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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

INITIAL BRIEF ON REMAND SUBMITTED ON BEHALF OF THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

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INTRODUCTION

In this proceeding, as in baseball, it is important to keep one's eye on the ball. The ball, in this case, is determining whether the plan for Cincinnati Gas and Electric Company's compliance with R.C. 4928.14, as encompassed within the Commission's Entry on Rehearing, is reasonable. It is abundantly clear that the plan encompassed in the Entry on Rehearing was reasonable and supported by the record *when it was approved* and remains reasonable and supported by the record today. In fact, the record at the remand hearing shows that the Entry on Rehearing plan has been very beneficial to the rate-paying public. Yes, the Commission got it right, indeed, very right in this case. Now it must merely explain why.

There will be those in this case who will try to deflect the Commission from recognizing its own success. They will discuss speculations about imaginary corporate separation violations and try to cast doubt on the motivations for actions taken in the case by some parties. They will suggest alternative outcomes that would be foolish or impossible. None of this matters for purposes of this case.

The obligations imposed on CG&E by R.C. 4928.14 exist even if the company violated some corporate separation requirement *and the record contains no evidence of any such violation*. Those two sets of obligations, compliance with corporate separation and R.C. 4928.14, both exist, but are entirely independent. Just as a citizen must not rob banks and must pay taxes, the duties are unrelated. Violating the one does not impact the other.

Further the motivations of any party for making a recommendation to the Commission are irrelevant. Parties, other than the Staff, can be assumed to be motivated by self-interest. This self-interest is healthy and is the assumption that drives all Commission processes. The Commission only considers motivations in two instances, when considering motions for intervention and when applying the three part test to assess a partial stipulation. Neither situation applies here, there being neither a stipulation supporting the Entry on Rehearing nor a motion for intervention before the Commission for consideration. The motivations of parties for recommending a different outcome from that which the Commission ordered cannot have any importance with relation to the matter at hand.

The outcome ordered by the Commission in its Entry on Rehearing is reasonable standing on its own merit, neither because of, nor despite, any recommendation made by any party. Indeed no party, not even CG&E, recommended the outcome encompassed by the Entry on Rehearing. That outcome was crafted *sui generis* by the Commission out of the individual facts and items of concern in the record at the time. As shown by the record both before and after remand, that outcome was reasonable, furthering the Commission's stated goals and striking an entirely sensible balance of those competing concerns.

It will be argued by some that the Commission should change its mind and order a different outcome. The suggestions will range from foolishly irresponsible to legally impermissible. While it does not appear that allowing the commission to change its mind was part of the Supreme Court's charge in its remand, the point is unimportant because the arguments for a different outcome should be rejected on their lack of merit.

In sum, the Commission did the right thing in the case below. Now it must merely more fully explain why.

DISCUSSION

The Supreme Court's Remand

The first matter to be discussed is the Supreme Court's remand. This is, after all, the reason that this part of the proceeding occurs.

The Court's direction to the Commission is quite brief and provides:

> For the reasons explained above, we hold that the commission failed to comply with R.C. 4903.09 by not

> providing record evidence and sufficient reasoning when it modified its order on rehearing and that the commission abused its discretion when it denied discovery regarding alleged side agreements. Accordingly, the commission's orders are affirmed in part and reversed in part, and this matter is remanded for further consideration consistent with this opinion.[1]

Thus, to comply with the Court's directive, the Commission must do two things namely, allow discovery as to side agreements and explain why it changed its decision in moving from the Opinion and Order to the Entry on Rehearing. Both of these matters are readily resolved.

The rationale for moving from the Opinion and Order to the Entry on Rehearing is easily stated. As Staff witness Cahaan explains, the Entry on Rehearing represents a more efficient treatment of the competing interests in the case. The Entry on Rehearing creates an outcome which is objectively better as a matter of fact. Witness Cahaan, of course, merely restates what was true at the time. The Commission must certainly have believed at the time that the Entry on Rehearing was superior to the Opinion and Order. All that is incumbent on the Commission now is to make that reasoning more explicit.

The question of discovery of side agreements is also easily resolved. In fact, it is resolved currently. The Court required that discovery be permitted and it has been. Nothing more need be done to satisfy the Court's side agreement directive.

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[1] *Consumers' Counsel v. Pub. Util. Comm'n.*, 111 Ohio St. 3d 300 (2006).

