

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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**DUKE ENERGY OHIO'S MEMORANDUM-CONTRA OHIO PARTNER'S
FOR AFFORDABLE ENERGY'S MOTION TO STRIKE**

Ohio Partner's for Affordable Energy (OPAE) seeks to strike three paragraphs of Duke Energy Ohio's (DE-Ohio) Remand Rider Reply brief because it alleges: (1) There is nothing wrong or relevant to these proceedings regarding OPAE's failure to make substantive comments during the settlement discussions that resulted in the partial Stipulation to resolve issues raised during the Remand Rider phase of these proceedings;¹ and (2) OPAE's 2004 settlement offer is not record evidence.² OPAE's arguments are incorrect and reveal that it may not understand the purpose of that portion of DE-Ohio's brief. DE-Ohio will

¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OPAE's Memorandum in Support of its Motion to Strike at 3) (June 8, 2007).

² *Id.*

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clarify its purpose and respectfully requests that the Commission deny OPAE's motion.

There was a reason for DE-Ohio's discussion of OPAE's settlement participation. OPAE attacked the Stipulation for its failure to meet the first prong of the Commission's three part test, that there was serious bargaining among capable and knowledgeable parties.³ OPAE based its argument on three related premises: (1) that the Stipulation did not have broad support from many customer classes;⁴ (2) that OPAE represented residential customers, and commercial customers –its members-,⁵ and no residential representative supported the Stipulation;⁶ and (3) that an organization, People Working Cooperatively PWC, which performs work similar to OPAE's members, lacks OPAE's altruistic interest in these proceedings because PWC receives contract funding provided by DE-Ohio for energy efficiency and weatherization services it performs.⁷ Thus DE-Ohio had to respond to OPAE's misguided allegations to establish that there was indeed serious bargaining among knowledgeable parties.

As part of its Motion OPAE adds one additional argument, that its "conduct is not relevant to the issue [sic] of whether the stipulation is the

³ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (OPAE's Remand Rider Initial Brief at 2-7) (May 17, 2007).

⁴ *Id.* at 5.

⁵ To the best of DE-Ohio's knowledge OPAE has two members in DE-Ohio's certified territory, Hamilton /Cincinnati Community Action Agency and Clermont County Community Action Agency.

⁶ *Id.*

⁷ *Id.* at 6-7.

product of serious bargaining” because it did not sign the Stipulation.⁸ In this assertion, like those before it, OPAE is wrong. Serious bargaining need not result in agreement. All parties that participate in settlement discussions contribute to the existence of serious bargaining if such parties are capable and knowledgeable, whether such parties sign the Stipulation or oppose it. OPAE has significant experience before the Commission and its participation in settlement discussions is evidence of serious bargaining.

DE-Ohio included the paragraphs at issue to rebut OPAE’s contentions. The first paragraph, set forth below, is meant to demonstrate that OPAE, like other parties such as PWC, did not raise issues regarding residential or commercial customers.

Regarding OPAE’s participation in the settlement discussions leading to the phase two Stipulation, DE-Ohio is unaware of any substantive comment made by OPAE during the settlement discussions. Unlike OCC, which made a settlement offer, OPAE made none.⁹

OPAE objects to the above quoted paragraph, not because the paragraph is inaccurate, indeed OPAE says that it was “under no requirement to make ‘substantive comments,’” but because its participation in settlement discussions is irrelevant because it did not sign the

⁸ *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OPAE’s Memorandum in Support of its Motion to Strike at 3) (June 8, 2007).

⁹ *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA, *et al.* (DE-Ohio’s Remand Rider Reply Brief at 16) (May 30, 2007).

Stipulation,¹⁰ and such a revelation violates the confidential nature of settlement discussions.¹¹ OPAE is wrong on both counts.

First, OPAE is relevant to the determination of whether there was serious bargaining among capable and knowledgeable parties. It does not matter that OPAE ultimately opposed the Stipulation. It is an experienced party in proceedings before the Commission with knowledge of Commission practice and at least some understanding of the issues before the Commission in these proceedings. OPAE's attendance at settlement discussions, and its rejection of settlement terms while other Parties agreed to such terms, is an indication of serious bargaining.

