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
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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
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REPLY BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO

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On behalf of the Staff of
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December 23, 2021

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REPLY BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

INTRODUCTION

The Stipulation in these cases seek to resolve a significant number of issues, involving both significant costs and credits, in a large number of cases. The intervenors in these cases have worked quite literally for years trying to reach resolutions. The Stipulation represents a delicate balance among an unusually diverse group of customers and constituents that will produce an equally diverse range of benefits, both to customers and the public interest. The vast majority of the benefits of resolving those issues are uncontroverted. The Stipulation, as a package, is reasonable and meets the Commission's three-part test for approval for such agreements. It should be adopted.

Interstate Gas Supply, Inc. ("IGS") and the Retail Energy Supply Association ("RESA") (collectively "Marketers") oppose the Stipulation. Those parties do not contest any of the provisions relating either to environmental remediation (manufactured gas plant, or "MGP") costs or their recovery, or the provisions relating to the Tax Cuts and Jobs Act ("TCJA"), although they argue that they were improperly prohibited from doing so. They had no interest in those cases or they would have intervened earlier to assert them. The fact that the Attorney Examiners limited their participation to non-MGP and non-TCJA provisions of the Stipulation, given their limited interest and non-participation, did not deny, but rather extended, due process to these potentially impacted market participants.

Aside from the many benefits of resolving so many complex and hotly contested cases, it bears remembering that the Commission has approved all of the now contested

"competitive market provisions" contained in this Stipulation as reasonable (or at least not unreasonable) in other agreements in other cases. There is no reason why the signatory and non-opposing parties could not propose such provisions here, especially since all that has been requested is an opportunity for Duke Energy Ohio ("Duke" or "Company") to commit to request such measures in a future proceeding. The Marketers have had a full and fair opportunity to voice their opposition. In light of the numerous benefits of the Stipulation, and the Commission's past actions with respect to similar competitive market provisions, it is clear that the proposed Stipulation is reasonable and should be approved without modification.

ARGUMENT

I. The Stipulation should be approved.

Staff respectfully submits that many significant benefits may be lost should the Commission tinker with this delicate balance. Staff urges the Commission to adopt the Stipulation as offered without modification, and respectfully submits that both the law and the record support such a result. Staff respectfully submits that the Stipulation here satisfies the reasonableness criteria, and that the evidence of record supports and justifies a finding that its terms are just and reasonable.

A. The stipulation is the product of serious bargaining among capable and knowledgeable parties.

The first part of the Commission's three-part test has been met. In considering whether there was serious bargaining among capable and knowledgeable parties, the

Commission evaluates the openness and results of the process, the level of negotiations that appear to have occurred and the experience and sophistication of the negotiating parties and their counsel. The fact that RESA and IGS did not sign the Stipulation does not indicate a lack of serious bargaining.

The bargaining among the Signatory and non-opposing parties was serious in both process and result. There were numerous negotiating sessions, and all parties that had intervened or sought to intervene in any of the 18 cases resolved by the Stipulation had the opportunity to participate fully. The Stipulation was the product of an open process in which all parties were provided an opportunity to participate. Negotiations occurred among the parties and the Stipulation reflects a comprehensive compromise of the issues raised by parties with diverse interests. Serious bargaining occurred for the parties to settle their differences reasonably.

"Serious bargaining" does not imply unanimity. Indeed, many parties have chosen not to oppose, rather than support, the Stipulation. Others, including Staff, have reserved positions on certain issues while supporting the whole. The reasonableness test for stipulations was developed specifically to evaluate contested stipulations. There is simply no precedent for concluding that contested, opposed, stipulations are necessarily not the product of serious bargaining. There is simply no requirement that a stipulation be executed by all parties, or even by a diverse group of stakeholders (as was the case here), in order to be approved by the Commission.

The Commission looks to see whether signatory parties routinely participate in complex Commission proceedings and that counsel for the signatory parties have

extensive experience practicing before the Commission in utility matters. This is not disputed in this case, nor could it have been reasonably disputed.

The Signatory and non-opposing parties are knowledgeable. All parties were represented by experienced and competent counsel that have participated in numerous regulatory proceedings before the Commission. These parties have participated in numerous regulatory proceedings before the Commission. The fact that individuals testifying in support of the Stipulation may not have been aware of certain arguments or position taken in other cases neither undermines nor diminishes their expertise. And each party was represented by counsel who amply and ably advocated their respective interests.

