

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. 14-375-GA-RDR
CASE NO. 15-452-GA-RDR
CASE NO. 16-542-GA-RDR
CASE NO. 17-596-GA-RDR
CASE NO. 18-283-GA-RDR
CASE NO. 19-174-GA-RDR
CASE NO. 20-53-GA-RDR**

**IN THE MATTER OF THE APPLICATION OF
DUKE ENERGY OHIO, INC. FOR TARIFF
APPROVAL.**

**CASE NO. 14-376-GA-ATA
CASE NO. 15-453-GA-ATA
CASE NO. 16-543-GA-ATA
CASE NO. 17-597-GA-ATA
CASE NO. 18-284-GA-ATA
CASE NO. 19-175-GA-ATA
CASE NO. 20-54-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-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

ENTRY

Entered in the Journal on November 10, 2021

I. SUMMARY

{¶ 1} In this Entry, the attorney examiner denies the joint interlocutory appeal and request for certification filed by the Retail Energy Supply Association and Interstate Gas Supply, Inc. as moot.

II. DISCUSSION

{¶ 2} Duke Energy Ohio, Inc. (Duke or the Company) is a natural gas company, as defined by R.C. 4905.03, and a public utility, as defined by R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

A. *Duke Manufactured Gas Plant Proceedings*

{¶ 3} On November 12, 2009, the Commission authorized Duke to defer environmental investigation and remediation costs related to two former manufactured gas plant (MGP) sites in Ohio for potential recovery of reasonable and prudent costs in a future base rate proceeding. *In re Duke Energy Ohio, Inc.*, Case No. 09-712-GA-AAM, Finding and Order (Nov. 12, 2009) at 4.

{¶ 4} On November 13, 2013, the Commission authorized the recovery of such environmental investigation and remediation costs as had been incurred by the Company between 2008 and 2012. The Commission authorized Duke to recover and continue deferring environmental investigation and remediation costs, indicating further that the Company would be able to recover those costs which were prudently incurred through Rider MGP. *In re Duke Energy Ohio, Inc.*, Case No. 12-1685-GA-AIR, et al., Opinion and Order (Nov. 13, 2013) at 70-74.¹

{¶ 5} On March 31, 2014, Duke filed an application in Case Nos. 14-375-GA-RDR and 14-376-GA-ATA, seeking approval to adjust its Rider MGP to recover costs incurred

¹ The Supreme Court of Ohio affirmed the Commission's decision authorizing Duke to recover and continue deferring environmental investigation and remediation costs associated with the MGP sites. *In re Application of Duke Energy Ohio, Inc.*, 150 Ohio St.3d 437, 2017-Ohio-5536, 82 N.E.3d 1148.

during 2013 for environmental investigation and remediation of the MGP sites pursuant to Ohio and federal environmental laws, amounting to \$8,346,698 (*2013 Rider MGP Adjustment*).

{¶ 6} On March 31, 2015, Duke filed an application in Case Nos. 15-452-GA-RDR and 15-453-GA-ATA, seeking approval to adjust its Rider MGP to recover costs incurred during 2014 for environmental investigation and remediation of the MGP sites pursuant to Ohio and federal environmental laws, amounting to \$686,031 (*2014 Rider MGP Adjustment*).

{¶ 7} On March 31, 2016, Duke filed an application in Case Nos. 16-542-GA-RDR and 16-543-GA-ATA, seeking approval to adjust its Rider MGP to recover costs incurred during 2015 for environmental investigation and remediation of the MGP sites pursuant to Ohio and federal environmental laws, amounting to \$1,061,056 (*2015 Rider MGP Adjustment*).

{¶ 8} On March 31, 2017, Duke filed an application in Case Nos. 17-596-GA-RDR and 17-597-GA-ATA, seeking approval to adjust its Rider MGP to recover costs incurred during 2016 for environmental investigation and remediation of the MGP sites pursuant to Ohio and federal environmental laws, amounting to \$1,296,160 (*2016 Rider MGP Adjustment*).

{¶ 9} On March 28, 2018, Duke filed an application in Case Nos. 18-283-GA-RDR and 18-284-GA-ATA, seeking approval to adjust its Rider MGP to recover costs incurred during 2017 for environmental investigation and remediation of the MGP sites pursuant to Ohio and federal environmental laws, amounting to \$14,652,068 (*2017 Rider MGP Adjustment*). On that same date, Duke also filed a motion to consolidate the *2013-2017 Rider MGP Adjustments*.

{¶ 10} By Entry issued on June 28, 2018, the attorney examiner granted the motion to consolidate the *2013-2017 Rider MGP Adjustments* and set a comment period.

