FILE

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	)	03-2080-EL-ATA
Procedures for Capital Investment in its	)	03-2081-EL-AAM
Electric Transmission And Distribution	)	05-724-EL-UNC
System And to Establish a Capital	)	05-725-EL-UNC
Investment Reliability Rider to be	)	06-1068-El-UNC
Effective After the Market Development	)	06-1069-EL-UNC
Period	)	06-1085-EL-UNC

INITIAL POST-HEARING BRIEF OF THE OHIO MARKETERS GROUP

NON-CONFIDENTIAL VERSION

April 13, 2007

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I. INTRODUCTION

The matter at bar concerns the remand of the Duke Energy Ohio [then known as Cincinnati Gas & Electric Company ("CG&E")] (hereinafter "Duke/CG&E") proposed Rate Stabilization Program ("RSP") decision in consolidated docket 03-93-EL-ATA. The Supreme Court approved the RSP in concept, but remanded the case on two issues. The first was to determine if alleged side agreements between signatory parties and Duke/CG&E tainted a May 19, 2004 stipulation in docket 03-93-EL-ATA (the "Stipulation") agreed to by only some of the parties in the case. Acceptance of the Stipulation formed the basis of some of the RSP rates. The Court also determined that separate and apart from the issue as to the validity of the Stipulation, certain of the RSP rate components including the infrastructure maintenance fund ("IMF"), were created in the Second Entry On Rehearing, and thus have no support in the evidentiary record. Thus, the High Court required the Commission to rehear the validity of the new RSP rate components including the IMF charge.

The Ohio Marketers Group ("OMG") participated in the original 03-93-EL-ATA proceeding and opposed the Stipulation in general, and the provider of last resort ("POLR") fees in particular. Now that the discovery has been completed on the side agreements, the evidence is overwhelming that the Stipulation was not a settlement negotiated by adverse parties, but one of purchased favors. As such, the Commission cannot rely on the Stipulation and must evaluate the remanded RSP rate components without regard to the Stipulation.

The record in this case also shows the IMF charge is not based on actual cost, does not fund discreet wire services and consists mainly of a request for increased payment for a franchise monopoly service. As such, the validity of the IMF for standard service customers is questionable at best, but the IMF certainly does not qualify as cost based utility service, which is the requirement for a non by-passable charge. For these reasons, the Commission should reject the IMF charge, or at a minimum make it a by-passable charge. Further, in light of the improper side agreements which appear to be aimed at eliminating competition and customer choice, the Commission should order Duke/CG&E to meet with the Staff and the competitive retail electric suppliers authorized to provide retail energy on the Duke/CG&E system to review existing barriers to market development.

Finally, Sections 4905.04 through 4905.06, Revised Code vests with the Commission both the authority and the responsibility to enforce the statutes and rules regulating the holders of state franchised monopolies. Even a cursory examination of the side agreements exposes a course of conduct where three cardinal principles of utility regulation have been intentionally violated. Sections 4905.32, 4905.33, and 4905.35

Revised Code prohibit selectively discounting tariff service. Duke/CG&E seeks to avoid this statutory requirement by having the discount paid by the Utility's parent corporation or sister affiliate. The Commission should make the appropriate findings of law and fact that charging a customer less than the tariff rate for a tariff service is illegal regardless of how the discount is paid or who pays the discount.

The second cardinal principle is that a regulated utility may not offer or pay financial or other monetary consideration in order to obtain support for a rate filing. The Commission should make the appropriate findings of law and fact that the side agreements, by trading discounts and cash payments for support of the Stipulation, nullify the Stipulation as a basis for the Commission to make rate determinations.

The third cardinal principle is that the regulated utility must be run separate and apart from its unregulated affiliates. The Commission should make the appropriate findings of law and fact that a program whereby a non regulated affiliate which does not sell power, but makes cash payments to standard service, customers of the utility violates Section 4928.02(G), Revised Code and Section 4928.17 Revised Code.

In sum, the side agreements exposed in this proceeding have harmed the public in two important ways. First, it has stymied the development of the competitive market by eliminating the opportunity for certain customers to choose to take service from a competitive retail electric supplier as well as creating a barrier of the payment of the IMF charge by shopping customers for which no discreet benefit is obtained. Second, it has undermined the integrity of the Commission's rate making process.

II. PROCEDURAL HISTORY

Since 2003, the Commission has encouraged Electric Distribution Utilities to file Rate Stabilization Plans which would provide rate certainty for consumers, provide financial stability for utility companies, and encourage the development of competition.[1] The predecessor of Duke Energy Ohio, Inc. (CG&E), filed applications in these matters to modify its nonresidential generation rates to provide for market-based standard service offer pricing and to establish an alternative competitive-bid process subsequent to the end of the market development period (MDP), to permit it to defer costs and investments, and to establish a rider to recover certain capital investments.

