service are subject to the regulation of this Commission under Section 4928.05(A)(2), Revised Code. Noncompetitive retail electric services are defined as components of retail electric service which neither have been declared competitive by this Commission nor declared competitive by statute. The legislature declared retail electric generation, aggregation, power marketing, and power brokerage services to be competitive. Ancillary service is not listed as competitive under Section 4928.03, Revised Code. In fact, although it is included within the list of components which could be declared competitive by this Commission, it has not been declared competitive. Section 4928.05(A), Revised Code. Since ancillary service meets neither test for being competitive, it is a noncompetitive retail electric service subject to the continuing regulation of the Commission. Section 4928.01(B), Revised Code.

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It is clear to this Commission that most of these ancillary services require generating plant. Thus, we find that SB 3 contemplates that the EDU would provide ancillary service from generating plant at least until such time as the Commission found that the market conditions had developed sufficiently to allow a declaration of competitiveness. The Commission could then relinquish its regulatory obligations as to retail ancillary service if there is effective competition and available alternatives. Section 4928.04(A), Revised Code. However, the POLR responsibility cannot be left unregulated, as it must be available if the market option fails. Therefore, we find that the statutory scheme of SB 3 does contemplate that the EDU would provide services from generating plant to provide "ancillary service" as it relates to POLR service. Consequently, there is no conflict between the market-based standard that Section 4928.14(A), Revised Code, requires for post-MDP SSOs and the Companies' proposal for assuring recovery of the costs of the IGCC plant.

Distribution reliability is a core concern of the Commission and the EDU's POLR function is a distribution-related service. The EDU is the only entity that can fill the POLR obligation. Neither a CRES provider nor a regional transmission organization (RTO), such as PJM, can provide POLR service. RTOs have a role at the wholesale, not retail level, to facilitate market transactions and indirectly promote reliability; but RTOs do not have direct responsibility to the customers of a particular EDU. Even though a CRES provider does have a retail relationship and direct responsibility to customers, the EDU still stands as the backup POLR provider and that standby duty is distinct from the CRES function of fulfilling day-to-day or minute-to-minute power requirements. The EDU is the entity that operates the distribution wires and these wires must remain charged for connected customers to receive service; the EDU must have capacity available ancillary to the provision of the distribution service.

In addition, the Ohio Supreme Court has confirmed the Commission's authority to establish a mechanism that assures recovery of costs that the EDU incurs in its position as the POLR. *Constellation NewEnergy, supra*. As was the case in the rate stabilization surcharge addressed in *Constellation NewEnergy*, the costs of the IGCC plant are costs that the Companies will incur in their position as POLR; they are costs that will be incurred to assist them in meeting their POLR obligation to all consumers in their certified territory; they are costs the recovery of which can be assured through the recovery mechanism that the IGCC Cost Recovery and Adjustment Factors provide; and the existence of these costs makes it reasonable to recover them through a POLR cost recovery mechanism that applies to all customers. Therefore, the Companies' proposed mechanism for assuring recovery of the IGCC plant's costs is comparable to the Rate Stabilization Surcharge that the Ohio Supreme Court confirmed when it affirmed the Commission decision in *Constellation NewEnergy, supra*. It is also comparable to the POLR charges that the Commission approved in the Companies' RSP Order, *supra*, at 27, 29, and 37. We find that this Commission has the authority to approve a mechanism that grants recovery of the costs of the IGCC plant.

### Conclusion

The AEP Application lays out a regulatory mechanism by which it might recover the costs of a coal-fired electric generating facility, to address the long-term reliability and security of the energy supply for the POLR obligation. However, the current proposal has no detailed schedules, budgets, designs, feasibility studies or financing options. AEP stated that it is presently negotiating a "wrap" agreement with GE/Bechtel that would provide for construction of, and performance guarantees associated with, the IGCC unit in exchange for AEP's agreement to pay a firm price (Tr. III at 268-269; Tr. II at 45). The AEP Companies recognize that they will need to subsequently bring a rate-case-style application before the Commission in a subsequent phase of litigation (Tr. II at 52). At issue in that subsequent phase will be the appropriate level of cost recovery as well as the method of recovery (rate design) (*Id.*).

The Staff stated its continuing interest in the clean coal technology of the IGCC plant. Staff witness Wissman documented AEP's aging generation fleet and the upcoming need for base load capacity. Discussing the increasingly stringent environmental requirements, Ms. Wissman concluded that "there does appear to be a need to invest in new clean coal technology given the aforementioned circumstances" (Staff Ex. 1 at 3). Staff witness Lambeck also observed that IGCC technology is "very attractive for high sulfur bituminous coals" and concluded that "the value of IGCC may be its importance as a hedging strategy - a way to keep using the nation's most abundant energy resource while providing options to deal with long-term environmental demands" (Staff Ex. 2 at 3-4). Staff argued that the Companies should be permitted to recover the relatively small costs, compared to the risks of not exploring further the IGCC proposal (i.e., the Phase I costs).

