

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. 14-375-GA-RDR

**IN THE MATTER OF THE APPLICATION OF
DUKE ENERGY OHIO, INC. FOR TARIFF
APPROVAL.**

CASE NO. 14-376-GA-ATA

**IN THE MATTER OF THE APPLICATION OF
DUKE ENERGY OHIO, INC. FOR AN
ADJUSTMENT TO RIDER MGP RATES.**

CASE NO. 15-452-GA-RDR

**IN THE MATTER OF THE APPLICATION OF
DUKE ENERGY OHIO, INC. FOR TARIFF
APPROVAL.**

CASE NO. 15-453-GA-ATA

**IN THE MATTER OF THE APPLICATION OF
DUKE ENERGY OHIO, INC. FOR AN
ADJUSTMENT TO RIDER MGP RATES.**

CASE NO. 16-542-GA-RDR

**IN THE MATTER OF THE APPLICATION OF
DUKE ENERGY OHIO, INC. FOR TARIFF
APPROVAL.**

CASE NO. 16-543-GA-ATA

**IN THE MATTER OF THE APPLICATION OF
DUKE ENERGY OHIO, INC. FOR AN
ADJUSTMENT TO RIDER MGP RATES.**

CASE NO. 17-596-GA-RDR

**IN THE MATTER OF THE APPLICATION OF
DUKE ENERGY OHIO, INC. FOR TARIFF
APPROVAL.**

CASE NO. 17-597-GA-ATA

**IN THE MATTER OF THE APPLICATION OF
DUKE ENERGY OHIO, INC. FOR AN
ADJUSTMENT TO RIDER MGP RATES.**

CASE NO. 18-283-GA-RDR

**IN THE MATTER OF THE APPLICATION OF
DUKE ENERGY OHIO, INC. FOR TARIFF
APPROVAL.**

CASE NO. 18-284-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. 19-174-GA-RDR

**IN THE MATTER OF THE APPLICATION OF
DUKE ENERGY OHIO, INC. FOR TARIFF
APPROVAL.**

CASE NO. 19-175-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. 20-53-GA-RDR

**IN THE MATTER OF THE APPLICATION OF
DUKE ENERGY OHIO, INC. FOR TARIFF
APPROVAL.**

CASE NO. 20-54-GA-ATA

ENTRY

Entered in the Journal on November 3, 2021

I. SUMMARY

{¶ 1} In this Entry, the attorney examiner grants the Retail Energy Supply Association's motion to move the hearing date and amends the procedural schedule, as well as denies the motion for protective order filed by Duke Energy Ohio, Inc. as moot.

II. DISCUSSION

{¶ 2} Duke Energy Ohio, Inc. (Duke or the Company) is a natural gas company, as defined by R.C. 4905.03, and a public utility, as defined by R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

A. *Manufactured Gas Plant Proceedings*

{¶ 3} On November 12, 2009, the Commission authorized Duke to defer environmental investigation and remediation costs related to two former manufactured gas plant (MGP) sites in Ohio for potential recovery of reasonable and prudent costs in a future base rate proceeding. *In re Duke Energy Ohio, Inc.*, Case No. 09-712-GA-AAM, Finding and Order (Nov. 12, 2009) at 4.

{¶ 4} On November 13, 2013, the Commission authorized the recovery of such environmental investigation and remediation costs as had been incurred by the Company between 2008 and 2012. The Commission authorized Duke to recover and continue deferring environmental investigation and remediation costs, indicating further that the Company would be able to recover those costs which were prudently incurred through Rider MGP. *In re Duke Energy Ohio, Inc.*, Case No. 12-1685-GA-AIR, et al., Opinion and Order (Nov. 13, 2013) at 70-74.¹

{¶ 5} On March 31, 2014, Duke filed an application in Case Nos. 14-375-GA-RDR and 14-376-GA-ATA, seeking approval to adjust its Rider MGP to recover costs incurred

¹ The Supreme Court of Ohio affirmed the Commission's decision authorizing Duke to recover and continue deferring environmental investigation and remediation costs associated with the MGP sites. *In re Application of Duke Energy Ohio, Inc.*, 150 Ohio St.3d 437, 2017-Ohio-5536, 82 N.E.3d 1148.

during 2013 for environmental investigation and remediation of the MGP sites pursuant to Ohio and federal environmental laws, amounting to \$8,346,698 (*2013 Rider MGP Adjustment*).

