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PUCO

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's Review and)	
Adjustment of the Fuel and Purchased Power and)	
System Reliability Tracker Components of Duke)	Case No. 07-723-EL-UNC
Energy Ohio, Inc. and Related Matters.)	
)	
In the Matter of the Application of Duke Energy)	
Ohio, Inc. to Adjust and Set its 2008 System)	Case No. 07-975-EL-UNC
Reliability Tracker.)	

**INITIAL POST-HEARING BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

A. Prefatory Comments

The Public Utilities Commission of Ohio ("Commission" or "PUCO") should follow-through on its plan to carefully evaluate and adjust proposals and procedures of Duke Energy Ohio, Inc. ("Duke Energy" or the "Company," including its predecessor organization the Cincinnati Gas and Electric Company) by means of an audit process for costs that customers pay. The above-captioned cases owe their beginnings to the rate plan initially approved in 2004 in Case Nos. 03-93-EL-ATA, et al., and recently re-adopted by the Commission in October 2007.¹ The Commission's entries and orders in

¹ *In re Duke Energy Post-Market Development Period Cases*, Case Nos. 03-93-EL-ATA, et al., Entry on Rehearing (November 23, 2004) ("Post-MDP Service Case Entry"); reversed in part, *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 ("*Consumers' Counsel 2006*"); re-adopted in *In re Duke Energy Post-Remand Cases*, Case Nos. 03-93-EL-ATA, et al., Order (October 24, 2007) ("Post-MDP Remand Order"). The Commission also issued a recent order on the subject of riders and tracker in the post-MDP cases. *In re Duke Energy Post-Remand Rider Cases*, Case Nos. 05-724-EL-ATA, et al., Order (November 20, 2007) ("Post-MDP Rider Order").

those proceedings dealt, in part, with fuel and economy purchased power (“FPP”) and system reliability tracker (“SRT”) charges. The audit procedures set in place by the Commission were undertaken, in the PUCO’s words, “to consider the reasonableness of expenditures” regarding the FPP and SRT charges because “[i]t is not in the public interest to cede this review.”² As part of the Commission’s review, the recommendations submitted by Liberty Consultants, Inc. (“Liberty” or the “Auditor”)³ should be adopted in their entirety.

Regrettably, Duke Energy has thus far been able to avoid adopting the most significant recommendations by Commission-appointed auditors.⁴ The Stipulation and Recommendation⁵ (“Stipulation”) submitted by Duke Energy in the above-captioned cases would, if adopted by the Commission, continue the Company’s ability to avoid making changes as the result of significant and recurring audit recommendations. This situation should be addressed in the above-captioned cases, adopting all of the Auditor’s recommendations. In the alternative, the Commission should make changes and/or clarifications to the proposals contained within the Stipulation that would undermine the audit recommendations.

² Post-MDP Service Case Entry at 10 (November 23, 2004).

³ PUCO Ordered Ex. 1 (“Liberty Report”). PUCO Ordered Ex. 1(A) is the redacted version of the Liberty Report. PUCO Ordered Ex. 1 and 1(A) have different page numbering for the same discussions as the result of the redactions. All page references in this brief are to PUCO Ordered Ex. 1, the unredacted version.

⁴ See, e.g., Post-MDP Rider Order at 15 (“continue is active management of its coal, EA, and purchased power portfolio, as provided in the stipulation”).

⁵ Joint Exhibit 1 (Stipulation).

B. Procedural History

The origins of the above-captioned case begin with the Company's filings to establish standard service offer rates for the post-market development period ("post-MDP" period). Cases proceeded on a consolidated basis (Case Nos. 03-93-EL-ATA, et al., the "*Post-MDP Service Case*"), and resulted in an Order dated September 29, 2004 and an Entry on Rehearing dated November 23, 2004. That Entry on Rehearing provided for Commission review of FPP and SRT charges.⁶

