

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates.	) ) )	Case No. 14-0375-GA-RDR
In the Matter of the Application of Duke Energy Ohio, Inc. for Tariff Approval.	) )	Case No. 14-0376-GA-ATA
In the Matter of the Application of Duke Energy Ohio, Inc. for an adjustment to Rider MGP Rates.	) ) )	Case No. 15-0452-GA-RDR
In the Matter of the Application of Duke Energy Ohio, Inc. for Tariff Approval.	) )	Case No. 15-0453-GA-ATA
In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates.	) ) )	Case No. 16-0542-GA-RDR
In the Matter of the Application of Duke Energy Ohio, Inc. for Tariff Approval.	) )	Case No. 16-0543-GA-ATA
In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates.	) ) )	Case No. 17-0596-GA-RDR
In the Matter of the Application of Duke Energy Ohio, Inc. for Tariff Approval.	) )	Case No. 17-0597-GA-RDR
In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates.	) ) )	Case No. 18-0283-GA-RDR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tarif Approval.	) )	Case No. 18-0284-GA-ATA
In the Matter of the Application of Duke Energy Ohio, Inc. for Implementation of the Tax Cuts and Jobs Act of 2017.	) ) )	Case No. 18-1830-GA-UNC
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of Tariff Amendments.	) ) )	Case No. 18-1831-GA-UNC

In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates.	)	Case No. 19-0174-GA-RDR
)	
In the Matter of the Application of Duke Energy Ohio Inc., for Tariff Approval.	)	Case No. 19-0175-GA-ATA
)	
In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Defer Environmental Investigation and Remediation Costs.	)	Case No. 19-1085-GA-AAM
)	
In the Matter of the Application of Duke Energy Ohio, Inc. for Tariff Approval.	)	Case No. 19-1086-GA-UNC
)	
In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates.	)	Case No. 20-0053-GA-RDR
)	
In the Matter of the Application of Duke Energy Ohio, Inc. for Tariff Approval.	)	Case No. 20-0054-GA-ATA
)	

INTERSTATE GAS SUPPLY, INC.’S MEMORANDUM CONTRA DUKE ENERGY OHIO, INC.’S MOTION FOR PROTECTIVE ORDER

I. INTRODUCTION

On August 31, 2021, parties submitted a Stipulation in the above-captioned cases. The Stipulation proposes to resolve several unrelated cases and includes new subject matter that is completely unrelated to the scope of the underlying proceedings. On October 15, 2021, the Attorney Examiner granted Interstate Gas Supply, Inc.’s (“IGS”) intervention and established an expedited procedural schedule to consider the Stipulation. Given the expedited schedule—and to respect the attorney examiner’s desire to avoid delay—IGS immediately served interrogatories on Duke to explore the subject

matter (and factual basis) for testimony and the Stipulation, as well as how the Stipulation satisfies the three-part test the Commission relies upon when considering the reasonableness of a Stipulation.

Despite limiting the scope of interrogatories to Duke's own testimony and the Stipulation itself, Duke Energy Ohio, Inc. ("Duke") filed a Motion for Protective Order ("Motion") seeking an order from the Public Utilities Commission of Ohio ("PUCO" or "Commission") that it is not required to respond to certain interrogatories included in Interstate Gas Supply, Inc.'s ("IGS") First Set of Discovery. Duke argues that it should not be required to respond to the eight interrogatories it identified in its supporting memorandum because the information requested exceeds the scope of IGS's limited intervention in this case.¹ Duke argues that because the Commission limited IGS's interest in these proceedings to the three competitive market-related provisions proposed in the Stipulation (i.e. Paragraphs 19, 24, and 25), any discovery issued by IGS should also be limited to those topics.² IGS disagrees.

