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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. to Modify Its Fuel and Economy Purchased Power Component of Its Market-Based Standard Service Offer.	)	Case No. 06-1068-EL-UNC
In the Matter of the Application of the Cincinnati Gas & Electric Company to Modify Its Fuel and Economy Purchased Power Component of Its Market-Based Standard Service Offer.	)	Case No. 05-725-EL-UNC
In the Matter of the Application of Duke Energy Ohio, Inc. to Adjust and Set its System Reliability Tracker.	)	Case No. 06-1069-EL-UNC
In the Matter of the Application of Duke Energy Ohio, Inc. to Adjust and Set its System Reliability Tracker Market Price.	)	Case No. 05-724-EL-UNC
In the Matter of the Application of Duke Energy Ohio, Inc. To Adjust and Set the Annually Adjusted Standard Service Offer.	)	Case No. 06-1085-EL-UNC

PUBLIC VERSION
(REDACTED)

APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential consumers of Duke Energy Ohio, Inc. ("Company" or "Duke Energy," including its predecessor, The Cincinnati Gas and Electric Company) and pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35(A), applies for rehearing of the Opinion and Order ("Order") issued by the Public Utilities Commission of Ohio ("PUCO" or

"Commission") on November 21, 2007 in the above-captioned cases. The OCC submits that the Commission's Remand Order is unreasonable and unlawful in the following particulars:

A. The Commission's Remand Order is unreasonable and unlawful because the Commission failed, as a quasi-judicial decision-maker, to "permit a full hearing upon all subjects pertinent to the issues(s), and to base [its] conclusion upon competent evidence" in violation of case law and R.C. 4903.09. *City of Bucyrus v. State Dept. of Health*, 120 Ohio St. 426, 430.

   1. The Auditor's Report should be followed regarding FPP Charges.

   2. Capacity costs should be based on actual costs, which excludes charges related to the DENA Assets at this time.

   3. The Order fails to eliminate additional "AAC" charges requested by the Company without any evidentiary basis.

B. The Commission's Order is unreasonable and unlawful because the Commission improperly delegated its duties to the Company and the Commission's Staff.

C. The Commission's Order is unreasonable and unlawful because the Commission failed to determine that certain entities had no standing in these cases.

D. The Commission's Order is unreasonable and unlawful because the Commission failed to properly apply the test for approval of a partial stipulation. *Consumers Counsel v. Pub. Util. Comm.*, (1992), 64 Ohio St. 3d 123, 125.

   1. The settlement was not the product of serious bargaining.

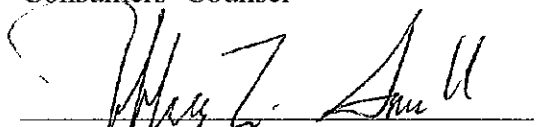
   2. The settlement package does not benefit the public interest.

   3. The settlement package violates important regulatory policies and practices.

The reasons for granting this Application for Rehearing are set forth in the attached Memorandum in Support.

Respectfully submitted,

Janine L. Migden-Ostrander
Consumers' Counsel



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MEMORANDUM IN SUPPORT

I. HISTORY OF THE CASE AND INTRODUCTON

A. Introduction

The OCC's Application for Rehearing and briefs in the "Remand Cases," Case Nos. 03-93-EL-ATA, et al., identified the parties who supported the proposals offered by Duke Energy in the Remand Cases (heard in "Phase I" of the cases consolidated with the

above-captioned cases).[1] Those parties supporting Duke's proposals remained essentially the same in the above-captioned cases (the subject of "Phase II" of the hearings). This situation further demonstrates the importance of evidence regarding the side deals between the Duke-affiliated companies and parties or members of parties to these proceedings. The impact of those side deals is documented, among other places, in the Commission's Order on Remand in the cases that were consolidated with the above-captioned cases.[2]

Serious negotiation of a stipulation regarding the Company's Fuel and Purchased Power ("FPP") tracker, System Reliability Tracker ("SRT"), and Annually Adjusted Component ("AAC") charges could only take place with parties that represent customers who bear the full brunt of the rate increases and that have not otherwise been "captured" by the Company by means of other financial arrangements. Such serious negotiation did not take place regarding the stipulation entered into by parties and filed on April 9, 2007 ("2007 Stipulation," Joint Remand Rider Ex. 1[3]).

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[1] *In re Post-MDP Generation Service Cases*, Case Nos. 03-93-EL-ATA, et al., OCC Application for Rehearing (November 23, 2007). For notational convenience, the portions of the case before and after the Court's deliberations are cited separately. The proceedings prior to the appeal are referred to, collectively, as the "*Post-MDP Service Case*." The proceedings after the appeal are referred to, collectively, as the "*Post-MDP Remand Case*." The *Post-MDP Remand Case* was separated in some respects into Phase I and Phase II (the latter the subject of the Order dated November 20, 2007).

[2] *In re Post-MDP Remand Case*, Order on Remand at 27 (October 24, 2007) ("inevitable conclusion").

[3] The cases consolidated to form the *Post-MDP Service Case* were further consolidated with the above-captioned "Rider" cases. Order at 6. A single evidentiary record exists that is applicable to the ultimate decisions in all the consolidated cases, including those that were originally consolidated with Case No. 03-93-EL-ATA, even though the above-captioned cases were heard, briefed, and decided separately in Phase II of the hearings. 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."

B. Burden of Proof

The burden of proof in these cases rests upon Duke Energy, and the OCC does not bear any burden of proof in these cases. In a hearing regarding a proposal that does not involve an increase in rates, R.C. 4909.18 provides that "the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility." In a hearing regarding a proposal that does involve an increase in rates, R.C. 4909.19 provides that, "[a]t any hearing involving rates or charges sought to be increased, the burden of proof to show that the increased rates or charges are just and reasonable shall be on the public utility." In the following sections, the OCC will explain how Duke Energy failed to prove that its post-MDP pricing proposals should have been adopted by the Commission.

C. Procedural History for These Cases

As stated in the Order, these cases were consolidated with the proceedings regarding the remand from the Court in a transcribed prehearing conference held on December 14, 2006.[4] That prehearing conference was attended by counsel for People Working Cooperatively ("PWC") who stated a lack of interest in the above-captioned cases and a desire that these cases not be consolidated with those on remand. The prehearing conference was not attended by other parties to the *Post-MDP Service Case*, which included the Ohio Hospital Association ("OHA"). Neither PWC nor OHA moved to intervene in the above-captioned cases, and neither is a party. Counsel for the Ohio Energy Group ("OEG") attended the prehearing conference, but OEG did not intervene in

[4] Order at 6.

Case No. 06-1085-EL-UNC that deals with the AAC portion of Duke Energy's proposed standard service offer.

Phase II of the hearings featured the submission of the Auditor's Report prepared by Energy Ventures Analysis, Inc. ("EVA"), as assisted by Larkin & Associates. Mr. Seth Schwartz of EVA and Mr. Ralph Smith of Larkin & Associates ("Larkin") supported the results of the Auditor's Report in their live testimony on April 10, 2007. The Audit's Report was prepared by EVA and Larkin for the audit period July 1, 2005 through June 30, 2006.[5]

The second day of the hearing for Phase II convened on April 19, 2007, and largely dealt with the 2007 Stipulation. Although not parties to the case, PWC and OHA both instructed counsel for the PUCO Staff to execute the 2007 Stipulation on their behalf. Also, OEG gave similar instructions even though it did not move to intervene in Case No. 06-1085-EL-UNC.

