FILE

Office of the Ohio Consumers' Counsel

Your Residential Utility Advocate

Janine L. Migden-Ostrander
Consumers' Counsel

May 17, 2007

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

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

Dear Ms. Jenkins:

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

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

Very truly yours,

Jeffrey L. Small
OCC Counsel of Record

Cc: Persons on electronic service list

[1] Tr. Vol. III at 176-177 (March 21, 2007).

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

PUBLIC VERSION

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

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Dated: May 17, 2007

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I. INTRODUCTON

A. Prefatory Comments

The briefs submitted to the Public Utilities Commission of Ohio ("PUCO" or "Commission") in Phase I of in these cases identified the parties who supported the proposals offered by Duke Energy Ohio, Inc. ("Duke Energy Ohio" or the "Company," including its predecessor company, "CG&E") in Phase I. Those parties supporting Duke's proposals remain essentially the same in Phase II of these proceedings. This situation further demonstrates the importance of evidence regarding the side deals between the Duke-affiliated companies and parties or members of parties to these proceedings.

Serious negotiation of a stipulation regarding the Company's Fuel and Purchased Power ("FPP") tracker, System Reliability Tracker ("SRT"), and Annually Adjusted

Component ("AAC") charges could only take place with parties that represent customers who bear the full brunt of the rate increases and that have not otherwise been "captured" by the Company by means of other financial arrangements. Such serious negotiation did not take place regarding the stipulation entered into by parties and filed on April 9, 2007 ("2007 Stipulation," Joint Remand Rider Ex. 1[1]).

The OCC files this brief with redactions to protect information regarding side deals that is alleged by Duke Energy Ohio and others to be confidential, as directed by the PUCO. The OCC maintains its previous arguments that such information should be released to the public domain. The true nature of the rate plan in Duke Energy Ohio's service area should be available for public scrutiny.

B. Burden of Proof

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

[1] For notational convenience, the portions of the case before and after the Court's deliberations are cited separately. The proceedings prior to the appeal are referred to, collectively, as the "*Post-MDP Service Case*," and the proceedings after the appeal are referred to, collectively, as the "*Post-MDP Remand Case*," the latter of which was separated in some respects into Phase I and Phase II. However, a single record exists that is applicable to the ultimate decisions. Exhibit references to the portion of the proceedings in Phase I after remand from the Court contain the word "Remand" to distinguish them from other exhibits. Exhibit references to the potion of the proceedings in Phase II after remand from the Court contain the words "Remand Rider."

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

C. The OCC Position

The Commission should only approve standard service offer rates with bases that can be checked and monitored for appropriateness by the PUCO rather than being based on Duke Energy Ohio's desired rates.[2] The Commission's objective should be to approve a good proxy for market-based rates based upon measurable and verifiable costs.[3] As stated by OCC Witness Talbot, "[t]here should be no overlap or duplication of items and the components should work together to achieve standard service offer rates that provide for reasonably priced service and meet the three standards of rate stability for customers, financial stability for the company, and encouragement of competition."[4]

In support for this objective, the OCC supports the positions presented by Energy Ventures Analysis ("EVA" or "Auditor") in its report to the Commission ("Auditor's Report," PUCO Ordered Remand-Rider Exhibit 1(A)). The Auditor's Report makes many recommendations regarding the manner in which the FPP and SRT should be dealt. These recommendations should be followed to prevent the Company from making procurement decisions that are detrimental to customers. As an example, the Auditor's Report states that under the Order in the *Post-MDP Service Case*, "CG&E believed that it had the license to evaluate and select which approach [to computing the FPP] to use," "CG&E continuously modified its approach to many . . . items," and "CG&E's elections

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[2] See, e.g. OCC Initial Post-Remand Brief, Phase I, at 13-14 (April 13, 2007).

[3] OCC Remand Ex. 1 at 6 (Talbot). OCC Witness Talbot testified that rate components should "meet[ ] the double standard of reflecting measurable accounting costs and verifiable costs." Id. at 47.

[4] Id. at 17 (Talbot), noting the Commission's test for a "rate stabilization plan."

had very significant ratepayer impacts."[5] OCC-sponsored testimony also supports a prohibition against SRT charges in connection with assets formerly owned by Duke Energy North America ("DENA Assets") and currently owned by Duke Energy Ohio.

OCC-sponsored testimony supports Commission review of the charges that Duke Energy Ohio proposes for the AAC charge. The Commission should eliminate that portion of the proposed charge that can be attributed to a return on all construction work in progress ("CWIP").

II. PROCEDURAL HISTORY

The procedural and substantive history of these consolidated cases, as supplemented herein, is contained in the OCC Initial Brief, Hearing Phase I, that was submitted on April 13, 2007 and the OCC Reply Brief, Hearing Phase I, that was submitted on April 27, 2007.

Phase II of the hearing convened on April 19, 2007, and featured the submission the Auditor's Report prepared by EVA, as assisted by Larkin & Associates. Mr. Seth Schwartz of EVA and Mr. Ralph Smith of Larkin & Associates ("Larkin") supported the results of the Auditor's Report in their live testimony. The Audit's Report was prepared by EVA and Larkin for the audit period July 1, 2005 through June 30, 2006.[6] The Auditor's Report states that the Commission requested that EVA "follow the general guidance that had been provided for the Electric Fuel Component audits" from the formerly applicable Ohio Administrative Rules and that the Auditor's Report was also

[5] PUCO Ordered Remand Rider Exhibit 1 at 1-3 (Auditor's Report).

[6] Id. at 1-1.

guided by the contents of a stipulation ("FPP Stipulation") that followed EVA's submission of an earlier report on October 7, 2005.[7]

The second day of the hearing for Phase II convened on April 19, 2007 and largely dealt with the subject of the 2007 Stipulation.

