

FILE

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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

REPLY BRIEF SUBMITTED ON BEHALF OF THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

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**PHASE II REPLY BRIEF
SUBMITTED ON BEHALF OF
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THE PUBLIC UTILITIES COMMISSION OF OHIO**

INTRODUCTION

Staff and others present the Stipulation involved in this case for the Commission's review. As the Commission knows well, any Stipulation is the product of compromise. This Stipulation, and all others, do not, and cannot, satisfy the "wants" of every party. That, perhaps, is why The Office of the Ohio Consumers' Counsel (OCC) and Ohio Partners for Affordable Energy (OPAE) are not signatories. The Stipulation does not satisfy all their "wants." They want "more" as the positions taken in their post-hearing briefs attest. The Commission should not be swayed by what boils down to merely cries for "more."

This Stipulation was entered by capable, knowledgeable parties representing broad interests. It incorporates practically all of the recommendations contained in the audit

report. It provides funds to ratepayers and provides processes for resolving outstanding issues. Its provisions recognize the competitive environment and statutes from which this case arises. The Stipulation benefits the public interest and ratepayers. It does not violate a significant regulatory practice or principle. For these reasons, Staff believes the Stipulation should be approved and adopted by the Commission.

DISCUSSION¹

I. **The Stipulation is the result of serious bargaining between capable, knowledgeable parties, contrary to the claims of OCC and OPAE.**

A. **OCC's witness on the Stipulation, Mr. Haugh, did not support OCC's current claim that the Stipulation is not the product of serious bargaining between capable, knowledgeable parties.**

OCC's presented a witness on the Stipulation, Mr. Haugh.² Mr. Haugh did not question that serious bargaining among capable, knowledgeable parties occurred.³ Additionally, he did not suggest that the Stipulation was suspect because OCC did not sign it as OCC now suggests.⁴ He did not suggest that any Stipulation signatory was influenced

¹ Staff is not responding directly to each claim of OCC and OPAE for the sake of brevity. Staff believes that its responses in this brief answer each of those claims even though some claims may not be expressly addressed. Accordingly, Staff's silence on a claim cannot be construed as acquiescence to that claim. Additionally, OCC and OPAE, the only two parties to complain about the Stipulation, raise many of the same arguments. Whatever Staff says in response to the arguments of either is intended to apply to the arguments of both.

² OCC Remand Rider Ex. 2 (Haugh Supp. Test.).

³ *Id.*

⁴ *Id.*

by any other agreement with Duke Energy-Ohio (DEOH).⁵ He did not even mention such agreements.⁶ In short, OCC's witness did not raise or support the issues that OCC now tries to suggest.

B. OCC is not a necessary signatory to a Stipulation to show the Stipulation is the product of serious bargaining between capable, knowledgeable parties.

OCC claims its agreement to the stipulation would have improved credibility and, presumably, remedied the other problems it alleges.⁷ Obviously, this Stipulation's credibility, as well as the Commission's approval of it, does not require OCC's agreement as many cases have shown. The Commission's rules do not give OCC, Staff or anyone else a veto over stipulations.⁸ OCC's decision regarding the Stipulation does not affect whether serious bargaining occurred, and it does not affect the knowledge and capabilities of the negotiating parties. OCC's decision to refrain from entering the Stipulation does not affect any of the three criteria the Commission historically has used to review a Stipulation. OCC's decision regarding the Stipulation, simply, is not relevant to any review of it.

⁵ OCC Remand Rider Ex. 2 (Haugh Supp. Test.).

⁶ *Id.*

⁷ *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et al.* (OCC's Initial Post-Remand Brief Hearing Phase II at 21) (May 17, 2007).

⁸ Ohio Admin. Code § 4901-1-30 (Anderson 2007).

C. The record does not support the claim that Stipulation signatories were influenced by side agreements.

OCC claims that serious bargaining did not occur because it claims some signatories were influenced by side agreements with DEOH.⁹ This claim, like others, is baseless. Despite this claim, OCC has not presented anything to show the motivation of anyone in the negotiations.¹⁰ OCC has not presented anything to show the evaluations of anyone regarding the Stipulation.¹¹ Accordingly, OCC has not supported its claim.

