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 dba Dominion East Ohio and Related Matters.	)))))	Case No. 05-219-GA-GCR

ENTRY ON REHEARING

The Commission finds:

(1) On January 31, 2007, the Commission issued an opinion and order approving and adopting a stipulation among staff, The East Ohio Gas Company dba Dominion East Ohio (DEO), Interstate Gas Supply (IGS), Industrial Energy Users-Ohio (IEU). The Office of the Ohio's Consumers Counsel (OCC) and Consumers for Fair Utility Rates, The Greater Cleveland The Housing Network, the Neighborhood Environmental Coalition and the Empowerment Center of Greater Cleveland (Citizens Coalition) did not sign the stipulation. The stipulation resolved all of the issues in this proceeding except two that were raised by OCC. The first issue related to the Commission's treatment of revenue derived from DEO's park, loan, and exchange (PLE) transactions, which are types of for-profit gas transactions engaged in by Dominion during the audit period. The second issue raised by OCC involved allegations that fraud was involved in DEO's pre-audit period gas transactions. The Commission found that, based on the evidence, it was unable to conclude that DEO's purchases of gas were unreasonable, unlawful, or improper and that the evidence presented did not support the allegations of fraud. The Commission also found that there was no basis to modify its policy on how PLE transaction revenue is treated by DEO.

(2) Section 4903.10, Revised Code, indicates that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined by filing an application within 30 days after the entry of the order upon the journal of the Commission.

(3) On March 2, 2007, OCC filed an application for rehearing of the Commission's January 31, 2007 opinion and order. In its rehearing application, OCC raises four assignments of error. On March 12, 2007, DEO filed a memorandum contra OCC's application for rehearing.

(4) In its first assignment of error, OCC contends that, in considering whether to approve the stipulation, the Commission should have, but failed to consider whether it was the product of serious bargaining among a representative cross-section of interested parties, including parties that represent the customers who will pay rates under the stipulation. OCC argues that the Commission erred by approving a stipulation among DEO; IGS, a marketer; IEU, which represents large industrial customers; and the staff; but which had no signatories from representatives of customers who pay the gas cost recovery (GCR) rate. As a result, OCC maintains that the interests of the entire class of residential customers were excluded from the final stipulation. OCC argues that a settlement reached without the participation of an affected customer class cannot be a settlement and that, therefore, the Commission should find that there was no settlement, at least with respect to the issues affecting GCR ratepayers.

(5) In its memorandum contra, DEO notes that OCC was not excluded from the settlement process and was invited to the settlement table along with all other parties. DEO argues that the only exclusion suffered by OCC was self exclusion from the stipulation. DEO also argues that there is nothing inherently unreasonable in a partial stipulation provided that all parties are offered a seat at the settlement table as happened here and where the record shows that the Commission afforded non-signatory parties a full opportunity to present evidence with respect to all contested issues.

(6) We find no merit to OCC's first assignment of error. As we noted in our opinion and order, we found that the stipulation satisfied the three criteria that the Commission has used to approve stipulations developed in *Consumers' Counsel v. Pub. Util. Comm.* (1992) 62 Ohio St. 3d 123. Specifically, we found that the settlement is a product of serious bargaining among capable, knowledgeable parties; the settlement, as a package, benefits ratepayers and the public interest; and the settlement

package does not violate any important regulatory principle or practice. In this case, we determined that the settlement process clearly involved serious bargaining by knowledgeable, capable parties.

