FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

OHIO PARTNERS FOR AFFORDABLE ENERGY'S REPLY BRIEF PHASE 2

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OHIO PARTNERS FOR AFFORDABLE ENERGY'S
REPLY BRIEF
PHASE 2

I. INTRODUCTION

Ohio Partners for Affordable Energy ("OPAE"), an intervenor in the above-captioned cases, hereby submits its reply brief in Phase 2 of these consolidated proceedings before the Public Utilities Commission of Ohio ("Commission"). This second part of the proceedings concerns applications made by The Cincinnati Gas & Electric Company ("CG&E"), now Duke Energy Ohio, Inc. ("Duke") to adjust riders previously allowed by the Commission. CG&E-Duke calls these riders the fuel and purchased power ("FPP") tracker, the system reliability tracker ("SRT") and the annually adjusted component ("AAC") of the market-based standard service offer.

On April 9, 2007, a stipulation and recommendation was filed in these cases purporting to resolve the Phase 2 issues. Joint Exhibit Remand Rider ("Jt. Ex. R.R.") 1 at 3. In addition to CG&E-Duke, the April 9, 2007 stipulation was signed by the Staff of the Commission ("Staff"), Ohio Energy Group ("OEG"), the

Ohio Hospital Association ("Hospitals"), the City of Cincinnati and People Working Cooperatively ("PWC"). The Industrial Energy Users-Ohio ("IEU-O") did not sign the stipulation but stated at the hearing that it did not oppose it. Transcript Remand Rider II at 153. The Office of the Ohio Consumers' Counsel ("OCC") and OPAE oppose the April 9, 2007 stipulation. Herein, OPAE replies to the initial briefs filed by CG&E-Duke and the Staff.

II. THE APRIL 9, 2007 STIPULATION IS NOT THE PRODUCT OF SERIOUS BARGAINING AMONG THE PARTIES.

The Staff discusses the Commission's criteria for the reasonableness of stipulations and contends erroneously that no one questions that the first criterion is satisfied. Staff Brief at 4. The first criterion, that the stipulation is the product of serious bargaining, has not been satisfied. Contrary to the Staff's implication, attendance and discussion at settlement negotiations does not satisfy the first criterion.

In remanding these cases to the Commission for further consideration, the Ohio Supreme Court questioned whether the existence of side agreements supports a finding that serious bargaining has taken place among the parties to settlement discussions. *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 300. As the Court stated, if CG&E and one or more of the signatory parties to the stipulation agree to a side financial arrangement or some other consideration to sign the stipulation, that information would be relevant to a determination whether all parties engaged in serious bargaining. The existence

of side agreements between CG&E and the signatory parties could be relevant to the integrity and openness of the negotiation process. Id.

The Court also found that the issue whether there was serious bargaining could not be resolved solely by reviewing the proposed stipulation. 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 concessions or inducements apart from the terms agreed to in the stipulation have relevance when deciding whether the settlement negotiations were fairly conducted.

The existence of concessions or inducements is particularly relevant in the context of open settlement discussions involving multiple parties. If there were special considerations in the form of side agreements among the signatory parties, one or more parties may have gained an unfair advantage in the bargaining process, and the open settlement discussions are compromised. Id.

The evidence on remand, currently under seal, demonstrates that side agreements undermined the negotiations among the parties so that the Commission must conclude that serious bargaining did not take place at the settlement negotiations. The evidence of side agreements has been discussed at length in the initial and reply briefs of OCC and OPAE in the remand phase of these cases, as well as in the initial brief in Phase 2. The evidence overwhelmingly demonstrates that side agreements undermined the settlement process, that the Commission's first criterion for the reasonableness of stipulations has not been met, and that the stipulation must be rejected.

CG&E-Duke argues incorrectly that the signatory parties to the stipulation represent every stakeholder group except competitive suppliers and that no competitive suppliers oppose the stipulation. CG&E-Duke Brief at 6. In fact, as OPAE argued in its initial brief in Phase 2, the April 9, 2007 stipulation has no support from marketers, residential customers or any other customer group that will be subject to its terms. OCC, which, by statute, represents all residential customers, opposes the stipulation, as does OPAE, which has served as an advocate for residential and low-income customers since its founding in 1996. OPAE also represents the interests of its member agencies located in the CG&E service territories that are commercial customers of CG&E.

