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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Columbia Gas of Ohio, Inc., and Related Matters.	)	**Case No. 05-221-GA-GCR**
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REPLY BRIEF OF COLUMBIA GAS OF OHIO, INC.

Mark R. Kempic, Asst. General Counsel
Stephen B. Seiple, Lead Counsel
200 Civic Center Drive
P.O. Box 117
Columbus, OH 43216-0117
Telephone: (614) 460-4648
Fax: (614) 460-6986
Email: sseiple@nisource.com

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I. INTRODUCTION

On April 18, 2007, parties in this case filed their initial post-hearing briefs. As noted in Columbia Gas of Ohio, Inc.'s ("Columbia") Post-Hearing Brief, the purpose of the annual Gas Cost Recovery ("GCR") case for each natural gas utility is to review the utility's gas procurement policies and practices. However, the focus of this case has, unfortunately, been totally misplaced. The management/performance audit report filed in this case has largely been ignored in the briefs of other parties. Instead of focusing on Columbia's gas procurement policies and practices, much of this case consisted of an attack on Columbia's most recent stipulation in a completely separate docket. That stipulation, the "Fourth Amendment to Joint Stipulation and Recommendation in Case No. 94-987-GA-AIR and Second Amendment to Joint Stipulation and Recommendation in Case No. 96-1113-GA-ATA and Stipulation and Recommendation in Case No. 03-1459-GA-ATA" (hereinafter referred to as the "2003 Stipulation") was filed with the Commission on October 9, 2003. This attack on the 2003 Stipulation was launched by the two parties – the Office of the Ohio Consumers' Counsel ("OCC") and the Staff of the Public Utilities Commission of Ohio ("Staff") – that opposed the 2003 Stipulation in Case Nos. 94-987-GA-AIR.

As noted in Columbia's brief, and as evidenced by the Staff and OCC briefs, much of the Staff and OCC cases have centered on issues related to the 2003 Stipulation. This anomaly has been justified because of a single sentence in one of the entries approving the 2003 Stipulation. In that sentence the Commission stated, "We further reserve our right to terminate our approval of the [2003] stipulation if we discover that Columbia is not implementing the stipulation as we have been informed it would."[1] The OCC and Staff have seized upon this single sentence and have raised in this case what they allege to be 2003 Stipulation "implementation" issues. However, the issues raised by the OCC are not implementation issues, but instead are direct attacks upon the 2003 Stipulation as approved by the Commission.

As argued in Columbia's brief, the Commission should never have allowed the hearing in this GCR case to evolve into a retrial of the 2003 Stipulation. The Commission can, by its order in the instant dockets, put a stop to this callous disregard of Commission orders in other cases and of the legal principles of res judicata and collateral estoppel. Columbia's argument regarding the preclusionary effect of the principles of res judicata and collateral estoppel were set forth in Columbia's initial brief and are incorporate by reference herein.

Columbia has demonstrated that it properly implemented the 2003 Stipulation. The Commission should reject the arguments put forward by the OCC and Staff and find that Columbia's gas procurement policies and practices during the audit period were reasonable. The OCC

1 PUCO Case Nos. 94-987-GA-AIR et al., Entry on Rehearing (May 5, 2004) at 11.

has also asked that the Commission direct Columbia to immediately implement a wholesale supply auction. The Commission lacks the statutory authority to issue the directive sought by the OCC, significant structural and regulatory differences exist between DEO and Columbia that prohibit an identical auction, and in any event the OCC request is premature.

II. ARGUMENT

A. The OCC Has Already Fully Litigated the Reasonableness of the 2003 Stipulation, and Therefore the Doctrines of Res Judicata and Collateral Estoppel Preclude Relitigation of the Issues in the Instant Cases

Much of the other party testimony and briefs, as well as much of the hearing time, in these cases has centered on issues related to the 2003 Stipulation. This anomaly has been justified by Staff and OCC because of a single sentence in one of the entries approving the 2003 Stipulation. In that sentence the Commission stated, "We further reserve our right to terminate our approval of the [2003] stipulation if we discover that Columbia is not implementing the stipulation as we have been informed it would."[2]

The OCC has seized upon this single sentence and has raised in this case what it alleges to be 2003 Stipulation "implementation" issues. The instant GCR dockets are not the proper forum for the discussion of such implementation issues, particularly when the alleged implementation issues are, in effect, nothing more than a continued attack on the 2003 Stipulation by the OCC, which actively opposed the stipulation when it was filed.

As discussed in Columbia's initial brief, to the extent such 2003 Stipulation issues are appropriately considered in the instant case – a doubtful proposition at best – such issues should

2 *Id.*

have been limited to true stipulation implementation issues, and collateral attacks on the 2003 Stipulation disguised as implementation issues should not have been permitted.

The true nature of the OCC's attack is now more evident than ever from its brief. While the OCC continues to pay lip service to its argument that it is contesting "implementation" issues, it no longer hides the fact that it is really seeking to have the 2003 Stipulation terminated or modified because it does not like the 2003 Stipulation outcome.

If the OCC believed that the 2003 Stipulation was not being implemented as it should have been one would have expected the OCC to request that the Commission implement the stipulation as intended by the Commission. However, rather than requesting that the Commission direct that the 2003 Stipulation be implemented as approved by the Commission, the OCC repeatedly calls for the Commission to modify the 2003 Stipulation.[3] Why? Because the OCC is using the instant case as a vehicle to collaterally attack the 2003 Stipulation as approved by the Commission.

Not only does the OCC repeatedly ask the Commission to modify the 2003 Stipulation, but the OCC makes it clear that the reason for this request is that the OCC simply is dissatisfied with the 2003 Stipulation, as it has been since it contested the agreement in Case Nos. 94-987-GA-AIR. The OCC repeats as it did in 2003 its dissatisfaction with the 2003 Stipulation because the OCC continues to allege that the agreement provides too much financial benefit for Columbia.[4] And the OCC brief, for the first time, goes even further in its frontal assault on the 2003 Stipulation by arguing that the 2003 Stipulation should be modified to prohibit Columbia from

3 See e.g., Post-Hearing Brief of the Office of the Ohio Consumers' Counsel ("OCC Brief") at 5, 10, 12, 13, 40, 43, 47, 48 and 63.
4 OCC Brief at 41.

retaining any of the Transition Capacity Cost Recovery Pool ("TCCRP") because the OCC is dissatisfied with the financial result.[5] The OCC fully exercised its right to litigate issues associated with its opposition to the 2003 Stipulation, both before the Commission and the Supreme Court of Ohio, and the doctrines of res judicata and collateral estoppel should be used to bar litigation of the same issues in a second administrative proceeding – i.e., the instant case.[6]

B. Columbia Properly Applied Revenue Sources to Offset CHOICE Program Capacity Costs

The 2003 Stipulation makes Columbia responsible for all CHOICE Program capacity costs. It also provides Columbia with several revenue sources that can be used to offset CHOICE Program capacity costs. Staff disagreed with Columbia's implementation of the 2003 Stipulation with respect to the order in which Columbia applied the revenue sources to offset the CHOICE Program capacity costs, and this is the sole issue addressed in Staff's brief. The OCC also addressed this issue in its initial brief.[7]

In their briefs, Staff and OCC argued that Columbia used TCCRP funds to offset CHOICE Program Costs instead of first using Off-System Sales and Capacity Release revenues to fund CHOICE Program Costs.[8] Staff argued that Off-System Sales and Capacity Release revenues were intended to be the principle funding source for CHOICE Program costs, and that the TCCRP balance was intended to be a secondary funding source.[9] These arguments assume that the 2003 Stipulation is ambiguous and therefore go to great lengths to argue about what the sig-

5 *Id.* at 52-54.
6 See Columbia Brief at 7-18.
7 Post-Hearing Brief of the Office of the Ohio Consumers' Counsel ("OCC Brief") at 14-28.
8 *Id.*; Post-Hearing Brief of Staff of Public Utilities Commission of Ohio ("Staff Brief") at 5-7.
9 Staff Brief at 7, 17-22.

natory parties did or did not intend with respect to the language in the 2003 Stipulation – all of this by two entities that were NOT signatory parties to the 2003 Stipulation. However, the 2003 Stipulation is clear that 75% of the balance of the 1999 TCCRP is to be used to offset Net Choice Program Costs.[10] Paragraph 21 of the 2003 Stipulation makes it equally clear that the last revenue source used to offset the items defined as Net Choice Program Costs in paragraph 15 of the 2003 Stipulation is the Off-System Sales and Capacity Release revenue (after sharing). This is what is set forth in the 2003 Stipulation. This is what the Commission approved. All of the detailed discussion in Staff's brief about what parties did or did not say in filed comments and pleadings is irrelevant because the Commission speaks through its orders, and its orders approved the 2003 Stipulation, including the provisions described above.

