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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Cincinnati Gas & Electric Company To Modify its Non-Residential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish a Pilot Alternative Competitively-Bid Service Rate Option Subsequent to 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

OHIO PARTNERS FOR AFFORDABLE ENERGY'S MEMORANDUM CONTRA

Respectfully submitted,

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MEMORANDUM CONTRA OF
OHIO PARTNERS FOR AFFORDABLE ENERGY

I. Introduction

Pursuant to R.C. §4903.10 and Ohio Adm. Code 4901-1-35, Ohio Partners for Affordable Energy ("OPAE") hereby submits to the Public Utilities

Commission of Ohio ("Commission") this memorandum contra the applications for rehearing filed in the above-captioned cases by The Cincinnati Gas & Electric Company, now Duke Energy Ohio, Inc. ("Duke") and the Industrial Energy Users-Ohio ("IEU-O"). Herein, OPAE explains why the applications for rehearing of Duke and IEU-O should be denied in their entirety. OPAE also respectfully renews its request that OPAE's application for rehearing be granted.

II. Duke's application for rehearing should be denied in its entirety.

A. Duke's contention that the IMF should not be avoidable by any customer and that shopping customers must be given the option to pay the RSC and AAC demonstrates that effectively functioning competitive markets do not exist; therefore, the IMF charge should be eliminated.

The Commission found that nonresidential shopping customers who agree to remain off Duke's service and not avail themselves of Duke's provider of last resort ("POLR") service do not cause Duke to incur any risk. Therefore, the infrastructure maintenance fund ("IMF") must be avoidable by these nonresidential shoppers. Remand Order at 38. The Commission also found that because the rate stabilization charge ("RSC") is a generation charge, the RSC should not be part of the POLR charge. Id. at 35.

Duke requests rehearing of the Commission's finding of the avoidability of the IMF by nonresidential shopping customers who agree not to avail themselves of Duke's POLR service. Duke believes that the IMF should be nonbypassable by all customers because, according to Duke, all customers benefit from the dedication of capacity to serve all load. Duke also argues that the Commission decision deprives nonresidential shopping customers the ability to pay the RSC

and the annually adjusted component ("AAC") and return to Duke at the rate stabilization plan ("RSP") standard service offer. According to Duke, customers sought to pay the RSC and AAC so that they could return to the RSP offer instead of locational marginal pricing ("LMP"). Duke argues that customers should not be forced to return to Duke at the LMP.

Duke claims that customers may not be deprived of POLR service under R.C. §4928.14 and that the Commission has undermined Duke's ability to fulfill its obligation to provide POLR service to all customers. According to Duke, the only way it can protect itself from the market risk associated with the provision of a "stabilized" market price (i.e., the RSP offer) is to limit its migration risk through unavoidable charges. Duke claims that unless the current pricing structure compensates it for providing POLR service, it will not have funding to purchase capacity for shopping customers should they need to return to Duke's service, and that it will lose money if the IMF and RSC are avoidable. Id. at 14.

Duke also argues that the Commission has unlawfully adjusted Duke's standard service offer without Duke's consent. Id. at 6. On the other hand, Duke concedes that the RSP standard service offer is in direct conflict with R.C. §4928.38 which provides that a utility is fully on its own in the competitive market. Id. at 12.

The POLR and IMF charges are not charges set forth in Ohio statutes. These charges have been derived from language in R.C. §4928.14 that requires a distribution utility, after the market development period, to provide a market-based standard service offer under R.C. §4928.14(A) and an option to purchase

service at a price determined through a competitive bidding process under R.C. §4928.14(B). If a generation supplier fails to provide service, its customers default to the utility's standard service offer under R.C. §4928.14(A) until the customers choose an alternative supplier. R.C. §4928.14(C).

R.C. §4928.14(A) and (B) envision the distribution utility providing at a market price a generation supply for nonshopping customers and customers whose supplier has failed. The statute does not permit the distribution utility to charge for the provision of the R.C. §4928.14 service. This is because the distribution utility does not itself supply the generation; the generation supplier will charge through its price for the service. Generation service is separate from distribution service, and generation charges are not applied to distribution service.

