

BEFORE


THE PUBLIC UTILITIES COMMISSION OF OHIO

- In the Matter of the Application of The)
Cincinnati Gas & Electric Company to Modify)
Its Nonresidential Generation Rates to)
Provide for Market-Based Standard Service) Case No. 03-93-EL-ATA
Offer Pricing and to Establish an Alternative)
Competitive-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.)

ENTRY ON REHEARING

The Commission finds:

- (1) The applicant, The Cincinnati Gas & Electric Company (CG&E), filed applications in these matters to modify its nonresidential generation rates to provide for market-based standard service offer pricing and to establish an alternative competitive-bid process subsequent to the end of the market development period (MDP), to permit it to defer costs and investments, and to establish a rider to recover certain capital investments.
- (2) On September 29, 2004, the Commission issued its opinion and order (opinion and order) in these proceedings. In the opinion and order, the Commission approved, with certain modifications, a stipulation (stipulation) filed by some of the parties in the cases (signatory parties), including CG&E; staff of the Commission (staff); FirstEnergy Solutions Corp. (FES); Dominion Retail, Inc. (Dominion); Industrial Energy Users-Ohio (IEU); Green Mountain Energy Company (GMEC); Ohio Energy Group, Inc. (OEG); The Kroger Co. (Kroger); AK Steel

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Corporation; Cognis Corp. (Cognis); People Working Cooperatively (PWC); Communities United For Action; and Ohio Hospital Association (OHA). Parties that did not sign the stipulation (nonsignatory parties) include Ohio Consumers' Counsel (OCC); Constellation NewEnergy Inc. (Constellation); MidAmerican Energy Company (MidAmerican); Strategic Energy, LLC (Strategic); WPS Energy Services, Inc. (WPS); Constellation Power Source, Inc. (CPS); Ohio Partners for Affordable Energy (OPAE); The Ohio Manufacturers' Association (OMA); National Energy Marketers Association; and PSEG Energy Resources & Trade LLC. (Constellation, MidAmerican, Strategic, and WPS may be referred to collectively as Ohio Marketers Group (OMG).)

- (3) The stipulation provided, *inter alia*, for the establishment of a rate stabilization plan for CG&E that would govern the rates to be charged by CG&E from January 1, 2005, through December 31, 2008 (with certain aspects of those rates also extending through the end of 2010). The opinion and order approved the stipulation while making a number of modifications to its content.
- (4) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days of the entry of the order upon the Commission's journal.
- (5) On October 29, 2004, CG&E, OCC, OMG, and CPS filed applications for rehearing.
- (6) In its application for rehearing, CG&E requests, in the alternative, that the Commission either (a) reinstate the stipulation without modification, (b) adopt CG&E's suggestions, as described in its application for rehearing, or (c) "acknowledge and approve CG&E's statutory right to implement its previously-filed market-based standard service offer." (CG&E's application for rehearing at 2.) CG&E also sets forth twelve additional assignments of error that relate to the Commission's consideration and modification of the stipulation in the opinion and order. Thus, CG&E's application for rehearing actually sets forth thirteen assignments of error, as follows:
 - (a) In CG&E's first assignment of error, it contends that the Commission erred in failing to adopt the stipulation without modification and requests that the Commission consider modifying the opinion and order on the basis of its suggestions.

- (b) In CG&E's second assignment of error, it contends that the Commission erred in purporting to establish the amount of the market price that CG&E charges for its market-based standard service offer (MBSSO), including the price to compare and provider of last resort (POLR) components and by retaining authority to approve increases or decreases in the MBSSO through annual rate reviews.
- (c) In CG&E's third assignment of error, it contends that the Commission erred in finding that additional regulatory transition charges (RTCs) proposed in the stipulation to be assessed against residential consumers during 2009 and 2010 would conflict with the stipulation and recommendation approved in *In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan, Approval of Tariff Changes and New Tariffs, Authority to Modify Current Accounting Procedures, and Approval to Transfer its Generating Assets to an Exempt Wholesale Generator*, Case No. 99-1658-EL-ETP et al. (August 31, 2000) (ETP opinion), while requiring CG&E to maintain a stable generation rate for those consumers after the MDP.
- (d) In CG&E's fourth assignment of error, it contends that the Commission erred in denying CG&E accounting deferrals and recovery of such deferrals through a rider amortized over a five-year period, from July 1, 2004, through December 31, 2005, related to its net capital investment to CG&E's distribution plant made on behalf of residential consumers.
- (e) In CG&E's fifth assignment of error, it contends that the Commission erred in permitting all consumers to avoid POLR charges, thereby requiring CG&E to further subsidize the competitive retail electric market.
- (f) In CG&E's sixth assignment of error, it contends that the Commission erred in not permitting CG&E to recover all of its POLR costs.