{¶ 6} On March 31, 2015, Duke filed an application in Case Nos. 15-452-GA-RDR and 15-453-GA-ATA, seeking approval to adjust its Rider MGP to recover costs incurred during 2014 for environmental investigation and remediation of the MGP sites pursuant to Ohio and federal environmental laws, amounting to \$686,031 (*2014 Rider MGP Adjustment*).

{¶ 7} On March 31, 2016, Duke filed an application in Case Nos. 16-542-GA-RDR and 16-543-GA-ATA, seeking approval to adjust its Rider MGP to recover costs incurred during 2015 for environmental investigation and remediation of the MGP sites pursuant to Ohio and federal environmental laws, amounting to \$1,061,056 (*2015 Rider MGP Adjustment*).

{¶ 8} On March 31, 2017, Duke filed an application in Case Nos. 17-596-GA-RDR and 17-597-GA-ATA, seeking approval to adjust its Rider MGP to recover costs incurred during 2016 for environmental investigation and remediation of the MGP sites pursuant to Ohio and federal environmental laws, amounting to \$1,296,160 (*2016 Rider MGP Adjustment*).

{¶ 9} On March 28, 2018, Duke filed an application in Case Nos. 18-283-GA-RDR and 18-284-GA-ATA, seeking approval to adjust its Rider MGP to recover costs incurred during 2017 for environmental investigation and remediation of the MGP sites pursuant to Ohio and federal environmental laws, amounting to \$14,652,068 (*2017 Rider MGP Adjustment*). On that same date, Duke also filed a motion to consolidate the *2013-2017 Rider MGP Adjustments*.

{¶ 10} By Entry issued on June 28, 2018, the attorney examiner granted the motion to consolidate the *2013-2017 Rider MGP Adjustments* and set a comment period.

{¶ 11} Staff, as directed by the June 28, 2018 Entry, filed its review and recommendations in relation to the *2013-2017 Rider MGP Adjustments* on September 28, 2018. Among other recommendations, Staff ultimately proposed to reduce the Company's requested recovery amounts for years 2013-2017 by \$11,867,900.00.

{¶ 12} On March 29, 2019, Duke filed an application in Case Nos. 19-174-GA-RDR and 19-175-GA-ATA, seeking approval to adjust its Rider MGP to recover costs incurred during 2018 for environmental investigation and remediation of the MGP sites pursuant to Ohio and federal environmental laws, amounting to \$19,804,031 (*2018 Rider MGP Adjustment*).

{¶ 13} On July 12, 2019, Staff filed its review and recommendations in the *2018 Rider MGP Adjustment*. Staff, again, proposed to reduce the requested recovery amount by \$11,366,243, in addition to other recommendations, such as netting the recommended disallowances against insurance proceeds.

{¶ 14} By Entry issued August 13, 2019, the attorney examiner consolidated the *2018 Rider MGP Adjustment* with the other ten rate adjustment cases and established a procedural schedule.² The procedural schedule also set a deadline for intervention in the *2018 Rider MGP Adjustment* of September 13, 2019. By Entry issued September 4, 2019, the evidentiary hearing was rescheduled to commence on November 18, 2019, at the offices of the Commission. The hearing was held as scheduled and post-hearing briefs were submitted by the parties.

