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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Dominion Retail, Inc., Complainant, v. Dayton Power and Light Company, Respondent.	:	Case No. 03-2405-EL-CSS
In the Matter of the Complaint of Miami Valley Communications Council, Complainant, v. The Dayton Power And Light Company, Respondent.	:	Case No. 04-85-EL-CSS
In The Matter of the Application not for an Increase in Rates of The Dayton Power and Light Company for Approval to Modify Its Existing Alternate Generation Supplier (AGS) Tariff Sheet No. G8.	:	Case No. 03-2341-EL-ATA

DOMINION RETAIL, INC.
AND
GREEN MOUNTAIN ENERGY COMPANY
MEMORANDUM CONTRA APPLICATION FOR REHEARING
OF
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

By its opinion and order in these dockets of February 2, 2005, the Commission adopted a stipulation and recommendation submitted by the Commission staff and almost all the parties to these proceedings as its resolution of the issues in these cases. On March 4, 2005, the Office of the Ohio Consumers' Counsel ("OCC"), the only non-signatory among the parties, filed an application for rehearing pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35(A), O.A.C, contending that the Commission's order is unlawful in numerous particulars. By this memorandum contra filed pursuant to Rule 4901-1-35(B), O.A.C., Dominion Retail, Inc. ("Dominion Retail"), the complainant in Case No. 03-2405-EL-CSS and an intervenor in Case Nos. 04-85-EL-CSS and 03-2341-EL-ATA, and Green Mountain Energy Company ("Green Mountain"), an intervenor in all three proceedings, respectfully submit that OCC's assignments of error are without merit and that its application for rehearing should be denied in its entirety.

As a review of the memorandum accompanying the OCC rehearing application will quickly show, most of the arguments presented therein are merely a rehash of arguments OCC previously advanced in its post-hearing briefs. The Commission discussed these arguments in considerable detail its February 2, 2005 order, and there is no purpose to be served repeating that analysis here. Simply stated, the Commission got it right the first time around, correctly concluding that the stipulation satisfied its familiar three-pronged test for evaluating settlement agreements first propounded by the Commission in *In the Matter of the Restatement of Accounts and Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC (November 26, 1985), and endorsed by the Supreme Court of Ohio in *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 547 (1994), *citing Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126 (1992). However, the spin that OCC attempts to put on certain of its positions in the memorandum in support of its rehearing application has produced a few new wrinkles that must be ironed out.

II. ARGUMENT

A. THE STIPULATION APPROVED BY THE COMMISSION RESULTS IN A SUBSTANTIAL BENEFIT FOR RATEPAYERS REGARDLESS OF THE STATUS OF GOVERNMENTAL AGGREGATION IN DP&L'S SERVICE TERRITORY.

The OCC spin begins in the introductory paragraphs of its memorandum, where OCC cites a newspaper account of the Commission's decision in these matters for the proposition that the Miami Valley Communications Council ("MVCC"), the complainant in Case No. 04-85-EL-CSS, "has confirmed" that the record "supports little or no benefits from the Partial Stipulation to compensate for its costs to customers" (OCC Memorandum, 1-2). MVCC, of course, said no such thing. What MVCC Executive Director Kent Bristol was reported to have said was that MVCC "probably won't make another try at electric aggregation anytime soon because market conditions have changed" (*see* OCC Memorandum, Attachment), a prediction that should come as no surprise to anyone familiar with the current wholesale electric market, and which obviously has no connection to the merits of stipulation approved in these proceedings.

Even under OCC's view of the world, DP&L is entitled to recover the costs of the billing system changes it implemented to make consolidated billing available to CRES providers operating within its service territory (9/30/04 Tr., 108), regardless whether any CRES providers ever subscribe to this service. The question is simply how DP&L is to be made whole for its investment. Although OCC studiously avoids any mention of the point in its application for rehearing, the uncontroverted evidence showed that DP&L customers will pay substantially less to effectuate this recovery under the stipulation than they would under the approach OCC continues to champion (*see* Staff Ex. 3, at 9-10). Thus, it is beyond debate that the stipulation benefits ratepayers, and nothing in the newspaper account of Mr. Bristol's comments cited by OCC suggests otherwise.[1]

