

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)	
Energy Ohio, Inc., for Approval of an)	Case No. 19-0791-GA-ALT
Alternative Form of Regulation.)	

POST HEARING REPLY BRIEF OF DUKE ENERGY OHIO, INC.

March 12, 2021

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I. INTRODUCTION AND SUMMARY

Ohio Administrative Code (O.A.C.) 4901-1-30 permits parties to proceedings before the Public Utilities Commission of Ohio (Commission) to enter into settlements, like the one at issue in this proceeding.¹ The Commission must now decide whether the Stipulation and Recommendation (Stipulation) presented before it is reasonable and should be adopted. In evaluating the reasonableness of any Stipulation, the Commission must answer three questions:

- 1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- 2) Does the settlement as a package, benefit ratepayers and the public interest?
- 3) Does the settlement package violate any important regulatory principles or practices?

This three-factor standard of review has been discussed in numerous Commission-proceedings and has been affirmed by the Ohio Supreme Court.²

The Stipulation presented to the Commission not only satisfies the Commission's three-part test for evaluating the reasonableness of regulatory settlements, it is absolutely consistent with Ohio law and the Commission's precedent, and it provides numerous benefits to customers. These benefits include, but are not limited to, price certainty and predictability and caps on future rider rate increases. Staff of the Commission (Staff) and Duke Energy Ohio, Inc., (Duke Energy Ohio or the Company) support a thorough, balanced, and reasonable resolution of this proceeding. And yet, OCC demands the Commission reject this well-thought and comprehensive settlement by misstating facts, attempting to re-write the law, imposing new settlement-approval standards, and ignoring precedent. The Commission should reject OCC's attempts and approve the Stipulation.

¹ O.A.C. 4901-1-30(A).

² See, e.g., *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 629 N.E.2d 423 (1994).

II. ARGUMENT

A. **The Implementation of Rider CEP Is Consistent with Ohio Law.**

Ohio law supports the Company's Application and the resulting Stipulation in these proceedings. Ohio Revised Code (R.C.) 4929.111, which became effective September 9, 2011, authorizes a natural gas company to file an application with the Commission to implement a capital expenditure program (CEP). The statute explicitly authorizes a natural gas company to file an application to implement a CEP for any of the following:

- (1) Any infrastructure expansion, infrastructure improvement, or infrastructure replacement program;
- (2) Any program to install, upgrade, or replace information technology systems;
- (3) Any program reasonably necessary to comply with any rules, regulations, or orders of the commission or other governmental entity having jurisdiction.³

R.C. 4929.111(D), in conjunction with an alternative rate plan filed under R.C. 4929.05, permits the recovery of these investments outside of a base rate case.

By Application dated December 20, 2013, in Case No. 13-2417-GA-UNC, *et al.*, Duke Energy Ohio sought authorization to implement a CEP in accordance with R.C. 4909.18 and 4929.111 and for accounting approval to defer certain costs.⁴ By Finding and Order dated October 1, 2014 (Deferral Order), the Commission approved Duke Energy Ohio's request.⁵

The Deferral Order authorized the Company to commence deferral of its incremental depreciation expense, property tax, and post-in-service carrying costs (collectively the CEP Deferrals) associated with certain types of capital investments permitted under R.C. 4929.111.⁶

³ R.C. 4929.111

⁴ *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Implement a Capital Expenditure Program*, Case No. 13-2417-GA-UNC, Application (Dec. 20, 2013).

⁵ *Id.*, Finding and Order (Oct. 1, 2014).

⁶ *Id.*, p. 8.

Moreover, the Deferral Order required the Company to come back before the Commission and seek recovery of its CEP Deferrals before they reached a level that would increase residential customer rates by \$1.50 per month.⁷ Thus stands the reason for the Company's Application in this proceeding to implement recovery of its CEP Deferrals through the proposed cost-recovery mechanism (Rider CEP).

On May 3, 2019, Duke Energy Ohio filed its Application in this proceeding to establish an alternative rate plan and new CEP program rider adjustment mechanism (Rider CEP) (Application).⁸ The Application and supporting testimony explained that, although the Company had not yet reached the previously established \$1.50 deferral cap, it was nonetheless seeking recovery associated with incremental capital investments from January 1, 2013, through December 31, 2018.⁹ The proposed Rider CEP would allow the Company to collect the amounts accrued under the CEP Deferral and a return on and of the underlying CEP capital assets and would also permit the Company to continue its CEP Deferrals and recovery process for new assets placed into service.¹⁰

OCC now argues that the Commission should reject the Company's Application and instead require the Company to wait to commence recovery of CEP Deferrals until it files a natural gas base rate case.¹¹ But OCC's preference for a base rate proceeding is neither the policy of Ohio, nor that of the General Assembly that enacted R.C. 4929.111. Nor is it the policy of this

⁷ *Id.*, p. 9. Per the Deferral Order, Duke Energy Ohio's ability to continue deferring CEP-related investments was capped at the \$1.50 level unless it files an application for recovery.

⁸ *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Alternative Form of Regulation*, Case No. 19-0791-GA-ALT, Application (May 3, 2019).

⁹ *Id.*, pp. 1, 2; Direct Testimony of Jay P. Brown, p. 3 (May 3, 2019).

¹⁰ *Id.*, p. 2.

¹¹ OCC Brief, p. 11.

