BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Regulation of the Purchased Gas Adjustment Clauses Contained Within the Rate Schedules of Columbia Gas of Ohio Inc. and Related Matters.	)	Case No. 04-221-GA-GCR
In the Matter of the Regulation of the Purchased Gas Adjustment Clauses Contained Within the Rate Schedules of Columbia Gas of Ohio Inc. and Related Matters.	)	Case No. 05-221-GA-GCR

REPLY BRIEF
OF
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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I. INTRODUCTION

On April 18, 2007, the Office of the Ohio Consumers' Counsel ("OCC") filed its Initial Post-Hearing Brief ("OCC Brief") in the above-captioned matter pursuant to the Commission's Entry dated April 13, 2007.[1] In addition, initial briefs were also filed by the Columbia Gas of Ohio, Inc. ("COH", "Columbia", or "Company") ("COH Brief"), the staff ("Staff") of Public Utilities Commission of Ohio ("PUCO" or "Commission") ("Staff Brief"), Dominion Retail, Inc. ("Dominion") ("Dominion Brief"), The Ohio Gas Marketers Group ("OGM")[2] ("OMG Brief"), and Honda of America MFG., Inc.

[1] Entry at 2 (April 18, 2007).

[2] The Ohio Gas Marketers Group consists of Commerce Energy, Inc., Direct Energy Services LLC, Hess Corporation, MxEnergy Inc., and Vectren Retail LLC (d/b/a Vectren Source).

("Honda") ("Honda Brief").[3] The OCC replies herein to these initial briefs of the other parties.

The history of the case is incorporated herein as presented in OCC's Initial Post-Hearing Brief.

II. ARGUMENT

The current GCR proceeding is the first opportunity for the Commission to review the GCR-related matters from the 2003 Stipulation[4] in the context of their actual impact on the GCR and GCR customers. These issues could not have been reviewed in the context of the GCR criteria of fair, just and reasonable rates[5] for GCR customers prior to this proceeding. COH challenges the parties' rights to have the Commission conduct such a review by arguing unreasonably that the doctrines of res judicata and collateral estoppel preclude such a review.[6]

Herein, OCC contests COH's interpretation of the 2003 Stipulation, and *inter alia* challenges COH's implementation that has resulted in the improper retention of Off-System Sales ("OSS") and Capacity Release ("CR") revenues at a cost of $14.8 million to consumers during the current audit period. OCC advocates for the

[3] Industrial Energy Users-Ohio ("IEU-Ohio") and Interstate Gas Supply, Inc. ("IGS") filed notices that they would not file an Initial Brief, but reserved their rights to file Reply Briefs (April 18, 2007).

[4] *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Service ("2003 Stipulation Case")*, 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 in Case No. 03-1459-GA-ATA ("2003 Stipulation") filed October 9, 2003, as modified by the Commission's Entry (March 11, 2004), and Entries on Rehearing (May 5, 2004 and June 9, 2004).

[5] R.C. 4905.302; See also Ohio Adm. Code 4901:1-14(7), and 4901:1-14(8).

[6] COH Brief at 13-18 (April 18, 2007).

termination of the 2003 Stipulation in accordance with the Commission's reservation of its right to terminate,[7] or in the alternative OCC requests that the Commission modify the 2003 Stipulation to remedy provisions that COH has drafted and has interpreted to maximize its own financial benefit, at the expense of the GCR and GCR customers.

The 2003 Stipulation cannot divert the PUCO's attention from the fact that COH's ability to generate OSS and CR revenues is made possible only through the utilization of GCR assets, and absent the 2003 Stipulation, COH would be required to return the OSS and CR revenues to its GCR customers. If the Commission determines that COH's collection and retention of OSS and CR revenues, under the 2003 Stipulation, violate R.C. 4905.302 and Ohio Adm. Code 4901:1-14 (07) and (08), then the Commission should not have any reservation about terminating or modifying the 2003 Stipulation. In reference to the utilization of the Transition Capacity Cost Recovery Pool ("TCCRP") funds to off-set CHOICE program costs instead of OSS and CR revenues, the Staff pointed out in its brief,

> GCR customers, particularly, are disadvantaged because they already pay all the capacity costs associated with GCR service. As a result of the procedure Columbia follows, GCR customers now pay a share of the CHOICE program costs for which Columbia agreed to bear responsibility because Columbia funds them with TCCRP funds that would otherwise be credited to GCR and CHOICE customers."[8]

Therefore, regardless of the 2003 Stipulation, the Company's retention of a disparate amount of OSS and CR revenues results in unjust and unreasonable GCR rates that the Commission must address in the context of these proceedings, and the Commission should require COH to flow the

[7] *2003 Stipulation Case,* Case No. 94-987-GA-AIR, et al., Entry on Rehearing at 10-11 (May 5, 2004).

[8] Staff Brief at 5-6 (April 18, 2007).

TCCRP revenues, in the amount of $14.8 million back to GCR customers in order to achieve a fair, just and reasonable GCR rate.

Furthermore, the Commission must address issues surrounding a prohibited off-system sales transaction with an industrial customer in direct violation of the 2003 Stipulation and the consequent concern that COH has excess capacity that GCR customers should not be responsible for. The Commission is also being asked to consider the appropriateness of the capacity cost allocations to COH's GCR customers. Finally, the Commission must consider OCC's argument that COH should be required to conduct a wholesale auction as a means to procure natural gas for its GCR customers.

A. Res Judicata and Collateral Estoppel Do Not Apply In This Case.

The Company has inappropriately argued that the "sole purpose of OCC witness Hayes testimony was to argue against the provisions of the 2003 Stipulation, and to attempt again to persuade the Commission to terminate the 2003 Stipulation. Similarly, the testimony of OCC witness Haugh seeks to undo a provision of the 2003 Stipulation -- i.e., the allocation of pipeline capacity costs."[9] These same arguments were made initially by the Company in COH's Motion to Strike filed with the Commission on December 14, 2006,[10] and were rejected by the Commission.[11] They should be rejected again.

[9] COH Brief at 8-9 (April 18, 2007).

[10] COH Motion to Strike the Testimony of the OCC and the PUCO Staff ("Motion to Strike") at 9-12 (December 14, 2006).

[11] Entry at 3 (December 29, 2006).

COH has improperly focused on OCC's arguments as violating the doctrines of res judicata and collateral estoppel.[12] The Company improperly stated:

> In this case, no one has presented any evidence that Columbia's gas procurement practices and policies during the audit period were imprudent or unreasonable. Instead, other parties have improperly used this GCR proceeding as a vehicle to collaterally attack the Commission's decisions in a rate case docket - i.e., PUCO Case No. 94-987-GA-AIR et al.[13]

Every argument OCC made in its Initial Post-Hearing Brief against the 2003 Stipulation has demonstrated the negative repercussions to the GCR rate paid by COH's GCR customers in this audit period, or in future periods.[14] In its arguments, COH fails to recognize, for example, that the Company's utilization of TCCRP funds instead of OSS and capacity release CR revenues to off-set CHOICE program costs is inextricably linked to the GCR rate that sales customers ultimately pay. Therefore, the Commission's review of the 2003 Stipulation in the context of a GCR case can and will have implications on the GCR rate COH charges its GCR customers.

Furthermore, contrary to the Company's arguments, the doctrines of res judicata and collateral estoppel do not apply in this case because there has not been a challenge to the 2003 Stipulation that has ever been decided on the merits and all the more important, not a challenge under the statute and PUCO rules applicable to the GCR rate paid by hundred of thousands of Columbia's sales customers.

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[12] COH Brief at 7-18 (April 18, 2007).

[13] Id. at 7.

[14] OCC Brief at 14-62 (April 18, 2007).

1. The Doctrine of Res Judicata is not applicable.

The Company argues that the re-litigation of issues raised by OCC in these proceedings should be barred by the doctrine of res judicata.[15] In *Whitehead v. General Telephone Co. of Ohio* (1969), 20 Ohio St.2d 108, 111-112, the Supreme Court of Ohio explained the two basic concepts of res judicata.

> First, [res judicata] refers to the effect a judgment in a prior action has in a second action based upon the same cause of action. The Restatement of Law, Judgments, Section 45, uses the terms 'merger' and 'bar.'[16] If the plaintiff in a prior action is successful, the entire cause of action is 'merged' in the judgment* * *. If the defendant is successful in a prior action, the plaintiff is 'barred' from suing, in a subsequent action, on the same cause of action* * *.
>
> The second aspect of the doctrine of res judicata is 'collateral estoppel.' While the merger and bar aspects of res judicata have the effect of precluding a plaintiff from relitigating the same cause of action against the same defendant, the collateral estoppel aspect precludes the relitigation, in a second action, of an issue that has been actually and necessarily litigated and determined in a prior action which was based on a different cause of action. Restatement of the Law, Judgments, Section 45, comment (c) and Section 68(2); *Cromwell v. County of Sac* (1876) 94 U.S. 351, 24 L.Ed. 195. In short, under the rule of collateral estoppel, even where the cause of action is different in a subsequent suit, a judgment in a prior suit may nevertheless affect the outcome of the second suit.

