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 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

MOTION TO FILE REPLY BRIEF INSTANTER ON BEHALF OF THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO AND REQUEST FOR EXPEDITED REVIEW

On Friday, December 23, 2022, Staff of the Public Utilities Commission served a Reply Brief in the above-captioned cases in this matter. That Reply Brief is attached hereto with no changes. The Attorney Examiners in this case were also copied on that email. Due to a filing error, the document was shared with the parties, but was not uploaded properly in the Commission's DIS docketing system. Staff believes that this

amounts to fundamental compliance and respectfully requests that the Reply Brief be deemed filed December 23, 2022.

Due to the recent discovery that the brief was not properly uploaded to DIS and Staff's desire to remedy the situation quickly, Staff has not had the opportunity to contact the other parties prior to filing this Motion and Request for Expedited Review.

Respectfully submitted,

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On behalf of the Staff of
The Public Utilties Commission of Ohio

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing **Motion to File Reply Brief Instanter on Behalf of The Staff of The Public Utilities Commission of Ohio And Request for Expedited Review** has been served upon the below-named counsel via electronic mail, this 28th day of December 2022.

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REPLY BRIEF
SUBMITTED ON BEHALF OF THE
STAFF OF PUBLIC UTILITIES COMMISSION OF OHIO

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On behalf of the Staff of
The Public Utilties Commission of Ohio

December 23, 2022

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REPLY BRIEF
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ARGUMENT

The majority of the parties[1] ("Signatory Parties") jointly agreed to a Stipulation and Recommendation to resolve the issues in this case. Ohio Partners for Affordable Energy ("OPAE"), Citizens Utility Board ("CUB"), and the Environmental Law & Policy Center ("ELPC") (collectively "Opposing Parties") ask the Commission to reject and/or modify the Stipulation.

The ultimate issue is whether the agreement is reasonable and should be adopted by the Commission. In considering the reasonableness of a stipulation, the Commission has considered criteria that have become known as the "3-part test." Staff respectfully submits that the settlement package satisfies all three of those criteria, and requests that the Commission approve the agreement of the Signatory Parties.

I. The settlement is a product of serious bargaining among capable, knowledgeable parties

A. Opposing Parties have misconstrued the Commission's "serious bargaining" standard.

The Commission has held that, "[p]ursuant to Commission and Supreme Court of Ohio precedent, there is no specific checklist that must be applied during the

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[1] Those parties include Columbia, the Staff of the Public Utilities Commission of Ohio ("Staff"), the Office of the Ohio Consumers' Counsel ("OCC"), Northeast Ohio Public Energy Council ("NOPEC"); Industrial Energy Users – Ohio ("IEU-Ohio"); Ohio Manufacturers' Association Energy Group ("OMA Energy Group"); Ohio Energy Group ("OEG"); The Kroger Co. ("Kroger"); Ohio Schools Council ("OSC"); Interstate Gas Supply, Inc. ("IGS"); and the Retail Energy Supply Association ("RESA").

negotiation process in order to demonstrate serious bargaining has occurred, provided there is no evidence of the intentional exclusion of an entire class of customers."[2] No party claims that an entire class of customers was intentionally excluded from this case.

Opposing Parties essentially assert that the Commission should not take the Signatory Parties representations at face value, but should instead look behind the curtain that veils, or, more properly, protects, the negotiation process and second guess the decisions made there. Staff respectfully submits that the Commission should decline to do so.

1. Differences between the Application and the Stipulation.

CUB suggests that current regulatory practice creates a "perverse incentive for a utility to apply for a revenue requirement, return on equity, and/or high fixed charge . . . that it knows the Commission would not approve as unreasonable." CUB Brief at 8. It claims that, because there is "no evidence that allows the Commission to determine whether the differences [between the Application and the Stipulation] were the product of the Company relinquishing unreasonable positions or

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[2] *In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates* ("*Duke MGP Cases*"), Case No. 14-0375-GA-RDR, *et al.*, Opinion and Order (April 20, 2022) at ¶104, citing *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 233, 661 N.E.2d 1097 (1996); *In re Ohio Edison Co.*, 146 Ohio St.3d 222, 2016-Ohio-3021, 54 N.E.3d 1218; *Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 12-1230-EL-SSO, Opinion and Order (July 18, 2012); *In re Duke Energy Ohio, Inc.*, Case No. 15-534-EL-RDR, Opinion and Order (Oct. 26, 2016); *In re Columbia Gas of Ohio, Inc.*, Case No. 16-2422-GA-ALT, Opinion and Order (Jan. 31, 2018).

compromising in the course of serious bargaining," serious bargaining did not occur. *Id.*

The Commission has, of course, held that differences between an application and a filed stipulation may constitute evidence of the seriousness of negotiations and bargaining between parties.[3] In the most recent AEP base rate case, for example, the Commission ruled on a question almost precisely on point with the issue raised by Opposing Parties here. The Commission ruled that absence of a provision in a stipulation, such as a DSM program, where one had been included in the utility's application, is evidence that serious bargaining *did* occur:

