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-ATA**
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 Tariff 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-ATA**

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**

DIRECT TESTIMONY OF JAMES H. CAWLEY

ON BEHALF OF

THE RETAIL ENERGY SUPPLY ASSOCIATION
AND
INTERSTATE GAS SUPPLY, INC.

November 12, 2021

I. WITNESS BACKGROUND

Q1. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS, AND ON WHOSE BEHALF YOU ARE TESTIFYING.

A1. I am James H. Cawley, a regulatory utility lawyer and Of Counsel to SkarlatosZonarich LLC in Harrisburg, Pennsylvania. I am presenting testimony on behalf of the Retail Energy Supply Association ("RESA") and Interstate Gas Supply, Inc. (“IGS”).

Q2. WHAT IS YOUR EDUCATIONAL BACKGROUND?

A2. I am a 1967 graduate of St. Bonaventure University (B.A. English), and a 1970 graduate of Notre Dame Law School (J.D.).

Q3. DO YOU HAVE ANY QUALIFICATIONS OR OTHER SPECIALIZED KNOWLEDGE THAT WOULD ASSIST THIS COMMISSION IN ITS DELIBERATIONS IN THIS CASE?

A3. Yes.

Q4. BRIEFLY DESCRIBE YOUR RELEVANT BUSINESS QUALIFICATIONS.

A4. I previously served as the Chairman, Vice Chairman, and a Commissioner of the Pennsylvania Public Utility Commission (“PaPUC”) (11/1979-09/1985; 06/2005-09/2015) regulating telecommunications, water, energy, and transportation utility services. While a PaPUC Commissioner, I was appointed by the Federal Communications Commission to the Federal-State Joint Board on Universal [Telephone] Service. I was a partner at the Harrisburg law firm of Rhoads & Sinon LLP (1996-2005) and at New York City-based LeBoeuf, Lamb, Greene & MacRae LLP in its Harrisburg office (1988-1996). For twenty years, I was an adjunct

professor of federal and state administrative law at the Harrisburg campus of Widener University Commonwealth Law School. Early in my career, I served as majority counsel to the Pa. Senate Consumer Affairs Committee and chief counsel to the Senate Democratic floor leader, and was a major drafter of the Pennsylvania Public Utility Code and the final version of the laws creating and funding the Office of Consumer Advocate, which was created as an independent entity within the Office of the Attorney General to represent residential public utility customers before the PaPUC (nearly identical laws were subsequently enacted creating and funding the Office of Small Business Advocate).

Q5. HAVE YOU PREVIOUSLY TESTIFIED BEFORE THIS PUBLIC UTILITIES COMMISSION?

A5. No, but I have testified as an expert witness six times in PaPUC proceedings since the end of my term as a member of that Commission on September 30, 2015:

1. On behalf of Transource PA, LLC (a subsidiary of American Electric Power) regarding its application for approval of the siting and construction of 230-kV transmission lines associated with the Independence Energy Connection East and West projects in portions of Franklin and York County, Pennsylvania, at Docket Nos. A-2017-2640195 and A-2017-2640200.
2. On behalf of UGI Utilities, Inc. – Gas Division in its general rate increase proceeding at Docket No. R-2019-3015162.
3. On behalf of Columbia Gas of Pennsylvania, Inc. in its general rate increase proceeding at Docket No. R-2020-3018835.

4. On behalf of the Philadelphia Gas Works in its general rate increase proceeding at Docket No. R-2020-3017206.
5. On behalf of Pennsylvania-American Water Company in its general rate increase proceedings at Docket Nos. R-2020-3019369 (Water) and R-2020-3019371 (Wastewater).
6. On behalf of the Pittsburgh Water and Sewer Authority in its general rate increase proceeding at Docket Nos. R-2020-3017951, R-2020-3017970, and P-2020-3019019.

II. PURPOSE OF TESTIMONY

Q6. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A6. The purpose of my testimony is to address the inclusion of the competitive retail market provisions in Sections III.B and III.C of the stipulation filed on August 31, 2021 in these proceedings. My direct testimony will focus on several main areas.

(1) Unauthorized use of Rule 4901-1-30(A), O.A.C.

(2) Failure of the Stipulation to satisfy certain of the criteria for reasonableness.

