**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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 |

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| 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 |

**DUKE ENERGY OHIO, INC.'S MEMORANDUM CONTRA THE APPLICATION FOR REHEARING FILED BY THE RETAIL ENERGY SUPPLY ASSOCIATION AND INTERSTATE GAS SUPPLY, INC.**

## I. INTRODUCTION

Pursuant to Ohio Administrative Code 4901-1-35(B), Duke Energy Ohio[1] opposes the Application for Rehearing filed by RESA[2] and IGS.[3] Joint Applicants[4] oppose the agreement between the Signatory Parties[5] via the Stipulation[6] because they believe the Stipulation is not in

[1] Duke Energy Ohio, Inc. (Duke Energy Ohio).
[2] Retail Energy Supply Association. (RESA).
[3] Interstate Gas Supply, Inc. (IGS).
[4] RESA and IGS. (together, the Joint Applicants).
[5] Duke Energy Ohio, Office of Consumers' Counsel (OCC), Staff of the Public Utilities Commission of Ohio (Staff), Ohio Energy Group (OEG) (together, the Signatory Parties).
[6] Joint Ex. 1, Stipulation and Recommendation, (Admitted Nov. 18, 2021) (Stipulation).

the best interests of retail suppliers. However, simply because the Stipulation is not helpful to their business model does not mean the Stipulation is in any way unreasonable or unlawful.

The Stipulation resolves eighteen proceedings, some of which have been pending for nearly eight years. Joint Applicants assert nine ways in which they believe the Commission's Opinion and Order[7] is allegedly unlawful and unreasonable: six evidentiary conclusions regarding the reasonableness of the Stipulation[8] and three procedural errors.[9] In each and every one of these instances, the Commission acted lawfully and reasonably based on the record evidence, the Commission's rules of practice, and Ohio law. Therefore, the Opinion and Order should stand, and Joint Applicants' Application for Rehearing should be denied.

## II. ARGUMENT

The Commission's decision to approve the Stipulation package was not unlawful or unreasonable. First, procedurally, the Commission did not unlawfully expand the scope of the MGP[10] and TCJA[11] proceedings because the Commission is not required to explicitly determine the scope of each proceeding as Joint Applicants claim. Joint Applicants' intervention was properly limited to the issues for which they were able to articulate a real and substantial interest, and the weighing of the evidence they presented upon those issues did not unlawfully shift the burden to Joint Applicants to prove that the Stipulation was unreasonable.

The Commission's conclusion that the Stipulation was the result of serious bargaining among knowledgeable and capable parties is properly supported by record evidence. The fact that Joint Applicants were not invited to those negotiations bears no weight in that analysis because

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[7] Opinion and Order (Apr. 20, 2022).
[8] Joint Application for Rehearing (Joint Application), Assignments of Error 4, 5, 6, 7, 8, and 9.
[9] Joint Application, Assignments of Error 1, 2, and 3.
[10] 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).
[11] Case Nos. 18-1830-GA-UNC and 18-1831-GA-UNC (TCJA Proceedings).

they were not parties. There is no obligation under Ohio law to invite non-parties to participate in settlement discussions. Joint Applicants also do not, on their own, constitute an entire "customer class." There are numerous suppliers that are not part of RESA, and most specifically there are numerous shippers that are not part of RESA. As such, RESA cannot claim to speak for anyone other than RESA. In fact, RESA's own brief states that RESA does not even speak for all of its members, and simply presents the opinions of RESA itself as a trade organization.[12] If RESA cannot represent the views for its own members, then it certainly cannot claim to speak on behalf of an entire class of customers.

The Commission's failure to entertain what provisions "could have been" included in the Stipulation do not render its finding unlawful or unreasonable. The Commission placed proper weight to the speculative testimony of Joint Applicants' Witness Cawley, who could not articulate a regulatory principle or practice the Stipulation violates. In contrast, the Commission's Opinion and Order includes multiple paragraphs iterating the Stipulation package's wealth of benefits to customers, thus forming the basis of the Commission's decision.

Finally, the same policy arguments Joint Applicants previously addressed in detail and have been asserting since their intervention are not grounds for rehearing. Rather, the Commission considered the inclusion of what Joint Applicants characterize as "wholly unrelated" provisions as well as the circumstances of the negotiations leading to the Stipulation, and based on the record evidence, rejected those arguments. Therefore, the Commission did not act unlawfully or unreasonably in approving the Stipulation, and the Joint Application for Rehearing should be denied.

[12] Joint Application p. 2, fn 1 ("The comments expressed by RESA in this filing represent the position of RESA as an organization but may not represent the views of any particular member of the Association.")

### A. Procedural Errors

The Commission did not unlawfully or unreasonably expand the scope of the MGP and TCJA proceedings, because the Commission is not required to explicitly state the scope of a proceeding and limit the resulting stipulations to that scope. The Commission acted reasonably in limiting Joint Applicants' intervention to the three issues that IGS and RESA refer to as "competitive market provisions," because neither IGS nor RESA demonstrated a real and substantial interest in any other issue related to these proceedings.[13] Finally, the Commission did not shift the burden to either IGS or RESA to prove that the Stipulation's competitive market provisions were unreasonable. Rather, Joint Applicants take out of context statements the Commission made in its consideration of the Stipulation.

#### 1. The Commission did not unlawfully expand the scope of the MGP and TCJA proceedings. (Assignment of Error 1).

First, Joint Applicants argue that "[t]he Commission acted unreasonably and unlawfully by considering issues outside of the ordered scope of the proceedings (see, Order at ¶ 137)."[14] Joint Applicants' puzzling argument is that, because the Commission did not explicitly state in its November 13, 2013 Opinion and Order in the MGP and TCJA proceedings that the purported competitive market issues were permissible to include within a stipulation resolving those proceedings, such an inclusion is therefore unlawful because the Commission is thus changing or modifying its original order without justification in violation of Ohio Supreme Court precedent.[15]

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[13] The three "competitive market provisions" relate to provisions in the Stipulation whereby the Company agreed to file a future application for Commission consideration to 1) Transition away from its Gas Cost Recovery process to an auction-based Standard Service Offer as is permitted pursuant to R.C. 4929.04; and 2) A New bill format as is permitted under O.A.C. 4901:1-13-11(D) to propose inclusion of a price-to-compare message, and commitment to share aggregated billing data with the Office of the Ohio Consumers' Counsel. While Duke Energy Ohio disputes that these provisions truly constitute competitive market provisions, nonetheless, in the interests of consistency and clarity in the record, the Company will use IGS and RESA's chosen term.

[14] Id., Assignment of Error 1.

[15] Joint Application, pp. 11–12.

