BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Services and Related Matters.	)	Case No. 21-637-GA-AIR
In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of an Alternative Form of Regulation.	)	Case No. 21-638-GA-ALT
In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of a Demand Side Management Program for its Residential and Commercial Customers.	)	Case No. 21-639-GA-UNC
In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval to Change Accounting Methods.	)	Case No. 21-640-GA-AAM

INITIAL POST-HEARING BRIEF OF THE ENVIRONMENTAL LAW & POLICY CENTER

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I. INTRODUCTION

In this case Columbia Gas requests a significant increase in its rates to pay for infrastructure improvements. Environmental Law and Policy Center (ELPC) does not question the amount of the rate increase, but questions the reasonableness of the rate design and the elimination of the Company's energy efficiency programs (also referred to as "demand-side management" (DSM) programs). At a time when gas prices have risen dramatically[1], Columbia proposes to increase the fixed monthly customer charge from $36.15 to $46.30 the first year and then up to $58.01 in year five.[2] Obviously, this means that in just a few years customers will start their month paying nearly $60 before they use any gas. At the same time Columbia takes these steps to guarantee its income, the Stipulation eliminates Columbia's non-low-income energy efficiency programs that Columbia itself touts as award-winning programs that help its customers control their bills.

In addition to reviewing the large increase in fixed charges and the elimination of all but the low-income efficiency program independently, the Commission needs to consider how these two issues relate to each other. The Commission's movement towards straight fixed variable (SFV) rates, which started in 2008 when Columbia's fixed charge was only $12.16 per month,[3] stems from the Commission's concerns regarding energy efficiency reducing customer sales. As discussed below, in the early days of DSM programs, the Commission tied its decisions on SFV

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[1] ELPC Ex. 1 at 7, ln. 1-5. "According to the U.S. Energy Information Administration (EIA)…the price of gas delivered during to residential customer has skyrocketed this year, nearly quadrupling through July of 2022. The EIA forecasts that gas prices during the winter of 2022-23 will be 37% higher than the year before, and if temperatures average 10% colder than normal, gas prices could be 50% higher than the year before." *See also* https://www.eia.gov/dnav/ng/ng_pri_rescom_a_EPG0_PRS_DMcf_m.htm; https://www.eia.gov/outlooks/steo/report/winterfuels.php

[2] The fixed monthly customer charge is composed of a base residential charge, the Infrastructure Replacement Program (IRP) Rider, the Capital Expenditure Program (CEP) Rider, and the Infrastructure Development Rider (IDR). The current fixed monthly charges are $36.15 ($16.75 base + $11.98 IRP + $5.92 CEP + $1.50 IDR). The Stipulation would increase the total fixed monthly charges to 46.30 in 2023 and 58.01 in 2027. *See infra.* n. 5 for more detail.

[3] *In re Columbia Gas*, Final Opinion and Order, 08-72-GA-AIR, et. al (Dec 3, 2008) at 21.

directly to its intention to eliminate utility disincentives to run effective energy savings programs. A disconnect that Columbia, Office of Consumer Counsel (OCC), and the other Signatory Parties glaringly ignore.

The parties signing the Stipulation do so despite making strong arguments in the initial phase of the case that contradict where they end up landing in the settlement. Columbia Witness Poe argues that the DSM program saves customers money on its bills and improves customer health, safety and comfort. Columbia Ex. 30 at 2, ln. 30-34. Similarly, OCC Witness Fortney argues in the strongest terms that itis unfair to low-use customers (often lower income) to pay the same fixed monthly charges as high-use customers. These inconsistencies do not require that the Commission reject the settlement, but it should raise questions about the benefits of the settlement to the public.

While the Commission may wish to encourage compromise, Columbia and OCC go too far in order to find a way to settle the case. As explained below the Stipulation fails prongs two and three of the test that require the settlement to be in the public interest and not violate any fundamental regulatory principles. Moreover, the record does not support a conclusion that the Stipulation resulted from serious bargaining. By statute, the Company bears the burden of proof in seeking approval of its rate increase, R.C. 4909.18; R.C. 4909.19(C), and Columbia makes very little effort to defend this Stipulation, filing what must be the shortest testimony on record that contains no analysis of the issues. The brevity (less than three pages of substance on the three prongs) and conclusory nature of Columbia's testimony speaks for itself. Hence, while the Commission process encourages parties to settle cases, this Stipulation does not meet the test and the Commission should reject it or modify it.

II. FACTS

The Signatory Parties propose an $68,192,000 increase in revenue from $855,400,000 to $923,592,000. Joint Ex. 1, Appendix A at 1. It can recover that revenue through either volumetric charges or an increase in its fixed monthly customer charges. In its Application Columbia requests an increased in its fixed charges to $80 per month,[4] and the Stipulation allows it to increase the charge from $36.15 to $58.01 by 2027. Below is a table that details all of the fixed charges proposed by the Company.[5]

SGS Rate Class	Base	CEP	IRP	IDR	Total Fixed Charge
Current	$ 16.75	$ 5.92	$ 11.98	$ 1.50	$ 36.15
2023	$ 38.62	$ 3.41	$ 2.77	$ 1.50	$ 46.30
2024	$ 39.08	$ 4.80	$ 4.05	$ 1.50	$ 49.43
2025	$ 39.30	$ 6.15	$ 5.35	$ 1.50	$ 52.30
2026	$ 39.30	$ 7.26	$ 6.70	$ 1.50	$ 54.76
2027	$ 39.30	$ 8.74	$ 8.47	$ 1.50	$ 58.01

Columbia defends the increase on the premise that it initially proposed raising the fixed charges to $80, and the Stipulation raised customer fixed charges less. Columbia makes this request at a time when gas prices for its customers have risen sharply.

While increases in the price of gas affects customers' ability to pay their bills, Columbia currently runs energy efficiency programs that help customers reduce their bills. In its Application Columbia proposes spending an average $30.9 million annually on the programs with a 2% annual increase to account for inflation, plus $7.1 million for the low-income program WarmChoice recovered in base rates. Columbia Ex. 30 at 9, ln. 21, n. 2. Columbia notes that the

[4] *See* OCC Ex. 2 at 6, ln. 16 n.3 for calculation of proposed $80 fixed charge.

[5] The source for the numbers is as follows: the base charge (Joint Ex. 1, Appendix C, ln. 6), the IRP Rider (Joint Ex. 1 at 15), the CEP Rider (Joint Ex. 1 at 17). The infrastructure development rider (IDR) was communicated verbally to ELPC counsel by Columbia counsel. In response to ELPC Interrogatories Set 1 No. 10, the Company "cannot know all of the inputs that determine total fixed customer charges," and Columbia told ELPC to calculate the number itself. ELPC Interrogatories Set 1, No. 11 is attached as ELPC Ex. 2 at 35.

programs are cost-effective and generate a Utility Cost Test (UCT) score of 2.37 excluding the low-income program, WarmChoice. *Id.*

While this Stipulation stemmed from bargaining between Columbia, Staff and OCC, Columbia ultimately excluded Environmental Law and Policy, OPAE and Ohio Citizens Utility Board from discussions that led to elimination of the DSM program and raised the fixed monthly charges. The record contains only conclusory statements regarding the analysis of how the Stipulation meets the standards in the three-prong test. Specifically, the record contains no explanation of why it's reasonable to eliminate the DSM programs and raise the fixed customer charges to $58 per month.

III. STANDARD OF REVIEW

In a distribution rate case, "the burden of proof to show that the increased rates or charges are just and reasonable shall be on the public utility." R.C. 4909.18; R.C. 4909.19(C); 4929.05(3); *see also Ohio Edison Co. v. Pub. Util. Comm.*, 63 Ohio St.3d 555, 558 (1992) ("Our holding is consistent with the provision of R.C. 4909.18 which places the burden upon the applicant to prove all issues raised in its application."). The utility continues to bear the burden after a settlement agreement has been reached. *In re Ohio Energy Company,* Case No. 20-585-EL-AIR, et al., Opinion and Order (Nov. 17, 2021) at ¶ 190; *In re Vectren Energy Delivery of Ohio*, 18-298-GA-AIR, et al., Opinion & Order (Aug. 28, 2019) at ¶47. As described below, the Commission reviews the Stipulation under its three-part reasonableness test, but that does not absolve the utility of its statutory mandate to prove that its rates are just and reasonable. R.C. 4909.18; R.C. 4909.19(C); 4929.05(3); *In re Vectren Energy Delivery of Ohio*, 18-298-GA-AIR, et al., Opinion & Order (Aug. 28, 2019) at ¶147.