The Commission's Order in the above-captioned cases was issued on November 20, 2007, and is the subject of the instant Application for Rehearing.

[5] PUCO Ordered Remand Rider Exhibit 1 at 1-1 (Auditor's Report).

II. ARGUMENT

A. The Commission's Order Is Unreasonable And Unlawful Because The Commission Failed, As A Quasi-Judicial Decision-Maker, To "Permit A Full Hearing Upon All Subjects Pertinent To The Issues(s), And To Base [Its] Conclusion Upon Competent Evidence" In Violation Of Case Law And R.C. 4903.09. *City Of Bucyrus V. State Dept. Of Health*, 120 Ohio St. 426, 430.

1. The Auditor's Report should be followed regarding FPP charges.

The Commission has placed in effect a process by which management audits are conducted regarding the costs that are included to arrive at the FPP and SRT charges. The Commission undertook this evaluation because "[i]t is not in the public interest to cede this review."[6] During the hearing, at which an OCC witness supported a similar process regarding AAC charges,[7] the cost of audits was raised by Duke Energy.[8] The Commission has exerted considerable effort to review Duke Energy's management of generation costs by means of obtaining technical advice from outside experts, and costs undeniably exist in connection with such audits. The recommendations of the experts hired by the PUCO, submitted on the record in these cases, should be heeded and not ignored in favor of the intransigent policies of Duke Energy.

The audit of Duke Energy's practices revealed that the Company's treatment of matters that affect the FPP calculation has needlessly raised costs. The Auditor's Report, entered into the record as PUCO Ordered Remand Rider Ex. 1, contained major

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

[7] OCC Remand Rider Ex. 1 at 5 (Haugh).

[8] See, e.g., Tr. Remand Rider Vol. II at 58 (April 19, 2007) (Haugh).

recommendations regarding Duke Energy's transactions that affect FPP charges that were rejected as the result of the PUCO's approval of the Stipulation. The recommendations rejected by Duke Energy, and therefore by the Commission in its Order, concern the adoption of "traditional utility procurement strategies related to the procurement of coal and emission allowances" (i.e. cease active management of such procurements) and the development of "portfolio strategy such that [Duke Energy] purchases coal through a variety of short, medium and long-term agreements with appropriate supply and supplier diversification with credit-worthy counterparties."[9] The Order mentions these two issues, but does not address another issue raised by the OCC regarding the recommendation by EVA "that as long as the FPP is in effect coal suppliers should not be required to allow the resale of their coal for the offers to be considered."[10] These three recommendations should be adopted by the Commission based on the record in these cases.

As noted in the Order, EVA's Seth Schwartz supported the recommendation that Duke Energy adopt a traditional utility procurement strategy for its coal purchases.[11] As stated in the Order, Mr. Swartz testified that the Company failed to "demonstrate whether the [active management] approach was a lower-cost approach."[12] The Company has the burden of proof, which has not been met under these circumstances. In further support for the Auditor's position, the Company's only argument is that an approach that is

[9] PUCO Ordered Remand Rider Exhibit 1 at 1-9 through 1-10 (Auditor's Report).

[10] Id. at 1-10.

[11] Order at 13.

[12] Id. at 14, citing Tr. Vol. Remand Rider I at 69-70.

appropriate for a regulatory environment is not appropriate for a deregulated environment.[13] On cross examination, the Auditor stated his [redacted][14] It is, therefore, unreasonable for Duke Energy to approach the purchase of coal by means other than it uses for its utilities that are in a fully regulated situation. The PUCO should not dismiss the expert opinion that was obtained at the behest of the Commission.

Related to the "active management" issue -- but subject to a separate EVA recommendation that is not mentioned in the Order -- EVA recommended that Duke Energy permit the consideration of bids from bidders who seek to limit the resale of their coal.[15] The Company should follow this recommendation because it opens up additional opportunities to obtain low-cost bids. [redacted][16] Duke Energy's defense of its practice is disingenuous. Company Witness Whitlock stated that "DE-Ohio does *include the resale of coal as a condition on its RFPs* but does not exclude an offer from consideration if the supplier will not permit the resale of coal."[17] Suppliers who desire to place restrictions on the resale of coal should not be told not to bid, and any

[13] Order at 14.

[14] Tr. Vol. Remand Rider Vol. I at 106 (April 10, 2007) (Auditor).

[15] PUCO Ordered Remand Rider Exhibit 1 at 1-10 (Auditor's Report).

[16] Id. at 2-11 (Auditor's Report).

[17] Company Remand Rider Ex. 2 at 9 (Whitlock Supplemental) (emphasis added).

other result would not result in acceptance of "all audit recommendations . . . except as set forth in paragraphs one through eight above."[18] Duke Energy should be specifically ordered to remove the restriction on the resale of coal from its requests for proposals and to select bids on a least cost basis.

EVA's recommendation that the Company should develop a portfolio approach to the purchase of coal essentially argues that [redacted]. The response to this evidence seems to accept this result by approving a provision within the 2007 Stipulation that provides for the "initiation of discussions."[19] The best that can result from the Order is the beginning of discussions that are too late to protect customers through the end of 2008, and a result that "[redacted][20] The result, therefore, is especially inconsistent "in light of pending legislation related to the post-RSP period."[21]

Company Witness Whitlock made an argument similar to that made by EVA and the OCC in his testimony regarding capacity purchases that are charged as part of the SRT:

> As I discussed earlier regarding economic management and balancing our resources earlier, DE-Ohio believes that it is beneficial to purchase capacity instruments for periods longer than a year and to do so would enable DE-Ohio to take advantage of

[18] Joint Remand Rider Ex. 1 at 7-8 ("accepts all audit recommendations . . . except as set forth in paragraphs one through eight above").

[19] Order at 16.

[20] PUCO Ordered Remand Rider Exhibit 1 at 2-19 (Auditor's Report).

[21] Order at 16.

> reliability and pricing opportunities in the market that would accrue to the benefit of MBSSO consumers.[22]

[redacted][23]

raises fuel costs, a policy that does not serve either Duke Energy or its customers.

Duke Energy should be ordered to follow EVA's recommendations regarding its coal management policies. The Commission should arrive at this result based upon the evidence in the record stemming from the Audit Report and related testimony, but also based upon the testimony of the Company's witnesses.

2. Capacity costs should not include charges related to the DENA Assets at this time.

The Auditor's Report contained the following major recommendation regarding Duke Energy's SRT charges:

> 6. EVA recommends that purchase of reserve capacity from DENA Assets should not be eligible for inclusion in the SRT, as is currently the case.[24]

The Order unreasonably rejects the Auditor's recommendation, stating the Commission's lack of concern over the Company's non-compliance with prior orders and its acceptance of the proposed pricing mechanism.[25] The Auditor's expert recommendation, solicited

[22] Company Remand Rider Ex. 1 at 7 (Whitlock).

[23] PUCO Ordered Remand Rider Exhibit 1 at 2-19 (Auditor's Report).

[24] PUCO Ordered Remand Rider Exhibit 1 at 1-10 (Auditor's Report).

[25] Order at 20-21.

by the PUCO and made part of the record, should be accepted in the Order instead of being ignored.

