

FILE

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of	:	
the Cincinnati Gas and Electric	:	Case Nos:
Company to modify its non-	:	03-0093-EL-ATA
residential generation rates to	:	05-725-EL-UNC
provide for market-based standard	:	06-1069-EL-UNC
service offer pricing and to	:	05-724-EL-UNC
establish an alternative	:	06-1068-EL-UNC
competitively-bid service rate	:	06-1085-EL-UNC
options subsequent to market	:	
development period.	:	

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POST-HEARING BRIEF OF STAFF OF  
PUBLIC UTILITIES COMMISSION OF OHIO

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**TABLE OF CONTENTS**

**Page:**

Introduction..... 1

Statement of Facts..... 1

Discussion..... 4

    I. The Commission evaluates Stipulations according to three criteria.....4

    II. The Stipulation Is The Product Of Serious Bargaining Among  
        Capable, Knowledgeable Parties. ....4

    III. The Stipulation, As A Package, Benefits Ratepayers And The  
        Public Interest. ....5

    IV. The Stipulation Does Not Violate An Important Regulatory  
        Principle Or Practice. ....7

Conclusion

## **Introduction**

The review of the Stipulation presented in this case is about reasonableness. The Stipulation is reasonable as Staff testified. No one questions the stipulation is the product of serious bargaining among capable and knowledgeable parties. Additionally, the Stipulation, as a package, benefits ratepayers and the public interest. Finally, the Stipulation does not violate an important regulatory principle or practice. The Stipulation should be approved.

## **Statement of Facts**

The General Assembly passed S.B.3 in 1999 providing for competitive retail electrical service in Ohio.<sup>1</sup> Pursuant to that legislation, Duke Energy-Ohio (DEOH)<sup>2</sup> and others submitted transition plans to the Commission for approval.<sup>3</sup> Those plans provided for market development periods to allow competitive retail electrical service competition to develop to a level anticipated by S.B.3.<sup>4</sup> That did not occur; competition did not develop to anticipated levels by the end of the market development period.<sup>5</sup>

In response to that situation, the Commission asked DEOH, among others, to file a rate stabilization plan (RSP) that would stabilize prices after the termination of the market development period and allow additional time for competitive retail electrical

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<sup>1</sup> *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et.al.* (Opinion & Order at 4) (September 29, 2004).

<sup>2</sup> Duke Energy-Ohio is the successor to Cincinnati Gas & Electric Company. References in this brief to one are intended to include both.

<sup>3</sup> *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et.al.* (Opinion & Order at 4) (September 29, 2004).

<sup>4</sup> *Id.*

<sup>5</sup> Staff Remand Ex. 1 (Cahaan Prepared Test. at 4) (March 9, 2007).

service markets to grow.<sup>6</sup> The Commission sought three goals through the rate stabilization plans, including DEOH's plan.<sup>7</sup> The plans should (1) provide rate certainty for customers, (2) provide financial stability for utility companies, and (3) encourage the development of competition.<sup>8</sup> These three goals conflict and the Commission seeks an appropriate balance and sustainable solution between these competing interests.<sup>9</sup>

Three major controls exist for a rate stabilization plan to use in accomplishing the requisite balance.<sup>10</sup> One control is the level of the (total) price of electricity under the standard service offer.<sup>11</sup> Another control is the amount of the total price that is avoidable if customers shop.<sup>12</sup> The third control is the mechanism, if any, for adjusting the price for changes in conditions, such as the riders involved in this case.<sup>13</sup> These control mechanisms do not necessarily affect results in symmetric or simple ways.<sup>14</sup> Nevertheless, the rate stabilization plan's goals are controlled by the three controls/tools.<sup>15</sup> How a value for each is determined does not matter. All that matters are the results in terms of achieving an appropriate and sustainable balance among the three conflicting goals.<sup>16</sup>

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<sup>6</sup> *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et.al.* (Opinion & Order at 5) (September 29, 2004).

<sup>7</sup> *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et.al.* (Entry on Rehearing at 13) (November 23, 2004); Staff Remand Ex. 1 (Cahaan Prepared Test. at 4) (March 9, 2007).

<sup>8</sup> *Id.*

<sup>9</sup> Staff Remand Ex. 1 (Cahaan Prepared Test. at 4) (March 9, 2007).

<sup>10</sup> *Id.* at 7.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 8.

<sup>15</sup> *Id.* at 9.

<sup>16</sup> *Id.* at 10.

