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**

JOINT INITIAL BRIEF OF THE RETAIL ENERGY SUPPLY ASSOCIATION AND INTERSTATE GAS SUPPLY INC.

December 9, 2021

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I. INTRODUCTION

These 18 proceedings should not involve competitive retail natural gas terms, nor implement significant changes to the competitive natural gas market. These proceedings were initiated and authorized by the Public Utilities Commission of Ohio (the "Commission") through two orders,[1] related to passing back the benefits of the Tax Cuts and Jobs Act of 2017 ("TCJA") and cost recovery for environmental investigation and remediation related to Duke Energy Ohio's manufactured gas plant ("MGP") sites. Neither of the orders authorized Duke Energy Ohio, Inc. ("Duke Energy" or "Duke") to address competitive natural gas market provisions, and there was no reason for either the Retail Energy Supply Association ("RESA")[2], Interstate Gas Supply Inc. ("IGS") or any supplier to become involved in these proceedings given the Commission's orders and scope of these proceedings.

Unfortunately, Duke Energy and other parties did not heed the Commission's directives in its orders. Instead, long after the TCJA cases and after most of the MGP cases went to hearing and were fully briefed, Duke Energy entered into a Stipulation and Recommendation on August 31, 2021 (the "Stipulation"), with the Ohio Energy Group ("OEG," an association for large industrial customers), the Office of the Ohio Consumers' Counsel ("OCC") and the Commission's Staff (collectively, with Duke Energy, the OEG and OCC, the "Signatory Parties"), to resolve not only

[1] One in *In re Commission's Investigation of the Financial Impact of the Tax Cuts and Jobs Act of 2017 on Regulated Ohio Utility Companies*, Case No. 18-47-AU-COI, Finding and Order (October 24, 2018) and the other in *In re Duke Energy Ohio, Inc.*, Case No. 12-1685-GA-AIR, et al., Opinion and Order (Nov. 13, 2013).

[2] The comments expressed by RESA in this filing represent the positions of RESA as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

the MGP and TCJA proceedings but also to implement significant changes to the competitive natural gas market for Duke's customers and competitive retail natural gas suppliers.

The magnitude of the changes and their collective impact on the competitive natural gas market and its participants cannot be minimized. The competitive market provisions in Sections III.B. and III.C. of the Stipulation require Duke Energy to (1) convert from a gas cost recovery method (wholesale purchase by Duke of natural gas with a pass-through of costs to customers) to a standard service offer ("SSO") auction (also a wholesale purchase by Duke of natural gas with a pass-through of costs to customers); (2) to put the SSO price from the prior month on a shopping customer's bill and committing to the bill message language—a commitment that would misinform customers and contravene a recent Commission order; and (3) to provide aggregate cost data to OCC on a non-confidential basis (for no specified use or reason and also in contravention of a Commission order) of what Duke's shopping customers receiving a consolidated bill from Duke would have paid if on the gas cost recovery ("GCR") and, in the future, on the SSO contemplated by the Stipulation. For purpose of clarity, the Commission Staff did not take a position with respect to the shadow billing provision.

Even more troubling is that Duke Energy and the rest of the Signatory Parties failed to notify or invite any supplier or RESA to the Stipulation negotiations that occurred over the course of one year. It was not until <u>after</u> Duke Energy filed the Stipulation on August 31, 2021, without seeking to reopen the record in the closed cases, that RESA and IGS became aware of what the Signatory Parties did in these proceedings. RESA and IGS promptly filed petitions to intervene in every proceeding (something other parties in these proceedings failed to do) yet were only granted limited intervention under heavy scrutiny to challenge the inclusion of the competitive market

provisions. Such grant of limited intervention raises due process concerns and inhibits RESA's and IGS' ability to challenge the Stipulation as a package.

Not one of the Signatory Parties explained to the Commission how and why the competitive retail market provisions became included in the negotiations and ended up in the Stipulation. Duke Energy put on conclusory testimony on the competitive retail market provisions from two witnesses who have little to no experience in the competitive retail natural gas industry. Indeed, none of the Signatory Parties or the parties that signed the Stipulation as non-opposing parties have direct experience in the competitive retail natural gas market. As OCC admitted, "none of the signatory parties to the stipulation directly represent the interests of competitive retail natural gas suppliers."[3]

How can a Stipulation be reasonable when it was developed and imposes material changes to the competitive retail gas market without the presence of even one supplier in the negotiations? Obviously, the answer is that it is not reasonable. The Commission should not approve any stipulation that implements material policy shifts in proceedings that impact industry participants where the industry participants had no reason to believe the proceedings would implement such changes, where the industry participants were not invited to the stipulation discussions and where the industry participants' interests were not adequately represented in the stipulation negotiations.

This conclusion follows James Cawley's expert opinion and advice, who spent sixteen years as a Chairman, a Vice Chairman, and a Commissioner of the Pennsylvania Public Utility Commission.[4] Mr. Cawley advised that:

> … 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

[3] *See* RESA Ex. 29, RFA-1-3.

[4] RESA/IGS Ex. 1 (Cawley Direct Testimony) at 1.

> broad range of positions are likely to be absent. Such absence does not promote sound decision making.[5]

Mr. Cawley also cautioned about the disturbing precedent that would be set if the Stipulation were adopted unchecked. He testified that "[t]he 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."[6] The Commission should not condone such behavior.

There are numerous examples of bad precedent that could arise from this case. If the Stipulation is not rejected or modified to remove the competitive market provisions, parties will be forced to intervene in cases that have nothing to do with their industry segment, something that has already started to occur due to the Stipulation – solely to ensure they are kept apprised of any settlement discussions that raise wholly unrelated issues in the proceeding. Moreover, to the extent that the conduct in these proceedings is condoned, it will send a nod of approval from the Commission that any party can settle any issue in any case – encouraging parties to do so whenever their typical opposition party is not present. That practice will tend to expand the scope of proceedings and weigh on the resources of all parties and the Commission itself. Further, parties will no longer need to show an interest in the underlying subject matter under the intervention standard. The only required interest will be a simple citation to the decision in these proceedings. If the stipulation is approved, the Commission would effectively be endorsing the insertion of unrelated provisions into settlements. The cost, time and waste of resources for utilities, suppliers,

[5] *Id.* at 12.

[6] *Id.* at 15-16.

trade associations, ratepayers, and the Commission in future cases if the Stipulation is left unchecked will be astronomical.

Because RESA and IGS were not present in the negotiations and because none of the Signatory Parties have explained how or why the competitive market provisions were added to the Stipulation, one can only hope that Duke Energy and the other Signatory Parties did not trade away TCJA credits or impose more costs on ratepayers for the MGP Rider charges in exchange for including the competitive market provisions in the Stipulation. Because their interventions were limited in these proceedings, RESA and IGS can only defer to the Commission on that question; however, both parties can show why the competitive market provisions should be removed from the Stipulation and why the provisions will harm the competitive retail natural gas market.

Specifically, the Stipulation should either be rejected or the competitive market provisions removed. The reasons supporting that conclusion are:

(1) The Stipulation is procedurally flawed because the Commission never authorized Duke Energy to address the operation and structure of the competitive retail natural gas market in the orders implementing the MGP and TCJA proceedings;

(2) The Stipulation is structurally flawed because at paragraphs 35 and 36 in Section IV of the Stipulation, the Signatory Parties seek a final order on Duke's future SSO application, a proceeding in which no application has been filed;[7]

(3) The Stipulation settlement was not the product of serious bargaining among capable, knowledgeable parties given that no suppliers were invited to or were involved in the negotiations, none of the Signatory Parties or non-opposing parties

[7] To the extent Duke or others argue that any of the competitive market provisions are only commitments to make future filings with the Commission, they are wrong. The Stipulation at paragraphs 35 and 36 states otherwise: the Stipulating Parties agreed that approval of the Stipulation is a final order for the proceeding to implement a standard service offer auction.

provided any evidence of having the requisite experience to consider the competitive market provisions, and the only witnesses that testified in support of the Stipulation were completely devoid of knowledge the Commission had very recently rejected two of the three market-related commitments;

(4) The Stipulation violates important regulatory rules and practices given the exclusionary tactics employed, the incorporation of wholly unrelated provisions in the Stipulation (the competitive market provisions) and the lack of participation in the negotiations by the industry participants most affected by the wholly unrelated provisions;

(5) The Stipulation will not benefit ratepayers or the public interest given the lack of consideration of moving to a standard choice offer ("SCO") auction process, which creates a relationship between the SCO supplier and the customer being served that is not present with an SSO supplier;

(6) The Stipulation will not benefit ratepayers or the public interest because of the false price signals and customer confusion created by listing an SSO price from a prior month on a customer bill, in addition to being contrary to Commission precedent set earlier this year;

(7) The Stipulation will not benefit ratepayers or the public interest because it will result in the provision and use of inaccurate and misleading aggregate cost data that was previously rejected by the Commission; and

(8) The Stipulation contains provisions that are contrary to Commission precedent and development of the competitive market, and thus contrary to regulatory policy and practice.

For all the above reasons, RESA and IGS urge the Commission to reject the Stipulation to ensure that the MGP costs and TCJA credits are fully bargained for, or, at a minimum, to remove the competitive market provisions from the Stipulation. As Mr. Cawley testified, "[r]ather 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."[8] While RESA and IGS defer to the Commission on whether it wants to direct that separate proceedings occur, the Commission must not allow Duke Energy, OCC, OEG and the Commission's Staff to effectively expand these 18 proceedings by making significant changes to the competitive natural gas market when those issues are wholly unrelated to the MGP Rider and the TCJA credit. To the extent necessary, the Commission should also rectify the procedural errors raised by RESA and IGS in this brief, including the lack of due process provided to RESA and IGS by limiting their interventions while allowing others (OEG, Kroger, OMAEG and OPAE) to participate in all proceedings without intervening.

The Stipulation should be rejected, or, at a minimum, modified to remove the competitive market provisions.

II. RELEVANT BACKGROUND FACTS

The relevant background facts in these proceedings show that: (1) Duke Energy unreasonably and unlawfully expanded these proceedings beyond the Commission's directives for the MGP and TCJA proceedings to implement changes to the competitive natural gas market; (2) that negotiations of the Stipulation occurred over almost a year without any notice to any suppliers or RESA; (3) no supplier or RESA was invited to or able to be involved in the Stipulation

[8] RESA/IGS Ex. 1 (Cawley Direct Testimony) at 13.

negotiations; (4) many of the parties that engaged in the negotiations of the Stipulation were not granted party status to the MGP or TCJA proceedings; and (5) the competitive market provisions in the Stipulation are wholly unrelated to the MGP and TCJA proceedings. With these facts, it is difficult to comprehend why any of the Signatory Parties allowed this to happen or why the Commission should approve the Stipulation without modification.

A. The Commission's directives for the MGP and TCJA proceedings did not include a directive or authorization to address/include competitive market provisions.

The Attorney Examiner's October 15, 2021 Entry in these proceedings clearly stated that the competitive market provisions in the Stipulation "… **do not represent** a mere expansion of the existing issues involved or an alternative proposal to resolve the issues involved or an alternative proposal to resolve the issues in the Duke MGP Proceedings or Duke TCJA Proceedings; rather, the attorney examiner agrees they represent **wholly unrelated matters** for the Commission's and other interested parties' consideration."[9] The Attorney Examiner's findings are supported by a review of the procedural history and the Commission's directives in the proceedings.

1. The Duke TCJA Proceedings were implemented through a Commission Order.

Starting first with the TCJA proceedings (Case Nos. 18-1830-GA-UNC and 18-1831-GA-ATA), the Commission authorized these proceedings in its October 24, 2018 Finding and Order in where the Commission found:

> … Ohio rate-regulated utility companies, unless expressly exempted, should file an application not for an increase in rates, pursuant to R.C. 4909.18, by January 1, 2019, either in an already-pending proceeding or a newly initiated proceeding, to allow the Commission the appropriate opportunity to consider the impacts of the

[9] October 15, 2021 Entry at ¶ 31 (emphasis added).