The record displays a conflict between Duke Energy's demands as stated in the 2007 Stipulation and requirements stated in earlier proceedings. In PUCO Case No. 05-724-EL-UNC, the Commission adopted a stipulation filed on October 27, 2005 ("SRT Stipulation"[26]). The SRT Stipulation was entered into by Duke Energy, the OCC, and other parties who agreed in October 2005 to a number of provisions in Case No. 05-724-EL-UNC.[27] The SRT Stipulation, part of which is quoted in the Order,[28] required Duke Energy to submit an application "for approval of the SRT market price associated with such DENA Asset(s)" and to "provide OCC with workpapers and other data supporting the use of DENA Assets . . . ."[29]

The hallmark of the SRT Stipulation provisions regarding the use of the DENA Assets was the ability of the OCC to review and analyze Duke Energy proposals at the before-the-application and application stages of the Company's proposals. The SRT Stipulation required much more than the discovery provided for in every proceeding.[30] The Order recognizes that the Company provided no information to the OCC in these

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[26] The SRT Stipulation is reviewed in the Auditor's Report. PUCO Ordered Remand Rider Exhibit 1at 6-1 through 6-2 (Auditor's Report). The SRT Stipulation itself is an exhibit in the record. OCC Remand Rider Exhibit 4, in which it was stated that Duke Energy could not use the DENA Assets in its SRT calculations without an application to the Commission requesting approval. *In re Setting of SRT*, Case No. 05-724-EL-UNC, Order at 6 (November 22, 2005).

[27] OCC Remand Rider Ex. 4.

[28] Order at 17.

[29] Id. at 5, ¶8.

[30] R.C. 4903.082. The agreement in the SRT Stipulation is therefore meaningless unless more was required of Duke Energy than responding to OCC discovery requests after an application was filed.

cases other than that which was sought by the OCC in ordinary discovery.[31] The application did not contain the pricing proposal associated with the use of the DENA Assets, as required by the SRT Stipulation, and the Order documents that that Duke Energy did not even provide a proposed price in the late-negotiated 2007 Stipulation.[32] The substance of the Commission's order that adopted the SRT Stipulation was not followed.

The Auditor's Report states that Duke Energy "has not demonstrated that its native customers are paying more for capacity in the market than they would if DE-Ohio purchased capacity for the legacy DENA [plants].[33] That is, the Company has not met its burden of proof regarding the use of the DENA plants. The Auditor's Report discusses the alternatives available to Duke Energy:

> EVA agrees with DE-Ohio as to the types of capacity products it is considering and notes that this list may change over time. As a result, monitoring of the market for alternatives is appropriate. EVA supports the use of a [redacted] Further, and as noted below, [redacted] * * * EVA agrees with DE-Ohio that is {sic, it} should employ arrangements that include capacity commitments for more than one year. In fact, it is not clear to EVA that DE-Ohio had previously been precluded from doing so. EVA believes that DE-Ohio should employ a portfolio strategy similar to what EVA is recommending for fuel.[34]

[31] Order at 20. The record, upon which the PUCO must base its decision, does not contain any information regarding the discovery process unless that information is contained in testimony.

[32] Id.

[33] PUCO Ordered Remand Rider Exhibit 1at 6-5 (Auditor's Report).

[34] Id. at 6-4 through 6-5.

EVA recommended the expansion of options applied by Duke Energy beyond the limited options selected by the Company's management.[35] The Order unreasonably adopts the Company's proposal to use the DENA Assets while completely ignoring the Auditor's expert advice regarding least-cost alternatives.

The Order approves the vague pricing proposal contained in the 2007 Stipulation. That document 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 Company and the PUCO Staff.[36] The use of broker quotes or third party transaction prices would not deliver savings from "the most reasonably priced capacity available" that was promised by Company Witness Whitlock.[37] To the contrary, use of the DENA Assets presents the danger of unreasonably high charges that could result from the Company's determination of costs associated with *Company-owned generation*.[38] The third pricing mechanism, agreement with the PUCO Staff, amounts to providing Duke Energy and the PUCO Staff the opportunity to enter into negotiations without the involvement of other parties and for these two parties to the 2007 Stipulation to make decisions in these cases. As further explained later in this Application for Rehearing, the

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[35] Company Remand Rider Exhibit 2 at 11 (Whitlock Supplemental) ("[l]imiting the options . . . [which] can only increase the cost to consumers"). The opportunity presented by the DENA Assets appears to be limited. Although Company Witness Whitlock stated that the location of DENA Assets "should not exclude them from consideration for Rider STR capacity purchases" (Company Remand Rider Exhibit 2 at 14), Mr. Whitlock stated under cross examination that he did not know whether a MISO transmission study had been conducted to determine whether the DENA Assets located in the PJM footprint could qualify as a Designated Network Resource ("DNR") to meet MISO requirements. Tr. Vol. Remand Rider Vol. I at 141-142 (April 10, 2007) (Whitlock).

[36] Joint Remand Rider Ex. 1 at 7, ¶8 (2007 Stipulation).

[37] Company Remand Rider Ex. 2 at 11 (Whitlock Supplemental).

[38] Company Witness Smith agreed that the word "purchases" in paragraph 8 of the 2007 Stipulation is inappropriate under circumstances where the generating facilities are owned by the Company. Tr. Remand Rider Vol. II at 95 (April 19, 2007) (Smith).

Commission may not lawfully delegate such decision-making responsibilities, and any such decision would not be based upon the record in these cases.

The Commission should rely on the expert opinion of the Auditor and reinstate the PUCO's previous position that did not permit the calculation of the SRT based upon reserve capacity from DENA Assets.

3. A return on CWIP should not be included in the AAC charges.

The Order's inclusion of plant CWIP amounts in the AAC recognize that the Commission previously stated that a review would be undertaken regarding these charges.[39] Approval of the CWIP amounts, however, has been achieved by Duke Energy without undergoing any significant review of its underlying costs. The reasonableness of a return on CWIP for environmental plant in the AAC calculations is a matter that is not covered by Staff's inquiries. Asked whether he formulated an opinion regarding whether a return on such CWIP is an appropriate component of the AAC, Staff Witness Tufts stated that he "did not form an opinion and that's not part of [his] testimony."[40] Neither the Company nor the Staff provided any detail -- for example, of the percentage completion of environmental upgrades at Duke Energy's plants -- that might further inform the Commission regarding the Company's cost of providing service.

Without more detailed knowledge of the CWIP accounts, the calculations available to the Commission are provided in the testimony of Company Witness Wathen and OCC Witness Haugh. Mr. Wathen provides a calculation of 9.1 percent of "little g"

[39] Order at 23.

[40] Tr. Remand Rider Vol. II at 35 (April 19, 2007) (Tufts).

based upon the inclusion of all CWIP, regardless of its state of completion.[41] As OCC Witness Haugh pointed out, this calculation takes advantage of the CWIP regulatory concept while completely ignoring regulatory practice for the evaluation of generation costs while plant additions are in progress.[42]

Mr. Haugh's calculation of 5.6 percent of "little g" excludes the return on CWIP from the calculation of the AAC.[43] Mr. Haugh explained that the elimination of a return on CWIP is consistent with Commission discretion regarding the treatment of CWIP for rate setting purposes. In the present situation, elimination of the return on CWIP is appropriate since customers may receive little or no benefit from the plant additions.[44]

Mr. Haugh's result is also consistent with the previous statements within the context of the *Post-MDP Service Case*, including the Commission's statement that the AAC should include "expenses."[45] The Company's proposed AAC in the 2004 Stipulation for purposes of charging market-based rates requested $60,172,508 out of a total calculation of $107,514,533.[46] The Commission's related finding resulted in only approval of $53,725,267,[47] a result that is inconsistent with Company Witness Wathen's calculations. The Order states that the PUCO originally "based [its] determination in part

[41] Company Remand Rider Ex. 4 at 11 (Wathen).

