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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Consolidated Duke Energy :
Ohio, Inc. Rate Stabilization Plan Remand and :
Rider Adjustment Cases. :

Case Nos. 03-93-GA-ATA, **PUCO**

DOMINION RETAIL, INC.
MEMORANDUM CONTRA APPLICATIONS FOR REHEARING
OF
DUKE ENERGY OHIO, INC. AND INDUSTRIAL ENERGY USERS-OHIO

I. INTRODUCTION

On October 24, 2007, this Commission, in response to the Ohio Supreme Court's decision in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d. 300 (2006), issued its order on remand in the above-captioned proceedings, modifying certain terms of the Duke Energy Ohio, Inc. ("DE-Ohio") rate stabilization plan ("RSP") previously approved by the Commission in its entry on rehearing in these dockets of November 23, 2004.¹ DE-Ohio, Industrial Energy Users-Ohio ("IEU-Ohio"), the Office of the Ohio Consumers' Counsel ("OCC"), and Ohio Partners for Affordable Energy ("OPAE") have now filed applications for rehearing from the remand order, asserting that the order unlawful and unreasonable in various particulars. Dominion Retail, Inc. ("Dominion Retail"),² an intervenor in these proceedings, hereby submits its memorandum contra the DE-Ohio and IEU-Ohio rehearing applications pursuant to Rule 4901-1-35(B), Ohio Administrative Code.

¹ The application that initiated Case No. 03-93-EL-ATA was filed by DE-Ohio's predecessor, the Cincinnati Gas & Electric Company, on January 10, 2003. However, for ease of reference, both entities will be referred to herein as DE-Ohio.

² Dominion Retail is a Commission-certified supplier of competitive retail electric retail service ("CRES") operating on the DE-Ohio system.

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In remanding this matter to the Commission for further proceedings, the court found that the Commission erred by (1) failing to set forth its reasoning and failing to identify any factual basis for certain of the charges it authorized in fashioning the version of the RSP it ultimately approved (*Consumers' Counsel*, ¶28),³ and (2) by improperly barring OCC from discovering whether any side agreements existed between DE-Ohio and the other parties to a stipulation submitted during the May 2004 hearing in this matter that might cast doubt on whether the stipulation was, in fact, the product of serious bargaining⁴ (*Consumers' Counsel*, ¶94).⁵ In its order on remand, the Commission, based on additional evidence adduced during the March 2007 remand hearing and its review of the side agreements it had compelled certain parties to produce, came to what it characterized as the “inevitable conclusion” that “there is a sufficient basis to question whether the parties engaged in serious bargaining and, therefore, that we should not have adopted the stipulation.” *Remand Order*, 27.

Having expressly rejected the stipulation (*id.*), the Commission then proceeded to rule on DE-Ohio's January 26, 2004 RSP application as originally filed based on its evaluation of the evidence presented during the initial May 2004 hearing and March 2007 remand hearing, noting

³ The court specifically identified the infrastructure-maintenance fund (“IMF”) component, the “baseline” set for calculating certain components, and the level of the non-bypassable charges applicable to customers electing to take generation service from CRES suppliers as elements of the approved RSP that lacked explanation and/or factual support. *See Consumers' Counsel*, ¶¶ 29-33.

⁴ Whether a stipulation is the product of serious bargaining among knowledgeable parties is, of course, the first prong of the familiar three-part test employed by the Commission and approved by the Ohio Supreme Court for evaluating stipulations. *See, e.g., Consumers Counsel v. Pub. Util. Comm.*, 64 Ohio St. 3d 123 (1992), at 125.

⁵ As the Commission well knows, the status of the May 19, 2004 stipulation was the subject of considerable debate during the proceedings that followed the remand. However, while the Commission did not adopt the stipulation in its entirety, it is beyond question that the Commission relied extensively on the terms of this stipulation in developing the RSP ultimately approved in its November 23, 2004 entry on rehearing.

that its rejection of the stipulation rendered moot the deficiencies in its November 23, 2004 entry on rehearing identified by the court. *Remand Order*, 28. As a result, the Commission approved the RSP as proposed by DE-Ohio, subject to two modifications. First, the rate stabilization charge ("RSC") and the annually adjusted component ("AAC"), which were heretofore bypassable by only the first twenty-five percent of residential switched load and fifty percent of non-residential switched load, are, under the remand order, now bypassable by all switching customers. *Remand Order*, 34-35. Second, the IMF component, which, according to the Commission, is intended to compensate DE-Ohio for the pricing risk of providing POLR service (see *Remand Order*, 36), is, under the remand order, now avoidable by non-residential shopping customers that agree to remain off DE-Ohio's market-based standard service offer ("MBSSO") service. *Remand Order*, 38.