An Order dated June 27, 2007 in Case No. 07-723-EL-UNC stated that, "[i]n order to complete our next annual review of Duke's FPP and SRT, . . . the Commission finds that the necessary audits should be conducted by a qualified independent auditing firm."⁷ Duke Energy submitted initial filings in the above-captioned cases on August 31, 2007, which included the prefiled testimony of Duke Energy Witnesses Wathen and Whitlock.⁸ The Liberty Report was docketed on November 1, 2007. Additional testimony by Duke Energy Witness Hofmann was submitted by Duke Energy on December 6, 2007.⁹

On November 7, 2007, nearly two weeks before the Commission issued its Post-MDP Rider Order, the above-captioned case was consolidated with cases that involved an "annually adjusted component."¹⁰ The consolidated cases were scheduled for a hearing

⁶ Post-MDP Service Entry at 10 (November 23, 2004).

⁷ Order at 1-2, ¶(3) (June 27, 2007).

⁸ Duke Energy Exs. 2 and 4 (Whitlock); Duke Energy Exs. 5 and 6 (Wathen).

⁹ Duke Energy Ex. 1 (Hofmann).

¹⁰ The Entry dated November 7, 2007 included a caption for *In re Application to Set AAC*, Case No. 07-973-EL-UNC.

on November 27, 2007. The OCC moved to continue the hearing, in part due to the long unavailability of unredacted versions of Duke Energy's testimony because Duke Energy refused to enter into a reasonable protective agreement with the OCC.¹¹ For the same reason, the OCC was unable to obtain an unredacted copy of the Liberty Report at the time it was filed. The logjam was ultimately resolved after an Entry granted the OCC's Motion to Compel.¹² The hearing was continued until December 13, 2007.

On December 13, 2007, the Company filed the Stipulation. The PUCO Staff filed the testimony of Staff Witness Cahaan.¹³ The hearing commenced on December 13, 2007. Company witnesses testified, as did Staff Witness Cahaan whose testimony was filed on December 14, 2007.¹⁴ Among other matters at the hearing, the Company attempted to conduct the direct examination of Duke Witness Wathen regarding his opinions in connection with, and support for, the Stipulation. The OCC objected based on the Commission's rule that provides that testimony of the type desired by Duke Energy must normally be committed to writing and pre-filed with the PUCO. Duke Witness Wathen's testimony in support of the Stipulation was filed on December 14, 2007, and the OCC conducted its cross-examination of Mr. Wathen on that same date.

¹¹ OCC Motion for the Continuance of the Hearing Schedule at 4 (November 8, 2007).

¹² Entry at 4 (October 29, 2007).

¹³ The testimony was marked and entered into the record as Staff Ex. 1.

¹⁴ Staff Ex. 2 (Cahaan).

II. ARGUMENT

A. The Recommendations in the Liberty Report Should be Adopted.

The audit of Duke Energy Ohio's practices revealed that the Company's treatment of matters that affect the FPP calculation has needlessly raised costs that residential customers would pay according to the Company's proposals. The Liberty Report contained the following major recommendations regarding Duke Energy Ohio's transactions that affect FPP charges:¹⁵

Chapter One - Organization, Policies and Procedures

Develop standard C[ommercial]A[sset]M[anagement] procedures for the procurement and management of fuel and emission allowances, including procedures, guidelines and limits on Active Management.

Chapter Two - Coal Procurement and Contracts

1. Evaluate the procedures and methods for forecasting coal consumption in an effort to bring forecast more in line with actual coal consumption.
2. Demonstrate the economic effectiveness of Active Management as a condition to its continued use by Duke Energy Ohio.

Chapter Three - Supply Management

Institute a security program to protect the integrity of coal samples from the time samples are bagged and ready for shipment until the samples arrive at the [laboratory].

* * *

¹⁵ Liberty Report at ES-7 through ES-8. Hereinafter, the recommendations will be designated by chapter and number, such as "Recommendation II-2" for the second major recommendation within Chapter 2 of the Liberty Report.

