IN THE SUPREME COURT OF OHIO
On Appeal from the Public Utilities Commission of Ohio

Office of the Ohio Consumers' Counsel and Ohio Partners for Affordable Energy, Appellants, v. The Public Utilities Commission of Ohio, Appellee.	))))))))))))))	Case No. 08-0466 Appeal from the Public Utilities Commission of Ohio Public Utilities Commission of Ohio Case No. 05-725-EL-UNC 06-1068-EL-UNC 06-1069-EL-UNC 06-1085-EL-UNC

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I. INTRODUCTION

Ohio Partners for Affordable Energy ("OPAE") herein replies to the briefs filed by the appellee Public Utilities Commission of Ohio ("PUCO") and the intervening appellee Duke Energy Ohio, Inc. ("Duke"). This case concerns applications made by Duke to adjust riders known as the fuel and purchased power tracker, the system reliability tracker ("SRT") and the annually adjusted component ("AAC") of the market-based standard service offer. The riders were established in a case remanded by the Court to the PUCO. *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 300. In its order on remand, the PUCO rejected the stipulation and recommendation that had established the riders (herein referred to as the "rejected stipulation") but kept the riders in place. The PUCO's order on remand is now on appeal to the Court. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, Case No. 08-376. In the instant case, the PUCO approved adjustments to the riders on the basis of another stipulation and recommendation (herein referred to as the "rider stipulation").

In the same way as the rejected stipulation, the approved rider stipulation is not the product of serious bargaining among the parties; it violates important regulatory practices and principles; and, it fails to benefit ratepayers and the public interest. Thus, the rider stipulation does not meet the PUCO's criteria for the reasonableness of stipulations, which have been endorsed by the Court. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.* (1994), 68 Ohio St.3d 559; *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d, 123, 126. The Court should reverse the PUCO's approval of the rider stipulation and remand this case to the PUCO for correction of errors as discussed herein.

II. IT IS UNREASONABLE AND UNLAWFUL FOR THE PUCO TO APPROVE A STIPULATION AND RECOMMENDATION THAT IS NOT THE PRODUCT OF SERIOUS BARGAINING AMONG THE PARTIES.

The PUCO, as usual, informs the Court that this case involves factual areas within the PUCO's expertise to which the Court should defer. The areas cited by the PUCO are the reasonableness of stipulations and the current environment for the sale of electricity. The PUCO also informs the Court that the General Assembly has entrusted these complex matters to the PUCO and that therefore the Court should affirm the PUCO's decision. Appellee Brief at 10.

The central issue before the Court in this case is not complex, nor is it one to which the Court has deferred to the PUCO. On the contrary, this case is inextricably connected to a case remanded by the Court to the PUCO, thus undermining any argument the PUCO may make about the Court's deference to the PUCO regarding the central issue in this case.

In the remanded case, the PUCO approved a stipulation without inquiring whether the parties to the stipulation had negotiated in good faith. The Court questioned whether the existence of side agreements supported a finding that serious bargaining had taken place among the parties to the settlement discussions. *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 300. As the Court stated, if one or more of the signatory parties to a stipulation agrees to a side financial arrangement or some other consideration to sign the stipulation, that information would be relevant to a determination whether all parties engaged in serious bargaining. The existence of side agreements between the signatory parties

is relevant to the integrity and openness of the negotiation process. Id. Any concessions or inducements apart from the terms agreed to in the stipulation have relevance when deciding whether the settlement negotiations were fairly conducted. If there were special considerations in the form of side agreements among the signatory parties, one or more parties may well have gained an unfair advantage in the bargaining process, and the open settlement discussions are compromised. Id. This is the Court's ruling on side agreements to stipulations and the basis of the Court's remand of the PUCO's decision approving the riders that are adjusted in the instant case.

The PUCO demonstrates its disregard for the Court's ruling in the remanded case by focusing narrowly on the Court's reference to open settlement negotiations. Thus, the PUCO argues that all parties were invited to settlement negotiations, that capable, knowledgeable persons participated in the settlement negotiations, and that the negotiating parties represented diverse interests. Appellee Brief at 18-20. In short, the PUCO believes that the Court is concerned only with the outward appearance of the settlement negotiations, not whether serious bargaining is actually taking place. Appellee Brief at 24.

