

**BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

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**JOINT INTERLOCUTORY APPEAL AND REQUEST FOR CERTIFICATION OF THE  
RETAIL ENERGY SUPPLY ASSOCIATION AND INTERSTATE GAS SUPPLY, INC.**

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Pursuant to Rule 4901-1-15 of the Ohio Administrative Code, the Retail Energy Supply Association (“RESA”)<sup>1</sup> and Interstate Gas Supply, Inc. (“IGS”) jointly seek an interlocutory appeal of the November 3, 2021 Entry (the “Entry” or the “November 3, 2021 Entry”), attached hereto as Exhibit A, by the Attorney Examiner and seeks certification thereof. Through the Entry, the Attorney Examiner attempted to clarify the scope of RESA’s and IGS’ right to participate in these proceedings pursuant to the October 15, 2021 entry (the “Intervention Entry”) granting

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<sup>1</sup> 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](http://www.resausa.org).

RESA's and IGS's limited intervention. In the November 3, 2021 Entry, the Attorney Examiner stated that "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." Entry at ¶ 28. The Attorney Examiner did not clarify if RESA and IGS can introduce evidence to challenge whether the August 31, 2021 stipulation (the "Stipulation") is reasonable under the Commission's three-prong test due to the inclusion of the retail market provisions, even though the Attorney Examiner purportedly attempted to make such clarification by stating that "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." Entry at ¶ 27.

The lack of clarity in the November 3, 2021 Entry as to the scope of the arguments RESA and IGS can raise at hearing and on brief brings into question whether the Attorney Examiner in the November 3, 2021 Entry is interpreting Rule 4901-1-30 and the Intervention Entry in such a way that prevents RESA and IGS from presenting evidence and arguments on the outcome in these proceedings. While RESA and IGS interpret the express language of the Intervention Entry as allowing RESA and IGS to address the Stipulation's reasonableness due to the inclusion of the retail market provisions, given the ambiguity of the November 3, 2021 Entry, either a separate entry should be issued to provide that confirmation or this interlocutory appeal be certified to allow the Commission to consider this issue of first impression – whether a party being granted limited intervention can be precluded from presenting evidence and arguments on an issue that will determine the outcome of a proceeding.

As parties who are adversely affected by the Attorney Examiner's November 3, 2021 Entry, RESA and IGS file this interlocutory appeal and request for certification, asking for a

Commission determination allowing RESA and IGS to present evidence and arguments on the ultimate issue in these proceedings and within their stated interests, whether the Stipulation is unreasonable due to the inclusion of the retail market provisions. Alternatively, the Attorney Examiner can issue a clarifying entry making the same determination.

Respectfully Submitted,

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## **MEMORANDUM IN SUPPORT**

### **I. INTRODUCTION**

The November 3, 2021 Entry (the “Entry” or the “November 3, 2021 Entry”) in these proceedings attempted to clarify the October 15, 2021 Entry (the “Intervention Entry”) that limited RESA’s and IGS’ intervention in these proceedings. When issuing the November 3, 2021 Entry, the Attorney Examiner found that Duke Energy Ohio’s (“Duke Energy”) motion for protective order was moot because Duke Energy had responded to discovery requests. Relevant to this interlocutory appeal, is that in the Entry the Attorney Examiner attempted to clarify the Intervention Entry by addressing both IGS’ and RESA’s arguments in opposition to the motion for protective order. This attempt at providing clarity included addressing RESA’s argument that the Intervention Entry did not prohibit RESA from challenging the reasonableness of the August 31, 2021 stipulation (“Stipulation”) given the inclusion of the retail market provisions. The Attorney Examiner concluded that “[c]ontrary 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.” Entry at ¶ 28.

Not only did the November 3, 2021 Entry appear to interpret and apply Rule 4901-1-30, but the November 3, 2021 Entry failed to make clear that RESA and IGS can present evidence and arguments as to the outcome of this proceeding—that the Stipulation is not reasonable due to the inclusion of the retail market provisions. Instead, the issue raised in Duke Energy’s motion for protective order remains open even as the November 18, 2021 hearing date fast approaches. Accordingly, absent a clarifying entry confirming that RESA and IGS can challenge the outcome of these proceedings, this interlocutory appeal should be certified and the Commission should issue

an order that makes clear that RESA and IGS may present evidence and make arguments as to why the Stipulation is not reasonable due to the inclusion of the retail market provisions.

