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. 14-375-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 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 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-UNC
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

REPLY BRIEF OF DUKE ENERGY OHIO, INC.

TABLE OF CONTENTS

I. INTRODUCTION

Throughout the evidentiary hearing and the post-hearing briefs submitted in these proceedings, IGS[1] and RESA[2] continuously attempt to distract from the core question before the Commission: whether the Stipulation,[3] as a whole, passes the three-part test.[4] As long as the Stipulation: (1) is the product of serious bargaining among capable, knowledgeable parties; (2) as a package, benefits ratepayers and the public interest; and (3) does not violate any important regulatory principle or practice, the Commission should place substantial weight on the terms of the Stipulation and adopt it in its entirety.[5]

The Stipulation represents a fair, reasonable, and comprehensive resolution of all issues raised by the negotiating parties. As a package, the Stipulation delivers benefits that will provide customers with immediate and meaningful value. The issue now before the Commission is whether this Stipulation, as a total settlement package, is reasonable and should be approved in accordance with the well-established three-part test.

IGS and RESA object to the three competitive market provisions for which their intervention was so narrowly granted: Duke Energy Ohio's[6] commitment to file an application to transition from the gas cost recovery (GCR) mechanism to a standard service offer (SSO) competitive auction format, the proposed SSO price-to-compare message on natural gas customer

---

[1] Interstate Gas Supply, Inc. (IGS).
[2] Retail Energy Supply Association (RESA).
[3] Joint Ex. 1, Stipulation and Recommendation, (Admitted Nov. 18, 2021) (Stipulation).
[4] *See, e.g., In re Cincinnati Gas & Elec. Co.*, Case No. 91-410-EL-AIR, Order on Remand (Apr. 14, 1994); *In re Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT, Opinion and Order (Mar. 30, 1994); *In re Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al., Opinion and Order (Dec. 30, 1993); *In re Cleveland Elec. Illum. Co.*, Case No. 88-170-EL-AIR, Opinion and Order (Jan. 31, 1989); *In re Restatement of Accounts and Records*, Case No. 84-1187-EL-UNC, Opinion and Order (Nov. 26, 1985).
[5] *See Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978).
[6] Duke Energy Ohio, Inc. (Duke Energy Ohio or the Company).

bills, and the commitment to provide OCC[7] aggregate shadow billing data on an ongoing basis.[8] In spite of IGS and RESA's vehement arguments to the contrary, the evidence presented at hearing fails to demonstrate that the three terms above will have any negative impact on the natural gas market in Ohio.

Additionally, IGS and RESA raise a number of procedural issues. They claim that they have been denied procedural due process by limiting the scope of their intervention and discovery to the competitive market provisions, the burden was improperly shifted from the Stipulation's proponents to its opponents, the records of some of these proceedings were not properly reopened, and various evidentiary rulings during the course of hearing prejudiced their ability to challenge the provisions within the Stipulation. IGS and RESA's procedural arguments have no merit in fact or law. Despite their wealth of experience before the Commission, IGS and RESA demonstrate a fundamental misunderstanding of the administrative rules of procedure. Their intervention, which was properly limited in scope based on their own motions to intervene, provided them the opportunity to engage in discovery, present evidence at hearing, including the cross examination of witnesses, and assert substantive arguments in brief. Despite this opportunity, IGS and RESA were unable to present compelling evidence that would move the needle in the Commission's analysis. The record reflects that the Stipulation meets the requirements of the three-part test, and therefore Duke Energy Ohio respectfully requests the Commission adopt the Stipulation without modification, in its entirety.

II. THE STIPULATION IS REASONABLE UNDER THE THREE-PART TEST.

The Stipulation, as a package, is reasonable under the Commission's three-part test, and therefore should be adopted without modification. Section 4901-1-30 of the Ohio Admin. Code

[7] The Office of Consumers' Counsel (OCC).
[8] Entry Granting Intervention, (Oct. 15, 2021), ¶ 32.

authorizes parties to Commission proceedings to enter into a stipulation.[9] The terms of an agreement are accorded substantial weight.[10] The ultimate issue for consideration is whether the agreement, which embodies considerable time and effort by the Signatory Parties,[11] is reasonable and should be adopted.[12] In considering the reasonableness of a stipulation, the Commission utilizes the following criteria: (1) is the settlement the 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.[13]

A. The Stipulation was the result of serious bargaining amongst knowledgeable and capable parties.

The Commission must determine that the Stipulation was the result of serious bargaining among knowledgeable and capable parties. The Stipulation is supported or unopposed by the Staff, the Office of the OCC, Duke Energy Ohio, and numerous major customer groups. Through extensive negotiations, it resolves 18 different cases and issues impacting millions of dollars In light of these undisputed facts, there can be no credible claim the Stipulation fails the first prong of the test.

---

[9] O.A.C. 4901-1-30(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.")
[10] *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992), *citing Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978)
[11] The Signatory Parties include Duke Energy Ohio, The Office of the Ohio Consumers' Counsel, Ohio Energy Group, and Staff of the Public Utilities Commission of Ohio. Note that The Ohio Manufacturers' Association Energy Group, The Kroger Co., and Ohio Partners for Affordable Energy have agreed not to oppose the Stipulation.
[12] *In re Cincinnati Gas & Elec. Co.*, Case No. 91-410-EL-AIR, Order on Remand (Apr. 14, 1994); *In re Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT, Opinion and Order (Mar. 30, 1994); *In re Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al., Opinion and Order (Dec. 30, 1993); *In re Cleveland Elec. Illum. Co.*, Case No. 88-170-EL-AIR, Opinion and Order (Jan. 31, 1989); *In re Restatement of Accounts and Records*, Case No. 84-1187-EL-UNC, Opinion and Order (Nov. 26, 1985).
[13] *Id.*

1. The signatory and non-opposing parties are knowledgeable and capable.

The parties that participated in negotiating and synthesizing the Stipulation are knowledgeable and capable parties for purposes of the Commission's inquiry. The Commission finds that parties are "knowledgeable and capable" when they "are familiar with Commission proceedings," [14] represent "a wide range of interests," [15] "regularly participate in matters before the Commission,[16] and are "represented by experienced and competent counsel."[17]

The Signatory Parties include Duke Energy Ohio, OCC, Staff,[18] and OEG.[19] Other intervening parties, including the OMAEG,[20] Kroger,[21] and OPAE,[22] agreed not to oppose the Stipulation.[23] All of these parties, alongside their counsel, regularly participate in rate proceedings before the Commission and are familiar with regulatory matters. The parties represent a wide variety of interests including commercial and residential customers. As the Company's witness Amy Spiller testified, the parties regularly participate in rate proceedings, are very knowledgeable in regulatory matters, and are represented in these proceedings by experienced, competent counsel.[24] The Signatory Parties were also assisted by subject matter experts.[25] IGS and RESA do not dispute these facts. In fact, even IGS and RESA's witness admitted that the signatory and non-

---

[14] *In the Matter of the Application of Ohio Power Company for Administration of the Significantly Excessive Earnings Test for 2017*, Case No. 18-989-EL-UNC, Opinion and Order (Jul. 17, 2021) ¶ 19.
[15] *In the Matter of Application of Duke Energy Ohio, Inc. to Adjust Rider DR-IM and Rider AU for 2014 SmartGrid Costs*, Case No. 15-883-GE-RDR, Opinion and Order, (Mar. 31, 2016) *22.
[16] *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Authority to Amend Filed Tariffs*, Case No. 08-72-GA-AIR, et al., Opinion and Order (Dec. 3, 2008) *26.
[17] *Id.*
[18] Staff of the Public Utilities Commission of Ohio. (Staff)
[19] Ohio Energy Group. (OEG)
[20] Ohio Manufacturers Association Energy Group. (OMAEG)
[21] The Kroger Company. (Kroger)
[22] Ohio Partners for Affordable Energy. (OPAE)
[23] Direct Testimony of Sarah E. Lawler, p. 21.
[24] Direct Testimony of Amy B. Spiller, p. 22.
[25] Direct Testimony of Sarah E. Lawler, p. 16.

opposing parties are knowledgeable and capable; witness Frank Lacey testified that Staff, Duke Energy Ohio, OEG, OMAEG, Kroger, and OPAE are all knowledgeable and capable.[26]

IGS and RESA attack the knowledge of the parties by arguing witnesses Amy Spiller and Sarah Lawler had not read the Finding and Order filed February 24, 2021, in Case No. 19-1429-GA-ORD. They argue that because these two individuals had not read this specific decision that they cannot possibly be "knowledgeable and capable" under the Commission's precedent. Obviously, there are logical fallacies with this argument. There are numerous Signatory and Non-Opposing Parties to this Stipulation and there is no evidence they were not aware of that decision. In fact, several of those parties are also parties to the Case No. 19-1429-GA-ORD proceeding and as such would have been aware of that decision. Similarly, there is no evidence that other Duke Energy employees were not aware of this specific decision. Indeed, Duke Energy Ohio participated in that case, having filed initial and reply comments.[27] Further, the fact that these two witnesses had not read this order does not mean that they were not knowledgeable and capable as it relates to the terms of the Stipulation. There is nothing in that order that prohibits the terms included in the Stipulation. As such, the fact that two specific individuals were not aware of this single decision is not relevant.

Moving to the specifics of the claim, the case IGS and RESA refer to, *In the Matter of the Commission's Review of the Minimum Gas Service Standards in Chapter 4901:1-13 of the Ohio Administrative Code,* deals with a proposal by OCC to adopt a novel rule requiring shadow billing provisions.[28] Notably, IGS and RESA quote only the following portion of the Commission's analysis: "[c]onsistent with our decisions in prior cases, the Commission declines to adopt OCC's

---

[26] Transcript, pp. 245–246.
[27] *In the Matter of the Commission's Review of the Minimum Gas Service Standards in Chapter 4901:1-13 of the Ohio Administrative Code*, Case No. 19-1429-GA-ORD, Initial Comments of Duke Energy Ohio, Inc., (Jan. 17, 2020); *Id.* Reply Comments (Jan. 31, 2020).
[28] *Id.*, Finding and Order (Feb. 24, 2021) ¶ 82.

shadow-billing proposal," explaining that witnesses Lawler and Spiller are not knowledgeable when they were "ignorant" of "the recent Commission rulemaking in which the Commission addressed two of three market-related provisions in the Stipulation (shadow billing and price-to-compare)."[29]

This comparison is invalid because the rulemaking case did not address the shadow billing provision as it exists in the Stipulation. OCC's proposal in Case No. 19-1429-GA-ORD would have required natural gas companies to conduct a shadow-billing analysis comparing the price the customer paid under competitive suppliers and what they would have paid through the SCO or GCR rate, file an annual report with the Commission that describes the aggregated customer savings or losses, and list on a shopping customer's natural gas bill the supply costs and the SCO or GCR rate for the same level of usage.[30] OCC's proposal would have been incorporated to the Ohio Administrative Code and been applicable to all competitive natural gas suppliers in Ohio and included requirements for reporting shadow billing data to the Commission itself. This was a completely different proposal than the one within the Stipulation, wherein only the Company would report aggregated shadow billing to OCC. Regardless of whether witnesses Lawler and Spiller read this rulemaking decision prior to assisting in the resolution of these proceedings via the Stipulation, Case No. 19-1429-GA-ORD is not indicative of whether the Commission has some established precedent of rejecting shadow billing provisions. More importantly, it is not indicative that witnesses Lawler and Spiller are not knowledgeable and capable parties who engaged in

---

[29] Joint Initial Brief, pp. 24–25.