The Commission's Rationale

The Commission's rationale for moving from the outcome defined by the Opinion and Order to that contained in the Entry on Rehearing is, as has been noted, very simply stated. The Entry on Rehearing is better. Why it is better takes more discussion.

The Commission had three goals in considering rate stabilization plans.[2] These goals are: rate certainty for customers, financial stability for utilities, and further development of competitive markets.[3] These goals are provided by statute specifically the Commission is charged to "ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service."[4] Even if the state policy were not perfectly clear, logic requires that the Commission act on these goals. Any scenario which unduly harms either ratepayers or the utilities is, simply put, not sustainable. Thus a balance *must* be struck between these competing interests. Further, setting the stage for competition is the focus of the restructuring that the General Assembly has enacted. In sum, it is not reasonable to quibble with the Commission's goals in this endeavor.

Stating the goals does not make them easy to achieve. As noted by Staff witness Cahaan, these three goals are inherently in substantial conflict.[5] Getting more of one necessitates giving up some of another. The General Assembly did not provide a formula

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2 *In re Cincinnati Gas & Electric Company Rate Stabilization Plan Cases*, Case Nos. 03-93-EL-ATA, *et al.* (Opinion and Order at 15) (September 29, 2004).

3 *Id.*

4 Ohio Rev. Code Ann. § 4928.02(A) (Anderson 2007).

5 Staff Ex. 1 at 4.

for making this determination. No formula is possible. The standard is merely that the standard service offer must be just and reasonable (R.C. 4909.18) and market-based (R.C. 4928.14(A)). This standard means that the Commission has very great latitude in the actions that it can take.

Perhaps the best way to understand the breadth of the Commission's freedom of action in this area is to discuss outcomes which would *not* be permitted. Conveniently two such impermissible outcomes are provided by the Ohio Consumers' Counsel[6] witness Talbot as adopted by OCC witness Hixon. OCC witness Talbot recommends that the Commission either set the market based standard service offer on a cost of service basis or simply go to an auction. He says, "If the Commission does not wish to let the market place itself determine prices for standard service offer, the next best proxy for market prices is a consistently cost-based standard service offer."[7] These approaches are illegal, but even if they were permissible, they are irresponsible. Let us examine each of them in succession.

Setting the market-based standard service offer based on a cost of service rate base, rate of return basis cannot be done. By statute the market-based standard service offer must be, as it says, market-based.[8] To do as Witness Talbot suggests is directly in violation of the statute. Staff recognizes, and witness Cahaan discusses, the difficulties in

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6 While it is easy to criticize the options presented by Consumers' Counsel, and the Staff does so, Staff also recognizes that at least Consumers' Counsel provided options. No other party saw fit to do so.

7 OCC Ex. 5 at 6.

8 Ohio Rev. Code Ann. § 4928.14(A) (Anderson 2007).

determining a market price and the recognition that it may be useful or necessary to use some cost-based components to reach an overall market-based price.[9] In fact the Entry on Rehearing does this and does so in a reasonable fashion.[10] This however is not what Talbot suggests. He advocates a return to traditional ratemaking and *this cannot be done legally*.

Even if traditional ratemaking was permitted, and it is not, it would be irrational to order it. While the OCC's proposal might seem innocuous, it is anything but. Witness Talbot suggests that the standard service offer should be entirely cost-based *and entirely avoidable*. He says that the ". . . standard service offer generation charges should be fully bypassable by customers who switch to competitive suppliers."[11] This recommendation, if adopted, would mean that the company would have to sell at cost when market prices were higher than its imbedded costs and standard ready to sell, but sell nothing, when market prices were lower. This is a variation on the old "army game." If market prices are high the company, does not benefit and, if market prices are low, the company loses. This is placing the company in the position of having to sell at the lower of cost or market and that is not sustainable. This is a formula for the destruction of the electric industry. Indeed this concern must be why the General Assembly, when designing the market-based standard service offer, made it market-based rather than cost-based. Traditional

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9 Staff Ex. 1 at 5.

10 *Id.* at 14.

11 OCC Ex. 5 at 6.

ratemaking cannot and should not be used to fashion the market-based standard service offer.

