

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
Energy Ohio, Inc., for an Adjustment to) Case No. 14-0375-GA-RDR
Rider MGP Rates.)

In the Matter of the Application of Duke) Case No. 14-0376-GA-ATA
Energy Ohio, Inc., for Tariff Approval.)

In the Matter of the Application of Duke)
Energy Ohio, Inc., for an Adjustment to) Case No. 15-0452-GA-RDR
Rider MGP Rates.)

In the Matter of the Application of Duke) Case No. 15-0453-GA-ATA
Energy Ohio, Inc., for Tariff Approval.)

In the Matter of the Application of Duke)
Energy Ohio, Inc., for an Adjustment to) Case No. 16-0542-GA-RDR
Rider MGP Rates.)

In the Matter of the Application of Duke) Case No. 16-0543-GA-ATA
Energy Ohio, Inc., for Tariff Approval.)

In the Matter of the Application of Duke)
Energy Ohio, Inc., for an Adjustment to) Case No. 17-0596-GA-RDR
Rider MGP Rates.)

In the Matter of the Application of Duke) Case No. 17-0597-GA-ATA
Energy Ohio, Inc., for Tariff Approval.)

In the Matter of the Application of Duke)
Energy Ohio, Inc., for an Adjustment to) Case No. 18-0283-GA-RDR
Rider MGP Rates.)

In the Matter of the Application of Duke) Case No. 18-0284-GA-ATA
Energy Ohio, Inc., for Tariff Approval.)

In the Matter of the Application of Duke)
Energy Ohio, Inc., for Implementation of the) Case No. 18-1830-GA-UNC
Tax Cuts and Jobs Act of 2017.)

In the Matter of the Application of Duke)
Energy Ohio, Inc., for Approval of Tariff) Case No. 18-1831-GA-UNC
Amendments.)

In the Matter of the Application of Duke)
Energy Ohio, Inc., for an Adjustment to) Case No. 19-0174-GA-RDR
Rider MGP Rates.)

In the Matter of the Application of Duke) Case No. 19-0175-GA-ATA
Energy Ohio, Inc., for Tariff Approval.)

In the Matter of the Application of Duke)
Energy Ohio, Inc., for Authority to Defer) Case No. 19-1085-GA-AAM
Environmental Investigation and)
Remediation Costs.)

In the Matter of the Application of Duke) Case No. 19-1086-GA-UNC
Energy Ohio, Inc., for Tariff Approval.)

In the Matter of the Application of Duke)
Energy Ohio, Inc., for an Adjustment to) Case No. 20-0053-GA-RDR
Rider MGP Rates.)

In the Matter of the Application of Duke) Case No. 20-0054-GA-ATA
Energy Ohio, Inc., for Tariff Approval.)

**MEMORANDUM OF DUKE ENERGY OHIO CONTRA
MOTIONS TO INTERVENE AND SET SCHEDULE**

I. Introduction

On September 17, 2021, Interstate Gas Supply, Inc., (IGS) filed a motion to intervene and to set a procedural schedule in a group of 18 Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) cases that have been pending at the Public Utilities Commission of Ohio (Commission) for as much as 7½ years. On September 29, 2021, the Retail Energy Supply Association (RESA)

similarly moved to intervene. A Stipulation and Recommendation was filed in those proceedings on August 31, with no opposition, yet IGS and RESA (Movants) claim that their interventions are reasonable and would not delay the process. In reality, however, these interventions will incontrovertibly delay the process and, as a consequence, will also delay the one-time credit of almost \$70 million¹ back to customers (which would be welcome at the start of winter), will delay the provision of customer assistance funding to seniors and low-income customers, and will delay the move to a natural gas standard service offer. The motion should be denied out of hand.

Of the 18 cases included in the motion, 16 relate to the Company's efforts to remediate manufactured gas plant (MGP) sites and to recover the costs of those efforts—issues that have already been litigated at the Ohio Supreme Court. The remaining two cases address the impacts of the Tax Cuts and Jobs Act of 2018. Neither of the Movants sought to intervene in any of those 18 cases, through their respective periods of consideration, although numerous other entities did so. Duke Energy Ohio, Staff of the Commission, the Office of the Ohio Consumers' Counsel (OCC), and all of the intervenors in the various cases worked for months to craft a settlement that could resolve all of the issues in all of the cases.

Movants, for their part, apparently do not agree with the resolution that was reached. IGS claims, although with no attempt at proof or even explanation, that two of the steps the Company agreed to take would “undoubtedly” impact the “integrity and balance of the competitive market.”² Duke Energy Ohio will demonstrate, below, the falsity of this assertion. IGS goes on to complain that the stipulation “seeks to predetermine the structure of an exit the merchant function application without input from competitive retail natural gas market participants,”³ even though the stipulation

¹ This is the amount of the credit as of August 31, 2021. The amount continues to rise.

² IGS Motion to Intervene, pp. 15-16.