The Commission approved DEOH's rate stabilization plan.<sup>17</sup> That plan has three cost tracking mechanisms that are set annually for the following year: the FPP, SRT, and AAC.<sup>18</sup> DEOH filed applications with the Commission to set those mechanisms for the succeeding year. Those applications occasioned this case and led, ultimately, to this Stipulation.

The Attorney Examiners conducted a hearing on the Stipulation at which DEOH and Staff presented evidence supporting the Stipulation. OCC's witness Haugh was the only witness presenting testimony against the Stipulation. Following the testimony, the Attorney Examiners set a briefing schedule and this brief is presented in accord with that schedule.

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<sup>17</sup> *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et.al.* (Entry on Rehearing) (November 23, 2004).

<sup>18</sup> *Id.* at 10.

## Discussion

### **I. The Commission evaluates Stipulations according to three criteria.**

The Commission has long applied three criteria to determine the reasonableness of a stipulation and that evaluation has been upheld by the Ohio Supreme Court.<sup>19</sup> The three criteria are:

- 1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- 2) Does the settlement, as a package, benefit ratepayers and the public interest?
- 3) Does the settlement package violate any important regulatory principle or practice?<sup>20</sup>

In applying these criteria, the Ohio Supreme court has stated the Commission may place substantial weight on the stipulation's terms even though the stipulation does not bind the Commission.<sup>21</sup> The stipulation presented in this case satisfies these criteria.

### **II. The Stipulation Is The Product Of Serious Bargaining Among Capable, Knowledgeable Parties.**

No one questions that the first criteria is satisfied. Mr. Michael Haugh, testifying on behalf of OCC, was the only witness to suggest the Stipulation did not meet all three criteria.<sup>22</sup> Although Mr. Haugh questioned whether the Stipulation met the second and

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<sup>19</sup> *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et.al.* (Opinion & Order at 12) (September 29, 2004).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> OCC Remand Rider Ex. 2 (Haugh Supp. Test. at 2-7) (DATE).

third prongs of the test, he did not question if the Stipulation was the product of serious bargaining among capable and knowledgeable parties.<sup>23</sup>

The Stipulation was the product of serious bargaining among capable and knowledgeable parties.<sup>24</sup> All parties had an opportunity to fully participate in all the settlement conferences.<sup>25</sup> As Mr. Smith, testifying on behalf of DEOH, stated “[a]ll parties were invited to attend settlement discussions regarding the Rider Adjustment Cases ....”<sup>26</sup> As he also described, “[d]uring those conferences, all Parties present were invited to participate and many issues were addressed, including the recommendations contained in the audit reports filed in the FPP and SRT Cases.”<sup>27</sup> Those discussions produced the Stipulation.<sup>28</sup>

All parties, including OCC, had an opportunity for input and to negotiate. The participating parties and their representatives were experienced and knowledgeable. The Stipulation met the first criteria and no one disputes that.

### **III. The Stipulation, As A Package, Benefits Ratepayers And The Public Interest.**

The settlement represented in this Stipulation, as a package, benefits the customers of DEOH and serves the public interest, a Mr. Cahaan testified.<sup>29</sup> This review of the riders associated with DEOH’s Rate Stabilization Plan, of course, springs from that plan and Ohio Revised Code Chapter 4928, concerning competitive electric retail

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<sup>23</sup> *Id.*

<sup>24</sup> DE-Ohio Remand Rider Ex. 6 (Smith Direct Test. at 4) (DATE).

<sup>25</sup> *Id.* at 4-5.

<sup>26</sup> *Id.* at 5.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Staff Remand Rider Ex. 3 (Cahaan Prepared Test. at 1) (April 9, 2007).

service.<sup>30</sup> Accordingly, this evaluation involves benefits, principles and practices associated with that plan.

The rate stabilization plan balances competing interests and this stipulation furthers that balance. As Mr. Cahaan explained, “rate stabilization plans are needed because well functioning markets had not sufficiently developed on either retail or wholesale levels.”<sup>31</sup> For that reason, the Commission called for the plans’ creation to serve three conflicting goals: 1) protecting the consumer from the volatility and risks of the very imperfect market, which is furthered by lower prices and lower risks 2) assuring electric distribution utilities, like DEOH, of financial stability, which is furthered by higher incomes and lower risk; and 3) encouraging the development of retail markets.<sup>32</sup> Rate stabilization plans have three major control variables to help accomplish these goals.<sup>33</sup> One is the price of electricity under the Standard Service Offer (SSO).<sup>34</sup> Another is the portion of SSO that is avoidable.<sup>35</sup> The final one is the mechanisms, such as the riders in this case, for adjusting the price for changes in conditions.<sup>36</sup> The rate stabilization plan’s goals and the allocation of money and risk are controlled by the SSO, the degree of avoidability and the nature of the cost tracking mechanism.<sup>37</sup>

Staff believes the Stipulation furthers a proper balance between competing goals. Furthering that balance benefits ratepayers and the public interest and it does not violate

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<sup>30</sup> *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et.al.* (Entry on Rehearing at 9-11) (November 23, 2004); *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et.al.* (Opinion and Order at 4-7) (September 29, 2004).

