

**In The
SUPREME COURT OF OHIO**

The Office of the Ohio Consumers' Counsel,	:	Case No. 08-0367
Appellant,	:	Appeal from the Public Utilities Commission
v.	:	of Ohio, <i>In the Matter of the Application of</i>
The Public Utilities Commission of Ohio,	:	<i>The Cincinnati Gas & Electric Company to</i>
Appellee.	:	<i>Modify its Nonresidential Generation Rates to</i>
	:	<i>Provide for Market-Based Standard Service</i>
	:	<i>Offer Pricing and to Establish an Alternative</i>
	:	<i>Competitive-Bid Service Rate Option</i>
	:	<i>Subsequent to the Market Development</i>
	:	<i>Period, Case No. 03-93-EL-ATA, et al.</i>

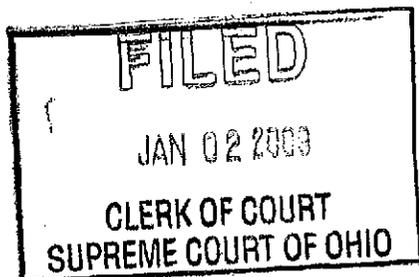
**MOTION TO DISMISS
SUBMITTED ON BEHALF OF APPELLEE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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The Office of the Ohio Consumers' Counsel,	:	Case No. 08-0367
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Appellant,	:	Appeal from the Public Utilities Commission of Ohio, <i>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.</i>
v.	:	
The Public Utilities Commission of Ohio,	:	
	:	
Appellee.	:	

**MOTION TO DISMISS
SUBMITTED ON BEHALF OF APPELLEE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

The Public Utilities Commission of Ohio moves this Honorable Court to dismiss this case as it is moot for the reasons set forth in the accompanying memorandum in support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

INTRODUCTION

The instant appeal presents two issues, both of which have been rendered moot.

First, the Ohio Consumers' Counsel (OCC or appellant) attacks the orders of the Public Utilities Commission of Ohio (Commission) approving the rate stabilization plan of Duke Energy Ohio (Duke). The appellant argues that the rates charged to Duke's customers under the rate stabilization plan are discriminatory and that a single component of the plan, the Infrastructure Maintenance Fund (IMF), is anti-competitive and unsupported by the record. The Commission orders continuing this IMF component, dated October 24, 2007 and December 19, 2007, are no longer the basis for the rates charged to consumers. The rate stabilization plan established by these orders has lapsed by its own terms. As of January 1, 2009, the rates charged to consumers are based on a new Commission order, dated December 17, 2008. *In re Duke Energy Ohio, Inc.*, Case Nos. 08-920-EL-SSO, *et al.* (Opinion and Order) (December 17, 2008), App. at 84-127.¹ This new order is based on new statutes, R.C. 4928.141(A) and 4928.143, which did not even exist at the time the orders on appeal in this case were entered. As the orders on appeal in this case no longer set the rates paid by consumers, consideration of these orders is moot.

Second, OCC attacks the Commission's initial determination as to the confidentiality of certain information in the record below. This initial determination has also

¹ References to appellee's appendix attached hereto are denoted "App. at ____."

been supplanted by subsequent Commission orders speaking to this topic. These orders, none of which are on appeal in this case, were issued on May 28, 2008; June 4, 2008; July 31, 2008; October 1, 2008; and November 5, 2008. Each of these later orders refined and limited the nature and amount of confidential information in the record below. It is these later orders that actually identify the particular words that are confidential and thus redacted in the record of the proceedings below. The orders on appeal do not reflect the current status of confidentiality in the case below and do not specifically identify any confidential information, being limited only to identifying classes of information that could be confidential. The confidentiality aspect of the orders on appeal is therefore moot.

Because the two issues raised in the instant case are moot, this Court should dismiss.

ARGUMENT

I. The rates charged to Duke consumers are set by statute.

The two issues raised in this case both turn on the effectiveness of the Commission's orders issued on October 24, 2007 and December 19, 2007. *In re Cincinnati Gas & Electric Co.*, Case Nos. 03-93-EL-ATA, *et al.* (Order on Remand) (October 24, 2007), App. at 23-68; *In re Cincinnati Gas & Electric Co.*, Case Nos. 03-93-EL-ATA, *et al.* (Entry on Rehearing) (December 19, 2007), App. at 69-83. As regards the rates charged to customers for standard service electricity, these orders re-established a rate stabilization plan (RSP) for Duke. This RSP was complicated but its complexity has already been

discussed in earlier pleadings and is not of concern for purposes of this motion. What is important for purposes of this motion is the term of the RSP. The RSP was time limited. It ended as of December 31, 2008 and thus has expired by its own terms. The orders re-establishing the RSP are no longer effective. No provision to reopen the RSP rates existed. An appeal of orders that are no longer effective, have expired by their own terms, and cannot be reopened is meaningless. *Lucas County Comm'rs v. Pub. Util. Comm'n*, 80 Ohio St. 3d 344, 686 N.E.2d 501 (1997). The first issue in the case is moot and should, therefore, be dismissed.

Mootness has long been applied in Commission cases. The Court expressed this most clearly, saying:

That an appellate court need not consider an issue, and will dismiss the appeal, when the court becomes aware of an event that has rendered the issue moot is a proposition of law that harks back almost a century.

This proposition of law has long been applied to appeals from commission orders. In 1916 the court held that when a commission order had been carried out, no stay had been granted, and there was nothing left upon which the court's decision could operate, the appeal was moot and should be dismissed. A later case involved an appeal of a commission order allowing a railroad to cease operation. After the commission's order was entered, the railroad's assets were dismantled and sold, and its employees were discharged. This court dismissed the appeal because any order the court could have issued would have been a vain act; no order of the court could have reconstituted the railroad.

In the absence of the possibility of an effective remedy, this appeal constitutes only a request for an advisory ruling from the court. The court should decline the invitation to undertake such an abstract inquiry. That is not the proper function of the judiciary, as this court has previously

observed: “It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and render judgments which can be carried into effect. It has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies.”

The court will not perform a vain act when there is no real issue presented in the appeal.

Cincinnati Gas & Electric Co. v. Pub. Util. Comm'n, 103 Ohio St. 3d 398, 401-402, 816 N.E.2d 238, 242 (2004) (citations omitted). While the *Cincinnati* case was a situation where the appellant had already complied with the order that it was challenging, the situation before the Court is analogous. Because the rates challenged are no longer in effect, indeed the law under which the orders were made is no longer in effect, the issue raised in this case is moot. Because both the rates and the law under which they were created are gone, the underlying case could be characterized as seeking an advisory opinion, or asking the Court to perform a vain act. However the case is characterized, it is moot and should be dismissed. *Lucas County Comm'rs v. Pub. Util. Comm'n*, 80 Ohio St. 3d 344, 686 N.E.2d 501 (1997).

As the appellant asserted in oral argument, there is an exception to the mootness doctrine. Specifically, the Court stated:

Moreover, an exception to the mootness doctrine arises when the claims raised are capable of repetition, yet evading review. This exception applies when the challenged action is too short in duration to be fully litigated before its cessation

or expiration, and there is a reasonable expectation that the same complaining party will be subject to the same action again.

State ex rel. Dispatch Printing Co. v. Loudon, 91 Ohio St. 3d 61, 64, 741 N.E.2d 517, 521 (2001) (quoting *State ex rel. Calvary v. Upper Arlington*, 89 Ohio St. 3d 229, 231, 729 N.E.2d 1182, 1185 (2000)). This exception has no application in the instant case. Even if the Commission had misapplied R.C. 4928.14(A) in some way, it could never do so again. The General Assembly has completely restructured this statutory mechanism, repealing R.C. 4928.14(A) and substituting an entirely new mechanism for establishing default service rates. Despite the appellant's assertions in oral argument, the section of the code under which the Commission acted in the case below, R.C. 4928.14(A), was replaced with R.C. 4928.143. The single paragraph of R.C. 4928.14(A) was replaced with the eight pages of R.C. 4928.143. There is no similarity between the old and the new. Issues related to the old section are dead and cannot be rejuvenated. The exception to the mootness doctrine cannot apply and the case should be dismissed as moot.

II. The confidentiality orders on appeal have been superseded.

The second issue in the case is the validity of the orders as regards the confidentiality of certain information contained in the hearing record below. This aspect of the orders on appeal is also moot.

The orders on appeal only identified categories of information that could be considered confidential. The Commission stated:

Specifically, we find that the following information has actual or potential independent economic value from its being not generally known or ascertainable: customer names, account numbers, customer social security or employer identification numbers, contract termination dates or other termination provisions, financial consideration in each contract, price of generation referenced in each contract, volume of generation covered by each contract, and terms under which any options may be exercisable.

In re Cincinnati Gas & Electric Co., Case Nos. 03-93-EL-ATA, *et al.* (Order on Remand at 15) (October 24, 2007), App. at 37. Having identified categories of information that could be confidential, the orders on appeal did not then proceed to apply that limited determination to the record. That actual application occurred in a series of later orders.

The process of applying the categories of potential confidentiality to the record in the case was remarkably time-consuming and difficult. The Commission twice attempted to achieve a consensus among the parties as to which particular parts of the record would fall in the categories established by the Commission. These efforts failed and ultimately the Commission had to make the application unilaterally. An additional layer of complexity was added to this process because the simple application of the categories is not sufficient. A portion of what would otherwise have been information that would have properly been kept confidential was made public through various means outside the Commission process. These disclosures happened in a variety of ways – inadvertently by the parties, through a common pleas court action, and other miscellaneous fashions. Thus, even once the Commission had gone through the thousands of pages of record in the case below to identify those types of items that might be confidential, it had to review those thousands of pages again against the list of items that had already otherwise been

made public. As an example, all of the agreements between the City of Cincinnati and any other entity have always been public, having been discussed in public sessions of the city council, even though they contain categories of information that, but for this disclosure, might have properly been protected. Only in this way could the Commission accomplish its two diametrically opposed obligations: revealing absolutely all information that must be revealed while simultaneously protecting absolutely everything that must be protected.

The final determination of confidentiality, that is, the actual division of the record in the case into redacted and unredacted portions, only occurred in the Commission orders on May 28, 2008; June 4, 2008; July 31, 2008; October 1, 2008; and November 5, 2008. These are the orders this Court would need to review to pass on the legality of what the Commission did about confidentiality. These orders are not on appeal. The orders that are on appeal merely identify categories of information that may be confidential. This is not the final determination of confidentiality. The real determination of confidentiality can only happen with an item by item review of each line of each document in the record. The Commission did this painstaking review, but it did not do it in the orders on appeal here. The orders on appeal here have been superseded by the later orders in which the real item by item review happened. The orders on appeal are therefore moot as regards confidentiality and the appeal should be dismissed.

III. There is no possibility of an effective remedy in this appeal.

While it is clear that the orders on appeal in this case do not present a confidentiality issue for resolution at this time, it is not clear what the appellant is seeking. Regardless, there is “no possibility of an effective remedy” in this appeal and it should therefore be dismissed as moot. *Cincinnati Gas & Electric Co. v. Pub. Util. Comm’n*, 103 Ohio St. 3d 398, 401-402, 816 N.E.2d 238, 242 (2004).

If the appellant is seeking an examination of alleged discriminatory rates, which would occur, if at all, through a corporate separation violation, the appellant’s recourse is through a complaint under R.C. 4928.18. Ohio Rev. Code Ann. § 4928.18 (Anderson 2008), App. at 20-22. If the appellant is seeking a refund of the IMF component,² that option has been foreclosed by the General Assembly, which “attempted to balance the equities by prohibiting utilities from charging increased rates during the pendency of commission proceedings and appeals, while also prohibiting customers from obtaining refunds of excessive rates that may be reversed on appeal.” *Lucas County Comm’rs v. Pub. Util. Comm’n*, 80 Ohio St. 3d 344, 348, 686 N.E.2d 501, 504 (1997); *Keco Industries v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957).

² The appellant did not request a refund in its notice of appeal or in its application for rehearing before the Commission. Accordingly, OCC failed to invoke the Court’s jurisdiction on this issue. Ohio Rev. Code Ann. § 4903.10 (Anderson 2008), App. at 13-15; Ohio Rev. Code Ann. § 4903.13 (Anderson 2008), App. at 15; *Cincinnati Gas & Electric Co. v. Pub. Util. Comm’n*, 103 Ohio St. 3d 398, 402, 816 N.E.2d 238, 243 (2004); *Consumers’ Counsel v. Pub. Util. Comm’n*, 70 Ohio St. 3d 244, 247, 638 N.E.2d 550, 553 (1994).

If the appellant is seeking public records relief, the appellant's recourse is through the filing of a public records request followed by a mandamus action if the result is unsatisfactory. Ohio Rev. Code Ann. § 149.43(C)(1) (Anderson 2008), App. at 9-10; *State ex rel. McGowan v. Cuyahoga Metropolitan Housing Authority*, 78 Ohio St. 3d 518, 520, 678 N.E.2d 1388, 1389 (1997). If the appellant wants to challenge the Commission's information handling orders in this case, the orders on appeal have been superseded and this issue in this appeal is moot.

Regardless of what the appellant is seeking, this case is not the vehicle for that relief. Indeed, this case is not the vehicle for any sort of relief. It is moot and should be dismissed.

CONCLUSION

There are two issues in the case – rates and confidentiality. Both are moot. The rate determination is moot because the rates established under the orders on appeal have terminated. The confidentiality aspect of the orders is moot because the orders have been superseded by subsequent orders that actually review each page of the record and make a specific division of information into that which must be protected and that which must be released. It is only these later orders that actually determine what information is confidential. These later orders are not on appeal. An examination of the orders currently on appeal is, therefore, meaningless and should be dismissed as moot.

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Motion to Dismiss** submitted on behalf of Appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, on the following parties of record, this 2nd day of January, 2009.



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APPENDIX

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149.43 Availability of public records for inspection and copying.

(A) As used in this section:

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

- (a) Medical records;
- (b) Records pertaining to probation and parole proceedings or to proceedings related to the imposition of community control sanctions and post-release control sanctions;
- (c) Records pertaining to actions under section 2151.85 and division (C) of section 2919.121 of the Revised Code and to appeals of actions arising under those sections;
- (d) Records pertaining to adoption proceedings, including the contents of an adoption file maintained by the department of health under section 3705.12 of the Revised Code;
- (e) Information in a record contained in the putative father registry established by section 3107.062 of the Revised Code, regardless of whether the information is held by the department of job and family services or, pursuant to section 3111.69 of the Revised Code, the office of child support in the department or a child support enforcement agency;
- (f) Records listed in division (A) of section 3107.42 of the Revised Code or specified in division (A) of section 3107.52 of the Revised Code;
- (g) Trial preparation records;
- (h) Confidential law enforcement investigatory records;
- (i) Records containing information that is confidential under section 2710.03 or 4112.05 of the Revised Code;
- (j) DNA records stored in the DNA database pursuant to section 109.573 of the Revised Code;

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

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

(m) Intellectual property records;

(n) Donor profile records;

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

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

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

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

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

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

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

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

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

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

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

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

(2) "Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) The identity and amount of any charitable or employment benefit deduction made by the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's

employer from the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's compensation unless the amount of the deduction is required by state or federal law;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(B)(1) Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time. If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt. When making that public record available for public inspection or copying that public record, the public office or the person

responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction.

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

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

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

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

(6) If any person chooses to obtain a copy of a public record in accordance with division (B) of this section, the public office or person responsible for the public record may require that person to pay in advance the cost involved in providing the copy of the public record in accordance with the choice made by the person seeking the copy under this division. The public office or the person responsible for the public record shall permit that person to choose to have the public record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it, or upon any other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of the public office or person responsible for the public record. When the person seeking the copy makes a choice under this division, the public office or person responsible for the public record shall provide a copy of it in accordance with the choice made by the person seeking the copy. Nothing in this section requires a public office or person responsible for the public record to allow the person seeking a copy of the public record to make the copies of the public record.

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

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

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

(8) A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile

adjudication to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.

(9) Upon written request made and signed by a journalist on or after December 16, 1999, a public office, or person responsible for public records, having custody of the records of the agency employing a specified peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT shall disclose to the journalist the address of the actual personal residence of the peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT and, if the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's spouse, former spouse, or child is employed by a public office, the name and address of the employer of the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's spouse, former spouse, or child. The request shall include the journalist's name and title and the name and address of the journalist's employer and shall state that disclosure of the information sought would be in the public interest.

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

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

2 of Article IV, Ohio Constitution, or in the court of appeals for the appellate district in which division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution.

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

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

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

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

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

(2)(a) If the court issues a writ of mandamus that orders the public office or the person responsible for the public record to comply with division (B) of this section and

determines that the circumstances described in division (C)(1) of this section exist, the court shall determine and award to the relator all court costs.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4903.10 Application for rehearing.

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission.

Notwithstanding the preceding paragraph, in any uncontested proceeding or, by leave of the commission first had in any other proceeding, any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission. Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

(B) The interests of the applicant were not adequately considered in the proceeding.

Every applicant for rehearing or for leave to file an application for rehearing shall give due notice of the filing of such application to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the commission.

Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application.

Where such application for rehearing has been filed before the effective date of the order as to which a rehearing is sought, the effective date of such order, unless otherwise ordered by the commission, shall be postponed or stayed pending disposition of the matter by the commission or by operation of law. In all other cases the making of such an application shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission.

Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear. Notice of such rehearing shall be given by regular mail to all parties who have entered an appearance in the proceeding.

If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law.

If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing.

If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed. An order made after such rehearing, abrogating or modifying the original order, shall have the same effect as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order prior to the receipt of notice by the affected party of the filing of the application for rehearing.

No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless

such person, firm, or corporation has made a proper application to the commission for a rehearing.

4903.13 Reversal of final order - notice of appeal.

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

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

4928.14 Failure of supplier to provide service.

The failure of a supplier to provide retail electric generation service to customers within the certified territory of an electric distribution utility shall result in the supplier's customers, after reasonable notice, defaulting to the utility's standard service offer under sections 4928.141, 4928.142, and 4928.143 of the Revised Code until the customer chooses an alternative supplier. A supplier is deemed under this section to have failed to provide such service if the commission finds, after reasonable notice and opportunity for hearing, that any of the following conditions are met:

(A) The supplier has defaulted on its contracts with customers, is in receivership, or has filed for bankruptcy.

(B) The supplier is no longer capable of providing the service.

(C) The supplier is unable to provide delivery to transmission or distribution facilities for such period of time as may be reasonably specified by commission rule adopted under division (A) of section 4928.06 of the Revised Code.

(D) The supplier's certification has been suspended, conditionally rescinded, or rescinded under division (D) of section 4928.08 of the Revised Code.

4928.143 Application for approval of electric security plan - testing.

(A) For the purpose of complying with section 4928.141 of the Revised Code, an electric distribution utility may file an application for public utilities commission approval of an electric security plan as prescribed under division (B) of this section. The utility may file that application prior to the effective date of any rules the commission may adopt for the purpose of this section, and, as the commission determines necessary, the utility immediately shall conform its filing to those rules upon their taking effect.

(B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20, division (E) of section 4928.64, and section 4928.69 of the Revised Code:

(1) An electric security plan shall include provisions relating to the supply and pricing of electric generation service. In addition, if the proposed electric security plan has a term longer than three years, it may include provisions in the plan to permit the commission to test the plan pursuant to division (E) of this section and any transitional conditions that should be adopted by the commission if the commission terminates the plan as authorized under that division.

(2) The plan may provide for or include, without limitation, any of the following:

(a) Automatic recovery of any of the following costs of the electric distribution utility, provided the cost is prudently incurred: the cost of fuel used to generate the electricity supplied under the offer; the cost of purchased power supplied under the offer, including the cost of energy and capacity, and including purchased power acquired from an affiliate; the cost of emission allowances; and the cost of federally mandated carbon or energy taxes;

(b) A reasonable allowance for construction work in progress for any of the electric distribution utility's cost of constructing an electric generating facility or for an environmental expenditure for any electric generating facility of the electric distribution utility, provided the cost is incurred or the expenditure occurs on or after January 1, 2009. Any such allowance shall be subject to the construction work in progress allowance limitations of division (A) of section 4909.15 of the Revised Code, except that the commission may authorize such an allowance upon the incurrence of the cost or occurrence of the expenditure. No such allowance for generating facility construction shall be authorized, however, unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Further, no such allowance shall be authorized unless the facility's construction was sourced through a competitive bid process, regarding which process the commission may adopt rules. An allowance approved under division

(B)(2)(b) of this section shall be established as a nonbypassable surcharge for the life of the facility.

(c) The establishment of a nonbypassable surcharge for the life of an electric generating facility that is owned or operated by the electric distribution utility, was sourced through a competitive bid process subject to any such rules as the commission adopts under division (B)(2)(b) of this section, and is newly used and useful on or after January 1, 2009, which surcharge shall cover all costs of the utility specified in the application, excluding costs recovered through a surcharge under division (B)(2)(b) of this section. However, no surcharge shall be authorized unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Additionally, if a surcharge is authorized for a facility pursuant to plan approval under division (C) of this section and as a condition of the continuation of the surcharge, the electric distribution utility shall dedicate to Ohio consumers the capacity and energy and the rate associated with the cost of that facility. Before the commission authorizes any surcharge pursuant to this division, it may consider, as applicable, the effects of any decommissioning, deratings, and retirements.

(d) Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service;

(e) Automatic increases or decreases in any component of the standard service offer price;

(f) Provisions for the electric distribution utility to securitize any phase-in, inclusive of carrying charges, of the utility's standard service offer price, which phase-in is authorized in accordance with section 4928.144 of the Revised Code; and provisions for the recovery of the utility's cost of securitization.

(g) Provisions relating to transmission, ancillary, congestion, or any related service required for the standard service offer, including provisions for the recovery of any cost of such service that the electric distribution utility incurs on or after that date pursuant to the standard service offer;

(h) Provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility. The latter may include a

long-term energy delivery infrastructure modernization plan for that utility or any plan providing for the utility's recovery of costs, including lost revenue, shared savings, and avoided costs, and a just and reasonable rate of return on such infrastructure modernization. As part of its determination as to whether to allow in an electric distribution utility's electric security plan inclusion of any provision described in division (B)(2)(h) of this section, the commission shall examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.

(i) Provisions under which the electric distribution utility may implement economic development, job retention, and energy efficiency programs, which provisions may allocate program costs across all classes of customers of the utility and those of electric distribution utilities in the same holding company system.

(C)(1) The burden of proof in the proceeding shall be on the electric distribution utility. The commission shall issue an order under this division for an initial application under this section not later than one hundred fifty days after the application's filing date and, for any subsequent application by the utility under this section, not later than two hundred seventy-five days after the application's filing date. Subject to division (D) of this section, the commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. Additionally, if the commission so approves an application that contains a surcharge under division (B)(2)(b) or (c) of this section, the commission shall ensure that the benefits derived for any purpose for which the surcharge is established are reserved and made available to those that bear the surcharge. Otherwise, the commission by order shall disapprove the application.

(2)(a) If the commission modifies and approves an application under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section or a standard service offer under section 4928.142 of the Revised Code.

(b) If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a

subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively.

(D) Regarding the rate plan requirement of division (A) of section 4928.141 of the Revised Code, if an electric distribution utility that has a rate plan that extends beyond December 31, 2008, files an application under this section for the purpose of its compliance with division (A) of section 4928.141 of the Revised Code, that rate plan and its terms and conditions are hereby incorporated into its proposed electric security plan and shall continue in effect until the date scheduled under the rate plan for its expiration, and that portion of the electric security plan shall not be subject to commission approval or disapproval under division (C) of this section, and the earnings test provided for in division (F) of this section shall not apply until after the expiration of the rate plan. However, that utility may include in its electric security plan under this section, and the commission may approve, modify and approve, or disapprove subject to division (C) of this section, provisions for the incremental recovery or the deferral of any costs that are not being recovered under the rate plan and that the utility incurs during that continuation period to comply with section 4928.141, division (B) of section 4928.64, or division (A) of section 4928.66 of the Revised Code.

(E) If an electric security plan approved under division (C) of this section, except one withdrawn by the utility as authorized under that division, has a term, exclusive of phase-ins or deferrals, that exceeds three years from the effective date of the plan, the commission shall test the plan in the fourth year, and if applicable, every fourth year thereafter, to determine whether the plan, including its then-existing pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. The commission shall also determine the prospective effect of the electric security plan to determine if that effect is substantially likely to provide the electric distribution utility with a return on common equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility. If the test results are in the negative or the commission finds that continuation of the electric security plan will result in a return on equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that will face comparable business and financial risk, with such adjustments for capital structure as may be appropriate, during the balance of the plan, the commission may terminate the electric security plan, but not until it shall have provided interested parties with notice and an opportunity to be heard. The commission may impose such conditions on the plan's termination as it considers reasonable and necessary to accommodate the transition from an approved plan to the

more advantageous alternative. In the event of an electric security plan's termination pursuant to this division, the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan.

(F) With regard to the provisions that are included in an electric security plan under this section, the commission shall consider, following the end of each annual period of the plan, if any such adjustments resulted in excessive earnings as measured by whether the earned return on common equity of the electric distribution utility is significantly in excess of the return on common equity that was earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. Consideration also shall be given to the capital requirements of future committed investments in this state. The burden of proof for demonstrating that significantly excessive earnings did not occur shall be on the electric distribution utility. If the commission finds that such adjustments, in the aggregate, did result in significantly excessive earnings, it shall require the electric distribution utility to return to consumers the amount of the excess by prospective adjustments; provided that, upon making such prospective adjustments, the electric distribution utility shall have the right to terminate the plan and immediately file an application pursuant to section 4928.142 of the Revised Code. Upon termination of a plan under this division, rates shall be set on the same basis as specified in division (C)(2)(b) of this section, and the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan. In making its determination of significantly excessive earnings under this division, the commission shall not consider, directly or indirectly, the revenue, expenses, or earnings of any affiliate or parent company.

4928.18 Jurisdiction and powers of commission concerning utility or affiliate.

(A) Notwithstanding division (D)(2)(a) of section 4909.15 of the Revised Code, nothing in this chapter prevents the public utilities commission from exercising its authority under Title XLIX [49] of the Revised Code to protect customers of retail electric service supplied by an electric utility from any adverse effect of the utility's provision of a product or service other than retail electric service.

(B) The commission has jurisdiction under section 4905.26 of the Revised Code, upon complaint of any person or upon complaint or initiative of the commission on or after the starting date of competitive retail electric service, to determine whether an electric utility or its affiliate has violated any provision of section 4928.17 of the Revised Code or an order issued or rule adopted under that section. For this purpose, the commission may examine such books, accounts, or other records kept by an electric

utility or its affiliate as may relate to the businesses for which corporate separation is required under section 4928.17 of the Revised Code, and may investigate such utility or affiliate operations as may relate to those businesses and investigate the interrelationship of those operations. Any such examination or investigation by the commission shall be governed by Chapter 4903. of the Revised Code.

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

- (1) Issue an order directing the utility or affiliate to comply;
- (2) Modify an order as the commission finds reasonable and appropriate and order the utility or affiliate to comply with the modified order;
- (3) Suspend or abrogate an order, in whole or in part;
- (4) Issue an order that the utility or affiliate pay restitution to any person injured by the violation or failure to comply;

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

- (1) Impose a forfeiture on the utility or affiliate of up to twenty-five thousand dollars per day per violation. The recovery and deposit of any such forfeiture shall be subject to sections 4905.57 and 4905.59 of the Revised Code.
- (2) Regarding a violation by an electric utility relating to a corporate separation plan involving competitive retail electric service, suspend or abrogate all or part of an order, to the extent it is in effect, authorizing an opportunity for the utility to receive transition revenues under a transition plan approved by the commission under section 4928.33 of the Revised Code.

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

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

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 Offer Pricing and to Establish an Alternative Competitive-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

ORDER ON REMAND

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ORDER ON REMAND

The Commission, coming now to consider the evidence presented in these proceedings, pursuant to the Supreme Court of Ohio's remand in *Ohio Consumers' Counsel v. Public Utilities Commission* (2006), 111 Ohio St.3d 300, the transcripts of the hearing, and briefs of the parties, hereby issues its order on remand.

APPEARANCES:

The following parties made appearances in the remand phase of these proceedings:

Paul A. Colbert, Senior Counsel, John J. Finnigan, Jr., Senior Counsel, and Rocco D'Ascenzo, Counsel, 139 East Fourth Street, P.O. Box 960, Cincinnati, Ohio 45202, on behalf of Duke Energy Ohio, Inc. (formerly known as the Cincinnati Gas & Electric Company).

Kravitz, Brown & Dortch, by Michael P. Dortch, 145 East Rich Street, Columbus, Ohio 43215, on behalf of Cinergy Corp. and Duke Energy Retail Sales, Inc.

Janine L. Migden-Ostrander, Ohio Consumers' Counsel, by Jeffrey L. Small, Ann M. Hotz, and Larry S. Sauer, Assistant Consumers' Counsel, Office of Consumers' Counsel, 10 West Broad Street, Suite 1800, Columbus, Ohio 43215, on behalf of the residential utility customers of Duke Energy Ohio, Inc.

Vorys, Sater, Seymour & Pease LLP, by M. Howard Petricoff and Stephen M. Howard, 52 East Gay Street, PO Box 1008, Columbus, Ohio 43215, on behalf of the Ohio Marketers' Group, comprised of Constellation NewEnergy, Inc.; MidAmerican Energy Company; Strategic Energy, LLC; and Integrys Energy Services, Inc. (formerly known as WPS Energy Services, Inc.).

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

Boehm, Kurtz & Lowry, by David F. Boehm and Michael L. Kurtz, 1500 URS Center, 36 East Seventh Street, Cincinnati, Ohio 45202, on behalf of the Ohio Energy Group, Inc.

