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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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OHIO PARTNERS FOR AFFORDABLE ENERGY'S  
INITIAL BRIEF

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PUBLIC VERSION

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**OHIO PARTNERS FOR AFFORDABLE ENERGY'S  
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**I. INTRODUCTION**

Ohio Partners for Affordable Energy ("OPAE"), an intervenor in the above-captioned cases, hereby submits its post-hearing brief in these consolidated proceedings before the Public Utilities Commission of Ohio ("Commission"). This part of the proceedings concerns the remand for additional consideration by the Ohio Supreme Court of the Commission's findings in its Entry on Rehearing of November 23, 2004 in Case No. 03-93-EL-ATA, et al., which findings were appealed to the Court by the Office of the Ohio Consumers' Counsel ("OCC"). In the Entry on Rehearing, the Commission approved a proposal made by The Cincinnati Gas & Electric Company ("CG&E"), now Duke Energy Ohio, Inc. ("Duke"). On appeal, the Court found that the Commission had erred by failing to compel disclosure of side agreements and by failing to support properly modifications made in the Entry on Rehearing. *Ohio Consumers' Counsel v.*

*Pub. Util. Comm.* (2006), 111 Ohio St.3d 300. On remand, the Commission is required to address and correct these errors.

**II. THE STIPULATION MUST BE REJECTED IN LIGHT OF THE OVERWHELMING EVIDENCE (CURRENTLY UNDER SEAL) OF A LACK OF SERIOUS BARGAINING TO REACH A SETTLEMENT ACCEPTABLE TO THE PARTIES IN THE CASE.**

The primary issue on remand from the Ohio Supreme Court is whether the stipulation supported by CG&E and certain other parties meets the Commission's criteria for the reasonableness of stipulations. In considering the reasonableness of a stipulation, the Commission uses a three-prong test approved by the Court:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?
2. Does the settlement, as a package, benefit ratepayers and the public interest?
3. Does the settlement package violate any important regulatory principle or practice?

*Ohio Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, 126.

In remanding this case to the Commission for further consideration, the Court questioned whether the existence of side agreements supports the Commission's finding that serious bargaining had taken place among the parties.

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

The Court found that the Commission had erred in denying discovery requested by OCC of side agreements as relevant to the first test of reasonableness of stipulations, i.e., whether the settlement is a product of serious bargaining among capable, knowledgeable parties. The Court found that the existence of side

agreements could be relevant to a determination that the stipulation was not the product of serious bargaining.

As the Court stated, if CG&E and one or more of the signatory parties to the stipulation agreed to a side financial arrangement or some other consideration to sign the stipulation, that information would be relevant to the Commission's determination whether all parties engaged in serious bargaining. The existence of side agreements between CG&E and the signatory parties entered into around the time of the stipulation could be relevant to ensuring the integrity and openness of the negotiation process. *Id.*

The Court also found that the issue whether there was serious bargaining could not be resolved solely by reviewing the proposed stipulation. The Commission cannot rely merely on the terms of the stipulation but rather must determine whether there exists sufficient evidence that the stipulation was the product of serious bargaining. Any concessions or inducements apart from the terms agreed to in the stipulation have relevance when deciding whether the settlement negotiations were fairly conducted. The existence of concessions or inducements is particularly relevant in the context of open settlement discussions involving multiple parties, such as those that purportedly occurred in this case. If there were special considerations in the form of side agreements among the signatory parties, one or more parties may have gained an unfair advantage in the bargaining process, and the open settlement discussions were compromised. *Id.*

The evidence on remand, currently under seal, demonstrates that side agreements undermined the negotiations among the parties so that the Commission must conclude on remand that serious bargaining did not take place at the settlement negotiations. The Commission's criteria for the reasonableness of stipulations have not been met, and the stipulation must be rejected.

**CONFIDENTIAL**













**END CONFIDENTIAL**

### **III. THE STIPULATION WAS NOT BALANCED AND DID NOT REPRESENT THE VIEWS OF ALL CUSTOMER CLASSES.**

In addition to the side agreements providing overwhelming evidence that serious bargaining did not take place at the settlement negotiations so that the Commission's criteria for the reasonableness of settlements have not been met, there is related proof that serious bargaining among the parties did not take place at the settlement negotiations. As OP&E noted in its brief before the Commission, the stipulation was not balanced and did not represent the views of all customer classes.

