

FILE

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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PUCO

In the Matter of the Consolidated)	Case Nos.	03-93-EL-ATA
Duke Energy Ohio, Inc. Rate)		03-2079-EL-AAM
Stabilization Plan Remand and)		03-2080-EL-ATA
Rider Adjustment Cases)		03-2081-EL-AAM
		05-724-EL-UNC
		05-725-EL-UNC
		06-1068-EL-UNC
		06-1069-EL-UNC
		06-1085-EL-UNC

REPLY OF PEOPLE WORKING COOPERATIVELY, INC. TO OHIO PARTNERS FOR AFFORDABLE ENERGY'S MEMORANDUM CONTRA

People Working Cooperatively, Inc. ("PWC") files this reply to the *Ohio Partners for Affordable Energy's Memorandum Contra*, filed on June 8, 2007 (referred to herein as "OPAE Memo Contra") in the above-named proceedings. Ohio Partners for Affordable Energy ("OPAE") filed this pleading in response to PWC'S renewed motion to strike language in several of OPAE's pleadings filed in these proceedings.¹

There is nothing new in OPAE's Memo Contra to which PWC has not previously responded, so PWC respectfully refers the Commission to PWC's original motion to strike, filed April 27; its May 14 reply in Phase I to OPAE's memorandum contra PWC's motion to strike, which OPAE filed May 4, 2007; and the PWC Reply Brief, Phase II, which was filed on June 1, 2007. It will be quite clear that OPAE has made

¹ OPAE states that it is replying to "the pleading filed June 1, 2007 by People Working Cooperatively..." OPAE Memo Contra, at 1, which is PWC's *Reply Brief, Phase II, of People Working Cooperatively, Inc. and Renewal of Motion to Strike a Portion of the Brief of the Ohio Partners for Affordable Energy by People Working Cooperatively, Inc.* (referred to herein as "PWC Reply Brief, Phase II," filed in these proceedings on June 1, 2007, two days after the filing date set by the presiding Attorney Examiner and accompanied by a *Motion for Extension of Time to File Reply Brief, Phase II, of People Working Cooperatively, Inc.*, which PWC filed under Ohio Administrative Code Rule 4901-1-12 (C).

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unfair and damaging claims against PWC expressly and in many instances by innuendo contrary to its attempt at innocence made in the OP&E Memo Contra.²

PWC also submits comments regarding OP&E's *Ohio Partners for Affordable Energy's Motion to Strike*, also filed in Phase II of these proceedings on June 8, 2007 (referred to herein as "OP&E Motion to Strike"), by which OP&E asks the Commission to strike the portions of Duke Energy-Ohio's reply brief, Phase II in which DE-O discusses the content of the settlement discussions of which the OP&E Settlement Offer was the center.³ PWC adds its comments because it too has offered arguments based on what happened in the settlement conference in which OP&E, Cincinnati Gas & Electric Company ("CG&E"), Communities United for Action ("CUFA") and PWC participated. Under the unusual circumstances surrounding the Settlement Offer's now being in the public record and the unrestrained discussion of some of the parties regarding other parties' motives⁴ in these proceedings, the settlement conference content appears to be fair game for argument in these pleadings.

Regarding OP&E's Motion to Strike, there has been much discussion of OP&E's Settlement Offer by Duke Energy-Ohio, PWC and OP&E. While OP&E has argued that the Settlement Offer is not in the record (an assertion unsupported by OP&E citation to law, including Commission precedent) and is confidential under a September 28, 2004

² See OP&E Memo Contra, second paragraph, page 1, beginning with "In its April 27, 2007 motion to strike...."

³ On July 16, 2004, OP&E filed what it described as a settlement offer in the docket of the original RSP proceeding and asked the Commission to grant the settlement offer protective order treatment under Ohio Administrative Code Rule 4901-1-24. On September 18, 2004, protective order treatment was granted, but only for the 18-month period provided for in OAC Rule 4901-1-24(F) and not permanently, as OP&E requested. The settlement offer is referred to as "Settlement Offer" herein. See *Motion for Protective Order and Waiver of Rule 4901-1-24(F)*, filed in these the pre-remand phase of these proceedings on July 16, 2004.