Chapter Five - Plant Operations

1. Exclude replacement power costs associated with the Zimmer outage from FPP recovery.
2. Act swiftly to establish high expectations for safety consciousness, cleanliness, and employee attitude at the Beckjord Station.
3. Do not reduce the 2009 capital and O&M budgets at Beckjord below budgeted level, and provide further budget support beyond 2008 for station maintenance if required.
4. Conduct a staffing level review of the Duke Energy Ohio coal plants to assure that staffing reductions are not resulting in, and do not have a significant potential for resulting in adverse operational performance.
5. Perform economic analyses to determine the level of spare parts at, the ability to share parts among, and the use of on line maintenance/redundant equipment at its generating stations.

* * *

Chapter Seven - Financial Audit

Examine the cause of the Company's under-collection on Fuel Costs.¹⁶

All of the recommendations contained in the Liberty Report should be adopted by the Commission.

Details supporting Liberty's recommendations are provided in the Liberty Report and need not be repeated at length, but a few matters deserve additional attention. The Commission should be particularly concerned about evidence that Duke Energy has

¹⁶ The redaction shown in this portion of the Liberty Report is inconsistent with the treatment of the same information in the public domain in the transcripts for these cases. Tr. Vol. I (December 13, 2007). The last Liberty recommendation should not be understood to present a problem for the Company, and does not result in a benefit for Duke Energy customers. The under-collections are subject to later true-up. Liberty states that the Company's procedures present "significant cost mismatches [that] have implications for customer choice." Liberty Report at VII-12.

resisted implementing recommendations that result from an objective, expert evaluation of the Company's operations.

Liberty's discussion of Recommendation I regarding "standard CAM procedures"¹⁷ illustrates the Company's resistance to adopt auditor recommendations. Liberty states that industry practice should dictate "operat[ion] under well-defined policies and procedures" for the "guidance of day-to-day activities[;] . . . formalizing institutional memory[;] . . . provid[ing] a standardized basis and point of reference for performance evaluations; . . . [and] provid[ing] the handbook and guid[ance] to operations that is vital for training . . . individuals new to the organization."¹⁸ The Liberty Report contains Duke Energy's response to this recommendation, which is essentially that the Company believes the "culture of the organization" protects customers from the operational losses that lie behind Liberty's recommendation.¹⁹ The "culture of the organization" revealed in the Liberty Report is one that should be subject to additional oversight in order to protect customers.²⁰

Recommendation II-2, regarding the Company's discontinuation of its active management activities for coal procurement, repeats a recommendation (i.e. not adopted

¹⁷ Liberty Report at ES-7.

¹⁸ Liberty Report at I-8.

¹⁹ Id.

²⁰ Other portions of the Liberty Report bear out this "culture" and are discussed later (e.g. coal sample security and the operation of the Beckjord Station).

by Duke Energy) previously submitted by Energy Ventures Analysis, Inc. (“EVA”).²¹ EVA was the auditor in the last case that involved the management performance evaluation of Duke Energy’s activities regarding the FPP and SRT charges. Duke Witness Whitlock stated that “the merits of active management have been vetted and the Commission has ruled in favor of DE-Ohio continuing its active management.”²² While the Commission accepted the active management concept in its approval of the stipulation in the last audit case,²³ the evidence for the audit period in the above-captioned cases shows that active management has resulted in negative margins (i.e. losses due to the added transactions).²⁴ Gains in previous audit periods were more than offset by losses in the current audit period.²⁵ Based upon the evidence, the Commission should reevaluate and change its decision that permitted the Company’s active management activities to continue.

The EVA and Liberty recommendations regarding Duke Energy’s discontinuation of its active management activities is closely tied to another EVA recommendation regarding the Company’s purchase of coal. EVA recommended that “as long as the FPP is in effect coal suppliers should not be required to allow the resale of their coal for the

²¹ Active management, according to Liberty, results in the “Company . . . often attempting to ‘flatten’ its coal position on a daily basis based upon short-term market events.” Liberty Report at I-5. “As DE-Ohio flattens its position, the forecast of coal prices is not a determinative factor.” *In re Duke Energy Post-Remand Rider Cases*, Case Nos. 05-724-EL-ATA, et al., Report of the Financial and Management/Performance Audit of the Fuel and Purchased Power Rider of Duke Energy - Ohio at 2-14 (October 12, 2006) (“EVA Report”). Administrative notice was taken of the EVA Report. Tr. Vol. I at 63 (December 13, 2007).