The AEP Companies contend that the proposed IGCC plant will advance the commercialization of IGCC technology and greatly reduce the emissions of nitrogen oxide, sulfur dioxide, carbon dioxide, particulates and mercury. The IGCC facility will be designed to incorporate carbon sequestration equipment for future installation (Tr. 3 at 270-271). It was generally agreed among the expert witnesses in this case that the key advantage offered by the IGCC technology is its potential to sequester carbon as part of the gasification process, in order to virtually eliminate the carbon dioxide emissions normally associated with a coal plant. Although it cannot be stated for certain whether carbon sequestration regulations will be passed during the operational life of the plant (or what the content and timing of such requirements may be), no expert witness stated a belief that carbon sequestration regulations would not be passed during the life of the plant. In addition, there are other technologies which anticipate removal of carbon dioxide in addition to IGCC (Staff Ex. 3 at 3-4); this technology choice should be explored and subjected to a test of economic comparison in the future phase of this proceeding.

As was clear from the public testimony offered at the Meigs County hearing, the local residents support the project for the jobs that the proposed facility will bring to the area. In addition to the direct economic and environmental impact of building an IGCC unit in Ohio, there are also significant secondary or indirect benefits including generation of new tax revenue and promotion of advanced technology. Therefore, the Staff recommends that the Commission allow the AEP Companies to recover the costs of the first phase of its proposal (the pre-construction costs). The Commission agrees that such economic benefits and technological advances are beneficial for the environment, the state of Ohio, the region, and the nation. Further, the Commission finds that, with the recent volatility of natural gas prices, the environmental cost of pulverized coal generation facilities, the age of the generating facilities in Ohio, the likely implementation of carbon sequestration legislation, the lead time required to place a generation facility in operation and the life-cycle of generation facilities, the diversification of electric generation facilities is wise. The Commission is not opposed to the consideration of an IGCC facility, and we, therefore, believe it is appropriate to take the initial step of approving Phase I cost recovery mechanism of the application.

It should be noted that the Companies have proposed that IGCC-related revenues collected through the Phase I surcharge would be tracked so as to reduce the total of additional generation increases that the Companies may request under the RSP. Therefore, with the approval of Phase I cost recovery, the Companies will have the funds to investigate, analyze, evaluate, and develop a realistic plan to address the very real concerns presented in this case. The Companies propose that the Phase I surcharge be collected for 12 consecutive months. Given that this Order directs the Companies to file additional information and anticipates that additional evidentiary hearings will be necessary, the Phase II and Phase III surcharges shall not become effective 90 days after the filing of the application as proposed by the Companies. Further, the Commission notes that the Phase I surcharge is bypassable. Therefore, the arguments raised by certain intervenors in regard to the non-bypassable nature of the proposed Phase III surcharge and the affect on competition are not applicable. Accordingly, the Commission will not address such arguments at this time.

OPAE argues that because the Companies' application will increase residential rates, approving the application will exacerbate a difficult financial situation for low income and percentage of income payment plan (PIPP) customers. OPAE requests that the Companies be required to fund a program to reduce the energy burden on CSP's and Ohio Power's low income customers (OPAE Brief at 15-21). The Commission will consider this issue in the next phase of the proceeding.

The Commission concludes that AEP should economically justify its construction choices, its technology choices, its timing, its financing structure, and the various other matters that have been left open in the current application. The reasonable costs to

000033

develop that plan and supporting analyses should be recoverable from ratepayers as a proper cost of providing distribution service. In addition to the level of cost recovery and rate design issues, there are certain specific issues that the Commission believes should be addressed in the next phase of this proceeding which are enumerated below:

1. The details of how the output of the proposed facility would flow to the benefit of Ohio customers either through or despite any interconnection or pooling agreements.
2. The delineation of the means, including transportation, through which Ohio coal would be used in the project.
3. The multiple issues concerning the production and sale of by-products from an IGCC unit.
4. The Companies are aware of and have committed to pursue financing opportunities available under the Energy Policy Act of 2005. The Energy Policy Act of 2005 provides significant incentives for deployment of clean coal technologies, including IGCC. The Companies are directed to determine its eligibility for and develop a proposal to obtain federal, state and other funding and/or tax incentives available to construct, operate and maintain the proposed IGCC facility. The Companies shall include, as a part of the detailed information provided in the next phase of this proceeding, a list of the potential funding sources considered and an explanation of whether or not such sources of funding were pursued by the Companies.
5. The Companies' consideration and evaluation of investors in the proposed IGCC facility.

Adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service cannot be provided to consumers in Ohio unless there is a functioning distribution system. The Commission's decision in this case is about ensuring the long-term viability of the distribution system and adequate capacity for AEP's POLR obligation. The AEP Companies should be permitted to recover the reasonable costs of further developing and detailing their proposal, to be considered by this Commission in a future proceeding.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

- (1) CSP and Ohio Power are electric distribution utilities as defined in Section 4928.01(A), Revised Code, and, therefore, the provider of last resort to electric consumers in their respective service areas.
- (2) On March 18, 2005, the Companies filed an application for approval of a cost recovery mechanism for a proposed IGCC electric generation facility. The Companies propose a three phase cost recovery process to commence prior to the construction of the IGCC facility and continue during the operating life of the IGCC facility.
- (3) Fourteen entities filed for intervention in this proceeding. All requests for intervention were granted.
- (4) Local public hearings were held in Hilliard, Canton, and Pomeroy, Ohio. The evidentiary hearing was held in Columbus, Ohio, August 8, 2005 through August 16, 2005.
- (5) OCC's request to overturn the Attorney Examiners' ruling and place certain confidential and proprietary information in the public record should be denied.
- (6) The confidential, proprietary information filed under seal in this proceeding shall remain under seal for 18 months from the date this order is issued.
- (7) The Commission is vested with the authority to oversee distribution ancillary services, pursuant to Section 4928.01(A), Revised Code, and vested with the obligation to ensure Ohio consumers with an adequate, reliable and reasonably priced electric service, pursuant to Section 4928.02(A), Revised Code.
- (8) The EDU is the POLR for consumers who either fail to choose an alternative supplier or return from another supplier.
- (9) The Commission has the authority to establish a charge for recovering the costs of fulfilling the POLR obligation.

- (10) The AEP Companies should provide additional detailed information, as enumerated above, for the Commission to consider the Companies' proposed Phase II and Phase III costs recovery.

ORDER

It is, therefore,

ORDERED, That OCC's request to overturn the Attorney Examiners' ruling and place certain confidential and proprietary documents in the public record is denied. The unredacted documents filed under seal in this phase of the proceeding shall remain under seal for 18 months after the date this order is issued. It is, further,

ORDERED, That should the AEP Companies and/or GE/Bechtel want the unredacted documents to remain under seal after the 18 months have elapsed, the Companies or GE/Bechtel must file a motion for a protective order pursuant to Rule 4901-1-24(F), O.A.C., in this docket. It is, further,

ORDERED, That the Companies' request for a cost recovery mechanism is granted, as modified herein, as to Phase I preconstruction costs. It is, further,

ORDERED, That the Companies file, for Commission approval in this docket, tariffs and customer notices to recover costs associated with Phase I. It is, further,

ORDERED, That the Companies' request for a cost recovery mechanism as to the proposed Phase II and Phase III cost is deferred to the next proceeding. It is, further,

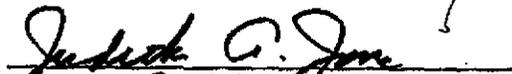
ORDERED, That the Companies submit in this case the additional detailed information set forth above for the Commission's consideration. It is, further,

ORDERED, That a copy of this Opinion and Order be served upon the AEP Companies and their counsel, and all other interested persons of record.

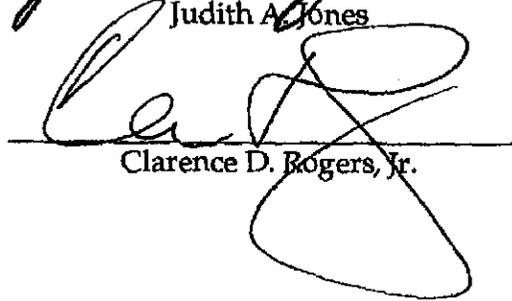
THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman

  
Ronda Hartman Fergus  
Judith A. Jones

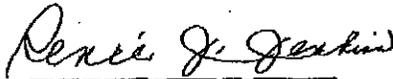
Donald L. Mason

  
Clarence D. Rogers, Jr.

