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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of The East Ohio Gas Company d/b/a Dominion East Ohio and Related Matters	Case No. 05-219-GA-GCR

THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO'S MEMORANDUM CONTRA APPLICATION FOR REHEARING OF OFFICE OF THE OHIO CONSUMERS' COUNSEL

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The East Ohio Gas Company d/b/a Dominion East Ohio ("DEO"), pursuant to Rule 4901-1-35(B), Ohio Administrative Code ("O.A.C."), submits its Memorandum Contra Application for Rehearing of the Office of the Ohio Consumers' Counsel ("OCC").

I. INTRODUCTION

OCC's Application for Rehearing reads like the script for a sequel to a bad "B" movie. Like most sequels, the story OCC tells on rehearing relies on the same themes that OCC used to tell its story in its post hearing briefs: mischaracterization and illusion. As a result, the sequel is no more compelling than the original.

At hearing, OCC alleged that DEO engaged in improper transactions with its affiliate, Dominion Hope ("Hope"), involving gas purchases as first of the month index ("FOMI") prices. OCC attempted to prove its allegations through the testimony of Mr. Paul Kroll, a former Hope employee. On rehearing, OCC alters its script by suggesting that Mr. Kroll's testimony was unnecessary and that there is no need for evidence that the FOMI transactions were improper. The transactions, OCC now says, were "on [their] face" unreasonable. (OCC App. p. 19.) What is more, OCC now claims that the Commission should order an audit not only of DEO's FOMI transactions with Hope, but "all of DEO's FOMI purchases" with anyone. (*Id.* at 20.) OCC dismisses all of the evidence explaining the purpose and structure of these transactions as nothing but a "claim." But all of this gets OCC nowhere. OCC has not and cannot rebut the simple fact that the FOMI transactions made no difference in the price of gas paid by GCR customers. And there certainly is no need to re-audit transactions that have already been audited.

A similar script change occurs in OCC's discussion of park, loan and exchange ("PLE") transactions. Here, too, OCC tries to dismiss the evidence concerning PLE transactions as nothing but "claims." OCC can call the testimony what it wants. OCC has offered nothing to refute testimony establishing that the capacity used to engaged in PLE transactions is different from the capacity used to serve GCR customers, and that GCR customers paid only for the capacity acquired and utilized on their behalf. All of this is explained in the Case No. 03-219-GA-GCR Order, and OCC has offered nothing to support a change in policy established by that order.

OCC also attacks the Stipulation entered in this case. OCC first contends that the Commission acted unlawfully by approving a stipulation that OCC was not a party to. OCC tries to suggest that, although it participated in settlement discussions, it was somehow "excluded" from the settlement process by virtue of the fact that it chose not to sign the Stipulation. But OCC was not excluded from anything. OCC excluded itself from the Stipulation by deciding not to enter into it. This is a wholly different situation than what occurred in *Time Warner AxS v. Public Util. Comm'n* (1996), 75 Ohio St. 3d 229, the case relied on by OCC, where the Supreme Court of Ohio expressed "grave concern" about stipulations entered into after other parties are excluded entirely from the settlement process. OCC participated in the settlement process but ultimately concluded it was not in its interests to sign the Stipulation. OCC then had a full and fair opportunity to litigate any issues it wanted. The fact that there was a Stipulation in which

OCC was not a signatory did not preclude OCC from litigating the issues addressed in the Stipulation.

Because the facts in this case do not warrant rehearing under existing law, OCC next asks the Commission to change the law to fit the facts. Specifically, OCC asks the Commission to "refine and amend" the criteria is has used for over 20 years in reviewing stipulations. OCC's point is not entirely clear. Even if the Commission were to adopt OCC's proposed criteria, the stipulation entered in this case would meet them. Be that as it may, what OCC really wants is to secure veto power over stipulations. The Commission has already determined that OCC cannot hold parties hostage through veto power over stipulations. In arguing otherwise, OCC offers no new arguments that the Commission hasn't already heard before.

OCC's story was not a hit during its initial release, and it certainly is not now. Having failed to offer evidence that the Commission's Order is in any way unreasonable or unlawful, the Application for Rehearing should be denied.