As an initial matter, it's worth noting that the narrow discovery standard that Duke seeks Commission authorization to enforce is not addressed anywhere in the Entry that granted IGS's motion for leave to intervene. Although the Commission did limit IGS's interests in these proceedings to the three-market related commitments discussed in its motion for leave to intervene, the Commission took no position on the scope of

¹ Motion of Applicant Duke Energy Ohio, Inc., for Protective Order Confirming That Response is Not Required to Certain Discovery and Request for Expedited Treatment, Case Nos. 14-0375-GA-RDR et al., at 7 (Oct. 22, 2021). (hereinafter "Motion for Protective Order")

² *Id.* at 7.

permissible discovery in these cases. The Entry granted the motions for leave to intervene of IGS and the Retail Energy Supply Association (“RESA”) and established a procedural schedule for the parties “to consider the Stipulation[.]”³

Given that the Entry did not limit the scope of discovery in this case, Duke should not be permitted to circumvent a party’s right to discovery—rights established by statute and the Commission’s rules. Indeed, “[a]ll parties and intervenors shall be granted ample rights of discovery.” R.C. 4903.082. And Ohio Adm. Code 4901-1-16(B) expressly provides that a party to proceeding may obtain discovery of *any* unprivileged matter that is relevant to the subject matter of the proceeding *and is reasonably calculated to lead to the discovery of admissible evidence*. “It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”⁴

IGS is a party to this case, which now seeks to determine whether the Stipulation that Duke filed on August 31, 2021, is reasonable. IGS’s First Set of Discovery is relevant to a determination of whether the Stipulation satisfies the Commission’s three-prong test for contested settlements, and despite Duke’s arguments to the contrary, is reasonably calculated to lead to the discovery of other admissible evidence. Nevertheless, Duke

³ Entry at 14 (Oct. 15, 2021).

⁴ *In the Matter of Application of Duke Energy Ohio, Inc. for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for a Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case Nos. 10-2586-EL-SSO, *et al.*, Entry at 4 (Dec. 13, 2010).

seeks to arbitrarily narrow the scope of discovery authorized under the Commission's rules and, in doing so, eviscerate IGS's right to due process in these proceedings.

Indeed, Duke has sought to withhold evidence regarding its *own testimony* and to prevent IGS from obtaining evidence relevant to the test that Duke itself will seek to address in its post-hearing brief. As the Supreme Court of the United States has noted, "[a] hearing is not judicial, at least in any adequate sense, unless the evidence can be known."⁵ Accordingly, Duke should not be permitted to refrain from responding to *any* discovery that seeks to evaluate the reasonableness of the Stipulation. Granting Duke's request would be "at variance with 'the rudiments of fair play' long known to our law. The Fourteenth Amendment condemns such methods and defeats them."⁶

IGS will demonstrate here that Duke's motion should be denied because each interrogatory included in its First Set of Discovery is relevant to the Commission's consideration of the Stipulation and is therefore reasonably calculated to lead to the discovery of admissible evidence. Regardless, IGS would note that this entire pleading cycle has been rendered moot by Duke's service of "responses."⁷ Just as an objection at trial is rendered moot after the witness answers the question, Duke's motion for protective order is moot and without legal significance.

⁵ *W. Ohio Gas Co. v. Pub. Utilities Comm'n of Ohio*, 294 U.S. 63, 69, 55 S. Ct. 316, 319, 79 L.Ed. 761 (1935).

⁶ *Id.* at 71 (quoting *Chicago, Milwaukee & St. Paul R. Co. v. Polt*, 232 U.S. 165, 168 (1914)).

⁷ While Duke responded to each interrogatory, IGS notes that its responses are evasive and potentially incomplete.

For the reasons set forth below, the Commission should deny Duke's Motion for Protective Order.