> Tax Cuts and Jobs Act of 2017 on each specific company, as described in this Finding and Order.[10]
>
> The Commission provided clear direction in the Finding and Order, stating that:
>
> Therefore, in order to address the remaining issues relating to the effects of the TCJA, including rider rates, ADIT, and base rates, **the Commission finds that, unless ordered otherwise, all Ohio rate-regulated utility companies should be directed to file applications "not for an increase in rates," pursuant to R.C. 4909.18, in a newly initiated proceeding, to pass along to consumers the tax savings resulting from the TCJA.** We find this will be the most appropriate course to resolve any outstanding issues relating to the TCJA and **will allow for a more deliberate and thorough analysis for each utility's individual circumstances**. Nonetheless, **in keeping with our case-by-case approach, the Commission is open to any alternative proposals by utilities, provided such proposals pass all tax savings on to customers, have the full agreement of Staff and provide for input from other interested stakeholders.** Utilities should make the necessary filings by January 1, 2019. Failure to make a filing consistent with this Finding and Order may result in the assessment of a civil forfeiture of up to $10,000 per day of non-compliance, pursuant to R.C. 4905.54.[11]

The Commission concluded its Finding and Order stating that "[i]t is therefore, ORDERED, That Ohio rate-regulated utilities file an application not for an increase in rates, pursuant to R.C. 4909.18, to reflect the impact of the TCJA on their current rates by January 1, 2019, unless exempted or otherwise directed in this Finding and Order."[12] Nowhere in its Finding and Order or in any subsequent order did the Commission authorize Duke Energy to include competitive market issues in its TCJA application or in the TCJA proceedings.

2. The Duke MGP Proceedings were implemented through a Commission Order.

Like the TCJA proceedings, the Duke MGP proceedings were implemented and authorized per Commission directive. As noted in the Attorney Examiner's October 15, 2021 Entry, on

[10] *In re the Commission's Investigation of the Financial Impact of the Tax Cuts and Jobs Act of 2017 on Regulated Ohio Utility Companies*, Case No. 18-47-AU-COI, Finding and Order at ¶ 1 (October 24, 2018).

[11] *In re Commission's Investigation*, Finding and Order at ¶ 29 (Oct. 24, 2018) (emphasis added).

[12] *Id.* at ¶ 35.

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.[13] Through its November 13, 2013 Opinion and Order, the Commission authorized the recovery of the environmental investigation and remediation costs incurred by Duke Energy between 2008 and 2012.[14]

Relevant to these proceedings, the Commission authorized Duke to recover and continue deferring environmental investigation and remediation costs beyond 2012 in the November 13, 2013 Opinion and Order.[15] Duke requested authorization to file applications in each subsequent year to update its Rider MGP (to recover the investigation and remediation costs) and the Commission granted that specific authorization as noted at page 72 of its November 13, 2013 Opinion and Order:

> Duke also requests authorization to file an application in each subsequent year to update Rider MGP based on the unrecovered balance and related carrying charges as of the prior December 31. In light of the fact that the Commission has determined herein that Duke should be authorized to recover the prudently incurred costs of MGP investigation and remediation for these two sites, the Commission finds Duke's request for annual updates to Rider MGP in order to reflect the costs for the preceding year is reasonable and should be approved. **Accordingly, the Commission finds that, beginning March 31, 2014, and on or before March 31 in each subsequent year, Duke must update Rider MGP based on the unrecovered balance, minus any carrying charges as required previously in this Order, as of the prior December 31. In these subsequent cases wherein Duke will be updating Rider MGP, Duke shall bear the burden of proof to show that the costs incurred for the previous year were prudent., indicating further that the Company would be able to recover those costs which were prudently incurred through Rider MGP.**[16]

[13] *In re Duke Energy Ohio, Inc.*, Case No. 09-712-GA-AAM, Finding and Order (Nov. 12, 2009) at ¶ 4.

[14] *In re Duke Energy Ohio, Inc.*, Case No. 12-1685-GA-AIR, et al., Opinion and Order (Nov. 13, 2013) at ¶¶ 70-74.

[15] *Id.* at ¶¶ 71-71.

[16] *In re Duke Energy Ohio, Inc.*, Case No. 12-1685-GA-AIR, et al., Opinion and Order (Nov. 13, 2013) at page 72 (emphasis added).

Following that directive, Duke Energy filed applications to update Rider MGP in the below proceedings:

- Case Nos. 14-375-GA-RDR and 14-376-GA-ATA, seeking approval to adjust Rider MGP to recover costs incurred during 2013 for environmental investigation and remediation of the MGP sites, amounting to $8,346,698;

- Case Nos. 15-452-GA-RDR and 15-453-GA-ATA, seeking approval to adjust Rider MGP to recover costs incurred during 2014 for environmental investigation and remediation of the MGP sites, amounting to $686,031;

- 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, amounting to $1,061,056;

- Case Nos. 17-596-GA-RDR and 17-597-GA-ATA, seeking approval to adjust Rider MGP to recover costs incurred during 2016 for environmental investigation and remediation of the MGP sites, amounting to $1,296,160;

- Case Nos. 18-283-GA-RDR and 18-284-GA-ATA, seeking approval to adjust Rider MGP to recover costs incurred during 2017 for environmental investigation and remediation of the MGP sites, amounting to $14,652,068;

- Case Nos. 19-174-GA-RDR and 19-175-GA-ATA, seeking approval to adjust Rider MGP to recover costs incurred during 2018 for environmental investigation and remediation of the MGP sites, amounting to $19,804,031; and

- Case Nos. 20-53-GA-RDR and 20-54-GA-ATA seeking approval to adjust Rider MGP to recover costs incurred during 2019 for environmental investigation and remediation of the MGP sites, amounting to $39,031,789.

Duke also filed an application in Case Nos. 19-1085-GA-AAM and 19-1086-GA-UNC, seeking authorization to extend deferral and collection of MGP investigation and remediation costs from customers beyond December 31, 2019. No hearing was held on that application although comments were received in 2019. Notably, not one of the applications filed sought authorization to address competitive market provisions, and understandably so given the Commission's clear

directive in its November 13, 2013 Opinion and Order that Duke Energy was authorized to file applications to update Rider MGP (and nothing more).[17]

B. It is undisputed that no suppliers or RESA were involved in the Stipulation negotiations which went on for almost one year.

Undisputedly, neither any competitive retail natural gas suppliers nor RESA were invited to participate in the Stipulation negotiations.[18] Duke Energy admitted that the Stipulation negotiations took place for over a year yet no suppliers were invited to those discussions.[19] The following admissions submitted into the record support this factual finding.

Hearing Exhibit #	**Request**	**Admission**
RESA Ex. 4	RESA-RFA-01: Admit that Duke Energy did not invite any competitive retail natural gas suppliers to participate in the stipulation negotiations.	Duke Energy Supplemental Response: Admit
RESA Ex. 29	RFA 1-4: Admit that the stipulation negotiations did not include any competitive retail natural gas suppliers.	OCC Response: Admit
RESA Ex. 29	RFA 1-5: Admit that OCC did not invite any competitive retail natural gas suppliers to participate in the stipulation negotiations.	OCC Response: Admit

OCC's admission that it did not invite suppliers to the negotiations is particularly troubling because when negotiating the Stipulation to include competitive market provisions, OCC knew that "none of the signatory parties to the stipulation directly represent the interests of competitive retail natural gas suppliers."[20] OCC knew RESA's and IGS' positions in Case No. 19-1429-GA-

[17] *In re Duke Energy Ohio, Inc.*, Case No. 12-1685-GA-AIR, et al., Opinion and Order (Nov. 13, 2013) at page 72.

[18] RESA Ex. 4, supplemental response November 8, 2021; RESA Ex. 29, IGS Ex. 34.

[19] *Id.*

[20] *See* RESA Ex. 29, RFA1-3.

ORD against shadow billing and a price to compare. In that case, the Commission rejected OCC's request for shadow billing and required modifications to the price to compare language supported by OCC.[21]

C. The negotiations included parties that did not intervene in all proceedings.

While excluding suppliers and RESA from the negotiations, Duke Energy allowed negotiations in the TCJA case and MGP cases to include non-parties. The below table shows the parties that signed the Stipulation as either Signatory Parties or non-opposing parties and the cases in which the Commission granted them intervention. Notably only OCC intervened in the TCJA cases, yet OEG, Kroger, OMAEG and OPAE all participated in the negotiations of the Stipulation.

Case No.	MGP or TCJA	OCC	OEG	Kroger	OMAEG	OPAE
14-0375-GA-RDR	MGP	X	X	X	X	X
14-0376-GA-ATA	MGP	X	X	X	X	X
15-0452-GA-RDR	MGP	X	X	X	X	X
15-0453-GA-ATA	MGP	X	X	X	X	X
16-0542-GA-RDR	MGP	X	X	X	X	X
16-0543-GA-ATA	MGP	X	X	X	X	X
17-0596-GA-RDR	MGP	X	X	X	X	X
17-0597-GA-ATA	MGP	X	X	X	X	X
18-0283-GA-RDR	MGP	X	X	X	X	X
18-0284-GA-ATA	MGP	X	X	X	X	X
18-1830-GA-UNC	TCJA	X				
18-1831-GA-ATA	TCJA	X				
19-0174-GA-RDR	MGP	X	X	X	X	X
19-0175-GA-ATA	MGP	X	X	X	X	X
19-1085-GA-AAM	MGP	X				
19-1086-GA-UNC	MGP	X				
20-0053-GA-RDR	MGP	X	X	X	X	
20-0054-GA-ATA	MGP	X	X	X	X	

No motion to consolidate the TCJA cases with the MGP cases was ever filed. The only consolidation occurred with respect to the cases seeking MGP Rider adjustments for years 2013

[21] *In re 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, Finding and Order (Feb. 24, 2021) at ¶¶ 89, 69.

through 2018.[22] This procedural history was aptly summarized in the Attorney Examiner's October 15, 2021 Entry.[23]

D. It is undisputed that the competitive market provisions in the Stipulation are wholly unrelated to the MGP and TCJA proceedings.

The Attorney Examiner's October 15, 2021 Entry found that the competitive market provisions in the Stipulation are wholly unrelated to the MGP and TCJA proceedings. As noted above, the Attorney Examiner found that the competitive market provisions represent **wholly unrelated matters** for the Commission's and other interested parties' consideration."[24] The Stipulation's provisions in Sections III.B. and III.C. implementing an SSO, an SSO price-to-compare and the provision of shadow billing information to OCC have nothing to do with the recovery of environmental investigation and remediation costs at Duke's manufactured gas plant sites and the passing of tax savings back to customers. Duke's witness Sarah Lawler confirmed this fact by acknowledging that the first time the competitive market provisions were raised in the proceeding was on August 31, 2021 when the Stipulation was made public.[25] Even the Stipulation recitals show that the MGP and TCJA proceedings are separate and apart from the competitive market provisions.[26] Any attempt by the Signatory Parties to claim otherwise should be immediately rejected.

[22] Following that consolidation, the Attorney Examiner noted the motions to intervene in one or more of the 12 MGP cases, considered them as motions to intervene in all of those 12 MGP cases, and granted the interventions. MGP November 2019 Tr. at 11.

[23] October 15, 2021 Entry at ¶¶ 14-15.

[24] *Id*. at ¶ 31.

[25] Tr. 40:2-41:17.

[26] *See* Joint Exhibit 1 at 4-7.

III. ARGUMENT

A. The Standard of Review Precludes Wholly Unrelated Provisions.

1. Rule 4901-1-30 applies to this proceeding.

"Ohio Adm.Code 4901-1-30 authorizes parties to commission proceedings to enter into stipulations."[27] Ohio Adm.Code 4901-1-30(A) provides "[a]ny two or more parties may enter into a written or oral stipulation concerning issues of fact, authenticity of documents, or the proposed resolution of **some** or **all of the issues** in the proceeding."[28]

"A written stipulation must be signed by all of the parties joining therein, and must be filed with the commission and served upon all parties to the proceeding." Ohio Adm.Code 4901-1-30(B). "[P]arties who file a full or partial written stipulation or make an oral stipulation must file or provide the testimony of at least one signatory party that supports the stipulation."[29] "Parties that do not join the stipulation may offer evidence and/or argument in opposition."[30]

"**No stipulation shall be considered binding upon the commission**."[31] "While the commission encourages agreement on issues, **it is not bound to accept the terms of any stipulation**." *Ohio Consumers' Counsel v. PUC*, 114 Ohio St. 3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶ 16 (emphasis added), citing *Akron v. Pub. Util. Comm.* 55 Ohio St. 2d 155, 157, 378 N.E.2d 480 (1978) ("The commission, of course, is not bound to the terms of any stipulation.").

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[27] *AK Steel Corp. v. PUC of Ohio*, 95 Ohio St. 3d 81, 82, 765 N.E.2d 862 (2002).

[28] Ohio Adm.Code 4901-1-30(A) (emphasis added).

[29] Ohio Adm.Code 4901-1-30(D).

[30] *Id.*

[31] Ohio Adm.Code 4901-1-30(E).

