BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Filing by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company of a Grid Modernization Business Plan	)	Case No. 16-481-EL-UNC
In the Matter of the Filing by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company Application for Approval of a Distribution Platform Modernization Plan	)	Case No. 17-2436-EL-UNC
In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company to Implement Matters Relating to the Tax Cuts and Jobs Act of 2017	)	Case No. 18-1604-EL-UNC
In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Tariff Change	)	Case No. 18-1656-EL-ATA

POST-HEARING REPLY BRIEF OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

PUBLIC VERSION

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INTRODUCTION

A broad and diverse group of stakeholders representing all customer classes and various industries and sectors has recommended that the Commission approve the Stipulation presented to the Commission in these proceedings.[1] The Stipulation satisfies the Commission's three-prong test for approval, and it benefits customers by (1) providing for all tax savings associated with the Tax Cuts and Jobs Act of 2017 ("TCJA") to flow back to customers; and (2) implementing the first phase of grid modernization ("Grid Mod I") that will, among other things, improve distribution system reliability, reduce end-use energy consumption, allow more informed choices about energy usage, and facilitate development of innovative products and services through the marketplace. The Stipulation also furthers the Commission's objectives expressed in its initial order approving the Companies' fourth Electric Security Plan ("ESP IV"),[2] its PowerForward Roadmap,[3] and its investigation of the TCJA in Case No. 18-47-AU-COI (the "TCJA Investigation").[4] For these reasons, the Commission should approve the Stipulation without modification so that the Stipulation's benefits can begin to be realized by customers.

[1] The Signatory Parties to the Stipulation are: Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies"), Staff of the Public Utilities Commission of Ohio ("Staff"), Industrial Energy Users-Ohio ("IEU-Ohio"), Ohio Energy Group ("OEG"), Direct Energy Services, LLC and Direct Energy Business, LLC (collectively, "Direct"), Ohio Cable Telecommunications Association ("OCTA"), Environmental Defense Fund ("EDF"), Ohio Hospital Association ("OHA"), Interstate Gas Supply, Inc. ("IGS"), The Office of the Ohio Consumers' Counsel ("OCC"), The Northeast Ohio Public Energy Council ("NOPEC"), and Ohio Partners for Affordable Energy ("OPAE").

[2] *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, pp. 22-23, 95-96 (March 31, 2016) ("ESP IV Order").

[3] Public Utilities Commission of Ohio, *PowerForward Ohio: A Roadmap to Ohio's Electricity Future* (Aug. 29, 2018) ("PowerForward Roadmap").

[4] *See In the Matter of 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 (Oct. 24, 2018) ("TCJA Order").

The benefits of the TCJA provisions of the Stipulation are undisputed. The Stipulation will ensure that all tax savings from the TCJA flow to the Companies' customers, with the total amount of customer savings reaching approximately $900 million. While the Ohio Manufacturers Association Energy Group ("OMAEG") and The Kroger Co. ("Kroger") assert that the allocation of tax credits among customer classes "unfairly" favors residential customers,[5] there is no testimony or other evidence that the allocation mechanism agreed to by the fourteen Signatory Parties, which include representatives of all customer classes, is unreasonable or unlawful. Nor is there any reason to believe that the agreed-upon allocation mechanism renders the Stipulation unreasonable or unlawful.

Of the six parties opposed to the Grid Mod I provisions in the Stipulation (the "Opposing Intervenors"),[6] five complain that the Stipulation was achieved using a rushed process and that they were "excluded" from negotiations because their preferred terms were not included in the Stipulation.[7] These parties confuse being excluded from negotiations with not obtaining certain concessions. Not only are these parties inaccurate in their characterization of the settlement process, but with such diverse and opposing interests in play, it is to the Signatory Parties' credit that most of Staff's and the intervenors' interests could be reconciled in the Stipulation.[8] Further, many terms negotiated into the Stipulation benefit the Opposing Intervenors' interests.

[5] OMAEG Brief, pp. 17-19; Kroger Brief, pp. 20-21.

[6] In addition to OMAEG and Kroger, the Opposing Intervenors are the Smart Thermostat Coalition ("STC") and the Environmental Law & Policy Center, Natural Resources Defense Council, and the Ohio Environmental Council ("ELPC/NRDC/OEC").

[7] STC did not raise this complaint but, instead, focused its arguments on obtaining funding for smart thermostats in Grid Mod I. *See* STC Brief, p. 2.

[8] For example, had the Stipulation included ELPC/NRDC/OEC's and STC's preferred $30 million smart thermostat program, OMAEG and Kroger likely would have been even more opposed to Grid Mod I and other Signatory Parties with opposing interests could have left the settlement group.

Various positions taken by the Opposing Intervenors are contradictory. When it comes to planned Grid Mod I capital investments, STC and ELPC/NRDC/OEC want the Companies and their customers to spend more than the $516 million stipulated to by the Signatory Parties (or, potentially, to divert these dollars to other purposes), while OMAEG and Kroger complain that Grid Mod I costs are already unreasonably exorbitant. Neither position squares with the evidence before the Commission, which overwhelmingly demonstrates that the Stipulation is a reasonable resolution of all disputed issues in these proceedings that will benefit customers and the public interest. Indeed, while the Opposing Intervenors recommend that the Commission and Staff review and understand the Cost Benefit Analysis ("CBA") supporting Grid Mod I investment before the Commission approves the Stipulation, the record shows that Staff already collaborated with the Companies to develop the CBA and finds it to be reasonable.[9]

Most of the Opposing Intervenors' arguments simply ignore the Commission's efforts, over many years, to promote the "grid modernization marketplace" anticipated in the ESP IV Order and later described in the PowerForward Roadmap.[10] Indeed, in ESP IV, the Commission directed the Companies to file a Grid Modernization Business Plan ("Business Plan") that would include deployment of smart meters and Advanced Metering Infrastructure ("AMI"), Distribution Automation ("DA") and Integrated Volt-VAR Control ("IVVC"), increase data access for customers and competitive suppliers, and recover grid modernization costs through the Companies' Advanced Metering Infrastructure/Modern Grid Rider ("Rider AMI").[11] Later, in the

[9] *See* Hearing Transcript ("Tr.") Volume ("Vol.") I at 201-02; Direct Testimony of Santino L. Fanelli ("Fanelli Direct"), p. 10.

[10] *See* PowerForward Roadmap, pp. 23-25.

[11] ESP IV Order, pp. 22-23, 95-96. The Commission found that the Business Plan filing for the deployment of smart grid technology and advanced metering infrastructure in accordance with Ohio policy set forth in R.C. 4828.02(D) was a qualitative benefit of ESP IV. *Id.*, p. 119.

PowerForward Roadmap, the Commission issued guidance regarding the future of grid modernization in Ohio that described how a modernized grid would serve as a platform that would allow innovative products and services to arise organically via the "grid modernization marketplace."[12] While the Business Plan recognized that full deployment of the Companies' grid modernization platform will take many years,[13] the Stipulation starts the process conservatively by authorizing the first three years of the grid investment anticipated in ESP IV in a manner consistent with the platform envisioned in the PowerForward Roadmap. The Opposing Intervenors seek modifications (none of which are justified) to a few of the Grid Mod I provisions to advance their own interests, but they cannot overcome the obvious benefits of the Stipulation to customers and the state of Ohio.

By entering into the Stipulation, the Companies, Staff and the other Signatory Parties agreed to flow back all TCJA tax savings to customers while taking a significant step toward improving grid reliability and facilitating innovative products and services for customers through the grid modernization marketplace. By approving the Stipulation without modification, the Commission will do the same.

ARGUMENT

I. THE STIPULATION IS THE PRODUCT OF SERIOUS BARGAINING AMONG CAPABLE AND KNOWLEDGEABLE PARTIES.

Several Opposing Intervenors challenge the first criterion of the Commission's three-part test for assessing the reasonableness of the Stipulation – i.e., whether a stipulation is the product of serious bargaining among capable and knowledgeable parties. Although their arguments are

[12] PowerForward Roadmap, pp. 5, fn. 1, 9, 23.

[13] *See* Business Plan, p. 13 (describing scenarios spanning from eight to fifteen years). Administrative notice was taken of the Business Plan at Tr. Vol. I at 28.

unsupported by any record evidence (including the conspicuous absence of any direct testimony on the issue), these Opposing Intervenors summarily claim that the negotiation process was "rushed,"[14] failed to afford interested parties a "meaningful opportunity to participate,"[15] and "did not fully involve all interested stakeholders."[16] Similarly, these Opposing Intervenors assert (again, without any evidence) that the Stipulation was already "set in stone" before it was presented to all interested parties for their review and comment, and, thus, lacked the "serious bargaining" necessary to warrant approval.[17] Not only are these arguments flatly contradicted by the record evidence, they also run contrary to well-established Ohio Supreme Court and Commission precedent.

A. There Was Serious Bargaining Among Capable and Knowledgeable Parties.

Decrying an allegedly "rushed process that did not fully involve all interested stakeholders," OMAEG contends that the parties were not given "sufficient time to fully understand the proposal to resolve four complex cases and evaluate a structural agreement four months in the making before being asked to sign onto the Settlement."[18] Kroger similarly maintains that the parties were deprived of the time needed to comprehensively understand and vet the "depth and complexity" of the issues resolved by the Stipulation.[19] OMAEG and Kroger are mistaken for several reasons.

[14] OMAEG Brief, p. 7.

[15] Kroger Brief, p. 9.

[16] OMAEG Brief, p. 7.

[17] ELPC/NRDC/OEC Brief, p. 11.

[18] OMAEG Brief, pp. 7, 8.

[19] Kroger Brief, pp. 9-10.

First, the record evidence demonstrates that the Companies reached out to and included all interested stakeholders in the negotiation process leading up to the signing of the Stipulation.[20] No party was excluded from the negotiation process.[21] To state (or imply) otherwise is false and unsupported by any record evidence. Second, eleven different stakeholders (including Staff), all of whom were represented by capable, experienced, and knowledgeable counsel, fully understood and signed the Stipulation.[22] The fact that eleven parties representing different (and often divergent) interests joined the Stipulation proves that the parties were, in fact, afforded sufficient time and meaningful opportunities to evaluate and understand the Stipulation and agree to its terms and conditions.

Further, the parties were well aware and knowledgeable of the two major issues underlying the Stipulation (i.e., grid modernization and TCJA-related customer refunds) long before the negotiation process began.[23] The origins of the grid modernization provisions of the Stipulation can be traced back to the Companies' Business Plan proceeding[24] filed three years ago on February 29, 2016, and the Companies' Distribution Platform Modernization Plan ("DPM Plan") proceeding[25] filed over a year ago on December 1, 2017 (collectively, the "Grid Modernization Cases").[26] With the issues in the Grid Modernization Cases pending for several years, all interested

[20] Fanelli Direct, pp. 7-8; Supplemental Testimony of Santino L. Fanelli ("Fanelli Supp."), pp. 3-4.

[21] *Id*. *See* Tr. Vol. I at 38 ("all parties had input, were allowed to provide feedback on all aspects of the Stipulation.").

[22] *See* Supplemental Stipulation and Recommendation filed on January 25, 2019 ("Supp. Stip."), p. 10.

[23] In considering the first prong of the Commission's three-part stipulation test, the Commission has previously found counsel to be knowledgeable and capable when they previously participated in regulatory proceedings that involved issues that "carry over" into the stipulation. *See In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, et al*., Case No. 16-1852-EL-SSO, *et al*., 2018 Ohio PUC LEXIS 442, Opinion and Order, ¶ 130 (Apr. 25, 2018).

[24] Case No. 16-481-EL-UNC.

[25] Case No. 17-2436-EL-UNC.

[26] Companies Brief, pp. 5-6.

parties had every opportunity to intervene, issue discovery, and comprehensively evaluate the Companies' grid modernization plans, which were eventually incorporated into and resolved by the Stipulation.[27] In fact, OMAEG, ELPC and OEC intervened in at least one or both of those proceedings.[28]

Stunningly, OMAEG criticizes the lack of "sufficient time to serve discovery" on the grid modernization investments outlined in the Stipulation despite being afforded every opportunity to propound as much discovery on these topics as it wanted while the Grid Modernization Cases remained pending for up to 3 years.[29] Other parties took full advantage of these opportunities as the Companies responded to numerous discovery requests concerning the grid modernization proposals that were eventually incorporated into the Stipulation.[30] Further, many intervenors in this case actively participated in all three phases of the Commission's PowerForward Initiative, which similarly touched on many of the grid modernization issues described in the Stipulation.[31] To claim that stakeholders were deprived of meaningful opportunities to issue discovery on these topics or that the parties were not knowledgeable of these issues is contradicted by the record evidence.

Not only have the parties been afforded more than sufficient time to evaluate the various grid modernization proposals described in the Stipulation over the last few years, the parties were also well aware of and knowledgeable about the TCJA tax-related issues underlying the

[27] Fanelli Direct, pp. 3, 4-6.

[28] *Id*., pp. 5-6. Although Kroger decided not to intervene in the Grid Modernization Cases, Kroger nonetheless acknowledges that these cases have been "long-pending" at the Commission. Kroger Brief, p. 5.

[29] OMAEG Brief, p. 9. This criticism rings hollow given that OMAEG never filed a motion to compel discovery from the Companies in any of these proceedings.

[30] Fanelli Direct, pp. 5-6.

[31] *Id*., p. 5.

Stipulation. For instance, many intervenors (including many Opposing Intervenors) participated in the TCJA Investigation, which commenced over a year ago.[32] Moreover, many intervenors (again, including many Opposing Intervenors) had knowledge of and experience with negotiating a similar TCJA-related stipulation involving AEP Ohio.[33] To present the negotiation process as "rushed" and requiring "more than a week to seriously bargain" over such "complex" grid modernization and TCJA-related issues completely ignores the fact that these issues have been pending at the Commission for several *years*.