II. BACKGROUND ON THE MOTION FOR PROTECTIVE ORDER

On October 15, 2021, the Commission issued an Entry in these cases that granted the motions for leave to intervene filed by IGS and RESA and established a procedural schedule.⁸ In granting IGS and RESA's motions to intervene, the Entry limited each party's interest in this case to the three competitive market-related provisions⁹ proposed in the Stipulation, "namely Duke's commitment to transition from the GCR mechanism to an SSO competitive auction format for natural gas supply, the proposed SSO price-to-compare message on natural gas bills, and the commitment to provide OCC aggregate shadow billing data on an ongoing basis."¹⁰ The Entry also set a discovery deadline and hearing date for the parties to properly consider whether the Stipulation satisfies the Commission's three-prong test for contested settlements.¹¹

To that end, IGS served Duke with a First Set of Discovery Requests ("Discovery") that sought additional information concerning the three competitive market-related commitments included in the Stipulation (i.e. Paragraphs 19, 24, and 25) as well as the testimony filed in support of the Stipulation by Duke witnesses Amy Spiller and Sarah Lawler.¹² The next day, Duke sent an email to IGS requesting that it withdraw the

⁸ Entry at 13 (Oct. 15, 2021).

⁹ IGS maintains that its intervention should not have been limited.

¹⁰ *Id.*

¹¹ *Id.* at 14.

¹² See *generally* Motion for Protective Order at Exhibit A-1.

following interrogatories: INT 1-3; INT 1-4; INT 1-5; INT 1-9; INT 1-10; INT 1-14; INT 1-18; and INT 1-19, arguing that each interrogatory is outside the scope of IGS's intervention in this proceeding.¹³ Because IGS's interrogatories are well-within the scope of permissible discovery in these proceedings, IGS declined Duke's request.¹⁴ Duke subsequently filed its Motion for Protective Order, which now seeks Commission authorization to refrain from responding to each of the interrogatories listed above.

III. ARGUMENT

By statute, "[a]ll parties and intervenors shall be granted ample rights of discovery." R.C. 4903.082. The Commission's rules of discovery are meant to "encourage the prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation for participation in commission proceedings."¹⁵ Both Ohio law and the Commission's rules permit discovery of *any* unprivileged matter relevant to the subject matter of the pending proceeding.¹⁶ The Commission's rules also permit discovery of information that *appears reasonably calculated to lead to the discovery of admissible evidence*. Ohio Adm. Code 4901-1-16(B). Thus, at this juncture, discovery need not necessarily request admissible information—it must merely be reasonably tailored to lead

¹³ Motion for Protective Order, Exhibit A-2 at pp 2-3.

¹⁴ *Id.* at 1.

¹⁵ Ohio Adm. Code 4901-1-16(A)

¹⁶ Ohio Adm. Code 4901-1-16(B); Civ.R 26(B).

to the discovery of admissible evidence.¹⁷ All questions regarding admissibility are a matter for trial.¹⁸

In this case, the Commission will “consider the Stipulation” and whether that agreement satisfies the Commission’s three-prong test for contested settlements. It follows then that any discovery that IGS seeks concerning the Stipulation is relevant to the subject matter of the pending proceeding and, therefore, discoverable. Here, IGS’s First Set of Discovery probes both the reasonableness of that agreement and the testimony submitted to support that agreement; thus, the discovery is reasonably calculated to lead to the discovery of admissible evidence. Responses to IGS’s discovery will be utilized to fully develop the record and assist the Commission in its consideration of the Stipulation. The information IGS seeks is reasonably calculated to lead to the discovery of admissible evidence with respect to the Commission’s consideration of the Stipulation as a package under the three-part test. Accordingly, the Commission should deny Duke’s Motion for Protective Order.

To support its position, IGS has cataloged the interrogatories at issue by subject matter and provided a detailed analysis of the information it is seeking and an explanation why the information sought is relevant to an evaluation of the Stipulation.

A. Interrogatories 1-3 and 1-18

The supporting testimony of Duke witnesses Spiller and Lawler both note that the Stipulation supports Duke’s “financial health[,]” and in doing so, imply that the Stipulation

¹⁷ *In the Matter of Application of Duke Energy Ohio, Inc. for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for a Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case Nos. 10-2586-EL-SSO et al., Entry at 4 (Dec. 13, 2010).