²² Duke Energy Ex. 3 at 5 (Whitlock).

²³ See, e.g., Post-MDP Rider Order at 15 (November 20, 2007).

²⁴ Liberty Report at II-13.

²⁵ *Id.*

offers to be considered.”²⁶ Duke Energy claims to have complied with the EVA recommendation,²⁷ but the Company still includes language in its RFPs that identifies coal suppliers who would not permit the resale of coal and thereby communicates its desire to purchase coal that it can resell.²⁸ The Company’s compliance with its agreement to purchase coal from suppliers regardless of their limitation on resale appears tied to Duke Energy’s discontinuation of the active management activities.²⁹ The Commission should order such discontinuation of the active management, as recommended by the last two auditors (i.e. EVA and Liberty). The discontinuation would result in a coal purchasing environment in which the Company would be more willing to purchase coal at advantageous prices from coal suppliers who limit the resale of their coal.

Duke Energy’s lack of vigilance regarding coal sample security, the subject of Liberty Recommendation III, has been the subject of previous comment by Liberty.³⁰ Liberty stated in an audit report submitted to the Commission in March 1999 that the

²⁶ EVA Report at 1-10; repeated in Liberty Report at ES-4.

²⁷ Duke Energy Ex. 2 at 5-6 (Whitlock). The testimony states, however, that “DE-Ohio does include the resale of coal provision as a component of its RFP process.” *Id.*

²⁸ *Id.*; also Tr. Vol. I at 48 (December 13, 2007) (Whitlock).

²⁹ Tr. Vol. I at 49-50 (December 13, 2007) (Whitlock).

³⁰ The Company’s resistance to valuing the recommendations of Commission-appointed auditors is further explored below regarding the contents of the Stipulation whereby the Company merely agrees to “evaluate the need and feasibility of additional security measures for transporting coal samples to the laboratory.” Stipulation at 4, Provision 7. Liberty Recommendation III is based upon sound industry practices that are simple and inexpensive to “institute.” Liberty Report at ES-8 (Recommendation III).

Company “d[id] not have a vigorous sample security program, which differentiates it from many utilities.”³¹

Liberty recommended in 1999 that the identity of coal samples should be disguised as part of coal sample security procedures. It also stated:

CG&E is moving to change contract specifications on its coal contracts, in order to move away from Btu deadbands and reward or penalize coal suppliers on the basis of actual Btu content. This new policy will cause any change in coal Btu content to result in a change in the price for that coal. Previously, the Btu deadband provided a range within which no cost penalties would apply. Without a deadband, incentives for altering measurement increase. While Liberty did not find evidence of any such actions during its conduct of this m/p audit, cost effective mitigation of the potential for abuse is appropriate to consider.³²

Nearly nine years have passed since Liberty filed these earlier statements regarding the Company’s poor coal sample security. The Company should take advantage of auditor recommendations, and may not be sufficiently motivated to act on such recommendations because Duke Energy views the cost of coal (and any overpayments to coal suppliers) as a cost that is flowed through to customers by means of FPP charges. Having a “flow-through” recovery mechanism does not relieve Duke Energy of the responsibility to act prudently and in a manner that will result in reducing the costs that its customers must pay. In the absence of reasonable action by Duke Energy regarding coal sample security, the Commission should act to protect customers where the Company refuses to take

³¹ *In re CG&E EFC Proceeding*, Case No. 98-103-EL-EFC, Final Report: Management/Performance Audit at IV-5 (March 5, 1999). The Commission took administrative notice of this earlier Liberty audit report. Entry at 1 (January 2, 2008).

³² *Id.* at IV-5. The discussion of coal sample security in the report submitted without any redactions in 1999 (and publicly available on the Commission’s web site) regarding the transportation of coal samples reveals that the redactions to the Liberty Report submitted in 2007 on the same subject were excessive. Liberty Report at III-10 (second sub-point under “C. Conclusions”).

effective actions that would protect against the potential for abuse regarding payments for coal.