B. THE STIPULATION ADOPTED BY THE COMMISSION DOES NOT VIOLATE ANY IMPORTANT REGULATORY PRINCIPLES OR PRACTICES.

As its first ground for rehearing, OCC asserts that the Commission's order is unlawful and unreasonable based on its claim that the stipulation that forms the basis of its order violates important regulatory principles or practices. Specifically, OCC charges that the Commission violated the doctrine of collateral estoppel by permitting DP&L to commence recovery of its deferred billing system costs from customers through the implementation of a rider effective January 1, 2006, contending that this measure violated both the ETP and MDP stipulations and the requirements of Section 4909.18, Revised Code (OCC Memorandum, 3-11). OCC further maintains that the stipulated charges for consolidated billing do not recover billing system modification costs as originally contemplated under the ETP stipulation and that the Commission erred by authorizing DP&L to collect these costs from residential customers in the face of OCC's sidebar agreement with DP&L that purported to "exonerate" residential customers from the deferred costs associated with billing system modifications (OCC Memorandum, 11-13). Finally, OCC contends that the default recovery rider mechanism provided in the stipulation is not consistent with Rule 4901:1-24-08, O.A.C., and creates a potential for double recovery (OCC Memorandum, 13-15). As previously indicated, we believe that the Commission adequately considered each of these arguments in rejecting them in its opinion and order, and nothing that

[1] Dominion Retail and Green Mountain would respectfully submit that a more accurate interpretation of Mr. Bristol's reported comments would be that MVCC has placed its aggregation plans on hold until market conditions turn more favorable, not that MVCC has no further interest in aggregation, as OCC attempts to suggest.

OCC presents in its memorandum in support of its rehearing application changes our view in this regard. However, we would offer the following observations.

First, regardless of whether the doctrine of collateral estoppel applies generally in the regulatory setting or specifically in these cases [*see Allnet v. Pub. Util. Comm.*, 32 Ohio St. 3d 115, 116 (1987)], it would be foolhardy for the Commission to refuse to revisit a cost-recovery process, whether created by stipulation or otherwise, that not only is not working, but that is at cross-purposes with the goal of establishing a competitive market in the DP&L service territory. Most Ohio EDUs elected to treat billing modification costs as transition costs and recover them currently from their customers through the transition charges established in their respective ETP proceedings. However, DP&L proposed to attempt to recover these costs through charges to CRES providers utilizing the service, and to defer the unrecovered portion of the costs to its next distribution rate case, which, under the terms of the rate stabilization plan approved in Case No. 02-2779-EL-ATA, cannot become effective prior to January 1, 2009.

The problem, of course, is that, as alleged in the Dominion Retail and MVCC complaints, and as OCC witness Pultz testified (*see* OCC Ex. 2, at 6-8), the fees originally proposed by DP&L for providing consolidated billing, even though they were below DP&L's actual per-bill cost (*see* DR/MVCC/GMEC Jt. Ex. 1, at 10), created an insurmountable barrier to entry into the DP&L residential and small commercial market, the very market in which the availability of consolidated billing is most critical to success (*see* DR Ex. 1, at 4-5). However, not only would the fees initially proposed by DP&L never recover DP&L's billing system modification costs because mass-market CRES providers would not pay them, but reducing the fees to a level that these CRES providers could live with would not cure the recovery problem because carrying costs would continue to drive up the deferred costs that ratepayers would ultimately have to bear even under the most optimistic of switching assumptions (*see* DP&L Ex. 1, at 8). OCC, while endorsing a substantial reduction in the fees charged CRES providers for consolidated billing, continues to turn a blind eye toward the cost-recovery side of the problem.

The necessary reduction in the per-bill fees leaves two choices: (1) continue to allow DP&L to defer these ever-increasing costs for recovery through distribution rates beginning in 2009, or (2) provide a mechanism by which DP&L could commence recovery of these costs prior to that time, so as to reduce significantly the total amount distribution customers would ultimately be required to pay (Staff Ex. 2, at 9-10), coupled with a process for the review of the reasonableness of any costs to be recovered through this mechanism. Although this would seem to be a no-brainer, OCC is apparently so devoted to the sanctity of stipulations that it is willing to argue against the result that is clearly in the best interest of the customers it represents. In so stating, we do not intend to suggest that we agree that the Commission's approval of the stipulation in these proceedings violated the doctrine of collateral estoppel. Rather, we merely wish to point out that the Commission's role is not always quasi-judicial and that its approval of the stipulation in these proceedings solved a very real problem that OCC, for reason known only to itself, simply ignores.

Ironically, while claiming that the result approved by the Commission in its order in these cases violates the earlier stipulations, OCC nonetheless has the temerity to argue that the Commission erred in finding that its sidebar agreement with DP&L did not prohibit recovery of the deferred costs associated with billing system modifications from residential customers. Indeed, if anything in these cases violates important regulatory principles, it is OCC's attempt, through a secret deal, to insulate an entire class of customers from any responsibility for costs incurred primarily for the benefit of that class. Who will pay these costs?

Although OCC never mentions the subject, it is apparent that OCC believes its is perfectly appropriate to have other customer classes shoulder this entire burden.

Finally, we are at a total loss to understand OCC's claim that the Commission erred by approving the stipulated default recovery rider because it "creates a potential double recovery for DP&L" (OCC Memorandum, 13). In fact, it was the Commission that pointed out the potential for a double recovery of POLR costs through this mechanism (Order, 14), which is precisely why the Commission put DP&L on notice that it would closely scrutinize costs proposed to be recovered through this rider. This is certainly not error, and rehearing on this ground should be denied.