⁴ See *Ohio Partners for Affordable Energy's Memorandum Contra Motion to Strike*, filed May 4, 2007 in which OP&E argued:

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....*

(Italics added) OP&E Memo Contra Motion to Strike, May 4, 2007, at 4.

Attorney Examiner Entry in these proceedings, it nonetheless makes arguments about the Settlement Offer in its pleadings and relies on the Settlement Offer to support its position regarding its motives in these proceedings.

This situation involving OPAE's Settlement Offer is unusual in Commission history because parties typically do not file a confidential settlement proposal, especially one that's been rejected, in the public record, even under seal as OPAE did in the original RSP portion of these proceedings on July 16, 2004. And if a party wishes continuing protective order treatment, such a party asks for the orders renewal. Upon the expiration of the 18-month period of protection from the first protective order, OPAE did not ask for continuation of protective order treatment for the Settlement Offer. This strongly suggests that OPAE did not believe continuing confidential treatment for the Settlement Offer to be necessary. Had OPAE filed a request for the renewal of the protective order for the Settlement Offer, there would be no discussion of the Offer in the pleadings. But now it's in the public record and, further, has been made relevant by OPAE's own pleadings to the matters before the Commission in both Phase I and II involving the motives⁵ of parties' signing (or not signing) stipulations in these proceedings.

Despite OPAE's July 16, 2004 *Motion for a Protective Order and Waiver of Rule 4901-1-24(F)*, by which OPAE was requesting "permanent confidential treatment of the material," which OPAE described as "a writing prepared for the purpose of settlement,"⁶ it did not renew its request for confidential treatment for the Settlement Offer when the protective order, granted by a September 28, 2004 Attorney Examiner entry for only the eighteen months provided for in Ohio Administrative Code ("OAC")

⁵ See fn 3 above.

⁶ OPAE *Motion for Protective Order and Waiver of Rule 4901-1-24(F)*, filed in these the pre-remand phase of these proceedings on July 16, 2004, at 1 of Motion and at 2 of Memorandum in Support of the Motion.

Rule 4901-1-24(D)⁷, expired. The Settlement Offer was formally listed in the public record in these proceedings of the Commission on May 14, 2007, although the protective order had expired some time in 2006.⁸

In its original motion for a protective order, OP&E argued under the Commission's rule (OAC 4901-1-24) and Ohio Rule of Evidence 408, which OP&E quoted as stating, "Evidence of conduct or statements made in compromise negotiations is not admissible."⁹ The September 28, 2004 Entry accepted OP&E's argument regarding the worthiness of the Settlement Offer for a protective order. In its June 8, 2007 motion to strike portions of DE-O's reply brief, Phase II, OP&E has cited to the Entry granting the Settlement Offer protective order treatment, which stated that the Settlement Offer "is privileged information and that its non-disclosure is not inconsistent with the purposes of Title 49, Revised Code." Such reliance is *now* misplaced since the circumstances that obtained in the summer-fall of 2004 have changed and the document is now in the public record.

There are at least two flaws in OP&E's position that the Settlement Offer is not available as evidence in these proceedings *at this point* because of the Settlement Offer's alleged continuing confidential nature.

- 1) OP&E did not renew the motion for a protective order. It is clear from the Attorney Examiner's September 28, 2004 Entry that the only way OP&E could enjoy continuing protective order treatment of the Settlement Offer was if OP&E timely renewed its motion for protective order treatment, consistent with OAC Rule 4901-1-24(F) because it did not warrant the permanent protective order

⁷ *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify Its Nonresidential General Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Case Nos. 03-93-EL-ATA, 03-2079-EL-AAM, 03-2081-EL-AAM and 03-2080-EL-ATA, Entry, September 28, 2004, para. 10 and second ordering paragraph.

⁸ See Commission Docket, Memorandum released from confidential status filed by Dave Rinebolt on behalf of Ohio Partners for Affordable Energy and Citizens United for Action, May 14, 2007.

⁹ OP&E Motion for Protective Order and Waiver of Rule 4901-1-24(F), July 16, 2004, at memorandum in support page 1.

treatment that OP&A requested in 2004. The Settlement Offer is now in the public record of these proceedings without the protection from the Commission's rule.