Based on this holding, the merits COH's res judicata arguments are inapplicable. First, the Commission did not hold an evidentiary hearing in the review of the 2003 Stipulation. Second, the Supreme Court of Ohio did not decide the OCC appeal of the 2003 Stipulation on the merits of the arguments raised.

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[15] COH Brief at 9-13 (April 18, 2007).

[16] Res judicata may also be referred to as "claim preclusion," whereas collateral estoppel is referred to as "issue preclusion".

The Company has incorrectly argued that OCC is attempting to re-litigate issues already litigated and decided by the Commission and the Supreme Court of Ohio.[17] The fundamental flaw with the Company's argument is the Commission did not conduct an evidentiary hearing and OCC's appeal of the 2003 Stipulation was dismissed on procedural grounds not resulting in a decision on the merits. Therefore, the GCR-related issues raised by OCC have not and could not be litigated until these cases. Second, many of the issues raised by OCC in these cases were put into issue by the Commission's reservation of the right to terminate the 2003 Stipulation without limitation,[18] and by the fact that the Management Performance ("M/P") Auditor ("M/P Auditor") raised certain issues as part of its audit ("M/P Audit") review.[19] Finally, the actual harm to customers caused by COH's implementation of the 2003 Stipulation has been demonstrated by OCC's analysis of the actual results from the first year under the 2003 Stipulation,[20] as well as Staff's challenge of the TCCRP issue.[21] For these reasons, the Commission should again reject the Company's arguments.

The practical effect of res judicata is to prevent a plaintiff from suing the defendant a second time on any theory which is based on the same nucleus of facts. In *Grava v. Parkman Township* (1995), 73 Ohio St. 3d 379, 382 the Supreme Court of Ohio

[17] COH Brief at 17 (April 18, 2007).

[18] *2003 Stipulation Case,* Case No. 94-987-GA-AIR, et al., Entry on Rehearing at 10-11 (May 5, 2004).

[19] Commission Ordered Ex. No. 1 (M/P Audit Report) at 5-16 (Calendar Year Issue); Commission Ordered Ex. No. 1 (M/P Audit Report) at ES-8 (Capacity Cost Allocation Issue); and Commission Ordered Ex. No. 1 (M/P Audit Report) at 5-15 (Losses from OSS Issue) (September 15, 2006).

[20] OCC Brief at 41-48 (April 18, 2007).

[21] Staff Brief at 6-29 (April 18, 2007).

held that "a valid, final judgment rendered upon the **merits** bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." (Emphasis added). The four elements of claim preclusion in Ohio are: (1) **a prior, valid judgment rendered on the merits**; (2) a second cause of action involving the same parties, or their privies, as the first; (3) a second cause of action raising claims that could have or were litigated in the first action; and (4) a second action arising out of the same transaction or occurrence as the first action. *Felder v. Community Mut. Ins. Co.* (1997), U.S. App. LEXIS 6622 (6th Circuit) (emphasis added). Claim preclusion does not apply in the current proceedings, because the first element is not met. Where the judgment of a court is not dispositive on issues which a party later seeks to litigate, res judicata is not applicable.[22] The Supreme Court's decision driving OCC's appeal of the 2003 Stipulation was not rendered on the substantive merits of the case, but rather was purely on a procedural ruling.[23]

The Company also incorrectly stated that OCC's arguments regarding the capacity allocation issue seeks to undue a provision of the 2003 Stipulation.[24] First, the Company has failed to cite any provision of the Stipulation that Mr. Haugh is attempting to undue. Second, Mr. Haugh was responding to an issue that the M/P Auditor discussed in the Audit Report by stating: "that allocation of pipeline capacity may unfairly burden

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[22] *Ameigh et al. v. Baycliffs Corporation, et al.* (1998), 81 Ohio St. 3d. 247, citing *Brookpark Entertainment, Inc. v. Cuyahoga County Board of Elections* (1991) 60 Ohio St. 3d. 44.

[23] *OCC v. PUCO*, S. Ct. No. 04-1227, Notice of Appeal (July 29, 2004) (Motion to Dismiss Granted March 23, 2005).

[24] COH Brief at 17 (April 18, 2007).

GCR customers and shield Choice customers."[25] The resolution of a GCR capacity issue clearly belongs in a GCR M/P audit proceeding. COH would prefer that this review never occur, and that the light of day not shine on this matter. The General Assembly's GCR statute and the PUCO's rule provide otherwise; the review must occur in these cases. Mr. Haugh's recommendation for the Company to perform a full cost of service study to address the capacity allocation issues admittedly requires a further proceeding, but the underlying capacity allocation issue is a GCR issue that belongs in these cases.

The Company also makes the erroneous argument that if OCC did not agree with the allocation of pipeline capacity costs in the 2003 Stipulation, it should have raised that issue in Case No. 94-987-GA-AIR.[26] First, there is no evidence that the capacity allocation issue raised by the M/P Auditor and addressed by Mr. Haugh in testimony was a problem in the 94-987-GA-AIR case. Second, the capacity misallocation issue involves the allocation of costs between GCR and CHOICE customers, an allocation issue that would not have been relevant in the 94-987-GA-AIR case because the COH CHOICE program had not yet started at the time of the 94-987-GA-AIR case.

2. Collateral Estoppel is not applicable.

COH also improperly raised the doctrine of collateral estoppel as a rationale for precluding OCC from litigating issues related to the 2003 Stipulation.[27] Collateral estoppel does not apply to these cases because the issues were dismissed on procedural

[25] Commission Ordered Ex. No. 1 (M/P Audit Report) at 5-16 (September 15, 2005).

[26] COH Brief at 18 (April 18, 2007).

[27] Id. at 13.

grounds, and not fully litigated, in the first action. Moreover, the Commission has applied collateral estoppel narrowly in the past.[28] The Commission has stated:

> in rendering a decision on the res judicata and collateral estoppel arguments, the Examiner believes that primary emphasis should be given to the question of whether the parties have been afforded one fair opportunity to litigate a claim or issue, not whether certain company decisions made, or actions taken, technically fall inside or outside of the audit period.[29]

Because the OCC did not have the opportunity to fully litigate issues under the 2003 Stipulation, and because its appeal was dismissed on procedural grounds, the Commission should not apply collateral estoppel as a basis for granting COH's Motion.

Further, the Commission has required that a thorough analysis be applied before barring an issue on the grounds of collateral estoppel. In *Board of Education of the Cleveland City School District v. Cleveland Elec. Illum. Co. et al.*, Case No. 91-2308-EL-CSS, Opinion and Entry at 7 (July 2, 1992), the Commission held that:

> in the interest of judicial economy and efficiency, a complaint might be dismissed if the rates have been recently and thoroughly considered by the Commission and the complainant alleges nothing new or different for the Commission's consideration.

Here, because the Commission specifically instructed the M/P Auditor to review certain aspects of the 2003 Stipulation including OSS/CR revenues to be an area subject to GCR Auditor or other Commission investigation/review over the November 1, 2004 to November 1, 2008 period, these issues should not be precluded from Commission

[28] *In the Matter of Regulation of the Electric Fuel Component Contained Within the Rate Schedules of the Toledo Edison Company and Related Matters*, Case No. 86-05-EL-EFC, Opinion and Entry at 4-5 (November 10, 1986).

[29] *In the Matter of Regulation of the Electric Fuel Component Contained Within the Rate Schedules of the Toledo Edison Company and Related Matters*, Case No. 86-05-EL-EFC, Entry at 4-5 (November 10, 1986).

consideration in these cases.[30] It would be wholly inconsistent for the Commission to specifically order the M/P Auditor to include certain issues as part of the M/P Audit and then preclude the parties from addressing those very same issues. Therefore, collateral estoppel does not apply and the Commission should reject the Company's arguments on brief.

Assuming arguendo that collateral estoppel might apply to these cases, under Ohio law, there are two relevant exceptions to the application of collateral estoppel. "Relitigation of the issue in a subsequent action between the parties is not precluded [when]: (1) a new determination of the issue is warranted **by differences in the quality or extensiveness of the procedures followed in the two courts," or if (2) "there is a clear and convincing need for a new determination of the issue * * * because of the potential adverse impact of the determination on the public interest.**"[31] The second exception applies in these cases because the Commission has specifically reserved the right to revisit the implementation of the 2003 Stipulation, without reservation and more importantly, the Commission gave COH and all of the parties ample notice of this reservation:

> 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."[32]

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[30] *2003 Stipulation Case,* Case No. 94-987-EL-AIR, et al., Entry on Rehearing at 10 (May 5, 2004).

[31] *State of Ohio v. Williams* (1996), 76 Ohio St.3d. 290, 295-296 (emphasis added).