Specifically, OCC claims serious bargaining did not take place because some of the group signatories had members who entered option agreements in the past with DEOH that OCC claimed “shielded” those members from some of the “rate increases that are the subject of negotiations.”¹² OCC cited only one member from the Ohio Hospital Association and the Ohio Energy Group to support its claim.¹³ OCC did not even suggest that either the Ohio Hospital Association or the Ohio Energy Group, the actual parties to the Stipulation, knew about the claimed agreements.¹⁴ Obviously, the groups could not have been affected, as OCC claims, if they did not know about the agreements. Additionally, OCC did not present anything even suggesting such agreements affected the

⁹ *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et al.* (OCC’s Initial Post-Remand Brief Hearing Phase II at 21-24) (May 17, 2007).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 22.

¹³ *Id.* at 21-22. Staff presumes these are the groups OCC labeled as OHA and OEG.

¹⁴ *Id.* at 21-24.

group representatives. OCC did not show the representatives knew about them.¹⁵ OCC did not show that any more than one member was affected by the agreement, whatever its provisions.¹⁶ OCC did not show how or why the agreement of one member would affect the judgment of those representing the entire group.¹⁷ Simply, these claims OCC alleges do not contradict the existence of serious bargaining by capable, knowledgeable parties.

D. The record does not support the claim that Cincinnati and People Working Cooperatively are not capable, knowledgeable parties.

Attempting to discredit another signatory, OCC claims Cincinnati “has not demonstrated any knowledge of the issues in these cases.”¹⁸ Again, OCC does not provide facts supporting this claim. OCC acknowledges that Cincinnati was involved in the *Post-MDP Service Case* although the city withdrew ultimately.¹⁹ Such involvement shows knowledge of the background to *this* case. Additionally, OCC also notes that Cincinnati intervened in this case almost two months before entering the Stipulation.²⁰ That is more than enough time to become familiar with the issues in the rider portion of this case. These are the *only* factual assertions OCC makes to support its claim. Neither do so. To the contrary, they show Cincinnati was knowledgeable.

¹⁵ *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et al.* (OCC’s Initial Post-Remand Brief Hearing Phase II at 21-24) (May 17, 2007).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 22-23.

¹⁹ *Id.* at 22.

²⁰ *Id.*

OCC also attacks Cincinnati claiming it entered the Stipulation “to protect its side deal that depends upon an outcome to these cases that is satisfactory to the Company.”²¹ OCC makes this assertion without factual basis beyond that claim.²² That shows OCC is merely imputing motivations convenient to its argument.

Like Cincinnati, OCC claims that People Working Cooperatively (PWC) “has not demonstrated any knowledge of the issues in these cases.”²³ OCC bases this claim on one statement of counsel at a prehearing conference in December, 2006.²⁴ That statement does not suggest that either counsel or PWC does not have knowledge of the case. In fact, the statement, as terse as it is, indicates both have knowledge of the case; enough knowledge to make evaluations about the various riders. Additionally, OCC omits to point out that PWC intervened in this case and it has been a party to this case since March, 2004, practically the inception of the case.²⁵

OCC has not presented anything showing PWC is not a knowledgeable party. To the contrary, the organization is represented by counsel known to this Commission for many years. The documents filed in this case, some cited by OCC, show the organization

²¹ *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et al.* (OCC's Initial Post-Remand Brief Hearing Phase II at 23) (May 17, 2007).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et al.* (Motion to Intervene by People Working Cooperatively, Inc.) (March 9, 2004).

has been involved in energy conservation and worked with matters involving utilities for many years.²⁶ PWC is a knowledgeable party.

Like OCC's claims against other signatories, OCC claims PWC is "focused on maintaining the financial support" of DEOH.²⁷ As those similar claims OCC asserted against other signatories, this claim does not have a basis. The basis OCC cites does not support its claim. OCC cites only PWC's Reply Brief and Motion to Strike to support this claim.²⁸ OCC states "That Motion [the Motion to Strike] explains PWC's dependency on funds provided by Duke Energy Ohio."²⁹ The citation to PWC's Reply Brief and Motion to Strike (April 27, 2007), states that PWC has many funding sources, one of which is DEOH. It states in this regard:

It [PWC] is a 32 year-old non-profit company that provides critical home repairs and weatherization services in the DE-Ohio service territory. PWC is unique in combining the funding it obtains from DE-Ohio with other public and private charitable dollars to provide services that have the effect of keeping low-income home owners in their homes.³⁰

PWC's participation in these proceedings is not to "protect its status as a recipient of the Company's funding" as OCC claims. It seeks the enforcement of DEOH's stipulation

²⁶ *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et al.* (Reply Brief of People Working Cooperatively, Inc. and Motion to Strike a Portion of the Brief of Ohio Partners for Affordable Energy by People Working Cooperatively, Inc. at 3) (April 27, 2007).

