

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of The East Ohio Gas Company)
d/b/a Dominion Energy Ohio for Approval of) Case No. 19-0468-GA-ALT
an Alternative Form of Regulation.)

**REPLY BRIEF OF THE EAST OHIO GAS COMPANY
D/B/A DOMINION ENERGY OHIO**

Mark A. Whitt (0067996)
Christopher T. Kennedy (0075228)
Lucas A. Fykes (0098471)
WHITT STURTEVANT LLP
88 East Broad Street, Suite 1590
Columbus, Ohio 43215
Telephone: (614) 224-3912
Facsimile: (614) 675-9448
whitt@whitt-sturtevant.com
kennedy@whitt-sturtevant.com
fykes@whitt-sturtevant.com

Andrew J. Campbell (0081485)
DOMINION ENERGY, INC.
88 East Broad Street, Suite 1303
Columbus, Ohio 43215
Telephone: (614) 601-1777
andrew.j.campbell@dominionenergy.com

ATTORNEYS FOR THE EAST OHIO GAS
COMPANY D/B/A DOMINION ENERGY OHIO

Dated: October 19, 2020

TABLE OF CONTENTS

I. INTRODUCTION	1
II. ARGUMENT	4
A. OCC and NOPEC have failed to rebut the evidence demonstrating that the Stipulation satisfies the three-prong test.	4
1. OCC and NOPEC participated in the settlement process.	4
2. The settlement offers even greater ratepayer benefits than approved in the Columbia and Vectren proceedings.	6
a. The Stipulation provides additional benefits to those previously approved by the Commission.	7
b. The Stipulation also contains substantial modifications to the Application and Staff Report.	8
3. OCC and NOPEC urge the Commission to ignore Ohio regulatory practices and principles.	9
B. The Commission should not modify the CEP Rider or its scheduled implementation.	11
1. The Commission should not delay implementation of the CEP Rider.	11
a. Delaying the CEP Rider would provide little benefit to customers, but would materially harm the Company.	12
b. Benefits contained in the Stipulation and other external factors more than offset the modest billing impact of the CEP Rider.	13
2. OCC and NOPEC have not justified modifying the cost of capital embedded in the CEP Rider.	16
a. OCC's and NOPEC's focus on current market conditions is both incomplete and misplaced.	16
b. The use of the utility's last authorized rate of return in authorizing riders adheres to the Commission's past practice.	18
c. OCC's attempted comparison to base rate proceedings involving smaller gas utilities is implausible on its face.	20
d. It is improper for OCC to challenge the timing it stipulated to in DEO's TCJA proceeding.	20
e. The record does not support adjusting the rate of return, and the issue is clearly "controverted."	21
3. The Commission should reject OCC's unreasonably low investment caps.	22
a. The evidence—including an independent outside audit—confirms that DEO's CEP investments were prudent and reasonable.	23
b. OCC has not shown that an investment cap is more straightforward or easier to manage than a rate cap.	24

4.	The Commission should reject OCC’s invented operational savings offsets.	25
a.	OCC’s invented O&M savings is neither based on relevant data nor the product of reliable methodology.	25
b.	OCC’s analogy to the O&M savings reflected in the PIR Rider is misplaced.	26
C.	The Commission should affirm the ruling denying OCC and NOPEC’s motion to strike.	28
III.	CONCLUSION	29

I. INTRODUCTION

In 2011, The East Ohio Gas Company d/b/a Dominion Energy Ohio (DEO or the Company) sought approval to begin a capital expenditure program (CEP). The Commission approved it, having made the findings required by law: the planned expenditures would be “consistent with the natural gas company’s obligation under section 4905.22 of the Revised Code to furnish necessary and adequate services and facilities, which services and facilities the commission finds to be just and reasonable.” R.C. 4929.111; *see also In re The East Ohio Gas Co.*, Case Nos. 11-6024-GA-UNC and 11-6025-GA-AAM, Finding & Order (Dec. 12, 2012) at 15; *In re The East Ohio Gas Co.*, Case Nos. 13-2410-GA-UNC and 13-2411-GA-AAM, Finding & Order (July 2, 2014) at ¶ 11. DEO’s implementation of its CEP culminated in an application for cost recovery filed May 1, 2019. This proceeding—which has lasted 537 days thus far, included independent review by both Staff and an outside auditor, and provided ample opportunity for discovery by all intervenors—has now confirmed that the Company did so prudently and reasonably. The Stipulation and Recommendation filed on August 31, 2020 (Stipulation) accordingly recommends that DEO be allowed to start recovering this CEP investment through an automatic adjustment mechanism, as authorized under R.C. 4929.05 and R.C. 4929.11.

Neither the Office of Ohio Consumers’ Counsel (OCC) nor the Northeast Ohio Public Energy Council (NOPEC) offer any credible reason to reject the Stipulation. Neither OCC nor NOPEC contest the Commission’s authority to approve an automatic adjustment mechanism. Nor do they contest DEO’s right to recover CEP investment. Their briefing arguments boil down to the following primary points: first, that the proposed rider be rejected outright and a future base rate filing be ordered in its place; or second, if the CEP rider is approved, it should be

modified in various ways, most notably: (a) not to go into effect until October 2021 “at the earliest” and (b) to reflect DEO’s alleged 2020 cost of capital (equity and debt), rather than the cost of capital determined in DEO’s last rate case.

Unfortunately for OCC and NOPEC, their objections to the Stipulation have little to do with the applicable three-prong test. The first prong of this test is whether the settlement is the product of serious bargaining among knowledgeable, capable parties—not whether the stipulation is unanimous. The second prong is whether the settlement provides ratepayer benefits—not whether the modifications proposed by non-signatory parties also provide benefits (and to be clear, the intervenors’ proposed modifications are not reasonable). The third prong is whether the settlement violates an important regulatory policy or principle—and here, the intervenors affirmatively *violate* the test, urging the Commission to ignore Commission precedent and to disregard the governing laws, going so far as to ask the Commission to seek repeal. NOPEC and OCC have simply failed to overcome the record evidence establishing the reasonableness of the Stipulation.

As to their first point, the fact that DEO *could* have filed for recovery of CEP investment through a base rate filing is little more than a statement of the obvious—and an irrelevant statement at that. Title 49 authorizes more than one option for cost recovery, and DEO chose the same option chosen by Columbia Gas of Ohio, Inc. (Columbia) and Vectren Energy Delivery of Ohio, Inc. (VEDO) in their respective CEP rider filings. OCC’s complaint that this choice exists does not render the exercise of this choice unreasonable or unlawful.

Similarly, whether DEO *could* delay implementation of its Rider CEP, or adjust the revenue requirement to incorporate OCC’s erroneous view of an updated cost of capital, does not render the Stipulation unreasonable. Capital costs are not the only costs that have changed since

DEO's last rate case. By sticking with the cost of capital authorized in its last rate case, the Stipulation merely follows Commission precedent that has been consistently and evenhandedly applied across many riders for many utilities.