Boehm, Kurtz & Lowry, by Michael L. Kurtz, 1500 URS Center, 36 East Seventh Street, Cincinnati, Ohio 45202, on behalf of the Kroger Co.

David C. Rinebolt and Colleen Mooney, 231 West Lima Street, Findlay, Ohio 45840, on behalf of Ohio Partners for Affordable Energy.

Christensen, Christensen, Donchatz, Kettlewell & Owens, LLP, by Mary W. Christensen, 100 East Campus View Boulevard, Suite 360, Columbus, Ohio 43235, on behalf of People Working Cooperatively, Inc.

Bell & Royer Co., LPA, by Barth E. Royer, 33 South Grant Avenue, Columbus, Ohio 43215, on behalf of Dominion Retail, Inc.

Richard L. Sites, General Counsel, 155 East Broad Street, 15th Floor, Columbus, Ohio 43215, and Bricker & Eckler LLP, by Ms. Sally W. Bloomfield and Mr. Thomas J. O'Brien, 100 South Third Street, Columbus, Ohio 43215, on behalf of the Ohio Hospital Association.

Marc Dann, Attorney General of the State of Ohio, Duane W. Luckey, Section Chief, Thomas W. McNamee, Werner L. Margard III, and Stephen P. Reilly, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Commission.

OPINION:

I. HISTORY OF THE PROCEEDINGS

On June 22, 1999, the Ohio General Assembly passed legislation¹ requiring the restructuring of the electric utility industry and providing for retail competition with regard to the generation component of electric service (SB 3). Pursuant to SB 3, on August 31, 2000, the Commission approved a transition plan for Duke Energy Ohio, Inc., (Duke or company).^{2 3} In that opinion, the Commission, among other things, allowed Duke a market development period (MDP) ending no earlier than December 31, 2005, for residential customers and, with regard to each other customer class, ending when 20 percent of the load of each such class switched the purchase of its generation supply to a certified supplier. The transition plan opinion also granted Duke accounting authority to defer and recover a regulatory transition charge (RTC) that would continue through 2008 for residential customers and through 2010 for nonresidential customers.

On January 10, 2003, Duke filed an application 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, (03-93) for authority to modify its nonresidential generation rates to provide for a competitive market option (CMO), including both a market-based standard service offer and an alternative competitive bidding process, for rates subsequent to the MDP.

On October 8, 2003, Duke filed three additional, related cases. In *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 (03-2079), Duke requested authority to modify

¹ Amended Substitute Senate Bill No. 3 of the 123rd General Assembly.

² *In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan, Approval of Tariff Changes and New Tariffs, Authority to Modify Current Accounting Procedures, and Approval to Transfer its Generating Assets to an Exempt Wholesale Generator*, Case No. 99-1658-EL-ETP et al.

³ Duke was, at that time, known as the Cincinnati Gas & Electric Company. It will be referred to as Duke, regardless of its legal name at any given time. Case names, however, will not be altered to reflect the changed name.

its current accounting procedures to allow it to defer incremental costs related to its participation in the Midwest Independent Transmission System Operator (MISO). In *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 Nos. 03-2080-EL-ATA (03-2080) and Case No. 03-2081-EL-AAM (03-2081), Duke requested authority (a) to modify its current accounting procedures to allow it to defer incremental costs related to its net capital investment in electric transmission and distribution facilities, where that investment was made between January 1, 2001, and the date when such investment is reflected in the company's base rates, together with a carrying charge, and (b) to establish a capital investment rider to recover those deferred transmission and distribution facilities capital investments after the end of the MDP.

On December 9, 2003, the Commission issued an entry consolidating 03-93, 03-2079, 03-2080, and 03-2081 and requesting that Duke file a rate stabilization plan (RSP) that would stabilize prices following the termination of the MDP, while allowing additional time for the competitive retail electric services (CRES) market to grow. Duke filed a proposed RSP on January 26, 2004. On March 9, 2004, most of the parties to these proceedings filed objections to Duke's proposed RSP. On April 22, 2004, a public hearing on Duke's applications was held in Cincinnati. An evidentiary hearing commenced on May 17, 2004, but was adjourned in order to allow the parties to engage in settlement discussions. On May 19, 2004, a stipulation and recommendation (stipulation) was filed by Duke, staff of the Commission, FirstEnergy Solutions Corp., Dominion Retail, Inc. (Dominion), Industrial Energy Users-Ohio (IEU), Green Mountain Energy Company, Ohio Energy Group, Inc. (OEG), The Kroger Co. (Kroger), AK Steel Corporation (AK Steel), Cognis Corp. (Cognis), People Working Cooperatively (PWC), Communities United for Action (CUFA), and Ohio Hospital Association (OHA) (collectively, signatory parties). The stipulation was not signed by Ohio Consumers' Counsel (OCC), Ohio Partners for Affordable Energy (OPAE), The Ohio Manufacturers' Association (OMA), National Energy Marketers Association, PSEG Energy Resources & Trade LLC, or Constellation Power Source, Inc. It was also not signed by Constellation NewEnergy, Inc. (Constellation); MidAmerican Energy Company; Strategic Energy, LLC; or Integrys Energy Services, Inc. (formerly known as WPS Energy Services, Inc.). These four entities are collectively referred to as Ohio Marketers Group (OMG).

On May 20, 2004, the evidentiary hearing resumed. At the hearing, OCC made an oral motion to compel discovery from Duke regarding alleged side agreements between Duke and other parties to the stipulation. The attorney examiners denied OCC's motion to compel. Duke, staff, and other parties presented testimony and evidence in support of the stipulation and Duke's original proposal and others presented testimony and evidence in opposition to the stipulation and the proposal. On September 29, 2004, the Commission issued its opinion and order approving the stipulation with certain modifications. The

stipulation provided for the establishment of an RSP for Duke that would govern the rates and riders to be charged by Duke from January 1, 2005, through December 31, 2008 (with certain aspects of those rates also extending through the end of 2010). The order approved changes in certain cost components, increased the avoidability of certain charges by shopping customers, and directed full corporate separation of the generation component by Duke if it failed to implement the stipulation as modified. The Commission also affirmed the attorney examiners' denial of OCC's discovery motion relating to side agreements.

Applications for rehearing were filed by Duke, OCC, OMG, and CPS. In its application for rehearing, Duke also proposed various modifications to the stipulation, which modifications would, when taken together, effectuate an alternative to the stipulated version of the RSP. On November 23, 2004, the Commission issued an entry on rehearing in which it found that Duke's proposed modifications to the stipulation were meritorious and, making certain further revisions, granted rehearing in part. The rehearing applications by OCC and CPS were denied. OMG's application for rehearing was granted in part and denied in part. OCC, MidAmerican, and Dominion filed applications for a second rehearing. These applications were denied on January 19, 2005, except for a narrow issue raised by MidAmerican. The Commission issued a third rehearing entry on April 13, 2005, that further refined Duke's RSP and certain of the RSP riders, based on MidAmerica's application for rehearing.

On March 18 and May 23, 2005, OCC filed notices of appeal to the Supreme Court of Ohio, raising seven claimed errors. Following briefing and oral argument on the consolidated appeals, the supreme court issued its opinion on November 22, 2006. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789. In that opinion, the Court upheld the Commission's actions on issues relating to procedural requirements, due process, support for the finding that the standard service offer was market-based, harm or prejudice that might have been caused by changes on rehearing to the price-to-compare component, reasonableness of Duke's alternative to the competitive bidding process, non-discriminatory treatment of customers, non-bypassability of certain charges, corporate separation, and denial of certain discovery based on irrelevance under the second and third prongs of the stipulation-reasonableness test. However, the Court remanded these proceedings to the Commission with regard to two portions of the Commission decision and also held that the side agreements are not privileged.

Pursuant to the court's direction on remand, by entry of November 29, 2006, the attorney examiners directed Duke to disclose to OCC the information that OCC had requested with regard to side agreements. In the November 29, 2006, entry, the examiners also found that a hearing should be held to obtain the record evidence required by the court, in order to explain thoroughly our conclusion that the modifications on rehearing are reasonable and to identify the evidence we considered to support our findings. The

examiners scheduled a prehearing conference for December 14, 2006, to discuss the procedure to be established.

On December 7, 2006, Duke responded to the disclosure direction, stating that OCC had requested "copies of all agreements between [Duke] and a party to these consolidated cases (and all agreements between [Duke] and an entity that was at any time a party to these consolidated cases) that were entered into on or after January 26, 2004." Duke notified the Commission that only one such agreement existed and that it was between Duke and the city of Cincinnati. It provided a copy of that agreement to OCC and all other parties to the proceedings.

On December 13, 2006, Duke filed a motion for clarification of the examiners' entry of November 29, 2006. Duke expressed its belief that the remand "presupposes that there already is evidence of record to support the Commission's decision." Thus, it asked that the examiners "clarify" that the proposed hearing would be limited to briefs and/or oral argument, citing record evidence. On December 20, 2006, OCC filed a memorandum contra this motion for clarification. OCC opined that the motion should be denied on procedural grounds, as Duke failed to seek an interlocutory appeal of the examiners' entry. OCC also disagreed with Duke on substantive grounds, arguing in favor of a full hearing, following a period for discovery and noting that, if no hearing were held, the court's order that side agreements be disclosed would have no practical purpose. The Commission responded to this motion on January 3, 2007, refusing to "clarify" the examiners' ruling but confirming that the hearing would include the presentation of testimony and the introduction of evidence. On February 1, 2007, OCC filed an application for rehearing, asserting that the Commission's entry prematurely dealt with issues relating to the admissibility of evidence. On February 12, 2007, Duke, Duke Energy Retail Sales, LLC, (DERS), and Cinergy Corp. (Cinergy) filed memoranda contra this application for rehearing.⁴ The application for rehearing was denied by operation of law.

Meanwhile, on December 13, 2006, OCC filed a motion for a *subpoena duces tecum*, asking, in part, that DERS provide copies of any agreements between DERS and customers of Duke, between affiliates of DERS and customers of Duke, and related correspondence and other documents. On December 18, 2006, OCC moved for a second, similar *subpoena duces tecum*. On December 20, 2006, DERS objected and moved to quash the two *subpoenas* on various grounds, including the ground that they were unduly burdensome. On that same day, Duke filed a motion in support of DERS's motion to quash, as well as a motion for a protective order, asking that further discovery in these proceedings not be permitted. On December 21, 2006, IEU filed a motion in support of the motions by DERS and Duke. On December 28, 2006, OCC filed a motion to strike DERS's motion to quash, together with a memorandum contra Duke's motion for a protective order, and a motion to strike IEU's memorandum. OCC asserted that DERS's motion should be stricken on the grounds that it

⁴ DERS and Cinergy are affiliates of Duke, with DERS being a CRES provider in Duke's certified territory.

was not a party to the proceedings. It opposed Duke's motion on the ground that the requested protective order would prevent OCC from developing its case on remand. OCC moved to strike IEU's memorandum, claiming that memoranda in support are not permitted by the Commission's procedural rules. With regard to OCC's motion to strike DERS's motion to quash, on January 2, 2007, DERS filed both a memorandum contra and a limited motion to intervene. With regard to OCC's memorandum contra Duke's motion for a protective order, Duke filed a reply on January 2, 2007. The examiners denied the motion to strike IEU's memorandum in support, denied Duke's motion for a protective order, denied OCC's motion to strike the motion to quash, and granted, in part, the motion to quash, restricting the *subpoenae* to requesting copies of agreements with customers of Duke that are current or past parties to these proceedings or affiliates or members of current or past parties.

At the prehearing on December 14, 2006, the remanded cases were consolidated with proceedings regarding various riders associated with Duke's RSP and various procedural matters were addressed. On February 1, 2007, the examiners issued an entry scheduling a hearing on the remand aspects of the consolidated cases to begin on March 19, 2007. The hearing on the riders was scheduled for a separate time. Only the remanded cases are being considered in this order on remand.

On February 2, 2007, Duke, DERS, and Cinergy filed motions *in limine*, seeking to exclude certain agreements and related documents from these proceedings. With those motions, Cinergy filed a limited motion to intervene and DERS renewed its limited motion to intervene. On February 7, 2007, staff of the Commission filed a memorandum in response to the motions *in limine*, asserting that the agreements in question are not relevant, on the grounds that no stipulation is currently before the Commission and corporate separation claims should be raised in a separate proceeding. OMG filed a memorandum in response on February 9, 2007. OMG asserted that ruling on relevance or admissibility would be premature at that time. OCC opposed the motions on several grounds, both procedural and substantive. It also opposed intervention by Cinergy and DERS. Duke, Cinergy, and DERS filed replies to OMG's responsive memorandum, on February 14, 2007. On February 16, 2007, Duke, Cinergy, and DERS filed replies to OCC's memorandum contra their motions *in limine*. On February 28, 2007, the examiners granted the motions for intervention for the limited purpose of protecting confidential information and, in light of the supreme court's directives, denied the motions to exclude evidence of the side agreements.

Through the course of these remanded proceedings, numerous motions for protective orders, covering purported confidential materials, were filed. The subject of confidential treatment of discovered material arose in the prehearing held near the start of the remand phase. At that time, counsel for Duke mentioned the existence of confidentiality agreements with several of the parties. According to OCC's March 13, 2007, filing with the Commission, OCC, on February 23, 2007, notified Duke, DERS, Cinergy,

Kroger, and OHA that they should either make public certain documents or prove to the Commission that such material deserved confidential treatment. On March 2, 2007, Duke, DERS, Cinergy, Kroger, and OHA filed motions for a protective order covering the disputed material. On that same day, IEU also filed a letter expressing its concern over OCC's proposed release. On March 5, 2007, the OEG similarly filed a letter opposing OCC's proposed disclosure of confidential materials. On March 9, 2007, OMG filed its response to this controversy, explaining that agreements between customers and their CRES providers must be kept confidential. On March 13, 2007, OCC responded with a memorandum contra all five motions. OHA filed a reply on March 14, 2007. On March 15, 2007, Duke, Cinergy, DERS, and IEU filed replies.

The hearing commenced on March 19, 2007, as scheduled. Before the start of testimony, the examiners ruled, with regard to the confidentiality dispute, that the motions for protective orders would be granted for a period of 18 months from March 19, 2007, on the condition that the granting of those protective orders may be modified by the Commission if it deems appropriate to do so in light of the actions that it takes. (Rem. Tr. I at 9.) Duke presented the testimony of Sandra Meyer, Judah Rose, and John Steffen. OCC presented the testimony of Neil Talbot and Beth Hixon. Staff of the Commission presented the testimony of Richard Cahaan.

Duke, OCC, OMG, OEG, OPAE, Cinergy, DERS, and staff filed merit briefs on April 13, 2007. On April 24, 2007, OMG and Dominion filed reply briefs. Duke, OCC, Cinergy, DERS, IEU, OEG, OPAE, PWC, and staff filed reply briefs on April 27, 2007. On April 30, 2007, a reply brief was filed by OEG.

PWC's reply brief also included a motion to strike a portion of the merit brief filed by OPAE. OPAE responded on May 4, 2007, with a memorandum contra the motion to strike. PWC filed its reply on May 14, 2007. On June 1, 2007, PWC renewed its motion to strike, expanding the motion to cover parts of a merit brief filed by OPAE following the hearing on the rider aspects of this consolidated proceeding. OCC weighed in on this controversy on June 6, 2007, opposing PWC's motion. OPAE filed its memorandum contra on June 8, 2007, also filing its own motion to strike portions of Duke's reply brief in the rider phase of the hearing (which motion will not be dealt with in this opinion and order). On June 11, 2007, PWC filed its replies. On June 15, 2007, Duke filed a memorandum contra the motion to strike, to which OPAE replied on June 18, 2007.

II. DISCUSSION

A. Introductory Issues

1. Confidentiality

(a) Procedural Background Related to Confidentiality

As noted previously, numerous motions for orders protecting the confidentiality of various documents were filed during the course of these remanded proceedings. Initially, those motions were made either by parties supporting confidentiality or by parties who were complying with confidentiality agreements. In response to a notice by OCC, pursuant to those confidentiality agreements, that it intended to make certain information public, Duke, DERS, Cinergy, OHA, and Kroger filed motions for protective orders on March 2, 2007, covering material supplied by them to OCC. On March 9, 2007, Constellation filed a memorandum supporting Kroger's motion for a protective order. On March 13, 2007, OCC filed a memorandum contra the motions for protective orders. Reply memoranda were filed on March 14 and 15, 2007. Additional documents were subsequently filed under seal, with motions for protective orders.⁵

On the first day of the hearing in these proceedings, the attorney examiners issued a bench ruling on these motions, stating that all of the pending motions for protective orders would be granted for a period of 18 months from that date, provided that such orders might be modified by the Commission if it deems it appropriate to do so. (Rem. Tr. I at 9.)

On July 26, 2007, the chairman of the Commission received a public records request for certain of the information covered by the protective order granted by the examiners. On August 8, 2007, the examiners issued an entry calling for specific issues to be addressed by parties, relating to the possible modification of the protective order. Responsive memoranda were filed on August 16, 2007, by six of the parties.

⁵ All or portions of the following documents were filed under motions for protective orders: *subpoena duces tecum*, filed on February 5, 2007; transcript of remand deposition of Charles Whitlock, filed on February 13, 2007; transcripts of remand depositions of Denis George, Gregory Ficke, and James Ziolkowski, with attachments, filed on March 15, 2007; remand reply memoranda filed on March 15, 2007, by Duke, Cinergy, and DERS; transcripts of remand depositions of Beth Hixon and Neil Talbot, filed by Duke on March 16, 2007; and transcript of remand deposition of Beth Hixon, stipulation, and exhibits, filed by OCC on March 16, 2007. In addition, all or portions of the following items were filed confidentially, pursuant to examiner order: transcript of remand prehearing conference held on December 14, 2006; transcript of remand hearing, held March 19-21, 2007, and filed on April 3-4, 2007, together with exhibits; remand merit briefs of OCC, OMG, Duke, Cinergy and DERS, and OP&E, all filed April 13, 2007; supplemental remand testimony filed on April 17, 2007, by OCC; remand reply brief of OMG, filed April 24, 2007; remand reply briefs of OCC, Duke, OP&E, and Cinergy and DERS, filed April 27, 2007.

(b) Legal Issues Relating to Confidentiality

Section 4905.07, Revised Code, provides that all facts and information in the possession of the Commission shall be public, except as provided in Section 149.43, Revised Code, and as consistent with the purposes of Title 49 of the Revised Code. Similarly, Section 4901.12, Revised Code, specifies that, "[e]xcept as provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX of the Revised Code, all proceedings of the public utilities commission and all documents and records in its possession are public records." Section 149.43, Revised Code, indicates that the term "public records" excludes information that, under state or federal law, may not be released. The Supreme Court of Ohio has clarified that the "state or federal law" exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State* (2000), 89 Ohio St.3d 396, 399.

Similarly, Rule 4901-1-24, Ohio Administrative Code (O.A.C.), allows the Commission to protect the confidentiality of information contained in a filed document, "to the extent that state or federal law prohibits release of the information, including where the information is deemed . . . to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code."

Ohio law defines a trade secret as

information . . . 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.

Section 1333.61(D), Revised Code.

The Ohio Supreme Court has found that an *in camera* inspection is necessary to determine whether materials are entitled to protection from disclosure. *State ex rel. Allright Parking of Cleveland Inc. v. Cleveland* (1992), 63 Ohio St. 3d 772. Rule 4901-1-24(D)(1), O.A.C., also provides that, where confidential material can be reasonably redacted from a document without rendering the remaining document incomprehensible or of little meaning, redaction should be ordered rather than wholesale removal of the document from public scrutiny. Thus, in order to determine whether to issue a protective order, it is necessary to review the materials in question; to assess whether the information constitutes a trade secret under Ohio law; to decide whether nondisclosure of the materials will be

consistent with the purposes of Title 49, Revised Code; and to evaluate whether the confidential material can reasonably be redacted.

The Commission has conducted an *in camera* review of the materials in question. We will now consider each of the two tests to assess whether trade secrets are present. If we find trade secrets to be present, we will then consider whether, based on our review of the documents, nondisclosure will be consistent with purposes expressed in Title 49. We will, finally, evaluate the possibility of redaction, if necessary.

(c) Tests for Trade Secrets

(1) Independent Economic Value

a. Arguments

As noted above, Section 1333.61(D), Revised Code, provides that, for information to be classified as a trade secret, it must derive "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." Several of the parties addressed this issue in their memoranda.

Duke describes the materials in dispute as including business analyses, financial analyses, internal business procedures, responses to data requests, interrogatories, internal correspondence, customer information such as consumption levels and load characteristics, discussions of these items during sealed depositions, commercial contracts of Duke's affiliates and material ancillary to those contracts. (Duke Motion for Protective Order, March 2, 2007, at 2.) Duke "asserts that all of the information it has marked as confidential in these proceedings relates to the [Duke], DERS, or Cinergy contracts and the matters ancillary thereto." (Duke Memorandum in Support of Motion for Protective Order, March 2, 2007, at 11.) Duke also notes that, in other cases:

[t]he Commission has often afforded confidential treatment to commercial contracts between parties in competitive markets. When it recently granted a protective order regarding terms in a competitive contract in [*In the Matter of the Joint Application of North Coast Gas Transmission LLC and Suburban Natural Gas Company for Approval of a Natural Gas Transportation Service Agreement*, Case No. 06-1100-PL-AEC], the Commission held "we understand that negotiated price and quantity terms can be sensitive information in a competitive environment."

(Duke Memorandum in Support of Motion for Protective Order, March 2, 2007, at 11.)

Cinergy explains that the material in question contains the terms of an economic development assistance agreement and "includes information regarding the nature of the service . . . , the specific Cinergy subsidiary which is to provide electric service . . . , the level

and duration of Cinergy's assistance . . . , the amount of load . . . , and the terms upon which either party may end the agreement." (Cinergy Memorandum in Support of Motion for Protective Order, March 2, 2007, at 5.) Cinergy maintains that this information is a trade secret and is not a public record. Cinergy also maintains that the information is economically significant to the contracting parties (Cinergy Memorandum in Support of Motion for Protective Order, March 2, 2007, at 5-6; Cinergy Reply Memorandum, March 15, 2007, at 11.)

DERS summarizes the documents about which it is concerned as being "over 1200 pages of documents that include or relate to confidential commercial contracts, business operations and include depositions in these proceedings, introducing and discussing such protected materials." (DERS Motion for Protective Order, March 2, 2007, at 2.) DERS also points out that all "of the information that DERS provided falls into the category of sensitive information in a competitive environment." (DERS Memorandum in Support of Motion for Protective Order, March 2, 2007, at 9.) In addition, DERS asserts that release of the terms and conditions of these contracts, as well as its business analysis, operational decisions, and customer information, to the public and to DERS's competitors will interfere with competition in the industry. Explaining further, DERS notes that it performed proprietary analysis to determine pricing constructs and conditions upon which to base its contracts. Disclosure, it claims, would result in DERS's foresight into energy markets and customer service becoming apparent to competitors, especially if DERS is the only competitive supplier subjected to this disadvantage. (DERS Reply to Memorandum Contra, March 15, 2007, at 7.)

Supporting its motion for a protective order covering OHA member agreements, OHA points out that Section 4928.06(F), Revised Code, specifically contemplates the Commission maintaining the confidentiality of certain types of information relating to CRES providers. OHA asserts that the information does derive independent economic value from not being known to competitors who can use it to their own financial advantage. The general counsel of OHA, Mr. Richard Sites, in a supportive affidavit, affirms that the release of this information would provide competitors of OHA's members the ability to use the information to their competitive advantage and to the detriment of OHA and its members. He explains, further, that the information in the documents provides members the means to conduct their operations on a more economic basis and that OHA and the affected members have expended significant funds and time to negotiate the agreements. If made public, Mr. Sites states, competitors would have access to this information at no cost and the value of the documents to OHA and its members would be negated. (OHA Memorandum in Support of Motion for Protective Order, March 2, 2007, at 5; Affidavit of Richard L. Sites in Support of Motion for Protective Order, March 2, 2007, at 4.)

Noting that the documents contain term and pricing information concerning its purchase of competitive retail electric service, Kroger also maintains that disclosure of this

information to its competitors in the retail grocery and produce business would cause severe disadvantage to Kroger, explaining that Kroger competes for goods and services, including electric service, to operate its stores, factories, warehouses, and offices. The disclosure of price and other terms it has negotiated for the provision of electric services, it states, would provide its competitors with "a bogey to target in their own negotiations for competitive retail electric services and reveal information concerning Kroger's operation costs." It asserts that this information should remain protected for so long as the agreement in question is in effect. (Kroger Memorandum in Support of Motion for Protective Order, March 2, 2007, at 5-6.)

While not filing a motion for a protective order, IEU also filed a letter in the docket, on March 2, 2007, strongly supporting the granting of protective orders. IEU states that it understands OCC to be threatening to disclose customer names, account numbers, customer locations, prices, and other sensitive information, without any redaction and without the customers' express written consent.

On March 5, 2007, OEG also filed a letter in support, noting that the documents in question contain information reflecting OEG members' electric costs and that those members operate in highly competitive industries.

On March 9, 2007, Constellation, the counterparty to the Kroger agreement that was the subject of Kroger's motion, filed a memorandum supporting Kroger's motion. Constellation points out that the documents in question contain proprietary pricing and other information. Constellation asserts that disclosure of this information would place both Kroger and Constellation at a competitive disadvantage. (Constellation Memorandum in Response to Motion for Protective Order of Kroger Co., March 9, 2007, at 2-3).

b. Resolution

The parties arguing in favor of confidentiality make it clear that they consider the material in question to have economic value from not being known by their competitors and to have content that would allow competitors to obtain economic value from its use. OHA states this quite clearly, explaining that the material allows the contracting parties to run their businesses more economically and to compete more effectively. The discussion by DERS is also particularly helpful, noting that, in addition to customers' identities and pricing, its own marketing strategies would also be helpful to a competitor. Cinergy also points to deposition testimony showing the economic significance of these contracts.

We recognize that OCC disagrees with the moving parties' contentions. According to OCC, the burden is on those seeking confidential treatment. As OCC points out, the Commission has held that, pursuant to Sections 4901.12 and 4905.07, Revised Code, there is a strong presumption in favor of disclosure that the party claiming protective status must overcome. OCC also maintains that the Commission has required specificity from those that seek to keep information from the public record and that the specificity required by

law and supported by the terms of both the protective agreements and the protective attachment is missing from the motions. (OCC Memorandum Contra Motions for Protective Orders, March 13, 2007, at 8-9, 11.) OPAE also disagrees, arguing that the information, other than individual customers' account numbers, should be released. It stresses the importance of open proceedings and public scrutiny of Commission orders and asserts that the parties claiming protection have not met their burden of proof. (OPAE letter, August 16, 2007.)

It is clear to us, from our review of the information, that at least certain portions of the documents would indeed meet this portion of the definition of trade secrets. We agree with the parties seeking protective treatment that certain portions of the material in question have actual or potential independent economic value derived from their not being generally known or ascertainable by others, who might derive economic value from their disclosure or use. Specifically, we find that the following information has actual or potential independent economic value from its being not generally known or ascertainable: customer names, account numbers, customer social security or employer identification numbers, contract termination dates or other termination provisions, financial consideration in each contract, price of generation referenced in each contract, volume of generation covered by each contract, and terms under which any options may be exercisable.

(2) Efforts to Maintain Secrecy

a. Arguments

The second test under Section 1333.61(D), Revised Code, as quoted above, requires a finding that the information in question has been the subject of reasonable efforts to maintain confidentiality. Again, the parties argue the point.

Duke submits that only Duke employees with a legitimate need to know the information covered by this dispute have access to it or are aware of it, that the information is only known to the individual counterparties and is not otherwise disseminated, and that the information is confidentially maintained in separate files that are only accessible to individuals with a legitimate need to know the information. (Duke Reply to Memorandum Contra, March 15, 2007, at 6-7.)

DERS asserts that the "information that OCC seeks to make public is trade secret information maintained by DERS and counterparties in a confidential manner." (DERS Memorandum in Support of Motion for Protective Order, March 2, 2007, at 8.) In DERS's March 15, 2007, reply, it confirms that all disputed information is maintained by it in a confidential manner.

Similarly, Cinergy submits that the information is the subject of reasonable steps taken by Cinergy to protect it from disclosure to those who have no need for it, even within Cinergy and its affiliates. (Cinergy Reply to Memorandum Contra, March 15, 2007, at 11.)

OHA confirms that the information in question is treated by OHA as confidential and is not disclosed outside of the OHA and its members except under confidentiality agreements or in the context of regulatory proceedings where protection is granted. OHA included, with its supporting memorandum, an affidavit of its general counsel, Mr. Richard Sites. Mr. Sites states that the material in question is known only by a very limited number of employees of OHA and its members who were engaged in the negotiation of the agreements or those who need to know their contents in order to verify compliance. He affirms that OHA and its members maintain internal practices to prevent disclosure. Further, he states that the information is never made available outside of OHA or its members other than as the subject of a confidentiality agreement required by these proceedings. (Affidavit of Richard L. Sites in Support of Motion for Protective Order, March 2, 2007, at 4-5.)

Kroger, in its memorandum supporting its motion for a protective order, asserts that it has treated the documents in question as proprietary, confidential business information, available exclusively to Kroger management and counsel. The documents are, it says, either stamped as confidential or treated as such and have only been disclosed to Kroger employees and counsel, other than subject to the protective agreement executed by OCC. (Kroger Memorandum in Support of Motion for Protective Order, March 2, 2007, at 6.)

OEG notes that the terms of these agreements are kept secret even from other OEG members, as the knowledge of such costs might prove advantageous to others. (OEG letter, filed March 5, 2007.)

