

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
Duke Energy Ohio, Inc. for an)	Case No. 21-0887-EL-AIR
Increase in Electric Distribution Rates.)	
In the Matter of the Application of)	
Duke Energy Ohio, Inc., for Tariff)	Case No. 21-0888-EL-ATA
Approval.)	
In the Matter of the Application of)	
Duke Energy Ohio, Inc., for Approval)	Case No. 21-0889-EL-AAM
to Change Accounting Methods.)	

INITIAL POST-HEARING BRIEF OF WALMART INC.

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Dated: October 31, 2022

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INITIAL POST-HEARING BRIEF OF WALMART INC.

Walmart Inc. ("Walmart"), by its attorneys, respectfully submits its Initial Post-Hearing Brief to the Public Utilities Commission of Ohio ("Commission") and states as follows:

I. INTRODUCTION AND FACTUAL BACKGROUND

On September 19, 2022, Duke Energy Ohio, Inc. ("Duke Energy" or "Company"), filed a Corrected Stipulation and Recommendation ("Stipulation") in these proceedings.¹ In addition to Duke Energy, the Stipulation was supported by 11 parties, including the Commission Staff ("Staff"), Ohio Partners for Affordable Energy ("OPAE"), Ohio Energy Group ("OEG"), the City of Cincinnati, People Working Cooperatively, Inc. ("PWC"), Retail Energy Supply Association ("RESA"), Walmart², Interstate Gas Supply, Inc. ("IGS"), One Energy Enterprises, Inc. ("One Energy"), Nationwide Energy Partners, LLC ("NEP"), and Citizens Utility Board of Ohio ("CUB Ohio"). Three additional parties comprised of Kroger Co. ("Kroger"), Ohio Manufacturers' Association Energy Group ("OMAEG"), and ChargePoint, Inc. ("ChargePoint") formally indicated that they did not oppose the Stipulation. This Stipulation was the result of negotiations

¹ See Joint Ex. 1. The original Stipulation and Recommendation was filed earlier in the day also on September 19, 2022. On September 26, 2022, Duke Energy filed a correction to Attachment 4 to the Stipulation.

² Walmart is incorrectly identified in the Stipulation as "Wal-Mart Stores East, LP and Sam's East, Inc."

that took place over many months. The 15 parties who signed the Stipulation, whether as supporting or non-opposing parties, represent a wide diversity of interests. The only party to contest the settlement is the Office of Consumers' Counsel ("OCC").

The ultimate issue before the Commission is whether the agreement is reasonable and should be adopted. The Commission has adopted a three-part test to evaluate the reasonableness of a stipulation:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?
2. Does the settlement, as a package, benefit ratepayers and the public interest?
3. Does the settlement package violate any important regulatory principle or practice?³

The Commission has discussed this standard in numerous prior proceedings.⁴ While a stipulation is not binding on the Commission, it is given substantial weight.⁵ As discussed below, the Stipulation in these dockets satisfies the Commission's three-prong test, is reasonable, and should be adopted without modification.

³ *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO, Opinion and Order (Nov. 22, 2011) ("Duke Energy 2011 ESP Order"), p. 41; *In the Matter of Ohio Edison Company, The Cleveland Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Offer Service Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order (July 18, 2012) ("FirstEnergy 2012 ESP Order"), p. 24 (citing *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 629 N.E.2d 423 (1994) and *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126, 592 N.E.2d 1370 (1992)).

⁴ FirstEnergy 2012 ESP Order, p. 24; Duke Energy 2011 ESP Order, p. 41 (citing *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14, 1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (Mar. 30, 1994); *Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al. (Dec. 30, 1993); *Cleveland Electric Illum. Co.*, Case No. 88-170-EL-AIR (January 30, 1989); and *Restatement of Accounts and Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC (Nov. 26, 1985)).

⁵ Duke Energy 2011 ESP Order, p. 41; FirstEnergy ESP Order, p. 24 (citing *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992) and *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978)).

II. ARGUMENT

A. The Stipulation Satisfies the Commission's Three-Prong Test for Determining Whether a Settlement is Reasonable and Should be Adopted.

1. *The Stipulation is the product of serious bargaining among capable and knowledgeable parties.*

The Commission should reject OCC's arguments that the Stipulation does not satisfy the first prong of the Commission's three-prong test.⁶ OCC's primary argument is that "[t]here is no consumer advocate dedicated to representing the broad interests of all residential customers that signed the Stipulation."⁷ The Commission has rejected this exact argument on numerous prior occasions.⁸ In particular, in one case specifically involving OCC, the Commission stated, "we have already rejected proposals that any one class of customers can effectively veto a stipulation, holding that we will not require any single party, including OCC, to agree to a stipulation in order for it to meet the first prong of the three-prong test."⁹ Despite this clear precedent, veto power is precisely what OCC seeks. At the hearing, OCC witness Williams testified as follows:

Q: ...So is it your position that OCC needs to enter an agreement in order for it to be a reasonable settlement?