In the case Joint Applicants cite, *Office of Consumers' Counsel v. Public Utilities Com.*, 16 Ohio St.3d 21, 22-23, 475 N.E.2d 786 (1985), the Ohio Supreme Court reversed an order of the Commission regarding Ohio Bell Telephone Company's request to raise its rates. In 1981, the Commission had authorized a gradual, four year phase-in approach to expensing Class A telephone carrier station connections.[16] Four years later, in the 1985 case, the Commission completely reversed its position without explanation, noting only that "[t]he issue really is how should these test year expenses be treated given the previously authorized phase-in treatment prescribed by this Commission. We believe that it is only logical to adopt the 100 percent expensing treatment…"[17]

The order was reversed. The Ohio Supreme Court stated that while the Commission has discretion to modify an order, it "will not allow the [C]ommission to arbitrarily change expensing levels unless the [C]ommission explains why its 1981 order and the rationale behind gradual phase-in should be overruled."[18] Precisely, the Court noted that "a few simple sentences in the [C]ommission's order in this case would have sufficed in this regard."[19]

First and foremost, the above case is not applicable to the MGP and TCJA proceedings as Joint Applicants claim. *Office of Consumers' Counsel* dealt with a direct contradiction between a 1981 order and subsequent 1985 order regarding how a utility was authorized to treat a test-year expense; first, the Commission authorized a gradual, four-year phase in, and then, without explanation, the Commission completely pivoted its position and substituted 100 percent, flash-cut expensing. Joint Applicants take this logic and stretch it to the extreme: if the Commission does not explicitly state that an issue is within the scope of a proceeding, it is categorically barred

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[16] *Office of Consumers' Counsel v. Public Utilities Com.*, 16 Ohio St.3d 21, 22-23, 475 N.E.2d 786 (1985), citing *In re Extension of F.C.C. First Report and Order* (July 31, 1981), case No. 81-828-TP-ORD.
[17] *Id.* at 22.
[18] *Id.* at 23.
[19] *Id.* at 21–22.

unless and until the Commission orders it to be permitted and provides rationale for that order. Notably, Joint Applicants are not claiming that the MGP and TCJA proceedings included an explicit directive limiting the scope of the proceedings but rather, that the *lack of* an explicit directive permitting matters outside the scope the proceedings categorically prevents consideration of any other matters. Not only is this obviously not what *Office of Consumers' Counsel* stands for, the result would prevent any and all pleadings, motions, and stipulations from including information "outside the scope" of the Commission's implicit directives, which is clearly at odds with common practice before the Commission.

Second, even if the Commission was "changing its position" on the scope of the MGP and TCJA proceedings (which it is not), "a few simple sentences in the Commission's order in this case would have sufficed" to prevent the "arbitrary change" in rationale as described in *Office of Consumers' Counsel* above.[20] The Commission provided that rationale quite clearly in emphasizing the irrelevance of the fact that the directives in the MGP and TCJA proceedings did not explicitly state that parties could consider competitive market provisions.[21] The rationale provided was that the Commission's test for assessing the reasonableness of a stipulation pursuant to Ohio Adm.Code 4901-1-30 does not require consideration of whether the stipulation includes only provisions directly related to the proceedings or explicitly authorized by the Commission.[22] In providing additional support for this rationale, the Commission noted that it "agree[d] with Duke" that "there are many Commission proceedings, including proceedings which specifically relate to TCJA, where stipulations include provisions not directly related to the reason the proceeding was originally initiated."[23] In this paragraph, the Commission (1) explained why it

[20] *Id.*
[21] Opinion and Order, ¶ 137.
[22] Id., ¶ 137.
[23] Id., ¶ 137.

considered Joint Applicants' assertion to be wrong, (2) provided the proper test that should be applied, and (3) provided an example of another matter where a similar conclusion was reached. This is more than enough to satisfy the "few simple sentences" the Court sought in *Office of Consumers' Counsel.* As such, the Commission did not act unlawfully or unreasonably in allowing the Stipulation to embrace provisions "outside of the scope" of the MGP and TCJA proceedings.

Joint Applicants argue that departing from the set scope of a proceeding is unfair because "such parameters are critical to not only parties to the proceeding, but also to non-parties, as non-parties rely on orders limiting the scope of proceedings in their determination to intervene or not or to monitor or not monitor the proceedings."[24] As discussed in more detail below, the fact that Joint Applicants could not have known the competitive market provisions would be included in the Stipulation is the precise reason intervention was granted to them.

It is also important to note the Commission "has the inherent authority to manage its own dockets"[25] and utilize its discretion to decide how "it may best proceed to manage and expedite the orderly flow of its business."[26] If an issue is raised by the particular facts and circumstances surrounding the approval of this Stipulation, the Commission has broad discretion to address it. However, and regardless of what Joint Applicants claim, the Commission is in no way obligated to address an issue that it views as irrelevant to the matter before it. Especially in cases where that issue has been repeatedly argued, the Commission may choose not to address it again in an effort to "avoid undue delay and eliminate unnecessary duplication of effort."[27]

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[24] Joint Application, p. 13.

[25] *In re Time Warner Communications of Ohio, L.P.*, Case No. 94-1695-TP-ACE, Entry on Rehearing (Oct. 25, 1995) ("The Commission has the inherent authority to manage its own dockets.").

[26] *Toledo Coalition for Safe Energy v. Public Utilities Commission of Ohio*, 69 Ohio St.2d 559, 560, 433 N.E.2d 212 (1982) ("the commission has the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort").

[27] *Id.*

### 2. The Commission and Attorney Examiner properly limited Joint Applicants' intervention to the issues for which they demonstrated a real and substantial interest. (Assignment of Error 2).

Next, Joint Applicants claim that "[t]he Commission acted unreasonably and unlawfully by not reversing the attorney examiner's decisions limiting the intervention of RESA and IGS in these proceedings (see, Order at ¶ 35)."[28] Specifically, in ¶ 35, the Commission found:

> [there is] no basis in the arguments proffered by RESA/IGS as to the granting of limited intervention. The reasoning provided by the attorney examiner in the October 15, 2021, November 3, 2021, and November 10, 2021 Entries is thorough and sound, and we will not opine further on the validity of those decisions; instead, we affirm them in their entirety for the reasons set forth therein.[29]

The Commission did not act unreasonably or unlawfully deny due process rights in adopting the Attorney Examiner's Entries on intervention. Ohio Admin. Code 4901-1-11(D) gives Attorney Examiners the ability to grant 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."[30] In deciding whether to permit intervention, the Commission or Attorney Examiner is required to consider the nature and extent of the prospective intervenor's interest.[31] Taking these two provisions together, the Commission or Attorney Examiner may only permit intervention to parties that have demonstrated a real and substantial interest in the matter; where no interest has been demonstrated, intervention should be denied or limited to those issues in which a real and substantial interest has been demonstrated.

The one and only reason the Attorney Examiner iterated for the limited nature of Joint Applicants' intervention was by their own doing: "the attorney examiner continues to find that

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[28] Joint Application, Assignment of Error 2.
[29] Opinion and Order, ¶ 35.
[30] Ohio Admin. Code 4901-1-11(D)(1).
[31] Ohio Admin. Code 4901-1-11(D)(A)(2).

IGS and RESA's interests in these proceedings are limited to the three areas **discussed in their motions for leave to intervene**."[32] Despite this, now, for the first time, Joint Applicants complain that the benefits of the MGP remediation costs and the TCJA proceedings went uncontested "because RESA and IGS were not allowed to contest them."[33]

Neither Joint Applicant intervened in any of the MGP or TCJA proceedings in the multiple years prior to the Stipulation being filed. Neither Joint Applicant mentioned any interest in the benefits of the MGP remediation costs or the TCJA proceedings in their respective motions to intervene. Joint Applicants believe the Commission acted unlawfully and unreasonably by not allowing them to contest portions of the Stipulation outside the competitive market provisions despite Joint Applicants' categorical lack of demonstrated interest in those benefits in any one of their filings prior to this Application for Rehearing. As noted in Duke Energy Ohio's Reply Brief, the Attorney Examiner can only examine the arguments placed before it.[34] In their Application for Rehearing, Joint Applicants fail to cite *any* demonstrated interest in the MGP and TCJA benefits within their motions to intervene, their interlocutory appeal of limited intervention, or the hearing transcript. Therefore, the Commission did not act unreasonably or unlawfully by affirming the Attorney Examiner's Entries limiting the scope of intervention.