In its application for rehearing, DE-Ohio attacks these modest modifications to its RSP as originally proposed, claiming that the Commission's order on remand exposes DE-Ohio to additional risks associated with customer migration without adequately compensating the company for those risks. IEU-Ohio's rehearing application, on the other hand, does not contest the terms of the RSP adopted by the Commission, but focuses solely on the Commission's finding that side agreements it was compelled to produce were relevant and admissible into evidence, claiming that, notwithstanding the protective measures ordered by the Commission to prevent disclosure of the terms of the confidential agreements on the public record, the prejudicial effect of admitting the side agreements outweighed any probative value the agreements might have. Although Dominion Retail, whose position on these matters is well known to the Commission (see *Dominion Reply Brief*, *passim*), does not wish to burden the

record by repeating its earlier arguments on these subjects, Dominion Retail feels compelled to offer a few limited observations.

II. ARGUMENT

A. THE ARGUMENTS RAISED BY DE-OHIO IN ITS REHEARING APPLICATION ARE WITHOUT MERIT.

1. As a practical matter, the Commission's determination that the RSC and AAC should be bypassable by all switching customers has no meaningful impact on the level of risk to which DE-Ohio is exposed.

After conceding the obvious – *i.e.*, that reducing the unavoidable costs switching customers are required to pay enhances competition (DE-Ohio Reh. App., 10) – DE-Ohio then maintains that the only way to protect itself from the market risks associated with the RSP is to limit migration risks by assessing unavoidable charges to switching customers (DE-Ohio Reh. App., 12).⁶ Thus, although DE-Ohio sees limiting the ability to bypass the RSC and AAC to the first twenty-five percent of switched residential load and fifty percent of switched non-residential load as striking an appropriate balance (*id.*), DE-Ohio contends that the Commission's decision to make the RSC and AAC avoidable by all switching customers means that it would no longer be adequately compensated for migration risks (DE-Ohio Reh. App., 18).⁷ The risk compensation issue has been thoroughly briefed by the parties, and was addressed by the Commission in the remand order. However, in considering DE-Ohio's arguments on this issue, including the parade of potential horrors DE-Ohio describes (*see* DE-Ohio Reh. App., 5-6, 16-18), there is one fact the Commission should keep firmly in view. Evidence introduced at the

⁶ This, of itself, speaks volumes regarding the DE-Ohio mindset, for one would assume, as a matter of principle, that switching customers should only be responsible for charges reflecting costs they cause, and that all other charges should be bypassable.

⁷ DE-Ohio indicates that it would agree that all switched load could bypass little g, including the RSC and AAC, if the Commission were to require all customers to pay the IMF (DE-Ohio Reh. App., 20).

remand hearing shows that as of December 21, 2006, the actual DE-Ohio switching rates for commercial, industrial, and residential customers were 8.40%, 0.36%, and 2.32%, respectively. OCC Remand Ex. 2A, 63. Based on these numbers, any adverse impact of extending the ability to bypass the RSC and AAC to all switching customers, as opposed to only the first twenty-five percent of switched residential load and the first fifty percent of non-residential load, is as a practical matter, totally illusory.

2. The Commission correctly determined that the IMF charge should not be imposed upon customers who voluntarily agree to remain off DE-Ohio's MBSSO service.

For those reasons previously stated, and as ably argued by OCC and OPAE in their respective rehearing applications (*see* OCC Reh. App., 8-11; OPAE Reh. App., 9-10), Dominion Retail continues to believe that there is no adequate evidentiary basis to support the IMF charge approved by the Commission in its order on remand. Because Dominion Retail targets the residential market, the Commission's determination that the charge cannot be imposed on non-residential customers that agree to remain off DE-Ohio's MBSSO service provides little solace. However, Dominion Retail, as a matter of principle, agrees with Commission's conclusion that a customer that agrees "that it will not avail itself of Duke's POLR service does not, by definition, cause Duke to incur any risk" (*Remand Order*, 38), regardless whether the IMF charge, in fact, actually reflects risks related to DE-Ohio's POLR obligation. While Dominion Retail will leave the defense of this Commission finding to the marketers serving non-residential customers, there is one aspect of DE-Ohio's argument on this subject that cannot be permitted to pass without comment.

In support of its argument that the IMF should be imposed on all customers, DE-Ohio contends that the Commission has no authority "to deprive POLR service to customers" or to

“allow customers to waive their right to rely on POLR service.” DE-Ohio Reh. App., 9.

Leaving aside that such customers will not be left without service options,⁸ Dominion Retail would suggest that these assertions are a tad disingenuous coming, as they do, from a party that has previously endorsed a requirement that certain switching customers waive their rights to return to POLR service as a condition of avoiding otherwise applicable charges. *See* May 19, 2004 Stipulation and Recommendation, ¶4.D.

