



Office of the Ohio Consumers' Counsel

Janine L. Migden-Ostrander
Consumers' Counsel

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PUCO

May 30, 2007

Ms. Renee Jenkins, Director
Public Utilities Commission of Ohio
Docketing Division
180 East Broad Street, 13th Floor
Columbus, Ohio 43215-3793

Re: OCC's Reply Post-Remand Brief, Hearing Phase II,
Case Nos. 03-93-EL-ATA, et al. ("Consolidated Cases")

Dear Ms. Jenkins:

Attached please find three "Confidential" copies of OCC's Reply Post- Remand Brief, Hearing Phase II, in the above captioned Consolidated Cases. Pursuant to an oral Motion for Protective Treatment of Confidential Materials, which the Attorney Examiners granted at hearing on March 21, 2007, parties were formally instructed to file the confidential versions of their briefs under seal.¹ Consistent with the Attorney Examiners' ruling on this matter, please file all copies of OCC's "Confidential" Reply Post-Remand Brief, Hearing Phase II, under seal.

In addition, please find copies of OCC's redacted (public version) Reply Post-Remand Brief, Hearing Phase II, which should be docketed for public access.

Very truly yours,

Jeffrey L. Small
OCC Counsel of Record

Cc: Persons on electronic service list

¹ Tr. Vol. III at 176-177 (March 21, 2007). This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.
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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

PUBLIC VERSION

**REPLY POST-REMAND BRIEF, HEARING PHASE II,
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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Dated: May 30, 2007

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**REPLY POST-REMAND BRIEF, HEARING PHASE II,
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I. INTRODUCTION

A. Prefatory Comments

The briefs submitted to the Public Utilities Commission of Ohio ("PUCO" or "Commission") by the Office of the Ohio Consumers' Counsel ("OCC") in Phase I and Phase II described the sides taken by parties to these cases and closely examined the reasons for the positions taken by those parties. In part, the OCC's examination addressed the deal struck between Duke Energy Ohio, Inc. ("Duke Energy Ohio" or the "Company," including its predecessor company, "CG&E") and parties that represent customers who do not bear the full brunt of the rate increases proposed by the Company. The paucity of support in Phase II briefs from signatories to the stipulation ("2007

Stipulation,” Joint Remand Rider Ex. 1¹) regarding the Company’s Fuel and Purchased Power (“FPP”) tracker, System Reliability Tracker (“SRT”), and Annually Adjusted Component (“AAC”) charges also speaks to the lack of actual involvement in the Phase II proceedings by most of the signatories to the 2007 Stipulation, and also their lack of knowledge concerning the Company’s proposals.

B. Burden of Proof

The OCC’s Initial Post-Remand Brief, Phase II (“OCC Initial Phase II Brief”) set out the burden of proof, as stated in R.C. 4909.18 and/or R.C. 4909.19, which rests upon Duke Energy Ohio in these cases. The burden of proof upon the applicant, in this case Duke Energy Ohio, is statutory and is not shifted or otherwise changed by the activities of the signatories to the 2007 Stipulation. The present cases vividly illustrate why the burden of proof is not shifted by a stipulation. If such a shift could take place, the burden could have been shifted by the Company’s hurried and haphazard efforts to present a stipulation in Phase II of these proceedings. The Company has the statutory burden to demonstrate that the rate increases that they have requested are reasonable.

The OCC does not bear any burden of proof in these cases. As explained in the OCC Initial Phase II Brief, and will further explain in the following sections, how Duke

¹ The notational conventions used by the OCC in earlier briefs and during the hearings will again be observed. The proceedings prior to the appeal are referred to, collectively, as the “*Post-MDP Service Case*,” and the proceedings after the appeal are referred to, collectively, as the “*Post-MDP Remand Case*,” the latter of which was separated in some respects into Phase I and Phase II. Exhibit references to the portion of the proceedings in Phase I after remand from the Court contain the word “Remand” to distinguish them from other exhibits. Exhibit references to the portion of the proceedings in Phase II after remand from the Court contain the words “Remand Rider.”

Energy Ohio has failed to prove that its post-MDP pricing proposals should be adopted without alteration by the Commission.

II. PROCEDURAL HISTORY

The procedural and substantive history of these consolidated cases is contained in the OCC's briefs in these proceedings, the last of which (i.e. the OCC Initial Phase II Brief) was submitted on May 17, 2007. Initial briefs for Phase II of these proceedings were submitted on that date in opposition to the Company's proposals by the OCC and the OP&E.

