FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Consolidated Duke Energy Ohio, Inc. Rate Stabilization Plan Remand and Rider Adjustment Cases.	: : :	Case Nos. 03-93-GA-ATA, *et al.*

REPLY BRIEF
OF
DOMINION RETAIL, INC.

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TABLE OF CONTENTS

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I. INTRODUCTION

The post-market development period rate stabilization plan ("RSP") of Duke Energy Ohio ("DE-Ohio")[1] is again before the Commission pursuant to the decision of the Ohio Supreme Court in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d. 300 (2006), remanding this matter on what are, ostensibly, two different grounds. The court found that the Commission (1) had failed to set forth its reasoning and failed to identify any factual basis for the charges it had authorized in fashioning the version of the RSP it ultimately approved, and (2) had improperly barred the Office of the Ohio Consumers' Counsel ("OCC") from discovering whether any side agreements existed between DE-Ohio and the other parties to a stipulation submitted during the initial hearing (the "Stipulation") that might cast doubt on whether the Stipulation was, in fact, the product of serious bargaining.[2] However, although these grounds

[1] The application which initiated Case No. 03-93-EL-ATA was filed by DE-Ohio's predecessor, the Cincinnati Gas & Electric Company, on January 10, 2003. However, for ease of reference, both entities will be referred to herein as DE-Ohio.

[2] Whether a stipulation is the product of serious bargaining among knowledgeable parties is, of course, the first prong of the familiar three-part test employed by the Commission and approved by the Ohio Supreme Court for evaluating stipulations [*see, e.g., Consumers Counsel v. Pub. Util. Comm.*, 64 Ohio St. 3d 123 (1992), at 125].

may appear to be separate and distinct, they are actually interrelated, as both go to whether the Commission had an adequate record basis for the version of the RSP it ultimately put in place.

Dominion Retail, Inc. ("Dominion Retail"), an intervenor in these proceedings, is a Commission-certified supplier of competitive retail electric retail service ("CRES") operating on the DE-Ohio system. Although participating in the remand hearing, Dominion Retail did not file an initial brief. However, lest its silence be construed as signifying that it agrees with the arguments advanced on brief by DE-Ohio, Cinergy Corp. ("Cinergy")/Duke Energy Retail Sales, LLC ("DERS), the Ohio Energy Group ("OEG"), and the Commission staff ("Staff"), Dominion Retail hereby files its reply brief in accordance with the schedule established by the presiding attorney examiners at the conclusion of the hearing. Dominion Retail agrees with and endorses the positions on the remand issues set forth in the initial brief of the Ohio Marketer's Group ("OMG") as well as much of what OCC has to say in its initial brief, and will not repeat the OMG and OCC arguments here. However, there are several claims made in the DE-Ohio, Cinergy/DERS, OEG and Staff briefs that Dominion Retail cannot permit to pass without comment.

I. ARGUMENT

A. THERE IS STILL NO EVIDENCE OF RECORD DEMONSTRATING THAT THE NON-BYPASSABLE INFRASTRUCTURE-MAINTENANCE FUND CHARGE IS BASED ON COST.

As the court noted in its decision, the Commission, in its November 23, 2004 First Entry on Rehearing, accepted, in large measure, the alternative RSP as proposed by DE-Ohio in its initial rehearing application, including an element styled as the infrastructure-maintenance fund ("IMF") charge, without providing the explanation required by Section 4903.09, Revised Code, and without identifying any record evidence that would support the IMF charge (*Consumers'*

Counsel, 307-308). Indeed, as the court observed, the Commission, in attempting to justify the departure from the version of RSP originally approved in its September 29, 2004 Opinion and Order, stated only that the modifications would provide rate certainty for consumers, ensure financial stability for DE-Ohio, and further encourage the development of competitive markets (*Consumers' Counsel*, 307). With respect to the IMF, the court specifically noted that it was impossible to determine, based on the record before it, whether the IMF charge "was some type of surcharge and not a cost component" (*Consumers' Counsel*, 308), thereby implicitly recognizing the importance of the distinction between the two. As ably argued by OMG in its initial brief, because the IMF charge, which is a component of the provider-of-last-resort ("POLR") charge, is not based on actual cost and does not fund discreet wire services, it does not meet the test for a non-bypassable charge and, thus, cannot properly be visited on switching customers (OMG Br., 2).[3] Rather, to use the court's term, the record shows that the IMF is merely a "surcharge" designed to generate additional revenues for DE-Ohio over and above the cost of providing monopoly utility service.

