FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Consolidated Duke Energy Ohio, Inc. Rate Stabilization Plan Remand, and Rider Adjustment Cases.	) Case Nos.	03-93-EL-ATA
	)	03-2079-EL-AAM
	)	03-2081-EL-AAM
	)	03-2080-EL-ATA
	)	05-725-EL-UNC
	)	06-1069-EL-UNC
	)	05-724-EL-UNC
	)	06-1085-EL-UNC
	)	06-1068-EL-UNC

OHIO PARTNERS FOR AFFORDABLE ENERGY'S INITIAL BRIEF PHASE 2

PUBLIC VERSION

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OHIO PARTNERS FOR AFFORDABLE ENERGY'S
INITIAL BRIEF
PHASE 2
CONFIDENTIAL VERSION

I. INTRODUCTION

Ohio Partners for Affordable Energy ("OPAE"), an intervenor in the above-captioned cases, hereby submits its initial brief in Phase 2 of these consolidated proceedings before the Public Utilities Commission of Ohio ("Commission"). This second part of the proceedings concerns applications made by The Cincinnati Gas & Electric Company ("CG&E"), now Duke Energy Ohio, Inc. ("Duke") to adjust riders previously allowed by the Commission. CG&E-Duke calls these riders the fuel and purchased power ("FPP") tracker, the system reliability tracker ("SRT") and the annually adjusted component ("AAC") of the market-based standard service offer.

On April 9, 2007, CG&E-Duke filed a stipulation and recommendation purporting to represent a fair and reasonable solution of the issues raised in these cases. Joint Exhibit Remand Rider ("Jt. Ex. R.R.") 1 at 3. In addition to CG&E-Duke, the April 9, 2007 stipulation was signed by the Staff of the Commission ("Staff"), Ohio Energy

Group ("OEG"), the Ohio Hospital Association ("Hospitals"), the City of Cincinnati and People Working Cooperatively ("PWC"). The Industrial Energy Users-Ohio ("IEU-O") did not sign the stipulation but stated on the record that it did not oppose it. Tr. Remand Rider (R.R.) II at 153.

II. THE APRIL 9, 2007 STIPULATION IS NOT THE PRODUCT OF SERIOUS BARGAINING AMONG THE PARTIES.

A. THE APRIL 9, 2007 STIPULATION IS NOT SUPPORTED BY A WIDE RANGE OF PARTIES TO THESE CASES.

In considering the reasonableness of a stipulation, the Commission uses a three-prong test approved by the Ohio Supreme Court:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?
2. Does the settlement, as a package, benefit ratepayers and the public interest?
3. Does the settlement package violate any important regulatory principle or practice?

Ohio Consumers' Counsel v. Pub. Util. Comm. (1992), 64 Ohio St.3d 123, 126.

Contrary to the first prong of the Commission's test, serious bargaining among the parties did not take place at the settlement negotiations. The stipulation is not balanced and does not represent the views of all customer classes who are parties to these cases.

The Ohio Supreme Court has affirmed the Commission's rate stabilization plan concept solely on the basis of stipulations supported by a wide range of parties to the cases. In *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, the Court affirmed the Commission's finding in approving a rate plan

on the basis of the reasonableness of a stipulation supported by all customer classes. As the Court stated in a subsequent case involving the rate plan of FirstEnergy Corp.:

> The absence of a stipulation signed by customer groups factually distinguishes this case from *Constellation*. In *Constellation* we also noted that "no entire customer class was excluded from settlement negotiations and that the following classes were represented and signed the stipulation: residential customers, low-income customers, commercial customers, industrial customers, and competitive retail electric service providers." When it enacted R.C. 4928.14, the General Assembly anticipated that at the end of the market-development period, customers would be offered both a market-based standard service as required by R.C. 4928.14(A) and service at a price determined through a competitive-bidding process as required by R.C. 4928.14(B); one very narrow exception contained in R.C. 4928.14(B) permits the commission to determine that a competitive-bidding process is not required. In *Constellation*, the customer groups, by stipulation, agreed to accept a market-based standard service offer and waive any right to a price determined by competitive bid. Those facts are not present in this case.