(3) The regulatory regret that will occur if the egregious behavior by the settlement signatories is condoned by the Public Utilities Commission of Ohio ("Commission" or "PUCO") by its approval of the Stipulation as filed, thus becoming a Commission precedent for all manner of cases.

(4) Public policy reasons why the Commission should not permit the inclusion of alien provisions (i.e., those unsupported by evidence of record) in settlement stipulations.

(5) The danger of relieving the settlement parties of the burden of proving the reasonableness of the wholly unrelated provisions added to the Stipulation by wrongly shifting the burden to the intervenors.

Q7. DO YOU HAVE ANY PRELIMINARY MATTERS TO ADDRESS?

A7. Yes. My testimony deals with regulatory policy issues. Given the nature of public utility regulation, much of the public policy in this field is constrained by and contained in decisions by regulatory agencies and courts; or in statutes, ordinances, or regulations. I cite or refer to these types of sources, not as a legal opinion (although I am qualified to provide expert testimony as a regulatory attorney in Pennsylvania), but rather as sources supporting my expert opinion concerning appropriate public policy and regulatory practice.

III. THE PROCEEDINGS AND STANDARDS OF REVIEW OF THE STIPULATION

Q8. WHAT ACTIONS INITIATED RESA'S INVOLVEMENT IN THESE PROCEEDINGS?

A8. On August 31, 2021, Duke Energy Ohio, Inc. ("Duke"), Commission Staff, Ohio Consumers' Counsel ("OCC"), and the Ohio Energy Group signed and filed the Stipulation and Recommendation (the "Stipulation") to collectively resolve all of the above-captioned proceedings begun by Duke seeking approval to modify its manufactured gas plant ("MGP") rider and to defer environmental remediation costs related to the MGP sites. Most of these MGP cases were consolidated and litigated; the records were closed in early 2020, and the cases await Commission decision.

The Stipulation also proposes to resolve the above-captioned non-MGP-related cases that involve passing back benefits to customers from the reduced corporate tax established by the Tax Cuts and Jobs Act of 2017 ("TCJA"). These TCJA cases were separately consolidated and litigated; the records were closed in 2019, and the cases await Commission decision.

None of these cases involved any supplier-related issues, and therefore I would not expect suppliers to have had any reason to intervene in them.

While wholly unrelated to the MGP and TCJA issues and cases, the Stipulation includes certain terms that will affect the natural gas industry, its customers and suppliers, and the Choice market in Ohio. These terms address agreements for (1) Duke's transition away from its gas cost recovery ("GCR") process and adoption of a natural gas auction process ("SSO" for Standard Service Offer) that will not include a standard choice offer; (2) a new bill format proposal to include an SSO price-to-compare message on natural gas bills; and (3) giving OCC 24-months of historic "shadow billing" data, which will include data comparing an aggregate of shopping customer costs with the GCR or SSO. *In re Duke Energy Ohio*, Case Nos. 14-375-GA-RDR, *et al*., Stipulation (Aug. 31, 2021), at pp. 16-19.

Despite the obvious relevance and importance of these issues to suppliers, to Duke's customers, and to a properly functioning Choice market in Ohio, the Stipulation's supporting signatories (and other parties who participated in the discussions leading to the Stipulation—the Ohio Manufacturers' Association Energy Group, The Kroger Company, and Ohio Partners for Affordable Energy—

and agreed not to challenge the stipulation) failed (apparently deliberately) to invite any supplier or RESA to participate when the settlement negotiations turned to a discussion of the three settlement terms just described. Thus, no supplier or RESA had any notice, nor did they receive notice, that GCR and SSO processes, bill formats, and shadow billing data would be added to the Stipulation in the proceedings that only related to the MGP and TCJA issues.

With a real and substantial interest in the proceedings, RESA and IGS sought and were granted limited leave to intervene and were made parties of record to protect the interests of retail energy suppliers, including active competitive suppliers operating in Duke's choice program.

Q9. HAVE YOU REVIEWED AND CONSIDERED THE MERITS AND PROCEDURAL PROPRIETY OF THE STIPULATION?

A9. Yes, I have.