The Commission also looks to see whether signatory parties represent diverse interests. The Signatory Parties represent an unusually broad spectrum of interests, including the Company, Staff, residential, commercial, and industrial customers.

The diversity of the parties, while important, does not determine whether this criterion is satisfied. Nor does Marketers' opposition to the Stipulation indicate that diverse interests were not represented. Further, as the Commission has previously noted, the three-part test does not include a mandatory diversity of interest component.[1] The Commission has also found that there is no requirement that any particular party must join a stipulation in order for the first part of the test to be met.[2]

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[1] *In re Ohio Power Co.***,** Case No. 14-1158-EL-ATA, Second Entry on Rehearing (Feb. 1, 2017) at ¶14; *In re Ohio Power Co.***,** Case No. 14-1693-EL-RDR, et al**.,** Opinion and Order (Mar. 31, 2016) at 52.

[2] *In re Vectren Energy Delivery of Ohio, Inc.***,** Case No. 04-571-GA-AIR, et al., Opinion and Order (Apr. 13, 2005) at 9.

The Commission has found that changes made in the negotiation process are indicative of serious, intricate negotiations among the signatory parties.[3] All Signatory Parties made significant concessions in the negotiations that resulted in the Stipulation. The very significant differences in terms both from the Company's original applications, the Staff Reports, and positions taken in previous litigation (described in detail in the Company's Post-Hearing Brief) all attest to this fact.

"Serious bargaining" is not determined by the content of the final agreement alone, but also by the process by which it resulted. There is no evidence in this record that the negotiation process was anything but open, or that the agreement was incomplete by its terms. The Stipulation reflects an overall compromise involving a balance of competing positions from multiple parties and incorporates many of the recommendations offered by Staff and interveners. Based on the record before the Commission, the Stipulation is the product of serious bargaining among capable, knowledgeable parties, and satisfies the first prong of the three-part test

RESA and IGS complain that they were not part of the settlement negotiations. That was, as the Ohio Energy Group ("OEG") noted in its Post-Hearing Brief, "simply the result of those CRES providers failing to intervene in any of the above-captioned proceedings over the seven-year period in which they have been pending." OEG Brief at 4. OEG quite properly concludes that "[t]he absence of parties who had expressed no

[3] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan,* Case No. 14-1297-EL-SSO, Opinion and Order (31 Mar. 2016) at 43-44.

interest in the above-captioned proceedings from settlement discussions does not mean that serious bargaining did not occur during those discussions." *Id*.

This is not a *Time Warner* situation, as Marketers suggest. There, the Ohio Supreme Court expressed grave concern regarding the adoption of a partial stipulation where the stipulation arose from settlement talks from which an entire *customer class* was intentionally excluded.[4] The record in these proceedings demonstrates that representatives of each of the customer classes, including the residential class, participated in the settlement negotiations. Marketers argue that "[a] class of suppliers is no different." Marketers Brief at 59. But they *are* different; CRES providers are not *customers*. There is no evidence in the record that an entire class of customers was excluded from the settlement negotiations.

Nor is it reasonable, as the Marketers argue, to conclude that the parties who had intervened "should have" invited the CRES providers to the table once issues that are of concern to them had been raised in negotiations. Ohio's rules and practice are not Pennsylvania's. Parties are, and should be, expected to advance and protect their own interests, not those of non-parties. It is not somehow "unfair" for a party to pursue its strategic purposes without inviting opposition. If the Marketers are correct in their "floodgates" suggestion that future resources will be needlessly wasted should the Stipulation be approved, then it must be true that comparable demands would be made if any possibly interested party was required to be invited to participate in all settlement

[4] *Time Warner AxS v. Pub. Util. Comm*., 75 Ohio St.3d 229, 233, 661 N.E.2d 1097 (1996) at fn. 2.

discussions. These cases, for example, would likely not have settled without the contested provisions, leading to protracted litigation, and potentially, relitigation of numerous of the cases resolved by this Stipulation.

Moreover, to do so would violate the propriety of settlement discussions. Parties would be unduly chilled from open discussion if doing so would raise the possibility that others at the table were free, indeed somehow compelled, to breach the confidentiality of those discussions by disclosing their content and inviting non-parties to intervene.