Initial briefs were submitted in support of the 2007 Stipulation by Duke Energy Ohio ("Company Initial Phase II Brief") and the PUCO's Staff ("Staff Initial Phase II Brief"). Duke Energy Ohio incorrectly states: "The cases that OCC sought to suspend and stay included cases seeking to set the 2007 market price for the Annually Adjusted Component (AAC), System Reliability Tracker (SRT), and Fuel and Purchased Power (FPP) component of DE-Ohio's MBSSO."² The OCC never sought to "suspend and stay . . . cases," but instead sought to stay the *rate increases* sought by the Company until the Commission decided cases on remand from the Supreme Court of Ohio.³

Staff incorrectly asserts that "Mr. Michael Haugh, testifying on behalf of OCC, was the only witness to suggest the [2007] Stipulation did not meet all three criteria."⁴ The featured witnesses during the hearing on April 10, 2007 were two *Staff* witnesses

² Company Initial Phase II Brief at 3-4, citing "OCC's Motion to Stay the AAC, FPP, and SRT" dated December 12, 2006.

³ OCC Motion to Stay All Rate Increases (December 12, 2006).

⁴ Staff Initial Phase II Brief at 4.

who supported the Auditor's Report prepared by Energy Ventures Analysis ("EVA" or "Auditor"), as assisted by Larkin & Associates ("Larkin"). Those witnesses support the OCC's positions regarding prudent fuel and capacity procurement practices that the Company should follow to reduce the FPP and SRT charges.⁵ These include recommendations that the 2007 Stipulation rejects.⁶

EVA's assigned tasks did not deal with the Company's proposed AAC charges, but the Auditor's Report recommends that the Company examine its assumptions relating to fuel purchases in connection with costs that are used in calculation of the AAC.⁷ That recommendation supports the OCC's recommendation that the next audit address the AAC charges.

III. ARGUMENT

A. The Test for a Partial Stipulation Emphasizes the Public Interest.

The 2007 Stipulation was filed just prior to the hearing on Phase II of these cases, and its recommendations are part of the record that the Commission will consider in these cases.⁸ The standard of review for consideration of a partial stipulation has been discussed in a number of Commission cases and by the Ohio Supreme Court. See, e.g., *CG&E ETP Case*, PUCO Case No. 99-1212-EL-ETP, et al., at 65 (July 19, 2000).

⁵ The conflict between the testimony in support of the Auditor's Report and the 2007 Stipulation explains attempts by Staff's counsel to conduct cross-examination of Mr. Schwartz rather than re-direct. Tr. Vol. Remand Rider Vol. 1 at 110, lines 12-16 (April 10, 2007).

⁶ See, e.g., Joint Remand Rider Ex. 1 at ¶¶1, 2, and 8 (2007 Stipulation).

⁷ OCC Initial Phase II Brief at 9, citing PUCO Ordered Remand Rider Exhibit 1 at 2-18 (Auditor's Report).

⁸ Joint Remand Rider Ex. 1 (2007 Stipulation).

The Court in *Consumers' Counsel 1992* considered whether a just and reasonable result was achieved with reference to criteria adopted by the Commission in evaluating settlements:

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?⁹

The OCC submits that the 2007 Stipulation violates the criteria set out by the Commission and the Ohio Supreme Court.¹⁰

B. The Partial Stipulation Fails the Test for Approval of a Settlement.

1. The Settlement Was Not the Product of Serious Bargaining by Capable, Knowledgeable Parties.

The PUCO Staff states, without the benefit of reading the initial Phase II briefs, that “[n]o one questions” that the 2007 Stipulation is the product of serious bargaining among capable and knowledgeable parties.¹¹ The initial briefs by both the OCC and OPAE argued that the 2007 Stipulation does not satisfy the first criterion for the evaluation of partial stipulations.¹² Key testimony was presented by OCC Witness Hixon regarding side agreements in the *Post-MDP Service Case* that resulted in [REDACTED]

[REDACTED]

⁹ Id. at 126.

¹⁰ Joint Ex. 1 at 2.

¹¹ Staff Initial Phase II Brief at 1 and 4.

¹² OCC Initial Phase II Brief at 21-24; OPAE Initial Phase II Brief at 2-10.

██¹³ Serious bargaining did not take place between Duke Energy Ohio and parties whose members are shielded from the brunt of rate increases that are the subject of the 2007 Stipulation.

