BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates.	**)))**	**Case No. 14-0375-GA-RDR**
In the Matter of the Application of Duke Energy Ohio, Inc. for Tariff Approval.	**))**	**Case No. 14-0376-GA-ATA**
In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates.	**)))**	**Case No. 15-0452-GA-RDR**
In the Matter of the Application of Duke Energy Ohio, Inc. for Tariff Approval.	**))**	**Case No. 15-0453-GA-ATA**
In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates.	**)))**	**Case No. 16-0542-GA-RDR**
In the Matter of the Application of Duke Energy Ohio, Inc. for Tariff Approval.	**))**	**Case No. 16-0543-GA-ATA**
In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates.	**)))**	**Case No. 17-0596-GA-RDR**
In the Matter of the Application of Duke Energy Ohio, Inc. for Tariff Approval.	**))**	**Case No. 17-0597-GA-ATA**
In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates.	**)))**	**Case No. 18-0283-GA-RDR**
In the Matter of the Application of Duke Energy Ohio, Inc. for Tariff Approval.	**))**	**Case No. 18-0284-GA-ATA**
In the Matter of the Application of Duke Energy Ohio, Inc. for Implementation of the Tax Cuts and Jobs Act of 2017.	**)))**	**Case No. 18-1830-GA-UNC**
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of Tariff Amendments.	**)))**	**Case No. 18-1831-GA-ATA**

In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates.	**)))**	**Case No. 19-0174-GA-RDR**
In the Matter of the Application of Duke Energy Ohio, Inc. for Tariff Approval.	**))**	**Case No. 19-0175-GA-ATA**
In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Defer Environmental Investigation and Remediation Costs.	**))))**	**Case No. 19-1085-GA-AAM**
In the Matter of the Application of Duke Energy Ohio, Inc. for Tariff Approval.	**))**	**Case No. 19-1086-GA-UNC**
In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates.	**)))**	**Case No. 20-0053-GA-RDR**
In the Matter of the Application of Duke Energy Ohio, Inc. for Tariff Approval.	**))**	**Case No. 20-0054-GA-ATA**

RESA'S MEMORANDUM CONTRA
DUKE ENERGY OHIO MOTION FOR PROTECTIVE ORDER

The Retail Energy Supply Association ("RESA")[1] submits this memorandum contra to Duke Energy Ohio's motion for protective order to address Duke Energy's claim that the attorney examiner's October 15, 2021 Entry precludes IGS and by implication, RESA, from addressing the "process leading up to the Stipulation" and "the validity of the Stipulation" in these proceedings. In other words, Duke Energy appears to be arguing that neither IGS nor RESA may seek discovery on or present arguments to this Commission on whether the Stipulation satisfies the Commission's

[1] The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

three prong test. That argument makes no sense because the ultimate issue before the Commission in this proceeding is whether the Stipulation is reasonable. To accept Duke Energy Ohio's attempt to deny IGS and RESA from discovering and presenting evidence on why the Stipulation fails the three prong test due to the inclusion of retail market provisions (provisions that represent wholly unrelated matters) would deny both parties a fundamental right of due process in these proceedings and violate the Commission's own rule on stipulations.

The importance that the Commission places on the reasonableness of a stipulation highlights why RESA and IGS must be provided due process to address that issue. As this Commission recently noted in a Duke Energy proceeding, "[t]he **ultimate issue** for the Commission's consideration is whether the [stipulation], which embodies considerable time and effort by the signatory parties, **is reasonable** and should be adopted." *In re Application of Duke Energy Ohio, Inc. for Approval of an Alternative Form of Regulation to Establish a Capital Expenditure Program Rider Mechanism*, Case No. 19-791-GA-ALT, Opinion and Order, April 21, 2021, ¶¶ 42-42 (emphasis added). The Commission recognized the importance of the three prong test, stating that "**[i]n considering the reasonableness of a stipulation,** the Commission has used the following criteria: (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 principle or practice?" *Id.* (emphasis added). There can be no more important right of due process in this proceeding than RESA's and IGS' right to seek discovery on and present evidence on the reasonableness of a stipulation that includes competitive market provisions.