²⁷ *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et al.* (OCC's Initial Post-Remand Brief, Hearing Phase II at 23) (May 17, 2007).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et al.* (Reply Brief of People Working Cooperatively, Inc. and Motion to Strike a Portion of the Brief of Ohio Partners for Affordable Energy by People Working Cooperatively, Inc. at 3) (April 27, 2007).

commitments.³¹ That is not to suggest those commitments include PWC. PWC applies for funds like other organizations.³² PWC explained:

The funding PWC receives from DE-Ohio for its electric weatherization projects is subject to review and recommendations by what was then the Cinergy Community Energy Partnership..., which is now called the Duke Community Energy Partnership ... (referred to herein together at [sic] the “Collaborative”). The funds have been obtained in a competitive process. PWC must apply for those funds and meet performance criteria in order to retain awarded funds and to obtain future funds.³³

PWC is committed to aiding low-income and elderly home-owners as the document OCC cites shows. Accordingly, it is a representative of the residential customers. OCC has not presented anything remotely suggesting that PWC would betray that constituency. The material OCC cites do not support OCC’s claim. The claim is baseless.

E. The record does not support the exclusion of residential consumers are marketers from the Stipulation adoption process.

OPAE makes one additional claim. OPAE claims that residential consumers and marketers were not represented in the Stipulation.³⁴ Regarding this claim, it is important to note that marketers, apparently, were not concerned about this Stipulation; in fact, they

³¹ *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et al.* (Reply Brief of People Working Cooperatively, Inc. and Motion to Strike a Portion of the Brief of Ohio Partners for Affordable Energy by People Working Cooperatively, Inc. at 3-4) (April 27, 2007).

³² *Id.* at 4.

³³ *Id.*

³⁴ *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et al.* (Ohio Partners For Affordable Energy’s Initial Brief Phase 2 at 5) (May 17, 2007).

have not complained about it. Like everyone else, they had an opportunity to participate in the negotiation.³⁵ Additionally, residential customers are well represented in the Stipulation. As discussed above CWP is a representative of residential consumers exclusively. Staff and Cincinnati also represent the interest of residential consumers as well as others. Residential consumers were represented by many parties. Accordingly, the facts of this case do not support OPAE's claim.

This Stipulation is the result of serious bargaining between capable and knowledgeable, parties as discussed in Staff's Post-Hearing Brief. OCC and OPAE have not presented anything beyond naked claims contradicting that. The claims of OCC and OPAE are not supported in the record as the foregoing shows. Those claims should not form the basis of rejecting the Stipulation.

II. The Stipulation, as a package, benefits ratepayers and the public interest, contrary to the claims of OCC and OPAE.

OCC and OPAE advocate the Commission adopt the recommendations in the audit report and reject the stipulation.³⁶ In so doing, they ignore the stipulation incorporates most of the audit reports recommendations. They, essentially, tell this Commission that it should reject the Stipulation despite all that it provides just because they want "more." While that may have been the reason they did not agree to the Stipulation, their desire for "more" does not negate the benefits the Stipulation provides ratepayers and the

³⁵ DE-Ohio Remand Rider Ex. 6 at 5 (Smith Direct Test.).

³⁶ *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, et al. (OCC's Initial Post-Remand Brief, Hearing Phase II at 34-35) (May 17, 2007); *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, et al. (Ohio Partners For Affordable Energy's Initial Brief Phase 2 at 20) (May 17, 2007).

ways the Stipulation benefits the public interest. Simply, their desire for more is not a reason for the Commission to reject the Stipulation.

A. DEOH's acceptance of most recommendations in the financial and management/performance audit report through the Stipulation benefits ratepayers and the public interest, contrary to the claims of OCC and OP&E.

Through the Stipulation, DEOH accepts *all* recommendations in both the management/performance audit and the financial audit except as set forth in paragraphs one through eight of the Stipulation.³⁷ The Stipulation so provides in stating:

The Parties agree that DE-Ohio accepts all audit recommendations made in the Report of the Financial and Management/Performance Audit of the Fuel and Purchased Power Rider of Duke Energy-Ohio dated October 12, 2006, except as set forth in paragraphs one through eight above.³⁸

Under this provision, DEOH accepts most of the recommendations resulting from the financial audit and the management/performance audit.

