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

COLUMBIA GAS OF OHIO, INC.'S POST-HEARING REPLY BRIEF

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1. Introduction

The initial brief of Columbia Gas of Ohio, Inc. ("Columbia") explains why the joint stipulation and recommendation ("Stipulation") between Columbia, Staff, the Office of the Ohio Consumers' Counsel ("OCC"), and seven other parties meets the three-part test that the Commission has used for decades to determine whether a stipulation is reasonable, with the approval of the Supreme Court of Ohio. Two of the three non-signatory parties – the Citizens' Utility Board of Ohio ("CUB Ohio") and the Environmental Law & Policy Center ("ELPC") – respond by insisting that the Commission modify its test. With regard to the first prong, CUB Ohio and ELPC ask the Commission to abandon its "recent * * * position that * * * differences between an application and a filed stipulation [are] evidence of the seriousness of * * * bargaining between the parties." (CUB Ohio Br. at 7; *see also* ELPC Br. at 11.) ELPC also argues that the Commission must abandon its traditional focus on "how many meetings were held, and was everyone invited?", and instead allow probing "questions about the substance of settlement negotiations." (ELPC Br. at 10-11.) ELPC goes so far as to argue that Columbia's ultimate decision to stop bargaining with the non-signatory parties, and accept a Stipulation that was unacceptable to them, violated their constitutional rights. (*Id.* at 33-34.) And while CUB Ohio notes the Commission's recent holdings emphasizing that the second prong of the three-part test does not ask "whether there are different or additional provisions that would better benefit ratepayers and the public interest[,]" it nonetheless asks the Commission to modify the Stipulation to reinstate withdrawn energy efficiency programs that CUB Ohio believes would "provide[ ] benefits to customers * * * ." (CUB Ohio Br. at 16.)

The remainder of the non-signatory parties' arguments against the Stipulation, including those of Ohio Partners for Affordable Energy ("OPAE"), repeat arguments against Columbia's continuation of a straight fixed variable ("SFV") rate design for its Small General Service ("SGS") class customers, and against the Stipulation's withdrawal of its non-low-income energy efficiency programs, that the Commission has repeatedly rejected in other recent Commission proceedings over the last three years (and, as it relates to their anti-SFV arguments, for more than a decade before that). As explained below, ample Commission precedent supports the use of SFV rate designs for a natural gas company's residential customers, and nothing has happened in the last few years that would warrant a change in policy. And no Commission precedent supports the non-signatory parties' arguments that the Stipulation's continuation of Columbia's award-winning WarmChoice® program, with an annual budget of almost $15 million, somehow violates the state's policies on energy conservation.

For the reasons provided below, the Commission should deny the non-signatory parties' demands that the Commission revise its three-part test to give stipulation holdouts veto power, reject their arguments on SFV rate design and energy efficiency, and approve the Stipulation without modification.

2. The Commission Should Approve The Stipulation.

2.1. The Commission properly applies a three-part test, approved by the Supreme Court of Ohio, to determine whether to approve stipulations.

When the parties to a Commission proceeding enter into a stipulation, the Commission applies a three-prong test to determine whether the stipulation "is reasonable and should be adopted":

(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?

In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Piedmont Gas Company and Related Matters, Case Nos. 22-213-GA-GCR and 22-313-GA-UEX, Opinion and Order ¶ 34 (Nov. 2, 2022).

The Commission first adopted this test in a 1985 proceeding to establish the asset value of the Zimmer Plant after it was converted from nuclear to coal-fired. *See In the Matter of the Restatement of the Accounts and Records of The Cincinnati Gas & Electric Co., The Dayton Power and Light Co., and Columbus & Southern Ohio Electric Co.*, Case No. 84-1187-EL-UNC, Opinion and Order (Nov. 26, 1985). In that case, the Plant's owners presented testimony from "Dr. George R. Hall, a former FERC commissioner and now a consultant with Charles River Associates," who proposed the exact test the Commission still applies today. *Id.* at 6. Dr. Hall explained that "it is sound regulatory policy to encourage dispute-resolution through settlements" because "litigation is expensive and time-consuming" and "introduces uncertainty into the regulatory process, * * * which also carries significant cost consequences" ultimately borne by consumers. *Id.* Although settlements "must be examined on a case-specific basis[,]" Dr. Hall suggested that regulators "must not focus on any single element of the stipulation, but must recognize that the settlement is a package which reflects the give-and-take of the negotiating process * * *." *Id.* at 6-7.

The Commission "agree[d] with Dr. Hall that it is sound regulatory policy to encourage parties * * * to resolve issues through negotiated settlements[,]" and further held that "Dr. Hall's proposed criteria provide an appropriate backdrop against which to consider" whether a "particular settlement is reasonable." *Id.* at 7. Seven years after that, the Ohio Supreme Court expressly approved the Commission's use of its three-part test "to resolve its cases in a method economical to ratepayers and public utilities." *Office of Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126, 592 N.E.2d 1370 (1992). The Commission has consistently employed this test ever since. Three decades later, CUB Ohio and ELPC ask the Commission to throw the test out or substantially modify it. The Commission should decline their request.

The Commission and the Supreme Court of Ohio have held that "the terms of a stipulation are properly accorded substantial weight." *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter Into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case Nos. 14-1693-EL-RDR, *et al.* ("*Ohio Power PPA Rider Case*"), Second Entry on Rehearing, ¶21 (Nov. 3, 2016), citing *Consumers' Counsel v. Pub. Util. Comm.,* 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978). Given the weight that Ohio law affords the Stipulation's negotiated terms, the Commission should find that the Stipulation is reasonable and approve it without modification.

2.2. The Commission's three-part test for weighing stipulations does not violate the non-signatory parties' due process rights.

Alone among the non-signatory parties, ELPC asserts that applying the Commission's decades-old test for weighing stipulations "to non-unanimous stipulations violates ELPC's procedural due process rights." (ELPC Br. at 30.) ELPC cites *Mobil Oil Corp. v. Federal Power Commission*, 417 U.S. 283, 314 (1974), and an Illinois Supreme Court opinion that applied it, *Business and Professional People for Public Interest v. Illinois Commerce Comm'n,* 136 Il.2d 192, 217 (1989), for the proposition that "if a settlement is not unanimous, the provisions of the settlement have to be independently supported by substantial evidence in the record." (ELPC Br. at 31-32; *see also id.* at 35.) In contrast, ELPC believes the Commission here will rely on "mere conclusory testimony," and not "the type of analysis * * * that allows the Commission to make an independent finding that the rates meet the just and reasonable standards." (ELPC Br. at 32.) (ELPC also asserts that the Commission's approach to prongs one and two of the three-part test violates ELPC's due process; Columbia will address those arguments separately below.)

Contrary to ELPC's suggestion, the standard for Commission review of non-unanimous stipulations does require an evaluation of the evidence. The Supreme Court of Ohio has held:

> When the commission reviews a contested stipulation, the requirement of evidentiary support remains operative. While the commission "may place substantial weight on the terms of a stipulation," it "must determine, *from the evidence*, what is just and reasonable."

(Emphasis in original.) *In re Columbus S. Power Co.*, 129 Ohio St.3d 46, 2011-Ohio-2383, 950 N.E.2d 164, ¶ 19, quoting *Consumers' Counsel v. Pub. Util. Com.*, 64 Ohio St.3d 123, 126, 1992-Ohio-122, 592 N.E.2d 1370. Thus, "the Commission considers evidence regarding every proposed stipulation by evaluating the contents of the stipulated terms and supporting evidence, as well as alternative evidence produced by opposing parties." *In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates*, Case Nos. 14-375-GA-RDR, *et al.* ("*Duke Energy MGP Case*"), Opinion and Order ¶ 86 (Apr. 20, 2022), citing *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 18-857-EL-UNC, Opinion and Order, at ¶ 34 (Mar. 20, 2019). Because the Commission requires evidence to support a Stipulation, Staff, OCC, and Columbia introduced testimony at hearing specifically for that purpose. Columbia also introduced the testimony and supplemental testimony that it had previously filed to support its Application, relevant portions of which it will cite in this Reply Brief to respond to the substantive arguments put forward in the non-signatory parties' Initial Briefs.

More generally, "[d]ue process requires a meaningful opportunity to be heard." *In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Gas Rates in Its Service Area*, Case Nos. 92-1463-GA-AIR, *et al.*, Opinion and Order at 16 (Aug. 26, 1993). And where "[t]he objecting parties were provided the opportunity to submit testimony, cross-examine witnesses, and to attack the reasonableness of the stipulation * * *, the objecting parties were afforded ample opportunity to be heard." *Id.* at 17. *See also Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm.*, 113 Ohio St.3d 180, 2007-Ohio-1386, 863 N.E.2d 599, ¶ 53 (rejecting Vectren's due process argument because "Vectren had a full hearing before the commission[,] and [i]t was permitted to present evidence through the calling of its own witnesses, the cross-examination of the other parties' witness, and the filling of exhibits" and it was "able to argue its position through the filing of posthearing briefs."). By that metric, ELPC has received due process. ELPC filed objections, offered testimony and exhibits, participated in the hearing, had the opportunity to cross-examine witnesses, and is filing post-hearing briefs objecting to the Stipulation. In short, ELPC has had ample opportunity to be heard in these proceedings.

Because the Commission's three-part test for stipulations protects all parties' due process rights, including ELPC, the Commission should continue to apply that test here.

2.3. Contrary to the assertions of CUB Ohio and ELPC, the Stipulation is the result of serious bargaining among capable, knowledgeable parties.

"As part of the first component of the three-part test, the Commission considers whether each party was afforded the opportunity to participate in negotiations, is proficient in the negotiation process, and sufficiently understands the matters at issue." *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of Demand-Side Management Programs for its Residential and Commercial Customers*, Case Nos. 16-1309-GA-UNC, *et al.* ("*2016 Columbia Gas DSM Case*"), Opinion and Order ¶ 52 (Dec. 21, 2016). Of the non-signatory parties challenging the Stipulation, none claims that it was excluded from negotiations with all the parties or that the parties negotiating the proposed settlement were not capable and knowledgeable. Additionally, no party disagrees that the Signatory Parties represent a broad range of interests. (*See* Columbia Ex. 35 (Thompson Supp. Testimony) at 3; Columbia Br. at 8.)

