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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

PUCO

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

OHIO PARTNERS FOR AFFORDABLE ENERGY'S
REPLY BRIEF

PUBLIC VERSION

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**OHIO PARTNERS FOR AFFORDABLE ENERGY'S
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PUBLIC VERSION**

I. INTRODUCTION

Ohio Partners for Affordable Energy ("OPAE"), an intervenor in the above-captioned cases, hereby submits its reply brief to the Public Utilities Commission of Ohio ("Commission"). This part of the proceedings concerns the remand by the Ohio Supreme Court of the Commission's findings in its November 23, 2004 Entry on Rehearing in Case No. 03-93-EL-ATA, et al. The findings were appealed to the Court by the Office of the Ohio Consumers' Counsel ("OCC"). In the Entry on Rehearing, the Commission approved, pursuant to a stipulation, 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 to ascertain whether the stipulation was the product of serious bargaining and by failing to support adequately modifications made in the Entry on Rehearing. *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 300.

II. THE OHIO SUPREME COURT HAS ALREADY FOUND THE STIPULATION TO BE RELEVANT TO THESE CASES.

The Staff of the Commission ("Staff") argues that the Commission need not concern itself with the stipulation because the stipulation has no meaning at this point. Staff Brief at 13. According to the Staff, when the company, a signatory party to the stipulation, filed an application for rehearing, the stipulation was no longer meaningful. Staff Brief at 14. The Staff also contends that because the Commission modified the stipulation, no party ever recommended the final outcome; therefore, there was no stipulation. Staff Brief at 15. According to the Staff, the stipulation is irrelevant.

The Staff's argument is inconsistent with the terms of the stipulation. The Stipulation states:

The Stipulation is expressly conditioned upon its adoption by the Commission, in its entirety and without modification. Should the Commission reject or modify all or any part of this Stipulation or impose additional conditions or requirements upon the Parties, the Parties shall have the right, within 30 days of issuance of the Commission's order, to either file an application (sic). Upon the Commission's issuance of an Entry on Rehearing that does not adopt the Stipulation in its entirety without modification, any Party may terminate and withdraw from the Stipulation by filing a notice with the Commission within 30 days of the Commission's order on rehearing. Upon such notice of termination or withdrawal by any Party, pursuant to the above provisions, the Stipulation shall immediately become null and void.

Stipulation and Recommendation (May 19, 2004) at 3. Clearly, CG&E's filing of an application for rehearing was contemplated by the stipulation and, pursuant to the terms of the stipulation, did not constitute CG&E's withdrawal from the stipulation. CG&E never withdrew from the stipulation, even after the Commission's Entry on Rehearing. Nor did any other party to the stipulation

exercise its right to withdraw from the stipulation by filing a notice with the Commission within 30 days of the Commission's Entry on Rehearing. The Supreme Court recognized this when it stated:

Second, the stipulation included a provision that allowed any signatory party to withdraw and void the rate-stabilization plan should the commission reject or modify any part of the stipulation. None of the signatory parties exercised its option to void the agreement despite significant modifications made by the commission to the original stipulation.

Ohio Consumers' Counsel v. Pub. Util. Comm. (2006), 111 Ohio St.3d 300, ¶146.

Thus, the Supreme Court has already found that the stipulation was not voided despite the significant modifications made by the Commission. Given the terms of the stipulation and the Court's finding, there is no support for the Staff's argument that the Commission's modifications of the stipulation in the Opinion and Order or Entry on Rehearing ended the stipulation or rendered it irrelevant.

The Staff also argues that the outcome reflected by the Commission's Entry on Rehearing "was crafted *sui generis* by the Commission." Staff Brief at 3. According to the Staff, the Commission was not relying on the existence of the stipulation as the rationale for the outcome ordered in the Entry on Rehearing. Staff Brief at 14.

There is, again, no support for the Staff's argument that the Commission did not rely on the stipulation to support its Entry on Rehearing. The Entry on Rehearing refers to the "amendment to the stipulation, attached to CG&E's application for rehearing." Entry on Rehearing (November 23, 2004) at 9. The Entry on Rehearing adopted amendments to the stipulation and relied on those

amendments, as well as on the stipulation as originally filed and the modifications made in the Opinion and Order. The Entry on Rehearing states:

ORDERED, That the stipulation be approved, to the extent and subject to the modifications and clarification set forth in the September 29, 2004, opinion and order in these proceedings, as further modified by this entry on rehearing.

Entry on Rehearing at 21.