- 2) It and the content of the discussions about the Settlement Offer are also, PWC contends, without protection from the Ohio Rules of Evidence, notably Rule 408. In its July 16, 2004 motion for a protective order, OP&A had relied upon Ohio Rule of Evidence 408 for its argument further supporting the confidentiality of the agreement and its worthiness for protective order treatment *at that time*. But the rule as a whole reads as follows:

RULE 408. Compromise and Offers to Compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. **This rule also does not require exclusion [of evidence] when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.**

Ohio Evid. R. 408. So even if the Settlement Offer had not become public, PWC contends that the Settlement Offer and the meeting in which it was discussed by the parties should not be excluded from the argument of parties in these proceedings because the argument based on the Settlement Offer is made for "another purpose," in this case, the purpose of showing the bias and prejudice of OP&A and its motives in these proceedings. OP&A is filling the record with information about PWC as if it were a witness, which will be the effect of his writings if its allegations are not stricken. PWC has raised and relied on the Settlement Offer that is now in the record in these proceedings, the authenticity of which has not been contested by OP&A, to show that OP&A has a bias in these proceedings and a prejudice against PWC and that the claims that OP&A makes against PWC regarding DE-O funding can and should be made

against OP&E given its DE-O funding history as supported in part by the Settlement Offer. If OP&E is or is deemed to be right about the motives of PWC that it has extrapolated from the fact that PWC seeks funding from DE-O, then it is relevant and important, as demonstrated by the Settlement Offer, that OP&E also sought substantial funding from CG&E, but did not get it. And, using OP&E's reasoning, it is not unreasonable to conclude that OP&E did not sign any stipulation with CG&E in the first round of the RSP proceeding because CG&E would not give OP&E control of over \$5 million dollars, OP&E's stated purposes for that money notwithstanding. PWC would not be making this argument except to show the Commission that, if OP&E's flimsy and reckless analysis of PWC's motives in these proceedings is right, then OP&E comes to the Commission with unclean hands. Its self-righteous position that "OP&E, at least, has not been co-opted by such funding [from CG&E]"¹⁰ can be explained as sour grapes since CG&E would not agree to fund OP&E. And again, using OP&E's approach, PWC would contend that OP&E's rejections of the stipulation is meaningless since OP&E's motives involved direct funding for itself, regardless of the benefits that the stipulation would bestow upon the residential consumers of the DE-O service territory. PWC would be going no farther than OP&E in recommending to the Commission that it disregard OP&E's rejection of the stipulations that have been signed by PWC because its motives were not pure.¹¹

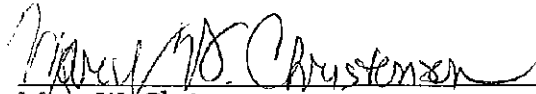
PWC does not like making arguments like the one above. It feels false because it's like OP&E's arguments about PWC. OP&E's arguments are false. There is no evidence in this record that OP&E's claims about PWC are true. The argument made immediately above demonstrates the complete unfairness of OP&E's hypocritical

¹⁰ See *Ohio Partners for Affordable Energy's Memorandum Contra Motion to Strike*, filed in these proceedings on May 4, 2007, at 2

¹¹ OP&E's Settlement Offer offered CG&E in exchange for OP&E's four demands its unconditional withdrawal from the RSP proceeding "another disposition mutually agreeable to both parties." See attached Settlement Offer, which is attached to OP&E *Motion for Protective Order and Waiver of Rule 4901-1-24(F)*, July 16, 2004.

approach to PWC's motives, interests and goals in these cases and the damage that can be done to the reputation of an otherwise worthy organization.


Respectfully submitted on behalf of
PEOPLE WORKING COOPERATIVELY, INC.



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply, of People Working Cooperatively, Inc. to the OP&E Memorandum Contra has been served on the following parties of record in this proceeding by e-mail this 11th day of June, 2007.


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Consumers for Fair Utility
Rates

Michael Williams
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Housing Authority

Chuck Wright
W.S.O.S Community Action

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Executive Director & Counsel

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Deputy Director

July 15, 2004

VIA Overnight Delivery

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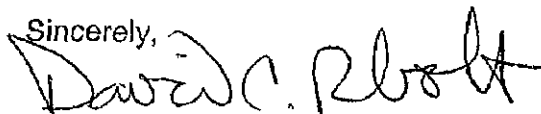
RE: Case No. 03-93-EL-ATA, et.al.