Q10. BEFORE FORMING YOUR OPINION ON THE MERITS AND PROCEDURAL PROPRIETY OF THE ISSUES PRESENTED BY THE STIPULATION, DID YOU REVIEW THE COMMISSION'S RULES AND RELEVANT CASE LAW PRECEDENTS FOR REVIEWING STIPULATIONS?

A10. Yes, I did. Rule 4901-1-30(A), O.A.C., authorizes parties to Commission proceedings to enter into a stipulation: "Any two or more parties may enter into a written or oral stipulation concerning issues of fact, the authenticity of documents, *or the proposed resolution of some or all of the issues in a proceeding.*" (Emphasis added.)

Although not binding on the Commission, the terms of such an agreement are accorded substantial weight. *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St. 3d 123, 125, 592 N.E.2d 1370 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978). When considering the reasonableness of a stipulation, the ultimate issue is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria (the "three-prong reasonableness criteria"):

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

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

(3) Does the settlement package violate any important regulatory principle or practice?

The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 561, 629 N.E.2d 423 (1994), citing *Consumers' Counsel, supra*, 64 Ohio St.3d at 126. The Court stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission.

Q11. BASED ON YOUR SIXTEEN YEARS AS A COMMISSIONER OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION, ARE THAT

COMMISSION'S STANDARDS OF REVIEW OF SETTLEMENT STIPULATIONS SIMILAR TO THOSE OF THE PUBLIC UTILITIES COMMISSION OF OHIO?

A11. Yes, they are. It is the policy of the Commission and the PaPUC to encourage settlements because the results are often preferable to those achieved at the conclusion of a fully litigated proceeding, and settlement may significantly reduce the time, effort, and expense of litigating a case.

To accept a settlement, both the Commission and the PaPUC must determine that the proposed terms and conditions are in the public interest. The settling parties have the burden to prove that a full or partial settlement is in the public interest, and they must file written Statements in Support of a proposed settlement.

Opposing parties may object to the settlement and encourage the attorney examiner and Administrative Law Judge to reject or modify it in his or her recommended decision to the Commission and the PaPUC. Opposing parties may also take exceptions to the recommended decision.

The PaPUC has not explicitly adopted the three-prong reasonableness test that the Ohio Commission has, but the PaPUC reviews and considers settlements by an expansive interpretation of the public interest, including the fairness and reasonableness of the settlement's provisions, the benefits to ratepayers, the inclusion and participation of affected interests and whether they support or oppose the settlement, compliance with applicable regulatory principles, and adherence by the parties and the Administrative Law Judge to the Commission's Rules of

Practice and Procedure (52 Pa. Code Chapters 1, 3, and 5) and procedural due process of law.

Q12. ARE THERE ANY IMPORTANT DIFFERENCES BETWEEN THE TWO COMMISSIONS' SETTLEMENT RULES?

A.12. Yes, there is one important difference with respect to the disclosure of parties to a settlement agreement. The PaPUC has promulgated a regulation regarding settlements that has the effect of alerting it when essential parties have been excluded from settlement negotiations. Section 5.232(b) (relating to settlement petitions and stipulations of fact), 52 Pa. Code § 5.232(b), provides:

> (b) **Positions of the parties.** A settlement agreement must specifically identify the parties:
>
> (1) Supporting the settlement.
>
> (2) Opposing the settlement.
>
> (3) Taking no position on the settlement.
>
> (4) *Denied an opportunity to enter into the settlement.*

(Emphasis added.)

If persons or entities are absent from a proposed settlement because they were denied an opportunity to enter into a settlement, the Commission is always desirous of knowing why that is the case. Serious concerns arise when the Commission regards the person or entity as an essential or necessary party to a proposed settlement, because, for example, that party is obviously affected or is likely to add substantial expertise or experience to the settlement agreement's provisions.

IV. INCLUSION OF THE COMPETITIVE MARKET PROVISIONS IN THE STIPULATION

Q13. IF YOU WERE A COMMISSIONER OF THE PUBLIC UTILITIES COMMISSION OF OHIO APPLYING THE THREE-PRONG REASONABLENESS CRITERIA TO THE STIPULATION AS FILED, WOULD YOU APPROVE IT GIVEN THE INCLUSION OF THE RETAIL MARKET PROVISIONS?