2. A stipulation must be reasonable.

"The **ultimate issue** for the Commission's consideration is whether the [stipulation], which embodies considerable time and effort by the signatory parties **is reasonable** and should be adopted." *In re Application of Duke Energy Ohio, Inc. for Approval of An Alternative Form of Regulation to Establish a Capital Expenditure Program Rider Mechanism,* Case No. 19-791-GA-ALT, Opinion and Order, April 21, 2021, ¶ 43 (emphasis added).[32] In determining whether a stipulation is reasonable, the Commission employs a three-part test:

(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?[33]

"While the commission 'may place substantial weight on the terms of a stipulation,' it 'must determine, *from the evidence*, what is just and reasonable.'" *In re Columbus S. Power Co.*, 129 Ohio St. 3d 46, 2011-Ohio-2383, 950 N.E.2d 164 ¶ 19 (emphasis in original), quoting *Office of Consumers' Counsel,* 64 Ohio St. 3d at 126. "The agreement of *some* parties is no substitute for the many procedural protections reinforced by the evidentiary-support requirement." *Id.* (emphasis in original).

[32] *See also In the Matter of the Commission's Consideration of Matters Related to the Stipulation Approved in Recent Cases Involving The Cleveland Electric Illuminating Company and the Toledo Edison* Company, Case No. 89-498-EL-COI, Opinion and Order, January 24, 1991, 1991 Ohio PUC LEXIS, at *35 ("In reviewing the stipulation, the ultimate question to be answered by the Commission is whether, in light of the record, the settlement is reasonable.").

[33] *AK Steel Corp.*, 95 Ohio St. 3d at 82-83; *Indus. Energy Consumers of Ohio Power Co. v. PUC of Ohio*, 68 Ohio St. 3d 559, 561, 629 N.E.2d 423 (1994); *Office of Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St. 3d 123, 126, 592 N.E.2d (1992) (endorsing the Commission's three-part test).

3. The stipulation process cannot be subverted to include provisions that are wholly unrelated to the proceedings and without the knowledge of the industry segment impacted by those provisions.

The Commission has not adopted a *per se* rule prohibiting unrelated provisions in a stipulation. This case, however, presents a unique set of facts. The Commission's precedent does not address the situation where **wholly unrelated** provisions are included **without the knowledge of the industry segment impacted by those provisions**.

Ohio Supreme Court case law provides guidance on this issue. The Court expressed "grave concern" when the Commission adopted "a partial stipulation that arose from exclusionary settlement meetings."[34] It is unsurprising then that the three-part test requires an evaluation of the stipulation as a package and whether it is a product of serious bargaining among capable, knowledgeable parties.[35]

While the Commission has, in other cases, included unforeseeable and unrelated provisions in a stipulation, those cases involve adequate due process protections for non-signatory parties. *See In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement Rider*, Case Nos. 14-1693-EL-RDR, 14-1694-EL-AAM, Entry, Apr. 5, 2017, 2017 Ohio PUC LEXIS 298, ¶ 24 (rejecting OCC's argument that the stipulation was unlawful because the stipulation "lacks a sufficient nexus to AEP Ohio's amended application and includes provisions that were unforeseeable."). In that case, the Commission included the challenged provisions in the stipulation because (1) OCC's contention that the case involved an ESP ran contrary to the Commission noting several times during the proceedings that it was not a ESP case; (2) the provisions were "commitments … to offer specific

[34] *Time Warner Axs v. PUC of Ohio*, 75 Ohio St. 3d 229, 223, fn. 2, 661 N.E.2d 1097 (1995).

[35] *AK Steel Corp.*, 95 Ohio St. 3d at 82-83.

proposals for the Commission's consideration in future proceedings"; (3) OCC was "involved in the settlement process culminating in the stipulation and were aware of the terms at issue"; and (4) "OCC was afforded ample opportunity to present evidence … in opposition to … the stipulation."[36]

Without adequate protections in place, wholly unrelated provisions are not "a product of serious bargaining among capable, knowledgeable parties" because the negotiations would not include the knowledge of the industry segment impacted by those provisions. The inclusion of wholly unrelated provisions, especially without input of the impacted industry segment, renders a stipulation incapable of being a "proposed resolution of some or all of **the issues in a proceeding**."[37]

Notably, the Commission has rejected requested stipulation modifications that go outside the scope of the proceedings. *See In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Duke Energy Ohio, Inc. and Related Matters*, Case Nos. 15-218-CA-GCR, 15-318-GA-UEX, 15-418-GA-PIP, Opinion and Order, Sept. 7, 2016, 2016 Ohio PUC LEXIS 817, ¶ 59 ("The Commission concludes that OCC's and OPAE's request for modification of the Stipulation … **[is] outside the scope of these proceedings, and have no bearing on whether the Stipulation meets the three-part test.**"); *In the Matter of the Application of The Dayton Power and Light Company for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, Case No. 05-276-EL-AIR, Opinion and Order, Dec. 28, 2005, 2005 Ohio PUC LEXIS 694, *30-31 ("Although, as provided for in the RSP Stipulation, this case was brought pursuant to Section 4909.18, Revised Code, **the scope of this proceeding remains a**

[36] *Id.*

[37] *See* Ohio Adm.Code 4901-1-30(A).

limited one, and the Commission finds that OPAE's recommendation is outside of the scope of this proceeding and its objection should be denied.").

Accordingly, RESA and IGS submit that the Commission's review of the reasonableness of the Stipulation should consider whether the Stipulation includes provisions that are wholly unrelated to the proceedings and whether those provisions were negotiated and included without the knowledge of the industry segment most impacted by those provisions. That factor weighs heavily against the reasonableness of the Stipulation.

B. The Commission cannot approve the Stipulation with the competitive market provisions because doing so would exceed the limited scope of the MGP and TCJA proceedings.

The Commission does not need to reach the issue of whether including the competitive market provisions renders the Stipulation unreasonable. That is because the Commission did not authorize or order Duke Energy to address competitive market issues in the MGP and TCJA proceedings.

As discussed in the background section above, the Commission granted Duke Energy's request to be able to file applications each year to recover investigation and remediation charges. As the Commission stated in its November 13, 2013 Opinion and Order:

> Duke also requests authorization to file an application in each subsequent year to update Rider MGP based on the unrecovered balance and related carrying charges as of the prior December 31. In light of the fact that the Commission has determined herein that Duke should be authorized to recover the prudently incurred costs of MGP investigation and remediation for these two sites, the Commission finds Duke's request for annual updates to Rider MGP in order to reflect the costs for the preceding year is reasonable and should be approved. **Accordingly, the Commission finds that, beginning March 31, 2014, and on or before March 31 in each subsequent year, Duke must update Rider MGP based on the unrecovered balance, minus any carrying charges as required previously in this Order, as of the prior December 31. In these subsequent cases wherein Duke will be updating Rider MGP, Duke shall bear the burden of proof to show that the costs incurred for the previous year were prudent., indicating**

further that the Company would be able to recover those costs which were prudently incurred through Rider MGP.[38]

Likewise, in its October 24, 2018 Finding and Order in Case No. 18-47-AU-COI, the Commission ordered that "[i]t is therefore, ORDERED, That Ohio rate-regulated utilities file an application not for an increase in rates, pursuant to R.C. 4909.18, to reflect the impact of the TCJA on their current rates by January 1, 2019, unless exempted or otherwise directed in this Finding and Order."[39]

Neither order authorized Duke Energy to include competitive market issues in these proceedings. Moreover, Duke Energy did not submit any request to the Commission to address competitive market issues in these proceedings. Nevertheless, Duke Energy ignored the limited scope of the MGP and TCJA proceedings, and in an apparent trade for better financial terms on the TCJA credit and MGP cost recovery, incorporated the competitive market provisions. Duke Energy's actions in doing so (failing to comply with the Commission's orders) are unreasonable and unlawful under the Revised Code.[40]

The Commission should ensure its orders are heeded, especially by a utility and especially given the circumstances in these proceedings where provisions wholly unrelated to the MGP and TCJA directives were added to the Stipulation. Duke Energy blatantly disregarded the enabling orders in these proceedings and the limited scope of these proceedings. The Commission should reject the Stipulation in its entirety to ensure the MGP and TCJA resolutions are fairly bargained for and to remove any doubt as to whether ratepayer credits and cost recovery were sacrificed for

[38] *In re Duke Energy Ohio, Inc.*, Case No. 12-1685-GA-AIR, et al., Opinion and Order (Nov. 13, 2013) at page 72 (emphasis added).

[39] *Id.* at ¶ 35.

[40] *See, e.g.*, ORC 4905.54 ("[e]very public utility or railroad and every officer of a public utility or railroad shall comply with every order, direction, and requirement of the public utilities commission made under authority of this chapter …").

the competitive market provisions. Alternatively, the Commission should remove the competitive market provisions from the Stipulation by modification.

C. The Stipulation is Not Reasonable.

As stated in Section III.A.2, *supra*, in considering the reasonableness of a stipulation, the Commission analyzes the following 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 Stipulation, as proposed, fails all three prongs, and is, therefore, not reasonable, and must not be approved without removing the competitive market provision. These factors are discussed below. However, the discussion below is limited to the competitive market provisions contained in the Stipulation in accordance with the limited intervention status granted to RESA and IGS. The November 10, 2021 clarifying Entry provides:

> [T]here 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.[41]

The Attorney Examiner has already found that "IGS and RESA received no notice that the Stipulation could include provisions related to the competitive market."[42] And as discussed below, the only "evidence" presented by the Signatory Parties to support the competitive market

[41] November 10, 2021 Entry, ¶ 30.

[42] October 15, 2021 Entry, ¶ 31

provisions in the Stipulation are a few conclusory statements in the direct testimony of Sarah E. Lawler (Duke Exhibit 6) and Amy B. Spiller (Duke Exhibit 7). RESA's and IGS' expert witnesses, however, (Frank Lacey and James L. Crist) provided testimony regarding the detrimental impacts of the competitive market provisions contained in the Stipulation. RESA's and IGS' witness James H. Cawley provided testimony regarding the competitive market provisions as they relate to considerations in regulatory proceedings, public policy concerns and improper burden shifting to RESA and IGS. Neither Duke nor any of the other Signatory Parties presented rebuttal witnesses to RESA's and IGS' witnesses.

As one last threshold matter, during the hearing Mr. Cawley, who has significant experience as a Chairman, a Vice Chairman, and a Commissioner of the Pennsylvania Public Utility Commission,[43] testified that the behavior by the Signatory Parties was "egregious"[44] and also referred to the conduct of the Signatory Parties as "shenanigans."[45] The Commission should pay close attention to the settlement process that took place, and perhaps more importantly, the immense potential harm that this process, if left unchecked, may cause in other proceedings before the Commission. RESA and IGS did not participate in the settlement discussions and, therefore, do not have sufficient factual bases to address the issues of "why the competitive market provisions found their way into the Stipulation?" or "who is at fault?". Accordingly, RESA and IGS will not engage in speculation in this brief and are not prescribing blame to any of the specific Signatory Parties.

RESA and IGS, are, however, very concerned about (1) the process through which the Stipulation arose, including the impropriety and/or manipulation of such process through the

[43] RESA/IGS Ex. 1 at pp. 1-2.

[44] RESA/IGS Ex. 1 at pp. 3, 12.

[45] RESA/IGS Ex. 1 at 16.

exclusion of natural gas suppliers, (2) the competitive market provisions contained in the Stipulation and (3) just as important, stipulations in Commission cases going forward– *i.e.*, the process, outcome and the future are the focus of this brief.

The competitive market provisions were slipped into the Stipulation without (a) RESA and IGS receiving any notice that the Stipulation could include provisions related to the competitive market and (b) RESA or IGS (or any other competitive retail natural gas supplier) being invited to participate in the stipulation negotiations.[46] For the reasons set forth below, such unscrupulous settlement/stipulation tactics cannot be condoned by the Commission.

It is against such backdrop that RESA and IGS proceed with their evaluation of the three-prong reasonableness test adopted by the Commission.

1. The Stipulation was not the result of serious bargaining by knowledgeable and experienced parties.

Duke Energy and OCC have admitted that they "did not invite any competitive retail natural gas suppliers to participate in the stipulation negotiations."[47] The stipulation negotiations did not include any competitive retail natural gas suppliers.[48] Further, none of the Signatory Parties directly represented the interests of competitive retail natural gas suppliers.[49] Despite no competitive retail natural gas suppliers participating in the Stipulation negotiations that gave rise to the competitive market provisions impacting such suppliers, Duke Energy admits that **"it would expect to be involved in negotiations that change the terms and conditions of Duke Energy's**

[46] RESA Ex. 4, supplemental response November 8, 2021; RESA Ex. 29, IGS Ex. 34.

