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 Standard Service Offer Pricing and to Establish a Pilot Competitively-Bid Service Rate Option Subsequent to Market Development Period. | Case No. 03-93-EL-ATA |
| In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Modify Current Accounting Procedures for Certain Costs Associated with the Midwest Independent Transmission System Operator. | Case No. 03-2079-EL-AAM |
| In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Modify Current Accounting Procedures for Capital Investment in its Electric Transmission and Distribution System And to Establish a Capital Investment Reliability Rider to be Effective after the Market Development Period. | Case No. 03-2081-EL-AAM<br>Case No. 03-2080-EL-ATA |

**DOMINION RETAIL, INC.**
**MEMORANDUM CONTRA**
**MOTION OF**
**THE CINCINNATI GAS & ELECTRIC COMPANY**
**TO COMPEL DISCOVERY**

By its motion of May 6, 2004, the Cincinnati Gas & Electric Company ("CG&E") seeks an order from this Commission directing the various marketer intervenors in these proceedings, including Dominion Retail, Inc. ("Dominion Retail"), to respond to Interrogatory No. 10 and Request for Production No. 9, both of which were contained in CG&E's first set of discovery.

Interrogatory No. 10 asked for a copy of each offer for competitive retail electric service made by the supplier to each potential customer located in Ohio since January 1, 2000, as well as for the dates the offers were effective and the number of customers who accepted the offers. Request for Production No. 9 sought "a representative copy of each contract containing the different price terms, and effective dates used by (Supplier) during this time period." Not surprisingly, each marketer served with these CG&E discovery requests objected to providing this information on the obvious grounds that these discovery requests sought information that was not relevant to the subject matter of these proceedings and that they were not reasonably calculated to lead to the discovery of admissible evidence [*see* Rule 4901-1-16(B), O.A.C.], that responding would impose an undue burden [*see* Rule 4901-1-24(A), O.A.C.], and that the information sought was competitively sensitive, trade secret information [*see* Rule 4901-1-24(A)(7), O.A.C.] (*see* CG&E Motion to Compel, Tab 1). Although, in its motion to compel, CG&E now limits the time period covered by these requests to the period January 1, 2003 to the present "to make it easier for Suppliers to respond" (CG&E Motion to Compel, 4), Dominion Retail submits that this measure does nothing to cure the fundamental flaws in these discovery requests. For those reasons set forth herein, the motion to compel should be denied.

CG&E begins its attempt to defend the interrogatory and request for production against the relevance objections by claiming that the information sought is pertinent to whether the proposed post-market development period rates contained in its MBSSO and ERRSP alternatives are just, reasonable, and non-predatory (CG&E Motion to Compel, 5-7). With all due respect, this is nonsense. First, Interrogatory No. 10 is not limited to rates actually charged by Dominion Retail, but seeks, instead, all "offers" made by Dominion Retail, whether or not they were accepted. Second, even if the interrogatory, like Request for Production No. 9, were limited to

actual contracts, neither is limited to contracts with customers within CG&E's service territory. Plainly, the price against which CRES suppliers must compete will be different in different EDU service areas. Third, the historical pricing of CRES offerings in the market development period environment, no matter which EDU territory is involved, would not tell the Commission the first thing about CRES pricing after the features of the various EDU transition plans that were intended to jump-start competition are no longer available. For example, once the enhanced shopping credit available to CG&E residential customers expires, there will be no residential shopping in CG&E's service territory because Dominion Retail, the only CRES provider serving residential customers, cannot conceivably compete under either the MBSSO or ERRSP plans proposed by CG&E in this case.[1] Using a price that will no longer be offered as a test of the reasonableness of CG&E's pricing in the post-market development period simply makes no sense.