A13. No, I absolutely would not approve the Stipulation for many regulatory and policy reasons. It contains three extraneous provisions that in my opinion are unauthorized by Rule 4901-1-30(A), O.A.C., and it fails to satisfy at least two of the requisite criteria for determining reasonableness: the settlement package violates important regulatory principles or practices, and it is not a product of serious bargaining among capable, knowledgeable parties.

Q14. WHAT ARE THE THREE EXTRANEOUS PROVISIONS?

A14. The extraneous provisions are those described above in my answer to Question 8: agreements for (1) Duke's transition away from its gas cost recovery ("GCR") process and adoption of a natural gas auction process ("SSO" for Standard Service Offer) that will not include a standard choice offer; (2) a new bill format proposal to include an SSO price-to-compare message on natural gas bills; and (3) giving OCC upon request 24-months of historic "shadow billing" data, which will include data comparing an aggregate of shopping customer costs with the GCR or SSO.

Q.15. WHY DO YOU BELIEVE THE EXTRANEOUS PROVISIONS ARE UNAUTHORIZED BY RULE 4901-1-30(A), O.A.C.?

A.15. I believe they are unauthorized by Rule 4901-1-30(A), O.A.C., because that rule authorizes two or more parties to enter into a stipulation for "the proposed resolution of some or all of the issues in a proceeding." It is undisputed that the closed records of the 18 underlying proceedings contain no mention of the subject matters of these three extraneous provisions in the Stipulation. Such subject matters cannot be "some or all of the issues in a proceeding" because they were never a part of the underlying proceedings. They are extraneous to those proceedings and do not belong in a stipulation seeking to amicably resolve the contested issues in those proceedings.

Q16. DOES THE STIPULATION VIOLATE IMPORTANT REGULATORY PRINCIPLES OR PRACTICES?

A16. In my opinion, yes. First, simply as a matter of sound public policy, it would be unwise to allow inclusion of alien provisions in settlement stipulations because there has been no opportunity for robust debate and careful development of the concepts, and because possibly interested parties may be blindsided after seeing no reason to intervene in the underlying proceedings (as occurred here).

Secondly, it is standard regulatory practice to ensure that adequate notice is given and an opportunity to participate is afforded to all interested parties in proceedings affecting them. It therefore is particularly troubling that RESA and suppliers were intentionally excluded from these settlement discussions. At least in the case of shadow billing, RESA and competitive suppliers have "openly and

notoriously" opposed the concept, which the Stipulation signatories (both supporting and agreeing not to oppose) knew or should have known. *See, e.g., In the Matter of the Commission's Review of its Rules for Electrical Safety and Service Standards Contained in Chapter 49-1:1-10 of the Ohio Administrative Code*, Case No. 17-1842-EL-ORD (Feb. 26, 2020) at ¶ ¶ 159-162, 2020 Ohio PUC LEXIS 244, *53-*56, and upon rehearing (Jan. 27, 2021) at ¶ ¶ 32-35, 2021 Ohio PUC LEXIS 20, *29-*34 (rejecting upon the urging of RESA, Interstate Gas Supply, Inc., Direct Energy, and others OCC's shadow billing proposals and noting prior rejections of the same).

It appears to me that the Stipulation signatories knew RESA and suppliers would oppose yet another attempt by OCC to end-run the Commission's precedents through deal making memorialized in settlement stipulations, so they simply excluded the naysaying essential parties and put forth the Stipulation to see if they could achieve success indirectly when direct attempts had failed.

Thirdly, having voted on many thousands of cases as a public utility regulator, I can say with certainty that it is exceedingly valuable to have a broad spectrum of parties advocating an equally broad range of positions from which the Commission can pick and choose to arrive at a decision that is in the public interest. When, as here, egregious exclusion of essential parties occurs, the broad spectrum of parties and broad range of positions are likely to be absent. Such absence does not promote sound decision making.

Fourthly, this case provides a poster child for why settlements may not be appropriate for formulating major policy positions. As is often the case in

settlements, the participants here were drawn into alliances against each other to achieve their individual goals instead of being encouraged to seek solutions that address the interests of all the stakeholders and especially the public interest. Rather than setting major policy on the GCR/SSO and shadow billing disputes via a partial settlement, I would direct separate application proceedings on each issue and entertain only full settlements, if any, and only after full evidentiary hearings and briefing of the issues.