{¶ 15} Additionally, in Case Nos. 19-1085-GA-AAM and 19-1086-GA-UNC, Duke had filed an application seeking authorization to extend its deferral and collection of MGP investigation and remediation costs from customers beyond December 31, 2019. By Entry issued August 13, 2019, the attorney examiner set September 13, 2019, as the intervention

² The August 13, 2019 Entry consolidated the following cases: Case Nos. 14-375-GA-RDR, 14-376-GA-ATA, 15-452-GA-RDR, 15-453-GA-ATA, 16-542-GA-RDR, 16-543-GA-ATA, 17-596-GA-RDR, 17-597-GA-ATA, 18-283-GA-RDR, 18-284-GA-ATA, 19-174-GA-RDR, and 19-175-GA-ATA.

deadline and established a comment period. Initial comments were received September 13, 2019, and reply comments were received October 2, 2019.

B. *Duke TCJA Proceedings*

{¶ 16} On December 21, 2018, in response to the passage of the 2017 Tax Cuts and Jobs Act (TCJA), Duke filed its application in Case No. 18-1830-GA-UNC, et al., to establish its natural gas TCJA rider to address the impacts of the reduction in the corporate income tax rate from 35 percent to 21 percent for its natural gas operations, including a reduction of the federal income tax rate and creation of excess accumulated deferred income taxes, ultimately reducing natural gas bills for customers. A hearing was scheduled and held on August 7, 2019, and post-hearing briefs were submitted by the parties.

C. *Outstanding Procedural Filings*

{¶ 17} On August 31, 2021, Duke, the Ohio Consumers' Counsel (OCC), Ohio Energy Group (OEG), and Staff filed a Stipulation, which they claim resolves all the issues raised by the signatory parties in the *Duke MGP Proceedings* and the *Duke TCJA Proceedings*, in addition to affording various customer protections and benefits. The Stipulation also provides a commitment to transition from Duke's gas cost recovery (GCR) mechanism to a standard service offer (SSO) competitive auction format for natural gas supply, a requirement for Duke to provide OCC, upon request, shadow billing information for natural gas customers in a format to be mutually agreed upon by Duke and OCC, and a new bill format proposal to include an SSO price-to-compare message on natural gas bills. The signatory parties aver that the Ohio Manufacturers' Association Energy Group, The Kroger Co., and Ohio Partners for Affordable Energy have agreed not to oppose the Stipulation. Duke also filed proposed tariffs, as well as the direct testimony of Amy Spiller and the supplemental testimony of Sarah Lawler in support of the Stipulation.

{¶ 18} On September 17, 2021, and September 29, 2021, respectively, Interstate Gas Supply, Inc. (IGS) and Retail Energy Supply Association (RESA) filed motions for leave to intervene in the above-captioned proceedings.

{¶ 19} Memoranda contra the motions for leave to intervene were timely filed by Duke, OCC, and OEG, to which RESA and IGS filed replies on October 12, 2021.

{¶ 20} By Entry issued October 15, 2021, the attorney examiner, citing the unique circumstances of these proceedings, granted limited intervention to RESA and IGS in order to address the three areas discussed in their motions for leave to intervene, namely Duke's commitment to transition from the GCR mechanism to an SSO competitive auction format for natural gas supply, the proposed SSO price-to-compare message on natural gas bills, and the commitment to provide OCC aggregate shadow billing data on an ongoing basis. The attorney examiner noted that, upon being granted limited intervention, IGS and RESA were entitled to inquire into these specific provisions of the Stipulation and any potential adverse impact they may have upon the competitive market in Duke's service territory. The October 15, 2021 Entry also established a procedural schedule, setting November 15, 2021, as the deadline for testimony in opposition to the Stipulation, and November 22, 2021, as the date on which the evidentiary hearing would commence.

{¶ 21} On October 27, 2021, RESA filed a motion to move the hearing date, arguing good cause exists to grant the motion as RESA's lead counsel would not be available the week of November 22, 2021, due to a preexisting family commitment. In order to avoid delaying the proceedings, RESA suggests moving the hearing date to either November 18, 2021, or alternatively, November 19, 2021.

{¶ 22} Duke filed its memorandum contra RESA's motion to move the hearing on November 1, 2021. Duke argues that, despite its efforts to have the parties agree on a revised procedural schedule, IGS and RESA continue to push against moving the deadline for testimony in opposition to the Stipulation, even if the hearing is moved to the week prior. Duke asserts having less than one week between the filing of testimony and the hearing date would severely prejudice Duke. As such, Duke suggests a litany of potential schedules for the attorney examiner's consideration, emphasizing the importance of having enough time

between the filing of the testimony and the hearing date in order to review testimony and conduct any necessary depositions.