ELPC/NRDC/OEC go so far as to claim there was no substantive negotiation process at all and that parties were excluded when Staff and the Companies met over the course of several months to draft a proposed stipulation that was eventually presented to the parties at the initial group settlement meeting on November 1, 2018.[34] ELPC/NRDC/OEC assert, without any record evidence, that no serious bargaining occurred because the draft Stipulation submitted to the parties on November 1, 2018, was already a "done deal."[35] But if that were the case, why would the Companies and Staff schedule numerous group and individual settlement meetings to actively seek out feedback, input, and comments from interested parties prior to signing the Original Stipulation?[36] And why would the Companies share information (e.g., estimated bill impacts) or take numerous steps to actively listen, consider, and address stakeholder concerns if it was truly a "take-it-or-leave-it" proposal?[37] And why would the Companies continue to engage in

[32] Companies Brief, p. 6.

[33] *Id*., pp. 3-4.

[34] ELPC/NRDC/OEC Brief, pp. 12-13.

[35] *Id*., p. 13.

[36] Fanelli Direct, pp. 7-8.

[37] *Id*. Curiously, ELPC/NRDC/OEC criticize the investment levels in grid modernization as set forth in the Stipulation (particularly, "AMI, IVVC, and other elements") on the basis that they merely reflect the product of compromise, instead of actual, objective necessity. *See* ELPC/NRDC/OEC Brief, p. 13. Yet, in so doing, ELPC/NRDC/OEC implicitly concede that serious bargaining did, in fact, occur with respect to the level of investment in Grid Mod I

negotiations in the months following the Original Stipulation, that eventually led to a Supplemental Stipulation that maintained all Signatory Parties to the Original Stipulation and included additional parties?[38]

The record evidence provides more than sufficient evidence that the Companies made repeated, concerted efforts to include *all* stakeholders in the negotiation process by coordinating numerous large group, small group, and individual meetings and providing additional information as requested to facilitate transparency and consensus.[39] The fact that these negotiations/discussions culminated in the filing of the Original Stipulation only eight days later on November 9, 2018, is a testament to the seriousness and determination of the parties to achieve a mutually agreeable compromise on a number of contested issues. The settlement process need not be protracted to evince serious bargaining – an important point the Commission has previously recognized.[40] Similarly, the Companies' inability to include ELPC/NRDC/OEC's preferred terms in the Stipulation is not evidence of a lack of serious bargaining.[41]

ELPC/NRDC/OEC avow that the Companies' evidence of serious bargaining is conclusory, and, thus, insufficient as a matter of law.[42] It is difficult to imagine what additional details or evidence would satisfy ELPC/NRDC/OEC without divulging the content of confidential settlement communications. The Companies submitted more than sufficient evidence of the

assets – a concession directly at odds with ELPC/NRDC/OEC's assertion that the "overall costs or how the money would be spent" was already a "done deal" and not subject to any serious bargaining. *Id.*

[38] Fanelli Supp., pp. 3-4; Companies Brief, p. 8.

[39] Fanelli Direct, p. 7.

[40] *See In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of an Alternative Form of Regulation to Extend and Increase Its Infrastructure Replacement Program*, Case No. 16-2422-GA-ALT, 2018 Ohio PUC LEXIS 116, Opinion and Order, at *19 (Jan. 31, 2018) ("It is not a requirement of serious bargaining that an offer or counteroffer be accepted nor is it indicative of serious bargaining that the process be protracted.").

[41] *Id.*

[42] ELPC/NRDC/OEC Brief, p. 12.

serious bargaining that occurred leading up to the November 9 Original Stipulation, including: describing the timing and occurrence of their meetings with Staff; the initiation of the initial settlement meeting among all parties on November 1, 2018 and two other meetings among all parties thereafter; their good faith efforts to contact and assemble other parties unable to attend the group settlement meetings; their efforts to meet with parties in one-on-one or small group meetings; the exchange of information between the parties to facilitate inclusive and meaningful negotiations; and, following November 9, their determination to continue negotiating and meeting with other non-signatory parties to elicit even broader support for the Stipulation (which eventually culminated in OCC, NOPEC and OPAE joining the Stipulation in late January 2019).[43] Company witness Fanelli also testified that "all parties had input" and "were allowed to provide feedback on all aspects of the Stipulation."[44] In short, the Companies have submitted compelling evidence of serious bargaining among capable and knowledgeable parties.[45]

Tellingly, during the months after the Companies, Staff, and seven other parties signed the Original Stipulation, the Companies continued to hold numerous settlement meetings with the non-Signatory Parties.[46] As a result of those good-faith settlement efforts, the Companies renegotiated and modified material terms and conditions of the Original Stipulation.[47] Specifically, the Supplemental Stipulation modified the allocation of customer credits associated with the TCJA

[43] Fanelli Direct, pp. 7-8; Fanelli Supp., pp. 3-4.

[44] Tr. Vol. I at 38.

[45] As explained in more detail below, neither the Commission nor the Supreme Court requires (let alone permits) an investigation into the content of any settlement discussions, including what was offered and/or what was rejected. *See, e.g., In re Ohio Edison Co.*, 146 Ohio St.3d 222, 2016-Ohio-3021, 54 N.E.3d 1218, ¶ 45; *In the Matter 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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan* ("*Companies ESP III Case*"), Case No. 12-1230-EL-SSO, 2012 Ohio PUC LEXIS 706, Opinion and Order, at *56-57 (July 18, 2012).

[46] Fanelli Supp., pp. 3-4.

[47] *Id*., pp. 2, 4-6.

and Grid Mod I, improved upon the customer benefits and safeguards related to Grid Mod I as proposed in the Original Stipulation, and enhanced the collaborative process outlined in the Original Stipulation, further underscoring the serious bargaining among the parties.[48] The Commission has previously recognized a utility's willingness to make concessions on issues of importance as evidence of serious bargaining.[49] The fact that the Opposing Intervenors did not obtain similar concessions from the Companies does not betray an absence of serious bargaining; rather, it merely reflects that their settlement positions were rejected.[50]

The Opposing Intervenors either completely ignore or downplay these developments because they contradict the false narrative that the Companies and Staff simply jammed through a "done deal" that was "set in stone" from the very beginning. Incredibly, ELPC/NRDC/OEC completely dismiss the modifications to the Original Stipulation as evidence of serious bargaining, speculating that OCC, although a Signatory Party, does not really support the "essence" of the Stipulation, because it opted out of supporting (but agreed not to oppose) certain sections of the Stipulation.[51] But this cynical view ignores the basic essence of compromise, particularly in Commission proceedings like this one where there are over ten different intervening parties (all of whom represent a diverse array of interests and customer classes) seeking to find common ground on a variety of contested issues. Not surprisingly, the Commission has previously rejected such a myopic interpretation of a signatory party's decision to opt-out of certain settlement provisions:

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[48] *Id*.

[49] *See In The Matter of the Commission's Review and Adjustment of the Fuel and Purchased Power and System Reliability Tracker Components of Duke Energy Ohio, Inc., and Related Matters; In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its 2008 System Reliability Tracker*, Case No. 07-723-EL-UNC, 2008 Ohio PUC LEXIS 126, Opinion and Order, at *27 (Feb. 27, 2008).

[50] *See In The Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its System Reliability Tracker Market Price, et al*., Case No. 05-724-EL-UNC, *et al*., 2007 Ohio PUC LEXIS 774, Opinion and Order, at *58-59 (Nov. 20, 2007).

[51] ELPC/NRDC/OEC Brief, p. 16.

> The signatory party's decision to opt out of a particular provision or provisions, and simultaneous election not to oppose the provision, merely reflects the signatory party's support of the stipulation as a total package and supports the likelihood that other parties to the case negotiated for certain provisions of the stipulation that were not of particular interest.[52]

The evidence reveals that the Companies initiated an inclusive settlement process where all interested parties could present their views and articulate their concerns. The fact that the negotiation process lasted several months (not a mere week as alleged by some of the Opposing Intervenors) repudiates the misguided belief that the Stipulation was nothing more than a "rushed" "done deal" that was always "set in stone."

B. The Ohio Supreme Court and the Commission Have Routinely Found Serious Bargaining Among Capable and Knowledgeable Parties Under Similar Circumstances.

Not only does the record evidence support a finding that there was serious bargaining among knowledgeable and capable parties, but also well-established precedent from the Ohio Supreme Court and the Commission demonstrate that there was serious bargaining under the specific circumstances presented here. In weighing challenges to the serious bargaining criterion, the Supreme Court and the Commission have refused to establish a specific set of rules to apply during the stipulation negotiation process, so long as there is no evidence of the intentional exclusion of an entire class of customers.

As a preliminary matter, the Opposing Intervenors rely improperly on the Ohio Supreme Court's decision in *Time Warner AxS v. Pub. Util. Comm.*[53] But in *Time Warner*, the Supreme Court held that it would have "grave concern" about a stipulation where there was evidence that

[52] *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider, et al.* ("*AEP Ohio PPA Rider Case*"), Case No. 14-1693-EL-RDR, et al., 2016 Ohio PUC LEXIS 997, Opinion and Order, at * 15 (Nov. 3, 2016).

[53] Kroger Brief, pp. 9, 11; ELPC/NRDC/OEC Brief, p. 10; OMAEG Brief, p. 8.

"an entire class of customers was intentionally excluded" from the settlement meetings.[54] As mentioned above, the record evidence reveals that no party (let alone an entire class of customers) was intentionally excluded from any settlement discussions.[55]

But even if there were evidence that the Opposing Intervenors were excluded from settlement discussions (which they were not), none of them represents an entire class of customers. Indeed, the Stipulation enjoys support from several representatives of residential, commercial and industrial customers (OMAEG and Kroger are outliers). Even if environmentalists could be viewed as a customer class (they are not), the Stipulation is supported by an environmental advocate – the Environmental Defense Fund.[56] Accordingly, *Time Warner* is unavailing to the Opposing Intervenors.

ELPC/NRDC/OEC advance the argument even further, claiming that the Supreme Court in *Ohio Consumers' Counsel v. Pub. Util. Comm.* requires the Commission to "investigate the context and circumstances of the settlement discussions" to ensure serious bargaining occurred.[57] But ELPC/NRDC/OEC overstate that holding. In *Ohio Consumers' Counsel*, the Supreme Court held that side agreements between signatory parties to a stipulation are discoverable to determine if any concessions or inducements were made that would give parties an unfair advantage in the bargaining process.[58] The decision in *Ohio Consumers' Counsel* did not authorize the Commission to more generally investigate the specific "context and circumstances of the settlement discussions" as alleged by ELPC/NRDC/OEC. On the contrary, longstanding Ohio Supreme

[54] *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 233, 1996-Ohio-224, 661 N.E.2d 1097, fn. 2.

[55] Fanelli Direct, pp. 7-8; Fanelli Supp., pp. 3-4.

[56] *See* Supp. Stip., p. 10 (signatory page).

[57] ELPC/NRDC/OEC Brief, p. 10.

[58] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶ 86.

Court and Commission precedents reflect an unwillingness to mandate any specific negotiation process to follow in order to satisfy the serious bargaining prong.

For instance, while the Supreme Court in *Time Warner* expressed "grave concern" where an entire class of customers is intentionally excluded from negotiations, the Supreme Court explicitly cautioned that its holding did "not create a requirement that all parties participate in all settlement meetings."[59] Further, the Supreme Court in *In re Ohio Edison Co*. refused to hold that a settlement process lacked serious bargaining where there was no conventional meeting with all parties in attendance.[60] The Court found "no legal support" for such a requirement, and declined to impose or promulgate specific negotiation process rules (e.g., time, manner, place requirements) for the purpose of satisfying the serious bargaining prong.[61]

Following the Supreme Court's lead, the Commission has repeatedly rejected arguments that serious bargaining did not occur where specific negotiation processes/procedures were not followed, so long as there was no evidence that an entire class of customers was intentionally excluded. For example, the Commission recently approved a stipulation that was conceived under similar circumstances as those presented here where intervenors argued that the settlement process was exclusionary and rushed. In the *2014 Duke EE/PDR Case*, after some three months of negotiating exclusively with Staff, Duke notified intervenors that it had reached a settlement agreement with Staff.[62] However, unlike this case, where there was significant negotiation that occurred over the course of many months and where the Companies agreed to make substantial

[59] *Time Warner*, 75 Ohio St.3d at 233, fn. 2.

[60] *In re Ohio Edison Co*., 146 Ohio St.3d 222, 2016-Ohio-3021, 54 N.E.3d 1218, ¶ 46.

[61] *Id*.

[62] *In the Matter of the Application of Duke Energy Ohio, Inc. for Recovery of Program Costs, Lost Distribution Revenue, and Performance Incentives Related to Its Energy Efficiency and Demand Response Programs for 2014* ("*2014 Duke EE/DR Case*"), Case No. 15-534-EL-RDR, 2016 Ohio PUC LEXIS 963, Opinion and Order, ¶¶ 28, 30-31 (Oct. 26, 2016).

modifications to the Original Stipulation based on those discussions, Duke provided intervenors one week to respond before the stipulation would be filed.[63]

Duke argued that it satisfied the serious bargaining prong because, among other things, it met with Staff numerous times to negotiate a stipulation, and although the stipulation was filed as drafted (with no modifications or supplements), all the parties were invited to discuss the draft stipulation and other settlement issues before and after it was filed.[64] Even though no intervenor signed the stipulation, the Commission refused to impose its own set of time, manner, and place rules for the negotiation process; instead, the Commission determined that without evidence that an entire customer class was intentionally excluded, serious bargaining occurred under the circumstances:

> The agreed-upon settlement represents significant compromises made by both Duke and Staff that was the result of several meetings over a three-month span. While aware that intervening parties did not sign the stipulation, we do not find that they were purposely excluded from negotiations. A proposed settlement was offered to the intervening parties and they were given an opportunity to respond before the stipulation was ultimately filed . . . Thus, it is clear that no parties were excluded from discussions regarding the agreement. Additionally, we find the signatory parties represent diverse interests, as contentions that Staff has no legitimate interests in the case are without merit. As Staff discussed, it has an interest in balancing the concerns of all of Ohio's ratepayers and ensuring reliable service and fair rates. Although the intervening parties also represent diverse interests, the Commission has consistently found that one party or group of parties cannot effectively nullify a stipulation. In sum, we find the stipulation is the result of serious bargaining among capable and knowledgeable parties, and that the first portion of the test is satisfied.[65]

[63] *Id*., ¶¶ 28, 30-32.

