FILE

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Joint Complaint of Constellation NewEnergy, Inc. and Cox Newspapers, Inc.,	:	
		Case No. 05-484-EL-CSS
Complainants	:	
v.	:	
The Cincinnati Gas & Electric Company,	:	
Respondent	:	

REPLY OF THE CINCINNATI GAS & ELECTRIC COMPANY

Now comes Respondent, the Cincinnati Gas & Electric Company (CG&E) and hereby respectfully submits its Reply to the Memorandum Contra of Co-Complainants Constellation NewEnergy (CNE) and Cox Newspapers (Cox).

CG&E incorporates each and every argument in its Motion to Dismiss as if fully restated herein, and again asserts that Co-Complainants have failed to allege reasonable grounds upon which relief can be granted, and should be collaterally estopped from bringing the present suit. Co-Complainants did not have the right to rely on tariffs that did not receive final Commission approval. Co-Complainants had actual knowledge that those tariffs were subject to change and that any change would require a billing adjustment. Furthermore, CG&E has breached no duty owed to CNE.

For the foregoing reasons as well as those set forth in CG&E's Motion and contained herein, CG&E respectfully requests the Commission overrule Co-Complainants' Memorandum Contra and grant CG&E's Motion to Dismiss.

I. LAW AND ARGUMENT

A. Co-Complainants have failed to state reasonable grounds upon which relief can be granted.

In their Memorandum Contra, Co-Complainants allege that they had the right to rely on the December tariffs at issue due to the Commission's December Order[1] Further, Co-Complainants rely on R.C. 4905.30 for the proposition that CG&E is required to file its tariffs and that the General Assembly intended the public be able to rely on these tariffs.[2] Co-Complainants then reach the conclusion that the December Order had the effect of making CG&E's December Tariffs a "contract offer to the public".[3] These assertions are simply incorrect.

First, R.C. 4905.30 is inapplicable to competitive retail electric service, in that the General Assembly, in enacting R.C. 4928.05, expressly excluded R.C. 4905.30 from Commission jurisdiction.[4] Although CG&E filed both its December and January Tariffs for competitive retail electric service, it certainly was not required to do so under 4905.30. Pursuant to the intent of the General Assembly in creating a competitive market for generation, the competitive retail electric service at issue is not subject to Commission supervision and regulation under R.C. 4905.30.[5] Therefore Co-Complainants' claim that R.C. 4905.30 is authority for their alleged reliance claim is meritless as this statute does not even apply to the case at bar.

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1 Co-Complainants' Memorandum at 5-6.
2 *Id.*
3 *Id.*
4 Ohio Rev. Code Ann. § 4928.05 (Baldwin 2005).
5 *Id.*

Second, Co-Complainants' arguments fail to acknowledge that in its December Order, the Commission clearly stated, in no uncertain terms, that it was not a final order.[6] The December Order constituted a conditional approval "subject to true-up, on an interim basis, pending further staff investigation and review."[7] Moreover, as stated in CG&E's Motion to Dismiss, the Commission went one-step further by explicitly stating:

> "[i]n the event that, following such investigation and review, changes are required that would have resulted in different bills having been sent to customers, *CG&E will be required to adjust subsequent bills to allow for the true-up of bills* that were prepared on the basis of the tariffs approved by this entry. *The Commission will be issuing a subsequent entry addressing final approval of these tariffs once staff has completed its investigation and review.*"[8]

As such, Co-Complainants had actual knowledge that the tariffs had not received final approval, were subject to modification, and that if such modifications occurred, CG&E *would be required* to adjust its billing accordingly. Therefore, any alleged reliance upon these tariffs was misplaced and any argument to the contrary is misguided.

Third, Co-Complainants' allegation that the Commission's December Order resulted in CG&E's December Tariffs becoming a firm contract for public offer is without merit because that very same order clearly indicated the "terms" of the alleged "offer" were subject to review, change and re-billing. In other words, the pricing term of Co-Complainants' alleged "offer" had not been given final approval and was not firmly set. The Commission's language is unambiguous in this respect and leaves no doubt that if changes to the Tariffs occur between the December Order and the Commission's Final Order approving CG&E's MBSSO, that CG&E

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6 *Entry* Case No. 03-93-EL-ATA, Dec. 21, 2004, at 4.
7 *Id.*
8 *Id. at 3. Emphasis added.*