OCC and NOPEC raise a number of other ancillary, irrelevant points—all to no avail. The ongoing pandemic does not suspend DEO's ongoing obligation to provide adequate service or its right to recover prudently incurred investment. The fact that operational savings were identifiable and quantifiable in one rider does not mean the same will be true for every rider. Delaying implementation of the CEP rider or imposing arbitrary spending caps would be counterproductive—and ultimately cost consumers more in the long run. But *even if* OCC or NOPEC had any marginal improvements to offer (and they do not), the Stipulation is perfectly reasonable and lawful as-is.

The last point DEO will make before addressing the initial briefs is this: OCC is not the only agency charged with protecting residential ratepayers. “The Public Utilities Commission of Ohio is the representative of the people of the state of Ohio. It is the intermediary between the citizen-consumer on the one side and the public utility on the other.” *City of Cleveland v. Public Util. Comm'n*, 127 Ohio St. 432, 435 (1934). Commission Staff work “under the direction of the commission” and “shall perform such duties as the commission prescribes.” R.C. 4901.19. The Commission Staff, in conjunction with an independent outside auditor, thoroughly reviewed DEO's application and negotiated a Stipulation that goes further in favor of ratepayers than prior CEP settlements approved by this Commission, and the intervenors' repeated insinuations that Staff has disregarded the interests of residential ratepayers is objectively untrue and patently unfair.

There is no basis in the record or in the arguments of the intervenors to reject or modify the Stipulation. The Commission should adopt the Stipulation in full as filed and not accept any of the recommendations of OCC or NOPEC.

II. ARGUMENT

Settlement agreements are “highly favored in the law.” *Cont’l W. Condo. Unit Owners Assn. v. Howard E. Ferguson, Inc.*, 1996-Ohio-158, 74 Ohio St.3d 501, 502. They are also favored before the Commission: “the Commission’s longstanding policy has been to encourage settlements in cases that come before it.” *In re Cincinnati Gas & Elec. Co.*, No. 99-1658-EL-ETP, Entry (May 19, 2000) at ¶ 4. Thus, if a Stipulation passes the Commission’s three-part test, it will be approved.

A. OCC and NOPEC have failed to rebut the evidence demonstrating that the Stipulation satisfies the three-prong test.

DEO’s initial brief demonstrated that the Stipulation: (1) is the product of serious bargaining among knowledgeable, capable parties; (2) provides benefits to ratepayers; and (3) violates no regulatory policy or practice. OCC and NOPEC fail to show otherwise on any count.

1. OCC and NOPEC participated in the settlement process.

The purpose of the first prong of the settlement test is essentially to ensure that settlements are not the product of collusion or back-room dealing. If settlement negotiations were transparent, if all parties were invited to participate, and if the parties’ counsel were competent and diligent, the first prong is satisfied. *In re The East Ohio Gas Co.*, Case No. 05-219-GA-GCR, Entry on Reh’g (Mar. 21, 2007) at ¶ 7 (“[W]hile not all parties signed the stipulation, all parties to this proceeding had ample opportunity to be involved in the development of the stipulation and to present evidence for the Commission’s consideration.”).

Here, OCC and NOPEC participated in settlement negotiations up to the very last minute. Indeed, although the application had already been pending for 463 days, DEO agreed on August 6 to continue the evidentiary hearing to accommodate even *more* serious bargaining among counsel and parties whose credentials are familiar to the Commission. That OCC and NOPEC eventually decided not to settle does not taint the process in any way.

OCC and NOPEC concede that unanimity is not required to satisfy the first prong of the test. In the very next breath, they attack the Stipulation because it is not unanimous. But the Commission has “repeatedly held that we will not require any party to agree to a stipulation in order to meet the first part of the three-part test.” *In re Ohio Power Co.*, Case No. 14-1158-EL-ATA, 2nd Entry on Reh’g (Feb. 1, 2017) at ¶ 14. “No one possesses a veto over stipulations, as this Commission has noted *many times*.” *In re Columbia Gas of Ohio, Inc.*, Case No. 07-0478-GA-UNC, Opin. & Order (Apr. 9, 2008) at 32 (emphasis added).

Apparently “many times” is not enough, as the intervenors continue to argue the same point. Not for the first time, they frame the objection as going to a “lack of diversity.” (OCC Br. at 2, 5.) But the Commission has already rejected that theory as well: “The three-prong test utilized by the Commission and recognized by the Ohio Supreme Court does not incorporate the diversity of interest component” *In re Ohio Power Co.*, Case No. 14-1693-EL-RDR, *et al.*, Opin. & Order (Mar. 31, 2016) at 52.

The record is clear that extensive negotiations, attended by all parties, preceded the Stipulation, and no party was excluded from negotiations. (DEO Br. at 10-11.) The result of this process was, as Staff explained, “a comprehensive compromise of the issues raised by parties with diverse interests, *including issues and concerns raised by the non-signatory parties*.” (Staff Br. at 3 (emphasis added).) And of course, the settlement included Staff, which has the “duty to

balance the interests of all customer classes, including residential customers,” *In re Ohio Power Co.*, Case No. 14-1158-EL-ATA, Opin. & Order (Apr. 27, 2016) at 7, and carried out that duty here.

The record clearly demonstrates that while the settlement was not unanimous, it was seriously bargained. And even though diverse interests are not required, they are represented here.

2. The settlement offers even greater ratepayer benefits than approved in the Columbia and Vectren proceedings.

The second prong recognizes that a settlement must not only be seriously bargained, but fairly resolve the issues as well. But the Commission recognizes that this must be determined by evaluating what the Stipulation includes, not by looking to what it does not. As any reasonable person must acknowledge, all settlements involve compromise; no party gets everything they want. *In re First-Energy Corp.*, Case No. 99-1212-EL-ETP, Entry on Reh’g (Sept. 13, 2020) at ¶ 5 (“The settlement package ultimately arrived at reflected a compromise of the positions that various parties may have otherwise taken. Necessarily in this process, the end result will represent a middle ground and, as with any negotiation process, it is likely that no party got everything it wanted.”); *In re Dayton Power & Light Co.*, Case No. 91-414-EL-AIR, Opin. & Order (Jan. 22, 1992) at 10 (“[S]ettlements inherently involve compromises and give-and-take concessions. Therefore, the results of the settlement process should be evaluated as a package rather than item-by-item.”).

OCC and NOPEC, however, fail to accept this fact. It may be fairly assumed that OCC and NOPEC did not settle because they could not get something they wanted. But complete satisfaction of a given party’s demands is *not* the test, and it does not mean the settlement fails to provide ratepayer benefits.

a. The Stipulation provides additional benefits to those previously approved by the Commission.