[47] *Id*.

[48] IGS Ex. 35, RESA Ex. 29, Tr. 47: 13-16.

[49] RESA Ex. 29, IGS Ex. 34.

own tariffs."[50] Of course Duke would have such expectation; nobody wants to be left out of important decisions affecting one's interests.

As set forth above, IGS and RESA received no notice that the Stipulation could include provisions related to the competitive market. As Ms. Lawler testified, there were no issues in the tax cases and the MGP cases comprising these proceedings that related to the competitive retail natural gas market.[51] Given the history of these proceedings, there would be no reason for IGS and RESA, or any other retail natural gas supplier, to be involved in these cases prior to the filing of the Stipulation. Yet the Signatory Parties then included the competitive market provisions at some point, provisions that clearly affect retail natural gas suppliers because they impact Ohio's competitive retail natural gas market.[52]

As will be explained *infra,* the competitive market provisions in the Stipulation have a significant impact on retail natural gas suppliers, customers and the retail natural gas market.[53] Yet, none of the Signatory Parties directly represented the interests of competitive retail natural gas suppliers.[54] For example, Duke witness Ms. Lawler was not even aware of ¶ 89 in the February 24, 2021 Finding and Order in Case No. 19-1429 (IGS Exhibit 11) in which the Commission held that "[c]onsistent with our decisions in prior cases, the Commission declines to adopt OCC's shadow-billing proposal."[55] Despite testifying that the Stipulation is the product of serious bargaining amongst knowledgeable and capable parties, Ms. Lawler and Ms. Spiller each agreed that the first time either one of them read the February 24, 2021 Finding and Order in Case No.

[50] RESA Ex. 5 (emphasis added).

[51] Tr. 40: 2-5 and 19-22.

[52] *See, generally,* RESA/IGS Ex. 2 (Lacey Direct Testimony) and RESA/IGS Ex. 3 (Crist Direct Testimony).

[53] *Id.*

[54] RESA Ex. 29.

[55] Tr. 78: 2-14.

19-1429 was **after the Stipulation was submitted in these proceedings**.[56] Ms. Lawler was involved in the settlement negotiations on behalf of Duke Energy leading up to the formulation of the Stipulation.[57] It cannot be concluded that Duke Energy Ohio was a knowledgeable party when all of its witnesses admitted to complete ignorance, prior to the submission of the Stipulation, of the recent Commission rulemaking in which the Commission addressed two of three market-related provisions in the Stipulation (shadow billing and price to compare).

Moreover, by excluding gas suppliers in the negotiations, the Signatory Parties were not able to learn from the experience of such gas suppliers. For example, many gas suppliers have more experience in gas supply transitions programs than does Duke Energy and could have provided valuable recommendations based on what worked well in other gas supply transition programs that they were involved in.[58] Duke Energy also was not a knowledgeable party as it relates to important issues for competitive retail natural gas suppliers. Not only did the Signatory Parties not directly represent the interests of competitive retail natural gas suppliers,[59] none of the evidence presented by Duke Energy demonstrates that the negotiating parties were knowledgeable, capable and experienced on issues affecting competitive retail natural gas suppliers. In her various roles from the present day going back to 2013, Witness Lawler did not perform any analysis or provide recommendations regarding the competitiveness of the retail natural gas market.[60] Ms. Lawler also has not reviewed the state policy in the Ohio Revised Code regarding the competitive market.[61] Like Witness Lawler, Witness Spiller is also inexperienced when it comes to issues

[56] Tr. 78: 15-23 and 115: 1-6.

[57] Tr. 38: 22-25.

[58] RESA/IGS Ex. 3 (Crist Direct Testimony) at 18.

[59] RESA Exhibit 29.

[60] Tr. 38: 10-15.

[61] Tr. 38: 16-18.

affecting competitive retail natural gas suppliers. While Ms. Lawler provided legal advice to Duke Energy Retail as a business partner,[62] there is no evidence in the record showing that she was knowledgeable, capable and experienced on issues affecting competitive retail natural gas suppliers. The burden is on the Signatory Parties (not on RESA and IGS) to satisfy such prong of the reasonableness inquiry. Indeed, the Signatory Parties did not present any evidence of serious bargaining with respect to the competitive market provisions.

In these proceedings, the retail natural gas suppliers were not at the settlement table. The competitive market provisions that were included in the Stipulation affect retail natural gas suppliers because they impact Ohio's competitive retail natural gas market. By virtue of engaging in secret and exclusionary settlement discussions on matters wholly unrelated to the MGP Rider and TCJA credit, the Signatory Parties set the stage for no serious bargaining among capable, knowledgeable parties. Bargaining, by definition, requires more than one knowledgeable party. There is simply no evidence in this proceeding that any of the Signatory Parties had the requisite knowledge to fully negotiate the Stipulation.

RESA's and IGS' witness testimony supports this finding. RESA's and IGS' witnesses have, collectively, decades of experience on matters relevant to the competitive retail natural gas market and regulatory policy considerations. Witness James L. Crist has run a consulting practice for the past 25 years focused on regulated and deregulated energy company strategy, market strategy, and regulatory issues, and prior to his consulting practice Mr. Crist worked at three major energy companies for a total of 19 years in various business functions.[63] Witness Frank Lacey has worked in the competitive energy market since 2001 and in the energy industry for approximately

[62] Tr. 103:13 to 104:24.

[63] RESA/IGS Ex. 3 (Crist Direct Testimony) at 1-3.

28 years.[64] Mr. Lacey testified that "[t]he only parties with compelling divergent interests from Duke and qualified expertise to participate in the negotiations on these contentious market issues are the CRNGS suppliers including IGS and RESA's members."[65]

RESA and IGS witness Mr. Cawley, who has significant experience as a Chairman, a Vice Chairman, and a Commissioner of the Pennsylvania Public Utility Commission over the course of 16 years,[66] testified that in his opinion the Stipulation was not a product of serious bargaining among capable, knowledgeable parties and that the Commission's broad range of diverse interests standard cannot be satisfied.[67] In summary, the Signatory Parties have failed to satisfy the first criterion of the reasonableness inquiry relative to the Stipulation.

This conclusion is consistent with the concerns expressed by the Ohio Supreme Court in *Time Warner Axs v. Public Utilities Commission*, 75 Ohio St. 3d 229, 661 N.E. 2d 1097 (1996). In *Time Warner*, the Commission approved a partial stipulation. *Id.* The stipulation "arose from settlement talks from which an entire customer class was intentionally excluded." *Id.* The Court expressed "grave concerns regarding the commission's adoption of a partial stipulation which arose from the exclusionary settlement meetings." *Id.* The court noted that a party to the stipulation "managed to either settle its competitive issues or defer them until a later date, **all without having its competitors at the settlement table.** *Id.* (emphasis added).

The Stipulation cannot be approved without modification because it was not the result of serious bargaining by knowledgeable and experienced parties.

2. The Stipulation violates important regulatory rules and practices.

[64] RESA/IGS Ex. 2 (Lacey Direct Testimony) at 2.

[65] *Id*. at 6.

[66] RESA/IGS Ex. 1 at pp. 1-2.

[67] RESA/IGS Ex. 1 (Cawley Direct Testimony) at 13-15; Tr. 208: 5-21.

As set forth in Section III.C.1 above, the Signatory Parties engaged in settlement meetings in these proceedings where not all participants were parties, and excluded competitive retail natural gas suppliers even though significant competitive market provisions were being negotiated. Despite such exclusionary tactics, the Signatory Parties agreed to a Stipulation containing the competitive market provisions, which directly impact the retail natural gas suppliers.

a. <u>The inclusion of wholly unrelated competitive market provisions (i.e., alien provisions) in the Stipulation violates regulatory principles and practices.</u>

As Mr. Cawley testified in his direct testimony, such inclusion of "alien provisions"[68] violates several important regulatory principles and practices:

- "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)."[69]

- "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."[70]

- "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."[71]

[68] RESA/IGS Ex. 1 (Cawley Direct Testimony) at 3.

[69] *Id*. at 11.

[70] *Id*. at 11-12.

[71] *Id*. at 12.

- "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."[72]

Mr. Cawley made it clear that if he were voting on the reasonable of the Stipulation, he would be offended that the Signatory Parties submitted the Stipulation with the extraneous provisions for approval.[73] During his cross-examination, he made it clear that he believes that the Signatory Parties "acted inappropriately."[74]

On redirect, Mr. Cawley stated his view that the use of the stipulation process to gain approval of alien provisions is improper.[75] The Commission cannot approve the Stipulation as it is a product of unscrupulous settlement tactics – sneaking certain provisions into a stipulation, which are wholly unrelated to the subject matters of the underlying proceedings[76] without notifying affected stakeholders of the negotiations. It is no wonder that Mr. Cawley would be "offended"[77] by the "egregious behavior"[78] of the Signatory Parties. If he was making a decision with respect to the Stipulation, Mr. Cawley recommended "that the shenanigans perpetrated here end here."[79]

[72] *Id.* at 12-13.

[73] *Id.* at 13.

[74] Tr. 185: 2-8.

[75] Tr. 211: 6-10.

[76] Ms. Lawler testified, there were no issues in the tax cases and the MGP cases comprising these proceedings that related to the competitive retail natural gas market. Tr. 40: 2-5 and 19-22. *See also* October 15, 2021, Entry ¶ 31.

[77] RESA/IGS Ex. 1 (Cawley Direct Testimony) at 13.

[78] *Id*. at 3.

[79] *Id.* at 16.

Mr. Cawley, noted the substantial harm that would occur if the Commission approves the Stipulation as filed.[80] He testified that:

> 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.[81]

Consistent with the principles laid out by Mr. Cawley, the Commission should not approve any stipulation that contains unrelated and material provisions if (a) the industry participants most affected by the provisions were not aware of and not invited to the stipulation negotiations and (b) did not have their interests adequately represented in the stipulation negotiations. The detrimental impacts if the Stipulation is allowed to stand without modification demonstrate the importance of the application of sound regulatory principles. If the Commission fails to exercise its gatekeeper role, then the costs of litigation at the Commission will increase substantially and the settlement process will be abused by parties to promote their own extraneous interests that are not at issue in the subject proceedings.[82] Indeed, RESA and IGS have expended a significant amount of time and

[80] *Id.* at 15-16.

[81] *Id*. at 15-16.

[82] *Id.* at 16.

resources in these proceedings toward addressing the three competitive market-related provisions that were improperly included in the Stipulation.

b. <u>The Commission's rule that a potential intervenor must show a valid interest to participate in a case will be eviscerated if the Commission approves the Stipulation with the competitive market provisions.</u>

Additionally, without unambiguous guidance from the Commission regarding the stipulation process, parties will be forced to intervene in every case, regardless of the subject matter of such case, because absent intervention there would be no way for such party to protect its interest that otherwise would be negotiated. The basis for such intervention would be a concern about hidden settlement provisions, wholly unrelated to the subject matter of such proceeding, and likely with a citation to these proceedings to justify why the person has a "real and substantial interest in the proceeding."[83] The end result would be that the requirements of Rule 4901-1-11(A)(2) would be a nullity, another reason why the Stipulation violates regulatory rules and practices.

c. <u>The Stipulation violates important regulatory principles as to the proposed price to compare and provision of shadow billing information.</u>

Lastly, the Stipulation violates important regulatory principles established by the Commission specifically relating to price to compare and shadow billing. For example, the Commission recently declined to adopt shadow billing in ¶ 89 in the Finding and Order, entered on February 24, 2021, in Case No. 19-1429-GA-ORD related to a Commission rulemaking proceeding (IGS Exhibit 11): "[c]onsistent with our decisions in prior cases, the Commission declines to adopt OCC's shadow-billing proposal … Further, there are a number of existing resources, such as the Commission's Energy Choice Ohio website, that provide a substantial

[83] Ohio Adm.Code 4901-1-11(A)(2).

amount of information for customers to compare pricing and available offers." Both Duke Energy and OCC participated in that rule making proceeding, with OCC advocating for shadow billing.