³ IGS Motion to Intervene, p. 14.

merely includes a commitment by the Company to file an application to exit the gas cost recovery (GCR) approach and move to a competitively procured auction structure. RESA baldly states, with no explanation, that the stipulation would (not could, but would) “affect the retail choice program, choice customers, and the competitive market.”⁴ Further, according to RESA’s logic, the stipulation “proposes swift and significant changes to the operation of Duke’s competitive marketplace and to the provision of shopping information and data . . .”⁵

Movants argue that their very late interventions should be excused because the ramifications are supposedly dire. However, they ignore entirely the fact that they can argue at great length in the separate exit proceeding. That is the case where their interest actually lies.

II. Movants Do Not Meet the Criteria for Intervention.

A. Applicable Law

As the Commission is aware, intervention is subject to both statutory requirements and parameters set forth in Commission rules. Under the applicable law, the Commission is required to consider four criteria:

1. The nature and extent of the prospective intervenor's interest;
2. The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;
3. Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings;
4. Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.⁶

The Commission’s administrative rule is similar, adding only a consideration of the possible duplication of interests.⁷

⁴ RESA Motion to Intervene, p. 6.

⁵ *Id.*

⁶ R.C. 4903.221(B).

⁷ O.A.C. 4901-1-11(B).

The efforts of IGS and RESA to intervene in these proceedings fail on all four required criteria and must be denied.

B. Nature of Movants' Interest

Most of Movants' discussions center on their purported interest in the stipulation filed by the parties to the above-captioned proceedings. In that stipulation, Duke Energy Ohio has agreed, subject to Commission approval, to three actions that Movants are concerned about.

First, the Company has agreed to provide calculated, aggregated shadow billing information to OCC. Importantly, the information is only to be given to OCC. It is not being given to customers or printed on their bills. Second, the Company has agreed to file an application with the Commission to transition away from the GCR and to a competitively procured auction structure. The stipulation provides that the Company's application will propose a standard service offer model for obtaining commodity supply for non-shopping customers. Such an application would have the effect of commencing a proceeding at the Commission—a proceeding in which all interested parties would have the opportunity to participate prior to any Commission decision. Put another way, there is no pre-determined decision regarding the Company's transition to a competitive auction structure. Finally, assuming the Commission allows the Company to move to a standard service offer, the Company would add the price to compare to the shopping customers' bills.

Other than the aggregated shadow billing data being given to OCC, the market-related commitments in the stipulation would not come to pass without a separate Commission proceeding on the merits of the proposal to move to a standard service offer. Nevertheless, both Movants claim they must be allowed to intervene in these MGP and TCJA cases at the last minute.

Columbia Gas of Ohio has been calculating shadow billing since the start of natural gas competition in 1997, apparently without negatively impacting the market or the business interests of competitive providers like IGS. Nevertheless, shadow billing is a topic that has been repeatedly argued about and addressed by the Commission. Generally, the arguments have related to requests that the cost-comparison data be placed on customers' bills or be otherwise made publicly available. For example, in the last two management and performance audits related to Duke Energy Ohio's GCR rates, the Commission refused to consider such a request because it was beyond the scope of the case, as set forth in R.C. 4905.302(C)(2).⁸ In a slightly different twist, the stipulation in AEP Ohio's currently pending base rate case provides that AEP Ohio will provide aggregate shadow billing data to OCC and Commission Staff and that a separate case will consider the possibility of putting that information on customers' bills.⁹

The stipulation at issue in these proceedings does not go even as far as the AEP Ohio agreement. This stipulation would only result in Duke Energy Ohio giving the shadow billing information to OCC, residential customer information that, arguably, might even be discoverable by OCC in a relevant regulatory proceeding. The information would not be placed on customers' bills and the Company is not agreeing to work toward that end.

IGS, at least, apparently recognizes that the stipulation might not be seen as actually impacting its interests or even the competitive market at large, as is required by the law on interventions. None of the three natural-gas-related topics in the Stipulation would have any such impact:

⁸ *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. 18-218-GA-GCR, *et al.*, Opinion and Order, ¶ 57 (Dec. 18, 2019); *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, ¶ 59 (Sep. 7, 2016).

⁹ *In the Matter of the Application of Ohio Power Company for an Increase in Electric Distribution Rates*, Case No. 20-585-EL-AIR, *et seq.*, Joint Stipulation and Recommendation, p. 11 (May 11, 2021).

- Shadow billing is merely a calculation, provided at an aggregated, monthly level. More information is arguably provided on the Commission’s own website and other utilities are already providing or agreeing to provide the same data.
- A transition to competitive procurement is just a promise to file an application, which Duke Energy Ohio could do absent the Stipulation.
- Sharing the price-to-compare on customers’ bills is already done by many other utilities in Ohio and the current GCR rate is shared on the Energy Choice Ohio website.

IGS attempts to solve for this problem by citing to a 2005 attorney-examiner entry in which IGS was allowed to intervene in a GCR case even though it did not have any actual interest in the accuracy of the calculation of the company’s GCR rates. Nevertheless, in that case the examiner noted that prior GCR cases had shown that Commission determinations therein “could have an impact” on IGS and the competitive market.¹⁰ IGS fails, however, in its attempt to draw an analogy between that case and the present situation. Here there is no history of similar cases in which the Commission has found that competitive marketers actually can be impacted by its decisions. Rather, IGS can only point to a few other cases in which somewhat similar—but not identical—proposals were made and were either agreed to or rejected. The 2005 GCR case does not control in this situation.