The PUCO's attention to outward appearances at the settlement negotiations is entirely misplaced. Appearances are not only deceiving but also irrelevant to a determination if side agreements undermine the settlement process so that the negotiations are not serious. No one is denying there were settlement negotiations attended by a range of parties. The whole point of the side agreements is that they rendered the negotiations a sham because many of the negotiating parties had side

agreements that stood to exempt them from whatever outcome the negotiating process produced. There was no serious or meaningful bargaining by many of the signatory parties.

The PUCO recognizes that the stipulating parties have side agreements. In fact, on remand, the PUCO rejected the stipulation in the remanded case because side agreements raised serious doubts about the integrity and openness of the negotiation process related to the rejected stipulation. The PUCO, however, claims that these side agreements did not "require" any one to execute the rider stipulation. Appellee Brief at 21. According to the PUCO, this is a distinguishing feature between the rider stipulation and the rejected stipulation. The PUCO states that "(N)o signatory party committed to the April 9, 2007 [rider] stipulation outside the negotiation of that stipulation." Appellee Brief at 23.

This convoluted language demonstrates the weakness of the PUCO's position. The PUCO attempts to isolate the negotiations for the rider stipulation from the side agreements to the rejected stipulation. The PUCO cites the signatory parties' statement that there were no side agreements related to the rider stipulation. The fact is that the relevant stipulating parties had already committed to support the riders in their side agreements and were doing precisely that when they signed the rider stipulation. The evidence on remand demonstrates that the side agreements entered into as inducement to sign the rejected stipulation continued to affect the views of the signatory parties to the rider stipulation. The stipulating parties joining Duke in the rider stipulation were simply continuing to follow the terms of the side

agreements that benefit themselves at the expense of entire classes of customers, an expense that the poor on whose behalf we advocate simply cannot afford.

Duke and five other parties submitted the rider stipulation. The City of Cincinnati signed the rider stipulation. The City of Cincinnati also signed a side agreement with Duke under which the City agreed to withdraw from the remanded case. Under the agreement, Duke provided the City with one million dollars ($1,000,000) in total consideration for certain amendments to three electricity agreements between Duke and the City. OCC Remand Ex. 6, OPAE Supplement to Merit Brief ("Supp.") at 17. The settlement agreement was conditioned upon the City not opposing the stipulation filed in the remanded case. The settlement agreement would terminate on the day that the PUCO issued an order unacceptable to Duke in carrying out the terms of the stipulation in the remanded case. The agreement also provides for termination if the PUCO does not issue acceptable orders in the remanded case "or a related case necessary to carry out the terms and conditions of the stipulation and recommendation filed in [the remanded] case." Id. at 2. This is a direct and explicit reference to the rider cases. The terms of the remanded stipulation are implemented via the stipulation adjusting the riders. The City of Cincinnati's support for the rider stipulation is a product of its side agreement with Duke. Id. The City agreed in its side agreement to support Duke in the rider cases. Id.

The PUCO claims that the evidence does not show that the governmental officials of the City of Cincinnati would act in a manner contrary to what they determined to be in the best interest of the Cincinnati populace. Appellee Brief at 25.

It is meaningless and irrelevant to speculate on whether the officials of City of Cincinnati would act in a manner contrary to whatever they determined. The City's side agreement with Duke concerns the City as a customer of Duke, not as a representative of the interests of the City's populace. The City withdrew from the remanded case pursuant to its side agreement and signed the rider stipulation, also pursuant to its side agreement, so that the PUCO would not issue an order unacceptable to Duke. Signing the rider stipulation ensured the City the financial benefits of its side agreement. The City of Cincinnati's position is that rates for customers should be increased to yield the revenue outcome requested by Duke and the benefits of the side agreement for the City. Because the City of Cincinnati showed no concern for the rate increases that the rider stipulation will impose on other customers, its support for the rider stipulation cannot be construed as support from any other customer or from the City's populace.

Another signatory party, which the PUCO cites as representing the residential class, is People Working Cooperatively ("PWC"). PWC operates demand-side management programs funded by Duke. PWC's primary purpose in the rider cases was to assure that funding promised by Duke would be continued and extended through the end of the market development period. PWC Motion to Intervene (March 9, 2004), OPAE Supp. at 14. The PUCO argues that PWC uses grants from Duke to provide weatherization services but that the existence of those grants does not suggest that PWC would ignore the interests of its "constituents" and enter into a stipulation that it did not believe was in their best interest. Appellee Brief at 25. The fact is that PWC itself limited its interest in this case to the funding it receives from

Duke. PWC made no claim to represent any other interest or constituent. PWC Motion to Intervene (March 9, 2004), OPAE Supp. at 14.