In reviewing a proposed stipulation, "[t]he ultimate issue for the Commission's consideration is whether the agreement . . . is reasonable and should be adopted." *In re Ohio Power Co. & Columbus S. Power Co. for Authority to Establish a Standard Service Offer*, Case No. 11-346-EL-SSO, *et al.*, Opinion & Order at 27 (Dec. 14, 2011). In conducting the inquiry, the Commission traditionally considers three criteria:

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

Id. But the Commission needs to bear in mind that it must apply the test in a way that still protects the parties' and ratepayers' fundamental rights. While the Commission encourages agreement on issues, it is not bound to accept the terms of any stipulation. *See City of Akron v. Pub. Util. Comm'n*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978). The Ohio Supreme Court has also clarified that a stipulation does *not* require less evidentiary support, and that a non-unanimous stipulation remains "litigated." *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 46, 950 N.E.2d 164, 2011-Ohio-2383, ¶ 19. While the Commission can give weight to a stipulation, it must still determine whether the utility's proposals are just and reasonable based on the record evidence. *Id.*

While the Commission generally approves stipulations, it has at times made the decision to modify a stipulation in order to better benefit the public. *See, e.g.*, *In re Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR *et al.*, Second Entry on Rehearing at 44 (Nov. 3, 2016) (affirming several modifications to the stipulation as "necessary to ensure that the stipulation benefits ratepayers and the public interest"); *In re Dayton Power &*

Light Co. to Establish a Standard Serv. Officer in the Form of an Elec. Security Plan, Case No. 16-395-EL-SSO, *et al.*, Opinion and Order at 34–35 (Oct. 20, 2017) (similar).

IV. ARGUMENT

A. The Stipulation Fails the Three-Prong Test

1. The Settlement is Not the Product of Serious Bargaining

The Commission must determine that the settlement is a result of serious bargaining among capable and knowledgeable parties. In defense of the "serious bargaining" element Columbia Witness Thompson testifies:

> The Stipulation is the product of an open process in which all parties were represented by able counsel and technical experts. Columbia and all other parties engaged in extensive negotiation to produce the Stipulation filed on October 31, 2022. There were numerous settlement negotiations with all parties beginning of May 16, 2022, where Columbia and the other parties presented various settlement positions that were considered and discussed.

Columbia Ex. 35 at 3, ln. 6-12. Columbia is the utility. This is Columbia's rate case and its burden of proof, R.C. 4909.18; R.C. 4909.19(C), and this is the entirety of the evidence it submits. Breaking this down, Columbia's conclusory testimony cannot possibly satisfy any meaningful legal standard, and Columbia's assessment reveals problems with the settlement. The fact that Columbia organized numerous settlement negotiations does not mean that parties engaged in serious negotiations. As ELPC Witness Rabago, a former Texas Public Utility Commissioner notes:

> The settling parties assert that the settlement reflects lower rates than the Company asked for.[6] But that doesn't prove in any way that serious bargaining led to the changes in the settlement. In my thirty years of experience, I have seldom seen a utility ask for just what they want, especially if settlement is likely. Indeed, the Company proposed SGS fixed customer charges that would reach $80 per customer per month.[7] Serious bargaining is not required to move a utility from an outrageous position, and I see no evidence in the

[6] Staff Ex. 8 at 4-7; OCC Ex. 1 at 6-10.
[7] OCC Ex. 3 at 8, ln. 6-9.

> Stipulation, proposed settlement, or supporting testimony that would support a Commission finding that the fixed customer charges proposed for residential customers, or even the settlement as a whole, resulted from such negotiations.

ELPC Ex. 1 at 9-10, ln 16-12, 1-3. Columbia never justifies $80/month as a realistic end point that it would achieve in a litigated case or even a reasonable starting point for negotiations. In fact, OCC Witness Fortney, the former Chief of the Rates and Tariffs Division, rejected any increase in the fixed monthly customer charge. OCC Ex. 3 at 11, ln. 6-12. No party submits any evidence that Columbia bargained on this important issue. Nor does Columbia submit any evidence regarding the bargaining that took place resulting in Columbia agreeing not to run the DSM programs for non-low-income customers. What is in the record is that Columbia contacted OCC outside of a settlement meeting attended by the parties and agreed to take out the DSM programs. Nov. 16, 2022 Hearing Transcript at 66.

Witness Rabago also notes that other factors refute the notion that serious bargaining took place. First, neither OCC nor NOPEC take any position on the fixed charges. Joint Ex. 1 at 3, n. 3. Second, that giving Columbia a very large increase in fixed charges, guarantees Columbia it will recover 70% of its revenue requirement, ELPC Ex. 1 at 10-11, ln. 19, ln. 1, n. 13, yet the record contains no evidence that Columbia's agreed to lower Return on Equity negotiations is reasonable:

> The Stipulation proposes a return on equity (ROE) of 9.60% for the Company. In my experience this is very high ROE for a monopoly service provider that charges customers under straight fixed-variable (SFV) rates, and where about 70% of revenues are guaranteed through fixed customer charges. The Company has little market risk, and more importantly, has little or no real revenue risk, due to the rate structure proposed in the settlement. The settling parties even agreed to a dramatic reduction in the scope of the Company's DSM programs, which further reduces the risk that it will not realize its allowed revenue requirement. OCC witness Zhu summarized this point, stating, "The most important factor in determining the required rate of return of cost of equity ("ROE") of a utility is risk,"[8] and appropriately recommended an ROE of 8.65%,[9] a full 95 basis

[8] OCC Ex. 4 at 13, ln. 1-2.
[9] *Id.* at 95, ln. 3.

> points below the level agreed to by the signatory parties. A proposal evidencing serious bargaining would provide evidence that rate design was evaluated as part of a whole package, along with ROE and other aspects of the rate increase request. There is no evidence that there was such serious bargaining on these and other issues.

ELPC Ex. 1 at 11, ln. 8-21. The Signatory Parties simply provide no evidence that they considered Columbia's reduced risk when they agreed to the ROE.

a) The Commission cannot review whether serious bargaining took place when it excludes all evidence regarding the negotiations

The way the Commission applies prong one, "[i]s the settlement a product of serious bargaining, among capable, knowledgeable parties," does not allow objecting parties to effectively probe whether serious bargaining occurred. *In re Ohio Power Co. & Columbus S. Power Co. for Authority to Establish a Standard Service Offer*, Case No. 11-346-EL-SSO, *et al.*, Opinion & Order at 27 (Dec. 14, 2011). The Commission and its Attorney Examiners apply this test erroneously, in a manner that ignores Ohio Rule of Evidence 408. The Commission seems to believe that the law requires the Commission to ignore the substance of settlement negotiations, but this is not consistent with Rule 408. Ohio Rule of Evidence 408 states the following:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of a claim or amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule *does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.*

Ohio R. Evid. 408 (emphasis added).

The failure to properly interpret Rule 408 must be viewed in the context of the first prong of the test which requires the Commission to analyze whether serious bargaining took place. The Commission only allowed parties to discuss that many meetings took place and that Columbia

invited parties to the meetings. In the present case, the Attorney Examiner, shut down all attempts to probe into the nature of settlement discussions, invoking Ohio Rule of Evidence 408. Nov. 16 Hearing Transcript at 51-67.

The Attorney Examiner made two distinct legal errors related to Rule 408 which infringe upon ELPC's ability to probe whether serious bargaining took place. First, the Examiner stated that "Rule 408 doesn't strictly apply to the Commission." *Id.* at 54. Second, the Examiner stated that "if we applied 408 strictly, we would gut any sort of settlement privilege before the Commission. We are not going to do that today." *Id.*

As to the first error made by the Attorney Examiner, Ohio Rule of Evidence indisputably applies to the Commission. O.R.C. 4903.22 reads "[e]xcept when otherwise provided by law, all processes in actions and proceedings under Chapter 4901., 4903., 4905., 4906., 4905., 4904., 4921., and 4927. of the Revised Code shall be served, and the *practice and rules of evidence in such actions shall be the same, as in civil actions.*" The Attorney Examiner erroneously blocked ELPC's questions regarding the substance of the bargaining amongst signatory parties because "Rule 408 doesn't strictly apply to the Commission." Nov. 16 Hearing Transcript at 54. This contradicts O.R.C. 4903.22.