The Commission should doubt any claim that the stipulation is balanced and represents the interests of all customer classes. OPAE addressed this issue at length in its initial and reply brief in the remand phase and in its initial Phase 2 brief. Given that the issue has already been thoroughly addressed on brief, OPAE will not repeat the discussion here. In short, no party representing the interests of residential customers, small commercial customers or marketers has signed the stipulation or supports it. No customer group supporting the stipulation will actually be subject to all its terms.

The stipulation does not represent the views or satisfy the interests of the residential class or any other class of customers affected by all of the stipulated terms. The stipulation is simply the furtherance of the side agreements that benefit a handful of customers at the expense of whole classes of customers. The Commission cannot find that serious bargaining took place among the parties

when the stipulation is not a balanced agreement representative of any customer class.

III. THE APRIL 9, 2007 STIPULATION VIOLATES IMPORTANT REGULATORY PRACTICES AND PRINCIPLES AND FAILS TO BENEFIT RATEPAYERS AND SERVE THE PUBLIC INTEREST BY ALLOWING FOR THE RECOVERY OF A RETURN ON CONSTRUCTION WORK IN PROGRESS THROUGH CG&E-DUKE'S AAC.

The Staff argues that the "traditional" approach to Construction Work in Progress ("CWIP") does not apply here because a traditional approach is not applicable in the "competitive environment." According to the Staff, a rate stabilization plan (RSP") "is not about cost-based ratemaking." Staff Brief at 8. The Staff argues that when an RSP borrows from a traditional approach, the practice is not the same. Thus, traditional CWIP is not the same as RSP CWIP. According to the Staff, individual RSP riders do not matter; only balance among the Commission's policy goals for an RSP is important. Therefore, the use of CWIP here in an RSP, according to the Staff, without the traditional regulatory safeguards does not violate any regulatory principle or practice. Staff Brief at 8-10.

The Staff's argument defies reality. There is no "competitive environment" for retail electric generation to serve Ohio's residential and small commercial customers. Retail competition is non-existent for these customers in CG&E-Duke's service area. Therefore, any determination of a rider amount or overall generation price must necessarily involve a proxy for a market price.

There is no dispute that only a proxy for a market price is available; the dispute is whether, in the absence of a functioning market, CG&E-Duke is allowed simply to name its own generation price. While the Staff claims that the only important consideration is the balancing of the Commission's RSP goals, the Staff cannot point to any statutory authority for these goals. The Commission is a creature of statute and must follow Ohio law. The Ohio Supreme Court has approved the RSP concept only in the context of agreement among a wide range of interested parties. That agreement is absent here. There is no stipulation reflecting the agreement of a wide range of interested parties.

OPAE and OCC did not introduce the concept of CWIP in these proceedings. CG&E-Duke introduced CWIP in its filing, and the Staff has no problem allowing CWIP based on the claimed costs. The Staff only has a problem if standards for CWIP apply. This makes no sense. There is no reason why standards for CWIP should not apply; in fact, standards must be applied in order for the necessary customer agreement to be accomplished.

CG&E argues that these proceedings are to set CG&E-Duke's "market price." CG&E-Duke Brief at 12. Again, in the absence of a functioning market, only a proxy for a market price can be set.

CG&E-Duke actually desires cost-based pricing. It complains that it has no assurance in the market of recovering its costs where there is no long-term price guarantee. CG&E also claims that absent the approval of its full CWIP request, there would be a deterioration of its ability to invest in infrastructure and provide reliable service. CG&E-Duke Brief at 13.

As with the Staff's arguments, CG&E-Duke's arguments defy reality. CG&E-Duke asks the Commission to set a "market price" but specifically requests the Commission to allow it to recover the costs it has incurred. CG&E-Duke claims that this proceeding sets a "market price," but CG&E-Duke has named that price itself and has clearly based it on its own generation costs. The Commission has no statutory authority to adopt a "market price" on the basis of these cost-based applications made by CG&E. Moreover, the Commission has no authority to consider whether CG&E-Duke is recovering its generation costs in the market place or has a long-term price guarantee, nor does the Commission have authority to consider whether CG&E-Duke is investing in generation plant infrastructure.

