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 REPLY BRIEF OF
THE RETAIL ENERGY SUPPLY ASSOCIATION
AND
INTERSTATE GAS SUPPLY, INC.

December 23, 2021

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I. INTRODUCTION

Despite the Signatory Parties' arguments to the contrary, the Stipulation does not satisfy the Commission's three-prong test. Indeed, the Stipulation fails to satisfy *any part* of the three-prong test—a certainty that crowns this Stipulation with a dubious distinction. The Retail Energy Supply Association ("RESA")[1] and Interstate Gas Supply, Inc. ("IGS") have proven through evidence at the November 2021 hearing that the negotiations were improper. The record establishes that the Signatory Parties and Non-Opposing Parties wholly excluded all retail suppliers while permitting non-parties to participate in negotiations. Indeed, the Signatory Parties and Non-Opposing Parties negotiated wholly unrelated matters in these proceedings without the knowledge of and opportunity for directly affected industry participants to be present. Therefore, the parties to the settlement lacked the knowledge and experience necessary to commit to the competitive market-related provisions at issue in this proceeding. This is reflected by the fact that the only witnesses that testified in support of the Stipulation lacked knowledge that the settlement included outcomes that were specifically rejected by the Commission through recent orders.

In response, the Signatory Parties (a) blame suppliers for not being present for the negotiations and (b) argue that the Commission's post-Stipulation process somehow gave RESA and IGS ample opportunity to challenge the Stipulation. The post-Stipulation process did not and could not correct the earlier impropriety. The Signatory Parties' inclusion of competitive market provisions without the industry participants most experienced and opposed to those provisions at the bargaining table demonstrates that no serious bargaining among capable, knowledgeable

[1] 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.

parties can be found. For that reason alone, the Commission should conclude that the Stipulation is not reasonable.

If the improper process leading up to the Stipulation were not enough, the evidence further demonstrates that the substance of the Stipulation is contrary to the public interest and regulatory practices and principles. The SSO envisioned by the Stipulation does little to nothing to benefit customers or develop the competitive retail natural gas market. Simultaneously, the Stipulation includes provisions related to shadow billing and a modified price to compare statement that will simply misinform and confuse customers to the detriment of the market. These provisions simply are not in the public interest. Of course—and likely because they reflect bad policy—the market-related provisions contained in the Stipulation are inconsistent with both recent and longstanding regulatory practices, principles, Commission orders, and existing rules. Thus, the record reflects extensive evidence that all three market provisions will affect the competitive market negatively, as well as violate important regulatory principles and practices while none of the Signatory Parties or Non-Opposing Parties put on any evidence to the contrary.

Faced with a lack of record evidence, Duke Energy Ohio, Inc. ("Duke Energy" or "Duke") tries to minimize the impact of the Stipulation by claiming that it merely committed to file a future application about the SSO auction and PTC language. Duke contends that suppliers can address their concerns in the future proceeding because the merits of the transition will be evaluated in that subsequent proceeding. The Stipulation tells a different story – namely that Duke's claims are disingenuous and that approval of the Stipulation will approve the SSO transition (which would start in 2022) and the SSO price-to-compare language. Claims from the Signatory Parties that the competitive market will not be affected or that there was no intent to harm the competitive market must be rejected.

Tellingly, the Signatory Parties repeatedly urged the Commission to act on emotion – not the evidence – to conclude the Stipulation is reasonable. The initial briefs filed by Duke, Staff, OCC and OEG are replete with evocative sound bites about the Stipulation, such as the Stipulation resolves "highly contested," "complex" and "significant" issues;[2] and resolves many and long-standing cases;[3] and the benefits under the Stipulation are "important," "significant" and "considerable."[4] Staff even goes further claiming the Stipulation is a "delicate balance" and speculates, without any evidence to back it up, that benefits will be lost if the Commission tinkers with the Stipulation.[5] None of these claims makes the Stipulation reasonable and none has any bearing on the reasonableness of the Stipulation. These claims are irrelevant emotional rhetoric, and in some respects incorrect. The Commission should filter out the noise, take the record as it finds it and, in doing so, **should not give this rhetoric any weight** in its evaluation of the reasonableness of the Stipulation. The focus must be on the evidence (or complete lack thereof in support of a finding that the Stipulation satisfies the three-part test).