II. ARGUMENT

A. The Commission Correctly Found That GCR Customers Were Not Harmed By PLE Transactions And That Its Policy Regarding Such Revenues Is Appropriate.

1. Extensive record evidence supports DEO's "claims" regarding the capacity used to make PLE transactions.

Throughout this proceeding, OCC has consistently ignored or mischaracterized any evidence that it doesn't like. In this instance, OCC reduces scores of pages of the hearing transcript to a mere "claim" by DEO that different types of transactions require different assets. In so doing, OCC ignores lengthy testimony from Mr. Murphy that differentiated GCR assets used for capacity release transactions from the non-GCR assets used for PLE transactions (Tr. 1 pp. 121-126) and that described why assets that could be used for various types of transactions are not interchangeable. (Tr. 1 pp. 130-137.) OCC had ample opportunity to question Mr. Murphy further regarding his testimony on those issues. Furthermore, OCC offered no evidence to contradict Mr. Murphy's statement that "certain transactions such as capacity release transactions are made using capacity acquired for GCR customers. Other transactions such as these park and loan transactions are made using capacity held for operational balancing purposes. They are not the same pool. They are held and acquired for different purposes." (Tr. 2 pp. 238-239.) This "claim" is sworn testimony. It is evidence. And OCC had the opportunity to cross examine Mr. Murphy about it. OCC's failure to do so does not reduce the evidence to a mere "claim."

Unlike OCC, the Commission clearly understood that there are differences in the kinds of capacity held by DEO. In summarizing Staff's position on the PLE transactions issue, the Commission noted the lack of interchangeability among different types of capacity. (Order, p. 15.) In summarizing DEO's position, the Commission cited numerous points made by Mr. Murphy throughout the hearing regarding the distinction between GCR and non-GCR capacity. (Order, p. 16.) That is a topic with which the Commission is already familiar, having discussed it at considerable length in its June 29, 2005 Entry on Rehearing in Case No. 03-219-GA-GCR. OCC did not produce any evidence contradicting DEO's position for one simple reason – it could not.

2. The Commission correctly recognized that the issue regarding retention of PLE revenues is whether GCR customers paid for the capacity.

With new arguments hard to come by, OCC resorted to the same tired script that failed to convince the Commission in DEO's last GCR proceeding. As noted by the Commission at paragraph 6 of its Entry on Rehearing in Case No. 03-219-GA-GCR, "the relevant issues are whether GCR customers had the reserved capacity available to them at all times during the audit period and whether that capacity was unaffected by Dominion's PLE transactions." After considering the issue at length in the prior case, the Commission determined that "Dominion did not use GCR-funded capacity when it engaged in PLE transactions because the capacity used for Dominion's PLE transactions during the audit period did not exceed the amount of capacity allocated to non-GCR customers, and Dominion ensured that GCR customers had available to them at all times during the audit period the capacity they had paid for and that was purchased to serve them." (*Id.*) As a result, the Commission found that DEO was "under no obligation to share the revenue derived from PLE transactions during the audit period." (*Id.*) Despite OCC's efforts to recast the issue by alleging that the capacity used to make PLE transactions was interchangeable with other capacity that could have been used for other transactions, there have been no facts introduced in this proceeding that warrant a change in the Commission's policy on how PLE transaction revenue is treated by DEO. There is no evidence to support rehearing on this issue.

B. The Commission Correctly Determined That GCR Customers Were Not Harmed By DEO's FOMI Purchases From Hope.

1. The transactions occurred prior to the audit period and are not subject to rehearing absent a demonstration of clerical error or fraud.