(7) We would be remiss by not noting that in three parts of its application for rehearing, OCC appears to contort the word "excluded" to leave the reader with the impression that OCC was not permitted to participate in the settlement negotiations in this proceeding. On page three of its application for rehearing, OCC stated: "...the resulting stipulation essentially excluded OCC and residential customers because it ignored the issues of concern to OCC and residential customers." OCC also continued this line of argument on page five of its application for rehearing: "In this case, the excluded parties (GCR customers represented by the OCC) fund a large portion of the benefits for the signatories. The resulting 'settlement' is nothing more than an agreement to benefit a few at the expense of the excluded." Again on page six of its application for rehearing, OCC states: "The criteria have resulted in an unfortunate pattern wherein settlement in the form of 'stipulations and recommendations' are brought before the PUCO even though intervening parties have been systematically and deliberately excluded from the resulting settlement." In point of fact, OCC acknowledged on page three of its application for rehearing that it was present during the settlement negotiations in this case. Similarly, there was never any claim raised at any time by OCC or any other nonsignatory party to the stipulation that they were ever denied a fair and reasonable opportunity to participate in settlement discussions that took place in this case or that any party was excluded from settlement negotiations. As we noted, while not all parties signed the stipulation, all parties to this proceeding had ample opportunity to be involved in the development of the stipulation and to present evidence for the Commission's consideration. Furthermore, as we indicated in our opinion and order, the existence of the filed stipulation between some of the parties never foreclosed any nonsignatory party from requesting further negotiation of the stipulation after it was filed.

(8) We also reject the premise of OCC's first assignment of error that a stipulation in a Commission proceeding cannot be in the best interests of the customers who pay the GCR and should not

be approved unless it is signed by a representative of those customers. Stipulations, by their very nature, involve compromises agreed to in an effort to reach an acceptable agreement. There may be a multitude of reasons why any one or more parties to a proceeding may elect not to be a signatory to a stipulation among various other parties. Further, the absence of a party to a stipulation does not, in and of itself, render a stipulation not in that party's interest. In this case, the evidence demonstrated that the stipulation provisions were responsive to the concerns raised in this proceeding, responsive to the concerns raised in the auditor's report, addressed management control issues, provided for enhancements to DEO's load forecasting process, required several studies recommended by the auditor, and provided for revenue sharing where PLE transactions use GCR capacity. On whole, the evidence supported approval of the stipulation and the conclusion that the implementation of the stipulation was in the best interests of all of DEO's affected customers.

(9) In its second assignment of error, OCC claims that the Commission should refine and amend its three-prong standard for the approval of settlements, to address the due process rights of those opposing such settlements. OCC argues that the Commission's standard of review should include five additional criteria. These include the following: (a) all intervenors should have a fair and reasonable opportunity to participate in the settlement discussions, so that their interests are addressed;(b) all side agreements that are entered into as an incentive for settlement should be entered into the record; (c) there should be an opportunity for all parties opposing the settlement to conduct discovery and prepare their case, so that the Commission has a full record not only from the proponents of a settlement but also from the opponents; (d) there should be a requirement that the parties supporting the settlement bear the burden of proving that the settlement is just and reasonable;(e) 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.

(10) DEO rejects OCC's argument 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. DEO contends that, in determining the reasonableness of a stipulation, the Commission considers all interests and not just the interests of the stipulating parties. DEO claims that OCC seeks veto power over stipulations in future proceedings in the name of the public interest but that the Commission and not OCC should decide whether stipulations are reasonable and in the public interest. DEO also rejects the suggestion of OCC that the Commission's criteria for evaluating stipulations should be amended; but that even if the Commission were to amend the criteria, the stipulation would still meet these criteria.

(11) We find insufficient basis to grant OCC's second assignment of error. The Commission's long-standing standard of review for considering the reasonableness of stipulations has been discussed in a number of prior Commission proceedings. See, e.g., *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14, 1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (March 30, 2004); *Ohio Edison Co.*, Case No. 91-698-EL-FOR *et al.* (December 30, 1993); *Cleveland Electric Illum. Co.*, Case No. 88-170-EL-AIR (January 30, 1989); *Restatement of Accounts and Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC (November 26, 1985). As we noted in the opinion and order in this case, the ultimate issue for our consideration is whether the stipulation, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. We have historically based that decision on the three factors discussed in finding (6) above. While we have used these three prongs to make our determination that the stipulation in this case was reasonable, and do not elect to change that standard at this time, we are not averse to revisiting the criteria used to evaluate the reasonableness of stipulations. Nevertheless, we believe that OCC's call for additional criteria to be used to evaluate stipulations is misplaced. It is not the number of criteria used by the Commission that determines whether a stipulation should be approved; it is, rather, the analysis by the Commission on the basis of the circumstances in the proceeding at issue.