The record evidence establishes uncontrovertibly, as summarized in RESA's and IGS's joint initial brief, the following about the Stipulation and its terms – there are detrimental procedural flaws, detrimental structural flaws, a lack of serious bargaining, violations of important regulatory policies and practices, and harm to the competitive market and public interest. The stipulated MGP and TCJA terms cannot make up for these substantial problems with the Stipulation and, as a result, the Commission cannot approve the Stipulation as presented by the Signatory Parties. RESA and IGS again urge the Commission to reject the Stipulation to ensure

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[2] Duke Initial Brief at 2, 11, 13, 26, 28, 29, 31, 35; OEG Initial Brief at 4 and Staff Initial Brief at 7.

[3] Duke Initial Brief at 7, 28, 31; OCC Initial Brief at 7; and Staff Initial Brief at 1. Duke even suggests that the Stipulation provides "finality" or avoided/avoids appeals. Duke Initial Brief at 2, 7-8, 29.

[4] Duke Initial Brief at 17, 18, 24, 35; OCC Initial Brief at 2, 11-12; and Staff Initial Brief at 7.

[5] Staff Initial Brief at 3.

that the MGP costs and TCJA credits were fully bargained for and not sacrificed in exchange for competitive market provisions. Alternatively, the Commissions should, at a minimum, remove the competitive market provisions from the Stipulation to put the Signatory Parties and others on notice that any attempts to utilize the settlement process to sidestep Ohio law and the Commission's rules via backroom negotiations will not be tolerated.

II. ARGUMENT

A. The Signatory Parties are wrong that the Stipulation satisfies the first prong of the reasonableness test – there was no "serious bargaining among capable, knowledgeable parties."

The evidence is undisputed that the Stipulation was **not** the result of serious bargaining among capable, knowledgeable parties. In an attempt to avoid that evidence, OEG and OCC blame suppliers for not being parties at the time the Stipulation was negotiated, claiming RESA and IGS "failed" to intervene or decided not to intervene earlier.[6] OEG and OCC misconstrue and ignore the record. Supplier-related issues were not raised in these 18 cases from 2014 through August 2021 until the Stipulation was filed. The majority of the cases were litigated in 2019 – with hundreds of pages of transcript, testimony from more than 10 witnesses, and more than 70 exhibits admitted into evidence – without raising supplier-related issues.

The Attorney Examiner understood that IGS and RESA had no reason to intervene prior to the Stipulation being filed. The October 15, 2021 Entry granting IGS and RESA limited intervention in these proceedings 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 in the Duke MGP Proceedings or Duke TCJA Proceedings; **rather, the attorney examiner agrees they represent wholly unrelated matters** for the Commission's

[6] OEG Initial Brief at 4 and OCC Initial Brief 5.

and other interested parties' consideration."[7] The Attorney Examiner then determined that RESA and IGS could not have been on notice that the competitive market provisions would be raised in these proceedings.[8]

Duke Witness Lawler admitted at hearing there were no issues in the tax cases and the MGP cases comprising these proceedings that related to the competitive retail natural gas market.[9] She agreed that the first time these issues were raised was on August 31, 2021, when the Stipulation was filed. Showing the lack of serious negotiations was Ms. Lawler's and Ms. Spiller's lack of awareness of the February 24, 2021 Finding and Order in Case No. 19-1429-GA-ORD (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."[10] Ms. Lawler also lacks experience regarding the competitive retail natural gas market. 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.[11] Ms. Lawler also has not reviewed the state policy in the Ohio Revised Code regarding the competitive market.[12]

Like Witness Lawler, Witness Spiller is also inexperienced when it comes to issues affecting competitive retail natural gas suppliers. While Ms. Spiller provided legal advice to Duke Energy Retail as a business partner,[13] there is no evidence in the record showing that she was

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

[8] *Id.*

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

[10] Tr. at 78: 2-23 and 115: 1-6.