The other OCC alternative fairs no better. Going to an auction is virtually certain to result in exactly the sort of crisis the Commission intended quite sensibly to avoid with this Rate Stabilization Plan initiative. As has been observed in those states which have gone to a competitive bid to set their equivalent to standard service, the result in very high prices. These efforts have precipitated crises in virtually all the states which have implemented the approach. The Commission does not need to examine the experience of other states to recognize the irresponsibility of moving to a competitive bid under current conditions in Ohio. There is experience right here. As the Commission is well aware, even under the relatively high prices (compared to the order in this case) of the First-Energy plan, no bidder was able to offer a better price. The experience of the high prices under both the Monongahela bid solicited near the end of their market development period, and the subsequent solicitation made by Monongahela's customers, shows that customers would be harmed by an immediate bid process. Even the experience of the Dayton Power and Light voluntary enrollment program, no one even willing to bid against the rate stabilization price, shows that the OCC's recommendation means only higher prices for customers. Clearly OCC's recommendation is foolishly irresponsible at the present time and when the Entry on Rehearing was made.

Not only is the OCC recommendation bad policy, Staff would submit that it is illegal as well. The Commission is charged to "ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and ***reasonably priced*** retail electric

service."[12] If, as the OCC would recommend, the Commission were to require the company to charge the higher prices which would certainly result from a competitive bid process, under current market conditions, when the less-expensive plan was available, it would violate this requirement. It cannot be reasonable to require a higher price when a lower price is available. Consumers' Counsel's recommendation would do just this and so is not permissible.

Thus the bounds of the Commission's discretion are very large. So long as a proposal is market-based, the Commission must balance the competing factors it has identified to reach the right result between the Scylla of illegal and destructive cost basis and the Charybdis of a foolish mandatory competitive bid in a sellers' market. Market basis and striking the right balance will be discussed in the following sections.

The Plan is a Market-Based Price

That the plan creates a market-based price is almost self-evident. As is reiterated in the testimony of Company Witness Rose, before the most recent hearing, the record already included evidence that showed the price set in the Entry on Rehearing was a market-based price.[13] The Staff fully agrees. The Commission already considered this evidence in its earlier orders. At this juncture, the Commission merely need point to this information as the reason for finding that the plan is market-based.

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12 Ohio Rev. Code Ann. § 4928.02(A) (Anderson 2007) (emphasis added).

13 Company Ex. 2 at 2-11.

The record in the recent hearing actually shows more than just the Commission was correct at the time. The evidence shows that the Commission made a very good decision indeed. Subsequent to the Entry on Rehearing market prices have risen to a greater extent than might have been thought at the time.[14] The net result is that the plan provides customers with a price today which is in the lower range of current market prices[15]. While this success cannot be cited as a reason supporting the reasonableness of the earlier decision, the Commission can be satisfied that it was very successful indeed.

In sum, the record provides an evidentiary basis for the Commission to find that the plan provides a market-based offer. The Commission must merely point to this evidence as the basis for its decision.

The Commission Struck a Reasonable Balance

Having shown that the plan provides a market-based offer, it now must merely be determined if there is a proper balance struck. As has been discussed, this examination is fundamentally different than the analysis which would have been done in rate cases in the past.[16] In those cases the General Assembly provided a formula and following the formula resulted in a "correct" or optimal outcome with reference to the legislative will. Discretion existed but it was a discretion within the tight boundaries of the ratemaking formula.

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[14] Company Ex. 2 at 11-13.

[15] *Id.* It will be speculated by some parties that this relatively favorable outcome is evidence that the plan was illegally low in price, that is to say not a market-based price, from the beginning. Such speculation is just that and should be disregarded. The evidence is to the contrary.

[16] Staff Ex. 1 at 4-5.

The present case is different. In making the market-based standard service offer analysis the Commission is charged to determine if rates are "just and reasonable."[17] No statutory formula exists to further restrict this legislative grant. Rather, the General Assembly saw fit to give the Commission the general guidelines of the policy statute to guide its implementation of all of the provisions of Chapter 4928. These considerations drive the Commission's need to balance the three goals it has identified namely: rate certainty for customers, financial stability for utilities, and further development of competitive markets.

The Commission has, essentially, three tools to balance these interests. Although these tools can come in a multitude of forms even in a single plan, fundamentally they are: the initial price, the means to adjust that price and the degree to which customers can avoid payment to the utility.[18] By tinkering with the aspects of a plan which change the initial price, the means to adjust the initial price, and the avoidability, the Commission strikes the balance between the interests of rate certainty for customers, financial stability for utilities, and further development of competitive markets. The General Assembly has provided no guidance for this balancing. There is no statutory basis to favor one interest over the others, no weighting of the factors. So long as something is provided for each of

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17 Ohio Rev. Code Ann. § 4909.18 (Anderson 2007).