- (g) In CG&E's seventh assignment of error, it contends that the Commission erred in denying CG&E recovery of POLR costs based upon the concept of rate shock without any evidence of record.
 - (h) In CG&E's eighth assignment of error, it contends that the Commission erred in permitting up to 50 percent of nonresidential consumers to avoid payment of the rate stabilization charge (RSC) of the POLR charge without CG&E's consent.
 - (i) In CG&E's ninth assignment of error, it contends that the Commission erred in attempting to compel CG&E either to accept the Commission's modifications of the stipulation or to take a variety of specified actions.
 - (j) In CG&E's tenth assignment of error, it contends that the Commission erred in attempting to determine CG&E's MBSSO by capping the price based on CG&E's cost instead of permitting a market price.
 - (k) In CG&E's eleventh assignment of error, it contends that the Commission erred in failing to approve CG&E's applications in these proceedings on a timely basis and in ruling only on the rate stabilization service requested by the Commission and offered as a settlement by CG&E.
 - (l) In CG&E's twelfth assignment of error, it contends that the Commission erred in failing to approve CG&E's MBSSO proposed on January 10, 2003.
 - (m) In CG&E's thirteenth assignment of error, it contends that the Commission erred in failing to acknowledge CG&E's rights to implement market rates and in failing to approve the market-based rates for which CG&E applied on January 10, 2003.
- (7) OCC sets forth twelve assignments of error in its application for rehearing, as follows:

- (a) OCC's first seven assignments of error relate to its contention that the stipulation, adopted by the opinion and order, violates important regulatory principles and practices. In OCC's first assignment of error, it contends that the Commission erred in failing to review alleged side agreements between individual parties, resulting in an inadequate review of the standard service offer (SSO).
- (b) In OCC's second assignment of error, it contends that the Commission erred in allowing certain non-bypassable charges.
- (c) In OCC's third assignment of error, it contends that the Commission erred in failing to price noncompetitive services through a statutory rate case.
- (d) In OCC's fourth assignment of error, it contends that the Commission erred in allowing an SSO that is not a market-based rate.
- (e) In OCC's fifth assignment of error, it contends that the Commission erred in failing to include a competitive bidding process.
- (f) In OCC's sixth assignment of error, it contends that the Commission erred in failing to require CG&E to transfer its generation assets to a separate affiliate.
- (g) In OCC's seventh assignment of error, it contends that the Commission erred in approving rates that are discriminatory.
- (h) OCC's next four assignments of error relate to its contention that the stipulation, adopted by the opinion and order, does not, as a package, benefit ratepayers and the public interest. In OCC's eighth assignment of error, it contends that the Commission erred in failing to consider alleged side agreements.
- (i) In OCC's ninth assignment of error, it contends that the Commission erred in approving an SSO

that does not result in the rate certainty that the Commission has identified as its objective in allowing for rate stabilization plans.

- (j) In OCC's tenth assignment of error, it contends that the Commission erred in failing to further the Commission's objective of developing a competitive market.
 - (k) In OCC's eleventh assignment of error, it contends that the Commission erred in failing to require specificity in the percentage of income payment plan (PIPP), weatherization and demand side management (DSM) programs in the stipulation.
 - (l) OCC's last assignment of error relates to its contention that the stipulation, adopted by the opinion and order, is not a product of serious bargaining among capable, knowledgeable parties. Specifically, in the twelfth assignment of error, OCC contends that the Commission erred in failing to allow for discovery of alleged side agreements between individual parties, resulting in a stipulation that is not a product of serious bargaining among capable, knowledgeable parties.
- (8) In its application for rehearing, OMG sets forth five assignments of error, as follows:
- (a) In OMG's first assignment of error, it contends that the Commission erred in failing to find that shopping customers should not have to pay CG&E's POLR charges unless they actually receive generation or capacity from CG&E.
 - (b) In OMG's second assignment of error, it contends that the Commission erred in not allowing all customers the option of electing not to purchase rate stabilization service and to avoid the RSC and the annually adjusted component, as defined in the opinion and order (AAC).
 - (c) In OMG's third assignment of error, it contends that the Commission erred in not establishing a