Staff continues to maintain that Paragraph 21 of the Stipulation describes how the various revenue sources would be used to offset CHOICE program costs, and that the revenue sources cited are capacity assignment and balancing service revenues received from marketers, and Columbia's share of its Off-System Sales and Capacity Release revenues.[11] Staff noted that there is no mention of TCCRP revenues in Paragraph 21, and that Paragraph 22 of the 2003 Stipulation provides that the balance of the TCCRP is to be used in the event that there are not otherwise sufficient revenues to fully recover all the CHOICE Program capacity costs.[12] In its brief Staff further cited the docketed comments of Columbia and other parties, noting the absence of discussion about the use of the TCCRP as an offset to CHOICE Program capacity costs.

10 2003 Stipulation at paragraph 22.
11 Staff Ex. No. 1 at 6-7.
12 *Id.* at 7-8.

The lack of discussion in filed comments about the TCCRP as an offset to CHOICE Program capacity costs is not surprising, given the uncertainty about the balance of the TCCRP at the time the 2003 Stipulation was filed and at the time comments were filed in late 2003. As noted in Columbia's initial brief, the concept of using the TCCRP balance to fund ongoing CHOICE Program capacity costs was discussed during the negotiations that preceded the 2003 Stipulation.[13] Once the use of 75% of TCCRP balance was introduced as a settlement concept, Columbia chose not to include the TCCRP balance on the settlement schedules because the number was difficult to estimate and was subject to extreme volatility.[14] In 2001, the estimate was approximately $4 million.[15] By the time of Columbia's 2002 GCR Case (Case No. 02-221-GA-GCR) the estimate had increased to $58 million.[16] By March 24, 2003, Columbia's estimate of the TCCRP balance had fallen from $58 million to $20 million.[17] The final balance ended up at $94 million,[18] but there were times during 2002 that the balance was projected to be negative.[19] The final balance of the TCCRP was not determined until December 2004,[20] fourteen months after the filing of the 2003 Stipulation, and no one could have known in 2003 what the final balance would be at the end of the 1999 Stipulation period in October 2004, or indeed whether the balance would be positive or negative.[21] The uncertainty in 2003 about the TCCRP

13 Columbia Brief at 28-29.
14 Tr. Vol. II at 23-25, 33; Tr. Vol. IV at 82.
15 Tr. Vol. V at 27, 32.
16 Tr. Vol. IV at 84.
17 *Id.* at 95-96.
18 Tr. Vol. II at 26.
19 Tr. Vol. IV at 104.
20 Tr. Vol. II at 27, 70.
21 *Id.* at 71, 142.

balance explains the absence of the TCCRP balance from certain settlement schedules as well as from comments filed shortly after the 2003 Stipulation was filed.

As noted in Columbia's initial brief, Staff and OCC have chosen to ignore paragraph 15 of the 2003 Stipulation,[22] and failed to read the interrelated paragraphs of the 2003 Stipulation as a whole.[23] Staff witness Puican admitted that he did not consider Paragraph 15 to be relevant to the point he "was making"[24] – i.e., it did not help his argument so he chose to exclude it as part of his analysis. However, Paragraphs 15, 21 and 22 must be read together, as part of the whole settlement agreement. They can not be read in isolation as Staff has attempted to do.[25]

Columbia witness Martin explained how Paragraph 15 interrelates with Paragraphs 21 and 22 of the 2003 Stipulation, and yields a different result than that advocated by Staff and OCC's more limited analysis:

> paragraph 22 makes it clear that the TCCRP balance is to be used to offset Net Choice Program Costs. Paragraph 15 defines Net Choice Program Costs as the Choice Program capacity costs, less revenue attributable to the Choice marketers' capacity assignments and payment of balancing fees. While the TCCRP balance is not explicitly referenced in paragraph 21, it is implicitly recognized when paragraph 21 is read in context with paragraphs 15 and 22. Paragraph 21 begins by stating that,
>
>> The Signatory Parties agree that Columbia will assume full responsibility for ***all Choice Program capacity costs removed from the GCR, less revenues received for assignment of capacity to Choice marketers, less revenues received for balancing services provided to Choice market-***

22 Paragraph 15 reads: "From November 1, 2004 through October 31, 2010, all revenue attributable to Choice marketers electing to take capacity as part of the Customer Choice program, and as a result of Choice marketers' payment of balancing fees, shall be retained by Columbia in recognition of the fact that Columbia is responsible for all Choice program costs. The Choice Program capacity costs, less revenue attributable to the Choice marketers' capacity assignments and payment of balancing fees, shall be referred to as Net Choice Program Costs."

23 Columbia Brief at 38.

24 Tr. Vol. III at 142.

25 Columbia Ex. No. 10 at 6.

> ***ers***, less Off-System Sales and Capacity Release revenue (after sharing) retained by Columbia....
>
> The language in paragraph 21 above that I have put in bold italics contains terms that are, pursuant to paragraph 15, the Net Choice Program Costs. And, as set forth in paragraph 22, the TCCRP balance is used to offset the Net Choice Program Costs. Thus, in accounting for the revenues used to offset the CHOICE Program capacity costs, the TCCRP balance is used first, followed by any Off-System Sales and Capacity Release revenues.[26]

Thus, the relevant language in Paragraph 21 is equivalent to the term Net Choice Program Costs, and pursuant to Paragraph 22 the TCCRP balance is used to offset the Net Choice Program Costs, followed by Off-System Sales and Capacity Release revenues. This is exactly how Columbia implemented the funding mechanism established by the 2003 Stipulation.[27]

Staff – which was not a party to the 2003 Stipulation and which withdrew early from the settlement negotiations – makes the brazen assumption that the definition of Net Choice Program Costs was not intended to apply throughout the 2003 Stipulation, or maybe was intended to be limited to the section in which it appears.[28] Staff thus officiously concludes that the definition of Net Choice Program Costs "was not significant" and that Columbia's reliance upon the definition is not supported by the Commission's entries.[29] Staff was not a participant into the final 2003 Settlement negotiations and does not know what the signatory parties intended. Furthermore, as explained above, the stipulation language approved by the Commission, when read in its entirety, supports Columbia's interpretation regarding use of the TCCRP funds.

26 *Id.* at 6-7.
27 Columbia Ex. No. 11 at 7.
28 Staff Brief at 18.
29 *Id.* at 18, 21.

The OCC alleges that the funding provisions of the 2003 Stipulation are ambiguous, and that because Columbia drafted the agreement that any ambiguities must be construed against Columbia.[30] As the OCC is well aware, the 2003 Stipulation was the final product resulting from the drafting and redrafting of many parties, and reflects the input of all the negotiating parties, including the OCC. It is disingenuous to suggest that any one party "drafted" the agreement, and noticeably the OCC argument on this matter reflects no citations whatsoever to the record.