Although ELPC complains that Ms. Thompson's "conclusory testimony" alone cannot satisfy "any meaningful legal standard" to demonstrate serious bargaining (*see* ELPC Br. at 6), ELPC ignores her testimony describing the open settlement process, the extensive negotiations that took place, and that various settlement positions were discussed by the Parties. (*See* Columbia Ex. 35 at 3:1-29.). Moreover, OCC and Staff also testified that the Stipulation resulted from serious bargaining. Kerry Adkins, on behalf of OCC, noted that virtual and in-person meetings, spanning many hours over five months, provided numerous opportunities for parties to attend and negotiate. (OCC Ex. 1 (Adkins Supp. Testimony) at 5:10-12.) Those negotiations resulted in a number of concessions by the Signatory Parties, which are reflected in the terms of the Stipulation. (*Id*. at 5:12-13.) David Lipthratt from the Commission's Rates and Analysis Department, likewise agreed that the Stipulation represents a comprehensive compromise of issues raised by parties with diverse interests who were represented by experienced and competent counsel. (Staff Ex. 8 (Lipthratt Testimony) at 3:10-16.) Additionally, Ms. Thompson testified at hearing about the parties' bargaining. Ms. Thompson testified that the parties held more than forty in-person and virtual settlement meetings over more than five months. (Tr. 65:11-12, 76:6-14; 78:3-12, 80:1-6.) Holding a large number of settlement meetings itself indicates that serious bargaining took place in order to arrive at the Stipulation. *See Duke Energy MGP Case*, *supra*, Opinion & Order, ¶ 102 (April 20, 2022). Moreover, no class of customers was excluded and, in, fact all parties were invited to each of the more than forty all-party settlement meetings. (Tr. 79:18-22.)

The fact that, at some point in the process, "Columbia engaged in negotiations with OCC without the invitation of CUB, OPAE, and ELPC" (Tr. 66:11-17) does not negate the fact that serious bargaining occurred. *See In the Matter of the Filing by Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company of a Grid Modernization Business Plan*, Case Nos. 16-481-EL-UNC, *et al.* ("*FirstEnergy Grid Modernization Business Plan Case*"), Opinion and Order, ¶ 61 (July 17, 2019) ("We will continue to allow parties to decide the form and manner of settlement negotiations, provided parties are able to demonstrate no entire class of customers is excluded from such negotiations."). And, as Ms. Thompson testified at hearing, the final version of the settlement agreement was presented to all remaining parties (including those parties opposing the Stipulation) for consideration before it was executed. (Tr. 80:7-23.)

CUB Ohio and ELPC's contentions fail to undermine the evidence presented by the Company and other supporters of the Stipulation that it did indeed result from serious bargaining among capable, knowledgeable parties. CUB Ohio and ELPC simply argue that, if the Commission overturned its longstanding precedent and applied a different test for serious bargaining, Columbia would fail that test. For the reasons provided below, the Commission should reject CUB Ohio and ELPC's proposed test.

2.3.1. As CUB Ohio and ELPC acknowledge, the Commission views significant differences between an Application and a Stipulation as evidence of serious bargaining.

CUB Ohio and ELPC contend that the Commission, when considering the first prong of the three-part test for stipulations, should not consider differences between the Company's Application and the Stipulation as evidence that serious bargaining took place. (CUB Ohio Br. at 8-9; ELPC Br. at 11-12.) To CUB Ohio and ELPC, consideration of such differences only encourages utilities to make "unreasonable" (CUB Ohio Br. at 8) or even "extreme" (ELPC Br. at 11) proposals in their applications, so that later stipulations departing from those proposals falsely appear to demonstrate some level of bargaining and compromise. As CUB Ohio puts it, if a public utility stipulates to a "revenue requirement, return on equity, and/or * * * fixed charge" that are less than what the utility sought in its application, that is merely evidence that the utility "ask[ed] for more revenue than it really need[ed] * * *." (CUB Ohio Br. at 9.) CUB Ohio and ELPC effectively propose a test under which any resolution of the parties' differences (reflected by a departure from the company's application) is evidence of a *lack* of serious bargaining. The Commission should reject such a flawed test for multiple reasons.

First, both CUB Ohio and ELPC concede that the Commission does, in fact, consider differences between a utility's application and a proposed stipulation in order to assess whether serious bargaining has occurred. Both intervenors acknowledge the Commission's Opinion and Order in FirstEnergy's 2014 ESP case as precedent on this point. (CUB Ohio Br. at 7; ELPC Br. at 11.) And ELPC concedes that the Commission also followed this approach just last year in Ohio Power Company's distribution rate case. (ELPC Br. at 11, citing *In the Matter of the Application of Ohio Power Company for an Increase in Electric Distribution Rates*, Case Nos. 20-585-EL-AIR, *et al.* ("*Ohio Power Company Rate Case*"), Opinion and Order, ¶ 107 (Nov. 17, 2021).[1] In an earlier Columbia Gas proceeding, the Commission likewise considered changes from the Company's application when considering whether the proposed stipulation reflected serious bargaining. *2016 Columbia Gas DSM Case*, *supra*, Opinion and Order, ¶ 56 (Dec. 21, 2016).

The Commission's frequent consideration of whether a proposed stipulation reflects changes and concessions from an original application is hardly surprising. By definition, the concept of "bargaining" embodies the give-and-take that occurs during meaningful negotiations, after opening proposals are made. *See* Random House Webster's Unabridged Dictionary at 168 (2001) (defining "bargain" to include "an agreement between parties settling what each shall give and take or perform and receive in a transaction.") Ignoring how a proposed stipulation differs from an application when assessing whether or not serious bargaining has occurred would mean ignoring the definition of "bargaining" and years of settled Commission precedent.

Second, CUB Ohio and ELPC criticize the Company's initial Application as "unreasonable," "outrageous," or "extreme" to undercut the serious bargaining that took place to arrive at the terms of the proposed Stipulation. (CUB Ohio Br. at 8; ELPC Br. at 11.) CUB Ohio argues in its post-hearing brief (at 8) that Columbia "knows the Commission would not approve" the revenue requirement, return on equity, and/or fixed charges originally sought in the Company's Application, and that Columbia "knows" those elements of the Application were "unnecessary to provide reliable service," but no evidence of Columbia's purported "knowledge" of such things appears in the record. The components of the Company's original Application were supported by hundreds of pages of direct testimony and detailed schedules.

Third, CUB Ohio and ELPC's proposed approach is unworkable. ELPC posits that "[u]sing 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." (ELPC Br. at 12.) But if every proposal in a utility's application had to be fully litigated and "vetted for reasonableness" in order for a utility to demonstrate that serious bargaining had occurred, there would be little practical purpose in making the

[1] ELPC erroneously captions this matter as "*In re Ohio Energy Company*." (ELPC Br. at 11.)

proposed stipulation at all. One key purpose of the three-part test, after all, is administrative efficiency. *See Office of Consumers' Counsel*, 64 Ohio St.3d at 126. *See also Ohio Power Company Rate Case*, *supra*, Opinion and Order, ¶ 151 (Nov. 17, 2021) (describing stipulations as "an efficient and cost-effective means of bringing * * * issues before the Commission, while * * * avoiding the considerable time and expense associated with [litigating] a fully contested case."). What CUB Ohio and ELPC are proposing would be *less* efficient than a normal hearing, as it would effectively require a *double* hearing on any stipulation. Said differently, under CUB Ohio and ELPC's approach, the Commission would first need to analyze the original application in full to determine whether it requested "more in rates than [the utility] needed to * * * provide adequate service" (CUB Ohio Br. at 8-9) or, alternatively, whether the rates requested in the application that *were not* ultimately included in the stipulation reflected "a realistic end point that [the utility] would achieve in a litigated case or even a reasonable starting point for negotiations." (ELPC Br. at 7). The Commission would then need to analyze the *stipulation*, as well, to determine whether the stipulation benefits ratepayers and the public interest and is consistent with important regulatory principles and practices. Adopting this double-hearing approach, which the Commission has never done, would be a waste of resources for all parties involved. The Commission should reject CUB Ohio and ELPC's proposed modifications to the Commission's application of the serious-bargaining prong.

2.3.2. The Commission should not accept ELPC's proposal to turn confidential settlement negotiations into open books.

ELPC also suggests a more fundamental revision to the Commission's test for serious bargaining. ELPC would require "a close[ ] examination of settlement negotiations" (ELPC Br. at 9) in which parties would need to identify the parties' positions and describe "the bargaining that took place" for each provision of the stipulation (*id*. at 7). For example, ELPC asserts that the stipulating parties were obligated to "submit[ ] * * * evidence that Columbia bargained on" the amount of its fixed monthly charge, even though ELPC concedes that the charge agreed to in the Stipulation is lower than what Columbia proposed in its Application. (*See id.* at 6-7.) ELPC further asserts that Columbia was required to "submit * * * evidence regarding the bargaining that * * * result[ed] in Columbia agreeing not to run the DSM programs for non-low-income customers" and "evidence that [the Signatory Parties] considered Columbia's reduced risk when they agreed to the [Stipulation's proposed 9.60% return on equity (ROE)." (*Id.* at 7-8.) ELPC asserts, also, that the Commission's "serious bargaining" prong "ignores Ohio Rule of Evidence 408." (*Id*. at 8.)

Again, ELPC is mistaken,[2] and adopting its position would chill the free and unfettered exchange of parties' positions and proposals in future confidential settlement negotiations aimed at securing proposed stipulations. *See FirstEnergy Grid Modernization Business Plan Case*, *supra*, Opinion and Order, ¶ 62 (July 17, 2019) (declining to "insert[ ] ourselves in the settlement process" in an "unnecessarily intrusive" manner that "would eventually require signatory parties to demonstrate the degree of serious consideration afforded to alternative language/proposals"). Parties will not be inclined to engage in confidential settlement negotiations if they know their positions during negotiations will be subject to cross-examination.

The Commission's serious-bargaining requirement is procedural, not substantive, and both the Commission and the Ohio Supreme Court have previously rejected invitations like ELPC's to delve into the substance of settlement communications exchanged by parties negotiating stipulations. *See, e.g.*, *Ohio Power Company Rate Case*, *supra*, Opinion and Order, ¶¶ 107-108 (rejecting Environmental Advocates' request to "closely examine settlement negotiations to determine whether serious bargaining occurred" or "evaluate the negotiation process" because "that is not an aspect of part one of the three-part test"); *In re Application of Ohio Edison Co.*, 146 Ohio St.3d 222, 2016-Ohio-3021, 54 N.E.3d 1218, ¶ 45 ("NOPEC's assignment of error would require this court to review the negotiations in their entirety * * * . NOPEC cites no authority for the proposition that this court must undertake such a review nor any compelling reason why it would be revelatory.").