[11] Tr. at 38: 10-15.

[12] Tr. at 38: 16-18.

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

knowledgeable, capable and experienced on issues affecting competitive retail natural gas suppliers. Yet, these are the only witnesses claiming the competitive market provisions enhance the market. No serious bargaining on competitive market-related issues can occur when the participants admittedly lack the experience necessary to properly address those issues. As to Duke Energy's claim that Staff was an impartial party, notably Staff excused itself from taking a position on the provision of shadow billing information to OCC which simply reinforces the conclusion that no serious bargaining occurred.[14]

Additionally, the Commission cannot overlook the **improper exclusionary negotiation tactics employed in these proceedings that are readily admitted by the Signatory Parties –** suppliers were excluded from the settlement discussions, while other non-parties were allowed to bargain for and sign the Stipulation.[15] There is no debate that none of the Signatory Parties directly represented the interests of competitive retail natural gas suppliers, that competitive retail natural gas suppliers were not invited to participate in the stipulation negotiations, and that there were no negotiations with suppliers.[16] Although suppliers were excluded from the negotiations – and later precluded from evaluating the Stipulation in its entirety, OEG, Kroger, OMAEG and OPAE were allowed to participate in the negotiations for all 18 cases – even multiple cases in which they were not parties because they did not seek intervention.[17] These tactics alone demonstrate that the Stipulation was not the product of serious bargaining among capable, knowledgeable parties.

[14] *See* Joint Ex. 1 at 19, footnote 18.

[15] *See* the procedural history in the October 15, 2021 Entry at ¶¶ 14-15. OEG, Kroger, OMAEG and OPAE are not parties to Case Nos. 18-1830-GA-UNC, 18-1831-GA-ATA, 19-1085-GA-AAM, and 19-1086-GA-UNC. OPAE is also not a party to Case Nos. 20-53-GA-RDR and 20-54-GA-ATA.

[16] *See* Duke Energy and OCC admissions in: RESA Ex. 4, supplemental response November 8, 2021; RESA Ex. 29 (at page 29 RFA-1-4 and RFA-1-5); IGS Ex. 34; IGS Ex. 35; and Tr. at 47:13-16.

[17] *See* the procedural history in the October 15, 2021 Entry at ¶¶ 14-15. OEG, Kroger, OMAEG and OPAE are not parties to Case Nos. 18-1830-GA-UNC, 18-1831-GA-ATA, 19-1085-GA-AAM, and 19-1086-GA-UNC. OPAE is also not a party to Case Nos. 20-53-GA-RDR and 20-54-GA-ATA.

Duke astoundingly claims in its initial brief that there was no foul from the exclusionary negotiations because the Commission's process after the Stipulation was filed "afforded RESA and IGS the same opportunity to oppose the Stipulation, [as] had they actually intervened prior to the Stipulation's filing."[18] RESA and IGS strongly disagree. The Signatory Parties and Non-Opposing Parties had years of participation in these proceedings before hearings were held in 2019, and in addition spent close to a year discussing a settlement.[19] Contrast that with the fact that RESA and IGS were granted only limited intervention, which meant that RESA and IGS could not conduct discovery on the MGP Rider and TCJA provisions to challenge the Stipulation in its entirety. As well, the Commission placed RESA's and IGS' actions under heavy scrutiny, the procedural/discovery schedule was expedited, and the hearing itself started and finished in one day with five witnesses. No party to a Commission proceeding would like to be in the position RESA and IGS were forced into in these proceedings.

Indeed, Duke's claim that RESA and IGS were afforded ample opportunity with respect to the Stipulation is undercut by Duke's own admission that "**it would expect to be involved in negotiations that change the terms and conditions of Duke Energy's own tariffs**."[20] To further underscore the importance of being involved in negotiations, OCC just complained to the Commission last week, on December 17, 2021, because it was not invited to negotiations before a settlement became public and was included in the initial filings of the proceeding.[21] OCC

[18] Duke Initial Brief at 34.