Both Staff and OCC would also have the Commission view the 2003 Stipulation in isolation, rather than as it should be viewed – i.e., as the last in a series of comprehensive regulatory agreements, each building upon earlier regulatory agreements. This regulatory history is described on pages 2-7 of the 2003 Stipulation. As the Staff and OCC are both aware, Columbia was not able to implement a $17 million base rate increase in 1996, and instead was permitted to retain Off-System Sales revenues to make up for the foregone base rate increase – revenue that is foregone each and every year.[31]

Staff notes that during the audit period 2003 Stipulation revenue streams exceeded CHOICE Program costs by $21,982,971.[32] However, Staff's recommendation is that Columbia be required to refund $14,830,898.[33] If Staff and OCC's recommendation were to be adopted, Columbia would be able to retain only $7,152,073 during the audit period. This is woefully short of the $17 million that Columbia gave up on an annual basis in order to substitute Off-System Sales revenues for the 1996 base rate increase. This type of revenue retention is not consistent

30 OCC Brief at 17.
31 See 2003 Stipulation at 4; Columbia Exhibit No. 10, Attachment LWM-1 at 3-4.
32 Staff Brief at 4.
33 Staff Brief at 5.

with Columbia's understanding of the 2003 Stipulation, based upon the regulatory history described in that agreement. As Columbia stated in its initial brief, if Staff and OCC's interpretation were to be adopted by the Commission the 2003 Stipulation would provide little value for Columbia, and Columbia would never have agreed to fund the CHOICE Program in the manner now suggested by Staff and OCC. If Staff and OCC's position is adopted by the Commission it could well mean an early end to the 2003 Stipulation and the eventual end of Columbia's CHOICE Program as currently structured.[34] While this is precisely the outcome that the Staff and OCC desire – because they have opposed the 2003 Stipulation all along – one cannot presume that this is the outcome desired by the Commission because it approved the 2003 Stipulation despite the ongoing opposition of Staff and the OCC.

C. Columbia Implemented the 2003 Stipulation as it Informed the Commission it Would

As noted earlier herein, in approving the 2003 Stipulation the Commission reserved the right to terminate its approval of the 2003 stipulation if it discovered that Columbia is not implementing the stipulation as the Commission was informed it would.[35] The OCC and Staff have seized upon this single sentence and have raised in this case what they allege to be 2003 Stipulation "implementation" issues. The OCC maintains that the 2003 Stipulation is not providing the benefits that it was projected to provide to customers, and the Commission should therefore terminate the 2003 Stipulation.[36] This argument is a sham, and the Commission should see through the argument for what it is – a disingenuous attempt on the part of the OCC to again attack the

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34 Columbia Brief at 41.
35 PUCO Case No. 94-987-GA-AIR, Entry on Rehearing (May 5, 2004) at 11.
36 OCC Brief at 42-48.

2003 Stipulation. While such arguments should be precluded by the doctrines of res judicata and collateral estoppel, as previously explained in Columbia's initial brief, even if the Commission elects not to preclude the arguments, the arguments should be rejected because the OCC has failed to demonstrate that Columbia did not implement the 2003 Stipulation as the Commission was informed Columbia would.

To support its argument the OCC relies upon documents that were used during the settlement negotiations that preceded the filing of the 2003 Stipulation.[37] However, the OCC has failed to demonstrate that these settlement documents constituted part of the information provided to the Commission to inform the Commission about the intended implementation of the 2003 Stipulation. And as made clear by the Hearing Examiner, "it is very important that in any briefing that it is strictly on the implementation of the stipulation, not the contemplation of the Commission at the time of the approval of the stipulation."[38]

In discussing the assumptions used to prepare settlement schedules the OCC claims that "the Commission's approval of the 2003 Stipulation was based in part on erroneous assumptions…."[39] The OCC continues to gloss over the fact that Columbia never docketed any of the settlement schedules with the Commission, nor used these documents in any manner whatsoever to inform the Commission about the intended implementation of the 2003 Stipulation.[40]

Much time at hearing was spent in discussion of the settlement schedules – whether the numbers contained therein were projections or assumptions, why certain numbers were included

37 See OCC Brief at 44; OCC Ex. No. 12, BMH Attachment 2.
38 Tr. Vol. II at 180.
39 OCC Brief at 45.
40 Tr. Vol. III at 13, 137-38; Tr. Vol. II at 188.

or excluded, whether the numbers included were reasonable, etc. However, all of that discussion is irrelevant. The fact is that the settlement schedules were never provided to the Commission in support of the 2003 Stipulation. The Commission must rely on the record before it and nothing in the record indicates that the Commission's approval and modification of the 2003 Stipulation was in any way predicated upon the settlement schedules attached to the OCC and Staff testimony. *Columbia and the other parties who supported the 2003 Stipulation never informed the Commission that the 2003 Stipulation would be implemented in accordance with the schedules attached to the OCC and Staff testimony.*

Furthermore, as demonstrated in Columbia's initial brief, the OCC's contorted use of the assumptions in the settlement schedules do not demonstrate that Columbia failed to implement the 2003 Stipulation as Columbia informed the Commission it would.[41]

D. There is No Basis in the Record to Alter the 2003 Stipulation's Provision Regarding the 1999 TCCRP Balance

The TCCRP was an accounting mechanism created to recognize that Columbia incurs pipeline capacity costs to serve sales customers, but that such costs may not be recovered through the GCR as sales customers migrated to transportation service under Columbia's CHOICE program.[42] The TCCRP was created as part of the "Third Amendment to Joint Stipulation and Recommendation in Case No. 94-987-GA-AIR and Amendment to Joint Stipulation and Recommendation in Case No. 96-1113-GA-ATA" ("1999 Stipulation"). Under the 1999 Stipulation, Columbia was entitled to retain the balance of the TCCRP at the end of the stipulation period

41 Columbia Brief at 21-34.
42 Columbia Ex. No. 10 at 2.

(October 31, 2004).[43] However, under the 2003 Stipulation, Columbia assumed responsibility for all of the CHOICE Program capacity costs associated with continuation of the CHOICE Program, and one of the funding sources Columbia was permitted to use to offset the CHOICE Program capacity costs was 75% of the balance of the TCCRP.[44]

Paragraph 22 of the 2003 Stipulation provides that Columbia may retain up to 25% of the over-funded revenue remaining in the TCCRP at October 31, 2004. There is nothing ambiguous about this language. No party filed testimony questioning Columbia's implementation of this provision of the 2003 Stipulation. Nonetheless, the OCC brief, for the first time, goes even further in its frontal assault on the 2003 Stipulation by arguing that the 2003 Stipulation should be modified to prohibit Columbia from retaining any of the TCCRP because the OCC is dissatisfied with the financial result of the 2003 Stipulation.[45]

The OCC argues that the Commission's approval of paragraph 22 of the 2003 Stipulation was against public policy because the Commission could not have known the level of the TCCRP when it approved the stipulation.[46] However, the OCC continues to ignore the fact that no one, including Columbia, knew what the level of the TCCRP would be in October 2004 at the time the 2003 Stipulation was filed on October 9, 2003.[47] That is why the 2003 Stipulation contains a percentage rather than a dollar figure for Columbia's retention of the TCCRP.

The Commission should reject the OCC's reprehensible collateral attack on the provisions of the 2003 Stipulation. This OCC argument cannot be considered an implementation issue

43 Tr. Vol. II at 38.
44 Columbia Ex. No. 10 at 4.
45 OCC Brief at 52-54.
46 OCC Brief at 53.
47 Columbia Brief at 29-30.

under any stretch of the imagination. The Commission found its approval of the 2003 Stipulation to be in the public interest, including paragraph 22. Were the Commission to adopt the OCC's recommendation and terminate the 2003 Stipulation, then Columbia would be entitled to retain all of the 1999 TCCRP balance under the terms of the 1999 Stipulation, and the Commission would have to devise a new method of fully funding CHOICE Program costs. Creating that kind of regulatory dilemma is not in the public interest – a matter conveniently overlooked by the OCC.