III. ARGUMENT

A. The Auditor's Report Should be Followed Regarding FPP Charges.

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. The Audit's Report contained the following major recommendations regarding Duke Energy Ohio's transactions that affect FPP charges:

1. EVA recommends for the audit period that the Company pass through the native load portion of the net margins associated with the trading of DE-Ohio coal assets purchased for delivery during the audit period except for these specifically excluded by paragraph D of the [FPP S]tipulation. * * *
2. EVA recommends that DE-Ohio adopt traditional utility procurement strategies related to the procurement of coal and emission allowances and cease its "active management" of such procurements throughout the balance of the RSP period. Accordingly, DE-Ohio should develop and implement a portfolio strategy such that it purchases coal through a variety of short, medium and long-term agreements with appropriate supply and supplier diversification with credit-worthy counterparties. EVA further recommends that DE-Ohio no longer seek to flatten its position on a daily basis.
3. EVA recommends that as long as the FPP is in effect coal suppliers should not be required to allow the resale of their coal for the offers to be considered.
4. EVA recommends that DE-Ohio initiate a study to report on the recurring overstatement of coal inventory at the Zimmer station.

[7] Id. at 1-2 through 1-3.

5. EVA recommends that DE-Ohio present several alternative sensitivity analyses of key variables, i.e., emission allowance prices and market coal prices, in its transaction review and approval process.[8]

The Auditor's recommendations should be followed by the Commission.

Regarding the first major recommendation, EVA noted that Duke Energy Ohio should pass through the margins, consistent with the FPP Stipulation.[9] The FPP Stipulation should be followed, and all margins not excluded by the FPP Stipulation should be passed through the FPP.

EVA's second major recommendation that the Company should develop a portfolio approach to the purchase of coal essentially argues that [redacted][10] [redacted]

> As I discussed earlier regarding economic management and balancing our resources earlier, DE-Ohio believes that it is beneficial to purchase capacity instruments for periods longer than a year and to do so would enable DE-Ohio to take advantage of reliability and pricing opportunities in the market that would accrue to the benefit of MBSSO consumers.[11]

[8] Id. at 1-9 through 1-10.

[9] Id. at 1-7 and 2-13.

[10] Id. at 2-19.

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

[redacted][12]

On cross examination, the Auditor stated his [redacted][13] [redacted][14] -- because the Company has the statutory obligation to provide a standard service offer after 2008.[15] [redacted]

EVA's third major recommendation would permit the consideration of bids from bidders who seek to limit the resale of their coal. The Company should follow this recommendation because it opens up additional opportunities to obtain low-cost bids. [redacted][16] [redacted] Company Witness Whitlock stated that "DE-Ohio does *include the resale*

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

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

[14] Id. at 56.

[15] R.C. 4928.14(A).

[16] PUCO Ordered Remand Rider Exhibit 1 at 2-11 (Auditor's Report).

of coal as a condition on its RFPs but does not exclude an offer from consideration if the supplier will not permit the resale of coal."[17] The Company's claim that it is willing to purchase coal from suppliers who place restrictions on the resale of coal, but such coal suppliers are *told not to bid*, bodes poorly for Duke Energy Ohio's agreement in the 2007 Stipulation to accept the Auditor's third major recommendation (i.e. which the Company claims to be following at present).[18] Duke Energy Ohio should be ordered to remove the restriction on the resale of coal from its requests for proposals and to select bids on a least cost basis.

An important step needed to carry out EVA's third major recommendation is for Duke Energy Ohio to draft a policies and procedures manual for fuel procurement. An earlier audit found the Company's manual lacked detail such that "EVA did not find the [existing] document to be particularly useful or relevant."[19] The situation was not corrected by Duke Energy Ohio for the most recent audit, such that the policies and procedure manual "contains no specific information regarding such items as [redacted][20] [redacted] and the solicitation process should remove the restriction on the resale of coal.[21]

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

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

[19] PUCO Ordered Remand Rider Exhibit 1 at 2-8 (Auditor's Report).

[20] Id. (citations omitted). The recommendation is not stated under "Management Audit Recommendations" (id. at 1-9 through 1-10), but is ancillary to the major recommendations regarding coal purchasing.

[21] Id., footnote 11.

EVA's fourth major recommendation would initiate a study into the overstatement of coal inventory at the Zimmer station. The Auditor's Report states that "DE-Ohio continues to follow the PUCO guidelines for adjustment to the DE-Ohio plants."[22] The overstatement existed for all five years listed in the Auditor's Report. The Auditor's Report states that "the Zimmer situation is a problem that DE-Ohio needs to address . . . forthwith."[23] The Commission should order Duke Energy Ohio to address the persistent problem.

EVA's fifth major recommendation regarding alternate sensitivity analyses in its transaction review and approval process [redacted][24] [redacted] A sensitivity analysis will provide the Commission and the intervenors with additional information with which to evaluate the reasonableness of the price assumptions utilized by Duke Energy Ohio. The Company's assumptions could significantly affect the costs that are passed on to consumers. The analysis would also be useful for a performance audit that includes a discussion of expenses that are used in the calculation of the AAC -- further discussed in a later section -- that was recommended by OCC Witness Haugh.[25]

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[22] Id. at 2-10.

[23] Id. at 2-11.

[24] Id. at 2-18.

[25] OCC Remand Rider Ex. 1 at 5-6 (Haugh).

Duke Energy Ohio should be ordered to follow all of EVA's recommendations, those stated in the "Management Audit Recommendations" section of the Auditor's Report as well as the ancillary recommendations that follow from the findings contained within the Auditor's Report.

