

FILE

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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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

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OHIO PARTNERS FOR AFFORDABLE ENERGY'S  
MEMORANDUM CONTRA MOTION TO STRIKE

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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,

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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 stylized with a large, looped "D" and a cursive "Rinebolt".

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

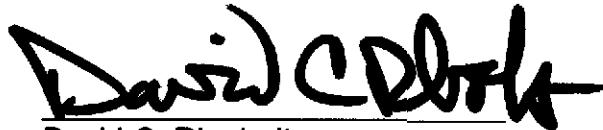
FAX – 419-425-8862

[cmooney2@columbus.rr.com](mailto:cmooney2@columbus.rr.com)

[drinebolt@aol.com](mailto: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 4<sup>th</sup> day of May 2007.



David C. Rinebolt  
Ohio Partners for Affordable Energy

## PARTIES

Paul Colbert  
Cincinnati Gas & Electric Company  
139 E. Fourth St. 25<sup>th</sup> Floor  
Atrium II Building  
Cincinnati, Ohio 45201-0960  
[paul.colbert@duke-energy.com](mailto:paul.colbert@duke-energy.com)  
[anita.schafer@duke-energy.com](mailto:anita.schafer@duke-energy.com)  
[rocco.d'ascenzo@duke-energy.com](mailto:rocco.d'ascenzo@duke-energy.com)

Jeffrey Small  
Office of the Consumers' Counsel  
10 W. Broad Street, 18<sup>th</sup> Floor  
Columbus, Ohio 43215  
[small@occ.state.oh.us](mailto:small@occ.state.oh.us)

Daniel J. Neilsen  
McNees, Wallace & Nurick  
Fifth Third Center, 21<sup>st</sup> Floor  
21 East State Street  
Columbus, Ohio 43215  
[dneilsen@mwncmh.com](mailto:dneilsen@mwncmh.com)

Michael Kurtz  
Boehm, Kurtz & Lowry  
36 E. Seventh St. Ste. 1510  
Cincinnati, Ohio 45202  
[mkurtz@bkllawfirm.com](mailto:mkurtz@bkllawfirm.com)

Thomas McNamee  
Attorney General's Office  
Public Utilities Commission Section  
180 E. Broad Street, 9<sup>th</sup> Floor  
Columbus, Ohio 43215-3793  
[Thomas.McNamee@puc.state.oh.us](mailto:Thomas.McNamee@puc.state.oh.us)

David Boehm  
Boehm, Kurtz & Lowry  
36 E. Seventh St. Ste. 1510  
Cincinnati, Ohio 45202  
[dboehm@bkllaw.com](mailto:dboehm@bkllaw.com)

Howard Petricoff  
Vorys, Sater, Seymour & Pease  
52 East Gay Street  
Columbus, Ohio 43216-1008  
[mhpetricoff@cssp.com](mailto:mhpetricoff@cssp.com)

Michael Dortch  
Kravitz, Brown & Dortch  
145 E. Rich Street  
Columbus, Ohio 43215  
[mdortch@kravitzllc.com](mailto:mdortch@kravitzllc.com)

Mary W. Christensen  
401 North Front Street, Ste. 350  
Columbus, Ohio 43215-2499  
[Mchristensen@Columbuslaw.org](mailto:Mchristensen@Columbuslaw.org)

Barth Royer  
Bell, Royer & Sanders  
33 South Grant Avenue  
Columbus, Ohio 43215  
[broyer@brscolaw.com](mailto:broyer@brscolaw.com)

Craig Goodman  
National Energy Marketers  
3333 K Street NW, Suite 110  
Washington, DC 20007  
[cgoodman@energymarketers.com](mailto:cgoodman@energymarketers.com)

Arthur E. Korkosz  
FirstEnergy Solutions  
76 South Main Street  
Akron, Ohio 44308  
[KorkoszA@FirstEnergyCorp.com](mailto:KorkoszA@FirstEnergyCorp.com)

Noel M. Morgan  
215 East Ninth Street, Ste. 200  
Cincinnati, Ohio 45202  
[nmorgan@lascinti.org](mailto:nmorgan@lascinti.org)

Dane Stinson, Bailey Cavalieri  
10 W. Broad Street, Suite 2100  
Columbus, Ohio 43215  
[dane.stinson@baileycavalieri.com](mailto:dane.stinson@baileycavalieri.com)

Rick Sites  
Ohio Hospital Association  
155 E. Broad Street, 15<sup>th</sup> Floor  
Columbus, Ohio 43215-3620  
[www.ohanet.org](http://www.ohanet.org)

Thomas J. O'Brien  
Bricker & Eckler  
100 South Third Street  
Columbus, Ohio 43215  
[tobrien@bricker.com](mailto:tobrien@bricker.com)

Shawn Leyden  
PSEG Energy Resources  
80 Park Plaza, 19<sup>th</sup> Fl.  
Newark, NJ 07102  
[shawn.leyden@pseg.com](mailto:shawn.leyden@pseg.com)

Theodore Schneider  
Murdock, Goldenberg, Schneider  
700 Walnut Street, Ste. 400  
Cincinnati, Ohio 45202  
[tschneider@mgsqglaw.com](mailto:tschneider@mgsqglaw.com)

Donald Marshall  
4465 Bridgetown Road, Ste. 1  
Cincinnati, Ohio 45211  
[eagleenergy@fuse.net](mailto:eagleenergy@fuse.net)