[30] "For the protection of consumers, OCC proposes that the Commission adopt a new rule, as Ohio Adm.Code 4901:1-13-11(B)(14), that would require natural gas companies to conduct a shadow-billing analysis to compare the difference between what shopping customers paid for natural gas through their competitive suppliers and what they would have paid if they had been served through the SCO or GCR rate. OCC's proposed rule would also require a natural gas company to file an annual report with the Commission that describes the aggregated customer savings or losses. Additionally, OCC proposes that the Commission adopt a new shadow-billing statement as Ohio Adm.Code 4901:1-13-11(B)(15), which would list a shopping customer's gas supply costs and the SCO or GCR rate for the same level of usage. OCC states that the shadow-billing statement would assist customers in determining whether they are saving money with their supplier." Finding & Order in Case No. 19-1429-GA-ORD (Feb 24, 2021) ¶ 82.

serious bargaining.[31] IGS and RESA's argument is thus misplaced, and the Company submits that the parties that participated in the negotiations that led to the final draft of the Stipulation were clearly knowledgeable and capable pursuant to the Commission's previous analyses.

2. The fact that the Stipulation includes additional bargained-for terms indicates serious bargaining occurred.

Bargained-for terms, especially those that would not have resulted from litigation, are clear indications that the Stipulation was the result of serious bargaining. Because the Stipulation does not necessarily reflect the position that any of the Signatory Parties would have adopted if these proceedings had been fully litigated, it is clear that serious bargaining, including compromises between diverse interests, occurred.[32]

In Case No. 20-585-EL-AIR, Ohio Power Company d/b/a AEP Ohio (AEP Ohio) filed an application for approval of an increase in its electric distribution rates, tariff modifications, and changes in accounting methods.[33] On November 17, 2021, the Commission evaluated a stipulation to resolve those issues submitted by AEP Ohio, Staff, OCC, Kroger, and OMAEG, among others.[34] In considering whether the stipulation was the result of serious bargaining, the Commission noted:

> [T]the fact that the Stipulation incorporates recommendations of the Staff, reflects several amendments to provisions proposed in the Company's application in favor of customers and intervenors, and includes the addition of terms and conditions to

[31] Witness Lawler is Vice President of Rates and Regulatory Strategy, where she is responsible for all state and federal regulatory rate matters involving Duke Energy Ohio and Duke Energy Kentucky. (Supplemental Testimony of Sarah E. Lawler, pp. 1–2). Witness Spiller is State President of Duke Energy Ohio and its subsidiary, Duke Energy Kentucky, and has spent the duration of her career managing state government and regulatory policies, strategies, and relationships on behalf of Duke customers. (Direct Testimony of Amy B. Spiller, pp. 1–2).

[32] *In the Matter of Smartenergy Holdings, LLC*, Case No. 19-1590-EL-UNC, Finding and Order (Nov 6, 2019) ¶ 9 ("Further, the Signatory Parties state that the Stipulation does not necessarily reflect the position that any of the Signatory Parties would have adopted if this matter had been fully litigated. Upon review, we find that the first prong of the test is met.")

[33] *In the Matter of the Application of Ohio Power Company*, Case No. 20-585-EL-AIR, et. al, Opinion and Order (Nov. 17, 2021) ¶ 5.

[34] *Id.*

> the benefit of customers, to be evidence of significant bargaining among the parties."[35]

Here, despite the divergent interests among them, the Signatory Parties conducted serious bargaining sessions to create a Stipulation that includes terms reflecting those interests. The settlement results in an overall rate decrease to customers.[36] The settlement provides certainty for all stakeholders, including Duke Energy Ohio, in resolving complex regulatory proceedings that have been pending for many years.[37] The settlement includes immediate bill credits to customers.[38] The Stipulation, as a whole, contains provisions that make clear that the parties engaged in extensive and thorough negotiations. It represents a comprehensive and reasonable balance of interests, and therefore is clearly the result of serious bargaining among knowledgeable and capable parties.

3. IGS and RESA continuously misstate the standard for serious bargaining amongst knowledgeable and capable parties.

IGS and RESA misstate the standard by which the Commission judges the first prong of the reasonableness test. The standard is "whether the Stipulation is the product of serious bargaining among capable, knowledgeable parties."[39] IGS and RESA's Joint Brief is replete with references to additional requirements that are not contained within this standard, and therefore any arguments that the Stipulation does not meet IGS and RESA's manufactured standard should be disregarded.

---

[35] *In the Matter of the Application of Ohio Power Company*, Case No. 20-585-EL-AIR, et. al, Opinion and Order (Nov. 17, 2021) ¶ 108.
[36] Direct Testimony of Sarah E. Lawler, p. 16.
[37] *Id.*, p. 17.
[38] Direct Testimony of Amy B. Spiller, p. 22.
[39] *In re Cincinnati Gas & Elec. Co.*, Case No. 91-410-EL-AIR, Order on Remand (Apr. 14, 1994); *In re Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT, Opinion and Order (Mar. 30, 1994); *In re Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al., Opinion and Order (Dec. 30, 1993); *In re Cleveland Elec. Illum. Co.*, Case No. 88-170-EL-AIR, Opinion and Order (Jan. 31, 1989); *In re Restatement of Accounts and Records*, Case No. 84-1187-EL-UNC, Opinion and Order (Nov. 26, 1985).

IGS and RESA argue that the standard for knowledgeable and capable parties includes experience in the particular issues the Stipulation attempts to resolve. Specifically, IGS and RESA note that "[n]one of the evidence presented by Duke Energy demonstrates that the negotiating parties were knowledgeable, capable, and experienced on issues affecting competitive retail natural gas suppliers."[40] IGS and RESA cite no authority to support the requirement that the parties must be "experienced on issues affecting" non-parties to the Stipulation. While occasionally parties offer evidence that they are "experienced in utility cases generally" or even in the specific subject matter at issue in the matter,[41] this "experience" is not a requirement the Commission must consider when determining the parties are "knowledgeable and capable." IGS and RESA are attempting to redefine the standard to require the parties have experience in the competitive supplier market in order to justify rejection of the Stipulation by virtue of suppliers not being present at the negotiations.

Even more, implied in IGS and RESA's brief is a notice requirement to non-parties prior to the resolution of a matter before the Commission that may affect non-party interests. For example, in their Joint Brief, the intervenors note that "IGS and RESA received no notice that the Stipulation could include provisions related to the competitive market."[42] They note that it is undisputed that neither any competitive retail natural gas suppliers nor RESA were invited to participate in the Stipulation negotiations.[43] The response to IGS and RESA's argument is simple—competitive suppliers were not required to be present. There is no statute, Commission rule or precedent that indicates that such a notice requirement exists.

---

[40] Joint Initial Brief, p. 25.
[41] *See In The Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Rates*, Case No. 08-709-EL-AIR et al., Opinion and Order (Jul. 8, 2009) *28 ("[the witness] also indicated that the parties in these proceedings have been involved in prior proceedings before the Commission and were knowledgeable and experienced in utility cases, generally, and in Duke rate setting matters, specifically.")
[42] Joint Initial Brief, p. 24.
[43] *Id.*, p. 12.

Duke Energy Ohio noted as much in its response to RESA's applicable Request for Admission. IGS and RESA note that Duke Energy Ohio admitted that it "did not invite any competitive retail natural gas suppliers to participate in the stipulation negotiations."[44] IGS and RESA omitted the entirety of Duke Energy Ohio's response, which stated:

> Objection. This request is irrelevant and beyond the scope of RESA's limited intervention. Without waiving said objection, Duke Energy Ohio admits no competitive retail natural gas suppliers were parties to the proceedings at the time of negotiations. Duke Energy Ohio invited all parties to the proceedings to the stipulation negotiations at the time of the negotiations and was under no legal obligation to invite non-parties to settlement negotiations.[45]

IGS and RESA do not dispute Duke Energy Ohio's statement that it was under no legal obligation to invite non-parties to settlement negotiations. They provide no citation to support their contention that any such obligation exists.

IGS and RESA note that the negotiations included parties that did not intervene in every single proceeding resolved by the Stipulation, and therefore it was inappropriate to exclude competitive suppliers.[46] But whether each party intervened in every single proceeding has no bearing on whether competitive suppliers should have been included in the negotiations. Each party that participated in the settlement negotiations had an interest in at least one of the cases sought to be resolved by the Stipulation. The fact that those parties did not intervene in every single case at issue within the negotiations does not create a legal obligation to exclude them until they intervene in all cases at issue, nor does it create a legal obligation to invite competitive suppliers to those negotiations. Despite their attempts to create a notice or experience requirement within the "knowledgeable and capable" standard, Commission precedent simply does not support IGS and RESA's reading of the standard.

---

[44] *Id.*, citing RESA Ex. 4 (RESA-RFA-01).
[45] RESA Ex. 4 (RESA-RFA-01).
[46] Joint Initial Brief, p. 13.

4. IGS and RESA were not denied due process simply because they did not participate in settlement negotiations.

RESA and IGS contend that their exclusion from settlement negotiations creates "due process concerns" that "inhibit RESA and IGS' ability to challenge the Stipulation as a package."[47] They argue that although the Commission has permitted similar Stipulations in the past (*i.e.*, including terms not directly related to the matters the settlement sought to resolve) it only did so where parties were "afforded ample opportunity to present evidence" in opposition to the stipulation.[48] To support this proposition, IGS and RESA cite *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, *et al.*, Entry (Apr. 5, 2017). IGS and RESA interpret the Commission's decision in that case to permit challenged, extraneous provisions only where the challenging party was provided adequate due process by participating in the settlement process and having an opportunity to present evidence in opposition to the stipulation.[49] But that interpretation is flawed. The Commission's analysis made particular reference to the fact that the challenging party—in that case, OCC—was permitted to present evidence at hearing and in post-hearing briefs:

> Following the filing of the stipulation, OCC was afforded ample opportunity to present evidence at the hearing on the stipulation, as well as post-hearing briefs, in opposition to any of the stipulation's provisions. PPA Order at 10-11; Second Entry on Rehearing at 113. We, therefore, reject the claim that intervenors were deprived of notice and an opportunity to be heard.[50]

---

[47] *Id.*, p. 3.
[48] Joint Initial Brief, p. 17, *citing In the matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, et al., Entry (Apr. 5, 2017) ¶ 24.
[49] Joint Initial Brief, p. 17.
[50] *In the matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, et al., Entry (Apr. 5, 2017) *10–11.