The Marketers argue that parties will be forced to intervene in cases that have nothing to do with their industry segment, despite an intervention standard that requires such an interest. But the process worked here. Although the "competitive market provisions" were not originally part of the underlying cases[5], the Marketers were made aware of their presence in the Stipulation. They moved to intervene and were granted intervention. They were given an opportunity to conduct discovery, contest those provisions in hearing, and provide testimony and evidence in support of their position. Their exclusion from negotiations was not a denial of due process.

The record demonstrates that serious bargaining occurred between capable and knowledgeable parties. The first prong of the Commission's test for approval of stipulations is clearly satisfied.

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[5] The fact that the Company was not somehow "authorized" to consider the competitive market provisions as part of the Commission orders initiating these cases is irrelevant. Parties are free to reach agreement on any issues between them in Commission proceedings. While the Commission has declined to consider "alien" proposals from parties opposing stipulations, as the cases cited by Markets clearly illustrate, Markets offer no precedent where the Commission has denied such provisions agreed upon by signatory parties. Moreover, of course, none of the competitive market provisions, should the Stipulation be approved, would change anything that the Company could not otherwise do, and now intends to do, in a different Commission proceeding.

B. The stipulation benefits the public interest.

The Stipulation benefits ratepayers and is in the public interest.

The Stipulation provides numerous benefits. These benefits, enumerated by numerous parties in their post-hearing briefs, are numerous and broad. All aspects of the public are helped by the various components.

Although the Commission's test does not require the Stipulation package's benefits to be "substantial," many of these enumerated benefits may prove to be quite substantial, to the economy, the environment, the energy market, and to individual ratepayers. Staff respectfully submits that the record adequately demonstrates that the Stipulation, taken as a package, benefits customers and is in the public interest.

And that component is key in this case – the Stipulation must be evaluated as a package. The Commission must determine whether the settlement, as a package, benefits ratepayers and the public interest. That is, it must look at the overall impact of the settlement.

There is no requirement that each individual provision, or that any particular provision, of the settlement must satisfy some "cost / benefit" analysis. Some provisions may, while others may not. Some provisions may benefit some customer classes more than others, or some members of a customer class more than others. This would not indicate that this portion of the test has failed. Indeed, the Commission must look at the totality of the settlement, as a package, and not the relative merits of its constituent parts.

There is also no requirement that a settlement seek to "maximize" benefits to ratepayers. If the package, as a whole, provides benefits to ratepayers and the public

interest, it should be approved. Because the stipulation before the Commission benefits both ratepayers and the public interests it should be approved.

The extent that a different form of auction, or a different bill format, or a different means of gathering and providing data to interested parties, may be more beneficial is not relevant to *these* proceedings. To the extent that changes in these proposals suggested by the Marketers might result in greater benefits, those recommendations are best advanced in proceedings where their approval is sought.

Staff supports these benefits, and believes that the Stipulation results in a just and reasonable resolution of the matters pending in these dockets. In sum, The Stipulation meets the second prong of the test

C. The stipulation does not violate any important regulatory principle or practice.

While there are many principles that guide the Commission in evaluating rate setting proposals, there is no "checklist," no scorecard, that enumerates which "regulatory principles or practices" are important. Each stipulation must be evaluated on a case-by-case basis. Staff respectfully submits that the Stipulation in this case satisfies this criterion.

RESA and IGS argue that the "market-based provisions" violate various principles and practices. Marketers initially mischaracterize the "competitive market provisions" of the Stipulation. The suggestion that these provisions require Duke to (1) to convert from a GCR method, (2) put certain information on customer bills, and (3) provide certain data to OCC presumes that approval for each of these actions is sought in these cases. It is not.

This Stipulation contains a commitment that the Company will file an application ("Auction Application") to transition to a competitive auction to procure supply, in the format of an SSO. Duke Energy Ohio is the last of the large investor-owned local distribution companies in Ohio that still uses the gas cost recovery mechanism to serve traditional sales customers. No party disputes that this movement toward competition, not a current request, is a potential benefit for customers.

The Marketers oppose the SSO format, arguing that there is no reason why the Company should not immediately transition to an SCO format, instead. They cite reasons why one format is preferable to the other, complaining only that the initiative is "not enough." Aside from the fact that it is unnecessary for every component of a stipulation to produce a benefit to satisfy the Commission's test for reasonableness, that test is not intended to optimize benefits. It is enough that the stipulation, as a package, as a whole, provides benefits.

