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July 15, 2004

VIA Overnight Delivery

Ms. Daisy Crockron
Docketing Division
The Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43266-5073

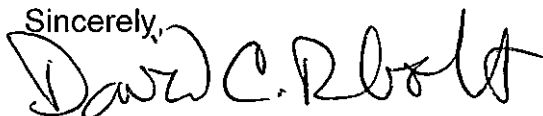
RE: Case No. 03-93-EL-ATA, et.al.

Dear Ms. Crockron:

Enclosed please find an original and 10 copies of a Motion to Strike. Please have the Motion docketed in the above-referenced case. Copies have been served on all parties on the attached certification of service. We do not require a stamped copy.

If you have any questions, please do not hesitate to call. Thank you for your assistance in this matter.

Sincerely,



David C. Rinebolt
Executive Director and Counsel

Enclosure

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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) Case No. 03-93-EL-ATA
Offer Pricing and to Establish an Alternative)
Competitively-Bid Service Rate Option Sub-)
sequent to the Market Development Period.)

In the Matter of the Application of The)
Cincinnati Gas & Electric Company for)
Authority to Modify Current Accounting) Case No. 03-2079-EL-AAM
Procedures for Certain Costs Associated 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 System) Case No. 03-2080-EL-ATA
And to Establish a Capital Investment)
Reliability Rider to be Effective after the)
Market Development Period.)

**Motion of Ohio Partners for Affordable Energy to Strike Portions of
The Cincinnati Gas and Electric Company Reply Brief and Supporting
Memorandum**

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July 2, 2004

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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) Case No. 03-93-EL-ATA
Offer Pricing and to Establish an Alternative)
Competitively-Bid Service Rate Option Sub-)
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Cincinnati Gas & Electric Company for)
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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 System) Case No. 03-2080-EL-ATA
And to Establish a Capital Investment)
Reliability Rider to be Effective after the)
Market Development Period.)

**Motion to Strike Portions of The Cincinnati Gas and Electric Company
Reply Brief and Supporting Memorandum**

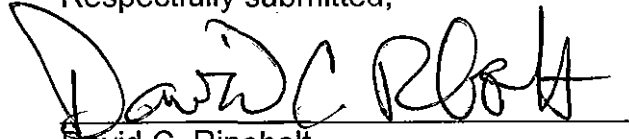
Pursuant to Rule 12(F) of the Ohio Rules of Civil Procedure ("O.R.C.P."), Ohio Partners for Affordable Energy hereby moves to strike the following parts of The Cincinnati Gas & Electric Company's Reply Brief; specifically the phrase "one low income representative whose sole clients in CG&E's service territory are also members of a signatory party (CUFA)¹", and the entire paragraph on Page 4 of the Reply Brief as follows:

¹ See first full paragraph on Page 2 of the Reply Brief.

OPAE's only interest is to become the sole administrator of energy efficiency and weatherization contracts. CG&E currently contracts for its energy and weatherization programs through the Cinergy Community Energy Partnership Board (CCEP). OPAE's clients in CG&E's certified territory, the Hamilton and Clermont County Community Action Agencies, belong to CCEP and to CUFA, a signatory to the Stipulation. The Commission should reject OPAE's arguments as simply an attempt to extract from CG&E the ability to control a substantial amount of dollars to the detriment of various energy efficiency and weatherization providers in CG&E's certified territory.

The reasons for this Motion to Strike are discussed in the Memorandum of Support which is attached hereto and incorporated herein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David C. Rinebolt". The signature is written in a cursive style with a horizontal line underneath it.

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Memorandum in Support

Under Rule 12(F), O.R.C.P, a motion to strike may be filed within twenty-eight days of the service of a pleading when no responsive pleading is permitted under the rules. The Cincinnati Gas & Electric Company ("CG&E") filed its Reply Brief on July 2, 2004. Thus, this motion is timely under Ohio procedural rules.

Ohio Partners for Affordable Energy ("OPAЕ") respectfully requests the sections of the Reply Brief cited in the Motion be stricken for two specific reasons: first, the sections contain factual misstatements that could mislead the Public Utilities Commission of Ohio ("PUCO" or "Commission") regarding the positions of OPAЕ and its members (and their affiliations); and, second, the pleading violates requirements that settlement discussions remain privileged and confidential.²

Regarding the first issue, CG&E alleges that Cincinnati/Hamilton Community Action Agency and perhaps Clermont Community Action Agency are members of Citizens United for Action ("CUFA"), a signatory party to the stipulation also interested in low-income issues. This is not the case. None of the OPAЕ members serving customers in the CG&E service territory -- Cincinnati/Hamilton Community Action Agency, Clermont Community Action Agency, Adams-Brown Counties Economic Opportunities, Inc. (ABECOI), Community Action Partnership of the Greater Dayton Area (CAP Dayton), and Supports to Encourage Low-Income Families (S.E.L.F.) -- are members of CUFA.