While the Commission did approve certain shadow billing provisions in an electric distribution case in the Opinion and Order, ¶¶ 129-131, entered on November 17, 2021, *In the Matter of the Application of Ohio Power Company for an Increase in Electric Distribution Rates*, Case No. 20-585-EL-AIR, et al, such decision was based on the evaluation of the stipulation in that case as a package,[84] a different record and divergent interests present in the negotiation thereof. That electric distribution case, however, did not involve the facts in these proceedings where wholly unrelated provisions were added to a stipulation in a limited scope proceeding with the persons most impacted by those provisions unaware that negotiations were taking place. Therefore, it would be wholly improper for the Commission to review shadow billing as part of the package instead of on its own, and the shadow billing provision in the Stipulation must be reviewed under the regulatory principle and guidance set forth by the Commission in its recent rulemaking proceeding, Case No. 19-1429-GA-ORD. The shadow billing provision in the Stipulation flies in the face of the Commission's decision in Case No. 19-1429-GA-ORD, violating regulatory practices.

Similarly, the price to compare provision in the Stipulation dictates the exact language that would be required on the bills of shopping customers,[85] and such language (which is focused on only on price) is inconsistent with the Commission's decision in the rulemaking proceeding and the rule that issued in that proceeding. In the rulemaking proceeding, the Commission recently

[84] The Commission stated that "each provision of the Stipulation need not provide a direct and immediate benefit to ratepayers and the public interest." *In the Matter of the Application of Ohio Power Company for an Increase in Electric Distribution Rates, Case No. 20-585-EL-AIR, et al* at ¶ 131.

[85] Joint Ex. 1 at 18, ¶ 24.

held that "it would be problematic to display the SCO or GCR rate on the bill, given that the rate changes from month to month."[86] The statement adopted by the Commission "ensure[s] that customers receive current pricing and supplier offer data rather than an outdated default commodity rate listed on their bills."[87] Thus, the Stipulation's proposal to place an outdated default service price on customer bills would misinform customers' shopping decisions.

Moreover, by focusing only on price, the provision in the Stipulation regarding price to compare is in violation of the Commission's well-established principle that price is only one factor in driving customer choices of a supplier. To further underscore such point, the Commission has revised the price to compare statement on customer bills to recognize that "[p]rice represents one feature of any offer; there may be other features which you consider of value."[88] Such quoted language is not contained in the price to compare language in the Stipulation that is to be added to the bills of natural gas customers if the Stipulation is approved and the SSO is implemented.

The Stipulation's price to compare proposal also contradicts Ohio Admin.Code 4901:1-13-11(B)(13) which prescribes the following billing message:

> "When shopping for a natural gas supplier, it may be useful to compare supplier offers with the standard choice offer (SCO) rate [or, if applicable, the gas cost recovery (GCR) rate] available to eligible customers, which varies monthly based on the market price of natural gas. Price represents one feature of any offer; there may be other features which you consider of value. More information about the SCO [or GCR, if applicable] and other suppliers offers is available at energychoice.ohio.gov or by contacting the PUCO."

The fact that the price to compare language in the Stipulation is in direct contrast with the current requirements of the Ohio Administrative Code violates a regulatory rule as well as practice.

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[86] *In re 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, Entry on Rehearing (April 21, 2021) at ¶ 28.

[87] *Id*.

[88] *In re 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, Finding and Order (Feb. 24, 2021) at ¶ 69.

Additionally, the price to compare language is not necessary as Duke admits that the Commission's EnergyChoiceOhio apples-to-apples website provides customers with information including supplier pricing offers, Duke Energy's GCR rate, whether an offered product is fixed or variable and the initial terms of the offer[89] – much more information than the price to compare provision contemplated in the Stipulation.

In summary, the Stipulation violates several important regulatory principles and practices. Mr. Cawley explained the regulatory principles violated by the Stipulation and its extraneous provisions and the substantial harm that would be caused if the Commission fails to exercise its gatekeeper role to prevent gaming of the stipulation process and ensuring fairness to all that are impacted by a stipulation. Further, the shadow billing and price to compare provisions of the Stipulation violate recent Commission principles and policies in such areas. The third prong of the reasonableness test with respect to the Stipulation has not been satisfied.

3. The Stipulation will not benefit ratepayers or the public interest.

The only "evidence" provided by the Signatory Parties in the record to try and show that the competitive market provisions contained in the Stipulation will benefit ratepayers and the public interest are a few conclusory statements by Duke Energy's witnesses Lawler and Spiller:

- Ms. Lawler testified that "[t]he Stipulation enhances the competitive natural gas market by moving [Duke] to a natural gas standard service offer (SSO) auction and transitions away from the current gas-cost recovery (GCR) process. Finally, this Stipulation will support Duke Energy Ohio's financial health in a manner that provides certainty and cost recovery allthewhile reducing natural gas rates for customers."[90]

- Ms. Spiller testified that the Stipulation "[e]nhances the competitive market for retail natural gas service through a transition to an auction format for gas supply for [Duke]'s non-shopping customers"[91] and also supports the expansion of the competitive natural gas

[89] RESA Ex. 10.

[90] (Duke Energy Ex. 6 (Supplemental Testimony of Ms. Lawler) at 8.)

[91] Duke Energy Ex. 7 (Supplemental Testimony of Ms. Spiller) at 3.

> market as "[Duke] will seek authority to transition to [the SSO auction]."[92] Ms. Spiller also testified that "[a]s a result of the Stipulation, natural gas customers will be given additional information related to choice and the competitive market and … the [OCC] will be provided with information to enable an aggregate comparison between charges paid to suppliers and under [Duke]'s future SSO."[93]

While the second prong of the reasonableness inquiry requires the Commission review the Stipulation "as a package," RESA and IGS, as a result of their limited intervention status, are limited to contesting the inclusion of the competitive market provisions in the Stipulation. Given this limitation, RESA and IGS are effectively prevented from arguing the "as a package" element in the second prong, and therefore will limit their arguments with respect to the second prong of the reasonable test to only addressing the competitive market provisions.

a. <u>If the Stipulation is approved, horrible case precedent will be set resulting in parties intervening in every Commission case to ensure notice is provided of settlement negotiations on wholly unrelated matters.</u>

If the Stipulation is approved as presented (with the three competitive market provisions), and notwithstanding the regulatory principles that would be undermined by such approval, the Commission will set a very disturbing precedent —it will have the practical effect of causing parties to intervene in every Commission case so that parties can ensure that they receive notice of settlement negotiations, even if the settlement negotiations on their face relate to wholly unrelated matters. If the Stipulation, as presented, is approved, parties will be forced to intervene in every case, regardless of the subject matter of the case, because absent intervention there would be no way for such party to prevent itself from being subject to the types of shenanigans that occurred in this proceeding – extraneous provisions affecting competitive retail natural gas suppliers being slipped into a Stipulation without suppliers receiving notice or opportunity to participate in the

[92] *Id.* at 14, 20-21.

[93] *Id*. at 21.

negotiations giving rise to the Stipulation. The bases for intervention, or the claimed interests supporting intervention, would be legitimate concerns about provisions being surreptitiously included in the settlement that are wholly unrelated to the subject matter of such proceeding, with a citation to what happened in these proceedings. Such broad scale intervention by numerous parties in every case before the Commission will not benefit ratepayers or the public interest – it will only lead to a substantial increase in the amount and costs of litigation at the Commission.[94] It will also amount to a waste of Commission resources. The Commission should be wary about the precedential effect of its decision in these proceedings on all cases involving the submission of a stipulation.

b. <u>A SSO versus a SCO will hinder and impede the development of the competitive retail natural gas market.</u>

RESA and IGS witness James L. Crist, P.E. provided the only substantive testimony regarding the supply of gas to Duke's non-choice customers and the benefits and disadvantages of the various options. Mr. Crist described Duke's use of the GCR,[95] how the GCR works[96] and the downsides of the GCR.[97] Mr. Crist then proceeded to describe the commitment by Duke in the Stipulation to transition to an SSO, the workings of an SSO and the lack of a relationship of the SSO wholesale supplier to the customer.[98]

Mr. Crist explained that a transition to an SSO will not enhance the competitive retail natural gas market. As Mr. Crist explained, an SSO supplier need not be licensed as a supplier.[99]

[94] RESA/IGS Ex. 1 (Cawley Direct Testimony) at 16.

[95] *Id.* at 5-6.

[96] *Id*. at 6.

[97] *Id.* at 6-7.

[98] *Id.* at 7-8.

[99] *Id.* at 8.

In fact, an SSO supplier could be a foreign bank with no other U.S. presence.[100] The SSO supplier has no relationship with a customer.[101] Under an SSO model, Duke will simply be procuring wholesale gas rather than having an asset manager procure gas on its behalf as Duke currently does under the GCR.[102] If there is a transition to an SSO mechanism, customers will not know that any change has occurred. On the other hand, Standard Choice Offer ("SCO") suppliers, who must be certified by the Commission unlike SSO suppliers, are assigned to serve specific customers.[103] The SCO supplier's name will appear on the customer's bill, and this can create brand recognition.[104] Since an SCO supplier must be a registered choice supplier,[105] the SCO supplier may have other products of interest to the customers and the brand recognition created may encourage the customer to explore such other products and choices. Moreover, the SCO suppliers must have a presence in the state and therefore invest in Ohio. Given that the policy purpose of R.C. 4929.02 is to encourage energy supplier choices for customers, Mr. Crist concluded that Duke's commitment in the Stipulation to transition to an SSO is not consistent with R.C. 4929.02.[106]

Lastly, Mr. Crist explained that a transition by Duke to an SCO model instead of an SSO model would move Duke closer to the ultimate desired end state of a fully competitive choice market.[107] A choice market provides various benefits to customers such as product and service

[100] *Id.* at 8.

[101] *Id.* at 11.

[102] Tr. at 57: 17-22.

[103] RESA/IGS Ex. 1 (Cawley Direct Testimony) at 11.

[104] *Id.* at 11.

[105] *Id.* at 11.

[106] *Id.* at 8-9.

[107] *Id.* at 16.

innovation.[108] Unlike the SSO model, the SCO option involves competitive retail gas suppliers serving customers and increasing knowledge of the competitive market, and such sets the stage to achieve the policy goal of a completely competitive gas supply market as set forth in R.C. 4929.02.[109] For instance, R.C. 4929.02(A)(7) states that it is the policy of this state to, throughout this state, "[p]romote an expeditious transition to the provision of natural gas services and goods in a manner that achieves effective competition and transactions between willing buyers and willing sellers to reduce or eliminate the need for regulation of natural gas services and goods under Chapters 4905 and 4909 of the Revised Code." The proposed transition to an SSO does not further this policy.

The record establishes that a transition to the SSO model instead of the SCO model would hinder the goal of a competitive retail choice natural gas market.

c. <u>An SSO price to compare and shadow billing will harm the competitive retail natural gas market.</u>

IGS and RESA witness Frank Lacey provided uncontroverted testimony with respect to the detrimental effects of price to compare and shadow billing provisions contained in the Stipulation on the competitive retail natural gas market. Each will be addressed in turn below, but each is detrimental to the competitive retail natural gas supply market.

In addition to violating important regulatory principles as set forth above, the price to compare language in the Stipulation is misleading. Mr. Lacey testified that a price to compare will create confusion to customers because Duke's current GCR and the SSO proposed in the Stipulation are essentially no-value wholesale cost pass-through products, whereas retail products have different attributes such as carbon offsets, efficiency products or services, long-terms and

[108] *Id.* at 11-12, 16.

[109] *Id.* at 16.

potentially other features.[110] Mr. Lacey's conclusion regarding the Stipulation's price to compare provision in the Stipulation is that it would "undoubtedly" have negative impacts on Ohio's competitive retail natural gas market,[111] which conclusion he thoroughly explained:

> First, it provides a message implying that all products are the same and price is the only attribute that matters. This stifles consumer interest and hampers innovation. The requirement will also result in consumers receiving delayed and inappropriate price signals that can lead to poor consumer decisions such as breaking contracts, entering contracts at inopportune times, or staying out of the market altogether and suffering the fate of gas price volatility. It will create confusion in the market because the statements might be completely untrue at the time the customer reads them or can react to them. Overall, including the default service price on customer bills would be bad policy. I can think of no consumer benefits of providing a backward-looking price comparison of fundamentally different consumer products.[112]

Mr. Lacey provided specific examples of the inherent deficiencies in and the misleading nature of a price to compare message. He showed how an SSO price to compare can cause a decision by a customer that is adverse to the customer's financial interest. For example, the SSO, if adopted, would be backward looking (reflecting actions that the utility took in the past to procure gas to meet an expected future demand) and the price would not be available to customers, whereas a competitive supply price is a forward-looking price available to customers at the time the customer agreement is signed that incorporates market expectations.[113] Ignoring all other factors, the different dates of SSO price versus competitive supply price render the comparison invalid.[114] Further evidencing the deficiencies with a price to compare, by the time a customer sees the data

[110] RESA/IGS Ex. 2 (Lacey Direct Testimony) at 13.