Neither RESA nor IGS provides the Commission with any explanation of how they or the competitive market could be impacted by the stipulation, particularly with respect to the Company agreeing to provide periodic data to OCC; rather, they simply pin a label on the stipulation and

¹⁰ *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of The Cincinnati Gas & Electric Company and Related Matters*, Case No. 05-218-GA-GCR, Entry (Nov. 15, 2005).

believes that will suffice. Unfortunately, the Ohio Supreme Court has recently made it quite clear that this type of argument is ineffective. Two examples should suffice:

- In a recent affirmation of a decision by the Ohio Power Siting Board, the Court noted a particular party did “no more than pin a label on [a witness’s] testimony. The lack of an authority-based argument defeats [the party’s] contention.”¹¹ The Court also cited a prior decision to the same effect, wherein the Court had found that an argument is, in essence, waived if “[n]o argument is supplied regarding whether the relevant case law, applied to the facts of this case, justifies a decision in [the party’s] favor”).¹²
- In a recent appeal concerning a Suburban rate case, OCC argued against a phased-in increase, speculating that the company might lose customers rather than gaining customers. Pointing out that OCC’s concern was purely speculative, with nothing in the record to support it, the Court refused to consider the issue.¹³

Because Movants provide no explanation of how and why the stipulation is such a risk to their interests, the Commission should reject the requests to intervene.

C. Relation of Interest to Merits of the Case

Movants do not even attempt to argue that their supposed interest in the stipulation has any relationship at all with the merits of the MGP or TCJA cases. If there had been any such interest, they would certainly have moved to intervene long before now.

Movants’ claim that these proceedings seek to resolve matters that will impact the competitive retail natural gas market is misleading and inaccurate. The settlement in these proceedings resolves rate-recovery issues that have been pending before the Commission since 2014. The settlement further creates a process and a path forward for the Company to file an application in a separate proceeding for the Commission to consider a proposal for the Company to exit its GCR and transition to a competitive procurement process. Interested entities would, as

¹¹ *In re Application of Duke Energy Ohio, Inc.*, Slip Opinion No. 2021-Ohio-3301, ¶ 35.

¹² *Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 53.

¹³ *In re Application of Suburban Natural Gas Co.*, Slip Opinion No. 2021-Ohio-3224, ¶¶ 41-43.

usual, be welcome to participate. Nothing is resolved vis-à-vis the competitive retail natural gas market. The stipulation only includes an agreement to file a separate case upon approval of the settlement by the Commission. There is no prejudice to IGS or any other competitive suppliers. All stakeholders can participate in that subsequent proceeding whereby the Commission will evaluate the merits of the Company's transition to a competitive procurement process.

The claim that the integrity and balance of the competitive market are somehow impacted is an exaggeration at best and a deliberate mischaracterization at worst. Movants' concern regarding the inclusion of a price-to-compare on customer bills is simply an attempt to deny customers access to meaningful data to make an informed choice. The Company already provides this information on electric bills for customers today. Natural gas customers should not be treated any differently. The Commission should not entertain Movants' (or anyone's) attempts to deny customers access to useful information regarding their energy choices. The Commission itself provides similar information to customers via its website through apples-to-apples comparisons. Duke Energy Ohio's customers should be permitted to have this information on their bills as well.

D. Delay of the Proceeding and Contribution to Development of Facts

Movants claim their intervention will not delay the outcome in these cases, but that assertion is untrue. Currently, no party opposes approval of the Stipulation. Thus, no further discovery is needed, and a hearing would only address the standard three criteria and could be accomplished with one witness and no cross-examination. All of that would change with the addition of parties that apparently do oppose the Stipulation. A delay would be inevitable.

The legal standard in Ohio is that the potential intervenor be one that would "significantly contribute" to development and resolution of the factual issues. But neither IGS nor RESA has provided any reason to believe that there is a dispute over the provision of shadow billing to OCC

or over filing an application to move to a competitive auction and afterward providing a price to compare. And, further, they have not provided any reason to believe that, if there were such disputes, IGS and RESA could help resolve them.

Finally, IGS's suggested procedural schedule should be ignored as unnecessary and improper.

III. Conclusion

For the reasons set forth herein, Duke Energy Ohio respectfully requests that the Commission deny the motions by IGS and RESA to intervene, and the motion by IGS to set a procedural schedule, in the above-captioned proceedings. Neither IGS nor RESA has a cognizable interest in the issues in the proceedings and their participation would only delay the ultimate resolution.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

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CERTIFICATE OF SERVICE

The undersigned certifies that notification of the filing of the foregoing document is being made upon the persons listed below via electronic mail, this 4th day of October.

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Summary: Memorandum Memorandum of Duke Energy Ohio Contra Motions to Intervene and Set Schedule electronically filed by Mrs. Tammy M. Meyer on behalf of Duke Energy Ohio Inc. and D'Ascenzo, Rocco and Kingery, Jeanne W. and Vaysman, Larisa