As the Commission recognized in the Order, the FOMI purchases from Hope preceded the audit period under review in this proceeding. (Order, p. 10.) In the past, the Commission has permitted a review of pre-audit period transactions under only limited circumstances involving either clerical errors or when there have been allegations that the company has been involved in fraudulent transactions. *Consumers' Counsel v. Public Util. Comm'n* (1985), 16 Ohio St. 3d 9; *In Re: Columbus Southern Power Co.*, Case No. 87-102-EL-ECF (Dec. 29, 1987 Entry on Reh'g.) No party in the case has suggested that there were clerical errors involving the FOMI purchases from Hope. Mr. Kroll, in fact, testified that the transactions were fraudulent because they were recorded accurately – a position the Commission found to be "dubious at best." (*See* Tr. 2 at 155, Order, p. 11.) And OCC does not suggest in its Application for Rehearing that fraud was committed. That is critical. While OCC goes on at length to question the reasonableness of the pre-audit period transactions, it makes no claim that those transactions were fraudulent, and therefore has failed to establish any basis for reviewing the pre-audit period transactions.[1]

2. The record evidence supports DEO's "claims" regarding purchases of FOMI priced gas from Hope.

The record plainly establishes that there was nothing improper about DEO's gas purchase from Hope at FOMI prices. As it attempted to do with the PLE transaction issue, OCC reduces scores of pages of expert testimony to a mere "claim." It is interesting that OCC takes that position, since Mr. Walther, who explained the purchases, was called to testify as a witness on behalf of OCC, not DEO. But, unfortunately for OCC, Mr. Walther did not advance their cause in the nearly 70 pages of his testimony contained in the hearing transcripts. Mr. Walther addressed the entire range of questions that OCC asked about the nature of the FOMI purchases from Hope, the limitation on DEO's obligation to take that gas, the risk that was present in the transaction, and the potential impact of the transactions on DEO's GCR customers. In a desperate attempt to make its point, OCC even resorted to attacking Mr. Walther, claiming that his description of the relative risk of the transactions "reflects on either his poor judgment, in which case he should not be in the position he has, or his veracity." (OCC App., p. 19.) The M/P Auditor viewed Mr. Walther quite differently, finding that "the capabilities of all of the individuals in the [Gas Supply] department are strong and consistently applied." (Audit Report,

[1] If the Commission issues an entry on rehearing in this case, it should clarify that pre-audit period transactions are beyond the scope of an M/P audit unless there is a demonstrable showing of clerical error or fraud. Otherwise, there is the prospect that parties may revisit the "prudence" of prior period transactions by merely *alleging* clerical error or fraud.

pp. I-16 – I-17.) Mr. Walther's testimony over the two days of hearing consistently reflected his in-depth understanding of DEO's gas procurement process. OCC had ample opportunity to follow up on any "claims" that it felt were unsubstantiated. The fact that it failed to do so reflects on OCC's judgment, not any lapse of judgment on Mr. Walther's part.

3. DEO's FOMI purchases from Hope did not increase the cost of gas to GCR customers.

The Commission got it right when it found that DEO's FOMI purchases from Hope were not unreasonable. The fundamental question regarding those purchases is straightforward: Did the transactions increase the cost of gas to GCR customers? The answer is equally straightforward: No. DEO's FOMI purchases from Hope did not increase the cost of gas to DEO's GCR customers. At various points in the hearing, Mr. Walther explained why: If DEO hadn't purchased the gas from Hope at the FOMI price, it would have bought it from someone else at the same price. (Tr. 2, pp. 229-230.)

Although OCC may not have understood Mr. Walther's explanation, it was nonetheless very basic. After explaining that DEO bought gas from Hope on a base load as well as a volume flexible monthly basis, Mr. Walther noted that "this purchase from Hope on a volume flexible basis through the month [at] the first of the month price was simply substituted for a base load purchase that East Ohio would have made from some third party if they weren't buying gas from Hope…." (Tr. 1, p. 226.) As a result, the FOMI purchases from Hope made no difference in the cost GCR customers paid for gas.

It is fascinating that OCC seizes on Mr. Walther's explanation as some sort of admission. (*See* OCC App., p. 17-18.) In focusing on the structure of DEO's FOMI purchases from Hope, OCC places form over result and, in so doing, completely misses the point. The fact that Hope was able to take advantage of certain hedging opportunities afforded by a pricing structure approved by the West Virginia Commission had no bearing whatsoever on the cost of gas purchased by DEO. In the absence of those purchases, DEO would have simply bought the gas in a different pattern (*i.e.*, base load as opposed to volume flexible) but at the same FOMI price. Thus, contrary to OCC's claim, there is no basis to suggest that the transactions were not reasonable "in result." (*Id.*, p. 12.) The Commission correctly recognized that DEO's GCR customers were not adversely impacted by the FOMI purchases.