Ohio Consumers' Counsel v. Pub. Util. Comm., 2006-Ohio-2110 ¶18. The Court made it clear that the stipulation signed by a wide range of parties was the determining factor that allowed the Court to affirm the Commission's orders. The Court made a strong distinction between Commission orders that could be made pursuant to a stipulation supported by a wide range of parties and orders that could not be made absent such a stipulation. In the same opinion, the Court also stated:

> In contrast to the customer groups in *Constellation*, the customer groups here did not agree to the FirstEnergy rates, and most customer groups, including the OCC, which represents all residential customers, opposed them. Under these circumstances, the PUCO had no authority to adopt the rate-stabilization plan without also ensuring that a reasonable means for customer participation had been developed.

Id. ¶19.

In short, the Court has affirmed the Commission's rate stabilization orders on the basis of customer agreement in a stipulation. The Court has explicitly stated that such

customer agreement is the determining factor in the Court's affirmation of the Commission's rate stabilization orders.

The Commission's own orders also emphasize the need for a broad range of parties supporting the stipulation. The Commission's paragraph finding a market-based standard service offer in its Opinion and Order in Case No. 03-93-EL-ATA, et al., reads as follows:

> The Commission finds that the rate under the stipulation is a market-based rate. The Commission notes that Section 4928.14, Revised Code, allows it flexibility in approving processes for determining market-based rates for the standard service offer. The Commission finds that the stipulation was negotiated among five suppliers and organizations representing various categories of consumers, from low income residential consumers to large industrial users. The stipulation also includes provisions that provide for changes to reflect changes in certain costs. In addition, the stipulation, as revised by this opinion and order, allows the Commission to monitor the prices and confirm that, over time, those prices remain market-based and that consumers have adequate options for choosing among generation suppliers.

Opinion and Order (September 29, 2004) at 26. Thus, the Commission made the finding of a market-based rate only in the context of a stipulation that "was negotiated among five suppliers and organizations representing various categories of consumers, from low income residential consumers to large industrial users." Id. The Court cited the Commission's finding as follows:

> After considering data and arguments from OCC and others attempting to refute CG&E's evidence, the commission found that CG&E's standard service offer was a market-based rate. The Commission stated that (1) R.C. 4928.14 allowed it flexibility in approving methods for determining market-based rates for standard service offers, (2) the stipulation was negotiated among five suppliers and other organizations representing various categories of consumers, from low-income residential consumers to large industrial users, (3) the stipulation allowed for modifications to reflect changes in certain costs, and (4) revisions to the stipulation would allow the Commission to monitor prices and confirm that prices will remain market based over time. ¶42.

The Court found that the stipulation among several competitors in retail electric service and various categories of consumers was one of the criterion relied on by the Commission in finding that the standard service offer was market based. The Court then found as follows:

> We conclude that the Commission's approval of CG&E's alternative to the competitive bidding process was reasonable and lawful. The commission found that CG&E's price to compare, as part of the standard service offer, was market based, and OCC has offered no evidence to contradict that finding. Various customer groups were parties to the stipulation and approved the price to compare and the method by which the price to compare would be tested to ensure that it remains market based. CG&E's rate stabilization plan provides for a reasonable means of customer participation. ¶56.

It is obvious that there was no finding of the reasonableness of the market-based standard service offer except in the context of a stipulation to which various customer groups agreed.

The April 9, 2007 stipulation has no support from marketers, residential customers or any other customer group that will be subject to its terms. OCC, which by statute, represents all residential customers, opposes the stipulation, as does OPAE, which has served as an advocate for residential and low-income customers since its founding in 1996. OPAE also represents the interests of its member agencies located in the CG&E service territories that are commercial customers of CG&E.

The Commission should be suspect of any claim that the stipulation is balanced and represents the views of all customer classes. The stipulation clearly does not represent the views or satisfy the interests of the residential class or any other class. The Commission cannot find that serious bargaining took place among the parties when the stipulation is not a balanced agreement representative of the customer classes.

B. THE PARTIES SUPPORTING THE APRIL 9, 2007 STIPULATION RECEIVE DIRECT BENEFITS OR ARE IMMUNE FROM THE TERMS OF THE STIPULATION.