<sup>31</sup> Staff Remand Ex. 1 (Cahaan Prepared Test. at 4) (March 9, 2007).

<sup>32</sup> *Id.* at 4, 7.

<sup>33</sup> *Id.* at 7.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 9.



any important regulatory policy or practice. Accordingly, Staff believes the Stipulation is reasonable and urges the Commission to approve it.

Mr. Cahaan explained the Stipulation's nine agreements relating to the riders. He explained the Stipulation's provisions can be grouped under two general categories. One group directly involves revenues.<sup>38</sup> The other group involves process matters.<sup>39</sup> Agreements one and five (in part) are those involving revenues.<sup>40</sup> Staff believes the first agreement "represents a reasonable compromise among the parties involved," as Mr. Cahaan testified.<sup>41</sup> Through the fifth agreement, the signatories adopt the calculations Staff presented and, perhaps not surprisingly, "Staff certainly believes that this element of the stipulation [the fifth agreement] is reasonable" as Mr. Cahaan testified.<sup>42</sup> All the other agreements involved "process" matters; that is, "how certain problems are to be solved."<sup>43</sup> Staff believes that these agreements initiate an appropriate means of addressing the problems.<sup>44</sup> Accordingly, Staff recommends the Commission approve the Stipulation.

#### **IV. The Stipulation Does Not Violate An Important Regulatory Principle Or Practice.**

The Stipulation does not violate an important regulatory principle or practice. Only OCC objected to the Stipulation and OCC claimed the Stipulation violated only one "traditional" regulatory principle; that "traditional" regulatory principle does not apply in this case. OCC objected to the inclusion of CWIP in the AAC because "traditional,"

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 2.

<sup>40</sup> Staff Remand Rider Ex. 3 (Cahaan Prepared Test. at 1) (April 9, 2007).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 2.

<sup>44</sup> *Id.*

meaning regulatory ratemaking, principles would not have allowed a return on CWIP in a ratemaking proceeding.<sup>45</sup>

The “traditional” principle OCC cites does not apply to this case. The “traditional” principle that OCC cites is a statutory, ratemaking limitation.<sup>46</sup> It is not applicable in the competitive environment. The Revised Code does not contain any requirement or any comparable one for a competitive environment such as involved in this matter.<sup>47</sup>

The differences between the competitive environment this case concerns and a monopolistic one are significant for any review of activities involving them. The analytic process is different.<sup>48</sup> A rate stabilization plan *is not about cost-based ratemaking*.<sup>49</sup> Mr. Cahaan testified this difference when discussing why “traditional” ratemaking principles, such as the CWIP limitation OCC relies on, do not apply in a case involving a rate stabilization plan such as this one. He stated:

To begin with, an RSP is not about cost-based ratemaking. Let me repeat this –a market based standard service offer is not about cost-based ratemaking. The ratesetting provisions of Ohio Revised Code 4909 do not apply.<sup>50</sup>

This case arises under the competitive retail electric provisions of Ohio Revised Code Chapter 4928. For that reason the Revised Code ratesetting provisions, Ohio Revised Code Chapter 4909, that OCC cites do not apply.<sup>51</sup>

Additionally, the logic and categories of cost-based ratemaking do not apply.<sup>52</sup>

Even where a principle or practice is borrowed from the “traditional” regulatory

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<sup>45</sup> OCC Remand Rider Ex. 2 (Haugh Supp. Test. at 6) (DATE).

<sup>46</sup> Ohio Rev. Code Ann. § 4909.15 (Anderson 2007).

<sup>47</sup> Ohio Rev. Code Ann. § 4928 (Anderson 2007).