There are many examples of the Commission's reliance on the stipulation in the Entry on Rehearing. One example is as follows:

- (20) OCC's fourth and fifth assignments of error are also denied. The Commission found, in its opinion and order, that the price under the stipulation is market-based. The Commission noted that the governing statute allows for flexibility in the determination of such charges and that the stipulation satisfied the statutory requirements. As for competitive bidding, the Commission found that the stipulation offered a reasonable alternative to a traditional process. The stipulation, as further modified by this entry on rehearing, meets these two requirements no less than did the stipulation as filed.

Entry on Rehearing at 18. Clearly, as the above example demonstrates, the Commission's Entry on Rehearing relies heavily on the stipulation, as modified by the Commission. According to the Commission, it was the stipulation that satisfied the statutory requirements.

Moreover, the Commission relied on the stipulation to support its orders at the Supreme Court. On appeal to the Court, the Commission's brief relied on the stipulation. The Commission's merit brief before the Court states:

The record revealed multitudes of benefits from the stipulation including: stabilized rates, withdrawal of certain appeals that were pending then; withdrawal of the then pending distribution rate increase cases; caps on increases; allowing avoidability of some provider of last resort (POLR) charges; among a variety of benefits.

Commission Merit Brief, Supreme Court Case No. 05-946 (August 5, 2005) at 4. The Commission did not argue before the Court that there was no stipulation or that CG&E's application for rehearing had rendered the stipulation irrelevant or meaningless; on the contrary, the Commission touted the benefits of the stipulation before the Court and pled for the Court's affirmation on the basis of the stipulation.

Contrary to the assertions of the Staff, the existence of the stipulation was absolutely crucial to the Commission's order in these cases and the Commission's quest for Supreme Court affirmation. This is because the Ohio Supreme Court has affirmed the Commission's rate stabilization plan concept solely on the basis of stipulations. In *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, the Court affirmed the Commission's approval of a rate plan on the basis of the reasonableness of a stipulation. *Constellation* is nothing more than the Court's affirmation of the Commission's approval of a stipulation to which parties from all customer classes agreed. *Id.* The Court stated in a subsequent case involving the rate plan of FirstEnergy Corp., as follows:

The absence of a stipulation signed by customer groups factually distinguishes this case from *Constellation*. In *Constellation* we also noted that "no entire customer class was excluded from settlement negotiations and that the following classes were represented and signed the stipulation: residential customers, low-income customers, commercial customers, industrial customers, and competitive retail electric service providers." When it enacted R.C. 4928.14, the General Assembly anticipated that at the end of the market-development period, customers would be offered both a market-based standard service as required by R.C. 4928.14(A) and service at a price determined through a competitive-bidding process as required by R.C. 4928.14(B); one very narrow exception contained in R.C. 4928.14(B) permits the commission to

determine that a competitive-bidding process is not required. In *Constellation*, the customer groups, by stipulation, agreed to accept a market-based standard service offer and waive any right to a price determined by competitive bid. Those facts are not present in this case.

Ohio Consumers' Counsel v. Pub. Util. Comm., 2006-Ohio-2110 ¶18.

The Court made it clear that the stipulation signed by a wide range of parties was the determining factor that allowed the Court to affirm the Commission's orders. The Court made a strong distinction between Commission rate plan orders that could be made pursuant to a stipulation supported by a wide range of parties and rate plan orders that could not be made absent such a stipulation. In the same opinion, the Court also stated:

In contrast to the customer groups in *Constellation*, the customer groups here did not agree to the FirstEnergy rates, and most customer groups, including the OCC, which represents all residential customers, opposed them. Under these circumstances, the PUCO had no authority to adopt the rate-stabilization plan without also ensuring that a reasonable means for customer participation had been developed.

Id. ¶19.

In short, the Court has affirmed the Commission's rate stabilization orders on the basis of customer agreement in a stipulation. The Court has explicitly stated that such customer agreement is the determining factor in the Court's affirmation of the Commission's rate stabilization plan orders.

The Staff claims that the Commission could have reached exactly the same outcome whether or not the stipulation was filed. It cannot be known what would have happened if the Commission had made the same orders in the absence of a stipulation; the Commission did not make its orders in the absence of a stipulation. The Commission relied on the stipulation in its orders and before

the Court. Court precedent is that the Commission's orders in this case in the absence of a stipulation would likely have been reversed. The Commission did not take that chance; it relied on the stipulation to convince the Court to affirm its orders.

Rather than affirming the Commission's orders, the Court questioned the validity of the stipulation on the basis that there may have been no serious bargaining among the parties. On remand, evidence was presented that proves that the stipulation did not meet the three-prong test for reasonableness because there was no serious bargaining among the negotiating parties. When the stipulation is rejected on that basis, as it must be, and the lack of agreement of the parties is obvious, the Commission's case before the Court is fatally flawed.