PWC signed the rejected stipulation, just as it signed the rider stipulation. Thus, PWC's position is that rates for residential customers should be increased in order to fund programs that PWC operates and to yield the revenue outcome requested by Duke. Because PWC showed no concern for the rate increases that the rider stipulation will impose on residential customers, its support for the rider stipulation cannot be construed as support from the residential class.

Other signatory parties to the rider stipulation include Ohio Energy Group ("OEG") and the Ohio Hospital Association ("OHA"). Members of OEG and OHA have side agreements with Duke. The evidence of these side agreements remains confidential and is set forth in the sealed testimony of OCC witness Beth Hixon. OCC Supplement to Merit Brief at 1-475. The evidence of the side agreements shows that consideration was provided to gain the support of certain large users of electricity to the rider stipulation. This evidence demonstrates that serious bargaining among the parties did not take place during the settlement negotiations for the rider stipulation.

Thus, the only customer parties to the rider stipulation have side agreements with Duke. While the PUCO argues that the side agreements do not "require the conclusions" that OCC and OPAE draw, it is obvious that serious bargaining does not take place when the relevant stipulating parties have side agreements that serve to exempt them from the terms of the stipulation and that have bound them to support it. Appellee Brief at 25.

Against the massive weight of the evidence, the PUCO continues to plead for the rider stipulation. The PUCO claims that the problem for OPAE and OCC is that we did not negotiate successfully and are now complaining to the Court about our failure in the negotiating process. Appellee Brief 27-28. The PUCO and Duke also argue that OPAE and OCC are seeking a "veto" over stipulations to which other parties agree. It is absurd to dismiss OPAE and OCC as two parties who failed to achieve a satisfactory result in a settlement process, when the settlement process, which was corrupted by the side agreements, was obviously unfair to OPAE and OCC. Moreover, OCC and OPAE are the parties representing the vast majority of Duke's customers, none of whom have side agreements and special inducements. OCC and OPAE are the only parties representing customers who are actually subject to the terms of the rider stipulation and who will actually pay all the charges set forth in the stipulation. The rider stipulation is an agreement among parties who have no stake in its terms.

The PUCO encourages stipulations among parties to cases. As the PUCO states in the instant case, "The stipulation provides for resolving the uncertainty associated with the post rate stabilization period." Appellee Brief at 27. The PUCO finds that "mandatory discussions among the parties" and "the expeditious resolution of issues provided by the stipulation" are in the public interest. Id. One important reason the PUCO endorses stipulations is that the Court has affirmed PUCO orders on the basis of stipulations supported by a wide range of parties. In *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, the Court affirmed the PUCO's approval of a rate plan on the basis of the reasonableness of a stipulation

supported by all customer classes. *Constellation* is based entirely on the Court's affirmation of the PUCO's approval of a stipulation to which parties from all customer classes agreed. Id.

Proof of the importance of a stipulation was emphasized again by the Court in a subsequent case involving the rates of FirstEnergy Corp. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 2006-Ohio-2110 ¶18. The Court made it clear that a stipulation signed by a wide range of parties was the determining factor that allowed the Court to affirm the PUCO's orders. The Court has made a strong distinction between electric rate orders that could be approved pursuant to a stipulation supported by a wide range of parties and orders that could not be approved absent such a stipulation. Reliance on a stipulation was also central to the Court's decision in *Elyria Foundry v. Pub. Util. Comm.*, 2007-Ohio-4164 (August 29, 2007).

Duke claims that there is nothing "extra-legal" in the rider stipulation. Duke Brief at 17. But Duke itself appealed the PUCO's remand order to the Court on the basis that the PUCO lacks statutory authority for its order on remand. Notice of Appeal of Duke, Case No. 08-367. The same lack of statutory authority applies to the PUCO's order approving the rider stipulation as well. Because the PUCO's statutory authority to issue electric rate plan orders was uncertain, stipulations were meant to facilitate PUCO and Court approval by implying that there was support for the stipulated outcome among customers even if explicit statutory authority did not exist. This explains the PUCO's need to approve a stipulation even in the absence of true agreement among the parties.