Second, the Commission's precedent and the Attorney Examiner misread Ohio Rule of Evidence 408 in sustaining objections to questions regarding the substance of the settlement bargain. *See e.g. In re Ohio Energy Company,* Case No. 20-585-EL-AIR, et al., Opinion and Order (Nov. 17, 2021) at ¶107; *In re Vectren Energy Delivery of Ohio*, 18-298-GA-AIR, et al., Opinion & Order (Aug. 28, 2019) at ¶58 (for Commission discussion of what is permissible under the first prong of the test). Rule 408 bars admissibility of settlement negotiations as it relates to "prov[ing] liability for or invalidity of a claim or amount." Ohio R. Evid. 408. The rule

goes on to state that "[t]his rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or providing an effort to obstruct a criminal investigation or prosecution." *Id.* The objecting parties to this case did not ask questions about settlement negotiations in order to "prove liability or invalidity of a claim or amount." Instead, these questions were asked for "another purpose," exactly as the plain language of Rule 408 contemplates, to demonstrate that serious bargaining did not occur in the course of settlement negotiations. The Attorney Examiner in this case decided that "if we applied 408 strictly, we would gut any sort of settlement privilege before the Commission. We are not going to do that today." Nov. 16 Hearing Transcript at 54.

ELPC's view of the rules of evidence, and presumption against admissibility is consistent with other areas of evidence of law. This same principle applies where character evidence is "at issue" in a case. While under normal circumstances, Rule of Evidence 404 precludes the admissibility of propensity character evidence, when character is an "essential element" of a claim, it must be admissible. *§ 187 Character in Issue*, 1 McCormick On Evid. § 187 (8th ed.) ("When character has been put in issue by the pleadings in such cases, evidence of character must be brought forth." *Id.*). One such example of this counter-presumption occurs when the claim is for negligently entrusting a motor vehicle to an incompetent minor. *See* Fed. R. Evid. 404, Advisory Committee Notes. In this example, the "incompetence" of the minor is "at issue" in the case, and therefore character evidence is admissible to prove this essential element.

Just like in those circumstances, the question of serious bargaining is *at issue* under the Commission's three-prong test. The objecting parties must be able to present evidence supporting their position and the only way to effectively do so is to ask questions about the substance of settlement negotiations. The Commission has to this point, measured the first prong

based on a quantitative standard—how many meetings were held, and was everyone invited? But as mentioned above, mere participation does not demonstrate that serious bargaining has occurred. Participation is not a proxy for power. If the Commission prohibits all substantive questions, that makes it an impossible standard for objecting parties to meet. Utilities will always invite all parties and hold enough meetings to meet the standard. That does not answer the question of whether serious bargaining has occurred.

b) The Commission cannot reach a conclusion about serious bargaining based on a change in Columbia's initial position

In analyzing the first prong of its reasonableness test, the Commission often evaluates whether a change in position has occurred. For instance, in the recent AEP rate case, the Commission found the Stipulation met prong one because, "there are significant differences between the Company's application and the Stipulation, which the Commission attributes to negotiations and serious bargaining." *In re Ohio Energy Company,* Case No. 20-585-EL-AIR, et al., Opinion and Order (Nov. 17, 2021) at ¶ 107. The Commission re-asserted its ability to "view the difference between an application and a filed stipulation as evidence of the seriousness of negotiations and bargaining between the parties." *Id.* citing *FirstEnergy 2014 ESP Case,* Opinion and Order (Mar. 31, 2016) at 44.

The Commission should abandon this improper approach to analyzing the first prong because the Utility's initial proposal should not be the baseline against which the Commission measures the reasonableness of the resulting stipulation. This approach encourages utilities to present ever more extreme opening proposals to demonstrate compromise. As ELPC Witness Rabago explained in testimony opposing the Stipulation, "I have seldom seen a utility ask for just what they want, especially if settlement is likely. Indeed, the Company proposed SGS fixed

customer charges that would reach $80 per customer per month. Serious bargaining is not required to move a utility from an outrageous position…" ELPC Ex. 1 at 9, ln. 18-21.

Using the Company's initial proposal as the measuring stick for serious bargaining is flawed when the Company's initial proposal has not been vetted for reasonableness in the first place. In reviewing the Company's initial proposal, ELPC Expert Witness Rabago concluded that "[t]he Company appears to have presented a case that sought far more in rates than it needed to move forward and provide adequate service." ELPC Ex. 1 at 15, ln. 5-6. Further Witness Rabago argued that the record lacked evidence to demonstrate to prove serious bargaining and that the difference between the opening proposal and the Stipulation proves nothing. "If a utility asks for more revenue than it really needs and settles for less than that amount, that fact does not constitute 'evidence'." ELPC Ex. 1 at 15, ln. 12-14.

2. The settlement, as a package, does not benefit customers and the public interest

The second prong of the Commission's test requires that "the settlement, as a package, benefit ratepayers and the public interest." *In re Ohio Energy Company,* Case No. 20-585-EL-AIR, et al., Opinion and Order (Nov. 17, 2021) at ¶ 95. The Commission asks whether "the Stipulation reflects a fair and balanced compromise that is intended to result in reasonable rates for both the Company and its customers." *Id.* at ¶150. Further, the Commission also "emphasize[s] that the second part of the three-part test is not whether there are different or additional provisions that would benefit ratepayers and the public interest, but whether the Stipulation, as a package, benefits ratepayers and the public interest." *Id.* at ¶151. The Commission values tangible benefits to ratepayers as well as the conservation of resources in evaluating the second prong of the test. *Id.* In particular, the Commission views a settlement package as an "efficient and cost-effective means of bringing the issues before the Commission,

while also avoiding the considerable time and expense associated with the litigation of a fully contested case." *Id.* Ultimately, this prong is more subjective than the third prong, and easier for the Stipulating Parties to meet. But ELPC argues that this Stipulation fails the second prong of the test because, when evaluated as a package, it fails to send efficient price signals to consumers and thereby discourages prudent use of gas. Columbia fails to meet the test because of the combination of raising the fixed charge to extreme levels, removing the DSM for non-low-income customers, and maintaining a high ROE.

a) The Signatory Parties' Approach to Evaluating the Public Interest is Flawed

Instead of evaluating the Stipulation on its own merits, the Signatory Parties argue that the Stipulation benefits ratepayers as compared to the Company's initial offering. For instance, the Signatory Parties argue that because the Stipulation reduces Columbia's revenue requirement increase from $221.4 million to $68.2 million the settlement benefits consumers. OCC Ex. 1 at 6, ln 5-13. Similarly, signatory party witnesses found the agreed upon ROE to benefit ratepayers because "the stipulated return on equity of 9.6 percent is significantly lower than the 10.95 percent requested by Columbia in its application." Staff Ex. 8 at 5, ln. 1-2.

The Commission must take a more comprehensive view of the public interest and ratepayer benefits. ELPC Witness Rabago critiqued the Signatory Parties' approach arguing:

> the proponents of the settlement would have the Commission measure the outcomes in the Stipulation almost entirely based on whether they deviate favorably from the requests initially filed by the Company. The public interest, in my opinion is not satisfied by whether a monopoly has been denied some rent-seeking behavior. Rather, regulation succeeds according to a different standard—whether the regulatory process has resulted in an outcome that would have been achieved had the monopolist faced the forces of true and efficient market competition.

ELPC Ex. 1 at 18-19, ln. 17-23, 1. The Company's initial proposal should not be the measuring stick against which the Commission should evaluate the public interest and ratepayer benefits.