The fact that daily prices vary from the first-of-month index comes as no surprise to anyone. DEO understands that. The M/P Auditors understand that. Even OCC understands that. However, OCC draws the wrong conclusion from that fact. OCC implies that, rather than make volume flexible purchases at an established FOMI price, DEO should have held back from buying a certain volume of FOMI-priced gas under speculation that it could buy the gas later on in the month at a lower price in the daily market. DEO has never purchased gas in that fashion, and no M/P Auditor has ever recommended that it implement such a practice. It is OCC's implied approach of betting on lower daily prices that would be imprudent, not DEO's long-standing approach to purchase FOMI price gas.

As Mr. Walther explained, DEO's FOMI purchases from Hope were based on overall system requirements: "East Ohio purchases gas – you know, on first of the month basis virtually every month. I don't know a month we haven't. We need a certain amount of gas to operate the system and that was just another purchase at first of the month index." (Tr. 1, p. 216.) In his role as the Director of the LDC Gas Supply Group, Mr. Walther participates extensively in the gas procurement planning process, and his testimony regarding DEO's alternatives to purchasing FOMI-priced gas from Hope is based on his in-depth knowledge of that process. It is OCC, and not the Commission, that has misapprehended the manifest weight of the evidence, which clearly points to no adverse impact on GCR customers from DEO's FOMI purchases either before or during the audit period.

4. The Commission correctly found that DEO's practice of purchasing FOMI-priced gas was no more risky than any other purchasing strategies.

OCC devoted considerable attention to the "risk" entailed in the FOMI transactions. As Mr. Walther explained, however, whatever risk was present was borne by Hope, not DEO. Thus, the simple answer to OCC's question concerning why DEO did not receive a "risk premium" from Hope is that DEO was not undertaking any risk by entering into the transactions. (*See* OCC App., p. 18.) In describing the risk of Hope buying gas under a so-called straddle arrangement with a third party,[2] Mr. Walther pointed out that "Hope's primary risk was that if gas was sold to Hope, it might not be able to consume the gas or inject it into storage. It might have to go out into the market and resell the gas. If it did, it might have to sell the gas at a loss. By being able to sell that gas to East Ohio, Hope reduced that risk." (Tr. 1, p. 225.) The critical point missed by OCC, but not the Commission, was that a reduction in risk to Hope did not result in a shift of risk to East Ohio. As explained by Mr. Walther, "East Ohio still had the right if they were operationally unable to take it on any day, that gas would revert to Hope and Hope still had to go out into the market and sell it, so Hope didn't entirely eliminate their risk. They were still carrying the ultimate risk, but it didn't increase the risk for East Ohio because East Ohio has a much bigger market. They were purchasing large quantities of gas at the first of month price. That's their normal operation." (Tr. 1, pp. 225-226.)

The simple fact is that DEO consistently bought large volumes of gas at first of month index prices, and Hope was merely one of a number of suppliers of that gas. As the M/P Auditor

[2] The record shows that DEO was never a party to any straddle arrangements. (Tr. 1, p. 143 and Tr. 2, p. 230.)

indicated, purchasing gas at index prices is consistent with industry practice. "Most regulatory agencies contributed to the move toward index pricing by ordering or otherwise encouraging utilities to contract for gas at market-clearing [*i.e.*, index] prices." (Audit Report, p. IV-12.) In fact, the M/P Auditor went so far as to say that "contracting for specific quantities of gas at market-clearing [*i.e.*, index] prices provided protection of supply and proved to offer significant savings to consumers over the older long-term fixed-price model." (*Id.*) As many other companies do, DEO purchased gas at a recognized market-based index price. The fact that some of that gas was purchased from an affiliate under both base load and volume flexible arrangements does not change that fact. The evidence introduced at the hearing clearly demonstrated that DEO's GCR customers faced no additional risks or costs in purchasing gas under those arrangements.

