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231 West Lima Street
P.O. Box 1793
Findlay OH 45839-1793
419. 425.8860
Fax 419 425.8862
www.ohiopartners.org

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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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
MEMORANDUM CONTRA MOTION TO STRIKE

Ohio Partners for Affordable Energy ("OPAE"), an intervenor in the above-captioned cases, hereby submits this memorandum contra the motion to strike filed at the Public Utilities Commission of Ohio ("Commission") by People Working Cooperatively ("PWC"), another intervenor in these cases. These dockets concern applications made by The Cincinnati Gas & Electric Company ("CG&E"), now Duke Energy Ohio, Inc. ("Duke") and the remand 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. *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 300.

In its motion to strike, PWC asks the Commission to strike from OPAE's initial brief (both the public and confidential version) the last two sentences of the second paragraph on Page 11. The second paragraph with the last two sentences highlighted reads as follows:

The stipulation had no support from residential customers.
OCC, which by statute, represents residential customers,

steadfastly opposed the stipulation, as did OPAE, which has served as an advocate for residential and low-income customers since its founding in 1996. 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.**

PWC argues that these last two sentences should be stricken from OPAE's brief because their factual premise and conclusion are not supported by any evidence of record and strongly suggest that PWC has not been and is not exercising its independent judgment regarding the issues in these proceedings.

On the other hand, PWC concedes that it obtains funding from CG&E-Duke. PWC also concedes that its primary purpose in these proceedings is to assure that funding promised by the stipulation in CG&E's electric transition plan case be continued and extended through the end of the market development period. PWC claims that its concern for the interests of consumers is demonstrated by its desire to extend the funding it receives from CG&E-Duke for its projects, apparently regardless of the overall impact of the decisions on residential customer bills. PWC also states that an OPAE client competes for and receives CG&E funds.

The point made in OPAE's brief is made even more emphatic by PWC's motion to strike. PWC receives funding from CG&E-Duke and its purpose in these cases is to assure continued funding. If an OPAE member competes for and receives some funding from CG&E, OPAE, at least, has not been co-opted

by such funding. OPAE did not sign the stipulation, and, in the interest of low-income residential and small commercial consumers, actively opposed and continues to oppose it.

PWC's support for the stipulation is important to this case. 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 finding in approving a rate plan on the basis of the reasonableness of a stipulation. 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.

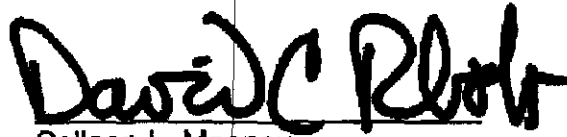
Ohio Consumers' Counsel v. Pub. Util. Comm., 2006-Ohio-2110 ¶18. The Court made it clear that the stipulation signed by a wide range of parties was the determining factor that allowed the Court to affirm the Commission's orders in *Constellation*. In the FirstEnergy opinion, the Court also stated:

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 to a stipulation. PWC's support for the stipulation allows CG&E and the stipulation's other signatories to claim support from some group purporting to represent the residential class. PWC signed the stipulation and takes no position contrary to CG&E-Duke's position in these cases. Its purpose in these cases is to assure continued funding from CG&E-Duke. These facts are the point made in OPAE's brief.

In these cases, the Commission relied on a stipulation to determine the outcome. The Court remanded the Commission's decision to determine whether the stipulation was actually the product of serious bargaining among the parties. The motive of the parties who signed the stipulation is an issue in these cases. OPAE has no desire to cast aspersions on PWC or any other party. PWC operates a number high quality programs to assist low-income customers. However, OPAE does note, as PWC itself admits, that PWC's purpose in this case is to assure continued funding from CG&E. If PWC is exercising independent judgment, its independent judgment tells it to side with CG&E to assure continued funding. PWC signed the stipulation and has taken no position contrary to the position of CG&E-Duke in these cases. PWC admits to the characterization of intent contained in OPAE's brief. There is no justification for this motion to strike, and it should be denied..