Second, it is difficult to understand how a revelation of a Party's failure to substantively participate in settlement discussions violates the confidentiality of settlement information. DE-Ohio did not reveal any information discussed by any Party. In fact, OPAE agrees that it did not raise substantive issues for discussion.¹² The Commission should reject OPAE's Motion to strike the first paragraph it references.

DE-Ohio included the second and third paragraphs, also set forth below, to rebut OPAE's claim that the Stipulation lacks broad based support because it represents residential consumers and People Working Cooperatively (PWC) does not.¹³

¹⁰ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (OPAE's Memorandum in Support of its Motion to Strike at 3) (June 8, 2007).

¹¹ *Id.* at 5.

¹² *Id.* at 3.

¹³ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (OPAE's Remand Rider Initial Brief at 5-7) (May 17, 2007).

DE-Ohio is aware of the unfounded accusations made by OPAE regarding People Working Cooperatively (PWC) in these proceedings. The prior settlement offer made by OPAE in 2004, is part of the public record in these cases.¹⁴ In the original MBSSO proceeding, DE-Ohio agreed to nearly all of OPAE's settlement offer, including the amount of money to fund energy efficiency and weatherization programs. The only item that DE-Ohio refused to agree upon was that OPAE should administer the energy efficiency and weatherization programs instead of the independent Duke Energy Community Partnership, which includes a voting board of many community organizations and OCC and Staff as non-voting members.

Basically, DE-Ohio would not agree to transfer control of energy efficiency and weatherization dollars from the Duke Energy Community Partnership (DECP) to OPAE. OPAE was quite clear that the only reason it did not sign the settlement was DE-Ohio's refusal to give it control of the program dollars. OPAE has not offered one suggestion regarding the interest of any party or consumer other than itself throughout these proceedings. It was reasonable for DE-Ohio, Staff, and the other Stipulation signatories to reject OPAE's unspoken position.¹⁵

OPAE objects to these paragraphs because its 2004 settlement offer is not record evidence.¹⁶ There is however, no rule that one must confine its brief citations to record evidence. Within the text of a brief or other case pleading, it is of course commonplace to cite to statutes, case law

¹⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (OPAE's MBSSO Settlement Offer) (July 16, 2004).

¹⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.* (DE-Ohio's Remand Rider Reply Brief at 16-17) (May 30, 2007).

¹⁶ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (OPAE's Remand Rider Initial Brief at 3) (May 17, 2007).

precedent, prior pleadings, and other scholarly sources, none of which constitute record evidence. One of the sources that are commonly cited is any document filed in the record of the proceedings at issue. OPAE's 2004 settlement offer is one such source document.

The ability to cite to OPAE's settlement offer is not mere conjecture on the part of DE-Ohio, but is supported by rule and statute. The applicable rule is found in the Appellate Rules of Procedure and states that "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, *with citations to the authorities, statutes, and parts of the record* on which appellant relies."¹⁷ Revised Code Section 2505.08 defines a record as "a complete transcript of all the *original papers, testimony, and evidence offered, heard, and taken into consideration* in issuing the final order."¹⁸ Further, there is little doubt that Appellate Rule of Procedure 16 and R.C. 2505.08 apply to the Commission.¹⁹ Revised Code Section 2505.01 applies the Appellate Rules and applicable statutes to include "an administrative officer, agency, board, department, tribunal, *commission*, or other instrumentality."²⁰ Thus, although not record evidence, OPAE's 2004 settlement offer is an -original paper- filed in these proceedings that may be cited and relied upon by any Party, including DE-Ohio, and a

¹⁷ APP. R. PROC. 16(A)(7) (Thompson 2006) (emphasis added).

¹⁸ Ohio Rev. Code Ann. § 2505.08 (Baldwin 2007) (emphasis added).

