BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Natural Gas Rates.	)))	Case No. 22-507-GA-AIR
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Alternative Form of Regulation.	)))	Case No. 22-508-GA-ALT
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	)))	Case No. 22-509-GA-ATA
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)))	Case No. 22-510-GA-AAM

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

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On Behalf of the Staff of the
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INTRODUCTION

The issues raised in the Ohio Consumers' Counsel's (OCC) Initial Brief are largely addressed by Staff's Initial Brief and Staff continues to assert that the Stipulation satisfies the three-part test for reasonableness. Specifically addressed in this Reply is Staff's explanation of: 1) why OCC does not have veto power over the Commission's approval of the Stipulation; 2) how the Stipulation's inclusion into base rates of deferred cost related to the termination of the propane caverns is allowed by R.C. 4909.15(A)(4) and violates no Supreme Court precedent; 3) how the CEP Rider cap provisions of the

Stipulation comply with the Opinion and Order in Case No. 19-791-GA-ALT. Accordingly, the Public Utilities Commission of Ohio (Commission) should approve the Stipulation.

ARGUMENT

I. Many of the challenges raised in OCC's Initial Brief against the approval of the Stipulation are fully addressed by Staff and the remaining Signatory Parties in their initial briefs.

The positions taken in Staff's Initial Brief, as well as those made by the Signatory Parties, fully address OCC's challenges to the stipulation involving ROR, ROE, capital structure, property tax expense, the allocation of base rates, the CEP Rider, the weatherization program, and financial performance incentives. Specifically, Staff's summarized responses to OCC's assertions are as follows:

- For the reasons stated in Staff's Initial Brief, Staff reasserts that the property tax calculation method adopted by the Stipulation ensures the property tax expense only includes the plant values that have been allowed as a result of the plant-in-service recommended by Staff.[1] Further, Staff agrees with the Company, for the reason stated in its Initial Brief, that the property tax expense calculation embodied within the Stipulation package is reasonable because it: 1) does not cause the revenue requirement to fall outside of Staff's recommendation range; 2) is consistent with GAAP; 3) follows the accrual method of recording expenses, which the Company is required to use; and 4) is supported by prior Commission decisions approving property tax expense for the Company.[2]

- The CEP Rider provisions of the Stipulation are reasonable and lawful. The bottom-line of Staff's position in its Initial Brief is that average annual rate caps of $1.59 are reasonable and O&M offsets are not necessary nor legally required. Staff's Initial Brief addressed the arguments raised in OCC's Initial Brief regarding the CEP Rider with Staff's response to OCC's

[1] *See* Staff's Initial Brief at pp. 13-14 (addressing OCC's Objection 6).
[2] *See* Duke's Initial Brief at pp. 34-36.

Objections 3, 22, 23, and 25.[3] Also, for the reasons provided in Section II. of Staff's Initial Brief (pp. 6-7), the CEP Rider and its provisions are reasonable, violate no regulatory principle or practice, and benefit the public.

- The ROR and its associated component calculations (ROE, capital structure, risk free rate, etc.) are reasonable for all of the reasons provided in Section III. of Staff's Initial Brief.[4] The bottom-line here is that the stipulated ROR of 6.96% falls well within the national range when considering relevant companies and time periods. Given that the ROR is reasonable, OCC's quibbles about the component calculations are mooted.

- Staff's responses to OCC's Objections 14-16, provided in Staff Initial Brief, address the arguments raised in OCC's Initial Brief regarding the allocation of the base distribution rates to residential consumers and the fixed delivery charge for the residential class.[5] The main point here is that the residential customer will still be subsidized if the Stipulation is approved and Staff finds the movement for residential customers towards their actual cost to be gradual and reasonable.[6] Contrary to the assertion in OCC's Brief stating that OCC's proposal moves customers towards their actual cost[7], OCC's proposal actually moves customers further away from their actual cost by decreasing customers' allocation from the current allocation of 67.77% to 67%.[8]

- Staff's Initial Brief also addresses all of the concerns raised in OCC's brief with regards to the weatherization program.[9] Further, the mere fact that the settlement provides funding for a low-income weatherization programs funded by the Company and ratepayers is a benefit to the public interest. Staff also agrees with People Working Cooperatively, Inc.'s Initial Brief and the benefits of the weatherization program for Duke Energy Ohio Inc's (Duke or Company) low-income customers expressed therein.

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[3] See Section III of this Reply Brief for Staff's Response to OCC's asserting that the CEP rate caps conflict with the Commission opinion in Case No. 19-791-GA-ALT.

[4] *See* Staff's Initial Brief at pp. 5-6.

[5] *See* Staff's Initial Brief at pp. 14-15.

[6] The Stipulation's proposal gradually moves residential customers' allocation from 67.77% to 67.83%. *See* Fortney's testimony in opposition to the Stipulation (RBF-1).