A: Based upon a review of the [Commission] standard, not having OCC on the settlement is I think an issue.¹⁰

⁶ OCC Ex. 3, Supplemental Testimony in Opposition to the Settlement of James D. Williams ("Williams Supplemental"), p. 5, line 13 to p. 8, line 11.

⁷ *Id.*, p. 7, lines 11-15.

⁸ See e.g., *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 Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing (Oct. 12, 2016), ¶ 225 ("[w]e also noted that we have rejected proposals that any one class of customers can effectively veto a stipulation," citing cases); see *Dominion Retail v. Dayton Power & Light Co.*, Case No. 03-2405-EL-CSS, Opinion and Order (Feb. 2, 2005), p. 18.

⁹ See *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 Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Opinion and Order (Mar. 31, 2016), p. 43 (citing *Dominion Retail v. Dayton Power & Light Co.*, Case No. 03-2405-EL-CSS, Opinion and Order (Feb. 2, 2005), p. 18; Entry on Rehearing (Mar. 23, 2005), p. 7).

¹⁰ Hearing Transcript ("Tr."), Vol. II, p. 241, line 25 to p. 242, line 5.

This argument should be rejected here as it has been in the past.

The Commission has also rejected an additional argument – as put forward by OCC here – that the Signatory Parties "do not fully represent diverse consumer interests."¹¹ Diversity of parties is *helpful* to a stipulation, but it is not *necessary* in order to meet the first prong of the Commission's three-part test.¹² By arguing that the Stipulation lacks diversity, OCC misstates the applicable legal standard and this argument should be rejected. Moreover, OCC is simply incorrect when it claims that residential customer interests are not represented by certain of the Stipulating Parties, including Staff, the City of Cincinnati, OPAE, PWC, and CUB Ohio.¹³

Finally, although OCC alleges that the Stipulation "dangles money in front of parties that desperately need money "in order to get "those parties to sign the Settlement,"¹⁴ the evidentiary record defies this allegation. For example, OCC admitted that Duke Energy is providing no funding to OPAE as part of the Stipulation.¹⁵ Similarly, the funding identified in the Stipulation being provided to PWC is simply the continuation of funding that is *already included* in base rates, which means the Commission has previously approved these amounts as just and reasonable.¹⁶ Finally, although the Stipulation provides certain funding to the City of Cincinnati for weatherization,¹⁷ that funding comes from the franchise fee that Duke Energy is obligated to pay to *any* city within its service territory.¹⁸ OCC actually admits that Duke Energy would pay the franchise fee to the City of Cincinnati "regardless of the settlement," but in the absence of the Stipulation, the City of Cincinnati could use the money any way it chose, not for weatherization

¹¹ Williams Supplemental, p. 7, lines 15-16.

¹² *In the Matter of the Application of the Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 16-0395-EL-SSO, Opinion and Order (Oct. 20, 2017), ¶ 21.

¹³ Williams Supplemental, p. 6, lines 15-17 and p. 7, line 16 to p. 8, line 8.

¹⁴ *Id.*, p. 5, lines 21-22.

¹⁵ Hearing Tr., Vol. II, p. 246, lines 13-16.

¹⁶ *Id.*, p. 246, line 17 to p. 247, line 9.

¹⁷ *Id.*, p. 248, lines 12-25.

¹⁸ *Id.*, p. 249, line 16 to p. 250, line 20.

to benefit residential customers.¹⁹ None of OCC's arguments pass muster; there simply is no basis upon which the Commission could conclude that the Stipulation is anything other than the product of serious bargaining among capable and knowledgeable parties.

2. *The Stipulation as a package benefits customers and the public interest.*

In its Application, Duke Energy sought a rate increase of \$54.7 million, an approximate 3.3 percent increase on a customer's bill.²⁰ The Company also sought a return on equity ("ROE") of 10.3 percent.²¹ By contrast, the Stipulation will result in a net rate increase of \$22.6 million, a nearly 60 percent reduction in the rate increase requested by Duke Energy.²² The Stipulation also resulted in an agreed upon ROE of 9.5 percent, an 80 basis point reduction.²³ Further, the Stipulation addresses interclass subsidization in a reasonable and balanced way. In particular, the rate increase will be allocated such that 64 percent of *total* distribution revenues will be recovered from residential customers,²⁴ which is lower than the recommendation from the Staff Report proposing 65 percent of distribution revenues be allocated to residential customers.²⁵ These factors, as well as other benefits described in the Stipulation, provide substantial benefits to customers and the public interest.

By contrast, the Commission should reject the arguments from OCC in favor of a different allocation to residential customers as OCC's recommendation finds no support in the evidentiary record. The class of service study revealed that residential customers were not paying their full cost of service, meaning they were being subsidized by other rates classes.²⁶ OCC concedes that

¹⁹ *Id.*, p. 251, lines 11-19.

²⁰ Duke Ex. 1, p. 3, ¶ 8.

²¹ *Id.*, ¶ 10.

²² Joint Ex. 1, ¶ B(1).

²³ *Id.*, ¶ B(2).

