FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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 MOTION TO STRIKE

Ohio Partners for Affordable Energy ("OPAE"), an intervenor in the above-captioned cases, hereby moves the Public Utilities Commission of Ohio ("Commission") to strike certain portions of the reply brief filed May 30, 2007 by The Cincinnati Gas & Electric Company ("CG&E"), now Duke Energy Ohio, Inc. The disputed portions of CG&E's brief refer to settlement discussions, which are privileged and confidential. Moreover, no evidence of record supports the statements made by CG&E in the disputed portions of its reply brief. Further support for this motion is set forth in the attached memorandum in support.

Respectfully submitted,

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OHIO PARTNERS FOR AFFORDABLE ENERGY'S
MEMORANDUM IN SUPPORT OF THE
MOTION TO STRIKE

Ohio Partners for Affordable Energy ("OPAE"), an intervenor in the above-captioned cases, hereby submits this memorandum in support of its motion to strike certain portions of the reply brief filed May 30, 2007 by The Cincinnati Gas & Electric Company ("CG&E"), now known as Duke Energy Ohio, Inc. Specifically, OPAE moves to strike the portions of CG&E's brief beginning at Page 16, Line 9 through Page 17, Line 10. The disputed portions are three paragraphs that read as follows:

> Regarding OPAE's participation in the settlement discussions leading to the phase two Stipulation, DE-Ohio is unaware of any substantive comment made by OPAE during the settlement discussions. Unlike OCC, which made a settlement offer, OPAE made none.
>
> DE-Ohio is aware of the unfounded accusations made by OPAE regarding People Working Cooperatively (PWC) in these proceedings. The prior settlement offer made by OPAE in 2004, is part of the public record in these cases. In the original MBSSO proceeding, DE-Ohio agreed to nearly all of OPAE's settlement offer, including the amount of money to fund energy efficiency and weatherization programs. The only item that DE-Ohio refused to agree upon was that OPAE should administer the energy efficiency and weatherization programs instead of the independent Duke

> Energy Community Partnership, which includes a voting board of many community organizations and OCC and Staff as non-voting members.
>
> Basically, DE-Ohio would not agree to transfer control of energy efficiency and weatherization dollars from the Duke Energy Community Partnership to OPAE. OPAE was quite clear that the only reason it did not sign the settlement was DE-Ohio's refusal to give it control of the program dollars. OPAE has not offered one suggestion regarding the interest of any party or consumer other than itself throughout these proceedings. It was reasonable for DE-Ohio, Staff, and the other Stipulation signatories to reject OPAE's unspoken position.

In the first cited paragraph, CG&E attacks OPAE for making no "substantive comments" in settlement negotiations and making no settlement offer. OPAE is under no requirement to make "substantive comments" as defined by CG&E in settlement negotiations, or a settlement offer. The settlement negotiations gave OPAE no reason to believe that a just and reasonable settlement of these cases would be reached in Phase 2 (even if the inevitable partial stipulation were filed). Since OPAE is not a signatory party to the stipulations in these cases, OPAE's conduct is not relevant to the issue whether the stipulation is the product of serious bargaining. The signatory parties to the stipulation must defend it in terms of their own serious bargaining.

CG&E disregards the fact that the joint settlement offer of OPAE and Citizens United for Action ("CUFA") in 2004 has not been admitted into the evidentiary record in these proceedings. Merely filing a document in the docketing section of the Commission does not make it part of the evidentiary record; otherwise parties would not have to make motions to admit exhibits into the record at hearing. If CG&E had wished to admit OPAE and CUFA's 2004 settlement offer into the record in these cases as an exhibit sponsored by CG&E, it could have done so at the hearing. The hearing record is

now closed and OPAE and CUFA's 2004 settlement offer is not part of the evidentiary record in these cases.