Just as OCC was permitted opportunity to be heard in Case No. 14-1693-EL-RDR, IGS and RESA were properly given an opportunity to be heard in these proceedings. IGS and RESA were afforded ample opportunity to present evidence at the hearing on the Stipulation, as well as submit post-hearing briefs, in opposition to the competitive market provisions of the Stipulation.

Finally, IGS and RESA's belief that there was "impropriety and/or manipulation" of the negotiation process "through the exclusion of natural gas suppliers" is completely speculative, insulting, and not supported by any discernable evidence.[51] Even still, "[t]he Commission is not required to evaluate the negotiation process…to determine whether serious bargaining occurred."[52] Based on the foregoing, it is clear that the Signatory and Non-Opposing parties to the Stipulation were knowledgeable and capable as the first prong of the reasonableness test requires. The fact that IGS and RESA were not invited to those negotiations does not change this. IGS and RESA have cited no Commission rule or precedent that would require notice to competitive suppliers prior to these negotiations. If that were the case, settlements would almost never occur because inevitably, some individual, customer, or other interested third party could argue they were not included in settlement negotiations. Nor does the Commission's longstanding reasonableness test require the parties have particularized experience with every term set forth within a settlement agreement though of course Duke Energy Ohio does have experience with the terms set forth in the Stipulation). Therefore, the Stipulation was the result of serious bargaining between knowledgeable and capable parties.

---

[51] See Joint Initial Brief, pp. 22–23.

[52] *In the Matter of the Application of Ohio Power Company*, Case No. 20-585-EL-AIR, et. al, Opinion and Order (Nov. 17, 2021) ¶ 108, *citing In re Application of Ohio Edison Co*., 146 Ohio St.3d 222, 2016-Ohio-3021, 54 N.E.3d 1218, ¶¶ 45-47.

B. The Stipulation does not violate any important regulatory principle or practice.

The Commission must also consider whether the settlement package violates any important regulatory principle or practice.[53] Despite IGS and RESA's arguments, this analysis considers the Stipulation as a whole, rather than a particular term in isolation. There is no regulatory practice or principle that prevents implementation of the three competitive market provisions. Including unrelated, bargained-for terms within a settlement package similarly does not violate any regulatory principle or practice, and approving the Stipulation will not "open the door" to circumventing regulatory procedure, as IGS and RESA warn. Therefore, Duke Energy Ohio respectfully submits that the Stipulation, as a package, does not violate any important regulatory principle or practice.

1. Implementation of the three competitive market provisions does not violate any important regulatory principle or practice.

The three competitive market provisions include Duke Energy Ohio's agreement to file an application to transition from its GCR mechanism to an SSO auction for the procurement of natural gas, the commitment to file an application to include a price-to-compare message on customer bills, and the agreement to provide aggregate shadow billing data to OCC on a periodic basis. The three substantive provisions that IGS and RESA take issue with cannot possibly violate any important regulatory principle or practice because two of the three (GCR to SSO transition and price-to-compare), are otherwise permitted under the law and Commission's own regulations and will be subject to future Commission proceedings. The remaining provision (shadow billing) is legally permitted as well.

[53] *Id.*

A commitment to take future action subject to Commission review, such as Duke's commitments with respect to the SSO and price-to-compare provisions, cannot possibly violate any regulatory principle or practice, because the Commission must approve of them. . The only term to be resolved now involves the provision of the aggregate shadow billing data to OCC. Duke Energy Ohio is legally permitted to disclose the shadow billing information even without a Commission Order, and the Commission has already approved similar shadow billing proposals for AEP and Columbia Gas of Ohio, Inc. (Columbia).[54] Therefore, IGS and RESA cannot in good faith argue that the Commission's previous decisions, which approved similar shadow-billing provisions, violate important regulatory principles and practices.

As this Stipulation does not resolve the price-to-compare issue in any way, the merits of that future proposal should not be considered at part of this Stipulation. However, if the Commission is inclined to consider the merits of the proposal now as urged by IGS and RESA, including the price-to-compare on customer bills does not violate any important regulatory principle or practice.

IGS and RESA cite to the Finding and Order in Case Number 19-1429-GA-ORD, issued on April 21, 2021, to establish that a regulatory principle or practice exists preventing the inclusion of the price-to-compare on shopping customers' bills.[55] The language IGS and RESA quoted from that Opinion and Order is the Commission's statement that "it would be problematic to display the SCO or GCR rate on the bill, given that the rate changes from month to month."[56] This quote is extremely misleading and out of context. In full, the Commission explained:

---

[54] *In the Matter of the Application of Ohio Power Company for an Increase in Electric Distribution Rates*, Case No. 20-585-EL-AIR, et al., Opinion and Order (Nov. 17, 2021) ¶ 131; *In the Matter of the Joint Motion to Modify the Dec. 2, 2009 Opinion and Order*, Case No. 12-2637-GA-EXM, Opinion and Order (Jan. 9, 2013), pp. 43, 46.
[55] Joint Initial Brief, p. 33.
[56] *Id.*, citing *In re Commission's Review of the Minimum Gas Service Standards in Chapter 4901:1-13 of the Ohio Administrative Code*, Case No. 19-1429-GA-ORD, Entry on Rehearing (April 21, 2021) at ¶ 28.

> We concluded, in the February 24, 2021 Finding and Order, that Staff's proposed price-to-compare statement should be modified and adopted, as it would provide customers with another informative tool to facilitate a comparison of offers. February 24, 2021 Finding and Order at ¶ 69.The price-to-compare statement, as adopted by the Commission, strikes an appropriate balance and reflects a reasonable resolution of the comments offered by various stakeholders. As many of the commenters emphasized, it would be problematic to display the SCO or GCR rate on the bill, given that the rate changes from month to month. The price-to-compare statement notes this fact, while also suggesting that customers may wish to compare supplier offers with the SCO or GCR rate, as well as acknowledging that price is only one feature of any offer.[57]

It is clear the Commission's precedent does not consider price-to-compare messages categorically misleading or unacceptable. Rather, the language of the price-to-compare message has a direct impact on whether such statement violates an important regulatory principle or practice. Here, although the proposed price-to-compare message is included within the Stipulation, it will still be subject to approval and modification by the Commission in a subsequent proceeding. This is exactly the sort of regulatory review that "strikes an appropriate balance and reflects a reasonable resolution" to the parties' positions, as set forth above in Case No. 19-1429-GA-ORD. In any event, the language of the price-to-compare message will be subject to review and comment in a subsequent proceeding that will be initiated following approval of the Stipulation, as submitted. A price-to-compare message itself and the commitment to file that future application therefore cannot violate any important regulatory principle or practice. If IGS and RESA believe the language that the parties agreed should be included in the Company's future application is problematic, then the proper forum for those arguments is that subsequent proceeding.

Second, Duke Energy Ohio's transition from a GCR to an SSO does not violate any important regulatory principle or practice because the Stipulation's provision is merely a promise

[57] *In re Commission's Review of the Minimum Gas Service Standards in Chapter 4901:1-13 of the Ohio Administrative Code*, Case No. 19-1429-GA-ORD, Entry on Rehearing (April 21, 2021) at ¶ 28.

to file an application to do so. Just like the price-to-compare issue discussed above, there is no reason for the Commission to address the merits of a transition from a GCR to an SSO at this time.

If this issue is addressed by the Commission now, the transition itself does not violate an important regulatory practice or principle in light of previous transitions from the GCR mechanism to an SSO or SCO by other Ohio utilities. Indeed, IGS and RESA's own witness, James Crist, admitted this is precisely the path that was followed by other Ohio gas utilities. Mr. Crist agreed that "it was appropriate" for Dominion Energy Ohio (Dominion), Vectren Energy Delivery of Ohio, Inc. d/b/a CenterPoint Energy Ohio (Centerpoint), and Columbia to transition to an SCO at the time those transactions were made.[58] Additionally, he agreed that the previous transitions of Dominion, CenterPoint, and Columbia did not violate Ohio Admin. Code Section 4929.02, which sets forth the policy of the State of Ohio with respect to natural gas services and goods.[59] It is unclear how IGS and RESA believe that Duke Energy Ohio's transition from a GCR to an SSO violates a longstanding regulatory principle when the Commission allowed the same transitions for three other utilities, which IGS and RESA's own witness agreed was reasonable and in line with the state's policy directives. That IGS and RESA might prefer an SCO and are predisposed to challenge even the notion of any other construct is immaterial to the issue before the Commission. The evidentiary record is undisputed—the SSO provision within the Stipulation cannot be said to violate any important regulatory principle or practice.

Finally, the provision of aggregate shadow billing data to OCC does not violate any important regulatory principle or practice. A very clear example that shadow billing does not violate Commission rules is Columbia's provision of shadow billing data. Columbia has been providing shadow billing data to OCC on a monthly basis since at least 2013, and the Commission

[58] Transcript, p. 297.
[59] *Id.*, p. 310.

has never indicated that such a practice violates any administrative rule or policy.[60] IGS and RESA's own witness agreed that Columbia provides this data to OCC on an ongoing basis, and admitted that he had never seen that data nor any news reports regarding the character or impact of that data.[61] As a practice that has occurred via agreement between Columbia and OCC for over seven years, it is absurd to now argue that such a practice violates longstanding, important regulatory principles.

Moreover, last month, the Commission confirmed that the provision of such shadow billing data does not violate any regulatory principle or practice and is in fact permitted by agreement.[62] In that case, the Commission considered a stipulation that included a similar shadow billing provision; AEP Ohio agreed to perform aggregate shadow billing calculations for residential customers and to make such calculations promptly available to OCC and Staff annually or at OCC's or Staff's request.[63] AEP Ohio and OCC agreed to work to develop a proposal that amends AEP Ohio's existing application to display additional computations on customers' bills to reflect potential consumer savings or losses.[64]

IGS put forth exactly the same arguments in the AEP case it does here. IGS and Direct Energy Services, LLC (Direct Energy) opposed the shadow-billing provision of AEP Ohio's stipulation because it would be backward looking, misleading, meaningless, and perpetuate the mistaken belief that a lower rate is the only benefit that customers receive from competition.[65] IGS

---

[60] *In re Columbia Gas of Ohio, Inc.*, Case No. 12-2637-GA-EXM, Opinion and Order (Jan. 9, 2013), p. 43.
[61] Transcript, p. 279.
[62] *In the Matter of the Application of Ohio Power Company for an Increase in Electric Distribution Rates*, Case No. 20-585-EL-AIR, et al., Opinion and Order (Nov. 17, 2021) ¶ 198.
[63] *Id.*, ¶ 72.
[64] *Id.*
[65] *Id.*, ¶ 129.

further argued that the Commission has consistently declined to order various forms of shadow billing.[66] The Commission explicitly rejected these arguments:

> The Commission finds that IGS and Direct Energy have not shown that the shadow-billing provisions in the Stipulation violate any important regulatory principle or practice. First, the Stipulation requires AEP Ohio to perform aggregate shadow-billing calculations for residential customers and report the information to OCC and Staff (Joint Ex. 1 at 11). Although we do not here address the value of such information, we do not agree that AEP Ohio's mere provision of the calculations to OCC or Staff violates the third part of the three-part test or that the provision must be rejected because it is insufficiently clear. As Direct Energy has previously acknowledged, a utility company may, as AEP Ohio has done here, elect to engage in shadow billing by agreement.[67]

It is clear from the recent AEP Ohio decision that the Commission does not consider the provision of aggregate shadow-billing data to OCC to violate any important regulatory principles or practice. Regardless of the "value" of such information, the "mere provision of the calculations" does not violate an established regulatory rule or practice. Therefore, the second prong of the reasonableness test is met with respect to the competitive market provisions.