The first criterion for the evaluation of partial stipulations asks whether the parties were capable and knowledgeable. The absence of briefs by many of the stipulating parties echoes their general lack of involvement in the *Post-MDP Remand Case*. This lack of involvement is also evidenced by the parties' lack of discovery activity, lack of contributions to pleadings, absence at depositions, and lack of participation in hearings (including the lack of sponsored witnesses).¹⁴ The record does not contain opinions by signatories to the 2007 Stipulation regarding a "Clarification" to that stipulation other than the support by the Company and the Staff who executed the document.¹⁵ Even the PUCO Staff, the sponsor of the Auditor's Report and witnesses who supported that document stated disinterest in the OCC's discovery activities. Staff's counsel attended the deposition of the DERS president Whitlock on January 9, 2007.¹⁶ Staff, like other parties, was offered copies of hundreds of documents that were used (in part) in the attachments to OCC Witness Hixon's testimony. After the deposition, Staff stated in response to the motions in limine by Duke Energy Ohio and its affiliates that it "has no

¹³ OCC Remand Ex. 2(A) (Hixon).

¹⁴ The transcripts that are part of the record show the list of parties represented at depositions. OMG Remand Ex. 4 (Whitlock) (OCC, DERS, Company, IEU, OEG, Kroger, OHA, Staff); OCC Remand Ex. 7 (George) (OCC, Kroger, Company); OCC Remand Ex. 8 (Ziolkowski) (OCC, Company); OCC Remand Ex. 9 (Ficke) (OCC, Company, Cinergy). Witness were sponsored by the OCC, Company, Staff (including EVA and Larkin representatives), and OMG (by means of OCC deposition of Charles Whitlock, OMG Ex. 4).

¹⁵ The document was entered into the record as OCC Remand Rider Ex. 3.

¹⁶ OMG Remand Ex. 4 (Whitlock).

such agreement [involving DERS].”¹⁷ A party that declines to accept and review copies of documents that were important to these cases -- especially in a remand that was ordered by the highest court in Ohio in part due to the non-disclosure of such documents -- is not “knowledgeable,” regardless of the identity of that party.

“Capable, knowledgeable parties” should not be confused, as the Company does, with past regulatory experience.¹⁸ The OCC became capable and knowledgeable in these proceedings by means of its efforts to develop a perspective independent of that exhibited by Duke Energy Ohio. Non-Company signatories to the 2007 Stipulation have not exerted such efforts. The circumstances of these cases, and of the parties to the 2007 Stipulation, demonstrate that the partial settlement was reached without *serious bargaining* that involved *capable, knowledgeable parties*.

2. The Settlement Package Does Not Benefit the Public Interest.

The settlement package stated in the 2007 Stipulation does not provide a benefit to ratepayers or serve the public interest. Instead of adopting the 2007 Stipulation without alteration, the Commission should adopt all of the Auditor’s recommendations regarding the FPP and the SRT (the latter as supported by OCC testimony) and reject the inclusion of a return on CWIP as part of the AAC in order to protect customers from paying unreasonable charges.

Staff minimizes the important impact on customers of paragraphs 2-4 and 6-9 in the 2007 Stipulation, characterizing them as merely “process matters” not involving

¹⁷ Staff Memorandum in Response to Motions *in Limine* at 2 (February 7, 2007).

¹⁸ Company Initial Phase II Brief at 6.

revenues.¹⁹ The OCC's Initial Phase II Brief demonstrates the importance of many of those paragraphs to the level of standard service offer charges, drawing support from EVA's recommendations that are rejected in paragraphs 1, 2, and 8 of the 2007 Stipulation.²⁰ The present discussion focuses on statements contained the initial briefs submitted by Duke Energy Ohio and the PUCO Staff that discuss specific provisions within the 2007 Stipulation.

Paragraphs 1 through 3 of the 2007 Stipulation relate to the purchase of coal, emission allowances, and purchased power. The Company seeks to eliminate major recommendations 1 and 2 in the Auditor's Report (i.e. the recommendations "shall be withdrawn"²¹) in order to replace the discontinuation of the Company's active coal management with meetings to "discuss" Duke Energy's coal procurement practices.²² The Company states that "there is no reason to delay discussions,"²³ but further

¹⁹ Staff Initial Phase II Brief at 7, citing Staff Remand Ex. 1 (but correctly identified as Staff Remand Rider Ex. 3 at Q&A 3 (Cahaan)).