(12) However, even after evaluating this stipulation on the basis of the five additional proposed criteria suggested by OCC, we still find that the stipulation was reasonable.

With regard to OCC's first proposed additional prong, we have addressed this in Finding (7) above.

As to OCC's second proposed additional prong, there was no issue or question raised or motion filed by OCC or any other party regarding the existence or discovery of any side agreements between any two or more of the parties to this proceeding. This was a non-issue in this case.

With respect to OCC's third proposed additional prong dealing with discovery requests, OCC ultimately received all of the information that it sought in this proceeding and was afforded every opportunity to introduce any and all evidence it believed relevant to either the stipulation or any other facet of this proceeding. Indeed, even though there was opposition raised to OCC's introduction of evidence regarding DEO's gas transactions prior to the audit period, as evidence of transactions that occurred in a time outside the audit period has historically not been considered relevant to a GCR proceeding, OCC was afforded every opportunity to present any and all of the evidence it moved to introduce in this case. This evidence was considered by the Commission.

As to OCC's fourth proposed additional prong, DEO presented the testimony of Mr. Murphy, in support of the stipulation, who was subject to cross-examination by nonsignatories to the stipulation, and did bear the burden of proving that the stipulation was just and reasonable. Based on his testimony and the other record evidence, the Commission found that the stipulation should be approved.

Curiously, while previously arguing that "[a] settlement reached without the participation of an affected customer class cannot be a settlement." OCC now argues that, as a fifth proposed additional prong, 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 of that customer class. The Commission always reviews stipulations to ensure that they are in the public interest, regardless of whether all parties to the proceeding are signatories to the stipulation. The fact that the stipulation in this case was not signed by all parties necessarily causes the Commission to review the terms of the stipulation and the

evidentiary record with a higher level of scrutiny. After reviewing the record evidence, we found that the stipulation should be approved.

(13) In its third assignment of error, OCC claims that the Commission erred because the stipulation's failure to return to GCR customers certain costs that it alleges were imprudently incurred by DEO through PLE transactions and through certain pre-audit period gas purchases at first of the month (FOMI) index pricing. OCC contends that the Commission did not require DEO to demonstrate that different assets are used for PLE transactions than for other transactions. According to OCC, this is contrary to the Commission's requirement on burden of proof. OCC also argues that DEO's gas transactions based on the FOMI price were unfair to DEO's GCR customers. OCC also claims that another issue in this proceeding was that DEO's decision to engage in PLE transactions resulted in nonoptimal GCR costs that were not just and reasonable as required by Section 4905.302, Revised Code and Rule 4901:1-14, O.A.C.

(14) In its memorandum contra, DEO argues that there was extensive record evidence supporting DEO's position regarding the capacity used to make PLE transactions. DEO claims that OCC ignores the lengthy testimony from Mr. Murphy that differentiated GCR assets used for capacity release transactions from the non-GCR assets used for PLE transactions and that described why assets that could be used for various types of transactions are not interchangeable. DEO also notes that OCC had ample opportunity to question Mr. Murphy further on those issues and OCC offered no evidence to contradict Mr. Murphy's statement concerning capacity release transactions. DEO also argues that OCC made no claim that DEO's pre-audit period gas transactions were fraudulent. In addition, DEO contends that the evidence demonstrates that DEO's gas purchases from Dominion Hope did not increase the cost of gas to DEO's GCR customers

(15) We find no merit in OCC's third assignment of error. In DEO's 2003 GCR proceeding, *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. 03-219-GA-GCR, Opinion and

Order (March 2, 2005), Entry on Rehearing (June 29, 2005), Second Entry on Rehearing (August 24, 2005), we found that, "we are now convinced 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." (June 29, 2005 Entry on Rehearing, at 3). OCC has raised nothing new in its assignment of error that would change our findings on this issue.