[19] Tr. at 46:13-21, 127:17-21.

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

[21] OCC Motion to Intervene in *In the Matter of the Commission's Investigation into AES Ohio's Compliance with the Ohio Administrative Code and Potential Remedial Action,* Case No. 21-1220-EL-UNC (filed December 17, 2021) (OCC argued "OCC was not invited to participate in the Settlement, and so consumers were not represented. The PUCO/AES Settlement was filed the *same day* as this case was initiated, which is another interesting example of the PUCO's process for administering justice"; "[t]hat arrangement obviously limits participation in the case, including

complained that it "… was not invited to participate in the Settlement, and so consumers were not represented[]" and that "[t]he proposed Settlement, in its closed process and inadequate substance, does not protect customers and should not be accepted by the PUCO Commissioners."[22] Based on the foregoing, it seems that the rules of fair play only apply when the interests of Duke and OCC are not adversely impacted. Persuasive authority from the Supreme Court of Ohio also contradicts the notion that there was no foul in the bargaining. In *Time Warner Axs v. Public Utilities Commission*, 75 Ohio St. 3d 229, 233, fn.2., 661 N.E. 2d 1097 (1996), the Court expressed "grave concerns regarding the commission's adoption of a partial stipulation which arose from the exclusionary settlement meetings," despite a hearing being held after the stipulation was signed.

Lastly, Duke Witness Lawler admitted at hearing there were no issues in the TCJA cases and the MGP cases that related in any way to the competitive retail natural gas market.[23] Wholly unrelated matters involving significant competitive market issues were introduced into the MGP and TCJA cases, and suppliers cannot be blamed. That is because the Signatory Parties and Non-Opposing Parties engaged in settlement meetings in these proceedings but excluded competitive retail natural gas suppliers from negotiating the competitive market provisions while other non-party participants were allowed. Any attempts by OEG[24] and OCC[25] to shift blame by asserting that it was somehow RESA's and IGS' own fault for not being involved in the Stipulation process are false and contrary to the facts and evidence. Likewise, Duke Energy cannot claim that serious bargaining took place when the supplier industry was not involved in the Stipulation and no party

by the Ohio Consumers' Counsel"; and "[t]he proposed Settlement, in its closed process and inadequate substance, does not protect customers and should not be accepted by the PUCO Commissioners") (emphasis in original).

[22] *Id.*

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

[24] OEG Initial Brief at 4.

[25] OCC Initial Brief at 5.

in the Stipulation's negotiations directly represented the interests of the competitive retail natural gas market. The Commission must conclude that the exclusion was unacceptable and that serious bargaining among capable, knowledgeable parties did not take place.

B. The SSO auction and PTC language terms of the Stipulation are not merely promises by Duke to file a future application, as Duke claims.

Duke repeatedly claimed in its initial brief that suppliers are not harmed by the SSO and PTC language terms in the Stipulation because those matters will be fully considered in a separate docket and suppliers will have an opportunity to raise their concerns in that later proceeding.[26] Duke's suggestion is that everything about the SSO auction and PTC language will be presented, debated and decided in that separate proceeding. Notably, Duke ignores that the Stipulation as presented seeks approval of Duke's action to provide OCC with shadow billing information that is inaccurate, deceptive and misleading.[27] The Stipulation, if approved, would also require Duke to continue to provide that information to OCC on a going-forward basis regardless of the outcome of any SSO application proceeding.[28]

Another oversight by Duke is that the Signatory Parties – including Duke – have agreed, pursuant to ¶¶ 35 and 36 of the Stipulation, that approval of the Stipulation similarly approves the implementation of the SSO auction and the PTC language. The pertinent language from the Stipulation follows:[29]

> 35. **This Stipulation is submitted for purposes of these proceedings only. The term "these proceedings" includes the above-captioned proceedings as well as the subsequent proceeding to implement the SSO auction.** Except for purposes of enforcement of the terms of this Stipulation, neither this Stipulation, nor the information and data contained therein or attached, shall be cited as

[26] Duke Initial Brief at 18, 25-26, 29-30, 32, 33.