In view of the court's decision, one would have expected those parties supporting the retention of the existing RSP to delve into the evidence presented at the remand hearing and to present detailed arguments in an attempt to show that the IMF charge is cost based. This did not happen. Instead, Staff merely rehashes the philosophical discussion contained in the testimony of its witness Cahaan regarding the inherent conflict in the Commission's stated goals in approving the RSP (*see* Staff Remand Ex. 1, *passim*), and pats the Commission on the back for

[3] Dominion Retail leaves it to the Commission whether, under these circumstances, the IMF charge can be appropriately applied to non-switching customers served pursuant to what is, by law, supposed to be a market-based standard service offer.

coming up with a result that supposedly balanced these competing interests (Staff Brief, 10-12).[4] Indeed, notwithstanding the express reference to the IMF in the court's decision, Staff never even mentions the IMF charge in its brief, let alone providing an analysis of the basis of the charge. OEG, for its part, does at least cite the testimony of DE-Ohio witness Steffen on the subject before handing the argument off to the "Duke companies" with the stated expectation that they will discuss the issue in detail (OEG Brief, 4-5).[5] That leaves us with the DE-Ohio brief, which, although parroting the testimony of Mr. Steffen (*see* DE-Ohio Br., 16-22), never answers the specific question the court posed: Where is the evidence that supports the proposition that the IMF charge is based on cost?

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[4] Before accepting the Staff's congratulations, the Commission should consider the evidence showing the state of competition in the DE-Ohio market. In 2004, switching rates for commercial, industrial, and residential customers were 22.04%, 19.87%, and 4.91%, respectively (Tr. II, 133). As of December 21, 2006, the corresponding numbers had dropped to 8.40%, 0.36%, and 2.32% (OCC Remand Ex. 2A, 63). Thus, although Commission-approved plan may have served the enunciated goals of providing rate certainty for consumers and ensuring financial stability for DE-Ohio, it is certainly a stretch for Staff to pretend that the RSP has done anything to further the development of the competitive market in DEO's service territory. In so stating, Dominion Retail readily concedes that there are a number of factors that have contributed to the decline in switching rates over this period, some of which have nothing to do with the Commission-approved RSP. However, the failure of the Commission to include the shopping credits as provided in the Stipulation or, alternatively, to maintain the even greater level of benefits to switching customers provided in the RSP approved its September 29, 2004 Opinion and Order certainly played at least some role.

[5] Dominion Retail finds OEG's reference to the "Duke companies" rather curious. If, as these affiliated companies (*i.e.*, DE-Ohio, Cinergy, and DERS) maintain, they are actually separate entities, why would OEG expect Cinergy and DERS to support DE-Ohio witness Steffen on this issue? If these are separate entities, Cinergy, which is not a certified CRES provider, clearly would have no stake in the outcome. On the other hand, DERS, despite the fact that it has no sales force, no customers, no revenues, and has never served the first end-user customer is, at least nominally, a CRES provider, which should lead one to expect that it would side with every other marketer participating in this proceeding in opposing the provision of the RSP that makes the IMF charge non-bypassable. Mercifully, contrary to OEG's expectation, Cinergy and DERS had the good sense to leave this issue well enough alone in their joint brief.

