

FILE

9

Confidential Release

**Case Number:
05-806-EL-UNC**

PUCO

2011 MAR 10 AM 8:42

RECEIVED-ROCKETING DIV

Date of Confidential Document: 11/30/2005

Today's Date: 3/10/2010

Reply brief of the Ohio Consumers' Counsel.

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.
Technician AW Date Processed 3/10/11

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

RECEIVED-DOCKETING DIV
2005 NOV 30 PM 3:44
PUCO

In the Matter of the Regulation of the Fuel)
And Economy Purchased Power)
Component of the Cincinnati Gas &)
Electric Company's Market-Based)
Standard Service Offer.)

Case No. 05-806-EL-UNC

CONFIDENTIAL

**REPLY BRIEF
OF
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Janine L. Migden-Ostrander
Consumers' Counsel

Kimberly W. Bojko, Trial Attorney
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-8574 (Telephone)
614-466-9475 (Facsimile)
bojko@occ.state.oh.us

November 30, 2005

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Regulation of the Fuel)
And Economy Purchased Power)
Component of the Cincinnati Gas &) Case No. 05-806-EL-UNC
Electric Company's Market-Based)
Standard Service Offer.)

CONFIDENTIAL

**REPLY BRIEF
OF
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

On June 1, 2005, Cincinnati Gas & Electric Company ("CG&E" or "Company") filed an application with the Public Utilities Commission of Ohio ("Commission") in Case No. 05-725-EL-UNC to establish the fuel and economy purchased power ("FPP") component of CG&E's market-based standard service offer as authorized by the Commission in CG&E's rate stabilization plan ("RSP") proceeding. Subsequently, the Commission opened docket 05-806-EL-UNC to review the reasonableness of the FPP costs, which for this review period are non-residential, and established the review periods for CG&E's future annual audit filings.¹ Upon completion of the review of Rider FPP, the auditors set forth specific recommendations in the financial and management/performance audit report ("Audit Report") filed with the Commission on October 7, 2005.

¹ See Entry at 2-3 (June 29, 2005).

Pursuant to the directive of the Attorney Examiners,² the Office of the Ohio Consumers' Counsel ("OCC") hereby replies to the post-hearing briefs filed by the various parties in this proceeding on November 21, 2005 and November 28, 2005. On brief, OCC set forth the Commission's standard of reasonableness that CG&E must meet in this case. Accordingly, the Commission should review and properly allocate the proceeds of the monetization of coal hedges for the RSP period and emission allowances held by CG&E during and after the market development period. In this reply, OCC will respond to certain legal arguments proffered by CG&E against Commission review of the FPP and the allocation proposed by OCC on brief.

II. ARGUMENT

No party disputes the fact that the FPP component of CG&E's market-based standard service offer works as an electric fuel component ("EFC").³ In fact, it has been referred to throughout this proceeding as "EFC-like."⁴ However, CG&E continually asserts that even though it is EFC-like and operates as a traditional EFC, it should not be regulated or reviewed.⁵ CG&E asserts that "the Commission lacks ratemaking authority over any competitive retail electric service, including the FPP."⁶ Despite CG&E's claim that the FPP is excluded from

² On November 10, 2005, the Attorney Examiners modified the briefing schedule via electronic correspondence to the parties (initial briefs were due November 21, 2005 and reply briefs were due November 30, 2005).

³ Staff Brief at 1, 20-21; IEU-Ohio Brief at 4-5; CG&E Reply Brief at 1.

⁴ Id.

⁵ CG&E Reply Brief at 1 ("Although CG&E agreed to calculate the FPP in the same manner as the old electric fuel component (EFC) was calculated, this is not an EFC case. Nor is this a case setting a regulated rate—it is a proceeding to affirm CG&E's calculation of the FPP in the manner agreed upon with the Public Utilities Commission of Ohio (Commission)."); CG&E Brief at 8 ("under the current statutory framework, the only jurisdiction the Commission maintains over the market price of a competitive retail electric service, including the FPP, is that authority set forth in R. C. 4905.33(B)").