On the contrary, the record here demonstrates that the Stipulation not only provides the same benefits that the Columbia stipulation in Case No. 17-2202-GA-ALT provided, but that on the whole, ratepayers fare *better* under DEO's Stipulation than Columbia's:

<i>Residential Rate Cap (Investment through:)</i>	Columbia - Approved	DEO - Stipulation
	12/31/2017: \$3.51 (Initial)	12/31/2017: n/a
	12/31/2018: \$4.56	12/31/2018: \$3.86 (Initial)
	12/31/2019: \$5.61	12/31/2019: n/a
	12/31/2020: \$6.66	12/31/2020: \$5.51
	12/31/2021: \$7.71	12/31/2021: \$6.31
		12/31/2022: \$6.96 12/31/2023: \$7.51
<i>Depreciation Offset</i>	<i>Yes</i>	<i>Yes</i>
<i>Incremental Bill Payment Assistance</i>	<i>None</i>	<i>\$750,000, which has been made available to customers</i>
<i>Pass Through of TCJA Savings</i>	<i>Approval simultaneous with and contingent on CEP Rider</i>	<i>Begun at least seven months prior to, and independent of, approval of CEP Rider</i>

(See DEO Br. at 13-14, 15, 18.) As this table illustrates, both Columbia and DEO agreed to a significant depreciation offset, and both agreed to rate caps, neither of which is required by statute.

DEO's Stipulation, however, goes further. Although each company initiated its CEP at the same time (October 2011), DEO's residential rate is lower for every comparable year; DEO's rate caps are lower for every comparable year; and DEO's average incremental rate-cap increase is lower by a considerable margin (\$0.73 per program year, compared to \$1.05 per program year). (See DEO Br. at 14.) DEO's Stipulation also contains shareholder funding for bill payment assistance—*already* made available to customers, and a customer benefit not part of the

Columbia stipulation. (*Id.* at 15.) And although the Columbia stipulation tied the pass-through of savings related to the Tax Cuts and Jobs Act (TCJA) to the approval of the new CEP charge, DEO’s customers have already been enjoying a significant TCJA credit (\$5.41/month) for the past seven months. (DEO Ex. 4.0 at 18-19.)

Given the similarity of issues, the Columbia settlement is an appropriate benchmark for the reasonableness of the Stipulation proposed here—indeed, it would be reversible error to disregard that precedent, given the Commission’s duties. *Cleveland Elec. Illuminating Co.*, 42 Ohio St.2d 403, 431 (1975), *superseded on other grounds by statute as recognized in Babbitt v. Public Util. Comm’n*, 59 Ohio St.2d 81, 89 (1979) (instructing the Commission to “respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law”). And in that case, OCC submitted expert testimony, which the Commission relied upon, describing the financial benefits of the Columbia stipulation to ratepayers, including the depreciation offset to rate base and the annual rate caps. *In re Columbia Gas of Ohio, Inc.*, Case No. 17-2202-GA-ALT, Opin. & Order (Nov. 28, 2018) at ¶ 43. OCC also testified that the Columbia stipulation did not violate any important regulatory principle or practice. *Id.* at ¶ 44. But if that was true for the Columbia settlement, then it must be true for a settlement that goes even further in favor of residential ratepayers.

b. The Stipulation also contains substantial modifications to the Application and Staff Report.

OCC faults the Stipulation as “an outcome that is tethered not far from the utility’s litigation position,” but that is simply not the case. (OCC Br. at 5.)

To begin with, OCC ignores the fact that DEO’s Application incorporated several elements of the Columbia settlement, most notably an over \$300 million depreciation offset that was bargained for in Columbia’s settlement. *In re Columbia Gas of Ohio, Inc.*, Case No. 17-

2202-GA-ALT, Opin. & Order (Nov. 28, 2018) at ¶ 37. DEO showed good faith in adopting such elements from the Columbia settlement, and OCC's focus only on post-filing compromises would merely discourage and penalize reasonable filings and incentivize aggressive gamesmanship. And regardless, as demonstrated above, it is self-evident that the Stipulation contains compromises and commitments that are *not* reflected in DEO's Application *or* in the Staff Report, and which directly address the intervenors' affordability concerns.

In short, the settlement process is a path to compromise. Not every concept will be accepted. Not every proposal will end up in the final agreement. The Stipulation does not reject the concern of customer affordability in the present economic climate; but it also recognizes that the Company has been investing millions upon millions without any cost recovery to date. That is the balance of interests that the Stipulation tackles. Although this process by its very nature will not give every side all the benefits desired, a fair balance was struck in this case.

Even if OCC and NOPEC's proposals were reasonable and balanced (and as DEO will discuss, they are not), the mere absence of their proposals is not sufficient to upset the Stipulation. The second part of the three-part test has been met—the Stipulation benefits customers and the public interest.

3. OCC and NOPEC urge the Commission to ignore Ohio regulatory practices and principles.

This leads to the final prong of the settlement test, which ensures that issues are resolved in accordance with Ohio law and consistent with Commission practice. *In re Columbus S. Power Co.*, 2011-Ohio-2383, ¶¶ 18-19, 129 Ohio St.3d 46, 49. OCC and NOPEC, however, urge the Commission to do the exact opposite of what is required under the third prong: disregard Ohio law and ignore relevant precedent.

Opposition to the governing laws seems to form the fundamental basis for almost all of OCC and NOPEC's particular objections. Consider the primary theme of OCC witness Kerry Adkin's testimony: "the PUCO *should seek repeal* of the alternative regulation laws permitting CEPs and single-issue ratemaking." (OCC Ex. 1.0 at 11.) (emphasis added). These, of course, are the duly enacted laws governing this case. But the Commission is not presiding over a legislative hearing to decide what the law should be. It is presiding over an administrative hearing, and it is obliged to *apply* the law *as it is*. See, e.g., *Disc. Cellular, Inc. v. Public Util. Comm'n*, 2007-Ohio-53, ¶ 51, 112 Ohio St.3d 360, 373 ("The PUCO, as a creature of statute, has no authority to act beyond its statutory powers").

Whether OCC and NOPEC like it or not, the law affords options for CEP recovery other than a base rate case. The law expressly permits recovery under an alternate rate plan, including an automatic adjustment mechanism: "the commission shall authorize the natural gas company to defer or recover in an application that the natural gas company *may file under section 4909.18, 4929.05, or 4929.11* of the Revised Code." R.C. 4929.111(D) (emphasis added). And so it is that Columbia and VEDO are today recovering the same kinds of costs, using the same mechanism, approved under the same laws, under which DEO seeks recovery. Following the law cannot *possibly* be construed as a harm to ratepayers.