All DE-Ohio tells us is that the IMF charge, which first surfaced in DE-Ohio's alternative RSP proposal, was, along with the new system reliability tracker ("SRT"), originally embedded in the annually adjusted component ("AAC") of the POLR charge proposed in the Stipulation (DE-Ohio Remand Ex. 3, at 16, 19; DE-Ohio Br., 18). Because the IMF and SRT components in the modified alternative RSP ultimately approved by the Commission were, in total, less than the implied combined level of these charges in the stipulated AAC (*see* DE-Ohio Remand Ex. 3, at 26-27; DE-Ohio Remand Ex. 3, Attachment JPS-SS1), DE-Ohio contends that that the IMF charge must necessarily be reasonable, and argues that the record support for the Stipulation, by implication, supports the IMF (DE-Ohio Br., 18).

The justification offered by DE-Ohio is problematic in at least two respects. First, although, according to DE-Ohio witness Steffen, the SRT is "a pure cost recovery mechanism" designed to recover the expenses incurred by DE-Ohio in fulfilling its POLR obligation (DE-Ohio Ex. 3, at 24), the IMF charge is neither tied to a specific out-of-pocket expense, nor intended to pass through actual tracked costs (*see* DE-Ohio Ex. 3, at 25). Rather, the IMF is the product of a formula created by DE-Ohio to produce "an acceptable dollar figure to compensate DE-Ohio for first call dedication of generating assets and the opportunity costs of not simply selling its generation into the market at potentially higher prices" (DE-Ohio Ex. 3, at 26). Plainly, the fact that the IMF is acceptable to DE-Ohio does not make it cost based.

Second, and perhaps more importantly, record support for the Stipulation does not somehow mysteriously morph into record support for a charge that was created as a part of a totally different package, even if some parties – most notably, the Staff – view the final version of the RSP approved in the Commission's January 19, 2005 Second Entry on Rehearing as a better overall deal than either the Stipulation or the modified version of the Stipulation approved

by the Commission in its September 29, 2004 Opinion and Order. Moreover, ignoring, for the moment, the impact the discovery of side agreements between the "Duke companies" and certain of the signatory parties has on the reasonableness of the Commission's reliance on the Stipulation as the framework for the RSP it ultimately approved, the Commission, in any event, must recognize that, unlike the Stipulation, which Dominion Retail and Green Mountain Energy signed, the RSP it approved does not have the support of any marketer.[6] Thus, any comfort the Commission may have taken from the fact that there were at least two marketers on board the Stipulation, has now evaporated. When this is coupled with OCC's opposition to both versions of the RSP, the claim that the final version of RSP balanced competing interests rings hollow. Without the support of any representatives of two of the stakeholder interests most concerned about the state of the competitive environment – unaffiliated CRES providers and residential customers – the burden of showing independent evidentiary support for the IMF charge takes on additional significance.

To divert attention from the lack of evidentiary support for the IMF charge, Staff, OEG, and DE-Ohio, focus, instead, on the remedies recommended by OCC witness Talbot (*see* OCC Remand Ex. 1), roundly attacking his proposals on the grounds that they are unworkable, ill-considered, and contrary to law. Whatever one thinks of these recommendations, the

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[6] Although Dominion Retail most certainly did not agree with every aspect of the RSP set forth in the Stipulation, it is inherent in negotiated settlements that no party emerges with everything it wants. Thus, although recognizing that certain features of the stipulation, including the AAC, were not good for marketers generally, Dominion Retail, which targets residential customers, believed that the $7 million in shopping credits available to residential customers under the Stipulation would provide it with at least some opportunity to compete successfully in the residential market in DE-Ohio's service territory. Although certain features of the RSP ultimately approved offset the impact of the elimination of the shopping credits to some degree, the benefits to switching residential customers are still significantly less than under the stipulated plan. Under these circumstances, Dominion Retail's signature on the Stipulation cannot be construed as support for any vestige of the stipulated plan that made its way into the RSP ultimately approved.