E. The Sharing Period Applicable to Off-System Sales and Capacity Release Revenues is Clear and Unambiguous

The term of the 2003 Stipulation, as approved and modified by the Commission is November 1, 2004 through October 31, 2008. Paragraph 17 of the 2003 Stipulation established a CHOICE Program Sharing Credit under which Off-System Sales and Capacity Release revenues earned in excess of $35 million in any *calendar year* during the stipulation term are shared between Columbia and its customers. In its May 5, 2004 Entry on Rehearing in Case Nos. 94-987-GA-AIR et al. the Commission reduced the threshold sharing amount from $35 million to $25 million.

The Auditor expressed some concern about the mismatch between the periods covered by the 2003 Stipulation (November 2004 through October 2008) and the calendar year period included within the CHOICE Program Sharing Credit.[48] As a result the Auditor made a prospective recommendation that "any future CHOICE Program cost sharing mechanism treat revenues, costs, and sharing threshold on a consistent basis."[49] The Auditor implicitly recognized that the

48 Commission-Ordered Ex. No. 1 at 5-18.
49 *Id.*

Commission had approved the calendar year provision of the 2003 Stipulation, and with proper deference to the Commission's orders made a prospective recommendation for the structure of future CHOICE Program sharing mechanisms.

In contrast, the OCC again showed a complete disregard for the Commission's orders and seized upon the issue identified by the Auditor, but cavalierly discarded the prospective aspect of the Auditor's recommendation. The OCC has taken exception with the CHOICE Program Sharing Credit as approved by the Commission because the credit is based upon a calendar year evaluation of Off-System Sales and Capacity Release revenues.[50] The OCC dislikes the CHOICE Program Sharing Credit because the Off-System Sales and Capacity Release revenues consist of only two months of revenue to be evaluated for calendar year 2004, and only ten months of revenue to be evaluated for calendar year 2008.[51] The OCC proposes to prorate the $25 million threshold for 2004 to $4.16 million, and to $20.83 million for 2008.[52]

The OCC again contends that this matter was not sufficiently disclosed on settlement schedules – schedules never filed in support of the 2003 Stipulation and not relied upon by the PUCO or OCC.[53] The OCC admits that it did not focus upon this issue, nor understand it well.[54]

It has always been clear that the CHOICE Program Sharing Credit was to be based upon a calendar year evaluation of Off-System Sales and Capacity Release revenues. There is nothing "unintended" or "unanticipated" about the language, despite the OCC's unsupported assertions to

50 OCC Brief at 37-41; OCC Ex. No. 12 at 10-13.
51 OCC Ex. No. 12 at 10-13.
52 *Id.* at 11.
53 *Id.* at 12-13.
54 *Id.* at 13.

the contrary.[55] Paragraph 17 of the 2003 Stipulation clearly used the term "calendar year" and that is what the Commission approved. Upon cross-examination, the Auditor and a Columbia witness both agreed on the accepted definition of a calendar year – a twelve-month period beginning on January 1 and ending on December 31.[56] The use of the "calendar year" concept in the 2003 Stipulation was part of the balance of interests agreed to by the parties, and approved by the Commission.[57]

The OCC is unhappy with the 2003 Stipulation, as modified and approved by the Commission. Its position on this calendar year issue cannot credibly be considered an implementation issue – the Commission's order is clear and the OCC admits that it failed to focus upon the issue. If the OCC took exception with the Commission's orders it should have raised this issue on rehearing, and the doctrines of res judicata and collateral estoppel prohibit the OCC from engaging in this after-the-fact collateral attack upon the Commission's orders in Case No. 94-987-GA-AIR et al. There simply is no doubt whatsoever that Columbia implemented Paragraph 17 of the 2003 Stipulation exactly as the Commission ordered, and there is no evidence that the Commission was unclear about the use of the calendar year language when it approved the 2003 Stipulation.

F. The OCC's Recommended Reallocation of Costs is Inappropriate and Unreasonable

The Audit Report found that "Columbia's calculation of the Stipulation Sharing Mechanism is consistent with the Stipulation."[58] However, the Auditor noted that "the allocation of

55 See OCC Brief at 40.
56 Tr. Vol. I at 83; Tr. Vol. II at 150.
57 Columbia Ex. No. 7 at 5-6.
58 Commission-Ordered Exhibit No. 1 at 5-16.

pipeline capacity costs may unfairly burden GCR customers and shield CHOICE customers."[59] As a result, the Auditor made a prospective recommendation:

> McFadden Consulting recommends the Commission modifying the allocation of capacity costs between CHOICE and GCR customers, subsequent to the expiration of the 2003 Stipulation, to ensure that both classes are being treated fairly.
>
> McFadden Consulting recognizes that the current methodology is consistent with the 2003 Stipulation and any modification would likely require modifying the stipulation. McFadden Consulting does not believe attempting to modify the existing stipulation would be an efficient use of the Commission resources.[60]

In response to the Auditor's recommendation, Columbia offered to perform a study to determine if any cost reallocation was necessary in light of the Auditor's comments.[61] The OCC, however, ignored McFadden's warning about inefficient use of Commission resources and wasted significant hearing time pursuing immediate cost reallocations.[62]

The OCC has not even purported to base its suggested cost reallocation upon an argument of improper implementation. As demonstrated in Columbia's initial brief, the cross examination of OCC witness Haugh made it clear that his arguments were based upon the OCC's unhappiness with current cost allocations, pure and simple – the arguments have no bearing whatsoever to any alleged improper implementation of the Stipulation.[63]

Instead of raising an implementation issue, OCC witness Haugh unabashedly sought to subvert the 2003 Stipulation on grounds that the OCC could have raised in Case Nos. 94-987-

59 *Id.*
60 *Id.* at 5-17 – 5-18.
61 Columbia Ex. No. 6 at 16-17.
62 OCC Ex. No. 13.
63 Columbia Brief at 42-43.

GA-AIR, et al. However, the OCC failed to do so. The OCC has had adequate opportunity to litigate the pipeline capacity cost issues associated with the 2003 Stipulation, and the doctrines of res judicata and collateral estoppel should be used to bar litigation of the capacity cost allocation issues in the instant case. The OCC should not be permitted to attack Commission-approved cost allocations in case after case just because the OCC does not like the result.

Even if capacity cost allocation issues were not barred by the doctrines of res judicata and collateral estoppel, a GCR case is not the type of case in which to effect cost reallocations. The OCC agrees that "any attempted re-allocation of costs can occur only as part of a base rate proceeding where all cost and allocation issues can be raised and addressed."[64] Nonetheless, the OCC would attempt to have the Commission rule upon cost allocations in this GCR case and penalize Columbia in so doing. The OCC's recommendation is inequitable and illogical.

With regard to the OCC's specific cost reallocation recommendation, the OCC's position is based upon a false assumption that invalidates its entire recommendation. At the beginning of his testimony OCC witness Haugh described how Columbia allocates pipeline capacity costs between GCR and CHOICE customers and stated,

> In establishing the demand curves for the Choice customers, the Company assumes that all residential customers have the same demand usage curve.
>
> * * * * * * *
>
> A more reasonable and accurate methodology would base the allocation of capacity costs on the total usage of each customer class. Developing an allocation between GCR and Choice customers based upon each customer's actual usage would more accurately reflect the usage patterns and cost causation for which those customers are responsible.[65]

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64 OCC Brief at 55.
65 OCC Ex. No. 13 at 4-6.