The stipulation had no support from residential customers. OCC, which by statute, represents residential customers, steadfastly opposed the stipulation, as did OP&E, which has served as an advocate for residential and low-income customers since its founding in 1996. OP&E also represents the interests of its member agencies located in the CG&E service territories, which agencies are commercial customers of CG&E. Two parties supporting the stipulation might have claimed to represent the residential class. One of those parties, Communities United for Action, limited its focus in this case to issues related to the Percentage of Income Payment Plan. The other, People Working Cooperatively ("PWC"), operates virtually all demand-side management programs funded by CG&E-Duke and has CG&E-Duke representation on its Board. Therefore, PWC is not a party with a position distinct from CG&E-Duke's own position.

There was good reason why the residential class did not support the stipulation. In spite of the Commission's professed goals for rate stabilization

plans, the stipulation only achieved a vast enrichment of CG&E-Duke at the expense of the residential class. Rates increased dramatically; they certainly were not stabilized. The stipulation offered no benefits to ratepayers; it merely sanctioned charges. The stipulation could not be found to be in the public interest when it dramatically increased rates with little regard to costs incurred by the utility. Thus, ratepayers, and especially residential ratepayers, were harmed by the stipulation in the form of higher rates. The stipulation failed to meet the standards for approval established by the Commission and approved by the Supreme Court.

The Commission should have been particularly suspect of any claim that the stipulation was balanced and represented the views of all customer classes. The stipulation clearly did not represent the views or satisfy the interests of the residential class or any other class. The Commission cannot find that serious bargaining took place among the parties when the stipulation was not a balanced agreement representative of the customer classes.

#### **IV. THE STIPULATION AND ALTERNATIVE PROPOSAL VIOLATE OHIO LAW.**

The evidence of the side agreements and the fact that the stipulation was not supported by any customer classes provide overwhelming proof that serious bargaining did not take place at the settlement negotiations. In addition, the Commission should also question whether serious bargaining takes place when a settlement violates Ohio law. Serious bargaining would certainly require a stipulation that conformed to Ohio law.

OPAE did not sign the stipulation because it violates Ohio law. The Commission has no option but to follow the statutes enacted by the Ohio General Assembly. *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87. The Commission is a creature of statute and cannot exceed its statutory authority. *Id.*

The Commission should not approve a stipulation that violates Ohio law. The proper course for the Commission to have followed in light of the changed *circumstances of the failure of the competitive retail electric service market* to develop was to ask the General Assembly to enact new legislation authorizing the Commission to act to address the market failure. Instead, the Commission made no request for legislative authority to address market failures and proceeded without statutory authorization to approve rate stabilization plans, which violate current law. The General Assembly, not the Commission, must make the decisions regarding how to modify legislatively the regulatory framework to address the failure of the competitive retail market to develop.

The existence of a stipulation before the Commission allows the Commission to consider the stipulation by applying the three-prong test for the *reasonableness of stipulations* and thereby avoid the *fundamental problem* whether the Commission has statutory authority for its orders. In this case, the Commission avoided the lack of statutory authority for its orders by claiming, *falsely*, to be approving a stipulation that meets its three-prong test. On remand, it is clear in this case that the stipulation did not meet the three-prong test because there was no serious bargaining among the negotiating parties. Such a

stipulation no longer provides the Commission with the cover it seeks to abuse its discretion and act outside the statutory framework and the bounds of Ohio law.

**V. THE COMPONENTS OF THE CURRENT STANDARD SERVICE OFFER PRICING ARE POORLY DEFINED AND DO NOT HAVE A REASONABLE BASIS.**

The second issue on remand is the lack of record support for CG&E's current standard service offer pricing. The Court found that the Commission's first entry on rehearing dated November 23, 2004 approving CG&E's alternative proposal was devoid of evidentiary support. There were no citations to the record supporting the Commission's modifications on rehearing. After all, CG&E and the parties supporting its position did not file proper applications for rehearing; they filed a stipulation instead. This procedure is not supported by the Commission's rules. In addition, the Commission did not sufficiently set forth its reasoning for the changes on rehearing. Instead, the Commission merely asserted, without further justification, that the modifications would provide rate certainty for consumers, ensure financial stability for CG&E, and further encourage the development of competitive markets.

The Court noted that the Commission approved the infrastructure maintenance fund ("IMF") as a component of the provider of last resort ("POLR") charge without reference to record evidence and without explanation. The Commission offered no factual basis or other justification for approving the IMF charge. The Court could not determine what the IMF was without explanation from the Commission.