[32] *2003 Stipulation Case,* Case No. 94-987-EL-AIR, et al., Entry on Rehearing at 11 (May 5, 2004).

The OCC demonstrated, at hearing, that the information provided to the Commission was so dramatically skewed -- that actual benefits were so fundamentally different from the projection provided by the Company -- that the 2003 Stipulation as COH has interpreted it and implemented leads to a GCR rate that is not fair, just, and reasonable and it is not in the public interest.[33] Moreover, the OCC responded to and addressed issues that were initially raised by the Auditor in the M/P Audit.[34] The Commission fully considered these arguments and decided against COH. The Commission should decide again that the doctrines of res judicata and collateral estoppel do not apply in these cases.

B. Columbia's Interpretation of the 2003 Stipulation Implementation is Unreasonable.

The Collaborative process that led to the filing and ultimate approval of the 2003 Stipulation was orchestrated by Columbia in a shroud of secrecy. The Company controlled the flow and content of the information that was presented to the signatory parties and to a certain extent the Commission. The lack of information that COH provided to the signatory parties should be viewed by the Commission as a lack of cooperation by the Company, and of itself, a sufficient reason for terminating the 2003 Stipulation.

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[33] OCC Ex. No. 12 Witness Hayes Prepared Testimony at 17-18 (December 8, 2006).

[34] OCC Ex. No. 12 (Hayes Prepared Testimony) at 8-13 (December 8, 2006), Commission Ordered Ex. No. 1 (M/P Audit Report) at 5-16 (September 15, 2006). (Specifically the calendar year issue involved in the sharing mechanism calculations); OCC Hearing Ex. No. 12 (Hayes Prepared Testimony) at 13-16 (December 8, 2006), Commission Ordered Ex. No. 1 (M/P Audit Report) at 5-14 (September 15, 2006) (Specifically the utilization of the Transition Capacity Cost Recovery Pool to off-set Choice Program Costs.); and OCC Hearing Ex. No. 13 (Haugh Prepared Testimony) at 4-9 (December 8, 2006), Commission Ordered Ex. No. 1 (M/P Audit Report) at 5-16 (September 15, 2006) (Specifically Capacity Cost Allocations).

Rather than having an affirmative defense for its actions, the Company's conscious decision to keep vital information from the Commission, should now be seen for what it is -- a means of manipulating the Commission's review process. Given that the Commission did not conduct an evidentiary hearing in the *2003 Stipulation Case,* Columbia's actions are even more troubling. To take matters to an even greater level of absurdity, the Company unreasonably uses the overall lack of information provided by COH to the Collaborative and the Commission as support for the Company's argument that its interpretation of the 2003 Stipulation was never disclosed; therefore, the Commission was not informed.[35] Such a twisted argument should not be accepted as rationale for protecting the financial windfall that has resulted from COH's implementation of the 2003 Stipulation. Moreover, this claim is wrong as some of this very same information **was provided** to the Commission by the OCC.[36] Therefore, the Commission should not be persuaded by the Company's arguments and should terminate the 2003 Stipulation or in the alternative modify the offending provisions.

1. The Commission's reservations of right to terminate the 2003 Stipulation.

The Commission explicitly reserved its right to terminate its approval of the 2003 Stipulation if it discovered that Columbia is not implementing the Stipulation as the Commission had been informed it would.[37] In addition, the Commission was concerned enough with the potential that COH would not cooperate with the Staff or M/P Auditor,

[35] COH Brief at 20-21 (April 18, 2007).

[36] *2003 Stipulation Case,* Case No. 94-987-GA-AIR, et al., OCC Reply Comments (December 22, 2003).

[37] Id. Entry on Rehearing at 11 (May 5, 2004).

in a subsequent proceeding such as this, that the Commission further reserved its right to terminate the 2003 Stipulation for additional reasons in its Entry on Rehearing by stating:

> our approval of the stipulation for a four year period is contingent upon Columbia providing all information requested by the staff and/or the GCR auditors during GCR audits or other investigations. If at any time we are not satisfied that Columbia is providing all requested information, we reserve the right to terminate our approval of the stipulation.[38]

As a result, the OCC asked the Commission to review the implementation of the 2003 Stipulation – action that the Commission itself obviously had contemplated.

The Company is overly critical of OCC's recommendations to terminate the 2003 Stipulation,[39] and additional concerns regarding this issue were also raised by other parties.[40] In response, OCC first points out that its recommendation is a direct result of the strongly worded language in the Commission's Entry on Rehearing.[41] Second, on brief, the OCC in every instance made recommendations to the Commission to modify the 2003 Stipulation, in the alternative to terminating the 2003 Stipulation. Mr. Hayes even explained OCC's position on the witness stand. However, COH and other parties have unreasonably isolated OCC's recommendation to terminate the 2003 Stipulation.[42] OCC worked within the framework that the Commission itself had established and in addition consistently offered a less intrusive recommendation for resolving the imbalance

[38] Id. at 10.

[39] COH Brief at 35-37 (April 18, 2007).

[40] Dominion Brief at 2-5; and Honda Brief at 2-4 (April 18, 2007).

[41] *2003 Stipulation Case,* Case No. 94-987-GA-AIR, et al., Entry on Rehearing at 10-11 (May 5, 2004).

[42] Tr. Vol. III at 31 (Hayes) (February 1, 2007).

of benefits that had been skewed in Columbia's favor as a result of its interpretation and implementation of the 2003 Stipulation.

The Company ignores the importance of the Commission's reservation of right by stating: "[t]he OCC and Staff have seized upon this single sentence and have raised in this case what they allege to be 2003 Stipulation "implementation" issues."[43] Columbia is right in that it is only a single sentence in the Entry on Rehearing, but it is a critical sentence and very important to these proceedings. The fact that this sentence is causing Columbia problems does not give COH the right to challenge the implications of the sentence in these proceedings. The appropriate time for Columbia to have challenged the sentence in question was when it appeared in the Commission's Entry on Rehearing.

Furthermore, pursuant to the second reservation of right to terminate, the Commission might consider terminating the 2003 Stipulation for failure by the Company to negotiate with the Collaborative in good faith. The Company was less than forthright with Collaborative members regarding information pertinent to the 2003 Stipulation. One glaring example of this is the undisputed fact that COH was the only party aware that the TCCRP revenue fund contained $94 million when the 2003 Stipulation was presented to the Commission for consideration.[44] The Commission had also reserved the right to terminate the 2003 Stipulation if at any time COH was not "providing all information requested by the Staff and/or GCR Auditor during a GCR audits,"[45] and in fact, a compelling argument for termination can be made consistent with the Commission's

[43] COH Brief at 13 (April 18, 2007).

[44] Tr. Vol. II at 26, 33-34 (Martin) (January 31, 2007).

[45] *2003 Stipulation Case,* Case No. 94-987-GA-AIR, et al., Entry on Rehearing at 10 (May 5, 2004).

concern over what could be characterized as an equally egregious lack of cooperation demonstrated by COH's actions during the negotiations with the Collaborative.

2. Columbia's control of information flow does not extend to controlling the Commission's consideration of the record.

Columbia has argued that the Commission must base its decisions upon the record in the *2003 Stipulation Case*.[46] While this might seem to be an intuitive argument, in reality it is another attempt by Columbia to control the outcome by controlling the information considered by the Commission. Columbia has single-mindedly argued that the information in the worksheets attached to OCC witness Hayes and Staff witness Puican's testimony are not in the record in the *2003 Stipulation Case*. COH argued:

> However, both parties have failed to demonstrate that 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.[47]

Columbia's claim is both overstated and just plain wrong. In making its argument, Columbia is conveniently ignoring the worksheet attached to Mr. Hayes testimony (OCC Ex. No. 12 at BMH Attachment 2) which is the very same worksheet that OCC attached to its Reply Comments in the *2003 Stipulation Case*.[48] This worksheet is also strikingly similar to others that COH provided to the Collaborative members during the negotiation

[46] COH Brief at 19-20 (April 18, 2007).

[47] Id. at 20 (original emphasis not included).

[48] *2003 Stipulation Case,* Case No. 94-987-GA-AIR, et al., OCC Reply Comments (December 22, 2003).

of the 2003 Stipulation.[49] Furthermore, the Commission, in these proceedings, took administrative notice of the Comments and Reply Comments in the *2003 Stipulation Case.*[50] Therefore, the worksheet attached to OCC witness Hayes testimony because it was attached to OCC Reply Comments *was* part of the record in the *2003 Stipulation Case,* and was included in the information the Commission reviewed and relied upon as part of the 2003 Stipulation.

