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**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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RECEIVED-DOCKETING DIV

- In the Matter of the Application )  
of The Cincinnati Gas & Electric )  
Company to Modify its Non- )  
Residential Generation Rates to )  
Provide for Market-Based ) Case No. 03-93-EL-ATA  
Standard Service Offer Pricing )  
and to Establish a Pilot )  
Alternative Competitively-Bid )  
Service Rate Option Subsequent )  
to Market Development Period )
  
- In the Matter of the Application of The )  
Cincinnati Gas & Electric Company for )  
Authority to Modify Current Accounting )  
Procedures for Certain Costs Associated ) Case No. 03-2079-EL-AAM  
With The Midwest Independent )  
Transmission System Operator )
  
- In the Matter of the Application of The )  
Cincinnati Gas & Electric Company for )  
Authority to Modify Current Accounting )  
Procedures for Capital Investment in its ) Case No. 03-2081-EL-AAM  
Electric Transmission and Distribution ) Case No. 03-2080-EL-ATA  
System and to Establish a Capital )  
Investment Reliability Rider to be )  
Effective After the Market Development )  
Period )

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**MEMORANDUM CONTRA OF  
THE CINCINNATI GAS & ELECTRIC COMPANY  
TO APPLICATION FOR REHEARING BY  
THE OHIO MARKETERS GROUP**

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Pursuant to OAC 4901-1-35(B), The Cincinnati Gas & Electric Company respectfully requests that the Commission reject the Ohio Marketers Group's (OMG) application for rehearing because OMG's

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arguments are contrary to the Electric Restructuring Act and the Commission's precedents in other rate stabilization plan cases.

Before responding to OMG's legal arguments, CG&E acknowledges OMG's stated willingness to participate in settlement negotiations regarding CG&E's alternative rate stabilization plan (RSP). Even if these settlement negotiations do not bear fruit, CG&E appreciates OMG's continued and constructive efforts to resolve these complex issues amicably.

OMG's first two assignments of error are interrelated because both arguments rely on the premise that shopping consumers should not be required to pay any provider of last resort (POLR) charges. CG&E therefore will address both arguments together. OMG first argues that the Commission erred by requiring shopping consumers to pay CG&E any POLR charges because such consumers will purchase generation or capacity from a Competitive Retail Electric Service (CRES) provider, and MISO will balance energy and demand; therefore, shopping consumers will not receive any POLR service from CG&E. Second, OMG argues that the Commission erred by not making the POLR charges avoidable by all shopping consumers, because only consumers who want the service should be required to pay for it. OMG's arguments lack merit in several respects, and the Commission should reject these arguments.

OMG's arguments are fundamentally flawed because OMG ignores CG&E's statutory duty to serve as the POLR.<sup>1</sup> The Commission correctly concluded that CG&E will incur costs for providing this POLR service.<sup>2</sup> CG&E must be permitted to recover such costs through its market-based rates. If CG&E's market-based rates did not permit it to recover such costs, then CG&E's market-based rates would be unlawful because they would be predatory.<sup>3</sup>

OMG also overlooks the fact that shopping consumers receive a substantial benefit for the POLR service. All consumers, including shoppers should be required to pay for the POLR service, because they have the option to return to CG&E's stable RSP rates at any time. If shopping consumers were not required to pay these POLR charges, they would receive a free option and this would create an unlawful subsidy at the expense of CG&E and its non-shopping consumers.<sup>4</sup> No CRES provider, including OMG's members, has a statutory obligation to provide POLR service. OMG's argument would remove the POLR service from R. C. 4928.14. The Commission must give effect to the statute and permit CG&E to charge market priced compensation for the POLR service.

In addition, OMG disregards the Commission's past precedent. The Commission has previously approved non-bypassable POLR charges

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<sup>1</sup> Ohio Rev. Code Ann. § 4928.14(A) (Baldwin 2004).

<sup>2</sup> *In re CG&E Rate Stabilization Plan*, Case No. 03-93-EL-ATA, *et al.* (Opinion and Order at 30) (September 29, 2004).

<sup>3</sup> Ohio Rev. Code Ann. § 4905.33(B) (Baldwin 2004).

<sup>4</sup> Ohio Rev. Code Ann. § 4928.02(G) (Baldwin 2004).

similar to the ones that OMG attacks as unlawful here.<sup>5</sup> The Commission expressly recognized the statutory POLR obligation in DP&L's rate stabilization plan case and permitted DP&L to recover its costs through a market-based charge.<sup>6</sup>

Finally, OMG's argument that system reserve capacity is unnecessary because MISO will in the future balance supply and demand, simply misses the point. MISO will, in the future, economically dispatch generation across the MISO region. While this might increase efficiency, it will do nothing to ensure that sufficient capacity is available. Obviously, MISO can only economically dispatch capacity that is physically available, just as CG&E currently can only economically dispatch capacity that is available within its control area. During peak demand, CG&E now, and MISO in the future, can only seek capacity in the marketplace if it has not been previously reserved for load in this area. If such capacity is available and can be brought to the load without physical transmission constraints, the lights will stay on. If not, load will be curtailed. The physical process necessarily works exactly the same, whether dispatch is occurring just across the control area or across the entire region – MISO cannot and will not add one kW of capacity that would not have otherwise been available.