## **II. BASIS FOR INTERLOCUTORY APPEAL**

Ohio Administrative Code Rule (“Rule”) 4901-1-15(B) allows an adversely affected party to take an interlocutory appeal to the Commission of procedural rulings or rulings issued during a hearing or prehearing conference. An interlocutory appeal in this instance must first be certified to the Commission by the legal director, deputy legal director, attorney examiner, or presiding hearing officer. Rule 4901-1-15(B). The legal director, deputy legal director, attorney examiner, or presiding hearing officer shall not certify such an appeal unless he or she finds:

- (a) **The appeal presents a new or novel question of interpretation, law, or policy;** or
- (b) The appeal is taken from a ruling which represents **a departure from past precedent** and an immediate Commission determination is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the Commission ultimately reverse the ruling in question.

The November 3, 2021 Entry presents a new or novel question of interpretation, law, or policy. Specifically, the Attorney Examiner’s November 3, 2021 Entry raises the issue of whether the Commission can preclude a party from opposing a stipulation contrary to the express language of Rule 4901-1-30. In the November 3, 2021 Entry, the Attorney Examiner cited to R.C. 4901.13 which provides the Commission with the authority to issue rules to “regulate the mode and manner” of its hearings,<sup>2</sup> and for the first time cited to Rule 4901-1-30 holding that “[c]ontrary to RESA’s arguments, RESA and IGS are being provided ample opportunity to offer evidence and/or

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<sup>2</sup> See *The Akron & Barberton Belt Rd. Co. et al. v. Public Utilities Commission of Ohio*, 165 Ohio St. 316, 135 N.E.2d 400, syllabus (1956). In that case, the Court stated “The sole rule-making power granted to the commission is that conferred by Section 4901.13, Revised Code, which provides: ‘The Public Utilities Commission may adopt and publish rules to govern its proceedings and to regulate the matter and manner of all valuations, tests, audits, inspections, investigations and hearings relating to parties before it. All hearings shall be open to the public.’” *Id.* at 319, quoting R.C. 4901.13.

arguments in opposition, consistent with Ohio Adm. Code 4901-1-30, but also within the confines of their limited intervention.”

The November 3, 2021 Entry, however, failed to clarify “the confines of [RESA’s and IGS’] limited intervention,” namely, the scope of evidence and arguments RESA and IGS may make in opposition to the Stipulation. This left open the question raised by Duke Energy’s Motion for Protective Order—whether RESA and IGS are precluded from opposing the reasonableness of a stipulation that includes retail market provisions. To the extent the November 3, 2021 Entry is interpreting Rule 4901-1-30 as allowing the Attorney Examiner to preclude a party from addressing the ultimate issue in these proceedings at hearing and on brief, which is whether the Stipulation is reasonable given the inclusion of the retail market provisions, then this appeal presents a new or novel question of interpretation, law and policy. Such an interpretation would also be a departure from past precedent, as RESA and IGS are not aware of any Commission precedent where a party was precluded from arguing the reasonableness of a stipulation.

Notably, paragraph 27 of the November 3, 2021 Entry recognizes that no party cited Commission precedent on the issues raised in the motion for protective order, that it was “... not surprising since the Commission rarely grants limited intervention[.]” Thus a valid basis exists for certifying this appeal absent an entry that makes clear that RESA and IGS can present evidence and arguments in this hearing on why the Stipulation does not meet the Commission’s three-prong test for reasonableness due to the inclusion of the retail market provisions.

### **III. ARGUMENT**

RESA and IGS interpret the express language in the Intervention Entry as allowing each of them to challenge the stipulation under the Commission’s three-prong test to address the inclusion of the retail market provisions. The Intervention Entry granted the intervention of RESA



and IGS on a limited basis to “... **address the proposed provisions related to the competitive market** ... [.]” Intervention 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 Intervention Entry by setting a procedural schedule “...for the above-captioned proceedings to **consider the Stipulation.**” *Id.* at ¶ 33 (emphasis added).