In its Entry granting intervention, the Attorney Examiner cited *In re Dayton Power & Light Co.*, Case No. 02-2779-EL-ATA, Opinion and Order (Sept. 2, 2003) at 8-9 for the proposition that "it should be no surprise to anyone that a case may be resolved by the proposal of a stipulation, which often will encompass a variety of issues, and the mere fact that a stipulation may resolve issues differently than initially proposed does not afford a party the right to intervene beyond the

[32] Id., ¶ 32 (emphasis added).
[33] Joint Application, p. 14.
[34] Duke Energy Ohio's Reply Brief, p. 38.

deadline."[35] The Attorney Examiner allowed limited intervention to IGS and RESA in light of this general principle because, in making its finding within *In re Dayton Power & Light Co.*, the Commission emphasized that "intervention was permitted not because the issues in the proceeding were expanded by the stipulation, but because the intervenor did not receive the notice of certain procedures specific to that case."[36] Thus, the granting of Joint Applicants' intervention was precisely for the protection of their due process rights in recognition of the fact that, as non-parties, they could not have received advanced notice that the Stipulation would include any provisions, let alone three competitive market provisions. Therefore, they were afforded an opportunity to examine the provisions of the stipulation for which they iterated demonstrable interest in, and intervention was properly limited to those issues.

Joint Applicants also claim that by not allowing them full intervention in these proceedings, the Commission improperly left Joint Applicants in a position where they had to prove a negative (*i.e.*, that the Stipulation does not benefit customers), but then would not weigh Joint Applicants' evidence with respect to shadow billing because of the "uncontested" benefits associated with the MGP remediation costs and the TCJA issues, on which Joint Applicants could not make arguments with their limited intervention.[37]

This argument confuses the issues. It is true that Joint Applicants were granted limited intervention, restricting their ability to present evidence regarding whether the MGP and TCJA provisions benefitted customers and the public interest. The Commission determined that, because those benefits were so valuable, even if the shadow billing provision did not benefit customers and the public interest, it would not outweigh the MGP and TCJA benefits such that the Stipulation,

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[35] Entry (Oct. 15, 2021), ¶ 30.
[36] Id., ¶ 30, citing *In re Dayton Power & Light Co.*, Case No. 02-2779-ELATA, Opinion and Order (Sept. 2, 2003) at 9.
[37] Joint Application, p. 15.

as a whole, would not meet that part of the test. To be sure, the Commission began that analysis by recognizing that the "test for evaluating stipulations requires us to consider the Stipulation, *as a package*, rather than limit our analysis to any one component to the Stipulation."[38]

First, the Commission noted "that the benefit produced by the commitments of Duke to finally return to customers millions of savings attributable to the TCJA, as well as significant reductions in the amounts the Company would be authorized to recover for its MGP remediation efforts, are substantial and ensures the Stipulation will quantitatively benefit the public interest."[39] In considering the competitive market provisions, first, the Commission found the commitments to file an SSO application and to provide price-to-compare messaging "to be of no adverse consequence to the opposing parties or the retail market, in general. Any intervenors in that case will be afforded an opportunity for input and comment on the eventual SSO application."[40]

Then, based on the foregoing (significant benefits of the MGP and TCJA provisions and two competitive provisions of no consequence), the Commission chose not to discuss whether the shadow billing provision, by itself, benefits customers and the public interest because, even if it did not, it could not outweigh the benefits the Commission already determined to be present. Additionally, the Commission chose not to discuss whether the shadow billing provision by itself benefits customers because, as previously noted, the test requires the Commission to view the Stipulation as a package rather than limit the analysis to any one component.[41] This analysis did not "leave RESA and IGS in a position where they had to prove a negative," but rather, properly balanced the benefits of the Stipulation as demonstrated by the record evidence. Thus, the Commission did not act unlawfully or unreasonably with regard to determining whether the

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[38] Opinion and Order, ¶ 123.
[39] Id.
[40] Id. at ¶ 121.
[41] Id. at ¶ 123.

shadow billing provision, as part of the whole Stipulation, benefits customers and the public interest.

### 3. The Commission did not unreasonably or unlawfully shift the burden to Joint Applicants to prove that the Stipulation was unreasonable. (Assignment of Error 3).

Finally, Joint Applicants allege that the Commission acted unreasonably and unlawfully by improperly shifting the burden to them to show that the Stipulation did not benefit customers and the public interest. Joint Applicants cite only one sentence from the Opinion and Order in this regard: "[t]he only remaining issue is to determine whether the competitive market provisions require us to find that the Stipulation does not benefit ratepayers and the public interest, despite these uncontested benefits related to the MGP remediation costs and TCJA."[42] Through this statement, Joint Applicants argue that the Commission unlawfully and unreasonably shifted the burden. Joint Applicants, however, strategically omitted the context of this statement. The provision cited by Joint Applicants actually states as follows:

> Similarly, all of the Signatory Parties agree that Duke's customers will begin receiving credits for Duke's protected EDITs from the passage of the TCJA, which will provide more than $147 million in credits to customers (Joint Ex. 1 at 10-11). Moreover, under the Stipulation, Duke will provide residential customers with their allocated share of the more than $54 million in credits related to the change in income tax rates under the TCJA. As agreed in the Stipulation, this will take effect in an immediate, one-time credit, which is expected to be a credit of at least $107.27 per customer. (Joint Ex. 1 at 5-6, 11; Duke Ex. 7 at 23.) Additionally, as stated by the Signatory Parties, Duke's base distribution revenue requirement will be reduced by approximately $12.9 million per year to account for the difference in the federal income tax rate, amounting to a 5.35 percent reduction in charges to consumers for natural gas service (Joint Ex. 1 at 12; Duke Ex. 6 at 17; Duke Ex. 7 at 23). Based on the record evidence, as discussed above, there is no question that these provisions related to the Duke MGP Proceedings and the Duke TCJA Proceedings benefit ratepayers and the public interest. The only remaining issue is to determine whether the competitive market provisions require us to find that the Stipulation does not benefit ratepayers and the public interest, despite these uncontested benefits related to the MGP remediation costs and TCJA.[43]

[42] Opinion and Order, ¶ 120.
[43] Id.

In ¶ 120, the Commission summarizes the evidence upon which it relied to come to the conclusion that the Stipulation, as a whole, benefits customers and the public interest. This is the third paragraph of iterated benefits, which are also contained in ¶¶ 118 and 119. The final sentence merely explains that, in light of the benefits to customers and the public interest already iterated in the Opinion and Order, the only provisions that could thus form the basis of rejecting the Stipulation under that portion of the test are the competitive provisions, which the Commission properly notes must be weighed against the benefits already enumerated in order to evaluate the Stipulation as a package. In fact, in the paragraph immediately following this sentence, the Commission begins by analyzing Duke Energy Ohio's arguments—properly placing the burden on the proponent of the Stipulation to prove that, as a package, it benefits customers and the public interest.[44]

The Commission did not have to "address the question of whether the Stipulation would be appropriate even if we found the shadow billing provision did not benefit ratepayers or the public interest" as noted by Joint Applicants because the Commission is obligated to consider the Stipulation as a *package*. Here, the Commission explains that even if the shadow billing provision does not benefit customers or the public interest, in light of the major benefits committed in the MGP remediation costs and taxes, the Stipulation, as a whole, would still benefit customers and the public interest and therefore, the issue is moot. Weighing the provisions that provide benefits to customers against provisions that may not provide benefits does not shift the burden to Joint Applicants. Therefore, in finding that the Stipulation, as a package, benefits customers and the

[44] Id at ¶ 121 ("In response to the arguments raised by RESA/IGS, Duke contends that two of the competitive market provisions, i.e., the commitment to file an application to transition from the GCR mechanism to an SSO and the commitment to include within that application proposed price-to-compare messaging to be included on customer bills, are merely commitments to file the proposals in a future proceeding.")

public interest, the Commission did not act unlawfully or unreasonably and instead properly analyzed the Stipulation under the three-part test and thoroughly described the record evidence upon which it relied to come to that conclusion.