{¶ 23} The parties were afforded the opportunity to present a mutually agreeable procedural schedule in response to the motion to move the hearing date and failed to do so. As such, the attorney examiner will be modifying the procedural schedule as follows:

- a. Testimony in opposition to the Stipulation should be filed by 12:00 p.m. on November 12, 2021.
- b. An evidentiary hearing shall commence on November 18, 2021, at 11:00 a.m. ET, via remote hearing technology. Instructions for participation in the evidentiary hearing shall be emailed to counsel prior to hearing. Individuals interested in observing the evidentiary hearing as a non-party can access the evidentiary hearing using the link <https://bit.ly/14-375-EVH>, and entering the password PUCO, or by calling 1-408-418-9388, and entering code 2344 552 9795.

{¶ 24} Any exhibits intended to be used on direct and cross-examination should be marked and exchanged by the parties and provided to the attorney examiner by electronic means no later than 12:00 p.m. on November 17, 2021. The parties are not required to re-file or exchange information that is already filed in the case dockets.

{¶ 25} Finally, Duke filed a motion for protective order on October 22, 2021, in which it requests that the Commission issue an order providing that Duke need not respond to the enumerated interrogatories, as they exceed the scope of discovery permitted by the October 15, 2021 Entry.

{¶ 26} IGS and RESA filed memoranda contra Duke's motion for protective order on October 29, 2021. IGS argues that ample rights of discovery are provided to all parties in Commission proceedings pursuant to R.C. 4903.082, adding that the Commission's rules allow discovery of "any unprivileged matter relevant to the subject matter" of a pending

proceeding and “appears reasonably calculated to lead to the discovery of admissible evidence.” Ohio Adm.Code 4901-1-16(B). According to IGS, the information it seeks is reasonably calculated to lead to the discovery of admissible evidence with respect to the Commission’s consideration of the Stipulation as a package under the three-part test. Additionally, IGS claims that Duke has provided responses, though it questions the completeness of some responses, thus rendering the motion for protective order moot. RESA presents a somewhat more targeted argument, claiming that there is no greater right to ensure due process in these proceedings than RESA’s and IGS’ right to seek discovery on and present evidence on the reasonableness of a Stipulation that includes competitive market provisions, given the ultimate issue for the Commission’s consideration is whether the Stipulation satisfies the three-prong test. RESA also argues that the Commission’s rules provide parties who do not join the Stipulation the opportunity to offer evidence and/or argument in opposition. Ohio Adm.Code 4901-1-30(D). Going further, RESA claims that the October 15, 2021 Entry contains no language prohibiting 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 competitive market provisions.

{¶ 27} First, the attorney examiner notes that, according to IGS, Duke has made some attempt to respond to the discovery requests, despite the filing of the motion for protective order. Thus, the motion for protective order appears to be moot at this point. However, to the extent there is clarification needed as to the October 15, 2021 Entry, the attorney examiner finds it appropriate to address the arguments raised by the parties. Notably, after reviewing the motion for protective order and responsive memoranda contra, no party has cited to Commission precedent that falls squarely on the issue presented in the motion for protective order. This is not surprising since the Commission rarely grants limited intervention, and when it has, discovery has typically either already concluded or the party granted limited intervention does not ultimately engage in the process. However, there is precedent that stands for the principle of limiting the scope of discovery in the event limited

intervention has been granted to a party. *See In re Cincinnati Gas & Elec. Co.*, Case No. 00-681-GA-GPS, Entry (Dec. 2, 2004). In that case, Norton McMurray Manufacturing Company (Norton) had been granted limited intervention for the purpose of opposing a motion for protective order filed by Cincinnati Gas & Elec. Co. (CG&E). The Commission issued its decision on the motion and set a procedural schedule instructing Staff to file a report with the study that was the subject of the motion for protective order as an attachment. Thereafter, Norton filed a motion to compel seeking additional documents. The Commission determined that, because Norton was only granted intervention for the purpose of opposing CG&E's motion for a protective order and the Commission had fully evaluated that motion and had issued a final decision on that matter, the limited purpose of its intervention had been completed. The Commission further stated that "[t]here is no reason, within this proceeding, for Norton to use the discovery process, as there is nothing to discover relevant to its now completed purpose for being in this case. Therefore, Norton should not be permitted to engage in a discovery-like process when it has not been permitted to further participate in this case."