[42] OCC Remand Rider Exhibit 1 at 7 (Haugh).

[43] Id. at 11 (Haugh).

[44] Id. at 7.

[45] Id. at 9, quoting *Post-MDP Service Case*, Order at 32 (September 29, 2004).

[46] Id. at 8-9.

[47] Id.

on Duke's supplied calculations."[48] The history of these cases reveals, however, that the Commission never accepted the entirety of the Company's calculations and rejected the type of calculations presented by Company Witness Wathen. The Commission should return to its earlier reasoning and reduce the AAC charge.

The Company's argument regarding the AAC charge is inconsistent with the Company's representations regarding other generation charge components in the consolidated record.[49] As discussed above, [redacted][50] Duke Energy should not be permitted to charge customers for plant CWIP amounts through the AAC in a manner that could only be justified by the assumption of long-term provision of generation service to its customers while [redacted] The AAC should not include amounts requiring customers to pay for CWIP.

[48] Order at 23.

[49] The Remand Order again runs afoul of R.C. 4903.09 that requires that the Commission "shall file . . . finding of fact and written opinions setting forth the reasons prompting the decision arrived at, based upon said findings of fact." See also, *City of Bucyrus v. State Dept. of Health*, 120 Ohio St. 426, 430.

[50] These matters, along with evidentiary support that includes warnings from the Auditor, were extensively briefed in the *Rider Cases*. OCC Initial Post-Remand Brief, Phase II at 6-7.

B. The Commission's Order Is Unreasonable And Unlawful Because The Commission Impermissibly Delegated Its Duties To The Company And The Commission's Staff.

Portions of the Order give the appearance that the Commission adopted the 2007 Stipulation,[51] but the 2007 Stipulation cannot be carried out according to its literal terms due to the time that elapsed between the hearing and issuance of the Order. As an example, the 2007 Stipulation provides that FPP credits will be "included in the quarterly Rider FPP filing for the period beginning July 1, 2007, and ending September 30, 2007 . . . ."[52] That action is impossible as the result of an Order dated November 20, 2007. The Order's apparent resolution of this conflict is contained in its order that "Duke [Energy] work with staff to determine a reasonable period over which the amounts authorized by this Opinion and Order should be trued-up and collected."[53] This provision amounts to providing Duke Energy and the PUCO Staff the opportunity to enter into negotiations without the involvement of other parties and for these two parties to the 2007 Stipulation to make decisions in these cases. The Commission may not lawfully delegate such decision-making responsibilities, and any such decision cannot be based upon the record in these cases.

These cases ultimately rest upon the Commission's authority to approve standard service offer rates after a filing that is required by R.C. 4928.14(A). That division states

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[51] Order at 30 (November 20, 2007) ("the stipulation [is] approved and adopted").

[52] Joint Remand Rider Ex. 1 at 4 (2007 Stipulation).

[53] Order at 30. The Order appears to also intend for true-up and *crediting to customers*. Any other interpretation of the Order is unreasonable and unlawful based upon the absence of a record to support asymmetrical treatment of the provisions in the 2007 Stipulation. As stated earlier, the Order also illegally delegates the SRT pricing mechanism associated with use of the DENA Assets to the Company and the PUCO Staff. These two parties to the 2007 Stipulation may not legally be provided authority to implement agreements that have not undergone scrutiny by the PUCO itself.

that "[s]uch [a standard service offer] shall be filed with the public utilities commission under section 4909.18 of the Revised Code." Decisions regarding rates, pursuant to R.C. 4909.18, reside with the Commission. Pursuant to R.C. 4903.09, such a decision must state "the reasons prompting the decisions arrived at, based upon . . . findings of fact." In contravention with the requirements set forth in the Revised Code, the Order delegates decision-making to agreement between the Company and the PUCO's Staff, decisions that cannot be based on the record in this case because the provision in the 2007 Stipulation are out of date due to the timing of the Order.

The Commission resisted earlier attempts by Duke Energy (then CG&E) to determine rate matters by submissions to only the PUCO Staff and not to the Commission itself. In response to Duke Energy's proposals in its Application for Rehearing submitted in 2004, the Commission stated:

> The amendment to the stipulation, attached to CG&E's application for rehearing, details the involvement that it expects from the Commission in the determination of the appropriate levels for the SRT, the AAC, and the FPP in various years. * * * In all of these cases, the Commission finds that it is . . . necessary to clarify that the Commission, in its consideration of CG&E's expenditures in these categories, will continue to consider the reasonableness of expenditures. *It is not in the public interest to cede this review.*[54]

The matters raised in the Order and not definitely resolved must be decided by the Commission itself as a matter of sound policy as well as a matter of law.

Examples illustrate the importance of a complete Commission decision in these cases. As one example, the Order notes the "pending legislation relating to the electric

[54] *Post-MDP Service Case*, Case Nos. 03-93-EL-ATA, et al., Entry on Rehearing at 9-10 (November 23, 2004).

industry,"[55] and that legislation (i.e. S.B. 221) recently passed the Ohio Senate containing a provision forming baseline rates based upon those rates in effect on February 1, 2008. Therefore, the manner of carrying out the "true-up" for 2007 could result in an actual true-up, or could result in a permanent increase in rates. The Commission, not Duke Energy and the PUCO Staff, should make the decisions regarding the adjustment of rates based upon a record developed in these cases.

Other matters of implementing the true-ups may remain in dispute without clear decisions by the Commission regarding implementation of true-ups that are the subject of the outdated provisions contained in the 2007 Stipulation. For instance, the Order mentions the OCC's observation that the 2007 Stipulation provides a true-up process without charging interest.[56] An appropriate interpretation of the 2007 Stipulation precludes the application of carrying charges that was previously the subject of a Commission Entry regarding interim rates for 2007.[57] The Order does not clearly state the Commission's treatment of interest charges. The OCC objects to the imposition of such charges to the extent that they result from the Order and the implementation of the Order by the Company and the PUCO Staff which cannot be based upon the record in these cases.

The proper authority for the approval of rates is the Commission, and not the Company or the Commission's Staff. A decision by the Commission on all matters before it in these cases will also resolve matters regarding the implementation of the

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[55] Order at 28.

[56] Order at 28. The observation is further explained regarding SRT and AAC charges is contained in the OCC's briefs. See, e.g., OCC Initial Post-Remand Brief, Hearing Phase II at 27 (May 17, 2007).

[57] Entry at 6 (December 20, 2006).

Order that remain unclear. Such a resolution must be based upon the record in these cases.

C. The Commission's Order Is Unreasonable And Unlawful Because The Commission Failed To Determine That Certain Entities Had No Standing In These Cases.

