FILE

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

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

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INTRODUCTION

A review of the briefs submitted in this case quickly reveals that the Commission's earlier decision was reasonable and supported by the record. The arguments presented to the contrary are unpersuasive, occasionally illegal, already disproved, or irrelevant. The various arguments will be discussed, in groups where possible, in the sections following.

ARGUMENT

The Stipulation is Irrelevant

OMG,[1] OPAE,[2] and OCC[3] all argue in various ways that the Stipulation is flawed. All of this can be ignored because the Stipulation, as discussed in Staff's Initial Brief on Remand, has no relevance in this case other than as a shorthand device so that every detail of the plan does not have to be rewritten continuously. The existence of the Stipulation does provide a base to which the Commission can add, and has added, changes to fashion its ultimate order. In this way, the stipulation is rather like a map which shows, but does not justify or explain, boundaries.

What the Stipulation cannot do is provide a justification for the ultimate order[4] the Commission made in this case. The ultimate order in this case is justified on the record and stands on its own. The testimony of witnesses Cahaan, Steffen, and Rose show that the plan ordered by the Commission is a reasonable, market-based standard service offer. This showing is entirely independent of the Stipulation *which recommends a different outcome*. Further, the testimony of Cahaan shows what the reasoning of the Commission must have been when it moved from the outcome in the Opinion and Order to the Entry on Rehearing.

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1 OMG Initial Brief at A.

2 OPAE Initial Brief at II, III, and IV.

3 OCC Initial Brief at 31-59.

4 Staff recognizes that the Opinion and Order was justified with reference to the Stipulation. That is why the three-part test was used initially. The Entry on Rehearing is the matter under consideration here and that cannot be justified with reference to the Stipulation which did not recommend the outcome created by the Entry on Rehearing.

The presence of the Stipulation makes not a whit of difference in any of this. The Stipulation is irrelevant and should be ignored.

Options are Irrelevant Here

OMG devoted its B and C arguments to challenging certain option agreements. In Staff's view, these agreements do not appear to have a relationship to this case. If OMG believes that these agreements represent some violation of a corporate separation requirement, let it file a complaint and make its case in the correct procedural vehicle. As has already been discussed, this is not a complaint case. The purpose of this case is to establish compliance with R.C. 4928.14. This needs to be done whether there is a corporate separation violation or not. OMG has chosen the wrong case in which to air its concerns. Let them use the correct one.

Alternatively, OMG would assert that the option agreements have tainted the Stipulation submitted in this case. Again, this does not matter even if it were true. As has been discussed, the Stipulation is irrelevant. Why a party signed an irrelevant document cannot make any difference in this case.

However one looks at the option agreements, the only conclusion is that they can not make a difference in this case. They should be ignored by the Commission.

Adopting Stipulations

The OCC presents a criticism[5] of the way the Commission considers stipulations. This criticism is most odd, in that the outcome ordered in the Entry on Rehearing, the focus of the remand, resulted from the rejection of the Opinion and Order, not from consideration of a stipulation. Indeed, there was no stipulation presented to the Commission on rehearing. Thus, no purpose is served by OCC's argument.

It might be well at this point to recall the previous steps. The Commission was presented with a Stipulation, which it adopted in its Opinion and Order. In adopting the Stipulation, the Commission made changes. Although apparently the Commission believed these changes were relatively small, the Company and the Staff believed the changes were significant and resulted in a different outcome from the one recommended in the Stipulation. The Staff and the Company would disagree about the characterization of the significant changes. The Staff would view the changes as improvements[6] while the Company would view the changes as harmful. The Company then filed an application for rehearing asking the Commission to adopt yet another outcome[7]. The Commission did not do that either. The Commission modified the Company proposal on rehearing yet again. It is this Entry on Rehearing that was the focus of the Supreme Court's remand and, as has been shown, it had nothing to do with a stipulation.

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5 OCC Initial Brief at 66-69.

6 Yes, the Commission ordered a better result than that which the Staff was able to reach through its negotiation.

7 The application for rehearing also offered alternatives of returning to the Company's original proposal or adopting the Stipulation without changes, but these alternatives are not important here.

Discrimination Still Does Not Exist

OCC renews an argument[8] already properly rejected by the Commission in both the first and second Entries on Rehearing. The outcome the Commission ordered is not discriminatory.

To the extent that the OCC views transactions between consumers and the competitive retail affiliate of Duke as harmful to competition, OCC is simply deluded. Affiliates of utilities are permitted to sell competitive electricity in Ohio.[9] To have buyers, those affiliates would need, as would any competitor, to sell electricity less expensively than the utility itself. It is difficult to imagine why a customer would go to a competitor *to pay more* for electricity. Any agreement must be at a lower price to some degree, measured in some way. If there were agreements between customers and the Duke retail competitive affiliate, or any other competitor, which lowered the effective price of electricity,[10] that would be a sign of market forces working. A market is, of course, where entities haggle over the terms under which they would freely exchange goods or services. How parties haggling over the terms under which they would freely exchange electricity is harmful to a market for electricity is something only the OCC can understand. To Staff, the freedom to arrange such transactions is the point of the restructuring effort.