Constellation notes that all Constellation contracts are kept confidential. (Constellation Memorandum in Response to Motion for Protective Order of Kroger Co., March 9, 2007, at 2.)

In its memorandum contra, OCC claims that some of the documents sought to be protected were obtained by OCC from other sources and, therefore, have lost their protected status under the protective agreements, although it does not cite evidence for this claim. OCC also states that Duke has released discussions of documents as part of discovery without any claim to confidentiality. In addition, OCC argues that maintaining confidentiality would be restrictive and cumbersome at the hearing. (OCC Memorandum Contra Motions for Protective Orders, March 13, 2007, at 7.)

b. Resolution

It is clear to us, from reading the many memoranda submitted on this issue, that the parties advocating confidential treatment have sought, at all junctures, to keep this

information confidential and have treated the documents in question as proprietary, confidential business information. The second prong of the test is, therefore, satisfied. The information described above as deriving independent economic value from being not generally known to or ascertainable by others should, therefore, be deemed trade secret information.

(d) Consistency with Purposes of Title 49

Having determined that both statutory tests for the presence of trade secrets are met in this situation by at least certain of the information in the covered documents, we must determine whether it is consistent with the purposes of Title 49 of the Revised Code to maintain confidentiality of this information. The legislature was quite clear that the purposes of Title 49 include the encouragement of competition, diversity, and flexible regulatory treatment of the electric industry, specifically requiring the Commission to "take such measures as it considers necessary to protect the confidentiality" of CREC suppliers' information. Sections 4928.02, 4928.06(F), Revised Code. We find, therefore, that maintenance of this trade secret information as confidential is consistent with the purposes of Title 49.

(e) Redaction

Based on our *in camera* review of the documents in question, we believe that they can be redacted to shield the trade secret information while, at the same time, disclosing all information that we have not found to be a trade secret, without rendering the documents incomprehensible or of little meaning. Therefore, pursuant to our ruling on this issue, those documents must now be redacted to keep confidential only those matters we have ruled to be trade secrets. In order to accomplish this task, Duke shall work with the parties to the side agreements to prepare a redacted version of the confidential information attached to the prefiled testimony of Ms. Hixon and will file that redacted version within 45 days of the date of this order on remand. Each party will then be required to redact all other sealed documents that such party filed with the Commission. Redacted versions of all documents filed in these proceedings shall be docketed no later than 60 days after the date of this order on remand. The redacted information will be subject to a protective order for a period of 18 months from the initial grant of protection on March 19, 2007. Any party desiring an extension of that protective order should file a motion to that effect, no less than 60 days before the termination of the protective order.

2. PWC Motions to Strike

PWC, with the filing of its reply brief, moved to strike portions of the initial briefs of OP&E. Specifically, PWC asks the Commission to strike language that states that "PWC is not a party with a position distinct from CG&E-Duke's own position" because it operates "virtually all demand-side management programs funded by CG&E-Duke and has CG&E-Duke representation on its Board." PWC asserts that no evidence of record supports this

information confidential and have treated the documents in question as proprietary, confidential business information. The second prong of the test is, therefore, satisfied. The information described above as deriving independent economic value from being not generally known to or ascertainable by others should, therefore, be deemed trade secret information.

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language and that OPAE's unfounded claims suggest that PWC does not exercise its independent judgment regarding the issues in these consolidated proceedings. PWC finds OPAE's claims to be highly misleading and harmful in its relationship with residential consumer clients, cooperative consumer agencies, and community supporters. Absent record evidence supporting OPAE's insinuation, PWC urges the Commission to strike the specified portions of OPAE's brief.

OPAE's memorandum contra was filed on May 4, 2007. OPAE argues against the striking of the disputed language, seeking to show the truth of the questioned statements. OPAE points out that PWC itself concedes both that it obtains funding from Duke and that its primary interest in these cases is to ensure that funding continues. OPAE also notes that PWC signed the stipulation in these cases and took no position contrary to Duke's position. Thus, OPAE concludes, there is no reason to strike the statements.

PWC's reply, filed on May 14, 2007, continues the debate, urging the Commission to strike the entire memorandum contra, as "nothing more than a continuation of innuendo and careless accusations that can harm PWC." PWC proclaims, *inter alia*, that there is no evidence that PWC acts in disregard of residential consumers' interests or that PWC's motivation is solely to continue Duke's funding of PWC's activities.⁶

The Commission will not strike arguments made by parties in these pleadings. However, as always, the Commission will base its determination on record evidence. Thus, any arguments that are not supported by evidence of record in these proceedings will be ignored.

B. Supreme Court of Ohio Remand

1. Background

As noted previously, on March 18 and May 23, 2005, OCC filed notices of appeal to the Ohio Supreme Court, raising seven claimed errors. Following briefing and oral argument on the consolidated appeals, the supreme court issued its opinion on November 22, 2006. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789. In its opinion, the Supreme Court of Ohio upheld the Commission's actions on issues relating to procedural requirements, due process, support for the finding that the standard service offer was market-based, harm or prejudice that might have been caused by changes on rehearing to the price-to-compare component, reasonableness of Duke's alternative to the competitive bidding process, nondiscriminatory treatment of customers,

⁶ This order on remand considers only those portions of the consolidated proceedings that relate to the matters remanded from the Supreme Court of Ohio. Matters relating to the riders will be considered in a subsequent order. The dispute relating to striking language from pleadings continued into the rider phase of the proceedings. That continued portion of this dispute will be considered in the subsequent order.

non-bypassability of certain charges, corporate separation, and denial of certain discovery based on irrelevance under the second and third prongs of the stipulation-reasonableness test. However, the court remanded these proceedings to the Commission with regard to two portions of the Commission decision.

The first portion of the decision that was the subject of remand relates to the justification for modifications made in the first entry on rehearing. The Commission had granted rehearing with regard to certain modifications to the opinion and order that were proposed by Duke in its application for rehearing. The court remanded the case back to the Commission ". . . for further clarification of all modifications made in the first rehearing entry to the order approving the stipulation. On remand, the commission is required to thoroughly explain its conclusion that the modifications on rehearing are reasonable and identify the evidence it considered to support its findings." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 36. The court expressed its concern that modifications were made without sufficient explanation of the rationale for those modifications and without citation to the record. It explained in more detail that the "commission approved the infrastructure-maintenance-fund charge without evidentiary support or justification. The commission approved other modifications without citing evidence in the record and with very little explanation." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 35.

The other area of remand concerns a discovery dispute. At the hearing, counsel for OCC had stated that, two days prior, OCC had transmitted to Duke a request for production of all agreements between Duke and parties to these proceedings, entered into on or after January 26, 2004. Duke had responded that it did not intend to comply with that request. OCC moved for an order compelling production. After oral argument relating to the motion, the examiners denied the motion, stating that the Commission has previously held side agreements to be irrelevant to their consideration of stipulations and, in addition, privileged. On appeal, although the court upheld "the commission's denial of OCC's discovery request to the extent that the relevance of the information sought was based on the second and third prongs of the reasonableness test" for stipulations, it found that the Commission erred in denying discovery under the first criterion. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 80. Under that first criterion, the Commission determines whether a proposed stipulation is the product of serious bargaining. The court found that the "existence of side agreements between [Duke] and the signatory parties entered into around the time of the stipulation could be relevant to ensuring the integrity and openness of the negotiation process." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 85. The court further explained that, in determining whether or not there was serious bargaining, 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." *Ohio Consumers' Counsel*

v. Pub. Util. Comm., 111 Ohio St.3d 300, at para. 86. In addition, although not directly related to the remand, the court refused to recognize a settlement privilege applicable to Ohio discovery practice. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 89. It noted that, even if there were such a privilege, it would not apply to the settlement agreement itself, but only to the discussions underlying the agreement. Thus, it held that the side agreements are not privileged. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 93.

It should be noted that the side agreement issue is relevant to these cases, according to the court's opinion, only with regard to the serious bargaining prong of the Commission's analysis of stipulations and arose, therefore, as part of the September 29, 2004, opinion and order in these proceedings. The remand for lack of evidentiary support arose because of an issue first addressed in the Commission's November 23, 2004, entry on rehearing. Therefore, although the court discussed the lack of evidentiary support first, in this order on remand we find it critical to consider the issues in the order in which the errors were made.

It should also be noted that these proceedings are being considered only with regard to issues remanded to us for further consideration. Therefore, we are limiting our deliberation and order to those remanded issues. Ancillary issues raised by parties in the remand phase and not considered in this order on remand, such as potential corporate separation violations and affiliate interactions, will be denied.

2. Discovery Remand

(a) Consideration of Side Agreements

(1) Extent of Supreme Court's Directive

Several of the parties have made arguments relating to whether or not the Commission should consider any side agreements⁷ revealed through discovery. The most extreme of these statements would have had the Commission compel production of the agreements, as the motion was framed prior to appeal, and do nothing more. "The Court required that discovery be permitted and it has been. Nothing more need be done to satisfy the court's side agreement directive." (Staff remand brief at 4.) In reply to this comment, Dominion noted that "this interpretation makes no sense, in that it assumes that the court remanded the case simply so OCC could perform a vain act." (Dominion remand reply at 7.) We agree.

⁷ We use the term "side agreements" here to refer to a number of agreements that were entered into by one or more of the parties to these proceedings and were related to matters that are the subject of the proceedings.

The Supreme Court of Ohio, in its opinion, specifically ordered that, after compelling disclosure of the side agreements, the Commission “may, if necessary, decide any issues pertaining to admissibility of that information.” *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 94. The court also held that the “existence of side agreements between [Duke] and the signatory parties entered into around the time of the stipulation could be relevant to ensuring the integrity and openness of the negotiation process.” *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 85. Hence, the court required this Commission not only to order disclosure of side agreements but, also, to consider their relevance to the integrity and openness of the bargaining process. Merely compelling discovery, as advocated by some of the parties, is not the end of the Commission’s responsibility.

(2) Continued Existence of Stipulation

In addition, many parties argued that no stipulation remains in existence and that, therefore, any disclosed side agreements are irrelevant to the proceeding.⁸ Without the existence of an approved stipulation, the seriousness of the bargaining that led up to that stipulation is irrelevant, they contend. For example, Duke asserts that “[u]ltimately, the Commission issued its Opinion and Order rejecting the Stipulation on September 29, 2004.” (Duke remand brief at 11.) OEG is slightly less affirmative in its position, stating that the stipulation was “effectively rejected by the Commission . . .” (OEG remand reply at 6.) OEG’s argument is that the Commission “so changed the Stipulation as to render it of no consequence.” (OEG remand brief at 7.) Staff concurs in that view, but goes further. It asserts that, “[i]f stipulating parties are dissatisfied with the Commission’s changes, they may, through rehearing application, express that objection.” Staff continued its explanation, stating that “the company, a signatory to the stipulation, had . . . rejected the Opinion and Order by filing an Application for Rehearing. Thus it was apparent that the Stipulation was no longer meaningful.” (Staff remand brief at 14. See also staff’s Memorandum in Response to Motions *In Limine*, February 7, 2007, where staff says that there is “no reason to consider that old stipulation.”) DERS and Cinergy follow similar logic in their arguments.

On September 29, 2004, the Commission issued an Opinion and Order in which it offered to “approve” the stipulation, but only with material modifications to its terms. However, as filed by the parties, the stipulation provided that all parties were released from any obligations thereunder if the Commission failed to approve the stipulation *without* material modification. Thus, the Commission’s action effectively invalidated the stipulation and the parties believed that it ceased to exist upon issuance of the Commission’s Opinion and Order.

⁸ Duke remand brief at 2, 5, 6, 7, 11, and 12; Duke remand reply at 6, 33, and 44; Cinergy and DERS remand brief at 1, 5, 6, 11, 16, and 17; Cinergy and DERS remand reply at 9 and 13; OEG remand brief at 7; OEG remand reply at 6; IBU remand reply at 3; staff remand brief at 2, 13, 14, and 15; staff remand reply at 2.

(Cinergy and DERS remand brief at 5 [emphasis in original].)

The Commission disagrees with this entire line of reasoning. While we could engage in a discussion of the substance of the changes to the stipulation that were ordered by the Commission and determine whether they were or were not major changes, we will not do so. Rather, we will focus on two more critical topics. First, and most important, the Supreme Court of Ohio has already issued an opinion that was based, in part, on the court's interpretation of the stipulation as continuing to be relevant. That conclusion is, therefore, not for this Commission to overturn. As succinctly stated by OMG, "the argument that the Stipulation has terminated is inconsistent with the Supreme Court's Remand." (OMG remand reply at 2.)

Further, the face of the stipulation makes it clear the stipulation was never terminated. The stipulation reads as follows, with regard to termination based on Commission-ordered modifications:

This Stipulation is expressly conditioned upon its adoption by the Commission, in its entirety and without modification. Should the Commission reject or modify all or any part of this Stipulation or impose additional conditions or requirements upon the Parties, the Parties shall have the right, within 30 days of issuance of the Commission's order, to either [sic] file an application for rehearing. Upon the Commission's issuance of an Entry on Rehearing that does not adopt the Stipulation in its entirety without modification, any party may terminate and withdraw from the Stipulation by filing a notice with the Commission within 30 days of the Commission's order on rehearing. Upon such notice of termination or withdrawal by any Party, pursuant to the above provisions, the Stipulation shall immediately become null and void.

(Stipulation at 3 [emphasis added].) Thus, the stipulation set up a system for the signatory parties to follow, in the event they disagreed with Commission-ordered modifications. First, the disagreeing party was required to file an application for rehearing. If rehearing was not successful, the party then had 30 days to file a notice of termination of the stipulation. While applications for rehearing were filed, no such notice of termination was filed by any party.

This point was clearly made and understood by the court and was noted by the nonsignatory parties. The court indicated that "the stipulation included a provision that allowed any signatory party to withdraw and void the rate-stabilization plan should the commission reject or modify any part of the stipulation." However, the court continued, "[n]one of the signatory parties exercised its option to void the agreement despite significant modifications made by the commission to the original stipulation." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 46. As the argument

was expressed by OP&E, "[c]learly, [Duke's] filing of an application for rehearing was contemplated by the stipulation and, pursuant to the terms of the stipulation, did not constitute [Duke's] withdrawal from the stipulation." (OP&E remand reply at 2.) Similarly, O&M points out that the stipulation "does not contain an automatic termination provision; in fact, it has a specific provision that keeps the Stipulation in place with modifications unless and until a party within 30 days formally withdraws." Because "at no time did any party withdraw," the stipulation remained in effect. (O&M remand reply at 4.)

We agree. According to its terms, the stipulation was never terminated and, therefore, remained in effect as modified by the Commission's orders.

(b) Seriousness of Bargaining in Light of Side Agreements

(1) General Rule Concerning Evaluation of Stipulations

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

The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. See, e.g., *Ohio-American Water Co.*, Case No. 99-1038-WW-AIR (June 29, 2000); *The Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14, 1994); *Ohio Edison Co.*, Case No. 91-698-EL-FOR et al. (December 30, 1993); *The Cleveland Electric Illuminating Co.*, Case No. 88-170-EL-AIR (January 30, 1989); *Restatement of Accounts and Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC (November 26, 1985). The ultimate issue for our consideration is whether the agreements, which embody considerable time and effort by the signatory parties, are reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

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

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

(2) Supreme Court Review

Referring to the three-prong test, OCC argued on appeal that this Commission cannot make a reasonableness determination regarding the stipulation without knowing whether side agreements existed among the stipulating parties and the terms of those agreements. The court disagreed in part, explaining that it had previously "rejected exactly this argument as applied to the second and third prongs of the reasonableness test." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 80. However, it agreed with OCC's contention, as to the first prong of the test. "OCC suggests that if [Duke] and one or more of the signatory parties agreed to a side financial arrangement or some other consideration to sign the stipulation, that information would be relevant to the commission's determination of whether all parties engaged in 'serious bargaining.' We agree." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 84.

Therefore, we will, as directed, examine the circumstances surrounding the side agreements and consider whether the existence of the side agreements may have caused any of the signatory parties to refrain from seriously bargaining over the terms of the stipulation or to impact other parties' bargaining.

(3) Impact of Side Agreements on Serious Bargaining

OCC submitted, as part of the testimony of Ms. Beth Hixon, a number of side agreements that, it suggests, evidence a lack of serious bargaining. OCC argues that the side agreements prove that the stipulation lacked substantial support from a number of interested stakeholders. (OCC remand brief at 34-38, 45-48.) OCC also contends that existence of the side agreements confirms that nothing important was discussed at settlement meetings to which all of the parties were invited. Rather, OCC claims, Duke made concessions only to a few large customers, documented in the side agreements. (OCC remand brief at 44-45, 50-51.)

OPAE also contends that neither it nor OCC was invited to any open negotiating sessions during the period between the Commission's order and the entry on rehearing. OPAE claims that Duke made no effort to meet the concerns of OPAE in the settlement process and that it was never invited to negotiate a side agreement. According to OPAE, only large users got special deals and were induced to sign a stipulation, even though such users were not actually subject to the terms of the stipulation. OPAE also claims that the alternative proposal introduced by Duke was supported by parties because the large users

had reached side agreements that would insulate them from the effect of a portion of the generation price increases publicly proposed by Duke. (OPAE remand brief at 7-10.)

OEG claims that the side agreements were valid business transactions and were not used to purchase intervenor support for the stipulation. OEG also claims that there was no evidence to suggest that the agreements were unfairly priced, and therefore no evidence that these agreements were anything other than arm's-length commercial transactions. (OEG remand reply at 6-8.)

Duke argues that the record evidence proves that it held extensive settlement discussion with all parties to these proceedings and that all parties reviewed the stipulation before it was filed. Duke also claims that the Commission rejected the stipulation and that, therefore, support for the stipulation is irrelevant. Duke also contends that there is nothing wrong with confidential meetings with one or more parties to a case to the exclusion of other parties, that such a process encourages settlement to the benefit of all stakeholders, and that OCC engages in the same conduct. (Duke Energy Ohio remand brief at 42.)

a. Timing of Side Agreements

OCC groups the agreements into three time periods: those signed prior to the issuance of the Commission's opinion, those signed after the opinion but prior to the issuance of the Commission's entry on rehearing, and those signed after issuance of the entry on rehearing. Breaking their analysis down into those three groups and discussing them at length, OCC contends, *inter alia*, that the agreements "undermine the reliance that can be placed upon the publicly stated support by a variety of parties for [Duke's] proposals . . ." (OCC remand brief at 31.)

OMG argues that, regardless of when the agreements were signed, the side agreements were consideration for some signatory parties supporting the stipulation. (OMG remand reply at 11-14.) According to OMG, the side agreements, which were intended to induce support for the stipulation, were never terminated. Further, OMG contends that the record clearly shows a course of conduct by which signatory parties received rate discounts that were not generally available to other similarly situated customers. (OMG remand reply at 12.) OMG also argues that, because it is common for agreements to be made orally with the written version following weeks or months thereafter, the date the side agreements were signed does not necessarily constitute the date the agreements were reached. (OMG remand reply at 12-14.)

On the other hand, Duke points out that the vast majority of these contracts was signed after the close of the evidentiary record and therefore could not have affected the Commission's consideration of the case or the parties' position with respect to the litigation. (Duke remand brief at 25-26).

OEG also indicates that many of the agreements became effective after the stipulation was signed. It claims that events occurring after the stipulation was signed could not have affected the stipulation. (OEG remand brief at 7.)

Certainly, timing of the side agreements has relevance to this issue. The supreme court's opinion did not specifically address this point, as the facts regarding timing of the side agreements were not then in evidence. However, the court did reference the general issue of side agreement timing. The court stated that "[t]he existence of side agreements between [Duke] and the signatory parties entered into *around the time of the stipulation* could be relevant to ensuring the integrity and openness of the negotiation process." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 85 (emphasis added). The court did not specifically make reference to side agreements being entered into only *before* the stipulation. Therefore, we must interpret the court's concern involving side agreements "around the time of the stipulation" to cover a broader, but unspecified, time period, both before and after the date the stipulation was entered into.

Clearly, any side agreement signed within a short time prior to the stipulation might have had an impact on a signatory party's support for the stipulation. Similarly, a side agreement signed shortly after execution of the stipulation might have documented the parties' earlier, oral understanding. Therefore, we find that side agreements entered into before the Commission issued its opinion and order are relevant to our evaluation of the seriousness of bargaining that led to the stipulation with regard to Duke's RSP. However, with regard to agreements that were executed after the opinion and order or the entry on rehearing, we note that they appear, based on testimony in the record, to be renegotiations of earlier side agreements. (Rem. Tr. III at 124-5. See, also, Duke Rem. Ex. 3, at 35-6.) While such substituted arrangements might show a continued understanding among parties, it is unlikely that they would be relevant to the evaluation of the first prong of the test for a stipulation that was remanded to us from the supreme court. Arrangements that were renegotiations, after the issuance of the opinion and order or the entry on rehearing, demonstrate little with regard to how seriously the parties bargained over the stipulation. Therefore, any agreements that documented renegotiations of side agreements that had been entered into prior to the issuance of the opinion and order are deemed irrelevant to this proceeding and form no part of the basis for our opinion.⁹

b. Support Provisions

Without referring to any matters that we have deemed to be trade secret, we will now consider whether side agreements may have impacted the bargaining process that led to the stipulation. The stipulation was executed on May 19, 2004. Affiliates of Duke

⁹ We would also note, however, that it would be possible for a side agreement to be entered into after the issuance of an opinion and order and still be relevant to the consideration of a stipulation, where it appears to the Commission that such a side agreement may have documented an understanding that had previously been reached.

entered into six agreements with signatory parties, all of which are nonresidential customers or associations representing nonresidential customers, between May 19 and July 7, 2004. The Duke affiliate was, in each case, either Cinergy, the parent of Cincinnati Gas & Electric Company, or Cinergy Retail Sales LLC, the predecessor of DERS and a CRES provider. Each of those six agreements included a provision requiring support of the stipulation. (OCC Rem. Ex. 2A attachments.)

c. Resolution Regarding Serious Bargaining

Certain of the parties to the stipulation had signed side agreements that required them to support the stipulation. While it is true that these agreements were executed on the same day as the stipulation or after that date, there is no evidence regarding the dates when the actual understandings may have been reached. We also note that there were other parties that did not have agreements requiring support of the stipulation and that a few of those entities did sign the stipulation. However, we have limited evidence regarding the continued presence and participation of the supportive parties during stipulation negotiations, or regarding the willingness of Duke to compromise with parties who may not have been discussing side arrangements. The fact that the contracting party may have been an affiliate of Duke, rather than the regulated utility itself, is irrelevant to our interest in the motivations of the signatory party to support the stipulation. Based on the supreme court's expressed concern over the "integrity and openness of the negotiation process" and its requirement that we seek affirmative "evidence that the stipulation was the product of serious bargaining," we now find that we do not have evidence sufficient to alleviate the court's concern. Rather, we find that the existence of side agreements, in which several of the signatory parties agreed to support the stipulation, raises serious doubts about the integrity and openness of the negotiation process related to that stipulation. Based on the expanded record of this case and our review of the side agreements, we now reach the inevitable conclusion that there is a sufficient basis to question whether the parties engaged in serious bargaining and, therefore, that we should not have adopted the stipulation. We now expressly reject the stipulation on such grounds.

3. Evidentiary Support Remand

(a) Supreme Court's Directive

The Supreme Court of Ohio, reviewing the modifications we made to our opinion and order when we issued our entry on rehearing, found insufficient support for those modifications. The court noted that the Commission is empowered to modify orders, as long as the modifications are justified. "The commission's reasoning and the factual basis supporting the modifications on rehearing must be discernible from its orders. . . . [A]ccordingly, we remand this matter to the commission for further clarification of all modifications made in the first rehearing entry to the order approving the stipulation. On remand, the commission is required to thoroughly explain its conclusion that the modifications on rehearing are reasonable and identify the evidence it considered to

support its findings." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 35-36.

Specifically, the court identified three areas about which it was concerned. The first topic to be supported was the "commission's approval of the infrastructure-maintenance fund as a component" of the RSP. The court was particularly concerned about whether that item was a cost component or a surcharge. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 29-30. Second, the court was troubled about the Commission's setting of a "baseline" for calculating various of the components, thereby presetting charges for certain years without record evidence. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 31. Finally, the court pointed out the lack of clarity about the impact of the various modifications relating to the level of charges that cannot be avoided by those customers who obtain their generation service from a competitive supplier. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, at para. 32-33.

The court's directive is no longer expressly applicable, as we have now found that the stipulation should not have been adopted. As a result of that finding, changes made to the opinion and order are moot.¹⁰ Without a stipulation to consider, we are compelled to consider Duke's RSP application, as filed on January 26, 2004, and subsequently modified by Duke prior to the initial hearing in these proceedings. ([Duke's] Filing in Response to the Request of the Public Utilities Commission of Ohio to File a Rate Stabilization Plan [RSP application], January 26, 2004; Duke Ex. 11, at 3-5.) We will review the reasonableness of the RSP application in light of the record evidence developed both in the initial hearing and in the hearing on remand, recognizing, also, that certain aspects of the RSP that was approved in these proceedings have already been implemented. We note, in this regard, that the initial hearing considered support for the competitive market option filed by Duke, the RSP filed and modified by Duke, and the proposed but now rejected stipulation.

(b) Legal Standard for Adoption of RSP

In adopting SB 3, the legislature set forth the policy of the state of Ohio with regard to competitive retail electric service. That policy includes matters such as ensuring the availability of reasonably priced electric service, ensuring the availability of retail electric services that provide appropriate options to consumers, encouraging innovation and market access for cost-effective service, promoting effective customer choice, ensuring effective competition, and protecting consumers against unreasonable market deficiencies and market power. The Supreme Court of Ohio has, recently, emphasized the importance of ensuring that these policy objectives are considered. See *Elyria Foundry Co. v. Pub. Util. Comm* (2007), 114 Ohio St.3d 305. Ohio law specifically requires each electric distribution utility, such as Duke, to "provide consumers, on a comparable and nondiscriminatory basis

¹⁰ The approach we will take in this order on remand will, nevertheless, serve as a complete response to the court's request for support for the changes made on rehearing.

within its certified territory, a market-based standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service." Section 4928.14(A), Revised Code. Section 4928.14(B), Revised Code, provides that, "[a]fter its market development period, each electric distribution utility also shall offer customers within its certified territory an option to purchase competitive retail electric service the price of which is determined through a competitive bidding process." Therefore, we will be reviewing Duke's proposal to ensure these policies and requirements are met.

(c) Consideration of RSP Proposal

Duke's proposed RSP is comprised of two major components: an avoidable, or cost-to-compare, component and an unavoidable, or provider-of-last-resort (POLR), component. We will review each of these components and then consider other terms in the proposal. Finally, we will evaluate whether the proposal, overall, meets the statutory requirements.

(1) RSP Proposal: Generation Charge

Under the terms of the original application, the generation charge, through 2008, was proposed to be equal to the unbundled generation charge (or "big G"), reduced by the RTC, resulting in what has been known as "little g." (Duke RSP application at 17.) Duke's modifications to its application altered the generation charge in two ways. First, the generation charge was reduced by 15 percent, creating a portion of the POLR charge (designated as the rate stabilization charge, or RSC) out of that reduction. Thus, the generation charge became 85 percent of little g. Second, Duke added a tracker element, to adjust the generation charge by the incremental cost of fuel and economy purchased power, excluding emission allowances. This fuel and purchased power tracker was originally to be calculated on the basis of projected native load fuel cost and projected retail sales volumes, as compared with a baseline of the fuel rate frozen on October 6, 1999. ([Duke] Ex. 11, at 4, 7-8.) OCC witness Pultz agreed that "increases in the cost of fuel and purchased power costs should be recovered through a bypassable charge." (OCC Ex. 3A, at 15.)

We find that little g is a reasonable base for setting the market price of generation. Little g was the generation charge prior to the unbundling of electric services, less the statutorily required regulatory transition charges. Hence, it is a logical starting point for a market rate. Because the omitted 15 percent of little g is proposed to become a POLR charge, we will discuss the question of whether the generation charge should be 85 percent or 100 percent of little g, below, as part of our discussion of the proposed POLR component.

We also find, based on the evidence of record in these proceedings, the fuel and economy purchased power tracker to be reasonable as a part of the market-based charge for generation, with certain modifications to Duke's proposal, as will be discussed below.

The embedded cost of generation that was unbundled, pursuant to SB 3, already included the cost of fuel and purchased power. ([Duke] Ex. 11, at 9.) The most recent determination of such costs was made in *In the Matter of the Regulation of the Electric Fuel Component Contained Within the Rate Schedules of Cincinnati Gas & Electric Company and Related Matters*, Case No. 99-103-EL-EFC. Therefore, the baseline for the incremental costs to be included in the fuel and economy purchased power tracker was reasonably proposed as the amount of such costs allowed in that case. (See [Duke] Ex. 11, at 8.)

In the application, the fuel and economy purchased power tracker was proposed not to include the cost of emission allowances. The now-rejected stipulation also proposed a tracker, designated there as the FPP, that similarly collected incremental fuel and economy purchased power costs. Through the process of these proceedings and during the pendency of the supreme court's review, the FPP was put into place and was the subject of evidentiary audit proceedings before this Commission. In the first such proceeding, the Commission adopted a stipulation detailing numerous aspects of the FPP's calculation, including the allocation of EPA-allotted zero-cost SO₂ emission allowances and the promise that neither NO_x emission allowance costs nor NO_x emission allowance transaction benefits would be included in the FPP through the end of 2008. *In the Matter of the Regulation of the Fuel and Economy Purchased Power Component of The Cincinnati Gas & Electric Company's Market-Based Standard Service Offer*, Case No. 05-806-EL-UNC, Opinion and Order (February 6, 2006), at 4-5. That stipulation was not opposed by any party and no application for rehearing was filed with regard to the opinion and order that adopted it. We now find that, on the basis that the fuel and economy purchased power tracker in Duke's proposal is analogous to the FPP in the previously approved RSP, the matters approved in Case No. 05-806-EL-UNC should remain in effect. Therefore, Duke's proposed fuel and economy purchased power tracker calculation should be modified to parallel that of the FPP.