Commission; the Commission has previously approved similar capital expenditure programs and recovery for other natural gas utilities, including Dominion Energy Ohio¹² and Columbia.¹³

OCC's preference for a base rate case in lieu of an alternative rate plan filing is irrelevant. Ohio law supports the Company's filing and implementation of a CEP recovery mechanism. Moreover, Commission precedent not only supports, but requires, the Company's application to commence cost recovery in order for the Company to be able to continue to defer costs beyond the \$1.50 deferral cap.¹⁴ Finally, OCC's own witness conceded that Ohio law allows for the CEP and does not prohibit recovery of CEP investments, precisely as the Company has proposed herein.¹⁵ The Commission should not reject the Company's Application to implement Rider CEP, as OCC requests.

B. The Stipulation Is the Product of Serious Bargaining among Capable, Knowledgeable Parties.

1. The record shows serious bargaining occurred.

As both the Company and Staff explain in their respective initial post-hearing briefs, the Stipulation is a product of serious bargaining among capable, knowledgeable parties, in this complex regulatory proceeding.¹⁶ The settlement resulted from significant negotiations, spanning several months.¹⁷ Both of these parties regularly participate in proceedings before the Commission, have significant experience in regulatory matters, and were represented by

¹² See, e.g., *In the Matter of the Application of the East Ohio Gas Company for Approval of an Alternative Form of Regulation to Establish a Capital Expenditure Program Rider Mechanism*, Case No. 19-468-GA-ALT, Opinion and Order, p. 56 (Dec. 30, 2020).

¹³ *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of an Alternative Form of Regulation to Establish a Capital Expenditure Program Rider Mechanism*, Case No. 17-2202-GA-ALT, Opinion and Order, pp. 29-30 (Nov. 28, 2019).

¹⁴ See Deferral Order, p. 9 ("If deferrals exceed the \$1.50 per month threshold, Duke will stop accruing future CEP deferrals until it files for authority to recover existing accrued deferrals.")

¹⁵ Transcript, p. 79.

¹⁶ See Initial Post-Hearing Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio, p. 3.; Post Hearing Brief of Duke Energy Ohio, p. 7.

¹⁷ Brown Supplemental Testimony (Duke Energy Ohio Ex. 7), pp. 7, 8.

experienced, competent counsel.¹⁸ OCC cannot dispute such facts. The Company's Application in this proceeding was subjected to two audits and reviews, first by an independent auditor, Larkin and Associates PLLC (Larkin), and the second by Staff.¹⁹ OCC's witness describes Larkin as a "good company" and "good at what they do."²⁰ The Stipulation adopts nearly all of the recommendations contained in both Larkin's report (Audit Report) and the Staff Report, and then some.

OCC maintains that the process of bargaining as well as the end product of the settlement should be considered in applying the first prong of the three-part test.²¹ Duke Energy Ohio agrees. For the better part of three months, all parties, including the OCC, participated in numerous virtual negotiation sessions.²² Parties were given the opportunity to raise issues and did in fact discuss positions and make recommendations for resolving the case.²³ Compromises were made by the Signatory Parties as compared to their initial positions. The result is the Stipulation before the Commission. Contrary to OCC's claims, the fact that the final Stipulation does not simply adopt the Audit Report, the Staff Report (or even the Company's Application, for that matter) without modification absolutely demonstrates that serious bargaining occurred. Likewise, the fact that OCC elected not to be part of the Stipulation does not make it *per se* invalid.

OCC would have this Commission believe that, because Staff (and the Company) was willing to compromise and agree to terms that varied from its initial position, somehow serious bargaining was not present in this settlement.²⁴ Likewise, OCC alleges that, because Duke Energy Ohio and Staff positions were closely aligned to begin, somehow serious bargaining could not

¹⁸ *Id.*, pp. 9, 10.

¹⁹ Staff Exhibits 2, and 1, respectively.

²⁰ Transcript, p. 55.

²¹ OCC Brief, p. 5.

²² Brown Supp. Testimony (Duke Energy Ohio Ex. 7), p. 10.

²³ *Id.*

²⁴ OCC Brief, pp. 5-6.

have occurred.²⁵ Nothing could be further from the truth. The Stipulation is conclusive proof that both Staff and Duke Energy Ohio made concessions from their initial positions in reaching resolution of all issues. Duke Energy Ohio agreed to institute revenue requirement caps for its Rider CEP and to nearly all of the recommended disallowances contained in the Audit Report, which were not part of the Company's Application.²⁶ The Company further agreed to file a natural gas base rate case, which had been an OCC recommendation, and to nearly every single recommended adjustment in the Audit Report and Staff Report. Staff, in turn, agreed to reasonable caps for the Company's CEP investments for 2019 and 2020 that had already been made and that were at levels consistent with the initial Commission-established \$1.50 threshold for filing a recovery mechanism. Staff further agreed the Company could continue to treat its capitalized incentives consistent with Generally Accepted Accounting Principles and the underlying costs in its existing natural gas base rates.²⁷

Such concessions resulted in an initial Rider CEP charge of \$3.69 for investments through December 31, 2018, instead of the \$3.68 contained in the Audit Report. OCC alleges that this fact is proof of a lack of serious bargaining.²⁸ OCC's position fails to acknowledge that the Company's Application and initial position was for an initial Rider CEP charge of \$3.72. The Stipulation results in a \$0.03 reduction from the Company's as-filed position and only a \$0.01 difference from what was contained in the Audit Report. Clearly, Duke Energy Ohio gave more than it got. Additionally, although it did not propose any caps in its Application, Duke Energy Ohio agreed to the recommended \$1.00 residential rate cap that Staff first proposed in its Staff Report for investments beginning in 2021. This was reasonable given the fact that the Company's 2019

²⁵ *Id.*

²⁶ Stipulation (Joint Ex. 1).