The Stipulation does not affect any of the recommendations in the financial audit report.³⁹ This means that DEOH accepts *all* the recommendations in the financial audit. Additionally, the Stipulation also does affect most of the recommendations in the recommendations in the management/performance audit report.⁴⁰ Accordingly, DEOH

³⁷ Jt. Remand Rider Ex. 1 at ¶ 9.

³⁸ *Id.*

³⁹ Compare, Jt. Remand Rider Ex. 1 at 4-8 (¶¶ 1-9) with Commission Ordered Remand Rider Ex. 1 at 5-39 to 5-41 (Recommendations).

⁴⁰ Compare, Jt. Remand Rider Ex. 1 at 4-8 (¶¶ 1, 3, 4, 5) with Commission Ordered Remand Rider Ex. 1 at 1-9 to 1-10 (Management Audit Recommendations).

accepts those recommendations without exception or modification. That means DEOH accepts the large majority of recommendations in the financial and management/performance audit report. The Stipulation provides the benefits from these recommendations. If adoption of the recommendations in the financial and management/performance audit report is any measure of the public interest and benefits to ratepayers, the Stipulation benefits the public interest and ratepayers.

B. The Stipulation’s “process” provisions benefit ratepayers and the public interest despite the cry of OCC and OPAE for more.

OCC and OPAE also express their belief that the stipulation is vague and that certain provisions do not provide anything beneficial.⁴¹ All but one of those provisions are what Mr. Cahaan described as concerning “process.”⁴² The processes lead to solutions. In doing so, they benefit the public interest and benefit ratepayers. OCC’s and OPAE’s desires for “more” do not negate those benefits.

OCC and OPAE also complain that the Stipulation allows a return on CWIP in the AAC.⁴³ This topic is addressed in the next section of this brief and that discussion will not be repeated here. Nevertheless, Staff wishes to note that allowing CWIP in the AAC

⁴¹ *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et al.* (OCC’s Initial Post-Remand Brief, Hearing Phase II at 27) (May 17, 2007); *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et al.* (Ohio Partners For Affordable Energy’s Initial Brief Phase 2 at 18-19) (May 17, 2007).

⁴² Staff Remand Rider Ex. 3 at 1-2 (Cahaan Prepared Test.) (April 9, 2007).

⁴³ *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et al.* (OCC’s Initial Post-Remand Brief, Hearing Phase II at 26) (May 17, 2007); *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et al.* (Ohio Partners For Affordable Energy’s Initial Brief Phase 2 at 10) (May 17, 2007).

does not negate the benefits of the Stipulation as OCC and OP&E claim. OCC and OP&E wish for “traditional” ratemaking principles.⁴⁴ This desire does not have any bearing on this case because this is not a rate case and “traditional” ratemaking principles do not have any application as Mr. Cahaan explained.⁴⁵ This is a competitive retail electric case and that entails a different set of goals and principles.⁴⁶ Accordingly, the CWIP provision OCC and OP&E assert does not apply.

C. The inclusion of a return on CWIP in the AAC is supported by the record and it does not negate the Stipulation’s benefits to ratepayers and the public interest.

OCC also objects to CWIP because Mr. Tufts did not form an opinion on whether the inclusion of CWIP in the AAC was appropriate.⁴⁷ Mr. Tufts’ purpose when auditing the AAC was not to develop such an opinion.⁴⁸ He sought instead to verify the inputs to the calculation of the AAC and to make sure it was properly calculated.⁴⁹ He did so as he testified.⁵⁰ Mr. Cahaan developed the policy regarding including CWIP in the AAC as he

⁴⁴ *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et al.* (OCC’s Initial Post-Remand Brief, Hearing Phase II at 26) (May 17, 2007); *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et al.* (Ohio Partners For Affordable Energy’s Initial Brief Phase 2 at 10) (May 17, 2007).

⁴⁵ Staff Remand Ex. 1 at 4-10 (Cahaan Prepared Test.) (March 9, 2007).

⁴⁶ *Id.*

⁴⁷ *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et al.* (OCC’s Initial Post-Remand Brief, Hearing Phase II at 32) (May 17, 2007).

⁴⁸ Remand Rider Tr. II at 33-34.