COH argued that it had never docketed the settlement worksheet in support of the 2003 Stipulation with the Commission, nor ever used them to inform the Commission as to how it intended to implement the 2003 Stipulation.[51] The Company would prefer to be unhindered by the existence of the worksheet in the record of the *2003 Stipulation Case,* and free to make any argument in support of its implementation of the 2003 Stipulation. However, it is irrelevant whether the worksheet was presented to the Commission in support or in opposition to the 2003 Stipulation.[52] The key is the Commission had the information, and arguably the information contained in the worksheet did present the Commission with a blue print of COH's intentions regarding implementation of the 2003 Stipulation.

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[49] OCC Ex. No. 12, (Prepared Testimony of Bruce M. Hayes) at BMH Attachment 2 (December 8, 2007); and Staff Ex. No. 1, (Supplemental Testimony of Stephen E. Puican) at Exhibit SEP-2 (December 21, 2006); See also OCC Ex. No. 18 (July 3, 2003 e-mail from Tom Brown to the Collaborative) Proffered at Tr. Vol. V at 43, (February 26, 2007); and OCC Ex. No. 19 (July 8, 2003 e-mail from Tom Brown to the Collaborative) Proffered at Tr. Vol. V at 43, (February 26, 2007).

[50] Tr. Vol. V at 62-77 (February 26, 2007).

[51] COH Brief at 20 (April 18, 2007).

[52] Id. at 21.

The Commission had the information to review and rely upon if it so desired, and it is not for the Company to argue for limitation of the use or importance of these documents. The Commission speaks through its orders, and those orders will ultimately determine the reliance, if any, on the worksheet as a tool used by the Commission to evaluate the Company's implementation of the 2003 Stipulation.

3. Columbia's actions in implementing the 2003 Stipulation are inconsistent with information provided to the Collaborative and the Commission.

The Company goes to great lengths to establish that the worksheet attached to OCC witness Hayes testimony reflects Company "illustrations of what the construct of the agreement could produce based on certain assumptions.[53] As part of the hearing, COH made every effort to downplay the projections, attached to OCC witness Hayes Testimony (BMH Attachment 2), as "simple estimates, or projections presented for illustrative purposes only."[54] At the hearing, the Company also unsuccessfully tried to absolve itself of responsibility to the other Signatory parties stating: "[f]or any party to rely upon the schedule [BMH Attachment 2] for anything other than one evaluative tool among many, without independent assessment of the assumptions used, would be surprising and unreasonable."[55] Nonetheless, the undisputed fact remains that COH produced and distributed numerous worksheets and that the estimates in those worksheets have proven to be consistently and incredibly inaccurate when compared to the actual end results.

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[53] Id. at 22.

[54] Motion to Strike at 10 (December 14, 2006); Tr. Vol. II. at 69-70 (Martin) (January 31, 2007); Tr. Vol. IV at 134 (Brown) (February 20, 2007).

[55] COH Ex. No.10, (Prepared Rebuttal Testimony of Larry W. Martin) at 13 (February 8, 2007).

The Company further wrongly argues that even had the assumptions been construed as estimates or projections, the fact that any projection turned out to be inaccurate after the passage of time does not mean that Columbia failed to properly implement the stipulation.[56] The problem with this argument is that the Company's projections were based on information solely controlled by the Company, and that they were universally inaccurate and universally inaccurate in the Company's favor.[57] When the magnitude of the errors is taken into consideration with the fact that the errors under-estimated or under-projected Company benefits while at the same time over-estimated or over-projected customer benefits, it becomes clear that the Commission's approval of the 2003 Stipulation was based in part on erroneous assumptions and the continuation of the 2003 Stipulation as COH has implemented it to date should not be an option the PUCO seriously considers.

The Company also argued its position relative to certain key assumptions that OCC had focused its criticism on.[58] These COH assumptions and OCC's opposition thereto, pertain specifically to CHOICE participation levels, TCCRP, and the Calendar Year Issue. Furthermore, the worksheets demonstrate that for these key assumptions, COH's actions were inconsistent with the information provided to the Collaborative, and the Commission.

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[56] COH Brief at 22 (April 18, 2007).

[57] OCC Ex. No. 12 (Prepared Direct Testimony of Bruce M. Hayes) at BHM Schedule 1, Line 1 (Actual Choice Participation 36.1 %, Projected Choice Participation 62%); Line 2 (Actual Choice Program Costs $68.6 million, Projected Choice Costs $125.5 million); Line 29 (Actual Customer Savings -$13 million, versus Projected Customer Savings $50 million); and Line 24 (Net Choice Program Costs, or the amount that funding sources exceeded actual Choice Program Costs $36.9 million versus projected Net Choice Program Costs, $5.1 million, (December 8, 2006).

[58] COH Brief at 23-34 (April 18, 2007).

a. Columbia significantly over-estimated CHOICE participation levels.

CHOICE participation levels are an important aspect to the 2003 Stipulation because so much of the balance between Company and customer benefits from the 2003 Stipulation hinges on this outcome. The higher the CHOICE participation levels, the more CHOICE program costs that COH is responsible for,[59] and the higher the risk COH assumes, and the less OSS and CR revenues COH can retain. On the customer side of the ledger, the higher the CHOICE participation, the higher the CHOICE customer savings COH projected.[60]

The actual CHOICE participation level for the first year under the 2003 Stipulation was 36 percent compared to COH's projection of 62 percent. This is a significant variance, and one that cannot be ignored. COH offers the non-credible explanation that the numbers in the worksheet are not Columbia's projections of expected results.

> Instead, the numbers illustrate the regulatory construct if CHOICE participation were to increase as the signatory parties to the 2003 Stipulation **hoped** it would – i.e., a **maximum** CHOICE participation level.[61]

However, BMH Attachment 2 includes "Major Assumptions Used In Development Of Columbia's Response," and in regards to CHOICE participation levels the following assumptions were used:

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[59] OCC Ex. No. 12 (Prepared Direct Testimony of Bruce M. Hayes) at BHM Schedule 1 at Line 2 (Actual Choice Program Costs $68.6 million, Projected Choice Costs $125.5 million).

[60] OCC Ex. No. 12 (Prepared Direct Testimony of Bruce M. Hayes) at BHM Schedule 1 at Line 29 (Actual customer savings -$13 million, versus projected customer savings $50 million).

[61] COH Brief at 24 (April 18, 2007) (emphasis added).

> The implementation of the opt-out provision of HB 9 by various governmental entities **will** result in a significant increase in Columbia's CHOICE program participation rates.
>
> The implementation of the opt-out provision of HB 9 by These entities **will** result In a CHOICE program participation rate 62% by October 31, 2005.
>
> CHOICE program participation rates **will** increase by 5% during the calendar year 2006 as more municipalities elect to participate in the program.
>
> There **will** be a major increase in Columbia's Choice program participation rates during calendar year 2007 as the program grows in popularity. This **will** result [in] a decision by major municipalities to become natural gas aggregators and **will** result in an overall participation level of 82 % by the end of calendar year 2007 which **will** remain constant for the balance of the term of the stipulation.[62]

Nowhere in COH's major assumptions is there a statement that these projections are aspirational or represent the "hopes" of the signatory parties. They are not couched in terms of being maximums, but rather in matter-of-fact terms such that these assumptions are stated that they "will" occur. There were also no disclaimers in the assumptions to declare COH's lack ability to control its Choice program participation levels,[63] or that these were not projections of what "CHOICE participation rates actually were expected to be."[64] Such after-the-fact rationalizing by Columbia is staggering because it raises questions about the underlying good faith, or lack thereof, involving COH's negotiations with the Collaborative. Furthermore, because these assumptions were never stated in

[62] OCC Ex. No. 12 at BMH 2 (December 8, 2006) (emphasis added).

[63] COH Brief at 25 (April 18, 2007).

[64] Id.

those terms to the Collaborative, as such COH's rationalizations go beyond litigation hyperbole and should be taken very seriously by the Commission.

Moreover, the CHOICE participation levels that COH provided were in response to an OCC interrogatory that requested "what are the annual estimated amounts for "Choice Program Capacity Costs as defined in Paragraph 22."[65] The OCC interrogatory did not ask for illustrations or projections. However, it did specifically ask for estimates. Thus regardless of how COH now attempts to characterize those numbers, after the fact, the absolute truth remains that at the time of the Commission's review of the 2003 Stipulation, the data on OCC Ex. No. 12 BMH Attachment 2, was COH's estimate of how the Stipulation would be implemented.

COH states: it is unreasonable for the OCC to attempt to penalize Columbia and other signatory parties[66] to the 2003 Stipulation because of Choice participation rates * * * remain subject to significant fluctuation throughout the remainder of the settlement term. Despite attempts to cloak itself in the role of a victim, COH is not the victim in this case. Quite to the contrary, COH has profited handsomely under the Company's implementation of the 2003 Stipulation. As described previously, COH, and COH alone, controlled the information flow and content, and developed the projections that the signatory parties relied upon when evaluating the 2003 Stipulation.[67] As OCC witness Hayes' testimony demonstrated, by virtue of COH's projection under-estimating

[65] OCC Ex. No. 12 at BMH 2 (December 8, 2006).