²⁰ OCC Initial Phase II Brief at 24-31. The OCC also points out that the Company's agreement in paragraph 9 to the audit recommendations "except as set forth in paragraphs one through eight" apparently does not mean that Duke Energy will remove the restrictions that it places in its RFPs for coal purchases. *Id.* at 30-31. The removal of such restrictions could provide savings for standard service offer customers.

²¹ Joint Remand Rider Ex. 1 at 4-5, ¶¶1-2 (2007 Stipulation). As stated in the OCC's Initial Phase II Brief, the stipulating parties have not explained how an *independent*, Commission ordered audit -- designated "PUCO Ordered Remand Rider Exhibit 1" and entered into the record for these cases -- can be "withdrawn." OCC Initial Phase II Brief at 24, footnote 86. EVA's Seth Schwartz and Larkin's Ralph Smith, both Staff witnesses, defended the findings and conclusions contained in the Auditor's Report without any withdrawal or retraction.

²² The interrelatedness of the provisions is evidenced by the Company's statement that the 2007 Stipulation provides a "bill credit . . . in an amount greater than that recommended by the FPP auditor during 2007." Company Initial Phase II Brief at 7. The Company seeks to retain its current coal procurement practices that may increase FPP charges. Also, the credit for [REDACTED] Joint Remand Rider Ex. 1 at 4, ¶1. The credits would take place in 2007, but would cover 30 months following the 12-month audit period.

²³ Company Initial Phase II Brief at 8.

discussion is delay. The agreement in the 2007 Stipulation to hold additional discussions is meaningless, as stated by OCC Witness Haugh.²⁴ The Auditor's recommendation that the Company end its active management of coal and emission allowances should be ordered without additional discussion.

In response to OCC Witness Haugh's testimony regarding paragraph 3 of the 2007 Stipulation, Duke Energy Ohio states that EVA "made no recommendation" in connection with finding 6 on page 1-8 of the Auditor's Report.²⁵ Finding 6 states that "DE-Ohio continues to purchase fuel and emission allowances in a manner that is inconsistent with best industry practices,"²⁶ and follows that finding in major recommendation 2 by recommending that "DE-Ohio adopt traditional utility procurement strategies related to the procurement of coal and emission allowances and cease its 'active management' of such procurements."²⁷ The Company's active management of coal should be discontinued, the net margins associated with the trading of coal would be eliminated under such circumstances, and the topic of the pass through of net margins should not need to be constantly revisited under EVA's recommendations that are supported by the OCC.

Paragraph 5 of the 2007 Stipulation relates to AAC calculations, and OCC Witness Haugh recommended against setting the AAC charge above 5.6 percent of

²⁴ OCC Remand Rider Ex. 2 at 3 (Haugh Supplemental).

²⁵ Company Initial Phase II Brief at 7-8.

²⁶ PUCO Ordered Remand Rider Exhibit 1 at 1-8, ¶6 (Auditor's Report).

²⁷ *Id.* at 1-9.

“little g.”²⁸ Staff’s Initial Phase II Brief states its support of Staff Witness Tufts’ check on plant additions,²⁹ but the controversy in these cases is whether a return on CWIP should be included in the AAC. Mr. Tufts stated no opinion on that matter,³⁰ and the opinion of Mr. Haugh should be followed regarding the exclusion of a return on CWIP.

Duke Energy faults OCC Witness Haugh for having “no idea what price consumers will pay if DE-Ohio is denied the ability to recover CWIP,” arguing that he did not evaluate factors that the Company might “substitute[] for the scrubbers that represent the bulk of DE-Ohio’s capital environmental investment at issue in these proceedings.”³¹ That evaluation was presented by Mr. Gregory Ficke, former president of the Company and advisor to its current president as a consultant.³²



²⁸ OCC Remand Rider Ex. 1 at 11 (Haugh). As stated in the OCC’s Initial Phase II Brief, the 2007 Stipulation does not recommend an AAC level. OCC Initial Phase II Brief at 26, footnote 90. Paragraph 5 of the 2007 Stipulation addresses calculations, not recommended AAC charges that are at issue between the OCC and the Company. Joint Remand Rider Ex. 1 at 6, ¶5 (2007 Stipulation).

²⁹ Staff Initial Phase II Brief at 7.

³⁰ Tr. Remand Rider Vol. II at 35 (April 19, 2007) (Tufts) (“I did not form an opinion and that’s not part of my testimony”).