- flat 60-day notice period for customers to waive the rate stabilization service and be relieved from paying the RSC.
- (d) In OMG's fourth assignment of error, it contends that the Commission was unclear with regard to whether a nonresidential shopping customer that returns to CG&E would pay, for each hour of CG&E service, either CG&E's incremental cost of supplying power for the month of the customer's return or the highest hourly price during the month in question.
- (e) In OMG's fifth assignment of error, it contends that the Commission was unclear as to the status of the current nonresidential shopping customers for calendar year 2005.
- (9) In its application for rehearing, CPS sets forth one assignment of error. Specifically, CPS contends that the Commission erred in failing to require an immediate auction in the event that it finds the rate stabilization plan (RSP) rates to be above market PRICES.
- (10) Memoranda responsive (both in support and contra) to the various applications for rehearing were filed on November 8 and November 18, 2004, by CG&E, OCC, OMG, OP&E, GMEC, Dominion, IEU, Kroger, Cognis, OHA, PWC, FES, and OEG (OEG amended its filing on November 9, 2004).¹ IEU, Kroger, Cognis, OHA, PWC, FES, and OEG indicated their support for CGE's first assignment of error.
- (11) The Commission has reviewed all the arguments for rehearing and will discuss below those arguments where the Commission finds further clarification or comment is required, or where rehearing is granted. Arguments for rehearing not discussed below have been adequately considered by the Commission in its opinion and order and are being denied.
- (12) CG&E's first assignment of error requests, in essence, that the Commission consider its suggested modifications of the opinion and order. CG&E's suggestions are as follows:

¹ On November 18, 2004, OMG filed a motion for leave to supplement its memorandum contra in order to respond to certain issues discussed by GMEC and Dominion in their memoranda contra. In the interest of allowing the parties the opportunity for argument related to these issues, this motion will be granted.

- (a) CG&E would retain five of the modifications required by the opinion and order; specifically, (1) the extension of the five percent residential discount through December 31, 2005; (2) the recovery of deferred distribution costs from only nonresidential consumers; (3) the termination of the recovery of RTCs from residential consumers as of December 31, 2008; (4) the calculation of a market price for returning nonresidential consumers based upon only CG&E's wholesale market costs; AND (5) the calculation of actual AAC and FPP, including both cost decreases and increases in each cost category.
- (b) CG&E suggests that the Commission modify the opinion and order to provide for an infrastructure maintenance fund (IMF) charge to compensate CG&E for committing its generation capacity to serve MBSSO consumers through 2008. The SUGGESTED IMF would be equal to four percent of "little g" as a component of CG&E's POLR charge during 2005 and 2006, and equal to six percent of "little g" as a component of CG&E's POLR charge during 2007 and 2008.
- (c) CG&E suggests that the cost of purchased power necessary to maintain system reliability be moved from the AAC, where it was covered in the stipulation and the opinion and order, to a separate component, which CG&E suggested designating as a system reliability tracker (SRT). The SRT would permit CG&E to apply annually to the Commission to purchase power to cover peak and reserve capacity requirements and to flow through those actual costs on a dollar-for-dollar basis.
- (d) CG&E suggests that the remaining portion of the AAC, as well as the RSC, be totally avoidable for the first 50 percent of nonresidential consumer load to switch to an alternate supplier and for the first 25 percent of residential consumer load to switch to an alternate supplier, as had been ordered for 2005 by the Commission.
- (e) CG&E suggests that the opinion and order be modified to increase avoidability of costs by

moving the recovery of emission allowances (EAs) from the AAC (under the stipulation) to recovery as part of the fuel and economy purchased power component of the price to compare (FPP).

- (f) CG&E suggests that increases in the AAC for nonresidential consumers be set at four percent of "little g" in 2005, an additional four percent in 2006, and allowing CG&E to apply for additional recovery of actual costs in 2007 and 2008, and by setting increases in the AAC for residential consumers at six percent of "little g" during 2006 and allowing CG&E to apply for additional recovery of actual costs in 2007 and 2008.
- (13) The Commission has reviewed CG&E's proposed modifications of the opinion and order and believes that, with certain clarifications and revisions, the suggestions are meritorious. Therefore, rehearing will be granted on CG&E's first assignment of error. The required clarifications and revisions are as follows:
- (a) The amendment to the stipulation, attached to CG&E's application for rehearing, details the involvement that it expects from the Commission in the determination of the appropriate levels for the SRT, the AAC, and the FPP in various years. As to the SRT, CG&E suggests that it would make an estimate, during the fourth quarter of each year, starting in 2004, of its load for the following year and of the purchases necessary to maintain a sufficient reserve margin. CG&E would "apply to the Commission for approval of such expenditures." (CG&E's application for rehearing, attachment 1, at 7.) Attachment 2 to CG&E's application for rehearing, on page 3, describes the timeline and mechanics for this calculation, filing, and approval. That document states that "the Commission will approve the plan or approve an agreed upon alternative."