²⁴ *Id.*, ¶ B(7).

²⁵ See Staff Exhibit 1, Staff Report at Table 4, p. 29.

²⁶ Hearing Tr., Vol. IV, p. 474, lines 14-19.

the 64 percent allocation set forth in the Stipulation moves residential customers towards, but not to, their cost of service; even with the Stipulation, nonresidential customers will continue to subsidize residential customers.²⁷

OCC witness Fortney puts forth purported "public policy" arguments to support OCC's request for an approximately 63 percent allocation to residential customers, including the impacts of COVID, high inflation, and rising generation prices.²⁸ The issue with this argument – as OCC witness Fortney concedes – is that many of these impacts are not limited to the residential class experience. All customer classes have been impacted by COVID and high inflation,²⁹ and Duke Energy does not own generation.³⁰ There is simply no justification, public policy, or otherwise, for OCC's position that the residential class should be allocated costs "*below* the residential cost to serve" and nonresidential rate classes be required to "pay more than their cost to serve."³¹

The 64 percent allocation of distribution revenues to the residential class strikes the proper balance among the various rate classes. This allocation moves the residential class closer to its cost to serve in a gradual manner while reducing subsidies that have long been paid by nonresidential customers. The mitigating steps taken in the Stipulation benefit all customers and the public interest by responsibly moving all rate classes closer to their cost of service. The Commission should reject OCC's arguments on this second prong and find that the Stipulation as a package benefits *all* customers and the public interest.

²⁷ *Id.*, p. 475, lines 4-12.

²⁸ *Id.*, p. 478, lines 1-10.

²⁹ *Id.*, p. 478, line 14 to p. 479, line 3.

³⁰ *Id.*, p. 478, lines 11-13.

³¹ *Id.*, p. 496, lines 7-23.

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

The final prong of the Commission's three-prong test evaluates whether the Stipulation violates any important regulatory principle or practice. Rather than violating any regulatory principle of practice, the Stipulation here furthers the state policy objectives set forth in R.C. 4928.02 by ensuring the "the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service." Moreover, because the revenue allocation in the Stipulation reduces but does not eliminate the interclass subsidies currently benefitting residential customers, the Stipulation properly reflects principles of gradualism.

Contrary to OCC's claims, allocating 64 percent of base distribution revenues to the residential customer class violates neither the principle of gradualism³² nor the principle of practicality.³³ The basis for OCC's argument that the Stipulation is inconsistent with principles of gradualism is that "147.18% of the overall increase" is being allocated to residential customers.³⁴ This argument wholly disregards the interclass subsidies in rates and the fact that the overall allocation of distribution revenues to the residential class is only 64 percent.³⁵ Indeed, OCC's recommendation that 63.06 percent of the revenue increase be allocated to residential customers will actually "perpetuate and exacerbate the existing inter-class subsidy already embedded in the Company's electric distribution rates."³⁶ For all these reasons, OCC's arguments on allocation and the concept of gradualism are incorrect, misleading, and should be rejected by the Commission.

³² OCC Ex. 7, Supplemental Testimony in Opposition to the Settlement of Robert B. Fortney ("Fortney Supplemental"), p. 9, line 19 to p. 10, line 15.

³³ *Id.*, p. 11, lines 5-21.

³⁴ *Id.*, p. 10, lines 6-15.

³⁵ See Hearing Tr., Vol. I, p. 169, lines 13-19; see also Duke Ex. 12, Second Supplemental Direct Testimony of Sarah B. Lawler ("Lawler Second Supplemental"), p. 16, lines 20-23.

³⁶ *Id.*, p. 19, lines 7-11.

OCC's arguments with respect to practicality are likewise unavailing. It is not difficult for a customer to understand that it costs the Company a certain amount of money to serve their customer class. When a customer class pays less than that amount – as is the case for residential customers – in order for Duke Energy to recover its prudently incurred costs, it must recover those costs from other rate classes. To rectify this subsidization, more dollars from the rate increase, a mere portion of total distribution revenues, must be allocated to the residential class to more closely align their revenue allocation with the cost to serve.³⁷ Any confusion created is entirely the fault of OCC who focuses on the amount of the increase being allocated to residential customers rather than total distribution revenue allocations.³⁸ Despite this self-created confusion, OCC has not shown that the Stipulation results in any practicality concern. There are no important regulatory principles or practices violated by the Stipulation, and the Commission should adopt the Stipulation in its entirety.

³⁷ See Hearing Tr., Vol. I, p. 192, line 11 to p. 193, line 13.

³⁸ See *id.*, p. 169, line 13 to p. 170, line 4; p. 191, line 3 to p. 192, p. 10.

III. CONCLUSION

For all the reasons set forth above, Walmart Inc. respectfully requests that this Commission adopt the Stipulation in its entirety and without modification.

Respectfully submitted,

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Dated: October 31, 2022

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Initial Post-Hearing Brief of Walmart Inc., was served by electronic mail, upon the following Parties of Record on this 31st day of October, 2022.

/s/ Carrie H. Grundmann

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