Duke Energy should be ordered to follow all of Liberty's recommendations.

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

The Stipulation that was executed by Duke Energy, the PUCO Staff, and the Ohio Partners for Affordable Energy was filed on December 13, 2007 during the hearing of these cases.³³ 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.³⁴

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:

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.³⁵

³³ Joint Ex. 1 (Stipulation).

³⁴ See, e.g., *CG&E ETP Case*, PUCO Case No. 99-1212-EL-ETP, et al., at 65 (July 19, 2000).

³⁵ *Consumers' Counsel 1992* at 125.

The present cases involved a partial settlement between Duke Energy, the PUCO Staff, and only one other party. While the PUCO Staff executed the Stipulation, the Liberty Report submitted by the Commission-selected Auditor conflicts with some positions taken in the 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?³⁶

The OCC submits that the Stipulation, which “recommend[s] that the Public Utilities Commission of Ohio . . . approve and adopt th[e] Stipulation,” violates the criteria set out by the Commission and the Ohio Supreme Court.³⁷

1. The Settlement Was Not the Product of Serious Bargaining.

The support for the Stipulation is weak. The first criterion stated in *Consumers' Counsel 1992* asks whether the negotiations over a settlement took place in an environment of sufficient conflict (i.e. “serious bargaining”) between signatories. Diversity of interests is an important component to assure that a stipulation is reasonable.

³⁶ Id. at 126.

³⁷ Joint Ex. 1 at 1 (Stipulation).

The Commission has found that the presence of a diversity of interests provides strong support for the reasonableness of a settlement package.³⁸

The only signatories to the Stipulation are the Company, the PUCO Staff, and the Ohio Partners for Affordable Energy (“OPAE”). The signatories do not include any representatives of consumers who are subject to the FPP and SRT charges.³⁹ Duke Energy Witness Wathen, testifying in support of the Stipulation, stated that he was involved in the negotiation of the Stipulation.⁴⁰ On cross-examination, however, he was unable to identify any contribution by OPAE (i.e. the only non-Company, non-Staff signatory) to the contents of the Stipulation.⁴¹ Diverse interests are not represented by the signatories on the Stipulation.

The circumstances of these cases, and of the parties to the Stipulation, demonstrate that the partial settlement was reached without serious bargaining that involved capable, knowledgeable parties. An extensive management performance audit (i.e. the Liberty Report) by a consultant selected by the Commission has been presented to the Commission, and the Commission also has earlier audit reports upon which to rely

³⁸ *In re Restatement of Accounts and Records of CG&E, DP&L, and CSOE*, Case No. 84-1187-EL-UNC, Order at 7 (November 26, 1985).

³⁹ OPAE, as stated in its Motions to Intervene, is an “Ohio corporation” whose members “provide[] essential service in the form of bill payment assistance programs and weatherization and energy efficiency services to low income customers of Duke.” *In re Review of FPP and SRT Components*, Case No. 07-723-EL-UNC, OPAE Motion to Intervene at 2 (July 26, 2007) and *In re SRT Rate for 2008*, Case No. 07-975-EL-UNC, OPAE Motion to Intervene at 2 (September 26, 2007). OPAE also states in both interventions that some of these members are “also ratepayers of Duke.” *Id.* These added statements provide an extremely tenuous link to any customers, and no link to residential customers who are represented by the OCC.

⁴⁰ Duke Energy Ex. 8 at 1 (Wathen).

⁴¹ Tr. II at 10 (December 14, 2007).

that also support Liberty's recommendations. The Commission should adopt the Liberty recommendations without relying upon the Stipulation.

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

a. The Stipulation Would Permit the Continuation of Poor Practices.

The settlement package stated in the Stipulation does not provide a benefit to ratepayers or serve the public interest. Instead of adopting the Stipulation without alteration, the Commission should adopt all the Liberty recommendations. Support for these positions is stated in the Liberty Report, and the present discussion will focus on the lack of benefits provided by the Stipulation.