As to the AAC, CG&E proposes that the level of the charge be preset for 2005 and 2006. The Commission's involvement in setting the level for 2007 and 2008 is described in CG&E's proposed amendment to the stipulation.

Following CG&E's filing of a schedule demonstrating its increases in "net costs incurred for homeland security, taxes, and environmental compliance during each year," Commission staff would audit CG&E's calculations. "If the Staff audit confirms CG&E's calculation, the rates shall be effective" for the following year. If staff disagrees with the calculations, a hearing would be held, to be concluded within 90 days of the original filing. (CG&E's application for rehearing, attachment 1, at 2-3.)

With regard to the FPP, CG&E would, on an ongoing basis, make quarterly filings with the Commission as to a proposed fuel and economy purchased power rate (including fuel and economy purchased power costs, a reconciliation adjustment, a system loss adjustment, and EAs). While CG&E refers to "periodic audits," it specifies no procedure for Commission review. (CG&E's application for rehearing, attachment 3, at 2.)

It is unclear, in any of these three categories of costs, the extent to which the Commission will be reviewing CG&E's expenditures in the context of its audits. In all of these cases, the Commission finds that it is therefore necessary to clarify that the Commission, in its consideration of CG&E's expenditures in these categories, will continue to consider the reasonableness of expenditures. It is not in the public interest to cede this review. Nor would it foster any rate certainty to allow all decisions of this nature to be free from Commission review of reasonableness. Therefore, the Commission will require CG&E, by September 1 of each year, to file with the Commission an application to establish the FPP, the SRT and the AAC levels for the following year (except with regard to the AAC where that amount is already established for 2005 and 2006 through our opinion and order, as modified by this entry on rehearing). CG&E's calculations will include all cost increases and decreases in all covered cost categories. The Commission will review those filings and will issue appropriate orders. The filing for 2005 should be made

within ten days following the issuance of this entry on rehearing.

- (b) The descriptions of the costs that are to be included in the SRT, the AAC, and the FPP are unclear as to the baseline for determination of includable cost components. "Little g" was originally determined by reference to the embedded generation cost. *ETP* opinion. That cost included certain of the items to be recovered by the SRT, the AAC, and the FPP. The Commission's modification of its opinion and order, pursuant to CG&E's first assignment of error, will clarify the baselines for these components as follows. First, at the time of CG&E's last rate case, the Commission staff determined that CG&E had sufficient generation capacity to cover all of its peak load and provider of last resort obligations. Therefore, the amount included in its approved generation cost for these obligations was zero. *In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Electric Rates in its Service Area*, Case No. 92-1464-EL-AIR, Staff Report (March 17, 1991), at 15. As a result, all amounts in the SRT are in excess of the cost of capacity requirements which are a part of "little g." Second, with regard to the AAC, the costs of environmental compliance, security, and tax law changes, will all be based on changes in costs since the year 2000. Third, with regard to the FPP, the amounts to be recovered for fuel, economy purchased power, and EAs are those in excess of amounts authorized in CG&E's last electric fuel component proceeding.
- (c) The SRT, as proposed by CG&E in its first assignment of error, would be unavoidable by shoppers. The Commission is aware that CG&E is required to maintain adequate reserves to meet its obligation as the provider of last resort. The SRT is designed to allow the recovery of expenses related to this obligation. However, it is currently unclear how this obligation will change, if at all, following the effectiveness of "MISO Day 2" (as explained in the opinion and order). Therefore, the Commission will clarify that the SRT for 2005, the level of which will be

determined based on an initial SRT filing to be made by CG&E within 30 days after the issuance of this entry on rehearing, will be unavoidable. However, the avoidability or unavoidability of the SRT for all subsequent years will be determined by the Commission in a proceeding to be commenced by CG&E within 60 days following the implementation of MISO Day 2, or by July 1, 2005, whichever is earlier.