> Environmental Advocates encourage the Commission to closely examine settlement negotiations to determine whether serious bargaining occurred or, in other words, whether they were inclusive in terms of the parties' positions on various provisions. . . . However, that is not an aspect of part one of the three-part test. The Commission notes that there are significant differences between the Company's application and the Stipulation, which the Commission attributes to negotiations and serious bargaining. . . . The Commission cannot conclude from the fact that the Stipulation does not include a specific provision (in this instance, the DSM program) that, as Environmental Advocates suggest, serious bargaining did not take place. It is not indicative of a lack of serious bargaining that a DSM program is not part of the Stipulation, where the Stipulation incorporates numerous other provisions and terms. On the other hand, the Commission may view the differences between an application and a filed stipulation as evidence of the

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[3] *In the Matter of the Application of Ohio Power Company for an Increase in Electric Distribution Rates* ("*Ohio Power Rate Case*"), Case No. 20-0585-EL-AIR, *et al.,* Opinion and Order (Nov. 17, 2021) at ¶ 131, citing *In re the Application of Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 14-1297-EL-SSO, Opinion and Order (Mar. 31, 2016) at 44.

> seriousness of negotiations and bargaining between the parties.[4]

Although ELPC acknowledged as much, it urges the Commission to abandon what it terms an "improper approach." ELPC Brief at 11. But contrary to ELPC's argument, a utility's application is necessarily a baseline against which the Commission measures the reasonableness of the resulting stipulation. Differences from the initial request may not be conclusive evidence of serious bargaining, but they are certainly evidence that bargaining occurred.

2. Time dedicated to settlement negotiations.

The time expended on negotiations is also a significant factor in determining whether serious bargaining occurred. The Commission has found that extensive time dedicated towards settlement negotiations constitutes evidence of serious bargaining. It has found serious bargaining to have occurred where, for example, "multiple meetings occurred over many months and all parties to the proceedings at the time of the settlement negotiations 'were provided with an opportunity to express their concerns that resulted in the resolution of issues' contained in the Stipulation."[5] As ELPC noted, Columbia witness Thompson testified that this is precisely what occurred in this case:

> The Stipulation is the product of an open process in which all parties were represented by able counsel and technical experts. Columbia and all other parties engaged in extensive negotiation to produce the Stipulation filed on October 31, 2022. There were numerous settlement

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4 *Ohio Power Rate Case*, Opinion and Order (Nov. 17, 2021) at ¶ 107.
5 *Duke MGP Cases*, Opinion and Order (April 20, 2022) at ¶102.

> negotiations with all parties beginning of May 16, 2022, where Columbia and the other parties presented various settlement positions that were considered and discussed.

Supplemental Direct Testimony of Melissa L. Thompson, Columbia Ex. 35 at 3

Ms. Thompson elaborated on redirect examination:

> Q. [Mr. Gallon]: I believe you said there were over 40 settlement negotiations in the lead up to that ultimate Stipulation; is that correct?
>
> A. [Ms. Thompson]: That's correct.
>
> Q. Did the parties to this proceeding participate in settlement meetings in which all parties entering -- or intervening in this proceeding were invited?
>
> A. Yes.
>
> Q. How often were those meetings held?
>
> A. Columbia scheduled meetings twice a week leading up -- beginning from May 16 to the filing of the Stipulation.
>
> Q. And again, when was the filing of the Stipulation?
>
> A. October 31, 2022.
>
> Q. So the period of time over which negotiations took place leading up to the adoption of the Stipulation entered into the record as Joint Exhibit No. 1 was approximately five-and-a-half months?
>
> A. That is correct.

Tr. 76:6-77:2. While Columbia also engaged in bilateral discussions with individual intervenors (Tr. 79:10-12), it is clear that extensive time was devoted to the resulting Stipulation, and that all parties were invited to participate and given opportunities to comment on proposals, and to offer counter-proposals. All of the Opposing Parties had more than sufficient time to assess the Company's Applications and prepare for, and engage in, settlement negotiations.

3. Opt out provisions.

Nor is the mere fact that a Signatory Party "footnoted out" of any particular provision evidence that serious bargaining did not occur. CUB makes this argument based on the belief that "if a party is signing onto the Stipulation it is signing onto support for the terms of the *entire* Stipulation." CUB Brief at 10. There is, of course, no basis for such an assertion. Moreover, the Commission has held 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 party's support of the stipulation as a total package and supports the likelihood that other parties to the case negotiated for certain provisions of the stipulation that were not of particular interest.[6]

Because the Commission's standard for reviewing applications focuses on the "package as a whole," it is not incumbent on signatory parties to support each and every individual term of the agreement. Parties agree to support the package, not necessarily each of the component parts.

ELPC argues that neither OCC nor NOPEC took any position on the fixed charges. Both ELPC and CUB specifically point to footnote 3 of the Stipulation, where OCC and NOPEC reserve their right to object to SFV rate design in future proceedings, "to refute the notion that serious bargaining took place." ELPC Brief at 7. OCC and NOPEC both, of course, strenuously objected to the SFV rate design for

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[6] *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* ("*Grid Mod Cases*"), Case No. 16-0481-EL-UNC, *et al*., Opinion and Order (July 17, 2019) at ¶ 61, citing *In re Ohio Power Co.*, Case No. 14-1693-EL-RDR, *et al*., Opinion and Order (Nov. 3, 2016).