[27] *See* Joint Ex. 1 at 19 *and see* RESA/IGS Ex. 2 (Lacey Direct Testimony) at 17, 29-30.

[28]Joint Ex. 1 at 19.

[29] Joint Ex. 1 at 23 (emphasis added).

precedent in any future proceeding for or against any Signatory Party or the Commission itself. This Stipulation is a reasonable compromise involving a balancing of competing positions and it does not necessarily reflect the position that one or more of the Signatory Parties would have taken if these issues had been fully litigated.

36. **The 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. **The Signatory Parties** fully support this Stipulation in its entirety and **urge the Commission to accept and approve the terms herein**. The Signatory Parties agree that the Stipulation represents a comprehensive compromise of issues raised by Signatory Parties with diverse interests. The Signatory Parties have signed the Stipulation and adopted it as a reasonable resolution of all issues. * * *

The above language contradicts Duke's repeated claims on brief regarding future approvals of the SSO auction and PTC language. The Signatory Parties have agreed that **approval of the Stipulation is intended to resolve the 18 proceedings <u>and</u> the SSO proceeding** where the SSO auction and PTC language will be implemented according to the terms set forth in the Stipulation.[30] In other words, upon approval of the Stipulation, the SSO auction and PTC language are *fait accompli*.

RESA/IGS Witness Cawley addressed the issue of a *fait accompli* during his testimony: "Commission approval of the Stipulation as filed would unduly prejudice RESA and IGS because of the inertia created by official approval of the concepts set forth therein. Subsequent proceedings will only implement a fait accompli. The genie simply can't be put back in the bottle."[31] Mr. Cawley's testimony is particularly persuasive because he further elaborated during his redirect

[30] In addition to Duke's claims being wrong, RESA and IGS do not agree that the Commission can lawfully approve another proceeding by approving the Stipulation as the Signatory Parties have structured it. This is a structural flaw with the Stipulation (which RESA and IGS addressed more fully in their Joint Initial Brief at 44-45) and it renders the Stipulation unreasonable.

[31] RESA/IGS Ex. 1 (Cawley Direct Testimony) at 18.

testimony that, **<u>from his experience as a commissioner</u>**, "a Commission is not going to adopt a settlement and then not allow the parties to have the benefit of their … bargain[] by denying the auction application. … [T]he official approval creates an inertia. It gives … every indication in my experience that the Commission will approve it."[32] Any claim by Duke Energy or any other Signatory Party that the Stipulation will not bind Duke Energy or the Commission in a future proceeding should be rejected, as the Stipulation will result in Duke moving forward with implementation of the SSO auction and PTC language.

Other language in the Stipulation establishes that Duke's claims regarding the future approvals of the SSO auction and PTC language on brief are wrong. The Stipulation expressly defines the framework of the SSO auction and expressly defines the PTC language that will appear on customer bills, details for which Duke and the other Signatory Parties seek Commission approval now. Those details include:

<u>For the PTC language[33]</u>

- The precise PTC language shall be: "In order for you to save money, a natural gas supplier must offer you a price lower than $X.XX per CCF for the same usage that appears on this bill."
- The PTC language is to be included on all shopping customer bills.
- The PTC language is to be on gas-only bills and on gas/electric combination bills.

<u>For the SSO auction[34]</u>

- Reasonable and prudent transitions costs to exit the GCR should be recovered via riders.

[32] Tr. at 210:15-23.

[33] Joint Ex. 1 at 18, ¶ 24.

[34] Joint Ex. 1 at 16-18, ¶ 22.

- The transition-related riders should be nonbypassable for residential natural gas customers and bypassable for nonresidential natural gas customers.

- Ongoing costs will be recovered through a bypassable rider.

- Costs will include incremental external labor and consultants.

- The first SSO auction will be held as soon as January 2022 or no later than three months after approval of the auction application.

- The first auctions' delivery period will commence no sooner than November 2022 or no later than three months after the first auction.

- Duke can recover early termination fees if the first auction is ordered to be held before November 2022.