- (d) In its responsive memorandum, GMEC argues, in part, that the stipulation previously restricted the seven million dollar bill credit to residential consumers served by a competitive retail electric service (CRES) provider not affiliated with CG&E. GMEC claims that, in deleting the bill credit provision and enhancing other incentives for shopping by residential consumers, CG&E would improperly eliminate that restriction. GMEC notes that, on August 23, 2004, CG&E's affiliate, Cinergy Retail Sales, Inc., filed an application to become a CRES provider. A certificate was issued to it on October 7, 2004. GMEC argues that Cinergy's name-brand recognition poses a threat that the shopping incentives could be exhausted before other CRES providers have been given an opportunity to compete. Therefore, GMEC requests that the Commission require that all shopping incentives available to the first 25 percent of switched residential load be available only to customers served by a CRES provider not affiliated with CG&E.

The Commission disagrees with GMEC on this issue. We note that, in the *ETP* opinion, the Commission stated that CG&E's nonresidential MDP could be terminated prior to December 31, 2005, only to the extent that it did not have an affiliated retail electric generation provider. As pointed out by GMEC, on October 7, 2004, Cinergy Retail Sales, Inc., an affiliated CRES provider, was issued a certificate to provide CRES in CG&E's service territory. However, the MDP for nonresidential consumers has been ended, due to the existence of more than 20 percent shopping levels. Thus, the restriction that might have prohibited CG&E from having

an affiliated CRES provider is no longer effective. As to the limitation in the stipulation on the availability of the seven million dollar bill credit only to customers of nonaffiliated CRES providers, the Commission will not require that customers of affiliates and customers of nonaffiliates be similarly distinguished. The Commission will continue to monitor the residential market.

- (14) The Commission has previously determined that rate stabilization plans should provide rate certainty for consumers, provide financial stability for utility companies, and encourage the development of competition. Opinion and Order at 15; *In the Matter of the Applications of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Continue and Modify Certain Regulatory Accounting Practices and Procedures, for Tariff Approvals and to Establish Rates and Other Charges Including Regulatory Transition Charges Following the Market Development Period*, Case No. 03-2144-EL-ATA, Opinion and Order (June 9, 2004); *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for The Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, et al., Opinion and Order (September 2, 2003) (*Dayton opinion*). The opinion and order provided adequate rate certainty for consumers in the CG&E service area. The opinion and order had modified the stipulation to require consideration of cost savings as well as cost increases, and to require Commission review of fuel and economy purchased power increases. The modifications to the opinion and order which are being made by this entry on rehearing do not change these items and, further, clarify Commission review of all annual changes to the cost components. Thus, rate certainty for consumers is being ensured.

The stipulation, as modified by the opinion and order, provided adequate assurance of financial stability for CG&E. Nothing in the proposed modifications suggested by CG&E in its first assignment of error would alter that conclusion.

The opinion and order modified the stipulation in a variety of aspects designed to encourage the development of competitive markets. First, the percentage of nonresidential consumers that can avoid the RSC and the AAC was increased by the opinion and order from 25 percent to 50 percent. Second, the opinion and order decreased the total cost of service for residential consumers by extending the residential discount

until December 31, 2005; by terminating the collection of RTCs as of December 31, 2008; and by charging only nonresidential consumers for the cost of certain capital investments in CG&E's distribution system. The revisions to the opinion and order which are being made by this entry on rehearing would leave all of these modifications in place and would also make two other positive changes. First, the opinion and order will be modified to increase the price to compare for all shoppers by moving the cost of EAs from the unavoidable portion of the price to the avoidable portion for the price. Second, the opinion and order will be modified to further increase the price to compare by making the AAC permanently avoidable for a percentage of each class of consumers.²

Therefore, the Commission finds that the modifications of the opinion and order suggested by CG&E in its first assignment of error will provide rate certainty for consumers, will provide financial stability for CG&E, and will further encourage the development of competitive markets. CG&E's first assignment of error is therefore granted, subject to the clarifications and revisions discussed above.