2. There is no regulatory principle or practice preventing a Stipulation from including unrelated, bargained-for terms.

Stipulations and settlement agreements before the Commission are not restricted to include only terms necessarily related to the applications filed in those proceedings. To their credit, IGS and RESA expressly acknowledge that Ohio law does not support their position. "The Commission has not adopted a *per se* rule prohibiting unrelated provisions in a stipulation."[68] Despite this concession, IGS and RESA argue that these types of proceedings are unique and should not be subject to what they acknowledge is Ohio law.

---

[66] *Id.*
[67] *Id.*, ¶ 198.
[68] Joint Initial Brief, p. 17.

IGS and RESA argue that the directives by which the MGP Proceedings[69] and TCJA Proceedings[70] began govern what can be included in the Stipulation that resolves them.[71] IGS and RESA cite the stipulation rule, OAC 4901-1-20, in support of this contention. The rule states: "[a]ny two or more parties may enter into a written or oral stipulation concerning issues of fact, authenticity of documents, or the proposed resolution of some or all of the issues in the proceeding."[72] Nothing in the language of this rule indicates that the resolution of issues within the proceeding are the only terms that may be included in the stipulation.

There are many Commission proceedings, including proceedings which specifically relate to the Tax Cuts and Jobs Act of 2017 (TCJA), where stipulations included provisions not directly related to the reason the Commission or Applicant originally initiated the case. IGS should be very familiar with that, because they are a signatory party to a stipulation which did just that. The Ohio Edison, Toledo Edison, Cleveland Electric Illuminating Company TCJA proceeding was settled in conjunction with its grid modernization proposal.[73] The grid modernization provisions alone involved more than $516 million in total program costs.[74] IGS was a signatory party to that stipulation and as such is very familiar with this principle of Ohio law.[75] The AEP Ohio TCJA proceeding was also resolved via a stipulation that included $4 million in low income billing assistance, changes to pole attachment rates unrelated to the TCJA, and an agreement not to revise pole attachment rates for several years.[76] As shown through these two representative examples,

---

[69] Manufactured Gas Plant Case Nos. 14-375-GA-RDR, 15-452-GA-RDR, 16-542-GA-RDR, 17-596-GA-RDR, 18-283-GA-RDR, 19-174-GA-RDR, 19-1085-GA-AAM, 20-0053-GA-RDR. (MPG Proceedings)
[70] Case Nos. 18-1830-GA-UNC and 18-1831-GA-UNC.
[71] See Joint Initial Brief, p. 8.
[72] O.A.C. 4901-1-20.
[73] Case No. 16-481-EL-UNC *et seq*.
[74] Case No. 16-481-EL-UNC, Stipulation filed November 9,2018, p. 10.
[75] Case No. 16-481-EL-UNC, Supplement Stipulation filed January 25, 2019.
[76] Case No. 18-1007-EL-UNC, Stipulation filed September 26, 2018, pp. 6-7.

nothing in Ohio law prohibits stipulations from including provisions not directly related to the purpose for which the proceeding was originated.

IGS and RESA next rely on two cases where the Commission rejected requests to modify stipulations by non-parties to those stipulations.[77] There is obviously a difference between cases in which non-stipulating parties seek to force the inclusion of unrelated issues and this case. There is an extensive precedent in Ohio of stipulations that include provisions that were not included in the original application in those cases, such as the FirstEnergy and AEP Ohio TCJA cases discussed above.

IGS and RESA also cite to the direct testimony of their witness James H. Cawley for the proposition that it violates regulatory principles and practices to allow inclusion of what he calls "alien provisions" in settlement stipulations.[78] IGS and RESA emphasized Mr. Cawley's testimony that, if he were voting on the reasonableness of the Stipulation, he would be "offended" that the Signatory Parties submitted the Stipulation with extraneous provisions.[79] Not only is Mr. Cawley's testimony as to how he would have voted if the Stipulation was before him as a Commissioner wholly irrelevant, he cites no Ohio or even Pennsylvania law for the proposition that the inclusion of extraneous provisions violate a regulatory principle or practice. This is because no such principle exists. It is common practice before the Commission to resolve matters by serious bargaining, both of the matters directly at issue in the case as well as with additional, bargained-for terms.

IGS and RESA argue that the Attorney Examiner already agreed that the competitive market provisions were "wholly unrelated" based on the language contained within the October

[77] Joint Initial Brief, pp. 18-19.
[78] Joint Initial Brief, p. 28, *citing* Direct Testimony of James H. Cawley, p. 11.
[79] Joint Initial Brief, p. 29, *citing* Direct Testimony of James H. Cawley, p. 13.

15, 2021 Entry granting intervention. However, the Attorney Examiner correctly addressed this argument at hearing by noting:

> I will note you are correct that we use the phrase wholly unrelated in that entry. However, not to be taken out of context, that entry was aimed to address the motions for leave to intervene by RESA and IGS. In no way were we making any sort of determination on the Stipulation filed. That's why we are here today.[80]

Additionally, the "wholly unrelated" language utilized by the Attorney Examiner has been addressed in the context of stipulated electric security plans, which may provide some insight on the matter.[81]

In Case No. 14-1297-EL-SSO, several of the non-signatory parties argued that the stipulation's components were not germane to the provision of the subject matter of the underlying cases and were "wholly unrelated" to the scope of the proceedings, thus requesting that each stipulated term be evaluated on its own merits in order to provide further protection to customers.[82] In response, the Commission noted that "we have considered and rejected arguments that the criteria for the evaluation of stipulations should be revised in light of the [electric distribution utility]'s statutory right to reject modifications to an ESP," emphasizing that "we decline to revisit that issue here. Under the three-prong test, we always carefully review all terms and conditions of the proposed stipulation."[83] Here, the "wholly unrelated provisions" must also be reviewed carefully within the context of the entire stipulation. Any argument to eliminate provisions unrelated to an initial application would modify the Commission's criteria in evaluating stipulations, which it has refused to do. Therefore, the Stipulation does not violate any regulatory

---

[80] Transcript, pp. 26–27.
[81] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer*, Case No. 14-1297-EL-SSO, Opinion and Order (Mar. 31, 2016) *78.
[82] *Id.*
[83] *Id.*, *79–80.

principle or practice by including additional, bargained-for terms outside of those necessarily related to the cases the Stipulation seeks to resolve.

3. Approving the Stipulation will not open the door to circumventing regulatory procedure.

Finally, approval of the Stipulation will not violate important regulatory principles or practices by encouraging parties to circumvent Commission procedure. IGS and RESA argue that if the Stipulation is approved, it will encourage settlements that "sneak in" unrelated provisions, and parties will be forced to intervene in every case, regardless of the subject matter of the case, because "absent intervention there would be no way for such party to prevent itself from being subject to the types of shenanigans that occurred in this proceeding."[84] First and foremost, approval of the provisions within the Stipulation does not grant approval in the subsequent cases where those issues will actually be considered. IGS and RESA witness Lacey recognized this fact, agreeing that the transition from the GCR to an SSO will not take place until the auction application is approved by the Commission.[85] Additionally, he agreed that when Duke Energy Ohio files the auction application, the Commission can prescribe any price-to-compare bill language it deems fit.[86]

In short, the Commission has, and will still have, the final say in adopting or modifying stipulations. It is impossible to "sneak in" provisions to circumvent regulatory oversight when the regulatory body has to approve both the Stipulation in which the provision is contained *and* the subsequent filings resulting from those Stipulation commitments. IGS and RESA have no support for their argument that approval of this Stipulation will open the door to attempts to end-run the

[84] Joint Initial Brief, p. 35.
[85] Transcript, p. 232.
[86] *Id.*, p. 227.

Commission, and therefore, their contention that approval of the Stipulation will create an influx of interventions contrary to established regulatory principles should be rejected.

C. The Stipulation benefits ratepayers and the public interest.

1. The Stipulation benefits ratepayers and the public interest as a package by resolving the MGP, TCJA and competitive issues.

The Stipulation is a comprehensive settlement package that benefits ratepayers and the public interest. It resolves 18 total cases, addresses cost recovery of more than $85 million, and lowers customer rates by more than five percent. Bringing resolution to a multitude of complex and highly-contested regulatory proceedings is absolutely in the interest of the public. The parties will no longer have the risk associated with pending MGP issues, lengthy and expensive trials, and the possibility of appeal. The settlement package creates bill assistance programs for qualifying customers, as well as message consistency for Duke Energy Ohio natural gas and electric customers. Additionally, the Stipulation package limits Duke Energy Ohio's ability to seek future deferral for potential MGP remediation by placing reasonable conditions on when Duke Energy Ohio may make a future application. In their initial brief, IGS and RESA do not rebut any of these benefits.

2. The Stipulation was negotiated in good faith by parties representing both consumer and industrial interests.

IGS and RESA deduce from the language of the Stipulation that the Signatory Parties "traded the market provisions at the expense of ratepayer credits and MGP Rider charges."[87] They provide no support for this contention, merely conclusively stating that "given the nature of these proceedings and the provisions of the Stipulation, the only value that could have been given up or traded is additional ratepayer credits or a lower amount collected through Rider MGP."[88] This

[87] Joint Initial Brief, p. 43.
[88] *Id.*, pp. 43–44.

allegation is completely unfounded, based on pure speculation, and provides no value to the Commission's analysis of the reasonableness of the Stipulation.