³¹ Company Initial Phase II Brief at 10.

³² OCC Remand Rider Ex. 9 at 13 (Ficke).



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The Company is evidently in the process of installing a scrubber, the capital investment in which will be recovered by future customers of the Company's plants. Duke Energy Ohio would like early consideration of its capital expenditures in a regulatory-type inclusion of a return on CWIP. The Company fails to recognize, however, the Commission's regulatory practice of evaluating such inclusions in costs only in some instances and only after an installation is 75 percent or more complete.³⁴ The Commission should set the AAC charge at 5.6 percent of "little g" as part of the PUCO's effort "to consider the reasonableness of expenditures" in the AAC category.³⁵

Paragraph 8 of the 2007 Stipulation would render EVA's "recommendation 6 on page 1-10 of the . . . Audit[or's] Report . . . inapplicable."³⁶ EVA's recommendation would exclude the use of the DENA Assets for purposes of calculating the SRT.³⁷ In its place, the Company proposes to charge for capacity from the DENA Assets based upon broker quotes, prices for third party transactions, or by a method acceptable to only the

³³ *Id.* at 128-129 (Ficke).

³⁴ OCC Remand Rider Exhibit 1 at 6 (Haugh).

³⁵ *Post-MDP Service Case*, Entry on Rehearing at 10 (November 23, 2004).

³⁶ Joint Remand Rider Ex. 1 at 7, ¶8.

³⁷ The "DENA Assets" were formerly owned by Duke Energy North America and are currently owned by Duke Energy Ohio. OCC Initial Phase II Brief at 4.

Company and the PUCO Staff.³⁸ Duke Energy Ohio states that “Staff and DE-Ohio clarified any ambiguity relating to the use of DE-Ohio’s DENA assets to meet the SRT reserved capacity requirements in a Stipulation entered on the record at hearing on April 19, 2007.”³⁹ The issue raised by the poorly drafted paragraph 8 of the 2007 Stipulation was that it did not provide meaningful customer protections against the wide use of the DENA Assets.⁴⁰ The Company proposes to depart from the cost basis for its standard service offer where it believes it can charge a higher market rate (i.e. the higher of cost or market),⁴¹ which in this instance is also where the prices for capacity could be influenced upward from the market price by the Company.⁴² The “Clarification” between the Company and Staff only attempted to address the first of these three issues.⁴³

The faults with the “Clarification” [REDACTED]

[REDACTED] are numerous. Asked whether the “Clarification” eliminated [REDACTED]

[REDACTED]⁴⁴ [REDACTED]

[REDACTED]⁴⁵ [REDACTED]

³⁸ Joint Remand Rider Ex. 1 at 7, ¶8.

³⁹ Company Initial Phase II Brief at 9.

⁴⁰ See OCC Initial Phase II Brief at 29.

⁴¹ See, e.g., OCC Remand Ex. 1 at 6 (Talbot).

⁴² See, e.g., OCC Initial Phase II Brief at 12.

⁴³ OCC Remand Rider Ex. 3.

⁴⁴ Tr. Remand Rider Vol. II at 88 (April 19, 2007) (Smith) [REDACTED]

⁴⁵ Id. at 90 (Smith).

[REDACTED]

[REDACTED]

[REDACTED]⁴⁶ [REDACTED]⁴⁷ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The 2007 Stipulation contains numerous faults that result from the narrow interests of those who fashioned the agreement and the haste with which the agreement was patched together. The broad public interest is not served by approval of the 2007 Stipulation. The Commission should order the Company to comply with all the recommendations contained in the Auditor's Report and the OCC-sponsored testimony.

3. The Settlement Package Violates Important Regulatory Policies and Practices.

Both Duke Energy Ohio and the PUCO Staff feature in their briefs the existence of settlement discussions in which all parties "participated."⁴⁸ These arguments apparently respond to the Supreme Court of Ohio's admonition that settlements that permit utilities to sidestep an entire customer class should be viewed with suspicion.⁴⁹ The procedure apparently endorsed by both these parties is somewhat different than that pursued during the *Post-MDP Service Case* when settlements were reached in secret negotiations. This time, parties such as the OCC and OP&E were offered a chance in

⁴⁶ Id. at 87 (Smith).

⁴⁷ Id.

⁴⁸ Company Initial Phase II Brief at 4; Staff Initial Phase II Brief at 4.