- (15) CG&E's second assignment of error includes two separate arguments. To the extent that it refers to annual reviews by the Commission, this issue was discussed previously in this entry. The remainder of this assignment of error is made moot by the grant of rehearing with regard to CG&E's first assignment of error.
- (16) Several of CG&E's other assignments of error, including those described above as numbers three, four, five, six, seven, eight, ten, eleven, twelve, and thirteen, are also moot. Some discussion of certain aspects of the ninth assignment of error is warranted.
 - (a) In its ninth assignment of error, CG&E argues that the Commission's order is unjust and unlawful because it attempts to compel CG&E to divest its generation assets if CG&E does not accept the changes to the stipulation required by the Commission's opinion and order. CG&E

² Dominion and Green Mountain both complained that the deletion of the provision in the stipulation which would have provided seven million dollars in bill credits for residential consumers would harm competition. The analysis by Dominion and Green Mountain is discussed and challenged in certain respects by OMG in its supplement to its memorandum contra. The Commission finds that the modifications to the opinion and order being made by this entry on rehearing provide sufficient other incentives for shopping by residential consumers that the loss of these bill credits is not unreasonably unsupportive of the development of competition.

claims that the Commission does not possess the statutory authority to require CG&E to divest its generation assets. It claims that Section 4928.17(E), Revised Code, permits CG&E to determine whether it will, or will not, divest its generation assets. CG&E also claims that it is not bound by the stipulation approved by the Commission in the *ETP* opinion because all parties, including CG&E, have the statutory right to seek an amendment to CG&E's corporate separation plan. CG&E claims that it applied for, and the Commission has approved, such an amendment, as part of the stipulation, modified or otherwise.

- (b) We find no merit to this assignment of error. Clearly the Commission has the statutory authority to require CG&E to implement a corporate separation plan. Section 4928.17(A), Revised Code, provides that no electric utility shall engage, either directly or through an affiliate, in the businesses of supplying both a noncompetitive retail electric service and a competitive retail electric service unless the utility implements and operates under a corporate separation plan that is approved by the Commission. Section 4928.17(A)(1), Revised Code, further provides that the plan must provide, at a minimum, for the provision of the CRES or the nonelectric product or service through a fully separated affiliate of the utility. Pursuant to these statutory requirements, CG&E filed an application for, and the Commission approved, CG&E's corporate separation plan in the *ETP* opinion. Under that order, we found that good cause existed to allow the separation of CG&E's generation assets as proposed by CG&E to occur by December 31, 2004. We found that this satisfied the public interest in preventing unfair competitive advantage and preventing the abuse of market power. We further noted that we would closely monitor the implementation of the plan and take appropriate steps where we found competitive inequality, unfair competitive advantage, or abuse of market power. In addition, CG&E fully acknowledged these statutory requirements and the Commission's authority to approve a

utility's corporate separation plan on pages 51-53 of its initial brief supporting the *ETP* stipulation. It is disingenuous for CG&E now to argue that the Commission lacks statutory authority over an electric utility's separation of generation assets.

- (c) As a part of the stipulation, CG&E sought Commission approval of a delay in the implementation of its corporate separation plan. CG&E has argued that any party has the right to file an application seeking to amend CG&E's corporate separation plan. We do not disagree. However, all such applications for amendments are subject to the approval of the Commission. Absent Commission approval, no such amendment is authorized. In addition, while CG&E is correct that the Commission approved a delay in the implementation of CG&E's corporate separation as part of our opinion and order, we did so as part of a package of modifications to the stipulation that we found to be appropriate and in the public interest. We further noted that, if the company did not implement the stipulation as revised by the opinion and order, then full separation should be established as directed by, and under the time frames established in the *ETP* opinion. The Commission's approval of CG&E's proposed delay in the implementation of its corporate separation remains conditional, being now conditioned on CG&E's acceptance of the Commission's modifications and clarifications set forth in this entry on rehearing. CG&E's ninth assignment of error is denied.
- (17) In its application for rehearing, OCC included three assignments of error (numbers one, eight, and twelve) that relate to the Commission's refusal to require discovery of side agreements. As the Commission has previously confirmed, side agreements, being information related to the negotiation of a proposed stipulation, are privileged and therefore not discoverable. *Dayton* opinion, at 13-14. In addition, even if it were not privileged, information relating to side agreements is not relevant to the determination of this matter. As stated in the *Dayton* opinion, "the Commission would note that no agreement among the signatory parties to the stipulation can change the terms of the stipulation. Either the terms of the

stipulation are, on their face, beneficial to the ratepayers and the public or they are not. Even if there were side agreements among the signatory parties, those agreements would not change the public benefit or detriment of the stipulation." *Dayton* opinion at 14. Rehearing on these grounds is denied.