R.C. §4928.14 applies only after the market development period, i.e., only after the market has developed. As the Commission's Staff has pointed out, Ohio's electric restructuring law clearly envisions the development of a fully competitive retail electric market where consumers are able to choose from a large number of competitive retail electric service providers to supply their electricity. Staff Comments, *Application of FirstEnergy,* Case Nos. 07-796-EL-ATA and 07-797-EL-ATA (September 21, 2007) at 2. This retail market has not developed. Id. Given the lack of customer choice in retail markets, the standard service offer set pursuant to R.C. §4928.14 is not a "fall back" option for customers who are in the process of finding a competitive supplier or switching from one competitive supplier to another, as the statute contemplates. In reality,

the R.C. §4928.14 is the only price available to all residential and small commercial customers. The distribution utility not only holds a monopoly on distribution service but also on generation service offers. Id. The failure of a market to develop has given new meaning, literally, to R.C. §4928.14.

Duke's reference to R.C. §4928.38 shows how far the statute has strayed from reality. R.C. §4928.38 states that a utility's receipt of transition revenues shall terminate at the end of the market development period, at which point the utility is on its own in the competitive market. Transition revenues were designed to compensate a utility for above-market priced generation during the market development period. Now, Duke, a distribution utility, is claiming to need unavoidable distribution service charges to provide monopoly generation service to customers.

The absurdity continues with Duke's argument that if the Commission permits switched load to return to the RSP standard service offer without having paid the IMF, the RSC and ACC, Duke is in effect subsidizing the competitive market. Id. at 2. Duke also argues that if a shopping customer returns to the RSP standard service offer without paying the IMF, the RSC and the ACC, the nonshopping customers are directly subsidizing the service of the switched load. These arguments would be persuasive only if there were an effective competitive market for Duke and nonshopping customers to subsidize. The amount of shopping even among nonresidential customers is so tiny that any possible subsidy would be insignificant. The Commission has already recognized this in natural gas markets by eliminating the gas cost recovery customer migration

riders, because the potential subsidy to competition was so small as to be illusory and the gas market has at least some competition. The Commission obviously still seeks to encourage the development of competitive electric generation markets, but the market development period has long since passed without the development of a competitive market. It is time to recognize that this experiment has failed.

For the low-income and small commercial consumers that OPAE represents, "avoidability" of certain charges is irrelevant. No shopping choices are available to these customers so the avoidability of certain charges in the event of shopping will not make any difference. The IMF is unavoidable for all residential customers, shoppers and nonshoppers, even though there is no risk that residential customers will shop. Customers on the Percentage of Income Payment Plan cannot shop; there is clearly no justification for them to pay POLR or IMF charges.

The evidence on remand demonstrates that the current standard service offer does not have a reasonable basis. It is not consistently cost-based, and, given the failure of a market to develop, it cannot be market based. If the market cannot determine prices for the standard service offer (because a functioning market does not exist), then the only proxy is a consistently cost-based standard service offer.

The Commission must consider cost as the basis for approved charges; it cannot justify disregarding costs on the basis that it is setting a market-based rate. The Commission must approve just and reasonable standard service rates.

R.C. §4909.18. The Commission should grant rehearing, dismiss the application, and require Duke to file an application for approval of a standard service offer that reflects the absence of competitive choice for residential and small commercial customers and Duke's actual costs to provide standard service offer generation.

B. The Commission has authority to act in the event of market failure; therefore, the Commission has authority to deny Duke's ability to transfer its generating assets.

The Commission found, in its Opinion and Order of September 29, 2004, that, in order for Duke to provide stable prices, it was imperative that Duke retain its generating assets. The Commission noted that there was no evidence that Duke or any Duke affiliate would have an undue advantage as a result of not structurally separating. Therefore, Duke's corporate separation plan was to be amended to require it to retain its generating assets during the RSP. Remand Order at 40.

Duke argues that the Commission lacks statutory authority to make this order because R.C. §4928.17 grants Duke the authority to divest its generating assets without Commission approval. Therefore, Duke argues that an order negating its ability to transfer its generating facilities to an affiliate directly contravenes Ohio statutes. Duke also argues that it should be permitted to sell and obtain generating assets to maintain a proper and reasonably priced resource mix to serve its load. Duke Application at 21.

As stated above, the market for electric generation service has not developed. R.C. §4928.17, which was enacted with Ohio's electric restructuring legislation, envisioned the development of competitive markets and with the markets, a new framework for the regulation of the electric industry. When the

competitive market failed to develop, many aspects of the new framework were no longer viable.

The Commission retains its statutory authority, which was augmented by Am. Sub. S.B. 3, to supervise public utilities such as Duke to ensure the availability to consumers of adequate, reliable and reasonably priced electric service and to ensure retail consumers protection against market deficiencies. R.C. §§4905.06 and 4928.02(A) and (H). Duke itself admits the possibility that there may not be sufficient capacity in the market to satisfy its own load and that it is incapable of selecting customers for the purpose of shedding load. Therefore, it is obvious that the Commission needs to use its authority under R.C. §§4905.06 and 4928.02(A) and (H) to ensure adequate, reliable and reasonably priced electric service and to protect consumers against market deficiencies. The Commission clearly acted within its statutory authority when it ordered Duke to retain its generating assets during the RSP.