In a similar vein, OCC (repeatedly) asks the Commission to pretend that the Columbia CEP proceeding never happened and even to *prohibit* reference to it in this proceeding. Having unsuccessfully sought to strike reference to the proceeding during the hearing, OCC does so again in its initial brief. DEO addresses this issue below (*see infra* at 28-29), but regardless of OCC's efforts to couch this as an evidentiary issue, OCC cannot credibly argue that the Commission should depart from its own relevant precedent without good reason. *Office of*

Consumers' Counsel v. Public Util. Comm'n, 10 Ohio St.3d 49, 50–51 (1984) (“When the commission has made a lawful order, it is bound by certain institutional constraints to justify that change before such order may be changed or modified.”); *see also Cleveland Elec. Illum. Co.*, 42 Ohio St.2d at 431. It is understandable that OCC and NOPEC do not wish the Columbia precedent to be cited or considered, because it highlights the lack of substance to their objections and the inconsistency of their positions.

OCC and NOPEC’s efforts to repeal the law and prohibit consideration of relevant precedent do not show that the Stipulation violates any regulatory practice or principle, which further confirms that all three elements of the three-part test have been satisfied.

B. The Commission should not modify the CEP Rider or its scheduled implementation.

Failing to show that the Stipulation violates the three-part test, OCC and NOPEC also ask the Commission to modify the settlement in several significant respects. But doing as the intervenors ask would only serve to unwind the Stipulation and effectively require the parties to re-litigate this case from scratch. Simply stated, the requested “modifications” are deal-breakers for DEO and not supportable by the law or the facts. The Commission should reject them.

1. The Commission should not delay implementation of the CEP Rider.

OCC and NOPEC repeatedly cite the COVID-19 pandemic and ensuing economic impacts as justification to delay recovery of CEP investments. (*See, e.g.*, OCC Br. at 24-25; NOPEC Br. at 2-3 (arguing that approving a new charge during the pandemic violates regulatory principles).) These are serious issues, of course, but these conditions do not require an “either/or” choice between providing bill relief to customers and permitting DEO to recover its investment. The Stipulation takes affordability concerns into account, and unlike the intervenor proposals, strikes an appropriate balance of *all* interests involved.

a. Delaying the CEP Rider would provide little benefit to customers, but would materially harm the Company.

The Company recognizes the financial difficulties that many Ohioans have faced during the last several months. The Commission and the Company acted quickly to respond to those concerns to ensure service continuity, provide bill relief, and protect against accruing arrearages. Programs like PIPP, HEAP, the Winter Reconnect Order, and COVID-related relief such as the waiver of various fees and deposits provide individual levels of relief frequently measured in the hundreds of dollars, and this does not account for the additional relief EnergyShare will provide to qualifying customers. But OCC and NOPEC have not established that the response to COVID-19 also requires the Commission to go yet one additional step and indefinitely delay the recovery of DEO's CEP investments—a step providing modest customer benefits, at best, but that would immediately and materially inflict financial harm on DEO.

Certainly there is no legal basis for such an imprudent and drastic step. DEO's CEP has been approved since 2012, and review by Staff and an independent auditor have now confirmed that DEO has followed that plan and prudently implemented it. Neither OCC nor NOPEC have alleged the contrary about *a single dollar* of DEO's investment. At this point, whatever else may be said, no one has questioned whether DEO's CEP was “consistent with its obligation under R.C. 4905.22” or whether the stipulated revenue requirement reflects “just and reasonable services and facilities.” R.C. 4929.111(C). If these conditions are met, recovery “shall” be approved, R.C. 4929.111(D), and given that DEO was *required* by the orders approving CEP deferrals to seek CEP recovery before those deferrals reached a certain level, it would be unreasonable and borderline unconscionable to delay recovery of prudent CEP investments. This is all the more true when the Commission has continued approving various rider adjustments by multiple utilities (including the Columbia CEP) throughout the pandemic.

NOPEC claims that “DEO will not be harmed if the Stipulation is denied in favor of awaiting a rate case filing.” (NOPEC Br. at 7.) This is not a remotely plausible statement. For every month that the CEP Rider is not in effect, the Company suffers financial harm due to the lost revenue.¹ Anyone with a rudimentary understanding of ratemaking or running a business knows that to be true. OCC and NOPEC have not demonstrated that delaying cost recovery is a necessary or effective response to COVID-19, and undeniably it is a proposal that will impair DEO’s finances and lessen the incentive of its parent company to invest in Ohio given the alternatives available in other segments of its business.

b. Benefits contained in the Stipulation and other external factors more than offset the modest billing impact of the CEP Rider.

OCC and NOPEC claim that the pandemic has affected DEO’s customers more than others. But even if this had been established in the record—and it has not been established—OCC and NOPEC overlook the fact that DEO has provided additional help to its customers that other utilities have not.

First, the record does not support OCC and NOPEC’s claim that DEO customers are uniquely affected by the pandemic. (OCC Br. at 6; NOPEC Br. at 4.) No expert testimony was offered to support this claim, aside from its witness’s effort to introduce a study whose author was never called to the stand and which was stricken from the record as inadmissible. (Tr. at

¹ NOPEC also claims that if the Application is dismissed, “DEO will continue to accrue its CEP deferrals until new base rates are set.” (NOPEC Br. at 7.) That is not necessarily true. The Commission “authorized DEO to accrue CEP-related deferrals only up until the point where the accrued deferrals, if included in rates, would cause the rates charged to the General Sales Service (GSS) class of customers to increase by more than \$1.50 per month.” *In re The East Ohio Gas Co.*, Case Nos. 13-2410-GA-UNC and 13-2411-GA-AAM, Finding & Order (July 2, 2014) at ¶ 2. Based on deferrals through March 31, 2019, the estimated impact of the recovery of accumulated CEP deferrals on the GSS class was already \$1.29. (DEO Ex. 2.0 at 4.) If the Commission dismissed the Application, it is unclear whether DEO would be able to continue to accrue CEP deferrals.

129-130, 141.) Although OCC witness Mr. Adkins attempted to paraphrase certain findings of the study, the transcript makes clear that the sole basis for his assertions was the stricken study, which Mr. Adkins did not prepare, and that he did not otherwise claim any expertise on comparative economic issues.

Even if DEO's customers were affected in some unique way, the Stipulation provides additional aid to DEO's customers that was not part of prior CEP approvals. In addition to the actions that the Commission and DEO have taken outside of this proceeding, the Stipulation contains a number of targeted benefits that directly address customer affordability. As discussed above, the Stipulation reflects a \$310 million depreciation offset; establishes annual residential rate caps at a lower level than in the Columbia case; and includes a \$750,000 shareholder-funded contribution to the EnergyShare program. OCC and NOPEC's briefs do not even mention this funding.