²⁷ See Brown Direct Testimony (Duke Energy Ohio Ex. 2), p. 9.; Transcript, pp. 61-62.

²⁸ OCC Brief, p. 6.

investments had already been made, and the Company's 2020 investment plan had already been established by the time the Staff Report that first proposed a revenue requirement cap was issued.²⁹ Again, the Company's investments for 2019 and throughout the majority of 2020 were within the initial deferral cap established by the Commission as a trigger for the filing of a recovery mechanism. Moreover, neither the Company's Application nor the Audit Report or Staff Report discussed the filing of a natural gas base rate case. Only OCC took a position that the Company should be required to file a base rate case.³⁰ Yet, the Signatory Parties did agree to a rate case filing timeline condition as part of the final settlement. Such concessions could only have occurred as part of serious bargaining.

2. Diversity of parties is not a requirement and OCC does not have a veto.

Commission precedent confirms, and OCC concedes, that there is no requirement that any one party must join a stipulation to satisfy the first prong of the three-part test.³¹ The diversity of the parties, while informative to the Commission, is not a dispositive factor as to whether the serious bargaining component of the three-part test is satisfied.³² The Commission has recently affirmed as much.³³ Moreover, there is no requirement that any particular party, including the party most adverse, be a signatory party to satisfy the first part of the three-part test.³⁴ Such a requirement, as OCC advocates, would mean that any non-unanimous settlement would be per-se invalid. This proceeding has only three parties: 1) Duke Energy Ohio, the Applicant; 2) Staff; and

²⁹ Brown Supp. Testimony (Duke Energy Ohio Ex. 7), p. 14.

³⁰ Objections by The Office of the Ohio Consumers' Counsel, p. 7 (June 22, 2020).

³¹ *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*, Case No. 14-1693-EL-ATA, *et al.*, Second Entry on Rehearing, p. 117 (Nov. 3, 2016); Opinion and Order, p. 52 (March 31, 2016)., OCC Brief, p. 3.

³² *In the Matter of the Application of Suburban Natural Gas Company for an Increase in Gas Distribution Rates*, Case No 18-1205-GA-AIR, *et al.*, Opinion and Order, p. 19 (Sep. 26, 2019).

³³ *In the Matter of the Application of The East Ohio Gas Company dba Dominion Energy Ohio for Approval of an Alternative Form of Regulation to Establish a Capital Expenditure Program Rider Mechanism*, Case No. 19-468-GA-ALT, p. 26 (Dec. 30, 2020).

³⁴ *Id.*

3) OCC. OCC's decision not to join the Stipulation is not a fatal flaw to the seriousness of the bargaining that occurred.

Admittedly, Staff and the Company did not agree to each and every demand set forth in OCC's initial comments (or those that OCC may, or may not, have raised during settlement discussions) and direct testimony. Some of those demands, like the filing of a natural gas base rate case, did find their way into the final settlement. Nonetheless, the absence of any or all OCC positions from the Stipulation does not invalidate the settlement or support OCC's aspersions regarding seriousness of the parties' bargaining ability. OCC does not have single-party veto. And the fact that the Signatory Parties did not address or concede to each and every issue raised by OCC in its comments or in direct testimony has no bearing on the seriousness of the bargaining that occurred. The Commission has recently reached such a conclusion, specifically finding the lack of reduction in a rate of return or in a revenue requirement in a settlement had no bearing on the seriousness of bargaining that went into a stipulation.³⁵ The Commission should do so again here.

It is also important to recognize that OCC is not the only party with the concerns of customers at heart. The Commission has previously rejected OCC's claims that a settlement to which Staff is a signatory party lacks diversity of interests and should do so here too.³⁶ Notwithstanding the fact that Duke Energy Ohio disputes any claim that the Company is not focused on the interests of its customers, the Company agrees with Staff that it is "disingenuous" for OCC to claim that Staff (or the Company) is not mindful of the interests of Duke Energy Ohio's

³⁵ *Id.*, p. 27.

³⁶ *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained within the Rate Schedules of Duke Energy Ohio, Inc., and Related Matters*, Case No. 15-218-GA-GCR, *et al.*, Opinion and Order, pp. 32-33 (Sept. 7, 2016).

customers.³⁷ In fact, Staff's position is to balance all stakeholder interests. To do so, Staff *per se* must be considering the impact to all stakeholders,³⁸ including both residential and non-residential customers, the latter of which OCC has no statutory interest in. Staff is absolutely aware of the impacts of regulatory settlements upon customers and, as a result, the settlement before this Commission includes reasonable and aggressive rate caps that are based upon the impact to residential customer rates.³⁹ This rate cap effectively establishes a cap for all customers by limiting the Company's overall revenue requirement increase that is permissible under Rider CEP. The Stipulation further caps the Company's deferral authority, beginning in 2021, at a lower level (\$1.00) than what the Commission initially established when the CEP deferral process was first approved (\$1.50) in Case No. 13-2417-GA-UNC (CEP Deferral Case).⁴⁰ Importantly, the Stipulation does not guarantee the recovery of the return on and of all these investments in 2019 and 2020, as they are still subject to an audit for prudence, reasonableness, and necessity. Once again, the Commission should continue to reject OCC's claims that a settlement lacking OCC's endorsement is not diverse and demonstrates a lack of serious bargaining.