¹⁹ Ohio Rev. Code Ann. § 2505.01 (Baldwin 2007).

²⁰ *Id.* (emphasis added)

document that the Commission may take into account in its decision making.

OPAE previously agreed with this position having cited to its 2004 settlement offer in a pleading before the Commission in these cases.²¹ In fact, not only did OPAE refer to the settlement proposal in its pleading, it filed the document in the docket in these proceedings and ultimately permitted the document to become public through expiration of the protective order eighteen months after its filing. Although a Party may certainly cite to confidential material, it is hard to understand how OPAE can complain about references to a document that it made public and offered into the record in these very proceedings.²²

OPAE also complains that “[i]t is not clear as to whom it was ‘quite clear’ why OPAE did not sign the Stipulation.”²³ The answer is quite clear and is supported by OPAE’s settlement document. OPAE did not sign the Stipulation even though DE-Ohio agreed to nearly everything OPAE demanded, including the dollar commitment for program content. DE-Ohio’s refusal to relinquish administrative control of the energy efficiency and weatherization funding to OPAE was the only item to which DE-Ohio did not agree.

²¹ *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (OPAE’s Motion for protective Order) (July 16, 2004).

²² *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (OPAE’s MBSSO Settlement Offer) (July 16, 2004).

²³ *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (OPAE’s Remand Rider Initial Brief at 4) (May 17, 2007).

The portion of DE-Ohio's Reply brief at issue because of OPAE's Motion to Strike, is merely an illustration of the diversity of positions taken throughout these consolidated proceedings, and the special interests of the Parties, including OPAE, in deciding whether or not to support a Stipulation. Certainly, documents voluntarily filed in the docket, made part of the record of the proceeding and subsequently made public, are relevant and may be considered by the Commission. DE-Ohio does not believe this recitation violates settlement confidentiality because OPAE made the settlement document, and therefore the substance of discussions, public. Having made the substance of settlement discussions public OPAE should not be permitted to limit the breadth of discussion to its view and scope.

It is true that the Commission has previously determined that the settlement negotiations at issue are privileged.²⁴ That was however, prior to the public disclosure of such discussions by OPAE. OPAE had every opportunity to file a motion to maintain the confidentiality of 2004 settlement discussions and choose not to do so. Every other Party involved in the discussions made the same choice. The substance of the settlement discussions are now public and open to discussion in these proceedings.

Finally, DE-Ohio asserts that nothing herein, or in its prior pleadings, should be taken as an assertion that OPAE's conduct in

²⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (Entry at 4) (September 28, 2004).

settlement discussions is improper, either regarding the Remand Rider Stipulation or the 2004 Stipulation. OPAE, like all other parties is entitled to determine the extent and scope of its interests and participation in any case, including these proceedings before the Commission. DE-Ohio simply wishes to make the point that OPAE is not representing residential customers, the Ohio Consumers' Counsel (OCC) and the City of Cincinnati are the sole statutory residential representatives, or for that matter its members as commercial customers, Kroger was the only commercial customer in these cases, but is simply representing its own interest.²⁵

Therefore, OPAE's interests in these proceedings are clearly self-serving. In these proceedings OPAE's interests lie in its ability to control the flow of energy efficiency and weatherization dollars to its members, perhaps to the exclusion of other Parties such as PWC. PWC, the OCC, Ohio Energy Group, the Ohio Hospital Association, and the other Parties, all have their own particular interest, some broader than others. The participation of the broad breadth of Parties, and their varied interest, regardless of how narrow or broad, conclusively demonstrates that there was serious bargaining among capable and knowledgeable parties during the settlement discussions leading to the filing of the Remand Rider Stipulation.

²⁵ OPAE has no office or presence in DE-Ohio's certified territory. Two of its members are located in DE-Ohio's certified territory.

CONCLUSION:

For the reasons set forth above, DE-Ohio respectfully requests the Commission deny OP&E's Motion to Strike.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "P.A. Colbert", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically on the following parties this 14th day of June 2007.



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