OCC and NOPEC also disregard external factors that mitigate any bill impact arising from the CEP Rider. Again, OCC and NOPEC give little credit to the Commission's efforts to respond to COVID-19, nor to existing assistance programs. There is little mention of the actions that the Company took to provide customers with "immediate bill relief," such as voluntarily suspending disconnections, waiving deposits, reconnection fees, and late payment fees, and expanding payment plan options. (DEO Br. at 24.) There is no discussion of the added protections for PIPP customers that the Commission issued in the Winter Reconnect Order and DEO's COVID-19 Plan proceeding, which treat unpaid balances as arrearages. (*Id.* at 24-25.) There is no analysis of the impact of HEAP funding in DEO's service territory or COVID-19 grants that local counties and nonprofit organizations have received through the federal CARES Act, a portion of which has been designated for mortgage, rent, and utility payments.

In addition to these industry-wide benefits, other benefits accrue specifically to DEO customers. There is the existing \$5.41/month credit that residential customers have been receiving through the Tax Savings Credit Rider (TSCR) throughout the pandemic—which was not tied to the approval of the CEP Rider. (DEO Br. at 23.) And there are the presently low natural gas prices—the commodity portion of a residential customer’s bill in 2020 is approximately 57 percent less than in 2008. (*Id.*) OCC and NOPEC’s briefs make no mention of the TSCR credit or the favorable effect of low commodity prices.

The Commission’s own publications confirm that with respect to the cost of natural gas service, DEO’s customers are actually better off. Each month, Commission Staff prepare and publish an analysis of typical bills for customers of PUCO-regulated electric, natural gas, and landline telephone bills in major Ohio cities. Analysis is provided for various types of customers, including residential, commercial and industrial customers. The most recent survey was conducted September 2020, and it showed that the typical gas bills in cities in DEO’s service territory compared very favorably to those in other territories. For example, a total residential gas bill based on 10 MCF for non-shopping customers in Akron, Ashtabula, Canton, Cleveland, Lima, Marietta, and Youngstown was \$54.61. The same measure showed bills ranging from \$71.75 for the Dayton area (VEDO), to \$77.61 for the Cincinnati area (Duke Energy), and to \$80.91 for Marion, Lorain, Chillicothe, Zanesville, Columbus, Toledo, and Mansfield (Columbia).²

² Ohio Utility Rate Survey (Sept. 5, 2020), available at <https://puco.ohio.gov/static/industry-information/statistical-reports/ohio-utility-rate-survey/2020/URS+09+2020.pdf>.

No one questions the goal of helping customers in need during the pandemic. But even if they found any support in the law, the means proposed by the intervenors would provide exceedingly modest benefits at an extremely severe cost, and have not been justified.

2. OCC and NOPEC have not justified modifying the cost of capital embedded in the CEP Rider.

The Commission should also reject OCC's proposal to substitute the cost of capital determined in DEO's last rate case with OCC's erroneous view of an updated cost of capital used to determine the CEP revenue requirement.

a. OCC's and NOPEC's focus on current market conditions is both incomplete and misplaced.

OCC and NOPEC spend much of their briefs fixated on 2020 market conditions. (OCC Br. at 9-19; NOPEC Br. at 5-8.) Both parties discuss at length their views on DEO's 2020 refinancing that lowered a portion of its cost of debt going forward. (OCC Br. at 10-11; NOPEC Br. at 6.) OCC argues the stipulated rate of return violates "longstanding" regulatory principles. (OCC Br. at 23-25.) And OCC also offers its ideas on how the current cost of equity would be calculated, if this case actually were a fully-litigated base rate case. (*Id.* at 12-13.)

The only rate before the Commission in this proceeding, however, reflects CEP investments placed in service from 2011 through 2018. The debt refinancing from June 2020 has nothing to do with that rate and did not support those investments. The same is true for the average returns on equity from 2019 and 2020. Yet, OCC uses precisely these data points to adjust the cost components of the stipulated rate of return, based on its witness's theory that the Commission should "reset, based on current market conditions, the pre-tax rate of return applicable to Dominion's current capital expenditure program." (OCC Ex. 2.0 at 11-12.) Whatever 2020 market conditions may be relevant to, they are not relevant to the rate under review.

OCC and NOPEC also both repeatedly argue that DEO will receive a “windfall” if the rate of return is not reset. (OCC Br. at 2, 10, 11, 19; NOPEC Br. at 2, 6, 9.) This argument conveniently ignores all of the cost increases since DEO’s last base rate case that would offset any decreases in DEO’s cost of debt or equity. (Tr. at 26.) Even OCC’s own witness acknowledges that. (Tr. at 127.) Even more conveniently, the intervenors ignore the need to update DEO’s capital structure, which today reflects the increased *equity* weighting that was necessary to achieve the cost of debt that OCC now wishes to incorporate.³

To the underlying concern whether DEO had excessive earnings, the Staff Report answered that very question. Staff reviewed the financial data presented in the Application and verified that DEO did not have excessive earnings for the review period. (Staff Ex. 1.0 at 8.) And this conclusion was reached notwithstanding the presence of another capital rider (the PIR Cost Recovery Charge), that similarly involves substantial capital expenditures and provides the identical rate of return embedded in the Stipulation. Indeed, DEO’s audited financials, which OCC’s own witness relied upon, shows that DEO’s earned return—6.82 percent for 2019—was significantly less than its authorized return for the most recent fiscal year. (OCC Ex. 2.0, Attach DJD-06 at 5, 7 (indicating a net income of \$146.3 million and an average common equity of \$2113.1 million (the average of \$2498.1 million and \$1728.1 million)).) Moreover, for future CEP filings, the Stipulation acknowledges that Staff may continue to make similar recommendations on this issue. (Joint Ex. 1.0 at ¶ 11.)

³ DEO’s actual capital structure for 2019 comprised approximately 60% equity and 40% debt. (Attach DJD-06 at 7.) In contrast, the capital structure embedded in DEO’s base rates comprises 51.34% equity and 48.66% debt. (OCC Ex. 2.0 at 10 n. 18.) OCC, however, has not updated its rate of return calculation to reflect that change in DEO’s capital structure.

In short, there has been no showing that any “windfall” has occurred, and if any party is concerned that excessive earnings have occurred in a future year, they may raise that issue in the applicable filing.

b. The use of the utility’s last authorized rate of return in authorizing riders adheres to the Commission’s past practice.