### B. The Commission did not act unlawfully or unreasonably in finding the Stipulation to be reasonable under the three-part test.

The Commission did not act unlawfully or unreasonably in finding that the Stipulation, as a package, satisfied the three-part test for reasonableness. In this case, the Commission properly applied its three-part test for the reasonableness of a stipulation, which 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.[45] Despite Joint Applicants' arguments to the contrary, the Commission's decision under each part of the test was properly supported by record evidence and its stated reasoning aligns with both Commission and Ohio Supreme Court precedent.

#### 1. The Commission did not act unlawfully or unreasonably in finding the Stipulation was the result of serious bargaining among capable, knowledgeable parties.

The Commission's finding that the Stipulation met the first part of the three-part test is not unlawful or unreasonable because the record evidence clearly demonstrated that the Stipulation resulted from serious bargaining among knowledgeable and capable parties. Joint Applicants were not deliberately excluded from negotiations as they claim because they were not parties to the proceedings prior to their interventions. The diversity of interests represented by the Signatory and

[45] *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).

Non-Signatory parties,[46] as well as the final result of the Stipulation as compared to those parties' initial positions, demonstrates the serious bargaining that took place. Finally, it was proper that the Commission did not address the Joint Applicants' accusation that the Signatory Parties traded the competitive market provisions at the expense of customer credits and MGP Rider charges because the issue of what could have been included in the Stipulation is of no consequence in the three-part test. Rather, the only issue is whether the presented Stipulation, as a package, is reasonable and meets the three-part test.

**a. The Commission's finding that the Stipulation was the result of serious bargaining among capable, knowledgeable parties is not against the manifest weight of the evidence. (Assignment of Error 4).**

First, Joint Applicants allege that "[t]he Commission acted unreasonably and unlawfully by concluding that there "appears to be" serious bargaining among capable, knowledgeable parties. (see, Order at ¶¶ 100-106)."[47] Curiously, Joint Applicants explain in a footnote that the use of the word "appears" by itself raises into question the Commission's determination and supports rehearing but does not further explain why this choice of words dooms the entirety of the Commission's finding.[48] It does not. The Commission's use of the phrase is merely in the context of having examined all of the evidence, that the evidence supports the seriousness of bargaining among capable and knowledgeable parties.

In any event, the Commission's determination that the Stipulation resulted from serious bargaining among knowledgeable and capable parties is not against the manifest weight of the evidence, as Joint Applicants claim. The decision was properly based on the following findings:

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[46] Ohio Manufacturer's Association Energy Group (OMAEG), The Kroger Company (Kroger), and Ohio Partners for Affordable Energy (OPAE) agreed not to oppose the Stipulation. *See* Direct Testimony of Sarah E. Lawler, p. 21.
[47] Joint Application, Assignment of Error 4.
[48] Joint Application, p. 19, fn 5.

that the parties routinely participate in complex Commission proceedings and that the Signatory Parties have extensive experience practicing before the Commission in utility matters; that the signatory and non-opposing parties represented diverse interests, including residential customers, a utility, large nonresidential customers, Staff, Ohio manufacturers and other business, as well as low-income customers and weatherization providers; the extensive amount of time dedicated towards settlement negotiations; the apparent differences between the application and the filed Stipulation; a "robust record demonstrating that significant concessions were made in negotiations"; the testimony of Joint Applicants' witness Frank Lacey that the Signatory Parties and non-opposing parties are knowledgeable and capable as to at least some issues;[49] and IGS and RESA's ability to fully participate in these proceedings consistent with their stated interests.[50]

This is the evidence against which Joint Applicants' contrary evidence must be weighed. The Commission's conclusion must be so manifestly against the weight of the Joint Applicants' contrary evidence that it is "so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty."[51] Joint Applicants argue that the Signatory and Non-Opposing parties do not represent diverse interests because "not one competitive retail natural gas supplier was involved in the negotiations."[52] That is the only record evidence that Joint Applicants argue warrants finding that the Commission's decision on the first prong is manifestly against the weight of the evidence.

Even if it could rationally be said that the omission of competitive suppliers holds the same or more evidentiary weight as the record evidence listed above, the Commission has consistently

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[49] Tr. at 245-246.
[50] Opinion and Order, ¶¶ 101-105.
[51] *See In the Matter of the Application of The Ohio Bell Telephone Company dba AT&T Ohio*, Case No. 07-1312-TP-BLS, Opinion and Order (May 14, 2008), p. 30, citing *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, ¶ 29.
[52] Joint Application, p. 20.

refused to incorporate a diversity requirement into the first part of the reasonableness test. "While the diversity of the signatory parties may be a consideration in determining whether a settlement is a product of serious bargaining among capable, knowledgeable parties under the first prong of the Commission's test, **there is no diversity requirement**…"[53] This is because, as Staff has noted, such a proposed approach would effectively give "global veto power, thereby precluding Commission approval of any settlement not endorsed [by the omitted party]."[54] Even without competitive suppliers, the Stipulation is still the result of negotiations undertaken by parties representing a wide range of interests, which, although not required, is "sufficient in the existing paradigm."[55]

Therefore, given the record evidence, the Commission did not act unlawfully and unreasonably by finding that the Stipulation resulted from serious bargaining among knowledgeable, capable parties, even in light of the fact that none of those parties was a competitive natural gas supplier.

**b. IGS and RESA do not represent an entire "customer class" as contemplated by *Time Warner*, and, even if they do, they were not intentionally excluded from negotiations. (Assignment of Erro r 5).**

Joint Applicants next argue that the exclusion of competitive suppliers from negotiation of the Stipulation violates the prohibition on intentional exclusion of an entire customer class set forth in *Time Warner,*[56] and that therefore, the Stipulation should fail the first part of the test.[57] This

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[53] *In re the Application of the Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co. for Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2017 through 2019*, Case No. 16-743-EL-POR, Opinion and Order (Nov. 21, 2017) at 25 (emphasis added).

[54] *Dominion Retail v. Dayton Power & Light Co.*, Case No. 03-2405-EL-CSS, Opinion and Order (Feb. 2, 2005) at 19.

[55] Opinion and Order, ¶ 105, citing *In re the 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) at 22.

[56] *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 233, 661 N.E.2d 1097 (1996). (*Time Warner).*

[57] Joint Application, Assignment of Error 5.

argument is inapplicable because suppliers are not a "customer class" as contemplated by *Time Warner*. Even if suppliers were considered a "customer class," the mere exclusion of IGS and RESA does not constitute the exclusion of an entire customer class, but merely two members of that class. And, even if IGS and RESA are considered to constitute an entire customer class, there is no evidentiary support for a finding that they were *intentionally* excluded.