B. Capacity Costs Should be Based on Actual Costs, Which Excludes Charges Related to the DENA Assets at this Time.

The Commission should only approve rates based upon measurable and verifiable costs for capacity. The Reserve Margin charge in the stipulation submitted on May 29, 2004 ("2004 Stipulation," Joint Ex. 1) was inappropriately based on the hypothetical cost of building new peaking units when capacity was available at much lower prices.[26] As stated in the OCC's briefs for Phase I, the SRT is the sole successor to the Reserve Margin component in the 2004 Stipulation, the charge for lining up reserve capacity.[27] The Infrastructure Maintenance Fund ("IMF") charge should be eliminated since it was added by the Company -- without any supporting costs -- in its Application for Rehearing in the *Post-MDP Service Case*. The SRT should be reasonable, and not set to reflect any hypothetical and/or poorly documented costs proposed by Duke Energy Ohio.

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

> 6. EVA recommends that purchase of reserve capacity from DENA Assets should not be eligible for inclusion in the SRT, as is currently the case.[28]

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[26] See, e.g., OCC Initial Post-Remand Brief, Phase I, at 20 (April 13, 2007), citing OCC Remand Ex. 1 at 46 (Talbot).

[27] Id.

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

In PUCO Case No. 05-732-EL-MER (*"Duke/Cinergy Merger Case"*), the Commission found that "costs that may be related to the transfer of the DENA assets will not be . . . passed on to Ohio customers without approval of the Commission."[29] Further, in Case No. 05-724-EL-UNC, the Commission adopted a stipulation filed on October 27, 2005 ("SRT Stipulation"[30]) in which it was stated that Duke Energy Ohio could not use the DENA Assets in its SRT calculations without an application to the Commission requesting approval.[31] The record does not support any change in the prohibition against charging for the DENA Assets, and the Auditor's recommendation should be followed by the Commission.

The Auditor's Report states that Duke Energy Ohio "has not demonstrated that its native customers are paying more for capacity in the market than they would if DE-Ohio purchased capacity for the legacy DENA [plants]."[32] The Auditor's Report discusses the alternatives available to the Duke Energy Ohio:

> EVA agrees with DE-Ohio as to the types of capacity products it is considering and notes that this list may change over time. As a result, monitoring of the market for alternatives is appropriate. EVA supports the use of a greater mix of products similar to what DE-Ohio employed in 2005 rather than the heavy reliance on one type of product in 2006. Further, and as noted below, DE-Ohio should be considering the use of multi-year arrangements rather than only single-year and spot products in its mix. * * * In fact, it is not clear to EVA that DE-Ohio had previously been precluded

[29] *Duke/Cinergy Merger Case*, Case No. 05-732-EL-MER, Order at 15 (December 21, 2005).

[30] The SRT Stipulation is reviewed in the Auditor's Report. PUCO Ordered Remand Rider Exhibit 1at 6-1 through 6-2 (Auditor's Report). The SRT Stipulation itself is an exhibit in the record. OCC Remand Rider Exhibit 4.

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

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

> from doing so. EVA believes that DE-Ohio should employ a portfolio strategy similar to what EVA is recommending for fuel.[33]

Contrary to the assertion of Company Witness Whitlock, therefore, EVA recommends the expansion of options applied by Duke Energy Ohio beyond the limited options selected by the Company's management in order to hold down costs for consumers.[34] OCC Witness Haugh pointed out that the "Company [did] not provide[ ] any market pricing mechanism in its Application."[35] Mr. Haugh stated that "DE-Ohio has not demonstrated that use of the DENA assets will provide benefits to customers."[36] The pricing mechanism was only addressed in the 2007 Stipulation. That approach is inadequate, and will be discussed below regarding the weaknesses in the 2007 Stipulation.[37]

The Auditor's Report states that affiliate transactions "are always problematic," "mak[ing] the market suspicious regarding pricing and potentially reduce[ing]

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

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

[35] OCC Remand Rider Exhibit 1 at 12 (Haugh).

[36] Id. at 11 (Haugh).

[37] In short, basing the price for using the DENA Assets on a "market" price documented by Duke Energy Ohio's market trading personnel assures that they will not be "the most reasonably priced capacity available." Company Remand Rider Exhibit 2 at 11 (Whitlock Supplemental).

competitive offers."[38] Thus, Duke Energy Ohio helped to create a problem by reducing the number of market participants in the Duke/Cinergy merger,[39] and its proposal to use the DENA Assets may compound that problem by discouraging the remaining market. Company Witness Whitlock stated that "there is no reason to believe that DE-Ohio's motives are nefarious and that the Company will not continue to act in the best interests of its consumers."[40] Mr. Whitlock misses the Auditor's fundamental point: the Company is expected to act in its *own best interests*, which creates the need for regulatory oversight and the audit process whereby EVA recommended adjustments to the Company's purchasing activities that would better align the Company's operations to the *public interest*.

The Auditor's Report states that such affiliate transactions "put[ ] a greater burden on the audit process which is then required to determine whether the transaction price was for no more than the market."[41] Part of that burden also falls to parties such as the OCC in future proceedings, and ultimately upon the Commission that must evaluate evidence presented by a future auditor and parties to future proceedings.

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[38] PUCO Ordered Remand Rider Exhibit 1at 6-5 (Auditor's Report). The Auditor's conclusions are correct, although pricing for the use of the DENA Assets is "problematic" because the generators are owned by Duke Energy Ohio as the result of the Duke-Cinergy merger. OCC Remand Rider Ex. 1 at 12 (Haugh).

[39] OCC Remand Rider Exhibit 1 at 12 (Haugh) (Q&A 23).