The April 9, 2007 stipulation was submitted by CG&E and five other parties, all of whom supported the Case No. 03-93-EL-ATA, et al., stipulation whose approval by the Commission is the subject of the remand by the Ohio Supreme Court. The persistence of the stipulation approach to Commission-case solving is remarkable, given that these proceedings call the entire stipulation process into question. The Court questioned the validity of a stipulation on the basis that there may be no serious bargaining among the parties if side arrangements are made. Thus, the motive of the parties who signed the April 9, 2007 stipulation is an issue in these cases.

One party supporting the stipulation is People Working Cooperatively ("PWC"). PWC operates demand-side management programs funded by CG&E-Duke. PWC has conceded "that its primary purpose for participating in these proceedings was to assure that funding promised by the stipulation in Cincinnati Gas & Electric Company's ETP case, be continued and that it be extended through the end of the market development period". PWC Motion to Strike (April 27, 2007) at 3. While PWC claims that its concern for the interests of consumers is demonstrated by its desire to extend the funding it receives from CG&E-Duke for its projects, PWC's position demonstrates no regard for the overall impact of the stipulation on residential customer bills.

PWC's position is distinct from the position of OPAE, which is concerned with the impact of the stipulation on customer bills. In its reply to OPAE's memorandum contra the motion to strike, PWC complains that OPAE asserts evidence not on the record, while PWC itself uses evidence not admitted into the record in these cases regarding a

settlement offer made by OPAE to CG&E-Duke. While OPAE's settlement offer has not been admitted into the record of these cases, it is worth noting, again, that PWC's own words prove OPAE's points. OPAE's settlement offer shows that OPAE not only requests funding for energy efficiency programs but also requests that the rate caps stay in place, that the enhanced shopping credit for residential customers be made available to Percentage of Income Payment Plan ("PIPP") customers, and that PIPP arrearages cease to be collected. OPAE had four points to its settlement proposal, not simply one for money, as PWC falsely implies.

OPAE's opposition to the stipulation is based on the stipulations' impact on customers; there is no basis for PWC to claim that OPAE, like PWC, is only interested in funding for its own projects. Thus, PWC's support for the stipulation should not be construed as support from the residential class.

The City of Cincinnati also signed the April 9, 2007 stipulation. The City of Cincinnati signed a settlement agreement with CG&E under which the City agreed to withdraw from Case No. 03-93-EL-ATA. Under the agreement, CG&E provided the City with one million dollars ($1,000,000) in total consideration for certain amendments to three electricity agreements between CG&E and the City. OCC Remand Ex. 6. The settlement agreement was conditioned upon the City not opposing the stipulation filed in Case No. 03-93-EL-ATA. The settlement agreement also would terminate on the day that the Commission issues an order unacceptable to CG&E in carrying out the terms of the stipulation in Case No. 03-93-EL-ATA. Id. at 2. Therefore, the City of Cincinnati's support for the stipulation in these rider cases is a product of its separate side agreement with CG&E.

CONFIDENTIAL

PAGES 8 THROUGH 10

END CONFIDENTIAL

III. THE APRIL 9, 2007 STIPULATION VIOLATES IMPORTANT REGULATORY PRACTICES AND PRINCIPLES AND FAILS TO BENEFIT RATEPAYERS AND THE PUBLIC INTEREST BY ALLOWING FOR THE RECOVERY OF A RETURN ON CONSTRUCTION WORK IN PROGRESS THROUGH CG&E-DUKE'S AAC.

Contrary to the second and third prongs of the Commission's three-prong test, the April 9, 2007 stipulation and recommendation fails to benefit ratepayers and the public interest and violates important regulatory practices and principles by allowing for the recovery of a return on construction work in progress ("CWIP") through CG&E-Duke's AAC. Paragraph 5 of the April 9, 2007 stipulation permits CG&E-Duke recovery of a return on CWIP to be included in the AAC charges. The stipulation is contrary to the recommendation of the management/performance auditor that a return on CWIP be excluded from the AAC. Commission-Ordered Ex. 1 at I-9.