[64] *Id*.

[65] *Id*. (citations omitted).

As this decision shows, so long as there is no evidence that an entire class of customers was intentionally excluded from settlement discussions, the Commission has consistently declined to find a lack of serious bargaining based on alleged complaints about the form and manner in which the utility presented and negotiated the stipulation.[66]

The Supreme Court and the Commission's reticence about probing the specifics of the negotiation process is understandable given the sensitivity and confidentiality surrounding such settlement discussions. As the Commission previously acknowledged, "in order to promote confidentiality in settlement discussions, the Commission has available to it a very limited record with respect to the settlement process in any given proceeding . . . ."[67] Therefore, the fact that the Companies negotiated with Staff for several months before initiating a series of settlement meetings (large group, small group, and individual meetings) to discuss and evaluate the draft Stipulation before it was filed is of no consequence, so long as the Companies did not intentionally exclude an entire class of customers, which the record shows they did not.[68] This is particularly true where, as here, there were additional, substantive modifications to the Stipulation after months of ongoing negotiations with even more interested stakeholders, which culminated in the filing of the Supplemental Stipulation months after the filing of the Original Stipulation.

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[66] *See, e.g*., *Companies ESP III Case*, Opinion and Order, at *56-57 (declining to impose a requirement on the "form and manner of negotiations"); *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of an Alternative Form of Regulation to Extend and Increase Its Infrastructure* ("*Columbia Alternative Rate Case*"), Case No. 16-2422-GA-ALT, 2018 Ohio PUC LEXIS 116, Opinion and Order, at *17-18 (Jan. 31, 2018) (rejecting arguments that serious bargaining did not occur where there was only one all-party meeting, where the utility did not circulate a settlement offer before or during the all-party meeting, and where the stipulation was allegedly "rushed through in a week and a half").

[67] *Companies ESP III Case*, Opinion and Order, at *56-57.

[68] *See 2014 Duke EE/DR Case*, Opinion and Order, at ¶¶ 28, 30-31; *see also In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation. In the Matter of the Complaint of the Office of the Consumers' Counsel v. The Ohio Bell Telephone Company*, Case No. 93-487-TP-ALT *et al*., 1994 Ohio PUC LEXIS 956, Opinion and Order (Nov. 23, 1994) (finding that serious bargaining may still occur where "various combinations of parties" break off to negotiate individually).

C. The Commission Should Decline ELPC/NRDC/OEC's Proposal to Overturn Thirty-Three Years of Longstanding Commission Precedent.

Recognizing that the Companies have more than satisfied their burden of proof to demonstrate the existence of serious bargaining among knowledgeable and capable parties, ELPC/NRDC/OEC implore the Commission to adopt a new stipulation review standard that would overturn thirty-three years of well-established Commission precedent that has been repeatedly endorsed by the Ohio Supreme Court.[69] The Commission should decline to sanction such a radical departure from existing precedent merely because a few intervenors dislike the bargain struck in this proceeding.

ELPC/NRDC/OEC argue that the current stipulation standard unfairly requires parties to "fac[e] the choice between signing onto a settlement without a chance for meaningful input or taking their chances in litigation."[70] To resolve this "dilemma,"[71] ELPC/NRDC/OEC argue that the existing legal standard should only apply when there is unanimous consent to a stipulation.[72] Put differently, the new standard proposed by ELPC/NRDC/OEC would effectively allow one party to hold an entire stipulation hostage by withholding consent unless its demands were met. The Commission has repeatedly rejected this proposal as it would effectively discourage

[69] ELPC/NRDC/OEC Brief, pp. 16-18. The Commission first established and applied its three-part criteria for evaluation stipulations in Case No. 84-1187-EL-UNC. *See In the Matter of the Restatement of the Accounts and Records of The Cincinnati Gas & Electric Company, The Dayton Power & Light Company, and Columbus & Southern Ohio Electric Company* ("Restatement of Accounts Case"), Case No. 84-1187-EL-UNC, 1985 Ohio PUC LEXIS 9, Opinion and Order, at *19 (Nov. 26, 1985). The Supreme Court first affirmed the three-part criteria in 1992. *See Office of Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126, 1992-Ohio-122, 592 N.E.2d 1370 ("We endorse the commission's effort utilizing these criteria to resolve its cases in a method economical to ratepayers and public utilities."). *See also In re Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement*, 2018-Ohio-4698, ¶ 39 (endorsing the three-part test); *In re Ohio Edison Co*., 146 Ohio St.3d 222, 2016-Ohio-3021, 54 N.E.3d 1218, ¶ 37 (same).

[70] ELPC/NRDC/OEC Brief, p. 16.

[71] *Id*.

[72] *Id*., p. 17.

settlements by giving any one party the ability to veto a hard-fought compromise reached by a multitude of parties representing diverse (and often, divergent) interests.[73]

In further support of their effort to reverse over three decades of Commission precedent, ELPC/NRDC/OEC posit that the Commission has "never found that a Stipulation does not meet the serious bargaining standard."[74] Notwithstanding the inaccuracy of that statement,[75] the fact that parties have successfully submitted sufficient evidence of serious bargaining does not attest to a fundamentally flawed legal framework; rather, it merely reflects that parties to stipulations have diligently worked to resolve their disputes in good faith through cooperation and compromise instead of litigation. If anything, as the Commission first recognized over thirty-three years ago, the development and application of the existing three-part test promotes "sound regulatory policy

[73] *See, e.g., In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, et al*., Case No. 16-1852-EL-SSO, *et al*., 2018 Ohio PUC LEXIS 800, Second Entry on Rehearing, ¶¶ 59-61 (Aug. 1, 2018) (rejecting similar arguments to revise the three-part test because the current standard "enables the Commission to conduct a careful review of all of the terms and conditions set forth in the proposed stipulation, in order to determine whether it is in the public interest and should otherwise be approved"); *In the Matter of the Application of the Dayton Power & Light Company to Establish a Standard Service Officer in the Form of an Electric Security Plan, et al*., Case No. 16-395-EL-SSO, *et al*., 2017 Ohio PUC LEXIS 909, Opinion and Order, ¶ 21 (Oct. 20, 2017) (noting that the Commission has "consistently rejected numerous proposals that any one class of customers can effectively veto a stipulation . . ."); *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider, et al*., Case No. 14-1693-EL-RDR, *et al*., 2016 Ohio PUC LEXIS 269, Opinion and Order, at *121-122 (Mar. 31, 2016) (same); *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. 14-1296-EL-SSO, 2016 Ohio PUC LEXIS 270, Opinion and Order, at *87 (Mar. 31, 2016) (same); *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc., for Approval of an Alternative Rate Plan for Continuation of its Distribution Replacement Rider*, Case No. 13-1571-GA-ALT, 2014 Ohio PUC LEXIS 33, Opinion and Order, at *20 (Feb. 19, 2014) ("no one possesses a veto power over stipulations"); *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, 2005 Ohio PUC LEXIS 694, Opinion and Order, at *10-11 (Dec. 28, 2005).

[74] ELPC/NRDC/OEC Brief, p. 16.

[75] *See In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period, et al*., Case No. 03-93-EL-ATA, *et al*., 2007 Ohio PUC LEXIS 703, Opinion and Order, at *62-63 (Oct. 24, 2007) (expressly rejecting the stipulation for failure to satisfy the serious bargaining prong); *see also Ohio Consumers' Counsel v. PUC*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853, ¶ 9 (acknowledging the Commission rejected a stipulation where the utility "failed to submit sufficient evidence to support a finding that the parties engaged in serious bargaining.").

to encourage parties to its proceedings to resolve issues through negotiated settlements."[76] ELPC/NRDC/OEC have failed to present any evidence that the existing legal framework for analyzing stipulations needs to be substantially overhauled. As such, consistent with longstanding Commission precedent, the Commission should reject ELPC/NRDC/OEC's plea to reformulate a brand-new legal standard for assessing the reasonableness of stipulations.

II. THE STIPULATION BENEFITS RATEPAYERS AND IS IN THE PUBLIC INTEREST.

The Stipulation ensures that customers will receive total tax savings of approximately $900 million resulting from TCJA adjustments to the Companies' base distribution rates and riders. Customers also will benefit from Grid Mod I, including estimated nominal benefits of over $1 billion over 20 years, which will improve system reliability, enable faster restoration of service after outages, improve voltage conditions on the distribution system, allow customers to make more informed choices about energy usage, facilitate access to customer data by authorized competitive retail electric service providers, and better enable the Companies to make future electric distribution grid modernization investments. Thus, as addressed in the Companies' Post-Hearing Brief, the Stipulation benefits ratepayers and the public interest.[77]

A. The Cost Benefit Analysis Prepared by the Companies and Staff Shows that the Benefits of Grid Mod I Exceed Its Costs.

While most parties to these proceedings have recognized the benefits of the Stipulation and signed on as Signatory Parties, a few parties claim that Grid Mod I charges may be unjust and unreasonable.[78] These opponents primarily rely on the testimony of ELPC/NRDC/OEC witness

[76] Restatement of Accounts Case, at *19.

[77] *See* Companies Brief, pp. 9-27.

[78] OMAEG Brief, pp. 15-17; Kroger Brief, pp. 17-18; ELPC/NRDC/OEC Brief, pp. 18-28.

Volkmann, who attempted to raise questions about the CBA supporting Grid Mod I.[79] Mr. Volkmann believes the benefits of DA included in the CBA may be overestimated.[80] As explained in the Companies' Post-Hearing Brief, Mr. Volkmann's lack of experience with modern DA deployments and with Ohio's storm events is matched only by the flaws in his analysis of the CBA.[81]

Mr. Volkmann focuses his testimony on the estimated benefits of DA included in the CBA for Grid Mod I. These benefits were derived by estimating the reliability improvement from DA, as measured by SAIDI (average outage duration per customer, in minutes) and SAIFI (average number of interruptions per customer, annually), both excluding and including major events, and converting the estimated reliability improvement into economic benefits for customers using the Department of Energy's Interruption Cost Estimate ("ICE") Calculator.[82] The SAIDI and SAIFI improvements used in the calculator were derived from the Companies' Smart Grid Modernization Initiative ("CEI Pilot").[83] The CEI Pilot involved a deployment of smart grid technologies in a 400-square-mile area southeast of Cleveland, Ohio, in CEI's service territory to determine and analyze the capabilities of AMI, DA and IVVC.[84] Based on this actual experience with DA deployment in northeast Ohio, the Companies estimated that DA deployed as part of Grid Mod I would result in SAIDI and SAIFI improvements during major storms/events of 46 percent and 40

[79] OMAEG Brief, p. 15; Kroger Brief, pp. 17-18; ELPC/NRDC/OEC Brief, pp. 20-27. *See* Volkmann Direct, pp. 6, 8-20.

[80] *See* Volkmann Direct, pp. 8-9 (questioning DA benefits during major storms/events). *But see id.*, p. 17 (recognizing that his analysis may be incorrect).

[81] Companies Brief, pp. 23-27.

[82] Volkmann Direct, pp. 9-10; O.A.C. 4901:1-10-10(B)(1). *See* pages with header "Estimated Benefits – DA" in ELPC Ex. 23-C. *See also* DPM Plan, p. 9 (describing SAIDI and SAIFI).

[83] Volkmann Direct, p. 11. *See also* ELPC Ex. 23-C.

[84] Business Plan, p. 3.

percent, respectively, and SAIDI and SAIFI improvements excluding major storms/events of 28 percent and 9 percent, respectively.[85]

As stated in the Companies' Business Plan, "DA focuses on improved reliability and is comprised of substation equipment, circuit reclosers, and wireless communications infrastructure. Fault Isolation Service Restoration ("FISR") is a [DA] application that runs a series of algorithms to determine the optimal operation of reclosers on a feeder so as to minimize both the duration as well as the number of customers affected by a power outage."[86] One of the benefits of DA is that it isolates the impact of an outage to a smaller group of customers.[87] Because the SAIFI metric does not include momentary outages of less than five minutes, DA and FISR improve SAIFI results by removing from the SAIFI calculation all customers on a circuit whose service is quickly restored.[88] Indeed, in AEP Ohio's very first year of DA deployment, its SAIFI, excluding major storms, improved by 14.1 percent (which is higher than the comparable estimate used by the Companies in the CBA), and the results in year two for both SAIFI and SAIDI were significantly more favorable than in year one.[89] The ability of DA to isolate faults when they occur also improves SAIDI by reducing the average outage duration each customer experiences.[90] The Companies also can use DA and fault isolation to restore service faster to smaller sections of the

[85] Volkmann Direct, p. 10.

[86] Business Plan, p. 11. *See* Volkmann Direct, pp. 5-6 (quoting DA definition from Business Plan).

[87] Tr. Vol. II at 237. *See* Business Plan, p. 28.

[88] Tr. Vol. II at 234, 237. *See* Business Plan, pp. 11-12, 28 (explaining how closing devices provides near immediate partial restoration on a circuit).

[89] Tr. Vol. II at 242-43.