[7] *See* OCC's Brief at p. 32 which incorrectly states, "The revenue increase to the residential class under Mr. Fortney's proposal would be no more than $18,575,793 million. This increase would gradually move the Residential Class closer to the cost of service while adhering to a public policy of recognizing the economic hardships of the class."

[8] *See* Fortney's testimony in opposition to the Stipulation (RBF-1).

[9] *See* Staff's Initial Brief at pp. 7-8.

- Finally, Staff's Initial Brief addresses the concerns OCC raised regarding the financial performance incentives. Namely, the Stipulation removes incentive compensation attributable to stock-based compensation and financial performance of the Company from Rider CEP on a going forward basis.[10] This is an example of how the parties were able to compromise to reach a final stipulated package that benefits the public interest.

Accordingly, Staff fully incorporates into this Reply Brief the arguments made in Staff's Initial Brief, as well as those of the Signatory Parties referenced above, as to the challenges to the Stipulation raised in OCC's Initial Brief.

II. The Stipulation is a product of serious bargaining. OCC has no veto authority over the Commission's approval of stipulations.

For all the reasons stated in Staff's Initial Brief, the Stipulation is a product of serious bargaining. OCC's assertion otherwise is based solely on the fact that OCC did not sign onto the Stipulation. Yet, OCC has no veto authority over the Commission's approval of stipulations. It's enough that the Signatory Parties considered and addressed where appropriated all of OCC's concerns before entering into the Stipulation. Consumers' concerns were also represented by the Signatory Parties. Staff, by its very function, considered the impact the Stipulation has on consumers before it agreed to be a Signatory Party. The knowledge and capability of the Signatory Parties is unquestioned. The Stipulation is a product of serious bargaining amongst knowledgeable and capable parties.

[10] *See* Staff's Initial Brief at pp. 6.

III. The Settlement provides for caps on Rider CEP that comply with the Opinion and Order in Case No. 19-791-GA-ALT.

The Opinion and Order in Case No. 19-791-GA-ALT does not limit the CEP caps that the Commission can approve in this current matter. The Case No. 19-791 Settlement states in its entirety that: "For Rider CEP update filings made by the Company [Duke] to recover the revenue requirement associated with investments and associated CEP regulatory assets beginning January 1, 2021 and forward, the monthly residential Rider CEP rate will be allowed to increase no more than $1.00 per year over the prior year's residential Rider CEP rate."[11] The Settlement goes on to state that "[t]he annual residential rate caps agreed to in this Stipulation shall apply until the effective date of the Company's next natural gas base rate case.[12]

OCC is arguably correct that the effective date for Duke's "next natural gas base rate case" is the date of a PUCO opinion and order in this case. However, if and when the Commission does issue an order approving the Stipulation in the current matter, to the extent that such order approves cap provisions different than those approved in Case No. 19-791-GA-ALT, it is completely appropriate. The Commission did not handcuff its own authority to approve appropriate Rider CEP caps in the current matter. The moment the Commission issues an order in this matter, the Opinion and Order in Case No. 19-791-GA-ALT with regards to the CEP Rider caps is no longer effective. Stated differently, the Stipulation presented to the Commission cannot be in violation of the Opinion and Order in Case No. 19-791-GA-ALT because it is just a proposal that does not become effective

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11 Case No. 19-791-GA-ALT, Stipulation and Recommendation (November 16, 2020) at ¶ 6, pp. 5-6.

12 *Id.*

until the Commission approves it. If and when it is approved, it cannot be in violation of the Opinion and Order in Case No. 19-791-GA-ALT because that opinion would then be no longer effective.

IV. The Stipulation's inclusion into base rates of deferred cost related to the terminated propane caverns is allowed by R.C. 4909.15(A)(4) and violates no Supreme Court precedent.

A. R.C. 4909.15(A)(4) is the only relevant statutory language that governs the Stipulation's inclusion of deferred cost related to propane caverns into base rates.

R.C. 4909.15(A)(4) governs the inclusion of cost into base rates and states, in relevant part, as follows:

> (A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, shall determine: … (4) The cost to the utility of rendering the public utility service for the test period…

Accordingly, R.C. 4909.15(A)(4) allows for the inclusion into base rates of "the cost to the utility of rendering the public utility service" for the test period. In *Office of Consumers' Counsel v. Public Utilities Com.*, 67 Ohio St.2d 153, 164 (1981), the Court found that cost associated with terminated plant[13] that was never placed into service was not contemplated by the legislature to be "the cost to the utility of rendering the public utility service" as provided in R.C. 4909.15(A)(4). The Court did not find, as OCC asserts, that cost associated with terminated plant that was placed in service is not "the cost to the utility of rendering the public utility service." *Id*. Indeed, the Commission has

[13] For the sake of this Reply Brief, "termination cost" and "cost associated with terminated plant" refer to the amortization of the deferral of costs related to the remaining net book value of propane air injection equipment, underground storage facilities, unused propane inventories and estimated decommissioning costs that are included into base rate via the provisions of the Stipulation.

allowed recovery of terminated plant that was placed in service in other matters. *See* Case No. 17-32-El-AIR, et al., Opinion and Order (December 19, 2018), and Case No. 19-664-EL-RDR, Opinion and Order (February 10, 2021).