SGS customers, both as presented in Columbia's Application and as accepted in the Staff Report of Investigation. Specifically, their joint Objection No. 3 stated that the "Staff Report erred by not proposing an end to the straight-fixed variable ('SFV') rate design that consumers are subjected to for base rates and for Riders IRP and CEP."[7]

Nor is this surprising. Those parties have consistently and persistently opposed SFV. Indeed, it was OCC that sought judicial review of the Commission's orders originally approving the SFV rate design. The mere fact that these parties were willing to accept that rate design in this case is in and of itself strong evidence that they were satisfied by the "package as a whole," despite their strong and historic objection to the rate design. The suggestion that OCC and NOPEC were "not engaged on the full range of issues during the course of the settlement negotiations," CUB Brief at 11, does not accurately reflect the negotiations that occurred in this case.

It is equally preposterous for CUB to argue that footnote 22 evidences a lack of serious bargaining on the part of Staff. As the Commission is well aware, Staff has for a number of years insisted on language in stipulations that prohibits actions taken by signatory parties from "voiding" an agreement. CUB, a relative newcomer to Ohio's utility regulation practice, would understandably have been unaware of this

[7] Objections to the PUCO Staff's Report of Investigation by Northeast Ohio Public Energy Council and Office of the Ohio Consumers' Counsel (May 6, 2022) (https://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A22E06B64511B01507).

fact. The only other time that Staff has deviated from this practice was in the stipulation resolving Duke's manufactured gas plant (MGP) cases.[8] Staff's reason for doing so in that instance that was because of the importance of the issue, the longstanding nature of the dispute, and the extraordinary compromises that resolved 18 open cases. Staff most certainly would not have agreed to stipulate this case with such a provision without believing that it had received the benefits of very serious bargaining. Those benefits were partly enumerated by Staff witness Lipthratt. CUB could have questioned Mr. Lipthratt on why Staff would have agreed to such an extraordinary footnote in this case, but chose not to do so.

4. Other indicia of serious bargaining.

Those benefits enumerated by Staff witness Lipthratt certainly reflect the serious bargaining that occurred. As Staff noted in its Post-Hearing Brief, Mr. Lipthratt detailed numerous compromises and concessions won only through negotiation. Columbia agreed to remove certain incentive compensation, financial incentives, pension and other postemployment benefits, agreed to withdraw its request to implement a number of riders, including the Federal/State Tax Reform Rider, Carbon Reduction Rider, and the Federally Mandated Investment Rider. The application of insurance proceeds to the recovery of MGP costs and limits on the deferral of environmental remediation costs was extremely important to a number of intervenors. There were a number of rate design compromises, for both the Small

[8] *Duke MGP Cases*, Stipulation (August 31, 2021) (https://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A21H31B52009D00286).

General Service ("SGS") Class and for the General Service ("GS") and Large General Service ("LGS") customers. There are a number of provisions intended to benefit residential consumers, and to enhance safety and reliability. The Company agreed to significant cap reductions for both its IRP and CEP Rider programs, both hotly contested.

ELPC argues that, given that Columbia is "guarantee[d]" recovery of a significant portion of its revenue requirement by virtue of SFV, "the record contains no evidence that Columbia's agreed to lower Return on Equity negotiations is reasonable." ELPC Brief at 7. In doing so, ELPC relies on its witness Rabago, who performed no fundamental analysis of his own, despite concluding that Columbia "has little market risk." ELPC Ex. 1 at 11. The Stipulation proposes a return on equity of 9.60%. Joint Stipulation and Recommendation, Joint Ex. 1 at 3. The Staff Report, which detailed its analysis using both the Capital Asset Pricing Model (CAPM) and the Discounted Cashflow (DCF) model, recommended a baseline range for the cost of common equity of 9.04% to 10.05%. Staff Report of Investigation, Staff Ex. 1 at 27. The stipulated return on equity of 9.60% is not only significantly lower than the 10.95% proposed by Columbia, but it is also well within the range proposed by the Staff. There is certainly ample evidence that both serious negotiations occurred, and that the resulting recommendation is reasonable.

5. Conclusion.

The Commission has found that "the fact that [a] Stipulation incorporates many of Staff's recommendations, reflects several amendments to provisions

proposed in the Company's various applications in favor of customers and intervenors, and includes the addition of terms and conditions to the benefit of customers, to be evidence of significant bargaining among the parties."[9]

The Stipulation represents a diverse group of parties involved in these proceedings and there is no record evidence that any party or class of customers was excluded from negotiations when negotiations were underway. Based on the evidence presented, the Commission should find that the Stipulation is the product of serious bargaining among capable, knowledgeable parties.

B. The Commission is not required to investigate the negotiation process

"The Commission is not required to evaluate the negotiation process . . . to determine whether serious bargaining occurred."[10] The Commission has consistently been unwilling to investigate the form and manner of settlement discussions. It should follow that precedent here.

1. No party was excluded from the negotiation process.

Ten years ago, the Commission held that there was

> no requirement that all interested parties meet as a group prior to the filing of a stipulation. Many parties or their counsel are not located in this state. There is no reason to impose a requirement that they be physically present in this state at least one time prior to the execution of a stipulation. On the other hand, with advances in technology, information and settlement proposals can be

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[9] *Ohio Power Rate Case*, Opinion and Order (Nov. 17, 2021) at ¶ 108.

[10] *Ohio Power Rate Case*, Opinion and Order (Nov. 17, 2021) at ¶ 108, citing *In re Application of Ohio Edison Co.*, 146 Ohio St.3d 222, 2016-Ohio-3021, 54 N.E.3d 1218, ¶¶ 45-47.