The Ohio Supreme Court has used a different baseline when evaluating the benefit to ratepayers. For example, in *Ohio Consumers' Counsel v. Public Utility Commission*, the Court found a stipulation carries "a benefit to ratepayers and the public interest for the parties to these cases to agree to a per-bill fee that is substantially lower than what DP&L currently charges." 110 Ohio St.3d 394, 398 (2006). The Commission concluded that the per-bill fee agreed to in the stipulation was lower than current charges—this reflected a benefit to ratepayers. *Id.*

The Company carries the burden of proof in seeking a rate increase, and the only testimony it has put forward to support this prong of the test, simply recites the terms of the stipulation benefitting customers without any context that allows the Commission to evaluate the package. *See* Columbia Ex. 35 at 3-4, ln. 35-39, 1-14. The testimony of the Signatory Parties does not properly demonstrate that the Stipulation benefits ratepayers or serves the public interest, only that it constitutes an improvement over what the Company requested. As Witness Rabago points out that improvement takes it from untenable to unjust.

b) The Interaction of the Drastic Increase in Residential Fixed Charges and Elimination of Non-Low-Income DSM is Inconsistent with the Public Interest

The Stipulation Agreement violates prong two because, when evaluated holistically, the package does not provide benefits to ratepayers and is contrary to the public interest. Under the Stipulation, residential customers shoulder the vast majority of the rate increase through higher fixed charges, while the Signatory Parties have agreed to remove non-low-income DSM programs from the Company's offering. In return for this rate increase and elimination of popular and successful DSM programs, the signatory parties argue that the fixed charge could have been higher and the rate increase could have been larger. This is simply not the correct way to measure "benefit" and the "public interest."

Allocating roughly 70% of the revenue requirement to the residential customer charge[10] disincentivizes customers to reduce usage. ELPC Ex. 1 at 21, ln. 16-20. The high fixed charge leaves only a small portion of the bill to be determined by volumetric gas usage. This means consumers have little incentive to curtail usage because it will have minimal impact on their overall bill. As OCC Witness Fortney emphasizes, "the price signal that [the proposed fixed charge] sends to consumers is 'usage doesn't matter.'" OCC Ex. 3 at 17, ln. 18-19.

Elimination of non-low-income DSM programs exacerbates the effect of allocating the revenue increase to residential customers. By Columbia's own analysis the DSM program benefitted customers. The interaction of the drastic increase in the fixed customer charges with the elimination and cap on DSM programs make the settlement package contrary to the public interest. When viewed as a package, "the reduction in rate payer and public interest benefits from the settlements means the proposal strikes a double blow against customers and the public interest." ELPC Ex. 1 at 24, ln. 8-10. Together, the increase in fixed charges and elimination of non-low-income DSM programs take away customer's ability to manage their bills, because a reduction in consumption will not lower overall costs. The settlement package results in an SGS rate that charges customers the majority of their bill before they use a therm of gas. Moreover, it is indisputable that this "double blow," will have an outsized effect on low-volume users, who are most often low-income consumers. *See* ELPC Ex. 1 at 7, ln. 10-11; OCC Ex. 2 at 7, ln. 9-10.

c) Raising SFV rates while eliminating DSM is unsound rate design which does not benefit customers and is contrary to the public interest.

The Commission set much of the precedent for the move toward SFV in a series of cases in 2007 and 2008 that included *In re Duke Energy Ohio,* Case Nos. 07-589, et al (May 28,2008);

[10] *See* ELPC Ex. 1 at 10-11, ln. 19, 1, n. 13.

In re Ohio Gas Company d/b/a Dominion East Ohio, Case No. 07-829 GA-AIR (Oct 15, 2008); and the Columbia rate case, *In re Columbia Gas*, Final Opinion and Order, Case No. 08-72-GA-AIR et. al (Dec 3, 2008). At that time DSM programs were relatively new and the Commission considered different ways to address, "the rate design that properly aligns the interests of Columbia and consumers in favor of energy efficiency and energy conservation." *In re Columbia Gas*, Final Opinion and Order, 08-72-GA-AIR, et al. (Dec. 3, 2008) at 6. In the Columbia Order the Commission relies on its order in the *Duke Energy* case where it rejects decoupling in favor of SFV:

> The SFV would allow the company to recover most fixed costs through a flat monthly fee. Staff asserted that, as long as Duke's distribution costs are recovered through the volumetric component of base rates, the decline in per customer usage will continue to threaten the company's recover its fixed costs of providing service. Staff claimed the levelized rate design best addresses the issue while simultaneously removing the disincentives to utility-sponsored energy efficiency programs that exist with traditional rate design.

Id. at 16. The Commission agreed with Staff's position. However, at that time Columbia charged its customers a fixed charge of $6.50 per month, and the Commission approved increases to $12.16 and ultimately $17.81. *Id.* at 21. In this case, only fourteen years later, Columbia's Stipulation increases the charge to $58.01 by 2027.

In testimony supporting the stipulation, Staff Witness Bremer states that Staff bases its support on the increase in Columbia's fixed charges on the Commission ruling in Columbia's 2008 rate case, Case No. 08-72-GA-AIR, where the Commission approved the transition towards SFV in response to Columbia's concerns that energy efficiency would erode its revenue. Staff Ex. 7 at 2-3, ln 15-22, 1-8. However, when Columbia has canceled all but the low-income WarmChoice program, Staff fails to reevaluate that policy. "Staff only investigates rate and tariff matters in a proposed application when the Company proposes modifications…Staff did not

perform an analysis regarding alternative rate design proposals for Columbia's SGS customers." Staff Ex. 7 at 3, ln. 2-6. Staff's policy may be sensible where a utility increases its fixed charge by a small amount, but here the Stipulation eliminates the DSM programs, which were the logic for the transition to SFV.

d) The Agreed Upon Return on Equity is Unjust and Unreasonable and Contrary to the Public Interest

When evaluated as a settlement package, the Signatory Parties agreed upon ROE for the Company does not meet the prong two standard. The Signatory Parties ask the Commission to evaluate the ROE in the Stipulation in relation to what the Company proposed. The Signatory Parties argue that the reduction from 10.95% to 9.6% represents a benefit to ratepayers. OCC Ex. 8 at 5, ln. 1-2. However, the Commission cannot conclude the Stipulation meets the standard merely because the ROE decreases slightly. The Commission must do two things. It must determine that the ROE in the context of the settlement package benefits ratepayers and serves the public interest; and the Commission must determine that the rates proposed by the parties are just and reasonable, in the context of the Company's lower risk from higher fixed charges. O.R.C. 4909.18.

The ROE agreed upon by the Signatory Parties, when viewed in the context of the entire settlement is overcompensatory. As OCC Witness Zhu explains, "[t]he most important factor in determining the required rate of return of cost of equity ("ROE") of a utility is risk." OCC Ex. 4 at 13, ln. 1-2. The combination of an increase to the fixed customer charge (which guarantees the Company's revenue), and the elimination of the non-low-income DSM programs (which further guarantees the Company will sell more gas), effectively minimizes the Company's risk. This reduction in risk, should be accompanied by a corresponding reduction in the Company's ROE. That is why OCC Witness Zhu recommended an ROE of 8.65%, a full 95 basis points below the

level agreed by the signatory parties. *Id.* at 95, ln. 3. ELPC Witness Rabago reached a similar conclusion finding the agreed to ROE was "very high…for a monopoly service provider that charges customers under straight fixed-variable (SFV) rates, and where about 70% of revenues are guaranteed through fixed customer charges." ELPC Ex. 1 at 11, ln. 9-11.

Under prong two, the Commission evaluates the settlement as a package, and when viewed together the individual terms of the settlement reduce the risk the Company will undercollect its revenue. Given the decreased risk, Columbia failed to justify the ROE in the Stipulation. R.C. 4909.18; R.C. 4909.19(C).