Dear Ms. Crockron:

Enclosed please find an original and 10 copies of a Motion for Protective Order including a two-page document to be filed under seal. Please have the Motion docketed in the above-referenced case. Copies have been served on all parties on the attached certification of service. We do not require a stamped copy.

If you have any questions, please do not hesitate to call. Thank you for your assistance in this matter.

Sincerely,



David C. Rinebolt
Executive Director and Counsel

Enclosure

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of The)
Cincinnati Gas & Electric Company to Modify)
Its Non-Residential Generation Rates to)
Provide for Market-Based Standard Service)
Offer Pricing and to Establish an Alternative)
Competitively-Bid Service Rate Option Sub-)
sequent to the Market Development Period.)

PUCO

Case No. 03-93-EL-ATA

In the Matter of the Application of The)
Cincinnati Gas & Electric Company for)
Authority to Modify Current Accounting)
Procedures for Certain Costs Associated with)
The Midwest Independent Transmission)
System Operator.)

Case No. 03-2079-EL-AAM

In the Matter of the Application of The)
Cincinnati Gas & Electric Company for)
Authority to Modify Current Accounting)
Procedures for Capital Investment in its)
Electric Transmission and Distribution System)
And to Establish a Capital Investment)
Reliability Rider to be Effective after the)
Market Development Period.)

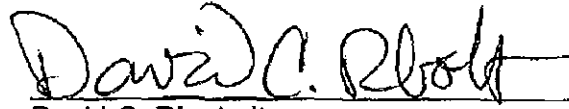
Case No. 03-2081-EL-AAM

Case No. 03-2080-EL-ATA

Motion for Protective Order and Waiver of Rule 4901-1-24(F)

Pursuant to Section 4901-1-24(D), O.A.C., Ohio Partners for Affordable Energy ("OPAE" respectfully requests that the Public Utilities Commission of Ohio ("PUCO" or "Commission") grant its Motion for a Protective Order with regard the Attachment A to the Motion to Strike Portions of The Cincinnati Gas & Electric Company's Reply Brief. In addition, OPAE also request a waiver of Rule 4901-1-24(F) to permit permanent confidential treatment of the material. These issues are discussed in the attached Memorandum in Support which is hereby incorporated herein.

Respectfully submitted,

A handwritten signature in black ink that reads "David C. Rinebolt". The signature is written in a cursive style with a horizontal line underneath it.

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Memorandum in Support

Ohio Partners for Affordable Energy seeks a protective order to protect the confidentiality of and to prohibit the disclosure of a document which is attached to the Motion to Strike filed by OPAE in this case and which was prepared as a settlement offer in the above-referenced case. This attachment has clearly been marked as confidential and is being filed contemporaneously with this Motion, under seal, separate from the remainder of the materials that compromise the Motion to Strike.¹

Under Evid. R. 408, "Evidence of conduct or statements made in compromise negotiations is not admissible." The document in questions was not a part of the discovery process in this case, nor is it evidence that was accepted by the Attorney Examiner as part of the record in this case. The document is a writing prepared for the purpose of settlement. In order to protect the privileged nature of the document and the sanctity of settlement discussions, OPAE is hereby requesting that it be afforded confidential treatment.

Rule 4901-1-24(D), O.A.C. authorizes the Commission to issue an order protecting the confidentiality of information "to the extent that state or federal law prohibits release of the information...and where non-disclosure of the information is not inconsistent with the purpose of Title 49 of the Revised Code." The document in question was prepared for the purpose of settlement discussion and

¹ The offer in questions was jointly submitted by OPAE and Citizens United for Action ("CUFA"). Counsel for OPAE has informed CUFA's counsel of this issue and he is unopposed to making this document available to the Commission confidentially.

is thus privileged under Ohio law. Non-disclosure is consistent with the purpose of Title 49 and the policy of the Commission to encourage full and frank discussions that could lead to settlement. OP&E is essentially alleging in its Motion to Strike that CG&E improperly relied upon this settlement document in making allegations in its Reply Brief. In order to provide the Commission with adequate information to make that determination, the document in question must be made available.