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<sup>5</sup> *In re DP&L Rate Stabilization Plan*, Case No. 02-2779, *et al.* (Opinion and Order at 28) (September 2, 2003).

<sup>6</sup> *Id.*

In its second assignment of error, OMG also argues that the Commission acted unlawfully by approving the modified RSP because the modified plan only allows 50% of non-residential consumers to avoid the RSC; hence, the RSP is discriminatory. Revised Code Section 4905.35 provides that “[n]o public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage.”<sup>7</sup> As a result, an electric utility can establish reasonable classifications for its consumers, but cannot treat similarly situated consumers in a discriminatory manner.<sup>8</sup> The Commission’s Order approving the modified RSP complies with this statute.

OMG witness Frank Lacey admitted that the Commission has approved similar classifications in past cases.<sup>9</sup> One of many existing examples of a reasonable classification approved by the Commission for differential treatment of consumers within the same rate schedule is the two-tiered shopping credits in *In re CG&E Electric Transition Plan*, where switching consumers in the first 20% of consumer load receive a higher shopping credit than the remaining 80% of consumer load.<sup>10</sup> The Ohio

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<sup>7</sup> Ohio Rev. Code Ann. § 4905.35 (Baldwin 2004).

<sup>8</sup> *F. & R. Lazarus & Co. v. Pub. Utilities Comm.*, 46 Ohio St. 2d 281, 348 N.E.2d 783 (1954).

<sup>9</sup> TR VI at 179-180.

<sup>10</sup> *In re CG&E Electric Transition Plan*, Case No. 99-1658-EL-ATA, *et al.* (Opinion and Order) (August 31, 2000).

Supreme Court has also approved these types of consumer classifications, including the instant example of CG&E's two-tiered shopping credit structure.<sup>11</sup>

The POLR charges are non-discriminatory because they result in similarly situated consumers being charged the same rate and non-similarly situated consumers being charged different prices.<sup>12</sup> Further, these provisions of the Commission-modified RSP are not discriminatory because every non-residential consumer has an equal opportunity to participate in the first 50% of switched load.<sup>13</sup> Finally, the Commission previously approved similar non-bypassable generation charges in *In re FirstEnergy Rate Stabilization Plan* and *In re DP&L Rate Stabilization Plan*.<sup>14</sup> Based on the foregoing, the Commission-modified RSP rates are not discriminatory.

As part of its second assignment of error, OMG seeks clarification that, if the Commission does not make the POLR charges avoidable for all shopping consumers, the Commission should clarify that current shopping non-residential consumers who want to avoid the RSC can enter the queue to avoid the RSC now, rather than wait until 2006.

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<sup>11</sup> *A K Steel Corp. v. Pub. Util. Comm.*, 95 Ohio St. 3d 81, 765 N.E.2d 862 (2002).

<sup>12</sup> CG&E Exhibit 3 at 20.

<sup>13</sup> Joint Exhibit 1 at 4-11.

<sup>14</sup> *In re FirstEnergy Rate Stabilization Plan*, Case No. 03-2144-EL-ATA (Opinion and Order at 22-24)(June 9, 2004); *In re DP&L Rate Stabilization Plan*, Case No. 02-2779-EL-ATA, *et al.* (Opinion and Order at 27-28)(September 2, 2003).

CG&E points out that the Stipulation already permits this. Page 9 of the Stipulation states:

All loads of consumers seeking to avoid the rate stabilization charge must be in the first 25% of the load of the applicable consumer class at the time that contract notice is given to CG&E. All consumers, *including those already switched*, may give such notice and shall be placed in the queue for avoidance of the rate stabilization charge at the time notice is given.<sup>15</sup>

In its third assignment of error, OMG argues that the Commission erred by not establishing a 60-day notice period for all consumers to waive the RSC service, and thus avoid the RSC charge. The Commission-modified plan provides that consumers wishing to avoid the RSC must give CG&E 60-day notice in 2004 and 90-day notice thereafter. OMG argues that a flat 60-day notice for the entire duration of the RSP is fair to CG&E and less confusing and less burdensome for consumers. The Commission has approved a similar provision in FirstEnergy's rate stabilization plan case.<sup>16</sup> Nevertheless, CG&E in the spirit of compromise agrees to a flat 60-day notice provision as requested by OMG, and as proposed by CG&E in its alternative rate stabilization plan proposal.<sup>17</sup>

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<sup>15</sup> Joint Exhibit 1 at 9 (Emphasis added.).

<sup>16</sup> *In re FirstEnergy Rate Stabilization Plan*, Case No. 03-2144-EL-ATA (Entry on Rehearing at 9-10) ( August 4, 2004) (approving a 45-day notice requirement for the first year of the rate stabilization plan for commercial and small industrial consumers, and a 90-day notice period for the remainder of the plan).