Contrary to the Court's opinions cited above, the PUCO failed to require any support for the rider stipulation from any customer group actually affected by its terms. The evidence on remand demonstrates that side agreements undermined the negotiations among the parties so that the Court must conclude that serious bargaining did not take place at the settlement negotiations for the rider stipulation, just as serious bargaining did not occur for the rejected stipulation.

A disservice is done to public policy when the PUCO approves stipulations that do not meet the PUCO's reasonableness criteria. The public interest is not served by the PUCO's approval of stipulations that do not actually reflect the agreement among the stipulating parties. The public interest is also not served by the PUCO's approval of stipulations that have no support from customers who are actually affected by the stipulation's terms. If the PUCO refuses to consider the evidence that a stipulation is not a bargained for agreement, there is a diminished incentive for parties to enter the negotiation process. Parties cannot trust that the PUCO will prevent the approval of sham stipulations.

The Court will reverse the PUCO's orders when the Court finds that the PUCO's decision was against the manifest weight of the evidence and was clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty. The Court will also reverse the PUCO's orders when they are unlawful. *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St. 3d 123, 125. Thus, the Court should reverse and vacate the unlawful and unreasonable PUCO order in this case approving the rider stipulation that is not the product of serious bargaining among the signatory parties. The Court should further the public interest by requiring the

PUCO to approve a stipulation only when it represents serious bargaining and agreement among the parties who are actually affected by the outcome of the stipulation through higher utility bills.

III. IT IS UNREASONABLE AND UNLAWFUL FOR THE PUCO TO APPROVE A STIPULATION AND RECOMMENDATION THAT VIOLATES IMPORTANT REGULATORY PRINCIPLES AND PRACTICES, DOES NOT BENEFIT RATEPAYERS AND DOES NOT SERVE THE PUBLIC INTEREST.

A. T he rider stipulation's treatment of returns on Construction Work in Progress ("CWIP") violates important regulatory principle and practice, does not benefit ratepayers and does not serve the public interest; therefore, the PUCO acted unreasonably and unlawfully when it approved the rider stipulation.

The PUCO argues that OPAE and OCC seek traditional rate of return regulation and that the statutory requirement for construction work in progress ("CWIP") under R.C. §4909.15 only applies to cases arising under R.C. Chapter 4909. According to the PUCO, this case arises under R.C. Chapter 4928, which concerns a competitive environment, and the limitation on CWIP in R.C. §4909.15 "has no place in a competitive environment." Appellee Brief at 33. The PUCO also states that "the logic and categories of cost-based ratemaking do not apply." Id. at 38.

The PUCO's order on CWIP in this case certainly lacks logic. The concept of CWIP does not exist in a competitive environment. This case does not concern a "competitive environment" because there is no competitive retail market for electric generation, at least for residential and small commercial customers, those who are affected by the rider stipulation. Contrary to the PUCO's assertion, this case arises out

of the failure of the competitive market to develop. The PUCO would not consider CWIP in a competitive environment; it is precisely because there is no competitive environment that CWIP arises as an issue in this case. When the PUCO found, as it did, that CWIP was appropriately included in Duke's AAC calculation, the PUCO was not acting in a competitive environment but instead was setting a cost-based rate that is a monopoly rate for captive customers, which include all residential and small commercial customers, families and small businesses witnessing price increases without a whiff of competition. Competitive markets do not require customers to pre-pay a supplier to build its plant with no guarantee the product will ever be delivered.

A return on CWIP without regard to percentage completion is not allowed in cost-based rates. A revenue requirement determined through a regulatory cost calculation would require that any CWIP be at least 75% complete before a return on it would be allowed. R.C. §4909.15, OPAE Appendix to Merit Brief ("App.") at 97. Under the regulatory paradigm, customers might pay a return on CWIP that is at least 75% complete during plant construction, because, after construction is complete, the customers will have lower capital costs as a result of the return on CWIP during the final stages of construction. The law represents a balance between the interests of the customer and the utility; the customers pay sooner to avoid higher costs and interest in future years. R.C. §4909.15, App. 97.

In this case, Duke did not demonstrate that the CWIP portion of the environmental compliance net plant is or will be at least 75% complete (or any other percentage) during the time that the Rider AAC is being collected. Moreover, the rate plan is only in place until the end of 2008, hardly enough time for customers to see any

benefit from the prepayment of construction costs. The three-year rate plan does not provide any assurance of lower capital costs for customers at a future date. Thus, the allowance of a return on CWIP in this rider case is unlawful, unjust and unreasonable.

