FILE

13

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	)	03-2080-EL-ATA
Procedures for Capital Investment in its	)	03-2081-EL-AAM
Electric Transmission And Distribution	)	05-724-EL-UNC
System And to Establish a Capital	)	05-725-EL-UNC
Investment Reliability Rider to be	)	06-1068-El-UNC
Effective After the Market Development	)	06-1069-EL-UNC
Period	)	06-1085-EL-UNC

MEMORANDUM CONTRA OF
THE OHIO MARKETERS GROUP

I. INTRODUCTION

Pursuant to Rule 4901-1-35 of the Ohio Administrative Code, the Ohio Marketers Group[1] submits this Memorandum Contra to the Applications for Rehearing of Duke Energy Ohio ("Duke") and Industrial Energy Users – Ohio ("IEU-Ohio"). The OMG submits that the Commission's Order on Remand is reasonable, lawful and supported by the evidence and that the Commission should deny both Applications for Rehearing.

II. ARGUMENT

A. The Commission's Order on Remand does not violate Section 4928.14, Revised Code by depriving customers of having a Provider of Last Resort Service; rather the Order on Remand creates two levels of Provider of Last Resort service each of which is priced in a manner consistent with the statute.

[1] The Ohio Marketers' Group consists of competitive retail electric service providers ("CRES") who are both certificated by the Commission and active in Ohio. The Ohio Marketers' Group consists of Constellation NewEnergy, Inc., Strategic Energy, LLC and Integrys Energy Services. Prior to the remand of the Rate Stabilization plan by the Ohio Supreme Court, MidAmerican Energy Company was an active member of the Ohio Marketers' Group and was certificated as a competitive retail electric service provider. Since that time MidAmerican has sold its Ohio operation and surrendered its CRES certificate.

At pages 9 through 15 of its Application for Rehearing, Duke argues that the Commission's Order on Remand deprives non-residential retail customers who are purchasing competitive retail electric service under a contract with a term past 2008 and who have pledged not to return to standard service under the prices offered under Duke's MBSSO rate Provider of Last Resort ("POLR") service, further that doing such violates Section 4928.14, Revised Code. This argument is factually flawed as the Order on Remand not only establishes a POLR for such customers, it also provides a choice of two POLRs. Similarly, the argument is legally deficient in that it cites no authority which would prohibit the Commission requiring two POLR service and pricing options.

Senate Bill 3[2] divided electric service into competitive retail electric service and non competitive retail electric service. Competitive retail electric services included generation[3] and other service items subsequently identified as competitive by the Commission. Duke as an electric distribution utility has a franchised monopoly to supply the non competitive electric service in its service area which is priced to the retail customers using cost of service principles[4]. Section 4928.14 (A), Revised Code also requires that Duke, as an electric distribution utility, provide a default, bundled competitive electric service for those customers who do not purchase competitive electric services on their own. The bundled competitive and non competitive service offering is called the standard service offer. Section 4928.14(A) specifies that the default generation being supplied as part of the standard service be priced at market rates.

> After its market development period, an electric distribution utility in this state shall provide consumers, on

[2] Now codified as Chapter 4928 Revised Code
[3] Section 4928.03, Revised Code also see the definition of competitive retail electric service Section 4928.01 (A)4 which references division (B)
[4] See Section 4909.18, Revised Code

> a comparable and non-discriminatory basis within its certified territory, a market-based standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. Such offer shall be filed with the public utilities commission under section 4909.18 of the Revised Code. (Emphasis added)[5]

As noted in division (A) of Section 4928.14, Revised Code quoted above; when an electric distribution utility is supplying the competitive retail electric service they receive a market based price for such generation, and that such an offering has to be comparable and non discriminatory. The Commission recognized the mechanics of pricing default supplied competitive retail electric service and thus found in the Order on Remand that "We are tasked, under Chapter 4928 of the Revised Code, with approving generation charges that are market-based and consistent with the state policy as set forth in this chapter"[6]. The Commission then reviewed the POLR service as per the Application for non residential customers and correctly concluded that the proposed POLR had two competitive services – generation and a future price limitation option. So the Order on Remand split the POLR service and allowed customers to elect either a POLR service in which the price limitations were in place as called for in the Application[7], in which case the retail customer paid the IMF, RSC and AAC charges; or the customer could agree that it would contract with a CRES so that it would return to standard service through the Rate Stabilization Period, but if the retail customer did return it would pay a market price for generation as established by the regional transmission organization's markets.

[5] Section 4928.14 (A), Revised Code
[6] Order on Remand October 24, 2007 p. 36
[7] Under the MBSSO pricing option if a customer returned from purchasing generation to the MBSSO they would pay the price which in effect was being held constant at the pre Senate Bill 3 cost of generation plus approved increases for fuel, capacity, and environment compliance costs.

