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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's)
Promulgation of Rules for the Conduct)
of a Competitive Bidding Process for) Case No. 01-2164-EL-ORD
Electric Distribution Utilities Pursuant to)
Section 4928.14, Revised Code.)

MEMORANDUM CONTRA OF THE OHIO CONSUMERS' COUNSEL TO
CINCINNATI GAS & ELECTRIC COMPANY'S APPLICATION FOR REHEARING
AND MOTION FOR STAY

I. INTRODUCTION AND SUMMARY

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential utility consumers of the State of Ohio, submits this Memorandum Contra the Application for Rehearing and Motion for Stay filed by Cincinnati Gas & Electric Company ("CG&E") on January 16, 2004 ("CG&E Application"). Ohio Adm. Code 4901-1-35(B). CG&E seeks rehearing of the Public Utilities Commission of Ohio's ("Commission's") Order dated December 17, 2003 ("Order") regarding the promulgation of rules for the period following the market development period ("post-MDP"). The CG&E Application, in support of a stay, threatens a challenge "at the Joint Committee on Agency Rule Review and at the Court," the latter in the form of "an appeal, application for a writ, or application for a declaratory action." CG&E Application at 30. A challenge regarding the Commission having gone too far in its rulemaking will not succeed because the Commission, while legally obligated to promulgate post-MDP rules by January 1, 2004 (R.C. 4928.14(B)), has not issued rules having "a general and uniform operation" (R.C.

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119.01(C)) across electric distribution utilities (“EDU’s”). See OCC Application for Rehearing at 2-4.

II. Argument

The CG&E’s challenge addresses the authority of the Commission to promulgate post-MDP service rules in addition to the substance of the action taken by the Commission in its Order. CG&E admits that the Commission has “express statutory authority pursuant to R.C. 4928.14(B) * * * to promulgate rules concerning the competitive bid process,” (CG&E Application at 9), but claims that this provision is “specific to the determination of competitive electric generation prices charged by an electric distribution utility” and therefore “limits [the] general power [under R.C. 4928.06].” *Id.* The provisions of R.C. 4928.14(B) are specific to Commission rulemaking only concerning the competitive bid process, but *not* to every process concerning prices charged by an EDU.

The provision in R.C. 4928.06 providing that, “[t]o the extent necessary, the commission shall adopt rules to carry out this chapter” is not rendered “surplusage” (CG&E Application at 10) in the presence of the rulemaking authority located in R.C. 4928.14(B). The specific provisions in R.C. 4928.14(B) provide details concerning appropriate Commission rulemaking that is not contained in R.C. 4928.06: competitive bidding rules must be promulgated “[p]rior to January 1, 2004,” and “shall * * * include[e] the information requirements necessary for customers to choose this option and the requirements to evaluate qualified bidders.” These are the specific statutory requirements that the Commission failed to meet when it approved “rules”

that have no substantive, uniform operation on the post-MDP service applications filed by EDUs. See OCC Application for Rehearing at 3-4, 9.¹

Ironically, it is CG&E that would render statutory provisions under R.C. Chapter 4928 “surplusage.” The general rulemaking authority located in R.C. 4928.06 is meaningless if CG&E’s reasoning is accepted such that all rulemaking authority must be specific to its task. Furthermore, R.C. 4928.14(A) provides that the market-based standard service offer “shall be filed with the public utilities commission under section 4909.18 of the Revised Code.” That section provides for the general supervision by the Commission over an application by “any public utility desiring to establish any rate.” CG&E’s argument that the Commission may not adopt comprehensive rules would render the oversight obligations of the Commission meaningless. The Commission should develop comprehensive rules that promote the “diversity of energy supplies and suppliers” (R.C. 4928.02(C)) by developing rules having general and uniform operation over all Ohio EDUs.²

III. CONCLUSION

Rather than impinging on the operations of the EDUs, as argued in the CG&E Application, the post-MDP service option “rules” approved by the Commission ensure that Ohio will have five different post-MDP models. This piecemeal approach will not provide the uniformity will help facilitate the participation of the maximum number of suppliers in the Ohio

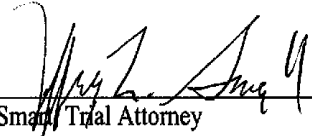
¹ The stay requested in the CG&E Application would make it more apparent that the Commission has not met the requirement that bidding service rules be adopted “[p]rior to January 1, 2004.” R.C. 4928.14(B).

² The OCC has proposed such a set of comprehensive rules. See OCC Application for Rehearing, Exhibit 1 (“Alternative Framework”).

electric market. On rehearing, the Commission should deny CG&E's assignments of error and follow Ohio law by addressing the assignments raised by the OCC.

Respectfully submitted,

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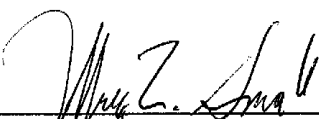


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memo Contra CG&E Application for Rehearing has been served upon those persons enrolled on the Commission's "bidding" listserver as well as the below-stated persons, via first class U.S. Mail, prepaid, this 26th day of January, 2004.



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