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[2] The Supreme Court of Ohio has repeatedly held that Ohio's Rules of Evidence do not apply to Commission proceedings. *See, e.g., Ohio Bell Tel. Co. v. Pub. Util. Comm.*, 14 Ohio St.3d 49, 50 (1984), citing *Greater Cleveland Welfare Rights Org., Inc. v. Pub. Util. Comm.*, 2 Ohio St.3d 62, 68 (1982) ("the commission is not bound by strict rules of evidence in its proceedings.") Thus, ELPC's lengthy argument (at 8-11) complaining that the Attorney Examiner failed to properly apply Rule 408 is a *non sequitur*. Moreover, ELPC misquotes R.C. 4903.22 to argue that the Ohio Rules of Evidence "indisputably" apply to the Commission in this context. (ELPC Br. at 9.) The statute says no such thing; ELPC's quotation of the statute (at 9) omits four key words. The statute actually reads:

> Except when otherwise provided by law, all processes in actions and proceedings **in a court arising** under Chapters 4901., 4903., 4905., 4906., 4907., 4909., 4921., and 4927. of the Revised Code shall be served, and the practice and rules of evidence in such actions and proceedings shall be the same, as in civil actions.

(Emphasis added.) This is not a "court" action, and the statute does not conflict with the Supreme Court's decisions in *Ohio Bell Telephone Company* or *Greater Cleveland Welfare Rights Organization*, *supra*, which do not require the Commission to be strictly bound by the Rules of Evidence. Although the Commission has its own rule addressing confidential settlement communications, Ohio Adm.Code 4901-1-26(E), ELPC nowhere cites or applies it.

Although the Commission's rules allow the offering of evidence relating to settlement negotiations "for [a] valid purpose" other than "to prove liability for or invalidity of the dispute" (Ohio Adm.Code 4901-1-26(E)), this does not allow parties to seek information regarding "the specific details of the settlement negotiations," as those details are not relevant to the serious-bargaining requirement. *Ohio Power PPA Rider Case*, *supra*, Opinion and Order at 17 (Mar. 31, 2016). Interpreting the rule otherwise would effectively "gut" the rule. (Tr. 54:18-20.) Only questions regarding the "form and manner of negotiations" (*id.* 64:19-20) – for example, "the occurrence of settlement meetings, the individuals in attendance, or other aspects of the bargaining process; * * * the specific provisions in the stipulation or how they may impact ratepayers or the public interest; or * * * the stipulation's effect on important regulatory principles or practices" – would be permissible. *Ohio Power PPA Rider Case*, *supra*, Opinion and Order at 17 (Mar. 31, 2016), *aff'd*, Second Entry on Rehearing ¶ 288 (Nov. 3, 2016). ELPC presents no sound basis to depart from this precedent and expose all future, confidential settlement negotiations to Monday-morning quarterbacking in the hearing room and on brief.

2.3.3. ELPC's "due process" arguments do not justify modifying the Commission's "serious bargaining" test.

ELPC also asserts that the Commission's application of the serious-bargaining prong of the three-part test violates ELPC's due process rights. According to ELPC, the Commission's 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." (ELPC Br. at 33.) ELPC concedes that it "[p]articipat[ed] in negotiations" and that "Columbia bargained with all the parties * * * ." (*Id.*) But in the end, ELPC asserts, Columbia and the other signatory parties did not "care[ ] about ELPC, CUB or OPAE's positions" on DSM and fixed charges. (*Id.* at 33-34.) ELPC argues that "[t]his essentially deprive[d] [ELPC, CUB Ohio, and OPAE] of their opportunity to be heard." (*Id.* at 35.)

As discussed above (*see* Section 2.2), ELPC and the other non-signatory parties have had ample opportunities to be heard in this case. And their post-hearing briefs will give them further opportunities to be heard. But at base, ELPC is really arguing that the Commission should not be permitted to adopt a non-unanimous stipulation that excludes it. The Commission has repeatedly rejected similar arguments. The Commission does not require unanimous stipulations, and no one party (or group of parties) possesses a veto over stipulations. *See*, *e.g.*, *In the Matter of the Application of Campbell Soup Supply Co. L.L.C. for the Approval of a Reasonable Arrangement for its Napoleon, Ohio Plant*, Case No. 21-1047-EL-AEC, Opinion and Order, ¶ 51 (June 1, 2022); *In the Matter of the Application of Duke Energy Ohio, Inc. for Recovery of Program Costs, Lost Distribution Revenue, and Performance Incentives Related to its Energy Efficiency and Demand Response Programs*, Case No. 15-534-

EL-RDR, Second Entry on Rehearing, ¶ 21 (Apr. 10, 2019) (pointing to opinions dating back to 2005 that held that "the choice of any one party to not sign a stipulation cannot invalidate a settlement"). The months and months of settlement negotiations between capable, knowledgeable, and sophisticated parties qualify as serious bargaining, even if CUB Ohio, ELPC, and OPAE did not ultimately sign on to the Stipulation.

2.3.4. Reservations of rights by the signatory parties to the proposed stipulation do not reflect a lack of serious bargaining.

Finally, both ELPC and CUB Ohio attack the serious-bargaining prong of the three-part test by seizing on reservations of rights that certain signatory parties included in footnotes to the Stipulation. For example, ELPC notes that neither OCC nor NOPEC take any position on the fixed charges reflected in the Stipulation. (ELPC Br. at 7, citing Jt. Ex. 1 (Stipulation) at 3, n. 3.) CUB Ohio notes the same, complaining that "'footnoting out' of provisions betrays the idea of serious bargaining." (CUB Ohio Br. at 10.) CUB Ohio also critiques a "lengthy" footnote by Staff (*id.* at 11), in which Staff notes its general disagreement with provisions like those found in § II.L.1. of the Stipulation but announces that it "does not object to including those provisions in this agreement." (Jt. Ex. 1 at 22, n. 22.)

In CUB Ohio's view of the world, "if a party is signing onto the Stipulation it is signing onto support for the terms of the *entire* stipulation," and thus should not "hide behind a footnote." (*Id.*) Thus, if any signatory party agrees to waive certain arguments for the purposes of reaching a mutually acceptable resolution, while reserving the right to raise those arguments in future proceedings, that is (in CUB Ohio's view) evidence that the signatory party does not *truly* approve of the stipulation or, alternatively, that the signatory party should have fought harder to obtain a different result. (*Id.* at 10-11.)

That is not how the Commission or the Ohio Supreme Court assesses stipulations under the three-part test. The Commission has repeatedly rejected challenges to stipulations that focused on their inclusion of opt-out provisions. *See FirstEnergy Grid Modernization Business Plan Case*, *supra*, Opinion and Order, ¶ 61 (July 17, 2019) (noting that "a signatory party's decision to opt out of a particular provision or provisions, and simultaneous election not to oppose the provision, merely reflects the signatory's support of the stipulation as a total package"); *Ohio Power PPA Rider Case*, *supra*, Second Entry on Rehearing, ¶ 24 (Nov. 3, 2016) (disagreeing with an intervenor's "attempts to raise a signatory party's decision to opt out of a particular provision as evidence of a lack of serious bargaining"). Moreover, both the Commission and the Supreme Court have approved numerous stipulations that included take-no-position and reservations-of-rights footnotes by signatories. *See, e.g.*, *Columbia Gas DSM Case*, *supra*, Opinion and Order

(Dec. 21, 2016) (adopting a Stipulation and Recommendation supported by IGS and RESA, even though IGS and RESA, pursuant to a footnote in the stipulation, did not take a position on the proposed gas costs or assumptions used to calculate the estimated gas costs in Columbia's application); *Ohio Power Company Rate Case*, *supra*, Opinion and Order, ¶ 72 n.7 (Nov. 17, 2021) (adopting an updated May 11, 2021 Stipulation and Recommendation supported by Staff and OCC, even though Staff took no position with respect to a provision regarding shadow billing); *In re Ohio Edison Co.*, 146 Ohio St.3d 222, 2016-Ohio-3021, 54 N.E.3d 1218 (rejecting a serious-bargaining challenge to a partial stipulation that included multiple "take no position" footnotes by signatories including OPAE). And the Commission has rejected the CUB Ohio argument that a party that opts out of some portion of a stipulation does not truly support the stipulation, holding: "The Commission refuses to overturn any signatory party's assessment of its interest and the decision to support the stipulation or otherwise based on the arguments of the opposing parties." *Ohio Power PPA Rider Case*, *supra*, Second Entry on Rehearing, ¶ 24 (Nov. 3, 2016).

In sum, the Stipulation recommended by the Signatory Parties for adoption and approval by the Commission meets the first prong of the Commission's three-part test and is a fair, balanced, and reasonable resolution of this proceeding by numerous parties with diverse interests.

2.4. The Stipulation benefits ratepayers and the public interest.

The second part of the Commission's three-part test for considering settlements considers whether the settlement, as a package, benefits ratepayers and is in the public interest. ELPC concedes that this second prong "is more subjective than the third prong, and easier for the Stipulation Parties to meet." (ELPC Br. at 13.)

Under this part of the test, "the stipulation offered by the signatory parties * * * must be viewed as a whole." *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, at 77-78 (Mar. 31, 2016). Yet none of the non-signatory parties analyzes the Stipulation as a package. Instead, they critique its continuation of an SFV rate design for residential customers; the total fixed charges to be paid by residential customers; and the parameters of the Stipulation's proposed low-income DSM program. For the reasons provided below, the Commission should reject the non-signatory parties' objections to the Stipulation and approve it in full without modification.

2.4.1. The Stipulation's fixed charges for residential customers are just and reasonable.

Customers in Columbia's SGS class currently pay $36.99 per month through three fixed monthly charges:

Monthly delivery charge:	$16.75
Rider IRP (Infrastructure Replacement Program):	$12.91
Capital Expenditure Program ("CEP") Rider:	$ 7.33
Total	$36.99

(*See* P.U.C.O. No. 2, Ninth Revised Sheet No. 16, Nineteenth Revised Sheet No. 27, and Seventh Revised Sheet No. 30d.; *see also* Tr. 36:13-18.)[3]

The first charge, Columbia's monthly delivery charge for SGS class customers, covers "a material portion of the costs of gas delivery service." (Columbia Ex. 7 (Feingold Testimony) at 34:25-26.) The second charge, Columbia's Rider IRP, recovers the costs associated with the Accelerated Mains Replacement Program, which is focused on modernizing significant segments of mainline pipe and associated facilities that present an existing hazard or have an increased probability of developing a leak; and the Hazardous Service Line Program, which maintains, repairs, and replaces service lines that present an existing or probable hazard to persons or property or that require a scheduled repair or replacement based on severity or location. (Columbia Ex. 14 (Slowbe Testimony) at 2:8-15; Columbia Ex. 4 (Thompson Testimony) at 12:26-38.) As to the third charge, Columbia's CEP includes four categories of capital investments: (a) Replacement / Public Improvement / Betterment; (b) Growth; (c) Support Services; and (d) Information Technology. (Columbia Ex. 4 at 21:16 – 22:19.) The CEP Rider recovers deferred depreciation expense, property taxes, and post-in-service carrying costs associated with those four categories and also a return on and of the CEP assets. (*See id.* at 20:36 – 21:6; Columbia Ex. 1, Application for Approval of an Alternative Rate Plan at 14.)