"will be required" to adjust customer billing accordingly.[9] The January Tariffs received final Commission approval, not the December Tariffs[10]. In other words, the January Tariffs were a true-up as contemplated by the Commission's December Order.[11] There would be no controversy had the Commission simply decided not to act on the December tariffs at all, and issued an order sometime later correcting them. In this instance, neither CG&E nor consumers can rely on pending tariffs.[12]

As stated in CG&E's Motion to Dismiss, the present case is the same as *Stand Energy Corporation v. CG&E*, (Stand Energy) in which the Commission held it was improper to rely on tariffs that had not yet received final approval.[13] In *Stand Energy*, finding that CG&E could not rely on its filed tariffs lacking final approval, the Commission was persuaded by the fact that CG&E was aware that the issue of the annual reconciliation would be considered in the gas choice investigation proceeding.[14] In other words, CG&E had actual knowledge that the filed tariffs were subject to further investigation, change or modification. The same is true in the present matter. The pending tariffs were conditionally approved subject to true-up and final approval making it improper for either CG&E or Co-Complainants to rely upon the December pending tariffs.

Admittedly, the December Tariffs contained miscalculations for the market price of competitive retail electric generation service to be paid by nonresidential shopping credit customers.[15] However, these miscalculations will not have a chilling effect on shopping, as Co-

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9 *Id. Emphasis added.*

10 Finding and Order, Case No. 03-93-EL-ATA, March 2, 2005, at 2.

11 *Entry* Case No. 03-93-EL-ATA, Dec. 21, 2004, at 4.

12 *In the Matter of Stand Energy Corporation v. The Cincinnati Gas & Electric Company,* Case No. 99-960-GA-CSS, (Opinion and Order, September 14, 2000).

13 *Id.*

14 *Id.*

15 *See* Motion to Dismiss, at 4.

Complainants would have this Commission believe.[16] The adjustments made in the January Tariffs did not affect or alter the shopping credit, but merely changed the market price for generation.[17] The Non-residential shopping credit customers are receiving the full shopping credit to which they were entitled to under CG&E's Commission approved transition plan. As this Commission has already determined, CG&E's January tariffs merely set forth the appropriate competitive market price for generation to be paid by the non-residential shopping credit customers in conformance with the Commission's express intent to maintain those customers in the same competitive position they enjoyed during the market development period.[18]

There is no chilling effect because the non-residential shoppers are receiving the precise benefit they are entitled to, and was envisioned by this Commission. In this complaint, Co-Complainants are simply requesting this Commission grant them a market price that never received final approval by this Commission, was never intended or contemplated by this Commission, and is simply unavailable anywhere in the competitive retail electric market. Co-Complainants' petition for relief results in an unintended windfall for a handful of customers that is otherwise unavailable in the competitive retail electric market.[19]

CG&E owes no duty to Co-Complainants regarding a particular market price for competitive retail electric generation service. Revised Code Section 4928.14 places no restriction on CG&E concerning the frequency with which it may amend its market-bases standard service offer (MBSSO) market price through application to the Commission.[20] CG&E may apply to amend its price every day. This is in sharp contrast to the frequency with which

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16 Co-Complainants' Memorandum at 4.

17 *See* January Tariffs, Case No. 03-93-EL-ATA, on file with this Commission.

18 Finding and Order, Case No. 03-93-EL-ATA, March 2, 2005, at 2.

19 *Id.*

20 Ohio Rev. Code Ann. § 4928.14 (Baldwin 2005).

CG&E may amend its regulated distribution rates pursuant to R. C. 4909.18 and 4909.43 that prohibit overlapping applications, applications for an increase filed less than 270 days after a pending application, or applications filed less than 6 months after the expiration of a municipal ordinance.[21] There is simply no basis upon which Co-Complainants are entitled to rely upon any market price offered by CG&E for any period of time just as neither CG&E nor its consumers may rely upon the market price offered by Constellation or any other competitive retail electric service (CRES) provider over any period of time. All market prices are subject to change from moment to moment. That is the nature of a market.

B. Co-Complainants claims are barred by Collateral Estoppel.

In their Memorandum Contra, Co-Complainants contend that the doctrine of Collateral Estoppel is inapplicable to their claim, because otherwise "there could never be a complaint after the establishment of rates through a rate increase case."[22] Clearly, this is not what CG&E is asserting by raising this defense. Co-Complainants fail to comprehend the competitive retail electric market in which price is no longer set pursuant to traditional rate-making statutes.