On September 29, 2004, the Commission issued its opinion and order in these proceedings. It approved, with certain modifications, the Stipulation filed by CG&E, the Staff, First Energy Solutions Corp., Dominion Retail, Inc., Industrial Energy Users-Ohio ("IEU"), Green Mountain Energy Company, The Ohio Energy Group, Inc. ("OEG"), The Kroger Co., AK Steel Corporation ("AK Steel"), Cognis Corp. ("Cognis"), People Working Cooperatively, Communities United for Action, and The Ohio Hospital Association ("OHA"). Other parties, including the Ohio Office of Consumers' Counsel ("OCC") and OMG, opposed this Stipulation. The Stipulation provided for the establishment of a Rate Stabilization Plan ("RSP") for CG&E that would govern the rates to be charged by CG&E from January 1, 2005 through December 31, 2008 with certain aspects of those rates also extending through the end of 2010. The Commission's

[1] In re: Dayton Power and Light Company, Case No. 02-2779-EL-ATA, et al., Opinion and Order, September 2, 2003.

September 29, 2004 Opinion and Order approved the stipulation with some modifications.

On October 29, 2004, CG&E, OCC, and OMG filed Applications for Rehearing. On November 23, 2004, the Commission issued its First Entry on Rehearing, denying OCC's Application for Rehearing but granting in part and denying in part the Applications for Rehearing filed by CG&E and OMG.

With respect to CG&E's Application for Rehearing, the Commission granted rehearing and authorized certain changes to the Opinion and Order to adjust or establish an annual adjustment component ("AAC"), a fuel and purchase power component ("FPP"), an infrastructure maintenance fund ("IMF"), and a system reliability tracker ("SRT").

Additional Applications for Rehearing were filed by Mid-American Energy Company, Dominion Retail, Inc., and OCC. In its Second Entry on Rehearing dated January 19, 2005, the Commission granted Mid-American's Application for Rehearing for further consideration but denied the Applications for Rehearing of Dominion Retail, Inc. and OCC.

The OCC appealed these matters to the Ohio Supreme Court. On appeal, the Ohio Supreme Court remanded the Duke Rate Stabilization Plan proceedings to the Commission finding:

> 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.

Ohio Consumers' Counsel v. Pub. Util. Comm. 111 Ohio St. 3d. 300 at 322.

On November 29, 2006, the Attorney Examiner issued an entry finding that "[a] hearing should be held in the remanded RSP Case, in order to obtain the record evidence required by the Court." Testimony was filed on behalf of Duke/CG&E on February 28, 2007 and by the OCC on March 9, 2007. The Staff also filed testimony on March 9, 2007 and the hearing proceeded from March 19 through March 21, 2007. Pursuant to the direction of the Attorney Examiners, OMG consisting of Consolation NewEnergy, Inc., Strategic Energy, LLC and Integrys, Energy Services, Inc. (formerly known as WPS Energy Services, Inc.) submits this initial post-hearing brief.

III. ARGUMENT

A. The Stipulation on which the Duke Rate Stabilization Plan is based fails the reasonableness test for it was not the product of serious bargaining.

B. The option contracts violate Section 4928.02(G), Revised Code.

C. The option contracts violate Section 4928.17, Revised Code.

D. There is no basis for the IMF charges.

The Ohio Supreme Court found that the infrastructure maintenance fund ("IMF") charge to be without evidentiary support or justification, determining that the Commission cannot justify the modifications made on rehearing merely by stating that those changes benefit consumers and the utility and promote competitive markets. Ohio Consumers' Counsel v. Pub. Util. Comm., 111 Ohio St. 3d 300 at 309. Thus, the issue of the IMF charge was remanded to be determined in this proceeding.

The statutory scheme under restructuring is fairly straight forward. An electric distribution company will charge for wire services as wire services remain a franchised monopoly service. Because these are monopoly services the rates and charges for the non competitive wire services remain subject to pricing under Section 4905.18 Revised Code which provides for cost of service pricing. Section 4928.14 (A) Revised Code also provides that electric distribution companies shall offer a default service for those who do not purchase power on the open market. This default or standard service is offered on a bundled service basis that contains the same wire service charges set by cost of service criteria for shopping customers; plus a competitive energy component priced at market rates[36].

The IMF charge did not appear until the second Order on Rehearing[37] and in that Order the IMF is listed as non by-passable wire charge funding provider of last resort charge services. Since the IMF charge was not a part of the Stipulation or the evidentiary hearing, the burden rests with Duke/CG&E in this proceeding to establish IMF true nature and justify its cost. Since the IMF is listed as a POLR charge it must be cost justified, as opposed to if the IMF was listed as an energy charge in which case it would have to be priced at market.

Duke/CG&E Witness Steffen presented the case for the IMF charge. Mr. Steffen's position is that IMF and the SRT are merely sub components of the Reserve Margin charge which was a POLR charge in the Stipulation and permitted Duke/CG&E to purchase excess capacity in the open market to be ready to serve customers in the event of excessive demand. Mr. Steffen then cost justifies the IMF rate by noting that if

[36] Section 4928.14(A), Revised Code.
[37] Case No. 03-93-EL-ATA – Second Order on Rehearing 1/19/2005.

the two sub components (SRT and IMF) of the Margin Reserve are added together they total $45,080,000 which is less than the $52,898,560 for the Reserve Margin calculated as the cost and listed as such in the Stipulation.[38]

In sum, Duke/CG&E's position is that the Reserve Margin was a POLR service for it was designed to maintain service for all customers in the event of peak demands above the expected level, and the cost of providing the Reserve Margin was addressed in the Stipulation which the Commission found reasonable. Given this theory, that the fact SRT and IMF are sub components of the Reserve Margin, which was approved in the Stipulation, Duke/CG&E put no other evidence in the record as the use and cost of the IMF.