3. The settlement package violates important regulatory principles

The final prong of the test requires Columbia and the stipulating parties to demonstrate that the settlement does not violate any important regulatory principle or practice. *In re Ohio Energy Company,* Case No. 20-585-EL-AIR, et al., Opinion and Order (Nov. 17, 2021) at ¶ 152. In contrast to prong two, which embodies a more subjective balancing test regarding benefit to ratepayers and the public interest, prong three presents a more absolute test. The Commission must reject a stipulation that violates "any" regulatory principles or practices.

a) The Signatory Parties Fail to Carry Their Burden that the Stipulation Does Not Violate "Any" Important Regulatory Principles

The Signatory Parties carry the burden to prove that the Stipulation does not violate any important regulatory principles or practices. R.C. 4909.18; R.C. 4909.19(C). The testimony of the Signatory Parties universally fails to answer the question asked by prong three of the Commission's test. Most notably, Company Witness Thompson's testimony on this prong covers five lines. It states simply, without any supporting evidence, that "[t]he Stipulation does not violate any important regulatory principle or practice, but instead affirms good regulatory

principles, such as straight fixed variable rate design for the SGS class." Columbia Ex. 35 at 5, ln. 1-5. Staff Witness Lipthratt's testimony on this prong covers three lines. Lipthratt summarily concludes "[b]ased on my experience, involvement in this proceeding.Similarly, Staff concludes that it does not violate any important regulatory principle or practice." Staff Ex. 8 at 7, ln. 9-11. OCC Witness Adkins's testimony is slightly longer, but still fails to provide meaningful evidence to support its sweeping conclusion that "[t]he Settlement package does not violate important regulatory principles and practices." OCC Ex. 1 at 11, ln. 6-12. Adkins merely states that, "the resulting charges to consumers are "'just and reasonable' as a package", and benefits low-income customers. *Id.* However, even Adkins fails to discuss fundamental regulatory principles or analyze the Stipulation it relates to those principle. Hence, the Commission cannot find based on this evidence that the signatory parties have carried their burden.

In other cases where the Commission has approved a settlement, it has done so on a record which includes a much more comprehensive discussion of prong three. *See e.g. In re East Ohio Gas Company*, 19-0468-GA-ALT, Opinion and Order (Dec. 30, 2020) at ¶74 (identifying several important regulatory principles in the Company Witness's testimony). For instance, in Vectren Energy's most recent rate case, the Commission cites extensively to Staff testimony which identifies relevant regulatory principles. *In re Vectren Energy Delivery of Ohio*, 18-298-GA-AIR, et al., Opinion & Order (Aug. 28, 2019) at ¶106. Similarly, in Vectren, Staff Witness Lipthratt cites to the principle of "adherence to cost-causation principles" and "avoidance of improper subsidization." *Id.* Witness Lipthratt "also identified protecting residential Ohioans and conservation as relevant and important regulatory principles." *Id.* This more thorough analysis of the prong three standard is absent from the Signatory Parties record testimony.

b) ELPC's Testimony Demonstrates the Stipulation Violates Regulatory Principles

Unlike the Signatory Parties, ELPC Witness Rabago offers substantial evidence that (1) articulates important regulatory principles and (2) demonstrates how the Stipulation fails to live up to those principles. ELPC Ex. 1 at 25-30. ELPC Witness Rabago introduced testimony on foundational principles of utility regulation articulated by scholar James Bonbright. *Id.* at 25, ln. 10-14; James C. Bonbright, *Principles of Public Utility Rates* (Columbia Univ. Press 1961), available at: https://www.raponline.org/knowledge-center/principles-of-public-utility-rates. Bonbright's principles are "a foundational reference for evaluation of rate making proposals and approaches." *Id.* at 25, ln. 12-13. Both the Ohio Supreme Court and the United States Supreme Court have relied on Bonbright's *Principles of Public Utility Rates* as a guide. *See Centerior Fuel Corp v. Zaino,* 90 Ohio St.3 540, 542 (2001); *Verizon Communications v. F.C.C.*, 535 U.S. 467 (2002). Witness Rabago's testimony distilled Bonbright's principles down into the following list:

- Rates should be characterized by simplicity, understandability, public acceptability, and feasibility of application and interpretation.
- Rates should be effective in yielding total revenue requirements.
- Rates should support revenue and cash flow stability from year to year.
- Rate levels should be stable in themselves, with minimal unexpected changes that are seriously averse to existing customers.
- Rates should be fair in apportioning costs of service among different consumers.
- Rate design and application should avoid undue discrimination.
- Rates should advance economic efficiency, promote the efficient use of energy, and support market growth for competing products and services.

ELPC Ex. 1 at 25-26, ln. 15-20, 1-3. The Stipulation package in this case violates several of these principles. Specifically, it is unduly discriminatory, it improperly apportions costs, it fails to promote efficient use of energy or the system, and it overcompensates Columbia with an excessive ROE. As mentioned above, if the Commission finds that the Stipulation violates "any"

regulatory principle or practice, it must reject the Stipulation. The Signatory Parties bear the burden of proof, and they have failed to carry the burden in regards to prong three. R.C. 4909.18; R.C. 4909.19(C).

c) The Stipulation Violates the Important Regulatory Principle that Rates Must Promote Efficient Use of Energy and the System

While all principles may not be equally important, the Stipulation violates the critical principle that "[r]ates should advance economic efficiency, promote the efficient use of energy and support market growth for competing products and services." ELPC Ex. 1 at 26, ln. 3-4. The Stipulation fails to promote efficient use of energy and the system in several ways. First, the Stipulation unjustly eliminates the non-low-income DSM program. Joint Ex. 1 at 11-12. Second, the drastic increase in fixed customer charges, both in absolute dollar value, and as a share of the overall revenue requirement, actively discourage efficient use of the system.

(1) Energy Efficiency is an Important Regulatory Principle in Ohio

Not only is energy efficiency a bedrock principle according to Bonbright, but it is recognized by the Ohio legislature, the courts and the Commission as an essential state policy. Moreover, Columbia Gas emphasizes the importance of its efficiency programs in its initial testimony and in testimony to the Commission during the energy efficiency workshops.

Two statutes in Ohio explicitly declare a state policy in favor of energy conservation. O.R.C. 4905.70 declares that "[t]he public utilities commission shall initiate programs that will promote and encourage conservation of energy and a reduction in growth rate of energy consumption, promote economic efficiencies, and take into account long-run incremental costs." Similarly, O.R.C 4929.02(A)(12) explicitly declares that "[i]t is the policy of this state to, throughout this

state promote an alignment of natural gas company interests with consumer interests in energy efficiency and energy conservation."

In addition to the statutes, Ohio and federal courts also recognize the policy goal of energy conservation. For example, in *City of Cleveland v. Pub. Util. Comm.*, the Ohio Supreme Court ordered the Commission to "continue its efforts to eliminate declining block" rate structures, because they "do[] not promote energy conservation." 63 Ohio St.3d 62, 69 (1980). Declining block rate structures give customers lower rates as they use more energy, which has a similar effect to Columbia's raising the fixed customer charge in terms of reducing incentives for customers to use energy efficiently. The United States Supreme Court has also emphasized the importance of energy efficiency, declaring that "[i]n view of our country's dependence on energy resources beyond our control, no one can doubt the importance of energy conservation." *Central Hudson Gas & Elec. Corp. v Public Service Commission of New York*, 447 U.S. 557, 568 (1980). In *Central Hudson,* the Court struck down a state law which indiscriminately restricted promotional advertising by utilities, but in the process, reaffirmed a "substantial" state interest in energy conservation. *Id.*

Finally, the Public Utilities Commission in its own words has declared energy efficiency a vital state policy initiative. In Vectren Energy's most recent rate case, which approved a robust energy efficiency program, the Commission stated, "we note that it is the policy of the state to promote an alignment of natural gas company interests with consumer interest in energy efficiency and energy conservation. R.C. 4929.02(A)(12)." *In re Vectren Energy Delivery of Ohio*, 18-298—GA-AIR, et al., Opinion & Order (Aug. 28, 2019) at ¶121.

(2) The Commission Has Now Held the Workshops it Referenced in the AEP Case

In the latest AEP distribution rate case, the Commission rejected arguments from ELPC and others about energy efficiency as an important regulatory principle. *In re Ohio Energy Company,* Case No. 20-585-EL-AIR, et al., Opinion and Order (Nov. 17, 2021) at ¶ 173. The Commission held that:

> Although we find that OPAE and Environmental Advocates have not sustained their position here [that EE is an important regulatory principle], we note that the Commission has announced its intention to hold a series of energy efficiency workshops to solicit the views of interested stakeholders on whether cost-effective energy efficiency programs are an appropriate tool to manage electric generation costs and how such programs fit into Ohio's competitive retail electric and natural gas markets. We, therefore, plan to fully consider these issues in a broader context than the distribution rate case of a single electric distribution utility.

