

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

**MEMORANDUM CONTRA JOINT MOTION TO REOPEN THE HEARING RECORD
TO SUBMIT A STIPULATED FACT**

The evidentiary hearing in the above captioned matters took place almost three months ago, and briefing was completed on December 23, 2021. Despite this, IGS¹ and RESA² (Movants)

¹ Interstate Gas Supply, Inc. (IGS)

² Retail Energy Supply Association (RESA)

have filed a motion to reopen the hearing record to submit a stipulated fact (the Motion). There is no reason for the Commission to do so when no party cited to the disputed fact in its post-hearing brief. Not only is the Motion procedurally improper, Movants have failed to establish the factual support for the accuracy of the information required by the rule. Therefore, Duke Energy Ohio³ respectfully requests the Commission deny the Motion.

Though Movants caption the Motion as request to submit a “stipulated fact” this fact is not stipulated to by any party other than Movants. Therefore, the only remaining question is whether Movants have provided valid grounds to reopen the record after briefing is complete. Pursuant to OAC 4901-1-34(B), a motion to reopen a proceeding for the purpose of presenting additional evidence, the motion “shall specifically describe the nature and purpose of such evidence, and shall set forth facts showing why such evidence could not, with reasonable diligence, have been presented earlier in the proceeding.”⁴ The proposed new evidence meets no part of this standard.

A. The proposed evidence could have been submitted earlier.

The purpose of evidentiary hearings is to allow parties to develop a record upon which the Commission can make a decision. The Commission’s rules do not permit parties to take a second bite at the apple after the hearing when they do not like the way the hearing went.

On November 12, 2021, Movants filed the direct testimony of James L. Crist. Mr. Crist’s testimony addressed Duke Energy Ohio’s gas supply procedures and their current and potential impact on the development of a competitive natural gas market.⁵ He included Exhibit JC-2 with

³ Duke Energy Ohio, Inc. (Duke Energy Ohio or the Company)

⁴ Ohio Adm. Code 4901-1-34(B).

⁵ Direct Testimony of James L. Crist, 4:11–15.

that testimony, which was a summary of the statewide total percent in choice for 2021 quarter two. That exhibit was printed from the Commission’s shopping statistics website.⁶

Mr. Crist was deposed prior to the hearing and asked about included Exhibit JC-2. He was also presented with what was ultimately marked as Duke Exhibit 8 during that deposition.⁷ Thus, Movants were put on notice of this issue by no later than Mr. Crist’s deposition.

At hearing, counsel for the Company again presented Mr. Crist with both Exhibit JC-2 from his testimony (also marked Duke Exhibit 9) as well as the same statistics from the same website from quarter two of 2012 (marked Duke Exhibit 8).⁸ The documents presented to Mr. Crist demonstrated an overall decline in natural gas shopping from 2012 to 2021.⁹ Mr. Crist had no personal knowledge of why the shopping statistics were higher than he expected in 2012.¹⁰ Now, three months after the hearing, Movants are attempting to reopen the hearing in order to “correct” the data presented in Duke Exhibit 8.

Movants do not argue in their Motion or briefing that Duke Energy Ohio failed to exchange Duke Exhibit 8 prior to the start of the hearing. Instead, Movants claim that “[t] was after the hearing closed that Staff provided documents to IGS’ attorney on December 1, 2021, that established the error.”¹¹ Movants’ ability to contest the accuracy of this exhibit is not dependent on a response from Staff. It is Movants’ responsibility to prepare for hearing in a timely manner.

Even if Movants’ ability to contest the accuracy of the exhibit depended on input from Staff, which it does not, Movants still provide no explanation as to why they allowed two months

⁶<https://app.powerbigov.us/view?r=eyJrIjojOGJjOTA2MjYtNzZmNi00Y2RhLTljZjEtZTU3Zjg5ZDZhMDgyIiwidCI6IjUwZjhmY2M0LTk0ZDgtNGYwNy04NGViLTM2ZWQ1N2M3YzhhMiJ9>.

⁷ Transcript, p. 302.

⁸ *Id.*, pp. 301–304.

⁹ *Id.* p. 304.

¹⁰ *Id.*

¹¹ *Id.*, p. 7.

to pass between the discovery of the alleged error and the filing of the Motion. Where the movant should have realized that he needed to raise and prove the issues in the case by presenting sufficient evidence in support thereof, he cannot “sit idly by, offering no further evidence and later claim that he was prejudiced or that he should be given another opportunity to present more evidence.”¹² Therefore, pursuant to OAC 4901-1-34(B), Movants have failed to set forth facts showing why such evidence could not, with reasonable diligence, have been presented earlier in the proceeding, and their Motion should be denied.

B. The proposed new evidence is not reliable or stipulated by any party other than Movants.

Rule 4901-1-34(B) also required the movant to superficially describe the “nature” of the evidence to be admitted. The “evidence” presented to support the Motion is an email exchange between counsel for IGS and Barbara Bossart, Chief of Reliability and Service Analysis Division at the Commission, who provided the data that “would have been published for December 2012 and December 2011.”¹³

Ms. Bossart is an employee of Staff, a Signatory Party. Ms. Bossart was not a witness to the above captioned matters. She did not present testimony at the hearing. Counsel for the Company was not able to cross-examine Ms. Bossart, nor any other witness who gathered, prepared, or summarized the data she passed on to counsel for IGS. There is no way for the Commission to verify the information presented by Ms. Bossart in the Motion, to provide context to that information, to explore the additional potential errors in Mr. Crist’s testimony which could

¹² *In the Matter of the Complaint of Gerald R. Hoolahan, Complainant, v. Columbi9a Gas of Ohio, Inc., Respondent, Relative to the Alleged Unjust and Unreasonable Billing for Gas Service*, Case No. 84-568-GA-CSS, Opinion and Order (May 14, 1985) p. 17–18.

¹³ Motion, Exhibit “A”.

have been discussed by Ms. Bossart. There is no effective way for Duke Energy Ohio, nor any other party, to challenge the veracity of the information. Thus, reopening the record to include such evidence would be both procedurally improper and factually unsupported, and would only serve to prejudice those parties that were not able to challenge the accuracy of such evidence. As a result, the Motion to reopen the hearing should be denied.

C. There is no purpose to admit the new evidence.

Under Rule 4901-1-34(B), the Motion “shall specifically describe the . . . purpose of such evidence. . .” Here there is no purpose to admitting the new evidence. No party cited to the contested exhibit or testimony. The briefing has been complete since December 23, 2021. As such, Movants have failed to show any purpose to reopening the record simply because they do not agree with one column in an exhibit which was admitted at hearing. As there is no valid purpose to admit the new evidence the Motion should be denied.

Respectfully submitted,

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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 16th day of February, 2022.

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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: Memorandum Conta Joint Motion to Reopen the Hearing Record to
Submit a Stipulated Fact electronically filed by Mr. N. Trevor Alexander on behalf of
Duke Energy Ohio, Inc.