OCC witness Haugh's testimony is predicated upon his conclusion that Columbia incorrectly assumed that all residential customers have the same demand usage curve.[66] The OCC brief on this issue starts with the same false premise.[67] However, it is OCC witness Haugh who is guilty of making an incorrect assumption – Columbia does ***not*** assume that all residential customers have the same demand usage curve.[68]

During cross examination it became apparent that OCC witness Haugh had no foundation for his conclusion that Columbia had incorrectly assumed that all residential customers have the same demand usage curve.[69] OCC witness Haugh's conclusion about Columbia's "incorrect assumption" is totally groundless, and because he came to the wrong conclusion the remainder of his cost allocation testimony is meaningless.

Columbia witness Anderson noted the errors in OCC witness Haugh's testimony and explained how Columbia allocates pipeline capacity costs.[70] Columbia witness Anderson's rebuttal testimony was neither cross-examined nor rebutted. As explained by Columbia witness Anderson, Columbia's process in determining the CHOICE demand curves purposely utilizes the actual monthly demand for each individual customer participating in the CHOICE program, whether the customer is a residential, commercial or industrial customer. This process develops not only the amount of gas that must be delivered by CHOICE marketers each day of the month, but it also determines the design peak day demand each month for each CHOICE marketers' nomination group

66 Columbia develops CHOICE demand curves monthly to inform CHOICE marketers how much gas they are required to deliver to Columbia each day of the month based upon either forecasted or actual temperatures. Columbia Ex. No. 9 at 7.
67 OCC Brief at 54.
68 Columbia Ex. No. 9 at 3.
69 Columbia Brief at 45.
70 Columbia Ex. No. 9.

based upon the customers' actual demand history. Each demand curve is specific to the associated participating customers.[71]

In developing CHOICE demand curves, Columbia uses the actual, most recent twelve months demand of the actual customers for each CHOICE marketer for each Columbia Transmission Company Market Area. In this process, Columbia does not use average usage curves.[72]

The OCC apparently would have Columbia allocate CHOICE Program capacity costs on an after-the-fact annual throughput basis.[73] However, that is inconsistent with how capacity costs are incurred to serve the demands of firm customers. Columbia does not allocate CHOICE program capacity on an annual throughput basis. Instead, CHOICE Program costs are allocated on a design peak day basis, just as they are incurred.[74] Columbia acquires capacity, and thus incurs costs, based upon the design peak day demand of its core market customers, not annual usage as OCC witness Haugh mistakenly believes. Capacity costs are not incurred based on consumption.[75]

As Columbia has explained, it is not possible to acquire firm storage and transportation capacity, and thus incur capacity costs on a consumption basis. Costs for firm upstream pipeline capacity are incurred on a demand basis, paid monthly for each Dth of daily entitlement irrespective of actual use.[76]

If there exists a need to change the method of determining upstream capacity to be allocated to CHOICE marketers, OCC witness Haugh's recommendation must be rejected because it

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71 Columbia Brief at 46-47.
72 *Id.* at 8.
73 OCC Brief at 55; OCC Ex. No. 13 at 5-6.
74 Columbia Ex. No. 9 at 10.
75 *Id.* at 11.

is based upon an unfounded assumption and is inconsistent with how Columbia acquires capacity. A study which incorporates the recommendation of the Auditor in this case, designed to be consistent with how Columbia acquires capacity, is a superior more reasoned approach to determine first, if a change is required, and second, how that change should be implemented.[77]

G. The Commission Lacks the Statutory Authority to Require Columbia to Conduct a Wholesale Supply Auction and it is Premature for Columbia to Rush to Implement a Wholesale Supply Auction Process

The OCC has proposed that Columbia be required to implement a wholesale supply auction, like that implemented by Dominion East Ohio ("DEO") by April 1, 2007.[78] The Commission lacks the statutory authority to require Columbia to conduct a wholesale supply auction, as demonstrated in Columbia's initial brief.[79]

This OCC recommendation is also premature, and simply because DEO has voluntarily implemented a wholesale supply auction does not mean that the DEO model simply can be imposed upon Columbia. The OCC states that, "the question is whether the wholesale auction process will achieve a better (more fair, just and reasonable or minimum) price…."[80] If one gets past the legal infirmities of the OCC argument, then this may indeed be an appropriate question, but one cannot answer the questions without careful study of a myriad of interrelated complex issues. That study has yet to be conducted. The OCC's suggested imposition of the DEO "blueprint" upon Columbia is overly simplistic. Columbia is not DEO, and the gas supply of 1.4 million customers cannot be entrusted to such overbroad generalizations.

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76 Columbia Brief at 48-49.
77 Columbia Ex. No. 9 at 18.
78 OCC Brief at 57-58.
79 Columbia Brief at 51-52.
80 OCC Brief at 57.

Despite the OCC's bold assertions, it is too early to determine whether or not the DEO auction is a success. In fact, it is unclear from the record in this case just how one would evaluate "success." It is premature for any party to determine the ultimate success of the DEO auction process. OCC witness Haugh's conclusion is based upon only five months of experience, with seventeen months yet to run on the DEO auction program. The DEO auction is a twenty-three month gas supply experiment – designed to smooth the transition to DEO's possible exit from the merchant function – which the OCC has proclaimed a success after only a few months of operation. The program has just now run through a full winter heating season and has not been reviewed by the Commission.[81]

The OCC definition of "success" seems to hinge solely upon price, however, in serving its customers Columbia's concerns go beyond price alone. As explained in Columbia's initial brief, the price equation of the supply contracts is only one factor in the overall performance of the contract and the related processes on DEO's system. Even if price were the only measure of success, the first few months of prices for the program is not the measure of that success. It must be recognized that the DEO gas price mechanism does not include a price hedge on the gas commodity for a two-year period.[82] This is a risk placed upon customers as a result of the auction, but there is no evaluation of that risk by the OCC. The conclusion that the price result of the auction was a success appears to be developed by a simple look at a twenty-four month historic period, and making an assumption that DEO's GCR would have mimicked those twenty-four months as compared to the price of the natural gas futures contract. As summarized in Columbia's brief, there were very unique

81 Columbia Brief at 53-54.
82 *Id.* at 54.

circumstances that existed at the time of the DEO auction that must also be further analyzed in order to determine how such circumstances may have impacted the DEO auction results and whether it is reasonable to expect such results to be duplicated.[83]

As explained in Columbia's initial brief, in addition to price, supply reliability must also be considered before implementing a wholesale supply auction. Price is important, but without confidence in reliability when serving the core firm market, that price is much less meaningful.[84] Columbia's current process involves scheduling and supply relationships with several pipelines and dozens of potential suppliers, many of them the largest gas producers or marketing arms of the largest gas producers in the country. Columbia is confident with the reliability that such an operation provides. The auction process results in only one contract design with only a few counterparties on which to rely.[85] Columbia's current process ensures that those required supplies, whether in storage or from flowing gas purchases, are in place when needed to meet extreme demand conditions during the coldest days or season of the year on Columbia's system. It is a process that has weathered the supply disruptions of numerous major hurricanes and that has ensured unimpeded, continuous service to firm customers under extreme cold weather conditions.[86] In contrast, the DEO process requires that transportation and storage capacity be released to the auction winners to be managed as they see fit. In Columbia's process, managing storage levels, injections and withdraws is the key stone of reliable supply planning process. If Columbia were to adopt the DEO auction process, Columbia would be delegating that important responsibility to

83 *Id.* at 55-60.
84 *Id.* at 60.
85 *Id.*
86 *Id.*

others, but would remain accountable for a failure of that supply should a marketer decided to take storage risks that Columbia would not take. This aspect of Columbia's portfolio is materially different than DEO's, in light of the fact that Columbia does not have 1 Bcf of peak day deliverability provided by on-system storage as does DEO.[87] The OCC brief and testimony never mention supply reliability.