The Order states "APPEARANCES" at its beginning and unquestioningly considers the support of signatories to the 2007 Stipulation. Two of those signatories – PWC and OHA -- never moved to intervene in the above-captioned cases and did not file timely briefs.[58] These entities were not parties to the above-captioned cases and have no standing. OEG, which moved to intervene in all but Case No. 06-1085-EL-UNC, is not a party to that case and did not have standing in that case.

Intervention in proceedings before the PUCO is governed by R.C. 4903.221 and is the subject of Ohio Adm. Code 4901-1-11. A request to intervene is not an empty gesture. R.C. 4903.221 states criteria that the Commission must consider when the matter of a party's participation in a case is placed at issue. Ohio Adm. Code 4901-1-11(C) states that "[a]ny person desiring to intervene in a proceeding *shall* file a motion to intervene with the commission, and shall *serve* it upon all parties . . . ." The words used in the Commission's rules *require* action before a person may gain standing as a party. The filing and service of a motion to intervene provide others the opportunity to oppose such an intervention request.[59] Party status also brings with it responsibilities such as the

[58] On June 1, 2007, PWC submitted a Motion for Extension of Time to File Reply Brief, Phase II, that did not comply with Ohio Adm. Code 4901-1-13(B) regarding an extension of time. The motion to file a brief out of time was neither granted nor denied. PWC's pleading is best described as a renewed motion to strike, and the Order discusses PWC's pleading in that context. Order at 29 (November 20, 2007) ("dedicated to renewal of its prior motion . . . intended to strike").

[59] Ohio Adm. Code 4901-1-12(B)(1).

requirement to respond to discovery inquiries that might reveal the intervenor's interests. These requirements were not met in any of the above-captioned cases by PWC or OHA, and were not met regarding by OEG in Case No. 06-1085-EL-UNC.

The present circumstances illustrate the importance of the intervention process, which might include opposition to a motion to intervene. The Order states that "[r]esidential consumers were represented by PWC" in negotiations over the rates provided for in the 2007 Stipulation. The OCC brought PWC's failure to intervene to the Commission's attention at the point when PWC sought to strike portions of the OCC's Reply Brief after the Phase II hearing.[60] The absence of a motion to intervene by PWC, however, deprived the OCC of the opportunity to state its objection to any characterization (had it been made) that PWC represents residential customers in rate-setting matters.[61] From its Motion to Intervene in the *Post-MDP Service Case* during 2004, PWC is "a small, non-profit organization * * * [whose] mission is to provide essential repairs and services so that homeowners can remain in their homes. . . ."[62] By extension of the Order's reliance on PWC as a representative of residential customers, every company would become a consumer advocate if it provides services to people who might be residential consumers. Such a result from the Order is error, and is inimical to organized legal practice before the Commission.

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[60] OCC Memorandum Contra PWC's Motion for Extension of Time to File Reply Brief, Phase II at 8 (June 6, 2007).

[61] The Commission also erred by accepting PWC as a representative of residential customers for purposes of supporting the 2007 Stipulation, which is examined further in later argument.

[62] *Post-MDP Service Cases*, PWC Motion to Intervene at 2 (March 9, 2004).

The OCC was improperly and illegally deprived of an opportunity to argue matters of standing regarding PWC, OHA, and OEG in the cases where they did not move to intervene.

D. The Commission's Order Is Unreasonable And Unlawful Because The Commission Failed To Properly Apply The Test For Approval Of A Partial Stipulation. *Consumers Counsel V. Pub. Util. Comm.*, (1992), 64 Ohio St. 3d 123, 125.

The 2007 Stipulation was filed just prior to the hearing on Phase II of these cases.[63] 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).

Among other places, the Ohio Supreme Court has addressed its review of stipulations in *Consumers Counsel v. Pub. Util. Comm.*, (1992), 64 Ohio St. 3d 123, 125 ("*Consumers' Counsel 1992*"). Citing *Akron v. Pub. Util. Comm.* (1978), 55 Ohio St.2d 155, 157, the Ohio Supreme Court stated in *Consumers' Counsel 1992* that:

> The Commission, of course, is not bound to the terms of any stipulation; however, such terms are properly accorded substantial weight. Likewise, the commission is not bound by the findings of its staff. Nevertheless, those findings are the result of detailed investigations and are entitled to careful consideration.
>
> In *Duff v. Pub. Util. Comm.* (1978), . . . in which several of the appellants challenged the correctness of a stipulation, we stated:
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> A stipulation entered into by the parties present at a commission hearing is merely a recommendation made to the commission and is in no sense legally binding upon the commission. The commission may take the stipulation into consideration, but must determine what is just and reasonable from the evidence presented at the hearing.[64]

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[63] Joint Remand Rider Ex. 1 (2007 Stipulation).

[64] *Consumers' Counsel 1992* at 125.

The negotiations of the 2007 Stipulation served narrow interests while broader interests were ignored. The Court is concerned with *actual* participation for representatives of all classes of customers in settlement discussions, including residential customers.[65] The 2007 Stipulation rejects many of the recommendations contained in the Audit Report that were supported in testimony by the Auditor. The result advanced by the 2007 Stipulation is not "just and reasonable."

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?[66]

The OCC submits that the 2007 Stipulation, which "recommend[s] that the Public Utilities Commission of Ohio . . . approve the [2007 Stipulation]," violates the criteria set out by the Commission and the Ohio Supreme Court.[67] The Commission's erred when it failed to properly apply the test set out in *Consumers' Counsel 1992*.

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[65] *Time Warner AxS v. Pub. Util. Comm.* (1996), 75 Ohio St.3d 229, 234, 661 N.E.2d 1097.

[66] Id. at 126.

[67] Joint Ex. 1 at 2.

1. The settlement was not the product of serious bargaining.

The Order misapplies the first criterion in *Consumers' Counsel 1992*. That first criterion asks whether the negotiations over a settlement took place in an environment of sufficient conflict (i.e. "serious bargaining") between signatories that were well-positioned to negotiate ("capable, knowledgeable parties"). These conditions were absent regarding the negotiation of the 2007 Stipulation.

The Order fails to provide a detailed analysis regarding whether there was sufficient conflict between the signatory parties. The consolidated record contains an extensive record of agreements between many of the signatories (or members of signatories) to the 2007 Stipulation and the Duke-affiliated companies. The Order, however, totally dismisses the arguments by the OCC and OPAE that these side agreements have a bearing on the above-captioned cases.

> [T]here is no argument that there was a similar connection to the [2007] [S]tipulation we are considering today. The signatory parties to this [2007] [S]tipulation specifically confirmed that there were no side agreements related to this [2007] [S]tipulation.[68]

The record documents the extensive efforts taken by parties to these cases to prevent the Commission's review of side agreements, and the allegations that side agreements did not affect negotiations over the 2007 Stipulation should come as no surprise. The Commission's refusal to consider the side agreements, however, is reminiscent of the Commission's refusal to consider the possibility that side agreements affected the course of the *Post-MDP Service Case* in 2004. That refusal ultimately required the additional hearings on remand.

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[68] Order at 27.