The intervenors’ proposal also goes against the Commission’s long-standing practice to adopt the last authorized rate of return when calculating a rider’s revenue requirement. *See, e.g., In re Columbia Gas of Ohio, Inc.*, Case No. 16-2422-GA-ALT (reauthorizing the Infrastructure Replacement Program (IRP)); *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 13-1571-GA-ALT (reauthorizing the Distribution Replacement Rider (DRR)). This practice was again followed when the Commission approved Columbia’s CEP Rider. *In re Columbia Gas of Ohio, Inc.*, Case No. 17-2202-GA-ALT, Opin. & Order (Nov. 28, 2018) at 16 (“the rate of return used to develop the revenue requirement for each application will be based on the capital structure and cost of capital authorized by the Commission in Columbia’s most recent base rate case”). This practice was also followed when setting the Company’s current AMR and PIR charges approved by the Commission, and when calculating the TCJA savings to pass back to DEO’s customers. (DEO Br. at 24-26.) DEO also utilized this practice to calculate the impact of CEP deferrals on customers in its annual reporting of projected CEP rate impacts—a practice that OCC never questioned. (*Id.* at 21.) This practice was also specifically reviewed and upheld by the independent auditor in this case. (Staff Ex. 2.0 at 107.) To date, OCC and NOPEC have not

identified a single Commission decision that would support their proposal to deviate from this practice.⁴

There are sound policy reasons why the costs of debt and equity should not be updated in rider proceedings—they constantly rise and fall between rate cases, and the underlying capital structure changes as well. (DEO Ex. 4.0 at 24-25; Tr. at 25-27, 84-85.) If this were a base rate case, the parties would have devoted a significant amount of time and resources to litigating a new rate of return. And if utilities were required to litigate rate of return issues in every rider authorization proceeding, this would defeat a key goal of alternative regulation, namely, to “minimize the cost and time expended in the regulation process,” contrary to legislative intent. R.C. 4929.01(A). The parties would have to take on what is ordinarily the most costly and time-consuming issue to litigate. That is not an efficient, fair, and predictable regulation. And it would be a waste of Commission resources. The better practice is what the Commission has been already doing—relying on the last authorized return and not turning rider cases into more complicated base rate cases.

Indeed, to follow OCC’s position to its logical conclusion, the Commission would be required to review and reset the rate of return, not just as each rider is authorized for every utility (gas and electric), but also *every year that each rider is updated* based on the current market

⁴ This includes OCC’s mischaracterization of the Commission’s Entry concerning DEO’s motion for waivers. In accordance with Staff’s recommendation, the Commission denied a portion of DEO’s waiver request and required DEO to file the Section D rate of return schedules. *See* June 19, 2019 Entry. Staff requested this information because it believed the information, including information on future projections, was relevant to its review of the Application. *Id.* at ¶ 18. It is false to state that this Entry shows that the Commission “had already rejected” DEO’s arguments concerning the appropriate rate of return for the CEP Rider (*see* OCC Br. at 14), particularly when the same Staff that requested the rate-of-return schedules now supports DEO’s use of its last authorized rate of return.

conditions. That continuous update would be a Herculean task and hamstring the Commission's ability to provide efficient regulation.

c. OCC's attempted comparison to base rate proceedings involving smaller gas utilities is implausible on its face.

It is particularly absurd for OCC to compare DEO's proposed rate increase for its CEP Rider with the recently-approved base rate revenue requirements for three considerably smaller gas utilities. (OCC Br. at 15.)

Is it any surprise that the revenue requirement for a small utility would be substantially smaller than the revenue requirement for a much larger one? DEO serves over 1.2 million customers, while Suburban Natural Gas Company, for example, serves roughly 18,000. (*In re Suburban Nat. Gas Co.*, Case No. 18-1205-GA-AIR, *et al.*, App. (Aug. 31, 2018) at 1.) And while the Commission did set a new rate of return for these utilities, this of course occurred in a base rate case, where no one disputes that the utility's rate of return should be reviewed and updated. So OCC seems to be willfully ignoring reality when it claims, "there is no valid reason not to do in this case what was done in those cases (i.e., update the rate of return based on current financial conditions and risks)." (OCC Br. at 15.) This case is not a base rate case, but a case filed under the laws expressly allowing for alternative ratemaking. And it needs to be pointed out, that in its comparison of natural gas utilities, OCC conveniently ignores the one utility that is the most similarly situated—Columbia.

d. It is improper for OCC to challenge the timing it stipulated to in DEO's TCJA proceeding.

Similarly, OCC's arguments regarding DEO's "control" of the timing of its rate case filing are inconsistent with the position OCC took in DEO's TCJA proceeding just months ago. (OCC Br. at 15.) OCC previously referred to DEO's commitment to file a rate case no later than October 2024 as a "benefit" of the stipulation approved in DEO's TCJA proceeding. *In re The*

East Ohio Gas Co., Case No. 18-1908-GA-UNC, *et al.*, Finding & Order (Dec. 4, 2019) at ¶ 31.

And in response to OCC’s recommendation, the Commission approved that timing when it approved the TCJA stipulation, which for over seven months has been providing a monthly credit for residential customers that is larger than the proposed initial CEP Rider (\$5.41 TCJA credit compared to the \$3.86 initial CEP rate).⁵

The Commission could and should prohibit OCC from advocating against the rate-case timing that it previously supported and was approved as part of the TCJA settlement. *See, e.g., City of Independence v. Office of the Cuyahoga Cty. Exec.*, 2014-Ohio-4650, ¶ 29, 142 Ohio St.3d 125, 132 (“Judicial estoppel precludes a party from taking a position inconsistent with a position that it successfully and unequivocally asserted in a prior judicial proceeding”); *see also Office of Consumers’ Counsel v. Public Util. Comm’n*, 16 Ohio St.3d 9, 10 (1985) (“OCC is barred by the doctrines of res judicata and collateral estoppel from attempting to relitigate [an issue] previously determined to be proper” in a previous action between the same parties). But regardless, OCC’s argument disregards the substantial and timely consumer benefits associated with the agreement to and approval of that timing.

e. The record does not support adjusting the rate of return, and the issue is clearly “controverted.”

Finally, OCC argues that the Commission “lacks the discretion to simply disregard” the testimony of OCC’s witness, Dr. Duann, because it is “uncontroverted” and thus should be afforded “substantial weight.” (OCC Br. at 16.) To DEO’s knowledge, the Commission has

⁵ NOPEC argues that the Commission ordered DEO to file a base rate case “no later than October 2024” because “the PUCO and its Staff are aware of the abuses that result from single issue ratemaking.” (NOPEC Br. at 6.) That assertion is incorrect, unsupported by the TCJA Order, and ludicrous on its face. Even a casual reader of the Order would know that is false.

never recognized such a standard, and the decisions cited by OCC do not define or even mention OCC's measure of "substantial weight."

But even if OCC's position were legally sound, Dr. Duann's opinions are in no way "uncontroverted." The Company absolutely challenges his opinions that components of the last authorized rate of return should be modified. It is correct that neither the Company nor the Staff offered witness testimony on how to calculate the rate of return, because this was not a rate case and neither party recommended updating the embedded cost of capital.

It is also correct that the Company and Staff did not cross-examine Dr. Duann on the inputs or methodologies underlying his rate of return calculation. Many of the Company's differences with Dr. Duann are at fundamental policy levels, and there is little need to waste time in the hearing room arguing points better suited for the briefs. Moreover, the key methodological problems with his approach—the failure to update the capital structure, and the mismatch between the period of investment (2011–2018) and the recommended rate of return data (2020)—do not require cross-examination to point out. A utility's weighted average cost of capital is just that: a weighted average. One cannot ignore the weighting of its individual components and hope to come up with anything resembling a reasonable cost of funds.