(2) RSP Proposal: Provider of Last Resort Charge

The POLR component is proposed by Duke to be a charge that includes costs that Duke determined are necessary for it to "maintain a reliable generation supply and to fulfill its statutory POLR obligation," with annual increases capped at 10 percent of little g, calculated cumulatively. It proposed including in this component taxes, fuel, environmental costs, purchased power, transmission congestion, homeland security, and reserve capacity. In its modifications, it proposed removing fuel and purchased power from the POLR component and making those items the subject of a separate tracker. In addition, it proposed to charge a fixed RSC equal to 15 percent of little g. (Duke RSP application at 17-18; [Duke] Ex. 11, at 3, 9-10.) Duke's witness Steffen testified that the POLR charge should be unavoidable, on the ground that "all consumers, including those who switch to a CRES provider, benefit from [Duke's] POLR obligation . . ." ([Duke] Ex. 11, at 11.)

The Supreme Court of Ohio has approved the concept of an unavoidable charge to recover, for an electric distribution utility, the costs of providing POLR services. *Constellation NewEnergy, Inc. v. Pub. Util. Comm.* (2004), 104 Ohio St.3d 530, at para. 36-40. However, the court has also specifically directed us to consider carefully the nature of the costs being collected through POLR charges. "We point out that while we have affirmed the commission's order with regard to the POLR costs in this and previous cases, the commission should carefully consider what costs it is attributing as costs incurred as part of an electric-distribution utility's POLR obligations." *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 340, at para. 26. Therefore, in compliance with the court's directive, we will evaluate each of the elements of Duke's proposed POLR rider to determine whether it is a legitimate POLR charge.

a. Reserve Margin Costs

Duke proposed that its POLR rider would include a component for reserve margin costs. ([Duke] Ex. 11, at 10.) Duke's witness Steffen explained that this component would recover for the reserve margin that Duke maintains for all load and for the call options that it maintains to cover switched load. He noted that factors affecting these costs include "the outstanding load, existing capacity, market concentration, credit risks, and regulatory risks." Duke intended, he testified, to purchase call options to cover some or all of the switched load and that this component would recover those out-of-pocket costs. The initial POLR charge included no costs for call options. The planned 17-percent reserve margin for all load was described by him as being "based on the annualized capital cost of constructing a peaking unit." ([Duke] Ex. 11, at 15.) The initial POLR charge calculations allowed for the recovery of \$52,898,560 for the projected cost of a peaking unit. ([Duke] Ex. 11, at attachment JPS-7.)

Although the stipulation in these proceedings has now been rejected, a component that was designed to recover analogous costs, the system reliability tracker or SRT, has been implemented since the approval of Duke's RSP. In order to assist with our analysis of the application, we will describe the stipulation's provisions in this area. The stipulation provided for the recovery of the cost of maintaining adequate capacity reserves, as a part of what was designated the annually adjusted component (AAC) of the POLR charge. (Stipulation, May 19, 2004, at para. 3.) The exact same attachment was a part of the stipulation, detailing Mr. Steffen's calculation, as was a part of Mr. Steffen's direct testimony filed a month earlier. Thus, the stipulation still proposed to calculate the reserves on the basis of the cost of constructing a peaking unit. (Stipulation, May 19, 2004, at Ex. 1.) However, in the stipulation there is no mention of adding out-of-pocket costs of call options to the peaker cost.¹¹

¹¹ We note that, on remand, Mr. Steffen nevertheless testified that call option costs were included as a part of the stipulated AAC's reserve margin pricing component. Duke Rem. Ex. 3, at 21.

The modifications to the stipulation, proposed by Duke on rehearing, moved the cost of the reserve margin into two newly designated components: the SRT and the infrastructure maintenance fund, or IMF, the latter of which is discussed below. This carving up of the AAC was discussed in the hearing on remand. The modifications, Mr. Steffen explained, "carved out several of the underlying cost and pricing factors previously embedded elsewhere in the Stipulated AAC, and included them as separately named POLR components or trackers. These carved out components became the IMF and the SRT." (Duke Rem. Ex. 3, at 16.) He testified further as to the new method of calculating reserve costs that was proposed in the modifications suggested in the application for rehearing. "In contrast to the fixed reserve margin amount proposed in the Stipulated AAC, the SRT is a mechanism of pure cost recovery of maintaining necessary capacity reserves (15% planning reserve for switched and non-switched load), and is subject to an annual review and true-up." (Duke Rem. Ex. 3, at 22.) It was noted, by many parties, that this actual-cost method of calculating the cost of reserves resulted in a much lower charge than the peaker unit cost methodology that had been proposed in Duke's application and in the stipulation. (See, for example, OCC rem. brief at 18-20; OCC Rem Ex. 1, at 31-32, 46, 48.)

OCC's witness Pultz discussed recovery for reserve margin costs. Mr. Pultz argued that shopping customers "should not have to pay both the power supplier and [Duke] for the same service." Therefore, he concluded, "any capacity reserves should . . . be included in a rider that could be modified as transmission arrangements change." (OCC Ex. 3A, at 17.)

The SRT calculation and avoidability were considered by this Commission in *In the Matter of the Application of The Cincinnati Gas & Electric Company to Adjust and Set its System Reliability Tracker Market Price*, Case No. 05-724-EL-UNC, Opinion and Order (November 22, 2005). In that case, we adopted an unopposed stipulation, in an order that was not subjected to an application for rehearing. We agreed, there, that the SRT should be avoidable by any nonresidential customer that signs a contract or provides a release agreeing to remain off Duke's standard service offer through 2008 and to return to Duke's service, if at all, at the higher of the RSP price or the hourly, locational marginal pricing market price. We also agreed, based on that stipulation, to several aspects of calculation of the SRT and our subsequent review of the SRT charges.

We find, based on the evidence of record in these proceedings and precedent from the supreme court, that the collection of costs of maintaining a reserve margin is appropriate for collection through a POLR rider. ((Duke] Ex. 11, at 14-16.) See *Constellation NewEnergy, Inc. v. Pub. Util. Comm.* (2004), 104 Ohio St.3d 530, at para. 40. We find, further, that the methodology approved for the SRT, and the avoidability also approved for the SRT, should be continued. This was reviewed by us as a POLR charge and was found reasonable. We continue to believe that Duke will not incur POLR costs with regard to a nonresidential customer that has committed not to avail itself of Duke's POLR services.

Therefore, such customers should avoid participation in the POLR reimbursement methodology. In addition, the approved methodology specifically allows the charge to be adjusted and reconciled quarterly, thus minimizing the magnitude of any changes to be absorbed by customers. Finally, the stipulation in the SRT case specifically provides for SRT transactions to be audited by us. This provision allows us to ensure, on an ongoing basis, that costs being passed through the SRT rider are appropriate for inclusion in a POLR charge.

b. Other Specified Costs

In addition to reserve margin, Duke's application, as modified, proposed that the RSP's POLR component would include incremental costs for homeland security, environmental compliance, emission allowances, and taxes. ([Duke] application at 17; Duke Ex. 11, at 10.) We will, at this point, review Duke's description of these factors and then discuss the reasonableness of recovery of these items through a POLR charge.

Taking them in the order listed by Duke, homeland security is first. Duke's witness described this component as being "designed to recover the revenue requirement on net capital expenditures and related O&M expenses associated with security improvements required for homeland security purposes. Only the revenue requirement associated with costs in excess of those incurred in year 2000 will be recovered." He provided examples of the items for which expenditures might be incurred, such as information technology security, additional security guards, and monitoring hardware. ([Duke] Ex. 11, at 13.)

In the environmental compliance and emission allowance areas, Mr. Steffen testified that the POLR charge was "designed to recover the revenue requirement associated with capital expenditures, net of accumulated depreciation, incurred to comply with existing and future environmental requirements, including the cost of emission allowances" and incremental operation and maintenance expenses. He also noted that the emission allowance costs would "be netted against the revenue recovered via the emission allowance component of the frozen EFC rate." The baseline for this calculation is the year 2000. ([Duke] Ex. 11, at 12-13.)

The tax aspect of the proposed POLR charge was "designed to recover any incremental expense [Duke] might incur as a result of significant changes in tax legislation. This includes federal, state and local taxes on income, property, payroll or any other taxes that are levied on [Duke]." ([Duke] Ex. 11, at 14.)

With regard to the calculation of the amounts of this charge, there must be a baseline against which to compare Duke's expenditures. To the extent that costs covered by the AAC are already being recovered by Duke, those same costs should not be recovered again. Following enactment of SB 3, requiring the unbundling of electric services, the Commission approved Duke's transition plan, unbundling those services on the basis of Duke's financial records as of December 31, 2000. *In the Matter of the Application of The*

Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan, Approval of Tariff Changes and New Tariffs, Authority to Modify Current Accounting Procedures, and Approval to Transfer its Generating Assets to an Exempt Wholesale Generator, Case No. 99-1658, et seq. Thus, any generation-related expenditures prior to that date would already be included in little g. We find that it is reasonable to allow Duke to collect for expenditures it makes in these areas, where those expenditures are greater than the levels approved in its last rate case prior to unbundling. Therefore, we find that, in all three situations (homeland security, environmental compliance, and taxes), calculations of incremental expenditures shall be based on changes in costs after December 31, 2000.

One further point must be made with regard to calculation of the amount of this proposed charge. As in the case of some of the other components of Duke's proposed RSP, these portions of the POLR charge must be reviewed in the light of not only the application and testimony on record but, also, the events that have transpired since the application was filed and the decisions made by this Commission in related proceedings. Duke's proposed modifications to the stipulation moved the emission allowance costs to the FPP, as discussed above. Also as discussed above, a stipulation relating to the FPP further adjusted the recovery of emission allowance costs. As we noted, that stipulation was adopted by us without objection and should remain in effect. Thus, we will follow the terms of that stipulation with regard to treatment of emission allowance costs.

In determining whether the costs of environmental compliance, homeland security, and taxes should be recoverable through a POLR rider that is charged to all customers, we must follow the direction provided in recent decisions by the Supreme Court of Ohio. The Dayton Power & Light Company's (DP&L) rate stabilization plan includes an environmental investment rider that was intended to allow that company to recover environmental plant investments and incremental operations and maintenance, depreciation, and tax costs. The Commission, in furtherance of the goal of promoting competition, required that rider to be avoidable by shopping customers, thereby increasing the price to compare. The supreme court did not disagree with that conclusion. *Ohio Consumers' Counsel v. Pub. Util. Comm. (2007)*, 114 Ohio St.3d 340.

We find that Duke's proposed POLR charge should be considered in an analogous manner. Here, the environmental compliance aspect of the POLR charge is comparable to DP&L's environmental investment rider. It is directly related to the generation of electricity. We note the testimony of witnesses for Constellation, who explained that environmental compliance costs, as well as other generation-related costs such as security and taxes, should not be a part of a POLR charge, as generation sold by CRES providers must also comply with environmental requirements and, so, the price of that generation includes recovery of environmental compliance costs. As a result, it argues, inclusion of environmental compliance costs in POLR charge would result in shoppers paying for this category of expenses twice. (OMG Ex. 14, at 6; OMG Ex. 11, at 8-9.) OCC's witness Pultz agreed. (OCC Ex. 3A, at 18-20. See also OMG brief, at 15-19.) We agree. Therefore, and in

order to continue encouraging the development of the competitive market for generation, we find that the environmental compliance, tax, and homeland security aspects of Duke's proposed POLR charge should be avoidable and, thus, not part of a POLR charge. This change will have the effect of increasing the price to compare over what it would have been under Duke's application and, thus, increasing the ability of CRES providers to market their services. The emission allowances that Duke proposed to recover through a POLR charge will be, as discussed above, treated as provided in the FPP-related stipulation previously adopted by this Commission.

c. Rate Stabilization Charge

As noted above, the proposed RSC would equal 15 percent of little g and would be charged to all consumers, regardless of who provides their generation services. In order to determine whether this is actually a charge for POLR services, as it is described by Duke in its amended application, we note that non-shopping customers would pay, for their generation, only 85 percent of little g. Duke would recover the other 15 percent of the cost of the generation that is provided to nonshoppers through the payment of the RSC. Clearly, payment of the RSC is a portion of their payment for the embedded cost of generation. Therefore, we conclude that the RSC should not be allowed as a portion of Duke's POLR charge. However, that does not mean that the portion of little g that would be recovered through the RSC should not be paid by nonshoppers. That 15 percent of little g was, before unbundling, a legitimate charge for generation. Therefore, we also conclude that the generation charge should be increased from 85 percent of little g to 100 percent of little g as it was in Duke's original application.

d. POLR Risk Costs

We recognize that identifiable and specifically calculable costs may not be the only costs that are incurred by Duke in its standing ready to serve shopping customers. Mr. Steffen noted that there is a risk to Duke inherent in the provision of POLR service. ([Duke] Ex. 11, at 10.) This has also been recognized by the supreme court. *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 340, at para. 18.

Under the terms of Duke's application, POLR service risk would have been recovered by making the RSC unavoidable or only partially avoidable. We have found that this is an inappropriate methodology. However, that does not mean that such risk does not exist. In the remand hearing, considering support for the elements of the now-rejected stipulation, Mr. Steffen explained that the IMF (which equaled a percentage of little g) was a non-cost based charge that is "the way [Duke] proposed to calculate an acceptable dollar figure to compensate [Duke] for the first call dedication of generating assets and the opportunity costs of not simply selling its generation into the market at potentially higher prices." (Duke Rem. Ex. 3, at 26.) Similarly, he also testified that the "IMF is not tied directly to a specific out of pocket expense and it is not a pass through of actual tracked costs. It is a component of the formula for calculating the total market price [Duke] is

offering and is willing to accept in order to supply consumers and to support its POLR risks and obligations." (Duke Rem. Ex. 3, at 25.)¹² We read this explanation as a statement that the IMF was, in the modified stipulation, an element that was designed to compensate Duke for the pricing risk of providing POLR service. While we are not now considering the modified stipulation, we are considering the reasonableness of Duke's application. As it no longer includes an element that would compensate Duke for this risk, we will now consider the parties' arguments on the IMF issue, to determine whether an analogous charge would be an appropriate charge for this purpose.

OCC disputes that the IMF was carved out of the stipulated AAC and priced within the original AAC amount. Mr. Talbot, on behalf of OCC, claimed that the IMF was, simply, a new charge, not a part of the stipulated AAC. (OCC Rem Ex. 1, at 48.) OCC believes that the AAC should be seen as compensation for existing capacity, along with little g. (OCC remand brief at 17.) It is not, according to OCC, justified on the basis of risk, reliability, or opportunity cost. (OCC remand brief at 21-23.)

OCC also argues against the IMF on the basis of dollar values assigned to various components. It points out, first, that the combination of the IMF and SRT is only less than the stipulated reserve margin amount in 2005 and 2006. The total, once the IMF increased in 2007, would be greater in subsequent years, OCC explains. (OCC Rem Ex. 1, at 48; OCC remand brief at 23.) Second, OCC points out that the original reserve margin estimate, against which the IMF is compared by Duke, was too high. It notes that the cost of acquiring existing capacity in the market, which is the basis for the SRT that Duke says was carved out of the original reserve margin, is far less than the cost of building a new peaking unit, which was the basis for the stipulated reserve margin. Therefore, according to OCC, the SRT and the IMF only fall within the original estimate because that estimate was too high. (OCC remand brief at 17-20; OCC remand reply at 14-15.)

OMG contends that the IMF is a POLR charge and that POLR charges are, by definition, noncompetitive and therefore must be cost justified. OMG suggests that the cost justification of the IMF is unconvincing. At most, OMG believes, the IMF could be an "energy charge" and, thus, avoidable. (OMG remand brief at 21-25.)

We are tasked, under Chapter 4928 of the Revised Code, with approving generation charges that are market-based and consistent with the state policy set forth in this chapter. Although, in some instances, costs or changes in costs may serve as proxies for reasonable market valuations or changes in such valuations, this is not the same as establishing prices

¹² By itself, a company's testimony that a price is "acceptable" as part of a standard service offer might not provide a sufficient basis to establish that the standard service offer produces reasonably priced retail electric service. In this instance, as we will discuss below, we also have considered Duke's testimony comparing its RSP price to market prices and have found that a standard service offer that includes a charge for recovery of pricing risk would be reasonably priced.

based on costs. Similarly, a market-based standard service offer price is not the same as a deregulated price. Standard service offers remain subject to Commission jurisdiction under Chapter 4928 of the Revised Code. And, standard service offers must be consistent with state policy under Section 4928.02, Revised Code. *Elyria Foundry Co. v. Pub. Util. Comm.* (2007), 114 Ohio St. 3d 305. Thus, while a standard service offer price need not reflect the sum of specific cost components, the result must produce reasonably priced retail electric service, avoid anticompetitive subsidies flowing from noncompetitive to competitive services, be consistent with protecting consumers from market deficiencies and market power, and meet other statutory requirements. Duke's original application for an RSP addressed risk recovery through the RSC, thereby recovering such costs from shoppers. Duke had proposed that the IMF charge would equal six percent of little g during 2007 and 2008. We find that the terms proposed by Duke for the IMF, the rationale for which was supported on remand, are reasonable for determination of a market-based charge to compensate for the pricing risk incurred by Duke in its provision of statutory POLR service. Recognizing that this component is not cost-based, we note that it is not necessary, under Section 4928.14, Revised Code, for components of a market price to be based on cost.

The next issue relates to the avoidability of a risk recovery rider. Duke noted that "[a]ll consumers in [Duke's] certified territory benefit by having first call on [Duke's] physical generating capacity at a price certain." (Duke remand reply at 18.) Duke also asserts that the Supreme Court of Ohio has found POLR service to be a part of the market-based standard service, making market-based pricing appropriate. (Duke remand reply at 18-19.) Duke's witness Steffen testified regarding increased avoidability resulting in stimulation of the market. (Duke Rem. Ex. 3, at 30; Duke's remand brief at 15.)

OCC, in discussing the previously approved IMF, asserts that the IMF should be fully avoidable, arguing that "even an apparently small non-bypassable charge can threaten a large percentage of competitive retailers' profit margins - margins that can be very small." (OCC remand brief at 66, citing Rem. Tr. II at 84-85.) Alternatively, OCC suggests that "termination" of the IMF would "remove a barrier to competitive entry . . ." (OCC remand brief at 66.)

OMG also argues in favor of avoidability of the IMF. OMG, on the other hand, says that the IMF, as a POLR charge, is either an unavoidable distribution charge that may be cost-based or a generation charge that must be avoidable. (OMG remand brief at 22; OMG remand reply at 15. *Accord*, Dominion remand reply at 3.)

Ohio law specifically references a utility's standard service offer serving as a default, or POLR, service for shopping customers. Section 4928.14(C), Revised Code. Thus, it is clear that POLR service is a legally mandated generation function of Duke, as the distribution utility in its certified territory. See *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 340, at para. 24. Thus, while POLR service and, hence, the risk

recovery rider, must be provided at a market price, it is reasonable that it also be unavoidable by any customer who may use that POLR service. (See Duke remand reply at 28.) However, we also find that a nonresidential customer who agrees that it will remain off Duke's service and that it will not avail itself of Duke's POLR service does not, by definition, cause Duke to incur any risk. Therefore, the risk recovery rider must be avoidable by nonresidential shoppers who agree to remain off the RSP, on the same terms as the SRT. On the other hand, the risk recovery rider must be unavoidable with regard to nonresidential shoppers who have not agreed to remain off the RSP and with regard to all residential shoppers.

(3) RSP Proposal: Other Provisions

The application filed by Duke also contained certain other provisions that we will, here, review.

The first paragraph ended the MDP for all customer classes on December 31, 2004. In actuality, the MDP ended for nonresidential customers on that date but continued through December 31, 2005, for residential customers. Similarly, the second paragraph addressed the termination of shopping credits. The resolution of these issues, now having already transpired, will not be further addressed.

In the fourth paragraph, Duke proposed that the RTC would continue through 2010. Also, in the sixth paragraph, Duke offered to maintain the five percent generation rate decrease for residential customers. These matters were discussed in detail in the opinion and order in these proceedings. We adopt that discussion for present purposes. We also find that termination of the RTC at the end of 2008, and termination of the five percent discount for residential customers will further encourage the development of competition. Termination of the RTC at the same time as the RSP will allow development of a post-RSP plan in its entirety. Elimination of the five-percent discount will increase the price-to-compare and, thus assist competitors.

In the seventh paragraph, Duke agreed to maintain the generation price of little g through 2008. We agree.

In the eighth paragraph, Duke proposed to defer certain FERC-approved transmission costs for subsequent recovery in its next distribution base rate case. We approved a similar provision in the stipulation and, in Duke's subsequent distribution rate, this issue was also addressed. *In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Electric Distribution Rates*, Case No. 05-59-EL-AIR. We will adopt the outcome that we reached in that rate case as appropriate here.

The ninth paragraph of Duke's proposal addressed shopping customers' return to Duke's generation service. This topic was specifically addressed by us in a post-hearing process, prior to appeal. In our order on rehearing, issued on April 13, 2005, we

determined a specific return-pricing methodology to be used. We adopt that conclusion here, as a modification of Duke's proposal. We find that the outcome we previously ordered is fair to customers and to Duke, and will result in market-based pricing and price transparency.

The tenth paragraph addresses the planned filing of a transmission and distribution base rate case. In the eleventh paragraph, Duke proposed a capital investment reliability rider to recover costs associated with capital investments in its distribution system. It similarly proposed a transmission cost order to recover changes in certain transmission costs. As a distribution base rate case has been filed and decided, and its stipulated outcome addressed similar issues, these provisions are moot. *In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Electric Distribution Rates*, Case No. 05-59-EL-AIR.

Paragraph 12 of the application dealt with the continuation of energy efficiency program funding, the filing of a demand side management cost rider, and the commitment of funds toward economic development in its territory. On January 24, 2006, Duke filed applications to implement ten electric and natural gas DSM programs for residential, commercial, and industrial consumers, as well as a research DSM program.¹³ On June 14, 2007, a stipulation was filed in those proceedings, signed by Duke, Commission staff, OEG, OCC, and Kroger. The stipulation was approved by the Commission on July 11, 2007. Pursuant to the stipulation, Duke will recover the costs of the DSM programs through DSM cost recovery riders applicable to residential electric and gas sales and nonresidential electric sales. On July 20 and 30, 2007, Duke filed its DSM tariff, effective July 31, 2007. Therefore, this provision is moot.

In paragraph 13, Duke proposed the use of a competitive bidding process to test the generation price. A competitive bidding option is critical under the terms of Ohio law. Section 2938.14(B), Revised Code. The supreme court upheld a similar process in its review of our opinion and order in these proceedings. *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 340, at para. 56. Therefore, we see no reason to deviate from the approach we previously approved.

Finally, in paragraph 14, Duke made certain proposals related to corporate separation and the transfer of generating facilities. Our resolution of this issue was also upheld by the court. *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 340,

¹³ *In the Matter of the Application for Recovery of Costs, Lost Margin and Performance Incentive Associated with the Implementation of Electric Residential Demand Side Management Programs by the Cincinnati Gas & Electric Company*, Case No. 06-91-EL-UNC; *In the Matter of the Application for Recovery of Costs, Lost Margin and Performance Incentive Associated with the Implementation of Electric Non-Residential Demand Side Management Programs by the Cincinnati Gas & Electric Company*, Case No. 06-92-EL-UNC; *In the Matter of the Application for Recovery of Costs, Lost Margin and Performance Incentive Associated with the Implementation of Natural Gas Demand Side Management Programs by the Cincinnati Gas & Electric Company*, Case No. 06-93-GA-UNC.

at para. 71, 76. In the opinion and order in these proceedings, we found that, in order for Duke to provide stable prices, it was imperative that Duke retain its generating assets. We noted that there was no evidence presented that would support an argument that Duke or any Duke affiliate would have an undue advantage as a result of not structurally separating. Therefore, Duke's corporate separation plan shall be amended to require it to retain its generating assets during the RSP.

(4) RSP Proposal: Statutory Compliance

Ohio law requires Duke to "provide customers, on a comparable and nondiscriminatory basis within its certified territory, a market-based standard service offer of all competitive retail electric services necessary to maintain essential service to consumers, including a firm supply of electric generation service." Section 4928.14(A), Revised Code.¹⁴ Thus, in order for us to approve Duke's RSP proposal, we must be able to find that the proposal provides comparable and nondiscriminatory service and that all aspects necessary to maintain electric generation service are available on a market basis, including firm supply.

In his testimony at the original hearing in these proceedings, Duke's witness Judah Rose testified that the proposed RSP price to compare is competitive. In reaching that conclusion, Mr. Rose compared the RSP price to compare with the price under Duke's proposed competitive market option and, also, to generation rates for other Ohio utilities and actual rates of certain CRES providers. He also noted the ability of the Commission to test the market to ensure that generation rates under the RSP are not significantly different. ([Duke] Ex. 7, at 41-47.) See also *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 340, at para. 41. We also note that Mr. Rose updated his market evaluation for purposes of the hearing on remand, finding that it remained within the range of market prices today. (Duke Rem. Ex. 2, at 2-13.) (See also OEG remand reply brief at 12.) On the basis of his evaluation, Mr. Rose confirmed, at the remand hearing, that current market prices were 28 percent higher than the RSP price. (Rem. Tr. I at 81.) Further, the supreme court refused to overturn our original conclusion that the RSP was a market-based rate, noting that our modifications on rehearing had been structured to promote competition. *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 340, at para. 44; Opinion and Order at p 26. The situation is similar here, as our order requires modifications to Duke's RSP that will further increase avoidability of price components by shoppers.

¹⁴ In addition, Duke is required to provide customers the option to purchase competitive retail electric service, the price of which is determined through a competitive bid, provided that the Commission may determine that such a process is not required if other means to accomplish generally the same option for customers is readily available in the market and a reasonable means for customer participation is developed. Section 2918.14(B), Revised Code. The alternative to a competitive bid process approved here is unchanged from that reviewed and approved by the court. We do not believe that changes in customer shopping percentages since the time of the application should affect the legality of the plan. The competitive bidding alternative will, therefore, not be discussed further.

As we have previously stated, we support parties' efforts to stabilize prices to provide additional time for competitive electric markets to grow. *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period of The Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, Opinion and Order (September 2, 2003, at 29.) We would point out, as we did in our opinion and order, that Section 4928.14, Revised Code, allows us flexibility in approving methods for determining market-based rates for standard service offers. As incisively discussed by staff's economist, Richard Cahaan, we have three control mechanisms. We can adjust the level of the price charges, we can order certain components of the price to be avoidable, and we can require the price to be adjusted on various schedules and bases. On the basis of the evidence presented in the original record in these proceedings and that presented on remand, we find that the design of the RSP, as it was originally proposed by Duke and modified both by Duke and in this order on remand, achieves a proper balance in the determination of market-based rates. (See Staff Rem. Ex. 1, *passim*.)

We find that basing the generation rate on little g, with adders to reflect changes in certain costs and with the provision of a POLR charge based on the cost of maintaining necessary capacity reserves, where it can be monitored for continued reflection of market rates, and a pricing risk recovery rider, is market based. We also find that nothing about this RSP, as we are approving it today, is discriminatory or noncomparable. Further, we find that Duke's proposed RSP, as modified by Duke and in this order on remand, does offer all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service.

C. Associated Applications

As previously noted, Duke filed three associated applications at the same time as the application for approval of its market rate. Case No. 03-2079-EL-AAM, relating to deferral of MISO costs, has been mooted by the resolution of *In the Matter of the Transmission Rates Contained in the Rate Schedules of The Cincinnati Gas & Electric Company and Related Matters*, Case No. 05-727-EL-UNC, Finding and Order (October 5, 2005). Case Nos. 03-2080-EL-ATA and 03-2081-EL-AAM, relating to deferral and recovery of costs related to capital investment in distribution and transmission facilities, have been mooted by the adoption of a stipulation in *In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Electric Distribution Rates*, Case No. 05-59-EL-AIR, Opinion and Order (December 21, 2005). Therefore, these three applications should be dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On September 29, 2004, the Commission issued its opinion and order in these consolidated proceedings. Following entries on rehearing, OCC appealed the decision to the Supreme Court of Ohio.

- (2) On November 22, 2006, the Supreme Court of Ohio issued an opinion in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, remanding the cases back to the Commission on two grounds.
- (3) On November 29, 2006, in compliance with the remand order of the court, the attorney examiners directed Duke to disclose to OCC the information that OCC had requested in discovery.
- (4) A hearing on remand was held on March 19-21, 2007, for the purpose of gathering such additional evidence as might be necessary to comply with the court's remand order.
- (5) Briefs and reply briefs on remand were filed on April 13, 24, 27, and 30, 2007.
- (6) Motions for protective orders were filed by several parties, with regard to numerous documents in these proceedings.
- (7) Under the provisions of Sections 4905.07, 4901.12, 149.43, and 1333.61(D), Revised Code, and Rule 4901-1-24, O.A.C., the Commission is empowered, assuming confidentiality is consistent with the purposes of Title 49 of the Revised Code, to issue protective orders to keep confidential such material as we find to be a trade secret on the bases that (a) 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 and (b) it is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.
- (8) Following an *in camera* review, the Commission finds that customer names, account numbers, customer social security or employer identification numbers, contract termination dates or other termination provisions, financial consideration in each contract, price of generation referenced in each contract, and volume of generation covered by each contract does meet each of the two tests required for a finding that the information is a trade secret and, in addition, that confidential treatment of such information is consistent with the purposes of Title 49 of the Revised Code.
- (9) Redaction of trade secret information is required, by precedent and by Rule 4901-1-24(D)(1), O.A.C., where reaction is possible without rendering the remaining document incomprehensible or of little meaning.

