

FILE

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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- 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 )

**MEMORANDUM CONTRA OF  
THE CINCINNATI GAS & ELECTRIC COMPANY  
TO APPLICATION FOR REHEARING BY  
CONSTELLATION POWER SOURCE, INC.**

Pursuant to OAC 4901-1-35(B), The Cincinnati Gas & Electric Company respectfully requests that the Commission reject Constellation Power Source, Inc.'s (CPS) single assignment of error, which asserts that the Commission erred by approving paragraph 13 of CG&E's stipulation

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rate stabilization plan (RSP), relating to the competitive bidding process (CBP) component of the RSP.

Paragraph 13 states:

13. The Parties agree that the Commission may determine and implement a competitive bidding process to test CG&E's price to compare, defined as the price to compare for the first 25% of load of each customer class to switch to a CRES provider, against the market price. If the price to compare is significantly different than the bid price, either the Commission or CG&E may begin discussions with all Parties to continue, amend, or terminate this Stipulation.<sup>1</sup>

The Commission has already considered and rejected CPS' arguments, and the Commission should do so again because CPS' arguments are contrary to the Electric Restructuring Act and the Commission's rules relating to the CBP.

CPS initially argues that the Commission's order violates R. C. 4928.14(B)<sup>2</sup> by "its failure to follow the statutory requirement for a bid out."<sup>3</sup> CPS then reverses course, and admits that the statute permits the Commission to waive the CBP if the Commission finds that similar market-based price options are available to consumers.<sup>4</sup> CPS' initial statement that the Commission violated the statute is wrong, and CPS' subsequent statement that the Commission can waive the CBP requirement is correct.

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<sup>1</sup> Joint Exhibit 1 at 16.

<sup>2</sup> Ohio Rev. Code Ann. § 4928.14(B) (Baldwin 2004).

<sup>3</sup> Application for Rehearing by Constellation Power Source, Inc. at 2 (October 29, 2004).

<sup>4</sup> *Id.* at 3.

Revised Code Section 4928.14(B) requires CG&E to offer consumers an option to purchase competitive retail electric service through a CBP.<sup>5</sup> Further, “[t]he Commission may determine at any time that a competitive bidding process is not required, if other means to accomplish generally the same option for customers is readily available in the market and a reasonable means for customer participation is developed.”<sup>6</sup>

CG&E’s CBP complies with R. C. 4928.14(B)<sup>7</sup> because: (1) CG&E’s RSP market price provides consumers with generally the same market pricing option they would have pursuant to a CBP; and (2) it provides an option for the Commission to conduct a CBP at any time, including terms that permit consumers to receive the information necessary to evaluate and choose winning bidders, and a process for the parties to modify or terminate the Stipulation if the price to compare is significantly different from the bid price. The Commission correctly held that CG&E’s CBP complies with this statute.<sup>8</sup> Even if the Commission would have found that the CBP did not comply with the statute, the Commission had discretion to waive the CBP requirement. CPS’ initial statement that the Commission failed to follow R. C. 4928.14(B)<sup>9</sup> therefore has no merit.

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<sup>5</sup> Ohio Rev. Code Ann. § 4928.14(B)(Baldwin 2004).

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

<sup>7</sup> *Id.*

<sup>8</sup> *In re CG&E Rate Stabilization Plan*, Case No. 03-93-EL-ATA, *et al.* (Opinion and Order at 28) (September 29, 2004).

<sup>9</sup> Ohio Rev. Code Ann. § 4928.14(B)(Baldwin 2004).

The Commission reasonably could have concluded, in compliance with R. C. 4928.14(B),<sup>10</sup> that a CBP is not required, because other means to accomplish generally the same option for consumers are readily available in the market and a reasonable means exists for consumer participation. The “other means” to accomplish the same result are the CBP provided under the Stipulation RSP, the option to purchase power directly from CRES providers, the option to aggregate, and the option to purchase power from CG&E at a market-based rate. In addition, the Commission’s rules allow it to approve a CBP “that varies from these rules where there is substantial support from a number of interested stakeholders.”<sup>11</sup> The Stipulation RSP clearly met the requirements of this rule.

CPS argues that the CBP in paragraph 13 of the stipulation would be doomed to failure because bidders would need to hold their prices open indefinitely while CG&E would attempt to negotiate new RSP rates, which would obviate the bid. CPS’ argument is without merit. Every CBP process requires the bidders to hold their offer open for a prescribed period of time pending a decision regarding which bid(s) should be accepted. There is no reason to believe that the decision-making process related to CG&E’s CBP process could not be conducted within a similar time frame used by EDUs which have successfully conducted CBPs.

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<sup>10</sup> *Id.*

<sup>11</sup> O. A. C. 4901:1-35-02(C).

CPS also argues that there is no reason why the Commission should not order a bid now, rather than wait for some undetermined time in the future.<sup>12</sup> The Commission's decision not to order a bid now is reasonable for several reasons. First, the RSP provides for CG&E to provide market-based standard service offer to non-residential consumers beginning January 1, 2005, and a CBP could not be completed in time to allow the bid price to be implemented by that date. Second, the Commission has already ordered FirstEnergy to conduct a CBP, and the Commission acted reasonably by not requiring other EDUs to undergo a CBP until the results of FirstEnergy's CBP are available. This will enable all stakeholders to determine whether a bidding process would likely result in market prices lower than the EDUs' rate stabilization prices, without requiring all Ohio EDU stakeholders to undergo duplicative and costly efforts to simultaneously conduct CBPs. Third, a substantial portion of CG&E's stakeholders, including representatives of suppliers and residential consumers, agreed to the stipulation CBP paradigm, which does not request the Commission to immediately order a bidding process. Fourth, the RSP would not impact residential consumers until January 1, 2006, so the Commission can refrain from ordering a test bid now, and will still have adequate time to order a test bid prior to that date, if it decides to do so.

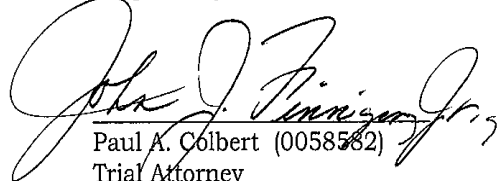
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<sup>12</sup> Application for Rehearing by Constellation Power Source, Inc. at 5 (October 29, 2004).

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 the same CBP process as the original stipulation and recommendation. 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 continue to uphold the CBP process because it is a key part of the compromise reached not only for the original stipulation and recommendation, but also for the new alternative proposal.

Based on the foregoing, CG&E respectfully requests that the Commission overrule CPS' application for rehearing.

Respectfully submitted,



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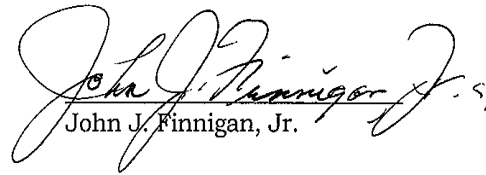
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CERTIFICATE OF SERVICE

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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