¹⁸ *Id.*

benefits ratepayers and the public interest.¹⁹ Neither witness, however, supported that statement by identifying the specific provision(s) in the Stipulation that will promote that objective. It is for that reason that Interrogatory 3(a) seeks to understand why—if at all—Duke witness Spiller believes that the stipulated commitments concerning shadow billing (i.e. Paragraph 25), the transition from a GCR to an SSO (i.e Paragraph 22) and the price-to-compare support Duke’s financial health. Despite Duke’s argument to the contrary, this interrogatory is well-within the scope of IGS’s interest in the case.

Interrogatory 18 also asks Duke witness Lawler to describe how the Stipulation will support Duke’s financial health and “provide certainty”²⁰ to customers; while Interrogatory 3(b) asks witness Spiller to clarify her testimony regarding the relationship between Duke’s credit rating and the potential for “abrupt cost increases.”²¹ In both cases, these statements appear to imply that the Stipulation benefits ratepayers and serves the public interest; therefore, the Commission should find that Interrogatories 3 and 18 are reasonably tailored to lead to admissible evidence and thus the motion should be denied.

In any event, despite Duke’s Motion, Duke produced responses to this discovery anyway; therefore, the Motion is moot. IGS is troubled that Duke submitted its Motion—thereby necessitating IGS to dedicate resources to respond to its Motion for Protective Order—even though it apparently intended to respond to the interrogatories at issue all along.

¹⁹ See Direct Testimony of Amy B. Spiller on Behalf of Duke Energy Ohio, Inc. in Support of Stipulation, at 14 (hereinafter “Spiller Testimony”); Supplemental Testimony of Sarah E. Lawler on Behalf of Duke Energy Ohio, Inc. in Support of Stipulation, at 8 (hereinafter “Lawler Supplemental Testimony”).

²⁰ Lawler Supplemental Testimony at 8.

²¹ Spiller Testimony at 14.

B. Interrogatories 1-4 and 1-5

Paragraph 18 of the Stipulation describes the total amount of insurance proceeds that Duke proposes to distribute amongst low-income, senior, and non-residential customers after MGP investigation and remediation expenses are offset. The details of that provision are discussed in the supporting testimony of Duke Witnesses Spiller and Lawler. Interrogatories 4 and 5 seek to understand: (1) whether all customer classes were fairly considered during the negotiations that gave rise to that provision; and (2) how those proceeds will be distributed to the customers identified in the Stipulation.²²

First, it is worth noting that these questions are directed at Duke's *own* testimony and the Stipulation in this proceeding. Permitting a party to submit evidence without permitting discovery regarding such evidence runs against fundamental principles of fair play, particularly when the rule of law and justice are considered.

Regardless, these provisions may potentially be considered "inducements" that impacted the bargaining process. IGS notes that when evaluating the Stipulation, the Commission "must determine whether there exists sufficient evidence that the stipulation was the product of serious bargaining. Any such concessions or inducements apart from the terms agreed to in the stipulation might be relevant to deciding whether negotiations were fairly conducted."²³ The Stipulation and testimony filed in support of Paragraph 18 offer little insight into why certain customer classes were selected over others. Accordingly, Interrogatories 4 and 5 are tailored to lead to admissible evidence in this

²² Motion for Protective Order, Exhibit A-1 at pp 8-9.

²³ *Consumers' Counsel v. Pub. Util.*, 111 Ohio St.3d 300, 321 (2006).

proceeding in that both questions will assist IGS and the Commission in determining whether the Stipulation satisfies the Commission's three-prong test.

IGS also notes that Duke responded to Interrogatories 1-4 and 1-5. Therefore, the Motion is moot.

C. Interrogatories 1-9, 1-10, 1-14, and 1-19

Interrogatories 1-9, 1-10, 1-14, and 1-19 probe various elements of the Commission's three-part test.²⁴ Interrogatory 1-9 requests that Duke identify whether any competitive retail natural gas suppliers participated in the negotiations that gave rise to a Stipulation that includes three market-related commitments. This interrogatory was served in response to statements made by Duke witness Spiller, which imply that the Stipulation satisfies the requirement that the Stipulation be the product of serious bargaining among capable, knowledgeable parties.