[40] Company Remand Rider Ex. 2 at 12-13 (Whitlock Supplemental).

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

Finally the Auditor's Report states that "DE-Ohio should not be disadvantaged by this [Auditor's Report] position as the legacy DENA assets should be able to be sold at market prices, which is what DE-Ohio is proposing to pay."[42]

The Commission should retain its current position that reserve capacity from DENA Assets is not eligible for inclusion in the calculation of the SRT.

C. A Return on CWIP Should Not be Included in the AAC Charges.

The calculation of the AAC and the underlying transactions were not within the scope of the Auditor's Report, a matter that should be adjusted so that future reviews consider a wider range of Company activities. The AAC, according to Attachment 1 to the Company's Application for Rehearing in Case No. 03-93-EL-UNC, is defined as a component "to recover costs associated with homeland security, taxes, and environmental compliance."[43] The review should include the managerial decisions that involved expenditures that potentially qualify for inclusion in the AAC.

The cross examination of OCC Witness Haugh missed the distinction between the additional review of the AAC that he recommended and the PUCO Staff's inquiries in this area.[44] The PUCO Staff investigated the Company's accounts regarding capital environmental plant additions, and to some extent verified the existence of certain plant additions.[45] Mr. Haugh recommended, however, that a "Management Performance

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[42] Id.

[43] Duke Energy Application for Rehearing, Attachment 1 (October 29, 2004).

[44] See, e.g., Tr. Remand Rider Vol. II at 61-62 (April 19, 2007) (Haugh) ("track costs").

[45] See, e.g., Tr. Remand Rider Vol. II at 29 (April 19, 2007) (Tufts) ("financial audit activities as well as a physical audit").

audit[ ]" should be conducted regarding the decisions related to expenditures that potentially qualify for inclusion in the AAC, similar to those conducted for the SRT and FPP cases as well as those in the natural gas industry.[46] Such a review would extend well beyond the verification of the Company's accounting records. An objective review should be undertaken regarding the sensitivity analyses recommended by EVA with respect to coal bid evaluations that should consider [redacted].[47] Duke Energy Ohio's cross-examination of Mr. Haugh demonstrated that the Company believes there are important trade-offs between its environmental-related expenditures and its fuel/purchased power activities.[48] The absence of a managerial audit of the AAC in conjunction with that of the FPP limits the Commission's insights into such possible trade-offs.

The reasonableness of a return on CWIP for environmental plant in the AAC calculations is another matter not covered by Staff's inquiries. Asked whether he formulated an opinion regarding whether a return on such CWIP is an appropriate component of the AAC, Staff Witness Tufts stated that he "did not form an opinion and that's not part of [his] testimony."[49] Neither the Company nor the Staff provided any detail -- for example, of the percentage completion of environmental upgrades at Duke Energy Ohio's plants -- that might further inform the Commission regarding the Company's cost of providing service. Like the instruction to EVA that its audit should

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

[47] PUCO Ordered Remand Rider Exhibit 1at 2-18 (Auditor's Report).

[48] Tr. Remand Rider Vol. II at 52-53 (April 19, 2007) (Haugh).

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

"follow the general guidance that had been provided for the Electric Fuel Component audits,"[50] the Commission should be interested in evaluating the Company's AAC cost submissions in light of past regulatory practice. Such practice considered only CWIP upgrades that were 75 percent or more complete before determining whether any return on CWIP should be included in rates.[51]

Without more detailed knowledge of the CWIP accounts, the calculations available to the Commission are provided in the testimony of Company Witness Wathen and OCC Witness Haugh. Mr. Wathen provides a calculation of 9.1 percent of "little g" based upon the inclusion of all CWIP, regardless of its state of completion.[52] As OCC Witness Haugh pointed out, this calculation takes advantage of the CWIP regulatory concept while completely ignoring regulatory practice for the evaluation of generation costs while plant additions are in progress.[53]

Mr. Haugh's calculation of 5.6 percent of "little g" excludes the return on CWIP from the calculation of the AAC.[54] Mr. Haugh explained that the elimination of a return on CWIP is consistent with Commission discretion regarding the treatment of CWIP for rate setting purposes. In the present situation, elimination of the return on CWIP is appropriate since customers may receive little or no benefit from the plant additions.[55]

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

[51] OCC Remand Rider Ex. 1 at 6 (Haugh).

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

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

[54] Id. at 11 (Haugh).

[55] Id. at 7.

Mr. Haugh's result is also consistent with the previous statements within the context of the *Post-MDP Service Case*, including the Commission's statement that the AAC should include "expenses."[56] The Company's proposed AAC in the 2004 Stipulation for purposes of charging market-based rates requested $60,172,508 out of a total calculation of $107,514,533.[57] The Commission's related finding resulted in only approval of $53,725,267,[58] a result that is inconsistent with Company Witness Wathen's calculations.

A managerial performance audit of the AAC should be included along with the next review of the Company's FPP and SRT trackers. The AAC should be set for 5.6 percent of "little g" as calculated by OCC Witness Haugh in the pending proceedings.

D. Charges for Generation Service Should be Located in the Generation Portion of the Customers' Bills

The RSC, SRT, IMF, and AAC charges that resulted from the *Post-MDP Service Case* were incorrectly stated and billed to customers as distribution charges when all these charges are part of the Company's standard service offer for generation service.[59] The RSC was created in the *Post-MDP Service Case* as a portion of "little g," and is clearly generation-related.[60] OCC Witness Haugh's testimony cites the testimony of Company Witness Wathen regarding the generation-related nature of the SRT and AAC charges.[61] The Commission stated that the AAC charge is "not . . . placed upon

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

[57] Id. at 8-9.