3. OCC cannot reasonably dispute the capability and knowledge of the Stipulating Parties.

OCC did not allege that the Signatory Parties lacked the capability and knowledge necessary to enter into a settlement. Nor can it. Duke Energy Ohio and Staff have participated in numerous proceedings before this Commission over many years. And both parties were represented by capable and experienced counsel. Accordingly, the first prong of the three-part test has been met.

³⁷ Initial Post-Hearing Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio, p. 5.

³⁸ See, e.g., *In the Matter of the Application of East Ohio Gas Company dba Dominion Energy Ohio for Approval of an Alternative Form of Regulation to Establish a Capital Expenditure Program Rider Mechanism*, Case No. 19-468-GA-ALT, Opinion and Order, p.27 (Dec. 30, 2020).

³⁹ Stipulation (Joint Ex. 1), p. 4.

⁴⁰ *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Implement a Capital Expenditure Program*, Case No. 13-2417-GA-UNC, Finding and Order, p. 12 (Oct. 1, 2014).

C. The Settlement, as a Package, Benefits Customers and Is in the Public Interest.

1. The settlement package contains numerous customer benefits.

The settlement at issue, as a package, both benefits customers and is in the public interest. As explained in the Company's post hearing brief, the Stipulation allows the CEP Deferrals to continue, which in itself benefits customers by encouraging investments in and enhancements to the overall safety, reliability, and capability of the natural gas delivery system.⁴¹ While affording the Company an ability to recover its prudently incurred costs, the Stipulation imposes reasonable, but aggressive, rate caps that mitigate rate impacts to all customers.⁴² Duke Energy Ohio agreed to nearly all of the recommended disallowances contained in the Audit Report and the Staff Report, including but not limited to elimination of the revenue requirement associated with the fitness center at its Kellogg Gas Operations Center, applying corrections to allocations affecting IT investments, adjusting composite depreciation rates, and removing projects erroneously included in the Rider CEP plant-in-service balance.⁴³ Each of these agreed-upon adjustments represents a benefit to customers. Moreover, as Company witness Brown explained, customers benefitted from the existence of the CEP deferral mechanism, which has enabled the Company to forego the filing of a natural base gas rate increase to date, and allowed customers to experience declining natural gas rates since 2016 as a result of the Company's completion of its Accelerated Main Replacement Program (AMRP) and Advanced Utility (AU) programs.

The Company's Rider CEP investments (and associated charges) will continue to be subject to an audit to determine lawfulness, used and usefulness, prudence, and reasonableness.

⁴¹ Post Hearing Brief of Duke Energy Ohio, pp. 9-10.

⁴² *Id.*

⁴³ Stipulation (Joint Ex. 1), pp. 3-7.

The establishment of Rider CEP through the Stipulation will provide customers with the immediate benefit from the depreciation offset that mitigates increases to a customer's bill during the term of Rider CEP. The depreciation offset allows customers to realize the benefit associated with depreciating assets currently being recovered by the Company in base rates. Absent the depreciation offset in Rider CEP, customers would not see this benefit until the time of the next natural gas base rate case.

Additionally, while the Company will continue to invest in infrastructure that benefits customers and will be subject to an annual audit to determine the lawfulness, used and usefulness, prudence, and reasonableness of the assets placed in service, the property tax, depreciation, and post in-service carrying costs related to the CEP investments will no longer be deferred into a regulatory asset related to those net additions above the stipulated cap. Therefore, the amount paid by customers will be lower than if the stipulated rate cap had not been agreed to and the deferrals had continued until the Company's next natural gas base rate case proceeding.

2. Customers have benefitted through the CEP deferral process for the last five years, notwithstanding the recent pandemic.

OCC argues that increasing customer rates to recover the Company's CEP investments is contrary to the public interest.⁴⁴ OCC fails to acknowledge that customers have benefitted from the CEP Deferral, as well as other rider recovery mechanisms like the Rider AMRP and Rider AU, for several years. Since its approval in 2014, the CEP Deferral has allowed the Company to make necessary natural gas system investments without the need to file a natural gas base rate case. Coupled with Riders AU and Rider AMRP, both of which have completed new investments, total natural gas rates have steadily declined for customers since 2016.⁴⁵ And, even with the customer

⁴⁴ OCC Brief, p. 8.

⁴⁵ Transcript, p. 33.

rate increases associated with this Stipulation, customers will still be paying less in total natural gas rates than they were paying in 2015.⁴⁶

OCC emphasizes that the Commission should reject the Stipulation because of the coronavirus and due to poverty rates in Hamilton County and the Cincinnati area.⁴⁷ Duke Energy Ohio is certainly sympathetic to the impact of the pandemic upon its customers and has worked diligently with the communities it serves to provide assistance, including suspending disconnections, waiving late fees, and offering extended payment plans for customers.⁴⁸ And the Commission has taken numerous actions to protect customers; most significantly, through moratoriums on disconnections and extending last year's winter reconnection order.⁴⁹ But those issues, while important and appropriate for consideration in separate proceedings, are not relevant to the lawfulness, prudence, reasonableness, and necessity of the investments that were made between 2013 through 2018 and that are under review in this case. Nor are those issues relevant to the recoverability of those investments under Ohio law now and going forward.

R.C. 4929.111 provides for deferral and recovery of depreciation, property taxes and post in-service carrying costs associated with CEP investments.⁵⁰ Those investments have been made in a manner consistent with the Company's obligation to provide necessary and adequate service

⁴⁶ Transcript, p. 28.