Dr. Duann's testimony should not be given substantial weight, and OCC's rate of return recommendations should not be adopted.

3. The Commission should reject OCC's unreasonably low investment caps.

The Commission should also reject OCC's proposed modification to the Stipulation to replace the agreed-upon rate caps with its unreasonably low investment cap.

a. The evidence—including an independent outside audit—confirms that DEO’s CEP investments were prudent and reasonable.

OCC claims that the Stipulation’s annual rate caps “do not adequately protect customers from paying too much.” (OCC Br. at 20.) OCC instead advocates for a \$73 million investment cap, arguing that “the availability of the CEP has encouraged Dominion to substantially increase its CEP spending.” (*Id.*) The record, however, affirmatively refutes any basis for this artificial cap.

Staff’s independent, outside auditor Blue Ridge was specifically hired to review the accounting accuracy, the used and useful nature, necessity, reasonableness, and prudence of the CEP assets placed in service from October 2011 through December 31, 2018. (Staff Ex. 2.0 at 19.) That audit lasted over seven months and included hundreds of data requests, interviews with personnel, field inspections, variance analysis and detailed transactional testing. (*Id.* at 18-19.)

Other than a few relatively minor adjustments to plant balances, Blue Ridge found “nothing to indicate” that the Company’s CEP investments “were unnecessary, unreasonable, or imprudent.” (*Id.* at 28.) Blue Ridge also found that DEO’s processes and controls that affect each of the plant balances “were adequate and not unreasonable,” was satisfied that DEO was “taking appropriate measures to control labor and contractor costs, which in turn control spending” and “did not see anything during field testing that would indicate the Company is ‘gold plating’ construction.” (*Id.* at 29.) Staff conducted its own review, issued additional data requests, and fully adopted the Blue Ridge recommendations. (Staff Ex. 1.0 at 7.) There are no facts that support OCC’s claim that DEO has been spending too much capital in its CEP program.

Indeed, OCC’s own witness, on cross examination, confirmed that OCC was not contesting the used and useful nature and prudence of any of the CEP investment placed in service. (Tr. at 114-115.) Furthermore, the witness did not claim any particular knowledge of

DEO's system or its capital needs. Lacking such expertise, he simply reached back to an arbitrary point in time, that just so happened to encompass lower-than-average plant additions, and then suggested that it would be a reasonable proxy for investment needs more than a decade into the future. But his recommended investment limit ignores the fact that DEO's program was still ramping up, and also ignores the level of DEO's actual CEP investments for the last six years (2014-2019)—all of which, again, were audited and confirmed reasonable.

OCC's stated rationale for this arbitrary limit is puzzling. It asserts that DEO "started substantially increasing its annual CEP spending, knowing that it would receive cost recovery for that investment on a more expedited basis through single-issue ratemaking." (OCC Br. at 21.) That is correct in a sense; the approval of the CEP *did* encourage more investment in Ohio. But that is a benefit, not a detriment, particularly after the Blue Ridge audit affirmed the prudence and necessity of DEO's investments, and when OCC cannot identify even a *single* CEP investment as imprudent or unreasonable.

There is no basis in the law for OCC's recommended \$73 million investment cap, and as a matter of policy, such a cap would hinder future investment regardless of the impact on DEO's system or its customers. The Commission should reject OCC's artificial investment limits.

b. OCC has not shown that an investment cap is more straightforward or easier to manage than a rate cap.

OCC also claims that an investment cap should be imposed rather than a rate cap. OCC claims that an investment cap is "straightforward," "more predictable," and "easier for Dominion to manage." (OCC Br. at 21.) That is not the case. (DEO Ex. 4.0 at 27.) The CEP revenue requirement can be impacted by a variety of factors (e.g., timing of in-service dates, updated depreciation rates and asset lives by categories of plant, changes in corporate income and/or

property tax rates), all of which can make it difficult to translate an investment cap to an impact on the customer bill. (*Id.*)

An annual rate cap serves the same fundamental purpose as an investment cap, but it does so in a more direct manner. Generally speaking, either kind of cap is a gradualism mechanism, and both require a balance of customer impacts and the level of beneficial investments. Unlike an investment cap, however, a rate cap directly sets a limit on billing and thus mitigates the impact on customers' bills—no matter how the ratemaking inputs may later change. In this regard, it is a superior instrument to both measure and control bill impacts. DEO is well versed in structuring investment programs to fit under rate caps, so there are no concerns regarding manageability. And it bears reminding that the Commission approved rate caps (not investment caps) for Columbia, with OCC's support, but at cumulative and average annual rate levels considerably higher than contained in the Stipulation.

DEO has already agreed to significantly lower rate caps than the Commission approved for Columbia. By the end of the approval period, the incremental rate cap will increase only by 55 cents. (*See* DEO Br. at 14-25.) OCC provides no basis for rejecting these caps and imposing further limits on investment in Ohio.

4. The Commission should reject OCC's invented operational savings offsets.

Finally, the Commission should reject OCC's modification to the Stipulation to impute invented operational savings offsets without recognizing expense increases.

a. OCC's invented O&M savings is neither based on relevant data nor the product of reliable methodology.

OCC claims that the Company's CEP investments "should result in O&M expense savings" that "should be passed on to customers." (OCC Br. at 22.) OCC argues that this O&M

savings should “be applied as a direct expense deduction in the revenue requirement calculation used to determine the annual CEP Rider rate.” (OCC Ex. 1.0 at 28.)

But OCC has not identified or calculated any potential savings from a single CEP investment included in the stipulated revenue requirement for the time period in question (October 2011 to December 31, 2018). As noted, Staff’s outside auditor performed a thorough review of DEO’s CEP plant investment. (DEO Br. at 19.) OCC had access to the Blue Ridge report and all of the Company’s responses to the auditor’s data requests. If OCC wanted to examine specific CEP investments and the associated O&M expenses, OCC had every opportunity. Absent that analysis, OCC has failed to support its recommendation with relevant data and reliable expert opinions. There is nothing in the record to support OCC’s contention that the wide-ranging and varied investments included in the CEP program for the period in question have resulted in a quantifiable net O&M savings. It is pure speculation to which the Commission should assign no weight.

b. OCC’s analogy to the O&M savings reflected in the PIR Rider is misplaced.

Instead of examining the investments that are actually the subject of this proceeding, OCC invents hypothetical O&M savings for the CEP program based on O&M expense data from an entirely different, narrowly focused infrastructure program, namely, DEO’s Pipeline Infrastructure Replacement program. (OCC Br. at 22.) Unlike the broad-based CEP, the PIR Program is focused on the replacement of bare steel, cast iron, and similar target pipe, which provides obvious and readily calculated O&M savings.