⁶ CG&E Reply Brief at 8.

regulation by the Commission pursuant to R.C. 4928.05, the Commission has jurisdiction over its standard service offer rate established pursuant to R.C. 4928.14. CG&E fails to mention⁷ that one of the exceptions to 4928.05(A)(1) is “except as otherwise provided in this chapter” (i.e., R.C. 4928.14(A)). As CG&E admits, the Commission approved the FPP as part of its standard service offer rate established in its RSP plan.⁸ Pursuant to R.C. 4928.14, CG&E was required to file its standard service offer with the Commission pursuant to R.C. 4909.18. R.C. 4909.18 allows the Commission to determine the justness and reasonableness of the rate. Accordingly, the Commission established a review process to determine the reasonableness of CG&E’s FPP expenditures.

Conversely, CG&E admits that this proceeding “will decide the costs that CG&E may recover through the FPP”⁹ and seems to concede that there was a review process established by the Commission.¹⁰ CG&E goes one step further and claims that its “FPP market price is calculated in a manner consistent with the past EFC calculation methodology.”¹¹ This statement contradicts CG&E’s claim that the proceeding is not an EFC proceeding and cannot be reviewed as such. CG&E’s split personality is interesting given that the Commission orders approving CG&E’s FPP, as part of its RSP, explicitly state that the expenditures will be reviewed to

⁷ CG&E Brief at 8.

⁸ CG&E Reply Brief at 2. OCC agrees with CG&E that “the Commission has no statutory authority to create an RSP” and OCC has appealed the Commission’s order establishing the RSP. *Id.* Nonetheless, the Commission has created the RSP pursuant to R.C. 4928.14, including the FPP component, which governs this proceeding unless and until the Commission’s RSP Order is reversed.

⁹ CG&E Brief at 3.

¹⁰ CG&E Reply Brief at 1 (see quote *supra* n.5).

¹¹ *Id.* at 5.

determine the reasonableness of the expenditures.¹² The Commission specifically stated: “the Commission, in its consideration of CG&E’s expenditures in these categories, will continue to review the reasonableness of expenditures. It is not in the public interest to cede this review. Nor would it foster any rate certainty to allow all decisions of this nature to be free from Commission review of reasonableness.”¹³ The Commission further stated that the “Commission will review those filings and will issue appropriate orders.”¹⁴ The Commission also specifically established a baseline for the FPP costs.¹⁵

CG&E chose to establish the FPP as part of its standard service offer, which was approved by the Commission with the condition of continual review of the reasonableness of the FPP expenditures.¹⁶ CG&E even states: “CG&E does not object to a Commission review as CG&E has agreed to an FPP calculation methodology like that used in the now repealed EFC cases.”¹⁷ Any attempts to limit the Commission’s review of the expenditures in this case is a misplaced collateral attack on the RSP Order.¹⁸ In CG&E’s RSP proceeding and subsequent rulings providing for an audit of the expenditures, the Commission clearly stated its intent to

¹² See *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify Its Nonresidential Generation 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 No. 03-93-EL-ATA, Entry on Rehearing at 10 (November 23, 2004) (“RSP Entry on Rehearing”); also see *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify Its Nonresidential Generation 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 No. 03-93-EL-ATA, Entry Nunc Pro Tunc at 2 (December 8, 2004).

¹³ Id.

¹⁴ Id.

¹⁵ Id.

¹⁶ CG&E Reply Brief at 10-11.

¹⁷ Id. at 11.

¹⁸ CG&E Brief at 8-10.

review the FPP. If CG&E protested such review or the parameters of the review, an appeal of the RSP case would have been required.¹⁹ As such, CG&E is estopped from raising this issue in this case.²⁰ CG&E cannot have it both ways. Either it supports the establishment of the FPP in the RSP case with the conditions set forth by the Commission, or it does not. CG&E cannot now attempt to limit or modify the previous rulings by the Commission.²¹

Given the Commission's stated standard of review, CG&E bears the burden of proving in this case the reasonableness of the FPP.²² CG&E has failed to demonstrate that the FPP as implemented was reasonable and that the audit recommendations should not be implemented. As such, the Commission should require CG&E to implement all of the audit recommendations concerning Rider FPP delineated in the Audit Report.