[90] *See* generally Volkmann Direct, p. 10, fn.11 (SAIDI = SAIFI * CAIDI, with CAIDI measuring minutes per interruption); Business Plan, p. 28.

circuits, which further reduces the outage duration measured by SAIDI.[91] There is no dispute that these benefits accrue to customers during all outages, including during major storms/events.[92]

Notably, as Staff witness Schaefer explained, the Companies had prepared CBAs to support both their Business Plan and their DPM Plan filings.[93] This work was the starting point for Staff working with the Companies to develop the reasonable assumptions included in the CBA for Grid Mod I.[94] Staff reviewed and agreed with all the assumptions used in the CBA.[95] Indeed, ELPC/NRDC/OEC witness Volkmann has spoken with Ms. Schaefer, believes that she understands the CBA, and does not have any basis to believe Staff does not understand the CBA.[96] Company witness Fanelli testified in support of the CBA.[97] Thus, ELPC/NRDC/OEC err by claiming that neither the Companies nor Staff offered expert testimony regarding the reliability assumptions used in the CBA[98] –Mr. Fanelli was a testifying expert on CBA assumptions and Ms. Schaefer confirmed Staff's agreement with the CBA assumptions. Thus, ELPC/NRDC/OEC had ample opportunity to investigate the reliability assumptions during the cross examinations of Mr. Fanelli and Mrs. Schaefer, but did not. And as Signatory Parties, OEG, IEU-Ohio, OCTA, OHA, IGS, Direct Energy and EDF also agree that Grid Mod I produces a positive cost-benefit analysis.[99]

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[91] Tr. Vol. II at 237-38; Business Plan, p. 28.

[92] Tr. Vol. II at 234-35, 237-38.

[93] Tr. Vol. I at 201. *See* Business Plan, pp. 19-30; DPM Plan, pp. 9-11 (see errata filed May 16, 2018 for update to table on page 9 of DPM Plan).

[94] Tr. Vol. I at 201-02. *See* Fanelli Direct, p. 10 (CBA for Grid Mod I developed in collaboration with Staff).

[95] Tr. Vol. I at 202.

[96] Tr. Vol. II at 272-73.

[97] Fanelli Direct, p. 10.

[98] ELPC/NRDC/OEC Brief, p. 23. As discussed in the Companies Brief, ELPC/NRDC/OEC also err by stating Mr. Volkmann provided an "expert" assessment of the CBA. Companies' Brief, pp. 23-27.

[99] *See* Original Stipulation filed November 9, 2018 ("Orig. Stip."), p. 10 ("The Companies, Staff and other Signatory Parties agree that Grid Mod I produces a positive cost-benefit analysis (on a net present value basis)."); *id.*, Attachment B. OCC and NOPEC take no position on whether Grid Mod I produces a positive cost-benefit analysis for consumers. Supp. Stip., p. 8.

The opponents of the Stipulation have not produced probative evidence demonstrating that all of these parties are wrong.

ELPC/NRDC/OEC correctly note that approximately two thirds of estimated DA reliability improvements come during major storms/events.[100] This reflects the actual results of the CEI Pilot.[101] In contrast to Mr. Volkmann's analysis, which is based on his uninformed hunches, the Companies have relied on actual historical results to estimate DA benefits. The benefits of DA during major storms should not be a mystery – major storms generate a higher number of circuit faults that can be isolated by DA and FISR, thereby reducing both the total number of customers interrupted and the average duration of outages per customer.

Mr. Volkmann believes that DA is likely to be less effective "during major storms/events when there is widespread system damage with multiple circuits impacted."[102] His theory is that DA depends on adjacent circuits being operational, so DA would be less effective if a storm wipes out all adjacent circuits.[103] But this theory is not based on any studies that he has seen or performed.[104] He has no experience with the deployment of a modern DA system such as that proposed by the Companies.[105] And his only experience with an electric utility reporting DA reliability during major storms/events is a sample of one – Duke North Carolina – that is not even listed on his Exhibit CV-2.[106] Regardless, even if we assume major storm damage of the type he has in mind may occur in North Carolina, he has offered no evidence that this type of

[100] ELPC/NRDC/OEC Brief, pp. 21-22.

[101] *See* ELPC Ex. 23-C, "Estimated Benefits – DA".

[102] Volkmann Direct, p. 9. *See* ELPC/NRDC/OEC Brief, p. 24.

[103] *See* Volkmann Direct, p. 9.

[104] Tr. Vol. II at 236-26, 237.

[105] *Id.* at 232-33.

[106] *Id.* at 231, 270-71. By not listing this case in his Exhibit CV-2, it suggests he may have read some of the filings in the case but did not prepare testimony or comments for the case.

comprehensive damage occurs in northern Ohio, and even if it did, the record evidence supports that DA would provide outage restoration benefits during a storm of this magnitude.[107] In contrast to Mr. Volkmann's theorizing, the Companies' reliability assumptions are based, in part, on an analysis of actual circuit results in CEI's territory.[108]

ELPC/NRDC/OEC also object that the Companies' reliability assumptions for DA may have included duplicate records.[109] However, ELPC/NRDC/OEC's witness identified only two days over the course of nine years that might include duplicate records, and these days have very little impact on the reliability improvement estimates.[110] For purposes of conducting the analysis, the Companies used the historical information currently available in their systems instead of selectively deciding which data to include.[111]

ELPC/NRDC/OEC's most aggressive effort to alter the reliability improvement estimates from DA relies on excluding "outlier data" from SAIDI and SAIFI calculations.[112] The Companies explained in their Post-Hearing Brief how this approach is flawed and defeats the purpose of the analysis.[113] ELPC/NRDC/OEC characterize this as the Companies including "outage data from unusually severe weather events" before DA deployment and "from unusually mild weather events" after DA deployment.[114] Yet, ELPC/NRDC/OEC's witness was looking only at customer minutes interrupted ("CMI") per month and deciding on his own what weather events were "too

[107] Business Plan, p. 28. *See* Orig. Stip., p. 20.

[108] Volkmann Direct, p. 11; Business Plan, p. 3 (describing CEI Pilot in CEI territory); *id.* at 19, 20 (noting that, based on work done during the CEI Pilot, the Companies evaluated each of the 2,878 circuits in Ohio to determine the individual potential for reliability improvement, which provided data inputs for the ICE calculator).

[109] ELPC/NRDC/OEC Brief, p. 25.

[110] *See* Volkmann Direct, pp. 11, 12-13.

[111] *Id.*, pp. 12-13.

[112] *See* ELPC/NRDC/OEC Brief, pp. 26-27.

[113] Companies Brief, pp. 25-26.

[114] ELPC/NRDC/OEC Brief, p. 27.

severe" or "too mild" based solely on how high or low the CMI were. Indeed, because he focused on monthly data instead of "per event" data, he excluded April 2005 results without taking into consideration that April 2005 included two, separate major storms.[115] Mr. Volkmann does not know whether storms or events of a similar intensity occurred during the four-year study period after DA had been deployed.[116] And although he removed data related to two major storms/events that occurred in June 2015 and February 2016, he admitted that he has no idea what impact DA had during those major storms/events.[117] He cannot have reasonably deduced that the "low" CMI during these two storms/events were from favorable weather without first knowing what impact DA had during those storms/events. In comparison, the Companies' approach of averaging and comparing all events on the same circuits over a five-year base period and a four-year study period reasonably included all "per event" data and all DA results.[118]

While ELPC/NRDC/OEC insist that the CBA supporting Grid Mod I is not credible, it is ELPC/NRDC/OEC's reliance on Mr. Volkmann's testimony that is not credible. In all fairness to Mr. Volkmann, his testimony recognized that "there may be legitimate reasons why the Companies have included this data in the calculations and my analysis is incorrect."[119] At the end of the day, his recommendation was only that the Companies be "transparent" in their explanation of the CBA to Staff and stakeholders.[120] Yet Staff participated directly in the preparation of the CBA and

[115] Volkmann Direct, pp. 14-15. *See* Tr. Vol. II at 243-44 (Mr. Volkmann admitting that he did not know how many major storms occurred during the five-year base period or four-test study period because he looked only at CMI).

[116] Tr. Vol. II at 244-45 ("Do you know if any storms with a similar intensity occurred in the 2014 to 2018 study period? . . . I don't know the answer to that question.").

[117] Volkmann Direct, p. 15; Tr. Vol. II at 245-46.

[118] *See* Volkmann Direct, p. 11.

[119] *Id.*, p. 17.

[120] *Id.*, pp. 17-18.

believes it reasonable, and many other stakeholders agree.[121] Thus, opponents of the Stipulation have not shown that Grid Mod I's costs will exceed its benefits.[122] Further, none of the Opposing Intervenors have taken issue with the nominal amount of estimated TCJA savings resulting from the Stipulation, which would be realized by customers on top of the estimated net benefits of Grid Mod I.

B. The Opposing Intervenors Fail to Demonstrate that the Stipulation Does Not Benefit Customers.

STC and ELPC/NRDC/OEC claim that the Commission should follow the lead of other states and reject Grid Mod I because it lacks a smart thermostat program and, in fact, bars the use of Grid Mod I's $516 million capital investment to fund smart thermostats. But they misrepresented those recent decisions, and the overwhelming weight of the evidence is that Grid Mod I and the TCJA provisions will benefit customers. The Commission should reject their criticisms of the Grid Mod I provisions of the Stipulation as misinformed and misplaced.

1. Regulatory decisions from Virginia and Kentucky, which are relied on by STC and ELPC/NRDC/OEC, support the reasonableness of Grid Mod I.

STC points to recent decisions from Virginia and Kentucky – two states without competitive retail electric service – as support for including a smart thermostat program in Grid Mod I.[123] ELPC/NRDC/OEC rely on the same Virginia decision, claiming that it is asking the Commission here to do "exactly" what the Virginia State Corporation Commission ("VSCC") did

[121] Tr. Vol. I at 201-02; Orig. Stip., p. 10.

[122] Midway through the implementation period, the Stipulation provides for a Staff consultant conducting an independent CBA, the results of which may be incorporated into future phases of grid modernization. Supp. Stip., p. 5. Grid Mod I covers only 700,000 of the Companies approximately 2.1 million customers and 200 of the Companies' 2,878 distribution circuits. *See* Orig. Stip., pp. 14, 19; Business Plan, p. 2. Thus, if the independent CBA reveals any concerns, future deployment can be adjusted "to ensure the goals of the investments are being met." Supp. Stip., p. 5.

[123] STC Brief, pp. 3-4.

in rejecting several parts of Dominion's grid modernization plan.[124] However, these states are operating under different legal authority, and neither decision provides support for the Commission rejecting the Companies' Grid Mod I plan included in the Stipulation.

The VSCC rejected the $1.5 billion first phase of a $6 billion plan proposed by Dominion that included, among other things, AMI, automated control devices, emerging technology, and grid hardening.[125] The VSCC rejected the AMI portion of Dominion's proposal because Dominion lacked a plan to fully optimize smart metering and lacked detailed cost information.[126] Notably, the VSCC did not identify smart thermostats as one of the missing elements that should be included in Dominion's next plan.[127] Instead, among other things, the VSCC stated that an AMI plan should include detailed cost estimates and a plan for time-varying rates.[128] Because the Companies' Grid Mod I includes both of these elements, STC's and ELPC/NRDC/OEC's reliance on the VSCC's decision is misplaced.

The Kentucky decision relied on by STC also is distinguishable on several grounds, including that the electric utilities involved were unable to satisfy the statutory test of demonstrating a need for smart meters and an absence of wasteful duplication.[129] There was no need for new meters because the existing meters had remaining service lives exceeding 15 years,

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[124] ELPC/NRDC/OEC Brief, pp. 1-2, 29.

[125] *Petition of Virginia Electric and Power Co. for Approval of a Plan for Electric Distribution Grid Transformation Projects Pursuant to § 56-585-1 A 6 of the Code of Virginia*, Case No. PUR-2018-00100, Final Order, p. 5 (Jan. 17, 2019) ("Dominion Order").

[126] *Id.*, pp. 8-9.

[127] *Id.*, pp. 10-11.

[128] *Id*.

[129] *In the Matter of Electronic Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for a Certificate of Public Convenience and Necessity for Full Deployment of Advanced Metering Systems*, Kentucky Public Service Commission Case No. 2018-00005, 20218 Ky. PUC LEXIS 823, at *8-9, 11-13 (Aug. 30, 2018) ("Kentucky Order").

and "need" is not justified in Kentucky "simply because of the superiority of new technology."[130] The Kentucky utilities also refused to pass net savings to customers, failed to propose time-varying rates, and relied on an unreasonably long service life for the smart meters to manufacture a favorable cost-benefit analysis.[131] The Kentucky Public Service Commission did note that the proposal before it lacked the innovative programs to implement the functionality of advanced meters that were included in an AMI plan proposed by Duke Energy Kentucky.[132] However, those "innovative" programs were a residential peak-time rebate pilot for up to 1,000 customers, which Duke Energy Kentucky would file within six months after completion of the AMI project, and a commitment to make usage data available to customers through a web portal.[133] In comparison, the Companies will propose a time-varying rate for Standard Service Offer ("SSO") customers within six months of the Opinion and Order in these proceedings and will make usage data available to customers through a web portal and Home Area Network.[134]

Thus, both the Virginia and Kentucky decisions support approval of the Stipulation without modification.

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[130] *Id.* at *11-13.

[131] *Id.* at *16-17, 21.

[132] *Id.* at *15-16. *See* STC Brief, p. 4.

[133] *In the Matter of Application of Duke Energy Kentucky, Inc. for (1) a Certificate of Public Convenience and Necessity Authorizing the Construction of an Advanced Metering Infrastructure; (2) Request for Accounting Treatment; and (3) All Other Necessary Waivers, Approvals, and Relief,* 337 P.U.R.4th 144, 2017 Ky. PUC LEXIS 540, *9-10, 14 (May 25, 2017).

[134] Orig. Stip., pp. 16, 17-18. *See, e.g., In the Matter of Entergy Arkansas, Inc.'s Application for an Order Finding the Deployment of Advanced Metering Infrastructure to be in the Public Interest and Exemption From Certain Applicable Rules,* Ark. P.S.C. Docket No. 16-060-U, 2017 Ark. PUC LEXIS 89, *105, 159-160 (October 30, 2017) (approving AMI program that included "provision of detailed usage information via web portal [incl. Green Button functionality]; remote meter reading; remote service connect, disconnect and reconnect; more efficient and cost effective meter reading; and improved outage and distribution system management.").