[58] Id.

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

[60] See, e.g., OCC Remand Ex. 1 at 22 (Talbot).

[61] OCC Remand Rider Ex. 1 at 17 (Haugh).

distribution or transmission, and is not an ancillary service."[62] The charges that were set in these cases were all clearly generation-related. They have appeared, however, in the distribution portion of customers' bills.[63] This misplacement should be corrected.

As OCC Witness Haugh points out, Duke Energy Ohio includes the SRT and the IMF in a line item entitled "Delivery Riders."[64] The IMF was not addressed, other than regarding its incorrect categorization by Duke Energy Ohio, in Phase II of these proceedings because it is not a "tracker" whose level was to be set based upon the Company's incurred costs. This, of course, is the problem with the IMF: the SRT is the true successor to the Reserve Margin charge that was stated in the 2004 Stipulation and the IMF has not been justified in the record of these cases.[65] Therefore, the charge that should be shown under the portion of the customers' bill for "Generation Charges" should include only the SRT portion of the charges formerly listed at "Delivery Riders."[66]

The generation-related charges that result from the Commission's final determinations in these cases should be charged to customers as generation charges. The change in the Company's bills should take place at the same time that new standard service offer charges are billed to customers.

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[62] *Post-MDP Service Case*, Entry on Rehearing at 17 (November 23, 2004).

[63] OCC Remand Rider Ex. 1 at 16 (Haugh).

[64] Id. at 18.

[65] See, e.g., OCC Remand Ex. 1 at 48 (Talbot).

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

IV. THE TEST FOR APPROVAL OF A PARTIAL STIPULATION

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

The 2007 Stipulation was filed just prior to the hearing on Phase II of these cases and its recommendations are part of the record that the Commission will consider in these cases.[67] The standard of review for consideration of a partial stipulation has been discussed in a number of Commission cases and by the Ohio Supreme Court. See, e.g., *CG&E ETP Case*, PUCO Case No. 99-1212-EL-ETP, et al., at 65 (July 19, 2000).

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

> The Commission, of course, is not bound to the terms of any stipulation; however, such terms are properly accorded substantial weight. Likewise, the commission is not bound by the findings of its staff. Nevertheless, those findings are the result of detailed investigations and are entitled to careful consideration.
>
> In *Duff v. Pub. Util. Comm.* (1978), . . . in which several of the appellants challenged the correctness of a stipulation, we stated:
>
> 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.[68]

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

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

The present cases involved negotiations between CG&E and a few parties that seem to have been directed at serving parties with narrow interests while broader interests were ignored. While the PUCO Staff executed the 2007 Stipulation, testimony by the Auditor is critical of many of the positions taken in the 2007 Stipulation. The PUCO Staff presented merely a cursory explanation for the abandonment of the Auditor's recommendations. The result advanced by the 2007 Stipulation is not "just and reasonable."

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

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?

2. Does the settlement, as a package, benefit ratepayers and the public interest?

3. Does the settlement package violate any important regulatory principle or practice?[69]

The OCC submits that the 2007 Stipulation, which "recommend[s] that the Public Utilities Commission of Ohio . . . approve the [2007 Stipulation]," violates the criteria set out by the Commission and the Ohio Supreme Court.[70]

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[69] Id. at 126.

[70] Joint Ex. 1 at 2.

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

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

The Commission's deliberations should include consideration of the narrow interests pursued by supporters of the 2007 Stipulation so that they can be accurately contrasted with the interests of those parties having broader interests who oppose the 2007 Stipulation. [redacted][71]

The 2007 Stipulation was again executed or has gone unopposed by Staff; OHA, OEG, and IEU[72] whose members [redacted]; the City of Cincinnati ("City"); and People Working Cooperatively ("PWC").[73] The OCC's participation in drafting an agreement would have provided credibility to the argument that serious bargaining took place over the 2007 Stipulation, but the OCC's efforts to correct even the obvious flaws in the document were entirely rebuffed.

[redacted][74]

[71] OCC Initial Post-Remand Brief, Phase I, at 37-38.

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

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

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

[redacted][75]

[redacted][76]

[redacted][77]

[redacted][78]

[redacted][79]

[redacted][80] The legacy of the side agreements in the *Post-MDP Service Case* continues: serious bargaining did not take place between Duke Energy Ohio and parties whose members are shielded from the brunt of rate increases that are the subject of negotiations.

The City withdrew from the *Post-MDP Service Case* on July 13, 2004 without any apparent participation other than the execution of a side deal with the Company that provided the City with $1 million.[81] The City did not file an initial brief by the June 22, 2004 deadline, and did not file a reply brief by the July 6, 2004 deadline before it withdrew. The City reentered these cases in a Motion to Intervene dated February 21, 2007. The City's only apparent participation in the *Post-Remand Case* was to execute the 2007 Stipulation. The City has not demonstrated any knowledge of the issues in these

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

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

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

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

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

[80] Id., see also id. at 52 (Hixon).

[81] OCC Remand Ex. 6 at ¶4.

cases. Its execution of the 2007 Stipulation is designed to protect its side deal that depends upon an outcome to these cases that is satisfactory to the Company.[82] Serious bargaining did not take place between Duke Energy Ohio and the City.