As OCC witness Michael P. Haugh pointed out, Duke seeks cost-based recovery that is similar to the regulatory methodology for the treatment of CWIP, but without the statutory limitation regarding the percentage of completion for additions to environmental plant and without any assurance of lower capital costs in the future. OCC Ex. R.R. 1 at 7, Supp. 20. Duke is seeking for itself the best of both worlds: cost recovery using the regulatory revenue requirement methodology (CWIP) but disregard for regulatory ratemaking principles, statutes, and rules governing cost recovery such as those that limit CWIP. Id. The PUCO's approval of a rider that allows Duke to collect almost $29 million more than it would under Ohio law clearly does not benefit customers or serve the public interest, nor is it consistent with regulatory practice or principle. It is a gift a competitive market would not give.

The PUCO argues that statutory consumer protections against unjust and unreasonable rates can be ignored in this case. Thus, the PUCO chooses to ignore R.C. §§4909.15, 4909.18, 4909.19, and 4928.14, App. 97, 101, 103, 105. The PUCO is wrong to dismiss the relevance of the statutory just and reasonable standard for standard service offer rates. Under Chapter 4928, specifically at R.C. §4928.14, standard service offer rates must be filed pursuant to R.C. §4909.18 and thus conform to a just and reasonable standard. Even if by some stretch of the imagination, the AAC rider were considered a lawful filing under Chapter 4928, it would still have to meet the

just and reasonable standard required by R.C. §4909.18 for standard service offers pursuant to R.C. §4928.14.

Thus, the rider stipulation's treatment of CWIP is unlawful, unjust and unreasonable. It violates Ohio law, as well as regulatory principles and practices. It also fails to benefit ratepayers or serve the public interest. In addition, to the rider stipulation not being the product of serious bargaining among the parties, the rider stipulation's treatment of CWIP is another reason why the PUCO's approval of the rider the stipulation should be reversed by the Court.

B. The stipulation's treatment of the use of DENA assets violates important regulatory principle and practice, does not benefit ratepayers and does not serve the public interest; therefore the PUCO acted unreasonably and unlawfully when it approved the stipulation.

With regard to the regulatory treatment of the Duke Energy North America ("DENA") assets, three powerplants sorely lacking in profitability, the PUCO argues that the DENA issue is a question of fact and that OPAE is arguing about "policy" and not regulatory principles. Appellee Brief at 41. The distinction between policy, principles and practices is not particularly clear in this case. The PUCO's criteria for the reasonableness of stipulations state that the stipulation should not violate any important regulatory principle or practice. If regulatory policy is somehow distinct from regulatory principles and practices, this distinction is too obscure to be significant in this case. The rider stipulation's treatment of the DENA assets is contrary to the recommendations of the management/performance auditor and PUCO precedent. Therefore, the stipulation's treatment of the DENA assets violates regulatory practice and principles.

The PUCO claims that neither OCC nor OPAE has pointed to any regulatory principles that are violated by the stipulation's provisions concerning the use of DENA assets. Appellee Brief at 39. In fact, OPAE pointed first to the management/ performance auditor's recommendation regarding the DENA assets; the auditor recommended that Duke's purchases of reserve capacity from DENA assets not be eligible for inclusion in the SRT. The auditor found that purchasing capacity from other providers would be less expensive for ratepayers than buying capacity from the uncompetitive DENA assets. Commission-Ordered Ex. 1 at 6-5, OCC Supp. at 496. The auditor also found that Duke could sell the DENA capacity elsewhere. Id. Moreover, the auditor stated that affiliate transactions, such as purchases of DENA capacity by Duke, are problematic and burdensome to audit. Id. These recommendations of the auditor were ignored. Ignoring the recommendations of auditors violates important regulatory principles and practices.

The PUCO argues that the rider stipulation included all but two recommendations of the management/performance auditor, as if the quantity of the recommendations adopted takes precedence over the importance of the recommendations. Appellee Brief at 30. In fact, the stipulation adopted the audit recommendations that Duke was willing to accept and rejected the audit recommendations that Duke was not willing to accept. The rider stipulation represents nothing but Duke's voluntary concessions with regard to the auditor's recommendations. The recommendation on the DENA asset was significant, but Duke did not agree with it. Therefore, it was not included in the rider stipulation; the

audit recommendation had no advocates among the signatory parties to the stipulation as they were unaffected by the stipulation's terms.