[3] A fourth fixed monthly charge, the Infrastructure Development Rider ("IDR"), varies annually depending on the infrastructure development costs recovered related to applicable economic development projects and, at the appropriate time, will be adjusted in a different proceeding. *See* R.C. 4929.165; Ohio Adm.Code 4901:1-43-04(B).

If the Commission approves the Stipulation without modification, Columbia will roll the Riders IRP and CEP plant through March 31, 2021 into the monthly delivery charge (Tr. 22:3-6; *see also* OCC Ex. 1 at 7:13-18) and, in 2023, customers will begin paying through those same three charges, as follows:

Monthly delivery charge:	$38.62
Rider IRP:	$ 0.73
CEP Rider:	$ 1.40
Total	$40.75

(Jt. Ex. 1, Appx. C and Appx. F, Original Sheet No. 1c.) Thus, if the Commission approves the Stipulation without modification, SGS customers will pay an additional $3.76 per month in fixed charges when Columbia's base rates go into effect from this case. (Columbia Ex. 35 at 3:36-38.)

After that, the monthly delivery charge will increase each year for two years, and the Rider IRP and CEP Rider charges will likely increase over the next five years. The monthly delivery charge for SGS customers will increase to $39.08 in 2024, and to $39.30 in 2025 and thereafter. (Jt. Ex. 1 at Appx. C.) For Rider IRP and the CEP Rider, which would both continue through 2027 and be updated each year (in May and September, respectively), the monthly charges for each rider would be capped. (*See* Jt. Ex. 1 at §§ II.F.1 and II.G.1.) The monthly rider caps and monthly delivery charges for SGS customers proposed in the Stipulation, along with the combined total maximum fixed charges, are as follows:

Year Charge Goes Into Effect	2023	2024	2025	2026	2027
Monthly Delivery Charge	$38.62	$39.08	$39.30	$39.30	$39.30
Rider IRP Rate Cap[4]	$2.77	$4.05	$5.35	$6.70	$8.47
CEP Rider Rate Cap	$3.41	$4.80	$6.15	$7.26	$8.74
Total Potential Maximum Charge	$44.80	$47.93	$50.80	$53.26	$56.51

[4] Columbia witness Thompson explained that the Rider IRP rate increases each year, even if Columbia replaces the same number of mains and lines each year, because it is cumulative; IRP-related costs incurred in 2022, for example, will start to be recovered in 2023 and continue to be recovered in 2024, 2025, 2026, and 2027, for example, and additional revenue requirement is included in the rider each year. (*See* Tr. 28:10 – 29:13.)

The non-signatory parties assert that these proposed fixed charges are too high. The relief they request from the Commission to remedy these "high" charges, however, varies.

CUB Ohio asserts that Columbia's residential customers are concerned about the fixed charges they are currently paying, and that the Stipulation's proposed rate increases will cause increased "concerns and frustrations." (CUB Ohio Br. at 13.) CUB Ohio asserts that "[h]igh fixed charges hurt low usage customers" because such customers "experience a greater percentage increase when fixed charges are increased." (*Id*. at 13-14.) CUB Ohio further asserts that "[h]igh fixed charges can significantly reduce incentives for consumers to reduce their consumption of natural gas" because it "remov[es] the price signal that would provide the short-term incentive to change behavior or [incent] investing in [energy efficient] technology." (*Id.* at 14, citing CUB Ohio Ex. 1 at 5.)[5] Rather than adopting the $3.5 million bill-payment assistance program proposed in the Stipulation to help customers pay the increased fixed charges, CUB Ohio argues that the Commission should "dismantl[e]" the SFV rate design. (*Id.* at 20.) More specifically, CUB Ohio witness Bullock recommends that the "base distribution revenue requirement for the residential class of customers should be recovered through a partially fixed charge and a partially volumetric charge." (*Id.* at 32, citing CUB Ohio Ex. 1 at 12.)

ELPC argues that residential customers will "have little incentive to curtail usage" because the "high fixed charge leaves only a small portion of the bill to be determined by volumetric gas usage." (ELPC Br. at 15.) ELPC further asserts that having fixed charges "will have an outsized effect on low-volume users, who are most often low-income customers." (*Id.*) ELPC argues that the Commission's prior approval of an SFV rate design was designed to address "Columbia's concern that energy efficiency would erode its revenue[,]" and that Columbia has now "canceled all but the low-income WarmChoice program * * * ." (*Id.* at 16.) Additionally, ELPC suggests that the increase in Columbia's fixed charges warrants a reconsideration of SFV rate design, in that the fixed charges have grown from $6.50 per month in 2008 to a potential combined charge of $58.01 by 2027. (*Id.*) ELPC asks the Commission to "either reject the Stipulation or require Columbia to accept a lower fixed customer charge * * * ." (*Id.* at 36.)

OPAE asserts that "the total current effective monthly delivery charge" for SGS customers (combining the monthly delivery charge with Rider IRP and the CEP Rider) is $34.65, and that the total charge increases to $56.51 under the Stipulation (based on the $39.30 monthly delivery charge, maximum Rider IRP charge of $8.47, and maximum CEP Rider charge of $8.74 in 2027). (OPAE Br. at 4.) OPAE argues that these proposed charges

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5 CUB Ohio witness Bullock actually makes this argument at page 4 of his testimony.

"are so high that they rise to a level of unreasonableness * * * ." (*Id.* at 5.) Citing the testimony of ELPC witness Rábago, OPAE further argues that the SFV rate design is "unjust and unreasonable" because it requires low-income, low-use customers "to pay the same fixed charges as high use customers" even though they "contribute very little to the costs causation behind those fixed charge[s]" and cannot pay "the increased costs." (*Id.*) According to OPAE, "[t]he size of the distribution system is determined by the collective demand of customers[,]" and "[l]ow-use customers place little demand on the system * * * ." (*Id.*) OPAE demands that the Commission "do something to control these ever-expanding fixed charges * * *." (*Id.*)

The Commission should reject the non-signatory parties' arguments against Columbia's fixed charges for customers in its SGS rate class for four reasons.

First, CUB Ohio and OPAE offer nothing to substantiate that Columbia's fixed rates are high for the services that Columbia is providing. (Unlike the other non-signatory parties, ELPC makes clear that it "does not question the amount of the rate increase" proposed in the Stipulation). (ELPC Br. at 1.)) The evidence shows that the monthly delivery charge for SGS class customers is not excessive. Columbia witness Russ Feingold, an independent consultant and former Vice President of Black & Veatch Management Consulting, LLC. (*see id.* at 1:3-15) who has testified before the Commission on numerous occasions regarding cost of service studies and straight fixed variable rate design, including in Vectren Energy Delivery of Ohio's recent rate case (Case No. 18-0298-GA-AIR) (*see* Columbia Ex. 7 at 1:37 – 2:2), performed a cost of service study which determined that the customer-related and other fixed infrastructure-related costs incurred by Columbia to serve the SGS rate class were $42.78/month – significantly more than the current monthly delivery charge for the SGS class *or* the Stipulated monthly delivery charges for 2023 through 2027. (*See id.* at 34:9-20 and Attachment RAF-3.) CUB Ohio and OPAE also do not challenge the stipulated rate base as of date certain; calculation of current operating income; operations and maintenance expense; or the allocation of the total base rate increase or the rider revenue requirements to the SGS class. They do not oppose the Accelerated Mains Replacement Program and the Hazardous Service Line Program, the costs of which are recovered through Rider IRP, or argue that fewer hazardous mains and service lines should be replaced over the next five years in order to lower Rider IRP charges. Similarly, they do not argue that Columbia should cut back on its replacement of facilities to improve system operating conditions, its installation of facilities required to provide service to new customers, or any of the other types of capital expenditures recoverable through the CEP Rider. (*See* Columbia Ex. 4 at 21:14 – 22:19.) They simply assert that Columbia's fixed charges are high, without regard to the necessary services those charges will allow Columbia to provide.

Second, given that the costs recovered through the monthly delivery charge, Rider IRP, and CEP Rider are fixed costs, the non-signatory parties' arguments do not justify the recovery of those costs through volumetric rates. Contrary to ELPC witness Rábago, Columbia witness Feingold explained that the costs to deliver natural gas to residential customers do not vary by usage. Feingold testified:

> It is a generally accepted concept in the utility industry that customer-related costs are incurred by a gas utility to attach a customer to the distribution system, meter any gas usage, and maintain the customer's account. Customer costs are a function of the number of customers served and continue to be incurred whether or not the customer uses any gas. They may include capital costs associated with minimum size distribution mains, services, meters, regulators, and customer service and accounting expenses.

(*Id.* at 7:29-35.) Put differently, the "delivery service costs of a gas distribution utility" – *i.e.*, "the non-gas costs incurred by the utility to move gas volumes from its city-gates to customers' premises" – "are primarily fixed costs * * * and do not vary as a function of the volume of gas consumed by customers." (*Id.* at 8:12-19 and n.2.) Feingold testified that the "fixed nature of these costs" is supported by significant evidence, including the National Association of Regulatory Utility Commissioners (NARUC) Staff Subcommittee on Gas's 1989 *Gas Distribution Rate Design Manual* and the fact that natural gas utilities do not weather normalize rate base. (*Id.* at 8:21 – 9:9.) And because they are fixed costs, Feingold opined, it makes sense that they be recovered through fixed charges "to the extent practical." (Columbia Ex. 7 at 30:32 – 31:2.) Similarly, Feingold explained that Rider IRP and the CEP Rider "enable the recovery of a material portion of Columbia's fixed distribution cost," making it "entirely appropriate to [recover] these costs on a fixed charge basis * * * ." (*Id.* at 34:36 – 35:2.) Feingold opined that "fixed charges promote fairness to all customers because the customer's bill reflects the actual average cost of providing gas delivery service * * * ." (*Id.* at 31:4-5.)

Third, the Commission has long rejected the argument that SFV rate designs are unjust or unreasonable if they negatively affect low-usage customers. OPAE in particular has been making such arguments for over a decade, and the Commission and Ohio Supreme Court have both rejected them. In *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 125 Ohio St.3d 57, 2010-Ohio-134, OPAE challenged "the commission's decision to implement [an] SFV rate design in Duke's and Dominion's rate cases" on several grounds, including that "the SFV rate design shifts cost responsibility from high-use, high-income customers to low-use, average-use, and low-income customers." *Ohio Consumers' Counsel*, 2010-Ohio-134, ¶¶ 12, 29. The Commission and the Ohio Supreme

Court agreed that adopting an SFV rate design resulted in "a shift in cost-sharing[,]" but found that "the shift in costs [does not result] in an unfair subsidy" (*id.* at ¶ 29), holding:

> The commission recognized that as with any rate-design change, some customers will be better off and some will be worse off under the SFV rate design. And in fact, the commission found that the SFV rate design will adversely impact low-use customers more, and high-use customers will actually experience a rate reduction. The commission explained that this situation resulted from past inequities in the previous rate design that allowed low-use customers to avoid paying their share of fixed costs. According to the commission, because utilities recovered most of their fixed costs under traditional rate design through a volumetric component, high-use customers were overpaying their own fixed costs and subsidizing low-use customers. The SFV rate design addresses this problem by spreading fixed costs more evenly among all customers and thereby requiring low-use customers to pay a more proportionate share of those costs. Thus, some low-use residential customers may pay more under the new rate design because those customers are no longer being subsidized by higher-use customers.