2. Grid Mod I facilitates and stimulates competitive market offerings of enabling technologies and services.

That STC and ELPC/NRDC/OEC are relying on regulatory actions taken in fully regulated states is telling. More than eighty percent of the Companies' customers participate in the retail competitive market.[135] As a result, if most of the Companies' customers are to benefit from time-varying rate offers utilizing AMI data, those offers will come from competitive suppliers in the grid modernization marketplace.[136] The Stipulation recognizes this by putting the platform in place, and making the data and systems available, that customers and competitive suppliers will use to benefit from AMI and time-varying rates (which may include enabling technologies purchased directly by customers or provided by competitive suppliers).[137] The Companies will offer a time-varying rate while competitive suppliers develop their own offerings.[138]

This is consistent with the PowerForward Roadmap objective of a "marketplace that allows for innovative products and services to arise organically and be delivered seamlessly to customers by the entities of their choosing."[139] Yet, while the Roadmap speaks of competitive providers and technology companies providing innovative products and services in the marketplace, STC and ELPC/NRDC/OEC prefer to ignore the marketplace and force their preferred product on customers by regulatory fiat. The PowerForward Roadmap is clear that behind-the-meter innovation "is more

[135] Tr. Vol. I at 106.

[136] *See* PowerForward Roadmap, pp. 23-25 (describing grid modernization marketplace, with competitive suppliers providing innovative behind-the-meter products and services to customers).

[137] Orig. Stip., pp. 14-18; Tr. Vol. I at 103, 105-06. *See* PowerForward Roadmap, p. 14 ("One of the objectives of PowerForward is to reconsider the distribution grid as a platform that creates the opportunity for entities to provide innovative products and services to customers."). *See also id.*, p. 23 ("Assigning the opportunity for behind the meter customer applications to competitive forces, whether CRES providers, third-party technology or other trusted customer advisors, is consistent with traditional behind the meter limitations on regulatory jurisdiction.").

[138] Tr. Vol. I at 105-06; Orig. Stip., pp. 17-18.

[139] PowerForward Roadmap, p. 9.

likely to succeed in the competitive marketplace than in a regulated environment."[140] As the Commission found:

> Assuming utility deployment of foundational assets through an architectural construct that provides access to non-utilities, innovative products and services can then be introduced. The introduction of nonregulated capital investment would mitigate the need for economic regulation and recovery, and more equitably allocate costs to those consumers who find net value in the product or service offered.[141]

Similarly, as Company witness Fanelli testified, the aim of Grid Mod I is to "provide smart meter data through a number of forms to customers and third-party suppliers, with the expectation that that data access to more parties and the granularity of it will help facilitate and stimulate market participation in those sorts of innovative products and service offerings."[142] Consistent with the PowerForward Roadmap and Ohio regulatory policy, Grid Mod I is designed to work within the grid modernization marketplace. Further, Grid Mod I is consistent with the Commission's ESP IV Order to "undertake grid modernization initiatives that promote customer choice."[143]

3. It is not appropriate to include a smart thermostat program in Grid Mod I.

STC and ELPC/NRDC/OEC have extolled the energy efficiency and peak demand reduction ("EE/PDR") benefits of a smart thermostat program, but most benefits claimed by STC and ELPC/NRDC/OEC for smart thermostats are wholly unrelated to grid modernization. STC offered evidence that smart thermostats provide savings of $131 - $145 annually, which is not dependent on time-varying pricing or any grid modernization initiative.[144] Similarly,

[140] *Id.*, p. 23.

[141] *Id.*

[142] Tr. Vol. I at 103.

[143] ESP IV Order, p. 22.

[144] STC Brief, pp. 10, 14.

ELPC/NRDC/OEC note that STC's two members calculated 15.2% cooling savings to Ohio customers from the use of their Ecobee and Nest smart thermostats, which is unrelated to grid modernization or time-varying rates.[145] STC witness Dzubay testified that nearly all smart thermostat features do not require grid modernization in order to provide any of their benefits to customers.[146] Thus, as STC notes, the Companies have included smart thermostat programs in their EE/PDR Portfolio Plan because they offer EE/PDR benefits on a stand-alone basis, without AMI and time-varying rates.[147] None of this is a convincing argument for rejecting a Stipulation that seeks approval of grid modernization investments.

The only tie between grid modernization and smart thermostats made by STC and ELPC/NRDC/OEC is that, once AMI is deployed and customers have subscribed to time-varying rates, smart thermostats can be programmed to pre-cool a home before peak pricing starts.[148] However, there is no evidence in the record demonstrating that this single benefit justifies including a $30 million smart thermostat program in Grid Mod I. Instead, what the evidence supports is approving Grid Mod I as proposed so that the Companies can deploy the technology platform that will facilitate the use of enabling devices such as smart thermostats within the grid modernization marketplace. Indeed, approval of Grid Mod I will start a review process in the Grid Mod collaborative of competitive time-varying rate options that may leverage smart thermostats

[145] ELPC/NRDC/OEC Brief, p. 33. ELPC/NRDC/OEC do not address the problematic questions surrounding data privacy raised by the testimony of STC's witness. *See* Tr. Vol. II at 290 (STC witness confirming that, as an Ecobee employee, she can access the data from all Ecobee smart thermostats in the Companies' service territories); *id*. at 304-05 (STC witness unaware of extent of data protections for customers).

[146] Tr. Vol. II at 285. *See also id.* at 247.

[147] STC Brief, p. 10. The Companies offer smart thermostat programs in their current EE/PDR Portfolio Plan, Case No. 16-743-EL-POR.

[148] STC Brief, p. 11; Dzubay Direct, pp. 14-15; Tr. Vol. II at 283-84 (Ecobee can program smart thermostat to allow time-of-use optimization). ELPC/NRDC/OEC's brief also claims that "smart thermostats give the utility the ability to control customer usage as peak time by turning back hundreds of thousands of customers' usage by a degree or two making the grid more reliable and resilient." ELPC/NRDC/OEC Brief, p. 35. This claim is not supported by the record.

and other devices.[149] If STC members want to boost deployment of smart thermostats through manufacturer marketing campaigns that support Ohio's competitive marketplace,[150] they certainly can do so. If smart thermostats have all the benefits claimed by STC and ELPC/NRDC/OEC, the market will provide them organically as intended in the PowerForward Roadmap.

4. A $30 million smart thermostat program is not necessary to achieve the AMI benefits included in the CBA.

ELPC/NRDC/OEC mistakenly claim that a smart thermostat program is needed to realize the AMI benefits in the CBA.[151] According to ELPC/NRDC/OEC, smart thermostats are needed to achieve the level of benefits included in the CBA for two of the five types of benefits expected to result from AMI deployment – benefits from participating in time-varying rate programs and savings from customers having a better understanding of energy management.[152] Indeed, ELPC/NRDC/OEC make this claim despite knowing that these projected benefits are based, in part, on the CEI Pilot, which did not include smart thermostats.[153] In fact, as Company witness Fanelli testified, the Companies used the CEI Pilot results "as part of the basis for our estimates but they were used to inform our best judgment on what we think a reasonable estimate would be for these particular benefits."[154] In other words, the estimated benefits included in the CBA reflect the terms and conditions of Grid Mod I as proposed in the Stipulation.

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[149] Orig. Stip., pp. 17-18.

[150] *See* STC Brief, p. 20. Ironically, while STC suggests customers could benefit from manufacturer marketing campaigns promoting smart thermostats, STC also complains that the Companies are relying on manufacturers to persuade customers to buy smart thermostats. *Compare* STC Brief, pp. 4-5 *to* STC Brief, p. 20. In actuality, the Companies are providing smart thermostat incentives through their EE/PDR Portfolio Plan and facilitating the adoption of enabling technologies via customer choice and market action.

[151] ELPC/NRDC/OEC Brief, pp. 28-32.

[152] *Id.*, pp. 29-32. *See* Tr. Vol. I at 44.

[153] ELPC/NRDC/OEC Brief, pp. 30. *See* Tr. Vol. I at 45, 46.

[154] Tr. Vol. I at 46.

As an example, the estimated benefits from participating in time-varying rate programs do not commence [begin confidential] [redacted][155][end confidential] And in year four, the assumed participation percentage is [begin confidential] [redacted][156][end confidential] This allows not only for the Companies' time-varying rate offer required under the Stipulation to go into effect, but also for competitive provider offerings to take root and begin flourishing as contemplated by the Stipulation and described in the testimony of IGS witness Childers.[157] No party has shown that the estimated benefits from time-varying rates that are included in the CBA are unreasonable.

Similarly, the projected benefits from customer energy management are conservatively based on the CEI Pilot and other factors, and do not depend on deployment of smart thermostats.[158] A customer does not have to participate in a time-varying rate to achieve customer energy management benefits.[159] In the CEI Pilot, some customers received programmable controllable thermostats ("PCTs") and others received in-home displays.[160] Based on this experience, the Companies projected customer energy management savings that should result from Grid Mod I, including a customer portal and Home Area Network, while also facilitating the use of enabling devices that would connect through the Home Area Network.[161]

[155] ELPC Ex. 23-C (see first and second pages of tab "Benefit #1 – Time Varying Rates (TVR)").

[156] *Id.*

[157] Direct Testimony of Brandon Childers ("Childers Direct"), pp. 4-9.

[158] *See* Tr. Vol. I at 46, 67-68, 102-04.

[159] *Id.* at 68.

[160] *Id.* at 49.

[161] *See id.* at 46-48, 49, 51, 102-04.

ELPC/NRDC/OEC suggest that these projected savings from customer energy management will materialize only if the Companies offer customers a time-varying rate and give them a free in-home display.[162] But customers will have time-varying rates, and most customers already have the equivalent of an in-home display – a computer or smart phone to view the customer portal.[163] ELPC/NRDC/OEC and STC also complain that the Companies have no budget or plan for any deployment of enabling technologies as part of Grid Mod. I.[164] Yet Company witness Fanelli explained that the Companies are enabling the use of those devices through Grid Mod I investments and through customers having the option to connect enabling devices through the Home Area Network.[165] Incredibly, ELPC/NRDC/OEC pretend that no customers will have smart thermostats unless the Companies pay for them out of the Grid Mod I budget.[166] This is absurd and contrary to the record.[167] While ELPC/NRDC/OEC want the Commission to compel the Companies to pay for everything, Grid Mod I properly depends on a mix of efficient regulatory initiatives and market forces to benefit customers and achieve the Commission's objectives in PowerForward and the Companies' ESP IV case. Thus, the Commission should reject their attempts to expand the cost of the Stipulation by some $30 million or more.

[162] ELPC/NRDC/OEC Brief, p. 31.

[163] *See* Orig. Stip., pp. 16-18.

[164] ELPC/NRDC/OEC Brief, p. 31; STC Brief, p. 4.

[165] Tr. Vol. I at 51.

[166] ELPC/NRDC/OEC Brief, p. 31. ELPC/NRDC/OEC also assert that customers cannot lower their cooling load in the afternoon when they are not at home unless they have a smart thermostat, but this untrue. Customers can use programmable thermostats to pre-set a higher temperature during the afternoon, or they can use a WiFi-enabled programmable thermostat to control their heating and cooling remotely through a computer or on their phone. Tr. Vol. II at 283.

[167] *See*, *e.g.*, Tr. Vol. I at 211 (Staff witness Schaefer describing the Companies' current EE/PDR Portfolio Plan with over 60,000 smart thermostats through two different programs); Tr. Vol. II at 290 (STC witness Dzubay confirming that smart thermostats already are in use in the Companies' service territories); Childers Direct, p. 6 (describing demand management solutions, including smart thermostats and smart appliances, that competitive providers can provide to customers once wholesale market settlement provisions in Stipulation are implemented).

C. The Stipulation Reasonably Prohibits the Use of Capital Investment for Distributed Energy Resources on the Customer Side of the Meter.

STC complains that a sentence in Section V.C.b. of the Stipulation is contrary to the public interest.[168] The sentence at issue states: "None of the capital costs of up to $516 million for Grid Mod I assets described in the Original Stipulation may be used to fund Distributed Energy Resources ("DER") services located on the customer side of the meter."[169] Because this provision bars the use of Grid Mod I capital investment for smart thermostat rebates, STC argues that it conflicts with the PowerForward Roadmap and other provisions of the Stipulation.[170] STC is mistaken.

The Signatory Parties have agreed that the Companies will make grid modernization investments that include AMI, a Meter Data Management System with associated systems and processes needed to enable advanced data access, DA, IVVC, and an ADMS.[171] The Companies will be authorized to recover their actual capital costs up to $516 million for these Grid Mod I assets.[172] This $516 million in capital spend is based on the projects required by the Stipulation, with available dollars already fully committed, to wit: 700,000 advanced meters and associated systems and processes, DA on at least 200 circuits, IVVC on at least 202 circuits, an ADMS, and other related grid modernization distribution system upgrades.[173] Although these capital investments necessarily would not include customer-owned, customer-meter-side devices, the

[168] STC Brief, pp. 14-17.

[169] Supp. Stip., pp. 2-3.

[170] STC Brief, pp. 14-17. *See* Tr. Vol. I at 82-83 (reference to DER includes customer-owned enabling technologies and would prevent use of Grid Mod I spend for rebates or incentives for customer-owned enabling technologies).

[171] Orig. Stip., p. 10.

[172] *Id*.

[173] *See* Supp. Stip., p. 7 (Platform cost and AMI-related distribution expenditures cost); DPM Plan, pp. 2-8 (Platform and ADMS work and ADMS cost). *See also* ELPC Ex. 25-C ("Total Capital Cost Assumptions – ELPC Set 2-RPD-003 Attachment 10 Confidential").