Commission should not lose sight of the fact that POLR charges must be based on the cost of providing monopoly utility service. Thus, as OMG argues in its initial brief, in the absence of an evidentiary showing that the IMF charge is based on these costs and is not just a revenue generating surcharge, the IMF charge should be made by-passable by switching customers – a remedy that is clearly workable, reasonable, and lawful.

B. IN THE FACE OF EVIDENCE DEMONSTRATING THAT THE STIPULATION WAS NOT THE PRODUCT OF SERIOUS BARGAINING AMONG PARTIES WITH COMPETING INTERESTS, THE COMMISSION CANNOT RELY ON THE PARTIES' ACCEPTANCE OF THE STIPULATION AS A BASIS FOR FINDING ITS TERMS TO BE REASONABLE.

1. The Stipulation Remains Relevant.

In response to the court's finding that the Commission erred by failing to permit OCC to conduct discovery designed to determine if there were side agreements that could cast doubt on whether the Stipulation satisfied the "serious negotiations" prong of the standard governing stipulations, the parties supporting retention of the RSP ultimately approved make much of the fact that Stipulation was not adopted by the Commission (*see, e.g.,* Staff Br., 13; OEG Br., 7). As these parties would have it, all the Commission had to do to carry out the court's mandate was to provide OCC with the opportunity to conduct the discovery it had previously been denied. Plainly, this interpretation makes no sense, in that it assumes that the court remanded the case simply so OCC could perform a vain act. Despite the fact that the Stipulation was not approved as filed, the court clearly understood that the terms of the Stipulation provided the framework for the RSP the Commission eventually approved. The Staff's notion that the Stipulation is somehow irrelevant because "(t)he Commission could have reached exactly the same outcome whether or not the Stipulation had been filed" (Staff Br., 15) is ludicrous. If there were no Stipulation, there would have been no record support for its features, many of which ultimately

made their way, albeit in a modified form, into the approved version of the RSP. The Commission cannot lawfully pull an RSP out of thin air, and it did not do so in this case. Indeed, the Commission had to rely on the Stipulation as a starting point, because there was no evidentiary record that supported the alternative RSP proposed by DE-Ohio in its rehearing application, there being no hearings after the May 26, 2004 hearing on the Stipulation. The court clearly understood the continuing relevance of the Stipulation, otherwise, it would not have remanded the case for a reassessment of whether the Stipulation met the "serious bargaining" test.

2. That Certain Side Agreements May Have Been Executed After The Stipulation Was Filed Has No Bearing On The Principle Involved.

On brief, OEG maintains that any agreements between signatories to the Stipulation and various Duke entities that did not take effect until after the Stipulation was signed are irrelevant because such agreements could not have affected the Stipulation itself (OEG Br., 7).[7] Dominion Retail disagrees. As Staff correctly points out, parties making recommendations to the Commission can be assumed to be motivated by self-interest (Staff Br., 2). Staff then goes on to observe that such "self-interest is healthy and is the assumption that drives all Commission processes" (*id.*). Indeed, it is this assumption that permits the Commission to accord considerable weight to stipulations supported by a broad range of parties with competing interests. Under such circumstances, the Commission can be confident that, although no party

[7] In addressing the side agreements issue, Dominion Retail understands its obligations regarding disclosure of agreements that were admitted into the record under seal. However, in discussing these matters, Dominion Retail takes its cue from OEG, which filed only a public version of its brief. Thus, although Dominion Retail will refrain from disclosing the specifics of any particular agreement between a Duke entity and a signatory to the Stipulation, Dominion will proceed on the assumption that it can discuss these matters in general terms without running afoul of confidentiality constraints and that, to the extent OEG has publicly revealed certain specifics, those specifics are now fair game.

got everything it wanted, the trade-offs in the negotiating process resulted in a stipulated resolution acceptable to all concerned.