> easily and quickly shared among parties located in or out of this state.[11]

The COVID-19 pandemic, of course, compelled all parties to embrace those technological advances in this case. In response to questioning, Columbia witness Thompson testified:

> Q. [By Examiner Price]: One is just clarification. The twice-a-week negotiations that Columbia scheduled, all the parties were invited to all of those meetings?
>
> A. [Ms. Thompson]: That is correct.
>
> Q. Were they all in person or were they all on Teams now virtually or were they a mix of both?
>
> A. It was a mix of both.
>
> Q. Okay. Second, the draft Settlement Agreement, were the drafts of the Settlement Agreement let's say both -- don't be compound. Was the initial draft Settlement Agreement presented to all the parties?
>
> A. Yes.
>
> Q. Was the final draft Settlement Agreement presented to all the parties?
>
> A. Yes.

Tr. 79:19-80:9. The Commission has consistently held that it would 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.[12] There is no evidence in this case that any class was excluded from the negotiation process.

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[11] *In the Matter 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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order (July 18, 2012) at 26-27.

[12] *Grid Mod Cases*, Opinion and Order (July 17, 2019) at ¶ 61.

Every class, and every party, had a seat at the bargaining table, and had an opportunity to engage in negotiations.

2. Evidence Rule 408 does not strictly apply.

ELPC claims that R.C. 4903.22 states that the Rules of Evidence apply just as they would in a civil action, and should strictly apply here. ELPC argues that the Attorney Examiner erred by ruling that "Rule [of Evidence] 408 doesn't strictly apply to the Commission." ELPC Brief at 9. Its claim that the Attorney Examiner shut down questioning, "invoking Ohio Rule of Evidence 408," ELPC Brief at 9, however, overstates the record. In fact, The Examiner limited questioning not because of Rule 408, but because Rule 408 does not strictly apply.

Contrary to ELPC's argument, neither Commission precedent nor the Attorney Examiner misread Ohio Rule of Evidence 408. Rather, ELPC fails to recognize that the Commission is not strictly bound by Rules of Evidence. This is somewhat ironic, especially given that ELPC argued in the most recent AEP base rate case that the Commission is not strictly confined by the Rules of Evidence, in that instance to admit testimony that would be considered hearsay in a civil proceeding.[13]

With respect to its hearing process, the Public Utilities Commission ". . . is a body vested with broad discretionary powers as to both the conduct and the place of

[13] *Ohio Power Rate Case*, Opinion and Order (Nov. 17, 2021) at ¶ 44.

its hearings."[14] Within the context of those discretionary powers, the Ohio Supreme Court has found consistently that the Commission, being an administrative body, is not and should not be inhibited by the strict rules as to the admissibility of evidence that prevail in courts.[15] The Supreme Court of Ohio has very clearly stated that ". . . the commission is not stringently confined by the Rules of Evidence. The commission, however, is granted very broad discretion in the conduct of its hearings."[16]

3. There was no "side deal."

During the hearing, counsel for ELPC argued that Evidence Rule 408 did not preclude a party from eliciting evidence of settlement negotiations if presented for purposes other than proving liability. In doing so, counsel specifically referenced that Ohio Supreme Court's decision finding that the Commission had erred in denying discovery of side agreements made by parties to a contested stipulation. Tr. at 53, 55. That argument completely misapprehends the Court's ruling in that case.

During the hearing on Cincinnati Gas & Electric Co.'s ("CG&E") rate stabilization plan, OCC moved to compel discovery relating to alleged side agreements among CG&E and its affiliates with certain other parties to a contested stipulation. The Commission denied the request on the grounds of privilege. The

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[14] *Elyria Telephone Co.* v. *Public Utilities Commission*, 158 Ohio St., 441 at 444, 110 N.E.2d 59.

[15] *The Chesapeake & Ohio Ry. Co. v. Public Utilities Commission*, 163 Ohio St. 252 (1955) at 263.

[16] *Greater Cleveland Welfare Rights Organization v. Public Utilities Commission*, 2 Ohio St.3d 62 (1982) at 68.

Court, however, found that the existence of separate, undisclosed agreements among some of the parties in the nature of "concessions or inducements apart from the terms agreed to in the stipulation might be relevant to deciding whether negotiations were fairly conducted."[17]

Several factors distinguish this case from the CG&E case. That case involved a discovery motion, and not an attempt to offer evidence during the hearing. As the Court noted, OCC in that case was "not seeking to discover the communications made during the settlement negotiations but, rather, the terms of the side agreements and the agreements themselves."[18] The Court stated that, upon disclosure in discovery, "the commission may, if necessary, decide any issues pertaining to admissibility of that information."[19]

More importantly, there is no evidence that there was any "separate, undisclosed agreement" here. Indeed, counsel's questions during the hearing specifically referenced "language appearing in Section D . . . in the Stipulation." Tr. at 53. Counsel also specifically referred to "the agreement that's articulated in the Stipulation starting on page 11, demand side management." Tr. at 57.

Columbia witness Thompson affirmed that there was no side agreement in this case.

> Q. (Ms. Weber) Ms. Thompson, did Columbia and OCC enter into a side agreement prior to involving

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17 *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 at ¶ 86.

18 *Id*. at ¶ 93.

19 *Id*. at ¶ 94.

ELPC, CUB, and OPAE that appears in -- starts on page 11 of the Stipulation?