An in-depth review of *Time Warner* and its progeny is necessary in evaluating the above considerations. In *Time Warner*, the Ohio Supreme Court reviewed a Commission order adopting a partial stipulation resolving Ameritech Ohio's application for an alternative form of regulation under 4927.04(A), Revised Code, and a complaint filed against Ameritech Ohio by OCC pursuant to 4905.26, Revised Code.[58] The Commission's order adopting the stipulation used non-traditional rate-setting methods to set Ameritech Ohio's rates in violation of 4927.04(A).[59] The Court found that the Commission "exceeded the scope of its statutory authority when it used non-traditional rate-setting methods" and reversed the order on those grounds.[60] In a footnote, the Ohio Supreme Court cautioned:

> Given our finding that the commission lacked jurisdiction to use R.C. 4927.04(A) when setting Ameritech's rates below, we need not specifically address the remaining propositions of law raised by the appellants. However, in the interest of judicial economy and given the extensive briefing and arguments of the parties, we feel compelled to note our grave concern regarding the partial stipulation adopted in the case at bar. The partial stipulation arose from settlement talks from which an entire customer class was intentionally excluded. This was contrary to the commission's negotiations standard in *In re Application of Ohio Edison to Change Filed Schedules for Electric Service*, case No. 87-689-EL-AIR (Jan. 26, 1988) at 7, and the partial settlement standard endorsed in *Consumers' Counsel v. Pub. Util. Comm*. (1992), 64 Ohio St. 3d 123, 125-126, 592 N.E.2d 1370, 1373. The benefits of alternative rate treatment and deregulation for the local exchange company under R.C. 4927.03 and 4927.04 are to be balanced by an equal offset of increased competition, infrastructure commitments, and other benefits to the ratepayers. R.C. 4927.02. This balancing did not occur. Ameritech managed to either settle its

[58] *Time Warner* at 230.
[59] *Id.* at 241.
[60] *Id.*

> competitive issues or defer them until a later date, all without having its competitors at the settlement table. Under these circumstances, we question whether the stipulation, even assuming the commission's authority to approve it, promotes competition in the telephone industry as intended by the General Assembly. We would not create a requirement that all parties participate in all settlement meetings. However, given the facts in this case, we have grave concerns regarding the commission's adoption of a partial stipulation which arose from the exclusionary settlement meetings.[61]

Despite this comment, in no case has the Commission rejected a stipulation by reason that an entire customer class was intentionally excluded from negotiations. In fact, no Commission order has found an entire customer class to have been intentionally excluded from negotiations at all. Even further, no Commission opinion has considered competitive suppliers to be "customers" for purposes of *Time Warner.*[62] Two subsequent Supreme Court opinions considered the *Time Warner* footnote that provide further clarification on its application.

First, in 2004, the Ohio Supreme Court issued an opinion in *Constellation*,[63] in which it considered whether Constellation NewEnergy, Inc. was improperly excluded from settlement negotiations in Dayton Power and Light Company's rate freeze case. In *Constellation,* Staff explicitly took the position that "CRES[64] providers do not represent any customer class but, rather, represent their own business and financial interests."[65] The Commission found that, "since representatives on behalf of DP&L residential, commercial, and industrial customers all participated in the settlement process and signed the Stipulation, no entire customer class was

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[61] *Time Warner*, fn 2.

[62] *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase* Agreement, Case No. 14-1693-EL-RDR et al, Opinion and Order (Mar. 31, 2016) at 122.

[63] *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 2004-Ohio-6767, 104 Ohio St. 3d 530, 820 N.E.2d 885. (*Constellation*).

[64] Competitive Retail Electric Service. (CRES).

[65] *In the Matter of the Continuation of the Rate Freeze for the Dayton Power and Light Company*, Case No. 02-2779-EL-ATA et al., Opinion and Order (Sept. 2, 2003) at 16.

excluded. The factual predicate upon which the *Time Warner* admonition was premised is simply not present in this case."[66]

Notably, CRES providers were not included in the Commission's list of "customer classes." On appeal, the Ohio Supreme Court affirmed the Commission's finding, and, although the Court did note that CRES providers were a "class," they were not identified as a "customer class" for purposes of the test, but rather a provider class.[67] In *Constellation*, the Court agreed with the Commission "that the admonition in the footnote in *Time Warner* is not applicable under the facts of this case."[68]

In 2016, the Ohio Supreme Court again considered the *Time Warner* test in *Ohio Edison*.[69] In that case, NOPEC[70] argued that a stipulation excluded an entire customer class by excluding three primary residential customer advocates from the bargaining process.[71] The Commission rejected the argument and on appeal, the Ohio Supreme Court affirmed, finding that "deliberate exclusion of specific customer-class members does not raise the same concern, so long as the class **in its entirety** is not excluded."[72]

Taking *Time Warner*, *Constellation*, and *Ohio Edison* together, a customer class is improperly excluded only where an entire class (rather than one or a few of its members) of customers (rather than providers), is *deliberately* excluded from settlement negotiations. Notably, neither the Commission nor the Ohio Supreme Court has ever made such a finding. Nor does such a finding in and of itself render the Stipulation unreasonable under the first part of the test.

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[66] *Constellation* at ¶ 23.
[67] *Id.*
[68] *Id.* at ¶ 24.
[69] *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase* Agreement, Case No. 14-1693-EL-RDR et al, Opinion and Order (Mar. 31, 2016). (*Ohio Edison*).
[70] Northeast Ohio Public Energy Council. (NOPEC).
[71] *Ohio Edison*, ¶ 42.
[72] *Id.* (emphasis added).

Against this backdrop, Joint Applicant's claims simply fall short. First, and most importantly, competitive suppliers are not customers. This has been Staff's position since 2004 in *Constellation*, it is still Staff's position in the current matter, and the Commission agrees: "*Time Warner* is inapplicable in these proceedings as suppliers are not customer classes."[73]

Joint Applicants argue that because competitive retail natural gas suppliers are subject to Duke Energy Ohio's tariffs and pay Duke Energy Ohio for its services, they are somehow therefore customers for purposes of *Time Warner.*[74] "Retail natural gas supplier" is defined in the Ohio Revised Code as "any person, as defined in section 1.59 of the Revised Code, that is engaged on a for-profit or not-for-profit basis in the business of **supplying or arranging for the supply of a competitive retail natural gas service to consumers** in this state that are not mercantile customers."[75] Competitive suppliers are not end-use customers; they are not residential customers, industrial customers, nor commercial customers. Rather, they are engaged in the business of *supplying* rather than *consuming* services, as a customer would.

The Ohio Supreme Court said as much in a recent case against Duke Energy Ohio in which DirectEnergy[76] claimed to be a "captive customer" with respect to a meter data management dispute.[77] The court clearly stated: "[w]e likewise see no evidence that Direct[Energy] was a 'consumer' of electricity supplied by Duke Energy, as the record does not establish that Direct paid for and received electric energy furnished by Duke Energy."[78] The Court stressed that DirectEnergy could not be a "customer" of Duke Energy Ohio because, "in the commercial sense,

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[73] Opinion and Order, ¶ 88.
[74] Joint Application, pp. 22–24.
[75] R.C. 4929.01(N). A similar definition is provided in R.C. 4928.01(27), which defines "retail electric service" as "any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state."
[76] DirectEnergy Business, LLC (DirectEnergy).
[77] *Direct Energy Business, L.L.C. v. Duke Energy Ohio, Inc.*, 161 Ohio St.3d 271, 2020-Ohio-4429, 162 N.E.3d 764.
[78] *Id.* at ¶ 17.

a 'customer' is generally one who buys or purchases goods or services," and DirectEnergy was not such a purchaser.[79] Put simply, IGS and RESA are not customers. The analysis ends there.