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8 OCC Initial Brief at 65-69.

9 Ohio Rev. Code Ann. § 4928.05(A) (Anderson 2007).

10 As noted previously, the Staff finds the agreements discussed at great length by others in this case to be ambiguous and irrelevant to this proceeding.

If OCC believes that there is some sort of violation of statute or rule, there is a means to deal with that. As noted previously, the proper recourse is to file a complaint and make a case. The purpose of this proceeding is not to address all wrongs real or imaginary. The purpose of this case is to establish a market-based standard service offer. The purpose of this portion of the proceeding is even more limited. It is to address the Court's remand. None of this has anything to do with the OCC's arguments. Let the OCC use the proper mechanism to air its concerns.

In sum, the retail affiliate is permitted to sell electricity by law. Economic reality would force all competitors to sell below the standard offer. That a competitor would have discussions with would-be customers and reach a variety of arrangements with those customers is a positive development in this market. The OCC's argument appears to really be with the General Assembly for permitting utility affiliates to operate in this market or perhaps with permitting competition at all. Regardless of the explanation, OCC's arguments provide no basis for the Commission to change its Entry on Rehearing.

Options are Irrelevant

OMG devotes its B and C arguments to criticisms of option agreements involving the Duke competitive retail affiliate. To the extent that OMG believes that the affiliate has behaved illegally as a competitor, its recourse is to file a complaint under R.C. 4928.16. To the extent that OMG believes that the affiliate may have violated corporate separation requirements, its recourse is to file a complaint under R.C. 4928.18. This case is a proceeding under R.C. 4928.14. OMG needs to make its arguments and present its

evidence, if any, in the proper case. This is not the proper case and the OMG arguments should be ignored currently.

The IMF is Reasonable

Several parties criticize the IMF component as not being based in the record.[11] This argument is belied in the record. Witness Steffen explained the basis and derivation of the IMF as well as the other components of the plan.[12] Although parties might disagree with Mr. Steffen, the evidence remains. The plan ordered in the Entry on Rehearing is, as a matter of fact, a reshuffling of the existing components. The criticisms have no basis.

The criticisms of the IMF reveal a much more fundamental problem with the arguments critical of the plan. The critics have not adjusted to the new regulatory paradigm created by the General Assembly's restructuring of the industry. They remain stuck in the old, rate-base, rate of return mindset.

An excellent example of the critics' unwillingness to adapt to the new regulatory structure is the criticism that the IMF is "duplicative." This criticism assumes that rates are to be built from individual costs added together with the total making up the final rate. In such a system, a given cost can only be included once. This is much like shopping in a grocery store where the final bill is the total of all the items purchased, but each item must only be charged once. In this sort of system, the term "duplicative" has

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11 OMG Initial Brief at C; OCC Initial Brief at 13-21

12 Duke Ex. 3.

meaning. We had such a system once but the General Assembly eliminated it. The term has no meaning in the market-based standard service offer context.[13]

The market-based standard service offer is not cost-based. If it were, we would call it the cost-based standard service offer. That is not what the General Assembly created. Rather, the market-based standard service offer is the price at which the Company is willing to provide full requirements service to customers. It is the Company's bid. The appropriate referent for it is, quite obviously, the market, not any underlying cost. All comparisons to market costs available in this record reveal that the Company's offer is in the low range of market prices.

In such a regime, the notion of duplication of costs is, quite simply, devoid of meaning. It is possible, and may be helpful, for a company to determine portions of its offer in terms that are defined by costs in one form or another, as described in the testimony of witness Cahaan. Indeed, this has been done in this case but the process is not merely summation of costs to reach a result as was true under the former regulatory structure. The use of cost is an expedient not a requirement. It would be perfectly appropriate for a company to propose that its standard service offer would be one and one-half or two times its costs measured in some defined way. Such a proposal would be literally duplicative[14]. It would also be perfectly reasonable for the Commission to approve such a rate if it compared favorably with market prices. It appears to be very dif-

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[13] For those portions of the rates which are still subject to R.C. 4909.15 ratemaking, the concept of "duplicative" still is applicable, but the market-based standard service offer is not in that category.

[14] In a way that the plan in this case is not. As noted the testimony of witness Steffen shows that the rate is not in fact duplicative.

ficult for some to accept but *costs do not matter* in the market-based standard service offer context[15]

The argument that the stabilization rate includes duplicative elements thus not merely should be rejected. It underscores the fundamental misunderstanding of the nature of the task given to the Commission by the General Assembly. The parties who make these criticisms have a dispute with the General Assembly, not with this Commission.

OCC and the False Dichotomy

As anticipated, OCC has argued a false dichotomy. It argues that the market-based standard service offer must be either entirely based on either cost of service or prices set by bid.[16] They cite no law for this notion since it violates both current law and good sense. Although this matter was discussed in Staff's Initial Brief on Remand, OCC's misunderstanding is so fundamental that it warrants being refuted again here.