[111] *Id.* at 20.

[112] *Id.* at 20.

[113] *Id.* at 13.

[114] *Id.* at 13.

point and can take action on it, the price-to-compare information is significantly out of date, so, in reality, it is not an actionable price.[115]

In effect, a price-to-compare message is sending a message every month that customers should attempt to save money on their gas supply.[116] Such a message may cause a customer to terminate its relationship with a supplier resulting in an early termination fee, or, even if there is no termination fee, the price to compare message may convince a customer to terminate a long-term supply contract at an attractive price prior to a winter in which natural gas prices will increase (as in this year).[117] Both decisions may be contrary to the financial interest of the customer. Interestingly, Mr. Lacey pointed out in his testimony that at least on several prior instances, Duke has argued against the implementation of a price to compare message on bills in other Commission cases. [118] Duke has provided no reasoning why it changed its position on such issue with respect to these proceedings.

If the Commission needs any additional reason to reject the proposed changes, it need look no further than its recent orders. As the Commission stated in April 2021, "it would be problematic to display the SCO or GCR rate on the bill, given that the rate changes from month to month."[119] The bill message adopted by the Commission "ensure[s] that customers receive current pricing and supplier offer data rather than an **outdated default commodity rate listed on their bills**."[120]

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[115] *Id.* at 23-25.

[116] *Id.* at 18.

[117] *Id.* at 18-19.

[118] *Id.* at 20-22.

[119] *In re 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, Entry on Rehearing (April 21, 2021) at ¶ 28.

[120] *Id*. (emphasis added).

Accordingly, RESA and IGS have provided ample evidence that the SSO price to compare provision in the Stipulation will harm the competitive retail natural gas market, whereas the Signatory Parties have presented no evidence whatsoever of any beneficial aspects of the price to compare to customers.

With respect to shadow billing, Mr. Lacey expressed concerns regarding the shadow billing provision in the Stipulation.[121] Shadow billing is a flawed concept and provides meaningless results.[122] Shadow billing provides inaccurate information that does not represent a complete comparison of pricing and savings. Specifically, shadow billing excludes volumes consumed and pricing for all choice customers not billed by Duke under its consolidated billing platform.[123] Therefore, as admitted to by Duke, the shadow billing in the proposed Stipulation would not account for dollars paid by choice customers billed directly by the competitive retail natural gas supplier for the supply of natural gas.[124] Additionally, Duke does not have access to the dollars amounts charged by such competitive retail natural gas suppliers to customers that are not billed by Duke Energy on a consolidated billing basis for the supply of natural gas.[125]

Because the shadow billing calculation is a financial calculation,[126] shadow billing excludes considerations that might be included in offers from competitive retail natural gas suppliers. For example, a customer may be willing to pay a premium for carbon offset natural gas. The shadow billing financial calculation will capture the price premium, but cannot capture the carbon offset piece. Therefore, in the above example, the shadow billing information is misleading

[121] RESA/IGS Ex. 2 (Lacey Direct Testimony) at 25.

[122] *Id.* at 26-30.

[123] RESA/IGS Ex. 2 (Lacey Direct Testimony) at 28; *see also* RESA Ex. 7 and RESA Ex. 8.

[124] RESA Ex. 7.

[125] RESA Ex. 9.

[126] RESA Ex. 7 and RESA Ex. 8.

and does not capture the true considerations involved in a transaction that a consumer entered into knowingly. The Commission understands that customers may choose an energy provider for various reasons other than price.[127] Such other reasons for consumer choices are not included in the shadow billing calculation. When customers makes natural gas supply decisions based on factors other than price, then any shadow billing information becomes entirely misleading.

Mr. Lacey explained that "[i]f any policy actions are taken in response to those meaningless results, they will almost certainly be bad policy actions."[128] For example, OCC used information provided by Duke prior to OCC agreeing to the Stipulation in a recent Commission rule proceeding.[129] Just as damaging would be if OCC uses the inaccurate information to lobby for legislative change. Such actions would harm the competitive retail natural gas market.

D. The Stipulation's deficiencies can be cured by removing the competitive market provisions.

For the reason set forth in this brief, the Commission must not approve the Stipulation as presented. However, there is an alternative solution: The Commission can remove the competitive market provisions from the Stipulation and approve the Stipulation without such provisions. The Commission can modify the Stipulation to further the public interest and make it reasonable. Such modification is consistent with the important policy principle that exclusionary side deals, in which the non-signatory parties are not invited to the stipulation negotiations and do not have their interests adequately represented in the stipulation negotiations, should not be encouraged. A

[127] *See e.g., In the Matter of the Application of Ohio Power Company for an Increase in Electric Distribution Rates,* Case No. 20-585-EL-AIR, et al., Opinion and Order (November 17, 2021) at ¶ 131.

[128] RESA/IGS Ex. 2 (Lacey Direct Testimony) at 29-30.

[129] See Consumer Protection Comments by Office of the Ohio Consumer's Counsel (October 8, 2021) filed in *In the Matter of the Commission's Review of Ohio Adm. Code Chapters 4901:1-21, 4901:1-23, 4901:1-24, 4901:1-27, 4901:1-28, 4901:1-29, 4901:1-30, 4901:1-31, 4901:1-32, 4901:1-33, and 4901:1-34 Regarding Rules Governing Competitive Retail Electric Service and Competitive Retail Natural Gas Service,* Case No. 17-1843-EL-ORD, et al.

straight-forward action the Commission can take to discourage such exclusionary side deals is to modify the Stipulation to exclude the provisions that comprise the wholly unrelated provisions.

1. The competitive market provisions are wholly unrelated to the MGP and TCJA proceedings.

As noted above, the competitive market provisions are wholly unrelated to the MGP and TCJA provisions. The Commission has already noted that:

> IGS and RESA received no notice that the Stipulation could include provisions related to the competitive market. Those provisions do not represent a mere expansion of the existing issues involved or an alternative proposal to resolve the issues in the *Duke MGP Proceedings* or *Duke TCJA Proceedings;* rather, **the attorney examiner agrees they represent wholly unrelated matters** for the Commission's, and other interested parties', consideration. Consistent with Commission precedent, however, the dispositive issue is determining whether IGS and RESA should have been on notice that these three provisions could be raised in these proceedings or appear in the resulting Stipulation. The attorney examiner finds that they could not have, based on the proceedings up to the filing of the Stipulation.[130]

2. Any claim from a signatory party that the competitive market provisions are material, indicates that they traded the market provisions at the expense of ratepayer credits and MGP Rider charges.

The competitive market provisions are wholly unrelated to the MGP and TCJA provisions. The fact that these unrelated provisions made their way into the Stipulation, means that one or more of the Signatory Parties found value in such competitive retail natural gas market provisions in agreeing to the terms of the Stipulation. Every settlement negotiation between sophisticated parties is a "give and take." By receiving value in the Stipulation in the form of such competitive market provisions means that the one or more Signatory Parties who sought such competitive market provisions gave up value elsewhere in order to come to agreement on the Stipulation. Given the nature of these proceedings and the provisions in the Stipulation, the only value that

[130] October 15, 2021 Entry, ¶ 31.

could have been given up or traded is additional ratepayer credits or a lower amount collected through Rider MGP.

Such trading in order to obtain provisions that are wholly unrelated to the subject of the underlying proceedings if it occurred should be concerning to the Commission given the directives in the enabling orders for the MGP Rider filings and TCJA credit filings.

3. The fact that only Duke Energy filed supporting testimony on the Stipulation reinforces that the competitive market provisions are not a necessary part of the Stipulation.

This is an odd case procedurally. A stipulation was entered that contained the competitive market provisions wholly unrelated to the MGP and TCJA matters. Duke was the only party that filed supporting testimony on the Stipulation, and its testimony hardly addressed the competitive market provisions. These facts reinforce that the competitive market provisions are not a necessary part of the Stipulation, because, if they were necessary, there would at least be an evidentiary record in support of them instead of a flimsy façade. Sneaking in the competitive market provisions into the Stipulation appears to be a "let's see if anyone notices" attempt by the Signatory Parties. The Commission simply cannot endorse this kind of ploy, which if allowed to go unchecked will have long term and detrimental ramifications.

The solution in these proceedings is to either reject the Stipulation or modify it to remove the competitive market provisions. *See e.g., In re 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, Finding and Order (Feb. 24, 2021) at ¶ 69 (the Commission modified the Staff's proposed price to compare statement).

E. The Stipulation contains a fatal structural flaw and violates the Commission's rule on stipulations – if approved it would apply to a proceeding for which no application has been filed.

Tucked away in the Stipulation is a fatal structural flaw. Paragraph 35 of the Stipulation states that the Stipulation is submitted for purposes of "these proceedings only." The next sentence states "[t]he term 'these proceedings' includes the above-captioned proceedings **as well as the subsequent proceeding to implement the SSO auction."**[131] Then in paragraph 36, the Stipulation states that "[t]he Signatory Parties stipulate, agree, and recommend that the Commission issue a final Opinion and Order **in these proceedings**, ordering the adoption of this Stipulation, including the terms and conditions agreed to in this Stipulation by all Signatory Parties."[132] These provisions render the Stipulation as structurally flawed because the Parties are seeking to submit a stipulation for a future proceeding, where issues have not been identified, parties have not had a chance to intervene and there is no evidentiary record. RESA and IGS do not know why the language was inserted into the Stipulation, but the language was carefully drafted, which indicates it was intentionally inserted by the Signatory Parties. Thus, given Rule 4901-1-30's requirement that a stipulation can only resolve some or all of the issues in a proceeding (i.e., the MGP and TCJA proceedings), the Commission cannot approve the Stipulation as drafted because it would bind the Commission in a future unidentified proceeding.[133] Accordingly, the Commission should either reject the Stipulation as beyond the scope of the MGP and TCJA enabling orders or modify the Stipulation to remove the competitive market provisions and this structurally flawed language.

F. The Commission should correct the procedural errors in these proceedings.

[131] Joint Ex. 1, ¶ 35, page 23 (emphasis added).

[132] Joint Ex. 1, ¶ 36, page 23 (emphasis added).

[133] Duke Energy has opened a docket in Case No. 21-0903-GA-EXM which appears to be the proceeding referenced in the Stipulation. No parties have intervened in that proceeding and no application has been filed.

As demonstrated below, there were multiple errors with a number of the procedural rulings issued by the Attorney Examiners in these proceedings. These matters are not raised lightly and they demonstrate a pattern of unfairness and, collectively, reflect that RESA and IGS were not given a fair opportunity to participate in these 18 proceedings. The Commission should either reject the Stipulation entirely or remove the supplier-related provisions in the Stipulation as a result of these errors.

1. RESA and IGS were not provided due process in these proceedings.

The Attorney Examiner's October 15, 2021 entry limited RESA's and IGS' right to participate in these proceedings to the three market-related commitments contained in the Stipulation. In doing so, the October 15 Entry deprived RESA and IGS of due process in these cases in violation of the Commission's intervention standard and the Fifth and Fourteenth Amendment to the U.S. Constitution.

The Supreme Court of Ohio has stated that intervention in Commission proceedings "ought to be *liberally allowed* so that the position of all persons with a real and substantial interest in the proceedings can be considered by the PUCO."[134] As the Court noted, intervention should be allowed whenever an entity has demonstrated an interest *in the proceeding.* Although RESA's and IGS' motions for leave to intervene satisfy the intervention criteria set forth in R.C. 4903.221 and Ohio Adm. Code 4901-1-11 to warrant full party status *in the proceedings*, the October 15 Entry unreasonably limited both parties' participation in these proceedings to only address the proposed provisions related to the competitive market.[135] A subsequent entry noted that because

[134] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940, ¶ 20 (emphasis added).

[135] October 15, 2021 Entry, ¶ 32.

RESA and IGS' participation was limited, both parties could only offer evidence and/or arguments in opposition to the three competitive market-related commitments at issue in this brief.[136]

RESA and IGS explained their interests in these cases in their motions to intervene, noting that the Stipulation seeks to resolve wholly unrelated matters that will directly impact the competitive market and its participants.[137] Their motions also explained that their views would not be adequately represented by the existing parties, and emphasized that their participation in these cases will not cause undue delay because a procedural schedule to consider the Stipulation had not been established.[138]

The October 15 Entry attempted to justify limiting intervention on that basis noting that it is the Commission's responsibility to ensure the expeditious and orderly conduct of its hearings, and that R.C. 4901.13 authorizes the Commission to adopt rules to govern its proceedings and to "regulate the mode and manner" of its hearings.[139] Despite the lack of a procedural schedule to consider the Stipulation or any evidence in the record to show that RESA and IGS' intervention would unduly prolong or delay the proceedings, the October 15 Entry unfairly limited both parties' participation in these cases to the proposed provisions related to the competitive market. In doing so, RESA and IGS were precluded from presenting evidence and/or arguments in opposition to the *entire* Stipulation pursuant to Ohio Adm. Code 4901-1-30(D) and, therefore, deprived of their right to due process.