Stipulation makes clear that none of the $516 million in capital costs may be used to fund DER services located on the customer side of the meter.[174]

STC's argument fails because the Companies' $516 million capital investment in Grid Mod I will benefit customers and is in the public interest.[175] Those dollars are committed to specific categories of projects, all of which will further the goals of the PowerForward Roadmap and are consistent with the Commission's Order in ESP IV. The fact that Grid Mod I dollars will not be spent on other projects is of no consequence.[176] Plus, STC has not demonstrated that using a portion of the $516 million capital investment for its preferred rebate program in Grid Mod I, to the potential detriment of other capital investment, will benefit customers and be in the public interest. If, as STC proposes, $30 million of the already-committed capital investment is diverted to pay for smart thermostat rebates, will the Companies stay within budget by not deploying tens of thousands of advanced meters or, perhaps, foregoing ADMS? STC does not explain how customers would benefit in this scenario. Thus, STC is incorrect that Section V.C.b. of the Stipulation is contrary to the public interest.

STC also is mistaken that Section V.C.b. of the Stipulation conflicts with one of the Companies' performance metrics, in Attachment C of the Stipulation, for "Enabling Technologies."[177] This metric tracks "rebates or incentives available for enabling technologies, e.g., smart thermostats; number of devices provided to each customer class, broken out by

[174] Supp. Stip., pp. 2-3.

[175] Companies Brief, pp. 9-27.

[176] STC's reliance on the Roadmap's reference to an optional rebate program for enabling technologies that can be paired with time-varying rates also is of no consequence. *See* STC Brief, p. 31. The Stipulation addresses this by providing, first, that the Companies will work with the Grid Mod collaborative and, second, will then propose a time-varying rate for nonshopping customers that should leverage enabling devices. Tr. Vol. I at 86.

[177] STC Brief, pp. 16-17.

technology."[178] As stated in the Stipulation, these metrics are intended to "measure the status of deployment *and related impacts* from grid modernization investments."[179] Although the Companies will not be using Grid Mod I dollars directly for smart thermostat rebates or incentives, the metric will track the impact of Grid Mod I on enabling technologies, which include impacts from time-varying rates offered by the Companies or competitive suppliers.[180] As such, consistent with the PowerForward Roadmap, this metric will inform the Companies and Staff regarding the progress of the grid modernization marketplace in enabling innovative technologies on the customer side of the meter.[181]

D. The Costs to be Recovered Through Rider AMI Are Not Duplicative of the Companies' Distribution Modernization Rider ("Rider DMR").

OMAEG and Kroger suggest that Rider AMI charges may not be just and reasonable because the Companies have not shown that these charges are not duplicative of Rider DMR.[182] As an initial matter, OMAEG's and Kroger's arguments are misplaced as Rider DMR recovery is not part of the Stipulation. Nonetheless, while both riders are related to grid modernization, this does not mean, *ipso facto*, that they double-recover grid modernization costs. In fact, each of these riders has a separate and distinct purpose as authorized by the Commission. Rider DMR provides credit support to the Companies in accessing capital markets in order to fund grid modernization investments.[183] Rider AMI, on the other hand, is approved by the Commission as the mechanism

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[178] Orig. Stip., Attachment C, pp. 2-3.

[179] Orig. Stip., p. 22 (emphasis added).

[180] Tr. Vol. I at 110-12. While the metrics for time-of-use offerings are restricted to SSO customers, the metric for enabling technologies is not. *Id.* at 111. *See* Orig. Stip., Attachment C, pp. 2-3.

[181] *See* PowerForward Roadmap, p. 23.

[182] OMAEG Brief, pp. 16-17; Kroger Brief, pp. 13-18.

[183] *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, Fifth Entry on Rehearing, pp. 90-91 (Oct. 12, 2016) ("ESP IV Fifth Entry on Rehearing").

to recover all costs associated with grid modernization investments, including a return of and on these investments.[184] Notably, however, the credit support provided by Rider DMR allows the Companies access to the necessary capital needed to make grid modernization investments at a more reasonable price than otherwise would occur, which should reduce the costs that will need to be collected under Rider AMI.

E. The Allocation of Tax Credits to Customers Is Reasonable.

OMAEG and Kroger argue that the Stipulation's allocation of tax credits to rate schedules of the Companies unfairly advantages residential customers.[185] Yet neither party has shown that the allocation in the Stipulation is unreasonable. OMAEG's argument is that the allocation in the Original Stipulation was reasonable, which makes the allocation in the Supplemental Stipulation unreasonable.[186] But this illogically assumes only one rate design can be reasonable. In fact, both allocations represent reasonable approaches to returning tax credits to customers, as confirmed by the Signatory Parties to the Original Stipulation and the Supplemental Stipulation. Notably, although OMAEG and Kroger complain that the Supplemental Stipulation reduced the amount of tax credits commercial and industrial customers would receive under the Original Stipulation, they elected not to be signatories to the Original Stipulation. Instead, the representatives of commercial and industrial customers who were Signatory Parties to the Original Stipulation consented, by also signing the Supplemental Stipulation, to the allocation of tax credits that is before the Commission for approval.

[184] ESP IV Order, pp. 22-23.

[185] OMAEG Brief, pp. 17-19; Kroger Brief, pp. 20-21. *See* Supp. Stip., p. 2 and Attachment E.

[186] OMAEG Brief, pp. 18-19.

OMAEG and Kroger baldly assert that provisions that "entice" parties to join a stipulation are "strongly disfavored" by the Commission.[187] To support this proposition, these parties cite *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Ultimate Construction and Operation of an Integrated Gasification Combined Cycle Electric Generation Facility*, Case No. 05-376-EL-UNC, Order on Remand (Feb. 11, 2015) ("AEP Ohio Construction Case"). That case hardly stands for the broad proposition asserted by OMAEG and Kroger. In that matter, the signatory parties stipulated to a process to refund funds due to customers.[188] Part of that process included a structure by which AEP Ohio, for the sake of reducing "administrative complexity," paid large sums directly to certain of the signatory parties consisting of groups of customers, and those signatory parties, in turn, agreed to distribute the entirety of the funds received to their members.[189] It was *this* structure – which directed to *intervenors* "funds to be refunded to *ratepayers*" – with which the Commission took issue, not the mere fact that signatory parties received a certain amount of funds.[190] Here, there is no such process. Unlike in the *AEP Ohio Construction Case*, the Stipulation does not redirect funds from customers to Signatory Parties. Instead, a broad group of Signatory Parties representing all customer classes has agreed on the allocation of tax credits among those classes.

The Commission's role here is to determine whether the Stipulation satisfies the three review criteria, not whether an earlier settlement would have been more favorable to specific parties in one respect. To prevail on this point, OMAEG and Kroger would have had to provide

[187] OMAEG Brief, p. 19; Kroger Brief, p. 20.
[188] AEP Ohio Construction Case, pp. 7-8.
[189] *Id.*
[190] *Id.*, pp. 11-12 (emphasis added).

probative expert testimony that the rate design in the Stipulation is unreasonable, which they elected not to do. Thus, the Commission should reject their criticism of the tax credit allocation.

F. The Stipulation's Time-Varying Rate Provisions Are Reasonable.

STC contends that the Companies should not be permitted to withdraw their time-varying rate offering once it is determined that the grid modernization marketplace provides sufficient offers.[191] However, the Companies' time-varying rate offering is simply an interim measure while the competitive marketplace develops its own products.[192] Once the Commission determines that competitive providers are offering sufficient products to customers, there will be no further need for the Companies' time-varying rate offering. This process supports competitive market development and thereby benefits customers.

Under the Stipulation, the Companies will meet with the Grid Mod collaborative group to discuss time-varying rate offerings that they will propose and expectations for time-varying rate offers by competitive providers to retail customers.[193] Based on this consultation, the Companies will propose for Commission approval a time-varying rate offering, with costs recovered through a bypassable charge.[194] The Companies also will submit a plan to Staff detailing the time-varying rate options the Companies reasonably believe competitive providers will offer to retail customers.[195] The Companies also will work with competitive suppliers to provide the data needed so that the suppliers can offer time-of-use products to customers once those customers have

[191] STC Brief, pp. 21-27.

[192] Tr. Vol. I at 105.

[193] Orig. Stip., pp. 17, 18.

[194] *Id*., pp. 17-18.

[195] *Id*., pp. 17, 18.

advanced meters.[196] Once customers have access to supplier-offered time-varying rate products, the Companies may apply to the Commission to withdraw their time-varying rate offering.[197]

STC is wrong in suggesting that withdrawal of the Companies' offering lacks a reasonable basis. Time-varying rate products are, of course, generation service offers, not distribution service offers, and the design of those products will be effectively and efficiently determined by the grid modernization marketplace. However, the Stipulation recognizes that development of the marketplace may take time, which is why the Signatory Parties are recommending that the Companies request Commission approval of an interim time-varying rate offering. Once competitive providers have the data needed to offer these products to customers, which the Stipulation ensures, there will be no further need for that interim offering.[198] Indeed, the Companies' commitment to withdraw the interim offering with Commission approval incentivizes competitive providers to roll-out their own products as quickly as possible, to the benefit of customers. Additionally, once competitive products are available, the less than twenty percent of the Companies' customers remaining on SSO service will not be responsible for the costs associated with the Companies' time-varying rate offering via a bypassable charge.[199] Instead, the

[196] *Id*., p. 17.

[197] *Id*., p. 18; Tr. Vol. I at 105.

[198] *See* Orig. Stip., pp. 14-17. *See In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market*, Case No. 12-3151-EL-COI, Finding and Order, p. 38 (Mar. 26, 2014) ("the EDUs should offer pilot time-differentiated rates only for so long as it takes for the market to develop and for a reasonable number of CRES providers to begin offering this service in each service territory."). *See also In the Matter of the Application of Ohio Power Company to Initiate Phase 2 of Its GridSMART Project And to Establish the GridSMART Phase 2 Rider*, Case No. 13-1939-EL-RDR, Opinion and Order, pp. 11-12, 31-32 (Feb. 1, 2017) (approving AEP Ohio's Time-of-Use Transition Plan, under which AEP will withdraw all TOU offerings once competitive market is sufficiently developed).

[199] *See* Orig. Stip., p. 18; Tr. Vol. I at 106.

grid modernization marketplace will "more equitably allocate costs to those consumers who find net value in the product or service offered."[200]

STC also wrongly suggests that the Companies are obligated by the PowerForward Roadmap to make a time-varying rate offering available to SSO customers forever.[201] But the Roadmap is just that – high-level guidelines that, in this case, "encourage" electric distribution utilities to propose time-of-use rate design for SSO customers.[202] This encouragement must be viewed in the over-arching context of the Roadmap, which is "an initial framework for the grid modernization marketplace."[203] Under that framework, electric distribution utilities provide the grid modernization platform, while the marketplace is the source of innovative products and services.[204] To the extent EDUs participate in the market, it is for a limited period to advance a specific policy objective.[205] That is exactly the intent of the Stipulation's inclusion of an interim time-varying rate offering.

STC's criticism of the triggers for the Companies applying to the Commission to withdraw their time-varying rate offering is easily addressed.[206] The Stipulation requires Commission approval of the Companies' application to withdraw this tariff offering. While STC disagrees with Company witness Fanelli's testimony that participants in the Grid Mod collaborative will have an

[200] PowerForward Roadmap, p. 23. STC suggests that unregulated competitive offerings are a bad thing and that competitive providers might harm customers by withdrawing products from the marketplace, STC Brief, pp. 23-24, 25, but this ignores that Ohio has elected to be a restructured state with a competitive retail marketplace. *See* PowerForward Roadmap, p. 23.

[201] STC Brief, pp. 22-23.

[202] PowerForward Roadmap, p. 31. *See id.*, p. 5, fn.1 ("The Commission issues this policy document to provide guidance to interested stakeholders regarding the future of grid modernization in this state. Although this document represents the Commission's vision for grid modernization and outlines a process for moving forward, nothing in this policy document should be construed as binding upon the Commission in any future case before the Commission.").

[203] *Id.*, p. 24.

[204] *Id.*, pp. 9, 23.

[205] *Id.*, p. 23.

[206] *See* STC Brief, pp. 24-25.

opportunity to provide their input on the application before it is filed,[207] STC cannot deny that a Commission process will afford interested parties an opportunity to comment on the application after it is filed. Once the application is filed, the Commission can consider the state of the marketplace at that time. Of course, if there are competitive products available, SSO customers would have access to those products and would not be harmed by the Commission's approval of the Companies' withdrawal of their time-varying rate offering.

G. The Companies' Agreement to Commence Discussions with Signatory Parties No Later Than June 1, 2020 Regarding the Development of Grid Mod II Is Reasonable.

STC also complains that Grid Mod II discussions should not be limited to "interested Signatory Parties."[208] STC misreads this provision. The commitment in the Stipulation is that, no later than June 1, 2020, the Companies and Staff will "initiate discussions with any interested Signatory Parties regarding the deployment of Grid Mod II, including reliability developments arising from Grid Mod I deployment."[209] This provision commits the Companies and Staff to start discussions with the other Signatory Parties by a date certain. Commencing discussions with the Signatory Parties is obviously a good place to start. It does not prevent the Companies and Staff from discussing Grid Mod II with any other interested party, either before or after June 1, 2020. STC's proposed modification to the Stipulation is problematic, as it would require the Companies and Staff to initiate discussions with any interested party by a specific date without defining who those parties are. For example, since STC is an *ad hoc* coalition that appears to exist solely to

[207] STC Brief, pp. 25-26. Mr. Fanelli's reading is certainly reasonable, given that the Companies will consult early on with the Grid Mod collaborative concerning competitive time-of-use products and will "update stakeholders on the status of the project throughout implementation of the Grid Mod plans and to provide for customer input and advice." Orig. Stip., pp. 14, 17-18. Thus, it is unnecessary to modify the Stipulation, as requested by STC, to require the Companies to consult with the Grid Mod collaborative before filing the application. *See* STC Brief, p. 27.

[208] STC Brief, pp. 29-30.

[209] Orig. Stip., p. 24.

provide testimony in these proceedings, there is no guarantee that it will exist by June 1, 2020.[210] Moreover, STC overlooks the independent Commission audit required by the Stipulation prior to the commencement of Grid Mod II,[211] the midterm review of Grid Mod I,[212] and the Grid Mod Collaborative,[213] all of which would provide interested parties an additional opportunity to discuss Grid Mod II. Regardless, if STC is still operational next year, the Stipulation does not prevent it from contacting Staff and the Companies with its views on Grid Mod II.