(16) As to OCC's contention in its third assignment of error that gas purchases at the FOMI price were unfair to GCR customers, the evidence does not bear out that claim. OCC argued that such purchases were imprudently incurred by DEO and unfair on their face to GCR customers. Such claims were unsupported by the evidence of record. The evidence showed that DEO's policy was to purchase gas from many sources, including its affiliate, Dominion Hope, and all of these purchases were made at the FOMI price. We noted that the evidence showed that many times the daily price was above the FOMI price and at other times the daily price was below the FOMI price. There was insufficient evidence to demonstrate that DEO's practice of purchasing gas at the FOMI price was any more risky than purchasing gas at the daily market price or any other purchasing strategy. In addition, there was insufficient evidence presented by OCC that DEO's purchases the FOMI price were, on their face, unfair to DEO's GCR customers or that DEO's gas purchases from Dominion Hope at the FOMI price were unreasonable, improper, or unlawful. With regard to OCC's contention that DEO's decision to engage in PLE transactions did not result in optimal GCR costs that were just and reasonable, the evidence did not bear out that claim. As we found, DEO engaged in both capacity release and PLE transactions and its participation in these transactions over other types of transactions was based on the available capacity used to make those transactions. We also found that there was no evidence that DEO had latent assets that it could have used for off-systems sales and which it intentionally chose not to use. Further, we found that there was no evidence that DEO had excess capacity or that any capacity was misused by DEO. OCC

has presented nothing new in its application for rehearing that would warrant a different finding.

(17) In its fourth assignment of error, OCC argues that the Commission's finding that the DEO/Dominion Hope transactions were prudent and not unreasonable, improper or unlawful was against the manifest weight of the evidence. OCC argues that the issue in this case was DEO's purchase of gas at the FOMI price only on the days that the seller required it to purchase. OCC claimed that the only way DEO's purchases would have been prudent is if such purchases occurred every day of the month. But, according to OCC, DEO did not make such purchases every day and only made such purchases when Dominion Hope required DEO to buy. According to OCC, over a period of four years, DEO paid more than it would have if it had bought every day. OCC also claims that entering into an agreement to purchase gas or any volatile commodity at any pre-determined price, whether it be at FOMI price or not, only on days when the seller wants you to purchase gas, is on its face unreasonable. OCC claims that, "in defending its decision, the Commission filled almost one-half of a page identifying each and every one of the 17 individual days out of the 1,065 days in the period in which DEO did not in fact purchase gas from Hope at the FOMI price when the daily price was lower than the FOMI price" (OCC Application for Rehearing at 21). OCC argues that, based on its statistical analysis, there can be no doubt that DEO's GCR customers paid excessive amounts to Dominion Hope shareholders because of an imprudent and unreasonable agreement with Dominion Hope. Lastly, OCC argues that the Commission erred by not adopting the recommendation of the auditor to conduct a special audit of DEO's pre-audit period transactions.

(18) In its memorandum contra, DEO argues that the evidence does not support OCC's claims. According to DEO, it consistently bought large volumes of gas at the FOMI price and Dominion Hope was one of a number of suppliers of that gas. DEO also noted that the auditor found that DEO's purchases of gas at the FOMI price was consistent with industry practice and that such purchases provided protection of supply and proved to offer significant savings to consumer over the older long-term fixed-price model. DEO also argues that OCC's claim that GCR customers paid more for gas is incorrect and that the evidence

demonstrates that DEO's GCR customers faced no additional risks or costs by DEO purchasing gas under the arrangements. DEO also argues that what OCC characterizes as losses to GCR customers are merely the differences in prices for gas purchases in the day market as compared to gas purchased in the monthly market and that these are not losses but rather evidence of a market where prices change over time. DEO notes that in the previous GCR audit in its 2003 GCR proceeding, it performed a detailed internal audit of affiliate gas procurement transactions for 2000-2002 and it agreed to 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 of concern. According to DEO, OCC helped craft the exhaustive audit scope identified in the stipulation, and it also had the opportunity to request additional areas of inquiry into the very transactions it is now asking the Commission to review. DEO claims that OCC never raised any concerns with respect to that audit or its conclusions and it cannot now suggest that a brand new audit be conducted covering the same ground.