[66] To the extent that IGS and Ohio Farm Bureau Federation ("OFB") have questioned how COH used the TCCRP funds during the audit period, then it is inaccurate to say that other signatory parties would be penalized by the Commission adopting OCC's recommendations in this case.

[67] Tr. Vol. II at 24, 27, 33-34 (Martin), and at 141 (Brown) (January 31, 2007); and Tr. Vol. IV at 99 (Martin) (February 20, 2007).

CHOICE participation rates; COH actually experienced significant benefits far in excess of the Company's projections, and consumers received benefits well below the Company's projections.

b. Columbia did not properly apply revenue sources, such as the Transition Capacity Cost Recovery Pool funds, to off-set CHOICE program costs.

COH mischaracterizes OCC's arguments pertaining to COH's utilization of the TCCRP funds to off-set CHOICE program costs by stating: "Columbia failed to implement the 2003 Stipulation as the Commission was informed the stipulation would be implemented because Columbia failed to include the TCCRP balance on the settlement schedule attached to the testimony of OCC witness Hayes."[68] OCC's position is much more fundamental. OCC contends that the 2003 Stipulation clearly delineates the order in which funding sources are to be utilized. This position is supported by the Staff,[69] and other signatory parties to the 2003 Stipulation.[70] COH has not adhered to that order of funding source utilization, and the worksheets that COH provided to OCC and the Collaborative do not support COH's actions or its theory of the case.

Pursuant to the 2003 Stipulation, Columbia is responsible for all of the CHOICE Program costs.[71] COH emphasized this position throughout the Commission's review of

[68] COH Brief at 27 (April 18, 2007).

[69] Staff Brief at 2-6 (April 18. 2007).

[70] OFB Motion to Intervene and Comments (January 17, 2007), See also Tr. Vol. V at 22-40 (Arnold) (February 26, 2007); See also Tr. Vol. III at 141-142 (Puican) (February 1, 2007) (Scott White phone call to Steve Puican); Tr. Vol. V at 55-56 (Puican) (February 26, 2007) (Scott White phone call to Steve Puican).(Scott White is President of IGS an intervenor in these proceedings and a signatory party to the 2003 Stipulation.).

[71] 2003 Stipulation at ¶ 21 (October 9, 2003).

the 2003 Stipulation as is evidenced by the Staff's brief.[72] Only now that the bill for those same CHOICE program costs is due -- Columbia is turning its back on its own prior statements and its GCR customers.

In exchange for assuming responsibility for CHOICE program costs, COH was provided with several funding sources to allow it the opportunity to fully recover these costs. The first source is from funds received from each Marketer participating in Columbia's CHOICE program for being responsible for no less than seventy-five percent of the design day capacity demand costs for that Marketer's customers.[73] The second funding source is revenues from COH's OSS and CR transactions as applied against the sharing mechanism. The Commission in approving the 2003 Stipulation granted COH the right to retain $25 million in OSS and CR per year intending those funds to be used to offset CHOICE program costs.[74] If the first two funding sources were insufficient to cover the CHOICE program costs, only then were the TCCRP funds to be made available.

Pursuant to Paragraph 22 of the 2003 Stipulation: "if and to the extent that the TCCRP is in an over-funded position, the TCCRP funds would be available to offset CHOICE program costs."[75] Instead of following this formula, Columbia has improperly used TCCRP funds first to offset CHOICE Program costs **before** using OSS and CR

[72] Staff Brief at 3,6,10,14, and 25 (April 18, 2007).

[73] 2003 Stipulation at ¶ 11 (October 9, 2003). (This seventy-five percent responsibility could be met through a combination of capacity and storage assignment from COH and purchase of balancing services.).

[74] *2003 Stipulation Case,* Case No. 94-987-GA-AIR, et al., Entry on Rehearing at 9-10 (May 5, 2004) (The Commission modified the sharing mechanism threshold from $35 million to $25 million). (Moreover, no where in any of its Comments to the Commission did COH indicate that it might retain 100 percent of the OSS and CR revenues to its bottom line instead of using them to off-set CHOICE program costs. Accordingly, none of the Commission's orders or entries contemplated this outcome.).

[75] 2003 Stipulation at ¶ 22 (October 9, 2003).

revenues, thus enabling the Company to apply all OSS and CR revenues directly to its bottom line and depleting the TCCRP funds, in the amount of $14.8 million, that should be returned to customers.

This outcome is contrary to the Company's own prior arguments that OSS and CR revenues **would not** be used to enhance its bottom line. In the *2003 Stipulation Case,* the Company filed a pleading in which COH addressed OCC's specific concerns about COH's retention of OSS and CR revenues. COH stated:

> * * * the OCC continually refers to Columbia's retention of Off-System Sales and Capacity Release revenue, but conveniently omits any meaningful discussion of the fact that the revenues are to be used to help offset CHOICE program costs. Thus, the OCC appears to be attempting to leave the false impression that all the revenue is retained by Columbia for the sole purpose of enhancing its bottom line. By using the non-traditional revenues to fund CHOICE program costs, ratepayers have available to them, with no additional base rate increases or related riders, one of the most robust CHOICE programs in the nation.[76]

Columbia's inconsistent positions cannot be reconciled and should not be taken seriously. The Company's argument in this case for the retention of OSS and CR revenues is a result of corporate excess, and the Commission should not be persuaded by the Company's chameleon-like change of positions, to the detriment of its GCR customers.

The Company's argument exaggerates a claim as to the importance of the TCCRP fund to the 2003 Stipulation, "[i]f the Staff's interpretation [utilization of OSS and CR revenues to off-set CHOICE program costs before using TCCRP funds] were to be adopted by the Commission, then the 2003 Stipulation would provide little or no value for Columbia,

[76] Staff Brief at 26 (April 18, 2007) citing: *2003 Stipulation Case,* Case No. 94-987-GA-AIR, et al., Memorandum Contra of Columbia Gas of Ohio, Inc. The Second Application for Rehearing of the Office of the Ohio Consumers' Counsel at 9 (May 24, 2004).

and Columbia never would have agreed to fund the Choice Program in the manner now suggested by the Staff."[77] However, being such a linchpin to the 2003 Stipulation is contradicted by COH's actions of not including the TCCRP funds on any of the worksheets,[78] or including the TCCRP as part of any of the Collaborative discussions,[79] or later on during the process mentioning the TCCRP in any pleadings filed by the Company at the Commission.[80] To the extent that virtually every quantified item on all of the worksheets were what COH characterized as assumptions or illustrations only,[81] then there is absolutely no valid excuse that an item as important as the TCCRP should have been excluded from the worksheets.

COH repeatedly provided spreadsheets, worksheets and assumptions to the parties that depicted either illustrative projections or estimated outcomes under the 2003 Stipulation, and **none** of these spreadsheets provided to the Collaborative members included

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[77] COH Brief at 41 (April 18, 2007).

[78] See e.g. OCC Ex. No. 16 (COH Post 2004 Regulatory Initiative) at 16-17 (March 24, 2003); OCC Ex. No. 12, (Prepared Testimony of Bruce M. Hayes) at BMH Attachment 2 (December 8, 2007); and Staff Ex. No. 1, (Supplemental Testimony of Stephen E. Puican) at Exhibit SEP-2 (December 21, 2006).

[79] Tr. Vol. II at 141 (Brown) (January 31, 2007).

[80] Staff Brief at 19 (April 18, 2007) The Staff noted the Company's silence in regards to the TCCRP in the following pleadings in the *2003 Stipulation Case,* Case No. 94-987-GA-AIR, et al., Reply Comments Of Columbia Gas Of Ohio On The Stipulation Filed October 9, 2003 (December 22, 2003); Memorandum Contra of Columbia Gas of Ohio, Inc. The Second Application for Rehearing of the Office of the Ohio Consumers' Counsel (May 24, 2004); Joint Application For Rehearing Or, In The Alternative, Application For Approval Of Modified Stipulation (April 9, 2004).