⁴⁹ *Time Warner AxS v. Public Util. Comm.* (1996), 75 Ohio St.3d 229, 234, 661 N.E.2d 1097. The case was previously quoted by the OCC. OCC Initial Phase I Brief at 67.

Phase II of these proceedings to observe that they were being completely ignored. Company Witness Smith felt comfortable testifying that all parties were contacted regarding the 2007 Stipulation negotiations,⁵⁰ but had no knowledge of whether any proposals by the OCC were communicated.⁵¹ The OCC is concerned with *actual* participation for representatives of residential customers in settlement discussions. The Commission should also be concerned with the *actual* ability of residential representatives to participate in settlement discussions as a regulatory principal.

Staff takes issue with the use of CWIP precedent as a traditional regulatory policy and practice for purposes of evaluating the third criterion for the evaluation of partial stipulations. Staff states that the Commission's approach to a return on CWIP for the purpose of calculating the AAC charge "does not apply in this case."⁵² Staff does not seem to appreciate that it has accepted a CWIP approach -- the incorrect approach proposed by Duke Energy Ohio -- in these cases. As OCC Witness Haugh pointed out:

DE-Ohio witness Wathen's "'new' formula to determine a market price" (page 5 again) 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.⁵³

The difference between the approaches taken by the OCC and the Staff/Company is not conceptual, but is based upon the application of CWIP concepts in these proceedings.

⁵⁰ Company Remand Rider Ex. 6 at 5 (Smith).

⁵¹ Tr. Remand Rider Vol. II at 108 (April 19, 2007) (Smith).

⁵² Staff Initial Phase II Brief at 7.

⁵³ OCC Remand Rider Ex. 1 at 7 (Haugh), referring to Company Remand Rider Ex. 5 (Wathen Supplemental).

Staff is willing to accept the Company's calculations based upon a return on 100 percent of CWIP in environmental plant and no showing by the Company regarding the percentage that the plant is complete. No precedent exists for such calculations, which should be based upon a showing that the environmental plant is at least 75 percent complete.⁵⁴ No such showing exists in the record of these proceedings. The Commission has already applied its traditional cost evaluation techniques in these proceedings, as evidenced by its instructions to EVA that the Auditor should follow techniques formerly used in electric fuel component cases.⁵⁵ The OCC supports AAC calculations that exclude a return on CWIP for environmental plant, as that evaluation of AAC charges is presented in the testimony of OCC Witness Haugh.⁵⁶ The different result proposed by the Company and accepted by the Staff violates important regulatory policies and practices.

IV. CONCLUSION

The OCC supports the positions presented in the Auditor's Report, and the Commission should adopt these positions despite the proposal of the stipulators that the independent Auditor's recommendations should somehow be "withdrawn." The Auditor's Report makes many recommendations regarding the manner in which the Company's fuel and capacity procurement practices should be altered or continued that

⁵⁴ OCC Remand Rider Ex. 1 at 6 (Haugh).

⁵⁵ The Auditor's Report states that the Commission requested that EVA "follow the general guidance that had been provided for the Electric Fuel Component audits" from the formerly applicable Ohio Administrative Rules. PUCO Ordered Remand Rider Exhibit 1 at 1-2 through 1-3 (Auditor's Report).

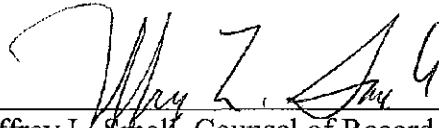
⁵⁶ OCC Remand Rider Ex. 1 at 6-8 (Haugh).

should be adopted by the Commission. The OCC also supports the continued prohibition against including the cost of using DENA Assets in the calculation of SRT charges.

The Commission should eliminate that portion of the proposed AAC charge that can be attributed to a return on all CWIP and set the AAC at 5.6 percent of "little g." Future management performance audits should include a review of Duke Energy's operations that contribute to the AAC charges.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

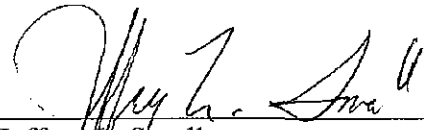
A handwritten signature in dark ink, appearing to read "Jeffrey L. Small", is written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing (Public Version) *Reply Post-Remand Brief, Hearing Phase II, by the Office of the Ohio Consumers' Counsel*, has been served upon the below-named persons in unredacted form (pursuant to the Attorney Examiners' instructions) via electronic transmittal this 30th day of May 2007.


Jeffrey L. Small

Assistant Consumers' Counsel

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