C. THE STIPULATION ADOPTED THE COMMISSION, AS A PACKAGE, BENEFITS RATEPAYERS AND THE PUBLIC INTEREST.

As its second ground for rehearing, OCC asserts that the Commission's adoption of the stipulation is unlawful because the stipulation does not, as a package, benefit ratepayers and the public interest. First, OCC maintains that the Commission erred by finding that the stipulation benefits ratepayers when no parties representing ratepayers executed the stipulation (OCC Memorandum, 15-17). Although this OCC argument is something of a non sequitur, we would point out that OCC, the statutory representative of residential customers in Commission proceedings, was a party to all three of these cases, and presumably, would be the representative of this customer class in any other Commission proceeding. Thus, it is far from clear, at least to us, how this alleged lack of notice bears on the issue of whether the stipulation, as a package, benefits ratepayers. Indeed, we suspect that DP&L's residential customers might be rather surprised to learn that its statutory representative is before the Commission advocating a result that would cost them far more in the long run than the stipulated result approved by the Commission.

Next, OCC repeats its earlier suggestion that, because MVCC has no immediate plans to rekindle its aggregation effort, residential customers receive no benefit from the stipulation (OCC Memorandum, 17-18). As previously explained, the fact that MVCC's aggregation efforts are currently on hold is a function of the current conditions in the wholesale electric market, and is not attributable to anything in the stipulation. Thus, this is not a test of whether the stipulation benefits ratepayers.

OCC then argues that it was unreasonable for the Commission to approve a stipulation that "rewards DP&L and penalizes its customers as the result of a complaint against DP&L for its abuse of market power," claiming that "(t)here would be no harm if the Commission would consider DP&L's recovery of its billing system modification costs in its next rate case" (OCC Memorandum, 19). Again, OCC wants it both ways. OCC agrees that the billing fees should be substantially reduced, but refuses to recognize the impact of this reduction on the deferred balance. No harm? How about the fact that ratepayers would pay substantially more if recovery is not accelerated by the implementation of the rider?

As its final assignment of error in this area, OCC cites the fact, under the stipulation, customers will be required to pay for the audit of the prudence of DP&L's billing system investment, whereas, had this audit been conducted by the staff in a subsequent rate case, customers would not have been asked to pick up the tab (OCC Memorandum, 20-21). Here, too, OCC mistakes the point. Conducting the audit of the prudence of DP&L's billing system investment now, permits the recovery of the costs to commence sooner, thereby reducing the total costs that would otherwise be charged to ratepayers. Cleary, this represents a substantial net benefit to ratepayers. Rehearing on this ground should be denied.

C. THE STIPULATION ACCEPTED BY THE COMMISSION WAS THE PRODUCT OF SERIOUS BARGAINING AMONG CAPABLE, KNOWLEDGEABLE PARTIES.

As its final ground for rehearing, OCC asserts that the Commission's order is unlawful and unreasonable because the stipulation upon which it is based was not the product of serious bargaining among capable, knowledgeable parties (OCC Memorandum, 21-22). On brief, OCC argued that the stipulation failed to satisfy this element of the Commission's three-pronged test for evaluating stipulations based on the astonishing proposition that MVCC was not a capable, knowledgeable party and the equally remarkable notion that the stipulation could not possibly be the product of serious bargaining because OCC did not sign it (OCC Brief, 41). Mercifully, OCC has abandoned these presumptuous positions in its rehearing application, but, curiously, fails to offer anything in their place. In fact, the three paragraphs that follow this assignment of error in OCC's memorandum contain no discussion whatever of the extensive negotiations that lead to the stipulation – negotiations in which OCC actively participated – or the expertise of the parties. Rather, OCC merely repeats its earlier argument that the stipulation should have been rejected because, in its view, the outcome was "illegal," and goes on to state that the cases should have been decided "on the basis of the record" (OCC Memorandum, Section C, 22). Plainly, these claims have nothing to do with the question of whether the stipulation was the product of serious bargaining among capable, knowledgeable parties. However, be that as it may, the outcome that would have been "illegal" was the outcome that would have resulted under OCC's secret sidebar agreement with DP&L. Further, the Commission did decide this case based on the record before it. Indeed, the Commission concluded that the record supported the reasonableness of the stipulated result rather than OCC's position, which, on its face, was not in anyone's best interest, including that of the customers OCC *purports to represent*. Rehearing on this ground should be denied.

III. CONCLUSION

For those reasons set forth herein, Dominion Retail and Green Mountain respectfully submit that OCC's application for rehearing should be denied and that the Commission should reaffirm its February 2, 2005 order in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the persons listed below by electronic mail, by first class U.S. mail, postage prepaid, or by a combination of these methods this 14th day of March 2005.

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