SDL/GNS:ct

Entered in the Journal

APR 10 2008



Renee J. Jenkins  
Secretary

FILE

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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Non-Residential Generation Rates To Provide For Market-Based Standard Service Offer Pricing and To Establish an Alternative Competitively-Bid Service Rate Option Subsequent to the Market Development Period. ) Case No. 03-93-EL-ATA

In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Modify Current Accounting Procedures for Certain Costs Associated with the Midwest Independent Transmission System Operator. ) Case No. 03-2079-EL-AAM

In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Modify Current Accounting Procedures for Capital Investment in its Electric Transmission and Distribution System and to Establish a Capital Investment Reliability Rider to be Effective after The Market Development Period. ) Case No. 03-2081-EL-AAM ) Case No. 03-2080-EL-ATA

MEMORANDUM IN SUPPORT OF ALTERNATIVE PROPOSAL OF CINCINNATI GAS & ELECTRIC COMPANY BY PEOPLE WORKING COOPERATIVELY, INC.

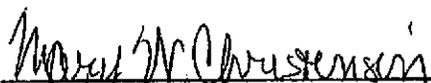
People Working Cooperatively, Inc. ("PWC"), a party to these proceedings, submits to the Public Utilities Commission of Ohio ("Commission") this memorandum in support of the position of applicant, Cincinnati Gas & Electric Company, as stated in its application for rehearing of October 29, 2004 in the above-named matters for the reasons set forth in the attached Memorandum in Support.

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PUCO

Respectfully submitted on behalf of  
PEOPLE WORKING COOPERATIVELY, INC.

  
\_\_\_\_\_  
Mary W. Christensen (0024452)  
Christensen & Christensen  
401 North Front Street Suite 350  
Columbus OH 43215-2499

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**MEMORANDUM IN SUPPORT OF  
ALTERNATIVE PROPOSAL OF CINCINNATI GAS & ELECTRIC COMPANY**

PWC is a small, non-profit organization that has served consumers in the Cincinnati Gas & Electric Company ("CG&E") service territory by providing weatherization and energy management services to consumers of services provided by CG&E. While a small organization, it is the largest provider of these services in CG&E's service territory. PWC's mission is to provide essential repairs and services so that homeowners can remain in their homes, living independently in a safe and sound environment—and with the benefits of electric service. The Commission, by Examiner Entry, granted PWC intervention in these proceedings on March 25, 2004. In a Stipulation in CG&E's ETP proceedings, which was approved by the Commission, CG&E committed to continued annual funding for weatherization services through the end of 2005, the benefits of which is and were demonstrable. In this case, CG&E proposed in its application the continued funding of these services through the end of 2008, the anticipated end of the market development period.

PWC is a more recent participant in Commission matters, having previously been a party in only CG&E's ETP proceeding.

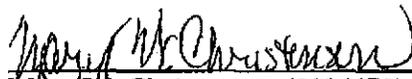
PWC was a signatory to the Stipulation and Recommendation ("Stipulation") that CG&E filed with the Commission on May 19, 2004 in these proceedings. The Stipulation appeared to be the optimum result in response to the questions and complicated circumstances surrounding this case, which have been amply discussed in CG&E's and the other parties' pleadings. It was the product of intense negotiations for several months. And, although some parties did not sign, the Stipulation carried the support of most parties and of a cross section of all customer classes whose interests were represented in the cases. It was a delicate balance.

The Commission, however, so materially changed the Stipulation by its rejection of its various parts in its Opinion and Order of September 29, 2004 that it nullified the

Stipulation. While PWC is one of many party interests, the Order, for example, appears to have eliminated CG&E's financial ability to continue support for the weatherization and DSM programs beyond the end of 2005.

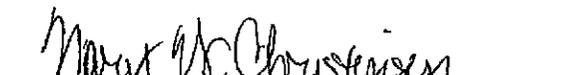
On October 29, CG&E filed its application for rehearing and a second proposal for agreement by the parties ("Alternative Proposal"). PWC has reviewed that proposal and respectfully requests that the Commission approve the Alternative Proposal, which it understands preserves those provisions of the Stipulation that were not rejected by the Commission. This Alternative Proposal again answers the questions and deals with the extremely complicated issues of this case in a different way, a way that, while also not perfect, PWC believes is preferable to the result of the Commission's Opinion and Order. The parties to this case have been negotiating again regarding the acceptability of the Alternative Proposal in an effort to bring back a better balance to the result of this case. PWC respectfully urges the Commission to approve CG&E's Alternative Proposal.

Respectfully submitted on behalf of  
PEOPLE WORKING TOGETHER, INC.

  
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Mary W. Christensen (0024452)  
Christensen & Christensen  
401 North Front Street Suite 350  
Columbus OH 43215-2499

#### CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum in Support by People Working Cooperatively, Inc. has been served on the parties of record on the attached list for this proceeding by e-mail and by first-class, postage prepaid U.S. mail on this 8<sup>th</sup> day of November, 2004.

  
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Mary W. Christensen