A. (Ms. Thompson) No.

* * *

Q. Ms. Thompson, does your answer to the last two questions depend on your definition of side agreement? I could put it differently. How would you define side agreement in the response to my question?

A. I define a side agreement as an agreement that has not been disclosed to other parties which has been finalized without any revisions.

Tr. 59, 60. Counsel was not entitled, during cross examination, to inquire into the substance of negotiations that resulted in agreements that were fully incorporated into the stipulation.

II. The settlement, as a package, benefits ratepayers and the public interest

The Commission must determine whether the settlement, as a package, benefits ratepayers and the public interest. That is, it must look at the overall impact of the settlement.

In general, Opposing Parties largely express their displeasure with high fixed charges and the SFV rate design, and lament the elimination of Columbia's DSM program. Arguing that differences from the Application proposals should not be considered "benefits," Opposing Parties believe that the comparative disadvantages (as they view it) of the Stipulation render the agreement not in the public interest. But, as Staff noted in its Initial Brief, there is no requirement that each individual provision, or that any particular provision, of the settlement must satisfy some "cost /

benefit" analysis. There is also no requirement that a settlement seek to "maximize" benefits to ratepayers. If the package, as a whole, *provides benefits* to ratepayers and the public interest, it should be approved.

A. The "benefits ratepayers and the public interest" standard

All of the Opposing Parties recognize that the Commission's stipulation test must evaluate the agreement to determine if it "benefits ratepayers and the public interest." CUB, however, argues that the test should be "how much the rate payers and public benefit compared to their costs and losses under the terms of the Stipulation." CUB Brief at 12. This is not a comparative test. ELPC appropriately summarized the Commission's standard for evaluating the second prong of its stipulation test by referring to its Opinion and Order in AEP's recent base rate increase proceeding. ELPC Brief at 12. There the Commission stated:

> The Commission again must emphasize that the second part of the three-part test is not whether there are different or additional provisions that would better benefit ratepayers and the public interest but whether the Stipulation, as a package, benefits ratepayers and the public interest. *In re The East Ohio Gas Co. dba Dominion Energy Ohio*, Case No. 19-468-GA-ALT, Opinion and Order (Dec. 30, 2020) ¶ 73; *In re Duke Energy Ohio, Inc.*, Case No. 19-791-GA-ALT, Opinion and Order (Apr. 21, 2021) ¶ 63. Further, the Stipulation must be viewed as a package for purposes of part two of the three-part test used to evaluate stipulations. *See, e.g., In re Ohio Power Co.*, Case No. 94-996-EL-AIR, et al., Opinion and Order (Mar. 23, 1995) at 20-21; *In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 99-1729-EL-ETP, et al., Opinion and Order (Sept. 28, 2000) at 44. We have repeatedly found value in the parties' resolution of pending matters through a stipulation package, as an efficient and cost-effective

> means of bringing the issues before the Commission, while also avoiding the considerable time and expense associated with the litigation of a fully contested case. *See, e.g.*, *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co.*, Case No. 12-1230-EL-SSO, Opinion and Order (July 18, 2012) at 42; *In re Columbus Southern Power Co. and Ohio Power Co*., Case No. 11-5568-EL-POR, et al., Opinion and Order (Mar. 21, 2012) at 17. We, therefore, reaffirm that the Stipulation offered by the Signatory Parties in these proceedings must be viewed as a whole . . .[20]

As noted above, Opposing Parties tend to focus on the "inappropriateness" of comparing the Stipulation to the Application proposals. OPAE argues that measuring benefit "to the Application, not to reality," is a "flawed premise." OPAE Brief at 7. ELPC goes so far as to improperly suggest that the "Ohio Supreme Court has used a different baseline when evaluating the benefit to ratepayers," ELPC Brief at 14, apparently suggesting that ratepayer benefit should be based on current[21] rather than proposed charges. In fact, the Court used no such baseline, merely determining that the Commission had "appropriately applied" the 3-part test in weighing the reasonableness of the stipulation at issue there.[22]

The Commission is undoubtedly aware that "inflationary pressures are crippling residential customers," OPAE Brief at 3, and that "Climate Change [is] not subsiding," CUB Brief at 15. It's obligation, however, is to approve "a revenue

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[20] *Ohio Power Rate Case*, Opinion and Order (Nov. 17, 2021) at ¶ 151.

[21] This, of course, is both illogical and unreasonable, since current revenues are insufficient to meet the Company's revenue requirement.

[22] *Ohio Consumers' Counsel v. Pub. Util. Comm.,* 110 Ohio St.3d 394, 2006-Ohio-4706 at ¶ 20.

requirement and rate design that are intended to result in new distribution rates that are reasonable and consistent with cost-causation principles."[23]

B. Opposing Parties have not refuted the benefits of the Stipulation.

Opposing parties do not argue that the Stipulating Parties have improperly agreed upon the Company's cost of service, or that the lion's share of those cost increases is properly allocable to the SGS Class. Rather, they focus on the impact that the SFV rate design will have on those customers.

The SFV rate design was first approved by the Commission for natural gas local distribution companies almost 15 years ago. CUB listed the cases that established the SFV rate design for Ohio's four major natural gas distribution companies.[24] CUB Brief at 3. Three of those cases (Columbia excepted) were appealed to, and were affirmed by, the Ohio Supreme Court.[25] In doing so, the Court plainly stated that the Commission's determination that the SFV rate design "would best provide the utilities with adequate and stable revenues and ensure that they

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[23] *Ohio Power Rate Case*, Opinion and Order (Nov. 17, 2021) at ¶ 150.