{¶ 11} Staff, as directed by the June 28, 2018 Entry, filed its review and recommendations in relation to the *2013-2017 Rider MGP Adjustments* on September 28, 2018. Among other recommendations, Staff ultimately proposed to reduce the Company's requested recovery amounts for years 2013-2017 by \$11,867,900.00.

{¶ 12} On March 29, 2019, Duke filed an application in Case Nos. 19-174-GA-RDR and 19-175-GA-ATA, seeking approval to adjust its Rider MGP to recover costs incurred during 2018 for environmental investigation and remediation of the MGP sites pursuant to Ohio and federal environmental laws, amounting to \$19,804,031 (*2018 Rider MGP Adjustment*).

{¶ 13} On July 12, 2019, Staff filed its review and recommendations in the *2018 Rider MGP Adjustment*. Staff, again, proposed to reduce the requested recovery amount by \$11,366,243, in addition to other recommendations, such as netting the recommended disallowances against insurance proceeds.

{¶ 14} By Entry issued August 13, 2019, the attorney examiner consolidated the *2018 Rider MGP Adjustment* with the other ten rate adjustment cases and established a procedural schedule.² The procedural schedule also set a deadline for intervention in the *2018 Rider MGP Adjustment* of September 13, 2019. By Entry issued September 4, 2019, the evidentiary hearing was rescheduled to commence on November 18, 2019, at the offices of the Commission. The hearing was held as scheduled and post-hearing briefs were submitted by the parties.

{¶ 15} Additionally, in Case Nos. 19-1085-GA-AAM and 19-1086-GA-UNC, Duke had filed an application seeking authorization to extend its deferral and collection of MGP investigation and remediation costs from customers beyond December 31, 2019. By Entry issued August 13, 2019, the attorney examiner set September 13, 2019, as the intervention

² The August 13, 2019 Entry consolidated the following cases: Case Nos. 14-375-GA-RDR, 14-376-GA-ATA, 15-452-GA-RDR, 15-453-GA-ATA, 16-542-GA-RDR, 16-543-GA-ATA, 17-596-GA-RDR, 17-597-GA-ATA, 18-283-GA-RDR, 18-284-GA-ATA, 19-174-GA-RDR, and 19-175-GA-ATA.

deadline and established a comment period. Initial comments were received September 13, 2019, and reply comments were received October 2, 2019.

B. *Duke Tax Cuts and Jobs Act Proceedings*

{¶ 16} On December 21, 2018, in response to the passage of the 2017 Tax Cuts and Jobs Act (TCJA), Duke filed its application in Case No. 18-1830-GA-UNC, et al., to establish its natural gas TCJA rider to address the impacts of the reduction in the corporate income tax rate from 35 percent to 21 percent for its natural gas operations, including a reduction of the federal income tax rate and creation of excess accumulated deferred income taxes, ultimately reducing natural gas bills for customers. A hearing was scheduled and held on August 7, 2019, and post-hearing briefs were submitted by the parties.

C. *Outstanding Procedural Filings*

{¶ 17} On August 31, 2021, Duke, the Ohio Consumers' Counsel (OCC), Ohio Energy Group (OEG), and Staff filed a Stipulation, which they claim resolves all the issues raised by the signatory parties in the *Duke MGP Proceedings* and the *Duke TCJA Proceedings*, in addition to affording various customer protections and benefits. The Stipulation also provides a commitment to transition from Duke's gas cost recovery (GCR) mechanism to a standard service offer (SSO) competitive auction format for natural gas supply, a requirement for Duke to provide OCC, upon request, shadow billing information for natural gas customers in a format to be mutually agreed upon by Duke and OCC, and a new bill format proposal to include an SSO price-to-compare message on natural gas bills. The signatory parties aver that the Ohio Manufacturers' Association Energy Group, The Kroger Co., and Ohio Partners for Affordable Energy have agreed not to oppose the Stipulation. Duke also filed proposed tariffs, as well as the direct testimony of Amy Spiller and the supplemental testimony of Sarah Lawler in support of the Stipulation.

{¶ 18} On September 17, 2021, and September 29, 2021, respectively, Interstate Gas Supply, Inc. (IGS) and Retail Energy Supply Association (RESA) filed motions for leave to intervene in the above-captioned proceedings.

{¶ 19} Memoranda contra the motions for leave to intervene were timely filed by Duke, OCC, and OEG, to which RESA and IGS filed replies on October 12, 2021.