The Commission is a creature of statute and possesses no more and no less authority than statutes provide. It must apply a statutory standard to determine whether CG&E's MBSSO is just and reasonable.[23] This standard is set forth in R. C. 4928.05, which provides in pertinent part:

> On and after the starting date of competitive retail electric service, *a competitive retail electric service supplied by an electric utility... shall not be subject to supervision and regulation... by the public utilities commission* under Chapters 4901., to 4909., 4933., 4935., and 4963. of the Revised Code, *except* section 4905.10, *division (B) of 4905.33, and sections 4905.35* and 4933.81 to 4933.90....[24]

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21 Ohio Rev. Code Ann. §§ 4909.18, 4909.43 (Baldwin 2005).

22 Co-Complainants' Memorandum at 6.

23 *Time Warner AxS, v. Pub. Util. Comm'n*, 75 Ohio St. 3d 229, 234, 661 N.E.2d 1097, 1101 (1996).

24 Ohio Rev. Code Ann. § 4928.05 (Baldwin 2005). (Emphasis added).

Revised Code Section 4928.05 thus divests the Commission of jurisdiction over the market price of any "competitive retail electric service," including the price-to-compare at issue in this case, subject to the Commission's limited authority contained in R. C. 4905.33(B) and R. C. 4905.35.[25] These exceptions prohibit CG&E from pricing below cost for the purpose of destroying competition and from discriminatory pricing.[26] Consumers in the competitive retail electric market maintain these protections and certainly may file an action on those bases.

In their Memorandum Contra, Co-Complainants cite R.C. 4905.26 as foundation for bringing the present claim.[27] As stated above, with regard to competitive retail electric service R.C. 4928.05 divests the Commission of jurisdiction under this statute except for an allegation that CG&E is in violation of various portions of R. C. Chapter 4928 pursuant to a complaint action brought through R. C. 4928.16.[28] Co-Complainants make no such claim in this complaint.

In the case at bar, Co-Complainants are disputing a market price offered by CG&E that was ultimately approved as just and reasonable by this Commission in case no. 03-93-EL-ATA.[29] As Co-Complainants are not alleging the price is below cost in violation of R.C. 4905.33(B), or discriminatory in violation of R.C. 4905.35, any dispute pertaining to the approval of CG&E's setting of a market price in its January Tariffs, must have been brought in case no. 03-93-EL-ATA. In effect, Co-Complainants are requesting this Commission to find that its decision approving CG&E's market price is wrong and change it. In other words, Co-

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25 *Id.* The remainder of the exceptions set forth in R.C. 4928.05 are inapplicable to the case at hand. Specifically, R.C. 4905.10 addresses the Commission's authority and ability to assess annual fees to utilities for Commission expenses, the public utilities fund, transfer of funds and commissioner's salaries. *See* Ohio Rev. Code Ann. § 4905.10 (Baldwin 2005). Additionally, the exceptions set forth in R.C.§§4933.81 to 4933.90 pertain to the setting of service territories for electric companies. *See* Ohio Rev. Code Ann. §§ 4933.81, 4933.82, 4933.83, 4933.84, 4933.85, 4933.86, 4933.87, 4933.88, 4933.89, 4933.90 (Baldwin 2005).

26 Ohio Rev. Code Ann. §§ 4905.33(B), 4905.35 (Baldwin 2005).

27 Co-Complainants' Memorandum at 6.

28 Ohio Rev. Code 4928.16 (Baldwin 2005).

29 Finding and Order, Case No. 03-93-EL-ATA, March 2, 2005, at 2.

Complainants are requesting the Commission manipulate and regulate the competitive retail electric service market. Neither Co-Complainants nor the Commission has this right.

As stated in CG&E's Motion to Dismiss, both the December Tariffs and the corrected January Tariffs were a product of a lengthy proceeding in which numerous interveners advocating varying interests were fully represented, including those of Co-Complainants.[30] Specifically, CNE was an actual party to the Case No. 03-93 EL-ATA proceeding, having its interests represented both in person and through its Association, the Ohio Marketers' Group (OMG).[31] The interests of every customer class, including those interests of Complainant Cox, as well as any of the other allegedly harmed CNE customers, were adequately represented through one of the numerous intervening parties to the 03-93-EL-ATA proceeding. The filing of the incorrect December Tariffs, the corrected January Tariffs, as well as the final Commission approval of the corrected January Tariffs on or about March 2, 2005, all occurred in Case No. 03-93-EL-ATA.[32] Any claim pertaining to the approval of CG&E's market price as set forth in the December or the January Tariffs should have been brought during the course of the 03-93-EL-ATA case. Moreover, Commission precedent is clear that although collateral attacks on prior Commission orders are not improper per se, where the Commission recently and thoroughly considered the subject, and the Complainant alleges nothing new or different for consideration, the Commission has the ability to dismiss such a complaint pursuant to the doctrine of collateral estoppel.[33]