(19) We find no merit to this assignment of error. First, as we found in the opinion and order, the evidence demonstrated that DEO's GCR rates were fair, just, and reasonable, and that its purchasing practices and policies promoted minimum prices consistent with adequate gas supplies. The evidence also demonstrates that DEO's determination of its GCR rates for the audit period was in accordance with the financial and procedural aspects of Chapter 4901:1-14, Ohio Administrative Code (O.A.C.), that such rates were properly applied to customer bills, and that the gas costs passed through DEO's GCR clause for the audit period were fair, just, and reasonable. OCC has raised nothing in its application for rehearing that would cause us to find differently with regard to DEO's audit period transactions. Rather, OCC's claim that DEO's gas purchases were unreasonable is directed at DEO's gas purchases in years prior to the audit period of this case. As we noted in the opinion and order, the evidence did not support the claim that DEO's gas transactions in the pre-audit period were imprudent or that DEO only purchased gas from Dominion Hope at the FOMI price when daily price was lower than the FOMI price or when Dominion Hope wanted it to do so. We are surprised that OCC would be critical of the fact that, in the opinion and order, there is a lengthy discussion of DEO's

gas transactions and the transaction reports that identified the gas purchases made by DEO from Dominion Hope, the prices paid, and amounts of gas transacted for in the pre-audit period. These gas transactions were at the heart of the claims of fraud raised by OCC. Furthermore, because of the seriousness of these allegations, we determined that there should be more than just a passing reference to these transactions in the opinion and order.

(20) As to OCC's claim in its fourth assignment of error that there was some unreasonable, imprudent agreement with Dominion Hope for the purchase of gas. The evidence did not support this claim and OCC has raised no new arguments regarding this issue. The evidence demonstrated that DEO purchased large quantities of gas from many suppliers and Dominion Hope was only one of those suppliers. Additionally, the evidence did not support claims that DEO's gas transactions with Dominion Hope were unreasonable, improper, or unlawful. OCC's principal witness, Mr. Kroll, failed to present any evidence of any fraud on the part of DEO; and there was insufficient evidence presented by OCC to demonstrate that DEO was involved in a concerted effort to defraud GCR customers in this time period by purchasing gas at the FOMI price rather than the daily price or that its purchases of gas were improper or unreasonable. Further, the evidence at hearing was that DEO's GCR customers were placed at no additional risk or incurred no additional cost as under the methodology used by DEO. The evidence also proved that, if DEO was unable to take gas on a given day, such gas would revert to Dominion Hope. In that event Dominion Hope still had to sell that gas and ultimately carried the risk. In addition, as noted by the auditor, DEO's contracting for gas at the FOMI price provided protection of supply and proved to offer significant savings to consumers.

(21) OCC has also raised nothing new in the portion of its fourth assignment of error regarding our decision not to implement the auditor's recommendation on pre-audit period gas transactions. We decline to change our finding that there was an insufficient basis to recommend that an m/p audit of DEO's gas purchases during this pre-m/p audit period should be conducted. As we noted in the opinion and order, the auditor acknowledged that it was never denied access to any information regarding DEO's gas purchases either before or during the audit period of this

case. Further, as we noted, in no previous GCR proceeding for DEO has any auditor questioned DEO's gas transactions with Dominion Hope or any other entity, presented any evidence of fraud, or raised any question regarding the reasonableness of DEO's gas transactions.

It is, therefore,

ORDERED, That OCC's application for rehearing be denied. It is, further,

ORDERED, That copies of this entry on rehearing be served upon parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Judith A. Jones

Valerie A. Lemmie

Donald L. Mason

SEF:ct

Entered in the Journal

MAR 21 2007

Reneé J. Jenkins
Secretary