III. THE OHIO SUPREME COURT HAS ALREADY FOUND THE SIDE AGREEMENTS TO BE RELEVANT TO THESE CASES.

The Staff argues that "the motivations of any party for making a recommendation to the Commission are irrelevant." Staff Brief at 2. The Staff believes that the Court merely required discovery of side agreements, that discovery was allowed and that nothing more is needed to satisfy the Court's side agreement directive. Staff Brief at 4. According to the Staff, because the stipulation is irrelevant, the motivations of those entering into it cannot matter.

Again, the Staff's argument lacks support. 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. If CG&E and one or more of the signatory parties to the stipulation agreed to a side financial arrangement or some other consideration in return for signing the stipulation, that information would be relevant to the Commission's determination whether all parties engaged in serious bargaining. The Court found that the existence of side agreements between CG&E and the signatory parties entered into around the time of the stipulation could be relevant evidence in determining the integrity and openness of the negotiation process.

Id.

The evidence of record on remand demonstrates that the side agreements

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Therefore, the motivation of the parties signing the stipulation is transparent – enlightened self-interest, some might say. Nonetheless, the position of parties representing small customers who refused to sign the stipulation is equally transparent – opposition to the inequitable imposition of riders totaling 30.5% on small customers.

The Staff claims that simply allowing discovery of the side agreements is sufficient to satisfy the Court. The Court found that the Commission must determine whether there exists sufficient evidence that the stipulation was the product of serious bargaining. The Court found that this issue could not be resolved solely by reviewing the proposed stipulation. 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 Court found that 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. Through 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 Court's opinion obviously refutes the Staff's argument that the only action the Commission must take is to allow discovery of the side agreements. There is no support for the Staff's argument that simply allowing the discovery is sufficient to satisfy the Court. The Court clearly is seeking evidence as to whether there was serious bargaining among the negotiating parties. The side agreements are relevant evidence. The Court clearly expects the Commission to consider whether the side agreements compromised the Commission's finding that the stipulation is the product of serious bargaining among the parties.

The side agreements provide 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. This evidence has been set forth in the confidential testimony of OCC witness Beth Hixon and described on brief (confidential version) by OCC, the Ohio Marketers Group and OPAE. As OPAE noted in its brief before the Commission, the stipulation has no support from residential customers or from any other customers actually subject to its terms; it is not balanced and does not represent the agreement of any customer class that was not benefiting from the company's largesse. The plan rates cannot possibly be viewed as just and reasonable, the standard for review traditionally applied by a commission in the regulatory process.

CG&E-Duke argues that it did not enter into any side agreements and that the Duke Energy Retail Services and Cinergy contracts are irrelevant to these proceedings. CG&E-Duke Brief at 14. CG&E argues that its affiliates made the side agreements and not CG&E itself.

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IV. THE OHIO SUPREME COURT AND THE COMMISSION RELIED ON THE STIPULATION IN FINDING THAT THE STANDARD SERVICE OFFER WAS REASONABLE AND MARKET BASED.

The Staff and CG&E-Duke claim that the standard service offer is a market price. They cite the Supreme Court as holding that the Commission's approved standard service offer is a market price. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 300, 310-311. CG&E Brief at 13.

The Commission's paragraph finding a market-based standard service offer in its Opinion and Order reads as follows:

The Commission finds that the rate under the stipulation is a market-based rate. The Commission notes that Section 4928.14, Revised Code, allows it flexibility in approving processes for determining market-based rates for the standard service offer. The Commission finds that the stipulation was negotiated among five suppliers and organizations representing various categories of consumers, from low income residential consumers to large industrial users. The stipulation also includes provisions that provide for changes to reflect changes in certain costs. In addition, the stipulation, as revised by this opinion and order, allows the Commission to monitor the prices and confirm that, over time, those prices remain market-based and that consumers have adequate options for choosing among generation suppliers.

Opinion and Order (September 29, 2004) at 26. Thus, the Commission makes the finding of a market-based rate only in the context of a stipulation that "was negotiated among five suppliers and organizations representing various categories of consumers, from low income residential consumers to large industrial users." *Id.* The Court has questioned the validity of that stipulation. Many of the signatories received an inducement to support the stipulation, which benefited their narrow interests, not the public interest (R.C. §4909.18).

Before the Court, the Commission pled for affirmation based on the stipulation. The Commission wrote:

The record shows that the rate was negotiated between suppliers and consumers, that it will be changed to reflect changes in market costs, and that it will be monitored by the Commission to maintain a market tie.

Commission Brief, Supreme Court Case No. 05-946 (August 5, 2005) at 15.

Thus, the Commission emphasized to the Court the importance of the negotiation between the suppliers and consumers that had brought forth the stipulation.