As previously stated in CG&E's Motion to Dismiss, the Commission recently and thoroughly considered CG&E's tariffs at issue in case no. 03-93-EL-ATA, giving final approval

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30 *See Entry on Rehearing, Case No* 03-93-EL-ATA, November 23, 2004.
31 *Id.*
32 *Id.*
33 *In Re Honecker v. Columbia Gas.*, Case NO. 00-544-GE-CSS, February 8, 2001, at 4.

of the January Tariffs on March 3, 2005.[34] The result of that case determined the generation rate of CG&E's competitive retail electric service charged to non-residential shopping credit customers was just and reasonable and consistent with the Commission's intent.[35] Co-Complainants' allegations in the case at bar challenge those precise rates which have only recently been approved by the Commission. Further, Co-Complainants have offered no new evidence indicating that the approved January Tariff rates are either discriminatory or predatory, than what has already been contemplated by the Commission in reaching its decision to approve the January Tariffs.[36] Co-Complainants are simply asking this Commission to retroactively approve the December Tariffs, which the Commission has already made clear were inconsistent with the Commission's November Order, and create an unintentional windfall to one class of customer.[37] This is exactly the situation historically deemed as appropriate for the application of the doctrine of collateral estoppel.[38]

Co-Complainants, as well as any other party allegedly prejudiced by the filing of revised January Tariffs, had reasonable opportunity to review and challenge the January Tariffs for nearly three months prior to the Commission giving final approval in March.[39] Moreover, pursuant to O.A.C. 4901-1-35, Co-Complainants had an additional thirty-day window beyond the Commission's issuing of its March Order approving CG&E's January Tariffs, to file an application for a re-hearing.[40] Specifically, 4901-1-35(A) O.A.C. provides in pertinent part:

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34 Finding and Order, Case No. 03-93-EL-ATA, March 2, 2005, at 2.
35 *Id.*
36 *Id.*
37 *Id.*
38 *In Re Honecker v. Columbia Gas.*, Case NO. 00-544-GE-CSS, February 8, 2001.
39 *See* Finding and Order, Case No. 03-93-EL-ATA, March 2, 2005.
40 OHIO ADMIN. CODE § 4901-1-35(A) (2005).

> *Any party or any affected person*, firm, or corporation may file an application for rehearing, within thirty days after the issuance of a commission order, in the form and manner and under the circumstances set forth in section 4903.10 of the Revised Code.[41]

As such, CNE, as a party to the 03-93-EL-ATA proceeding, and Cox newspapers, as an "affected person" had the ability to file for rehearing up to and including April 2, 2005.[42] Clearly, the 03-93-EL-ATA case was the proper forum to raise a challenge to those tariffs and Co-Complainants had more than reasonable time to raise such a challenge. Collateral estoppel is appropriate and should be applied to bar the unfounded allegations raised by Co-Complainants.

In their Memorandum Contra, Co-Complainants make the dubious counter claim that because the Commission issued its interim December Order, CG&E should be collaterally estopped from filing different rates in its January Tariffs.[43] Complainants' analysis in this regard is fundamentally flawed. Conceptually, collateral estoppel operates to give finality to issues that have been previously litigated and determined to finality in another cause of action.[44] In the case at hand, the Commission's December Order clearly stated that it was not the final order approving CG&E's tariffs, and that further investigation and review *i.e.*, litigation would follow.[45] Collateral Estoppel cannot apply in such a situation.

However, since the March 2005 Order in case no. 03-93-EL-ATA did constitute a final approval of the MBSSO tariffs, collateral estoppel should apply and Co-Complainants' allegations challenging CG&E's approved market price should be dismissed.

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41 *Id. Emphasis added.*

42 The case at bar was filed on April 12, 2005, just ten (10) days later.

43 Co-Complainants' Memorandum at 7.

44 *Trautwein, v. Sorgenfrei et al.*, 58 Ohio St. 2d 493 (1979). at 495.

45 *Entry* Case No. 03-93-EL-ATA, Dec. 21, 2004, at 4.