The Stipulation displays multiple instances of resistance to the expert advice provided by the Liberty auditors that will prevent the effective protection of customers. While styled as an "agree[ment] to work with Commission Staff," Provision 6 in the Stipulation provides for "documentation" of the active management transactions that two consecutive auditors (EVA and Liberty) have advised the Commission is unproven for the control of costs.⁴² As noted previously, the auditor recommendations that such Company practices be discontinued is closely connected with EVA's recommendation that Duke Energy consider economical purchases of coal from coal producers who do not permit the resale of their coal.

Provision 7 continues Duke Energy's reluctance to act on Liberty's recommendation to "institute a security program to protect the integrity of coal samples,"⁴³ merely promising to "evaluate the need and feasibility of additional security measures."⁴⁴ Duke Energy apparently lacks the proper incentives to provide security that

⁴² Stipulation at 4, Provision 6.

⁴³ Liberty Report at ES-8.

⁴⁴ Stipulation at 4, Provision 7.

is important for the protection of consumer interests. According to Liberty:

It would not be difficult to obtain the appropriate sample tags such that *there would be no way of knowing that coal samples had been switched*. Sample integrity is an ongoing issue because of the relationship between the results of coal sample analyses and penalties or premiums paid to coal suppliers for coal that is either below, or above, the specified contract coal quality guarantee.⁴⁵

Evidence of misdeeds and inappropriate charges to customers will be difficult to obtain by means of the audit process because any perpetrators of such misdeeds would attempt to conceal their activities and *Duke Energy has made such concealment, according to Liberty, more readily available*. The Commission should act to adopt the full contents of Recommendation III-2 since Duke Energy refuses to act.

Liberty's recommendation regarding coal sample security follows upon its recommendations *nine years ago* that the Company bring its sample security procedures up to industry standards. Company Witness Wathen could not explain such stubbornly held backwardness,⁴⁶ stating that he could not "speak for Mr. Whitlock"⁴⁷ who did not take the stand in support of the Stipulation. The Company is apparently unwilling to commit to simple improvements that would place coal samples under "lock and key" until tested.⁴⁸ "Lock and key" procedures are inexpensive, and could prevent tampering with coal samples that would be costly to the Company's customers who pay FPP charges.

⁴⁵ Liberty Report at III-11 through III-12 (emphasis added).

⁴⁶ Tr. Vol. II at 18 (December 14, 2007) (Wathen) ("I don't know what the rationale was for that").

⁴⁷ Id.

⁴⁸ Liberty Report at III-10.

b. The Benefits Claimed for the Stipulation do Not Add to Those Provided by the Adoption of the Liberty Recommendations.

Provision 8, according to Company Witness Wathen's prefiled testimony, "preserves the issue surrounding the Zimmer turbine outage extension."⁴⁹ Liberty recommended that the Commission "[e]xclude replacement power costs associated with the Zimmer outage from FPP recovery."⁵⁰ The outage that is the subject of Provision 8 in the Stipulation was extended in April to June portion of 2007, which caused increased costs in the form of added purchased power costs.⁵¹ Duke Energy, which was totally resistant to any change in the words used in Provision 8, apparently took nine lines to state the simple proposition that the issue is preserved to the next audit. Duke Witness Wathen stated that Provision 8 is "[j]ust wordy, I guess."⁵² The Attorney Examiner stated: "I am just trying to clarify here. You are not trying to direct the auditor on how they would conduct their review, are you?"⁵³ Mr. Wathen responded: "I can't see a defined limit on what they can look at."⁵⁴ The Commission should adopt the Liberty Recommendation regarding the Zimmer outage. In the event that Liberty Recommendation V-1 regarding the Zimmer outage is not adopted, however, the clarification provided in the exchange between the Attorney Examiner and Mr. Wathen should be explicitly stated in the Commission's order.

⁴⁹ Duke Energy Ex. 8 at 5 (Wathen).

⁵⁰ Liberty Report at ES-8.