The Court cited the Commission's finding as follows:

After considering data and arguments from OCC and others attempting to refute CG&E's evidence, the commission found that CG&E's standard service offer was a market-based rate. The Commission stated that (1) R.C. 4928.14 allowed it flexibility in approving methods for determining market-based rates for standard service offers. (2) the stipulation was negotiated among five suppliers and other organizations representing various categories of consumers, from low-income residential consumers to large industrial users, (3) the stipulation allowed for modifications to reflect changes in certain costs, and (4) revisions to the stipulation would allow the Commission to monitor prices and confirm that prices will remain market based over time.

Ohio Consumers' Counsel v. Pub. Util. Comm., 111 Ohio St. 3d 300 ¶42. The Court found that the stipulation among several competitors in retail electric service and various categories of consumers was one of the criterion relied on by the Commission in finding that the standard service offer was market based. The Court then found as follows:

We conclude that the Commission's approval of CG&E's alternative to the competitive bidding process was reasonable and lawful. The commission found that CG&E's price to compare, as part of the standard service offer, was market based, and OCC has offered no evidence to contradict that finding. Various customer groups were parties to the stipulation and approved the price to compare and the method by which the price to compare would be tested to ensure that it remains market based. CG&E's

rate stabilization plan provides for a reasonable means of customer participation. Id. ¶56.

Again, it is obvious that there was no finding of the reasonableness of the market-based standard service offer except in the context of a stipulation to which various customer groups agreed. With the validity of that stipulation now in doubt, there is no finding that the standard service offer is reasonable or market based.

The Staff argues that the standard service offer must be just and reasonable (R.C. §4909.18) and market based [R.C. §4928.14(A)]. According to the Staff, the Commission has very great latitude in the actions that it can take. Staff Brief at 6. The Staff argues that there cannot be a cost-based standard service offer, but also concedes that it is necessary to use some cost-based components to reach an overall market-based price. Staff Brief at 7.

OCC witness Neil H. Talbot testified that the components of the Commission-approved standard service offer are poorly defined and do not have a reasonable basis. The Commission-approved 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. While the Staff argues that the standard service offer cannot be cost based, the Staff concedes that cost-based components are necessary. It makes no sense that the Staff cannot allow a consistently cost-based standard service offer to serve as a proxy in the absence of a functioning retail market.

OCC witness Talbot urged the Commission to consider the overall reasonableness of the standard service offer's broader items and the reasonableness of the overall 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. In this context, specifically, the infrastructure maintenance fund ("IMF") charge should be eliminated as a new and duplicative charge.

The status quo is not acceptable. 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. It is as though the components were designed to achieve a revenue target while frustrating potential competitors. 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. With the rejection of the stipulation and the outcome before the Court in doubt, the Commission should craft a standard service offer actually acceptable to all the parties, including the representatives of all customer classes, in these cases. Moreover, as the evidence of record affirms, the IMF charge should be eliminated.

VI. CONCLUSION

Contrary to the arguments put forth by the Staff, the Ohio Supreme Court has already determined the relevance of the stipulation and the side agreements.

The existence of a stipulation is fundamental to the Commission's Opinion and Order and Entry on Rehearing in these cases. The Commission relied on the stipulation in its orders and before the Court. The Court also relied on the stipulation in determining that the standard service offer was reasonable.

The Court remanded this case to the Commission to allow discovery of the side agreements not as an end in itself, but because the Court found that the side agreements could challenge the Commission's finding that the stipulation was the product of serious bargaining among the parties. The evidence of the side agreements, currently under seal, clearly demonstrates that there was no serious bargaining among the parties;

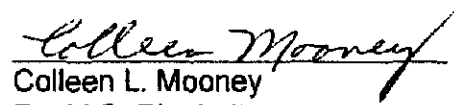
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With the remand evidence of the side agreements, the Commission must now find that its criteria for the reasonableness of settlements have not been met. The Commission cannot now find that the stipulation should have been approved.

In response to the Court's questioning of the validity of the stipulation, the Staff responds that the stipulation is irrelevant. This is not the argument the Staff made at the Commission or the Court. The Commission's brief before the Court urged affirmation on the basis of the stipulation. The Commission relied on the stipulation as it has in numerous occasions before the Court. The stipulation was absolutely crucial to the Commission's case before the Court. Court precedent is that rate plans may be affirmed on the basis of stipulations among various

interests and customer groups. The Court's questioning of the validity of this stipulation does not make the stipulation irrelevant; it renders suspect the entirety of the Commission's case before the Court.


Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of Ohio Partners for Affordable Energy's Reply Brief (public version) has been electronically delivered to the following parties in the above-captioned proceedings on this 27th day of April 2007.


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