² Counsel for CG&E has also mischaracterized OPAЕ's position in these discussions.

Only three of the agencies providing energy efficiency services, Cincinnati/Hamilton, Clermont and ABECOI have participated in the Cinergy Community Energy Partnership ("CCEP").³ And, our member agencies have received little if any funding from the CG&E despite participation in CCEP; generally this funding has been secured through litigation or via subcontracts with People Working Cooperatively – the organization that receives over 90 percent of the funding CG&E devotes to low-income programs.

In summary, the CG&E Reply Brief mischaracterizes the relationships between OPAE members and other parties and the function of the CCEP. Those references should be stricken lest a false impression be created to the Commission.

Regarding the second issue, the Commission has made it exceedingly clear in recent cases that discussions associated with settlements are privileged and are likely not relevant as evidence in a proceeding. See generally, *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for The Dayton Power & Light Company*, Case Nos. 02-2779-EL-ATA, et al., Opinion and Order at 12 (September 2, 2003); Entry on Rehearing at 9 (October, 22, 2003); appeal pending in Ohio Supreme Court Case No. 03-2159.⁴

³ Moreover, OPAE's members hardly "belong to" the CCEP which is an advisory panel CG&E uses as a sounding board for developing programs which it alone controls funding for. To imply that the CCEP makes funding decisions is simply incorrect. See Tr. II, pp. 155-156.

⁴ In the September 2, 2003 Opinion and Order, the Commission explained that settlement communications have been held to be privileged. In the Entry on Rehearing, the Commission denied the Application for Rehearing and stated that "the court was clear in its holding that settlement discussions are privileged." Entry on Rehearing at 9.

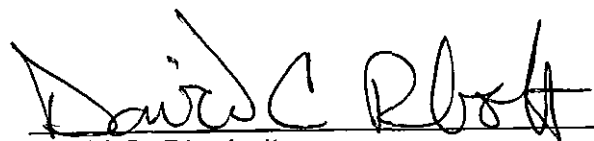
Beyond the Commission's recent determination that settlement communications are privileged, the Ohio Rules of Evidence, the Ohio Administrative Code and public policy make clear that settlement agreements cannot be cited as evidence inasmuch as they are privileged, irrelevant, and inadmissible as evidence. For example, in *Goodyear Tire & Rubber v. Chiles Power Supply*, (C.A.6, 2003), 332 F.3d 976, 978, the Sixth Circuit Court of Appeals held that "the content of settlement discussions are always confidential and may never be disseminated, even after a case is closed." (internal quotations omitted). See also, Evid. R. 408; Rule 4901-1-16(B), Ohio Administrative Code. "Evidence of conduct or statements made in compromise negotiations is likewise not admissible." Evid. R. 408. Because settlement negotiations are not admissible, it goes without saying that the content of such negotiations cannot be cited in an initial or reply brief.

CG&E's allegation that "OPAE's only interest is to become the sole administrator of energy efficiency and weatherization contracts" – while not only untrue – could only have come from privileged settlement discussions, specifically from an offer made by OPAE to CG&E in the course of these discussion, attached to this motion, incorporate herein, and filed separately under seal.⁵ OPAE has indeed forwarded discovery requests to CG&E regarding low-income related issues. We also conducted some questioning of a witness on

⁵ As OPAE noted in its initial Motion to Intervene, its interests go far beyond low-income programs and funding. As an advocacy organization we are concerned about the prices to be paid by all customers, including our member agencies which are served under various commercial tariffs. Moreover, as a party to the original stipulation in the ETP case, OPAE also has an interest in ensuring the commitments made by CG&E in that case are fulfilled. Finally, as has been made clear in OPAE's Initial and Reply Briefs, other issues of public policy also concern the organization.

these topics. But, low-income issues, and the operation of CG&E's programs specifically, were never referred to in the OPAE Initial Brief. OPAE's Reply Brief did support continuation of funding for programs through the CCEP, pledging to work through our agencies involved in that process, and supporting the provision for discussions regarding Percentage Income Payment Plan arrearages and the proposed DSM Rider.

This is hardly a record that can justify the assertions made by CG&E. Either the statements are factually incorrect or evidence for the statements can only come from a mischaracterization of a document provided and conversations which occurred in the course of settlement discussions in which OPAE participated in good faith. The Commission should not countenance such actions nor permit a party to place these discussions, however mischaracterized, in a reply brief. Therefore we respectfully request that the offending sections be stricken from the CG&E Reply Brief.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Strike and Memorandum in Support of Ohio Partners for Affordable Energy were served electronically and by regular U.S. Mail upon the parties of record identified below in this case on this 15th day of July, 2004.



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