IGS and RESA argue that Duke Energy Ohio ignored customers and their needs by bargaining away their benefits. This is simply not the case. While IGS and RESA claim to represent customer interests, Duke Energy Ohio negotiated directly with customers, including industrial and residential customer groups, to create a balanced settlement package that benefits all parties. For example, Duke Energy Ohio agreed in the Stipulation to withdraw its request to amortize the unprotected excess accumulated deferred income taxes (EDIT) liability over a six-year period and instead immediately apply the entire unprotected EDIT regulatory liability against natural gas customers' obligations, thereby reducing customers' obligation by over $28 million.[89]

IGS and RESA also put forth a perplexing argument that the Signatory Parties carefully drafted Paragraph 35 of the Stipulation to intentionally "trick" the Commission into issuing a final order in the SSO proceeding before an application has even been filed.[90] In Paragraph 35 of the Stipulation, "these proceedings" are defined to include both the matters set forth in these captioned cases as well as the future proceeding initiated by the application to transition to the SSO auction format.[91]This definition is warranted as certain commitments contained in the Stipulation inform that future filing. In a separate paragraph, the Stipulation recommends the Commission issue a final Opinion and Order in "these proceedings." Suggesting deceit, IGS and RESA now accuse the Signatory Parties of intentionally attempting to secretly elicit a final Order approving the SSO auction.

[89] Stipulation, ¶ 6.0
[90] Joint Initial Brief, p. 43.
[91] Stipulation, ¶ 35.

This tenuous argument is ludicrous. There is absolutely no evidence that the parties were intentionally attempting to mislead the Commission with this language and, even if they could, the Commission would not let such an attempt stand. The SSO application must be approved through a subsequent proceeding (as is expressly acknowledged in supporting testimony[92] and in the Stipulation where it specifically calls for the Auction Application to be filed), and an Order in this matter would resolve only those matters the Stipulation seeks to resolve—the captioned matters. It strains credulity that IGS and RESA honestly believe that the Commission could be tricked into approving a major utility's complete restructuring of its natural gas procurement via a definitional technicality. In any event, the allegation is false, and the Commission should reject the argument.

3. Implementation of the three competitive market provisions benefits ratepayers and the public interest.

As discussed above, the Commission is not required to consider whether the competitive market provisions to be resolved in the future benefit customers at this point. The only agreement reached in this Stipulation is that a future application will be filed. As such, there is no need for the Commission to reach the merits of those proposals at this time.

If the Commission is inclined to consider those provisions at this time, there is record evidence from Company witnesses Spiller and Lawler that the competitive market provisions are reasonable. IGS and RESA have offered the testimony of Mr. Lacey and Mr. Crist in opposition to these three proposals. However, neither witness has offered any actual data to support their opinions. Despite Ohio including the price-to-compare on electric customer bills for years, neither witness quantified any relationship between the inclusion of the price-to-compare and the rate of customer shopping. Neither witness quantified any manner in which the inclusion of the price-to-

[92] "The Company will seek approval of the transition, including a plan for conducting an auction as early as January 2022, but no later than three months following approval of the Company's SSO application..." (Direct Testimony of Amy B. Spiller, p. 20); "Following approval of the Company's Auction Application..." (Direct Testimony of Sarah E. Lawler, p. 14).

compare causes shopping customers to make worse shopping decisions by choosing programs that are inconsistent with their goals. Neither witness quantified any relationship between customer shopping rate and the utility providing service via the GCR, SSO, or SCO. Neither witness quantified any way in which providing shadow billing information to OCC would impact shopping rates. Instead, the witnesses provided only their unsupported conclusory opinions and conjecture in opposition to these programs. Unsupported opinions are simply not persuasive in light of Ohio's extensive history with each of these three competitive proposals.

a. Including the price-to-compare on customer bills benefits ratepayers and the public interest.

Adding a price-to-compare message on customers' bills benefits ratepayers and the public interest by providing additional information for shopping customers without harming the competitive market. Again, the decision as to whether to approve the price-to-compare message and its language is subject to later Commission review. However, as a general matter, the price-to-compare gives customers additional information to make more informed decisions while shopping. As a result of including this provision in the Stipulation, "natural gas customers will be given additional information related to choice and the competitive market."[93]

IGS and RESA disagree, first arguing that the inclusion of the price-to-compare on shopping customers' bills will negatively impact the market. To demonstrate the same, they presented the testimony of Frank Lacey, who opined that the message implies that all products are the same, stifles consumer interest, and hampers innovation.[94] However, Mr. Lacey's description is an overstatement of the impact a price-to-compare message would have on the market.

[93] Direct Testimony of Amy B. Spiller, p. 21.
[94] Joint Initial Brief, p. 39.

While Mr. Lacey believes that suppliers often provide advanced energy management services including innovative retail energy products that would be disregarded in a price-to-compare message, he was unable to identify the number of Duke Energy Ohio shopping customers who receive smart thermostats, carbon offsets products, and other non-commodity benefits.[95] He failed to conduct or provide any studies or reviews of customer shopping to demonstrate that a significant or even notable amount of customers shop for premium energy products.[96] Without such evidence, his testimony emphasizing the major negative market impact of comparing commodity costs to noncommunity costs is simply unsupported.

Additionally, no evidence was presented at hearing that providing customers with a comparison has any negative impact on shopping rates. For example, Mr. Lacey explained that while he is aware that the Commission requires a price-to-compare message on electric bills, he did not know the rate of shopping for electric customers or how it compares to the rate of shopping for natural gas service in Ohio.[97] If Mr. Lacey was correct, then the rate of natural gas shopping would be higher than the rate of electric shopping, holding all else constant. However, Mr. Lacey was not able to address this point, and in fact provided no testimony that establishes his theory about how the price-to-compare would impact shopping rates at all. As IGS and RESA have not supported this theory with any facts whatsoever, it should not be accepted by the Commission.

In contrast to Mr. Lacey's testimony, the price-to-compare statement is not confusing or misleading for customers. Mr. Lacey testified that providing a price-to-compare on a customer bill could lead a customer to terminate their long-term contract and potentially incur an early termination fee, but he was not aware of any studies that have found a relationship between the

[95] Transcript, pp. 260–261.
[96] Transcript, p. 259.
[97] Transcript, p. 240.

imposition of a price-to-compare bill message and an increase in customers being exposed to early termination fees.[98] Mr. Lacey argued that the price-to-compare message would be confusing because it is a backward-looking price that is not obtainable by customers for the future, which would be "very misleading."[99] However, he admitted that Duke Energy Ohio's current GCR rate, listed on the Commission's Apples to Apples website, is also backward-looking.[100] In short, there is no support for Mr. Lacey's claims, which fly in the face of the current Ohio practice of disclosing the GCR rate to customers on the Commission's own website.

Finally, Mr. Lacey argued that the price-to-compare message is "discriminatory" because it will only be implemented on the bills of shopping customers. However, he also agreed that there is no prohibition in the Stipulation from the Commission to require the same bill message to appear on non-shopping customers' bills.[101] Again, those issues will be ripe for resolution in that subsequent proceeding if the Stipulation is approved. As such, it is entirely possible that the Commission will require that the price-to-compare be disclosed on both shopping and non-shopping bills.

Ultimately, while Mr. Lacey's testimony claims that a price-to-compare message will severely inhibit the competitive market, there is simply no evidence to support this testimony. Therefore, there is no evidence in the record other than Mr. Lacey's unsubstantiated opinion demonstrating that the inclusion of the price-to-compare message on customers' bills will harm ratepayers. Rather, the only credible evidence confirms that such a message gives customers additional information to make informed choices about competitive suppliers.

---

[98] Transcript, p. 233.
[99] Transcript, pp. 227–228.
[100] Transcript, p. 228.
[101] Transcript, p. 235.

b. Duke Energy Ohio's commitment to transition from a GCR to an SSO auction benefits ratepayers and the public interest.

The Commission is not being asked at this point whether the Auction Application should be approved. The Auction Application will be filed in the future and the Commission can approve this Stipulation and reject the Auction Application if the Commission chooses to do so. The parameters of the auction, credit requirements of suppliers, timelines, agreements, defaults, and virtually every other facet of the SSO auction will be subject to Commission review pursuant to the requirements set forth in the Administrative Code. Therefore, the decision as to whether the SSO transition itself is appropriate should be deferred to a later proceeding.

If the Commission does address the merits of this proposal now, the commitment to file an application to transition from a GCR mechanism for natural gas procurement to an SSO auction would benefit wholesale competition by making competition more public and eliminating the need for GCR audits, which are costly and time-consuming.

IGS and RESA attempted to present evidence that the transition from the GCR to the SSO would harm the competitive market. However, Mr. Lacey agreed at the hearing that he is not aware of whether the previous applications of utilities to transition from the GCR to the SSO harmed the competitive market, because he did not review those applications.[102] This is fatal to the RESA and IGS position. Other Ohio natural gas utilities have undergone the exact same transition as is anticipated here. If that transition harmed the competitive market, there would have been some evidence of that fact.

Mr. Lacey further agreed that suppliers are still able to communicate directly with current and prospective customers regarding offers and comparisons between wholesale and retail natural

[102] Transcript, p. 236.

gas supply, facilitating market choice.[103] There simply is no evidence in the record supporting IGS and RESA's belief that the transition to an SSO auction for the procurement of wholesale commodity would have any impact on the competitive market, much less a negative impact. Therefore, it cannot be said that Duke Energy Ohio's commitment to file an application to make that transition does not benefit ratepayers and the public interest.

c. Providing aggregate shadow billing data to OCC benefits ratepayers and the public interest.

Duke Energy Ohio's commitment to provide aggregate shadow billing data to OCC on a regular basis benefits ratepayers and the public interest. However, the mere provision of that data does not violate the three-part test.[104] The Commission recently reviewed AEP Ohio's commitment to provide shadow billing data to OCC and Staff, which was met with nearly identical arguments in opposition from IGS and Direct Energy.[105] IGS and Direct Energy argued that shadow billing provisions perpetuate the mistaken belief that a lower rate is the only benefit that customers receive from competition.[106] IGS noted that the Commission has revised the price-to-compare statement on customer bills to recognize that "[p]rice represents one feature of any offer; there may be other features which you consider of value."[107]

The Commission rejected IGS and Direct Energy's arguments and approved the provision of aggregate shadow billing data to OCC and Staff, explaining:

> The Commission finds that no valid reason has been presented to justify elimination of the shadow-billing provisions from the Stipulation pursuant to part two of the test to evaluate stipulations. We emphasize that the Commission must evaluate the benefits of the Stipulation as a package and each provision of the Stipulation need not provide a direct and immediate benefit to ratepayers and the public interest.

---

[103] *Id.*, p. 250.
[104] In the Matter of the Application of Ohio Power Company for an Increase in Electric Distribution Rates, Case No. 20-585-EL-AIR, et al., Opinion and Order (Nov. 17, 2021) ¶ 198.
[105] *Id.*, ¶ 129.
[106] *Id.*
[107] *Id.*, *citing In re Commission's Review of the Minimum Gas Service Standards in Chapter 4901:1-13 of the Ohio Administrative Code*, Case No. 19-1429-GA-ORD, Finding and Order (Feb. 24, 2021) at ¶ 69.