B. IEU-OHIO’S APPLICATION FOR REHEARING MISSTATES THE DOMINION RETAIL ARGUMENT ADOPTED BY THE COMMISSION IN DETERMINING THAT THE SIDE AGREEMENTS WERE RELEVANT AND ADMISSIBLE.

As noted above, IEU-Ohio’s application for rehearing is directed at the Commission’s determination that the side agreements IEU-Ohio was compelled to produce were relevant and admissible. Dominion Retail readily concedes that industrial customers have a legitimate interest in protecting the confidentiality of their service agreements, and leaves to the Commission whether the protective measures ordered in this case to preserve the confidentiality of the side agreements in question are adequate to protect those interests and whether those measures impose an unreasonable burden on the customers involved. However, Dominion Retail disagrees with IEU-Ohio’s claim that the Commission erred in finding that the side agreements at issue in this case were relevant and admissible, and, more specifically, with IEU-Ohio’s characterization of the Dominion Retail argument accepted by the Commission in reaching its decision on this issue.

The “serious bargaining” prong of the three-part test the Commission utilizes in evaluating stipulations is intended to provide assurance that the stipulated result reflects the give-

⁸ These customers can return at the LMP MBSSO price, or alternative, elect service from another CRES supplier.

and-take of the negotiating process among parties with a broad range of competing interests. As the court and the Commission have correctly recognized, a problem arises if, by virtue of undisclosed side agreements, certain signatories to the stipulation are not actually subject to the terms they ostensibly accepted, a circumstance that undercuts the underlying assumption that the stipulation represents a hard-bargained compromise that satisfies the interests those signatories purport to represent. IEU-Ohio does not appear to take issue with this fundamental proposition. Rather, IEU-Ohio argues that because the stipulation in question was not ultimately adopted by the Commission as filed, any side agreements by signatory parties were irrelevant and should have been deemed inadmissible. IEU-Ohio Reh. App., 8.

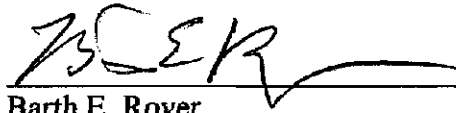
As Dominion Retail pointed out in addressing this same argument in its reply brief, the court, in finding that the Commission erred in preventing OCC from discovering if any side agreements existed, was well aware that the Commission had not adopted the stipulation as filed. Dominion Reply Brief, 7-8. Thus, as Dominion Retail argued, and as the Commission found in its remand order, the interpretation of the court's decision urged by various parties – that all that was required was to permit OCC to conduct the discovery it had requested – made no sense, in that it assumed that the court remanded the case simply to permit OCC to perform a vain act. *Remand Order*, 20. Plainly, whether or not the original stipulation “existed” or “remained in effect” at the time the Commission issued its November 23, 2004 entry on rehearing approving its modified version of the stipulated RSP is irrelevant. The important point, as the court clearly understood, was that the original stipulation provided the basic framework for the RSP the Commission eventually approved. Otherwise, as Dominion Retail pointed out, there would have been no purpose to be served by the court's directive that the Commission permit OCC to engage in the requested discovery.

In its application for rehearing, IEU-Ohio makes much of the fact that the court, although ordering the Commission to allow OCC to conduct discovery with respect to the side agreements, left the question of the admissibility of those agreements to the Commission, and argues that the Commission erred in admitting the agreements. IEU-Ohio Reh. App., 11. This argument overlooks the fact that, on remand, the Commission, pursuant to the court's directive, had the obligation to determine whether the stipulation was the product of an open and legitimate bargaining process. *See Remand Order*, 21. Having determined, in accordance with the court's mandate, that the side agreements were relevant to this determination, the Commission would have had no record upon which to decide this issue without admitting the side agreements and related testimony into evidence. Thus, while the Commission ultimately determined that the stipulation should be rejected on the grounds that it was not the product of serious bargaining (*see Remand Order*, 27), this is not a finding that could have been made before the fact, as IEU-Ohio seems to suggest. This is a question separate and apart from the issues IEU-Ohio raises with respect to the adequacy of the protective measures the Commission ordered to prevent public disclosure of competitively-sensitive information contained within the agreements, and the reasonableness of the burden imposed upon IEU-Ohio to keep those measures in place in perpetuity.

III. CONCLUSION

Consistent with the foregoing discussion, the Commission should deny the DE-Ohio application for rehearing in its entirety, and should reject IEU-Ohio's arguments relative to the relevance and admissibility of the side agreements.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'BER', followed by a horizontal line.

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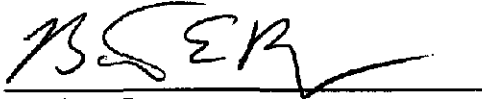
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the parties listed below by first class U.S. mail, postage prepaid, this 3rd day of December 2007.


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