For the sake of argument, even if competitive suppliers could be considered "customers" for the purposes of the *Time Warner* admonition, IGS and RESA cannot together be considered the "entire class" of competitive retail suppliers. As discussed above and as stated on the very first page of its brief, RESA only represents itself and does not even speak for all of its members. RESA and IGS do not collectively represent or speak for the entire competitive natural gas supplier industry. To order otherwise would disregard the interests of competitive suppliers that are not members of RESA, including Direct Energy LP, Frontier Utilities, LLC, Santana Energy Services, and Xoom Energy LLC, among others. As noted in *Ohio Edison*, even *deliberate* exclusion of specific customer-class members does not raise the *Time Warner* concern, so long as the class in its entirety is not excluded, and the entire "class" of competitive suppliers was not excluded here.[80]

Even if IGS and RESA could be considered the entirety of a customer class, under *Time Warner*, their exclusion from negotiations must still be deliberate. The record is completely devoid of any evidence suggesting that IGS and RESA were purposefully or intentionally excluded from negotiations. In an effort to create such evidence, Joint Applicants point to Mr. Cawley's testimony that it was "particularly troubling that RESA and suppliers were intentionally excluded from these settlement discussions."[81] Mr. Cawley's conclusion that suppliers were "intentionally" excluded is apparently supported by two facts: first, that the Stipulation signatories knew or should have known that suppliers openly and notoriously opposed the concept of shadow billing, and second,

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[79] *Id.* at ¶ 21.
[80] *Ohio Edison.* at ¶ 42.
[81] Joint Application, p 25, citing Cawley Direct Testimony at 3.

Duke Energy Ohio and OCC's responses to RESA's Requests for Admissions[82] agreeing that they did not invite any competitive suppliers to participate in the negotiations.[83]

This evidence cannot possibly amount to a finding that the Signatory and Non-Signatory parties intentionally or deliberately excluded competitive suppliers. The Commission was clear in *Constellation* that "the lack of involvement of certain parties, for whatever reason and due to whichever parties' actions or inactions, does not change the fact that the stipulation resulted from serious bargaining among capable, knowledgeable parties."[84] Additionally, "the Commission would note that it is not any one party's responsibility to see to it that everyone is included."[85] Neither Duke Energy Ohio nor OCC was obligated to "invite" IGS and RESA, which were non-parties to all of these 18 proceedings, to participate in negotiations, even in light of their "open and notorious" opposition to shadow billing. To find such an obligation exists would severely diminish the ability for parties to resolve complicated matters via stipulation. Joint Applicants point to no other evidence of deliberate exclusion. As a result, it was not unlawful or unreasonable that the Commission found that "there is nothing in the record to indicate that these parties were improperly or intentionally excluded from settlement negotiations."[86]

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[82] Joint Applicants misrepresent Duke Energy Ohio's response to the applicable Request for Admission for the second time. This misrepresentation was already made in IGS and RESA's post hearing briefs and corrected by Duke Energy Ohio in its reply brief. Specifically, Duke Energy Ohio did not merely "admit" but rather responded: "[o]bjection. 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." *See* Duke Energy Ohio's Reply Brief, p. 14, citing RESA Ex. 4 (RESA-RFA-01).

[83] Id.

[84] *In the Matter of the Continuation of the Rate Freeze for the Dayton Power and Light Company*, Case No. 02-2779-EL-ATA et al., Opinion and Order (Sept. 2, 2003) at 17.

[85] *Id.* at 16–17.

[86] Opinion and Order, ¶ 88.

### c. The Commission was not required to consider the reasonableness of the Stipulation in light of provisions that could have been, but were not included, within it. (Assignment of Error 6).

Joint Applicants argue that the Commission acted unreasonably and unlawfully by not considering whether the Signatory Parties traded the competitive market provisions at the expense of additional customer credits and MGP Rider charges, in violation of R.C. 4903.09.[87] In doing so, they ask the Commission to delve into the mindsets of the negotiating parties and speculate on what provisions could have been included in the Stipulation rather than properly analyze the reasonableness of the provisions that make up the Stipulation under the three-part test. Joint Applicants cite no provision of law mandating such a consideration. This argument also runs afoul of the fact that "the Commission has long held that settlement negotiations shall remain confidential. We will not consider the parties' good faith efforts to resolve [a] dispute as evidence…"[88]

As to R.C. 4903.09, Joint Applicants cite to two cases[89] in which the Ohio Supreme Court found the Commission failed to meet the statutory requirement, which requires it to explain its decisions and identify, in sufficient detail to enable review, the record evidence upon which its orders are based.[90] Both cases dealt with the Commission's failure to explain specific findings necessary to the issues pending before it.

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[87] Joint Application, Assignment of Error 6.

[88] *In the Matter of the Complaint of Karl Friederich Jentgen, et al.* Case No. 15-245-EL-CSS, Entry on Rehearing (Dec. 7, 2016) at ¶ 33.

[89] Joint Application, p. 28, citing *In re Comm'n Review of the Capacity Charges of Ohio Power Co.*, 147 Ohio St.3d 59, 2016-Ohio- 1607, 60 N.E.3d 1221, ¶ 53 (reversing the Commission's decision when it "approved the staff's proposed energy credit without specifically addressing any of AEP's challenges to the inputs used in the EVA's methodology."); see also *In re Application of Columbus Southern Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734, ¶ 66 ("The commission never offered a response to AEP's claims and thus failed to explain its decision. This was error.")

[90] R.C. 4903.09.

The first case dealt with AEP's[91] application for approval of a capacity charge.[92] The Court found that the Commission failed to explain its decision in approving Staff's hired-consultant's methodology, which was used to calculate the energy credit designed to offset AEP's capacity costs.[93] The Commission's explanation of the issue was necessary to the resolution of the case because the energy credit becomes one part of the overall calculation determining the appropriate capacity charge.

The second case dealt with the ESP[94] of Columbus Southern Power Company.[95] Specifically, the Court found that the Commission failed to explain its decision to impose a 12% SEET[96] threshold for the term of the ESP over objections.[97] The Commission's explanation of the issue was necessary to the resolution of the case because utilities that opt to provide service under an ESP must undergo annual earnings review, and if the ESP results in significantly excessive earnings under the SEET threshold, the utility must return the excess to its customers.[98]

In this case, the Commission did not violate R.C. 4903.09's requirement to explain its decision and identify the evidence upon which that decision was based. Unlike the cases cited by Joint Applicants, whether or not OCC and Staff traded the competitive market provisions at the expense of additional customer credits and MGP Rider charges has no bearing on the matter that was before the Commission. The Opinion and Order considers only whether to adopt the Stipulation. No portion of the Commission's three-part test requires the Commission to consider what provisions could have been in the Stipulation but were bargained away for other terms, and

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[91] Ohio Power Company, d/b/a American Electric Power Ohio. (AEP).
[92] *In re in re Columbus S. Power Co.*, 2016-Ohio-1608, ¶ 40, 147 Ohio St. 3d 439, 455, 67 N.E.3d 734, 749.
[93] *Id.*
[94] Electric Security Plan. (ESP).
[95] *In re in re Columbus S. Power Co.*, 2016-Ohio-1608, ¶ 40.
[96] Significantly Excessive Earnings Test. (SEET).
[97] *In re in re Columbus S. Power Co.*, 2016-Ohio-1608, ¶ 40
[98] *Id.*

therefore consideration of the same is not necessary to a resolution of the overall matter. Because such an analysis is not a basis for the Commission's decision, it was not unlawful or unreasonable for the Commission to omit such an analysis from its Opinion and Order.

**2. The Commission did not act unreasonably or unlawfully by concluding that the Stipulation, as a package, did not violate any important regulatory principle or practice.**

The Commission properly found that the Stipulation does not violate any important regulatory principle or practice. Despite Joint Applicants' arguments to the contrary, Mr. Cawley's testimony did not demonstrate that the Stipulation violated such regulatory principles. Further, the Commission's reliance on Ms. Spiller's testimony and the regulatory principles set forth in R.C. 4929.02 were proper, and therefore, the Commission's finding in this respect was not against the manifest weight of the evidence.