> Nonetheless, in this instance, we find that, while OCC indicates that it has no current plans for the shadow-billing report, the report may serve to confirm information otherwise available about the competitive market or highlight issues for further review and analysis.[108]

IGS and RESA's witness Lacey also opined that shadow billing would negatively impact the market because it yields "meaningless results" and "if any policy actions are taken in response to those meaningless results, they will almost certainly be bad policy actions."[109] However, Mr. Lacey agreed that Columbia provides shadow billing data to the Commission, and was unable to provide any research, studies, or other data to show that the provision of that data had a negative market impact for Columbia.[110]

IGS and RESA challenge the accuracy of the data that will be provided to OCC. For example, they note that the data would not account for dollars paid by choice customers billed directly by the certified retail natural gas supplier for the supply of natural gas.[111] However, the data cannot be "inaccurate" without a purpose; unless and until the data is used by OCC in some way, it cannot fail to be "representative" or "accurate." Rather, it is simply data that is being provided. Even still, and as the Commission noted in the recent AEP Ohio matter, "while OCC indicates that it has no current plans for the shadow-billing report, the report may serve to confirm information otherwise available about the competitive market or highlight issues for further review and analysis."[112] Therefore, the provision of this data can only benefit ratepayers and the public interest, and it is therefore reasonable as a term within the Stipulation's package.

---

[108] *Id.*, ¶ 131.
[109] Direct Testimony of Frank Lacey, pp. 29–30.
[110] Transcript, pp. 242, 244.
[111] Joint Initial Brief, p. 41.
[112] *Id.*, ¶ 131.

III. PROCEDURAL ISSUES

IGS and RESA also allege various procedural errors, including violation of their due process rights by limiting the scope of their intervention and discovery to the competitive market provisions, that the burden was improperly shifted, that the records were not reopened, and that various evidentiary rulings during the course of hearing prejudiced their ability to challenge the provisions within the Stipulation. As set forth below, none of these arguments have merit, and the Commission should thus reject them.

A. IGS and RESA's intervention was properly limited to the three competitive market provisions.

First, IGS and RESA contend that the October 15, 2021, Entry deprived them of due process in violation of the Commission's intervention standard. Due process under the Fourteenth amendment requires notice and an opportunity to be heard.[113] In the context of intervention, only if a party has demonstrated a real and substantial interest by being deprived of notice and opportunity to be heard would due process have been denied.[114] That is not the case here. Because IGS and RESA demonstrated a real and substantial interest only with respect to the competitive market provisions, their intervention was properly limited to those three provisions. Establishing that real and substantial interests exists is a necessary prerequisite to any potential denial of due process; here, IGS and RESA did not demonstrate such an interest with respect to any other provisions within the Stipulation.

By arguing that they should have been granted full party status in all eighteen proceedings, what IGS and RESA are really seeking is participation in these proceedings without limit, despite

[113] *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18, 1976 U.S. LEXIS 141.
[114] *See* 4901-1-11; *In the Matter of the Application of MFS Intelenet of Ohio, Inc. for a Certificate of Public Convenience*, Case No. 94-2019-TP-ACE, Entry on Rehearing (Jun. 1, 1995), *3.

their own decision not to seek intervention until September 17, 2021, and September 29, 2021, respectively—over two years after the most recent intervention was sought by Kroger.[115]

IGS and RESA also claim that they were precluded from presenting evidence and arguments in opposition to the entire Stipulation pursuant to Ohio Admin. Code 4901-1-30(D) and therefore were deprived of their due process rights.[116] However, IGS and RESA do not support this argument with any authority. Ohio Admin. Code 4901-1-30(D) states that "[u]nless 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."[117] It is unclear how this rule confers any due process right upon RESA or IGS such that limiting their participation to the competitive market provisions can be considered a due process violation. Nonetheless, in the event that limited intervention has been granted to a party, the Attorney Examiner properly referenced precedent supporting limiting the scope of discovery, as discussed below.[118]

Limited intervention was reasonable because the Commission is empowered to determine whether the interest of a party is sufficient to warrant the grant of a petition to intervene.[119] Ohio Admin. Code 4901-1-11(D)(1) allows the Commission or the Attorney Examiner to "[g]rant limited intervention, which permits a person to participate with respect to one or more specific issues, if the person has no real and substantial interest with respect to the remaining issues or the person's interest with respect to the remaining issues is adequately represented by existing parties."[120] Here, although IGS and RESA claim they "demonstrated real and substantial interests

---

[115] Motion to Intervene of the Kroger Co. (Sept. 12, 2019).
[116] Joint Initial Brief, p. 47.
[117] O.A.C. 4901-1-30(D).
[118] Entry (Nov. 3, 2021) *citing In re Cincinnati Gas & Electric Co.*, Case No. 00-681-GA-GPS, Entry (Dec. 2, 2004).
[119] *Dworken v. Pub. Util. Comm.*, 133 Ohio St. 208, 12 N.E.2d 490 (1938).
[120] O.A.C. 4901-1-11(D)(1).

in all 18 proceedings and oppose the stipulation," those interests were never expounded upon in their respective motions to intervene.[121] IGS and RESA admit that they "identified concerns with the Stipulation's three supplier-related provisions in their motion to intervene" and were silent on any other issues for which their intervention was purportedly necessary.[122] Because the Stipulation had already been filed in its entirety, IGS and RESA could have explained in their motions to intervene why unlimited intervention in all eighteen proceedings was necessary, but instead chose only to seek intervention based upon the three supplier-related provisions. The Attorney Examiner can only examine the arguments placed before it; it is not the duty of the courts (or the Commission) to create an argument where none is made, much less make a party's arguments for them.[123] Thus, IGS and RESA failed to demonstrate that they had any real and substantial interest with respect to the remaining issues, and therefore granting limited intervention was proper in accordance with 4901-1-11(D).

Next, IGS and RESA argue that they "could not have been on notice that the supplier-related provisions could be raised in the proceedings."[124] This argument does nothing to support their claim that intervention was unreasonable. In fact, the reason they were granted limited intervention was precisely because they could not have been put on notice that those issues would be raised in the proceedings, and intervention was granted to avoid any potential due process issues.[125] As IGS and RESA were granted limited intervention and the opportunity to conduct discovery on those matters prior to the hearing on the Stipulation, they were provided due process.

---

[121] Joint Initial Brief, p. 51; Motion to Intervene of IGS, Motion to Intervene of RESA.
[122] Joint Initial Brief, p. 50.
[123] *See, e.g., Deutsche Bank Natl. Trust Co. v. Taylor*, 2011-Ohio-435, ¶ 7 ("It is not . . . our duty to create an argument where none is made."); *Cardone v. Cardone*, 9th Dist. No.18349, (May 6, 1998) at *8.
[124] Initial Joint Brief, p. 50.
[125] Entry (Oct. 15, 2021), ¶ 31 ("Consistent with Commission precedent, however, the dispositive issue is determining whether IGS and RESA should have been on notice that these three provisions could be raised in these proceedings or appear in the resulting Stipulation. The attorney examiner finds that they could not have, based on the proceedings up to the filing of the Stipulation.")

Finally, IGS and RESA claim that the Attorney Examiner's limited intervention ruling is unfair and erroneous because of the "unprecedented level of participation the Attorney Examiners have allowed for others."[126] Through this argument, IGS and RESA attempt to compare themselves to parties who have been involved in these proceedings for up to seven years. This is not a truly fair comparison, as had RESA and IGS had any interest in these eighteen proceedings—as the other intervenors demonstrably had—then RESA and IGS would have sought intervention much earlier than they did. One can only surmise that they did not seek to intervene because their only real and substantial interest here is in the competitive market provisions raised when they finally did seek intervention.[127] IGS and RESA are repeat players before the Commission that are familiar with the standard for intervention. There is no reason they would not have been capable of intervening in any of these proceedings before the Stipulation was filed should they have had a real and substantial interest in any of those cases. Therefore, IGS and RESA's intervention was properly limited in scope to the three competitive market issues as requested in their motions to intervene, and they were not denied due process or an opportunity to be heard on those issues.

B. Discovery was properly limited to the three competitive market provisions.

Because IGS and RESA's intervention was limited to exploring the three competitive market provisions of the Stipulation, discovery was properly limited to those issues. IGS and RESA were afforded an opportunity to conduct discovery with respect to the competitive market provisions, depose and cross-examine Duke Energy Ohio's witnesses, present direct testimony and evidence via their own witnesses, and provide extensive substantive factual and legal arguments

[126] Joint Initial Brief, p. 51.

[127] In fact, IGS and RESA even stressed this point in their motions to intervene. In the October 15, 2021 Entry granting their intervention, the Attorney Examiner noted that "IGS and RESA stress that they had no prior reason to intervene in these proceedings and, only now with the filing of the Stipulation and its inclusion of the GCR and SSO processes, bill formats, and shadow billing, were they made aware that such issues would arise in these proceedings." ¶ 18.

in both the post-hearing initial and reply briefs. This scope is consistent with the limited intervention granted to IGS and RESA in this proceeding.

Here, IGS and RESA were not precluded from participating in discovery. IGS and RESA were expressly permitted to conduct extensive discovery, but that discovery was limited to the issues relevant to their limited intervention. The Attorney Examiner properly clarified that "[t]here is nothing in the October 15, 2021, or November 3, 2021 Entries that would prohibit RESA or IGS from contesting the inclusion of the competitive market provisions in the Stipulation, including whether such inclusion renders the Stipulation unreasonable pursuant to the Commission's three-prong test."[128] Granting a motion for intervention does not require an Attorney Examiner to also grant unlimited discovery. Instead, the scope of permissible discovery is well within the authority of the attorney examiner.[129]

For example, discovery was even more limited in *In the Matter of the Complaint of the City of Cleveland and WPS Energy Services, Inc.*, Case No. 01-174-EL-CSS, Entry, (Mar. 29, 2001). In that case, the City of Cleveland and WPS Energy Services filed a complaint against Cleveland Electric Illuminating Company (CEI) and FirstEnergy Corp. for failing to comply with the market support generation (MSG) provisions of the stipulations approved by the Commission in CEI's transition plan case.[130] After an initial settlement conference, Allegheny Energy Supply Company, LLC (Allegheny) and the city of Toledo filed motions to intervene.[131] Intervention was granted on a limited basis, by reason of the "unique series of facts", with respect to the legal issues surrounding the market support generation plan.[132] In that Entry, the Attorney Examiner noted that

[128] Entry, (Nov. 10, 2021) ¶ 30.
[129] *See* O.R.C. 4901.18.
[130] In the Matter of the Complaint of the City of Cleveland and WPS Energy Services, Inc., Case No. 01-174-EL-CSS, Entry, (Mar. 29, 2001) ¶ 1.
[131] *Id.*, ¶ 4.
[132] *Id.*.