- (18) OCC's second assignment of error and OMG's first and second assignments of error relate to their argument that the Commission should not have allowed certain non-bypassable charges. They claim that the AAC and the RSC should be avoidable. The Commission, as described above, has found that the stipulation, as modified and clarified by the opinion and order and this entry on rehearing, benefits consumers as a package. In addition, the Commission notes that the avoidability of the SRT will be specifically considered during 2005. Rehearing on these grounds is denied.
- (19) In OCC's third assignment of error, it argues that the Commission unreasonably and unlawfully established a procedure to increase the AAC that does not meet the requirements of Section 4928.15, Revised Code. OCC claims that the AAC is a noncompetitive service under Section 4928.01(B), Revised Code. As a result, OCC contends that Section 4928.15, Revised Code, requires that noncompetitive services be priced through Section 4909.18, Revised Code. Further, OCC claims that, because the AAC charge is meant to increase rates, Section 4909.18, Revised Code, requires a full review of the company as conducted in a traditional rate case. We find no merit to this assignment of error. Section 4928.15, Revised Code, provides that no electric utility shall supply noncompetitive retail electric distribution, transmission, or ancillary service in this state except pursuant to a schedule for that service that is filed with the Commission under Section 4909.18, Revised Code. The AAC, about which OCC is complaining, is not a charge placed upon distribution or transmission, and is not an ancillary service. Thus, a traditional rate case review under Section 4909.18, Revised Code, is inapplicable.

In addition, the Commission has found, and finds in this entry on rehearing, that the stipulation, as modified by the opinion and order and by this entry on rehearing, is not unreasonable as to the amount to be charged under the AAC. Section 4928.14, Revised Code, provides that competitive retail electric services, including a firm supply of electric generation service, shall be provided to consumers at market-based rates, rather than establishing such charges through the traditional rate-based approach under Section 4909.18, Revised Code. Thus,

the statutory requirement for the Commission, and what is provided under the stipulation as modified, is to ensure that CG&E's generation rates are market-based. In this case, the AAC is a part of CG&E's competitive electric generation charge, which we have previously determined to be a market-based rate. Accordingly, we deny this portion of OCC's application for rehearing.

- (20) OCC's fourth and fifth assignments of error are also denied. The Commission found, in its opinion and order, that the price under the stipulation is market-based. The Commission noted that the governing statute allows for flexibility in the determination of such charges and that the stipulation satisfied the statutory requirements. As to competitive bidding, the Commission found that the stipulation offered a reasonable alternative to a traditional process. The stipulation, as further modified by this entry on rehearing, meets these two requirements no less than did the stipulation as filed.
- (21) OCC's sixth assignment of error relates to its belief that CG&E's generation assets should be transferred to a separate affiliate. This topic was discussed fully above. Rehearing is denied.
- (22) OCC's seventh assignment of error states that the rates approved are discriminatory. The Commission has previously found that any residential consumer has the opportunity to become a part of the group that can receive shopping incentives. Opinion and order at 28. Therefore, there is no discrimination. Rehearing on this ground is denied.
- (23) OCC's ninth and tenth assignments of error relate to its argument that the stipulation does not result in rate certainty or the development of competition. The Commission has fully discussed these issues in this entry on rehearing, as well as in the opinion and order. Rehearing on these grounds is denied.
- (24) OCC's eleventh assignment of error states that more specificity should have been required in CG&E's plans regarding the PIPP, weatherization and DSM programs. The Commission notes that CG&E agreed to extend its current programs regarding weatherization and energy assistance. This is sufficient "detail." As to DSM programs, CG&E committed that it would work to develop such programs in a collaborative process. The Commission finds this approach to be reasonable. Therefore, rehearing on this ground is denied.