Id. ¶ 30. The Commission also rejected OPAE's argument "that shifting costs from high-use to low-use customers is inequitable because high users make greater use of the distribution system and should bear a greater share of its costs." *Id.* ¶ 31. The Court noted that "[t]he commission found that virtually all the utility's distribution costs are fixed and that the cost to serve a residential customer is largely the same regardless of how much gas a customer uses." *Id.* Columbia witness Feingold reached the same conclusion in this case, explaining that "the costs incurred by Columbia are relatively uniform, on average, across the range of customers in the [SGS] rate class." (Columbia Ex. 7 at 35:33-35.)

Fourth, CUB Ohio and ELPC's concerns that the use of an SFV rate design will not send the proper price signals to residential customers to reduce their consumption of natural gas make less sense at a time of "high energy prices." (CUB Ohio Br. at 1) (*See also* ELPC Br. at 1 n. 1, referencing natural gas price forecasts for winter 2022-2023.) Residential customers may not reduce consumption in response to fixed costs, but they will reduce consumption in response to high natural gas commodity costs. Moreover, as Columbia witness Feingold testified, "SFV rates minimize the distortion of gas commodity prices, thus promoting more accurate commodity price signals to the customer * * * ." (Columbia Ex. 7 at 36:15-17.)

For all of these reasons, the non-signatory parties have not demonstrated that Columbia's continued reliance on an SFV rate design for SGS class customers deprives the Stipulation, as a package, of benefits to consumers. For low-income customers needing assistance paying their bills, the Stipulation proposes "a $3.5 million customer bill-payment assistance program," most of which will be funded by Columbia's shareholders. (Jt. Ex. 1 at § II.I.) CUB Ohio concedes that "[a]ssisting those in need is beneficial to ratepayers and the public." (CUB Ohio Br. at 19.) And as CUB Ohio further notes, Columbia's website offers information regarding "multiple options available to customers in need of bill payment assistance, including" The Winter Crisis Program, the Percentage of Income Payment Plan (or PIPP), the Home Energy Assistance Program (HEAP), and HeatShare. (*Id*. at 20, citing OPAE Ex. 1 (Sarver Testimony) at 9-10.)

2.4.2. The non-signatory parties do not dispute that the Stipulation's proposal to continue Columbia's WarmChoice® program and provide bill payment assistance would benefit customers.

CUB Ohio and ELPC's briefs acknowledge that the Commission does not weigh stipulations by considering whether "different or additional provisions * * * would better benefit ratepayers and the public interest * * * ." (CUB Ohio Br. at 16; *see also* ELPC Br. at 12.) "The question before the Commission is not whether there are other mechanisms that would better benefit ratepayers and the public interest but whether the Stipulation, as a package, benefits ratepayers and the public interest." *In the Matter of the Application of The East Ohio Gas Company dba Dominion Energy Ohio for Approval of an Alternative Form of Regulation to Establish a Capital Expenditure Program Rider Mechanism*, Case No. 19-468-GA-ALT, Opinion and Order, ¶ 73 (Dec. 30, 2020). And yet, with regard to Columbia's DSM program, CUB Ohio, ELPC, and OPAE focus almost exclusively on the benefits that Columbia's DSM program has historically provided, and the extra benefit that continuing Columbia's non-low-income DSM programs, and increasing funding for Columbia's WarmChoice® program, would provide if the Stipulation were modified. (*See*, *e.g.*, ELPC Br. at 15 (noting generally that Columbia's DSM program "benefitted customers"); OPAE Br. at 7 (asserting that "the non-low-income DSM programs that are being withdrawn" under the Stipulation "would have been a benefit to customers").)

CUB Ohio cites Columbia's comments for the Commission's energy efficiency workshop (*see* CUB Ohio Br. at 15), which stated that "[t]he energy efficiency measures undertaken through Columbia's DSM programs will save customers over 113.1 Bcf of natural gas over the life of the measures." (OPAE Ex. 1, Exhibit JFS-2, Columbia Gas of Ohio Energy Efficiency Workshop Comments (Mar. 2, 2022), *cited in* CUB Ex. 1 at 6.) CUB Ohio also notes the "non-natural gas and non-energy benefits" from Columbia's DSM program, "including lower water, sewer, and electric bills; avoided CO-2 emissions; direct economic benefits; and increased tax-revenue for local governments." (*Id.* at 18, citing Columbia Ex. 19 (Poe Testimony) at 3.) And CUB Ohio notes Columbia's past rebates on smart thermostats and appliances. (*See* CUB Ohio Br. at 15.) CUB Ohio argues that customers will need the cost and energy savings from Columbia's non-low-income DSM programs to mitigate inflation, energy price increases, and climate change (*see id.*), and that the market "cannot achieve the same results or reach the same number of customers as utility programs." (*Id.* at 17.) CUB Ohio further criticizes the use of DSM funds for bill payment assistance, which it argues will "incentivize[ ] *more* use of natural gas" and do nothing to lower bills long-term. (*Id.* at 20.)

OPAE begins by expressing its support, "without reservation," for Columbia's proposal ("left undisturbed by the Stipulation") to increase the cap on income eligibility for WarmChoice® to "200% of the federal poverty guidelines * * * ." (OPAE Br. at 8.) OPAE states that the change "will bring WarmChoice in line with the eligibility requirements for other assistance programs[,] thereby * * * reducing administrative costs[,]" and "will also enable the program to reach more people." (*Id.* at 8-9.) However, OPAE suggests that increasing WarmChoice® funding to "the original proposed budget levels found in the Application[,]" would allow Columbia to serve additional customers. (*Id.* at 9.) OPAE also opposes the "two new [management] audits" of WarmChoice® that would be required under the Stipulation (*id.*), "at the mid-point and at the end of the five-year term of the Demand Side Management Program" (Jt. Ex. 1 at 13), because they would be "paid for out of the WarmChoice budget." (OPAE Br. at 9-10.) Additionally, OPAE opposes the provision of the Stipulation that prohibits property owners from "receiving weatherization assistance for [more than] one rental premise per calendar year during the five-year term of the DSM Program." (Jt. Ex. 1 at 13.) OPAE asserts that "rental premise" is ambiguous (OPAE Br. at 11); that the limitation will prevent some renters from receiving weatherization benefits (*id.*, citing OPAE Ex. 2 at 9-10); and that "this provision would * * * eliminate the efficiency that can be created [when] numerous low-income customers live in * * * the same area" (*id.* at 11-12).

OPAE also opposes the Stipulation's proposal to shift up to $1.2 million from WarmChoice® to a bill-payment assistance program. (*See* OPAE Br. at 12, citing Jt. Ex. 1 at 19-20.) OPAE states that it "supports bill payment assistance as a short term, tactical fix for a customer's problem." (OPAE Br. at 12.) However, it asserts that "weatherization services" like WarmChoice® provide "long-term, strategic solutions." (*Id.*) OPAE also critiques the fact that the Stipulation leaves it to Columbia, Staff, and OCC to determine "the criteria for the bill payment assistance program," and lists certain default criteria in case "agreement cannot be reached." (Jt. Ex. 1 at 19.) OPAE argues that the lack of settled criteria render this "not a program" and asserts that OCC has no "statutory authority * * * to direct and dispense customer funds." (OPAE Br. at 13.) Finally, OPAE asserts that shifting money from WarmChoice® to bill payment assistance would redirect it towards "supporting Columbia's bottom line" – both because it would help customers pay their bills (which, OPAE asserts, "line[s] the coffers of Columbia and its shareholders") and because the Stipulation allows Columbia to recover its costs to administer the bill payment assistance program (up to 10% of total program funds). (OPAE Br. at 13.)

As stated above, the non-signatory parties' arguments are irrelevant to the test the Commission applies to stipulations. "[T]he Commission's task in evaluating a settlement agreement under the three-part test is not to determine whether it reflects the best possible result or outcome for customers." *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Alternative Form of Regulation to Establish a Capital Expenditure Program Rider Mechanism*, Case No. 19-791-GA-ALT, Opinion and Order, ¶ 63 (Apr. 21, 2021). It is "whether the Stipulation, as a package, benefits ratepayers and the public interest." (Citation omitted.) *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case No. 21-887-EL-AIR, Opinion and Order, ¶ 121 (Dec. 14, 2022).

Further, no party disputes that the WarmChoice® program provides benefits to customers. In particular, WarmChoice® provides income-qualified homeowners and renters with no-cost, whole-home energy efficiency services, including whole-home diagnostic energy and safety inspections and energy efficiency upgrades, which may include attic, wall, floor, duct, and pipe insulation, air leakage sealing, and replacement of defective natural-gas-fueled water and/or space heating appliances. (Columbia Ex. 19 at 6.) The Stipulation proposes over $14.8 million in funding annually through 2027 for the WarmChoice® program (Jt. Ex. 1 at § II.D.1.), which Staff witness Ripke testified "should ensure an adequate amount of overall funding" for the program. (Staff Ex. 6 at 3:3.) The continued WarmChoice® program will also include changes such as additional management audits, new parameters on eligible participants, and the removal of Columbia's shared savings opportunity. (OCC Ex. 1 at 8; Columbia Ex. 19 at 6:29-38.)

Additionally, no party denies that helping low-income residential customers pay their bills (*see id.* at § II.I.) provides a benefit. Again, OPAE states that it generally "supports bill payment assistance as a short term, tactical fix for a customer's problem" (OPAE Br. at 12), and CUB Ohio agrees with OPAE's description of the program (CUB Ohio Br. at 21). The proposed bill payment assistance program, which is a new benefit to customers, will be primarily paid for by shareholders. (OCC Ex. 1 at 9:20 – 10:1.) Although the final criteria for participation in the program remain to be resolved through further discussion between Columbia, Staff, and OCC, the funding levels, funding sources, and default participation criteria are all set forth in the Stipulation. (*See* Jt. Ex. 1 at § II.I.)

For all of these reasons, the Commission should conclude that the DSM and bill payment assistance portions of the Stipulation help the settlement, as a package, benefit ratepayers and the public interest. (*See* Columbia Ex. 35 at 4:4-6 and 4:9-12.)