"[a]lthough Toledo and Allegheny are precluded from participating in discovery and settlement discussions, they will be able to monitor the public hearings. In addition, Toledo and Allegheny are welcome to file briefs when the parties file their post-hearing and reply briefs in these cases."[133] Thus, the scope of permissible discovery granted to Toledo and Allegheny in light of their limited intervention was even more restricted than in this case; here, IGS and RESA were permitted to conduct extensive discovery related to the issues for which their intervention was granted.

C. The burden was not shifted to IGS/RESA.

The Signatory Parties have the burden to prove that the Stipulation, as a whole, passes the three-part test. IGS and RESA argue that the burden was improperly shifted to IGS and RESA to prove that the competitive market provisions were unreasonable.[134] In support of this argument, IGS and RESA rely solely on the following excerpts from the October 15, 2021, Entry granting intervention:[135]

> However, upon being granted limited intervention, IGS and RESA are 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, even if Duke, OCC, and OEG believe there will be no such adverse impact.[136]
>
> In their motions for leave to intervene, both IGS and RESA have indicated they will not unduly burden the proceedings, and upon being granted limited intervention, the attorney examiner will heavily scrutinize any requests from IGS or RESA that are perceived to unnecessarily delay the outcome of these proceedings.[137]

IGS and RESA argue that, taken together, these statements improperly shifted the burden to IGS and RESA to show that the competitive market provisions are not reasonable. This is not the case.

First, the Entry's statement that IGS and RESA are "entitled to inquire" into the competitive market provisions cannot possibly be interpreted as an attempt to shift the burden to

---

[133] *Id.*
[134] Joint Initial Brief, p. 52.
[135] Joint Initial Brief, p. 52.
[136] Entry, (Oct. 15, 2021) ¶ 32.
[137] *Id.*, ¶ 33.

the two intervenors. In their Motions to Intervene, both IGS and RESA alleged that the Stipulation contained certain terms that would affect the competitive market.[138] Both specifically requested an opportunity to inquire into those terms.[139] Intervenors cannot specifically request to inquire into portions of the Stipulation, then argue that the granting of that request improperly "shifts the burden."

Second, both IGS and RESA provided assurances that their late intervention would not unduly prolong or delay the proceedings.[140] The Entry simply acknowledges this promise by notifying the intervenors that the Attorney Examiner would scrutinize any requests from IGS or RESA that are perceived to create unnecessarily delay. This is in alignment with Ohio Admin. Code 4901-1-11(B)(3), which not only permits, but *mandates* that an Attorney Examiner consider whether intervention will unduly delay the proceedings. In adhering to the rule's directive, the Attorney Examiner merely reminded IGS and RESA that while their motions to intervene were to be granted, the rule requires the Attorney Examiner to consider and scrutinize attempts at undue delay. Such an action cannot be said to "shift the burden" to IGS and RESA; rather, this statement simply emphasizes established Commission rules of procedure.

Similarly, the Entry's statement that "Duke, OCC, and OEG believe there will be no such adverse impact" does not shift the burden to IGS and RESA to prove that such an adverse impact exists. The Entry is merely stating the position of those parties. Moreover, the Attorney Examiner again complies with the mandate in Ohio Admin. Code 4901-1-11(B), which also requires an Attorney Examiner to consider "[t]he extent to which the person's interest is represented by

---

[138] Motion to Intervene of RESA, p. 5; Motion to Intervene of IGS, p. 5.
[139] Motion to Intervene of RESA, p. 6 ("[t]hus, RESA has a substantial interest in addressing the stipulation and in ensuring that these issues are properly resolved"); Motion to Intervene of IGS, p. 17 ("the procedural schedule that IGS proposes will provide market participants with sufficient opportunity and due process to conduct discovery, prepare testimony, and hold a hearing to develop a record and probe certain commitments that appear to run afoul of Ohio law and the Commission's rules.").
[140] Motion to Intervene of RESA, p. 6; Motion to Intervene of IGS, p. 17.

existing parties."[141] In granting IGS and RESA's motions to intervene, the Attorney Examiner merely emphasized the contrasting positions of the existing parties with intervenors, demonstrating further compliance with the directive found in Ohio Admin. Code 4901-1-11. The October 15, 2021, Entry's attempt to thoroughly consider the factors set forth in the intervention rule did not shift the burden to IGS and RESA to prove that the competitive market provisions were unreasonable, and therefore, any argument that the burden was shifted should be rejected.

D. The record was properly reopened by the October 15, 2021, Entry for the purpose of evaluating the Stipulation.

In establishing a procedural schedule with an evidentiary hearing, the Attorney Examiner reopened the proceedings upon her own motion. IGS and RESA argue that the evidentiary records for these matters were not reopened, thus creating "an additional procedural error."[142]

Ohio Admin. Code 4901-1-34 states that the Commission or an attorney examiner may, "upon their own motion or upon motion of any person for good cause shown, reopen a proceeding at any time prior to the issuance of a final order."[143] Given the nature of the issue, neither the Commission nor the Ohio Supreme Court has shed significant light on Ohio Admin. Code 4901-1-34, however, the language "upon their own motion" in reference to attorney examiners is found in nine other places within Ohio Admin. Code Section 4901. Attorney examiners may, upon their own motion: authorize the amendment of any application, complaint, long-term forecast report, or other pleading filed with the commission;[144] issue an expedited ruling on any motion;[145] shorten or enlarge the time periods for discovery;[146] issue subpoenas;[147] quash subpoenas;[148] hold

---

[141] O.A.C. 4901-1-11(B)(5).
[142] Joint Initial Brief, pp. 53–54.
[143] 4901-1-34(A).
[144] 4901-1-6.
[145] 4901-1-12(F).
[146] 4901-1-17(G).
[147] 4901-1-25(A).
[148] 4901-1-25(C).

prehearing conferences;[149] require that all parties to the proceeding file with the Commission and serve upon all other parties a list of the issues the party intends to raise at the hearing;[150] permit or require the filing of briefs or memoranda at any time during a proceeding;[151] and hear oral arguments at any time during a proceeding.[152] Many of these actions are taken without official motion.

It is unclear what language IGS and RESA believe is missing from the Attorney Examiner's October 15, 2021, Entry that would constitute a "motion" to reopen the record. What is clear is that, based on Commission practice, "upon their own motion" does not create an affirmative obligation for an attorney examiner to make some sort of statement that the motion to do a particular thing is being made; rather, an attorney examiner directs the parties as appropriate pursuant to the rules. To argue otherwise would create a host of procedural issues in almost every single case before the Commission.

In establishing a procedural schedule with a date for an evidentiary hearing, the Attorney Examiner, upon her own motion, reopened the applicable records. The Attorney Examiner indicated as much when the issue was raised by counsel for RESA during the evidentiary hearing.[153] The Attorney Examiner explained that "the October 5[sic], 2021, Entry would, in fact, constitute the reopening of the proceedings for the purposes of evaluating the Stipulation for the Commission's consideration."[154] Additionally, the Attorney Examiner stated explicitly: "[w]e are here, the proceedings have been reopened, and we will be proceeding with the hearing this morning."[155] Therefore, both in the October 15, 2021, Entry granting intervention as well as at the

[149] 4901-1-26(A).
[150] 4901-1-26(C).
[151] 4901-1-31(A).
[152] 4901-1-32.
[153] See Transcript, p. 22.
[154] Transcript, pp. 23–24.
[155] Transcript, p. 24.

start of the hearing, the Attorney Examiner, upon her own motion, reopened the proceedings. Therefore, no procedural error exists with respect to Rule 4901-1-34.

Finally, it is important to note the purpose for which the record was reopened. Several of the cases had been fully litigated by the time the Stipulation was signed. However, those hearings took place prior to the Stipulation. As such, if the record had not been reopened there would have been no way for the Stipulation to be addressed under Ohio's three-part test, or for IGS or RESA to contest those provisions of the Stipulation. This would have prevented the Commission from receiving important record evidence regarding the Stipulation. Accordingly, the Attorney Examiner's decision to reopen the record was appropriate in all respects.

E. Testimony from all three of IGS and RESA's joint witnesses was properly stricken by the Attorney Examiners.

Finally, IGS and RESA argue that the Attorney Examiners erred in striking portions of the direct testimonies of RESA/IGS witnesses Cawley, Lacey, and Crist.[156] On the contrary, the Attorney Examiner properly excluded these various statements on the basis that they were irrelevant, speculative, hearsay, or some combination of the same. Although not strictly bound by the Ohio Rules of Evidence, the Commission "seeks to maintain consistency with the Ohio Rules of Evidence to the extent practicable." [157] Further, "the presiding hearing officer may, without limitation, take actions that are necessary to avoid unnecessary delay and prevent the presentation of irrelevant or cumulative evidence."[158] In this case, the Attorney Examiners did so with respect to each and every portion of testimony stricken.

---

[156] Joint Initial Brief, p. 56.
[157] *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, 12-426-EL-SSO et al., Opinion and Order, (Sept. 4, 2013), *17, *citing Greater Cleveland Welfare Rights Organization, Inc. v. Public Utilities Com.*, 2 Ohio St. 3d 62, 442 N.E.2d 1288, 1982 Ohio LEXIS 760, 2 Ohio B. Rep. 619.
[158] O.A.C. 4901-1-27(B)(7).

1. Mr. Cawley's testimony regarding the Signatory Parties' intentions in negotiating the Stipulation were properly excluded on the basis that he had no personal knowledge of the negotiations.

Two sections (12:10–14; 13:9–10) of Mr. Cawley's direct testimony were stricken as a result of his speculation into the intentions and knowledge of the Signatory Parties during the course of negotiation and settlement. In the first portion of testimony, Mr. Cawley testified that it "appeared to him" that the Signatory Parties purposefully attempted to "end-run the Commission's precedents" to "achieve success indirectly."[159] In the second portion of stricken testimony, Mr. Cawley stated that he "would be offended that the Signatory Parties thought so little of the Commission's commitment to fair proceedings that they audaciously" submitted the Stipulation.[160]

The Attorney Examiner did not err in granting the motions to strike both of these portions of testimony on the ground that Mr. Cawley could not possibly have the personal knowledge to convey what the Signatory Parties "thought" or "purposefully attempted" to do in the course of negotiating the resolution of these matters. In granting the motion to strike the first portion, the Attorney Examiner properly noted that Mr. Cawley's observation that the parties "purposeful attempt to end-run the Commission's precedents" was "very speculative," finding that the witness "not in a position" to provide such testimony.[161]

This ruling is absolutely correct in light of Ohio Rule of Evidence 602, which prohibits a witness from testifying to a matter "unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."[162] Not only was no evidence introduced sufficient to support a finding that Mr. Cawley has personal knowledge of the parties' intentions

[159] Direct Testimony of James. H. Cawley, 12:10–14.
[160] *Id.*, 13:9–10.
[161] Transcript, p. 156.
[162] Ohio Evid. R. 602.

with regard to the involvement of competitive suppliers in negotiating a settlement, he admitted just the opposite:

> **Q:** None of the signatory or nonopposing parties told you that they have purposely excluded RESA and other suppliers from settlement negotiations, correct?
>
> **A: Correct.**
>
> **Q:** You don't have any personal knowledge to indicate that RESA and the suppliers were intentionally excluded from settlement discussions, correct?
>
> **A: I do not have personal knowledge, no.**[163]

Based on his own testimony, Mr. Cawley cannot possibly testify to the intentions, knowledge, or purpose of any signatory party in the negotiation or formation of the Stipulation. The Attorney Examiner thus properly excluded these two portions of Mr. Cawley's direct testimony based on his lack of personal knowledge.