{¶ 28} Despite IGS arguing that the general scope of discovery rules should apply, namely that a party may obtain discovery of *any* non-privileged matter that is relevant to the subject matter of the proceeding and is reasonably calculated to lead to the discovery of admissible evidence, adopting that view under the circumstances would effectively render meaningless the directives limiting intervention for these two parties. RESA and IGS had every opportunity to make their arguments in an interlocutory appeal of the Entry granting limited intervention. No such appeal was filed and, thus, any arguments attempting to contravene those directives are not well taken at this time. Finally, the attorney examiner disagrees with the contention that discovery was not somewhat limited by the October 15, 2021 Entry, as the attorney examiner noted the limited scope of discovery yet to be conducted in these proceedings, given the limited intervention granted to IGS and RESA, and reduced the discovery response time to seven days. As also noted in the October 15, 2021 Entry, R.C. 4901.13 permits the Commission to adopt rules to govern its proceedings

and to “regulate the mode and manner” of its hearings, just as the Commission is empowered to determine whether the interest of a party is sufficient to warrant the grant of a petition to intervene. *Dworken v. Pub. Util. Comm.*, 133 Ohio St. 208, 12 N.E.2d 490 (1938). Contrary to RESA’s arguments, RESA and IGS are being provided ample opportunity to offer evidence and/or argument in opposition, consistent with Ohio Adm.Code 4901-1-30, but also within the confines of their limited intervention status. Importantly, the attorney examiner is neither expanding nor reducing the ability of RESA or IGS to participate in these proceedings as provided in the October 15, 2021 Entry.

{¶ 29} As the deadline for written discovery requests has passed, and no requests to extend that deadline have been presented, it appears the only circumstance in which this issue would surface again would be during the scheduled depositions of Duke’s witnesses, Spiller and Lawler.³ The attorney examiner notes that the same guidance set forth in the October 15, 2021 Entry, as well as this Entry, should be applied during depositions conducted in these proceedings.

{¶ 30} It is, therefore,

{¶ 31} ORDERED, That the motion to move the hearing date filed by RESA be granted and the parties adhere to the amended procedural schedule, as set forth in this Entry. It is, further,

{¶ 32} ORDERED, That Duke’s motion for protective order be denied as moot. It is, further,

³ IGS recently filed a notice to take the depositions of Duke witnesses Spiller and Lawler.

{¶ 33} ORDERED, That a copy of this Entry be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ Megan J. Addison

By: Megan J. Addison
Attorney Examiner

NJW/mef

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**Case No(s). 14-0375-GA-RDR, 14-0376-GA-ATA, 15-0452-GA-RDR, 15-0453-
GA-ATA, 16-0542-GA-RDR, 16-0543-GA-ATA, 17-0596-GA-RDR, 17-0597-GA-
ATA, 18-0283-GA-RDR, 18-0284-GA-ATA, 18-1830-GA-UNC, 18-1831-GA-ATA,
19-0174-GA-RDR, 19-0175-GA-ATA, 19-1085-GA-AAM, 19-1086-GA-UNC, 20-
0053-GA-RDR, 20-0054-GA-ATA**

Summary: Attorney Examiner Entry granting the Retail Energy Supply Association's motion to move the hearing date and amending the procedural schedule, as well as denying the motion for protective order filed by Duke Energy Ohio, Inc. as moot. electronically filed by Ms. Mary E. Fischer on behalf of Megan J. Addison, Attorney Examiner, Public Utilities Commission of Ohio