H. The Changes to the Rider AMI Tariff Language Included in the Stipulation Are Reasonable.

OMAEG criticizes the Companies' reconciliation language used in its riders for allegedly not protecting customers.[214] Kroger echoes this complaint.[215] However, this language is included in the Supplemental Stipulation simply to add the case numbers of these proceedings to the Commission-approved reconciliation language for Rider AMI.[216] OMAEG and Kroger have not shown that adding these case numbers to the existing Rider AMI language is unreasonable.

The Companies applied to the Commission on March 19, 2018 for approval of this reconciliation language, and Staff recommended approval.[217] The Commission approved the reconciliation language, finding "that, in accordance with Staff's recommendations, the Companies' revised proposed tariffs contain the appropriate reconciliatory language, are consistent

[210] *See* Dzubay Direct, p. 1.

[211] Supp. Stip., pp. 5-6.

[212] *Id.*

[213] Orig. Stip., p. 14.

[214] OMAEG Brief, pp. 10-15.

[215] Kroger Brief, pp. 22-24.

[216] *See* Supp. Stip., p. 4.

[217] *In the Matter of The Review of the Advanced Metering Infrastructure Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company,* Case No. 17-2276-EL-RDR, Finding and Order, ¶¶ 8-9 (Mar. 28, 2018) ("Rider AMI Order").

with the Commission's decisions in FirstEnergy's ESP proceedings, do not appear to be unjust or unreasonable, and should be approved and become effective no earlier than April 1, 2018."[218] The only change made in the Stipulation is to add the four case numbers of these proceedings.[219] Because the Stipulation includes specific audit provisions for Rider AMI,[220] adding these case numbers is reasonable.

OMAEG suggests that the Commission should modify this reconciliation language to make explicit that refunds can result from orders of the Ohio Supreme Court.[221] OCC made the same argument in Case No. 17-2276-EL-RDR, which the Commission dismissed in approving Rider AMI's current reconciliation language.[222] Further modification of the reconciliation language is unnecessary because the Ohio Supreme Court typically does not order refunds but, instead, would remand an appeal to the Commission for further proceedings consistent with its legal decision. If a Commission audit of Rider AMI in accordance with Commission orders in any of the listed proceedings were appealed to the Ohio Supreme Court, and the Court identified errors in the audit and remanded to the Commission for further proceedings, the reconciliation language would apply.[223] In such a case, any reconciliation ordered by the Commission would be "based solely upon the results of audits ordered by the Commission."

OMAEG also takes issue with the word "solely" in the rider language.[224] The rider provides that it is subject to reconciliation based solely upon the results of audits ordered by the

[218] *Id.*, ¶ 13.

[219] Supp. Stip., p. 4.

[220] *See* Orig. Stip., pp. 12-13; Supp. Stip., p. 3.

[221] OMAEG Brief, p. 10.

[222] Rider AMI Order, ¶¶ 11, 14.

[223] Tr. Vol. I at 128-29.

[224] OMAEG Brief, p. 12. *See also* Kroger Brief, p. 23.

Commission in accordance with orders issued in certain proceedings (i.e., proceedings in which audit procedures have been approved by the Commission). The proceedings listed are the only proceedings that establish Rider AMI audit procedures, which is why the rider says "solely." Because OMAEG has not shown how Rider AMI would be subject to audits ordered by the Commission in accordance with any other proceedings, the reconciliation language is reasonable.

OMAEG and Kroger also complain that an audit could be ordered in a proceeding that is not one of the proceedings listed in the rider, which could prevent reconciliation.[225] They misread the language. An audit is likely to occur under a separate case number, which is typical Commission practice. This would not prevent a reconciliation, provided the Commission's audit in that case is performed in accordance with the Commission's orders in the listed proceedings.[226]

OMAEG and Kroger have not shown that the Rider AMI reconciliation language set out in the Stipulation is unreasonable.

I. The Grid Mod Collaborative Provision Is Reasonable.

STC asks the Commission to order the Companies to include STC as a participant in the Grid Mod collaborative group because the Stipulation identifies OCC and NOPEC as participants.[227] As stated in the Stipulation, any stakeholder may participate.[228] The Stipulation's reference to OCC and NOPEC is "without limitation on the participation of other stakeholders."[229] As Company witness Fanelli very plainly stated, "if there's a party who is interested in

[225] OMAEG Brief, pp. 12-13: Kroger Brief, p. 23.

[226] *See* Tr. Vol. I at 125-26.

[227] STC Brief, pp. 27-29.

[228] Orig. Stip., p. 14.

[229] Supp. Stip., p. 4. This would include the Companies, Staff and other Signatory Parties, none of whom require a special Commission order to participate in the Grid Mod collaborative.

participating in the collaborative discussions, they can do so."[230] The term "stakeholder" was used to make clear that participation is not limited to a party to these proceedings.[231] Thus, assuming STC is interested (which is not a choice the Companies can make), STC may participate in the Grid Mod collaborative group. The language of the Stipulation is clear and requires no further Commission modification.

III. THE STIPULATION DOES NOT VIOLATE ANY IMPORTANT REGULATORY PRINCIPLE OR PRACTICE

No party claims that the tax credits and related TCJA provisions included in the Stipulation violate any regulatory principle or practice. ELPC/NRDC/OEC, OMAEG and Kroger argue that Grid Mod I charges violate R.C. 4928.02(A), (E) and (N), but these arguments are based on the same "customer benefit" arguments addressed and rebutted above. Remarkably, these opponents of Grid Mod I ignore the Commission's long-standing support for grid modernization. For example, the Commission previously found in the Companies' ESP IV proceeding that grid modernization advances several policies of the state of Ohio: "we note that Ohio policy supports innovation through the implementation of smart grid programs and advanced metering infrastructure. R.C. 4928.02(D). Further, modernizing the grid in the Companies' service territories is also consistent with efforts to make the grid more reliable and cost effective for consumers. Further, advanced metering associated with grid modernization will promote competition by facilitating the offering by competitive suppliers of innovative products to meet customers' needs."[232] Additionally, in the PowerForward Roadmap, which itself represents a detailed policy paper in support of grid modernization, the Commission specifically called out

[230] Tr. Vol. I at 118.

[231] *See id.* at 119.

[232] ESP IV Order, pp. 95-96.

R.C. 4928.02(D) as explicitly supporting grid modernization.[233] The few remaining opponents of the Stipulation's grid modernization provisions simply cannot show that they are contrary to state policy.

A. The Stipulation Does Not Violate R.C. 4928.02(A).

ELPC/NRDC/OEC summarily allege that the Stipulation does not "[e]nsure the availability to customers of . . . reasonably priced electric service" because Grid Mod I is based on "incomplete plans and unjustified savings projections."[234] Of course, the actual policy ELPC/NRDC/OEC are referencing, without the ellipsis, is to "[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service." As the Commission has found, grid modernization benefits customers by making the grid *both* more reliable *and* more cost effective for customers.[235] As discussed above, ELPC/NRDC/OEC have not shown that Grid Mod I's costs will exceed its benefits, nor have they shown that Grid Mod I is based on incomplete plans. Further, ELPC/NRDC/OEC fail to acknowledge the benefits of the TCJA provisions of the Stipulation, which are supportive of R.C. 4928.02(A) by ensuring reasonably priced retail electric service.

OMAEG and Kroger contend that the Stipulation violates R.C. 4928.02(A) because it duplicates Rider DMR costs, unfairly shifts tax credits to residential customers, and has "loopholes" in its Rider AMI reconciliation language.[236] These are simply reiterations of the baseless claims rebutted above, and they equally fail as grounds for violation of state policy. The Commission can and should easily dispose of these parties' arguments.

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[233] PowerForward Roadmap, p. 31.

[234] ELPC/NRDC/OEC Brief, p. 36.

[235] ESP IV Order, p. 96.

[236] OMAEG Brief, pp. 20-22; Kroger Brief, pp. 25-26.

B. The Stipulation Does Not Violate R.C. 4928.02(E).

OMAEG and Kroger contend that the Stipulation violates R.C. 4928.02(E),[237] which provides that it is the policy of the state to "[e]ncourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote both effective customer choice of retail electric service and the development of performance standards and targets for service quality for all consumers, including annual achievement reports written in plain language." OMAEG and Kroger focus solely on the words "cost effective" in this section and somehow relate this to Rider DMR.[238] But the policy relates to cost-effective access to information, which the Stipulation provides in spades. For example, Section V.C.d.iii. of the Stipulation addresses data enhancements that will promote customer choice and specifies that the Companies will not charge fees "to customers or suppliers for individual access to or requests for data provided via EDI, customer portal, or supplier portal (including data accessed through API)."[239] And with respect to the development of performance standards, the Stipulation also includes commitments to file applications to revise the Companies' reliability performance standards.[240] Thus, the Stipulation actually advances state policy as stated in R.C. 4928.02(E).

C. The Stipulation Does Not Violate R.C. 4928.02(N).

OMAEG also summarily alleges that the Stipulation violates R.C. 4928.02(N) because it duplicates Rider DMR costs, includes "exorbitant" rates, and unfairly shifts tax credits to

[237] OMAEG Brief, pp. 22-23; Kroger Brief, p. 27.

[238] *Id.*

[239] Orig. Stip., pp. 15-16; Supp. Stip., p. 4.

[240] Orig. Stip., p. 21.

residential customers.[241] Again, these are simply reiterations of the baseless claims rebutted above and are not proof that the Stipulation will interfere with the state's effectiveness in the global economy. To the contrary, by providing hundreds of millions of dollars in tax credits to customers and by making the grid more reliable and resilient, the Stipulation facilitates the state's effectiveness in the global economy.[242]

IV. THE COMMISSION SHOULD REJECT OPPOSING INTERVENORS' CLAIMS OF ALLEGED PROCEDURAL DEFICIENCIES.

A. The Attorney Examiners Did Not Err in Granting Consolidation of the Grid Modernization Cases and the TCJA Tax Refund Case.

OMAEG and Kroger criticize the Attorney Examiners for granting consolidation for the purpose of considering the Stipulation reached by a multitude of parties representing diverse interests. Specifically, Kroger contends these matters never should have been consolidated because the "cases began in three different years and involve completely unrelated subjects."[243] Similarly, OMAEG argues that "consolidation of these matters was inappropriate given the completely divergent subject matters at issue."[244] What both Kroger and OMAEG overlook is the longstanding precedent, repeatedly affirmed by the Ohio Supreme Court, that the Commission is vested with broad discretion to manage its dockets, including the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay, and eliminate unnecessary duplication of effort.[245]

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[241] OMAEG Brief, p. 23.

[242] *See*, *generally*, Fanelli Supp., pp. 6-7.

[243] Kroger Brief, p. 2.

[244] OMAEG Brief, p. 6.

[245] *See, e.g., Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 379, 384 N.E.2d 264 (1978); *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559, 560, 433 N.E.2d 212 (1982); *In re Columbus S. Power Co.*, 129 Ohio St.3d 46, 2011-Ohio-2383, 950 N.E.2d 164, ¶ 34 (expressing deference to the Commission concerning "docket-

Kroger and OMAEG posit that for consolidation to be granted, the cases being consolidated must all share the same common issues.[246] Overlooking the fact that the cases share a common stipulation they contend that, since the four underlying cases resolved by the Stipulation do not share any common issues (again, according to Kroger's and OMAEG's mistaken belief), the Attorney Examiners erred in granting consolidation.[247] Kroger and OMAEG are mistaken on both points. First, the consolidation of these four proceedings was reasonable because the Stipulation filed in each of the proceedings is a package that, if adopted by the Commission, will resolve the issues in all four proceedings.[248] In other words, the reasonableness of the settlement for the Companies and their customers is the common issue justifying consolidation of the proceedings here. As explained in a recent proceeding involving a stipulation that resolved a number of diverse issues: "The Stipulation purports to be a package that simultaneously resolves the issues in all four cases. It is logical, then, for the Commission to consider all the cases together and thus consolidate them."[249]

Nevertheless, assuming arguendo that none of the four proceedings resolved by the Stipulation share any commonality, the Commission does not *require*, as a condition precedent to granting consolidation, that cases share the same common facts/issues. By way of example, the Commission recently approved a stipulation and affirmed the consolidation of ***ten*** different cases involving an electric security plan, a base distribution rate case, supplier issues, reliability

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management decision[s]"); *see also In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider, et al.*, Case No. 14-1693-EL-RDR, *et al.*, Opinion and Order, p. 10 (Mar. 31, 2016); *AEP Ohio PPA Rider Case*, Opinion and Order, ¶ 35 (Nov. 3, 2016) (affirming "the Commission's broad discretion to manage its dockets").

[246] OMAEG Brief, p. 6; Kroger Brief, p. 2.

[247] *Id*.

[248] *See* Orig. Stip., pp. 7, 28-29; Supp. Stip., p. 9.

[249] *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates* ("*Duke Global Stipulation Case*"), Case No. 17-32-EL-AIR, *et al*., 2018 Ohio PUC LEXIS 525, Entry, ¶ 8 (May 9, 2018).

standards, the provision of generation and transmission service, a price stabilization rider, TCJA-refunds, and grid modernization.[250] Importantly, none of the ten cases resolved by that stipulation shared the same common facts/law. On the contrary, the ten cases underlying that stipulation involved dense subjects that are often vigorously and independently contested in protracted Commission proceedings. As the Commission observed: "Each of these cases, in isolation, is extremely intricate. Undoubtedly, distribution rate cases, standard service offers, and, recently, riders involving power purchase agreements are some of the most heavily litigated cases that appear before the Commission."[251] Nonetheless, the Commission concluded that "consolidation of these proceedings provided parties with unique opportunities for discussion that ultimately resulted in an agreement that the Commission determines will benefit ratepayers by offering stability, reasonable rates, and improved reliability."[252]

Here, the Commission should similarly find that the Attorney Examiners did not err in permitting the parties to consolidate four cases for purposes of presenting the Stipulation for the Commission's review. Consolidation enables the parties to swiftly return tax-savings to customers, bringing the total savings to approximately $900 million, consistent with the Commission's expectation in the TCJA Investigation, and also provides for the first significant phase of grid modernization investment consistent with the Commission's objectives in the PowerForward Roadmap and ESP IV. If OMAEG and Kroger had their way, the Commission would consider each of these proceedings separately, thereby requiring four separate evidentiary hearings, four separate sets of witness testimony, and four separate sets of post-hearing briefs – all repetitively explaining why the same stipulation satisfies the three-prong test. OMAEG and

[250] *See Duke Global Stipulation Case*, Opinion and Order, ¶¶ 1-2, 87-157 (Dec. 19, 2018).