<sup>48</sup> Staff Remand Rider Ex. 1 (Cahaan Prepared Test. at 4-5) (March 9, 2007).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

framework and used in the competitive environment, that principle or practice is not the same.<sup>53</sup> The legal basis and even the technical basis for a principle of practice are different in a competitive environment than the basis in a cost-based regulatory application.<sup>54</sup> Mr. Cahaan explained:

The logic and categories of cost-based ratemaking do not apply, unless we choose them to apply. We may choose such concepts and mechanisms [cost-based ratemaking concepts such as CWIP] because of familiarity, which helps consensus and implementation, but the fit is not exact. For instance, the CGE RSP contains a mechanism to mitigate risk to the EDU by tracking fuel and purchased power costs. This FPP is similar to the EFC of cost-based ratemaking, but, although the concept is similar, it is not the same.... Other ratemaking concepts, such as CWIP, do not have the same legal basis, and possibly not even the same technical basis, as they do in cost-based regulation.<sup>55</sup>

Moreover, the individual components so essential to the “traditional” rate-of-return ratemaking regulation do not matter when reviewing the implementation of an RSP, such as in this case.<sup>56</sup> That is a significant difference between a review in a “traditional” ratemaking case and this review. Mr. Cahaan explained:

In short, the various bases for determination of the individual components which exist in a cost-based environment do not exist. The precedents, legal definitions, the accounting and technical categories – all these do not exist in the RSP environment and are therefore unable to determine or condition decisions regarding individual pieces of the plan, at least not in the same way that they do in cost-based regulation.<sup>57</sup>

The traditional rate-case uses individual components, such as CWIP, differently than an RSP case.<sup>58</sup> In a rate case, the Commission evaluates a large number of

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<sup>52</sup> *Id.*  
<sup>53</sup> *Id.*  
<sup>54</sup> *Id.*  
<sup>55</sup> *Id.* at 5.  
<sup>56</sup> *Id.* at 10.  
<sup>57</sup> *Id.* at 5-6.  
<sup>58</sup> *Id.* at 4-5

individual components and determines each one individually.<sup>59</sup> The “correct” determination of each individual item “is *presumed* to generate a fair, reasonable, and sustainable solution and an appropriate balance of competing interests,” as Mr. Cahaan testified.<sup>60</sup> The decision-making in an RSP case is much different.<sup>61</sup>

The assessment of individual components does not matter in an RSP case such as this case.<sup>62</sup> Mr. Cahaan explained:

What is more, there is no guarantee or even presumption that independent determination or individual issues [so critical in a rate-making environment] will produce an acceptable result in terms of the goals, the fairness, and the sustainability of the Plan [RSP]. Everything works as a part of the whole and must be considered in that framework. Conversely, the logic of justifying the determination of any individual item in the RSP cannot be made in terms of that item Alone, but can only be made in terms of how it works with all other aspects of the Plan [RSP] to achieve the goals.<sup>63</sup>

The control variables do not necessarily affect prices and risk in symmetric or simple ways.<sup>64</sup> Even the existence of the individual riders is not important.<sup>65</sup> The important principle is *balance* among the three conflicting policy goals. Mr. Cahaan testified, “All that matters are the results in terms of achieving an appropriate and sustainable balance of outcomes (money and risk) among conflicting policy goals.”<sup>66</sup> In the rate stabilization case, the whole rather than the individual parts is the important consideration.

Simply, CWIP and all other “traditional” rate-making principles cannot be transferred to an RSP case and used in evaluations in the same way they are employed in a ratemaking case. It is not the same principle and it is not used in the same way. The

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<sup>59</sup> *Id.* at 4.

<sup>60</sup> *Id.* at 5-6.

<sup>61</sup> *Id.* at 6.

<sup>62</sup> *Id.* at 10

<sup>63</sup> *Id.* at 6.

<sup>64</sup> *Id.* at 8.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

statutory limitation that OCC relies on is not relevant here. Accordingly, the use of CWIP in the ACC does not violate any regulatory principle or practice. The Stipulation does not violate any important regulatory principle or practice, as Mr. Cahaan testified.<sup>67</sup>

### **Conclusion**

The Stipulation is reasonable. It meets all the criteria the Commission has applied in the past to evaluate a Stipulation. For that reason, Staff believes the Commission should approve the Stipulation.

Respectfully submitted,

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<sup>67</sup> Staff Remand Rider Ex. 3 (Cahaan Prepared Test. April 9, 2007) at 1.

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Post Hearing Brief was served by regular U.S. mail, postage prepaid, via electronic mail, or hand-delivered upon the following parties of record this 17<sup>th</sup> day of May, 2007.

/s/ Stephen A. Reilly

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