{¶ 20} By Entry issued October 15, 2021, the attorney examiner, citing the unique circumstances of these proceedings, granted limited intervention to RESA and IGS in order to address the three areas discussed in their motions for leave to intervene, 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. The attorney examiner noted that, upon being granted limited intervention, IGS and RESA were entitled to inquire into these specific provisions of the Stipulation and any potential adverse impact they may have upon the competitive market in Duke's service territory. The October 15, 2021 Entry also established a procedural schedule, setting November 15, 2021, as the deadline for testimony in opposition to the Stipulation, and November 22, 2021, as the date on which the evidentiary hearing would commence.

{¶ 21} Duke filed a motion for protective order on October 22, 2021, in which it requested that the Commission issue an order providing that Duke need not respond to certain interrogatories, as they exceeded the scope of discovery permitted by the October 15, 2021 Entry.

{¶ 22} IGS and RESA filed memoranda contra Duke's motion for protective order on October 29, 2021.

{¶ 23} On October 27, 2021, RESA filed a motion to move the hearing date. Duke filed its memorandum contra RESA's motion to move the hearing on November 1, 2021.

{¶ 24} By Entry issued November 3, 2021, the attorney examiner granted RESA's motion to move the hearing date and rescheduled the hearing to begin on November 18, 2021, at 11:00 a.m. via remote hearing technology. The deadline for testimony in opposition to the Stipulation was consequently adjusted, as well. Further, the attorney examiner found

that the motion for protective order appeared to be moot, given Duke's attempts to provide responses to the discovery requests. However, despite finding the motion to be moot, the attorney examiner provided additional guidance in response to the parties' arguments regarding the scope of discovery to be had in these proceedings. Ultimately, the attorney examiner noted that RESA and IGS are being provided ample opportunity to offer evidence and/or argument in opposition, consistent with Ohio Adm.Code 4901-1-30, but also within the confines of their limited intervention status. The November 3, 2021 Entry neither expanded nor reduced the ability of these parties to participate in these proceedings as provided in the October 15, 2021 Entry.

{¶ 25} Ohio Adm.Code 4901-1-15 sets forth the standards for interlocutory appeals. The rule provides that no party may take an interlocutory appeal from a ruling by an attorney examiner unless that ruling is one of four specific rulings enumerated in paragraph (A) of the rule or unless the appeal is certified to the Commission by the attorney examiner pursuant to paragraph (B) of the rule.

{¶ 26} Ohio Adm.Code 4901-1-15(B) specifies that an attorney examiner shall not certify an interlocutory appeal unless the attorney examiner finds that the appeal presents a new or novel question of law or policy or is taken from a ruling which represents a departure from past precedent and that an immediate determination by the Commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties should the Commission ultimately reverse the ruling in question. In order to certify an interlocutory appeal to the Commission, both requirements need to be met.

{¶ 27} On November 8, 2021, RESA and IGS filed a joint interlocutory appeal and request for certification. Specifically, RESA and IGS request that the attorney examiner issue a subsequent entry providing additional clarity as to what is permitted in discovery, or certify the issue to the Commission for its review. RESA and IGS claim the November 3, 2021 Entry presents a new or novel question of interpretation, law, or policy, specifically as to whether the Commission can preclude a party from opposing a stipulation contrary to

the express language of Ohio Adm.Code 4901-1-30. According to these parties, the November 3, 2021 Entry failed to clarify “the confines of [RESA’s and IGS’] limited intervention,” namely, the scope of evidence and arguments RESA and IGS may make in opposition to the Stipulation. RESA and IGS argue that, as a result, there remains the question raised in Duke’s motion for protective order, namely whether RESA and IGS are precluded from opposing the reasonableness of the Stipulation that includes retail market provisions. To the extent the November 3, 2021 Entry is interpreting Ohio Adm.Code 4901-1-30 as allowing the attorney examiner to preclude a party from addressing the ultimate issue in these proceedings at hearing and on brief, which is whether the Stipulation is reasonable given the inclusion of the retail market provisions, RESA and IGS argue that this appeal presents a new or novel question of interpretation, law, and policy, as well as a departure from past precedent, and should be certified to the Commission pursuant to Ohio Adm.Code 4901-1-15(B).

{¶ 28} On November 10, 2021, Duke and OCC filed memoranda contra the joint interlocutory appeal and request for certification. In its memorandum contra, Duke argues that RESA and IGS have failed to provide a legal basis for an interlocutory appeal as the November 3, 2021 Entry is not ambiguous and is adequately supported. Duke asserts that the November 3, 2021 Entry was clear in affording RESA and IGS an opportunity to challenge the Stipulation, but only if such challenge directly relates to the three competitive market provisions. Not only does Duke contend that the interlocutory appeal is improper, given the unambiguous language used in the Entries, Duke also asserts granting the request for certification would unnecessarily delay the proceedings in direct contradiction to the October 15, 2021 Entry. Thus, Duke requests that the interlocutory appeal be denied.