Duke's argument that the Order on Remand "deprived" retail customers of POLR service is a mischaracterization of the Order. All retail customers, if they cease purchasing generation from a CRES, will have access to default generation provided by Duke as called for by Section 4928.14(A) Revised Code. The difference is what the returning retail customer who has not paid the IMF, ACC and RSC charges will have to pay Duke for such power. A more accurate description of the Order on Remand is that it creates a POLR options for non residential customers. Given the fact that Section 4928.14(A), Revised Code requires that the POLR be comparable and non discriminatory the Commission was well within its authority to require a POLR service that does not constitute a forced purchase of generation from specific units or supply contracts owned by Duke. Further, Section 4928.02, Revised Code states that State Policy favors establishing supply options for retail customers. Section 4928.14, Revised Code which establishes that standard service offer be comparable and non discriminatory and have generation priced at market, also provides for the utility to file the standard service offer with the Commission. The intent of the General Assembly is clear, not only will standard service offer have the criteria, but the Commission which has general supervisory authority over electric distribution utilities[8] will enforce and maintain the statutory standards. The Commission has done so in the Order on Remand and Duke has not met its burden of showing otherwise.

B. The Commission properly found that the Infrastructure Maintenance Fund ("IMF") charge should be avoidable by a non-residential customer who agrees that it will remain off Duke's service and that it will not avail itself of Duke's POLR service.

[8] Sections 4905.05 and .06 Revised Code

In its Application for Rehearing, Duke Energy Ohio takes issue with the Commission's Order on Remand which makes the IMF avoidable for non-residential switched load that agrees to remain off Duke's MBSSO price through 2008 even though such customers may return to Duke at the monthly average hourly locational marginal price (LMP) price. The LMP price is established by an open market run by the Midwest Independent System Operator ("MISO"). Further, Duke objects to the fact that by enabling switched load to avoid paying the IMF, the Commission's Order on Remand conflicts with the statutory policy because it requires Duke to subsidize the competitive retail electric service market.

At page 35 of its Order on Remand, the Commission recognized that Duke witness Steffen stated that the IMF was a non-cost based charge -- that is the way it proposed to calculate an acceptable dollar figure to compensate Duke for the first call dedication of generating assets and the opportunity costs of not simply selling its generation into the market at potentially higher prices. (Duke Rem. Ex. 3, at 26.) Section 4928.03, Revised Code clearly establishes that generation is a competitive retail service. So if the IMF is to compensate Duke for generation assets it must be avoidable if the retail customer is not taking the generation.

The Order on Remand also noted that Mr. Steffen, Duke's chief witness on the IMF charge testified that:

> The IMF is not tied directly to a specific cost out-of-pocket expense and is not a pass through of actual tracked costs. It is a component of the formula for calculating the total market price [Duke] is offering and is willing to accept in order to supply consumers and to support its POLR risks and obligations." (Duke Rem. Ex. 3, at 25.) Order on Remand, at 35-36.

Thus, by Duke's own witness' testimony the record is clear that the IMF is not a discrete expense for providing wire service, or being able to provide market based generation – the IMF is merely a price component of the market rate Duke has determines would compensate it for providing generation. Given those facts, the Commission properly found that the IMF charge should be avoidable where a non-residential customer agrees that if they return to standard service they will pay the market price at that time without a price reservation. Similarly, those retail customers that want a price reservation may have such if they voluntary agree to pay the IMF and other charges in order to reserve a right to return at the MBSSO rate.

No facts in the record support Duke's assertion that by making the IMF avoidable it subsidies the competitive electric service market. CRES offer generation at a price to retail customers. Those who wish may purchase such generation, those that do not will default to the standard service. Under the Order on Remand, customers who purchase CRES generation may then elect to either pay the IMF, ACC and RSC charges are reserve the right to return at the MBSSO rate, or not pay the those fees and come back at the higher of MBSSO or the purchase price of the MISO market. The only discrimination in the system is the fact that the retail customer who returns to Standard Service and is supplied generation by Duke purchased from the MISO market may have to actually pay Duke more than the MISO price if Duke's MBSSO price happens to be above the MISO price.

C. In furtherance of the goal of promoting competition and not allowing shoppers to pay for certain categories of expenses twice, the Commission properly found that environmental compliance, tax, and homeland security costs should be avoidable and not part of a POLR charge.

In its Application for Rehearing at pages 9-10, Duke objects to the Commission amending its POLR charge to make the RSC and AAC avoidable by switched load. Duke cites pages 34-35 of the Order on Remand.