The Commission's deliberations failed to consider the absence of significant conflict between the supporters of the 2007 Stipulation. The OCC Initial Brief, Phase I, and the OCC's Application for Rehearing regarding the Order on Remand demonstrated the narrow support for the 2004 Stipulation once the support of those connected with side deals is disregarded.[69] The 2007 Stipulation was again executed or has gone unopposed by Staff; OHA, OEG, and the Industrial Energy Users – Ohio ("IEU")[70] whose members [redacted] the City of Cincinnati ("City"); and People Working Cooperatively ("PWC").[71] The narrowness of the stated support for the 2007 Stipulation diminishes significantly after it is recognized that *the City is the only non-Staff signatory that can claim that it properly intervened in all of the cases listed on the heading of the 2007 Stipulation*. The OCC's efforts to correct even the obvious flaws in the document were entirely rebuffed.[72]

[redacted]

[69] See, e.g., *Post-MDP Remand Case*, OCC Initial Post-Remand Brief, Phase I, at 37-38.

[70] IEU, while not a signatory to the 2007 Stipulation, made it publicly known that it did not oppose the agreement. Tr. Remand Rider Vol. II at 153 (April 19, 2007) (position statement by IEU Counsel Neilsen).

[71] Joint Remand Rider Ex. 1 at 9 (2007 Stipulation).

[72] For instance, the OCC's observations regarding the weak consumer protections in paragraph 8 of the 2007 Stipulation went unheeded. The hastily executed stipulation led to a cross-examination of Duke Energy Witness Whitlock by the Assistant Attorney General that revealed a disagreement between the Staff and Duke Energy. See OCC Remand Rider Ex. 2 at 3 (Haugh Supplemental), citing Tr. Remand Rider I at 143 (Whitlock). The 2007 Stipulation, therefore, lacked the balanced that concerns the Court regarding the partial settlement standard set forth in *Consumers' Counsel 1992*. See, e.g., *Time Warner AxS v. Pub. Util. Comm.* (1996), 75 Ohio St.3d 229, 234, 661 N.E.2d 1097.

[redacted][73]

[redacted][74] [redacted]

[redacted]

[redacted][75] [redacted][76] [redacted]

[redacted]

[redacted][77] [redacted][78] [redacted]

[redacted]

[redacted][79] The side agreements are "related to this [2007] [S]tipulation"[80] by means of the insulation they provided to selected customers regarding the increased rates that are addressed in the 2007 Stipulation. The legacy of the side agreements in the *Post-MDP Service Case* continues to show the lack of serious conflict between the signatory parties.

The remaining signatories to the 2007 Stipulation besides the Company and the PUCO Staff were the City and PWC -- signatories that the Order states represented the residential class of customers in negotiations over the 2007 Stipulation.[81] These entities

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[73] OCC Remand Ex. 2(A).

[74] Id., BEH Attachment 17 (Bate stamp 89).

[75] Id.; see also id. at 51 (Hixon).

[76] Id., BEH Attachment 17 (Bate stamp 11).

[77] Id.; see also id. at 52 (Hixon).

[78] Id., BEH Attachment 17 (Bate stamp 44).

[79] Id.; see also id. at 52 (Hixon).

[80] Order at 27.

[81] Order at 27.

did not represent residential customers in the manner contemplated by the first criterion for evaluating settlements, and neither were "capable, knowledgeable parties" as stated in the first criterion stated in *Consumers' Counsel 1992*.

The City's Motion to Intervene in the *Post-MDP Service Case* stated:

> Cincinnati recently signed agreements with . . . CG&E . . . to deliver the electric power necessary for various city-owned and/or operated governmental facilities * * * [and] it is . . . clear that the City's recently negotiated agreements with CG&E would be negatively affected to some significant, but as yet unknown, degree.[82]

The City withdrew from the *Post-MDP Service Case* on July 13, 2004 without any apparent participation other than the execution of a side deal with the Company that provided the City with $1 million and required the City's withdrawal.[83] The City submitted a Motion to Intervene in the above-captioned "Rider" cases (i.e. and not in the cases on remand) on February 21, 2007, again emphasizing the City's operation of the City's water utility and the Metropolitan Sewer District that is owned by Hamilton County.[84] The City's only other activity even arguably connected with these cases was a "special appearance" at the status conference held on December 14, 2006 for the sole purpose of opposing the OCC's efforts to obtain documents that involved the City[85] and the City's execution of the 2007 Stipulation. Counsel for the City did not appear at the hearings conducted in 2007, and did not file a brief.

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[82] *Post-MDP Service Case*, City Motion to Intervene at 2 (April 21, 2004).

[83] OCC Remand Ex. 6 at ¶4.

[84] *Post-MDP Remand Rider Case*, City Motion to Intervene at 2 (February 21, 2007).

[85] Tr. at 49-50 (December 14, 2007).

The City's efforts have been limited to agreements between the City and the Company. The City has not demonstrated any knowledge of the issues in the above-captioned Rider cases, whether those affecting residential customers or any other customers. The City's interest in these cases is clear: its million dollar side agreement would terminate if the "Commission, in Case No. 03-93-EL-ATA *or a related case necessary to carry out the terms and conditions of the Stipulation and Recommendation filed in that case*, issues an order unacceptable to CG&E."[86] The City's execution of the 2007 Stipulation is, therefore, directly and explicitly linked to its side deal that also required the City's withdrawal from the *Post-MDP Service Case*.[87] Serious bargaining did not take place between Duke Energy and the City in the above-captioned cases. The City's course was set in 2004 when it entered into its side agreement with Duke Energy.

PWC's role in support of the 2007 Stipulation is more questionable than that of the City. *PWC did not submit a motion to intervene* in the above-captioned cases (and did not timely file a brief). In the *Post-MDP Service Case*, PWC's motion to intervene (March 9, 2004) stated that PWC is "a small, non-profit organization * * * [whose] mission is to provide essential repairs and services so that homeowner can remain in their homes. . . ."[88] PWC's counsel appeared at the status conference conducted on December 14, 2006, stating that PWC opposed the consolidation of the cases on remand with these Rider cases because PWC would not normally be interested in the Rider cases.[89] PWC

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[86] OCC Remand Ex. 6 at ¶6.

[87] Id. at ¶4.

[88] *Post-MDP Service Cases*, PWC Motion to Intervene at 2 (March 9, 2004).

[89] Tr. at 25-27 and 72 (December 14, 2007).

counsel appeared for portions of the consolidated hearings, again stating to the Attorney Examiners that, "as you all know, People Working Cooperatively has limited interests in the case . . . ."[90] The Order may not reasonably and legally rely upon the support by PWC -- which is not a party to the above-captioned cases -- as either a representative of residential customers or as a representative of any other interest.

The Order's reliance upon PWC's support of the 2007 Stipulation is misplaced even if PWC had standing in these cases. PWC's support for the 2007 Stipulation is best explained by its Motion to Intervene in the 2004 *Post-MDP Service Case* and its Motion to Strike regarding the OPAE's brief.[91] The 2004 Motion to Intervene states that PWC is concerned with home repairs,[92] and the Motion to Strike states PWC's dependency on funds provided by Duke Energy.[93] PWC stated its interest: "Parties intervene because they want something from the Commission process and usually that outcome involves money."[94] PWC's "issues," as reflected by its Motion to Strike, relate to its status as a recipient of the Company's funding. Like the City, PWC has not demonstrated that it is capable, knowledgeable, and serious about settling a conflicting view regarding the issues raised in the 2007 Stipulation.

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[90] Tr. Vol. Remand Vol. I at 19 (March 19, 2007).

[91] PWC Motion to Strike (April 27, 2007).