⁴⁷ OCC Brief, pp. 8-10.

⁴⁸ Brown Supp. Testimony (Duke Energy Ohio Ex. 7), p. 19.

⁴⁹ *Proper Procedures and Process for the Commission's Operations and Proceedings During the Declared State of Emergency and Related Matters*, Case No. 20-591-AU-ORD, Entry (March 12, 2020), Entry (March 13, 2020); *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its Temporary Plan and Waiver of Tariffs and Rules Related to the COVID-19 State of Emergency*, Case No. 20-599-GE-UNC, Entry (June 17, 2020); *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of a Reasonable Arrangement*, Case No. 20-856-AEC, Entry (June 17, 2020); *In the Matter of the Application of Duke Energy Ohio Inc., to Modify Economic Competitiveness Fund Rider and Request for Waivers*, Case No. 20-857-EL-RDR, Entry (June 17, 2020). *In the Matter of the Commission's Consideration of the Solutions Concerning the Disconnection of Gas and Winter Service in Winter Emergencies for the 2020-2021 Winter Heating Season*, Case No. 20-1252-GE-UNC, Finding and Order (Aug. 12, 2020).

⁵⁰ R.C. 4929.111

and facilities under R.C. 4905.22.⁵¹ Duke Energy Ohio was required, pursuant to Commission order in the Company's CEP Deferral Case, to seek recovery of its CEP deferrals before such deferrals reached a specific level.⁵² The Company's Application in this proceeding is in direct response to and compliance with that Commission directive, and it would be unreasonable to delay—and unconscionable to outright deny—recovery at this time.

3. It is reasonable to use the return on equity and cost of debt approved in the Company's last natural gas base rate case for Rider CEP.

As the Company explained in its post hearing brief, use of the previously approved return on equity and cost of capital for Rider CEP is reasonable and consistent with established Commission precedent. Commission precedent consistently utilizes the last authorized rate of return to calculate the revenue requirement in various rider proceedings for natural gas utilities.⁵³ The Commission has recently rejected OCC's arguments to the contrary, finding "[i]t is the Commission's practice to utilize the cost of capital and capital structure approved in the utility's last rate case in subsequent alternative rate plan and rider proceedings."⁵⁴

Contrary to OCC's assertions, the Commission did not intend to veer from the above-described Commission precedent when it issued a procedural ruling denying in part the Company's

⁵¹ R.C. 4905.22.

⁵² *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Implement a Capital Expenditure Program*, Case No. 13-2417-GA-UNC, Finding and Order, p. 12 (Oct. 1, 2014).

⁵³ See, e.g., *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, Opinion and Order (Jan. 31, 2018) (reauthorizing the Infrastructure Replacement Program); *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, Opinion and Order (Feb. 19, 2014) (reauthorizing the Distribution Replacement Rider); *In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of Tariffs to Adjust Its Automated Meter Reading Cost Recovery Charge to Recover Costs Incurred in 2019*, Case No. 19-1945-GA-RDR, Finding and Order (April 8, 2020) (approving Dominion's AMR recovery charge); *In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion Energy Ohio to Adjust Its Pipeline Infrastructure Replacement Program Cost Recovery Charge and Related Matters*, Case No. 19-1944-GA-RDR, Finding and Order (April 8, 2020) (approving Dominion's PIR recovery charge).

⁵⁴ *In the Matter of the Application of the East Ohio Gas Company for Approval of an Alternative Form of Regulation to Establish a Capital Expenditure Program Rider Mechanism*, Case No. 19-468-GA-ALT, Opinion and Order, p. 41 (December 31, 2020).

request for a waiver of the standard filing requirements.⁵⁵ Staff’s recommendation, on which the Commission based its ruling, did not question the propriety of using the rate of return from the last base case for recovery of historic deferrals and assets, and requested the standard information be submitted because “Duke is seeking . . . collection of future deferrals and assets as well.”⁵⁶

The Company’s investments included in its Rider CEP proposal have been reviewed in detail twice: first by Larkin and then by Staff. Neither party recommended any deviation from the Company’s previously authorized rate of return. Moreover, Staff concluded that the Company did not have excessive earnings during the review period.⁵⁷ Accordingly, the previously approved rate of return also cannot be excessive.⁵⁸

OCC myopically claims that using a Commission-approved rate of return and cost of debt from the Company’s last natural gas base rate case is unreasonable.⁵⁹ OCC cites to its own witness’s testimony to support its position. However, OCC’s witness did not perform a traditional rate of return analysis in reaching his conclusion. He did not perform a Discounted Cash Flow, Capital Asset Pricing Model (CAPM), Empirical approximation of the CAPM, Risk Premium, or any other noteworthy analysis typically presented to support an ROE, or like what the Company submitted in its prior base rate proceedings.⁶⁰

Although the Company has not filed an application for a natural gas base rate increase for nearly eight years, customers have actually benefitted from that delay as explained above.⁶¹ The

⁵⁵ See OCC Brief, pp. 18-19.

⁵⁶ Entry, (June 18, 2019), p. 6.

⁵⁷ Staff Report (Staff Ex. 1), p. 7.

⁵⁸ *Id.*

⁵⁹ OCC Brief, pp. 12-17.

⁶⁰ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, et al., Opinion and Order (November 13, 2013), pp. 20-22 and Direct Testimony of Roger A. Morin, Ph.D. (July 20, 2012).

⁶¹ See footnotes 45-46, *supra*, and accompanying text.