In its Order on Remand, the Commission cited the record and provided a basis as to why environmental compliance, tax, and security costs should not be part of the POLR charge. The Constellation witnesses explained that these costs are generation related costs as they are incurred by CRES providers who also must comply with environmental requirements. As a result, if environmental compliance costs were included in the POLR charge, shoppers would be paying for such expenses twice. In addition, the Commission cited the DP&L rate stabilization plan case where the Supreme Court did not disagree with the Commission's conclusion that in the furtherance of the goal of promoting competition, the environmental investment rider should be avoidable by shopping customers. See pages 34-35 of the Order on Remand. Thus, the Commission has a rational basis and record support for making environmental compliance, tax, and homeland security costs avoidable and not part of the POLR charge. Duke's ground for Rehearing should be rejected.

D. The Commission properly found that the May 19, 2004 Stipulation continued in existence.

At pages 5-11 of its November 21, 2007 Application for Rehearing, IEU-Ohio argues that the Commission erred in finding that the Stipulation remained in effect subsequent to the September 29, 2004 Opinion and Order and the November 23, 2004 Entry on Rehearing. There has been nothing new raised by the IEU-Ohio in its Application for Rehearing that was not addressed by the Commission.

At page 22 of its Order on Remand, the Commission noted that the Supreme Court of Ohio recognized that the Stipulation included a provision that allowed any signatory party to withdraw and void the rate-stabilization plan should the Commission reject or modify any part of the Stipulation. The Court also noted that none of the signatory parties exercised the option to void the agreement despite significant modifications made by the commission to the original Stipulation, See Ohio Consumers' v. Pub. Util. Com, 111 Ohio St. 3d 300 at paragraph 46. Any argument that the Stipulation was terminated is inconsistent with the Supreme Court's remand.

The Commission itself noted in its November 23, 2004 Entry of Rehearing affirmed the existence of the Stipulation in one of its ordering paragraphs ordering that "the Stipulation be approved, to the extent and subject to the modifications and clarifications set forth in the September 29, 2004 Opinion and Order in these proceedings, as further modified by the Entry on Rehearing."

The Commission reasonably and lawfully determined that the May 19, 2004 Stipulation is still in existence. IEU-Ohio's first ground for rehearing must be denied.

E. The Commission properly admitted certain side agreements.

At pages 11-13 of its Application for Rehearing, IEU-Ohio alleges that the Commission erred in admitting all side agreements inasmuch as the prejudicial effect outweighs the probative value and that such admission was a needless presentation of cumulative evidence. This ground should be rejected.

Contrary to IEU-Ohio's argument, the Commission did not admit all side agreements. At page 26 of its Order on Remand, the Commission stated "Therefore, any agreements that documented renegotiations of side agreements that had been entered into

prior to the issuance of the Opinion and Order are deemed irrelevant to this proceeding and form no part of the basis of our opinion." Thus, not all of the agreements were admitted.

With respect to those agreements that were admitted, the Commission was merely following the mandate of the Court. The Court stated that the existence of side agreements between Duke and the signatory parties entered into around the time of the Stipulation could be relevant to insuring the integrity and openness of the negotiation process. See page 26 of the Order on Remand quoting Ohio Consumers' Counsel v. Pub. Util. Com., 111 Ohio St. 3d 300 at paragraph 85. The Commission followed the Court's instruction and reviewed those side agreements. The Commission noted that certain of the parties to the Stipulation had signed side agreements that required them to support the Stipulation. See Order on Remand at 27. Given the Supreme Court's concern about the integrity and openness of the negotiation process, the Commission needed to review those agreements and admit them into evidence to support its ultimate decision that the existence of such side agreements raise serious doubts about the integrity and openness of the negotiation process related to the Stipulation. Without having these agreements in the record, the Commission could not make the finding that it did. The side agreements that were admitted into evidence were properly received pursuant to the Court's directive. This ground for rehearing must be rejected.

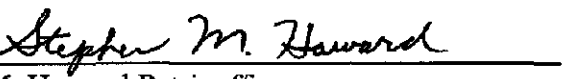
III. Conclusion

Neither Duke Energy Ohio nor IEU-Ohio have raised any new arguments in support of their Applications for Rehearing that were not previously considered. The

Commission's Order on Remand is reasonable, lawful, and supported by the evidence.

Duke Energy Ohio's and IEU-Ohio's Applications for Rehearing should be denied.

Respectfully submitted,

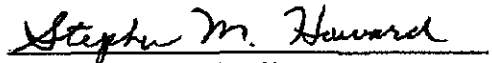


M. Howard Petricoff
Stephen M. Howard
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street, P.O. Box 1008
Columbus, Ohio 43216-1008
Tel: (614) 464-5414
Fax: (614) 719-4904
E-mail: mhpetricoff@vorys.com

Attorneys for The Ohio Marketers Group

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra of The Ohio Marketers Group was served by email on December 3, 2007 to all of the trial counsel on the special email list prepared by the Attorney Examiners.