18 Staff Ex. 1 at 7-10.

the goals[19] and each change in a control factor results in a pure tradeoff between the competing goals, the Commission has achieved a balanced outcome. While there are many ways to strike this balance, there is no way to objectively, either economically or legally, pick between them, the decision is inherently discretionary.

As described in the testimony of witnesses Cahaan and Steffen, the Commission did strike a balance. The Entry on Rehearing offers a degree of rate certainty for customers, financial stability for utilities, and further development of competitive markets. As described in the testimony of witness Cahaan, the Entry on Rehearing avoids an objectively suboptimal outcome while providing a balance between the factors.[20] Thus the Commission's decision is within the range of reasonable outcomes permitted by law and logic and should, therefore, stand.

Staff must point out that other possible reasonable outcomes exist. The nature of the situation is such that there is no, singular "best" outcome. All outcomes which begin with a market price and strike a balance between the goals which leaves no costless gains unrealized are reasonable. The Commission's job is to identify these outcomes and pick amongst them. It has done so. This record shows that the public has benefited mightily from the Commission's efforts.

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19 To be on the optimal curve, each adjustment of the controlling factors would result in a pure tradeoff of one goal for another. If the situation is such that an adjustment in one of the control factors could result in a gain for one of the three goals without any corresponding loss for one of the others, that outcome is objectively suboptimal. This is to say that gains could be achieved without loss. That was the technical problem with the outcome originally ordered by the Commission in its Opinion and Order. Staff Ex. 1 at 13.

20 *Id.* at 13-14.

The Meaning of the Stipulation

Many parties will spend lots of pages discussing the Stipulation filed in this case. There is no reason for the Commission to concern itself with these matters. The stipulation has no meaning at this point.

The issue currently under consideration is the rational for the outcome the Commission ordered in the Entry on Rehearing. There is no stipulation which speaks to the outcome ordered in the Entry on Rehearing. No party, including the Company, has submitted any stipulation supporting the outcome ordered in the Entry on Rehearing. The only stipulation recommended an outcome the Commission has already not taken.

Much of the remand hearing was taken up with a confusion of the Commission's "approval" of the stipulation with the reasoning which supports the Commission's decision. In both the Opinion and Order and the Entry on Rehearing, the Commission approved the stipulation in that it used the outcome recommended in the Stipulation as the base for the Commission's determination. In both instances this was an adoption by reference to avoid the need to specify all of the little details contained in the plan which the Commission did not change.

In the Opinion and Order the Commission went on to use the existence of that Stipulation as the justification for its order. That is the purpose of the three part test and the Commission proceeded to apply the three part test in the Opinion and Order and found that the Stipulation should be approved because the three part test was met but that there were changes needed to that outcome and the Commission made them.

This is commonly done. The Commission frequently adopts a stipulation while also changing it slightly. The Staff believes that the changes the Commission made were significant in this case.[21] If stipulating parties are dissatisfied with the Commission's changes, they may, through rehearing application, express that objection. That happened in this case. The company objected to the Commission's changes and suggested an alternative outcome.

The Commission did not accept this alternative outcome entirely either. Although the Commission adopted substantial portions of the outcome proposed in the Application for Rehearing, it changed others. What the Court found lacking[22] in the Commission's Entry on Rehearing was a rationale for the change in outcome from the Opinion and Order to the Entry on Rehearing. The parties filled this apparent gap with the assumption that the Commission was still relying upon the existence of the Stipulation as the rationale for the outcome ordered in the Entry on Rehearing. This is a mistake.

The Commission could not have been relying on the existence of the stipulation as a reason for the Entry on Rehearing. Clearly the company, a signatory to the stipulation, had already rejected the Opinion and Order by filing an Application for Rehearing. Thus it was apparent that the Stipulation was no longer meaningful.

Logic likewise dictates that the Stipulation is not a rationale for approval of the Entry on Rehearing. It must be remembered that the Stipulation was a recommendation

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21 Staff Ex. 1 at 12.