The OCC maintains that there are no regulatory barriers that Columbia must overcome to implement a wholesale auction.[88] That conclusion appears to be oversimplified. There may not be significant state regulatory barriers, but there is a need to have such a large change in the procurement process pre-approved by the Commission, and accepted to a degree, by Columbia's customers and other interested parties if it was determined that they would likely be impacted by the change.[89]

There is however, a significant issue currently before the Federal Energy and Regulatory Commission ("FERC") that involves asset management contracts, and a wholesale supply auction process is a form of an asset management contract.[90] Asset management agreements are in question as a result of their potential conflict with FERC rules and policies regarding capacity release. Columbia discussed this issue at length in its initial brief,[91] however, the OCC has chosen to continue to ignore it.

There may be other potential regulatory hurdles. Columbia relies heavily on upstream interstate pipeline storage capacity to balance the supply and demand on its system. If Columbia

87 *Id.* at 60-61.
88 OCC Brief at 57-58.
89 Columbia Ex. No. 13 at 20; Tr. Vol. II at 161-62.
90 Columbia Ex. No. 13 at 20; Tr. Vol. IV at 65-66.
91 Columbia Brief at 66-68.

were to implement a wholesale supply auction the same would still hold true although Columbia's supplies would be replaced with auction supplies. As a result of such a wholesale supply auction process, Columbia would still manage at least a portion of its contract storage in order to balance the system, but would no longer hold title to the gas that must be injected or withdrawn daily from its storage. Columbia could be in conflict with the FERC's rule that interstate shippers (transportation and storage capacity holders) must have title to the gas that is being transported or stored with their capacity.[92] In a DEO-style auction for Columbia, only CHOICE marketers, transportation customers (and their marketers), and the auction suppliers would be buying gas. By the very nature of the balancing services provided by Columbia with the retained storage contracts, gas from those shippers would be in Columbia's retained upstream storage.[93] This situation is different for DEO because DEO has a significant storage system of its own that resides on its own system. As it is not an interstate pipeline, DEO's storage does not fall under the FERC's "shipper must have title" rule.[94] Again, the OCC has ignored these aspects of its auction recommendation.

The OCC also has suggested that Columbia's "current procurement practices are already very similar to a wholesale auction."[95] This is simply inaccurate. As Columbia witness Phelps explained, a wholesale supply auction is similar to Columbia's process only in that they both serve to determine the price of a gas purchase. Beyond that, the OCC's characterization is a gross over-simplification and DEO's auction is materially different from Columbia's current procurement process.[96]

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92 Columbia Ex. No. 8 at 22-23.
93 *Id.* at 23.
94 *Id.*
95 OCC Brief at 58.
96 Columbia Ex. No. 8 at 18.

Columbia's process results in Columbia having control of the capacity assets to best meet its customers' demands. The gas purchase contracts that result from Columbia's RFP process result only in Columbia's right to purchase gas and the suppliers' obligation to deliver gas at a specified receipt point. No capacity is released as in the DEO auction process. In Columbia's RFP and negotiating process for firm supplies, only a portion of Columbia's supply needs are contracted for and most of these supplies are contracted for in the three coldest winter months. Much of the remainder of Columbia's supply demands are satisfied through short-term monthly and daily purchases of spot gas that add flexibility to Columbia's process. The Commission has reviewed Columbia's gas procurement process in multiple GCR audits. Columbia's process acquires gas at the market prices combined with hedged and storage supply prices. It is a process that is both market-sensitive and flexible in its implementation.[97]

In DEO's case, the two years of discussions with interested parties that preceded the August 29, 2006 auction was used to address longer term portfolio decisions in anticipation of the auction, and ultimately for DEO's exit from the merchant function. Columbia would need similar lead time in order to ensure that Columbia's contracts expire or renew at the right time to make such an auction possible, and such a contract review has not begun because a wholesale supply auction has not been part of Columbia's gas procurement plan.[98] At a minimum, a Columbia wholesale supply auction would need to address Columbia's existing capacity release, hedging, longer term purchases, and off system sales contracts that extend beyond April 1, 2007 (the OCC's proposed implementation date for an Auction) and in some cases out to March 31, 2009.[99] The OCC brief

97 *Id.*
98 *Id.* at 18-19.
99 *Id.* at 19.

ignores all of this and instead continues to blithely assume that the DEO model can be simply and expeditiously imposed on others.

In a single paragraph in the OCC brief, the OCC states that Columbia has not offered persuasive operational differences between DEO's system and Columbia's.[100] To the contrary, it is not that Columbia has failed to offer a persuasive explanation of operational differences. Rather, it is that the OCC has chosen to overlook and ignore the differences.

OCC witness Haugh admitted that he had come to the conclusion about operational differences without even discussing the issues with any Columbia personnel,[101] despite the fact that the proposed auction was apparently an important OCC issue.[102] Instead, OCC witness Haugh's conclusions were based upon a response to a single data request, a response which he largely ignored.[103]

The OCC's scant attention to the differences between Columbia and DEO falls far short of the type of review that is needed to determine if an asset management supply structure would be beneficial for Columbia and its customers, and if so, what would need to be done to facilitate such a change without disrupting or putting at undue risk existing, long-standing services to GCR, CHOICE, and traditional transportation customers.[104] Despite OCC witnesses Haugh's ill-founded conclusion, there are significant operational differences between Columbia and DEO that preclude simply imposing DEO's wholesale supply auction upon Columbia.

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100 OCC Brief at 60.
101 Tr. Vol. III at 78, 107.
102 *Id.* at 102.
103 *Id.* at 78-79; 99-102.
104 Columbia Ex. No. 8 at 17-18.

DEO relies heavily upon its on-system storage fields to assign and balance supplies with demand on its system. Columbia on the other hand has no on-system storage, but instead contracts for one hundred percent of its storage from upstream interstate pipelines. This, in and of itself, is a significant difference in the way the two LDCs operate and manage their systems on a day-to-day basis.[105] OCC witness Haugh was unsure of the differences between Columbia's and DEO's storage.[106] In addition, Columbia must manage over 900 points of local delivery from interstate pipeline companies, while DEO has to manage only 35.[107]

Furthermore, Columbia must contract for certain locally-produced gas supplies that are the sole supply source in certain areas of Columbia's system. Columbia's local gas production receipts amount to about 4 Bcf per year, while DEO's local production supplies, provide about 55 Bcf of DEO's annual throughput.[108] These DEO local gas supplies can be utilized throughout DEO's system, and can be used by auction winners as supply comparable to a firm transportation contract with upstream pipelines. On Columbia's system the receipt of local gas production is limited to specific receipt points. These are further examples of the kind of issues that must be studied in detail before drawing conclusions about whether a wholesale supply auction makes sense for Columbia.[109]

The OCC further opines that its recommendation would not significantly impact the 2003 Stipulation. The OCC comes to this conclusion because Columbia would be permitted to retain some pipeline capacity and storage, and "these assets would afford COH the opportunity to conduct

105 *Id.* at 17.
106 Tr. Vol. III at 103-04.
107 Tr. Vol. II at 114; Vol. III at 104.
108 Columbia Ex. No. 8 at 17.
109 *Id.*

OSS [Off-System Sales] and CR [Capacity Release] transactions albeit on a smaller scale."[110] Despite the OCC's efforts to downplay the matter, the OCC's proposed wholesale supply auction would result in a significant change in Columbia's entire regulatory construct under the 2003 Stipulation, and such significant changes have not been analyzed by Columbia, the Auditor or the Commission.[111] As discussed earlier herein, Off-System Sales and Capacity Release revenues constitute a significant part of Columbia's revenue opportunities under the 2003 Stipulation, and are used to offset, in part, CHOICE Program capacity costs. However, under the OCC proposal Columbia would retain control over fewer pipeline capacity assets with which to make Off-System Sales and Capacity Releases,[112] yet OCC witness Haugh did not consider the impact of his proposal upon Off-System Sales, Capacity Release or CHOICE Program funding.[113]