5. There were no "huge losses" incurred by DEO or its GCR customers as a result of the FOMI-priced purchases from Hope.

In its ongoing attempt to distort the record, OCC alleges that DEO incurred "huge losses" on behalf of its GCR customers. (OCC App., p. 19.) It bases that assertion on a schedule prepared by Mr. Haugh that compared the cost of FOMI-priced volumes purchased from Hope to what those volumes would have cost in the daily market. In commenting on the analysis, Mr. Walther pointed out several flaws. The first is that the schedule, which was intended to quantify the impact of volume-flexible purchases, included base load purchases in the months of May 1999, November 1999, May 2001 and November 2001. (Tr. 2, p. 228.) The other problem is much more serious. "The second thing that I noticed about this exhibit is that there's a fundamental flaw in the analysis that renders the conclusion meaningless. In this analysis, Mr. Haugh assumes that … had Dominion East Ohio not been purchasing this gas from Hope, that it would be purchasing this gas in the day market on a day-to-day basis." Mr. Walther went on to explain that: "As I testified earlier, East Ohio entered in to these transactions with Dominion Hope in lieu of other base load transactions it would have made with other third parties at the same price." (Tr. 2, pp. 229-230.) Given that explanation, which OCC did not challenge or refute, the analysis performed by Mr. Haugh does not provide meaningful information. What OCC characterizes as "losses" are merely the differences in prices for gas purchased in the day market as compared to gas purchased in the monthly market. These are not losses at all, but rather evidence of a market whose prices change over time.

Not only does OCC submit an analysis that is fundamentally flawed, it attempts to color the underlying data in a very misleading way. OCC focuses attention on the number of days where DEO purchased FOMI-priced gas when daily prices were lower than the FOMI price. However, it fails to recognize that 22% of those days (122 days out of 549) involved base load supply arrangements and that 36% of the alleged "huge losses" ($1,495,600 out of $4,177,700) involved those base load periods. Of much greater concern, however, is the precedent that would be set if parties were allowed to go back and, with the benefit of perfect hindsight, quantify what would have happened if only gas were bought in another way. Both DEO and the M/P Auditor spent considerable time explaining the industry- and commission-accepted practice of purchasing gas at first of month index prices. OCC would now have the Commission go back and re-price each purchase after the fact whenever daily prices were lower than the monthly index price. If the Commission were to do that, it would also have to permit utilities to pass through higher costs whenever daily prices exceed the monthly index. Regardless of which way the numbers cut, such a process would constitute the ultimate in second-guessing.

A process of second-guessing would serve no purpose over the long run as suggested by the M/P Auditor. As Mr. Teumim explained, "if you buy a contract at the first of the month price and the gas prices exhibit volatility throughout the month, I think over a long period of time you would expect the overs and unders to work out." (Tr. 1, p. 94.) The problem, of course, is that in any given audit period, there may be a dominance of overs or unders that can lead to a much different result than one would expect over a longer period. The Commission would do all stakeholders in the GCR audit process – companies, interveners, customers and itself – a great disservice by heading down the 20-20 hindsight path suggested by OCC.

Lastly, it is worth noting that OCC is trying to have its cake and eat it too. Mr. Murphy testified as to the benefit that GCR customers get from commodity acquired under DEO's non-GCR operational balancing capacity. (Tr. 2 pp. 248-252.) The Commission's Order noted that over the audit period, GCR customers benefited by $11.2 million from reduced costs attributable to that operational balancing supply being purchased at a lower price over the summer injection period, injected into non-GCR operational balancing storage capacity, and then being sold at cost to GCR customers over the winter. (Order, p. 17, fn. 11.) The amount of that direct benefit to GCR customers considerably exceeds the alleged "huge losses" of $4,177,700 which, as noted above, are illusory and baseless.

6. No further audit of the FOMI transactions is necessary because an in-depth audit of affiliate transactions covering the period in which DEO purchased FOMI-priced volumes from Hope has already been conducted.