Company's typical natural gas bills and rates thereunder have gone down, not up, since 2013 when new base rates were put into effect.

The Company's earnings during this time were not ignored by Staff when they reviewed the Company's Application and issued their own Staff Report. Staff explicitly found that the Company's earnings were not excessive.⁶² The Company's authorized return on equity (ROE) (9.84%) for natural gas base rates was approved by the Commission in 2013.⁶³ What OCC ignores is that, as a combination electric and natural gas utility, the Company filed electric distribution and natural gas base rate cases contemporaneously⁶⁴ in 2012.⁶⁵ Both cases were prosecuted at the exact same time. Both cases resulted in an identical ROE of 9.84% for the Company's respective electric and natural gas operations.⁶⁶ The significance of this determination is that the Company also filed an electric distribution rate case in 2017,⁶⁷ which was resolved by a non-unanimous settlement that was fully litigated, and yet approved by the Commission in 2018.⁶⁸ In that litigated case, the Commission considered and re-affirmed the same 9.84% ROE for the Company's electric distribution business.⁶⁹ For OCC to argue that the Company's 9.84% ROE is out of market and

⁶² Staff Report (Staff Ex. 1), p. 7.

⁶³ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, et al., Opinion and Order, pp. 20-22 (November 13, 2013).

⁶⁴ *Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case No. 12-1682-EL-AIR, et al., Application (July 9, 2012); *Application of Duke Energy Ohio, Inc. for an Increase in Gas Rates*, Case No. 12-1685-GA-AIR, et al., Application (July 9, 2012).

⁶⁵ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Electric Distribution Rates*, Case No. 12-1682-EL-AIR, et al., Application (July 9, 2012); *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, et al., Application (July 9, 2012).

⁶⁶ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Electric Distribution Rates*, Case No. 12-1682-EL-AIR, et al., Opinion and Order, p. 6 (May 1, 2013).

⁶⁷ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates*, Case No. 17-32-EL-AIR, et al., Application (March 3, 2017).

⁶⁸ *Id.*, Opinion and Order, p. 92 (Dec. 19, 2018) (OCC challenged the stipulated ROE of 9.84 percent). *Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case No. 17-0032-EL-AIR, et al., Opinion and Order (December 19, 2018).

⁶⁹ *Id.*, p. 92

unreasonable because it is more than eight years old, it must also ignore the fact that the Commission recently re-authorized that same ROE for the Company less than three years ago.

Finally, OCC points out that the Company and its parent, Duke Energy Corporation, have above-average credit ratings without any indication of business and financial risks. OCC argues that this fact justifies lowering the Company's ROE for purposes of calculating the Rider CEP rate.⁷⁰ However, OCC's view of the Company's credit ratings are outdated. Since the filing of testimony, Moody's changed its outlook for Duke Energy Corporation to negative in October and then placed it on review for downgrade in February 2021 (currently rated Baa1). S&P downgraded Duke Energy Corporation's corporate credit rating to BBB+ and the senior unsecured debt rating to BBB in January 2021.⁷¹

Using a previously approved and fully vetted return is reasonable and consistent with Commission precedent. Staff has already determined that the Company has not had excessive earnings. And the Company has already agreed to file a natural gas base rate case as early as June of next year. Accordingly, the Commission should affirm the Company's current return for purposes of establishing its Rider CEP, as contemplated in the Stipulation.

D. The Stipulation Does Not Violate Any Important Regulatory Principle or Practice.

1. The Stipulation furthers important regulatory principles and practices.

OCC alleges that the Stipulation violates important regulatory principles and practices by repeating its baseless claims that the Company's existing ROE is inconsistent with current market conditions, results in inequitable rate making, and does not result in just and reasonable rates. Duke

⁷⁰ OCC Brief, p. 23.

⁷¹ See also: https://www.moodys.com/research/Moodys-reviews-Duke-Energy-Duke-Carolinas-and-Duke-Progress-for--PR_440622 , last visited March 11, 2021; Available at: <https://www.duke-energy.com/our-company/investors/fixed-income-investors/credit-ratings>

Energy Ohio has addressed these issues throughout its reply. Nonetheless, in summary, using the existing ROE is consistent with Commission practice. OCC's witnesses' conclusory statements regarding the Company's rate of return were not based upon any analysis as is typical in base rate case proceedings. And Staff has already stated that the Company has not had excessive earnings. Using the current, Commission-authorized, rate of return does not change the opportunity of shareholders to earn a return on their investments. Moreover, the Company has agreed to file a base rate proceeding as early as June 2022, at which time all of the Company's rates, including its return, will be fully vetted.

Customers have been treated very equitably, having benefitted from the CEP Deferrals, and Ohio's alternative regulatory processes for the last eight years. Duke Energy Ohio has not filed for a natural gas base rate increase, and customers have enjoyed steadily declining total average natural gas bills as a result. Even factoring in the anticipated increases for Rider CEP investments through 2018, customers will still be paying less, on average, than in 2013. Moreover, the Company's CEP investments for calendar years 2019 and 2020 remain subject to upcoming audits by Staff. There is no guarantee that the Rider CEP will increase to the levels OCC describes and what is permitted by the Stipulation. And, even if 100 percent of Duke Energy Ohio's CEP investments, after audit, are determined to be reasonable, prudent, lawful, and necessary, those deferrals for 2019 and for nearly all of 2020 remained below the deferral cap established by the Commission in 2013. OCC does not explain how the Company's investments could possibly be unreasonable if they were consistent with the Commission's prior order.