As Columbia noted in its initial brief, it may eventually be possible to overcome the problems associated with implementing a wholesale supply auction. However, the OCC's demand to pursue such an activity at this time is fraught with many problems and complexities that would require a good deal of time in order understand the issues and to craft workable solutions. Columbia has begun stakeholder discussions with regard to the issues associated with the expiration of the 2003 Stipulation. These discussions will, at a minimum, begin to deal with the broader issues of Columbia's CHOICE program and Columbia's merchant role in the post-October 2008 time frame. The issue of utilizing traditional purchase contracting processes versus an asset management or portfolio management contract that could result from an auction process will be included within

110 OCC Brief at 61.
111 Tr. Vol. II at 162-63, 182-83.
112 Tr. Vol. V at 19.
113 Tr. Vol. III at 81-82.

those discussions. With respect to the auction, those discussions should take into account price volatility mitigation, supply reliability, operational reliability, the impact of extreme conditions and the impact upon existing operations and tariffs.[114]

H. Columbia is Not Making Any Off-System Sales to its Own Customers

Paragraph 16 of the 2003 Stipulation provides, in part, "Columbia will not use its capacity assets for the purpose of making Off-System Sales (retail or wholesale) to Columbia customers…." During cross examination in this case, the OCC noted that in a response to an Auditor data request Columbia had listed as an Off-System Sales transaction sales to one of Columbia's industrial customers.[115] The OCC claims that this violated the 2003 Stipulation, and urged the Commission to terminate the 2003 Stipulation or to reprice Columbia based on an excess capacity allegation.[116]

As explained in Columbia's initial brief, the transaction with the industrial customer initially preceded the effective date of the 2003 Stipulation.[117] The transactions with this customer were first effective in November 2000, several years before the 2003 Stipulation became effective. The final winter of the arrangement was the November 2005 through March 2006 period. Prior to extending that arrangement for the 2006-2007 winter, Columbia determined that continuation of the arrangement might not be consistent with the 2003 Stipulation that became effective in November 2004, and decided on its own volition to discontinue the arrangement.[118]

114 Tr. Vol. IV at 55-56.
115 Tr. Vol. II at 97.
116 OCC Brief at 32-33.
117 Columbia Brief at 34-35.
118 Columbia Ex. No. 8 at 27-28.

It is not clear that this agreement with an industrial customer is the type of agreement prohibited by the 2003 Stipulation, particularly given that it originated prior to the effective date of the 2003 Stipulation. The OCC filed no testimony on this issue and, notably, no signatory party to the Stipulation filed testimony questioning the transactions with this customer. However, even if the Commission were to determine that continuation of the agreement was a violation of the 2003 Stipulation, Columbia has already terminated the agreement and any such past inadvertent violation is not significant enough to warrant termination of the 2003 Stipulation.

Furthermore, the OCC's arguments for suggested repricing due to alleged "excess capacity" are devoid of any record support. The OCC claims that Columbia engaged in this transaction by utilizing unused GCR capacity, which it deemed to be excess capacity.[119] The OCC then calculated a recommended GCR disallowance of $288,240 by taking 120,000 dth per month, dividing that by 30 days per month, multiplying that by $6.005/dth and multiplying that by 12 months.[120] Because the OCC presented this calculation for the first time in its brief – the OCC neglected to support its argument on this issue with any direct testimony – it is difficult to fathom the rationale behind the OCC's calculation. However, the recommended adjustment appears to be ill-founded and the OCC calculation appears to be incorrect.

First, the OCC's characterization of the capacity is wrong. The transportation capacity available to Columbia is that capacity the costs of which are paid for by Columbia, not the GCR customers, pursuant to the 2003 Stipulation. As set forth on Attachment C to the 2003 Stipulation, the pipeline capacity costs have already been removed from the GCR and thus Columbia's

119 OCC Brief at 33.
120 *Id.* at 34.

GCR customers were never billed for the capacity used for the arrangement in question. Furthermore, as a result of the CHOICE Program Sharing Credit GGC customers actually receive 50% of any margin created by the transaction.

Because the OCC failed to conduct timely discovery with respect to this issue, and because the OCC did not make its case through the use of direct testimony, not surprisingly, the OCC's calculation of the recommended disallowance is incorrect. The OCC incorrectly assumed that the 120,000 dth is a monthly number when it is instead a seasonal number.[121] If one were to factor this correction into the OCC calculation the equation would instead be 120,000 dth per winter, divided by 151 days per winter, multiplied by $6.005/dth multiplied by 12 months, resulting in a total of $57,266/year.

Because the arrangement at issue was originally initiated before the effective date of the 2003 Stipulation, and because the capacity used to conduct the transaction was not paid for by GCR customers, and because the OCC's recommended disallowance is improperly calculated, the Commission should reject in its entirety the OCC argument with respect to this issue.

I. Columbia Correctly Calculated and Applied Interest on Pipeline Refunds

The OCC Brief argues that Columbia is not properly flowing back through the GCR some of the interest earned on supplier refunds.[122] The OCC maintains that between the time Columbia receives a supplier refund and the time that the refund is flowed back to customers through the GCR, Columbia earns interest on the refund and that interest is not passed back to customers. The OCC believes that this contravenes the Ohio Administrative Code. While the OCC description of

121 Columbia Ex. No. 8 at 28; Tr. Vol. II at 98.
122 OCC Brief at 48.

the refund process is accurate, its conclusion about the violation of the Ohio Administrative Code is incorrect.

Under the Commission's rules that govern GCR filings, supplier refunds are flowed back to customers in the quarter following a utility's receipt of the refund.[123] When reflected in the calculation of the GCR rate, interest at the annual rate of 10% is applied to the refund amount.[124] The GCR rule states, in pertinent part:

> (A) The gas cost recovery rate equals:
>
> > (1) The gas or natural gas company's expected gas cost *for the upcoming quarter*, or other period as approved by the commission, pursuant to paragraph (K) of rule 4901:1-14-01 of the Administrative Code, plus or minus;
> >
> > (2) The supplier refund and reconciliation adjustment, which reflects:
> >
> > > (a) Refunds received from the gas or natural gas company's interstate pipeline suppliers or other suppliers or service providers plus ten per cent annual interest....[125]

The language in the rule quoted above makes it clear that both the refund and the interest on the refund apply to the upcoming quarter. That is, there is a lag of a quarter in the reflection of refunds in the calculation of the GCR.[126] This is how the rule has been interpreted and applied since the inception of the GCR mechanism nearly thirty years ago. Neither the Commission Staff nor the financial Auditor in this case noted any discrepancy between Columbia's calculation of its GCR rates, including interest on supplier refunds, and the Commission's GCR rules.[127]

Furthermore, there is a degree of symmetry between the treatment of supplier refunds and the treatment of gas cost undercollections in the GCR rules. Just as the GCR is not credited with

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123 Ohio Admin. Code § 4901:1-14-05-Appendix – see the definition of "q."

124 Ohio Admin. Code § 4901:1-14-05(A)(2)(a),

125 Ohio Admin. Code § 4901:1-14-05 (emphasis added).

126 Tr. Vol. II at 48.

any interest earned on supplier refunds prior to the inclusion of the refunds in the calculation of the GCR rate, the utility collects no carrying costs on gas cost undercollections (which can exceed $100 million) prior to the inclusion of the undercollected amounts in a subsequent quarter reconciliation adjustment.[128]

The OCC recently made a similar argument in another utility's GCR case, and the Commission rejected the argument.[129] Consistent with that decision, the Commission should again reject this spurious OCC claim.