Just in case its attempt to get another bite at the disallowance apple fails, OCC recommends that the Commission duplicate an entire audit that was performed in 2003. In accordance with the Commission-approved stipulation among the company, OCC and Staff in Case No. 01-219-GA-GCR, DEO performed a detailed internal audit of affiliate gas procurement transactions for 2000, 2001, and 2002. (*See* December 13, 2002, Stipulation and Recommendation in Case Nos. 01-219-GA-GCR and 01-319-GA-FOR, pp. 3-4.) In that stipulation, DEO agreed to conduct an internal audit of affiliate transactions and have its internal audit staff discuss the scope of the audit in advance with OCC and Staff to make sure that it covered all of the areas that they wanted to address. Thus, not only did OCC help craft the exhaustive audit scope identified in the stipulation, it also had the opportunity to request additional areas of inquiry into the very transactions it is now asking the Commission to review all over again. OCC never raised any concerns with respect to that audit or its conclusions. It cannot now suggest that a brand new audit be conducted covering the same ground. Enough is enough. The Commission should reject OCC's call for yet another audit of these transactions that have now been reviewed by a prior M/P Auditor, DEO's internal auditing group and, by virtue of their review of that audit, Staff and OCC, not to mention the Commission itself in prior *m/p audit proceedings.*

C. The Commission Did Not Act Unreasonably Or Unlawfully in Approving the Stipulation.

1. OCC was not excluded from the settlement process.

OCC relies on *Time Warner AxS v. Public Util. Comm'n* (1996), 75 Ohio St. 3d 229 to argue that approval of the Stipulation was unreasonable and unlawful because "OCC, the statutory representative of residential customers, was not a signatory party to the stipulation." (*OCC App., p. 3.*) "Therefore," according to OCC, "the settlement negotiations were on their face unacceptable pursuant to *Time Warner*." (*Id.*) But OCC mischaracterizes *Time Warner*, which contains no holding about stipulations. Although the case came to the court through an appeal of a partial stipulation adopting an alternative form of regulation for Ameritech Ohio, the court never ruled on the reasonableness of the stipulation. The court reversed the Commission order based on its determination that the Commission acted outside the scope of its statutory authority in approving a stipulation that provided for a form of alternative regulation that was contrary to statute. *Id.* at 240-41. Although the court commented, in a footnote, that it had "grave concerns" about the stipulation because it "arose from settlement talks from which an entire customer class was intentionally excluded," the court made clear that "[w]e would not create a requirement that all parties participate in all settlement meetings." *Id.* at 233 n.2. The court limited its criticism to "the commission's adoption of a partial stipulation which arose from the exclusionary settlement meetings." *Id.*

Here, OCC was not excluded from the settlement process. It was invited to the settlement table along with all other parties. Indeed, in their Application for Rehearing, OCC acknowledges that it was "present during settlement discussions." (OCC App., p. 3.) OCC's decision not to enter into the Stipulation cannot be considered "exclusion" from the settlement process by the signatories to the Stipulation. *OCC excluded itself* from the Stipulation by deciding not to enter into it. Exclusion from the settlement *process* and self-exclusion from a stipulation are two very different concepts.[3] There is no error in approving a partial stipulation so long as "[t]he record shows that the commission afforded [non-signatory parties] full opportunity to present evidence with respect to all contested issues." *City of Akron v. Public Util. Comm'n* (1978), 55 Ohio St. 2d 155, 158. That is exactly what happened here, and OCC does not argue otherwise.

The "Zimmer Plant Case," Case No. 84-1187-EL-UNC (Opinion and Order of Nov. 26, 1985) also does not help OCC's cause. OCC relies on this case for the proposition that a "diversity of interests represented by the signatory parties" is required before the Commission may find that a stipulation is reasonable. (OCC App., p. 4.) This, too, is a mischaracterization.

[3] Although OCC acknowledges that it was "present during settlement discussions," it suggests something to the contrary when it says, at page 5 of its rehearing application, "the parties were not in agreement and whole classes of interests *were intentionally excluded from the settlement negotiations.*" (p. 5) This is either a misstatement, or an attempt to shoe-horn the underlying proceedings to fit the dicta from *Time Warner* regarding exclusionary settlement agreements. Regardless, DEO unequivocally states that OCC was not excluded.