[251] *Id*., ¶ 2.

[252] *Id*.

Kroger's proposal defies common sense and would unnecessarily strain the resources of the Commission and the parties.[253]

Finally, Kroger and OMAEG allege that the Companies failed to follow the example of AEP Ohio, as directed by the Commission, in filing an application to address the TCJA refunds and in securing "unanimous" support from interested parties.[254] As an initial matter, the Commission never required utilities to seek or obtain unanimous support from parties in resolving TCJA-related tax refund issues. Moreover, the Commission never *required* utilities to follow AEP Ohio's example; rather, the Commission merely "encourage[d]" utilities to use AEP Ohio's filing as an "example."[255] And, in fact, the Companies did so by filing Case Nos. 18-1604-EL-UNC and 18-1656-EL-ATA. Regardless, passing along all TCJA-related tax savings to customers via a widely-supported Stipulation fully complies with the Commission's recommendation in the TCJA Investigation.

B. The Attorney Examiners Did Not Err by Precluding Cross-Examination Related to the "Serious Bargaining" Prong or Rider DMR.

Kroger and ELPC/NRDC/OEC assert evidentiary violations concerning the Attorney Examiners' refusal to permit cross-examination into sensitive confidential settlement communications and into irrelevant topics such as the Companies' Rider DMR.[256] None of these alleged evidentiary violations has any merit.

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[253] OMAEG contends that the Stipulation does not create efficiencies but only adds unnecessary complexity by resolving them on an expedited basis. OMAEG Brief, p. 7. However, as referenced previously, none of the issues resolved by the Stipulation are new or unfamiliar to the parties. The Grid Modernization Cases have been pending at the Commission for up to 3 years, while the TCJA-related issues have been well known to the parties since January 2018 when the Commission's TCJA Investigation commenced. Fanelli Direct, pp. 3-6. Consolidating the cases does nothing to change that. Plus, because the Companies offered one witness in support of the Stipulation (OMAEG and Kroger offered no testimony in opposition), efficiencies certainly were gained by consolidating these proceedings.

[254] *See* Kroger Brief, p. 1; OMAEG Brief, pp. 2-3.

[255] TCJA Order, ¶ 30.

[256] Kroger Brief, pp. 11-12, 18-20; ELPC/NRDC/OEC Brief, pp. 14-15.

1. The Attorney Examiners properly denied cross-examination concerning the content of sensitive confidential settlement discussions.

The Commission's longstanding policy has been to encourage settlements in cases that come before it, which is consistent with "well settled" public policy in Ohio.[257] To encourage settlements, the Commission has declined to allow parties to admit evidence concerning the content of confidential settlement discussions, which is consistent with longstanding Supreme Court precedent and Rule 408 of the Ohio Rules of Evidence.[258] As a result, it is customary for the Commission to have a "very limited record with respect to the settlement process in any given proceeding."[259] Nevertheless, ELPC/NRDC/OEC contend that the Attorney Examiners' ruling denying cross-examination into confidential settlement discussions "ignores Ohio Rule of Evidence 408 and relevant case law."[260]

The only case law cited by either Kroger or ELPC/NRDC/OEC in support of their argument is *Time Warner*.[261] Yet *Time Warner* never addresses the (in)admissibility of confidential settlement discussions.[262] Instead, the leading Ohio Supreme Court case on the issue is *Ohio Consumers' Counsel v. Pub. Util. Comm.* Although the Court in that case held that

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[257] *In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan, et al*., Case No. 99-1658-EL-ETP, *et al*., 2000 Ohio PUC LEXIS 337, at *5; *Humm v. City of N. Royalton*, 8th Dist. Cuyahoga No. 33431, 1975 Ohio App. LEXIS 6049, at *6 (Apr. 3, 1975) ("It is well settled that public policy favors the settlement of controversies and the avoidance of litigation. In furtherance of this policy, testimony relating to offers of compromise is deemed incompetent for without such a rule it would be difficult for parties to attempt 'the amicable adjustment or compromise of disputes.'").

[258] *Companies ESP III Case*, Opinion and Order, at *56-57 ("[I]n order to promote confidentiality in settlement discussions, the Commission has available to it a very limited record with respect to the settlement process in any given proceeding"); *Sherer v. Piper & Yenney*, 26 Ohio St. 476, 478-479 (1875); *see also Fireman's Fund Ins. Co. v. BPS Co*., 23 Ohio App.3d 56, 62, 491 N.E.2d 365 (10th Dist. 1985) ("[U]nder Evid. R. 408, not only is evidence of a compromise inadmissible but evidence of conduct or statements made in the compromise are also inadmissible.").

[259] *Companies ESP III Case*, Opinion and Order, at *56-57.

[260] ELPC/NRDC/OEC Brief, pp. 14-15.

[261] Kroger Brief, pp. 11-12; ELPC/NRDC/OEC Brief, pp. 14-15. ELPC/NRDC/OEC also cite *State v. Heinish*, but only to show that their offer of proof to preserve the record on appeal was sufficient under Ohio law. *Id*., p. 15.

[262] *See, generally, Time Warner AxS v. Pub. Util. Comm*., 75 Ohio St.3d 229, 1996-Ohio-224, 661 N.E.2d 1097.

stipulation side agreements are discoverable for purposes of demonstrating a lack of serious bargaining, the Court distinguished stipulation side agreements from confidential "communications made during settlement negotiations."[263] Even Kroger and ELPC/NRDC/OEC agree that the content of settlement communications are confidential and inadmissible.[264] But Kroger and ELPC/NRDC/OEC insist that the cross-examination at issue never probed the content of settlement discussions, only issues concerning whether parties were "essentially excluded" from negotiations.[265] The hearing transcript proves otherwise.

> Q. (By Ms. Fleisher) Mr. Fanelli, did parties, other than Staff, have input into the scope and elements of Grid Mod I?
>
> A. I think that all parties had input, were allowed to provide feedback on all aspects of the Stipulation.
>
> Q. **Do you recall FirstEnergy representatives telling parties that the scope and elements of Grid Mod I could not be changed?**
>
> MR. LANG: Yeah, objection, your Honor. That clearly goes to settlement discussions.
>
> EXAMINER PRICE: Sustained.
>
> . . .
>
> Q. Certainly. **And I believe you mentioned you did receive feedback from parties, during the course of settlement discussions, regarding the contemplated spending for Grid Mod I, correct?**
>
> MR. LANG: Objection, your Honor.
>
> EXAMINER PRICE: Sustained.[266]

[263] *Ohio Consumers' Counsel*, 111 Ohio St.3d at ¶ 93.

[264] *See* ELPC/NRDC/OEC Brief, p. 15; Tr. Vol. I at 37, 41; Kroger Brief, pp. 11-12.

[265] Kroger Brief, pp. 11-12; ELPC/NRDC/OEC Brief, p. 15.

[266] Tr. Vol. I at 38, 41 (emphasis added).

As the transcript illustrates, counsel for the Opposing Intervenors pointedly asked about the content of confidential communications made during settlement negotiations. Thus, the Attorney Examiner did not err in sustaining the Companies' objections. Importantly, the Attorney Examiner narrowly tailored his ruling, explaining that it did not preclude cross-examination concerning other, non-confidential topics relevant to serious bargaining (e.g., cross-examining the Companies' witness on any potential differences between the Original and Supplemental Stipulations).[267] Indeed, the Opposing Intervenors cross-examined the Companies' witness on a variety of non-confidential settlement discussion topics (e.g., timing and duration of settlement discussions, the identities of negotiating parties, who was invited to specific settlement meetings, whether parties were afforded the opportunity to provide input, etc.).[268]

ELPC/NRDC/OEC also allege that the Attorney Examiners improperly denied an offer of proof to explain why the foregoing questions concerning the parties' confidential settlement discussions were appropriate.[269] Again, ELPC/NRDC/OEC are mistaken. Under Ohio law, an offer of proof consists of two elements: 1) the offering party must provide the legal theory upon which admissibility is proposed; and 2) the offering party must show what the witness was expected to testify to and what that evidence would have proven or tended to have proven.[270] Here, however, ELPC/NRDC/OEC did not have any evidence supporting the proffer; instead, counsel for ELPC/NRDC/OEC initially cited her own personal knowledge, only later claiming that the

[267] Tr. Vol. I at 37.

[268] Tr. Vol. I at 34-38.

[269] ELPC/NRDC/OEC Brief, p. 15.

[270] *Second Calvary Church of God in Christ v. Chomet*, 9th Dist. Lorain No. 07CA009186, 2008-Ohio-1463, ¶ 27.

proffer would be supported by unidentified discovery responses that were never admitted into the record.[271] ELPC/NRDC/OEC's offer of proof is entirely insufficient.

Nevertheless, even if ELPC/NRDC/OEC provided a sufficient offer of proof (which they did not), it would not have mattered. As described previously, Ohio law is clear that the underlying content of confidential settlement communications is not admissible. As such, the Attorney Examiners did not err by precluding cross-examination regarding the content of sensitive confidential settlement negotiations.

2. The Attorney Examiners did not err by denying cross-examination of the Companies' witness concerning Rider DMR.

Kroger contends that the Attorney Examiners improperly prevented cross-examination of the Companies' witness regarding Rider DMR.[272] Kroger claims that Rider DMR is relevant in this proceeding because the rationale for the grid modernization components of the Stipulation is "nearly identical" to the one offered by the Companies in support of Rider DMR.[273] As such, Kroger alleges that ratepayers are effectively "pay[ing] twice" to reap the same rewards, and should have been able to explore the issue on cross-examination at the evidentiary hearing.[274] Kroger is wrong.

As an initial matter, the Supreme Court has long held that the Commission is entitled to "very broad discretion in the conduct of its hearings" and "is not strictly confined by the Rules of Evidence."[275] As such, the Attorney Examiners enjoy "very broad discretion" in terms of

[271] Tr. Vol. I at 177-179.

[272] Kroger Brief, pp. 18-20.

[273] *Id*.

[274] *Id*., p. 15.

[275] *Greater Cleveland Welfare Rights Org., Inc. v. Pub. Util. Comm.*, 2 Ohio St.3d 62, 68, 442 N.E.2d 1288 (1982); *Elyria Tel. Co. v. Pub. Util. Comm.*, 158 Ohio St. 441, 444, 110 N.E.2d 59 (1953); *see also In the Matter of the Regulation of the Electric Fuel Component Contained within the Rate Schedules of The Dayton Power & Light*

determining the scope of relevance in Commission proceedings. Here, Kroger has failed to show any abuse of discretion by the Attorney Examiners, as Rider DMR is wholly unrelated to this proceeding and would not yield any probative evidence for the Commission's consideration of the Stipulation.

The Commission first approved Rider DMR more than two years ago in the Companies' ESP IV proceeding.[276] As discussed above, Rider DMR was approved to provide credit support to enable the Companies to access capital markets on more favorable borrowing terms.[277] Rider DMR is not affected by the Stipulation. In fact, the only reference to Rider DMR in the Stipulation is to clarify that the Signatory Parties' support for the Stipulation may not be used against them in any future proceeding concerning Rider DMR.[278] And as confirmed by the Companies' witness on cross-examination, nothing in the Stipulation touched on or otherwise impacted the potential two-year extension of Rider DMR.[279] Thus, questioning regarding Rider DMR was irrelevant.

Finally, even if the Attorney Examiners erred in precluding cross-examination on Rider DMR (which they did not), Kroger has not demonstrated any prejudice from this "error." After all, Kroger devoted seven full pages of its Initial Brief to discussing Rider DMR, thereby belying any claim that the Attorney Examiners' ruling deprived the Commission of potentially probative evidence against the Stipulation.[280]

Company and Related Matters, Case No. 86-07-EL-EFC, 1987 Ohio PUC LEXIS 107, Opinion and Order, at *33 (Feb. 18, 1987) (recognizing the same).

[276] ESP IV Fifth Entry on Rehearing, pp. 87-88.

[277] *Id*., pp. 90-91.

[278] Orig. Stip., p. 29; Supp. Stip., 8.

[279] Tr. Vol. I at 162-163.

[280] *See* Kroger Brief, pp. 13-20. Indeed, Kroger's first objectionable question was a reading from the Commission's Fifth Entry on Rehearing in ESP IV following by "did I read that correctly?" Tr. Vol. I at 160. Kroger included this same portion of the Fifth Entry on Rehearing in its brief, plus much more. *See* Kroger Brief, p. 14.

In sum, the Attorney Examiners did not abuse their "very broad discretion" by precluding Kroger from cross-examining the Companies' witness on an extraneous issue that has no connection to or bearing on the Commission's review of the Stipulation.

CONCLUSION

The Opposing Intervenors have offered no sound basis for rejecting or delaying approval of the Stipulation. Therefore, for the reasons set forth herein and in the Companies' Post-Hearing Brief, the Commission should approve the Stipulation without modification.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Post-Hearing Reply Brief of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 12th day of March, 2019. The PUCO's e-filing system will electronically serve notice of the filing of this docket on counsel for all parties.

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Case No(s). 16-0481-EL-UNC, 17-2436-EL-UNC, 18-1604-EL-UNC, 18-1656-EL-ATA

Summary: Reply Brief electronically filed by Mr. James F Lang on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company