[92] *Post-MDP Service Cases*, PWC Motion to Intervene at 2 (March 9, 2004).

[93] PWC Motion to Strike at 3-5 (April 27, 2007).

[94] PWC Motion for Extension of Time to File Reply Brief, Phase II, Attachment at 6 (June 1, 2007).

For the purpose of residential customer representation, the Commission should rely upon the OCC as the statutory representative of these customers.[95] For that purpose, the Commission should *not* rely upon the City, whose position was set as the direct result of the City's side agreement with Duke Energy in the *Post-MDP Service Case*, and should not rely upon a non-party to these Rider cases (i.e. PWC). The diversity of interests that is referred to in the Order[96] does not exist when only the actual participants in these Phase II cases are considered, and no representative of the residential class is a signatory regardless of the number of signatories to the 2007 Stipulation that are considered.

The circumstances of these cases, and of the signatories to the 2007 Stipulation, demonstrate that the partial settlement was reached without serious bargaining that involved capable, knowledgeable parties. The Order's conclusions to the contrary[97] were error.

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 have adopted the recommendations of its technical expert regarding the FPP and the SRT and reject the treatment given to the AAC as stated above.

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[95] R.C. Chapter 4911.

[96] Order at 27 ("each stakeholder group").

[97] Order at 25-27.

Paragraph 2 of the 2007 Stipulation states that an EVA recommendation "shall be withdrawn," referring to the second major management audit recommendation.[98] EVA recommended that Duke Energy Ohio adopt a portfolio approach to the procurement of coal and emission allowances. Paragraph 3 of the 2007 Stipulation offers "meet[ings] to discuss the terms and conditions under which DE-Ohio may purchase and manage coal assets, emission allowances, and purchased power for the period after December 31, 2008" in order to "make a recommendation . . . for consideration no later than the next FPP audit."[99] This provision for meetings in the 2007 Stipulation concedes that the EVA recommendation regarding coal procurement has substance.

Paragraph 5 of the 2007 Stipulation states that "DE-Ohio's proposed Rider AAC Calculation shall be adjusted in accordance with the Staff corrected supplemental testimony of L'Nard E. Tufts."[100] The controversy in these cases regarding AAC charges does not, however, involve Mr. Tufts' work or dispute regarding the manner in which any AAC calculations were carried out. The controversy in these cases is whether a return on CWIP should be included in the AAC, a matter on which Staff Witness Tufts stated no opinion.[101] The Commission should reject Paragraph 5 of the 2007 Stipulation and set the AAC charge at 5.6 percent of "little g" as supported in OCC Witness Haugh's

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[98] Joint Remand Rider Ex. 1 at 5, ¶2.

[99] Id. at 5, ¶3.

[100] Id. at 6, ¶5. Construed literally, the 2007 Stipulation does not make a recommendation regarding AAC charges. Paragraph 5 states agreement regarding the Company's calculations, not the AAC charge. The Company's calculations having been adjusted by agreement between certain parties, the issue of whether to accept the inclusion of a return on CWIP remains unaddressed by the 2007 Stipulation.

[101] 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.").

testimony as part of the PUCO's efforts "to consider the reasonableness of expenditures" in the AAC category.[102]

Paragraph 6 states that "DE-Ohio shall work with the Staff to amend its bill format" "to reflect generation-related charges such as the FPP, SRT, and AAC, in the generation portion of the customer bill."[103] The proper placement of generation-related charges was raised in the testimony of OCC Witness Haugh.[104] The agreement that "such amendments will not result in additional programming or billing costs" is the correct result.[105] However, that result is not particularly gratifying as part of the settlement quid pro quo since the Company caused the problem when it prepared customer bills that did not recognize the Commission's determinations that these charges are generation in nature.[106] Paragraph 6 is also vague, referring to charges "*such as* the FPP, SRT, and AAC."[107] The RSC, SRT, IMF, and AAC -- all charges that resulted from the *Post-MDP Service Case* that dealt with standard service offer generation rates pursuant to R.C. 4928.14(A) -- were incorrectly stated and billed to customers as distribution charges when all these charges are part of the Company's charges for generation service.[108] The Company's post-hearing activities illustrate that implementation of Paragraph 6 is

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

[103] Joint Remand Rider Ex. 1 at 6, ¶6.

[104] OCC Remand Rider Ex. 1 at 16-18 (Haugh).

[105] Joint Remand Rider Ex. 1 at 6, ¶6.

[106] OCC Remand Rider Ex. 1 at 16-17 (Haugh), citing Commission orders including the Entry on Rehearing dated November 23, 2004 in the Post-MDP Service Case.

[107] Joint Remand Rider Ex. 1 at 6, ¶6 (emphasis added).

[108] OCC Remand Rider Ex. 1, MPH Attachment 2 (Haugh).

imperiled[109] -- Duke Energy submitted a separate application in Case No. 07-1205-GE-UNC to change its bill format in an "end around" the Commission's Order.

Paragraph 7 states a minor concession on the part of Duke Energy by providing for the collection of "DE-Ohio's projected 2007 planning reserve capacity purchases by year-end," which would not require the payment of interest.[110] The Commission's Entry dated December 20, 2006 set the SRT at zero and provided for interest as part of the true-up following its decision in these cases.[111] Paragraph 5 of the 2007 Stipulation also refers to collections -- this time for the AAC -- trued-up "such that the amount calculated to be recovered in 2007, will be recovered by December 31, 2007" and does not include interest charges.[112] The Order states that it adopts the 2007 Stipulation provisions,[113] but does not explicitly state that interest charges will not be assessed. Combined with the delegation of tasks to the PUCO Staff, it is not clear that customers will benefit from the small concession that is contained in the 2007 Stipulation.[114]

Paragraph 8 of the 2007 Stipulation presented the most obvious controversy at hearing, and remains an unsettled element regarding Duke Energy's intentions under the

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[109] The Company's intentions regarding this new case are unknown, but the filing may undercut Duke Energy's agreement that bill format "amendments will not result in additional programming or billing costs." Joint Remand Rider Ex. 1 at 7, ¶6.

[110] Joint Remand Rider Ex. 1 at 7, ¶7.

[111] Entry at 6 (December 20, 2006).

[112] Joint Remand Rider Ex. 1 at 5, ¶5.

[113] Order at 30.

[114] Any check on proper implementation of the Order is also made difficult by Duke Energy's efforts to collaterally deal with the issues in these cases in other dockets. For instance, the SRT true-up (without supporting calculations) is contained in a stipulation filed in Case Nos. 07-723-EL-UNC, et al. on December 13, 2007. The bill format issues in these cases are also the subject of Case No. Case No. 07-1205-GE-UNC.

agreement. Paragraph 8 would render EVA's "recommendation 6 on page 1-10 of the . . . Audit[or's] Report . . . inapplicable."[115] EVA's recommendation would exclude the use of the DENA Assets for purposes of calculating the SRT. 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 Company and the PUCO Staff.[116] The use of broker quotes or third-party transaction prices would not deliver savings from "the most reasonably priced capacity available" that was promised by Company Witness Whitlock.[117] To the contrary, use of the DENA Assets presents the danger of unreasonably high charges that could result from the Company's determination of costs associated with *Company-owned generation*.[118]

Paragraph 8 is weakly worded and unable to protect customers from the Company's overcharges if Duke Energy is permitted to use the DENA Assets.[119] For instance, the 2007 Stipulation does not provide for Commission approval of an agreement reached between the Company and the PUCO Staff regarding charges for using the DENA Assets. Also, OCC Witness Haugh noted the apparent disagreement regarding the interpretation of paragraph 8 that broke out as early as the cross-examination of Company Witness Whitlock on April 10, 2007. In Mr. Haugh's supplemental testimony filed on

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[115] Joint Remand Rider Ex. 1 at 7, ¶8.