[24] *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*, Case No. 07-589-GA-AIR, et al., Opinion and Order (May 28, 2008); *In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Authority to Increase Rates for its Gas Distribution Service*, Case No. 07-829-GA-AIR, et al., Opinion and Order (October 15, 2008); *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Distribution Service*, Case No. 08-072-GA-AIR, et al., Opinion and Order (December 3, 2008); and *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Authority to Amend its filed Tariffs to Increase the Rates and Charges for Gas Service and Related Matters*, Case No.07-1080-GA-AIR, et al., Opinion and Order (January 7, 2009).

[25] *Ohio Consumers' Counsel v. Pub. Util. Comm*., 125 Ohio St.3d 57, 2010-Ohio-134 (Duke and East Ohio), *Ohio Consumers' Counsel v. Pub. Util. Comm*., 127 Ohio St.3d 524, 2010-Ohio-6239 (Vectren).

would be able to continue to provide safe and reliable service" was "clearly stated and reasonable." Contrary to ELPC's assertion, the companies' DSM programs were not "the logic for the transition to SFV." ELPC Brief at 17. As the Court explained, the Commission's decision to adopt SFV was because "the natural gas market is currently characterized by volatile and sustained price increases, causing customers to increase their efforts to conserve gas. These factors in turn have caused a revenue-erosion problem for natural-gas utilities."[26] It further found that "the trend in declining customer usage was historical in nature."[27] While the Court recognize that the Commission *also* found that "breaking the link between fixed-cost recovery and gas sales would remove any disincentive of the utilities to promote energy conservation and efficiency,"[28] this was neither the basis of the Commission adoption of SFV nor the Court's approval of that decision. The underlying rational behind changing to SFV was to ensure rate stability. More than a decade of experience has shown that the SFV rate design has provided the rate stability necessary to enable utilities to continue to provide safe and reliable service. Opposing Parties have not demonstrated otherwise.

Opposing Parties also point to the Commission's responsibility to encourage conservation and the reduction in the growth rate of energy consumption. *E.g.*: OPAE Brief at 15. As Staff noted in its Initial Brief, Staff generally supports DSM

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26 *Ohio Consumers' Counsel v. Pub. Util. Comm*., 125 Ohio St.3d 57, 2010-Ohio-134 at ¶ 16.
27 *Id*.
28 *Id*. at ¶ 17.

programs, and agrees with CUB that energy efficiency provides benefits to customers. CUB Brief at 16. The Commission, however, has increasingly determined that the future of energy efficiency programs in the state "will best be served by market-based approaches."[29] Accordingly, Staff respectfully submits that a "Stipulation need not . . . .incorporate a DSM program to comply with part two of the test used to evaluate stipulations."[30]

The Opposing Parties do not contest many of the numerous benefits outlined by the Stipulating Parties. None, for example, dispute either the need for or the value of the Infrastructure Replacement or Capital Expenditure Programs; only the recovery of those costs. None dispute the significant limitations placed on the recovery of manufactured gas plant costs.

In addition, there are a number of rate design compromises and consumer protections included in the package that would not exist but for the Stipulation. The competitive suppliers, for example, noted that the taskforce to explore opportunities for Columbia to exit the merchant function will further develop the competitive retail natural gas service market in the State. RESA-IGS Brief at 2. OCC noted that Columbia will implement an online privacy feature to allow customers to more easily opt out of having their personal contact information disclosed to marketers, giving them more control over their choices. OCC Brief at 12.

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29 *Ohio Power Rate Case*, Opinion and Order (Nov. 17, 2021) at ¶ 128.

30 *Id.*

The benefits, both to ratepayers and for the public interest, are numerous and widespread. Because this is a negotiated settlement, each party is likely to feel that some of the benefits that it sought were "left on the table." But the Commission's standard for evaluating stipulations does not require that agreements maximize benefits, or even result in the lowest cost to consumers. Rather, a stipulation must be reasonable, and provide benefits to ratepayers and the public. Staff respectfully submits that this Stipulation does precisely that. Based on the record before the Commission, the Stipulation, as a package, benefits ratepayers and the public interest, and satisfies the second prong of the three-part test.

III. The settlement package does not violate any important regulatory principle or practice.

While there are many principles that guide the Commission in evaluating rate setting proposals, there is no "checklist," no scorecard, that enumerates which "regulatory principles or practices" are important. Each stipulation must be evaluated on a case-by-case basis. The Signatory Parties submit that the Stipulation in this case satisfies this criterion.

A. Signatory Parties unanimously affirm that the Stipulation does not violate regulatory principles of practices.

ELPC is critical of the testimonies of Signatory Party witnesses supporting the Stipulation as lacking "thorough analysis." ELPC Brief at 19. There is no question, however, that Columbia witness Thompson, OCC witness Adkins, and Staff witness Lipthratt are very knowledgeable of regulatory practices and procedures, and

extensively experienced in Commission cases and proceedings. In addition, counsel for the Ohio Energy Group, the Retail Energy Supply Association, and Interstate Gas Supply, Inc. all agreed that does not violate any important regulatory principle or policy.