Id. Through the first half of 2022, the Commission solicited comments from interested parties and held those workshops and solicited comments from interested parties. Columbia Gas submitted opening comments along with several other utilities on January 28, 2022, and submitted final comments on March 2, 2022 which state "Columbia's customers have benefitted from the program for almost four decades. It has helped customers save money, reduced their carbon footprint, improved their understanding of natural gas usage, and contributed other benefits too numerous to completely document in any one place." Columbia Gas Final Comments, Energy Efficiency Workshop Comments (March 2, 2022). In its July 27, 2022 meeting, PUCO Commissioners thanked participants for their contributions and Chairwoman French summarized the Commission's position on energy efficiency, stating:

> The Commission encourages jurisdictional and non-jurisdictional interested parties to work collaboratively and cooperatively to propose energy efficiency initiatives. In accordance with the Commission's statutory authority, parties interested in pursuing

> these energy efficiency initiatives, are also encouraged to incorporate these into either comprehensive or standalone proceedings before the Commission for its consideration.[11]

Thus, while the Commission withheld its judgment on energy efficiency as an important regulatory principle in the AEP rate case it has held the workshops it deemed necessary before reaching a conclusion on this question.

(3) Columbia Recognizes the Importance of its Efficiency Programs

Columbia Gas itself recognizes the critical role that energy conservation plays in the state's energy policy and overall economic goals. In January 28, 2022, comments addressed to the Commission by Columbia Gas and other Ohio utilities, the Company advocated strongly for its energy efficiency programs. It argued that these programs align with state energy policy. *Joint Comments of the East Ohio Gas Company d/b/a Dominion Energy Ohio, Vectren Energy Delivery of Ohio, inc d/b/a Centerpoint Energy Ohio, and Columbia Gas of Ohio*, Energy Efficiency Workshop Comments (Jan. 28, 2022). The Utilities emphasized, "[t]hese public policy goals have grown increasingly important to customers, investors, and other stakeholders as energy efficiency and energy conservation programs provide opportunities for utilities to provide additional benefits to customers they serve and the communities that comprise the utilities' service territory." *Id.* at 1-2. Columbia touted their programs as "successful," citing decreased customer usage and energy burden, job creation and environmental benefits associated with energy efficiency programs. *Id.* at 3. In its initial DSM Application, the Company explained the importance of the continuation of the DSM program, stating:

> Columbia believes it is in the continued best interest of its customers to continue to provide DSM services through programs that promote the installation and implementation of energy efficiency measures and technologies in a cost-effective manner. For many of Columbia's customers, there are numerous barriers to the adoption of efficient technology, including

[11] PUCO Commission Meeting, Chairwoman French, minutes 19-20 (July 27, 2022) https://www.youtube.com/watch?v=HsEaoP1iNI0&t=1218s (transcribed on Dec. 5, 2022).

> higher incremental costs for high efficiency equipment, lack of customer education, lack of contractor trade ally training, lack of monetary resources, and fear of change. Accordingly, Columbia believes that it can continue to play an important role in promoting and encouraging energy efficiency, economic development, and job creation in Ohio. Utility companies in the nation are in a unique position to bring energy efficiency to scale, which would be absent without these investments.

Application of Columbia Gas of Ohio, Inc. To Continue Its Demand Side Management Program. Case No. 21-639-GA-UNC, June 30, 2021. The Company has removed the non-low-income DSM program despite it being "in the continued best interest of its customers." *Id.* This Stipulation violates the important regulatory principle of energy efficiency.

(4) The Increased Fixed Customer Charges Also Violate the Principle that Rates Should Advance the Efficient Use of Energy

The Stipulation package fails to promote this alignment, in violation of O.R.C. 4929.02(A)(12), because of the combination of excessive fixed charges and the elimination of DSM. Both ELPC Witness Rabago and OCC Witness Fortney explain how the high fixed customer charge sends the wrong price signals and discourage efficiency. Mr. Rabago notes "the high fixed charges proposed in the settlement encourage additional waste. In short there is little reason for a customer to be efficient in volumetric use when there will be no real benefit in bill savings. High fixed charges send inefficient price signals to customers…" ELPC Ex. 1 at 20, ln. 17-20. OCC Witness Fortney also highlights how high fixed customer charges harm ratepayers:

> One of the most important and effective tools that any regulator has to promote efficient use of energy (including gas) is by developing rates that send proper price signals to conserve and utilize resources efficiently. Pricing structures that are weighted heavily on fixed charges are much more inferior from a conservation and energy efficiency standpoint than pricing structures that require consumers to incur more costs with additional consumption.

OCC Ex. 3 at 18, ln. 4-9.

As discussed above, this “double blow” of increased fixed charges and elimination of non-low-income DSM harms customers, and violates the important regulatory principle of efficient use of energy.

d) The Settlement Contravenes the Important Regulatory Principle that Rates Must Be Fair in Apportioning Costs

Another of Bonbright’s principles requires that “[r]ates should be fair in apportioning costs of service among different consumers.” ELPC Ex. 1 at 25, ln. 3. Cost causation is indisputably a fundamental principle of utility rate design.

Low-volume consumers do not put the same strain on the system as high-volume consumers. As OCC Witness Fortney explains when capacity costs are allocated to the fixed charge, “the signal is that all residential consumers require the same amount of system capacity, regardless of the size of the residence (or, the size of the connected load). Size does matter.” OCC Ex. 3 at 16, ln. 18-21. As Fortney goes on to explain;

> In reality, distributions costs are NOT permanently fixed; investment in distribution is constant and growing, and unavoidable. Inevitably, the utility will have to make new capital investments; load growth may require new generating equipment or distribution lines to be upgraded; and investments will be made for reliability purposes and to replace existing systems.

Id. at 18-19, ln. 17, 1-5. Usage does affect the need for long-term investment in the system.

The record in this case is replete with evidence that high fixed charges are economically regressive, and “unfair” towards low-volume users, who are more often than not low-income individuals. ELPC Witness Rabago described the use of high fixed charges as “a cross subsidy from low users and lower-wealth customers to higher-use and wealthier customers.” ELPC Ex. 1 at 28, ln 18-20. OCC Witness Fortney aptly describes the unfair nature of the straight fixed charge, stating “I still don’t understand why a consumer who lives in a 5,000 square foot house,

heats with gas, has a gas water heater, and a multitude of gas appliances should pay the same distribution bill as a consumer living in a 500 square foot apartment with gas heat." OCC Ex. 3 at 16, ln. 3-7. OCC Witness Colton emphasized that this mis-aligned and unfair rate design will ultimate create a higher energy burden for low-income customers. Colton analyzed usage patterns and income levels and determined, "[l]ow-income consumers use less gas, period." OCC Ex. 2 at 8, ln. 9. And that "as usage decrease, the percentage bill increase proposed by Columbia increases." *Id.* at 7, ln. 16-17. Colton ultimately concluded that "[b]y dramatically increasing the portion of the Columbia bill that is unavoidable as a fixed monthly charge, Columbia is impeding, if not outright preventing, the ability of its low-income consumers to reduce their bills to more affordable levels." *Id.* at 41, ln. 20-22.

In past cases, the Commission has rejected this argument because the link between low-volume users and low-income customers was not sufficiently developed in the record. *See In re Vectren Energy Delivery of Ohio*, 18-298—GA-AIR, et al., Opinion & Order (Aug. 28, 2019) at ¶49. ("the record demonstrates that low income customers are not necessarily low-usage customers."). In the present case, there is ample evidence put forward by OCC Witness Colton that there is a direct correlation between low-volume consumers and low-income consumers. Colton concluded, using Columbia's own data that "the local Columbia data supports the findings of every Federal agency that has examined the relationship between income and natural gas consumption. Gas consumption at higher income levels is higher than gas consumption at lower income levels." OCC Ex. 2 at 13, ln. 15-18. The final step which the Commission found lacking in the Vectren rate case is present in this record. Colton's testimony is unrebutted by the Signatory Parties, as is the testimony of ELPC Witness Rabago. The use of straight fixed charges, especially at such a high proportion of the revenue requirement, do not properly

correlate to cost causation and it is unfair to low-income consumers. The high residential fixed charge violates foundational principles of utility regulation, and therefore the Stipulation should be rejected.

e) The Settlement Must Be Rejected Because It Produces Unjust and Unreasonable Rates

The Commission must find utility rates to be just and reasonable rates. R.C. 4909.18; R.C. 4909.19(C); R.C. 4929.05(3). Just and reasonable rates need not be determined by "use of any single formula." *Fed. Power Comm'n v. Hope Natural Gas Co.,* 320 U.S. 591, 602 (1944). Instead, when rates are challenged, "the question is whether that order 'viewed in its entirety meets the [statutory] requirements.'" *Id.* The United State Supreme Court has declared that "[t]he fixing of 'just and reasonable rates'" is "the heart of the [] regulatory system." *Id.* at 611. Similarly, the Supreme Court ruled, rates must be come from a "reasonable judgment having its basis in a proper consideration of all relevant facts." *Bluefield Waterworks & Pub. Srv. Comm'n.*, 262 U.S. 679, 690 (1923). When a Commission determines Return on Equity it must consider "the nature of the investment, a higher rate being regarded as justified by the risk incident to a hazardous investment." *Id.* The Supreme Court elaborated that "the question whether a rate yields such a return as not to be confiscatory depends upon circumstances, locality, and risk…" *Id.* at 693.