There is also absolutely no support for CG&E's statement that OPAE was "quite clear that the only reason it did not sign the settlement was DE-Ohio's refusal to give it control of the program dollars." It is not clear as to whom it was "quite clear" why OPAE did not sign the stipulation. The source for this statement is unknown, and the statement is not supported by any evidence of record in these cases. Clairvoyance does not amount to evidence. CG&E confirms its reliance on intuition when it writes that "it was reasonable for DE-Ohio, Staff and the other Stipulation signatories to reject OPAE's unspoken position." There is absolutely no precedent for attacking a party for something it has not said. There is also no precedent for characterizing as "reasonable" the views of others (such as the Staff and other signatory parties) regarding OPAE's "unspoken" position in settlement negotiations that were conducted only among CG&E, OPAE and CUFA.

CG&E continues to mischaracterize the joint OPAE-CUFA settlement offer, which requested that unspent funding for demand side management already included in CG&E's base rates be provided as a grant to OPAE to finance the delivery of weatherization services by all qualified providers – including People Working Cooperatively ("PWC").[1] The offer specifically notes that "[c]urrent programs will continue." The plain language of the settlement offer – which again is not on the evidentiary record – fails to support the interpretation offered by CG&E.

[1] The settlement offer also includes three other distinct issues which would affect all customers either directly or indirectly.

There is no court reporter at settlement negotiations to prove or disprove statements such as those made here by CG&E. Moreover, it is hypocritical for CG&E to criticize OPAE for making no settlement offers in Phase 2 of these proceedings on the one hand and then only a few sentences later to criticize OPAE for a settlement offer OPAE made in 2004. In making these unsupported statements, CG&E utterly disregards any notion of confidentiality and privilege in settlement negotiations. CG&E's actions will have a chilling effect on settlement discussions; its conduct makes clear that anything a party says in the same room as CG&E may wind up mischaracterized - if not created out of whole cloth - in a subsequent public filing.

The Commission has already found that the settlement negotiations at issue are privileged. In an Entry dated September 28, 2004, the attorney examiner granted OPAE's motion for a protective order for the 2004 settlement document and found that protection was warranted. Id. at 3. While the protective order for the document has expired, the privilege for the settlement negotiations remains. The examiner granted OPAE's motion to strike portions of CG&E's reply brief "based on alleged factual misstatements and violations of requirements that settlement discussions remain privileged." Entry at 4. The Entry confirms that statements made in the settlement discussions remain protected and may not be freely disclosed. Id. at 4.

CG&E's problem with OPAE is not that it made no "substantive comments" or offers at the settlement negotiations for Phase 2 or that OPAE made an offer that CG&E rejected in 2004. CG&E's problem is that OPAE opposes the stipulation and argues that no serious bargaining took place among the signatory parties to the stipulation. The serious bargaining was for the side

deals under which a few large customers benefited. Those receiving the negotiated benefits then signed a stipulation which foisted the majority of the rate increases on small customers. Thus, the stipulations do not meet the Commission's test for the reasonableness of stipulations because, among other things, they are not the product of serious bargaining. Moreover, the settlement process has been so clearly undermined in these proceedings that it should be impossible for the Commission to find that any stipulation arising from these dealings has any merit whatsoever, much less satisfies the Commission's criteria for the reasonableness of stipulations.

Wherefore, the Commission should strike CG&E's brief beginning at Page 16, Line 9 through Page 17, Line 10. There is no evidence of record in these cases that supports the claims made by CG&E in these paragraphs. CG&E merely gives a self-serving account of privileged settlement negotiations (for which no record exists) in an apparent attempt to embarrass OPAE both for allegedly making a settlement offer and then allegedly not making a settlement offer. A previous ruling by the attorney examiner in these cases granted a motion to strike portions of a CG&E pleading for exactly the same reasons offered herein by OPAE. This direct precedent and the opinions on which it is based should be followed here. See, *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for The Dayton Power & Light Company*, Case Nos. 02-2779-EL-ATA, et al., Opinion and Order at 12 (September 2, 2003); Entry on Rehearing at 9 (October 22, 2003).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Ohio Partners for Affordable Energy's Motion to Strike has been electronically delivered to the following parties in the above-captioned proceedings on this 8th day of June 2007.

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