Were I voting on the reasonableness of this Stipulation, I would be offended that the signatory parties thought so little of the Commission's commitment to fair proceedings that they audaciously submitted the Stipulation with the extraneous provisions for approval, including some that are contrary to recent Commission precedent. I would vote to either modify the Stipulation to remove the competitive retail market provisions if I was satisfied with the substance of the proposed resolution of the TCJA and MGP cases, or direct the parties to submit a Stipulation, without the three extraneous provisions, resolving the 18 proceedings based on the records created in each case.

Q17. IN YOUR OPINION IS THE STIPULATION A PRODUCT OF SERIOUS BARGAINING AMONG CAPABLE, KNOWLEDGEABLE PARTIES?

A17. No. Contrary to Commission and Ohio Supreme Court precedents, the Stipulation was negotiated without any notice and opportunity to participate by all interested and essential parties, specifically RESA and competitive energy suppliers.

The Commission has followed the guidance of the Supreme Court of Ohio that an entire *customer class* may not be excluded from settlement negotiations

affecting that customer class's interests, which was the factual predicate of the Ohio Supreme Court's admonition regarding exclusionary settlement processes in *Time Warner Axs v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 661 N.E.2d 1097 (1996), Footnote 2. *See also, Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885 (2004).

The Commission has found the first reasonableness criterion met when a broad range of diverse interests supports the stipulation. *See, e.g., In the Matter of Ohio Edison Company, et al.*, No. 12-1230-EL-550 (July 18, 2012), 2012 WL 3038632 (Ohio P.U.C.), 299 P.U.R.4th 1 (reasonableness criterion met where signatory parties represent diverse interests including the Companies, a municipality, *competitive suppliers*, commercial customers, industrial consumers, advocates for low and moderate-income customers, and Staff).

Competitive suppliers need not be included in *every* Commission proceeding, but they certainly need to be given notice of and an opportunity to participate meaningfully in any Commission proceeding involving issues that may have a significant effect on the proper functioning of Ohio's competitive energy choice programs. Stated another way, competitive suppliers (or their designated representative, RESA) merit inclusion in such Commission proceedings because competitive suppliers were legislatively included as essential entities in Ohio's statutory Choice scheme.

Therefore, I do not believe that the Commission's broad range of diverse interests standard can be met where all members of a group vital to the success of a legislatively-created scheme administered by the Commission has been

intentionally given no notice of and excluded from settlement negotiations involving obviously important Choice issues.

Were I voting on the reasonableness of the Stipulation, I would find that (1) a broad range of diverse interests does not support the settlement, (2) the signatory parties acted in bad faith by excluding RESA and suppliers from the negotiating process and by conspiring to circumvent Commission precedents on an individual case basis by corrupting the stipulation procedure, and (3) the Stipulation is not in the public interest because of the inclusion of the competitive retail market provisions.

Q.18. IF THE COMMISSION APPROVES THE STIPULATION AS FILED, WOULD IT HAVE AN ADVERSE IMPACT ON OHIO'S COMPETITIVE RETAIL NATURAL GAS MARKET?

A.18. Such an approval would soon engender bitter regulatory regret, a malady that public utility regulators occasionally suffer when they belatedly rue a bad decision they have made in good faith. It would adversely impact Ohio's competitive retail natural gas market by creating precedent on important issues for gas suppliers in proceedings which had nothing to do with such issues until such issues somehow appeared in the Stipulation.

The precedent created by approval of the Stipulation as filed would (i) encourage many more blatant attempts to end-run the Commission's established precedents, (ii) not promote sound decision making and the public interest, (iii) substantially increase the litigation time and expense of all parties before the Commission, and (iv) most heavily burden the Commission and its Staff.

If the behavior displayed by the signatories to the Stipulation is not sternly forbidden, the Commission and its Staff, rather than being able to rely on Ohio's sufficient probative evidence rule requiring evidence of record, will be forced instead to laboriously compare every offered stipulation with the underlying record to ensure some evidence supports *every* stipulation provision.