⁵¹ Stipulation at 5, Provision 8. The redactions in the Liberty Report are greater than those in the publicly filed Stipulation. Liberty Report at V-4.

⁵² Tr. Vol. II at 21 (December 14, 2007) (Wathen).

⁵³ Id. at 23.

⁵⁴ Id.

Any PUCO action that adopts provisions of the Stipulation should explicitly state that the issue regarding the Zimmer outage is preserved, and that the Stipulation does not direct the auditor regarding how the later review should be conducted. Such an explicit statement would eliminate the possibility that Duke Energy's insistence upon every word of the nine lines contained in Provision 8 would result in restrictions on a future auditor evaluation of the Zimmer outage.

While Duke Energy Witness Wathen testified regarding "negotiations" between signatories to the Stipulation, its terms include matters to which the Company previously agreed. Provision 4 of the Stipulation concerns Liberty's recommendation regarding formally documenting coal procurement procedures, a matter that was already adopted by the Company as stated in Duke Energy Witness Whitlock's testimony on December 6, 2007.⁵⁵ Similarly, Provision 5 regarding procedures for forecasting coal consumption adds nothing to the Company representations by Duke Energy Whitlock in his testimony dated December 6, 2007.⁵⁶

Provisions 9 and 10 of the Stipulation state Company "commitments" that are expected of utilities without the presence of a stipulation, and which would be the subject of later audits if Duke Energy did not meet industry standards. Provision 9 requires "safety consciousness, cleanliness, and [high expectations regarding] employee attitude at [the Company's] Beckjord generating station."⁵⁷ Parties should not have to negotiate for a proper attitude on the part of Company employees, but the record again shows that the

⁵⁵ Duke Energy Ex. 3 at 3 (Whitlock). Mr. Wathen admitted that Provision 4 added nothing to previous Company commitments. Tr. Vol. II at 17 (December 14, 2007) (Wathen)

⁵⁶ Duke Energy Ex. 3 at 3 (Whitlock).

⁵⁷ Stipulation at 5, Provision 9.

Company is already “in the midst” of a plan to make improvements with the assistance of a consultant without the need for the Stipulation.⁵⁸ Provision 10 does not adopt Liberty Recommendation IV-3 that would prohibit reductions in 2008 budgets that support Beckjord operations.⁵⁹ Instead, Provision 10 contains the “watered down” version according to which Company funding levels will “maintain reliability and safety at its Beckjord Generating Station in 2008.”⁶⁰ Duke Energy Witness stated that Provision 10 documented the Company’s “different view”⁶¹ from that of Liberty regarding the power plant whose operations are the subject of considerable criticism by Liberty.⁶²

Finally, the portion of Stipulation Provision 2 that provides for a true-up for 2007 SRT costs is a subject addressed in the Post-MDP Rider Order, and is inappropriately combined with matters considered in these proceedings. The Post-MDP Rider Order stated that “Duke [shall] work with staff to determine a reasonable period over which the amounts authorized by this Opinion and Order should be trued-up and collected.”⁶³ Having been previously ordered by the Commission, and the subject of an earlier Duke Energy stipulation that was adopted in the Post-MDP Rider Order, the true-up should not have been a matter of negotiation by any parties to gain a reasonable result from these cases.

The Stipulation contains numerous faults. The Commission should order the

⁵⁸ Tr. Vol. II at 27 (December 14, 2007) (Wathen).

⁵⁹ Stipulation a 5, Provision 10; compare with Liberty Report at ES-8.

⁶⁰ Id., Provision 10.

⁶¹ Tr. Vol. II at 29 (December 14, 2007) (Wathen).

⁶² Liberty Report at V-11 through V-12.

⁶³ Post-MDP Rider Order at 30 (November 20, 2007).

Company to comply with all the recommendations contained in the Liberty Report in order to provide customer benefits and serve the public interest that are contemplated by the PUCO's second settlement criterion.