⁴⁹ *Id.*

⁵⁰ *Id.*

testified.⁵¹ His testimony did not depend on Mr. Tufts' testimony. Mr. Cahaan was available to answer OCC's and OPAE's questions on this subject and did so. The attempt to negate his testimony by claiming Mr. Tufts should have done it instead is baseless.

OCC and OPAE represent residential constituents. This is a limited group. Many more interests exist in evaluating the benefits to the public interest and ratepayers. Accordingly, OCC's and OPAE's cries for "more" do not define what benefits the public interest and ratepayers. Moreover, three signatories to the Stipulation also count residential consumers among their constituents: Staff, PWC, and Cincinnati. Accordingly, OCC and OPAE have not negated the benefits to the public interest and ratepayers that the facts of this case show.

III. The Stipulation does not violate an important regulatory principle or practice, contrary to the claims of OCC and OPAE.

A. "Traditional" rate-making principles and practices cannot be transferred to a rate stabilization plan case, such as this one, and used in evaluations in the same way they are employed in a ratemaking case.

OCC and OPAE claim that the Stipulation violates "traditional regulatory principles and practices."⁵² Staff discussed this claim extensively in its Post-Hearing Brief.⁵³ Staff refers the reader to that discussion and, for brevity, Staff will not repeat that entire

⁵¹ Remand Rider Tr. II at 131.

⁵² *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et al.* (OCC's Initial Post-Remand Brief, Hearing Phase II at 31) (May 17, 2007); *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et al.* (Ohio Partners For Affordable Energy's Initial Brief Phase 2 at 11-12) (May 17, 2007).

⁵³ *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et al.* (Staff's Post-Hearing Brief at 7-11) (May 17, 2007).

discussion here. As a summary, Staff notes, as Mr. Cahaan testified, *traditional*, meaning regulatory rate of return regulation, is not relevant in the competitive environment that now exists.⁵⁴ This case does not arise under the rate of return regulatory provisions of Ohio Revised Code Chapter 4909. This case arises under the *competitive retail electric service* provisions of Ohio Revised Code Chapter 4928. Simply, the bases for OCC's argument do not apply and it is not relevant to this case.

Significant differences between the competitive environment this case concerns and a monopolistic environment involved in a "traditional" rate case that affect any review. The analytic process is different.⁵⁵ A rate stabilization plan *is not about cost-based ratemaking*.⁵⁶ Mr. Cahaan testified concerning this difference when discussing why "traditional" ratemaking principles, such as the CWIP limitation OCC relies on, do not apply in a case involving a rate stabilization plan such as this one. He stated:

To begin with, an RSP is not about cost-based ratemaking. Let me repeat this –a market based standard service offer is not about cost-based ratemaking. The rate setting provisions of Ohio Revised Code 4909 do not apply.⁵⁷

Additionally, the logic and categories of cost-based ratemaking do not apply.⁵⁸ Even where a principle or practice is borrowed from the "traditional" regulatory frame-

⁵⁴ Staff Remand Rider Ex. 1 at 4-6 (Cahaan Prepared Test.) (March 9, 2007).

⁵⁵ *Id.* at 4-5.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

work and used in the competitive environment, that principle or practice is not the same.⁵⁹ The legal basis and even the technical basis for a principle of practice are different in a competitive environment than the basis in a cost-based regulatory application.⁶⁰

Mr. Cahaan explained:

The logic and categories of cost-based ratemaking do not apply, unless we choose them to apply. We may choose such concepts and mechanisms [cost-based ratemaking concepts such as CWIP] because of familiarity, which helps consensus and implementation, but the fit is not exact. For instance, the CGE RSP contains a mechanism to mitigate risk to the EDU by tracking fuel and purchased power costs. This FPP is similar to the EFC of cost-based ratemaking, but, although the concept is similar, it is not the same.... Other ratemaking concepts, such as CWIP, do not have the same legal basis, and possibly not even the same technical basis, as they do in cost-based regulation.⁶¹

Moreover, the individual components so essential to the “traditional” rate-of-return ratemaking regulation do not matter when reviewing the implementation of an RSP, such as in this case.⁶² That is a significant difference between a review in a “traditional” ratemaking case and this review. Mr. Cahaan explained:

In short, the various bases for determination of the individual components which exist in a cost-based environment do not exist. The precedents, legal definitions, the accounting and technical categories – all these do not exist in the RSP environment and are therefore unable to determine or

⁵⁹ Staff Remand Rider Ex. 1 at 4-6 (Cahaan Prepared Test.) (March 9, 2007).