ELPC relies extensively on Bonbright. Curiously, although it claims that the Ohio Supreme Court has relied on Bonbright's *Principles of Public Utility Rates* as a guide, it does so by referencing a tax case, not one involving a public utility. In that instance, the Court "relied" on Bonbright only for its definition of the primary purpose of AFUDC ("allowance for funds used during construction").[31] ELPC cites no decision of the Commission that relies upon Bonbright in analyzing the third prong of its stipulation test.

Staff does not thereby mean to imply that Bonbright's principles are not meritorious. Rather, Staff respectfully submits that the "violations" alleged by ELPC are not as "absolute" as ELPC suggests, and remain subject to Commission discretion.

B. Reasonableness of rates.

Opposing Parties believe the proposed rates to be unjust and unreasonable. They oppose the recovery of costs through fixed rates, since such rates could have facially disproportionate impacts. But the fact is that all SGS customers are treated

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[31] *Centerior Fuel Corp. v. Zaino*, 90 Ohio St.3d 540, 542, 2001-Ohio-13.

the same. Each imposes costs on the utility, and each is expected to bear the burden of ensuring that the utility can provide service. This will disproportionally affect customers because every customer is different. This is no different than any other non-subsidized commodity. But, by the same token, all similarly situated customers are treated the same, and that is what the law requires.

1. State energy policies.

Opposing Parties assert that the Commission cannot approve the elimination of Columbia's DSM program without violating R.C. 4905.70 and R.C. 4929.02. But the Ohio Supreme Court has been very clear that what ELPC terms an "essential state policy," ELPC Brief at 21, is a matter within the Commission's discretion.

> [T]he commission must consider state energy policy in deciding whether a proposed modification is in the public interest . . . See R.C. 4929.02(B). Whether [a] requested modification is consistent with policy objectives . . . are issues best suited for the regulatory agency assigned to implement state policy. Thus, given the commission's duty and authority to enforce these . . . statutes and policies, we accord due deference to the agency's ability to determine how best to further a competitive natural-gas market. See *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 125 Ohio St.3d 57, 2010-Ohio-134, ¶ 40, 926 N.E.2d 261 ("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"); *Payphone Assn. v. Public Util. Comm.*, 109 Ohio St.3d 453, 2006-Ohio-2988, ¶ 25, 849 N.E.2d 4 ("As the agency with the expertise and statutory mandate to implement the statute, the [Public Utilities Commission] is entitled to deference").[32]

[32] *In re Application to Modify, in accordance with R.C. 4929.08, the Exemption Granted to E. Ohio Gas Co.*, 144 Ohio St.3d 265, 2015-Ohio-3627 at ¶ 29.

The Commission has exercised that discretion to find that R.C. 4905.70 does not require that a utility offer a DSM program. In Ohio Power's most recent rate case, for example, the Commission declared that

> 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. . . . Further, Environmental Advocates have not supported their contention that the Stipulation will result in customers paying for electricity that they do not need. No part of the Stipulation precludes customers from undertaking energy efficiency measures on their own initiative through market-based products or services.[33]

Neither have the Opposing Parties made any such showing in this case.

Nor do the "state energy policy" provisions compel the inclusion of DSM programs. The Ohio Supreme Court has found that these provisions do not impose strict conditions on the Commission, or, indeed, require anything of it. "Rather, the policy provisions are guidelines for the PUCO to weigh when it considers a utility proposal."[34]

The Commission did, as ELPC noted, conduct workshops "to solicit the views of interested stakeholders on whether cost-effective energy efficiency programs are an appropriate tool to manage electric generation costs and how such programs fit into Ohio's competitive retail electric and natural gas markets."[35] Significantly, the Commission took no action to find that energy efficiency was an important

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33 *Ohio Power Rate Case*, Opinion and Order (Nov. 17, 2021) at ¶ 128.
34 *In re Application of Ohio Power Co.*, 159 Ohio St.3d 130, 2020-Ohio-143 at ¶ 31.
35 *Ohio Power Rate Case*, Opinion and Order (Nov. 17, 2021) at ¶ 173.

regulatory principle, rather encouraging the parties to work cooperatively to offer proposals for Commission consideration. In this case, the Signatory Parties agreed not to make such a proposal. In the context of the settlement package, this decision is reasonable, and consistent with the Commission's finding in the *Ohio Power* case.

2. Rate of Return

ELC solely relies on its witness Rabago to claim that the stipulated ROE is excessive, "especially in light of the increase in guaranteed recovery." But Mr. Rabago performed no fundamental analysis of his own, relying instead on the testimony of a witness for OCC, a Signatory Party. The Stipulation proposes a return on equity of 9.60%. Joint Stipulation and Recommendation, Joint Ex. 1 at 3. The Staff Report, which detailed its analysis using both the Capital Asset Pricing Model (CAPM) and the Discounted Cashflow (DCF) model, recommended a baseline range for the cost of common equity of 9.04% to 10.05%. Staff Report of Investigation, Staff Ex. 1 at 27. The stipulated return on equity of 9.60% is not only significantly lower than the 10.95% proposed by Columbia, but it is also well within the range proposed by the Staff. There is certainly ample evidence both that that the resulting recommendation is reasonable.

C. The Stipulation does not constitute a "gag order."

As part of the Stipulation, Columbia agreed not to pursue consumer-funded energy efficiency programs through legislation or other regulatory initiatives until it

files its next base rate case. Opposing Parties characterize this voluntary concession as a "gag order," and argue that it should be disapproved as against public policy.