{¶ 29} In its memorandum contra, OCC goes even farther to suggest that IGS and RESA’s joint interlocutory appeal is procedurally improper as it stands as a collateral attack on the Commission’s ruling granting limited intervention and effectively seeks an advisory ruling on what will be admissible at the hearing in these cases. OCC contends that the October 15, 2021 Entry granting limited intervention was unambiguous and RESA and IGS’

recent filing serves as an untimely interlocutory appeal to that decision, rather than a request for clarification. Alternatively, OCC claims that IGS and RESA are requesting an improper advisory opinion as to what will be admissible during the hearing. Furthermore, OCC agrees with Duke that the Commission has not precluded IGS and RESA from opposing the Stipulation, so the interlocutory appeal fails to present a new or novel question of interpretation, law, or policy. Finally, OCC states that IGS and RESA have also failed to demonstrate that an immediate determination by the Commission is needed to prevent the likelihood of undue prejudice or expense.

{¶ 30} RESA and IGS contend the November 3, 2021 Entry raises the issue of whether the Commission can preclude a party from opposing a stipulation contrary to the express language in Ohio Adm.Code 4901-1-30; however, Duke and OCC are quite correct that no such determination has ever been made. The attorney examiner was merely making a distinction to clarify the parameters set forth in the October 15, 2021 Entry, and note that there would be some inherent limitations given the limited intervention status of RESA and IGS. The attorney examiner fails to find any ambiguity or inconsistency as alleged by the joint appellants. To the extent IGS and RESA require “additional clarity,” there is nothing in the October 15, 2021, or November 3, 2021 Entries that would prohibit RESA or IGS from contesting the inclusion of the competitive market provisions in the Stipulation, including whether such inclusion renders the Stipulation unreasonable pursuant to the Commission’s three-prong test. To find otherwise would be contrary to the Commission’s rules and past precedent, as well as the explicit language used in the November 3, 2021 Entry. However, the attorney examiner again notes this Entry does not expand the already existing participatory rights of either IGS or RESA and they should continue to operate within the parameters of the October 15, 2021, and November 3, 2021 Entries, as well as this Entry, when conducting depositions or otherwise participating in these proceedings. Consistent with Commission rules and practice, the admissibility of any purported evidence will be determined at the hearing, as aptly noted by OCC. Additionally, although OCC is correct that the Commission’s orders speak for themselves and the Commission does not issue

advisory opinions, the Commission has, based on the circumstances before it, found it appropriate to provide guidance to parties to avoid confusion during the hearing process. *See, e.g., In re the Application of The Cincinnati Gas & Elec. Co. for an Increase in Elec. Rates in its Service Area*, Case No. 91-410-EL-AIR, Entry (July 18, 1991). Based on the unique circumstances of these cases, the attorney examiner similarly finds that the guidance provided herein will help promote administrative efficiency during the depositions scheduled to be conducted in these proceedings, as well as the hearing. In accordance with the discussion above, the interlocutory appeal and request for certification should be denied as moot.

{¶ 31} It is, therefore,

{¶ 32} ORDERED, That the interlocutory appeal and request for certification filed by RESA and IGS be denied as moot. It is, further,

{¶ 33} ORDERED, That a copy of this Entry be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ Megan J. Addison

By: Megan J. Addison
Attorney Examiner

NJW/mef

**This foregoing document was electronically filed with the Public Utilities
Commission of Ohio Docketing Information System on**

11/10/2021 1:07:26 PM

in

**Case No(s). 14-0375-GA-RDR, 15-0452-GA-RDR, 16-0542-GA-RDR, 17-0596-
GA-RDR, 18-0283-GA-RDR, 19-0174-GA-RDR, 20-0053-GA-RDR, 14-0376-GA-
ATA, 15-0453-GA-ATA, 16-0543-GA-ATA, 17-0597-GA-ATA, 18-0284-GA-ATA,
19-0175-GA-ATA, 20-0054-GA-ATA, 18-1830-GA-UNC, 18-1831-GA-ATA, 19-
1085-GA-AAM, 19-1086-GA-UNC**

Summary: Attorney Examiner Entry denying the joint interlocutory appeal and request for certification filed by the Retail Energy Supply Association and Interstate Gas Supply, Inc. as moot. electronically filed by Ms. Mary E. Fischer on behalf of Megan J. Addison, Attorney Examiner, Public Utilities Commission of Ohio