The Court found that the Commission's reasoning and the factual basis supporting the modifications on rehearing must be discernible from its orders. The Commission was required to make further clarification of all modifications made in the first entry on rehearing to the order approving the stipulation. On remand, the Commission is required to thoroughly explain its conclusion that the modifications on rehearing are reasonable and identify the evidence it considered to support its findings.

The evidence on remand demonstrates that the components of the current standard service offer pricing are poorly defined and do not have a reasonable basis. OCC witness Neil H. Talbot testified that the current standard service offer is neither consistently cost based nor consistently market based. If the market cannot determine market prices for the standard service offer (because a functioning market does not exist), then the next best proxy is a consistently cost-based standard service offer.

Because the specific items of the standard service offer are parts of broader components, which in turn are parts of rates paid by customers, OCC witness Talbot urged the Commission to consider the overall reasonableness of these broader items and the reasonableness of the rates they constitute. OCC Ex. R-1 at 17. There should be no overlap or duplication of items, and the components should work together to achieve standard service offer rates that are reasonably priced and cost based.

Mr. Talbot testified that the rate stabilization charge ("RSC") and the IMF charge have no cost basis and that the tariff generation charge ("TGC") is a

historic charge that should be updated. OCC Ex. R-1 at 16. He testified that there is a difficulty in finding a reasonable basis for some of the charges, that there is a problem of differing or conflicting pricing methodologies, and a problem determining how the various rate components fit together. OCC Ex. R-1 at 64.

OCC witness Talbot's testimony strongly confirms the supposition of the Ohio Supreme Court that the IMF may be "some type of surcharge and not a cost component." *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3 300, 308. The system reliability tracker ("STR") and the IMF charges together amount to \$45,080,000, which is less than the \$52,898,560 for the reserve margin calculation supporting the stipulation. CG&E-Duke witness Steffen argues (simplistically) that there is no evidentiary problem regarding the basis for the SRT and IMF charges. CG&E-Duke Ex. R-3 at 26-27. The total of the charges for the SRT and the IMF is only less than the amount for CG&E-Duke's original reserve margin estimate under the stipulation because the actual costs for the SRT were far less than the estimates contained in Mr. Steffen's testimony in support of the stipulation. In Mr. Talbot's words, "the SRT . . . is the sole successor to the Reserve Margin charge." OCC Ex. R-1 at 4. The IMF charge should therefore be eliminated as a new and duplicative charge.

Mr. Talbot also noted that the charges are caught between a market-pricing framework and cost-based justification for specific rate components. While some components are apparently cost based, CG&E-Duke also uses a broader justification, namely that the components are part of a market-based pricing. This allows CG&E-Duke to claim that cost-based items do not need to

be specifically justified if the overall total price is reasonable. OCC Ex. R-1 at 65.

However, in the absence of a functioning market, there is no clear evidence as to what exactly the market price is. This leaves an accounting cost basis as a proxy, and a precisely estimated proxy is better than an approximate one. Greater reliance on actual accounting costs can provide a relatively stable proxy for market prices. Tightening up the cost basis of the charges is a reasonable response to the challenge of developing a consistent and reasonable framework for the standard service offer pricing that provides reasonable prices. OCC Ex. R-1 at 72-73.


Mr. Talbot testified that the status quo is not acceptable because it is impossible to find a reasonable and consistent basis for all of the pricing components separately or in combination as they are currently designed. OCC Ex. R-1 at 73. Given that the components of the current standard service offer pricing are poorly defined and do not have a reasonable basis, the Commission must determine a proxy of consistently calculated embedded and current costs to serve as a reasonable price for consumers. *Id.* at 74.

## **VI. CONCLUSION**

The evidence of the side agreements, currently under seal, clearly demonstrates that there was no serious bargaining among the parties. The Commission's criteria for the reasonableness of settlements have not been met and the Commission cannot find that the stipulation should have been approved.

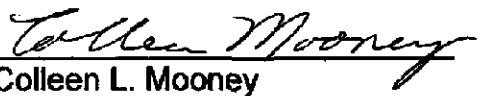
Moreover, the components of the current standard service offer pricing are poorly defined and do not have a reasonable basis. In addition, the IMF charge should be eliminated as a new and duplicative charge. Finally, the Commission has no statutory authority to approve CG&E's rate stabilization plan, the stipulation or the alternative proposal.

Respectfully submitted,

  
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#### CERTIFICATE OF SERVICE

I hereby certify that a copy of Ohio Partners for Affordable Energy's Initial Brief has been electronically delivered to the following parties in the above-captioned proceedings on this 13<sup>th</sup> day of April 2007.

  
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