There is no question, of course, that Columbia could have taken these very same actions on its own, voluntarily, regardless of any stipulation in this case. The effect of opting out of such efforts would be no different.

The difference, then, is the agreement of other, potentially affected, parties to such a provision, and the import of any Commission order that might approve such a measure. Staff will not opine of the enforceability of such a provision, or whether the Commission should, assuming that it could, enforce such a provision.

It is worth noting, however, that nothing in this provision prohibits the Company from opining about such programs, or from pursuing or supporting energy efficiency initiatives, that are not consumer-funded. Tr. 99. Indeed, when asked directly whether this provision meant that Columbia would not pursue DSM programs, Columbia witness Thompson disagreed. Tr. 71. Even CUB witness Bullock agreed that the settlement does not preclude Columbia from pursuing energy efficiency or DSM legislative or regulatory initiatives that are not consumer-funded. Tr. 102. Mr. Bullock further agreed that the Stipulation would allow Columbia to pursue even consumer-funded energy efficiency initiatives once it filed it next rate case.

No one would disagree that the Company has the right to file applications at the Commission to implement or seek recovery of costs of services authorized by law. Nor would anyone disagree that the Company has the right to agree to forego

such filings, either voluntarily or in agreement with others. Indeed, Columbia has, in this Stipulation, agreed not to file for approval not only of certain riders that it had proposed in its Application, but also any "similar riders," prior to its next base rate filing. Joint Exhibit 1 at 8. Such provisions are common in Commission proceedings.

There should be no objection, then, to Columbia agreeing not to pursue energy efficiency programs through regulatory initiatives. How, then, is the agreement to voluntarily forego the legal right to pursue or support such programs legislatively any different? While sound public policy might seek to encourage input and dialogue, it is equally sound public policy to sanction a party's decision to sit on the sidelines if it chooses to do so.

IV. Opposing Parties have not been deprived of their due process rights.

ELPC contends that it has been denied due process by virtue of the standard used by the Commission to evaluate stipulations. But ELPC was given precisely what it asks for. Relying on an appellate court's denial of a challenge to a Medical Board decision, it seeks a "full opportunity to offer evidence on [its] behalf and to rebut the state's [Signatory Parties'] evidence." ELPC Brief at 30-31. ELPC was given a chance to offer evidence, and it did so. It was given the opportunity to support its objections both to the Staff Report and to the Joint Stipulation. It has been given an opportunity to rebut the evidence offered by the Signatory Parties, however "conclusory" it believes it was, *Id*. at 31, and it has done so. ELPC was given an opportunity to be heard. It has not been denied any process.

But ELPC wants more. It asks this Commission to abrogate its traditional 3-part tests for stipulations. Specifically, ELPC demands that the "Commission must change its approach and evaluate each provision of a settlement agreement individually." *Id.* at 34. The law, it claims, "requires that the Commission rule on the merits of the issues." *Id.*

The Commission's stipulation test is now decades old. An outgrowth of the Zimmer cases of the early 1980's, the test was first proposed by an expert witness, Dr. George R. Hall, a former FERC commissioner. He testified that, while settlements are to be encouraged,

> they must be examined on a case-specific basis. However, he cautions that as a part of that evaluation, regulators and analysts must not second guess the parties to the negotiation by speculating as to the trade-offs and compromises they would have made in constructing the settlement package had they been involved in the negotiations. They 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.[36]

The Commission adopted Dr. Hall's recommended criteria, finding that "it is sound regulatory policy to encourage parties to its proceedings to resolve issues through negotiated settlement."[37]

In its first opportunity to review the criteria adopted by the Commission to evaluate settlements, the Ohio Supreme Court "endorse[d] the commission's effort

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[36] *In the Matter of the Restatement of the Accounts and Records of The Cincinnati Gas & Electric Company, The Dayton Power and Light Company, and Columbus & Southern Ohio Electric Company*, Case No. 84-1187-EL-UNC, Opinion and Order (Nov. 26, 1985) at 6-7.

[37] *Id.* at 7.

utilizing these criteria to resolve its cases in a method economical to ratepayers and public utilities."[38] The law in Ohio, then, in contrast to what may be the case in Indiana or Illinois, requires that the Commission determine whether the agreement is reasonable and should be adopted. It does not require that the Commission rule on the merits of each of the issues in the case, or each of the provisions of the stipulation.

This long-standing practice, spanning nearly 40 years, has been consistently applied, and consistently approved by the courts of this state. ELPC's due process arguments are without merit, and should be rejected.

[38] *Consumers' Counsel v. Pub. Util. Comm*. (1992), 64 Ohio St.3d 123, 126, 592 N.E.2d 1370, 1992-Ohio-122

CONCLUSION

The parties in this case have reached a Stipulation that resolves the issues among the Signatory Parties. The agreement represents a fair, balanced, and reasonable compromise of the issues in this proceeding. The Stipulation satisfies the Commission's three-part test for reasonableness. Staff respectfully requests that the Stipulation should be approved without modification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing **Reply Brief** has been served upon the below-named counsel via electronic mail, this 23rd day of December 2022.

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Summary: Motion to File Reply Brief Instanter on Behalf of The Staff of The Public Utilities Commission of Ohio And Request for Expedited Review electronically filed by Mrs. Kimberly M. Naeder on behalf of PUCO