The Commission cited the "diversity of interests" as but one of several factors supporting the reasonableness of the settlement package. The Commission did not state that a "diversity of interests" must be represented in every stipulation. Nor did it suggest that there cannot be a "diversity of interests" where a party in the proceeding does not enter into a stipulation. That can't be what the Commission meant because in the *Zimmer Plant* case, the City of Cincinnati refused to enter into the stipulation, but the Commission still approved it. It is hard to understand why OCC thinks this case helps them.

Partial stipulations are common in Commission proceedings, particularly where there are complex issues and diverse parties. There is nothing inherently unreasonable with a partial stipulation, provided that all parties are offered a seat at the settlement table. That happened here. That OCC couldn't get what it wanted out of a settlement does not taint the entire settlement process. Nor does it change any fact cited by the Commission in explaining the overall reasonableness of the Stipulation.

2. The Commission does not need to "refine and amend" its well-settled criteria for reviewing stipulations.

Faced with a situation where it cannot make the facts fit the law, OCC urges the Commission to change the law to fit the facts. Specifically, OCC asks the Commission to "modify the criteria that it has relied on in the past to determine the reasonableness of settlements before the PUCO." (OCC App., p. 6.) This, of course, is an admission by OCC that the only way the Commission could find that it erred in approving the Stipulation is to re-write the rules.[4]

[4] The irony of OCC's position is that the Stipulation entered in this proceeding meets each of OCC's five "refined" criteria. First, "All intervenors should have a fair and reasonable opportunity to participate in the settlement discussions so that their interests are addressed." OCC admits, at page 3 of this brief, that it had such an opportunity. Second, "All side-agreements that are entered into as an incentive for settlement should be entered into the record." There were no side agreements in this proceeding, nor did OCC request any during discovery. Third, "There should be an opportunity for all parties opposing the settlement to conduct discovery and prepare their case so that the PUCO has a full record not only from the proponents of a settlement, but also from the opponents." OCC had that opportunity here, evidenced by the fact that there was significant discovery and a hearing. Fourth, "There

For many years, the Commission has reviewed stipulations under the following criteria: (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? These criteria have been tried and tested at the Supreme Court of Ohio on many occasions. *E.g., Ohio Consumers' Counsel v. Public Util. Comm'n of Ohio* , 111 Ohio St. 3d 300, 2006-Ohio-5789, ¶79; *Constellation NewEnergy, Inc. v. Public Util. Comm'n,* 104 Ohio St. 3d 530, 2004-Ohio-6767, ¶ 8; *Office of Consumers' Counsel v. Public Util. Comm'n* (1992), 64 Ohio St. 3d 123, 126 ("We endorse the commission's effort utilizing these criteria to resolve its cases in a method economical to ratepayers and public utilities.").

OCC complains that the "the problem with the manner in which current criteria are applied is that the criteria permit settlements to occur that include some, but not all, of the knowledgeable parties." (OCC App., p. 7.) This argument stems from a fundamental misapprehension of what a stipulation is, and what it isn't. OCC equates the term "stipulation" with "settlement" and concludes that when a stipulation is entered into without the consent of all parties, the stipulation "cannot and does not reflect a meeting of the minds or compromise in which all those interests and perspectives have been taken into account." (*Id.* at 7.) A stipulation reflects a "meeting of the minds" only with respect to the signatory parties. The Commission

(continued...)

should be a requirement that the parties supporting the settlement bear the burden of proving that the settlement is just and fair." The Commission's existing criteria already require stipulating parties to prove the reasonableness of a stipulation, and the Opinion and Order provides ample evidence that that burden has been met. Fifth, "Any settlement that excludes an entire class of customers should be subject to greater scrutiny and a higher burden of proof with regard to the public interest." OCC was not "excluded" from a "settlement." OCC participated in settlement negotiations concerning the stipulation and elected not to enter into it. It had ample opportunity to present evidence on contested issues. The adversarial process and the Commission's duty to review settlements provided the very "scrutiny" that OCC advocates.