The information sought in Interrogatory 1-19 also seeks to explore the negotiation process that gave rise to the Stipulation. Similar to Interrogatory 1-9, this interrogatory is meant to evaluate whether competitive market participants were represented at the bargaining table. Interrogatory 1-19 is relevant to a determination of whether the Stipulation can satisfy the first prong of the Commission's three-part test and is therefore discoverable.

Whether the Stipulation—including the market-related commitments—satisfies the first part of the test is a matter under consideration in this case. Of course, the Supreme Court of Ohio has expressed “grave concern” when a Stipulation arises from an

²⁴ See *In re Application of Columbus S. Power Co.*, Case No. 09-1089-EL-POR, Opinion and Order at 21 (May 13, 2010).

exclusionary settlement process. *Time Warner AxS v. PUCO*, 75Ohio St. 3d 229, FN 2 (1996). It is IGS's belief that all competitive retail natural gas suppliers were excluded from settlement negotiations. However, since IGS was not a participant in those negotiations, we cannot confirm that point absent the discovery at issue here. Therefore, Interrogatories 1-9 and 1-19 are reasonably tailored to lead to admissible evidence.

Regardless, Duke already responded to Interrogatories 1-9 and 1-19; therefore, its Motion is moot.

Since Witness Spiller also testified that the Stipulation does not violate the third prong of the Commission's test,²⁵ Interrogatory 1-14 seeks clarification as to her understanding of "regulatory principle or practice." Given Duke's longstanding opposition to OCC's shadow-billing related suggestions²⁶ as well as the series of Commission orders rejecting OCC's proposals, IGS should be permitted to inquire what definition Duke is using and whether it includes Commission precedent. The request is tailored to lead to the discovery of admissible evidence.

Finally, Interrogatory 1-10 seeks to gain insight into whether Duke would exercise its right to withdraw from the Stipulation²⁷ if the three market-related provisions referenced above are stripped out of the agreement and all other provisions remain unchanged. Given that the Attorney Examiner recently agreed that the competitive-market related provisions included in the Stipulation "represent wholly unrelated matters

²⁵ See Spiller Testimony at 22.

²⁶ *In the Matter of the Commission's Review of the Minimum Gas Service Standards in Chapter 4901:1-13 of the Ohio Administrative Code*, Case No. 19-1429-GA-ORD, Reply Comments of Duke Energy Ohio at 2 (Jan. 31, 2020).

²⁷ Stipulation at ¶33.

for the Commission's consideration,"²⁸ it is not beyond the realm of reason that the Commission may conclude—for a plethora of reasons—that it was inappropriate to include these provisions in the Stipulation. It would be helpful to understand the gravity of these provisions for the signatory parties and the potential for Duke, or another signatory party, to withdraw from the Stipulation. Moreover, to the extent that parties would in fact withdraw over these completely unrelated provisions, it begs the question regarding what they may have traded in return for such alleged "benefit."

Here again, Duke has also responded to this interrogatory; therefore, its Motion is moot.

IV. CONCLUSION

The foregoing demonstrates that the interrogatories at issue in Duke's Motion for Protective Order are within the scope of discovery authorized under Ohio Adm. Code 4901-1-16(B), because the information sought is relevant to an evaluation of whether the Stipulation satisfies the Commission's three-part test for contested settlements. Accordingly, the Commission should reject Duke's Motion for Protective Order and require Duke to provide meaningful responses to the eight interrogatories at issue in its brief.

Respectfully submitted,

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²⁸ Entry at 12.

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CERTIFICATE OF SERVICE

I certify that *Interstate Gas Supply, Inc.'s Memorandum Contra Duke Energy Ohio, Inc.'s Motion for Protective Order* was filed electronically with the Docketing Division of the Public Utilities Commission of Ohio on this 29th day of October 2021.

/s/ Michael Nugent
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Summary: Memorandum Contra Duke Energy Ohio, Inc.'s Motion for Protective Order electronically filed by Mr. Michael A. Nugent on behalf of Interstate Gas Supply, Inc.