The Commission has not already determined that a return on CWIP may be included in the AAC. OCC R.R. Ex. 1 at 8-9. The Commission's orders regarding the components of the AAC mention "expenses," which do not describe the return on CWIP. The Commission did not approve a set formula for the calculation of the AAC, but adopted a flexible approach citing factors such as proven expenses and other factors as may be appropriate from time to time. OCC Ex. R.R. 1 at 9. The Commission has also stated that it will continue to consider the reasonableness of "expenditures" and that it will seek to ensure that CG&E-Duke's generation rates are market based. Thus, this proceeding is the first opportunity that the parties have had to present their views regarding a reasonable level of AAC charges.

The Staff of the Commission has offered no justification for the inclusion of a return on CWIP in the AAC. Staff witness L'Nard E. Tufts merely verified CG&E-Duke's

revenue requirement by tracing numbers from CG&E-Duke's filing to its records. Staff R.R. Ex. 2 at 2. Adjustments were made to update and correct numbers based on the information supplied by CG&E-Duke. Although the Staff signed the stipulation, the Staff made no recommendations and provided inadequate justification for the appropriateness of the inclusion of a return on CWIP in the AAC.

The return on CWIP should be excluded from the revenue that CG&E-Duke seeks to obtain through the AAC. The inclusion of a return on CWIP results in unreasonable AAC charges.

First, a return on CWIP would not traditionally have been allowed in ratemaking proceedings. A revenue requirement determined in Ohio through a traditional regulatory cost calculation would require that any CWIP be at least 75% complete before the Commission would consider allowing a return on CWIP. CG&E-Duke has not demonstrated that the CWIP portion of the environmental compliance net plant is or will be at least 75% complete (or any other percentage) during the time that the AAC is being collected.

Second, under a traditional regulatory paradigm, CG&E-Duke might propose allowing a return on CWIP that customers would pay up front during plant construction. After construction is complete, the customers have a claim that the return on CWIP will provide lower capital costs at a future date when the plant is in service. The current regulatory paradigm does not provide any assurance of lower capital costs for customers at a future date. The future is too uncertain to guarantee the claimed benefit would ever be realized by the consumers who would pay the 2007 AAC because it is

not known which customers will receive service from CG&E-Duke's generating units in the future.

CG&E-Duke will argue that the traditional regulatory treatment does not apply and that the current generation market is deregulated. In reality, the AAC has no place in the deregulated environment. As OCC witness Michael P. Haugh points out, the "new" formula used by CG&E-Duke to determine a market price for standard service generation simply seeks cost-based recovery that is similar to the traditional methodology for the treatment of CWIP, but without any limitation regarding the percentage of completion for additions to environmental plant and without any assurance of lower capital costs in the future. OCC Ex. R.R. 1 at 7. Clearly, CG&E-Duke is seeking for itself the best of both worlds: cost recovery using traditional revenue requirement methodology (such as CWIP) instead of a market approach, but disregard for traditional rules governing cost recovery such as those that governed CWIP. Id.

In a truly competitive market, CWIP would not be earned at all. A return on the plant would not occur until the plant is fully operational. In a proper market approach, the entire AAC would be a generation charge that is avoidable for customers who switched to another supplier. Thus, in a deregulated generation environment, CWIP is inappropriate.

Under the circumstances of an application requesting recovery of a typically regulated concept such as CWIP, it is obvious that traditional regulatory practices can and should be used to guide development of realistic costs to ensure reasonable standard service offer rates. A reasonable method should be used to reflect actual costs for charges such as the AAC.

The CWIP portion should be removed from the "Return on Environmental Plant" calculation in CG&E-Duke's filing for purposes of setting a more reasonable AAC charge. Mr. Haugh removed the $244,413,759 CWIP amount from the "Return on Environmental Plant" filing by CG&E-Duke witness Wathen's Attachment WDW-2, Schedule 2. This reduces the "Pre-Tax Return" to $53,938,303 and reduces the "Total Environmental Compliance Increase" to $50,429,411. OCC Ex. R.R. 1 at 11. The removal of the CWIP portion of the Environmental Plant reduces the revenue requirement for the 2007 AAC to $45,246,994. Id.; MPH Attachment 1.