**a. The Commission properly found that Mr. Cawley's testimony did not demonstrate that the Stipulation violates any regulatory principle or precedent. (Assignment of Error 7).**

Joint Applicants claim that the Commission "acted unreasonably and unlawfully by finding that RESA and IGS "have failed to present any evidence demonstrating that the Stipulation violates any regulatory principle or precedent."[99] Joint Applicants believe that such a finding is unlawful and unreasonable in light of the testimony of IGS and RESA witness Mr. Cawley, a former Commissioner of the Pennsylvania Public Utility Commission.[100] They believe that the Commission's finding that the Stipulation did not violate any important regulatory principle or practice was against the manifest weight of the evidence and must be reversed to give Mr. Cawley's testimony "the weight that it deserves."[101]

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[99] Joint Application, Assignment of Error 7.
[100] Id., p. 28, citing Cawley Direct Testimony at 1.
[101] Id., p. 28.

Just because the Commission concluded that Joint Applicants failed to present any evidence demonstrating that the Stipulation violates any regulatory principle or practice does not mean the Commission did not consider Mr. Cawley's testimony; rather, it means Mr. Cawley's testimony did not demonstrate that the Stipulation violated any such regulatory principles. It may be Mr. Cawley's opinion that such violations exist. In fact, the Commission acknowledged as much by summarizing Mr. Cawley's testimony within the portion of its Order considering this part of the test: the Commission reiterated Mr. Cawley's opinion on the improper inclusion of so-called "alien provisions," the standard regulatory practice of providing interested parties adequate notice and opportunity to participate in proceedings that affect them, his recommendation to direct separate application proceedings for the SSO and shadow billing issues, and his opinion that the Signatory Parties "acted inappropriately," among other testimony.[102]

It is clear the Commission considered Mr. Cawley's testimony. While this testimony is certainly evidence, it is not "evidence demonstrating that the Stipulation violates any regulatory principle or precedent."[103] Its existence in the record does not automatically render a finding in favor of Joint Applicants on the issue. Therefore, the Commission did not act unlawfully or unreasonably in affording Mr. Cawley's testimony little weight and noting that IGS and RESA "failed to present any evidence" that the Stipulation fails to meet this prong.

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[102] Opinion and Order, ¶ 127.

[103] The fact that the Commission did not find Mr. Cawley's testimony—or what was left of it after the Attorney Examiner properly granted multiple parties' Motions to Strike—to be convincing in this regard is not surprising. *See* Tr. at 150-165. Joint Applicants continuously lean on Mr. Cawley's former service as a Commissioner of the Pennsylvania Public Utility Commission to parrot-in unfounded and speculative opinions on the formation of the Stipulation and the mindset of the parties as they negotiated its terms.

**b. The Commission did not act unreasonably or unlawfully by concluding that the Stipulation does not violate any important regulatory principle or practice. (Assignment of Error 8).**

In addition to Joint Applicant's objection to the weight the Commission placed on Mr. Cawley's testimony, they take issue with the Commission's explanation for why the Stipulation does not violate any important regulatory principle or practice.[104] Joint Applicants object to the Commission's basis for the decision, which included both the testimony of Amy B. Spiller as well as the policies set forth in R.C. 4929.02.[105]

First, Witness Spiller's testimony is proper support for this finding despite Joint Applicants' assertion that "Mr. Cawley's testimony was much more detailed and thorough than any of Duke's…"[106] The portions of Ms. Spiller's testimony that the Commission cited in support of its finding that the Stipulation did not violate any important regulatory principle or practice stated:

> This Stipulation provides certainty to all stakeholders by resolving complex regulatory proceedings that have been pending before the Commission for many years. The Stipulation resolves cost recovery issues in a way that will not result in any rate increase for customers. To the contrary, it results in an overall reduction in natural gas base rates, a monthly credit related to protected EDITs through the Company's Rider GTCJA, and immediate bill credits for all customers. The Stipulation also reserves funds for bill relief for qualifying customers. Moreover, as I previously discussed, this Stipulation advances important regulatory policies including enhancing the competitive natural gas market and providing more information to customers regarding their natural gas service and related choices.[107]

Additionally, Joint Applicants strategically omit the portion of the Order noting that the resolution of these pending cases "is consistent with the state's policy set forth in R.C. 4929.02, as well as the Commission's directives.[108] R.C. 4929.02 sets forth the policy of the state as to

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[104] Joint Application, p. 31.
[105] Id., citing Opinion and Order at ¶ 133.
[106] Id., p. 31.
[107] Direct Testimony of Amy B. Spiller, pp. 22–23.
[108] Opinion and Order, ¶ 133.

natural gas services and goods. Various portions of the Stipulation realize these goals. For example, the lack of a rate increase and the credits provided to consumers "promote[s] the availability to consumers of adequate, reliable, and reasonably priced natural gas services and goods"[109] pursuant to R.C. 4929.02(A)(1). The inclusion of price-to-compare messaging on customer bills "encourage[s] cost-effective and efficient access to information regarding the operation of the distribution systems of natural gas companies in order to promote effective customer choice of natural gas services and goods"[110] pursuant to R.C. 4929.02(A)(5).

Joint Applicants continuously argue that the three provisions to which their intervention was limited will have a detrimental impact on the competitive market and therefore render the entirety of the Stipulation in violation of a regulatory principle, i.e., the fostering of effective competition. However, the Stipulation does not settle substantive, competitive market issues. The fact that Duke Energy Ohio agrees to make some future filing is not a final resolution of the issues in those filings. Even further, Duke Energy Ohio has the *legal right* to make such filings; it cannot be said that exercising a legal right under Ohio's regulatory scheme violates an existing regulatory principle or practice. Additionally, Duke Energy Ohio's disclosure of aggregate shadow billing data to OCC does not, standing alone, affect the market. Parties in the negotiations are more than capable to address these issues and Joint Applicants were given the right to engage in discovery on them, and yet remain unable to present evidence that the provisions will impact the competitive market in and of themselves.

In the absence of any evidence to the contrary, it was not against the manifest weight of the evidence for the Commission to find that that Stipulation does not violate any important

[109] R.C. 4929.02(A)(1).
[110] R.C. 4929.02(A)(5).

regulatory principle or practice. Therefore, Joint Applicants eighth assignment of error is inapposite.

### 3. The Commission did not act unreasonably or unlawfully in finding that the Stipulation, as a package, benefits ratepayers and the public interest (Assignment of Error 9).

Finally, Joint Applicants argue that the Commission's finding that the settlement package benefits customers and the public interest was unlawful and unreasonable "because of the precedent set by such a finding under these circumstances, because the competitive market provisions were included to the detriment of ratepayers and because of the approval of the provision of misleading shadow billing information to OCC."[111] To prove this point, IGS and RESA assert the same policy arguments they asserted in their motions to intervene, at hearing, and in their post-hearing briefing. First, they emphasize that the practical effect of the Order will require parties to intervene in every Commission case "so that parties can ensure that they receive notice of settlement negotiations, even if the settlement negotiations on their face relate to wholly unrelated matters."[112] Notably, Joint Applicants do not argue the Commission's decision disregarded record evidence or in some other way acted improperly. Rather, they conclude that, because this policy argument exists, the Commission must have erred.