Duke Energy views the Intervention Entry differently than do RESA and IGS. This is clear from Duke Energy’s October 22, 2021 motion for protective order in which Duke Energy claimed that 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 argued that neither IGS nor RESA may seek discovery on or present arguments to this Commission on whether the Stipulation satisfies the Commission’s three prong test.

RESA responded to Duke’s interpretation of the Entry through its memorandum contra filed on October 29, 2021, noting that the ultimate issue before the Commission in this proceeding is whether the Stipulation is reasonable. RESA also argued that 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.

Through the Entry, issued on November 3, 2021, the Attorney Examiner found Duke Energy’s Motion for Protective Order moot. Relevant to this interlocutory appeal, the Attorney

Examiner also sought to clarify the Intervention Entry by addressing the arguments raised by RESA regarding its ability to challenge the reasonableness of the Stipulation. After doing so, the Attorney Examiner cited to the Commission's authority to adopt rules to regulate hearings under R.C. 4901.13 and held that "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." Entry at ¶ 28.

Instead of clarifying the Intervention Entry, the November 3, 2021 Entry did not address the issues raised by Duke Energy's Motion for Protective Order, leaving open the issue of whether Duke Energy's apparent interpretation of the Intervention Order is correct. Thus, to the extent the November 3, 2021 Entry seeks to interpret or limit Rule 4901-1-30 such that RESA and IGS cannot submit evidence and make arguments on the issue creating their interest in this proceeding (the reasonableness of the Stipulation given the inclusion of the retail market provisions), this interlocutory appeal is warranted.

The Commission's used its authority to promulgate rules to regulate its hearings under R.C. 4906.13 when it adopted Rule 4901-1-30. That rule, titled "Stipulations" addresses stipulations and the procedures related to stipulations. The rule states:

(A) Any 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.

(B) A written stipulation must be signed by all of the parties joining therein, and must be filed with the commission and served upon all parties to the proceeding.

(C) An oral stipulation may be made only during a public hearing or record prehearing conference, and all parties joining in such a stipulation must acknowledge their agreement thereto on the record. The commission or the presiding hearing officer may require that an oral stipulation be reduced to writing and filed and served in accordance with paragraph (B) of this rule.

(D) Unless otherwise ordered, parties who file a full or partial written stipulation or make an oral stipulation must file or provide the testimony of at least one signatory

party that supports the stipulation. **Parties that do not join the stipulation may offer evidence and/or argument in opposition.**

(E) No stipulation shall be considered binding upon the commission.

Ohio Adm.Code 4901-1-30 (emphasis added). Under the plain language of this rule, both RESA and IGS are allowed to present arguments in opposition of the Stipulation – i.e., that the Stipulation cannot be reasonable given the inclusion of the retail market provisions.

When considering stipulations under Rule 4901-1-30, the Commission considers whether the stipulation is reasonable. In considering the reasonableness of a stipulation, the Commission uses 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; and (3) does the settlement package violate any important regulatory principle or practice. *See, e.g., AK Steel Corp. v. PUC of Ohio*, 95 Ohio St. 3d 81, 82-83, 765 N.E.2d 862 (2002). 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).

Given the express language in the rule, both RESA and IGS may present evidence and arguments that the Stipulation cannot be reasonable due to the inclusion of the retail market provisions. In other words, RESA and IGS should be allowed to argue as to the **outcome** of RESA’s and IGS’ stated interests, just as Norton McMurray Manufacturing Company did when it was granted limited intervention for the purpose of opposing a motion for protective order, a case cited in the Entry. *See* the November 15, 2021 Entry at ¶ 27 *citing to In re Cincinnati Gas & Elec.*

Co., Case No. 00-681-GA-GPS, Entry (Dec. 2, 2004). And as RESA stated in its September 29, 2021 motion to intervene at page 6, “[t]he stipulation proposes swift and significant changes to the operation of Duke’s competitive marketplace and to the provision of shopping information and data, which are of direct interest and affect RESA and its members.” RESA also stated in its motion to intervene at page 6 that “... **RESA has a substantial interest in addressing the stipulation and in ensuring that these issues are properly resolved.**” RESA Motion to Intervene at p. 6 (emphasis added). Likewise, IGS stated a clear interest in these proceedings, stating at page 14 of its motion to intervene that “IGS has a real and substantial interest in this proceeding, the disposition of which may impair or impede IGS’ ability to protect that interest.”