IV. THE APRIL 9, 2007 STIPULATION VIOLATES IMPORTANT REGULATORY PRACTICES AND PRINCIPLES AND DOES NOT BENEFIT RATEPAYERS OR THE PUBLIC INTEREST BY ALLOWING, WITHOUT APPROPRIATE RESTRICTIONS, THE RECOVERY OF CAPACITY COSTS ASSOCIATED WITH THE DENA ASSETS THROUGH THE SRT.

The April 9, 2007 stipulation and recommendation also rejects the management/performance auditor's recommendation regarding the use of Duke Energy North America ("DENA") assets. The auditor recommends that CG&E-Duke's purchases of reserve capacity from DENA assets not be eligible for inclusion in the SRT. The auditor does not believe that customers would pay more for capacity from the market than they would for capacity from the DENA assets. Commission-Ordered Ex. 1 at 6-5. The auditor also believes that CG&E-Duke could sell the DENA capacity on the open market. Id. Moreover, the auditor stated that affiliate transactions are problematic and burdensome to audit. Id.

The auditor's recommendations reflect the Commission's current orders regarding the DENA assets. The Commission has previously found that costs related to

the transfer of the DENA assets may not be passed on to Ohio customers without prior approval of the Commission. Finding and Order, Case No. 05-732-EL-MER (December 21, 2005) at 15. Further, in Case No. 05-724-EL-UNC, the Commission adopted a stipulation, which states that CG&E-Duke may not use the DENA assets to satisfy the SRT margin requirements without an application to the Commission requesting approval of a market price associated with the DENA assets. Case No. 05-724-EL-UNC, Opinion and Order (November 22, 2005) at 5; OCC R.R. Ex. 4. CG&E-Duke has not provided any market pricing mechanism in its application. OCC Ex. R.R. 1 at 12.

OCC witness Haugh concurred with the auditor's recommendation that charges related to DENA assets should not be collected from customers in CG&E-Duke's SRT. CG&E has not shown that customers are better off by using DENA assets than paying for capacity in the market. Thus, CG&E-Duke has not demonstrated that use of the DENA assets benefits customers. The use of the DENA assets may result in SRT costs that do not provide reasonably-priced retail electric service for Ohio customers. OCC Ex. R.R. 1 at 15. CG&E-Duke should be allowed to purchase capacity from the DENA assets in the future only in an emergency situation and only if CG&E-Duke demonstrates that the DENA assets clearly offered a better price or a better product for customers than that offered in the open market.

With regard to the use of DENA capacity, CG&E-Duke and the Staff presented a clarification of the April 9, 2007 stipulation and recommendation. OCC R.R. Ex. 3. This clarification states that Paragraph 8 of the stipulation is intended to permit CG&E-Duke to use its DENA capacity on an emergency basis where capacity to meet operational requirements is necessary with less than seven days advance notice during two

consecutive seven-day periods. In that event, CG&E-Duke must obtain Commission approval before using such capacity during the second seven-day period. The Staff and CG&E agreed that CG&E-Duke may recover short term (seven days or less) capacity purchases from its DENA assets through the SRT. CG&E-Duke and the Staff would agree on a pricing methodology before CG&E-Duke purchases the DENA capacity. CG&E-Duke and the Staff also agreed that the recommendation of the auditor was inapplicable to the extent it is in conflict with their agreement. OCC R.R. Ex. 3.

In spite of this effort by CG&E-Duke to clarify the stipulation with regard to the use of DENA assets, it was obvious at the hearing that CG&E-Duke and the Staff are not in agreement over the meaning of Paragraph 8 of the April 9, 2007 stipulation. CG&E-Duke apparently believes that the April 9, 2007 stipulation allows it to purchase capacity from the DENA assets whenever it wants assuming that it is only for a seven-day period. The Staff would limit DENA purchases to an emergency situation. The April 9, 2007 stipulation, therefore, appears to mask a disagreement over the use of the DENA assets between CG&E-Duke and the Staff. Such disagreement should not exist at such an early point following the execution of a stipulation. OCC R.R. Ex. 2 at 3.