[116] Id.

[117] Company Remand Rider Ex. 2 at 11 (Whitlock Supplemental).

[118] Company Witness Smith agreed that the word "purchases" in paragraph 8 of the 2007 Stipulation is inappropriate under circumstances where the generating facilities are owned by the Company. Tr. Remand Rider Vol. II at 95 (April 19, 2007) (Smith).

[119] See OCC Remand Rider Ex. 2 at 3-5 (Haugh Supplemental).

April 17, 2007, he observed that the Assistant Attorney General's cross-examination of Mr. Whitlock revealed Staff's more narrow interpretation of paragraph 8 that would not permit the Company to repeatedly use the DENA Assets.[120] The 2007 Stipulation was apparently executed hastily and without complete agreement between the stipulating parties.

Paragraph 9 is deceptive in its provision regarding Duke Energy's acceptance of "all audit recommendations made in the Report of the Financial and Management/ Performance Audit . . . except as set forth in paragraphs one through eight above."[121] As noted above, Company Witness Whitlock testified that Duke Energy "does not exclude an offer from consideration if the [coal] supplier will not permit the resale of coal."[122] From that statement, the Company apparently believes it already complies with EVA's major recommendation 3 which states that "coal suppliers should not be required to allow the resale of their coal for the offers to be considered."[123] Company Witness Whitlock admits, however, that Duke Energy "include[s] the resale of coal as a condition on its RFPs."[124] That condition on the RFPs renders meaningless the Company's "agreement" in Paragraph 9 to consider bids that Duke Energy actively discourages and that the Company would consider non-complying with its RFPs. The Commission should reject

[120] Id. at 3, citing Tr. Remand Rider I at 143 (Whitlock).

[121] Joint Remand Rider Ex. 1 at 7-8, ¶9.

[122] Company Remand Rider Ex. 2 at 9 (Whitlock Supplemental).

[123] PUCO Ordered Remand Rider Exhibit 1at 1-10 (Auditor's Report).

[124] Company Remand Rider Ex. 2 at 9 (Whitlock Supplemental).

the Company's subterfuge whereby it states agreement to an EVA recommendation but intends (in practice) the opposite result.

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.[125] Instead, 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.

The 2007 Stipulation violates important regulatory policies and practices in more than one way. Most fundamentally, the settlement was reached by involving entities who had no standing in the cases identified in the caption of the 2007 Stipulation. OHA and PWC, entities that did not move to intervene in the above-captioned cases, should not have been involved in the negotiations and become signatories. Paragraph 5 addresses the calculation of the AAC, and OEG was not properly a party to Case No. 06-1085-EL-UNC whose topic is determination of the AAC. Inclusion of PWC as "representative" of residential customers, when it is neither a party nor interested in the rate-setting for residential customers, is another means by which the residential class has been completely excluded from settlement of the case.[126]

Paragraph 5 of the 2007 Stipulation addresses the calculation of the AAC, and adoption of that provision violates a traditional regulatory policy and practice. That

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[125] *Time Warner AxS v. Pub. Util. Comm.* (1996), 75 Ohio St.3d 229, 234, 661 N.E.2d 1097 requires the balancing of important, competing interests.

[126] Id.

paragraph fails to recognize the Commission's earlier statements that AAC calculations would consider "expenses."[127] Commission policies and practices should be used to guide the development of reasonable standard service offer rates. The Commission failed to undertake the evaluation of AAC costs, in the PUCO's words, "to consider the reasonableness of expenditures" in the AAC category because "[i]t is not in the public interest to cede this review."[128] The Commission should have rejected Paragraph 5 of the 2007 Stipulation and set the AAC charge at 5.6 percent of "little g" as supported in OCC Witness Haugh's calculations and testimony.[129]

As stated above, Paragraph 8 of the 2007 Stipulation permits pricing of supply from DENA Assets based upon agreement between Duke Energy and the PUCO Staff. Such delegation of authority is illegal, was rejected by the Commission in 2004 based upon sound regulatory practice,[130] and should be rejected again.

Paragraph 8 also supports Duke Energy's breach of the SRT Stipulation as well as the Company's violation of the Commission's Order that adopted the SRT Stipulation in its entirety.[131] The Order's conclusion that the intent of the SRT Stipulation[132] was

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[127] OCC Remand Rider Ex. 1 at 9, quoting *Post-MDP Service Case*, Order at 32 (September 29, 2004).

[128] *Post-MDP Service Case*, Entry on Rehearing at 10 (November 23, 2004). Staff Witness Tufts did not formulate an opinion as to whether a return on CWIP was appropriate for standard service offer rates. 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.").

[129] OCC Remand Rider Exhibit 1 at 11 (Haugh).

[130] *Post-MDP Service Case*, Entry on Rehearing at 10 (November 23, 2004). The agreement of the PUCO Staff raises a legal issue, but that legal issue is linked to practical problems. The Commission acts by vote in open session. In contrast, it is not clear how the PUCO Staff would express its agreement with a Duke Energy proposal and the Order lends no clarity to the situation.

[131] *In re Setting of SRT*, Case No. 05-724-EL-UNC, Order at 6 (November 22, 2005).

[132] Order at 20.

served even though Duke Energy undertook no affirmative effort to comply with the SRT Stipulation encourages non-compliance with Commission orders and discourages efforts to settle cases before the Commission.[133]

The Commission should reconsider its decisions in light of the important regulatory policies and practices that are violated by adoption of the 2007 Stipulation.

III. CONCLUSION

The Commission's should not ignore the recommendations of the technical experts who reviewed the Company's policies and practices as requested by the PUCO. The Auditor's Report makes many recommendations regarding the manner in which the FPP and SRT should be dealt. OCC-sponsored testimony also supports the Auditor's recommendation that would continue the prohibition against including the cost of using DENA Assets in the calculation of SRT charges.

OCC-sponsored testimony also supports Commission review of the charges that Duke Energy proposes for the AAC charge. On rehearing the Commission should eliminate that portion of the proposed charge that can be attributed to a return on all CWIP.

The Commission should correct its legal errors, consistent with the arguments stated above.

[133] Order at 20.

Respectfully submitted,

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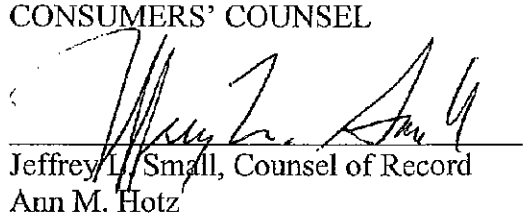

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Application for Rehearing by the Office of the Ohio Consumers' Counsel,* has been served upon the below-named persons via electronic transmittal this 20th day of December 2007. Counsel for parties who receive the confidential, redacted version of this pleading are reminded to treat its contents as required for the confidential versions of briefs and the applications for rehearing in Phase I of the proceedings.

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