RESA’s and IGS’ due process rights to present evidence and arguments on why the inclusion of the retail market provisions causes the Stipulation to fail the Commission’s three prong test support RESA’s interpretation and application of Rule 4901-1-30. There can be no more important right of due process in this proceeding than RESA’s and IGS’ right to present evidence and arguments on the outcome of these proceedings. 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.<sup>3</sup> 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 why the Stipulation is not reasonable given the inclusion of the retail market provisions, as allowed by Rule 4901-1-30.<sup>4</sup>

RESA and IGS also note that the Attorney Examiner’s authority to regulate the conduct of a hearing cannot be used to limit RESA’s and IGS’ ability to oppose the stipulation. R.C. 4906.13, titled “Publication of rules governing proceedings”, provides the authority to the Commission to “... to adopt and publish rules ... to regulate the mode and manner of all ... hearing relating to the parties before it.” Under that statutory authority, the Commission has adopted Rule 4901-1-27 which allows “[t]he presiding hearing officer to “... regulate the course of the hearing and the conduct of the participants.” But regulating the hearing cannot be a basis of stripping away a party’s right to oppose a stipulation under Rule 4901-1-30. Moreover, the Commission has taken no action under Rule 4901-1-38 to waive the requirements of Rule 4901-1-30 nor has any party sought to seek a waiver from Rule 4901-1-30 in this proceeding. Thus, RESA and IGS must be permitted to present evidence and arguments on why the Stipulation is not reasonable given the inclusion of the retail market provisions.

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<sup>3</sup> 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.

<sup>4</sup> *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.**”).

Therefore, to the extent the Attorney Examiner's November 3, 2021 Entry seeks to interpret Rule 4901-1-30 as allowing the Attorney Examiner to prevent RESA and IGS present evidence and arguments in opposition to the stipulation, then that interpretation is in error. The rights granted under Rule 4901-1-30 are express, and the only way a party can oppose a stipulation is to address the ultimate issue, whether the stipulation is reasonable under the Commission's three-prong test. Absent clarification through a separate entry by the Attorney Examiner, this appeal should be certified so the Commission can confirm that RESA and IGS can offer evidence and/or arguments to show why the Stipulation fails the three-prong test due to the retail market provisions being added to the Stipulation.

#### **IV. CONCLUSION**

It defies both reasonableness and fundamental due process rights if RESA and IGS can be granted limited intervention in these proceedings to address the market-related commitments in the stipulation but not be able to present evidence and arguments on the outcome of these proceedings. Absent clarification through a separate entry, the ambiguity left open in the November 3, 2021 Entry will very likely lead the Stipulating Parties to argue that RESA and IGS cannot challenge the reasonableness of the Stipulation regardless of the fact that the Stipulation includes wholly-unrelated retail market provisions (Duke Energy has already asserted such argument in its October 22, 2021 motion for protective order). Consequently, the Attorney Examiner should clarify the November 3, 2021 Entry and if necessary, the Intervention Entry, and

not, certify this interlocutory appeal so that the Commission can address the interpretation and application of Rule 4901-1-30 in these proceedings.

Respectfully Submitted,

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## **CERTIFICATE OF SERVICE**

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being sent (via electronic mail) on the 8th day of November 2021 on all persons/entities listed below:

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/s/ Michael J. Settineri  
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## Exhibit A

**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.<sup>1</sup>

{¶ 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

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<sup>1</sup> 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.<sup>2</sup> 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

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<sup>2</sup> 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.<sup>3</sup> 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,

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<sup>3</sup> 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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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

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Summary: Application Application for Joint Interlocutory Appeal and Request for Certification of the Retail Energy Supply Association and Interstate Gas Supply, Inc. electronically filed by Mr. Michael J. Settineri on behalf of Retail Energy Supply Association