22 The Staff would disagree with the Court's view in this regard. It appears to the Staff that the Commission did state its reasons for ordering as it did, but the Court's opinion is what it is and we must comply.

that the Commission adopt a particular outcome in the case, for simplicity, we may refer to this as outcome A. The Commission did not order outcome A, instead it did something else, let us refer to this as outcome B. In the Staff's view these are quite distinct outcomes.[23] The company rejected outcome B and, through an Application for Rehearing, asked the Commission to order something different yet, outcome C. Ultimately, in the Entry on Rehearing, the Commission did a fourth thing, it ordered outcome D. It seems apparent that the fact that some parties recommended outcome A to the Commission provides no justification for the Commission to ultimately order outcome D. No party ever recommended the final outcome in the case. No one agreed. There was no stipulation. While the outcome in the Entry on Rehearing was reasonable and actually superior to the outcome that the Staff supported in the Stipulation, no one agreed to support it before the fact.

The presence or absence of the Stipulation therefore makes no difference. It fails the basic test of relevance. It does not make any matter at issue in the case[24] more or less likely. The Commission could have reached exactly the same outcome whether or not the Stipulation had been filed. The only difference would have been that the Commission would have had to have written out all the details that constituted the plan itself rather than relying on the shorthand of adoption by reference.

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23 Staff Ex 1 at 12.

24 The Stipulation was relevant earlier in the case. It did form the basis of the Opinion and Order. The Opinion and Order is gone now. The Commission has moved on and the Stipulation has no consequence now.

Since the Stipulation is irrelevant, the motivations of those entering into it cannot matter. Thus the Commission should ignore the large amount of discussion and speculation on this topic. All of this speculation is unfruitful. It simply has no relationship to the ultimate outcome of the case.

Side Deals and Imagined Rule or Corporate Separation Violations

Some parties will argue that the information obtained in this case indicates that there was some sort of violation of some Commission rule or corporate separation requirement. The Staff does not believe that such evidence has been provided in this case. Staff sees only agreements with mutual compensation.

Others will disagree with the Staff's view. They have recourse. Let them file a complaint and air their concerns in the proper forum. If they believe they can make out a claim, let them do so. This is not that case and it is a mistake to try to force that issue, if it is an issue, into this case.

The object of this case is ultimately to set a market-based standard service offer. That is really quite complicated enough on its own. Adding consideration of other issues only confounds what is already a complex undertaking.

CONCLUSION

The Commission was tasked by the Supreme Court to do two things. It needed to provide discovery and it has done so. It also needs to provide an explanation for why it moved from the Opinion and Order to the Entry on Rehearing. Clearly the Commission moved from the Opinion and Order to the Entry on Rehearing because the Entry on

Rehearing constituted a result which was better. Not better in some vague, judgmental sort of way but, rather, better objectively. The Entry on Rehearing strikes a balance which is economically optimal[25] in a way that the Opinion and Order was not. Thus, the change was justified by the record at the time and now.

The Commission reached its balance point decision not based on some recommendation made to it but rather it made its determination based on its own judgment. In fashioning the Entry on Rehearing the Commission could not rely on any recommendation by a party (as it had when making the original Order) because there was no stipulation that had any vitality. But the Commission needs no stipulation to act. Its powers come from the General Assembly, not from the collective will of intervenors. The Commission looked to the record before it and made a decision. The record shows that the decision was within the range of reasonable outcomes at the time and remains so today. When the Commission explains this in its order, it will have complied with the second portion of the Supreme Court's directive.

Some parties will try to convince the Commission to depart from the Supreme Court's relatively simple charge. Some parties will ask the Commission to plumb the depths of the motivations for recommendations that others made at earlier stages in this case. Some will spin Byzantine tales of improper relations between utility affiliates. None of this makes a difference for the task at hand. Fundamentally the Commission must act to approve a legal market-based standard service offer. It did so based on its

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[25] Although, as noted, not uniquely optimal. It is part of a three dimensional curve of possible optimal outcomes.

own exercise of judgment examining the record before it. The Supreme Court has asked the Commission to explain itself more fully. When the Commission does so, this case is over.

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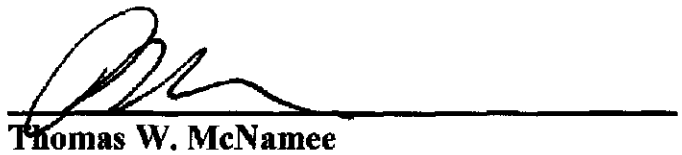

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PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Initial Brief on Remand** on behalf of the Staff of the Public Utilities Commission of Ohio was served upon the parties of record indicated on the attached service list this 13th day of April, 2007 via U.S. mail, postage prepaid and/or electronic service.

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