Moreover, this is not the proper forum for determining whether the structure to be approved should be an SSO or SCO. The proper place for that debate, and every party including the Marketers will have a full opportunity to engage in that debate, is in the case where that application has been filed.[6]

In this respect, the Marketers' argument that paragraphs 35 and 36 of the Stipulation constitute an agreement that "approval of the Stipulation is a final order for the proceeding to implement a standard service offer auction," Marketer Brief at fn. 7, is

[6] *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of a General Exemption of Certain Natural Gas Commodity Sales Services or Anc*., Case No. 21-0903-GA-EXM, et al.

entirely specious. Those paragraphs reflect an agreement that the terms and conditions contained in the Stipulation be approved. Those terms merely commit the Company to *file an application* within certain parameters. It is preposterous to suggest that approval of this Stipulation would somehow constitute a "final order" on an application not yet filed.

Similarly, the Stipulation provides that the Company will request to amend its current bill format to include additional price-to-compare information for its customers. Its intention is to model what it currently provides for electric customer bills, a format already approved by the Commission.[7] As with the ultimate form of the auction, any debate over the bill format will, and should, occur as part of the case concerning that yet to be filed application.

With respect to the provision on shadow billing, Staff notes, at the outset, that it specifically took no position on that provision of the Stipulation.[8] The Commission has, of course, previously approved of data gathering and "shadow billing" as part of a stipulation. In previous cases where local distribution companies have sought approval to exit the merchant function, the Commission has not only approved the gathering and sharing of information, but has found that doing so was instrumental to its review of the transition.

In the case of Columbia Gas, for instance, the Commission held that,

> [I]n order to assist in our review of the effects of Columbia's exit on competition and customers, the Commission finds that the maximum amount of information should be provided

[7] *In the Matter of the Application of Duke Energy Ohio, Inc. for Bill Format Approval,* Case No. 19-1593-GE-UNC, Finding and Order (Dec. 18, 2019) at ¶36.

[8] Stipulation, Joint Ex. 1 at fn. 18.

> regarding the impact of Columbia's exit from the merchant function for nonresidential customers. Such information should include, but is not limited to, a record of the number of suppliers participating in Columbia's service territory over the next five years; a record of the number and type of various supplier offers of new products and services; a record of customer participation levels in new supplier products and service offerings; an analysis of any increased investment in Ohio by suppliers that was caused by Columbia's exit; specific customer billing determinants; and any other data Staff determines is necessary to adequately provide information to assist the Commission in determining future actions pertaining to natural gas competition. . . . Columbia and suppliers shall collect the information that Staff determines is necessary and provide such information to Staff.[9]

Emphasizing its belief that "a maximum amount of information should be provided regarding the impact" of transitioning from sales service, the Commission used essentially the identical language in its Order in Dominion East Ohio's application.[10] On rehearing in that case, the Commission ordered that all information provided to Staff also be provided to OCC.[11]

As recently as last month, the Commission declined to eliminate the shadow billing provisions from an Ohio Power Company stipulation, reiterating that it "must evaluate the benefits of the Stipulation as a package and [that] each provision of the

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9 *In the Matter of the Application to Modify, in Accordance with Section 4929.08, Revised Code, the Exemption Granted Columbia Gas of Ohio, Inc. in Case No. 08-1344-GA-EXM*, Opinion and Order (Jan. 9 2013) at 31.

10 *In the Matter of the Application to Modify, in Accordance with Section 4929.08, Revised Code, the Exemption Granted to The East Ohio Gas Company b/d/a Dominion east Ohio in Case No. 07-1224-GA-EXM*, Opinion and Order (Jan. 9 2013) at 17 ("*DEO Exemption Case*")

11 *DEO Exemption Case*, Entry on Rehearing (Mar. 6, 2013) at ¶24.

Stipulation need not provide a direct and immediate benefit to ratepayers and the public interest."[12]

CONCLUSION

The parties in these 18 cases have reached a Stipulation that resolves the issues among the signatory and non-opposing parties. That Stipulation satisfies the Commission's three-part test for reasonableness.

Staff respectfully requests that the Stipulation should be approved without modification.

[12] *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 (Nov. 17, 2021) at ¶131.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Reply Brief** submitted on behalf of the Staff of the Public Utilities Commission of Ohio was served via e-mail upon the following parties of record, this 23rd day of December, 2021.

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Summary: Reply Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio electronically filed by Mrs. Kimberly M. Naeder on behalf of PUCO