CG&E next pooh-poohs the marketer objections to Interrogatory No. 10 and Request for Production No. 9 on the grounds that providing the requested information would be unduly burdensome, claiming that providing this information would be a simple undertaking involving no more than a data base query (CG&E Motion to Compel, 7). In so stating, CG&E ignores that the scope of its interrogatory, while now more limited in terms of time, still goes to any Dominion Retail offer made anywhere in Ohio, whether accepted or not. Moreover, even if these requests sought relevant information – which they do not – or were reasonably calculated to lead to the discovery of admissible evidence – which they are not – Dominion Retail's current pricing for residential service in the CG&E territory is publicly available on the Commission's website.

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[1] As it is, the CG&E enhanced credit produced only 5% switching in the residential class.

With respect to the objections based on grounds that the information sought is a trade secret, CG&E states that the recourse for the party from which discovery is sought is to seek a protective order to prevent public disclosure, not simply to refuse to produce the requested information (CG&E Motion to Compel, 8). Mercifully, CG&E has not attempted to compel responses to certain of its other outrageous discovery requests that seek what is obviously highly sensitive information,[2] but, even so, the CG&E argument has the cart before the horse. Although the party from which discovery is sought certainly has the option of seeking a protective order, the party would do so only if it were directed to provide trade secret information over its objection. A party resisting discovery would have no reason to seek a protective order for information it believes is properly withheld on other grounds.

Finally, CG&E cites as precedent for the "Admissibility/Discoverabilty" of supplier price information the fact some suppliers provided information in the FirstEnergy rate stabilization plan case "on the prices at which they could supply power into the First Energy's service territory" (CG&E Motion to Compel, 9). This has absolutely no bearing on the issue at hand. In the first place, as CG&E concedes (*id.*), the suppliers in question did not disclose either the prices or term in their customer contracts, which is the information CG&E seeks through the discovery requests now at issue here. Second, what these suppliers provided were estimates of post-market development period prices, not information regarding historical prices and specific terms of actual offers. This is obviously not what CG&E has asked for in this case, nor could it properly have done so, for one party cannot compel another to perform an analysis of this type through a discovery request. Contrary to CG&E's suggestion, that estimates of future prices

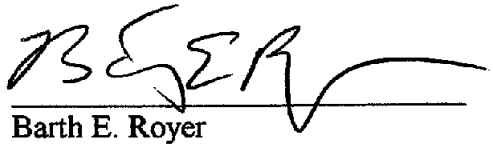
[2] Interrogatory No. 11, seeking the methodology by which Dominion Retail determines its pricing, and Request for Production No. 10, seeking copies of all Dominion Retail internal business plans for the period January 1, 2000 to the present, fall into this category.

were admitted into evidence in one case does not mean that historical information is discoverable in another.

In this same vein, CG&E's reliance on excerpts from depositions in the DP&L rate stabilization plan case for the proposition that, in that case, "the Commission granted a motion to compel discovery in favor of DP&L and against Strategic Energy, LLC and Constellation NewEnergy, Inc. requesting information of the same type CG&E seeks here" is, to put it mildly, a bit of a stretch (*id.*). Although there were disputed DP&L discovery requests that sought existing contracts these suppliers had in the ECAR region, there was no published Commission resolution of the dispute, nor was there a written or oral ruling on the matter by the presiding attorney examiner. All CG&E can point to is portions of deposition testimony that suggest that some sort of information along these lines was provided, with no explanation of the specific conditions under which it was provided. Upon information and belief, no contracts were turned over in that case. Further, although the prices sought by DP&L were existing prices, the contract years in question ran into the early years of the DP&L post-market development period. Dominion Retail has no such contracts with customers in CG&E's service territory.

WHEREFORE, Dominion Retail respectfully requests that CG&E's motion to compel be denied.

Respectfully submitted,



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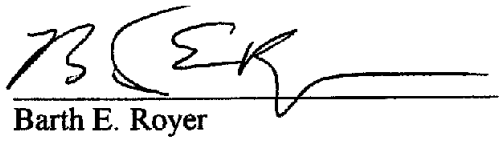
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the parties listed below by electronic mail this 13th day of May 2004. In addition, counsel for CG&E has also been served this date by first class mail, postage prepaid.



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