J. Any Losses Associated with Avoided Costs as Part of an Off-System Sales Transactions Should Not be Excluded from the CHOICE Program Sharing Credit Calculation

The Audit Report noted that Columbia entered into eleven transactions in which it sold gas at prices below that at which it purchased the gas. The Auditor noted that Columbia represented that there were avoided costs associated with each of the transactions that would off-set the losses. However, because the Auditor began investigating this issue so late in the audit process it was unable to verify the avoided costs.[130] The Auditor recommended that the costs associated with the eleven transactions be borne by Columbia and not by customers, despite the fact that the 2003 Stipulation did not prevent Columbia's treatment of avoided costs.[131] The OCC

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127 *Id.* at 72.
128 *Id.* at 72-73. In fact, the utility *never* earns any interest on gas cost undercollections, even after such undercollected amounts are included in the calculation of the GCR.
129 *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Vectren Energy Delivery of Ohio, Inc. and Related Matters*, Case No. 02-220-GA-GCR, Second Entry on Rehearing (December 21, 2005) at 3-5.
130 Audit Report at 5-15.
131 *Id.* at 5-17; Tr. Vol. I at 98.

concurred with the Auditor's recommendation, opining that, "COH has been unable to prove that there were any avoided costs, the Company has failed to meet its burden of proof." [132]

The Auditor's recommendation and the OCC Brief are both contrary to the express terms of the 2003 Stipulation. Attachment B to the 2003 Stipulation contains a definition of Off-System Sales, and states, in pertinent part," Off-System Sales revenue included additional savings generated from arrangements that result in avoided costs."[133] As Columbia witness Phelps explained, "with the incremental transactions that resulted in the booking of avoided costs, there was associated previously flowing supply, and when the effect of the incremental transaction is overlaid or added to the known costs of the flowing supply, the overall costs of the supply is reduced."[134] Columbia is at a loss to understand why the OCC or others would seek to negate a combination of transactions, the net result of which is lower gas costs for customers.

The OCC allegation that Columbia has been unable to prove that there were any avoided costs is nonsensical. Columbia provided avoided cost information to the Auditor as part of the audit process. Because the Auditor chose not to explore this issue until the end of the audit, the Auditor did not have time to verify the avoided cost data provided.[135] That is no fault of Columbia's – Columbia promptly provided the data to the auditor when it was requested. Columbia witness Phelps further testified about the treatment of avoided costs, which testimony was not cross-examined, nor did any party file testimony to rebut Columbia witness Phelps' avoided cost testimony. Columbia met its burden of proof, and it is the OCC who has failed to sustain its bur-

132 OCC Brief at 56.
133 2003 Stipulation, Attachment B.
134 Columbia Exhibit. No. 5 at 4-5.
135 Tr. Vol. I at 97.

den by failing to file any testimony whatsoever on this issue. Columbia's treatment of avoided costs is consistent with the 2003 Stipulation, and the OCC recommendation therefore should be rejected.

K. A Lack of Collaborative Meetings Does Not Justify Termination of the 2003 Stipulation

As noted in the OCC Brief, the Columbia Collaborative was to meet semi-annually, but the meeting frequency has turned out to be less than semi-annually.[136] However, the OCC incorrectly places the burden for the initiation of such meetings solely upon Columbia. Nothing in the 2003 Stipulation makes Columbia alone responsible for the initiation of Collaborative meetings. Admittedly, Columbia did not seek to schedule full Collaborative meetings as often as required by the 2003 Stipulation in part because of the OCC's litigious propensities in this case,[137] and in part because the time of Columbia personnel was fully consumed by the Commission's Minimum Gas Service Standards rulemaking. In addition, Columbia and other stakeholders have been waiting to see how DEO's wholesale supply auction impacted the industry. As Columbia witness Brown explained,

> Columbia has had meetings with a number of stakeholders, both in group meetings and in one-on-one discussions. Many of those stakeholders have expressed the position that, given the term of the Stipulation discussed above, and the long-term process leading to the recently implemented Wholesale Auction process for Dominion Retail, the best time to begin discussions about Merchant Function issues and the continuing development of Columbia's CHOICE Program would be after the 2006-2007 winter. Columbia agrees and intends to begin a series of open collaborative meetings no later than the end of the first quarter of 2007.[138]

136 OCC Brief at 36.
137 Tr. Vol. II at 167.
138 Columbia Exhibit No. 7 at 6.

While Columbia may not have asked for the scheduling of Collaborative meetings as often as set forth in the 2003 Stipulation, no other signatory party requested such meetings either prior to the hearing in this case. The first such party to request the scheduling of a meeting was Interstate Gas Supply, Inc. during the course of the hearing in this case, and Columbia has held the agreed upon meeting.[139] Because no signatory party to the 2003 Stipulation filed testimony on this issue, the OCC's request to terminate the 2003 Stipulation on this ground is extreme and should be rejected.

The OCC also noted that the Commission required Columbia to meet with the Commission Staff to re-initiate merchant function discussions.[140] Columbia met with Staff as directed and agreed to let the DEO process evolve before scheduling additional meetings.[141] Thus, there is simply no basis upon which to terminate the 2003 Stipulation based upon the OCC's recommendation.

III. CONCLUSION

The Commission should never have allowed the hearing in this GCR case to evolve into a retrial of the 2003 Stipulation. The Commission can, by its order in the instant dockets, put a stop to this callous disregard of Commission orders in other cases and of the legal principles of res judicata and collateral estoppel. Nonetheless, Columbia has demonstrated that it properly implemented the 2003 Stipulation. The Commission should reject the arguments put forward by the OCC and Staff and find that Columbia's gas procurement policies and practices during the audit period were reasonable. The OCC has also asked that the Commission direct Columbia to imme-

139 Tr. Vol. I at 152.
140 OCC Brief at 35.
141 Tr. Vol. II at 168-69.

diately implement a wholesale supply auction. The Commission lacks the statutory authority to issue the directive sought by the OCC, significant structural and regulatory differences exist between DEO and Columbia that prohibit an identical auction, and in any event the OCC request is premature.

Respectfully submitted by
COLUMBIA GAS OF OHIO, INC.

Stephen B. Seiple

Stephen B. Seiple, Trial Attorney

Mark R. Kempic, Assistant General Counsel
Stephen B. Seiple, Lead Counsel
200 Civic Center Drive
P.O. Box 117
Columbus, OH 3216-0117
Telephone: (614) 460-4648
Fax: (614) 460-6986
Email: sseiple@nisource.com

Attorneys for
COLUMBIA GAS OF OHIO, INC.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Reply Brief of Columbia Gas of Ohio, Inc. by email and regular U.S. mail to the persons named on the attached Service List this 9th day of May, 2007.

Stephen B. Seiple
Attorney for
COLUMBIA GAS OF OHIO, INC.

SERVICE LIST

Anne L. Hammerstein
Assistant Attorney General
180 E. Broad Street
Columbus, OH 43215-3793
Email: anne.hammerstein@puc.state.oh.us

Stephen Reilly
Assistant Attorney General
180 E. Broad Street
Columbus, OH 43215-3793
Email: steve.reilly@puc.state.oh.us

W. Jonathan Airey
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
Email: wjairey@vssp.com

Larry S. Sauer
Assistant Consumers' Counsel
10 W. Broad St., Suite 1800
Columbus, OH 43215-3485
Email: sauer@occ.state.oh.us

John W. Bentine
Bobby Singh
Chester, Willcox & Saxbe, LLP
65 East State Street
Suite 1000
Columbus, OH 43215
Email: jbentine@cwslaw.com

Gretchen J. Hummel
McNees, Wallace & Nurick, LLC
21 East State Street, 17th Floor
Columbus, OH 43215
Email: ghummel@mwncmh.com

M. Howard Petricoff
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
Email: mhpetricoff@vssp.com

Barth E. Royer
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, OH 43215-3927
Email: barthroyer@aol.com

Dale R. Arnold
Director, Energy Services
Ohio Farm Bureau Federation
280 North High Street
P.O. Box 182383
Columbus, OH 43218-8694
Email: darnold@ofbf.org

William S. Newcomb, Jr.
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
Email: wsnewcomb@vssp.com