Neither lemma of the dilemma OCC posits for the Commission is legally sustainable. The market-based standard service offer is neither cost-based nor is it set by bid.[17] That the MBSSO is not based on cost is self-evident. The statute requires that it be based on the market.[18] OCC's policy arguments to the contrary need to be directed to the Gen-

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15 This ignores the potential situation of a rate set below cost for purposes of destroying competition. As the arguments are that the rate is set above cost, there is no reason to discuss the hypothetical.

16 OCC Initial Brief at 13.

17 It is permitted under the statute for a bid to substitute for the MBSSO and vice versa with appropriate Commission findings but that is not pertinent for purposes of this discussion.

18 Ohio Rev. Code Ann. § 4928.14 (Anderson 2007).

eral Assembly not to the Commission. Likewise the MBSSO is not just a bid price. If it were just a bid price, that would be effectively reading R.C. 4928.14(A) out of the statute because R.C. 4928.14(B) already contains a bid option. It is not a valid construction to read words out of a statute.[19]

Good sense bars the OCC argument as well. The OCC's position would, as noted previously, place the Company in the impossible position of guarantor of the market. If the Company had to stand ready to supply all customers with unlimited power at the Company's cost of production either of two situations would have to hold, either the short-term market rates would be higher or lower than the Company's cost of production. If the short run market price was higher than the Company's cost of production, all the customers would come back to the Company but the Company would only break even, that is, cover its costs. If the short run market price was lower than the Company's cost of production, all the customers would leave and the Company would have losses. Such a structure cannot be maintained. The Company is in a position in which it can only break even or lose, it cannot profit. In the long run, the Company must fail under these circumstances. Good sense requires rejection of the OCC argument.

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[19] "A basic rule of statutory construction requires that 'words in statutes should not be construed to be redundant, nor should any words be ignored.' " *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4712, at ¶ 26, quoting E. *Ohio Gas Co. v. Pub. Util. Comm'n*, 39 Ohio St.3d 295, 299, 530 N.E.2d 875 (1988). Moreover, "[s]tatutory language 'must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative." ' *Id.*, quoting *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn.*, 95 Ohio St. 367, 372-373, 116 N.E. 516 (1917).

Astonishing Claims

OCC makes a number of claims which are astonishing in their wrong-headedness. It criticizes the rate stabilization plan because the rates are *too high*. This objection is perfectly contra-factual. Every scrap of evidence shows that, in the absence of this plan, customers would be paying much more for electricity. All other attempts at bids in Ohio and around the country show this. All the analysis in the case shows this. Every comparison made shows this. There is simply no basis to doubt that this plan results in more favorable prices for customers than would otherwise hold.

OCC objects that the charges under the plan should be avoidable. Except for a trivial percentage (less than 4%), the charges are avoidable. If competition cannot withstand such a trivial and necessary[20] charge, the restructured environment is not sustainable. OCC's argument is with the General Assembly, not this Commission.

Perhaps most surprisingly, the OCC points to the reduction in the number of customers who are shopping in the Duke territory as evidence that the plan has failed. This is purest non-sense. The current level of shopping in Duke's territory is proof of the remarkable success and balance of the plan. Under the plan, prices for non-shopping customers have increased but at a much lower rate than the increase in wholesale prices over the same period. It would be expected that, under such conditions, all customers would return to the plan. The plan is cheaper; returning is the sensible thing to do. That there are any customers still shopping shows the remarkable balance and effectiveness of

[20] A company must be permitted to collect something for its POLR obligations.

the Commission's decision. Despite wholesale market conditions that are both beyond anyone's control and extremely hostile to retail market development, the plan has preserved some degree of competitive retail market. The truth is the exact opposite of the OCC's argument. The current level of shopping in the Duke service territory is proof of the remarkable success of the Commission's initiative.

CONCLUSION

The charge to the Commission is simple to state, the Commission needs to explain in its order the basis for the Entry on Rehearing and explain why it moved to it from the decision in the Opinion and Order. Ultimately the decision that the Commission made is the best, in its view, balance of the competing interests, namely the well being of consumers, the utility, and the competitive market. It is the best balance not because it was recommended to the Commission in some stipulation; indeed, it was not recommended by any party. Rather the Entry on Rehearing is best standing on its own merits. It assures the well-being of the utility, the customers, and still allows substantial incentives for retail competition. This is perfectly in keeping with the directives of the General Assembly in R.C. 4928.02. The plan avoids the opposite errors, advocated by some in this process, of illegal cost-based rates and customer ruining short term market prices. Further, the Entry on Rehearing is objectively preferable to the Opinion and Order as it reduces unnecessary risk. This explanation completes the Commission's task. All the information needed to explain this was included in the record before the case went to the Supreme Court. The Commission is merely making an entry effectively *nunc pro tunc*.

Having done all it need do in this case, some parties advocate more. Some would suggest that the Commission should delve into unrelated issues of corporate separation or violations of other rules or statutes. These suggestions should be rejected. This is neither the time nor the procedural vehicle for such considerations. The parties making these suggestions have the means available to them to raise such issues properly. Let them file complaints and bear the burden of proof to establish their case if they can. That is what complaint cases are for. This is not a complaint case and it should not be muddied with these outside matters.

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PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Reply 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 27th day of April, 2007 via U.S. mail, postage prepaid and/or electronic service.

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