The support of PWC is best explained by its Motion to Strike a Portion of the BRIED {sic, "BRIEF"} of Ohio Partners for Affordable Energy.[83] That Motion explains PWC's dependency on funds provided by Duke Energy Ohio.[84] Like the City, PWC has not demonstrated any knowledge of the issues in these cases. Its participation in the prehearing conference held on December 14, 2006 focused on protesting the possible consolidation of cases involving the Company's trackers with issues identified by the Supreme Court of Ohio. According to PWC's counsel: "My client is sort of an unusual party in this case, and my client . . . would not have intervened in all of these other [rider] cases at this point."[85] Its "issues," as reflected by its Motion to Strike, seem driven by protecting its status as a recipient of the Company's funding. Despite its protestations, PWC has focused on maintaining the financial support for its narrow interests. The Commission, on the other hand, should disregard such narrow interests and base its decision upon the public interest.

The circumstances of these cases, and of the parties to the 2007 Stipulation, demonstrate that the partial settlement was reached without serious bargaining that involved capable, knowledgeable parties. A full evidentiary record has been presented to

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[82] OCC Remand Ex. 6 at ¶6 ("order unacceptable to CG&E" "in Case No. 03-93-EL-ATA or a related case necessary to carry out the terms and conditions of the Stipulation").

[83] PWC Reply Brief and Motion to Strike (April 27, 2007).

[84] Id. at 3-5.

[85] Tr. at 26-27 (December 12, 2006) (transcribed prehearing conference).

the Commission, including an extensive management performance audit by a consultant selected by the Commission. The Commission should reach its decision in these cases without relying upon the 2007 Stipulation.

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

The settlement package stated in the 2007 Stipulation does not provide a benefit to ratepayers or serve the public interest. Instead of adopting the 2007 Stipulation without alteration, the Commission should adopt all the EVA recommendations regarding the FPP and the SRT (the latter as supported by OCC testimony) and reject the inclusion of a return on CWIP as part of the AAC. Support for these positions is stated above, and the present discussion will focus on the numerous weaknesses contained within the 2007 Stipulation that result in a settlement package that does not benefit the public interest.

Paragraph 1 of the 2007 Stipulation addresses credits to customers that were the subject of EVA's first major management audit recommendation. Paragraph 1 addresses one source of credits recommended by EVA, but not all the recommended credits. In particular, the 2007 Stipulation states that "Recommendation 1 on page 1-9 of the Auditor's Report dated October 12, 2006, shall be withdrawn."[86] As stated above, all credits recommended by EVA should be flowed back to customers who incur FPP charges.

[86] Joint Remand Rider Ex. 1 at 4, ¶1 (2007 Stipulation). The 2007 Stipulation does not explain how such a recommendation can be "withdrawn." The Commission ordered the preparation of the Auditor's Report (i.e. "PUCO Ordered Remand Rider Exhibit 1"). EVA's Seth Schwartz and Larkin and Associate's Ralph Smith defended the findings and conclusions contained in the Auditor's Report without any withdrawal or retraction.

Paragraph 2 also states that an EVA recommendation "shall be withdrawn," this time the second major management audit recommendation.[87] EVA recommended that Duke Energy Ohio adopt a portfolio approach to the procurement of coal and emission allowances. Paragraph 3 of the 2007 Stipulation offers "meet[ings] to discuss the terms and conditions under which DE-Ohio may purchase and manage coal assets, emission allowances, and purchased power for the period after December 31, 2008" in order to "make a recommendation . . . for consideration no later than the next FPP audit."[88] This provision for meetings in the 2007 Stipulation concedes that the EVA recommendation regarding coal procurement has substance. The provision for meetings also recognizes that the 2007 Stipulation was rushed into place before the Phase II hearings were held and without carefully dealing with all the substantive matters at issue. The Commission should act on EVA's recommendations rather than adopt an unaltered 2007 Stipulation that would essentially hand Duke Energy Ohio "veto" authority over progress on fuel purchasing procedures.

Paragraph 4 of the 2007 Stipulation would reinstate the Company's proposed treatment of transmission congestion costs and reject the Commission's removal of those costs from the FPP to "Rider TCR, as approved in paragraph 26 of the PUCO's December 20, 2006 Order in Case No. 03-93-EL-ATA *et al.*"[89] The record does not contain an explanation for the change, offering the Commission no hope of explaining the change from its previous order.

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

[88] Id. at 5, ¶3.

[89] Id. at 6, ¶4.

Paragraph 5 of the 2007 Stipulation states that "DE-Ohio's proposed Rider AAC Calculation shall be adjusted in accordance with the Staff corrected supplemental testimony of L'Nard E. Tufts."[90] That testimony contained small additions to the Company's CWIP accounts. The controversy in these cases regarding AAC charges does not, however, involve Mr. Tufts' work or dispute regarding the manner in which any AAC calculations were carried out. The controversy in these cases is whether a return on CWIP should be included in the AAC, a matter on which Staff Witness Tufts stated no opinion.[91] The Commission should reject Paragraph 5 of the 2007 Stipulation and set the AAC charge at 5.6 percent of "little g" as supported in OCC Witness Haugh's testimony as part of the PUCO's efforts "to consider the reasonableness of expenditures" in the AAC category.[92]

Paragraph 6 states that "DE-Ohio shall work with the Staff to amend its bill format" "to reflect generation-related charges such as the FPP, SRT, and AAC, in the generation portion of the customer bill."[93] The proper placement of generation-related charges was raised in the testimony of OCC Witness Haugh.[94] The agreement that "such amendments will not result in additional programming or billing costs" is the correct

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

[91] Tr. Remand Rider Vol. II at 35 (April 19, 2007) (Tufts) ("I did not form an opinion and that's not part of my testimony.").