OCC witness Haugh testified that if a circumstance arose where CG&E-Duke was in an emergency situation and unable to meet its capacity needs, then use of the DENA assets could be appropriate. The DENA capacity should be used only as a last resort and if there is a pre-determined reasonable method to set the price for the capacity from the DENA assets. OCC Ex. R.R. 1 at 15-16.

The stipulation does not provide a reasonable method to set the price for the capacity from the DENA assets. Therefore, the stipulation does not provide adequate

protection for ratepayers against CG&E-Duke's overcharging for the DENA assets. Paragraph 8 of the stipulation allows CG&E-Duke to determine the "market price" by either using the midpoint of broker quotes, the average price of third-party transactions, or another method determined by CG&E-Duke and the Staff. In reality, there are usually very few broker quotes. OCC R.R. Ex. 2 at 4. The problem with the stipulated method is that there is a limited market. If there are very few or no transactions, then there is only speculation about the market price. Given the lack of transactions in the capacity market, the market price for capacity would be determined with limited or no market data. This is not an acceptable solution for determining the market price of the DENA assets, nor does it provide a reasonable cost for capacity for CG&E-Duke customers. OCC Ex. R.R. 1 at 14.

Contrary to the stipulation, the guidelines for formulating a price for the DENA assets need to be more stringent. If there are limited broker quotes and transactions in the capacity market, there will be too much uncertainty regarding the true market price. The formula set forth in Paragraph 8 of the April 9, 2007 stipulation should not be used unless there is a minimum number of broker quotes and transactions to determine the price of the DENA capacity.

OCC witness Haugh suggested that a minimum of three bids and offers from three separate brokers would be needed. He also suggested a minimum of three third-party transactions be required. Finally, when formulating a price, there needs to be a cap on the amount CG&E-Duke is charging to the customers who are paying the SRT. OCC witness Haugh suggested that the price be capped at the median price CG&E-Duke has paid for capacity during the time frame in which the emergency occurs. He

believes this cap should be implemented if any capacity from the DENA assets is used. OCC R.R. Ex. 2 at 6.

The April 9, 2007 stipulation's treatment of the DENA assets (and the awkward attempt to clarify its meaning) renders the stipulation harmful to ratepayers and against the public interest. The use of DENA assets should be limited to emergency situations where there are no other options. Moreover, the Commission should adopt the limitations and safeguards recommended by OCC witness Haugh for pricing the DENA capacity in the event of its use in an emergency situation. The stipulated methodology to formulate a "market price" for the DENA assets does not provide proper protections for customers paying the SRT. The stipulation, therefore, violates important regulatory principles and practices by allowing for the use of DENA assets and recovery of costs through the SRT without adequate limitations and safeguards.

V. THE STIPULATION AND RECOMMENDATION VIOLATES IMPORTANT REGULATORY PRACTICES AND POLICIES AND FAILS TO BENEFIT RATEPAYERS AND THE PUBLIC INTEREST BY FAILING WITHOUT JUSTIFICATION TO ADOPT RECOMMENDATIONS MADE BY THE MANAGEMENT/PERFORMANCE AUDITOR.

The April 9, 2007 stipulation proposes to accept some, but not all, of the management/performance auditor's recommendations. By presenting this suspect stipulation and recommendation to the Commission, CG&E has been able to choose the audit recommendations that it is willing to implement, and ignore those that it chooses to ignore. This is inappropriate and should not be allowed.

The disregard for the auditor's recommendations regarding the recovery of a return on CWIP through the AAC and the use of DENA assets has already been

discussed in this brief. As has been discussed, the disregard for the CWIP and DENA audit recommendations has caused the stipulation to violate the second and third prongs of the Commission's three-prong test. The stipulation does not benefit ratepayers and the public interest, and it violates important regulatory practices and policies by allowing the return on CWIP and the use of the DENA assets under inappropriate circumstances.