⁶⁰ *Id.*

⁶¹ *Id.* at 5.

⁶² *Id.* at 10.

condition decisions regarding individual pieces of the plan, at least not in the same way that they do in cost-based regulation.⁶³

The traditional rate-case uses individual components, such as CWIP, differently than an RSP case.⁶⁴ In a rate case, the Commission evaluates a large number of individual components and determines each one individually.⁶⁵ The “correct” determination of each individual item “is *presumed* to generate a fair, reasonable, and sustainable solution and an appropriate balance of competing interests,” as Mr. Cahaan testified.⁶⁶ The decision-making in an RSP case is much different.⁶⁷

The assessment of individual components does not matter in an RSP case such as this case.⁶⁸ Mr. Cahaan explained:

What is more, there is no guarantee or even presumption that independent determination or individual issues [so critical in a rate-making environment] will produce an acceptable result in terms of the goals, the fairness, and the sustainability of the Plan [RSP]. Everything works as a part of the whole and must be considered in that framework. Conversely, the logic of justifying the determination of any individual item in the RSP cannot be made in terms of that item alone, but can only be made in terms of how it works with all other aspects of the Plan [RSP] to achieve the goals.⁶⁹

⁶³ Staff Remand Rider Ex. 1 at 5-6 (Cahaan Prepared Test.) (March 9, 2007).

⁶⁴ *Id.* at 4-5

⁶⁵ *Id.* at 4.

⁶⁶ *Id.* at 5-6.

⁶⁷ *Id.* at 6.

⁶⁸ *Id.* at 10

⁶⁹ *Id.* at 6.

The control variables do not necessarily affect prices and risk in symmetric or simple ways.⁷⁰ Even the existence of the individual riders is not important.⁷¹ The important principle is *balance* among the three conflicting policy goals. Mr. Cahaan testified, “[a]ll that matters are the results in terms of achieving an appropriate and sustainable balance of outcomes (money and risk) among conflicting policy goals.”⁷² In the rate-stabilization case, the whole rather than the individual parts is the important consideration.

Simply, CWIP and all other “traditional” rate-making principles cannot be transferred to an RSP case and used in evaluations in the same way they are employed in a ratemaking case. It is not the same principle and it is not used in the same way. Accordingly, the use of CWIP in the ACC does not violate any regulatory principle or practice. The Stipulation does not violate any important regulatory principle or practice, as Mr. Cahaan testified.⁷³

B. The record supports the endorsement of Stipulation paragraph 5 by Staff witness, Mr. Cahaan.

OCC also complains that “[s]taff witness Cahaan supported the reasonableness of [Stipulation] paragraph 5 based entirely upon its adoption of ‘calculations put forth by Staff witness Tufts.’”⁷⁴ OCC attempted to belittle Mr. Cahaan’s endorsement of Stipula-

⁷⁰ Staff Remand Rider Ex. 1 at 8 (Cahaan Prepared Test.) (March 9, 2007).

⁷¹ *Id.*

⁷² Staff Remand Rider Ex. 1 at 8 (Cahaan Prepared Test.) (March 9, 2007).

⁷³ Staff Remand Rider Ex. 3 at 1 (Cahaan Prepared Test.) (April 9, 2007).

⁷⁴ *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et al.* (OCC’s Initial Post-Remand Brief, Hearing Phase II at 32) (May 17, 2007).

tion paragraph 5 because Mr. Tufts did not offer an opinion on the policy of including or excluding a return on CWIP.⁷⁵ Mr. Cahaan's did not require Mr. Tufts' opinion on that subject because Mr. Cahaan was responsible for that policy as he testified.⁷⁶ Mr. Tufts verified the numbers DEOH used to calculate the AAC.⁷⁷ Accordingly, there is no basis to OCC's complaint.

Finally, OCC complains that it did not receive DEOH work-papers timely as OCC claimed the prior stipulation required. OCC, essentially, claims a compliance issue involving another stipulation somehow creates a regulatory policy or principle that *this* Stipulation violates. OCC states:

The SRT Stipulation was designed to counter natural suspicions with 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 Assets for the calculation of the SRT under these circumstances.⁷⁸

This complaint, obviously, does not involve a regulatory policy or principle and OCC does not identify one. Accordingly, *this* Stipulation does not violate any policy or principle because of DEOH's actions, or failure to act, under a prior stipulation.