M. Howard Petricoff
Stephen M. Howard

Thomas McNamee / Werner Margard
Stephen Reilly / Anne Hammerstein
thomas.mcnamee@puc.state.oh.us
stephen.reilly.@puc.state.oh.us
werner.margard@puc.state.oh.us
anne.hammerstein@puc.state.oh.us

Sally W. Bloomfield
Thomas J. O'Brien
Bricker & Eckler
100 S. Third Street
Columbus, OH 43215-4291
sbloomfield@bricker.com
tobrien@bricker.com

David F. Boehm
Boehm, Kurtz & Lowry
36 East Seventh St.
Suite 2110
Cincinnati, OH 45202
dboehmlaw@aol.com

Mary W. Christensen
Christensen Christensen & Devillers
401 N. Front Street
Suite 350
Columbus, OH 43215-2249
mchristesen@columbuslaw.org

Paul Colbert / Rocco D'Ascenzo
James Gainer / Michael Pahutski
Cinergy Corporation
155 E. Broad Street, Suite 21
Columbus, OH 43215
pcolbert@cinergy.com
mchael.pahutski@duke-energy.com

John J. Finnigan, Jr.
CG&E
139 E. Fourth Street
25th Fl., Atrium II
P.O. Box 960
Cincinnati, OH 45202
jfinnigan@cinergy.com

Stacey Rantala / Craig G. Goodman
National Energy Marketers Assoc.
3333 K. Street, N.W., Suite 110
Washington, DC 20007
cgoodman@energymarketers.com
srantala@energymarketers.com

Ann M. Hotz
Larry Sauer
Office of Consumers' Counsel
10 W. Broad St., Suite 1800
Columbus, OH 43215
hotz@occ.com sauer@occ.state.oh.us

Anita M. Schafer
Cinergy Corp.
139 E. Fourth Street
P.O. Box 960
Cincinnati, OH 45201-0961
Anita.Schafer@Cinergy.COM

Arthur E. Korkosz
First Energy Corp.
76 South Main Street
Legal Dept., 18th Floor
Akron, OH 44308-1890
korkosza@FirstEnergyCorp.com

Michael L. Kurtz
Boehm, Kurtz & Lowery
2110 CBLD Center
36 East Seventh Street
Cincinnati, OH 45202
mkurtz@bkllawfirm.com

Shawn Leyden
PSEG Energy Resources & Trade LLC
80 Park Plaza
19th Floor
Newark, NJ 07102
shawn.leyden@pseg.com

Lisa McAllister
Kimberly Bojko
McNees, Wallace & Nurick
Fifth Third Center
21 E. State Street, 17th Fl.
Columbus, OH 43215
lgatchell@mwncmh.com

Noel F. Morgan
Legal Aid Society of Cincinnati
215 E. Ninth Street
Suite 200
Cincinnati, OH 45202
nmorgan@lascinti.org

Donald I. Marshall
Eagle Energy
4465 Bridgetown Road, Suite 1
Cincinnati, OH 45211-4439
eglenrg@aol.com

Grand Antique Mall
9701 Reading Rd.
Cincinnati, OH 45215

David C. Rinebolt
Ohio Partners For Affordable Energy
337 S. Main St.
4th Floor, Suite 5
P.O. Box 1793
Findlay, OH 45839-1793
drinebolt@aol.com

Barth E. Royer
Bell, Royer & Sanders Co., L.P.A.
33 South Grant Avenue
Columbus, OH 43215-3927
barthroyer@aol.com

Richard L. Sites
Ohio Hospital Association
155 East Broad St., 15th Fl.
Columbus, OH 43215-3620
ricks@ohanet.org

Dane Stinson, Esq.
William Adams, Esq.
Bailey Cavalieri LLC
10 W. Broad Street, Suite 2100
Columbus, OH 43215
dane.stinson@baileycavalieri.com

Michael D. Dortch
Kravitz, Brown & Dortch, LLC
145 East Rich Street
Columbus, OH 43215
mdortch@kravitzllc.com

Patrick Maue
Midwest Utility Consultants, Inc.
5005 Mallet Hill Dr.
Cincinnati, OH 45244

Lee Woodruff
Richards Industries Valve Group
3170 Wasson Road
Cincinnati, OH 45209

Rocco D'Ascenzo
Cinergy Corporation
155 E. Broad Street, Suite 21
Columbus, OH 43215
rocco.Dascenzo@duke-energy.com

cmooney2@columbus.rr.com
sam@mwncmh.com
dneilson@mwncmh.com
lmcallister@mwncmh.com
jbowser@mwncmh.com

WTTPMLC@aol.com
schwartz@evainc.com
rsmithla@aol.com
jkubacki@strategicenergy.com
eagleenergy@fuse.net

scott.farkas@puc.state.oh.us
jeanne.kingery@puc.state.oh.us

small@occ.state.oh.us