C. Constellation NewEnergy lacks standing to maintain this action.

CNE's altruistic commitment to file "complaints with its customer against the unlawful and unreasonable practices of electric distribution utilities," is commendable, but such an ideal is both procedurally and legally insufficient to establish CNE's standing in the case at bar.[46] A complaining party must have standing to bring a complaint before the Commission. In other words, the complaining party must be the person directly affected by the matters raised via complaint. The Commission has previously followed both the Ohio Rules of Civil Procedure and Ohio Supreme Court precedent, in dismissing improper parties to a proceeding, finding that:

> "It is basic legal principle that every action must be prosecuted in the name of the real party in interest. Ohio Civ. R. 17(A). A "real party in interest" is a person or entity having a real interest in the subject matter of the litigation, and not merely an interest in the action itself. *(Citation omitted)* A real party is one who will be directly benefited or injured by the outcome of a proceeding."[47]

CNE alleges that it has the requisite standing to maintain the present action in that it has suffered actual damage in terms of its "reputation and working rapport with its customers."[48] Clearly, such damages are civil in nature and are outside the scope of jurisdiction of this Commission.[49] Regardless, CNE's reputation has not been harmed due to CG&E's inaccurate December Tariff rates. Arguably, CG&E may have damaged its own reputation with the refilling of the tariffs, but not CNE's.

CNE further claims that in filing the corrected January tariffs, CG&E has breached a duty imposed pursuant to 4901:1-10-29 O.A.C.[50] Specifically, CNE alleges CG&E has breached its

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46 Co-Complainants' Memorandum at 8.

47 *In re: Smith dba ArielEngineering v. Jebcom,* Case No, 90-270-RC-CSS; *citing* State ex rel. Dallman v. Court of Common Pleas, 35 Ohio St. 2d 176 (1973); West Clermont Ed. v. West Clermont Local Bd., 67 Ohio App. 2d 160, 426 N.E. 2d 512 (1980).

48 Co-Complainants' Memorandum at 7.

49 *In re Pete Demos, v. Ameritech Ohio*, Case No. 94-1323-TP-CSS (September 21, 1994)

50 Co-Complainants' Memorandum at 7.

duty "to coordinate" with CNE "to promote nondiscriminatory access to electric services."[51] In filing its corrected January Tariffs, which were conclusively determined to be consistent with the intent of the Commission's November Entry on Rehearing, CG&E did not act discriminatorily.[52] In fact, CG&E has fully cooperated with all CRES providers, including CNE, in providing nondiscriminatory access, ensuring timely enrollment, maintaining electric service, and timely and accurately switching customers in accordance with 4901:1-10-29 O.A.C. However, contrary to CNE, this duty to cooperate cannot be distorted into an obligation of CG&E to provide or guarantee a particular market price, especially one that is found to be expressly in opposition to Commission intent.[53] Nowhere does O. A. C. 4901:1-10-29 require CG&E to maintain a particular market price, or limit the Commission's ability to approve, an amended market price. This is especially true in the new and unregulated competitive market of generation, where price is no longer established through traditional cost based rate-making. There is no guaranteed savings in a competitive market. Moreover, CG&E's market price for generation cannot be unilaterally established or changed by consumers. CG&E has fully complied with O. A. C. 4901:1-10-29 and in its complaint CNE has not alleged otherwise.[54]

As stated in CG&E's Motion to Dismiss, CNE is a sophisticated entity having fully negotiated and entered into service contracts with its customers wholly independent of CG&E. CNE is still receiving the benefits of its bargains with those customers.[55] CNE is not a customer of CG&E and does not take service under any of CG&E's tariffs. CG&E should not be forced to defend itself against an entity that is not a CG&E customer, and which cannot legitimately allege to have suffered any recognizable damage.

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51 *Id.*

52 Finding and Order, Case No. 03-93-EL-ATA, March 2, 2005, at 2.

53 *Id.*

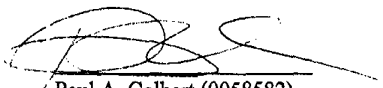
54 *See Complaint.*

55 Motion to Dismiss, at 12.

II. CONCLUSION

For the foregoing reasons, as well as those stated in CG&E's Motion to Dismiss, CG&E respectfully requests that Co-Complainants' Memorandum Contra be overruled and the case at bar dismissed with prejudice. In the alternative, CG&E requests the Commission to find that CNE lacks standing to participate in the litigation of this matter, and should be dismissed as a party from this proceeding.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply was served via regular US Mail postage prepaid, this 24th day of August 2005, upon the following:

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