

FILE

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
REPLY TO MEMORANDUM CONTRA

Ohio Partners for Affordable Energy ("OPAE"), an intervenor in the above-captioned cases, hereby submits to the Public Utilities Commission of Ohio ("Commission") this reply to the June 15, 2007 memorandum contra filed by The Cincinnati Gas & Electric Company ("CG&E"), now called Duke Energy Ohio, Inc. CG&E's memorandum opposes OPAE's motion to strike portions of CG&E's May 30, 2007 reply brief beginning at Page 16, Line 9 through Page 17, Line 10. The disputed portions of CG&E's reply brief 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

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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.

CG&E claims that OPAE was not active in the settlement negotiations, i.e., that OPAE made no substantive comments and no offers. CG&E also claims that OPAE's participation is relevant to the issue of whether or not serious bargaining occurred because OPAE attended the settlement discussions and rejected the settlement terms, thus confirming that there was serious bargaining. OPAE has asked for these paragraphs to be stricken from the brief because: 1) the paragraphs have no relevance to any issue before the Commission; 2) the paragraphs concern confidential settlement negotiations, which should be protected; and, 3) there is no evidentiary support for any of the assertions made by CG&E in these paragraphs.

First, in remanding these cases to the Commission for further consideration, the Ohio Supreme Court questioned whether the existence of side agreements supports the Commission's finding that serious bargaining took place among the parties. *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006),

111 Ohio St. 3d 300. The question is whether the side agreements undermined the settlement discussions so that no serious bargaining took place. As OPAE discussed at length in its briefs in these cases, the evidence of record clearly demonstrates that the side agreements undermined the settlement negotiations so that no serious bargaining took place. This is true for Phase 2 of these cases as well. OPAE did not sign the settlement agreement and has no side agreement with CG&E. OPAE's conduct has no relevance to the issue whether the settlement is the product of serious bargaining because OPAE did not agree to the settlement. OPAE also has no side deal that would have undermined the settlement negotiations. Contrary to CG&E's claim, OPAE's conduct at settlement negotiations has no relevance to the issue whether the stipulation is the product of serious bargaining.

The issue of serious bargaining is not resolved by exploring whether parties attended and talked (or did not talk) at the settlement negotiations. Whether OPAE attended settlement discussions, spoke a little, spoke a lot, said substantive things or non-substantive things has no relevance. Mere attendance and discussion at settlement meetings is not indicative of serious negotiations when side deals have been made. The Court has not asked the Commission to consider such trivialities.

Second, the 2004 joint settlement offer made by OPAE and Citizens United for Action has not been admitted into the record in these cases; however, discussions about its confidentiality are now moot. In any event, the motion to strike does not concern the 2004 settlement offer document. Regardless of the

status of the 2004 settlement offer document, the examiner has already determined that the settlement discussions themselves remain privileged and may not be freely disclosed. Entry (September 28, 2004) at 4. It is obvious that the paragraphs in dispute concern OPAE's position on signing the stipulation, not on the 2004 settlement offer. If at any point OPAE discussed with any person why or why not it would sign or not sign the stipulation, this discussion remains confidential regardless of the status of the 2004 settlement offer.

Third, CG&E's counsel is not free to provide his own personal recollections of OPAE's participation and comments in settlement negotiations as evidence of serious bargaining. His recollection is clearly faulty and entirely self-serving. No record of settlement discussions supports his recollections. The portions of CG&E's reply brief that should be stricken consist of wholly unsupported remembrances of CG&E's counsel as to why OPAE did not sign the settlement agreement. There is 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." There is no court reporter at settlement negotiations to prove or disprove a statement such as the one made here by CG&E. These wholly unsupported statements must be stricken from the reply brief.

Finally, CG&E opines that OPAE is not representing residential or commercial customers in these cases and that the Office of the Ohio Consumers' Counsel ("OCC") and the City of Cincinnati are the sole statutory residential representatives while Kroger is the only commercial customer involved in these

matters.¹ This is nonsense. The Commission has granted OPAE's intervention in countless cases on the basis that OPAE represents low-income customers as well as its members as commercial customers. Given that the City of Cincinnati has a side deal that undermines its support for the stipulation and OCC and OPAE are not signatory parties, CG&E is apparently now conceding that the stipulation has no residential class support. Likewise, Kroger has a side deal, again undermining the claim that the settlement is a product of serious bargaining. OPAE concedes that the side deals represent serious bargaining, but once those were complete, there could be no serious bargaining on the cases as a whole because the signatory parties had already agreed to forego serious negotiations on the overall settlement proposal.

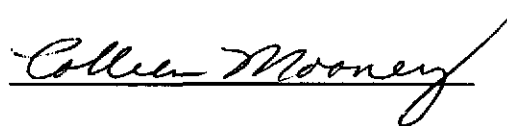
CG&E also apparently now abandons its endorsement of People Working Cooperatively ("PWC") as a representative of residential customers. In its reply brief, CG&E had stated that PWC represents the interests of "low-income residential consumers that rely upon programs funded by DE-Ohio for energy efficiency and weatherization services." CG&E Reply Brief (May 30, 2007) at 17. While it is good that PWC cares about the customers it serves with CG&E funding and wants to continue to do so, the organization clearly has no interest in minimizing the rates paid by these same customers.

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

¹ OPAE has five members with multiple locations within the CG&E service territory being served under commercial tariffs. See www.ohiopartners.org.

merely gives a self-serving account of privileged settlement negotiations (for which no record exists). The status of the 2004 joint settlement offer is irrelevant to this matter, because the disputed sections of the brief discuss why OPAE did not sign the stipulation, not the 2004 offer. It is also irrelevant whether OPAE attended or spoke at the settlement negotiations. The serious bargaining issue concerns side deals that undermined the settlement process, not the performance, or lack thereof, of OPAE in confidential, off-the-record settlement negotiations.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of Ohio Partners for Affordable Energy's Reply to the Memorandum Contra has been electronically delivered to the following parties in the above-captioned proceedings on this 18th day of June 2007.



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