Second, OPAE pointed to the PUCO's previous order that costs related to the transfer of the DENA assets may not be passed on to Ohio customers without prior approval of the PUCO. Further, in Case No. 04-724-EL-UNC, the PUCO adopted a stipulation, which states that Duke may not use the DENA assets to satisfy the SRT margin requirements without an application to the PUCO requesting approval of a market price associated with the DENA assets. OCC R.R. Ex. 4, Supp. 64. Duke did not provide any market pricing mechanism in its SRT application. OCC Ex. R.R. 1 at 12, Supp. 20.

OCC witness Haugh concurred with the auditor's recommendation that charges related to DENA assets should not be collected from customers in Duke's SRT. Duke has not shown that customers are better off by using DENA assets than paying for capacity in the market, and the auditor found that ratepayers would see no savings from the self-dealing of Duke with its DENA assets. Thus, Duke did not demonstrate that the use of the DENA assets would benefit customers. The use of the DENA assets may result in SRT costs that do not provide reasonably-priced retail electric service for Ohio customers. OCC Ex. R.R. 1 at 15, Supp. 20.

Third, the rider stipulation allows Duke to determine the "market price" it will charge ratepayers by either using the midpoint of broker quotes, the average price of third-party transactions, or another method determined by Duke and the Staff. In reality, there are usually very few broker quotes. OCC R.R. Ex. 2 at 4, Supp. 47. The problem with the stipulated method is that there is a limited market. If there are very

few or no transactions, then there is only speculation about the market price. Given the lack of transactions in the capacity market, the market price for capacity would be determined with limited or no market data. This is not an acceptable solution for determining the market price of the DENA assets, nor does it provide a reasonable cost for capacity for Duke customers who must pay the SRT. OCC Ex. R.R. 1 at 14, Supp. 20.

The rider stipulation disregards the recommendation of the management/ performance auditor and previous PUCO precedent prohibiting charging ratepayers for any costs associated with the DENA assets. Therefore, the PUCO has not provided adequate protection for ratepayers nor has it prevented overcharging Duke's customers for capacity. The rider stipulation's treatment of the DENA assets confirms that the rider stipulation violates important regulatory principle and practice and is harmful to ratepayers and against the public interest. In addition, to the rider stipulation not being the product of serious bargaining among the parties and the rider stipulation's treatment of CWIP, the rider stipulation's treatment of DENA assets is another reason why the PUCO's approval of the rider the stipulation should be reversed by the Court.

V. CONCLUSION

The PUCO and Duke argue that OCC and OPAE seek to create a right of "veto" over stipulations. Duke Brief at 15. In fact, the party with "veto" power over the stipulation is Duke. Duke got what it wanted and paid off certain individual large

customers to sign a stipulation that would not affect them and that the PUCO would approve.

The rider stipulation fails all three parts of the PUCO's three-part test for the reasonableness of stipulations. The rider stipulation is not the product of serious bargaining among the parties. The evidence demonstrates that side agreements undermined the settlement negotiations for the rider stipulation, which was not supported by any class of customers actually subject to its terms.

The rider stipulation also violates important regulatory practices and principles. It does not benefit ratepayers and serve the public interest. It allows for the inclusion of a return on CWIP in Duke's Rider AAC without regard to any standards for the allowance of a return on CWIP. Recovery of a return on CWIP in the AAC must be disallowed if the AAC is to result in just and reasonable rates as is required by current law. R.C. §§4909.15, 4909.18 and 4928.14. The rider stipulation also fails to clarify that the DENA assets may only be used in an emergency when no alternative is available and only subject to a price cap for purposes of any cost recovery. The recovery through the SRT rider of capacity costs associated with the DENA assets should not be allowed.

The Court is required to reverse, vacate or modify final orders of the PUCO where the orders are unreasonable or unlawful. *Consumers' Counsel* v. *Pub. Util. Comm.,* (1979) 58 Ohio St.2d 108, 110. The Court should reverse and vacate the unlawful and unreasonable PUCO decision in this case approving the rider stipulation. The Court should further the public interest by requiring the PUCO to approve only

stipulations that meet the PUCO's three-part test for determining the reasonableness of stipulations.

Respectfully submitted,

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Ohio Partners for Affordable Energy

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Appellant, Ohio Partners for Affordable Energy, was served upon all parties to this proceeding by hand delivery or regular U. S. Mail this 8th day of August 2008.

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