This needless additional work will extend way beyond stipulation reviews and competitive market cases. The precedent set here will apply to all settlements of public utility disputes within the Commission's jurisdiction, bounded only by an exhaustion of legal counsel's inventiveness. To the dismay of the Commission's attorney examiners, there soon will be a spike in late intervention motions filed by interested and aggrieved parties who had no earlier reason to intervene in cases.

In short, I recommend that the shenanigans perpetrated here end here. If the Commission does not exercise its gatekeeper role to reign in such shenanigans, the amount and costs of litigation at the Commission will increase substantially for the foregoing reasons and parties will abuse settlements to promote their own extraneous interests that are not at issue in the subject proceedings. For all of the above reasons, my opinion is that the Stipulation as a package is not in the public interest. No matter how beneficial the MGP and TCJA resolutions are in the Stipulation, it cannot cure the deficiency created by what has happened in these proceedings with the inclusion of the retail market provisions.

Q.19. IS ANY HARM SUFFERED BY RESA AND COMPETITIVE SUPPLIERS CURED BY THEIR OPPORTUNITY TO CHALLENGE THE STIPULATION AFTER BEING GRANTED LIMITED INTERVENTION?

A.19. The harm caused by RESA's and suppliers' exclusion may be somewhat mitigated by the limited intervention granted them, but the harm is far from cured. Having been wrongly excluded, they were forced to surmount the "extraordinary circumstances" standard for late intervention, with the time and expense attendant thereto.

Even then, RESA and IGS were given only two weeks for discovery, and the hearing will occur in four weeks--scant time compared to the months that the other parties to the proceedings have had to bargain and scheme without RESA's and suppliers' participation.

A very prejudicial reality is that, although the burden of proof is on settling parties to establish the reasonableness of the Stipulation, practically there will be a shifting of that burden to RESA and IGS, forcing them to prove the unreasonableness of the settlement. With Duke's witnesses having provided few and only conclusory statements to support the extraneous provisions in the Stipulation, my fear is that RESA and IGS will be made to counter with substance when Duke has provided none to begin with. Of particular interest is the Reply Brief by the Office of the Ohio Consumers' Counsel, *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its Energy Efficiency and Peak Demand Reduction Portfolio of Programs*, Case No. 16-576-EL-POR (April 7, 2017) at p. 2 ("It is well-settled that the signatory parties to a settlement, and not

the opposing parties, bear the burden of proving that the settlement is reasonable and satisfies the PUCO's three-prong test. [Citation omitted.] Parties opposing a settlement have no burden of proof. Instead, they assist the PUCO in determining whether the signatory parties have or have not met their burden and make recommendations to the PUCO to consider as a regulator.").

Commission approval of the Stipulation as filed would unduly prejudice RESA and IGS because of the inertia created by official approval of the concepts set forth therein. Subsequent proceedings will only implement a fait accompli. The genie simply can't be put back in the bottle.

Q.20. DOES THIS CONCLUDE YOUR DIRECT TESTIMONY?

A.20. Yes, but I reserve the right to modify my testimony.

CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being sent (via electronic mail) on the 12th day of November 2021 on all persons/entities listed below:

Duke Energy Ohio, Inc.	rocco.dascenzo@duke-energy.com jeanne.kingery@duke-energy.com larisa.vaysman@duke-energy.com talexander@beneschlaw.com mkeaney@beneschlaw.com khehmeyer@beneschlaw.com ssiewe@beneschlaw.com
Staff of the Public Utilities Commission of Ohio	werner.margard@ohioAGO.gov
Ohio Consumers' Counsel	larry.sauer@occ.ohio.gov christopher.healey@occ.ohio.gov william.michael@occ.ohio.gov amy.botschner.obrien@occ.ohio.gov
Ohio Energy Group	jkylercohn@bkllawfirm.com kboehm@bkllawfirm.com mkurtz@bkllawfirm.com
Ohio Partners for Affordable Energy	rdove@keglerbrown.com
The Kroger Co.	paul@carpenterlipps.com
Ohio Manufacturers Association Energy Group	bojko@carpenterlipps.com
Interstate Gas Supply, Inc.	michael.nugent@igs.com bethany.allen@igs.com evan.betterton@igs.com joliker@igs.com

/s/ Michael J. Settineri
Michael J. Settineri