[136] November 3, 2021 Entry, ¶ 29.

[137] October 15, 2021 Entry, ¶ 18.

[138] *Id.* at ¶ 20.

[139] *Id. at* ¶ 25.

The Stipulation was entered into as a package and intended to resolve *all* issues in these cases.[140] In considering the reasonableness of a stipulation, the Commission evaluates the settlement as a package to determine whether the agreement benefits ratepayers and the public interest and does not violate any important regulatory principle or practice.[141] Perhaps it is for that reason that "the Commission rarely grants limited intervention . . . ."[142] Regardless, as two of only three parties[143] to seek intervention in *all* of the proceedings that the Stipulation seeks to resolve, RESA and IGS should have been afforded a full and fair opportunity to review the entire settlement without limitation to determine whether the agreement benefits ratepayers and the public interest.

The October 15 Entry and subsequent clarifying entry[144] enabled Duke to sidestep Ohio law and the Commission's rules on discovery[145] by withholding documents and/or failing to provide meaningful responses to certain IGS interrogatories that addressed other, non-market related commitments included in the Stipulation. Consequently, both IGS and RESA were prevented from obtaining evidence relevant to the three-part 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."[146] The Commission's decision to limit RESA's and IGS' intervention and scope of discovery in these

[140] Joint Ex. 1 at 23, ¶¶ 35-36.

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

[142] November 3, 2021 Entry, ¶ 27.

[143] Tr. at 57. RESA and IGS note that the OCC was only party to intervene in all the cases that are part of the Stipulation.

[144] November 3, 2021 Entry, ¶ 27.

[145] R.C. 4903.082; Ohio Adm. Code 4901-1-16(B).

[146] *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).

cases is "at variance with the 'rudiments of fair play' long known to our law. The Fourteenth Amendment condemns such methods and defeats them."[147]

Although several parties to the Stipulation failed to intervene in either of the TCJA cases,[148] each of those parties was afforded the opportunity to provide input on the resolution of those matters. Rather than extend the same rights to RESA and IGS, which sought intervention in each of the above-captioned proceedings, the October 15 Entry selectively and discriminatorily limited both parties' right to participate in these proceedings.

Indeed, the October 15 Entry prejudiced RESA's and IGS' interests by preventing both parties from discovering and presenting evidence on why the Stipulation, as a package, satisfies the Commission's three prong test. RESA members and IGS serve a variety of customer classes in the Duke service territory, yet neither party was permitted to explore the provisions of the Stipulation that outlined the netting and crediting of benefits to residential and non-residential customers[149] or to evaluate the methodology used to distribute insurance revenues to certain designees.[150] Of equal concern is the fact that the October 15 Entry deprived both parties of an opportunity to truly explore whether the Stipulation provides value to customers as Duke alleged.[151] For example, neither RESA nor IGS were permitted to explore whether the proposed bill credit[152] and/or calculation was appropriate, or to better understand why Duke has been collecting outdated and increased tax costs through rates when other Ohio utilities have returned the benefits of the TCJA to customers for years. Simply put, RESA and IGS were completely and

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

[148] Tr. at 52.

[149] *See e.g.*, Joint Ex. 1 at ¶ 10.

[150] *Id*. at ¶ 18.

[151] *See generally*, October 15, 2021 Entry.

[152] Joint Ex. 1 at ¶ 10.

utterly deprived of a fair opportunity to explore the reasonableness of the Stipulation and to present evidence regarding the very test that the Commission applies in its cases.

The October 15 Entry violated RESA's and IGS' right to due process in these proceedings by unfairly limiting the scope of the parties' intervention. Based on the foregoing, the Commission should find that RESA and IGS satisfied the liberal standard for intervention, and thus, each party can evaluate the Stipulation in its entirety.

2. RESA's and IGS' interventions in these proceedings were improperly limited and under heavy scrutiny – both parties should have been granted unlimited intervention rights.

The Attorney Examiner ruled on October 15, 2021, that RESA and IGS would be granted intervention on a limited basis "to address the proposed provisions to the competitive marketplace" and that that intervention would be heavily scrutinized. Entry at ¶¶ 32 and 33. This conclusion was reached because RESA and IGS identified concerns with the Stipulation's three supplier-related provisions in their motions to intervene. Intervention in Commission proceedings is liberally granted and rarely on a limited basis. The Supreme Court of Ohio has stated that intervention in Commission proceedings should be liberally allowed so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the Commission. *Ohio Consumers' Counsel v. Pub. Util. Comm.* 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940, ¶ 20. Inasmuch as RESA and IGS have real and substantial interests, no other party represented RESA's and IGS' interests, and RESA and IGS could not have been on notice that the supplier-related provisions could be raised in the proceedings, it was unfair and error to limit their intervention and put them under heavy scrutiny as was done.[153]

[153] That limited intervention caused further debate by the parties – through Duke's motion for a protective order and the RESA/IGS interlocutory appeal, which further hampered their ability to prepare for hearing under the expedited schedule.

The Attorney Examiner's limited intervention ruling is unfair and erroneous as well given the unprecedented level of participation the Attorney Examiners have allowed for others. For example, Ohio Energy Group, Ohio Manufacturers' Association Energy Group and The Kroger Company did not request intervention and were not granted intervention in the TCJA cases (Case No. 18-1830-GA-UNC and 18-1831-GA-ATA) or the 2019 MGP-related cases (Case Nos. 19-1085-GA-AAM and 19-1086-GA-UNC). Ohio Partners for Affordable Energy did not request intervention and was not granted intervention in the TCJA cases, the 2019 MGP-related cases, or the 2020 MGP-related cases (Case Nos. 20-53-GA-RDR and 20-54-GA-ATA).[154] These parties have, however, been permitted to file pleadings, make appearances, make arguments at hearing, and present positions on brief in cases in which they never sought to intervene. It is plain that entities who either support or chose not to oppose the Stipulation have been allowed great freedom in all 18 proceedings – including the ability to participate in cases in which they never asked to intervene. Yet, RESA and IGS, who demonstrated real and substantial interests in all 18 proceedings and oppose the stipulation, were only allowed to participate in a limited manner and under heavy scrutiny. This disparate level of participation is an additional basis for concluding that RESA and IGS were inappropriately granted only limited intervention in the 18 proceedings and under heavy scrutiny.

3. The burden of proof was improperly shifted to RESA and IGS through the Attorney Examiner's October 15, 2021 Entry.

The burden of proof rests on the Signatory Parties to establish that their proposed resolution of these 18 proceedings is reasonable and should be adopted by the Commission. *See e.g. In the*

[154] OEG, OMAEG, Kroger and OPAE were granted intervention in 12 of the MGP-related cases on November 18, 2019 (MGP November 2019 Tr. at 11) in 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-RDR, 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.

Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals, et al., Case Nos. 10-2376-EL-UNC et al., Entry on Rehearing at ¶ 15 (February 23, 2012) ("[W]e find, upon review of the record in this proceeding, that the Signatory Parties have not met their burden of demonstrating that the Stipulation, as a package, benefits ratepayers and the public interest as required by the second prong of our three-part test for the consideration of stipulations."); *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 321 (November 22, 2006) (regarding the first prong of the three-part stipulation test, "[t]he commission cannot rely merely on the terms of the stipulation, but, rather, must determine whether there exists sufficient evidence that the stipulation was the product of serious bargaining."); *see also* Ohio Admin. Code 4901-1-30(D) (requiring the stipulating parties to present testimony from at least one signatory party that supports the stipulation).

The Attorney Examiner, at paragraph 32 of the October 15, 2021 Entry however, ruled that the limited intervention was granted for RESA and IGS "to inquire into" and "to address" the three proposed provisions in the Stipulation related to the competitive market and any potential adverse impact they may have on the competitive market in Duke's service territory, "even if Duke, OCC, and OEG believe there will be no such adverse impact." The Entry further stated that the Attorney Examiner would "heavily scrutinize any requests from RESA or IGS that are perceived to unnecessarily delay the outcome of these proceedings."[155] Taken together, these statements from the Attorney Examiner imposed the burden on RESA and IGS to address and prove under heavy scrutiny the *unreasonableness of the three supplier-related provisions.* Rather than keeping the burden of proof where Commission and Court precedent say it actually exists – on the Signatory

[155] Entry at ¶ 33. Additionally, the Attorney Examiner's concern was unwarranted – as she noted in her entries, the 18 cases had been **pending for years**. Moreover, before the Stipulation was filed, the TCJA cases had been awaiting a Commission decision for more than two years and most of the MGP-related cases were awaiting a Commission decision nearly two years.

Parties to prove the reasonableness of the Stipulation including the three supplier-related provisions. The statement in the November 10, 2021 Entry confirms that the Entry shifted the burden of proof to RESA and IGS. In that later Entry at paragraph 30, the Entry stated "…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."[156]

It was error for any of the aforementioned entries to impose any burden of proof on RESA and IGS. The burden of proof lies with the Signatory Parties. The Commission must correct this error and determine whether the Signatory Parties satisfied their burden of proof of presenting sufficient evidence of the reasonableness of the Stipulation, including the reasonableness of including the market provisions in the Stipulation.

4. Neither the parties nor the Attorney Examiners opened the evidentiary records in the closed proceedings.

The evidentiary hearing records for the majority of the cases proposed to be resolved by the Stipulation were closed long ago and not reopened prior to the November 18, 2021 hearing. There also was no request made to reopen them. This omission was brought to the attention of the Examiners and the parties. [157] The Examiners improperly stated that the evidentiary hearing records were reopened by the October 15, 2021 Entry.[158] Nothing in that Entry (or the other two Entries issued between the filing of the Stipulation and the November 18, 2021 Evidentiary Hearing), reopened any evidentiary hearing record. The failure to reopen the previously closed

[156] November 10, 2021 Entry, ¶ 30.

[157] Tr. at 22.

[158] Tr. at 23-24.

evidentiary hearing records in 14 of the 18 cases involved is an additional procedural error for these proceedings.

Before the Stipulation was filed, the two TCJA cases proceeded to hearing and that evidentiary hearing record closed on August 7, 2019, when the hearing ended.[159] The parties in the TCJA cases also filed briefs in September 2019 pursuant to the schedule that had been established by the Attorney Examiners. A similar situation existed before the Stipulation was filed for 12 of the MGP-related cases. Twelve MGP cases were consolidated and an evidentiary hearing was conducted over four days.[160] That evidentiary hearing record closed on November 21, 2019, when the hearing ended. The parties in those 12 consolidated MGP-related cases filed initial and reply briefs for those 12 consolidated cases in early 2020 pursuant to the schedule that had been established by the Attorney Examiner. Thus, in 14 of the 18 cases proposed to be resolved by the Stipulation, evidentiary hearings were held and their evidentiary hearing records had closed long before the August 31, 2021 Stipulation was filed.

The Signatory Parties did not request that the evidentiary hearing records for those 14 cases be reopened even though they addressed how the Commission should proceed, stating that they:

- "desire to resolve all issues in the above-styled proceedings";[161]
- "support the consolidation of the above-listed proceedings for purpose of settlement";[162]

[159] The TCJA-related cases are Case Nos. 18-1830-GA-UNC and 18-1831-GA-ATA.

[160] The following 12, MGP-related cases were consolidated and proceeded to hearing separately from the TCJA 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-RDR, 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. Two other MGP-related cases (Case Nos. 19-1085-GA-AAM and 19-1086-GA-UNC) proceeded separately to a comment cycle. Case Nos. 20-53-GA-RDR and 20-54-GA-ATA had not proceeded yet.

[161] Joint Ex. 1 at 7, 21.

[162] *Id.* at 8, 21.

- agreed that certain exhibits should be admitted into the consolidated record;[163] and

- agreed that the Commission should "issue a final Opinion and Order in these proceedings, ordering the adoption of this Stipulation, including the terms and conditions agreed to in this Stipulation by all Signatory Parties.[164]

The non-opposing parties also did not request that the evidentiary hearing records for those 14 cases be re-opened.