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

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

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

result.[95] However, that result is not particularly gratifying as part of the settlement quid pro quo since the Company caused the problem when it prepared customer bills that did not recognize the Commission's determinations that these charges are generation in nature.[96] Paragraph 6 is also vague, referring to charges "*such as* the FPP, SRT, and AAC."[97] The RSC, SRT, IMF, and AAC -- all charges that resulted from the *Post-MDP Service Case* that dealt with standard service offer generation rates pursuant to R.C. 4928.14(A) -- were incorrectly stated and billed to customers as distribution charges when all these charges are part of the Company's charges for generation service.[98]

Paragraph 7 states a minor concession on the part of Duke Energy Ohio by providing for the collection of "DE-Ohio's projected 2007 planning reserve capacity purchases by year-end," which would not require the payment of interest.[99] The Commission's Entry dated December 20, 2006 set the SRT at zero and provided for interest as part of the true-up following its decision in these cases.[100] Paragraph 5 of the 2007 Stipulation also refers to collections -- this time for the AAC -- trued-up "such that the amount calculated to be recovered in 2007, will be recovered by December 31, 2007" and does not include interest charges.[101] However, the AAC should be set at a level

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

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

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

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

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

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

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

below that currently being charged, as recommended by OCC Witness Haugh.[102] Therefore, the absence of interest charges on the true-up of AAC charges is only a concession on the part of Duke Energy Ohio if the higher AAC charges requested by the Company are approved.

Paragraph 8 of the 2007 Stipulation presented the most obvious controversy at hearing, and remains an unsettled element regarding Duke Energy Ohio's intentions under the agreement. Paragraph 8 would render EVA's "recommendation 6 on page 1-10 of the . . . Audit[or's] Report . . . inapplicable."[103] EVA's recommendation would exclude the use of the DENA Assets for purposes of calculating the SRT. In its place, the Company proposes to charge for capacity from the DENA Assets based upon broker quotes, prices for third party transactions, or by a method acceptable to only the Company and the PUCO Staff.[104] The use of broker quotes or third party transaction prices would not deliver savings from "the most reasonably priced capacity available" that was promised by Company Witness Whitlock.[105] To the contrary, use of the DENA Assets presents the danger of unreasonably high charges that could result from the Company's determination of costs associated with *Company-owned generation*.[106]

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[102] OCC Remand Rider Ex. 1 at 11 (Haugh).

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

[104] Id.

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

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

Paragraph 8 is weakly worded and unable to protect customers from the Company's overcharges if Duke Energy Ohio is permitted to use the DENA Assets.[107] For instance, the 2007 Stipulation does not provide for Commission approval of an agreement reached between the Company and the PUCO Staff regarding charges for using the DENA Assets. Also, OCC Witness Haugh noted the apparent disagreement regarding the interpretation of paragraph 8 that broke out as early as the cross-examination of Company Witness Whitlock on April 10, 2007. In Mr. Haugh's supplemental testimony filed on April 17, 2007, he observed that the Assistant Attorney General's cross-examination of Mr. Whitlock revealed Staff's more narrow interpretation of paragraph 8 that would not permit the Company to repeatedly use the DENA Assets.[108] The 2007 Stipulation was apparently executed hastily and without complete agreement between the stipulating parties.

Apparently in response to the cross-examination of Mr. Whitlock and Mr. Haugh's pre-filed supplemental testimony, Staff and the Company produced a "Clarification" on April 19, 2007 that permitted use of the DENA Assets "during two consecutive seven day periods" only with "Commission approval."[109] According to Company Witness Smith, the Clarification permits Duke Energy Ohio to use the DENA Assets in a series of transactions, without Commission approval, as long as at least one

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

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

[109] OCC Ex. Remand Rider 3 at 1-2 ("Clarification of April 9, 2007, Stipulation and Recommendation"). Company Witness Smith could not satisfactorily explain his vision of the Commission approval process. Tr. Remand Rider Vol. II at 93 (Smith).

day separates the seven day periods.[110] The Clarification therefore appears to protect consumers to the extent that Duke Energy Ohio may only use its DENA Assets for seven-eighths of the year. The confusion over fashioning consumer protections involving the use of the DENA Assets reveals a weakness in the 2007 Stipulation as well as the underlying wisdom behind EVA's recommendation against their use in computing the SRT.

Paragraph 9 is deceptive in its provision regarding Duke Energy Ohio's acceptance of "all audit recommendations made in the Report of the Financial and Management/Performance Audit . . . *except as set forth in paragraphs one through eight* above."[111] As noted above, Company Witness Whitlock testified that Duke Energy Ohio "does not exclude an offer from consideration if the [coal] supplier will not permit the resale of coal."[112] From that statement, the Company apparently believes it already complies with EVA's major recommendation 3 which states that "coal suppliers should not be required to allow the resale of their coal for the offers to be considered."[113] Company Witness Whitlock admits, however, that Duke Energy Ohio "include[s] the resale of coal as a condition on its RFPs."[114] That condition on the RFPs renders meaningless the Company's "agreement" in Paragraph 9 to consider bids that Duke Energy Ohio actively discourages and that the Company would consider non-complying

[110] Tr. Remand Rider Vol. II at 92-93 (Smith).

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

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

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

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

with its RFPs. The Commission should reject the Company's subterfuge whereby it states agreement to an EVA recommendation but intends (in practice) the opposite result.

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

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

Paragraph 5 of the 2007 Stipulation addresses the calculation of the AAC, and adoption of that provision would violate a traditional regulatory policy and practice. That paragraph fails to recognize the Commission's earlier statements that AAC calculations would consider "expenses."[115] Even if CWIP calculations regarding capital expenditures are considered for purposes of setting the AAC, Commission policies and practices should be used to guide the development of reasonable standard service offer rates. As stated above, the Commission informed EVA that it should use the previously effective provisions regarding electric fuel component cases in the evaluation of Company practices as they related to the FPP.[116] Similar evaluation of CWIP amounts, i.e. pursuant to regulatory practices that pre-dated electric restructuring in Ohio, should be applied for the purpose of deciding which costs are appropriately associated with capital expenditures.