The interaction of the drastic increase in fixed charges and inflated ROE is unjust and unreasonable. ELPC outlines its objections to Columbia's proposed increase to the fixed customer charges above, and notes that the Company fails to provide persuasive evidence that it cannot recover a reasonable percentage of its revenue requirement through volumetric rates. The issues with a discriminatory and unjust fixed charge are accentuated by an ROE that is not correspondingly reduced to compensate for the lack of risk faced by the company when its

revenue is guaranteed. As discussed in prong two, both OCC Witness Zhu and ELPC Witness Rabago concluded that the stipulated ROE is excessive, especially in light of the increase in guaranteed recovery. Witness Zhu testified that, "[t]he most important factor in determining the required rate of return of cost of equity ("ROE") of a utility is risk." OCC Ex. 4 at 13, ln.1-2. By increasing the amount of revenue recovered through fixed costs, as opposed to volumetric charges, the utilities risk is substantially reduced. Therefore, for the Stipulation to mirror a litigated case, one would expect to see a significant drop in ROE to reflect the significant increase in the residential fixed charges. The Company initially proposed an ROE of 10.95%, which was reduced to 9.6% in the settlement. Staff Ex. 8 at 5, ln. 1-2. OCC Witness Zhu suggests an ROE of 8.65%, a full 95 basis points below the level agreed by the Signatory Parties. OCC Ex. 4 at 95, ln. 3. ELPC Witness Rabago agreed with OCC Witness Zhu finding that the agreed-to ROE was "very high" in light of both the high fixed charges and elimination of DSM. ELPC Ex. 1 at 11, ln. 9.

Review of NiSource affiliates' rate design demonstrates Columbia's ability to recover its revenue through volumetric rates. The Company's residential fixed charges far exceed the fixed charges employed by other NiSource subsidiaries. By the terms of the settlement, Columbia Gas of Ohio will collect 68.7% of its total revenue requirement from residential fixed charges in 2023.[12] In Indiana, NiSource subsidiary NIPSCO's recently approved rate case included a fixed charge of $16.50 per month, NIPSCO will collect only 18.9% of its total revenue requirement through its fixed charge.[13] NiSource's Kentucky subsidiary's recently approved rate increase

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[1212] $38.62 fixed charge per month x 16,600,000 bills per year = $641,092,000 / $932, 592, 000 (total revenue requirement) = 68.7%. ELPC Ex. 1 at 10-11, ln. 19, 1, n. 13.

[13] $16.50 fixed charge per month x 12 months x 847,821 customers = $167,868,558/$886,319,992 (total revenue requirement) = 18.9%. Indiana Util. Reg. Comm'n Order of Jul. 27, 2022, Cause No. 45621, at p. 24, 26. Customers totals from Barynbruch testimony (Sept. 9, 2021).

includes a $19.75 residential fixed charge that makes up 17.6% of total revenue requirements."[14] Finally, in Virginia, the NiSource subsidiary, proposed a drastically lower fixed charge than in Ohio. While this rate increase has not been approved, Columbia of Virginia proposed a residential fixed charge of $21 which comprises only 17.2% of its total revenue requirement.[15] Columbia fails to explain why these NiSource affiliates can supply service collecting much greater percentages of revenue through volumetric rates than what Columbia proposes.

The combination of the high straight fixed charges combined Columbia's high proposed ROE make the Stipulation unjust and unreasonable.

B. The Proposed Stipulation Violates ELPC's Due Process Right

The Commission's application of the three-prong test to non-unanimous stipulations violates ELPC's procedural due process rights. The United States and Ohio Constitutions each guarantee a litigant due process when their established rights are at stake. U.S. Const. Am. XIV; Ohio Const. Art. I, Sec. 16. The due process clause ensures that in the course of a proceeding, parties have "an opportunity to present their objections." *Mullane v. Cent Hanover Bank & Trust Co.,* 303 U.S. 306,314 (1950). At its core, "[p]rocedural due process is not a technical concept but, rather concerns fundamental fairness." *Gross v. State Med. Bd. of Ohio*, 10th Dist. No. 08AP-437, 2008-6826 ¶20. In *Gross,* the court upheld the Medical Board's determination to strip Dr. Gross of his license to practice medicine in Ohio on due process grounds. *Id.* at ¶49. The court noted that Dr. Gross was provided "the reasons for the board's proposed action" in advance, and "was provided with a full opportunity to offer evidence on his behalf and to rebut

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[14] $19.75 x 1,313,261 bills per years = $25,936,904.80 / $165,965,00 (total revenue requirement) = 15.6%. Final Commission Order, *In re Columbia Gas of Kentucky*, Case No. 2021-00183, Public Service Commission of Kentucky at 3, 5, Attachment C page 1.

[15] $21 x 265,789 customers x 12 months = 66,978,828/ $389,290,857 (total revenue requirement) = 17.2%. Direct Testimony of Candice Lash on Behalf of Columbia Gas of Virginia, Inc. before the Virginia SCC, Case No. PUR-2022-00036 at CL-1, CL-2, p. 1 of 3; *See also* Direct Testimony of John D. Taylor at 28.

the state's evidence." *Id.* at ¶¶24, 25. The due process "concept is 'flexible' and 'calls for such procedural safeguards as the particular situation demands.'" *Krusling v. Ohio Bd. of Pharmacy,* 981 N.E.2d 320, 323 (12th Dist. 2012) quoting *LTV Steel Co. v. Indus. Comm.,* 140 Ohio App.3d 680, 688 (10th Dist. 2000). "A substantial denial of a procedural right in the course of an administrative proceeding that works a manifest injustice is violative of due process." *DeVilbiss v. Schade*, 186 Ohio. App.3d 441, 451 (2d Dist. 2010).

1. When the Commission Reviews Non-Unanimous Settlements It Must Make Independent Findings Supported by Substantial Evidence

In other jurisdictions, non-unanimous settlements receive less deferential treatment than the Commission affords. The Supreme Court of the United States has ruled that administrative agencies can consider non-unanimous settlements, but it held that when FERC reviews non-unanimous settlements it must make "an independent finding supported by 'substantial evidence on the record as a whole' that the proposal will establish 'just and reasonable rates for the area.'" *Mobil Oil Corp v. Federal Power Commission,* 417 U.S. 283, 314 (1974). The Commission cannot properly evaluate a non-unanimous settlement based on mere conclusory testimony such as that submitted by Columbia. Testimony that "serious bargaining occurred" (Thompson Supplemental Direct at 3), or "the stipulation does not violate any important regulatory principles" (*Id.* at 5), does not constitute a basis for an independent finding based on substantial evidence.