The basis for OCC’s imputed savings is OCC’s unsubstantiated claim that “*some* of the CEP investments are similar to the types of investments made through Dominion’s PIR.” (*Id.* (emphasis added).) Based on that extremely general but nevertheless unsupported assumption,

OCC uses O&M savings that the Company has reported for the PIR program to derive its estimated CEP O&M savings. (*Id.*) DEO witness Friscic addressed the faulty logic underlying OCC's theory during her cross-examination:

[T]he CEP program covers a broad range of assets in various categories, so unlike Dominion's pipeline infrastructure replacement program where the activities are very specific in the cost categories in which savings are being determined, there's a direct link there. With the broad base of CEP assets, it's not possible to specifically determine which O&M expenses have gone up as a result of CEP investment or which ones have gone down that could potentially offset one another. There isn't the same causality, if you will, between the O&M expenses for the CEP asset categories as there was with the [P]IR.

(Tr. at 86; *see also* DEO Ex. 4.0 at 27 ("It is not feasible to isolate O&M impacts, both higher and lower, attributable to CEP, which covers a broad range of asset types. That is much different from the PIR program, where leak repairs savings are an obvious consequence of pipe replacement activity.").)

Without any supporting analysis, OCC's prefiled testimony claims that the CEP program includes "replacement and improvement of the same types of pipelines and infrastructure that is replaced in Dominion's PIR program." (OCC Ex. 1.0 at 27.) But OCC points to nothing in the record to support its speculation other than the broad descriptions of the capital investment categories in DEO's CEP program. (*Id.* at 25-27.) OCC points to no specific CEP investment project that would be analogous to a PIR replacement project. And even if a few analogous projects did exist between the two programs, as Ms. Friscic testifies, it is not feasible to determine all of the related impacts to O&M expense caused by the diverse investments included in the CEP program. Where offsets are appropriate and feasible to recognize for the CEP Rider (e.g., depreciation offsets and incremental revenue recognition), DEO has agreed to recognize them as appropriate. In the case of Columbia's approved CEP Rider, there is no O&M savings

offset. OCC has not made the case that the Commission should include such an O&M expense offset for DEO's CEP Rider.

In sum, none of the modifications to the Stipulation recommended by the intervenors should be adopted.

C. The Commission should affirm the ruling denying OCC and NOPEC's motion to strike.

Separately from review of the Stipulation, OCC and NOPEC also ask the Commission to reverse the Attorney Examiners' ruling on their joint motion to strike. (OCC Br. at 25-27; NOPEC Br. at 8-9.) Their motion had claimed that DEO was prohibited from citing the settlement approved in Case No. 17-2202-GA-ALT, involving Columbia's CEP Rider. (Am. Jt. Mot. (Sept. 8, 2020) at 1.) The Attorney Examiners properly denied the motion, reasoning that "Dominion was not a party in the Columbia CEP case and, therefore, is not bound by the Stipulation." (Tr. at 11.)

OCC effectively presents the same arguments that were already rejected and to which DEO has already responded, and the Commission need not revisit the Attorney Examiners' decision. The Columbia stipulation included a sentence stating that approval of the settlement "shall not be cited as precedent in any future proceeding for or against any Signatory Party." (*Id.*) OCC reasons that because it was a "Signatory Party," no one else—not DEO, not any other utility, and apparently not even the Governor of Ohio—may "cite" the stipulation "in any future proceeding for or against" OCC, Columbia, Commission Staff, and even the Commission itself. This is not a reasonable position.

As DEO previously explained in its Memorandum Contra, which it fully incorporates here, stipulations are interpreted and enforced under contract principles. Contracts are binding on the parties who enter them. A and B may not contract to hoist an obligation upon C. *See*

E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 294 (2002) (“It goes without saying that a contract cannot bind a nonparty.”) The “anti-slamming” rules for retail gas and electricity are built around this very principle. See R.C. 4928.10((D)(4); 4929.22(D)(3). DEO is simply not bound by OCC’s agreement with Columbia and Staff.

OCC’s answer to this is that the Commission approved the Stipulation. This does not change the fact that DEO is a stranger to the Columbia proceeding. The Commission has no statutory authority to issue an ex parte order affecting the rights of persons who were not parties to a proceeding. See *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) (“It is a principle of general application in Anglo–American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party.”). And regardless, the official, public approval of the Columbia stipulation did nothing to lessen the Commission’s duty either to respect its own precedents or to treat similarly situated parties in a consistent manner.

By its express terms, the Columbia stipulation binds only the Signatory Parties defined therein. The Commission has previously recognized the common-sense notion that stipulations are only binding on parties. See, e.g., *In re Ohio Power Co.*, Case No. 10-501-EL-FOR, Opin. & Order (Jan. 9, 2013). The Attorney Examiners properly denied OCC’s motion.

III. CONCLUSION

In summary, the evidence shows that the Stipulation complies with all three parts of the Commission’s test. For these reasons, the Commission should approve the Stipulation as filed.

Dated: October 19, 2020

Respectfully submitted,

/s/ Christopher T. Kennedy

Mark A. Whitt (0067996)

Christopher T. Kennedy (0075228)

Lucas A. Fykes (0098471)

WHITT STURTEVANT LLP

88 East Broad Street, Suite 1590

Columbus, Ohio 43215

Telephone: (614) 224-3912

Facsimile: (614) 675-9448

whitt@whitt-sturtevant.com

kennedy@whitt-sturtevant.com

fykes@whitt-sturtevant.com

Andrew J. Campbell (0081485)

DOMINION ENERGY, INC.

88 East Broad Street, Suite 1303

Columbus, Ohio 43215

Telephone: (614) 601-1777

andrew.j.campbell@dominionenergy.com

(Counsel willing to accept service by email)

ATTORNEYS FOR THE EAST OHIO GAS
COMPANY D/B/A DOMINION ENERGY OHIO

CERTIFICATE OF SERVICE

I hereby certify that a courtesy copy of the foregoing pleading was served by electronic mail upon the following individuals on October 19, 2020:

werner.margard@ohioattorneygeneral.gov
christopher.healey@occ.ohio.gov
william.michael@occ.ohio.gov
bojko@CarpenterLipps.com
gkrassen@bricker.com
dstinson@bricker.com

Attorney Examiners:
greta.see@puco.ohio.gov
anna.sanyal@puco.ohio.gov

/s/ Christopher T. Kennedy
One of the Attorneys for The East Ohio Gas
Company d/b/a Dominion Energy Ohio

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

10/19/2020 4:20:35 PM

in

Case No(s). 19-0468-GA-ALT

Summary: Brief Reply Brief of The East Ohio Gas Co. d/b/a Dominion Energy Ohio
electronically filed by Christopher T Kennedy on behalf of The East Ohio Gas Company d/b/a
Dominion Energy Ohio