2. Mr. Cawley's testimony comparing the Commission and the Pennsylvania Public Utilities Commission was properly excluded as irrelevant.

The Attorney Examiner also properly granted Duke Energy Ohio's motion to strike and excluded 8:17–9:23 of Mr. Cawley's direct testimony.[164] Within this portion of testimony, Mr. Cawley describes in detail the Pennsylvania Public Utilities Commission's (PaPUC) process for reviewing proposed settlements, including certain sections of the Pennsylvania Code requiring settlement agreements to disclose parties denied an opportunity to enter into the settlement. In granting the motion to strike, the Attorney Examiner found it "highly irrelevant to go into the differences and highlight the differences between the two commissions when that difference far exceeds what is put forth in the Ohio Commission's three-prong test."[165]

---

[163] Transcript, pp. 177–178.
[164] *Id.*, p. 159.
[165] Transcript, p. 159.

The Attorney Examiner properly excluded this testimony from the record because it makes no fact regarding the reasonableness of the Stipulation under Ohio law more or less likely. Ohio Rule of Evidence 401 defines "relevant evidence" as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence."[166] The difference between Ohio and Pennsylvania law makes no fact of consequence to the reasonableness of the Stipulation more or less probable. The PaPUC's approach to the consideration and approval of settlement agreements holds no bearing on this matter, which is before the Public Utilities Commission of Ohio. As such, it was properly excluded as irrelevant evidence.[167]

That is particularly true here, where the stricken testimony does not actually address prior decisions of the PaPUC. Instead, in this section of his testimony Mr. Crawley was merely providing his opinion regarding what the PaPUC might do based on a rule which has never been cited in any decision by the PaPUC. A witnesses' opinion regarding what legal standard another state might apply is irrelevant to the legal standard to be applied by the Commission here.

3. Mr. Lacey's testimony claiming to attribute certain terms of the Stipulation to a particular signatory party was properly excluded as speculative.

The Attorney Examiner properly granted OCC's motion to strike Mr. Lacey's direct testimony at 9:9 based on a lack of personal knowledge of what terms within the Stipulation were proposed or advocated for by what party.[168] Mr. Lacey's direct testimony included an observation that Duke Energy Ohio's agreement to file an application to transition from a GCR to an SSO, along with other provisions, were "clearly included by OCC."[169] OCC moved to strike this portion

[166] Ohio Evid. R. 401.
[167] Ohio Evid. R. 402 ("Evidence which is not relevant is not admissible.")
[168] Transcript, p. 224.
[169] Direct Testimony of Frank Lacey, 9:9.

of Mr. Lacey's testimony because he lacks the personal knowledge to state that a certain term was included by any particular party, and that motion was properly granted by the Attorney Examiner.

Again, a witness is not permitted to testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.[170] Just like Mr. Cawley, Mr. Lacey admitted he "was not present at any of the discussions between the signatory and non-opposing parties regarding the Stipulation."[171] The record clearly reflects that Mr. Lacey does not know and cannot know what terms were proposed or advocated by what party in the process of settlement negotiations. Therefore, pursuant to Ohio Rule of Evidence 602, he lacks the personal knowledge to testify on the matter and the exclusion of that testimony was appropriate.

4. Mr. Crist's testimony regarding historical and current employment and salary data for IGS and Duke Energy Ohio was properly excluded as speculation and hearsay.

The Attorney Examiner properly granted the motion to strike sections 12:18–13:20 of Mr. Crist's direct testimony because he has no personal knowledge of the data he presented and was simply parroting hearsay told to him by counsel for IGS. The testimony at issue describes employment data of both IGS and Duke Energy of Ohio, including the number of employees, annual payroll, and salaries for the purposes of demonstrating that the choice program in Ohio has "resulted in development of industry."[172]

The data Mr. Crist presented with respect to Duke Energy Ohio is wholly inaccurate. Within his stricken testimony, Mr. Crist presented Duke Energy Ohio's "Administrative & General Salaries" that he obtained from previous rate filings to make claims regarding the number of

[170] Ohio Evid. R. 602.
[171] Transcript, p. 245.
[172] Direct Testimony of James L. Crist, 12:18–13:20.

employees Duke Energy Ohio has in the state of Ohio. His analysis is flawed because that account fails to include numerous Ohio employees, including accounting, treasury, rates, meter readers, call center employees, linemen, vegetation management, billing groups, distribution physical operations, capitalized labor, transmission employees, and other non-administrative payrolls. The obvious flaws with the calculations made by Mr. Crist demonstrate a clear and complete lack of personal knowledge of the numbers upon which he attempts to rely.

Similarly, the data Mr. Crist presented with respect to IGS was not based on his own personal knowledge, as was clearly demonstrated when he was unable to verify IGS's employment data during the course of his voir dire. Mr. Crist admitted that the payroll numbers were simply provided to him by counsel for IGS.[173] Pursuant to Ohio Evidence Rule 602 discussed in connection with Mr. Cawley and Mr. Lacey's testimonies, it is again clear that the witness does not have the personal knowledge to support the accuracy of the data IGS and RESA seek to admit.

Even further, because Mr. Crist's testimony simply repeats information told to him by counsel for IGS, it is simultaneously inadmissible hearsay. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"[174] and is not admissible.[175] In their brief, IGS and RESA present a completely novel ground for the admittance: Ohio Evid. R. 803(6), the exception to the rule against hearsay for records of regularly conducted activity.[176] This argument is completely misplaced. 803(6) allows for the admittance of regularly conducted business activities if certain requirements are met, "all as shown by the testimony of the custodian or other qualified witness." IGS and RESA now proffer Mr. Crist as such a "qualified witness."[177] Mr. Crist cannot be qualified witness under

---

[173] Transcript, p. 314.
[174] Ohio Evid. R. 801(C).
[175] Ohio Evid. R. 802.
[176] Joint Initial Brief, p. 58, citing Evid. R. 803(6).
[177] *Id.*

Ohio law. A "qualified witness" for the purposes of 803(6) is someone "with enough familiarity with the record-keeping system of the business in question to explain how the record came into existence in the ordinary course of business."[178]

Instead, Mr. Crist's voir dire revealed the following: that he is not, nor has he ever been, an employee of IGS Energy or IGS Ventures; that the information he cited in this portion of his testimony was provided to him by counsel for IGS Energy; that he did not know the relationship between IGS Energy and IGS Ventures; and that he has never seen payroll information or financial statements from either company.[179]

To say Mr. Crist has personal knowledge of IGS' employment data is false; to argue that he is a "qualified witness" for the purposes of sponsoring a record of regularly conducted business is quite obviously incorrect. Under the standard urged by IGS, witnesses could be handed literally any information by counsel and it could be included in their sworn testimony despite their complete lack of knowledge as to its accuracy.[180] This is obviously inappropriate under Ohio law and the Attorney Examiner's decision was accordingly correct.

IV. Conclusion

As a package, the Stipulation was the product of serious bargaining amongst knowledgeable, capable parties; it does not violate any important regulatory principle or practice, and it benefits ratepayers and the public interest by resolving eighteen matters that have been pending before the Commission for years. IGS and RESA's objections to the competitive market provisions do not render the Stipulation unreasonable in light of the evidence within the record

---

[178] *State v. Hood*, 135 Ohio St. 3d 137, 147, 2012-Ohio-6208, 2012 Ohio LEXIS 3220 ¶ 40, *citing* 5 McLaughlin, Weinstein's Federal Evidence Section 803.08[8][a] (2d Ed.2009); *United States v. Lauersen*, 348 F.3d 329, 342 (2d Cir. 2003).
[179] Transcript, pp. 290–291.
[180] Because the Motion to Strike was granted the parties did not need to pursue with Mr. Crist how he could possibly swear to the information which he freely admitted had been provided to him only the day before the hearing began by counsel for IGS Energy of which he had no personal information.

and the Commission's precedent. Therefore, based on the foregoing, Duke Energy Ohio respectfully requests the Commission adopt the Stipulation without modification.

Respectfully submitted,

/s/ Rocco O. D'Ascenzo

Rocco O. D'Ascenzo (0077651)
Deputy General Counsel
Larisa Vaysman (0090290)
Senior Counsel
Duke Energy Business Services LLC
139 East Fourth Street
Cincinnati, Ohio 45202
(513) 287-4320
(513) 287-4385 (Facsimile)
Rocco.D'Ascenzo@duke-energy.com
Larisa.Vaysman@duke-energy.com

N. Trevor Alexander (0080713)
Mark T. Keaney (0095318)
Kari D. Hehmeyer (0096284)
Sarah G. Siewe (0100690)
BENESCH, FRIEDLANDER, COPLAN & ARONOFF LLP
2600 Huntington Center
41 South High Street
Columbus, Ohio 43215
talexander@beneschlaw.com
mkeaney@beneschlaw.com
khehmeyer@beneschlaw.com
ssiewe@beneschlaw.com

Attorneys for Duke Energy Ohio, Inc

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the foregoing was served on the following parties of record by electronic service, this 23rd day of December, 2021.

/s/ Rocco D'Ascenzo
Rocco D'Ascenzo

Werner.margard@OhioAGO.gov
rdove@keglerbrown.com
joe.oliker@igs.com
michaelnugent@igs.com
evan.betterton@igs.com
bethany.allen@igs.com
mjsettineri@vorys.com
gpetrucci@vorys.com
aasanyal@vorys.com
eowoyt@vorys.com

Christopher.healey@occ.ohio.gov
William.michael.@occ.ohio.gov
Amy.botschner.obrien@occ.ohio.gov
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com
jkylercohn@BKLlawfirm.com
Bojko@carpenterlipps.com
donadio@carpenterlipps.com
paul@carpenterlipps.com

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, 19-0174-GA-RDR, 19-0175-GA-ATA, 18-1830-GA-UNC, 18-1831-GA-ATA, 19-1085-GA-AAM, 19-1086-GA-UNC, 20-0053-GA-RDR, 20-0054-GA-ATA

Summary: Reply Brief of Duke Energy Ohio Inc. electronically filed by Sarah Siewe on behalf of Duke Energy Ohio, Inc.