[81] Tr. Vol. II at 16, 19, 30 (Martin) (January 31, 2007), and Tr. Vol. II at 143 (Brown) (January 31, 2007); COH Exhibit No. 10 (Prepared Rebuttal Testimony of Larry W. Martin) at 8 (February 8, 2007).

the TCCRP as a funding source.[82] COH witness Martin's explanation for this intentional act of omission was that "we were not comfortable with the estimates that we had available at the time because of the volatility of the TCCRP balance."[83] It is ludicrous that the Company's support of the 2003 Stipulation hung in the balance of a funding source that was so volatile that COH was not comfortable estimating its value for the Collaborative; a fund -- the final balance of which was not determined until December, 2004 -- fourteen months after the filing of the 2003 Stipulation.[84] More noteworthy is the fact that the TCCRP fund steadily increased to approximately $94 million.[85]

The Company has made the tortured argument that the Staff witness Puican has not read the 2003 Stipulation provisions appropriately (i.e. read Paragraphs 15, 21, and 22 together), but rather has "cherry picked" the provisions that support Staff's argument.[86] The problem with the Company's position is that it attempts to elevate the TCCRP into a position of primary funding source when, at best, the 2003 Stipulation treats it as a secondary funding source.[87] The TCCRP is not mentioned in the 2003 Stipulation section *Treatment of Costs* (Paragraph 21),[88] TCCRP is not mentioned in the 2003 Stipulation

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[82] See e.g. OCC Ex. No. 16 (COH Post 2004 Regulatory Initiative) at 16-17 (March 24, 2003); OCC Ex. No. 12, (Prepared Testimony of Bruce M. Hayes) at BMH Attachment 2 (December 8, 2007); and Staff Ex. No. 1, (Supplemental Testimony of Stephen E. Puican) at Exhibit SEP-2 (December 21, 2006); See also OCC Ex. No. 18 (July 3, 2003 e-mail from Tom Brown to the Collaborative) Proffered at Tr. Vol. V at 43, (February 26, 2007); and OCC Ex. No. 19 (July 8, 2003 e-mail from Tom Brown to the Collaborative) Proffered at Tr. Vol. V at 43, (February 26, 2007).

[83] Tr. Vol. II at 24 (Martin) (January 31, 2007).

[84] COH Brief at 30 (April 18, 2007).

[85] Tr. Vol. II at 26 (Martin) (January 31, 2007).

[86] COH Brief at 39 (April 18, 2007).

[87] Staff Brief at 17 (April 18, 2007).

[88] Id.

section on *Revenues to Offset CHOICE Program Costs* (Paragraphs 11-20),[89] in addition the definition section of the 2003 Stipulation does not define the TCCRP,[90] or the term *Net Choice Program Costs* (a term that is central to COH's argument).[91]

It is also interesting to note that the Commission in its Orders approving the 2003 Stipulation failed to mention the TCCRP as a primary funding source for COH to off-set CHOICE program costs. In fact the sole mention identifies the TCCRP in a footnote where the Commission states: "funds possibly remaining in the transition capacity cost recovery pool are expected to be credited to the choice program sharing credit (per original provision 22)."[92] The Commission clearly understood and envisioned the return of the TCCRP funds to consumers, and not to be used by COH to off-set Choice program costs, as the Company has done.

Therefore, the Commission should disregard the Company's arguments and require the Company to return $14.8 million of TCCRP funds used by COH, during the current GCR audit period, to offset CHOICE program costs to the regulatory liability account from which it had been improperly amortized, so that the TCCRP funds can be available for refund to customers at the conclusion of the 2003 Stipulation period. Furthermore, the Commission should preclude COH from using TCCRP funds to off-set CHOICE program costs before using OSS and CR revenues during the remainder of the 2003 Stipulation. The ramifications of such a Commission mandate over the four year term of the 2003 Stipulation

[89] Id.

[90] Id.

[91] Id. at 18.

[92] Id. at 22, citing, *2003 Stipulation Case,* Case No. 94-987-GA-AIR, et al., Entry on Rehearing at 10 footnote 6 (May 5, 2004).

potentially amounts to $70 million in TCCRP funds that should be returned to COH's core customers under the 2003 Stipulation.

c. Columbia did not properly apply Off-System Sales and Capacity Release Revenues to the sharing mechanism during all time periods of the M/P Audit.

The 2003 Stipulation includes a provision requiring OSS and CR revenues earned by COH to be shared with core customers, during the period of the Stipulation, if the revenues exceed a certain threshold.[93] Columbia improperly argues that "it has always been clear that the CHOICE Program Sharing Credit was to be based upon a calendar year evaluation.[94] That is not true. During the negotiations of the 2003 Stipulation, at some unidentified point in time, the proposals as authored and presented by COH were altered so that the proposed periods for the stipulation **changed** from a twelve month basis that included every month of the 2003 Stipulation period,[95] to a calendar year basis that omitted November and December, 2004 OSS and CR revenues from the sharing mechanism.[96] This change and omission has cost COH's core customers $4.3 million during the current M/P Audit period.[97]

[93] 2003 Stipulation at ¶ 17 (October 9, 2003).

[94] COH Brief at 32 (April 18, 2007).

[95] OCC Ex. No. 16 (COH Post 2004 Regulatory Initiative) at 16-17 (March 24, 2003).

[96] OCC Ex. No. 12, (Prepared Testimony of Bruce M. Hayes) at BMH Attachment 2 (December 8, 2007); and Staff Ex. No. 1, (Supplemental Testimony of Stephen E. Puican) at Exhibit SEP-2 (December 21, 2006); See also OCC Ex. No. 18 (July 3, 2003 e-mail from Tom Brown to the Collaborative) Proffered at Tr. Vol. V at 43 (February 26, 2007); and OCC Ex. No. 19 (July 8, 2003 e-mail from Tom Brown to the Collaborative) Proffered at Tr. Vol. V at 43 (February 26, 2007).

[97] OCC Ex. No. 12 (Prepared Testimony of Bruce M. Hayes) at 13 (December 8, 2007).

It is apparent from early negotiations that the Company was presenting scenarios for the Stipulation period of November 1, 2004 through October 31, 2010 on a twelve months ending October 31 basis.[98] Those scenarios included the revenues for November and December 2004.[99] Later worksheets provided by COH illustrate the benefits of the 2003 Stipulation were prepared by COH on a calendar year basis, beginning in 2005, without demonstrating the implications for November and December 2004 OSS and CR revenues under the sharing mechanism.[100] It is clear from the evidentiary hearing that COH did not provide any worksheet depicting a calendar year scenario to the parties in which the November and December 2004 OSS and CR revenues were ever listed.[101] It is equally clear that the signatory parties were not made aware of the change and could not have understood that the change would enrich COH without any *quid pro quo* or corresponding benefit to customers. It is also unclear how the Commission could have understood the implications of the change and how it would impact the public interest.

The Company unreasonably argues that the "calendar year" concept in the 2003 Stipulation was part of the balance of interests agreed to by the parties, and approved by the

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[98] OCC Ex. No. 16 (Post 2004 Regulatory Initiative) (March 24, 2003) at 16, and Tr. Vol. IV at 90-92 (Martin) (February 20, 2007).

[99] Tr. Vol. IV at 90-93 (Martin) (February 20, 2007).

[100] OCC Ex. No. 12 (Prepared Testimony of Bruce M. Hayes) at BMH Attachment 2, page 2 of 3 (December 8, 2006); See also OCC Ex. No. 18 (July 3, 2003 e-mail from Tom Brown to the Collaborative) Proffered at Tr. Vol. V at 43 (February 26, 2007); and OCC Ex. No. 19 (July 8, 2003 e-mail from Tom Brown to the Collaborative) Proffered at Tr. Vol. V at 43 (February 26, 2007).

[101] Tr. Vol. IV at 90-93 (Martin) (February 20, 2007).

Commission.[102] What the Staff characterized as an unintended consequence,[103] the Company characterizes as a negotiated benefit for the Company. Once again the Company's position seems to have derived from "smoke and mirror" negotiations rather than actual give and take in which the Company clearly spelled out for the signatory parties and the Commission the impact and results of these "sleight of hand" language changes in the 2003 Stipulation.

Because the 2003 Stipulation is a four-year agreement, the OSS and CR sharing mechanism should encompass all four twelve-month periods of the 2003 Stipulation. The Commission should modify the 2003 Stipulation in order to return to COH's core customers $4.3 million[104] in shared OSS and CR revenues that had been unreasonably retained by the Company under the calendar year sharing mechanism.

C. Columbia Made Off-System Sales to One of its Industrial Customers in Violation of the 2003 Stipulation.

The record is abundantly clear and uncontested[105] that during certain times that were relevant under the 2003 Stipulation, [between November 2004 and March 2006] COH made an on-going OSS transaction with one of its industrial customers in direct violation of the 2003 Stipulation.[106] The 2003 Stipulation explicitly stated that:

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[102] COH Brief at 33 (April 18, 2007).

[103] Tr. Vol. III at 143-144 (Puican) (February 1, 2007); see also OCC Hearing Ex. No. 16 (Post 2004 Regulatory Initiative) (March 24, 2003) at 16.

[104] OCC Ex. No. 12 (Prepared Testimony Bruce M. Hayes) at 13 (December 8, 2006).

[105] There is no record evidence at all that these transactions did not violate the 2003 Stipulation. Any argument that any industrial customer may make in a Reply Brief -- is just that, argument, totally unsupported by any record evidence in this case.

[106] COH Brief at 34 (April 18, 2007).

> Columbia **will not** use its capacity assets for the purpose of making Off-System Sales (retail or wholesale) to Columbia customers * * *.[107]

The 2003 Stipulation did not provide for any exceptions to this prohibition, including "grandfathering" any then-existing contracts.