- Authority is granted to defer the prudently incurred costs prior to implementing.

Given the above terms in the Stipulation, the Signatory Parties are asking for approval here and now of the framework for the SSO auction and the PTC language from which Duke will then proceed.

C. The Stipulation negatively affects the competitive market and violates regulatory principles/practices.

Duke Energy claims that the Stipulation will not affect the competitive market while OEG claims that the Stipulation is not intended to harm the competitive market.[35] Both claims are false and contrary to the uncontroverted evidence in the record that the competitive market-related provisions in the Stipulation will harm the competitive market.

1. <u>The competitive market provisions in the Stipulation will harm the market, customers and suppliers in many different ways.</u>

The evidence in this record is one-sided and definitive showing that each of the Stipulation's competitive market provisions (the mandatory transition to an SSO, an SSO price-to-compare and providing shadow billing information to OCC) will harm the market, customers

[35] Duke Initial Brief at 32-33; and OEG Initial Brief at 5.

and suppliers. First, the record is clear that the requirement that Duke Energy transition to an SSO will not enhance the competitive market but rather hinder the market. RESA/IGS witness Crist explained that a transition to an SSO will not enhance the competitive retail natural gas market because Duke will simply be procuring wholesale gas in a different manner, and customers will not know that any change has occurred.[36] Moreover, he opined that a transition from the GCR without implementing a Standard Choice Offer ("SCO") negatively affects the competitive market.[37] Mr. Crist noted that, unlike the SSO, the SCO will result in suppliers being assigned to serve specific customers, will create brand recognition, and will encourage customers to explore such other products and choices.[38]

Mr. Crist also testified (correctly) that an SCO follows Ohio statutory policy, which is to promote 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."[39] To the contrary, an SSO does not expeditiously transition to transactions between buyers and sellers.[40] This evidence demonstrates that the Stipulation's requirement that Duke Energy transition to an SSO without considering an SCO will negatively affect the competitive market.

Second, there are many ways the Stipulation's SSO price-to-compare provision will harm customers and suppliers. RESA/IGS witness Lacey testified that a price-to-compare is misleading

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[36] RESA/IGS Ex. 3 (Crist Direct Testimony) at 8-10).

[37] RESA/IGS Ex. 3 (Crist Direct Testimony) at 14, 16-17.

[38] *Id.* at 11.

[39] *Id.* at 8-9. *See also* R.C. 4929.02(A)(7).

[40] RESA/IGS Ex. 3 (Crist Direct Testimony) at 8-9.

and creates confusion for customers in multiple ways. He stated: "I can think of no consumer benefits of providing a backward-looking price comparison of fundamentally different consumer products."[41] In particular, he explained:[42]

- The price-to-compare implies that all products are the same and that price is the only attribute that matters.

- Customers will receive 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.

The Commission also expressed these same harmful concerns earlier this year with the same price-to-compare message being listed on customer bills, and rejected it as an outdated default commodity rate.[43]

Third, the record establishes that shadow billing is a flawed concept, and provides meaningless and inaccurate information that does not represent a complete comparison of pricing and savings.[44] Duke admitted that the shadow billing data to be provided to OCC would not be complete because the data omits dollars paid by choice customers who are billed directly by the competitive retail natural gas supplier for the supply of natural gas.[45] The data also excludes considerations other than price that might be included in offers from competitive retail natural gas suppliers.[46] In addition, Mr. Lacey explained that "[i]f any policy actions are taken in response to

[41] RESA/IGS Ex. 2 (Lacey Direct Testimony) at 20.

[42] *Id*. at 14, 20.

[43] *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 at ¶ 28 (April 21, 2021) ("[I]t would be problematic to display the SCO or GCR rate on the bill, given that the rate changes from month to month").

[44] RESA/IGS Ex. 2 (Lacey Direct Testimony) at 13-14, 16-17, 23-24, 29.

[45] RESA Ex. 7.