- (10) We find the redaction of the trade secret information is possible without rendering the remaining documents incomprehensible or of little meaning and should be carried out as described in our opinion.
- (11) Motions by PWC to strike certain portions of pleadings should be denied.
- (12) The stipulation in these proceedings was adopted, with modifications, by the Commission and was never terminated by the signatory parties.
- (13) Any side agreement entered into prior to the time the Commission issued its opinion and order in this case is relevant to our evaluation of the seriousness of bargaining that led to the stipulation with regard to Duke's RSP. Any agreements that documented renegotiations of side agreements that had been entered into prior to the issuance of the opinion and order are irrelevant and form no part of the basis for our opinion.
- (14) Based on provisions in the side agreements, requiring parties to support the stipulation, and given the limited record evidence regarding the continued presence and participation of the supportive parties during negotiations, there is insufficient evidence to support a finding that the parties engaged in serious bargaining. Therefore, the stipulation will now be rejected.
- (15) Under Section 4928.14, Revised Code, Duke is required to provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a market-based standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service.
- (16) Duke's RSP, as originally proposed in its application and modified by Duke and in this order on remand, provides consumers, on a comparable and nondiscriminatory basis within its certified territory, a market-based standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. The RSP appropriately balances goals of protecting consumers from risk, assuring Duke of some level of financial stability, and encouraging the development of the competitive market. Duke's RSP, as modified in this order on remand, should be approved.

- (17) Case Nos. 03-2079-EL-AAM, 03-2080-EL-ATA, and 03-2081-EL-AAM are moot and should be dismissed.
- (18) All arguments raised in these consolidated proceedings but not addressed in this order on remand should be denied.

ORDER:

It is, therefore,

ORDERED, That, regarding side agreements and documents discussing such side agreement, customer names, account numbers, and customer social security or employer identification numbers, contract termination date or termination provisions, financial consideration for each contract, price or generation referenced in each contract, and volume of generation covered by each contract shall all be deemed trade secret information and shall be maintained on a confidential basis under protective orders for a period of eighteen months from March 19, 2007. It is, further,

ORDERED, That information that is not a trade secret be placed in the public record in these proceedings, as set forth in this order on remand. It is further,

ORDERED, That parties comply with redaction instructions set forth in this order on remand. It is, further,

ORDERED, That PWC's motions to strike, filed on April 27 and June 1, 2007, be denied. It is, further,

ORDERED, That the stipulation filed in these proceedings be rejected. It is, further,

ORDERED, That Duke's RSP, as modified by this order on remand, be approved. It is, further,

ORDERED, That Duke file tariffs for Commission approval that reflect the terms of this order on remand, within 45 days. It is, further,

ORDERED, That the applications in Case Nos. 03-2079-EL-AAM, 03-2080- EL-ATA, and 03-2081-EL-AAM be dismissed. It is, further,

ORDERED, That all arguments raised in these consolidated proceedings but not addressed in this order on remand be denied. It is, further,

ORDERED, That a copy of this order on remand be served upon all parties of record.

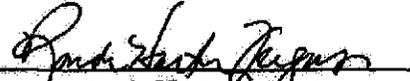
THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman



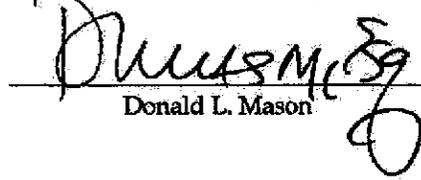
Paul A. Centolella



Ronda Hartman Fergus



Valerie A. Lemmie



Donald L. Mason

JWK/SEF:geb

Entered in the Journal

OCT 24 2007



Renee J. Jenkins
Secretary

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.)

ENTRY ON REHEARING

The Commission finds:

- (1) On January 10, 2003, Duke Energy Ohio, Inc., (Duke)¹ filed an application for authority to modify its nonresidential generation rates to provide for a competitive market option subsequent to the market development period. On October 8, 2003, Duke filed three additional, related cases. On September 29, 2004, following a hearing, the Commission issued its opinion and order, approving a stipulated rate stabilization plan (RSP) in the proceedings, with certain modifications. Following applications for rehearing, the Office of the Ohio

¹ Duke was, at that time, known as the Cincinnati Gas & Electric Company. It will be referred to as Duke, regardless of its legal name at any given time. Case names, however, will not be altered to reflect the changed name.

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Consumers' Counsel (OCC) filed notices of appeal to the Supreme Court of Ohio. The court issued its opinion on November 22, 2006, upholding the Commission's actions on most issues, but remanding the cases with regard to two issues.

- (2) An additional hearing was held, commencing on March 19, 2007. The Commission issued its order on remand on October 24, 2007.
- (3) Section 4903.10, Revised Code, indicates that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined by filing an application within 30 days after the entry of the order upon the journal of the Commission.
- (4) On November 23, 2007, applications for rehearing were filed by Duke, OCC, Ohio Partners for Affordable Energy (OPAE), and Industrial Energy Users-Ohio (IEU). The grounds for rehearing raised in each such application will be set forth below.
- (5) On December 3, 2007, memoranda contra the applications for rehearing were filed by Duke, OCC, OPAE, IEU, Dominion Retail, Inc., (Dominion) and Ohio Marketers' Group (OMG),²
- (6) The Commission has reviewed all the arguments for rehearing. Many of those arguments merely repeat positions previously presented to the Commission and do not offer anything new. The Commission has already considered, decided, and discussed such positions in its order on remand and the Commission does not intend to repeat those discussions in this entry on rehearing. Accordingly, the Commission finds that arguments for rehearing not discussed below have been adequately considered by the Commission in its order on remand and are being denied.
- (7) Duke sets forth six grounds for rehearing:
 - (a) Duke alleges that the Commission, without statutory authority, modified Duke's market-based standard service offer (MBSSO) price. Specifically, Duke objects that: (1) the order makes the infrastructure maintenance fund (IMF) avoidable for nonresidential switched load that agrees to remain off Duke's standard MBSSO price

² OMG is comprised of Constellation NewEnergy, Inc.; Strategic Energy, LLC; and Integrys Energy Services.

through 2008 even though such customers may return to Duke at the monthly average hourly locational marginal price (LMP) MBSSO price; and (2) the order makes the rate stabilization charge (RSC) and the annually adjustable component (AAC) avoidable for non-residential customers that want the option to return to Duke at the standard MBSSO price.

- (b) Duke alleges that the Commission's order, contrary to statute, deprives provider-of-last-resort (POLR) service to non-residential switched load that agrees to remain off Duke's standard MBSSO price through 2008.
 - (c) Duke alleges that the Commission, without statutory authority, modified Duke's MBSSO price by making the RSC and AAC avoidable by all switched load.
 - (d) Duke alleges that, by enabling switched load to avoid paying the IMF, AAC, and RSC, the Commission order conflicts with statutory policy because it requires Duke to subsidize the competitive retail electric service (CRES) market.
 - (e) Duke alleges that the Commission's order is unjust and unlawful because it requires Duke to retain its generating assets in conflict with statute.
 - (f) Duke alleges that the Commission's order is unjust and unreasonable because it is ambiguous that the non-residential regulatory transition charge continues through December 31, 2010.
- (8) We would note first that, in various portions of its application for rehearing, Duke refers to the IMF as a rider that would help to cover the costs of capacity. (Duke application for rehearing at 5, 13, and 15.) As repeatedly indicated by Duke, it is the system reliability tracker (SRT) that ensures that Duke is financially able to purchase sufficient capacity to serve its customers. On the other hand, the IMF, as we discussed in our order on remand, does not address capacity costs, but, rather, compensates Duke for pricing risk incurred in its provision of statutory POLR service.
- (9) Duke's first four grounds for rehearing all touch on the avoidability of various riders by various customers. Most of these matters were

comprehensively discussed in the order on remand and will not be covered again here. However, Duke does note that the order on rehearing, issued on April 13, 2005, in these proceedings, allowed shopping customers to choose to return at the rate-stabilized price by electing to pay the old rate stabilization charge (RSC) and the annually adjustable component (AAC) while they were shoppers. However, as Duke indicates, the order on remand did not take this option into account. (Duke application for rehearing at 4, 10.) We should have done so. Therefore, we will grant rehearing to modify and clarify the applicability of various riders during shopping situations.

First, it is clear that residential shopping customers must always have the right to return to Duke's POLR service at the RSP price. As stated in the order on remand, residential customers would pay the SRT and the IMF, while shopping, as those riders represent impacts on Duke of maintaining the ability to provide service for returning customers, one covering cost of capacity and one covering pricing risk.

With regard to nonresidential shopping customers, an additional division must be made. The first group of nonresidential shopping customers includes those considered in the order on remand. These customers would agree to remain off the RSP through 2008 and to return to Duke's service only at the LMP price, as specified and fully described in the April 13, 2005, order on rehearing, findings 16 through 18. In exchange for their agreement to remain off the RSP and return at that price, those customers would avoid the SRT and the IMF as, once again, those riders represent impacts on Duke of maintaining the ability to provide service for returning customers. The nonresidential shopping customers would also avoid the AAC, as we have previously found that it is a charge for generation-related cost. (Contrary to some statements by Duke, they would also avoid the RSC, as that rider has been eliminated as separate from the generation charge.)

The second group of nonresidential shopping customers includes those, not considered in the order on remand, that prefer to have the option to return to Duke's service at the rate-stabilized price. In order for Duke to maintain its preparedness to serve those customers at a rate-stabilized price, Duke will incur additional capacity costs, additional pricing risk, and additional generation-related costs. Therefore, the Commission finds that such customers should be charged the SRT, and the IMF.

As we stated in the April 13, 2005, order on rehearing, shopping customers will be liable for payment of all of the riders on a going-forward basis, if and when they return to Duke's service.

- (10) We also note that Duke attempts to support several of its rehearing arguments by reference to matters that are outside of the record of these proceedings. This effort occasioned OCC's subsequent motion to strike. Although we will not strike Duke's references to information that is not a part of the record, neither will we consider this information in our deliberations on rehearing.
- (11) Duke's fifth ground for rehearing asserts that the Commission had no authority to require it to retain its generating assets. Rather, Duke suggests, the Commission should permit Duke to void the requirement in its corporate separation plan that it transfer its assets to an exempt wholesale generator. (Duke application for rehearing at 21-22.) The Commission grants rehearing on Duke's fifth ground for rehearing for the purpose of giving further consideration to the matter. Our order on remand with respect to the transfer of assets shall remain in place pending our further review of this issue.
- (12) Duke's sixth ground for rehearing asks for clarification of the termination date of its nonresidential regulatory transition charge (RTC). ((Duke application for rehearing at 20.) Although we believe that the order on remand was clear on this point, we will restate that the residential RTC terminates at the end of 2008 and that the nonresidential RTC terminates at the end of 2010.
- (13) OCC sets forth three grounds for rehearing:
 - (a) OCC alleges that the Commission's remand order is unreasonable and unlawful because the Commission failed, as a quasi-judicial decision maker, to permit a full hearing upon all subjects pertinent to the issues, and to base its conclusion upon competent evidence, in violation of Section 4903.09, Revised Code, and case law. OCC breaks this assignment of error into three, more specific, claimed errors.
 - i. OCC suggests that the remand order fails to eliminate capacity charges that are simply surcharges that Duke requested for customers to pay, without any evidentiary basis for why consumers should pay them.

- ii. OCC suggests that the remand order fails to consider the needs of the competitive market for the bypassability of all standard service offer components, based upon the record.
 - iii. OCC suggests that the remand order fails to eliminate the additional AAC charges that Duke requested, without any evidentiary basis for why customers should pay them.
- (b) In its second assignment of error, OCC alleges that the Commission's remand order is unreasonable and unlawful because it fails to prohibit pricing and price elements in side agreements that violate Ohio statutes and rules, thereby permitting the devastation of the competitive market for generation service that could provide benefits for customers. OCC breaks this assignment of error into four, more specific, claimed errors.
- i. First, OCC suggests that the remand order fails to consider all legally permitted uses of the discovery that was required by the court in the decision to remand the case.
 - ii. Second, OCC suggests that the remand order fails to prohibit Duke's discriminatory pricing that demonstrates the standard service offer rates were too high for customers discriminated against, and the discrimination has caused serious damage to the competitive market for generation service.
 - iii. Third, OCC suggests that the remand order fails to prohibit Duke's violation of corporate separation requirements, which has caused serious damage to the competitive market for generation service that was intended to provide benefits to customers.
 - iv. Fourth, OCC suggests that the remand order fails to prohibit the impact of certain side agreements, causing serious damage to the competitive market for generation service.
-

- (c) In its third assignment of error, OCC alleges that the Commission's remand order is unreasonable and unlawful because it withholds information from public scrutiny by designating the contents of documents "trade secret" without legal justification.
- (14) In support of the first section of its first ground for rehearing, OCC claims that little g, the RSC, and the IMF all recover for the costs of existing capacity and are, therefore, duplicative. (OCC application for rehearing at 11.)
- (15) Duke claims, in its memorandum contra, that the record evidence fully supports the IMF. (Duke memorandum contra at 4-13.)
- (16) Pursuant to the order on remand, the RSC has been eliminated and the amounts that would have been charged through the RSC will be recovered through the generation charge, from which the RSC originated. On the other hand, the IMF, as fully discussed in the order on remand, is a rider to recover for pricing risk. The IMF and the portion of the generation charge that previously represented the RSC are therefore not duplicative.
- (17) In support of the second subsection of its first ground for rehearing, OCC argues that the IMF and the SRT should be bypassable. OCC asserts that the Commission failed to consider record evidence on this issue and failed to consider the competitive market's need for full bypassability. (OCC application for rehearing at 14-15.)
- (18) Duke, in its memorandum contra, harkens back to Section 4928.14(A) and (C), Revised Code, which require only electric distribution utilities (EDUs) to provide default service for all consumers. Further, it suggests that POLR charges cannot affect the competitive market, since CRES providers have no POLR-related costs and, therefore, do not include such costs in their prices. (Duke memorandum contra at 13.)
- (19) The Commission has fully discussed this issue in the order on remand. Rehearing on this ground will be denied.
- (20) In support of the third section of its first ground for rehearing, OCC argues about the reasonableness of a return on construction work in progress (CWIP). (OCC application for rehearing at 15-17.) This matter is not addressed in the order on remand. The reasonableness of Duke's recovery of CWIP through the AAC rider was argued by OCC and was thoroughly considered by the Commission on pages 21

through 24 of our November 20, 2007, opinion and order in the rider phase of these consolidated proceedings. We see no need to repeat that discussion here. This ground for rehearing will be denied.

- (21) In its second ground for rehearing, OCC claims that the order on remand failed to prohibit pricing and price elements in side agreements that violate Ohio statutes and rules, thereby permitting the devastation of the competitive market for generation service that could provide benefits for customers. As with the first ground, OCC breaks this assertion into several sections. In the first, third and fourth sections, OCC asserts that, in various ways, the Commission should have expanded the use of the discovered side agreements. (OCC application for rehearing at 17-21, 27-30.)
- (22) In response, Duke notes that the supreme court allowed the Commission complete discretion to decide issues relating to admissibility of the side agreements. Consistent with its role as the decider of fact, Duke argues that this allows the Commission to determine admissibility, the issues to which evidence is relevant, and the appropriate holdings to be reached. Duke also claims that the Commission permitted discovery well beyond that required by the Court or requested by OCC. After allowing such discovery, Duke submits that the Commission properly ruled on the relevance of the evidence. Duke also points out that OCC is asking for a ruling on allegations that OCC itself refused to make at the hearing. With regard to corporate separation issues, Duke also indicates that OCC made no claim that Duke is operating outside the parameters approved by the Commission in its corporate separation plan. (Duke memorandum contra at 16-19, 22.)

DERS and Cinergy, in their memorandum contra, argue that the Commission complied with the mandate of the court and that the Commission has no obligation to expand the scope of the proceedings before it. (DERS and Cinergy memorandum contra at 9-12.)

- (23) OCC is incorrect. There is an almost limitless number of claims that the side agreements might support. Their existence does not make them relevant to our consideration of the matter before us: Duke's application for approval of an RSP. As we said in the order on remand, the purpose of these proceedings is, at this point, only to consider those matters that are relevant to the application and remanded to us by the supreme court. The first, third, and fourth sections of the second ground for rehearing will be denied.

- (24) In the second section of the second ground for rehearing, OCC contends that the total effect of Duke's RSP is pricing that is discriminatory and that the Commission should have considered the expanded record on that issue. (OCC application for rehearing at 21-27.)
- (25) Duke asserts that all of its customers are paying Commission-approved rates. Duke also points to testimony by OCC's witness in which she admitted her lack of expertise in the area covered by the side agreements. (Duke memorandum contra at 19-21.)
- (26) As we discussed in the order on remand, our purpose was only to consider issues remanded by the supreme court. For purposes of this proceeding, this issue is ancillary and, therefore, should be denied.
- (27) OCC's final ground for rehearing claims that the Commission erred in its designation of certain portions of the record as trade secrets. OCC claims that the Commission made "no significant effort to reduce the amount of information shielded from public scrutiny." OCC complains that parties failed to address the individual contents of the documents and, thus, failed to meet their burden of proof. (OCC application for rehearing at 30-37.)
- (28) DERS and Cinergy strenuously object to OCC's argument. They point out that OCC is continuing to exaggerate its complaint by suggesting that "nearly every word" will be redacted. Rather, DERS and Cinergy point out, the Commission's ruling provided a detailed list of specific items that could be protected on the basis of its *in camera* inspection. (DERS and Cinergy memorandum contra at 6-9).

IEU points out that OCC has raised nothing new in this regard. It also notes that the law does not require a motion for protective treatment to explicitly describe the information for which the protective order is sought. (IEU memorandum contra at 6-8.)

In addition to disagreeing with the content of OCC's argument, Duke suggests that it is premature. It claims that the issue is not ripe until the parties comply with the Commission's redaction order.

- (29) This matter was fully discussed in the order on remand. OCC's application for rehearing on this ground will be denied.
- (30) OP&E sets forth two grounds for rehearing:

- (a) In its first assignment of error, OP&AEE alleges that the Commission acted unreasonably and unlawfully when, having rejected the May 19, 2004, stipulation on the basis of the remand record of the side agreements, it approved Duke's application; given that the statutory requirements of Sections 4928.14 and 4909.18, Revised Code, and the Commission's own RSP goals were not met, the Commission should have dismissed the application and ordered Duke to file a new application for the provision of standard service electric generation in its service territory.
 - (b) In its second assignment of error, OP&AEE alleges that the Commission acted unreasonably and unlawfully when it found that the IMF charge was reasonable.
- (31) Arguing with regard to its first assignment of error, OP&AEE suggests that, rather than considering its original application, the Commission should have found all the evidence to be tainted and should have dismissed the application. OP&AEE reviews various precedents to reach the conclusion that the Commission did not have the authority to adopt this RSP without the existence of a stipulation supported by a wide variety of customer groups. It also re-argues its concern regarding some components being cost-based and others being market-based. (OP&AEE application for rehearing at 5-12.)
- (32) Duke argues, in its memorandum contra, that broad support does exist for its RSP. (Duke memorandum contra at 24-26.)
- (33) OP&AEE is incorrect in its belief that we did not consider the quality of the evidence before us. We did review and consider all aspects of the evidence presented at the original hearing in these proceedings, finding such evidence to be persuasive and convincing with regard to the outcome ordered in the order on remand. The evidence was not tainted by the side agreements.
- (34) Also with regard to its first ground for rehearing, while it is true that there is no longer an RSP stipulation in these proceedings, we note that Duke's RSP application, which we approved as modified, includes the possibility that the Commission might use a bid process to test the generation price against market prices. We find that, under current circumstances, a traditional competitive bidding process is not required in light of the possibility that the Commission could solicit

test bids. As we said in the opinion and order in these proceedings, considering a similar provision, this test bid procedure "offers a reasonable alternative to a more traditional competitive bidding process, provides for a reasonable means of customer participation through the various options that are open to customers under the RSP, and fulfills the statutory requirements for a competitive bidding process." We also point out that this aspect of the RSP was not overturned by the court. Additionally, we note the support for Duke's RSP that was discussed in Duke's memorandum contra.

- (35) With regard to its second ground for rehearing, OP&AE argues that the IMF is not a reasonable component of the RSP and is a new and duplicative charge. It asks that the IMF be eliminated. (OP&AE application for rehearing at 12-13.)
 - (36) This issue was fully discussed in our order on remand. The assignment of error will be denied.
 - (37) IEU sets forth four grounds for rehearing:
 - (a) In its first assignment of error, IEU alleges that the Commission erred by finding that any side agreements are relevant to whether serious bargaining of a stipulation occurred, inasmuch as no stipulation remained in effect subsequent to its September 29, 2004, opinion and order, and November 23, 2004, entry on rehearing.
 - (b) In its second assignment of error, IEU alleges that the Commission erred in admitting all side agreements, inasmuch as the prejudicial effect of admitting the side agreements outweighs the probative value and because the admission is a needless presentation of cumulative evidence.
 - (c) In its third assignment of error, IEU alleges that the Commission erred by finding that the information in the side agreements could be released without the customers' permission, pursuant to Rule 4901:1-10-24, Ohio Administrative Code (O.A.C.).
 - (d) In its fourth assignment of error, IEU alleges that the Commission erred in admitting into the evidentiary record side agreements that the Commission determined
-

were irrelevant and, thus, inadmissible pursuant to Rule 402, Ohio Rules of Evidence.

- (38) IEU, to support its first and second grounds for rehearing, repeats its argument that there was, at the time of the remand, no stipulation in effect, as the parties' stipulation had been modified by the Commission. Ignoring the plain language of the Supreme Court of Ohio and of its own agreement, IEU believes that "it was unnecessary for any party to withdraw from the Stipulation." (IEU application for rehearing at 10.) Without a stipulation, IEU contends, the side agreements are not relevant. Further, IEU believes that admission of those side agreements was improper, as the prejudicial effect outweighed the probative value. The "prejudicial effect" cited by IEU is the risk of release of "sensitive information." Finally, IEU claims that admission of the agreements is a "needless presentation of cumulative evidence and that, therefore, the agreements should have been reviewed *in camera* and never admitted into the record, even if necessary for evaluation of the first prong of the stipulation test. (IEU application for rehearing at 5-13.)
- (39) OCC disagrees with IEU's claim that the stipulation was not still in effect and asserts that the side agreements' admission was neither prejudicial nor cumulative, pointing out that no actual *unfair effect* of the evidence was described by IEU. (OCC memorandum contra at 3-6.) Similarly, OPAB insists that the stipulation remained in effect prior to the issuance of the order on remand. OPAB contends that issues of admissibility of the side agreements are moot, as IEU failed to submit an interlocutory appeal relating to their admission at the hearing on remand. (OPAB memorandum contra at 8-10.) Dominion also weighs in on this discussion, correcting IEU's characterization of a prior Dominion argument and agreeing with the Commission's finding that the side agreements were relevant. OMG also agrees that the stipulation remained in existence at the time of the hearing on remand and that evidence of those agreements was properly admitted.
- (40) The matter covered by IEU's first assignment of error, relating to the relevance of any side agreement in the face of the claimed nonexistence of the stipulation, was fully discussed in our order on remand. With regard to IEU's second assignment of error, in light of the fact that we found that the terms of the side agreement bore directly and critically on our ability to consider the stipulation, we find that their probative value was extremely high. In addition, we find that evidence of the side agreements was not prejudicial in any way and did not confuse

the issues or the Commission. Therefore, on balance, it was not error to admit the agreements into the record. Further, with regard to IEU's extraordinary suggestion that the side agreements should have been evaluated, for purposes of the three-prong stipulation test, outside of the record, we note that Section 4903:09, Revised Code, requires the Commission, in all contested cases, to develop a complete record of the proceedings, which record forms the basis for the ultimate determinations in such cases. Both of these assignments of error will be denied. To do as suggested by IEU, to wit, to render findings of fact based on non-record evidence, would surely constitute reversible error.

- (41) With regard to its third assignment of error, IEU cites to an administrative rule prohibiting release of certain customer information by EDUs. IEU proposes to use this narrow administrative rule to reach the conclusion that no trade secret information in this case may ever be released into the public record without customer consent.
- (42) OP&E points out that the cited rule does not apply to the release of information by the Commission. It suggests that the sensitive customer identification information could be permanently redacted from the documents held under seal. OCC also points out that the rule in question only touches on the release of account numbers and social security numbers.
- (43) The Commission found, in the order on remand, that various kinds of information in the side agreements should be considered to be a trade secret, including customer names, identifying numbers, and certain contract terms. Rule 4901:1-10-24, Ohio Administrative Code, referenced by IEU, prohibits electric distribution utilities from publicly releasing a customer's account number or social security number without the customer's consent, except in certain listed circumstances. IEU makes the claim that "because all of the information that has been deemed a trade secret cannot be released without customer consent, all such information should be stricken from the record." (IEU application for rehearing at 15.) IEU is apparently attempting to expand this administrative rule to prevent the Commission from allowing the public release of filed documents, where those documents include not only account numbers and social security numbers but, also, various contract terms. We decline to reach this conclusion.

We do agree, however, that the continued protection of customer account numbers, social security numbers, and employer identification numbers would be a burden on customers under the current 18-month

protective order. IEU's third ground for rehearing will be granted only to extend the protective order duration to five years with regard to customer account numbers, social security numbers, and employer identification numbers.

- (44) IEU's fourth ground for hearing alleges that irrelevant side agreements should not have been admitted into the record. It asks the Commission to direct all parties to return or destroy all discovered documents that were ultimately found to be irrelevant.
- (45) OMG claims that not all of the side agreements were admitted, on the basis that the Commission found certain ones of them to be irrelevant. OCC believes that the side agreements were all properly admitted and that their use should be expanded.
- (46) With regard to IEU's fourth ground for rehearing, the Commission finds that the attorney examiners properly admitted all side agreements into the record. While we ultimately found that certain of those documents would form no part of the basis for our opinion, that does not mean that we did not need to review them in order to reach that conclusion. Our statement that such agreements were "deemed irrelevant" was, perhaps, imprecise. We will therefore clarify that statement. Our intent was merely to say that the terms of those particular side agreements did not affect our order on remand in any way. From an evidentiary standpoint, however, they remained relevant and admissible. We would point out, here, that evidence does not become retroactively inadmissible when a court or administrative body fails to use that information as part of its decision. IEU's fourth ground for rehearing will be denied.

It is, therefore,

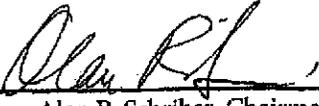
ORDERED, That the applications for rehearing by OCC and OPAB be denied. It is, further,

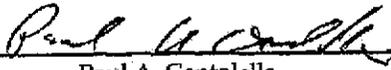
ORDERED, That Duke's fifth ground for rehearing be granted as set forth in Finding (11) for further consideration of the matters specified therein and that the remainder of Duke's application for rehearing be granted in part and denied in part. It is, further,

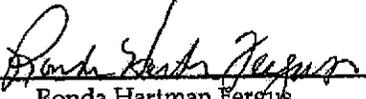
ORDERED, That the applications for rehearing by IEU be granted in part and denied in part. It is, further,

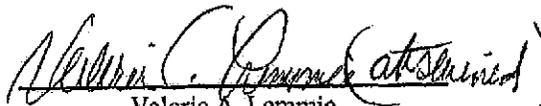
ORDERED, That a copy of this entry on rehearing be served upon all parties of record.

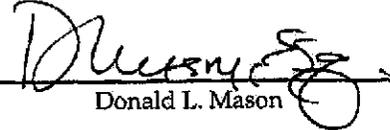
THE PUBLIC UTILITIES COMMISSION OF OHIO


Alan R. Schriber, Chairman


Paul A. Centolella


Ronda Hartman Fergus


Valerie A. Lemmie


Donald L. Mason

JWK/SEF;geb

Entered in the Journal

DEC 19 2007



Renee J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

- In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Electric Security Plan.) Case No. 08-920-EL-SSO
- In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Amend Accounting Methods.) Case No. 08-921-EL-AAM
- In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of a Certificate of Public Convenience and Necessity to Establish an Unavoidable Capacity Charge(s).) Case No. 08-922-EL-UNC
- In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Amend its Tariff.) Case No. 08-923-EL-ATA

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

APPEARANCES

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Bricker & Eckler LLP, by Thomas J. O'Brien, 100 South Third Street, Columbus, Ohio 43215, on behalf of the city of Cincinnati.

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Christensen, Christensen, Donchatz, Kettlewell & Owens LLP, by Mary W. Christensen, 100 East Campus View Boulevard, Columbus, Ohio 43235, on behalf of People Working Cooperatively.

Bell & Royer Co., LPA, by Barth E. Royer, 33 South Grant Avenue, Columbus, Ohio 43215, on behalf of the Ohio Environmental Council and Dominion Retail, Inc.

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Sheryl Creed Maxfield, First Assistant Attorney General of the State of Ohio, Duane W. Luckey, Section Chief, by Thomas W. McNamee and William L. Wright, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Commission.

OPINION

I. BACKGROUND AND HISTORY OF THE PROCEEDINGS

Duke Energy Ohio, Inc., (Duke) is a public utility as defined in Section 4905.02, Revised Code, and, as such, is subject to the jurisdiction of this Commission. Duke currently provides electric service under the rate stabilization plan (RSP) approved 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.

On April 23, 2008, the Ohio legislature adopted Amended Substitute Senate Bill No. 221 (SB 221), which became effective on July 31, 2008. Among the provisions of SB 221 were changes to Section 4928.14, Revised Code, requiring electric utilities to provide customers with a default standard service offer (SSO), consisting of either a market rate offer (MRO) or an electric security plan (ESP). The law provides that the first SSO application must include an application for an ESP.