understands that. A stipulation cannot bind non-parties, who remain free to present their position at hearing, just as OCC did in this proceeding. Nor does a stipulation preclude Commission review of the issues subject to the stipulation. In determining the reasonableness of a stipulation, the Commission considers *all* interests, and not just the interests of the stipulating parties. "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 binding upon the commission." *Office of Consumers' Counsel,* 64 Ohio St. 3d at 125, *quoting Duff v. Public Util. Comm'n* (1978), 56 Ohio St. 2d 367, 379. Although the Commission may take a stipulation into consideration, the Commission "must determine what is just and reasonable from the evidence presented at the hearing." *Id.* The Order in this case outlines in significant detail the evidence relied on by the Commission to conclude that the Stipulation is just and reasonable for *all* interested parties, including GCR customers. (*See* Order, pp. 19-24.)

OCC also does not answer the question of what is so bad about partial stipulations. Different stakeholders in Commission proceedings represent different interests. Sometimes, all parties are able to reach agreement on all issues. Other times, some parties reach agreement on some issues. And sometimes, nobody is able to agree on anything. Allowing parties to settle uncontested issues saves public and private resources by avoiding the need for evidentiary hearings. *See Consumers' Counsel,* 64 Ohio St. 3d at 125 (stipulations allow Commission "to resolve its cases in a method economical to ratepayers and public utilities."). The trend in courts and administrative agencies throughout the country has been to adopt policies that promote settlements, not hinder them. The Commission is in step with these policies. For example, the amended procedural rules recently promulgated in Case No. 06-685-AU-ORD will require settlement conferences in all complaint cases. *See* Amended Rule 4901-9-01(G). OCC's zerosum proposition of requiring all parties to settle, lest none of them may settle, would reduce the number of settlements and is squarely at odds with Commission policy.

OCC also complains, without explanation, that approval of the stipulation in this case under existing criteria "has effectively shifted the burden of proof from the Company to the parties opposing the stipulation." (OCC App., p. 7.) The Order makes no such finding, nor can one be implied. The Commission's Order sets out in meticulous detail the reasons supporting a finding of reasonableness of the stipulation. It addresses evidence offered by OCC to attempt to rebut DEO's evidence. The fact that OCC lost does not lead to the conclusion that the Commission "shifted the burden of proof." Likewise, while OCC criticizes the Commission's review of stipulations as "cursory" (OCC App., p. 8), no examples are provided to support this irresponsible statement. Regardless, the Order in *this proceeding* is anything but "cursory."

Of course, OCC's real objective is not to seek correction of any alleged errors that occurred in this proceeding regarding review of the Stipulation. What OCC wants is precedent giving it veto power over stipulations in future proceedings, in the name of the "public interest." (*Id.* at. 7.) OCC does not represent the "public interest." It represents the interests of residential ratepayers, which is but one of many interests that comprise the "public interest." And OCC is not the regulator. The Commission is the regulator. It is the Commission's job, not OCC's, to decide whether stipulations are reasonable and in the public interest. That is why the Commission has refused to grant such veto power when OCC has asked for it before. If the Commission were to require unanimity in stipulations, "dissenting parties could exercise a virtual veto over any such partial settlement agreements." *In Re: The East Ohio Gas Co. d/b/a Dominion East* Ohio, Case No. 05-474-GA-ATA (Opinion and Order of May 26, 2006, at p. 13.) OCC should quit asking for something that it isn't entitled to.

III. CONCLUSION

One thing that is clear about OCC's sequel is that it is not a documentary. It contains much more fiction than fact. But even as fiction, it requires too much suspension of disbelief to be credible. The evidence proves that DEO's purchasing policies and practices both before and during the audit period were reasonable and prudent in all respects. The evidence proves that GCR customers are not disadvantaged by PLE transactions. DEO has met its burden of proof. None of its proof was rebutted. All OCC can offer is mischaracterization and speculation. The Commission should deny the Application for Rehearing in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing The East Ohio Company d/b/a Dominion East Ohio's Memorandum Contra Application for Rehearing of Office of the Ohio Consumers' Counsel was delivered to the following via regular U.S. Mail this 12th day of March, 2007:

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