[46] RESA/IGS Ex. 2 (Lacey Direct Testimony) at 17.

those meaningless [shadow billing] results, they will almost certainly be bad policy actions."[47] Altogether, this evidence demonstrates that provision of shadow billing information will negatively affect the competitive market – especially if OCC uses it to attempt to influence legislative and administrative changes. Indeed, OCC has already attempted to use shadow billing data in Commission proceedings to influence policy, and it has done so in a misleading manner that fails to acknowledge any other characteristic of a supplier's product.

Notably, the Commission just this year in a natural gas proceeding declined (again) to require shadow billing information, stating: "[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 amount of information for customers to compare pricing and available offers." *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 at ¶ 89 (February 24, 2021). While Duke points to the Commission's recent decision in the AEP Ohio electric rate case proceeding to support its exclusionary negotiating tactics, the facts in these proceedings are much different than the AEP Ohio case because here no supplier was a party to the proceedings when the Stipulation was negotiated, the market being addressed is natural gas and not electric, shadow billing has been inserted in proceedings that were opened with a limited scope (to address the MGP Rider and TCJA credit), and the Commission just this year rejected shadow billing in its recent natural gas rulemaking proceeding in Case No. 19-1429-GA-ORD.

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

2. <u>The Stipulation's inclusion of competitive market provisions violates regulatory principles and practices.</u>

In addition to negatively affecting the competitive market, the Stipulation's competitive market provisions violate regulatory principles and practices. The price-to-compare and shadow billing provisions violate important regulatory principles as they are directly contrary to the Commission 2021 decision in *Minimum Gas Service Standards*. It is noteworthy that the Commission rejected the same price-to-compare and shadow billing provisions as are contained in the Stipulation, that rejection is just the most recent such rejection being issued in 2021 while the Stipulation negotiations were taking place. It is inexplicable why Duke Energy would agree to and argue for adoption of stipulated terms that do not comply with Commission decisions and rules, while acknowledging on brief its need to comply with what the Commission requires.[48]

The three market provisions also collectively violate multiple principles and practices as explained by RESA/IGS witness Cawley. The Commission should afford Mr. Cawley's testimony substantial weight given his time as a Chairman and commissioner on a public utility commission in a deregulated state (Pennsylvania). Mr. Cawley's testimony was much more detailed and thorough than any of Duke's two witnesses, neither of whom has Mr. Cawley's experience and understanding of the ramifications of allowing the Signatory Parties to push through the Stipulation without modification under the facts and circumstances of these proceedings.

As Mr. Cawley explained, given that the supply community was not present or represented

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[48] Duke Initial Brief at 32.

during the negotiation of the Stipulation, the egregious exclusion of essential parties has resulted in stipulated market provisions that violate:[49]

- **Sound public policy** because there was no opportunity for truly robust debate and careful development of the concepts.
- **Standard regulatory practice** of ensuring adequate notice and an opportunity to participate is afforded to all interested during the negotiation of a stipulation.
- **Sound decision making** because the Commission is presented with stipulated terms resulting from inappropriate behavior and a bad process.

Mr. Cawley further added that, collectively, the circumstances in these proceedings illustrate that partial settlements may not be appropriate for formulating major policy positions.[50]

The record establishes that the competitive market will be affected by the market provisions in the Stipulation, that these provisions will harm the competitive market, and that the inclusion of these provisions in the Stipulation violates multiple important regulatory principles and practices.

3. <u>OEG's contention that there was no intent to harm the competitive market is false and Staff's speculation should be rejected.</u>

As a final point, OEG's contention that there was no intent to harm the competitive market[51] is not genuine given the surrounding circumstances at the time. While suppliers were omitted from and not aware of the negotiations, other entities who do not represent the supply industry, including some who were not a party to the TCJA and MGP cases, agreed to put the three market provisions in the Stipulation contrary to the suppliers' positions on these issues but

[49] RESA Ex. 1 (Cawley Direct Testimony) at 11-12.

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

[51] OEG Initial Brief at 5.

consistent with what OCC advocated for and lost on in multiple prior cases.[52] OEG cannot absolve itself of its role in signing the Stipulation that very likely sacrificed TCJA ratepayer credits and increased MGP Rider costs to satisfy some party in the negotiations that wanted shadow billing, a price-to-compare and an SSO auction format. Willful blindness is no excuse.