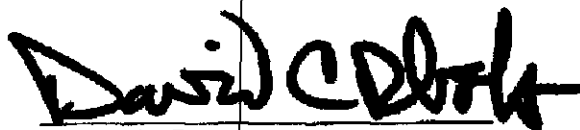
Respectfully submitted,

A handwritten signature in black ink that reads "David C Rinebolt". The signature is written in a cursive, slightly slanted style.

Colleen L. Mooney
David C. Rinebolt
Ohio Partners for Affordable Energy
231 W. Lima Street
PO Box 1793
Findlay, Ohio 45839-1793
Tele - 419-425-8860
FAX - 419-425-8862
cmooney2@columbus.rr.com
drinebolt@aol.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of Ohio Partners for Affordable Energy's Reply Brief has been electronically delivered to the following parties in the above-captioned proceedings on this 4th day of May 2007.



David C. Rinebolt
Ohio Partners for Affordable Energy

PARTIES

Paul Colbert
Cincinnati Gas & Electric Company
139 E. Fourth St. 25th Floor
Atrium II Building
Cincinnati, Ohio 45201-0960
paul.colbert@duke-energy.com
anita.schafer@duke-energy.com
rocco.d'ascenzo@duke-energy.com

Daniel J. Neilsen
McNees, Wallace & Nurick
Fifth Third Center, 21st Floor
21 East State Street
Columbus, Ohio 43215
dneilsen@mwncmh.com

Thomas McNamee
Attorney General's Office
Public Utilities Commission Section
180 E. Broad Street, 9th Floor
Columbus, Ohio 43215-3793
Thomas.McNamee@puc.state.oh.us

Howard Petricoff
Vorys, Sater, Seymour & Pease
52 East Gay Street
Columbus, Ohio 43216-1008
mhpetricoff@cssp.com

Jeffrey Small
Office of the Consumers' Counsel
10 W. Broad Street, 18th Floor
Columbus, Ohio 43215
small@occ.state.oh.us

Michael Kurtz
Boehm, Kurtz & Lowry
36 E. Seventh St. Ste. 1510
Cincinnati, Ohio 45202
mkurtz@bkllawfirm.com

David Boehm
Boehm, Kurtz & Lowry
36 E. Seventh St. Ste. 1510
Cincinnati, Ohio 45202
dboehm@bkllaw.com

Michael Dortch
Kravitz, Brown & Dortch
145 E. Rich Street
Columbus, Ohio 43215
mdortch@kravitzllc.com

Mary W. Christensen
401 North Front Street, Ste. 350
Columbus, Ohio 43215-2499
Mchristensen@Columbuslaw.org

Barth Royer
Bell, Royer & Sanders
33 South Grant Avenue
Columbus, Ohio 43215
broyer@brscolaw.com

Craig Goodman
National Energy Marketers
3333 K Street NW, Suite 110
Washington, DC 20007
cgoodman@energymarketers.com

Arthur E. Korkosz
FirstEnergy Solutions
76 South Main Street
Akron, Ohio 44308
KorkoszA@FirstEnergyCorp.com

Noel M. Morgan
215 East Ninth Street, Ste. 200
Cincinnati, Ohio 45202
nmorgan@lascinti.org

Dane Stinson, Bailey Cavalieri
10 W. Broad Street, Suite 2100
Columbus, Ohio 43215
dane.stinson@baileycavalieri.com

Rick Sites
Ohio Hospital Association
155 E. Broad Street, 15th Floor
Columbus, Ohio 43215-3620
www.ohanet.org

Thomas J. O'Brien
Bricker & Eckler
100 South Third Street
Columbus, Ohio 43215
tobrien@bricker.com

Shawn Leyden
PSEG Energy Resources
80 Park Plaza, 19th Fl.
Newark, NJ 07102
shawn.leyden@pseg.com

Theodore Schneider
Murdock, Goldenberg, Schneider
700 Walnut Street, Ste. 400
Cincinnati, Ohio 45202
tschneider@mgsqglaw.com

Donald Marshall
4465 Bridgetown Road, Ste. 1
Cincinnati, Ohio 45211
eagleenergy@fuse.net