The Company unreasonably argues after-the-fact that "[i]t is not clear that this agreement with an industrial customer is the type of agreement prohibited by the 2003 Stipulation * * *."[108] The Company made this argument on brief despite the fact that its own witnesses confirmed the existence of the agreement and that it violated the 2003 Stipulation. Mr. Brown confirmed that such an OSS arrangement would be a violation of the 2003 Stipulation by stating:

> Q. That's the same language precluding off-system sales. So my question to you is if, in fact, Columbia made an off-system sale to one of its customers, would it be in violation of the stipulation?
>
> A. That would seem to conflict with this [2003 Stipulation prohibition] language.[109]

Mr. Phelps also concurred with Mr. Brown's assessment of this OSS arrangement in his rebuttal testimony: "The final winter of the arrangement was November 2005 through March 2006 period. Prior to extending that arrangement for the 2006-2007 winter heating season, Columbia determined that continuation of the arrangement might not be consistent with the 2003 Stipulation that became effective November 2004, and decided

[107] 2003 Stipulation at ¶ 16 (October 9, 2003) (emphasis added).

[108] COH Brief at 35 (April 18, 2007).

[109] Tr. Vol. II at 156 (Brown) (January 31, 2007).

to discontinue the arrangement."[110] Therefore, for the first two years under the 2003 Stipulation, the Company was engaged in an OSS transaction with a COH customer admittedly in violation of the 2003 Stipulation. This violation should be considered by the Commission as yet another ground for termination of the 2003 Stipulation, or in the alternative the Commission should consider the capacity reserved for the industrial customer as excess capacity, and grant disallowance of the costs of the excess capacity to be flowed through to GCR customers.

OCC argued on brief, that if COH was providing this service as an Off-System Sale transaction, then the capacity being used is unused GCR capacity.[111] Furthermore, it should have been impossible for COH to be able to guarantee that there would be unused GCR capacity ahead of time because the capacity is supposed to be needed to serve GCR customers. Nonetheless, COH was able to offer this guaranteed service, which indicates that COH has excess capacity under contract, and the Commission should address this issue.

OCC recommended that the Commission disallow the demand reservation costs associated with the amount of $288,240 per year.[112]

D. Columbia's Method of Allocating Capacity Costs is Unreasonable and Harms GCR Customers.

COH's allocation of capacity costs was raised by the M/P Auditor who stated: "the allocation of pipeline capacity costs may unfairly burden GCR customers and shield

[110] COH Ex. No. 8, (Prepared Rebuttal Testimony Phelps) at 27-28 (February 8, 2007).

[111] OCC Brief at 33 (April 18, 2007).

[112] Id. at 34.

CHOICE. * * *. Effectively, the GCR customers underwrite the allocation of capacity costs to CHOICE customers."[113] The Company argues that the M/P Auditor's issue should be addressed prospectively and recommended performing a study to determine if any cost reallocation was necessary.[114] Because the potential exists that the Company's cost allocation practice is unreasonable and harms GCR customers, it would be inappropriate to delay addressing this issue.

COH correctly noted that Mr. Haugh did not allege this issue was the result of the Company's implementation of the 2003 Stipulation.[115] Inasmuch as this is COH's GCR case, and the issue impacts the GCR rate, then the issue must be addressed in these proceedings at this time. As OCC previously argued, it was an issue driven purely by the M/P Auditor, and carried out in OCC witness Haugh's prepared testimony.[116]

Mr. Haugh's analysis showed that residential CHOICE customer deliveries over the past four-year period have been 9.3 % higher than residential GCR deliveries.[117] The magnitude of this difference resulted in Mr. Haugh calculating an alternative allocation method based upon actual usage which takes into consideration the significant differences between GCR and CHOICE customer usage.[118] On cross-examination, the M/P Auditor opined that Mr. Haugh's allocation method was a **reasonable alternative** to the full

[113] Commission Ordered Ex. No. 1 (M/P Audit Report) at ES-8 (September 15, 2006).

[114] COH Brief at 42 (April 18, 2007).

[115] Id.

[116] OCC Ex. No. 13 (Prepared Testimony of Michael P. Haugh) at 4-9 (December 8, 2006).

[117] Id. at 6, See also Commission Ordered Ex. No. 1 (MP Audit Report) at Exhibit 2-14, Page 2-9 (September 15, 2006).

[118] Id. at MPH-2.

study that the M/P Auditor recommended that COH conduct.[119] The result of Mr. Haugh's analysis is that GCR customers were overcharged for capacity costs in the amount of $8,932,337 during the one year period covered by the first year of the 2003 Stipulation, November 1, 2004 through October 31, 2005.[120]

Despite the M/P Auditor's acknowledgement that Mr. Haugh's analysis was a reasonable alternative to the full study the M/P Auditor recommended, Dominion argues Mr. Haugh's method violates the fundamental ratemaking principle that cost responsibility should be allocated on the basis upon which costs are incurred.[121] In support Dominion offers the testimony of COH witness Anderson who stated: under the current COH methodology, GCR customers do not pay for any capacity costs associated with serving other customer subsets.[122] It is not exactly clear how Mr. Anderson can testify on this subject with such conviction, because it was understood that this type of certainty was unavailable absent an allocation study.

Dominion also finds OCC's recommendation to be unfair presumably because this is not a rate case proceeding, and COH would not be permitted to re-allocate any of those capacity costs allocated from the GCR customers to any other customer class.[123] Any attempted re-allocation of costs can only occur as part of a base rate proceeding where all cost and allocation issues can be raised and addressed. The allocation method used by Mr.

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[119] Tr. Vol. I at 82-83 (McFadden) (January 30, 2007).

[120] OCC Ex. No. 13 (Prepared Testimony of Michael P. Haugh) at7 (December 8, 2006).

[121] Dominion Brief at 7-8 (April 18, 2007).

[122] Id. at 8.

[123] Id.

Haugh was intended to assure that charges to GCR customers are fair just and reasonable. Therefore, the Commission should order COH to refund to its GCR customers the $8.9 million overcharge identified in Mr. Haugh's testimony and order COH to reallocate these costs on a going forward basis, and put the onus on Columbia to file for rate relief to address any disparity in cost recovery.[124]

E. The Commission Should not be Persuaded by Columbia's Arguments Against a Wholesale Auction.

The Company has argued that the Commission lacks the statutory authority to mandate COH to undertake a wholesale auction.[125] The Company has also pointed out that Dominion East Ohio ("DEO") voluntarily implemented their wholesale supply auction.[126] However, Columbia agreed to participate in Collaborative meetings and the Commission did mandate that the Company was to adhere to the Collaborative meeting obligations, contained in the 2003 Stipulation by stating:

> We will also require Columbia to re-initiate discussions with our staff about exiting the merchant function within the next 60 days. **We expect those discussions to be meaningful and detailed.**[127]

Columbia did not challenge the Commission's authority to require COH to re-initiate discussions pertaining to exiting the merchant function at the time of the Entry on Rehearing. However, since the Entry on Rehearing, and despite these very explicit and very specific requirements, the evidentiary record in this proceeding demonstrates that

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[124] OCC Ex. No. 13 (Prepared Testimony Michael P. Haugh) at 8 (December 8, 2006).

[125] COH Brief at 50 (April 18, 2007).

[126] Id.

[127] *2003 Stipulation Case,* Case No. 94-987-GA-AIR, et al., Entry on Rehearing at 11 (May 5, 2004) (emphasis added).

COH has **ignored** the Commission Order, and absolutely **failed** to implement any of these requirements for a Collaborative meeting.[128]

Nonetheless, the wholesale auction for GCR gas purchases is not a significant change from how COH does business today.[129] It is also an appropriate issue for the Commission to consider in the context of a GCR proceeding. COH's argument on Commission authority might apply if OCC were arguing for COH to be forced to exit the merchant function, but that is not the case. OCC is not advocating that COH be forced to exit the merchant function. Instead, OCC is merely asking that the Commission require COH to use the best tools available to purchase gas for GCR customers to achieve fair, just, and reasonable[130] at optimal costs[131] GCR rate. The evidence on the record demonstrates the benefits for GCR customers.[132]

Columbia's refusal to entertain the wholesale auction process as a tool to achieve the best gas purchasing practices violates Ohio law, and assures COH GCR customers that they will be second class citizens when compared to DEO GCR customers. The Commission should not permit this to happen.

There is no doubt that COH wants to push any discussion of a wholesale auction or any development of a strategy to exit the merchant function as far out to the future as it possibly can. The reason is Columbia's self interest, focused on profit, is

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[128] OCC Brief at 34-37 (April 18, 2007).

[129] Tr. Vol. I at 153-156 (McFadden) (January 30, 2007).

[130] R.C. 4905.302; See also Ohio Adm. Code 4901:1-14(7), and 4901:1-14(8).

[131] Ohio Adm. Code 4901:1-14-07(D).