The Commission should also not excuse the Signatory Parties from what happened here simply because Staff speculates, without any evidence to back it up, that benefits will be lost if the Commission tinkers with Stipulation.[53] While Staff objected to speculation in the evidentiary hearing, Staff has now provided its own speculation on brief to try to sway the Commission. That speculation should be ignored, and the Commission should take note that Staff could have but did not put on any witness to support the Stipulation. Moreover, Staff's added claim that the Stipulation was signed by an "unusually diverse group,"[54] is wrong – the Signatory Parties are all regular participants in Commission proceedings and regularly enter into stipulations.[55] None of

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[52] *See* the procedural history in the October 15, 2021 Entry at ¶¶ 14-15. OEG, Kroger, OMAEG and OPAE are not parties to Case Nos. 18-1830-GA-UNC, 18-1831-GA-ATA, 19-1085-GA-AAM, and 19-1086-GA-UNC. OPAE is also not a party to Case Nos. 20-53-GA-RDR and 20-54-GA-ATA *and see 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 at ¶ 28 (April 21, 2021) ("[I]t would be problematic to display the SCO or GCR rate on the bill, given that the rate changes from month to month").

[53] Staff Initial Brief at 3.

[54] *Id.*

[55] In the following cases, stipulation were signed by all four Signatory Parties here (Duke, Staff, OEG and OCC): *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of the Establishment of Rider BTR and Associated Tariffs*, Case Nos. 11-2641-EL-RDR et al., Opinion and Order (May 25, 2011); and *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO et al., Opinion and Order (November 22, 2011). In the following cases, a stipulation to resolve most issues was signed by Duke, Staff and OCC (OEG was not a party): *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case Nos. 12-1685-GA-AIR et al., Opinion and Order (November 13, 2013). In the following cases, a stipulation was signed by Duke, Staff, and OEG: *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates*, Case Nos. 17-32-EL-AIR et al., Opinion and Order (December 12, 20219). In the following cases, stipulations were signed by Duke and Staff: *In the Matter of the Regulation of the Purchased Gas Adjustment Clauses Contained within the Rate Schedules of Duke Energy Ohio, Inc. and Related Matters*, Case Nos. 15-218-GA-GCR et al., Opinion and Order (September 7, 2016); and *In the Matter of the Regulation of the Purchased Gas Adjustment Clauses Contained within the Rate Schedules of Duke Energy Ohio, Inc. and Related Matters*, Case Nos. 18-218-GA-GCR et al., Opinion and Order (December 18, 2019). Most recently, stipulations were signed by Staff,

Staff's claims makes the Stipulation reasonable and none has any bearing on the reasonableness of the Stipulation.

III. CONCLUSION

The Signatory Parties used these proceedings to include competitive market provisions that are wholly unrelated to the MGP and TCJA proceedings and harmful to customers, suppliers and the development of the competitive natural gas market in Ohio. The Signatory Parties used unscrupulous settlement tactics by incorporating the competitive market provisions without the knowledge of the industry participants most affected by the changes. With what happened in these proceedings now being exposed, the Signatory Parties resort to rhetoric and feeble arguments on brief. None of the Signatory Parties have established that the Stipulation satisfies the Commission's three-part test. The Commission should reject their unfounded arguments, ignore the emotional rhetoric, and follow the evidence before it. That evidence establishes that the Stipulation is not reasonable as presented, and either must be rejected or modified to remove the competitive market provisions.

OCC and OEG (along with another Ohio utility) in *In the Matter of the Application of Ohio Power Company for an Increase in Electric Distribution Rates*, Case Nos. 20-585-EL-AIR et al., Opinion and Order (November 17, 2021); and *In the Matter of the Application of Ohio Power Company to Initiate Phase 3 of Its gridSMART Project*, Case No. 19-1475-EL-RDR, Opinion and Order (December 1, 2021).

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 23rd day of December 2021 on all persons/entities listed below:

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