2.4.3. The stipulated ROE is reasonable and supported by the evidence.

As indicated in Columbia's initial post-hearing brief, the Stipulation proposes a return on equity ("ROE") of 9.60 percent and a rate of return ("ROR") of 7.08 percent. (Jt. Ex. 1 at § II.A.1.) Columbia noted that these returns are well below the returns proposed by Columbia in its Application (an ROE of 10.95%, later updated to 11.30%, and an ROR of 7.85%, later updated to 7.94%). (Columbia Ex. 17 (Moul Initial Testimony) at 1:27-30; Columbia Ex. 29 (Moul Supplemental Testimony) at 10:1-4.) Columbia explained that these lower rates of return benefit customers because (along with other changes) they result in a reduction in rate base and a lower monthly fixed charge for residential customers. (*See* Columbia Br. at 9-10.)

The non-signatory parties argue that Columbia's initial proposed rates of return were intentionally inflated or otherwise excessive, and thus the signatory parties' settlement at a lower agreed rate of return is not evidence of any benefit to customers. (*See* CUB Ohio Br. at 8; ELPC Br. at 13, 17; OPAE Br. at 6.) Neither CUB Ohio nor OPAE presents an analysis to supports its critiques of Columbia's Application.

Although the non-signatory parties assert that Columbia's original proposed ROE was excessive, Columbia did not simply throw out a number. Columbia's witness Paul Moul arrived at his 10.95% ROE recommendation by utilizing three different market model approaches: Discounted Cash Flow (DCF), Capital Asset Pricing Model (CAPM), and Risk Premium. (Columbia Ex. 17 at 32.)

Moul used a proxy gas group of eight gas utility companies he called the Gas Group. (*Id*. at 3.) He began with a DCF analysis designed to determine "the value of an asset as the present value of future expected cash flows discounted at the appropriate risk-adjusted rate of return." (*Id*.) He used the six-month average dividend yield for the Gas Group of 3.56% and adjusted it thirteen basis points in a generally accepted, forward looking manner to reach 3.69%. (*Id*. at 15, 22 and Attachment PRM-7.) He next calculated an appropriate growth rate, 6.75%, based on a "company-specific growth analysis, which focuses principally upon five-year forecasts of earnings per share * * * [and] conforms with the type of analysis that influences investors' expectations of their actual total return." (*Id*. at 17.) He applied a leverage adjustment of 0.93% to account for the risk differential between market-value and book-value capital structures. (*Id.* at 19-20.) Moul arrived at a DCF rate of 11.37% (3.69% + 6.75% + 0.93%), with no adjustment for flotation. (*Id*. at 23.)

Moul turned next to the Risk Premium model to evaluate Columbia's cost of equity "by corporate bond yields plus a premium to account for the fact that common equity is exposed to greater investment risk than debt capital." (*Id*. at 23.) He analyzed historical and forecasted interest rates to estimate a 3.75% corporate bond yield based on A-rated public utility debt. (*Id.* at 23-25.) He then "analyzed the results from 2021 SBBI Yearbook, Stocks, Bonds, Bills and Inflation" to "develop an appropriate equity risk premium" of 6.75% (*Id*. at 25-26.) This produced a cost of equity of 10.50% (3.75% + 6.75%), again excluding flotation costs. (*Id.* at 26.)

Moul then employed the CAPM method. The "CAPM specifically accounts for differences in systematic risk (i.e., market risk as measured by the beta) between an individual firm or group of firms and the entire market of equities." (*Id.* at 27.) To compute the cost of equity with the CAPM, he analyzed three components: "a risk-free rate of return (Rf), the beta measure of systematic risk (β), and the market risk premium (Rm-Rf) derived from the total return on the market of equities reduced by the risk-free rate of return." (*Id*.) Using multiple well-known and reliable sources of historical, current, and forecasted data, Mr. Moul determined the risk-free rate of return to be 2.75% based on 30-year Treasury Yields, a leveraged *Value Line* beta of 0.98 for the book value capital structure of the Gas Group, and a market premium of 8.92% based on historical and forecasted returns. (*Id*. at 27-29.) Because "Columbia is relatively smaller than the Gas Group, * * * a mid-cap [size] adjustment of 1.02%" was applied. (*Id*. at 29.) This produced a cost of equity of 12.51% (2.75% + (0.98 x 8.92%) + 1.02%), excluding flotation costs. (*Id*. at 26, 30.)

Mr. Moul concluded that 10.95% is a reasonable ROE based on the three market-based models he used. (*Id*. at 32.) Mr. Moul supplemented his testimony in May 2022 to account for the changes in financial conditions from inflation and recommended increasing the ROE to "at least 11.30%." (Columbia Ex. 29 at 10.) Yet the parties stipulated to an ROE that was significantly lower.

ELPC witness Rábago asserts that 9.6% is still "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 Br. at 18, quoting ELPC Ex. 1 at 11.) ELPC quotes OCC witness Dr. Zhu's filed testimony, which stated that "risk" is "[t]he most important factor in determining the required [return on equity]" (ELPC Br. at 17, quoting OCC Ex. 4 at 13), and argues that the Stipulation's proposed increase in the "fixed customer charge" and "elimination of the non-low-income DSM programs * * * minimizes the Company's risk" by, respectively, "guarantee[ing] the Company's revenue" and "guarantee[ing] the Company will sell more gas * * * ." (ELPC Br. at 17.)

The Commission should note that ELPC's witness Rábago has no experience with Ohio's competitive natural gas distribution industry. His experience is with electric utilities having certified service territories. (*See* ELPC Ex. 1 at 3-4.) Labeling Columbia a "monopoly" suggests he is unaware of Ohio law and Commission precedent encouraging competition between natural gas distribution utilities. *See, e.g., In the Matter of the Complaint of Suburban Natural Gas Co. v. Columbia Gas of Ohio, Inc.*, Case No. 17-2168-GA-CSS, Opinion and Order, at ¶ 52 (Apr. 10, 2019), *aff'd*, *In re Complaint of Suburban Natural Gas Co. v. Columbia Gas of Ohio, Inc.*, 162 Ohio St.3d 162, 2020-Ohio-5221, ¶ 30. While Moul recognized how competition factors into a proper assessment of Columbia's financial risk (*see* Columbia Ex. 17 at 5), Rábago appears oblivious to it. Consequently, the Commission should not give any weight to Rábago's opinions about Columbia's financial risk or the stipulated ROE.

There is also no evidence to support Rábago's assertions that fixed customer charges and eliminating non-low-income DSM programs lowers Columbia's risk. ELPC's assumption ignores the competitive marketplace, which offers energy efficiency services and products to replace Columbia's DSM program offerings. There is no dispute that "non-utilities can and do provide EE services." (OPAE Ex. 1, Exhibit JFS-2 at 5.) If anything, the risk *increases* from the lost opportunity to earn additional revenue through the "shared savings" feature of the DSM program. (*See* Jt. Ex. 1 at 12).

The record establishes that Columbia's cost of equity recommendation took into account "the risk implications" of the SFV rate design for regulated gas utilities including Columbia. (Columbia Ex. 17 at 6-7.) Moul testified how the market prices of gas utility company common stock reflect the expectations of investors related to regulatory mechanisms that are designed to assure recovery of fixed costs and that SFV rate designs and other forms of revenue decoupling were "baked in" to his cost of equity analysis using regulated natural gas proxy companies and multiple models. (*Id*. at 7.) Thus, the Stipulation's mere continuation of the existing SFV rate design, already properly "baked in" to the ROE analysis, did not cause any "reduction" of Columbia's financial risk. ELPC's opposition to the stipulated ROE is just another misguided challenge to SFV.

ELPC also makes much of the fact that OCC witness Zhu recommended a lower ROE of 8.65%. (ELPC Br. at 7-8). Yet, OCC filed testimony supporting the agreed upon rate of return (which includes the return on equity component). (*See* OCC Ex. 1 at 6:17-19.) Additionally, the stipulated 9.60% is much closer to the midpoint (9.545%) of Staff's proposed range for ROE (9.04% to 10.05%). (Staff Ex. 1 (Staff Report) at 27.) Staff supports the stipulated ROE. (*See* Staff Ex. 8 at 5:1-2; *see also* Staff Ex. 2 (Zell Testimony) at 3:14-16 (defending Staff's rate of return range as "market-based and inclusive of financial and business risks faced by Columbia").)

Staff developed its recommended range for rate of return "using a cost of capital approach which reflects a market-derived cost of equity and the actual cost of debt for the Applicant." (Staff Ex. 1 at 26.) To calculate the cost of common equity, the Staff averaged the results of the CAPM and the DCF model. For both models, Staff selected a group of comparable companies using the S&P peer company selection tool, which include a universe of all utilities in the United States. (*Id*.)

For its CAPM analysis, Staff used the CAPM formula of: CAPM = Risk Free Rate + (Beta * Equity Risk Premium). For the Risk Free Rate, Staff used the weighted average of 10-year and 30-year monthly closing Treasury Yields for the period from September 1, 1991 through September 1, 2021. The averaged 10-year yield is 4.07 percent, and the averaged 30-year yield is 4.63 percent. The average of both was 4.35 percent. For beta, Staff employed the average of Standard & Poor's (S&P) betas of the comparable companies, which was 0.8. And Staff used an equity market risk premium of 6.21 percent from Fairness Finance, calculated as the Market Risk Rate – Risk Free Rate. That produced a CAPM calculation of 4.35% + 0.8(6.21%) = 9.32%. (*Id*.)

For its DCF analysis, for each comparable company, Staff used the annual average stock price, the sum of the last four quarterly dividends, and estimates of the expected rate of growth of earnings. The stock price used was the average daily closing price for the period from September 14, 2020 through September 10, 2021. The DCF model assumes that earnings growth and dividends growth are the same. The Staff averaged earnings per share estimates from Yahoo Finance, Zack's, and Value Line to get DCF growth estimates for each company. (*Id.* at 27.) Dividends were assumed to grow at a rate derived from financial analysts' growth estimates for the first five years (i.e., long term growth rate). From the twenty-fifth year on, the growth rate was assumed to equal the long-term growth rate in GNP. For the sixth through twenty-fourth years, dividends vary between the two rates in a linear fashion. The long-term growth rate in GNP was the average annual change in GNP from the U.S. Department of Commerce for 1929 through 2020. Based on long-term GNP growth, the respective Company DCF growth estimate and dividend, a stream of annual dividends was calculated. The internal rate of return derived from the dividend stream and the stock price was used for Staff's non-constant growth DCF cost of equity estimate. Staff's DCF analysis produced a ROE of 9.60% by averaging the comparable group non-constant DCF cost of equity estimates (*Id.*)[6]

Staff then averaged the DCF result with the CAPM calculation and adjusted for uncertainty and issuance costs to arrive at a recommended range of 9.04 percent to 10.05 percent. (*Id.*) As noted above, the stipulated ROE is in the middle of Staff's range. *Compare In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case No. 21-887-EL-AIR, Opinion and Order, ¶ 132 (Dec. 14, 2022) (accepting a stipulated ROE of 9.50% and noting that "the proposed ROE is squarely in the range recommended by Staff").