[132] OCC Brief at 62 (April 18, 2007).

incompatible with the public interest protected by Ohio law. In this case, it is Columbia's contention that OSS and CR revenues should equate to profit for COH, albeit at the expense of .GCR customers. Despite the fact that COH is not permitted to make a profit off the GCR, the truth is that they do. OSS and CR revenues are made possible through GCR upstream capacity and storage assets. During this audit period COH earned $13.6 million in CR revenues[133] and $26.5 million in OSS revenues[134] ($40.1 million in total). The profit motive is so strong that rather than use these revenues to off-set CHOICE program costs, as the 2003 Stipulation intended, the Company used customer dollars (TCCRP funds) instead, thereby flowing all the OSS and CR revenues directly to the Company's bottom line. Furthermore, during calendar year 2006, COH increased its OSS and CR revenue activity to $52.5 million.[135] It is difficult to imagine a scenario in which COH will "voluntarily" walk away from this much impact to their bottom line. The reality of this situation is that the Commission is going to have to issue an order that shakes COH's world and takes the Company away from its current comfort zone.

Columbia has thrown any number of obstacles in the way of the wholesale process to prevent it from going forward. For example, the Company unreasonably argues that it is premature to implement a wholesale auction,[136] or that it is too early to conclude that

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[133]Commission Ordered Ex. No. 1 (M/P Audit Report) at Ex. 5-9 (September 15, 2006).

[134] Id. at Ex. 5-23.

[135] *2003 Stipulation Case,* Case No. 94-987-GA-AIR, et al., COH Report to the Commission on the Revised Sharing Credit and the Filing of Revised Tariff Sheets. (March 30, 2007) (Per the 2003 Stipulation COH retains the first $25 million OSS and CR revenues and shares the excess based upon the Choice Participation rates, or in 2006 according to a 50/50 split. COH retained an additional $13.7 million and shared with customers $13.7 million.

[136] COH Brief at 53 (April 18, 2007).

the DEO auction process is a success.[137] COH characterizes the DEO auction as a "twenty-three month gas supply experiment" which will not conclude until June, 2008.[138] To wait for the final evaluation of the DEO auction at the conclusion of the DEO auction process will not allow for implementation of such an auction in COH territory before the expiration of the 2003 Stipulation, October 31, 2008, or even further into the future delaying possible benefits for GCR customers.

It is also noteworthy that COH has rarely been so cautious in implementing such changes in the past. For example, COH proceeded with the CHOICE program from the Toledo area trial[139] to a system-wide program[140] with amazing speed in sharp contrast to the Company's behavior now. Despite the fact that the goal of both the CHOICE program and a wholesale auction is to provide benefits -- whether gas purchasing options or actual savings -- to end use residential customers. Columbia's refusal to act in its customers' best interest now, as required by Ohio law, needs to be resolved by the Commission.

The Company also relies on the argument that operational differences exist between COH and DEO systems that preclude the implementation of a DEO.[141] However, on brief OCC presented counter arguments to the three operational

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[137] Id.

[138] Id. at 54.

[139] *In the Matter of the Application of Columbia Gas of Ohio, Inc. to Establish the Columbia Customer Choice Program*, Case No. 96-1113-GA-ATA, Opinion and Order at 9 (January 9, 1997).

[140] *In the Matter of the Commission's Investigation of the Customer Choice Program of Columbia Gas of Ohio, Inc.*, Case No. 98-593-GA-COI, et al., Finding and Order at 48 (June 18, 1998).

[141] COH Brief at 62 (April 18, 2007).

differences[142] that COH provided to OCC in discovery. [143] In addition, the Commission should be aware that on cross-examination, a Company witness refuted two of the Company's own stated distinctions acknowledging that CHOICE suppliers are already serving customers throughout COH's "expansive" service territory, and conceptually every one of the over 900 points of receipt could be receiving gas from a Marketer on COH's system.[144]

Contrary to the Company's arguments, the Commission should not be persuaded that the wholesale auction is significantly different than what the Company does today to procure its natural gas for GCR customers.[145] The M/P Auditor stated on cross-examination that "I had trouble distinguishing between an exit the gas business and having an auction and what most companies including Columbia do when they go out and ask for bids on a gas contract."[146] In addition, OGM pointed out that COH conducts auctions to obtain commodity for its Percentage of Income Payment Plan ("PIPP") program. Indeed, in its February 13, 2007 Application in Case No. 07-166-GA-UNC, COH has proposed using an auction process in selecting the alternative natural gas supplier for its PIPP customer class.[147] In light of these facts, the Commission should

[142] OCC Brief at 60 (April 18, 2007).

[143] OCC Ex. No. 13 (Prepared Testimony of Michael P. Haugh) at MPH Attachment 1 (December 8, 2006).

[144] Tr. Vol. II at 114 (Anderson) (January 31, 2007).

[145] OCC Brief at 58-59 (April 18, 2007).

[146] Tr. Vol. I at 153-156 (McFadden) (January 30, 2007).

[147] OMG Brief at 3 (April 18, 2007).

order Columbia to conduct a wholesale auction for the procurement of natural gas for its GCR customers.

Mr. Haugh readily admitted on the stand that to implement a wholesale auction process in COH's territory would require a stakeholder process.[148] Recognizing that in this case, the wheel does not need to be re-invented, the DEO auction process should serve as the blueprint for a COH auction. However, a stakeholder process with an unwilling or uncooperative Columbia will not be fruitful. Certainly, the determination as to whether the auction results are fair just and reasonable rests with the Commission. The Company must be encouraged and ordered to take any and all necessary actions to bring a wholesale auction to its customers. For this to happen; however, the Commission must send a very clear message to Columbia outlining its end state expectations and time-frames for accomplishing the desired results.

III. CONCLUSION

The evidentiary record in these proceedings is clear. The 2003 Stipulation was negotiated by Columbia with the other signatory parties, and approved by the Commission without the benefit of reasonable and otherwise readily available information that COH intentionally kept from all other stakeholders.[149] The Commission reserved the right to terminate the 2003 Stipulation. However, OCC proposed modifications to the 2003 Stipulation implementation in the alternative to termination. Because the benefits of the 2003 Stipulation are skewed heavily in the Company's favor,

[148] Tr. Vol. III at 94 (Haugh) (February 1, 2007).

[149] Tr. Vol. II at 24 (Martin) (January 31, 2007); and Tr. Vol. IV at 99 (Martin) (February 20, 2007).

OCC proposes modifications that involve significant dollars to correct the imbalance of benefits caused by COH's implementation of the 2003 Stipulation. For all the reasons OCC argued in its Brief, the Commission should exercise its right to restore the intended balance and relative benefits to the signatory parties. The Commission should clarify and modify the 2003 Stipulation consistent with the positions OCC advocated in its Brief (all of which will impact the GCR rate that COH charges its GCR customers), and provide COH's customers with the following benefits:

- Return TCCRP funds improperly used to off-set CHOICE program costs during the current GCR audit period for future refund:[150] $14.8 million
- Return to the TCCRP fund COH's improper retention of the first 25% of the TCCRP: $23.5 million
- Disallow excess capacity associated with OSS transaction with an industrial customer in violation of the 2003 Stipulation: $288,240
- Include November and December OSS and CR revenues within the sharing mechanism by addressing the calendar year issue: $4.3 million
- COH's failure to refund interest to its customers for the interim period between when the refund is received and when the refund flows to customers: $55,700
- Change its method of allocating capacity costs to its GCR customers: $8.9 million
- Refund to COH's customers costs associated with OSS transactions in which gas was sold at a loss: $11,479

[150] This modification to the 2003 Stipulation has an implication of a potential $70 million refund over the four-year period of the 2003 Stipulation.

In addition, the OCC has proposed the Commission require COH to conduct a wholesale auction to procure natural gas on behalf of its GCR customers. The blueprint exists through the auction process that the Commission recently approved in the Dominion East Ohio Case. Similarly, OCC proposes that the Commission reserve the right to ultimately reject the auction results if the auction results are deemed unreasonable.

Respectfully submitted,

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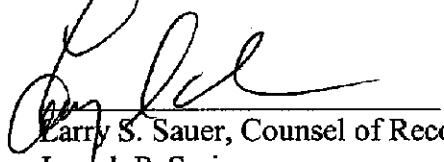

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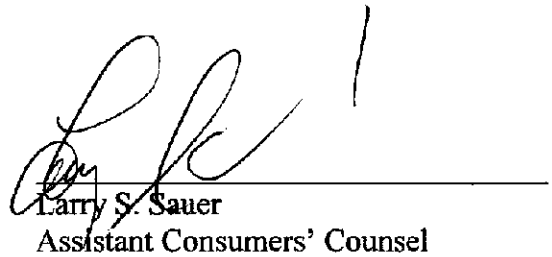
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Reply Brief of the Office of the Ohio Consumers' Counsel* has been served upon the below-named counsel via First Class Mail this 9th day of May 2007.



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