Even if one accepts the argument that the IMF is a sub component of the Reserve Margin, the cost justification is far from convincing. The fact that the total of the charges for the SRT and the IMF are less than the amount Duke/CG&E originally estimated has many alternative explanations. For example, the IMF could have been over priced and the SRT under priced, thus the total of the two may be the same, but that is because both are inaccurate. The cost justification in the Stipulation was based on projected costs of capacity, and the sum of the SRT and IMF may be lower now because the projections were both overstated. In sum, the fact that the two cost components total less than the projected Reserve Margin cost projection offers little proof that either the IMF or the SRT are correctly priced.

In a subsequent proceeding the SRT was converted to a tracked cost and made by-passable by those retail customers who shopped and agreed not to return to the standard

[38] Duke Remand Ex. 3 at 26-27.

service prior to the end of the RSP.[39] The sub component argument was also challenged on factual grounds. OCC Witness Talbott refuted the concept that the IMF was part of the Reserve Margin component of the Stipulation testifying that "the SRT ... is the sole successor to the reserve margin charge." OCC Remand Ex. 1 at 4.

If Witness Talbott is incorrect, and the SRT and IMF are merely parts of the same reserve margin charge, then logically if the Commission found that the SRT was not an essential POLR charge and at the retail customer's election could be made by-passable, then the same should be true of the IMF.

The IMF cost justification though really begins to unravel when one considers the side agreements and the fact that Stipulation may lack the verification of being agreed to by opposing parties. If the Stipulation is tainted, and no longer passes the Industrial Energy Users three part test, the Stipulation cannot be used to justify the Reserve Margin cost of which Duke/CG&E now claims the IMF is a sub component. In sum, the burden on Duke/CG&E is to justify the IMF charge on cost of service principles. The record in this matter has no independent cost justification of the IMF.

Duke/CG&E Witness Rose could not remember what the components of the IMF were. Tr. I, 77. Witness Steffens was emphatic that the IMF was not a discreet charge for a discreet service. That is, unlike the FPP which tracts fuel expense, or the SRT which is based on the actual cost of capacity costs billed to Duke/CG&E, or the AAC which is based on environmental and Homeland Security costs, the IMF is not associated with any discrete expense. Tr. I, 123. Rather, Mr. Steffen stated that Duke looked at the "totality of the price" and believed that the price, without care for the actual components

[39] See the Second Entry on Rehearing paragraph 6 response to Mid American Energy p.2 and Opinion and Order, Case No. 05-724-EL-UNC, November 22, 2005.

comprising such price, met a reasonable standard that the company was willing to accept. Tr. I, 121.

The POLR services are monopoly services. To prevent the charging of monopolistic services, a POLR fee cannot be just what the franchised monopolist would want to charge. If such economic rents were permitted the system could quickly break down. In this case, given the side agreements unsubstantiated charges are particularly questionable for one wonders as to whether the non discreet services charges are funding the discounts. The IMF charge may be proper as an energy charge, for there the pricing criteria is whether in sum the energy charge is at market and does not have to be a discreet cost of service based charge. What can be said definitively though is that the record in the matter at bar does not cost justify the IMF as a wire service POLR expense. Thus, the IMF must be made a by-passable charge.

III. CONCLUSION

For the foregoing reasons the OMG request:

A. The Commission find that the Stipulation fails the reasonableness test and should not be accepted for rate making purposes.

B. The Commission find that charging a customer less than the tariff rate for a tariff service is illegal regardless of how the discount is paid or who pays the discount.

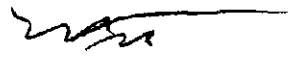
C. The Commission find that a program whereby a non regulated affiliate which does not sell power, but makes cash payments to retail standard service

retail customers of the utility violates Section 4928.02(G), Revised Code and Section 4928.17 Revised Code

D. The Commission find that the IMF is not a utility POLR charge and thus must be by-passable if it is charged at all.

Ohio Marketers Group does not ask that the option contracts be invalidated at this time because of the harm that may cause to the community, but in light of the anti competitive nature of the agreements, asks that Duke be required to meet with the Staff and the CRES authorized to make retail energy sales on the Duke\CG&E system to discuss how to remove barriers to shopping and report back to the Commission.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Confidential Initial Post-Hearing Brief of The Ohio Marketers Group was served by email on April 13, 2007 to all of the trial counsel on the special email list prepared by the Attorney Examiners. Non-confidential copies of the Initial Post-Hearing Brief were served on the following parties of record by email or first class mail this 13th day of April 2007.

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