This principle also extends to filings supporting the proposals of another party. Surely, the Commission is entitled to assume that, when a party endorses a particularly recommendation, it signifies that its self-interest is satisfied by that recommendation. However, if it is subsequently shown that the party's self-interest was satisfied, not by the proposal in question, but by a side agreement unknown to the Commission, the Commission can no longer rely on the party's endorsement of proposal as a signal that the proposal is reasonable from the standpoint of either that party or other similarly situated parties. This is particularly important in a case where, as here, the proposal in question has not been subjected to scrutiny in an evidentiary hearing. If it is shown that the support of parties that endorsed DE-Ohio's alternative RSP was bought and paid for, this leaves the Commission in the untenable position of having approved an RSP that almost no one actually found acceptable except DE-Ohio itself.[8] Thus, leaving aside the possibility that the side agreements may have been in the works prior to the execution of the Stipulation, that certain side agreements were entered into after the Stipulation was filed has no bearing on the underlying principle.

3. Although The Currency Of A Side Agreements Is Significant Where The Nature Of The Currency Is Such That The Party In Question Knows That It Will Not Be Subject To Certain Provisions Of A Stipulation Or An RSP That It Has Publicly Endorsed, The More Important Issue Is The Nature Of The Consideration Involved.

OEG also takes the position that the only perceived problem with certain of the side agreements is "the currency they were priced in," and suggests that if the currency had been

[8] Yes, it is true that Staff also supported the proposal, but, according to the Staff brief, the Staff is not motivated by self-interest (*see* Staff Br., 2). Thus, the Staff is not a stakeholder, and its endorsement of the RSP does not invoke the "serious bargaining" principle under discussion.

strictly dollars, rather than reimbursement of certain components of the RSP, the specter of impropriety would never have reared its ugly head (OEG Br., 10). Again, Dominion Retail disagrees. First, the currency of these agreements is what it is. Although it is clearly not unlawful for the contracting parties to utilize reimbursement of certain components of the RSP as the currency of a transaction, the fact that this was the currency used clearly undercuts the Commission's reliance on the public support of the party receiving the reimbursement as a testament to the reasonableness of the charges in question. Under these circumstances, the purpose of the "serious bargaining" standard is completely thwarted. However, the more important issue is not the currency used, but the consideration received.

DE-Ohio and Cinergy/DERS make much of the fact that, other than DE-Ohio agreement with the city of Cincinnati, none of the side agreements at issue are with DE-Ohio. Although DE-Ohio may not be a party to these transactions, DE-Ohio is clearly the third-party beneficiary of all these agreements, in that the quid pro quo for each of these deals was the requirement that the contracting party support DE-Ohio's position in this proceeding. Dominion Retail agrees that the question of whether these other Duke entities may have violated the affiliate separation rules is not an issue for this docket. However, the fact remains that the consideration for these transactions had nothing whatever to do with attracting customers to competitive retail service – the usual purpose of inducements extended by marketers in contract negotiations. The consideration for these agreements was, pure and simple, customer support for the DE-Ohio position in a proceeding to which neither Cinergy nor DERS was a party, a position which, at least with respect to DERS, would certainly seem to be directly contrary to its self-interest as a CRES provider. Under these circumstances, the Commission cannot reasonably find that the Stipulation and the subsequent support of certain parties for the alternative RSP proposed by DE-

Ohio in its application on rehearing was the result of serious bargaining. Although bargaining undoubtedly occurred, the nature of the resulting bargains was such that the Commission cannot rely on the public positions of the parties in question as an indicator of the reasonableness of either the Stipulation or the RSP it ultimately approved.

III. CONCLUSION

Consistent with the foregoing discussion, the Commission should find that the IMF charge is by-passable by switching customers.

Respectfully submitted,

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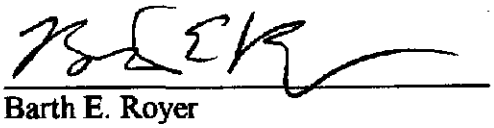
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the parties listed below by first class U.S. mail, postage prepaid, and/or by electronic mail this 24th day of April 2004.



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