On July 31, 2008, Duke filed an application for approval of an SSO, pursuant to Section 4928.141, Revised Code. Along with that application, Duke filed the direct testimony of Barry W. Wood Jr., James B. Gainer, Todd W. Arnold, Tony R. Adcock, William Don Wathen Jr., Charles R. Whitlock, Sandra P. Meyer, Theodore E. Schultz, Richard G. Stevie, Christopher D. Kiergan, Judah L. Rose, James M. Lefeld, James S. Northrup, Daniel L. Jones, and Paul G. Smith. Duke filed supplemental direct testimony of witnesses Smith, Schultz, and Stevie on September 16, 2008.

Motions to intervene were filed, on various dates, by the Ohio Energy Group (OEG); the Ohio Consumers' Counsel (OCC); the Kroger Company (Kroger); the Ohio Environmental Council (OEC); Industrial Energy Users – Ohio (IEU); the city of Cincinnati (Cincinnati); Ohio Partners for Affordable Energy (OPAE); Constellation NewEnergy, Inc., and Constellation Energy Commodities Group, Inc. (jointly, Constellation); Dominion Retail, Inc. (Dominion); Communities United for Action (CUFA); the Sierra Club, Ohio

Chapter (Sierra); the Natural Resources Defense Council (NRDC); National Energy Marketers Association (NEMA); Integrys Energy Services, Inc. (Integrys); Direct Energy Services, LLC (DES); the Ohio Manufacturers' Association (OMA); Greater Cincinnati Health Council (GCHC); People Working Cooperatively (PWC); the Ohio Farm Bureau Federation (OFB); the village of Terrace Park (Terrace Park); the American Wind Association, Wind on Wires, and Ohio Advanced Energy (jointly, Wind); the University of Cincinnati (UC); the Ohio Association of School Business Officials, the Ohio School Boards Association, and the Buckeye Association of School Administrators (jointly, Schools); Morgan Stanley Capital Group, Inc. (MSCG); and Wal-Mart Stores East, LP, Sam's Club East, and Macy's Inc. (jointly, the Commercial Group). All of such motions were granted.¹

On August 5, 2008, the attorney examiner assigned to the proceedings issued an entry, setting a procedural schedule, including a technical conference and an evidentiary hearing, the latter of which was set to commence on October 20, 2008. In addition, the examiner announced that local public hearings would be established by subsequent entry. On August 26, 2008, OCC, OEC, and OPAE jointly filed a motion for the setting of local public hearings. The movants specifically asked that three public hearings be scheduled during November or early December in Cincinnati, Mason, and Middletown. On that same day, the same movants filed a separate motion asking the Commission to grant a 60-day continuance of the evidentiary hearing date and an extension of the discovery deadline or, in the alternative, a 15-day continuance and extension. Duke filed a memorandum contra the motion for the continuance and extension, on August 29, 2008, and the movants replied on September 4, 2008. On September 5, 2008, the examiner ruled on the motion, agreeing to continue the evidentiary hearing until November 3, 2008, and to extend the procedural schedule.

On September 17, 2008, the examiner issued an entry scheduling two local public hearings. On September 19, 2008, OCC filed another motion for a continuance and an extension of time. In this motion, OCC requested a 30-day continuance and extension or, alternatively, an order compelling discovery. On September 22, 2008, OCC, Sierra, NRDC, and CUFA filed a joint interlocutory appeal and request for certification, asserting that the local public hearing schedule established by the examiner allowed for only 20 days' notice and that such notice was insufficient. Duke filed memoranda in opposition to the motion for the further delay in the hearing and to the interlocutory appeal, on September 19 and 22, 2008. OCC replied to the memorandum in opposition to the motion for continuance. On October 1, 2008, the examiner denied the motion for the continuance, granted OCC's motion to compel discovery, denied the appellants' request for certification, and scheduled an additional local public hearing.

¹ CUFA filed its motion to intervene beyond an established deadline, together with a motion for leave to file out of time. Such motion is hereby granted, together with its motion to intervene.

On September 29, 2008, OCC, OPAE, CUFA, Sierra, and NRDC filed a motion to stay negotiations between Duke and the other parties to the proceedings. Duke opposed on October 3, 2008. The movants replied on October 8, 2008. The examiner did not issue such a stay. However, on October 15, 2008, the examiner did alter the schedule to allow additional time for negotiations, retaining November 3, 2008, as the date for commencement of the evidentiary hearing. Also, on October 21, 2008, OCC requested an extension of time to file intervenor testimony, which request was granted on October 22, 2008. The procedural schedule was further modified, at the request of Duke, on October 31, 2008.

On October 27, 2008, Duke filed a stipulation and recommendation and an addendum to that stipulation. The stipulation was signed by Duke, staff of the Commission, PWC, GCHC, Integrys, NRDC, Sierra, CUFA, Constellation, OPAE, OEC, Kroger, OCC, OEG, OMA, and the Commercial Group.² A separate addendum between Duke and CUFA was also filed on October 27, 2008. On November 10, 2008, Cincinnati filed a letter indicating that it was joining the stipulation. On November 19, 2008, Terrace Park similarly advised the Commission that it was joining the stipulation. Although OCC signed the stipulation, it reserved one issue for litigation, as discussed in this opinion and order. IEU did not sign the stipulation and litigated one issue.

Also on October 27, 2008, IEU filed testimony of Kevin M. Murray and the Commercial Group filed testimony of Michael Gorman. On October 28, 2008, Duke filed the second supplemental testimony of witness Smith. Staff of the Commission filed testimony by Tamara S. Turkenton on October 31, 2008. On November 5, 2008, OCC filed testimony by Wilson Gonzalez and IEU filed supplemental testimony by Kevin Murray.

The first local public hearing was held on October 7, 2008, at Cincinnati State Technical and Community College. At that midday hearing, held before Alan R. Schriber, chairman of the Commission, and Valerie A. Lemmie, commissioner, eight witnesses testified. Although most expressed opposition to rate increases, they also encouraged energy conservation and renewable energy and discussed affordability, rational rate structure, infrastructure repairs, and responses to emergencies. The second local public hearing, before Chairman Schriber, was held on October 7, 2008, in the evening, at the Union Township Civic Center. At that hearing, 17 witnesses testified in opposition to the proposed rate case. The witnesses expressed concern that rate increases would be hardest on customers with fixed incomes, suggested that rate increases should only be granted if the economy and customer service improve, and opposed using rate increases to fund infrastructure improvements. The final local public hearing was held on October 15, 2008, before Chairman Schriber, in the evening, at the Lakota East High School. Fifteen

² Wal-Mart Stores East LP also signed individually but is included within the Commercial Group.

witnesses testified, expressing opposition to rate increases and concerns regarding reliability, competition, energy sources, billing, and low-income programs.

The evidentiary hearing occurred on November 10, 2008. At that hearing, the examiners admitted, without cross-examination, the testimony of Duke's witnesses Adcock, Arnold, Gainer, Kiernan, Lefeld, Meyer, Rose, Wathen, Whitlock, and Wood. Witnesses Jones, Schultz, Smith, and Stevic appeared at the hearing, on behalf of Duke, and were cross-examined. Tamara Turkenton testified on behalf of staff, Kevin Murray testified on behalf of IEU, and Wilson Gonzalez testified on behalf of OCC.

Following the hearing, Duke, OEC, OEG, IEU, OCC, and staff submitted initial briefs on November 17, 2008. Staff, OCC, IEU, OEC, and OEG filed reply briefs on November 26, 2008.

II. DISCUSSION

A. Applicable Law

Chapter 4928 of the Revised Code provides an integrated system of regulation in which specific provisions were designed to advance state policies of ensuring access to adequate, reliable, and reasonably priced electric service in the context of significant economic and environmental challenges. In reviewing Duke's application, the Commission is cognizant of the challenges facing Ohioans and the electric power industry and will be guided by the policies of the state as established by the General Assembly in Section 4928.02, Revised Code, as amended by SB 221.

Section 4928.02, Revised Code, states that it is the policy of the state, *inter alia*, to:

- (1) Ensure the availability of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service.
- (2) Ensure the availability of unbundled and comparable retail electric service.
- (3) Ensure diversity of electric supplies and suppliers.
- (4) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service, including, but not limited to, demand-side management, time-differentiated pricing, and implementation of advanced metering infrastructure.
- (5) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution

systems in order to promote both effective customer choice and performance standards and targets for service quality.

- (6) Ensure effective retail competition by avoiding anticompetitive subsidies.
- (7) Ensure retail consumers protection against unreasonable sales practices, market deficiencies, and market power.
- (8) Provide means of giving incentives to technologies that can adapt to potential environmental mandates.
- (9) Encourage implementation of distributed generation across customer classes by reviewing and updating rules on issues such as interconnection, standby charges, and net metering.
- (10) Protect at-risk populations, including when considering implementation of new advanced energy or renewable energy resource.

In addition, SB 221 amended Section 4928.14, Revised Code, which now provides that, beginning on January 1, 2009, electric utilities must provide customers with an SSO, consisting of either an MRO or an ESP. The SSO is to serve as the electric utility's default SSO. The law provides that electric utilities may apply simultaneously for both an MRO and an ESP; however, at a minimum, the first SSO application must include an application for an ESP. Section 4928.141, Revised Code, specifically provides that an SSO shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the electric utility's rate plan. In the event an SSO is not authorized by January 1, 2009, Section 4928.141, Revised Code, provides that the current rate plan of an electric utility shall continue until an SSO is authorized under either Section 4928.142 or 4928.143, Revised Code.

Duke's application in these proceedings proposes an ESP, pursuant to Section 4928.143, Revised Code. Paragraph (B) of Section 4928.141, Revised Code, also requires the Commission to hold a hearing on an application filed under Section 4928.143, Revised Code, to send notice of the hearing to the electric utility, and to publish notice in a newspaper of general circulation in each county in the electric utility's certified territory.

Section 4928.143, Revised Code, sets out the requirements for an ESP. Under paragraph (B), an ESP must include provisions relating to the supply and pricing of generation service. The plan, according to paragraph (B)(2) of Section 4928.143, Revised Code, may also provide for the automatic recovery of certain costs, a reasonable allowance for certain construction work-in-progress (CWIP), an unavoidable surcharge for the cost of

certain new generation facilities, certain charges relating to customer shopping, automatic increases or decreases, provisions to allow securitization of any phase-in of the SSO price, provisions relating to transmission-related costs, provisions related to distribution service, and provisions regarding economic development.

The statute provides that the Commission is required to determine whether the ESP, including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under an MRO. Section 4928.143(C)(1), Revised Code. In addition, a surcharge for CWIP or for new generation facilities may not be authorized if the benefits derived for any purpose for which the surcharge is established are not reserved or made available to those that bear the surcharge. Section 4928.143(B)(2)(c), Revised Code.

The Commission may, under Section 4928.144, Revised Code, order any just and reasonable phase-in of any rate or price established under Sections 4928.141, 4928.142, or 4928.143, Revised Code, including carrying charges. If the Commission does provide for a phase-in, it must also provide for the creation of regulatory assets by authorizing the deferral of incurred costs equal to the amount not collected, plus carrying charges on that amount. It also must authorize collection of the deferrals through an unavoidable surcharge.

The Commission has adopted new rules concerning SSOs, corporate separation, and reasonable arrangements for electric utilities, pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised Code.³

B. Summary of the Application and Stipulation

Duke's application in these proceedings notes Governor Strickland's objectives of ensuring affordable and stable energy prices, attracting jobs to the state through an advanced energy portfolio standard, modernizing Ohio's energy infrastructure, and empowering consumers to make reasonable energy choices through transparent processes and states that it accomplishes the goal of favoring reliable generation service at reasonable prices for all energy consumers. Duke explains that the proposal is its best effort to provide relatively stable prices while maintaining a financially viable utility. Summarizing the major elements of its proposed ESP, Duke points out that it includes dedicated efficient generating assets, reasonably priced capacity additions to reduce its

³ See *In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised Code, as amended by Amended Substitute Senate Bill No. 221, Case No. 08-777-EL-ORD (Finding and Order, September 17, 2008).*

short position and to supply consumers' future needs, a renewable and energy efficiency portfolio to meet statutory mandates, and opportunities to enhance economic development within Duke's certified territory. Duke believes that approval of its proposal will allow the continued development of the competitive market, thereby providing consumers with more choices and greater transparency regarding the SSO price, enhancing consumers' ability to compare pricing, and facilitating the Commission's oversight of competitive prices. (Duke Ex. 20, at 1-3.)

Duke proposes a three-year ESP, ending December 31, 2011. According to Duke, the ESP includes four base components. The first base component is an avoidable price-to-compare (PTC) charge that would compensate Duke for base generation costs (comparable to "little g" in Duke's RSP); costs of fuel, emission allowances, energy from renewable resources, economy purchased power costs, congestion and losses, and financial transmission rights (consistent with the fuel and purchased power tracker, or FPP, in Duke's RSP); environmental compliance, homeland security, and changes in tax law costs (consistent with the annually adjusted component, or AAC, in Duke's RSP); and a consumer price index adjustment to account for future inflationary pressures on the base generation component of the PTC. The second base component described in Duke's application includes an unavoidable system resource adequacy (SRA) charge that would compensate Duke for market capacity purchases (consistent with the system reliability tracker, or SRT, in Duke's RSP), for the dedication of capacity for reliability purposes to retail load in Duke's certified territory (consistent with the infrastructure maintenance fund, or IMF, in Duke's RSP), and for capacity newly dedicated to retail load in Duke's certified territory, including capacity designed to produce renewable energy. Duke's third base component is an avoidable transmission cost recovery (TCR) tracker (consistent with the TCR tracker in its RSP). The final component is an unavoidable distribution charge, consisting of three charges: an infrastructure modernization (IM) rider to recover incremental costs associated with maintaining and modernizing distribution infrastructure, including SmartGrid investments, as well as the costs incurred to set up an electronic bulletin board (EBB) to provide consumers with market choices; a rider (known as Save-a-Watt, or SAW) to compensate Duke for its costs incurred to achieve its statutory energy efficiency mandates; and a rider (known as economic competitiveness fund, or ECF) to assess prices associated with economic development and maintenance contracts approved by the Commission. The regulatory transition charges (RTC) would expire on December 31, 2008, for residential customers and on December 31, 2010, for nonresidential customers. All riders, according to the application, are subject to adjustment by Duke, with the approval of the Commission. (Duke Ex. 20, at 4-6.)

The stipulation signed by many of the parties to these proceedings specifies that Duke shall implement an ESP as set forth in the application, except as modified by the stipulation. Therefore, we will review the application and the stipulation jointly. This discussion is not intended as a restatement of all matters that are included in either the

application or the stipulation but is, rather, a summary of those documents. The omission of any particular provision from this summary should not be construed as a deletion of that item from Duke's proposed or adopted ESP.

The stipulation includes a useful summary of the ESP price structure. We will reproduce it here, in relevant part, and will follow the order of this outline in our discussion of the proposed ESP.

Generation

Avoidable Generation Charges [first component discussed above]

Price-to-compare (PTC)

Base Generation (PTC-BG)

Fuel, Purchased Power & Emission Allowances (PTC-FPP)

Annually Adjusted Component (PTC-AAC)

Unavoidable Generation Charges [second component discussed above]

System Resource Adequacy (SRA)

Capacity Dedication (SRA-CD)

Market Capacity Purchases (SRA-SRT) [avoidable in some cases]

Regulatory Transition Charge (RTC)

Transmission [third component discussed above]

Avoidable Transmission Charge (TCR)

Distribution [Unavoidable] [fourth component discussed above]

Infrastructure Modernization (DR-IM)

Energy Efficiency (DR-SAW)

Economic Competitiveness Fund (DR-ECF)

(Jt. Ex. 1 at Attachment 1.) We would also note that certain riders were proposed in the application but were not included in the agreed-upon price structure that the stipulating parties submitted for our consideration. Those omitted riders will not be discussed in detail below and are not part of the structure that we are approving in this opinion and order.

1. Generation Riders

(a) Base Generation

The base generation price rider (PTC-BG), according to the application, is the Commission-approved unbundled generation price, less the RTC, and would be adjusted to compensate Duke for generation production, associated operation and maintenance, and the dedication of existing generating assets (including fuel). Those adjustments would include avoidable capacity charges, rather than adjusting the unavoidable capacity

dedication rider. As stated in the application, this approach is an effort by Duke to assist in the development of the competitive retail electric service market by minimizing unavoidable charges. Similarly, Duke proposes to move its historic fuel and emission allowance price out of PTC-BG and into Rider PTC-FPP in order to increase transparency for consumers. (Duke Ex. 20, at 7-8.)

The stipulating parties modified the proposal, relative to PTC-BG. The stipulation provides that PTC-BG would reflect the unbundled generation rate approved in Case No. 99-1658-EL-ETP, less the RTC, provided that the RTC for residential customers would be eliminated on December 31, 2008, and for nonresidential customers on December 31, 2010. It also states that the costs associated with frozen fuel, purchased power, and emission allowances currently recoverable in "little g" (i.e., 1.2453 cents per kilowatt hour [kWH]) should be transferred to Rider PTC-FPP but that such transfer would not increase the total price charged to customers. The stipulation also provides for specified base generation charge increases for all customers on January 1 of 2009 and 2010 and for nonresidential customers on January 1, 2011. (Jt. Ex. 1 at paras. 2, 3.)

(b) Fuel, Purchased Power & Emission Allowances

The application describes rider PTC-FPP as a continuation of its current FPP rider, recovering all fuel and economy purchased power costs; any costs for environmental emission allowances, including but not limited to SO₂, NO_x, carbon, and/or mercury emission allowances; and renewable energy costs. Further, Duke asserts that it will move certain costs that are currently embedded in the generation charge into this rider, in order to create a more complete and transparent Rider PTC-FPP. Duke proposes to continue the quarterly adjustment of this rider, although it also asks for authority to make interim updates as necessary to minimize significant over- or underrecovery. Duke suggests that it submit to an audit, with due process, on or about June 1 of each year, in order to review the prior year's PTC-FPP rider. (Duke Ex. 20, at 8-9.)

The stipulating parties agree that Rider PTC-FPP should reflect the transfer of frozen fuel, purchased power, and emission allowances currently included in the frozen base generation rate. Under the stipulation's provisions, the PTC-FPP rider should include an allocation, as of the date the stipulation was docketed, of the actual delivered cost of fuel under existing fuel and transportation agreements; the actual cost of net purchased power, including gains and losses resulting from the settlement of forward power contracts; and SO₂ and NO_x emission allowance inventories proportional to the expected generation share needed to serve Duke's PTC-FPP rider customers. Noting that recent court rulings are unclear as to the NO_x emission allowance inventory, the stipulating parties agree to allocate that inventory, and any other emission allowance inventory established during the ESP period, in proportion to the expected generation share needed to serve Duke's rider PTC-FPP customers, as of the date the allowances are granted to Duke. The parties agree that an actively managed commodity portfolio

consisting of fuel, SO₂, and NO_x emission allowances, Duke-owned and dedicated generation, and purchased power will be maintained, with the objective of providing a least-cost energy supply for the PTC-FPP customers, with the associated costs, gains, and losses flowing to those customers. Duke agrees, in the stipulation, to make a filing, during the first quarter of 2009, to propose the manner of any true-ups of rider PTC-FPP revenues and costs through December 31, 2008, and that such filing will be subject to due process and will include an audit for the 18-month period ending December 31, 2008. That audit would be conducted by an independent third-party auditor or staff, at the Commission's discretion, with Duke funding the audit and receiving cost recovery through rider PTC-FPP, as approved by the Commission. Annual audit filings would also be made during the first quarter of subsequent years. The parties also agree that, in order to maintain consistency with the current process, MISO⁴ costs for net congestion and losses shall be recovered through rider PTC-FPP, including the net revenue received from financial transmission rights and auction revenue rights. Finally, the stipulating parties agree to recommend that the Commission grant Duke's request for a waiver to permit such cost recovery through the avoidable rider PTC-FPP rather than through the avoidable rider TCR. (Jt. Ex. 1 at paras. 7-8.)

(c) Annually Adjusted Component

In its application, Duke proposes to continue rider PTC-AAC to recover incremental costs associated with environmental compliance, including a return of and on incremental investment in plant and associated operating expenses, homeland security, and changes in tax law. The environmental costs, according to the application, would include expenses for reagents, a return of and on capital expenditures required to increase fuel flexibility, and, consistent with current practice, a return on CWIP from the date such expenditures begin. Adjustments would be made annually, allowing Duke and interested parties appropriate due process. Duke notes that the calculation would be substantially identical to the current rider AAC except that Duke would include, subject to the Commission's preapproval during each annual process, new cost-effective generation projects that are not required for environmental compliance but that would reduce PTC-FPP costs and would benefit consumers. (Duke Ex. 20, at 9-10.)

The stipulation notes that rider PTC-AAC will be updated, effective December 1, 2008, subject to the Commission's approval in Case No. 08-1025-EL-UNC. Further, it states that Duke may request annual updates, subject to due process. The parties to the stipulation agree that Duke may seek approval for recovery, through the PTC-AAC or the PTC-FPP, of cost-effective generation projects not required for environmental compliance that would improve fuel flexibility, although the stipulating parties reserve the right to oppose such a request. In addition, Duke agrees to propose to the Commission the manner of any true-up of rider PTC-AAC reagent revenues and costs through December

⁴ Midwest Independent System Operator, Inc.

31, 2008, with such filing to be made during the first quarter of 2009. The audit, by staff or an independent auditor, of the period ending December 31, 2008, will be subject to due process and will be funded by Duke. (Jt. Ex. 1 at para. 9.)

(d) Capacity Dedication

Rider SRA-CD, as proposed in the application, is an unavoidable charge that is part of Duke's system resource adequacy component which, as a whole and with the base generation rate in PTC-BG, is described as allowing Duke to fulfill its provider-of-last-resort (POLR) obligations. Duke also contends that the system resource adequacy component allows Duke to obtain additional capacity on behalf of retail customers, in order to maintain an adequate long-term supply of capacity and to earn a reasonable return on its investment. Rider SRA-CD, specifically, is Duke's proposed stated charge for (a) providing customers first call on its capacity and foregoing the opportunity to sell capacity currently dedicated through its RSP to the competitive electric service markets; (b) permitting customers to switch to competitive retail electric service (CRES) providers; and (c) assuming the risk associated with maintaining a reasonably stable capacity price offer during the ESP period. Duke believes that its proposal will provide customers a price that is below market and will, also, provide Duke reasonable compensation for making those commitments. (Duke Ex. 20, at 11-12, 13-14.)

The stipulating parties agree that the rate of rider SRA-CD is equal to the rate of the current IMF rider and will remain constant through the ESP period. With regard to avoidability of rider SRA-CD, the stipulation addresses governmental aggregation customers separately, as discussed below. The stipulation points out that Duke will incur up to \$50,000,000 in operating and maintenance costs at the Beckjord generating station, beginning in 2009, in order to allow its continued operation. It provides that such costs are to be deferred and amortized over three years and that such deferral and amortization expense is included for recovery through rider SRA-CD. The SRA-CD rider rate will equal the current rate charged for Duke's rider IMF under its RSP and will remain constant throughout the ESP period. (Jt. Ex. 1 at para. 16.)

(e) Market Capacity Purchases

Duke proposes, in its application, to continue its current unavoidable rider SRT, although moving to a three-year planning cycle instead of the current one-year cycle, thus permitting it to take advantage of opportunities to obtain low-priced capacity beyond the subsequent year. It asks that the annual due process and quarterly filings associated with the SRT continue, as rider SRA-SRT. Duke suggests that, because system reliability is paramount, it will continue to purchase capacity necessary to maintain an offer of firm generation service and to provide default service to all consumers in its certified territory. Duke explains that it currently purchases 115 percent of the capacity necessary to serve all its load, whether switched or unswitched, and that it would continue to obtain the higher

of the Commission's or MISO's planning reserve requirements. According to the application, Duke would make such purchases from its then-available gas-fired generating assets not previously used and useful, where such purchases are economic, subject to staff's audit. Duke points out that such assets have always been merchant plants and have never been included in its rate base. (Duke Ex. 20, at 12-13.)

The stipulation addresses a number of aspects of the SRA-SRT. It specifies that the SRA-SRT may include the recovery of market capacity purchases for any duration up to three years, with Commission approval, and that Duke must solicit for capacity in an open, nondiscriminatory, and competitive manner. Duke is required, under the stipulation, to award capacity contracts to the lowest and best offer submitted. The stipulation also provides that rider SRA-SRT may include compensation for capacity owned by Duke or its affiliates that has never been used and useful in serving Duke's load, provided that compensation for that capacity must be determined through offer solicitation by Duke using one of two methodologies: Compensation may equal the lowest offer price for the capacity pursuant to an open, nondiscriminatory, and competitive offer solicitation process or, if there are no offers for capacity other than from Duke, then Duke will be compensated at the price of the last, actual, competitively priced, arm's-length transaction. The stipulation clarifies that it does not require Duke to solicit bids through a formal request for proposal process overseen by an independent third party. Duke is required, under the stipulation, to implement a tariff to compensate nonresidential customers with qualified backup generating facilities for the use of such facilities, as needed to maintain reliable generation service, with compensation for that capacity not to exceed the average price per kilowatt for capacity purchases that are recoverable in rider SRA-SRT. The stipulation clarifies that such capacity would count toward Duke's market capacity purchases and the compensation paid for that capacity would be recovered through rider SRA-SRT. Duke agrees to make a filing, during the first quarter of 2009, to propose the manner in which rider SRA-SRT revenues and costs through December 31, 2008, would be trued up, including an audit of the 18-month period ending December 31, 2008, to be paid for by Duke and the costs of which would be recoverable, with Commission approval, through the SRA-SRT. (Jt. Ex.1 at para. 10.)

Under the stipulation, rider SRA-SRT would be avoidable for all nonresidential customers who agree not to return to the standard service offer for the remainder of the three-year term of the ESP, with that agreement documented by contract or, as approved for the RSP, by a two-page form or specified telephonic approval process. In addition, the stipulating parties would allow those customers to receive a shopping credit equal to six percent of the current "little g" (which is an amount that is equal to the cost of rider SRA-CD). However, such customers could return, according to the stipulation, only by paying 115 percent of Duke's generation charges, along with 100 percent of transmission and distribution riders, but would not be subject to any minimum stay. Nevertheless, under that stipulation provision, a mercantile customer, as defined in Section 4928.01(A)(19),

Revised Code, that returns to Duke between May 15 and September 16 of any year, is required to remain on Duke's SSO service for twelve consecutive billing periods or risk being charged an exit fee by Duke. In addition, the stipulation excepts, from the 115 percent requirement, nonresidential customers who are, as of September 30, 2008, purchasing CRES service under a contract that expires on or after January 1, 2009, if such a customer notifies Duke at least 60 days prior to the expiration of their current contract (including extensions) that it intends to enroll in the SSO. Finally, the stipulation proposes that nonresidential shoppers who enter into a CRES contract after December 31, 2008, may enroll in Duke's SSO after the expiration of the ESP only if they provide Duke with notice, at least 60 days before January 1, 2012, of their desire to enroll in the SSO at the expiration of their contract, including extensions. (Jt. Ex. 1 at paras. 10.f, 17, 18, 20.)

The stipulation also continues the RSP's provision that nonresidential shoppers (including those in a governmental aggregation) may return to the SSO price at any time without notice if they choose to pay rider SRA-SRT and waive the shopping credit. (Jt. Ex. 1 at paras. 17, 20.)

(f) Regulatory Transition Charge

The application proposed the elimination of the RTC for all residential customers on December 31, 2008, and for nonresidential customers on December 31, 2010. This was left unchanged by the stipulation. (Duke Ex. 20, at 6; Jt. Ex. 1 at para. 2.a, b.)

2. Transmission Rider

The application proposes a TCR rider similar to the current TCR rider, noting that transmission charges remain fully regulated by the Commission but are fully avoidable, as CRES providers also must provide transmission service for their customers. Because Duke intends to maintain its current cost recovery structure, to the extent necessary Duke requests a waiver of Appendix (B) of Rule 4901:1-35-03, Ohio Administrative Code (O.A.C.). (Duke Ex. 20, at 16-17.)⁵

3. Distribution Riders

(a) Infrastructure Modernization

The application describes Duke's proposed rider DR-IM as permitting a reasonable revenue requirement to maintain distribution system reliability and to purchase and deploy SmartGrid technology. Duke also anticipates establishing an electronic bulletin board (EBB), accessible through the internet and by telephone, that would permit Duke, its

⁵ The Commission believes that Duke's reference is to Rule 4901:1-35-03, O.A.C., as it has been adopted by the Commission in Case 08-777-EL-ORD. That rule is not yet effective. Therefore, no waiver is currently necessary. Duke may request a waiver, if and when the proposed rule becomes effective.

customers, and CRES providers to participate in the CRES market through transparent price offerings by allowing Duke and CRES providers to post market prices for consideration by customers. The application provides that any customer who switches to an EBB-posted price would be required to remain at that EBB-posted price, or to receive service from a CRES provider, for the duration of the ESP. The anticipated \$9,000,000 cost of establishing the EBB service would be recovered through rider DR-IM as an unavoidable charge. (Duke Ex. 20, at 18-19.)