In addition, nothing in the three Entries issued between the filing of the Stipulation and the November 18, 2021 Evidentiary Hearing actually reopened any of the evidentiary hearing records. The October 15 Entry, which the Examiners pointed to, recited the history of the cases and the filing of the Stipulation (¶¶ 3-17), recited the motions to intervene from RESA and IGS and opposition to them (¶¶ 18-24), ruled on their interventions (¶¶ 25-32, 37), and set a procedural schedule with a date for an evidentiary hearing (¶¶ 33-35, 38). Nothing in that entry indicates that any evidentiary hearing record is reopened. The November 3, 2021 Entry recited the history of the cases and the filing of the Stipulation (¶¶ 3-17), recited RESA' and IGS' intervention (¶¶ 18-20), recited RESA's motion to change the date of the evidentiary hearing and opposition to it (¶¶ 21-22), changed dates for certain procedural steps (¶¶ 23-24, 31), recited Duke's motion for a protective order related to the scope of discovery and opposition to it (¶¶ 25-26), ruled on the (¶¶ 27-29, 32). The November 10, 2021 Entry recited the history of the cases and the filing of the Stipulation (¶¶ 3-17), recited RESA' and IGS' intervention (¶¶ 18-20), recited Duke's motion for protective order and ruling (¶¶ 21-24), recited RESA's interlocutory appeal and opposition to it (¶¶ 25-29), ruled on the interlocutory appeal (¶¶ 30, 32).

[163] *Id.* at 20.

[164] *Id.* at 23.

The Attorney Examiners erred by not re-opening the evidentiary hearing records for 14 of the 18 cases. The Signatory Parties should have filed motions to reopen the record but failed to do so, and Attorney Examiners had the opportunity to address the Signatory Parties' failure but wrongly claimed a prior scheduling entry was tantamount to reopening the record.

5. The Attorney Examiners improperly struck testimony throughout the hearing – and that testimony should be admitted.

The Attorney Examiners erred in striking portions of the direct testimonies of RESA/IGS witnesses Cawley and Lacey. The Commission should reverse those rulings.

As to Mr. Cawley's direct testimony, the Attorney Examiner struck the direct testimony on page 12 (lines 10-14) regarding the Signatory Parties knowingly side-stepping Commission precedent on the ground that it was speculative and that the witness was not in a position to testify on that subject.[165] The Attorney Examiner also struck similar testimony on page 13 (lines 9-10).[166] The Attorney Examiner, however, is mistaken. The Signatory Parties and Non-Opposing Parties knowingly and deliberately negotiated the Stipulation. These parties have participated in numerous Commission proceedings over the years, including in cases in which OCC has argued for, RESA and IGS have argued against, and OCC has lost on the same market-related provisions that are contained in the Stipulation. They knew RESA and IGS were not parties in these 18 proceedings when they negotiated the Stipulation. Therefore, the plain and obvious deduction to make is that the supplier-related provisions were an end-run on prior Commission denials at a time when the opposition was not present. If any of the Signatory Parties or Non-Opposing Parties were in the same position that RESA and IGS have found themselves vis-à-vis the Stipulation, they undoubtedly would make the same deduction. There is nothing speculative about Mr.

[165] Tr. at 155-156.

[166] Tr. at 164.

Cawley's testimony based on his analysis of Commission precedent, the procedural history of these 18 cases and the Stipulation.

The Attorney Examiner also struck Mr. Cawley's direct testimony on page 8 (lines 17-23) and page 9 (lines 1-23) regarding the Pennsylvania Public Utility Commission's review of settlement that differs from the Commission's three-part test, concluding it was not relevant.[167] The testimony is relevant since the Pennsylvania commission generally follows a similar approach to reviewing settlements, and the witness has extensive, first-hand knowledge. The additional details in this testimony also highlight the extra step that the Pennsylvania commission has taken to prevent the precise circumstances of exclusionary settlement discussions as occurred in these 18 proceedings. The Commission should, therefore, find the testimony is relevant and reverse the Attorney Examiner's ruling.

With regard to Mr. Lacey's direct testimony, the Attorney Examiner struck testimony on page 9 (line 9) regarding the supplier-related provisions having been included by OCC, on the grounds of lack of personal knowledge.[168] This is also an obvious deduction that the witness made regarding the supplier-related provisions. OCC has argued for, RESA and IGS have argued against, and OCC has lost on the same market provisions in multiple other Commission proceedings for years. None of the other Signatory Parties has been seeking these provisions. Mr. Lacey made a logical deduction from known facts, and it should not have been stricken.

Finally, with regard to Mr. Crist's direct testimony, the Attorney Examiner improperly struck testimony page 12 (lines 18) to page 13 (line 20) regarding historical and current employment and salary data for IGS Energy. Specifically, Mr. Crist testified that IGS has grown

[167] Tr. at 159.

[168] Tr. at 224.

from 183 employees in 2010 to approximately 750 employees in 2021, with an annual Ohio payroll of approximately $77 million.[169] As Mr. Crist testified, this demonstrates that the development of the competitive retail markets have positively impacted the Ohio economy and it is "clear that the Commission should proceed cautiously when it modifies the playing field for retail natural gas services, as the changes may be detrimental to the competitive market and result in job loss in Ohio."[170] Under Ohio Rule of Evidence 803(6), a witness can may testify regarding records of regularly conducted activity. The witness may either be "a custodian or other qualified witness." Mr. Crist is very familiar with IGS' business activities, having worked with and testified on behalf of IGS many times over several decades. The stricken testimony did not relate to a complicated set of factual data that could not have been known by any individual other than an IGS employee—rather, Mr. Crist testified regarding a simple tabulation of annual payroll and salary information. As the Commission has previously held, as an administrative agency, the Commission is capable of evaluating evidence itself and can give it the necessary weight in each situation.[171] This information should have be considered by the Commission in this proceeding, which may negatively affect jobs in Ohio.

G. The Commission should adopt an interpretation of the stipulation three prong test to ensure this never happens again.

The Signatory Parties attempted a sleight of hand in in these proceedings. At the 11th hour, they attempted to add cpmpetitive market provisions that were wholly unrelated to the underlying

[169] Tr. at 316.

[170] RESA/IGS Ex. 3 at 13.

[171] *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals*, Case Nos. 11-346-EL-SSO, *et. al.*, Opinion and Order at 13 (Dec. 14, 2011) ("When the Commission has deemed it appropriate, it has allowed the admission of hearsay testimony. We note that hearsay rules are designed, in part, to exclude evidence, not because it is not relevant or probative, but because of concerns regarding jurors' inability to weigh evidence appropriately. These concerns are inapplicable to administrative proceedings before the Commission, as the Commission has the expertise to give the appropriate weight to testimony and evidence.")

proceeding, without consulting any supplier or RESA. This type of behavior should never have occurred, and the Commission should proactively curb this behavior.

Indeed, permitting this type of conduct sets a dangerous precedent and has been specifically admonished by the Ohio Supreme Court. *See Time Warner,* 75 Ohio St. 3d at 223, fn. 2. In *Time Warner*, the Commission approved a partial stipulation. *Id.* The stipulation "arose from settlement talks from which an entire customer class was intentionally excluded." *Id.* The Court expressed "grave concerns regarding the commission's adoption of a partial stipulation which arose from the exclusionary settlement meetings." *Id.*

The Commission has noted the importance of not excluding customer classes. *See, e.g., In the Matter of the Application of Ohio Power Company for an Increase in Electric Distribution Rates*, Case Nos. 20-585-EL-AIR, 20-586-EL-ATA, 20-587-EL-AAM, Opinion and Order, November 17, 2021, ¶ 107 (noting that "no class of customers [were] excluded from settlement negotiations."). A class of suppliers is no different. The Signatory Parties held negotiations behind closed doors without any representation from any suppliers. To be clear, RESA and IGS do not argue that they should have been consulted during negotiations. Instead, *someone* representing the suppliers should have been present during the negotiations. Because the suppliers were not represented, RESA and IGS were forced to file a motion to intervene to challenge the competitive market provisions from being added to the Stipulation. In all likelihood, if a supplier was present during the negotiations, the competitive market provisions may not have even made it before the Commission for consideration.

Permitting the competitive market provisions to stay in the Stipulation will, in effect, be an endorsement of "logrolling" in Commission proceedings. "Logrolling" is "[t]he legislative practice of including several propositions in one measure or proposed constitutional amendment

so that the legislature or voters will pass all of them, even though these propositions might not have passed if they had been submitted separated."[172] It is evident by RESA's and IGS' intervention that the Stipulation's competitive market provisions would not have been agreed to if they, or other suppliers, were involved in the negotiations. Without their intervention, the Signatory Parties would have easily "logrolled" the competitive market provisions into the Stipulation.

The prejudice of logrolling is so severe that the General Assembly is expressly prohibited from logrolling pursuant to the Ohio Constitution's "one-subject" rule.[173] The purpose of the rule was "to place checks on the legislative branch's ability to **exploit** its position as the overwhelmingly pre-eminent branch of state government."[174] Further, the one-subject rule prevents "unnatural combinations of provisions in acts."[175] "When there is an **absence of common purpose or relationship between specific topics in an act** and when there are no discernible practical, rational or legitimate reasons from combining the provisions in one act, there is a strong suggestion that **the provisions were combined for tactical reasons**."[176]

Just like the legislature prior to the enactment of the "one-subject" rule, any party to a Commission proceeding, with enough influence, can tactically include completely unrelated provisions without input or pushback from relevant stakeholders, even if those stakeholders would disapprove. The only procedural safeguard to prevent this type of behavior are 11th hour motions

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[172] *Logrolling, Black's Law Dictionary* (8th Ed. 2004).

[173] *See* Oh. Const. Art. II, § 15(D).

[174] *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 452, 495, 715 N.E.2d 1062 (1999) (emphasis added).

[175] *Id*.

[176] *Id.* at 496-97 (emphasis added), quoting *State ex rel. Dix v. Celeste*, 11 Ohio St. 3d 141, 145, 464 N.E.2d 153 (1984).

to intervene by stakeholders (like what occurred in these proceedings) who become aware of prejudicial provisions in a stipulation. Of course, a party may not even become aware of "logrolled" provisions until it is too late, when the effects of the provision are felt long after the Commission approves the stipulation.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[177] The Commission should heed this principle. If the Signatory Parties' conduct is endorsed, there will be grave consequences. In some cases, relevant stakeholders may not be appraised of unrelated prejudicial provisions in a stipulation before it is too late. Fortunately, in these proceedings, RESA and IGS discovered the Stipulation and its market provisions, and were able to file motions to intervene, but other parties in future cases may not be so lucky. Moreover, if this type of behavior is permitted, motions to intervene at the front-end of a proceeding will be the only way for stakeholders to challenge stipulations and protect their interest, increasing time and costs for the Commission, all parties involved, and the tax-paying citizens of Ohio.

Accordingly, the Commission should interpret the three-part test to find that it is unreasonable to approve a stipulation that includes unrelated provisions that significantly affected stakeholders who are not parties to the proceeding or part of the negotiations. At the very least, the Commission should interpret the three-part test in these proceedings to determine that including unrelated competitive market provisions is unreasonable under the three-part test. To interpret otherwise, would allow any entity or person, with enough influence, leverage, or connection, to include any provision in a stipulation, without regard to its effect on relevant stakeholders. To

[177] *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950) (citing cases).

ensure that this never happens again, the Commission should determine that this type of conduct is unreasonable under the three-part test.

IV. CONCLUSION

The Commission's directive to Duke Energy to file an application to address the TCJA and its authorization for Duke Energy to file updates to Rider MGP did not include implementing a fundamental change to the competitive natural gas market as well as providing aggregate natural gas customer cost data to OCC (something that has been debated and rejected by the Commission in many proceedings). Yet Duke Energy and the other Signatory Parties did just that using these proceedings to include competitive market provisions that are not only wholly unrelated to the MGP and TCJA proceedings but harmful to the customers, suppliers and the development of the competitive natural gas market in Ohio. In doing so, the Signatory Parties corrupted the Commission's rule on stipulations by incorporating the competitive market provisions without the knowledge of the industry participants most impacted by the changes. The Stipulation cannot stand as presented, and either must be rejected or modified to remove the competitive market provisions. If not, settlements in proceedings before the Commission will have no boundaries and the express language of Rule 4901-01-30 will have no meaning ("proposed resolution of some or all of the issues in a proceeding"). RESA and IGS urge the Commission to either reject the Stipulation to ensure the MGP Rider charges and TCJA credits are fairly bargained for or to modify the Stipulation to remove the competitive market provisions.

Respectfully Submitted,

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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 9th day of December 2021 on all persons/entities listed below:

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Summary: Brief Joint Initial Brief electronically filed by Mr. Michael J. Settineri on behalf of Retail Energy Supply Association and Interstate Gas Supply, Inc.