⁷⁵ *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et al.* (OCC's Initial Post-Remand Brief, Hearing Phase II at 32) (May 17, 2007).

⁷⁶ Remand Rider Tr. II. at 131.

⁷⁷ Staff Remand Rider Ex. 3 at 33-34 (Tufts Corrected Supp. Test.).

⁷⁸ *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et al.* (OCC's Initial Post-Remand Brief, Hearing Phase II at 34) (May 17, 2007).

C. The Stipulation's provision permitting DEOH to use DENA assets in a limited, emergency, situation does not violate an important regulatory principle of practice.

OPAE makes three additional claims, all involving DENA assets, that Staff wishes to discuss. First, OPAE complains about the possibility of DEOH recovering costs associated with DENA assets under very limited circumstances.⁷⁹ OPAE, however, does not identify a significant regulatory principle or practice violated. In fact, OEPA recognized costs related to DENA assets may be passed to Ohio consumers under current practice of the Commission as previously discussed.⁸⁰ This current practice shows that recovery of such costs does not inherently violate any significant regulatory principle or practice. As discussed previously, the Stipulation merely allows cost recovery when those assets are used in emergency situations as defined in the Stipulation.⁸¹ This does not violate any significant regulatory policy or practice.

OPAE also claims Staff and DEOH disagree about the meaning of Stipulation paragraph eight.⁸² That is not true. Staff and DEOH even stipulated as to their common understanding of that paragraph.⁸³ This factually erroneous claim is not a basis to reject the Stipulation.

⁷⁹ *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et al.* (Ohio Partners For Affordable Energy's Initial Brief Phase 2 at 18) (May 17, 2007).

⁸⁰ *Id.* at 14, 18.

⁸¹ Remand Rider Tr. II at 11-12; OCC Remand Rider Ex. 3.

⁸² *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et al.* (Ohio Partners For Affordable Energy's Initial Brief Phase 2 at 15) (May 17, 2007).

⁸³ Remand Rider Tr. II at 11-12; OCC Remand Rider Ex. 3.

Finally, OP&E complains about the pricing associated with the emergency use of D&NA assets because OP&E claims sufficient protections for consumers do not exist.⁸⁴ This is not true. The Stipulation provides protections. OP&E recognizes a limited market exists.⁸⁵ The Stipulation provides protections despite that market while making the assets available for consumer benefit in an emergency circumstance.⁸⁶ That does not violate any regulatory principle or practice and OP&E does not identify one.

Simply, OCC and OP&E have not identified any policies or principles applicable to a competitive environment such as the one involved in this case that the Stipulation presented in this case violates. That leads only to the conclusion that the Stipulation does not violate any significant regulatory policies or principles.

⁸⁴ *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, *et al.* (Ohio Partners For Affordable Energy's Initial Brief Phase 2 at 16) (May 17, 2007).

⁸⁵ *Id.*

⁸⁶ Jt. Remand Rider Ex. 1 at 7 (¶ 8).

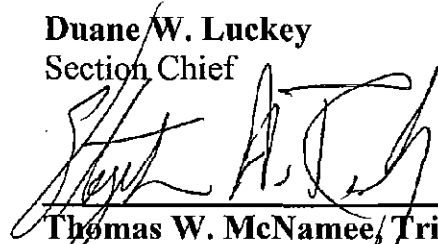
CONCLUSION

For all the above stated reasons, Staff asks the Commission to approve and adopt the Stipulation presented in this case.

Respectfully submitted,

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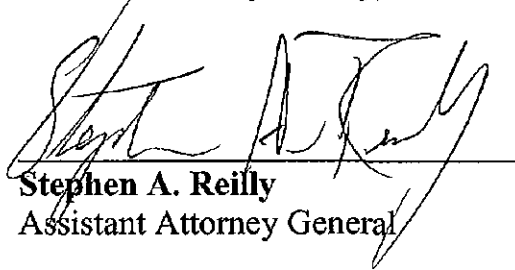
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PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Reply Brief** submitted on behalf of the Staff of the Public Utilities Commission of Ohio was served upon the parties of record indicated on the attached service list this 30th day of May, 2007 via U.S. mail, postage prepaid and/or electronic service.



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