In the stipulation, rider DR-IM is to be initially set at zero and is recommended for approval only with regard to the proposed deployment of SmartGrid, Duke's gas furnace program, and, if subsequently approved by the Commission, the EBB.⁶ The stipulation states that cost recovery for the SmartGrid project would be on a cost-per-meter basis, with all annual, second-quarter adjustments of rider DR-IM being subject to due process. The cost recovery process for the gas furnace program would, under the stipulation, remain as it currently is approved under rider DSM, thus having no effect on customers' rates. The stipulating parties state that rider DR-IM should be adjusted following the effective date of the Commission's order in Duke's next base electric distribution rate case to reflect the amount of SmartGrid, EBB, and gas furnace program costs, if any, that are included in base rates. The stipulation also includes projections of investments in SmartGrid deployment, as well as operating costs net of savings and revenue requirements through 2014. The parties to the stipulation propose that, for each annual rider DR-IM filing, 85 percent of the annual SmartGrid revenue requirement would be allocated to residential customers and recovered through a monthly price per meter. Similarly, nonresidential customers served on the distribution system (excluding lighting) would be allocated the remaining 15 percent, to be recovered through a monthly price per meter, based on the currently approved, weighted average customer charge. Such monthly charges are agreed not to exceed \$0.50 in 2009, \$1.50 in 2010, \$3.25 in 2011, \$5.25 in 2012, \$5.50 in 2013. (Jt. Ex. 1 at para. 11.)

Duke agrees to accrue post-in-service carrying charges at the most recently approved weighted average cost of long-term debt and to defer depreciation and operating costs from the date the expenditures are incurred until they are included for recovery in rider DR-IM. The parties also agree to the regulatory asset accounting treatment for replaced meters, as described in the application, for which recovery would be made through existing depreciation rates, as amended from time to time. Duke would, according to the stipulation, make an annual filing in which it would include the projected deployment and implementation plan for the current year, including its design requirements, performance, goals, metrics, and milestones. The stipulation states that staff would audit and verify the previous year's costs and system performance levels, together with an overview of the following year's plan, which information would be shared with

⁶ Stipulating parties who were not parties to Case No. 06-91-EL-UNC express no opinion as to retention and funding of the gas furnace program.

OCC contemporaneously with staff. The stipulating parties agree that the 2010 review would include a mid-deployment program summary and review and that the 2011 review would include progress through 2010, including expenditures, deployment program summary, and review. Duke also agreed to outline deployment milestones, system performance levels, customer benefits versus the plan, deployment lessons learned, an updated allocation of the annual distribution revenue requirement, and the desirability of program continuation beyond 2011. (Jt. Ex. 1 at para. 11.)

The parties also agreed that Duke should convene a working group or collaborative process to explore opportunities to maximize the benefits of the SmartGrid investment, that it would focus initially on deployment on circuits in high density areas with a high percentage of inside meters, and that it would deploy the technology in the village of Terrace Park during 2009. Because the stipulating parties expect that system reliability will be enhanced by SmartGrid deployment, Duke agrees on improved reliability targets and the parties agree that Duke may request suspension of deployment if it meets the deployment commitments but reliability does not improve as expected. Finally, the stipulating parties note that, as a combination gas and electric utility, Duke has also addressed SmartGrid issues relating to the gas distribution portion of its business and that Duke may apply to the Commission for approval of alternatives to certain provisions in the stipulation. (Jt. Ex. 1 at para. 11.)

With regard to the proposed EBB, the stipulating parties agree only that Duke will initiate a collaborative process to establish an EBB as generally proposed in the application and note that the EBB would be an open access platform that is competitively neutral and may utilize a third-party independent operator. The design and cost of developing and maintaining the EBB shall be discussed in the collaborative process and, to the extent the Commission approves such cost recovery, the EBB will be developed and the actual costs incurred to develop the EBB shall be recoverable through Rider DR-IM or otherwise as agreed upon. (Jt. Ex. 1 at para. 19.)

(b) Energy Efficiency

Duke's application describes the company's desire to take an aggressive approach to energy efficiency program design, implementation, development, and cost recovery, proposing the establishment of rider DR-SAW (save-a-watt) as a replacement for the current rider DSM. Duke states that DR-SAW would permit it to increase its energy efficiency research and development efforts and would permit CRES customers to participate in efficiency programs. In order to encourage implementation of energy efficiency measures by low-income customers, Duke also seeks approval of a pilot program that would protect up to 10,000 low-income customers from the impact of Duke's rate design proposal. (Duke Ex. 20, at 19-20.)

The stipulation states that rider DR-SAW should be implemented by January 1, 2009, and specifies that the current rider DSM should be eliminated at the same time, with the older rider being reconciled and subjected to a final true-up and with any true-up amounts being added to or subtracted from rider DR-SAW. Energy efficiency programs that had been approved under rider DSM would continue, pursuant to the stipulation, with the same reporting and program approval requirements as are currently in effect, which include due process and an opportunity for a hearing. The stipulation provides that the DR-SAW true-up would occur in the second quarter of 2012.

Pointing to Section 4928.66(A)(2)(c), Revised Code, the stipulating parties agree that mercantile customers with a minimum monthly demand of three megawatts (MW) at a single site or at multiple, aggregated sites within Duke's territory may take certain actions to be exempted from payment of rider DR-SAW if they commit their demand response or other such capabilities to Duke's energy efficiency and demand reduction programs. Under the stipulation, in order to qualify for exemption, the applicant customer must demonstrate to the Commission that it has undertaken or will undertake self-directed energy efficiency and/or demand reduction programs that have produced or will produce annual percentage energy savings and/or peak demand reductions equal to or greater than the applicable statutory annual percentage energy savings and/or peak demand reduction benchmarks to which Duke is subject.

The stipulating parties also agree that Duke will apply to the Commission for approval of DR-SAW programs other than those set forth in the application in these proceedings, with programs being developed by Duke or through a collaborative. With regard to allocating of nonresidential rider DR-SAW recovery between distribution and transmission service customers, the stipulation states that the allocation of distribution revenues approved in Duke's most recent electric distribution rate case would be followed. The stipulation sets forth, as an incentive to Duke for achieving energy efficiency above the statutory mandate, additional levels of return on investment on the program costs based on the level of efficiency achieved. The stipulating parties also agree that Duke will develop a nonresidential interruptible tariff as an energy efficiency option, which program will be submitted to the Commission for approval. Duke also agrees to work with OMA to establish an energy efficiency manufacturing collaborative and to provide that collaborative with an investor-funded contribution of \$100,000 per year for research and development of energy efficiency programs for manufacturers. According to the stipulation, all demand response program participation requirements will be consistent with MISO's load serving entities planning reserve requirements. Finally, the parties agree that, if the Commission adopts a decoupling or straight fixed variable rate design, Duke will discuss and implement appropriate adjustment to its recovery of lost margins under rider DR-SAW. (ft. Ex. 1 at para. 13.)

(c) Economic Competitiveness Fund

Duke's application proposes the establishment of a rider for an economic competitiveness fund, rider DR-ECF, that would permit Duke and the Commission to support public and private economic development, including green infrastructure for public entities and public renewable energy projects, as well as public and private job creation and job retention initiatives and requests by business customers for generation service discounts. The application suggests that the Commission would review contracts or grants where Duke seeks recovery of costs through rider DR-ECF. The rider would be adjusted quarterly and would be audited annually, according to the application. (Duke Ex. 20, at 21-22.)

The stipulating parties agree that Duke should be authorized to recover, through rider DR-ECF, delta revenues associated with reasonable arrangements, to the extent individually approved by the Commission. They also recommend that the Commission approve an economic development contract with the city of Cincinnati under Section 4905.31, Revised Code. (Jt. Ex. 1 at paras. 14-15.)

4. Other Matters

(a) Corporate Separation

Duke points out, in its application, that it is operating under a corporate separation plan approved by the Commission in prior cases and that the Commission has granted it a waiver such that it is not required to transfer its generating assets prior to December 31, 2008. In the application, Duke asks for approval to transfer its generating assets to an affiliated entity or entities that will directly or indirectly own or have rights to the capacity of the units. (Duke Ex. 20, at 23-25.)

The stipulation states that Duke's corporate separation plan shall remain in effect as filed in these proceedings, except that Duke may transfer to an affiliate or sell to an unaffiliated party five gas-fired generating assets, with such transfer subject to approval by the Federal Energy Regulatory Commission (FERC), if necessary. Further, Duke agrees to withdraw, from these proceedings and from FERC, its request to transfer its previously used and useful assets. However, the stipulation notes that Duke may subsequently file an application for a transfer to be effective no earlier than January 1, 2012. (Jt. Ex. 1 at para. 26.)

(b) Market Price

Duke's application notes that its witnesses testify that the ESP price is less than the price would be under a market option. (Duke Ex. 20, at 25-26.) The stipulation recommends that the Commission find that the ESP price, terms, and conditions, including

deferrals and future recovery of deferrals, as modified by the stipulation, is more favorable in the aggregate than the expected results that would otherwise apply under Section 4928.142, Revised Code. (Jt. Ex. 1 at para. 27.)

(c) Excessive Earnings

Duke's application also states that its witnesses address the fact that no ESP component materially affects Duke's earnings and, also, propose a test to determine if Duke's earnings are significantly excessive at the end of each year of the ESP. (Duke Ex. 20, at 25-26.) The stipulation proposes that, beginning in 2010, and by May 15 of each year covered by the stipulation, the Commission implement a significantly excessive earnings test as set forth in the stipulation by the parties. (Jt. Ex. 1 at para 28.)

(d) Governmental Aggregation

The application notes that there currently no active governmental aggregators in Duke's certified territory and that, therefore, there are no phase-in charges allocated to consumers in such groups. According to Duke, because the law permits governmental aggregators not to receive "standby service" but lacks a definition of that term, it proposes to credit governmental aggregation customers five percent of its SRA-SRT and SRA-CD rider charges as a proxy for the standby service charge that should be avoidable by governmental aggregators. (Duke Ex. 20, at 26-27.)

In the stipulation, residential and nonresidential customers in governmental aggregations are treated separately. With regard to nonresidential customers in governmental aggregations, the stipulation provides that they can avoid the SRA-SRT and receive a shopping credit equal to six percent of "little g" (an amount that is equal to the cost of rider SRA-CD) if the aggregator provides Duke with 60 days' notice of its intent to maintain the aggregation throughout the remainder of the ESP period and agrees that returning nonresidential customers will pay 115 percent of Duke's generation charges. Residential customers in governmental aggregations are not allowed to avoid rider SRA-SRT or receive the shopping credit, but are allowed to return to the ESP pricing at any time. The parties to the stipulation specifically agree that Duke "does not assess a separate charge for standby service or default service." (Jt. Ex. 1 at paras. 17, 20, 21.)

(e) Assistance to Certain Customers

Duke agrees, in the stipulation, that it will increase funding for home energy and weatherization contracts during the ESP to \$1,000,000 per year. It also agrees to contribute \$50,000 per year, through 2011, to a specified nonprofit organization in Duke's certified territory to be used for distributing fans and/or air conditioners to qualifying customers. Additionally, Duke agrees to contribute \$700,000 each year for the benefit of electric customers who are at or below 175 percent of the poverty level and who do not participate

in the percentage of income payment plan program. Finally, Duke also agrees with CUFA to provide \$100,000 each year through 2011 to fund an energy education program. (Jt. Ex. 1 at paras. 22, 23, 34, addendum.)

(f) Withdrawal of Certain Riders

Duke's application requested approval of an avoidable inflation adjustment rider. Duke proposed an increase of three percent annually. (Duke Ex. 20, at 10-11.) The stipulation provides for Duke to withdraw its request for Rider PTC-IA. (Jt. Ex. 1 at para. 5.)

Duke had also applied for approval of an unavoidable rider to recover certain costs of newly dedicated capacity. (Duke Ex. 20, at 14-16.) The stipulation provides for withdrawal of that request, with the stipulating parties recommending that the Commission authorize Duke to make market purchases with the objective of filling its short capacity position in a least cost manner, with cost recovery through the SRA-SRT. (Jt. Ex. 1 at para. 24.)

(g) Continuation of Rider GP

The stipulation states that Duke's current rider GP, covering its GoGreen program, should be extended through 2011, rather than expiring at the end of 2008 as currently scheduled, with certain plans for revision. (Jt. Ex. 1 at para. 31.)

C. Consideration of the Stipulation

Rule 4901-1-30, O.A.C., authorizes parties to Commission proceedings to enter into a stipulation. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight. See, *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155 (1978).

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

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

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

We will first analyze the two substantive issues that are specifically asserted by certain of the parties and then will proceed to consider the three criteria just described.

1. Specific Issues Raised by Parties

(a) Residential Governmental Aggregation Customers

OCC raises an issue regarding POLR charges and residential customers of governmental aggregations.

(1) Governing Law

Section 4928.143, Revised Code, allows an electric utility to file an application for an ESP. A number of topics that may be included in an ESP are set forth in division (B)(2) of that section. One of those permissible topics is described, in division (B)(2)(d), as follows:

Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service.

SB 221 dealt specifically with governmental aggregation in Section 4928.20(J), Revised Code. The first three sentences of that section are relevant to this issue and are as follows:

On behalf of the customers that are part of a governmental aggregation under this section and by filing written notice with the public utilities commission, the legislative authority that formed or is forming that governmental aggregation may elect not to receive standby service within the meaning of division (B)(2)(d) of section 4928.143 of the Revised Code from an electric distribution utility in whose certified territory the governmental aggregation is located and that operates under an approved electric security plan under that section. Upon the filing of that notice, the electric distribution utility shall not charge any such customer to whom electricity is delivered under the governmental aggregation for the standby service. Any such consumer that returns to the utility for competitive retail electric service shall pay the market price of power incurred by the utility to serve that consumer plus any amount attributable to the utility's cost of compliance with the alternative energy resource provisions of section 4928.64 of the Revised Code to serve the consumer.

(2) OCC's position

According to OCC, because it did not agree to the stipulation's provisions with regard to residential governmental aggregation customers, the "[s]tipulation has not established a course with regard to this issue." Thus, OCC believes that the Commission's standards for approving partial stipulations do not apply. Rather, noting that the burden of proof in this proceeding should be on Duke, OCC asserts that the Commission may approve Duke's ESP only if Duke proves it to be more favorable in the aggregate than the expected results of a market rate offer. (OCC brief at 3; OCC reply at 3.)

OCC reviews the applicable statutory provisions, beginning with the opportunity for governmental aggregators to elect to avoid standby charges. However, although OCC correctly quotes the statute, it introduces the provision with a description stating that it allows governmental aggregators to elect to avoid "provider of last resort charges . . ." OCC reaches this conclusion by reading Section 4928.143(B)(2)(d), Revised Code, as a definitional provision and stating that Section 4928.143(B)(2)(d), Revised Code, "defines 'standby service' broadly to encompass provider of last resort service." Thus, OCC reaches the conclusion that Section 4928.20(J), Revised Code, authorizes "governmental aggregators to opt-out of most provider of last resort services . . ." From this interpretation, OCC determines that residential governmental aggregation customers should have the opportunity to elect not to pay the SRA-SRT and to receive the six percent shopping credit that compensates for payment of rider SRA-CD, in return for agreeing not to return to the ESP. Without this opportunity, OCC contends that the proposed ESP would be discriminatory and would not be more favorable in the aggregate than the expected results under a market rate offer. (OCC brief at 4-15; OCC reply at 4-6, 12-14.)

OCC also disagrees with the stipulation's proxy⁷ for a market rate upon the return of a governmental aggregation customer. Although the stipulating parties have set 115 percent of the ESP price as, in essence, a proxy for the market rate that is mandated by SB 221, OCC believes that residential customers of governmental aggregations should be allowed to pay the lower of the actual market price or 115 percent of the ESP price. (OCC Ex. 1, at 12-13; Tr. at 168, 169; OCC brief at 15-16; OCC reply at 14-16.)

(3) Stipulating Parties' Positions

Duke challenges OCC's assertion that Duke has failed to meet its burden of proof on the issue of whether the ESP is more favorable in the aggregate than a market rate offer, pointing out that OCC did not disagree with the stipulation on this issue. Staff agrees, and notes that OCC did not include this argument in the issue that it carved out of the stipulation for litigation. (Duke reply at 6; Staff reply at 7-8.)

With regard to shopping by residential customers of governmental aggregations, it is Duke's position that the statute does not address the avoidance of riders SRA-SRT and SRA-CD. Duke contends that OCC misinterprets the statutory provisions and the terms of the stipulation. According to Duke, the statute does not define the term "standby service" as being "synonymous with POLR obligations." The stipulation, as Duke points out, deals with standby service charges separately from provider of last resort obligations, meaning that they are not synonymous. As Duke sums up, "although governmental aggregators may avoid charges for standby service pursuant to [Section 4928.20, Revised Code], they cannot similarly, and by statute, avoid charges for [Duke's] POLR obligations. Thus the OCC cannot compel such a result here." (Duke brief at 16; Duke reply at 6-7.)

Staff also submits that OCC's statutory interpretation is in error and that the "standby" charges that the statute makes avoidable cannot be equated with POLR requirements. Staff points out that Section 4928.20(J), Revised Code, refers only to the avoidance of charges for "standby service within the meaning of division (B)(2)(d) of section 4929.143 of the Revised Code . . ." The cited division, it says, is not a definition of "standby service," as suggested by OCC but is, rather, "part of an extensive listing of things that can be included in an ESP." To interpret the meaning of "standby service," staff chooses to look to the term's use in a different section. It points out that "standby service" is used in Section 4928.02(K), Revised Code, to refer to charges imposed by utilities on customers who rely on distributed generation to compensate the utility for standing by in case the customer's equipment fails. Staff believes that its interpretation avoids paradoxical problems that would exist if we adopted OCC's reading of the statutory language. (Staff reply at 2-6.)

⁷ While the stipulation does not refer to this as a "proxy," we will use this term to more clearly distinguish the stipulation's preset market price from the actual market price that OCC believes should be calculated at the time a residential customer might return to Duke's service.

Duke also disagrees with OCC's contention that residential customers of governmental aggregators should be allowed to return at the lower of market price or 115 percent of the ESP price. First of all, it notes, this issue was not reserved for litigation. The applicable footnote in the stipulation, by means of which OCC noted its reservation of one issue for litigation, reads, "The parties agree that OCC shall have the right to carve out for litigation the issue of bypassability of charges and shopping credits for residential government aggregation customers." Thus, the return price is not at issue, according to Duke. (Duke brief at 16; Staff brief at 13-14; Staff reply at 9.)

On the substance of the issue, Duke notes that OCC provided no definition of a market price, no proposed market price calculation method, and no estimate of what the market price might be. Thus, OCC's proposal is, in Duke's opinion, unsubstantiated. Duke notes OCC's argument that residential customers should not be discriminated against with regard to avoidance of the SRA-SRT and the SRA-CD and points out that, when it came to the return price, OCC argued in favor of a different treatment of residential and nonresidential customers. Because the statute, in Duke's approach, does not require the SRA-SRT and SRA-CD to be avoidable upon request by a governmental aggregator, Duke believes that it can treat residential and nonresidential customers differently in this regard, if the groups are differently situated. Duke contends that, because residential customers are not in as good a position as nonresidential customers to make appropriate choices regarding risk, this differential treatment is permissible. (Duke brief at 16-19; Duke reply at 7-10.)

(4) Commission Analysis and Determination

We will first address the issue of whether rider SRA-SRT should be avoidable by residential customers of governmental aggregations and whether those customers should be able to receive the six percent shopping credit to compensate for payment of rider SRA-CD. We agree with OCC that Section 4928.20(J), Revised Code, allows the Commission no discretion with regard to the right of governmental aggregations to elect not to receive standby service and, therefore, to avoid charges for that service. The only question to be determined in this regard is the statutory interpretation of the meaning of the term "standby service."

Contrary to OCC's contention, Section 4928.143(B)(2)(d), Revised Code, is not a definition of the term "standby service." Rather, as argued by staff, that section is part of a lengthy itemization of the provisions that may be included in an ESP. Unfortunately, although that section includes several similar terms (including "standby service") that apparently could cover POLR service, the section allowing aggregators to elect out of standby service is much more specific. The list of allowable ESP provisions allows for inclusion of "standby, back-up, or supplemental power service, default service . . ." The aggregation section specifies only "standby service" as the service that aggregators may

elect not to receive. Searching for an implied definition, staff recommends that we look to a different section within Chapter 4928. While we do not necessarily disagree with staff's interpretation of the term in the section it reviews, we find it inappropriate to look to a different section, if evidence of the legislature's intent can be gleaned by considering subsequent language in the section that we are interpreting. Immediately after directing that the electric utility shall not charge aggregation customers, if the election has been made, for standby service, the statute goes on to provide that "[a]ny such consumer that returns to the utility for competitive retail electric service shall pay the market price of power incurred by the utility to serve that consumer . . ." Section 4928.20(J), Revised Code. The legislature had first provided that an aggregation could elect out of an aspect of the electric utility's service. Then it said that the electric utility could not charge the aggregation's customers for that service. This was immediately followed by a description of the price that the electric utility would therefore be allowed to charge if one of those customers returned to that service. Clearly, the legislature's intent was that the service for which the customers were not being charged was the electric utility's standing ready to serve those customers at the SSO price if they were to choose to return. This statutory provision, then, must mean that governmental aggregations may elect not to receive that service and not to pay for it.

OCC claims that both rider SRA-SRT and rider SRA-CD would be encompassed by this statutory provision. We will review each of those riders in order to determine whether they fall within the scope of Section 4928.20(J), Revised Code, as we have interpreted it. Rider SRA-SRT will compensate Duke for its "purchase [of] capacity necessary to maintain an offer of firm generation service and [provision of] default service to all consumers in its certified territory; . . . whether switched or unswitched." (Duke Ex. 20, at 12.) The purchase of capacity to allow Duke to maintain default service for switched customers, we find, is clearly within the scope of the intent of Section 4928.20(J), Revised Code. Rider SRA-CD is quite different, however. That rider is intended to compensate Duke for providing customers with a first call on its capacity, foregoing the opportunity to sell capacity that is currently dedicated to its standard service offer, permitting customers to switch to competitive suppliers, and assuming the risk associated with maintaining a reasonably stable price during the ESP period. (Duke Ex. 20, at 13-14.) The only aspect of the SRA-CD that relates to shopping is one that notes that Duke will permit customers to switch to a competitive supplier but does not address Duke's potential costs upon their return. The statutory provision we are considering only referred to the price that the electric utility could charge upon the return of customers who have avoided payment of particular riders. Thus, rider SRA-CD does not appear to be encompassed within the intent of Section 4928.20(J), Revised Code. We conclude that, if a residential governmental aggregation elects not to receive Duke's promise to stand ready to serve the customers at the SSO price if they were to choose to return, the customers in that aggregation should not be charged for rider SRA-SRT, but would be obligated for rider SRA-CD.

OCC's second issue is the appropriate return price to be charged to residential governmental aggregation customers. We agree, as Duke and staff point out, that this issue was not one that OCC reserved, in the stipulation, for litigation. Therefore, we can only conclude that, at the time OCC executed the stipulation, it intended to agree with the return price provisions. We should also note that, even if we were considering the issue, we would conclude that residential and nonresidential customers are not differently situated in any way to justify what would then be different return pricing provisions.

We also wish to address OCC's contention that, because its aggregation issue was reserved for litigation, the three-pronged stipulation test does not apply and Duke must satisfy the comparison with a market rate offer. There are two problems with this argument. First, even if OCC did not agree with the aggregation provisions of the stipulation, that does not mean that there was no stipulation as to that issue. Rather, OCC's refusal to agree with those provisions means only that one of the several stipulating parties did not agree to that portion of the stipulation. Others remained in agreement as to this provision. Therefore, the three-pronged test for stipulations is still applicable. Second, we recognize that OCC stipulated that the ESP, with the aggregation issue undecided, would be more favorable in the aggregate than a market rate offer. (Jt. Ex. 1 at para. 27.) Thus, this issue is no longer open for OCC to dispute.

(b) Exemption from Rider DR-SAW

IEU raises, as an issue, the restrictions on availability of the rider DR-SAW exemption, which are set forth in provision 13.b of the stipulation. As discussed above, rider DR-SAW is intended by the stipulating parties to collect costs associated with meeting energy efficiency and peak demand reduction requirements under Section 4928.66, Revised Code, and allows certain large, nonresidential users to avoid payment by committing their own demand response or other similar capabilities to Duke's programs. The threshold for a nonresidential customer to qualify to avoid payment of rider DR-SAW is, under the stipulation, that it have a minimum monthly demand of three MW at a single site or at multiple sites within Duke's certified territory. In addition, in order to qualify for the exemption, the stipulation's terms would require the customer's self-directed energy efficiency and/or demand reduction programs to produce energy savings and/or peak demand reductions equal to or greater than the statutory benchmarks to which Duke is subject. IEU states that it opposes this provision of the stipulation.

(1) Governing Law

The first three sentences of Section 4928.66(A)(2)(c), Revised Code, are critical to the analysis of this issue. They are, here, split apart for more convenient reference in the ensuing discussion:

Compliance with divisions (A)(1)(a) and (b) of this section shall be measured by including the effects of all demand-response programs for mercantile customers of the subject electric distribution utility and all such mercantile customer-sited energy efficiency and peak demand reduction programs, adjusted upward by the appropriate loss factors.

Any mechanism designed to recover the cost of energy efficiency and peak demand reduction programs under divisions (A)(1)(a) and (b) of this section may exempt mercantile customers that commit their demand-response or other customer-sited capabilities, whether existing or new, for integration into the electric utility's demand-response, energy efficiency, or peak demand reduction programs, if the commission determines that that exemption reasonably encourages such customers to commit those capabilities to those programs.

If a mercantile customer makes such existing or new demand-response, energy efficiency, or peak demand reduction capability available to an electric distribution utility pursuant to division (A)(2)(c) of this section, the electric utility's baseline under division (A)(2)(a) of this section shall be adjusted to exclude the effects of all such demand-response, energy efficiency, or peak demand reduction programs that may have existed during the period used to establish the baseline.

(2) IEU's Position

IEU presented the testimony of one witness, Kevin M. Murray, to support its argument that paragraph 13.b of the stipulation should be rejected by the Commission. Mr. Murray identifies himself as a technical specialist employed by counsel for IEU and states that his education consists of a Bachelor of Science degree in Metallurgical Engineering. (IEU Ex. 1, at 1-2.) Admittedly, Mr. Murray is not an attorney. (IEU Ex. 1, at 4.) Mr. Murray's testimony begins with his belief that the purpose of paragraph 13.b of the stipulation is "to limit and narrow the opportunity for a mercantile customer to secure an exemption from the cost recovery mechanism regardless of the case the customer might otherwise make to the Commission in favor of such an exemption." (IEU Ex. 1, at 5-6.) Continuing, Mr. Murray evaluates the language in the stipulation and compares it to the requirements and definitions in SB 221. He expresses his opinion that the Ohio General Assembly is responsible for making public interest determinations, only giving the Commission the ability to make case-by-case determinations on exemption requests. Based on his interpretation of the language in the statute, he believes that the "arbitrary cut-off" contained in the stipulation, which prohibits exemptions for mercantile customers using less than three MW per year, is contrary to the legislature's expression of the public interest. (IEU Ex. 1, at 7.) Mr. Murray also testifies that the stipulation's requirement that a customer be in a position to reduce usage by an amount equal to Duke's benchmark is

fundamentally wrong and could serve to discourage mercantile customers' efforts toward efficiency. (IEU Ex. 1, at 9-12.) Ultimately, Mr. Murray proposes that, "[i]f the Commission is presented with a request for an exemption by a mercantile customer that can only commit towards some portion of an electric distribution company's portfolio obligation, rather than committing a full proportionate share, it can make a specific determination based upon the facts presented to it in that proceeding, as to whether a full exemption, no exemption, or some middle ground is reasonable." (IEU Ex. 1, at 12.) (*See, also*, Tr. at 128-131.)

Relying on the testimony of Mr. Murray, IEU, in its brief, first discusses its contention that the stipulation violates the law by being more restrictive than the governing statute with regard to which customers may seek exemption from rider DR-SAW. IEU explains that Section 4928.66(A)(2)(c), Revised Code, provides that "the Commission may exempt mercantile customers that commit their demand-response, energy efficiency, or peak demand reduction capabilities to the electric utility from mechanisms designed to cover those costs . . ." (IEU brief at 7.) IEU then goes on to indicate that the term "mercantile customers" is defined by Section 4928.01(A)(19), Revised Code, to mean a commercial or industrial customer that consumes more than 700,000 kWh per year or that is part of a national account involving multiple facilities. (IEU brief at 7; IEU Ex. 1, at 6-7.) On the other hand, IEU points out that the stipulation requires a customer to have a minimum monthly demand of three MW at a single site or at multiple sites within Duke's territory. (IEU brief at 5-6; IEU Ex. 1, at 6.) IEU believes that the higher threshold in the stipulation would violate the terms of Section 4928.66(A)(2)(c), Revised Code. It contends that the Ohio legislature has "specified the eligibility which determines which customers may seek [the] exemption" and argues that the Commission may not "redraw the exemption eligibility lines" set by statute. (IEU brief at 8.) In IEU's opinion, because it violates the law, the stipulation also violates important regulatory principles or practices, does not benefit ratepayers, and is not in the public interest.

IEU also quarrels with a provision in the stipulation that would, in addition to the minimum demand requirement, necessitate a showing by the customer that its demand response, energy efficiency, or peak demand reduction programs equal or exceed the statutory benchmarks then applicable to Duke. As with the eligibility requirement, IEU claims that the proposed stipulation provision would violate the law, as the governing statute does not include this requirement. IEU asserts that, by approving the stipulation, the Commission would "preemptively rewrite Ohio law to include more prescriptive terms," as the benchmarks are not applicable to mercantile customers. (IEU brief at 8-10.) IEU believes, also, that this limitation is not in the public interest as it would result in some energy efficiency improvements being discouraged. IEU, rather, argues for a case-by-case approach by the Commission, with individual exemptions being granted or denied by Commission action. (IEU brief at 10; IEU Ex. 1, at 12.)