III. IEU-O's application for rehearing should be denied in its entirety.

A. The Ohio Supreme Court has already determined that the May 19, 2004 stipulation remained in effect after the Commission's modifications.

IEU-O first argues that the May 19, 2004 stipulation was no longer in effect after the Commission modified it in its November 23, 2004 Entry on Rehearing. IEU-O acknowledges that the Ohio Supreme Court has already found that no party to the May 19 stipulation exercised its option to void it after the Commission's modifications, but IEU-O claims that the Court "did not make a specific determination as to whether the Stipulation remained in effect." IEU-O Application at 9. IEU-O also argues that the stipulation was expressly

conditioned upon its adoption by the Commission in its entirety and that when the Commission modified it, "it was unnecessary for any party to withdraw from the Stipulation." Id. at 10. IEU-O believes that it was not possible for the May 19, 2004 stipulation to be in effect after the Commission modified it.

These arguments are without merit. Obviously, when it determined that no party had acted to void the stipulation, the Supreme Court found that the stipulation was still in effect. On remand, the Commission correctly found that the Court had already issued an opinion based on the stipulation continuing to be relevant. Remand Order at 22, 23. In addition, as the Commission also found, the stipulation on its face makes clear that it was not terminated by Commission modifications. The stipulation set up a system for the signatory parties to follow in the event that they disagreed with the Commission's modifications. None did. The stipulation expressly did not terminate automatically with Commission modifications but was kept in place unless a party followed the designated procedures. Therefore, it is settled beyond doubt that the stipulation was never terminated and remained in effect as modified by the Commission. The stipulation as modified by the Commission was what the Supreme Court remanded and ordered the Commission to review. It could not have ceased to exist.

B. Issues of the admissibility of record evidence are moot.

IEU-O also argues against admitting the side agreements, related documents and testimony concerning the side agreements into the record. IEU-O Application at 12. Contrary to IEU-O's argument, evidence is admitted into the record at hearing by the attorney examiners overseeing the case. The hearing record is closed with the close of the hearing.

If IEU-O objected to the admission into the record of any evidence presented at the hearing, IEU-O's remedy was to file an interlocutory appeal of the examiner's ruling when the evidence was admitted into the record. IEU-O did not timely submit an interlocutory appeal on the admission of evidence; at this point, the time has long passed for such an appeal. Therefore, any rulings made by the attorney examiners at the hearing regarding the admissibility of evidence must now stand.

Moreover, the Commission's determination in the remand order that certain documents are irrelevant does not affect their admission into the evidentiary record. The Commission's finding on relevance may be appealed to the Court, upon which appeal the Court will consider the documents already admitted into evidence at the hearing.

C. The Commission could order that customer numbers be redacted from the confidential documents.

IEU-O cites O.A.C. Rule 4901:1-10-24 as precluding an electric distribution utility from making sensitive consumer information public without the customer's express written consent. IEU-O Application at 15. In fact, the rule refers only to an electric distribution utility obtaining the customer's signature on a consent form prior to releasing the customer's account number or social security number. All participants in the low-income customer assistance programs operated by OPAE members sign such a waiver as part of their application process. The issue here is the Commission's release into the public record of side agreements, not the utility's release of customer account numbers or social security numbers.

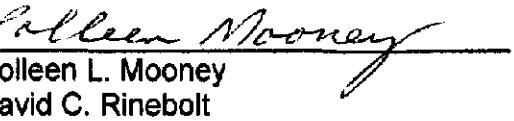
The Commission has already addressed IEU-O's concern. In the remand order, the Commission ordered customer names, account numbers, social

security or employer identification numbers, and many other items to be redacted from documents eventually released to the public. IEU-O expresses concern that it will have "the administrative burden of having to extend the protective order every 18 months." Id. at 13. In order to remedy that portion of IEU-O's concern that is justifiable, the Commission could order that the account numbers be redacted from the confidential documents held by the Commission under seal. In that way, even if the protective order expires without renewal at some point, the customer's account numbers will remain confidential.

IV. Conclusion

Wherefore, the applications for rehearing of Duke and IEU-O should be denied in their entirety. OPAE also respectfully requests that the Commission grant OPAE's application for rehearing filed November 23, 2007.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was served electronically upon the parties of record identified below on this 3rd day of December 2007.

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