The Commission properly considered and rejected this argument. It emphasized that this portion of the three-part test requires the Commission to view the Stipulation as a package rather than any one provision.[113] Here, Joint Applicants attempt to disregard every single benefit

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[111] Joint Application, Assignment of Error 9.
[112] Id., p. 33.
[113] Opinion and Order, ¶ 117, citing *In re Ohio Power Co.*, Case No. 94-996-EL-AIR, et al., Opinion and Order (Mar. 23, 1995) at 20-21; *In re Columbus S. Power Co. and Ohio Power Co.*, Case No. 99-1729-EL-ETP, et al., Opinion and Order (Sept. 28, 2000) at 44.

ratepayers will receive in favor of a speculative policy argument that would only impact institutional players.

The reality is, and as the Commission set forth as the basis for its decision, the Stipulation creates a wide breadth of benefits for customers. Specifically, the Commission noted that the Stipulation reduces Duke Energy Ohio's charges to consumers for MGP remediation costs by nearly $11.4 million; Duke Energy Ohio's natural gas customers will receive an immediate credit for $28.1 million; Duke Energy Ohio will be required to use the $45.8 million of the $50 million of insurance proceeds it received for claims related to MGP remediation efforts to further offset the charges; a provision of the Stipulation includes a commitment from Duke Energy Ohio to terminate Rider MGP; the approximately $4.8 million in insurance proceeds remaining after the full offset will be used to benefit consumers who have been impacted by the coronavirus pandemic, including approximately $3.8 million to be used for bill payment assistance for qualifying low-income residential consumers and seniors.[114]

Whether approval of the Stipulation will incentivize parties to "intervene in every case" cannot be the entire basis of rejecting the Stipulation under this part of the test in light of the stated benefits. Interested parties have a right to seek intervention in proceedings before the Commission, providing they satisfy intervention criteria set forth in O.A.C. 4901-1-11. Nothing in the Commission's Order changes that. Joint Applicants emphasize the Commission again ignored the testimony of Mr. Cawley, who noted that such broad scale intervention will not benefit customers or the public interest but instead will only lead to a substantial increase in the amount and costs of litigation at the Commission.[115] However, the Commission did address the potential impact of the inclusion of wholly unrelated provisions within stipulations and properly cautioned parties:

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[114] Opinion and Order, ¶ 119.

[115] Joint Application, p. 33, citing Cawley Direct Testimony at 16.

> While we find that modifications are not necessary to the three-prong test, we take a moment to caution parties before including similarly unrelated provisions in future stipulations. We note that, in the event parties choose to include provisions that are wholly unrelated to the underlying proceedings, such an act will invariably invite additional due process, and consequently cause delay before the Commission renders a decision on the reasonableness of that proposed stipulation. Parties, thus, assume the risk of this delay, in addition to the eventual possibility that the Commission will reject the provisions resulting from the analysis of the three-part test, much like any other provision contained in a stipulation before us.[116]

In this respect, the Commission considered Joint Applicant's argument and clearly envisioned that cases resolved by including wholly unrelated provisions in a resulting stipulation will play out much like this one; the Commission effectively warns settlement drafters that any new substantive interests impacted by a stipulation will result in intervention, hearing on the inclusion of those provisions, and briefing on the same—just as IGS and RESA were afforded in this case. This statement calls out that stipulation drafters cannot circumvent due process to intervenors. The language puts parties on notice that the inclusion of such unrelated provisions will inevitably result in a delay in the proceedings to afford that due process.

Joint Applicants complain that "caution is not sufficient to avoid the risk in any other proceeding that negotiations may take place that exclude regulated entities…"[117] But, that same type of "caution" created *Time Warner* and its progeny, which originated from mere dicta in a footnote offering the "grave concern" the Court felt regarding the course of negotiations and is now quite often seriously argued and considered by parties and the Commission alike. In any event, "[a]s acknowledged by RESA/IGS, there is no explicit Commission rule that prohibits parties from including provisions in a stipulation that are unrelated to the underlying proceedings" and therefore it was proper for the Commission to approve the Stipulation despite such an inclusion.[118]

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[116] Opinion and Order, ¶ 89.
[117] Joint Application, pp. 33–34.
[118] Opinion and Order, ¶ 86.

Joint Applicants also again argue that Duke Energy Ohio's commitment to file an application to transition to an SSO and the commitment to include the proposed price-to-compare messaging were not mere commitments to file proposals as the Commission indicated, but provided no record evidence in support of this argument.[119] Therefore, the Commission properly stated that it would not use its decision in this matter to predetermine any outcome of such applications.[120]

Lastly, Joint Applicants argue that the inclusion of the shadow billing provision dooms the entire Stipulation under this part of the test.[121] Joint Applicants argue that the Commission inappropriately dismissed their evidence on the shadow billing issue and therefore acted unlawfully and unreasonably.[122] Again, the Commission did consider Joint Applicants' evidence, namely, the testimony of Frank Lacey, who testified that shadow billing provides inaccurate information that does not represent a complete comparison of pricing and savings, as a customer may choose an energy provider for various reasons other than price.[123]

Even in light of this evidence, the Commission concluded that the shadow billing provision did not violate any important regulatory principle or practice because "[a]lthough we do not here address the value of such information, we do not agree that Duke's mere provision of the calculations to OCC or Staff violates the third part of the three-part test" and because "a utility company may, as Duke has done here, choose to engage in shadow billing by agreement."[124]

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[119] Joint Application, p. 32.
[120] Opinion and Order, ¶ 121.
[121] Joint Application, p. 36.
[122] Id., p. 36.
[123] Opinion and Order, ¶ 115.
[124] Id., ¶ 136, citing *In re Columbia Gas of Ohio, Inc.*, Case No. 12-2637-GA-EXM, Opinion and Order (Jan. 9, 2013) at 43; *Ohio Power Rate Case*, Opinion and Order (Nov. 17, 2021) at ¶¶ 131, 108, 198.

Joint Applicants argue for the first time that if OCC uses the aggregate shadow billing information to lobby for legislative change, such actions will harm the competitive retail natural gas market.[125] No provision of the Stipulation sets forth that OCC will use the shadow billing information at all, much less that it will use the information to "lobby for legislative change." Further, it is not within the statutory power granted to the Commission to supersede the legislative authority General Assembly; a hypothetical lobby is not only not within the Commission's power to regulate, but also not included in the Stipulation and therefore is not an issue before the Commission. It is wholly speculative, and therefore, the Commission should not consider it.

## III. CONCLUSION

Joint Applicants relent that "[n]o party to a Commission proceeding would like to be in the position RESA and IGS were forced into in these proceedings, and the language in the [Opinion and Order] exemplifies the lack of due process in these proceedings."[126] The reality is that IGS and RESA's position resulted from their own actions. Joint Applicants clearly had no interest in the resolution of the MGP and TCJA proceedings until the Stipulation was filed. Their intervention was thus properly limited to the competitive market provisions. They were granted an opportunity to conduct written discovery, depose witnesses, present their own witnesses, and submit multiple briefs on the issues before the Commission. The fact that the weight of the evidence favored approval of the Stipulation did not improperly shift the burden to Joint Applicants. As it has done in countless other cases, the Commission carefully analyzed the terms of the proposed Stipulation as a package under the three-part test and found the Stipulation to be reasonable. The fact that Joint Applicants do not like that result does not mean the Commission acted unlawfully or unreasonably.

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[125] Joint Application, p. 36.
[126] Id., p. 17.

Therefore, rehearing is not necessary, and Duke Energy Ohio respectfully requests the Commission deny IGS and RESA's Joint Application for Rehearing.

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 31st day of May, 2022.

*/s/ Rocco D'Ascenzo*
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Summary: Memorandum Contra the Application for Rehearing Filed by the Retail Energy Supply Association and Interstate Gas Supply, Inc. electronically filed by Mr. N. Trevor Alexander on behalf of Duke Energy Ohio, Inc.