It should come as no surprise that OCC, Staff, and Columbia independently arrived at differing estimates of ROE. As the Commission has long recognized:

> [A]lthough the cost of capital analyses generally presented in proceedings of this type have an aura of precision about them, the fact is that they are fraught with judgments and assumptions and, had the sponsoring witness made even slightly different choices with respect to any of the factors which must be considered, swings of many basis points might well have been produced. Finally, the fact that the Commission selects one recommendation over another does not mean that any of the recommendations are "wrong", save in those instances where internal inconsistencies render the recommendation unacceptable even under the witnesses own approach, but merely that the Commission, in a necessary exercise of its judgment, must select the recommendation it believes to be the most appropriate for application in a given case in light of the evidence.

In re Dayton Power & Light Co., Case No. 78-92-EL-AIR, 29 P.U.R. 4th 145, Opinion and Order at 26 (Mar. 9, 1979) (quoted in part in *In re Columbus Southern Power*, 134 Ohio St.3d

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[6] Notably, the stipulated ROE matches the result of Staff's DCF's analysis. This coincidence may provide the Commission additional assurance of the reasonableness of 9.60%, since the Commission for a long time viewed the DCF method as the "most reliable measure" of ROE. *In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Electric Service,* Case No. 91-418-EL-AIR, Opinion and Order, 1992 Ohio PUC LEXIS 318, at *196 (May 12, 1992). In later proceedings, the Commission acknowledged that "averaging * * * methodologies helps to offset any anomalies that may be present with reliance on only one model." *In the Matter of the Application of Cincinnati Bell Telephone Company for Approval of a Retail Pricing Plan Which May Result in Future Rate Increases and For a New Alternative Regulation Plan,* Case No. 96-899-TP-ALT, Opinion and Order, 1999 Ohio PUC LEXIS 620, at *37 (Nov. 4, 1999). Staff in this case properly applied CAPM and DCF and Moul reasonably used all three market-based models.

392, 2012-Ohio-5690, 983 N.E.2d 276, at ¶37, and *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.2d 71, 79, 413 N.E.2d 799 (1980)). Here, the Signatory Parties are not asking the Commission to select one recommendation over another. Rather, the *only* parties to actually have conducted cost of capital analyzes have come together in the Joint Stipulation, following months of negotiations, and agreed on a reasonable ROE which is very near the mid-point of Staff's originally recommended range and well below the mid-point of the wider range formed from OCC's and Columbia's witness recommendations. Accordingly, the Commission can safely conclude that the stipulated ROE of 9.60% represents a benefit to ratepayers.

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

The arguments posed by the non-signatory parties on the third prong of the Commission's test are of no avail and should be entirely rejected by the Commission, as the Stipulation does not violate any important regulatory principle or practice. Rather, as Columbia (and other Signatory Parties) explained in their respective initial briefs, the Stipulation supports and advances many of the policy considerations in R.C. 4929.02 that the Commission balances as it reviews the Stipulation. (*See, e.g.,* Columbia Br. at 14-15.)

2.5.1. Columbia's continued use of a straight fixed variable rate design for residential customers is consistent with Commission policy and practice.

As explained in Columbia's initial brief (at 15), the Stipulation promotes important regulatory principles by maintaining a straight fixed variable (SFV) rate design for the SGS class. Indeed, on multiple occasions the Commission expressly encouraged utilities to utilize the SFV rate design. Nonetheless, the non-signatory parties contend that Columbia's continued use of an SFV rate design for its residential customers is contrary to important regulatory principles. The non-signatory parties do not offer any new evidence to support the Commission's abandonment of its longstanding rate design policy for residential customers.

CUB Ohio argues that "[t]he codified policies of the state as to natural gas service are replete with dedicated goals that encourage customer control of their usage and bills * * * ." (CUB Ohio Br. at 23-24.) CUB Ohio cites R.C. 4929.02(A)(12), which says that it is state policy to "[p]romote an alignment of natural gas company interests with consumer interest in energy efficiency and energy conservation." CUB Ohio further asserts that "increased fixed charges" violate "both the letter and spirit of the Commission's charge 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." (CUB Ohio Br. at 24.) CUB Ohio witness Bullock's testimony clarifies that this "charge" comes from R.C. 4905.70. (CUB Ohio Ex. 1 at 5:9-12.) Finally, CUB Ohio argues that the Stipulation's "high fixed charges" are "unfair to most (and especially low usage) customers; discriminatory; and perpetuate waste and inefficient use of natural gas resources." (CUB Ohio Br. at 27.) CUB Ohio asserts that it is unfair for SGS customers to pay the same monthly delivery charge regardless of usage. (*Id.*) CUB Ohio further asserts that a "high fixed charge does not provide accurate price signals" to encourage investment in energy efficiency or conservation. (*Id.* at 28.)

ELPC offers much the same arguments. ELPC asserts that the purportedly "excessive" fixed charges proposed in the Stipulation violate R.C. 4929.02(A)(12) because they "send[ ] the wrong price signals and discourage efficiency." (ELPC Br. at 25.) ELPC argues that fixed charges violate principles of cost-causation, because "high-volume consumers" put more "strain on the system" and require greater "long-term investment in the system." (*Id.* at 26.) Accordingly, ELPC asserts, fixed charges require low-use, low-income customers to subsidize high-use, high-income customers. (*Id.*, citing ELPC Ex. 1 at 28:18-20.) ELPC further asserts that low-income customers use less gas, meaning that low-income customers will pay a higher percentage of their bills as fixed charges that they cannot reduce. (*Id.* at 27.) ELPC also asserts that Columbia's affiliates use lower residential fixed charges paired with volumetric rates. (*See id.* at 29-30.)[7]

The non-signatory parties offer no arguments the Commission and the Ohio Supreme Court have not already rejected. As CUB Ohio and ELPC concede, the Commission has consistently endorsed the SFV rate design for over a decade. (*See* CUB Ohio Br. at 3; ELPC Br. at 1, 15; *see also* Columbia Br. at 15.) The Supreme Court of Ohio has also twice affirmed the SFV rate designs. *See Ohio Consumers' Counsel v. Pub. Util. Comm.*, 125 Ohio St.3d 57, 2010-Ohio-134, at ¶ 4 (2010); *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 127 Ohio St.3d 524, 2010-Ohio-6239 (2010). In those cases, appellants argued that the Commission violated various regulatory principles in adopting the SFV rate design, including the ones cited by the non-signatory parties. *Ohio Consumers' Counsel*, 125 Ohio St.3d 57, at ¶ 27; *Ohio Consumers' Counsel*, 127 Ohio St.3d 524, at ¶ 24. But in each case the Ohio Supreme Court disagreed. *Ohio Consumers' Counsel*, 125 Ohio St.3d 57, at ¶ 15-18 (finding that the Commission's policy decision to adopt SFV was reasonable); *Ohio Consumers' Counsel*, 127 Ohio St.3d 524, at ¶ 2 (affirming the Commission's orders that

[7] As described in Columbia's separate Motion to Strike (filed December 22), the discussion of the fixed rates proposed or charged by Columbia's affiliates on pages 29-30 of ELPC's Brief should be stricken and not considered by the Commission.

approved the SFV rate design for Vectren as being within the lawful and reasonable discretion of the Commission). In the first case, the Court specifically rejected arguments "that the SFV rate design violates" R.C. 4929.02 and R.C. 4905.70, holding:

> The General Assembly left it to the commission to determine how best to carry out the state's policy goals in R.C. 4929.02(A)(4) and 4905.70. Moreover, conservation is just one of many factors set forth in R.C. 4929.02 that the commission must balance in determining an appropriate natural-gas rate design. *See* R.C. 4929.02(A)(12).
>
> Here, the commission found that the SFV rate design * * * better achieved the stated public policy goals. Absent a demonstration that the commission's order is clearly unsupported by the record, it will not be disturbed on appeal.

Ohio Consumers' Counsel, 127 Ohio St.3d 57, ¶¶ 40-41.

CUB Ohio now asks the Commission to take a "second look at SFV." (CUB Ohio Br. at 31.) So, too, does ELPC, which asserts that "much of the [Commission's] precedent" regarding SFV was originally set in 2008 when fixed prices were lower. (ELPC Br. at 16.) But ELPC's assertion is incorrect. The Commission reaffirmed its previous position regarding SFV designs when it adopted Vectren's rate case stipulation in 2019. *See In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc., for Approval of an Increase in Gas Rates*, Case Nos. 18-298-GA-AIR, *et al.*, Opinion and Order (Aug. 28, 2019). Intervenors in that case argued that it was "unreasonable to continue the [SFV] design" because the "factors which the Commission previously used to justify the SFV rate design have changed significantly * * *." *Id.* at ¶ 12. The Commission disagreed, noting that it has long established "that the SFV rate design is the appropriate rate design for natural gas company distribution rates * * *." *Id.* at ¶ 47. The Commission explained that the SFV rate design provides "a more equitable cost allocation among residential customers because the costs of providing distribution service are principally fixed and each residential customer should bear an equal proportion of the distribution costs." *Id.* at ¶ 48.

OPAE made similar arguments in Suburban's recent rate case, contending that "the SFV rate design sends improper price signals to customers, discourages energy efficiency, and disproportionately affects low-usage residential customers." *See In the Matter of the Application of Suburban Natural Gas Company for an Increase in Gas Distribution Rates, Tariff Approval, and Certain Accounting Authority*, Case Nos. 18-1205-GA-AIR, *et al.*, Opinion and Order, at ¶ 127 (Sept. 26, 2019). The Commission once again disagreed. *Id.* at ¶ 131. Instead, the Commission reaffirmed its 2017 Opinion and Order approving

Suburban's SFV rate design, while citing to the Ohio Supreme Court's adoption of SFV rate designs. *Id.*; *See also In the Matter of the Application of Suburban Natural Gas Company for Approval of an Alternative Form of Regulation to Initiate a Revenue Decoupling Mechanism*, Case No. 17-594-GA-ALT, Finding and Order, at ¶ 35 (Nov. 1, 2017) (holding that the SFV rate design "provides significant customer benefits, such as more stable customer bills throughout the entire year, better price signals to consumers, and more equitable cost allocations among customers, as well as greater conservation by diminishing the utility's incentive to increase its gas sales.").