- (25) In OMG's application for rehearing, its third assignment of error states that the Commission should have established a flat, 60-day notice for waiver of the rate stabilization service. CG&E, in its memoranda contra OMG's application for rehearing, states (at page 7) that "in the spirit of compromise [it] agrees to a flat 60-day notice provision as requested by OMG." However, CG&E suggests that the notice may be provided to CG&E starting on December 15, 2004. The Commission finds that notice cannot be given in time for a consumer to bypass the RSC and the AAC by the beginning of 2005. Therefore, the Commission will grant rehearing as follows: (a) the opinion and order is modified to allow a flat 60-day notice period; (b) notices may be given to CG&E any time after the issuance of this entry on rehearing; and (c) for those consumers wishing to avoid the RSC and the AAC as of any date between January 1, 2005, and January 24, 2005 (for whom a 60-day notice is impossible), notice to CG&E by December 15, 2004, shall be considered timely. The Commission further finds that CG&E should inform the Commission, within three days following the issuance of this entry on rehearing, as to the process it will employ to ensure that all nonresidential customers that may be affected by these provisions will be notified of these deadlines.
- (26) OMG's fourth assignment of error requests clarification of the cost to be charged to returning, nonresidential shoppers. In CG&E's memorandum contra OMG's application for rehearing, CG&E states that such customers would pay "the highest hourly cost of power for each hour during which CG&E served the consumer." To the extent that the opinion and order was unclear on this point, rehearing is granted on this ground. CG&E will charge any returning, nonresidential shopper, for each hour it provides service to the returned shopper, the highest hourly cost of power that CG&E incurs for that hour. That highest hourly cost of power could, therefore, fluctuate on an hourly basis. For customers without time-of-day meters, CG&E should work with staff to develop an appropriate process to calculate such charges.
- (27) OMG's final assignment of error requests clarification of the status of current nonresidential shopping customers for the calendar year 2005. CG&E responds that it would be inequitable and unlawful to require CG&E "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." The Commission agrees with OMG. The RSC and the AAC, as well as the SRT (which covers cost

components that were a part of the AAC as discussed in the opinion and order), should be avoidable by current, nonresidential shopping credit customers during 2005. The Commission finds that this will encourage further development of the competitive market.

OMG also requested that nonresidential consumers who are receiving shopping credits be allowed to give notice to CG&E of their intent to avoid the RSC and AAC effective January 1, 2006. The Commission finds that notice of intent to avoid the RSC and the AAC could be given well in advance of January 1, 2006, based on a consumer's execution of the appropriate contract with a CRES provider. Rehearing on this ground is therefore granted.

- (28) In its application for rehearing, CPS argues that the opinion and order should be amended to state that, if the Commission at any time finds the RSP to be a non-market rate, the Commission on its own may call for a bid-out to be conducted pursuant to Section 4928.14(B), Revised Code. As discussed in our opinion and order, Section 4928.14(B), Revised Code, provides that the 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 are readily available in the market and a reasonable means for customer participation is developed. The opinion and order further found that the procedure established by the stipulation offers a reasonable alternative to a more traditional competitive bidding process, provides for a reasonable means of customer participation through the various options that are open to customers under the RSP, and fulfills the statutory requirements for a competitive bidding process. Further, we note that, under paragraph 13 of the stipulation, the "parties agree that the Commission may determine and implement a competitive bidding process to test CG&E's price to compare." Accordingly, the Commission retains the authority under the stipulation to implement a competitive bidding process at any time. CPS's application for rehearing is therefore denied.

It is, therefore,

ORDERED, That the motion by OMG for leave to file a supplement to its memorandum contra be granted. It is, further,

ORDERED, That the application for rehearing filed in this matter by CG&E be granted in part and denied in part. It is, further,

ORDERED, That the application for rehearing filed in this matter by OCC be denied. It is, further,

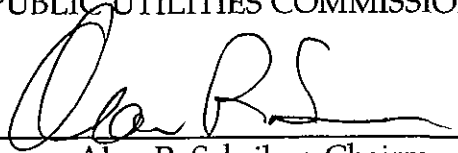
ORDERED, That the application for rehearing filed in this matter by OMG be granted in part and denied in part. It is, further,

ORDERED, That the application for rehearing filed in this matter by CPS be denied. It is, further,

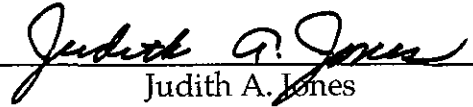
ORDERED, That the stipulation be approved, to the extent and subject to the modifications and clarifications set forth in the September 29, 2004, opinion and order in these proceedings, as further modified by this entry on rehearing. It is, further,

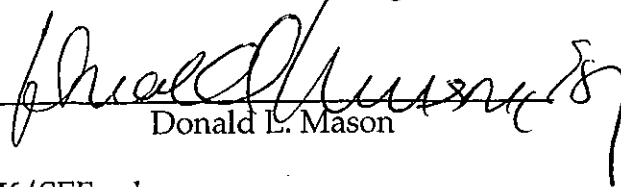
ORDERED, That a copy of this entry on rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Alan R. Schriber, Chairman


Ronda Hartman Fergus

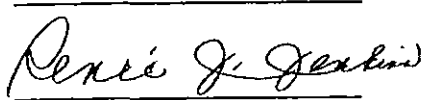

Judith A. Jones


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Entered in the Journal
NOV 23 2004



Renee J. Jenkins
Secretary