In addition, the stipulation disregards other audit recommendations without any justification other than CG&E-Duke's desire to disregard them. For example, the auditor recommended that CG&E-Duke discontinue its active management practices and adopt a traditional utility procurement strategy related to the procurement of coal, emission allowances and forward power purchases. Commission-Ordered Exhibit 1 at I-9. The April 9, 2006 stipulation and recommendation states that the auditor's recommendation at I-9 that active management practices be discontinued will be withdrawn. Jt. Ex. R.R. 1 at 5. In addition, the April 9, 2007 stipulation states that interested parties shall meet to determine how to handle CG&E-Duke's management of its portfolio of coal assets, emission allowances, and purchased power arrangements post-2008. Id.

OCC witness Haugh found this provision of the stipulation to be ambiguous or meaningless. The stipulation does not accomplish anything except an agreement to meet and use best efforts to make a recommendation. In addition, a docket already exists for the determination of issues such as the procurement of coal, emission allowances and power in the post-2008 period. Case No. 06-986-EL-UNC. This docket serves the purpose of exploring post-2008 issues more appropriately than the provision in the April 9, 2007 stipulation. OCC R.R. Ex. 2 at 2.

The stipulation does not adequately address the auditor's concern that active management be discontinued. There is no basis on the record to disregard the auditor's recommendation; therefore, the Commission should adopt the recommendation of the auditor that active management be discontinued.

The auditor also recommended that CG&E-Duke present several alternative sensitivity analyses of key variables (i.e., emission allowance prices and market coal prices) in its transaction review and approval process. CG&E-Duke should maintain detailed documentation of all emission allowance prices, market coal prices, and power purchase transactions to enable the next FPP auditor to review adequately the management of the procurement process for coal, emission allowances and power. If the auditor discovers that CG&E-Duke's management of the procurement process for coal, emission allowances, and power has resulted in imprudently incurred costs in the FPP price, then those imprudent costs should be refunded to FPP customers.

OCC witness Haugh recommended that audits of current and future AAC filings be conducted annually if these charges continue in the future. OCC Ex. R.R. 1 at 6. An audit of the charges associated with the AAC is the only way the Commission will be able to conclude whether the proposed AAC charge is reasonable and properly calculated. The audit of the AAC should be included with the audit of the 2007 and 2008 SRT and FPP riders, if those charges continue in the future. An audit of the first six months of 2007 AAC costs should be included within the scope of the next FPP and SRT audit period, July 1, 2006 through June 31, 2007. AAC costs incurred from July 1, 2007 and beyond should be included within the scope of subsequent annual FPP and SRT audits.

The Commission should adopt the auditor's recommendation that adequate documentation of the procurement practices be available so that the next auditor will have the documentation needed to evaluate their effectiveness. The Commission should also adopt the recommendation of OCC witness Haugh for an audit of the AAC. The recommendations of OCC witness Haugh fit together with the auditor's recommendation so that the auditor's recommendation for sensitivity analyses for allowance, fuel and power procurement processes can be accomplished in one audit for the FPP and the AAC together. Contrary to what CG&E-Duke may argue, this one audit of the FPP and AAC together will not be overly burdensome but will merely extend the scope of the current audit to include costs for coal, allowances and purchased power with costs for environmental compliance.

VI. CONCLUSION

The April 9, 2007 stipulation and recommendation fails all three prongs of the Commission's three-prong test for the reasonableness of stipulations. It is not the product of serious bargaining among the parties. It violates important regulatory practices and principles. It does not benefit ratepayers and the public interest. Based on the evidence of record, the April 9, 2007 stipulation must be rejected.

In rejecting the stipulation, the Commission should adopt the recommendations made by the management/performance auditor and OCC witness Haugh in these cases. The Commission should disallow recovery of a return on CWIP in the AAC. Only if the return on CWIP is eliminated will the Commission use a reasonable means to develop costs for the standard service offer prices. The Commission should also not allow any recovery through the SRT of capacity costs of the DENA assets. The DENA

assets should be used only on an emergency basis and then subject to the pricing methodology set forth in the testimony of OCC witness Haugh. Finally, the AAC should be audited and the scope of the combined FPP-AAC audit should be expanded as set forth above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Ohio Partners for Affordable Energy's Initial Brief Phase 2 Public Version has been electronically delivered to the following parties in the above-captioned proceedings on this 17th day of May 2007.

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