Addressing the Supreme Court's finding in *Mobil,* the Illinois Supreme Court rejected the Illinois Commerce Commission's approval of a non-unanimous settlement related to a utility rate increase, holding if the Commission approves a non-unanimous settlement it must only do so "as long as the provisions are within the Commission's power to impose, the provisions do not violate the Act, and the provisions are independently supported by substantial evidence in the

whole record." *Business and Professional People for Public Interest v. Illinois Commerce Comm'n,* 136 Il.2d 192, 217 (1989). The Illinois Supreme Court further stated, "the Commission failed to support its decision withy any credible evidence; that is evidence other than the circumstances of the Settlement and its own discretion." *Id.* at 223. The key here being that if a settlement is not unanimous, the provisions of the settlement have to be independently supported by substantial evidence in the record. Likewise in Indiana, the Indiana Utility Regulatory Commission has held that it has a "duty to make an independent decision of all relevant matters giving consideration to all evidence of record including the Stipulation between the parties. *In re Northern Indiana Pub. Serv. Co.,* 85 Pub. Util. Rep. 4th (PUR) 605, 614 (Ind. Util. Reg. Comm'n 1987). As noted above, Columbia and the Signatory parties do not conduct the type of analysis of the settlement that allows the Commission to make an independent finding that the rates meet the just and reasonable standards.

2. The Commission's Treatment of Non-Unanimous Stipulations Violates ELPC's Due Process Rights by Failing to Analyze the Agreement on Its Merits

The Commission granted ELPC's intervention in this proceeding on June 3, 2022, based on its motion to intervene filed on April 22, 2022. The motion to intervene details ELPC's interest in the case, and ELPC took positions on the energy efficiency programs and the fixed customer charge issues in its Objections to the Staff Report and Witness Rabago's testimony addressing the Stipulation. ELPC objected to two aspects of the Staff Report. First, "ELPC object[ed] to Staff's recommendation to deny Columbia's request to continue its DSM programs and increase spending by 2% annually for inflation." ELPC Objections to Staff Report at 3. Second, "ELPC object[ed] to Staff's failure to recommend transitioning the delivery charge, IRP rate, and CEP rate for the Small General Service (SGS) rate class to volumetric charges." *Id.* at

5. ELPC also relied on Columbia Gas' testimony supporting the efficiency programs and OCC's testimony opposing the increases in fixed customer charges. As a party in the case, ELPC expects the Commission to weigh its positions and arguments on the merits.

The Commission's three-prong test fails to protect ELPC and its member constitutionally protected rights, because the test gives overwhelming bargaining power to the utility bringing a case to pick and choose which party or parties it deems worthwhile to negotiate with. This is further enforced by a test that evaluates the settlement agreement "as a package" and does not analyze individual provisions of the settlement. The practical effect of this choice is to deprive objecting parties their "opportunity to be heard" on critical issues. *Krusling*, 981 N.E.2d at 324.

Despite claims by the Signatory Parties, the Commission process for reviewing settlements does not adequately analyze the evidence on the merits. Participation in negotiations is not equate to fairness. In cross examination, Columbia admitted that it met with OCC and Staff without ELPC present. Tr. at 66. Columbia agreed to a deal that cut its DSM programs except for WarmChoice, and raised the fixed monthly customer charge to $58 by 2027. It did this knowing that ELPC supports EE and opposes higher fixed customer charges, and there's no evidence in the record that Columbia cared about ELPC, CUB or OPAE's positions on those issues. Columbia chose which parties to partner with, and somehow persuaded OCC to agree to high fixed customer charges despite its adamant opposition to those charges as expressed by Witnesses Fortney and Colton. Moreover, the way the Commission reviews settlements, ELPC, CUB and OPAE have no opportunity to create a record on the issues that they want to litigate except in relation to the three-prong test.

Essentially, Columbia bargained with all the parties until it decided not to include the ones it no longer wanted to bargain with. And the minute it did that, ELPC, CUB and OPAE no

longer mattered, and the signatory parties ignored ELPC, CUB and OPAE's positions on the issues. This is the equivalent of Columbia, OCC and ELPC going out to dinner, and Columbia and OCC deciding that ELPC will pick up the tab while ELPC is in the bathroom. These negotiations render ELPC's views on the correct way to split the bill irrelevant.

Due process requires the Commission to carefully examine the disputed issues in the case, whether or not a non-unanimous settlement is filed. When the Commission approves a non-unanimous settlement under its three-prong test, it has repeatedly stressed that, "the second part of the three-part test is not whether there are different or additional provisions that would benefit ratepayers and the public interest, but whether the Stipulation, as a package, benefits ratepayers and the public interest." *Id.* at ¶151. This standard violates the "fundamental fairness" due process standard used by Ohio courts. *Gross v. State Med. Bd. of Ohio*, 10th Dist. No. 08AP-437, 2008-6826 ¶20. The way the Commission applies the test ignores ELPC's record evidence and its vital interests on energy efficiency and SFV rate design and looks at only the settlement itself. This is improper. The law requires that the Commission rule on the merits of the issues. When the Commission ignores objecting parties' views on individual issues in favor of reviewing the settlement only "as a package" the Commission violates the fundamental constitutional due process standard that its application of just process "shall not be unequal in operation." *State ex rel. Schneider v. Gullat Cleaning,* 32 Ohio N.P.(N.S.) 121, 126 (Ohio 1934).

To comply with its constitutional mandate, the Commission must change its approach and evaluate each provision of a settlement agreement individually, as part of the whole record. This analysis tracks with similar approaches taken in Illinois and Indiana. *Business and Professional People for Public Interest v. Illinois Commerce Comm'n (BPI),* 136 Il.2d 192, 217 (1989); *In re Northern Indiana Pub. Serv. Co.,* 85 Pub. Util. Rep. 4th (PUR) 605, 614 (Ind. Util

Reg. Comm'n 1987). In particular, the Illinois Supreme Court case, *Business and Professional People for Public Interest*, is an instructive example. In that case, the Illinois Supreme Court invalidated a settlement agreement between the utility and the Commission's staff. The Illinois Supreme Court held that the Commission could not "impose a settlement not agreed to by all of the parties and intervenors." *BPI*, 136 Il.2d at 218. Instead, the Commission must make "an independent finding supported by substantial evidence in the record as a whole, that the proposal would establish just and reasonable rates." *Id.* at 217. The current test employed by the Commission does not protect the important interests and due process rights of parties that object to non-unanimous stipulations.

The current process gives utilities outsized bargaining power and an ability to select which parties "matter" in the course of settlement negotiations, while ignoring those deemed inconsequential to settlement. The Commission re-enforces this dynamic by refusing to analyze each provision of a stipulation individually, on its own merits. This essentially deprives objecting parties of their opportunity to be heard. The Commission's actions are "[a] substantial denial of a procedural right…that work[] a manifest injustice" on ELPC and other objecting parties. *DeVilbiss*, 196 Ohio. App.3d at 451. The Commission should end the practice of evaluating non-unanimous stipulations "as a package," and instead adopt a similar model to Illinois or Indiana which review each provision on their merits as part of the whole record.

V. Conclusion & Request for Relief

Columbia and Signatory Parties request that the Commission approve a settlement that requires customers to pay a fixed monthly customer charge of $58.01 per month. The settlement also eliminates Columbia's non-low-income DSM programs. The Stipulation asks the Commission to ignore Columbia's strong support for its award-winning DSM programs that it emphasizes saves customers money on their bills, and benefits participants and non-participants.

The Stipulation also asks the Commission to ignore OCC's strong policy arguments against raising the fixed customer charges. Stipulating Party OCC Witness Fortney's quote from the Commission's order in a 2010 case sums it up best:

> Finally, we are cognizant of our own obligation to initiate programs that will promote and encourage conservation of energy and a reduction in the growth rate of energy consumption, promote economic efficiencies, **and take into account long-run incremental costs**. Section 4905.70, Revised Code.

OCC Ex. 3 at 19, ln. 11-16 (emphasis in his testimony) citing, *In the Matter of Aligning Electric Distribution Utility Rate Structure With Ohio's Public Policies to Promote Competition, Energy Efficiency, and Distributed Generation,* Case No. 10-3126-EL-UNC at 5 (Dec. 29, 2010). A package that sends the wrong price signals and eliminates efficiency programs fails both the public interest test, and the important regulatory principle test.

While ELPC argues that the Stipulation process violates due process, the Commission need not get that far in this proceeding. The Stipulation violates all three prongs of the Commission test, and the Commission should either reject the Stipulation or require Columbia to accept a lower fixed customer charge and reinstate its DSM program as proposed in its Application.

Dated December 9, 2022 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Initial Post-Hearing Brief* submitted on behalf of the Environmental Law & Policy Center was served by electronic mail upon the following Parties of Record on December 9, 2022.

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