2. Duke Energy Ohio's natural gas capital investments at issue in this proceeding are reasonable, prudent, and necessary.

Company witness Petchul supports the drivers of the Company's investments, both during the audit review period and going forward. These drivers include: customer growth, government-driven relocations, replacement of aging infrastructure, infrastructure improvements, and

investments required to meet existing and emerging state and federal integrity management requirements.⁷² Those drivers align with the statutory categories established for CEP projects established under R.C. 4929.111, namely: 1) infrastructure expansion, improvement, or replacement programs; 2) programs to install, upgrade, or replace information technology systems; and 3) programs reasonably necessary to comply with Commission or other governmental agency rules or regulations.⁷³ There is no evidence to contradict Mr. Petchul's testimony; there is no basis to assert that the Company's natural gas system investments to date have been unreasonable, imprudent, or unnecessary. Moreover, there is no basis to argue that these investments were unrelated to the Company's statutory obligation for provision of necessary and adequate service and facilities under R.C. 4905.22.⁷⁴ As Mr. Petchul explained under cross-examination, his testimony describes the Company's investments and the benefits and justifications for them.⁷⁵ OCC concedes it "did not prove that they were imprudent."⁷⁶

The scope of Larkin's audit of the Company's natural gas investments was not limited to the Company's CEP-related investments. Rather, the purpose of the audit was two-fold: 1) to "review and attest to the accounting accuracy and used and useful nature of the Company's non-AMRP and non-Rider AU capital expenditures and related assets and corresponding depreciation reserve since the date certain of its most recent base rate case . . . [and] to simultaneously assess and form an opinion on the necessity, reasonableness, and prudence of [Duke Energy Ohio's] non-AMRP and non-Rider AU capital expenditures and related assets, with an emphasis on the CEP expenditures and related assets for the period January 1, 2013 through December 31, 2018."⁷⁷

⁷² Petchul Direct Testimony (Duke Energy Ohio Ex. 8), pp. 12-13.

⁷³ R.C. 4929.111(A)(1)-(3).

⁷⁴ R.C. 4905.22.

⁷⁵ Transcript, p. 44.

⁷⁶ *Id.*, p. 53.

⁷⁷ Audit Report (Staff Ex. 2), p. 2-2.

Larkin confirmed that the Company's capital investment records through December 31, 2018, are accurate and the Company's depreciation calculations were reasonable.⁷⁸ Although the Audit Report recommended some adjustments, Larkin did not find anything to indicate that the CEP-related capital expenditures and assets for the period January 1, 2013, through December 31, 2018, were unnecessary, unreasonable, or imprudent.⁷⁹

Although OCC complains about the magnitude and pace of the Company's investments,⁸⁰ OCC does not dispute that the Company's CEP-related investments through December 2018 are used and useful.⁸¹ OCC admits it did not perform a prudence audit, and thus cannot dispute the prudence of the Company's CEP-related investments.⁸² OCC agreed that Larkin did not find any of the Company's CEP-related capital expenditures and assets were imprudent.⁸³ Accordingly, the prudence, reasonableness, and necessity of the Company's CEP-related investments through December 31, 2018, are not in dispute. The cost recovery of these investments and the associated CEP Deferrals via Rider CEP are consistent with Ohio law. The Commission should, therefore, approve the Stipulation.

3. Duke Energy Ohio's natural gas capital investments are not excessive.

OCC argues that alternative regulation and the CEP law have harmed customers and claims that Duke Energy Ohio's CEP spending has increased 547% since 2013.⁸⁴ First, as explained above, alternative regulation and the CEP process are the law in Ohio.⁸⁵ OCC's preference for base rate proceedings notwithstanding, OCC concedes that fact, and that the Commission has

⁷⁸ Audit Report (Staff Ex. 2), pp. 2-5, 2-9.

⁷⁹ *Id.*, p. 2-12.

⁸⁰ Transcript, p. 54.

⁸¹ Transcript, pp. 52- 53.

⁸² Transcript, Vol. 1, 52-53.

⁸³ *Id.*, p. 56.

⁸⁴ *Id.*

⁸⁵ See footnotes 3, and 11-13 *supra*, and accompanying text.

approved CEP recovery mechanisms for other natural gas utilities.⁸⁶ Moreover, customers have benefitted from the alternative regulatory process, as that is precisely what has enabled Duke Energy Ohio's customers to experience steadily declining typical natural gas bills, on average, since 2013.⁸⁷ The depreciation offset works to reduce rates for customers in between rate cases and gives customers credit for the depreciation of assets currently in base rates now - before it would normally be reflected in the next base rate case.

Further, OCC's focus on CEP-related investments instead of the impact to customers' total bills as a result of the Company's total natural gas capital investment is the rate equivalent of missing the forest for the trees. As Company witness Brown explained under cross-examination, OCC's math is erroneous and irrelevant. OCC's calculation does not speak to magnitude and does not give any indication as to the reasonableness of the Company's CEP investments.⁸⁸ Duke Energy Ohio could have invested a single dollar in 2013, nothing between years 2013 through 2017, and then invested \$6.47 dollars in 2018 and OCC would come up with the same percentage increase. As Mr. Brown explained, a more accurate and appropriate metric for reasonableness is the impact the Company's investments have had on rates over the last eight years since the CEP Deferral was established.⁸⁹ The answer is zero. And in fact, customers have actually experienced a decrease in rates on a total average bill basis.⁹⁰

The Audit Report itself demonstrates that, since 2014, the Company's total annual incremental natural gas plant in service for the period under review has been lower than in 2013, the first year of the CEP deferral.⁹¹ Larkin's audit focused on whether Duke Energy Ohio

⁸⁶ Transcript, pp. 58-59, 63.