IEU also raises one evidentiary argument, claiming that, because no witness testified in support of the restrictions proposed by this provision of the stipulation, the Commission is without record support to approve it. IEU points out that Section 4903.09, Revised Code, requires the Commission to have evidentiary support for its conclusions. Because there is no testimony in support of the restrictions discussed by IEU, it concludes that the Commission must reject that provision. (IEU brief at 11-12.)

(3) Stipulating Parties' Positions

The stipulating parties disagree with IEU's arguments and conclusions on this issue. Duke, in its reply brief, argues that IEU fails to accept that Section 4928.66(A)(2)(c), Revised Code, is permissive; that there is no absolute right to an exemption. It also notes that Section 4928.66(A)(2)(d), Revised Code, permits mercantile customers to request approval from the Commission of a reasonable arrangement under which they may offer their own demand response, energy efficiency, or peak demand reduction capabilities to the company. (Duke reply at 2.)

Similarly, pointing to the statutory prohibition against approval of an exemption that does not have the effect of encouraging customers to commit their capabilities to the programs, OCC argues that "[t]he law only limits the Commission's discretion according to those that it may not approve." Thus, OCC believes that this provision of the stipulation does not violate any important regulatory principal. (OCC reply at 17.)

OCC also emphasized the tremendous administrative burden that would be placed on the Commission, OCC, and other interested parties if a substantial number of exemption applications were filed by small mercantile customers, as well as the difficulties and costs that would be involved in changing Duke's billing system to allow for many full or partial exemptions. In addition, OCC noted the ongoing expense of monitoring continuing compliance by those exempted customers. Thus, OCC strongly believes that it is both reasonable and appropriate to place limitations on the extent to which rider DR-SAW may be avoided. Indeed, without restrictions such as are included in the stipulation, OCC believes that the Commission would be obligated to reject the stipulation as not being in the public interest and not benefitting ratepayers. (OCC reply at 18-20.)

OEC also starts its argument with a focus on the permissive language in the statute, pointing out that, although IEU's witness admitted, "I am not an attorney," the examiners allowed his testimony into the record. (IEU Ex. 1 at 4.) OEC contends that the bulk of Mr. Murray's testimony is purely legal argument. Pointing to the second sentence of the section in question, OEC recounts that Mr. Murray believes this language evidences the legislature's determination that it is in the public interest that all mercantile customers have the opportunity to seek an exemption from rider DR-SAW, with requests decided on a case-by-case basis. In contrast, OEC stresses that the legislature could have enacted a statute that said that the rider "shall" exempt such mercantile customers, rather than using

the term, "may." OEC summarizes its position on this point, saying, "Because there is no mandatory requirement that the mechanism designed to recover the costs of an electric utility's energy efficiency and demand reduction programs provide for any exemption, it necessarily follows that limiting the availability of the exemption by including any eligibility threshold is legally permissible." (OEC brief at 10.) OEC goes on to argue that the statute does not require Duke to integrate the capabilities of a mercantile customer but, rather, places the onus of meeting the statutory benchmarks on Duke. It points out that offering relief from DR-SAW is a detriment to other ratepayers and is, therefore, inappropriate if Duke is able to satisfy the benchmarks through its own programs. In addition, OEC argues that the signatories to the stipulation cannot be faulted for failing to produce a witness to respond to legal arguments because legal arguments are the subject for briefs not testimony. (OEC brief at 4-5, 8-12; OEC reply at 3.)

Staff also believes that the word "may" in the second sentence of the section results in it being permissive, rather than mandatory. Recognizing that the rider could allow the exemption of all mercantile customers that make the commitments or, on the other hand, could refuse to exempt any, staff submits that the stipulation strikes a reasonable balance, "recognizing that some large customers may have efficiencies that can reasonably be captured, verified and accounted for, while not expending the reach beyond what can be managed." Staff points out that this provision is part of an ESP that lasts for only three years and that it is a period during which the Commission and the parties will gain actual knowledge and experience on which to base further refinements. (Staff brief at 9-12; staff reply at 9.)

Regarding IEU's contention that Duke must allow a mercantile customer to commit less than Duke's benchmark, with consideration on a case-by-case basis, Duke believes it would be illogical to reach this conclusion as the purpose of the exemption from payment of rider DR-SAW is to develop a means by which it may meet its mandate. Duke argues that allowing an exemption without requiring the customer to commit its equivalent share of efficiency would leave Duke at risk and, to the extent that the customer falls short of the mandate, would require other customers to bear the costs of meeting the mandate and would necessarily create an illegal cross-subsidy. Duke also points out that IEU's witness did not know how many mercantile customers would qualify under its proposal or what standard should be used by the Commission to consider such applications. (Duke reply at 3-5.)

OEC controverts this IEU argument, as well. Honing in on Mr. Murray's testimony that prudent mercantile customers will not undertake energy efficiency and demand reduction measures that are not cost-effective, OEC reviews various alternatives. First, in its analysis, a measure under consideration by a mercantile customer may be deemed cost-effective "in its own right" and will, therefore, be undertaken without further incentive. Second, if the payback period for investment in a measure does not satisfy the mercantile

customer's internal rate of return calculus, Duke may provide a program to induce it to proceed; indeed, Duke plans to establish a collaborative process to develop such programs. Third, according to OEC, Duke could enter into a special arrangement with an individual mercantile customer in order to provide specially tailored incentives. The final option under OEC's rationale would be to exempt that customer from payment of rider DR-SAW. As it is the last of several options, all of which may encourage efficiency and demand reduction, OEC argues that the exemption may appropriately, under the statute, be limited to instances in which integration of that customer's capabilities will produce a meaningful contribution to Duke's ability to comply with the benchmarks, especially as it is at risk for failure to comply with those benchmarks. Finally, as to the requirement that customers must commit programs to save energy at the benchmark level if they wish to be exempted, OEC submits that the statute does not provide for partial exemptions from riders. OEC also addresses the IEU proposal that the Commission exempt customers on a case-by-case basis, advising that this approach is unworkable. (OEC brief at 12-17.)

As to IEU's evidentiary argument, Duke initially notes that it is generally sufficient for the Commission to consider the stipulation itself, together with testimony that the signatory parties collectively agreed to its terms, and the factors supporting the three-pronged test. It also indicates that its witness, Theodore Schultz, discussed the original proposal for allowing certain customers to opt out of rider DR-SAW in his direct testimony and that Duke witness Paul G. Smith explained the provision as a public benefit. Duke notes that Mr. Smith testified that IEU's objections were addressed in the testimony of Duke witnesses Richard G. Stevie and Theodore Schultz. (Duke reply at 2-3 [referring to Duke Exs. 9, 11, and 18].)

On this subissue, OCC submits that IEU's witness Murray provided mostly a discussion of statutory interpretation and little factual evidence, contrary to IEU's claims that its witness provided the only record evidence as to how this paragraph meets the Commission's three-pronged test. According to OCC, the evidence that he did provide failed to address how IEU's proposed approach would assist Duke in meeting the savings benchmarks. (OCC reply at 22-22.) OEC agreed that Mr. Murray's testimony on this subject was not actually evidence, but pure legal argument by a non-lawyer. "Legal argument is the subject for briefs, not testimony." (OEC reply at 4-5.)

(4) IEU's Position on Reply

IEU's reply brief, in addition to reviewing its previously expressed arguments, addresses certain points made in other parties' briefs. It contends that a three-year term is unreasonable on its face, as its "only possible virtue" is the avoidance of an evaluation of earnings that would otherwise be required. IEU also believes that it is unreasonable to approve a stipulation in which some provisions have proposed impacts that exceed the ESP's three-year term. It expresses a concern for Duke's Save-a-Watt program, for the predetermined excessive earnings test formula, the ability to transfer generating assets,

and Duke's ability to lock in its earnings growth, all of which are included in the stipulation package. (IEU reply at 7-12.)

With regard to the overriding question of whether the statute prevents the stipulation from limiting which mercantile customers may be exempted, IEU asserts that "the Commission's discretion is limited to determining whether an exemption would reasonably encourage customers to commit their energy efficiency and peak demand reduction capabilities for integration into an electric utility's programs, not which customers may seek an exemption." (IEU reply at 13.) IEU challenges the suggestion that a mercantile customer that does not meet the requirements for an exemption could still seek to enter into a reasonable arrangement otherwise, explaining that such an approach would defeat the apparent intent of the exemption limitation. (IEU reply at 13-15.)

IEU also disagrees with OEC's statement that Duke would not be required, under the statute, to integrate the capabilities of a mercantile customer into its own programs. To make its point, IEU refers to the first sentence of statutory provision, in which it is made clear that mercantile customers' programs are to be included in measuring the electric utility's efficiency efforts. (IEU reply at 16-17.)

IEU disputes Duke's cross-subsidy argument, noting, among other things, that a mercantile customer electing to commit its customer-sited capabilities for integration is taking steps to distinguish itself from others and, thereby, providing the basis for a determination that it is not similarly situated to other customers. (IEU reply at 20.)

(5) Commission Analysis and Determination

As reviewed above, IEU claims that the stipulation violates the law and, therefore, fails to satisfy the second and third prongs of the Commission's traditional evaluation stipulations, both because of the three MW threshold and because of the requirement that customers meet Duke's benchmark in order to receive an exemption. In addition, IEU believes that paragraph 13.b is unsupported by record evidence, leaving the Commission with no evidentiary basis upon which to approve it. In evaluating the arguments we will, first, consider whether the paragraph at issue violates the face of the governing statute. We will subsequently evaluate the provision's other potential benefits or detriments to customers and to the public interest.

Mr. Murray testified as to the specific issues under consideration. To the extent that he presented factual evidence or expert opinion testimony, we will consider his testimony in our analysis. However, we note that multiple parties moved to strike portions of Mr. Murray's testimony on the ground that he is not an attorney and the testimony appeared to be a legal argument. Although the attorney examiners denied the motions to strike, they cautioned that the Commission would recognize that the witness is not an attorney in evaluating the weight to be given to his testimony. (See, e.g., Tr. at 101.) Our analysis, at

this point in the discussion, is one of determining whether the proposed stipulation provision violates the law and necessitates a legal interpretation of the meaning of the governing statute.

As referenced at the start of our analysis of this issue, division (A)(2)(c) of Section 4928.66, Revised Code, includes four sentences, the first three of which have relevance to our discussion or were referenced by parties. While we will not repeat the text of those sentences here, we will summarize them. The first sentence provides that calculation of the electric utility's compliance with the benchmarks should include the effects of all mercantile customers' programs. That first sentence includes no reference to whether or not such programs are capabilities that have been "committed" to the electric utility's own programs. The second sentence allows the Commission to approve a rider that exempts, from its coverage, mercantile customers who commit their capabilities to the electric utility's programs, if the Commission finds that the exemption encourages the customers to commit their capabilities. The third sentence goes back to the calculation methodology and requires the electric utility's baseline to be adjusted to exclude the effect of committed capabilities of mercantile customers.

Although IEU's discussion on brief relies in part on the first sentence, that sentence does not relate to the issue of the possible exemption. Even if rider DR-SAW included no exemption language, the first sentence would still apply to the calculation of Duke's compliance with the section as a whole. Therefore, our focus must not be on the first sentence. Similarly, the third sentence merely explains how calculation of compliance with the benchmark should be made, in the event that customers' capabilities have been committed to the electric utility's programs. Thus, it is also not relevant to our analysis of which customers may be exempted. The second sentence, on the other hand, is key to our analysis. In both halves of this issue, that is, the three MW minimum discussion and the benchmark parity discussion, the stipulating parties seek to narrow the coverage of the second sentence of the division.

No one debates the definition of the term "mercantile customer." Section 4928.01(A)(19), Revised Code, defines that term to mean a commercial or industrial customer that consumes more than 700,000 kWh per year or that is part of a national account involving multiple facilities. Rather, the stipulating parties focus, largely, on the permissive aspect of this division of the statute: the verb in the sentence is "may exempt." Clearly, a rider to be approved by the Commission need not exempt mercantile customers who commit their capabilities to an electric utility's programs, even if such an exemption might reasonably encourage such commitment. The question, as we see it, is whether, because of the permissive tenor of the sentence, a rider may exempt some such mercantile customers while refusing to exempt others.

We note, in this regard, that the legislature has not, in SB 221, changed the policy of this state such that it would not include "ensur[ing] the availability to consumers of . . . nondiscriminatory . . . retail electric service." Section 4928.02(A), Revised Code. Indeed, the legislature enacted language to require electric utilities to provide service "on a comparable and nondiscriminatory basis . . ." Section 4928.141(A), Revised Code. Without the existence of the second sentence in the provision that we are considering, a rider such as DR-SAW would have to make the exemption open to any of its customers that could meet the reasonable terms of that exemption. The impact of that second sentence, therefore, is to allow the exemption to be discriminatory to the extent of the specifications set forth in the sentence. The sentence we are considering says nothing about limiting the availability of the exemption to mercantile customers with an annual usage over three MW. It also says nothing about limiting the availability of the exemption to mercantile customers with capabilities equal to the benchmark then applicable to the electric utility. It does, however, allow us to determine whether the exemption "reasonably encourages" the customers' commitment of their capabilities to the electric utility's programs. We find that this does allow us some limited flexibility in the consideration of the structure of a rider's exemption provisions. We will, under this approach, consider each of the proposed limitations.

Turning first to the benchmark parity issue, we recognize that, if an exempted customer did not have to commit capabilities equal to the electric utility's applicable benchmark, then either the customer would be exempted only from a corresponding percentage of the cost recovery rider or the customer would still be exempted from the entire cost recovery rider. As noted by Duke, if a customer committing less than the benchmark were exempted from the entire rider, other customers would have to bear an increased burden of Duke's cost recovery. We find such a result to be inequitable. On the other hand, requiring Duke and the Commission to calculate and review percentages of exemptions that are appropriate for each customer would be time consuming and expensive, the cost of which would have to be borne by ratepayers. Similarly, other interested parties would likely need to review those calculations, in order to ensure that their constituencies were not to be overcharged. We also note that the governing statute makes no reference to the possibility of a partial exemption. Therefore, we find it reasonable and appropriate for the rider to limit the availability of an exemption to those customers whose capabilities meet or exceed the applicable benchmark in any given year, as proposed by the stipulation.

The proposal that the exemption only be available to larger mercantile customers is more problematic. Here, the concerns raised by the parties are primarily that a large number of applications would create a substantial administrative burden. However, we would note that the potential for such a burden is reduced by the requirement that an exempted customer meet the applicable benchmark. Due to the existence of that provision, a small mercantile customer with only limited capabilities will not be applying

for an exemption. We are also aware that the legislature has deemed it important to encourage innovation, to provide incentives to technologies that can adapt successfully to environmental mandates, and to encourage the education of small business owners to encourage their use of energy efficiency programs. Section 4928.02, Revised Code, at divisions (D), (J), and (M). We do not believe, therefore, that the legislature intended us to approve a rider that bases the availability of the exemption on a different usage level than that approved in the definition of "mercantile customer." We also do not believe that the administrative concerns regarding the number of possible applications are tenable. Therefore, we will not approve that portion of the stipulation that raises the minimum annual usage, for qualification to apply for the exemption, to three MW. Thus, the ability to apply for the exemption should be available to all mercantile customers, if their capabilities meet or exceed the applicable benchmark. With this modification, we find that the exemption would reasonably encourage mercantile customers to commit their energy efficiency and peak demand reduction capabilities for integration into Duke's programs.

Finally, we will comment on IEU's claim, discussed above, that we cannot approve this provision of the stipulation because no proponent testified specifically with regard to the terms of that particular provision. We note that, at the same time that it makes this evidentiary assertion, it also suggests, in its reply brief, that the Commission consider information that is not a part of the evidentiary record developed in these proceedings. (IEU reply at 8-11.) While we will not consider the material referenced by IEU that is outside the record, we will point out that, in reviewing evidence in support of stipulations, we have never made it a prerequisite for approval that every provision be supported by a witness. Such a test could necessitate multiple witnesses, would unnecessarily lengthen proceedings, and would increase the litigation expenses for all parties. Rather, our review of stipulations focuses, as required by the Supreme Court of Ohio, on the stipulation as a whole and our determination of whether the stipulation meets the three-pronged test.

2. Serious Bargaining

No party argues that the stipulation was not the result of serious bargaining among capable, knowledgeable parties. Duke points out that its witness, Paul Smith, testified that the stipulation resulted from lengthy bargaining sessions, with parties represented by capable counsel and technical experts, and that all parties were invited to attend all settlement discussions. (Duke brief at 4-5, citing Duke Ex. 18, at 3-4.) Staff's witness Tamara Turkenton similarly noted that settlement meetings were noticed to all parties and opined that the settlement, being the product of an open process, with extensive negotiations and analysis on complex issues, is the product of serious bargaining among knowledgeable parties. (Staff Ex. 1, at 2.) (*See, also*, OEG brief at 1.) We conclude that this test has been satisfied.

3. Benefits to Customers and the Public Interest

Staff's witness Turkenton also testified as to various ways in which the stipulation benefits ratepayers and promotes the public interest. Among other things, she referenced the fact that the stipulation establishes fair and reasonable increases in the base price of generation, establishes a rider to recover costs relating to SmartGrid technology and requires Duke to explore ways to maximize SmartGrid benefits, provides incentives for Duke to achieve energy efficiency above statutory mandates, allows Duke to recover revenues associated with economic competitiveness arrangements, and provides shareholder funding for customer assistance to low income customers. (Staff Ex. 1, at 3-5.)

Similarly, Duke's witness Smith provided a list of benefits to consumers and the public interest. Some of the most critical of those benefits include the following: Mr. Smith states that the stipulation provides rate stability for customers, financial stability for Duke, and continued development of the competitive market. He also maintains that customers' service through the ESP period will include only modest, annual, predictable increases, at a substantially lower price increase than Duke had supported in its application. He points out that stipulated price increases for residential customers, under the stipulation's terms, would be approximately two percent in 2009 and 2010 and zero percent in 2011. The corresponding increases for nonresidential customers would be approximately two percent in each of the three years. Mr. Smith points out the price transparency in the stipulation and the fact that Duke has agreed to withdraw from these proceedings its proposed change in distribution customer charges and its proposed annual inflation-based price adjustment. Mr. Smith's list of benefits includes Duke's agreement to defer and amortize up to \$50,000,000 to be spent at the Beckjord generating station in order to allow its continued operation. He notes, also, that the stipulation provides for the establishment of a collaborative process to design an EBB that will further enhance the continue development of the competitive retail market. Mr. Smith also points out several benefits that are included for low-income customers. (Duke Ex. 18, at 6-12.) (See, also, OEG brief at 1.)

We also note that, on December 15, 2008, Duke filed a letter in the docket, indicating that its overall rates, including the effects of the proposed ESP and the adjustments to riders FPP and SRT, will decrease. Duke calculates that rates for typical residential customers will decrease by 3.8 percent, that rates for typical commercial customers will decrease by 4.4 percent, and that rates for typical industrial customers will decrease by 5 percent. With regard to the future design of the EBB, the Commission encourages Duke to include other electric utilities in its discussions. We have previously addressed the concerns raised by OCC and IEU. With the modifications that we have already found appropriate, we conclude that the stipulation, as modified, provides many benefits to customers and is in the public's interest.

4. Violation of Policies and Practices

Both Mr. Smith and Ms. Turkenton testified that the stipulation, as presented, does not violate any important regulatory principles or practices. While we recognize that the stipulation resolves certain issues related to the statutorily required test for excessive earnings during the effective period of the stipulation, we recommend that Duke participate in any Commission-sponsored workshops on this issue, with regard to the period subsequent to the stipulation. As we have previously discussed, OCC and IEU each disputed that contention with regard to identified issues. (*See, also*, OEG brief at 1.) With our resolution of those particular issues, we find that the stipulation, as modified, satisfies this criterion.⁸

D. Implementation

On December 10, 2008, Duke filed proposed tariffs in the docket of these proceedings. We will proceed, at this point to a review of those proposed tariffs. First, we note that Duke has proposed to modify riders PTC-FPP, SRA-SRT, and TCR. We will consider each of those modifications individually.

Rider PTC-FPP, according to the stipulation, is to be based on the same process as the FPP rider under the currently effective RSP, with a true-up filing to be submitted during the first quarter of 2009 and with that true-up being subject to due process and including an audit for the eighteen-month period ending December 31, 2008. (Jt. Ex. 1 at paras. 7, 8.) Rider FPP has, under the RSP, been adjusted through quarterly filings with the Commission, at least 30 days prior to the start of each quarter. The year's charges were then audited, reviewed, and subjected to any necessary true-ups, in the context of an annual proceeding. During the RSP, that proceeding was commenced on about September 1 of each year, with the audit generally covering a period from July 1 to June 30. On December 2, 2008, Duke filed an update to rider FPP in Case No. 07-974-EL-UNC, also proposing to modify it to meet the stipulation's provisions for rider PTC-FPP. Although no fourth quarter audit was commenced, a substitute for the audit is included in the stipulation, with the audit expected to occur during the first quarter of 2009. We find that Duke's filed update of rider FPP is in compliance with the process that has been followed throughout the RSP and is, therefore, in compliance with the process to be established under the stipulation. Therefore, we will allow rider PTC-FPP to be set on the basis of that filing.

Rider SRT, under the RSP, was set by Commission action each year and was then subject to quarterly adjustment by Duke. It was subject to an annual audit and true-up, on

⁸ We would note that, with regard to the EBB, we are approving only the initiation of a collaborative process to design an EBB. We are not, in this opinion and order, approving the substance of any design, or the structure of any EBB offerings, that may be developed through that collaboration.

the same schedule as the FPP. In the stipulation, Duke agreed to file a proposal as to the manner of any true-up of rider SRA-SRT revenues and costs through December 31, 2008. That proposal is due to be filed during the first quarter of 2009 and is to be subject to due process and an audit of the eighteen-month period ending December 31, 2008. As it has in the past, on December 30, 2008, Duke filed a proposed quarterly adjustment of rider SRT in Case No. 07-975-EL-UNC. We find that, like the PTC-FPP, its filed update is in compliance with the process that has been followed and is a reasonable continuation for the establishment of rider SRA-SRT under the terms of the stipulation. Therefore, we will allow the SRA-SRT to be set on the basis of that filing.⁹

The TCR rider also needs to be established. The application, unchanged by the stipulation, provides that the rider TCR mechanism will remain similar to the current rider TCR. The current TCR process allows Duke to make semi-annual modifications of the TCR rate, through a filing made 45 days prior to the date on which it is to be effective. Interested persons are allowed to file comments no later than 20 days after the initial filing. If the Commission does not suspend a proposed modification, it becomes effective on the 46th day after filing. The last proposal to modify rider TCR was filed, in Case No. 05-727-EL-UNC, on October 17, 2008, and reflected tariffs that were proposed to become effective with the first billing cycle of January 2009. No comments were filed in that docket and the Commission sees no reason to suspend the modification. Therefore, the rider TCR rates should reflect that modification.

Duke has filed proposed tariffs. The Commission has reviewed the proposed tariffs and finds that they should be approved with the exception that they be revised to reflect the modifications ordered by the Commission in this opinion and order. The standard service offer and tariffs approved herein shall be effective on a services-rendered basis, effective on January 1, 2009. Duke should be aware, however, that final copies of the approved tariffs must be filed before the tariffs can become effective. Duke shall notify its customers of the changes approved in this opinion and order, by means of a bill insert in the first billing after the effective date of the revised tariffs. Duke is directed to work with staff to develop appropriate language for that notice.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) Duke is a public utility as defined in Section 4905.02, Revised Code, and, as such, is subject to the jurisdiction of this Commission.
- (2) On July 31, 2008, Duke filed an application for approval of a standard service offer, pursuant to Section 4928.141, Revised Code.

⁹ In order to reflect the Commission's determinations as to Duke's applications in Case No. 08-974-EL-UNC and 08-975-EL-UNC, the Commission will order its docketing division to file this opinion and order in each of those dockets.

- (3) Motions to intervene were filed and granted, on various dates, allowing intervention by the OEG, OCC, Kroger, OEC, IEU, Cincinnati, OPAE, Constellation, Dominion, CUFA, Sierra, NRDC, NEMA, Integrys, DES, OMA, GCHC, PWC, OFB, Terrace Park, Wind, UC, Schools, MSCG, and the Commercial Group.
- (4) On August 5, 2008, the attorney examiner assigned to the proceedings issued an entry, setting a procedural schedule, including a technical conference and an evidentiary hearing, set to commence on October 20, 2008. In addition, the examiner announced that local public hearings would be established by subsequent entry.
- (5) On August 26, 2008, OCC, OEC, and OPAE jointly filed a motion for the establishment of local public hearings. Also on that same day, the same movants filed a separate motion asking the Commission to grant a sixty-day continuance of the hearing date and extension of the discovery deadline or, in the alternative, a 15-day continuance and extension. On September 5, 2008, the examiner ruled on the motion, agreeing to continue the hearing until November 3, 2008, and to extend the procedural schedule.
- (6) On September 17, 2008, the examiner issued an entry scheduling two local public hearings. On September 22, 2008, OCC, Sierra, NRDC, and CUFA filed a joint interlocutory appeal and request for certification, asserting that the local public hearing schedule established by the examiner allowed for only 20 days' notice and that such notice was insufficient.
- (7) On September 19, 2008, OCC filed another motion for a continuance and an extension of time. In this motion, OCC requested a 30-day continuance and extension or, alternatively, a motion to compel discovery.
- (8) On October 1, 2008, the examiner denied the motion for the continuance, granted OCC's motion to compel discovery, denied the appellants' request for certification, and scheduled an additional local public hearing.
- (9) On September 29, 2008, OCC, OPAE, CUFA, Sierra, and NRDC filed a motion to stay negotiations between Duke and the other parties to the proceedings. The examiner did not issue such a stay but did alter the schedule to allow additional time for negotiations, retaining November 3, 2008, as the date for commencement of the evidentiary hearing.

- (10) On October 21, 2008, OCC requested an extension of time to file intervenor testimony, which request was granted on October 22, 2008. The procedural schedule was further modified, at the request of Duke, on October 31, 2008.
 - (11) On October 27, 2008, Duke filed a stipulation and recommendation and an addendum to that stipulation. The stipulation was signed by Duke, staff, PWC, GCHC, Integrys, NRDC, Sierra, CUFA, Constellation, OP&E, OEC, Kroger, OCC, OEG, OMA, and the Commercial Group. On November 10, 2008, Cincinnati filed a letter indicating that it joins the stipulation. On November 19, 2008, Terrace Park also advised the Commission that it joins the stipulation.
 - (12) Three local public hearings were held on October 7 and 15, 2008. At those meetings, 40 public witnesses testified.
 - (13) The evidentiary hearing was held on November 10, 2008.
 - (14) Section 4928.20(J), Revised Code, requires that all governmental aggregations be allowed to elect not to receive and pay for the services for which Duke is compensated through rider SRA-SRT but not the services for which Duke is compensated through rider SRA-CD.
 - (15) It is reasonable and appropriate for rider DR-SAW to limit the availability of an exemption to those customers whose capabilities meet or exceed the applicable benchmark in any given year but not to those customers who have a minimum monthly demand of three MW at a single site or aggregated at multiple sites within Duke's certified territory. With this modification, we find that the exemption would reasonably encourage mercantile customers to commit their energy efficiency and peak demand reduction capabilities for integration into Duke's programs.
 - (16) The Commission finds that the stipulation, as so modified, meets the three criteria for adoption of stipulations and should, therefore, be adopted.
 - (17) The Commission specifically finds that Duke's proposed electric security plan, as set forth in the application, modified through the stipulation, and further modified herein, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared
-

to the expected results that would otherwise apply under Section 4928.142, Revised Code.

- (18) The Commission finds that the proposed tariffs filed by Duke on December 10, 2008, are reasonable, subject to being revised to reflect the modifications ordered by the Commission in this opinion and order.

ORDER

It is, therefore,

ORDERED, That the stipulation filed in these proceedings be adopted, as modified herein. It is, further,

ORDERED, That the application of Duke for approval of a standard service offer, pursuant to Section 4928.141, Revised Code, be granted, to the extent set forth herein. It is, further,

ORDERED, That Duke be authorized to file in final form four complete, printed copies of tariffs consistent with this opinion and order, and to cancel and withdraw its superseded tariffs. Duke shall file one copy in this case docket and one copy in its TRF docket (or may make such filing electronically, as directed in Case No. 06-900-AU-WVR). The remaining two copies shall be designated for distribution to staff. It is, further,

ORDERED, That the effective date of the new tariffs shall be a date not earlier than both January 1, 2009, and the date upon which four complete, printed copies of final tariffs are filed with the Commission. The new tariffs shall be effective for services rendered on or after such effective date. It is, further,

ORDERED, That Duke shall notify its customers of the changes approved by this opinion and order, as described herein. It is, further,

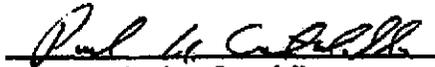
ORDERED, That the Commission's docketing division shall file a copy of this order in Case Nos. 08-974-EL-UNC and 08-975-EL-UNC. It is, further,

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

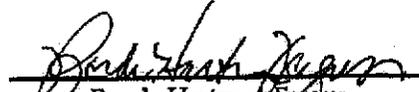
THE PUBLIC UTILITIES COMMISSION OF OHIO



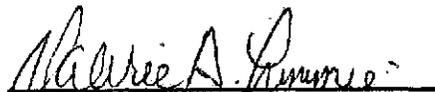
Alan R. Schriber, Chairman



Paul A. Centolella



Ronda Hartman Fergus



Valerie A. Lemmie

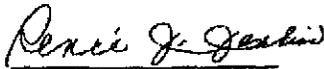


Cheryl L. Roberto

JWK/SEF:geb

Entered in the Journal

DEC 17 2008



Renee J. Jenkins
Secretary