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

[116] PUCO Ordered Remand Rider Exhibit 1 at 1-2 through 1-3 (Auditor's Report).

The Commission should undertake the evaluation of AAC costs, in the PUCO's words, "to consider the reasonableness of expenditures" in the AAC category because "[i]t is not in the public interest to cede this review."[117] Reasonable methods should be used to reflect actual costs for charges such as the AAC. As stated in OCC Witness Haugh's evaluation of regulatory principles and practices, "[p]aragraph five of the 2007 Stipulation would permit a return on CWIP that would not traditionally have been allowed in ratemaking proceedings."[118]

Staff Witness Tufts evaluated the accounts and physical assets associated with the Company's AAC calculation. He did not, as stated above, formulate an opinion as to whether a return on CWIP was appropriate for standard service offer rates.[119] Staff Witness Cahaan supported the reasonableness of paragraph 5 based entirely upon its adoption of "calculations put forth by Staff witness Tufts."[120] Such an endorsement by Mr. Cahaan is meaningless regarding the policy of including or excluding a return on CWIP, a matter upon which Mr. Tufts offered no opinion. The Commission should reject Paragraph 5 of the 2007 Stipulation and set the AAC charge at 5.6 percent of "little g" as supported in OCC Witness Haugh's calculations and testimony.

Paragraph 8 of the 2007 Stipulation addresses the pricing of capacity from the DENA Assets, and adoption of that provision would violate a traditional regulatory policy and practice. That paragraph improperly supports Duke Energy Ohio's breach of

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

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

[119] Tr. Remand Rider Vol. II at 35 (April 19, 2007) (Tufts) ("I did not form an opinion and that's not part of my testimony.").

[120] Staff Remand Rider Ex. 3, Answer 3.

the SRT Stipulation as well as the Company's violation of the Commission's Order that adopted the SRT Stipulation in its entirety.[121] The SRT Stipulation was entered into by Duke Energy Ohio, the OCC, and other parties who agreed in October 2005 to a number of provisions in Case No. 05-724-EL-UNC.[122] Among other matters, "CG&E agreed to "provide OCC with workpapers and other data supporting the use of DENA Assets as part of the SRT and if any interested party is concerned about the use of DENA Assets in the SRT the Commission will hold a hearing."[123] The Company failed to provide the OCC with any such information.[124]

The subject of the proceeding to which the SRT Stipulation applied was the "price for competitive retail electric service for the period of January 1, 2006, through December 31, 2006."[125] The workpapers and other supporting data should have been provided to the OCC *before* the hearing in which the Company proposed to include the use of DENA Assets. Company Witness Smith agreed that the SRT Stipulation contemplated the provision of information to the OCC before the hearing that is mentioned in the SRT Stipulation.[126] Duke Energy Ohio's Senior Counsel, who executed the SRT Stipulation,[127] stated at the hearing on April 29, 2007 that "frankly, we are having a hearing. That's what we are doing." The workpapers and supporting data,

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

[122] OCC Remand Rider Ex. 4.

[123] Id. at 5, ¶8.

[124] Tr. Remand Rider Vol. II at 97-98 (April 19, 2007) (Smith) ("I don't know how you would").

[125] OCC Remand Rider Ex. 4 at 3 (last "WHEREAS").

[126] Tr. Remand Rider Vol. II at 101 (April 19, 2007) (Smith).

[127] OCC Remand Rider Ex. 4 at 5.

therefore (and by admission), should have been presented to the OCC *before* the hearings in these cases.

Company Witness Whitlock submitted testimony regarding the Company's request to use the DENA Assets on November 16, 2006.[128] The required workpapers and other supporting data, however, were never provided to the OCC. The SRT Stipulation anticipated that the Company would work towards documentation that would support use of the DENA Assets if it sought to include their use in a SRT calculation. Company Witness Smith, however, stated that such documentation would not be provided before the Company's request to use the DENA Assets.[129] The effect of the Company's actions -- in this case its lack of actions -- is to raise suspicions that Duke Energy Ohio's motives are "nefarious."[130] The SRT Stipulation was designed to counter natural suspicions with the sharing of information, a design that has been thwarted by Duke Energy Ohio's non-compliance. The Commission should not approve the use of the DENA Assts for the calculation of the SRT under these circumstances.

V. CONCLUSION

The OCC supports the positions presented in the Auditor's Report. The Auditor's Report makes many recommendations regarding the manner in which the FPP and SRT should be dealt. OCC-sponsored testimony also supports the Auditor's recommendation

[128] Company Remand Rider Ex. 2 at 10-14 (Whitlock Supplemental).

[129] Tr. Remand Rider Vol. II at 97-98 (April 19, 2007) (Smith).

[130] The word choice is that of Company Witness Whitlock, so disingenuously stated that "there is no reason to believe that DE-Ohio's motives are nefarious. . . ." Company Remand Rider Ex. 2 at 13 (Whitlock Supplemental).

that would continue the prohibition against including the cost of using DENA Assets in the calculation of SRT charges.

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

Respectfully submitted,

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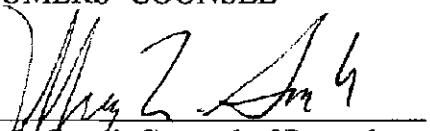

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing (Public Version) *Initial Post-Remand Brief, Hearing Phase II, by the Office of the Ohio Consumers' Counsel,* has been served upon the below-named persons in redacted form (pursuant to the Attorney Examiners' instructions) via electronic transmittal this 17th day of May 2007.

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