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

The Commission decided in 2004 that the audit process was important, and that the Company's plans to simply impose the FPP and SRT charges without Commission oversight (unless the PUCO Staff questioned these charges) was not sufficient to protect the public interest. The audit procedures resulted from the Commission's decision that it would "consider the reasonableness of expenditures" because "[i]t is not in the public interest to cede this review."⁶⁴ Duke Energy has been able to avoid adopting the most significant auditor recommendations by Commission-appointed auditors through a process of stipulating with the PUCO Staff.⁶⁵ The Stipulation in these cases would, if adopted by the Commission, continue the Company's ability to avoid making changes as the result of significant and recurring audit recommendations. Adopting the Stipulation would cede Commission review of Duke Energy's FPP and SRT charges to a Company-dominated process that rejects the recommendations of Commission-appointed experts.

The Commission should also be concerned that Duke Energy inappropriately seeks to resolve matters in the above-captioned cases that were the subject of the PUCO's previous determinations. As stated previously, the Company was already ordered to resolve the issue of a true-up of SRT accounts for 2007 in the Post-MDP Rider Order

⁶⁴ Post-MDP Service Case Entry at 10 (November 23, 2004).

⁶⁵ See, e.g., Post-MDP Rider Order. A stipulation that rejected many of the previous recommendations by the EVA auditor regarding the FPP and SRT charges was executed by only Duke Energy, the PUCO Staff, the Ohio Energy Group (a group of industrial customers), the City of Cincinnati, and persons who did not intervene in the underlying cases.

issued on November 20, 2007.⁶⁶ There is no reason for Duke Energy to collaterally deal with this same matter in the instant cases.⁶⁷ Good reason exists for the resolution of the SRT true-up in Case Nos. 05-724-EL-ATA (“Post-MDP Rider Case”), et al., the case that gave rise to the Post-MDP Rider Order. The resolution of the SRT true-up in the Post-MDP Rider Case would permit a check on proper implementation of the Post-MDP Rider Order that involved the parties who intervened in that case and had sufficient interest in that case (i.e. according to the PUCO’s determinations). Furthermore, non-Company parties to the instant case should not be pressed to bargain for a SRT true-up result that has already been ordered by the Commission.

The Commission should adhere to important regulatory policies and practices by adopting all of the Auditor’s recommendations. The Stipulation submitted by Duke Energy undermines the audit recommendations, and also undermines Commission orders when it contains terms that are the subject of a previous PUCO Order. The settlement package, therefore, violates important audit and regulatory oversight policies and practices.

III. CONCLUSION

The OCC supports the positions presented in the Liberty Report that contains the audit ordered by the Commission. Some of Liberty’s recommendations echo the observations and recommendations in previous management performance audits. The Auditor’s serious appraisal and review of the Company’s performance, in an effort to

⁶⁶ Post-MDP Rider Order at 30.

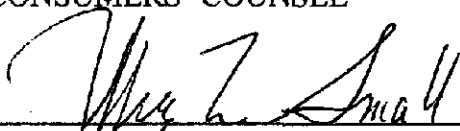
⁶⁷ The bill format issues, also the subject of the Post-MDP Rider Order, is the subject of Case No. 07-1205-GE-UNC because of another improper attempt by Duke Energy to collaterally deal with matters over which the Company has already received a PUCO order.

protect customers against unreasonable charges, warrants the adoption of significant recommendations rather than the approval of Company-submitted proposals that undermine important audit recommendations.

In the alternative, the Commission should modify the Stipulation (or provide explicit, clarifying interpretations) so its terms are not later used by Duke Energy to claim compliance when the Company makes few or no substantive changes. Such modifications/clarifications may also serve to eliminate additional litigation over whether Duke Energy complied with the results of these cases.

Respectfully submitted,

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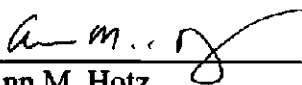
A handwritten signature in black ink, appearing to read "Jeffrey L. Small", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Initial Post-Hearing Brief by the Office of the Ohio Consumers' Counsel has been served electronically (as instructed by the Attorney Examiners) upon the following attorneys this 7th day of January 2008.


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