Even Duke Energy has relied on due process **in these proceedings** seeking modification of the August 13, 2019 procedural entry to provide Duke Energy with the opportunity to file

supplemental testimony in response to the filed Staff reports. Entry dated August 27, 2019 ("In the interest of judicial economy, fairness, and achieving due process for all interested parties, Duke requests that the procedural schedule be amended to permit the Company to file supplemental testimony in response to the Staff reports by October 4, 2019."). Duke Energy has also relied on due process when it supports its interests in other proceedings. *See e.g. In re Application of Duke Energy Ohio, Inc. to Adjust Rider AU for 2018 Grid Modernization Costs*, Case No. 19-664-GA-RDR, Second Entry on Rehearing, February 10, 2021 at ¶ 15 (arguing no due process provided when Commission suspended collection of Rider AU charges). Duke and the other signatory parties have placed the "ultimate issue" before the Commission both in the Stipulation and through Duke's testimony.[2] Duke and the other signatory parties thus have ensured they will have due process. RESA and IGS should have nothing less, and must be afforded with an opportunity to be heard on the ultimate issue in these proceedings.[3]

RESA's and IGS' rights to challenge the Stipulation are also expressly provided for by the Commission's rule on stipulations. Rule 4901-1-30 authorizes parties to Commission proceedings to enter into a stipulation. Specifically that "[a]ny two or more parties may enter into a written or oral stipulation concerning issues of fact, the authenticity of documents, or the proposed resolution of some or all of the issues in a proceeding." Ohio Adm.Code 4901-1-30(A). Importantly, the rule states that "[p]arties that do not join the stipulation **may offer evidence and/or argument in opposition.**" Ohio Adm.Code 4901-1-30(D) (emphasis added). Notably, Duke Energy does not

[2] *See* August 31, 2021 Stipulation at Section IV, ¶ 36 *and see generally* Supplemental Testimony of Sarah E. Lawler on behalf of Duke Energy Ohio, Inc. in Support of Stipulation.

[3] *In re Matter of the Commission's Investigation into Palmco Power Oh LLC DBA Indra Energy and Palmco Energy OH, LLC DBA Indra Energy's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Noncompliance*, Case No. 19-957-GE-COI, Opinion and Order, January 29, 2020 at ¶ 47 ("**However, due process requires notice and an opportunity to be heard**.").

address this rule in its motion for protective order and the express right granted by rule to parties to oppose a stipulation they did not sign or have any notice of until it was filed.

The Attorney Examiner's October 15, 2021 Entry also does not support Duke Energy's attempt to stop RESA and IGS from seeking discovery on and opposing the reasonableness of the Stipulation. The Attorney Examiner granted IGS' and RESA's intervention on a limited basis to "… **address** the proposed provisions related to the competitive market … [.]" Entry at ¶ 32 (emphasis added). The Attorney Examiner also stated that "… IGS and RESA are entitled to inquire into these specific provisions [the retail market provisions] of the Stipulation and any potential adverse impact they may have upon the competitive market in Duke's service territory … [.]" *Id.* The Attorney Examiner concluded the Entry by setting a procedural schedule "…for the above-captioned proceedings to **consider the Stipulation**." *Id.* at ¶ 33. Nowhere in the Entry did the Attorney Examiner prohibit IGS and RESA from conducting discovery that is reasonably calculated to lead to the discovery of admissible evidence challenging the reasonableness of the Stipulation given the inclusion of the retail market provisions.

Duke Energy's motion for protective order should also be denied because the Commission provides for wide ranging discovery in Commission proceedings. Per the Commission's discovery rule, "… any party to a commission proceeding may obtain discovery of any matter, not privileged which is relevant to the subject matter of the proceeding." Ohio Adm.Code 4901-1-16(B). It is not a valid basis for objection that the information sought would be inadmissible at hearing, if the information sought through the discovery request "… appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* Under this rule, any discovery request by IGS or RESA that delves into the reasonableness of the Stipulation given the inclusion of the retail market provisions would be "reasonably calculated to lead to the discovery of admissible evidence." That

includes any discovery requests that could lead to admissible evidence on the process of how the Stipulation was reached (i.e., the third prong of the three prong test) and the discovery of evidence challenging the validity of the Stipulation (i.e., the first and second prongs of the three prong test).

In conclusion, the Entry may have limited RESA's and IGS' interests in these proceedings to the retail market provisions but it did not limit RESA's and IGS' right to challenge the reasonableness of a stipulation that includes provisions that are wholly unrelated to the issues in these proceedings. If Duke Energy, OEG and OCC wish to avoid RESA's and IGS' participation in these proceedings, they can easily present an amended stipulation to the Commission minus the retail market provisions. Until they do so, RESA and IGS have every right to be heard on the reasonableness of the Stipulation. Accordingly, Duke Energy's motion for protective order seeking to limit IGS' right (and by implication RESA's right) to seek discovery on and challenge the "process leading up to the Stipulation" and "the validity of the Stipulation" should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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Summary: Memorandum Contra Duke Energy Ohio Motion for Protective Order electronically filed by Mr. Michael J. Settineri on behalf of Retail Energy Supply Association