In sum, there is a need above all for customer agreement for an RSP to pass a challenge on appeal. The positions set forth on CWIP by OPAE and OCC are reasonable and consistent with regulatory practices and principles; they also benefit ratepayers and serve the public interest. The Commission should adopt the recommendations of OCC witness Haugh regarding the exclusion of the return on CWIP in CG&E's AAC calculation.

IV. THE APRIL 9, 2007 STIPULATION VIOLATES IMPORTANT REGULATORY PRACTICES AND PRINCIPLES AND DOES NOT BENEFIT RATEPAYERS OR SERVE THE PUBLIC INTEREST BY ALLOWING, WITHOUT APPROPRIATE RESTRICTIONS, THE RECOVERY OF CAPACITY COSTS ASSOCIATED WITH THE DENA ASSETS THROUGH THE SRT.

CG&E-Duke claims that it has clarified any ambiguity relating to the use of assets formerly owned by Duke Energy North America ("DENA") to meet its SRT reserve capacity requirements in a stipulation entered in the hearing record on

April 19, 2007. CG&E-Duke Brief at 8-9. In fact, as the hearing record indicates, there remains confusion about the use of these assets, which should be limited to an emergency situation. The Commission must itself clarify, therefore, that the use of DENA assets is limited to emergencies when no other alternative is available.

CG&E-Duke also argues that there is no reasonable method to set a price cap for the use of DENA assets in an emergency. CG&E-Duke Brief at 9. While CG&E-Duke claims that a price cap is not a reasonable pricing methodology for the DENA capacity in emergencies, CG&E-Duke also states that it is willing to negotiate a reasonable pricing methodology and has suggested several such methodologies as set forth in the stipulation. Id. Again, the stipulation fails to clarify the issues related to the pricing of the capacity from the DENA assets. There is no stipulated agreement on a pricing methodology for the use of DENA assets, nor is any agreement on methodology likely to arise from the terms of the stipulation.

The pricing methodology recommended by OCC witness Haugh is reasonable for DENA capacity used in an emergency situation. Given that CG&E-Duke admits that the price of capacity in a true emergency can be extremely high, there is good reason to cap the price. Therefore, the Commission should adopt the recommendations of OCC witness Haugh regarding the pricing methodology for the use of DENA assets in an emergency situation when no alternative to the DENA capacity is available.

V. CONCLUSION

The April 9, 2007 stipulation and recommendation fails all three prongs of the Commission's three-prong test for the reasonableness of stipulations. As OPAE argued in its initial briefs, the stipulation is not the product of serious bargaining among the parties. The evidence demonstrates that side agreements undermined the settlement negotiations. Moreover, the stipulation is not supported by any class of customers that are subject to its terms.

The stipulation also violates important regulatory practices and principles. It does not benefit ratepayers and serve the public interest. It allows for the inclusion of a return on CWIP in CG&E's AAC without regard to any standards for the allowance of a return on CWIP. It also fails to clarify that the DENA assets may only be used in an emergency when no alternative is available and only subject to a price cap for purposes of any cost recovery.

Based on the evidence of record, the April 9, 2007 stipulation must be rejected. In rejecting the stipulation, the Commission should adopt the recommendations made by the management/performance auditor and OCC witness Haugh in these cases. The Commission should disallow recovery of a return on CWIP in the AAC so that a reasonable means to develop costs for the standard service offer prices is used. The Commission should also not allow recovery through the SRT of capacity costs associated with the DENA assets. The DENA assets should be used only on an emergency basis and then subject to the price cap methodology set forth in the testimony of OCC witness Haugh. Finally,

the AAC should be audited and the scope of the combined FPP-AAC audit should be expanded as set forth in the testimonies of OCC witness Haugh.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Ohio Partners for Affordable Energy's Reply Brief Phase 2 has been electronically delivered to the following parties in the above-captioned proceedings on this 30th day of May 2007.

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