⁸⁷ *Id.*, p. 33.

⁸⁸ Transcript, p. 29.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Audit Report (Staff Ex. 2), 2a,p. 6-7.

“accurately accounted for its plant in-service and depreciation reserve as of December 31, 2018, and whether those investments were used and useful, necessary, reasonable, and prudent.”⁹² Larkin specifically audited the percentage increase in CEP-related assets and was “satisfied that the CEP-related construction activity was not unreasonable.”⁹³ Larkin noted that “from 2013 through 2015, all three categories of the Company's CEP expenditures were significantly under budget, resulting in favorable variances for each of those years.”⁹⁴ Larkin’s review included *all* natural gas capital assets placed in service since March 31, 2012, the date certain of the Company’s last rate case, through December 31, 2018, focusing on CEP expenditures from January 1, 2013, through December 31, 2018.⁹⁵ Exhibit 6-2 contained on page 6-7 of the Audit Report depicts “Reconciliations to FERC by Rider and Other Exclusions.”⁹⁶ This schedule, among other things, shows the Company’s incremental natural gas plant in service by year beginning April 1, 2012, the first day following the rate case test year. It demonstrates, on line 11, that Duke Energy Ohio’s total incremental gas plant in service during 2013, as reconciled with its FERC Form 2, was \$100,768,771.⁹⁷ This chart further shows that, for each subsequent calendar year, Duke Energy Ohio’s total incremental natural gas plant in service was lower than what was invested in 2013.⁹⁸ Specifically, the Company’s 2014 total incremental plant in service was 89,447,347, approximately 11 percent lower than that of 2013. The Company’s 2015 incremental plant in service was \$82,267,149, or approximately 18 percent lower than that of 2013.⁹⁹ Likewise, the Company’s incremental gas plant in service for calendar years 2016, 2017, and 2018 were also

⁹² *Id.*, p. 6-1

⁹³ *Id.*, p. 6-46.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*, p. 6-7.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

lower than 2013 levels, (15 percent, 23 percent, and 4 percent, respectively).¹⁰⁰ Clearly, between 2014 and 2018, the Company's incremental natural gas plant in-service has been lower than what the Company placed in service in 2013. Moreover, as previously explained, as it relates to the CEP Deferrals, the CEP-only investments between 2013 and 2018, and even including 2019 and most of 2020, still did not result in an increase beyond what the Commission established as a threshold for coming back to the Commission and instituting a proceeding for cost recovery.¹⁰¹

While OCC expresses concern regarding the magnitude of the Company's investments since the Commission's approval of the Company's CEP Deferrals, OCC cannot dispute that the level of investments at issue in this proceeding, through December 31, 2018, fell well below the previously established \$1.50 deferral cap.¹⁰² Moreover, the Company's CEP Deferrals did not exceed the previously established cap during 2019 and only reached that cap in late 2020.¹⁰³ Accordingly, OCC's concern regarding the Company's capital spending and the magnitude of the potential increases is really an improper and untimely attempt to seek rehearing of the Commission's initial decision to establish the \$1.50 CEP deferral cap eight years after the fact. The Commission should not entertain the OCC's attempts to undermine well-settled law regarding rehearing of Commission decisions.

¹⁰⁰ *Id.*

¹⁰¹ See Brown Direct Testimony (Duke Energy Ohio Ex. 2), p. 9.; Brown Supp. Testimony (Duke Energy Ohio Ex. 7), p. 14.; Transcript, pp. 61-62.

¹⁰² See Brown Direct Testimony (Duke Energy Ohio Ex. 2), p. 9.; Transcript, pp. 61-62.

¹⁰³ Brown Supp. Testimony (Duke Energy Ohio Ex. 7), p. 14.

4. There is no evidence that there are net O&M savings resulting from the Company's CEP investments.

OCC speculates that the Company's CEP investments result in O&M savings.¹⁰⁴ However, there is no evidence in the record to support such a claim. OCC did not offer any specific evidence that such savings exist. In fact, to the contrary, Mr. Petchul testified that it cannot be verified whether there are net operational savings.¹⁰⁵ In fact, in some instances, O&M costs have actually increased, due to these expenditures resulting in expansion of service and new assets, which results in incremental increases in expenses.¹⁰⁶ At any rate, any efficiencies that do occur will eventually be included in natural gas base rates when the Company files its next natural gas base rate case, which per the stipulation may be as soon as June of 2022.

III. CONCLUSION

The Stipulation in these proceedings presents a reasonable, supported, and fair conclusion to a complex regulatory proceeding. The Stipulation was the product of nearly three months of negotiations and, as a complete package, will provide regulatory certainty and stability for customers, stakeholders, and the Company. The terms of the Stipulation do not violate any important regulatory principle or practice and comprise a package that, on balance, was designed to resolve issues of significant importance for the signing parties. For the reasons stated above, the Stipulation should be approved as filed.

¹⁰⁴ OCC Brief, pp. 33-34.

¹⁰⁵ Petchul Direct Testimony (Duke Energy Ohio Ex. 8), p. 11.

¹⁰⁶ *Id.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the foregoing was served on the following parties of record by electronic service, this 12th day of March, 2021.

/s/ Rocco O. D'Ascenzo
Rocco O. D'Ascenzo

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