Even if the language of R.C 4909.15(A)(4) is considered ambiguous with respect to cost related to plant termination that was once in service – and it's not - to read R.C. 4909.15(A)(4) and, thereby, the phrase "the cost to the utility of rendering the public utility service" to exclude such costs from base rates would be counterintuitive and unjust. After all, the statute governs an industry that constantly incurs plant termination costs. In enacting a statute, it is presumed that a just and reasonable result is intended. R.C. 1.47(C). Indeed, the whole point of R.C. 4909.15(A) is the establishment of just and reasonable rates. *See* R.C. 4909.15(A). Accordingly, R.C. 4909.15(A)(4) should be read to accomplish the object sought to be obtained. *See* R.C. 1.49(C). Just and reasonable rates cannot be established if common and reoccurring industry costs (i.e. plant termination cost) are excluded from base rates through an unjust and purpose-undermining reading of the R.C.4909.15(A)(4).

With the forgoing said, there is nothing ambiguous about R.C. 4909.15(A)(4) concerning its treatment costs for terminated plant that has been in service. The Commission need not look beyond the plain language of R.C. 4909.15(A)(4) to reach the conclusion that "the cost of the utility of rendering the public utility service" must include the termination cost of the utility of rendering the public utility service. "Statutory interpretation involves an examination of the words used by the legislature in a statute, and when the General Assembly has plainly and unambiguously conveyed its legislative

intent, there is nothing for a court to interpret or construe, therefore, the court applies the law as written." *State v. Kreischer*, 109 Ohio St. 3d 391, 2006-Ohio-2706 – Syllabus. "Courts do not have the authority to ignore the plain and unambiguous language of a statute under the guise of statutory interpretation, but must give effect to the words used..." *In re Collier* (1993), 85 Ohio App. 3d 232, 236-237. Words and phrases should be read in context and construed according to the rules of grammar and common usage. R.C. 1.42. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, should be construed accordingly. *Id*. "Termination costs" of utilities clearly fall within the definition of "costs" and are clearly allowed to be recovered under R.C. 4909.15(A)(4) as long as they are related to plant that was in service.

B. R.C. 4909.15(A)(1) is irrelevant to the Stipulation's inclusion of deferred plant termination costs into base rates.

Though the legal analysis for the inclusion of plant termination cost into base rates for the propane caverns is a simple matter, OCC attempts to confuse the analysis by arguing the irrelevant language of R.C. 4909.15(A)(1). R.C. 4909.15(A)(1) reads, in relevant part, as follows:

> (A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, shall determine: (1) The valuation as of the date certain of the property of the public utility used and useful … as of the date certain, in rendering the public utility service for which rates are to be fixed and determined…

Accordingly, R.C. 4909.15(A)(1) governs when the valuation of property is included into rate base, while R.C. 4909.15(A)(4) governs how costs are included into base rates.

Further, R.C. 4909.15(A)(1) focuses on whether the property is used and useful as of date certain, while R.C. 4909.15(A)(4) focuses on whether the costs were incurred during the test period. Therefore, costs which are merely included in base rates are treated completely different than property upon which a utility earns a rate of return. R.C. 4909.15(A)(1) is irrelevant to the Stipulation's inclusion of deferred plant termination costs into base rates. Furthermore, OCC's reliance on *In re Suburban Nat. Gas Co.*, 166 Ohio St.3d 176 (2021) is misplaced because the case dealt with R.C. 4909.15(A)(1) and whether plant was useful as of date certain to be included into rate base. *In re Suburban Nat. Gas Co.* did not deal with plant termination costs or R.C. 4909.15(A)(4).

Therefore, OCC's assertions that the propane caverns had to be used and useful at date certain in order for the plant termination costs to be included in base rates is against the plain language of R.C. 4909.15(A)(1) and (A)(4). Clearly, the only requirements are that the plant termination costs had to occur during the test year and had to result from plant that was once in service. Since the existence of neither requirement is challenged in this matter, OCC's assertions that the plant termination costs are disallowed by R.C. 4909.15 are baseless. Moreover, if somehow R.C. 4909.15(A)(1) and (A)(4) were confoundingly read together to require the propane caverns to be used and useful at date certain to allow for the inclusion of plant termination costs in base rates, OCC's assertions would still fail. The propane caverns were used and useful as a backup to allow for the testing of the newly online Central Corridor Pipeline at date certain.[14]

[14] Lawler Supp. Test. at p. 17.

The Commission should approve the Stipulation because it violates no regulatory principles or practices, despite OCC's incorrect assertions that inclusion of plant termination costs in base rates is unlawful.

CONCLUSION

The Stipulation satisfies the three-part test for reasonableness and should be approved by the Commission.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the **Reply Brief** has been served upon the below-named counsel via electronic mail, this 14th day of July, 2023.

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