¹⁹ In fact, OCC would have welcomed an appeal of the Commission's RSP order by CG&E.

²⁰ The doctrine of collateral estoppel bars the relitigation of the RSP case. "Collateral estoppel may be applied in a civil action to bar the relitigation of issues already determined by an administrative agency and left unchallenged if the administrative proceeding was judicial in nature and if the parties had an adequate opportunity to litigate their versions of the disputed facts and seek review of any adverse findings." *Tedesco v. Glenbeigh Hospital of Cleveland* (March 16, 1989), 1989 Ohio App. LEXIS 899, 903; see also *Superior's Brand Meats, Inc., v. Lindley* (1980), 62 Ohio St.2d 133. The doctrine of collateral estoppel applies to administrative decisions as well as to judicial decisions. *Consumers' Counsel v. Pub. Util. Comm.* (1985), 16 Ohio St.3d 9. CG&E cannot be allowed to modify the Commission's approval of CG&E's application and its own stipulation in the RSP case.

²¹ It is clear that CG&E is trying to relitigate the RSP case when it relies on the Commission's decision in American Electric Power Company's ("AEP") RSP case and claims that this FPP case is identical to AEP's RSP case. This case is not an RSP case. Again, the OCC welcomes CG&E's withdrawal of its opposition to OCC's appeal of the CG&E RSP case pending before the Supreme Court.

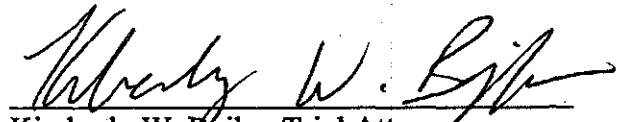
²² Staff agrees that the FPP is subject to a reasonableness review. Staff Brief at 1.

III. CONCLUSION

For the aforementioned reasons and the reasons stated in OCC's Post-Hearing Merit Brief, on behalf of CG&E's approximately 600,000 residential electric customers, the OCC respectfully requests that the Commission fulfill its responsibility to judge the reasonableness of CG&E's application²³ by requiring CG&E to implement all of the audit recommendations provided in the financial and management/performance audit report filed with the Commission on October 7, 2005. Specifically, as explained in OCC's Post-Hearing Merit Brief, the Commission should review and properly allocate the proceeds of the monetization of coal hedges for the RSP period and emission allowances held by CG&E during and after the market development period.

Respectfully submitted,

Janine L. Migden-Ostrander
Consumers' Counsel



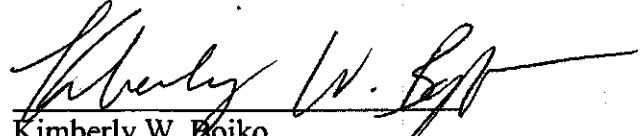
Kimberly W. Bojko, Trial Attorney
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-8574 (Telephone)
614-466-9475 (Facsimile)
bojko@occ.state.oh.us

²³ See RSP Entry on Rehearing at 10.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Office of the Ohio Consumers' Counsel's Confidential *Reply Brief* was served upon the following parties via first class mail, this 30th day of November 2005.


Kimberly W. Bojko
Assistant Consumers' Counsel

SERVICE LIST

Daniel J. Neilsen, Esq.
McNees, Wallace & Nurick, LLC
21 East State Street, 17th Floor
Columbus, OH 43215-0960

Paul Colbert, Esq.
Cincinnati Gas & Electric Co.
139 East Fourth Street
29th Floor, Atrium II Bldg.
Cincinnati, OH 45201-0960

Stephen A. Reilly, Esq.
Attorney General's Office
Public Utilities Section
180 East Broad Street
Columbus, OH 43215