Confidential treatment of this document will not serve to disadvantage any party to this proceeding. CG&E is already in possession of the document, as are two other parties that were involved in discussions relative to low-income and Demand Side Management programs in the CG&E service territory. No other parties have raised issues associated with these matters in their initial or reply briefs. Some have seen earlier versions of this document which was made available during discussions with other parties. Thus, the information is irrelevant or already available to other parties and confidential treatment is not inconsistent with the goals of Title 49. In fact, the opposite is true because treating the document as confidential will reaffirm the policy of the Commission to encourage privileged settlement discussions.

OP&E also requests a waiver of Rule 4901-1-24(F), O.A.C. which would result in rescinding the protective order after eighteen months. OP&E asserts that the information deemed confidential today will remain so in eighteen months given that the document is a settlement offer and remains privileged under Ohio Rules of Evidence.

Wherefore, OP&E respectfully requests that the Commission grant its Motion for a Protective Order pursuant to Section 4901-1-24(D), O.A.C. and its Motion for a waiver of Rule 4901-1-24(F) for the reasons set forth above.



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Ohio Partners of Affordable Energy

MEMORANDUM

To: Paul Colbert, Senior Counsel – Cinergy
John Finnigan, Senior Counsel -- Cinergy

From: Dave Rinebolt, Executive Director and Counsel
Noel Morgan – Legal Aid Society of Cincinnati

Subject: CG&E Rate Case – Settlement Proposal

Date: May 10 2006

NOTE: The following information is confidential and relates to ongoing settlement discussions involving Case No. 03-93 et.al.

Ohio Partners for Affordable Energy ("OPAE") and Citizens United for Action ("CUFA") jointly make the following settlement offer to Cincinnati Gas & Electric Company ("CGE"). In return for an agreement on the following issues, OPAE and CUFA are willing to withdraw from the case or reach another disposition mutually agreeable to both parties.

Our proposal is as follows:

1. ***The Company will provide OPAE with \$1.345 million per year through 2008 for an energy efficiency and health and safety program modeled on the FirstEnergy Community Connections Program.*** Allowable program measures include energy efficiency/weatherization, roof repair and replacement, electrical repairs and upgrades, appliance repair and replacement, and consumer education. The program will be piggybacked with other energy efficiency programs funded by the federal and state governments and utilities. Funds will be proportionally allocated to all agencies with a demonstrated capacity to deliver these services, as evidenced by other contracts.

Currently, CG&E rates collect \$4.8 million from residential customers per year for DSM. Per the Commission Order in Case No. 95-203-EL-FOR, the Company was permitted to utilize \$2.4 million to amortize deferrals from other DSM programs. The balance of funding was to be spent on programs approved by the Cinergy Community Energy Partnership. Unfortunately, the Company is currently spending only \$1,054,971 per year, the vast majority on low-income programs. We are essentially asking for the balance of the funds CG&E is collecting in rates. Current programs would continue.

2. **The Market Development Period for Residential customers will extend through 2005 for residential customers.** Rate caps must stay in place for residential customers as required by law. ✓
3. **The enhanced shopping credit for residential customers will be made available to PIPP customers through 2005.** OPAE and CUFA wish to clarify that the enhanced shopping credit is available to the PIPP pool, if it is aggregated and bid prior to the 20% switching threshold being reached. Since this is unlikely to occur prior to the end of the MDP and actual shopping plus the PIPP pool is unlikely in the aggregate to meet the 20% threshold, there is no financial harm to CG&E. ✓
4. **CG&E will cease collecting PIPP arrearages on behalf of the Ohio Department of Development.** Under the current contract between CG&E and ODOD, the Company acts as a collection agent for PIPP arrears from both current and former customers. The arrears appear as debts on credit reports, making it difficult to get loans, increasing the cost of insurance, and preventing people from getting jobs. It can also block a household from getting electric service when it is no longer eligible for PIPP (when, e.g., the heat is master-metered and electricity is needed only for lights) even though the arrearage is actually now to ODOD and not to the utility. This is one of the legacy features of PIPP that needs to be eliminated. OPAE and CUFA propose that CG&E exercise the option in its current contract with ODOD to provide the required 60 day notice, eliminate arrears from customer's bills and cease collection of PIPP arrears.