The testimony of Columbia witness Feingold supports each of the factual findings in the recent *Vectren* and *Suburban* cases. Feingold testified that the SFV rate design follows the "matching principle," which acknowledges that "customers should be charged for utility service based on the costs of producing the type and level of service they receive." (Columbia Ex. 7 at 35:35-37—36:1-2.) He testified that the use of an SFV rate design for Columbia's SGS class "reflects the cost causation characteristics of gas delivery service," in that SGS class customers "pay a flat monthly fee" for Columbia's fixed "costs of gas delivery service * * * ." (*Id.* at 35:18-33.) He testified that SFV rates "track embedded costs more accurately, thus eliminating intra-class subsidies and undue discrimination within the * * * [SGS] rate classes." (*Id.* at 36:18-20.) He also testified that "SFV rates minimize the distortion of gas commodity prices, thus promoting more accurate commodity price signals to the customer * * * ." (*Id.* at 36:15-17.) Moreover, he opined that the SFV rate design provides customer bill stability, minimizes the distortion of gas commodity prices, and represent a simple and easily understood rate. (*See id.* at 36:15-25.) And, he testified that "SFV rates eliminate the financial incentive for the gas utility to increase sales[,] which also positions the gas utility to pursue conservation and efficiency activities." (*Id.* at 36:30-32.) (Under the Stipulation, Columbia will continue to offer its WarmChoice® program. *See infra.*)

The Stipulation's implementation of a SFV rate design, therefore, is consistent with the Commission's past rulings, does not violate any Commission rules, regulation, or policies, and affirms long-standing regulatory principles.

2.5.2. Columbia's continuation of its WarmChoice® program furthers the state policies to promote energy efficiency and conservation.

ELPC asserts that the Stipulation's DSM provisions fail to "promote the efficient use of energy," in violation of James Bonbright's *Principles of Public Utility Rates*. (ELPC Br. at 20; *see also id.* at 25.) Like CUB Ohio, ELPC notes the "state policy in favor of energy conservation" found in R.C. 4905.70 and R.C. 4929.02(A)(12), and cites a recent Vectren Energy rate case in which the Commission cited R.C. 4929.02(A)(12). (*See id.* at 21-22.)

ELPC also notes a 1980 Ohio Supreme Court opinion[8] and a 1980 United States Supreme Court opinion in which those courts "recognize[d] the policy goal of energy conservation." (*See id.* at 22.)

To their credit, CUB Ohio and ELPC acknowledge that the Commission rejected a nearly identical argument from many of the same parties in AEP Ohio's recent distribution rate case. (*See* CUB Ohio Br. at 26; ELPC Br. at 23.) In that case, AEP Ohio agreed, as part of a broader stipulation, to withdraw its proposed DSM program. OPAE, ELPC, the Ohio Environmental Council, and Natural Resources Defense Council argued that "eliminating AEP Ohio's proposed DSM program * * * violates R.C. 4905.70" and various "state policy objectives in R.C. 4928.02," including "ensuring the availability of efficient, nondiscriminatory, and reasonably priced rates; encouraging innovation and market access for cost-effective supply- and demand-side retail electric service, including DSM; * * * and facilitating the state's effectiveness in the global economy." *Ohio Power Company Rate Case*, Opinion and Order, ¶ 166 (Nov. 17, 2021); *see also id.* at ¶ 167. The Commission disagreed, holding:

> Contrary to the position of OPAE and Environmental Advocates, no portion of R.C. 4905.70 requires the Commission to mandate the implementation of a DSM plan as part of a distribution rate case. Neither does R.C. 4928.02 dictate such an outcome. * * * No part of the Stipulation precludes customers from undertaking energy efficiency measures on their own initiative through market-based products or services.

Id. at ¶ 173. However, CUB Ohio and ELPC distinguish the *Ohio Power Company Rate Case* opinion, noting that it preceded the Commission's energy efficiency workshops, and that Chair French, at the conclusion of those workshops, "encouraged" public utilities to offer energy efficiency programs. (CUB Ohio Br. at 26; ELPC Br. at 23-24.[9])

What CUB Ohio and ELPC fail to note is that Chair French prefaced her remarks by making clear she was not presenting the Commission's official position, stating: "As is customary, the Commission speaks through its written entries and orders."[10] The Commission has long held that, "While Commission webcasts may be instructional on

[8] ELPC's citation to the Ohio opinion, *City of Cleveland v. Pub. Util. Comm.*, contains a typographical error. The case citation is 63 Ohio St.2d 62 (1980), not 63 Ohio St.3d 62 (1980).

[9] CUB Ohio's Brief mistranscribes the comments of Chair French at the Commission's July 27, 2022 meeting. (*See* CUB Ohio Br. at 26.) ELPC's Brief correctly transcribes those comments. (*See* ELPC Br. at 23-24.)

[10] Public Utilities Commission of Ohio, PUCO Commission Meeting – July 27, Comments of Chair French, at 19:13 (*available at* https://www.youtube.com/watch?v=HsEaoP1iNI0&t=1218s).

the views of the individual members, * * * the Commission speaks through its published opinions and orders, as provided by Section 4903.09, Revised Code." *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*, Case No. 07-589-GA-AIR, Entry on Rehearing, at ¶ 11 (July 23, 2008) (striking "an electronic video file of the webcast of the April 23, 2008, Commission meeting"). *See also Ohio Consumers' Counsel v. Pub. Util. Comm.*, 125 Ohio St.3d 57, 2010-Ohio-134, ¶ 43 ("the views of individual commissioners * * * do not reflect the holding of the commission" and are not "evidence").

Regardless, the *Ohio Power Company Rate Case* opinion's treatment of AEP Ohio's withdrawal of its proposed DSM program is only distinguishable from this proceeding in one way, and that way supports the Stipulation: Columbia did not withdraw its entire proposed DSM program. The Stipulation proposes to continue Columbia's low-income program, WarmChoice®, for five years, with an annual budget of $14.867 million. (*See* Jt. Ex. 1 at 11-13.) No party argues that the continuation of WarmChoice® violates any important regulatory principle or practice. Nor does any party explain why Columbia's continued offering of a low-income DSM program, funded at almost $15 million per year, would not "promote efficient use of energy" (ELPC Br. at 20) in furtherance of state policy.

The Commission is not required to approve any particular DSM programs or specific funding levels under R.C. 4929.02 or R.C. 4905.70. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 125 Ohio St.3d 57, 2010-Ohio-134 at ¶39; *see also Ohio Partners for Affordable Energy v. Pub. Util. Comm.*, 115 Ohio St.3d 208, 2007-Ohio-4790 at ¶¶ 36-39. Rather, the provisions of R.C. 4929.02 are guidelines the Commission may consider as it exercises its discretion to balance the various policy implications of the Stipulation. *Id.* at ¶ 40. And Staff believes approval of the Stipulation would be consistent with the policies raised in R.C. 4929.02(A)(12) and R.C. 4905.70. (Staff Ex. 6 at 4). The WarmChoice® program contained in the Stipulation appropriately furthers state policy to promote energy efficiency and conservation and should be approved without modification.

2.5.3. Columbia's agreement not to pursue consumer-funded energy efficiency programs through other means does not violate any important regulatory principle or practice.

Lastly, in the Stipulation, "Columbia agrees not to pursue (and not to support others' pursuit of) consumer-funded, low-income and * * * non-low-income energy efficiency programs (including demand side management [DSM] programs) through legislation or other regulatory initiatives until Columbia files its next base rate case." (Jt. Ex. 1 at § II.D.1.) CUB Ohio refers to this as a "gag order" (CUB Ohio Ex. 1 at 8:11) and asks that it be struck from the Stipulation (CUB Ohio Br. at 30). CUB Ohio asserts that it is "unjust" and "unreasonable" to "silence" a party in another Commission proceeding or "outside of the context of the PUCO," and asserts that the Commission lacks jurisdiction to enforce such a prohibition. (*Id.* at 29.) CUB Ohio also asserts that "it is against good public policy" for Columbia to "silence itself on DSM and energy efficiency * * * ." (*Id.*) Because Columbia "serv[es] 1.4 million customers" and has supported DSM programs in the past, CUB Ohio argues, Columbia's "voice" must be heard "in upcoming debates on energy savings * * * ." (*Id.*)

This portion of the Stipulation is not unjust, unreasonable, or contrary to good public policy. Nothing in the Stipulation "silence[s]" Columbia. Columbia is choosing not to speak. CUB Ohio witness Bullock admitted he had no reason to believe that Columbia signed the Stipulation involuntarily, or that Columbia was "coerced" to sign the Stipulation. (Tr. 100:19 – 101:2.) This portion of the Stipulation also is limited in scope and effect. CUB Ohio witness Bullock conceded the Stipulation allows Columbia to pursue "energy efficiency or DSM legislative or regulatory initiatives that are *not* funded by consumers" (emphasis added.) (Tr. 102:3-9), and to "pursue even consumer-funded energy efficiency and demand side management programs after it files its next rate case * * * ." (Tr. 103:1-5.) Moreover, Columbia's agreement not to pursue consumer-funded energy efficiency programs until it files its next base rate case in 2027 (*see* Jt. Ex. 1 at § II.G.1.a.iv) largely reinforces the other DSM-related commitments that Columbia made in the Stipulation. Columbia's separate agreement to "not charge consumers for non-low-income DSM" and to limit the WarmChoice® Program budget to $14,867,329 per year from 2023 through 2027 (Jt. Ex. 1 at § II.D.1) has much the same effect as the challenged provision. Finally, the provision in question is not tied to any actual, pending Commission proceedings or legislation. CUB Ohio does not identify the supposed "upcoming debates on energy savings" to which their briefing refers; the Commission has already completed its energy efficiency workshops. And nothing in Ohio law would *require* Columbia to weigh in in favor of DSM in any such Commission proceedings or legislative initiatives in the absence of the Stipulation. CUB Ohio simply hypothesizes that the provision in question will prevent speech that would have occurred otherwise.

CUB Ohio provides no legal citations to support its contention that the provision in question is unjust or contrary to public policy. Even as a corporation, Columbia is protected by the First Amendment. *See*, *e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 342, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010). And "[t]he First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the freedom of speech." *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448, 2463, 201 L.Ed.2d 924 (2018). But "freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Id.* (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (Burger, C. J.)). In the Stipulation provision in question, Columbia is choosing to refrain from speaking.

Columbia requests that the Commission respect its voluntary decision not to speak in favor of consumer-funded DSM programs, either in Commission proceedings or at the General Assembly, until its next base rate case.

3. Conclusion

For all of the reasons expressed above and in Columbia's initial Brief, Columbia Gas of Ohio, Inc. respectfully requests that the Commission approve the Stipulation without material modification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document is also being served via electronic mail on the 23rd day of December, 2022, upon the persons listed below.

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