<sup>17</sup> CG&E Application for Rehearing (October 29, 2004 at Attachment 1 at 5).

OMG's fourth assignment of error seeks clarification on the price for power that shopping consumers will pay upon returning to CG&E's standard service offer. OMG requests that the Commission should clarify that "CG&E's incremental cost" should be defined as CG&E's actual incremental cost to provide power to serve the returning consumer during the month, not the highest hourly price for any hour during the month times the number of hours served during the month. No clarification of the Commission's Order is required on this point, and CG&E is concerned that OMG's proposed definition of "incremental cost" is too vague.

The correct measure of "incremental cost" that returning consumers who avoided the RSC should pay is the highest hourly cost of power for each hour during which CG&E served the consumer. This is the definition provided in the stipulation and recommendation, and approved in the Commission's order. This is the actual measure of CG&E's incremental cost to serve the returning consumer who avoided the RSC, and the Commission should continue to uphold this definition.

Finally, in its fifth assignment of error, OMG seeks clarification on the status of current non-residential shopping consumers for calendar year 2005. OMG notes that the stipulation provides that non-residential consumers who are switched as of December 31, 2004 shall continue to receive their shopping credits, per CG&E's ETP stipulation, and that the Commission's September 29, 2004 Order states that the AAC component



of the POLR shall not apply to shopping non-residential consumers during 2005, but is silent regarding the RSC. OMG argues that such consumers should also be able to avoid the RSC during 2005, and OMG also reiterates its argument that current shopping non-residential consumers should be permitted to get in the queue to avoid the RSC now, rather than waiting until 2006.

This is essentially a re-hash of OMG's earlier arguments that the RSC should be avoidable for all shopping consumers, the only difference being that such non-residential consumers who are switched as of December 31, 2004 will receive the shopping credits during 2005 as originally provided in the stipulation and Commission Order in CG&E's ETP case. CG&E has previously addressed OMG's arguments regarding the avoidability of the RSC earlier in this memorandum, and CG&E will not repeat its arguments here.

Pursuant to the stipulation shopping consumers may give the applicable notice and sign a contract to remain off of CG&E's market-based standard service offer service, decline the shopping credit during 2005, and avoid the RSC and AAC if they are in the first 50% of load to switch. Consumers however, may not take both the shopping credit and avoid the RSC. Consumers must choose. It would be inequitable and unlawful to CG&E to require it to further subsidize the shopping consumers by permitting shopping consumers who are switched as of

December 31, 2004 and receiving shopping credits during 2005, to avoid the RSC or the AAC during 2005.

It is equitable that shopping non-residential consumers receive a shopping credit, benefit from CG&E's POLR service during 2005 by having the option to return to CG&E's POLR service at any time, and pay CG&E the RSC and the AAC charges for this option. Only when such consumers no longer have the option to receive the shopping credits should they have the ability to avoid the RSC and AAC. Finally, the Commission should reject this assignment of error because the Commission has already ruled that an EDU can impose non-bypassable POLR charges on consumers who are simultaneously receiving shopping credits.<sup>18</sup>

Finally, CG&E points out that it filed an application for rehearing that requests approval of an alternative RSP proposal as one option for the Commission to resolve these proceedings. The alternative RSP proposal contains some of the same features as the original stipulation and recommendation, such as the same CBP process. CG&E anticipates that the alternative RSP proposal will receive substantial support from many interested stakeholders, including representatives of commercial, industrial and residential customer and supplier groups. Importantly, the Commission should reject the OMG's application for rehearing because it attacks certain key parts of the compromise reached not only

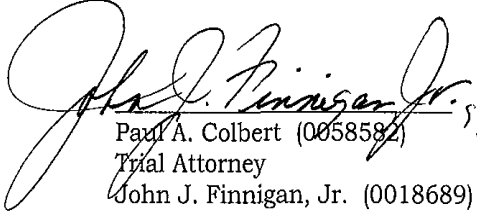
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<sup>18</sup> *In re FirstEnergy Rate Stabilization Plan*, Case No. 03-2144-EL-ATA (Opinion and Order at 28-36) (August 4, 2004).

in the original stipulation and recommendation, but also in the new alternative proposal.

Based on the foregoing, CG&E respectfully requests that the Commission overrule OMG's arguments and clarify its September 29, 2004 Order as provided herein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John J. Finnigan, Jr.", is written over a horizontal line. The signature is cursive and somewhat stylized.

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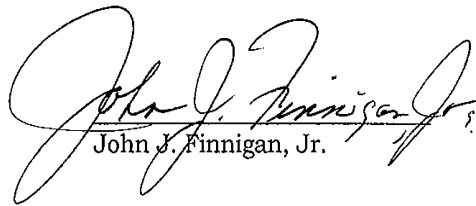
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum Contra of The Cincinnati Gas & Electric Company to Application for Rehearing by Ohio Marketers Group was electronically served on the following parties this 8th day of November 2004.

  
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