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

DUKE ENERGY OHIO, INC.'S MEMORANDUM CONTRA APPLICATION FOR REHEARING OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

The Public Utilities Commission of Ohio (Commission) issued an Opinion and Order (Order) in the above-captioned proceeding on November 1, 2023, approving the natural gas distribution rates to be charged by Duke Energy Ohio, Inc. (Duke Energy Ohio or the Company). The Office of the Ohio Consumers' Counsel (OCC) seeks rehearing of that decision in its Application for Rehearing (Application).

An application for rehearing must specifically allege in what respect a Commission order was unreasonable or unlawful to satisfy the requirements of R.C. 4903.10,[1] and none of OCC's four assignments of error establishes that the Commission unlawfully or unreasonably erred in

[1] *See Disc. Cellular, Inc. v. Pub. Util. Comm'n*, 112 Ohio St.3d 360, 375 (2007); *Columbus & S. Ohio Elec. Co. v. Pub. Util. Comm'n*, 10 Ohio St.3d 12, 13 (1984) ("The General Assembly did not intend for a rehearing to be a *de novo* hearing.").

approving the Joint Stipulation and Recommendation (Stipulation) agreed to by the other parties to this case. Instead, OCC's Application merely repackages its own policy positions and arguments. OCC's arguments are either contrary to well-settled Ohio law and ratemaking practice, or the Commission has already carefully considered and rejected them as part of its Order, or both. OCC seeks to relitigate decided issues on the same arguments it previously presented as part of this proceeding and fails to acknowledge that the Stipulation was to be considered as a package. In sum, OCC's arguments are stale and inconsistent with the law and record, and the Commission should once again reject them.

II. LAW AND ARGUMENT

A. Assignment of Error No. 1: Used and Usefulness of Propane Facilities

While the Company's post-hearing briefing and the Commission's Order both already address all arguments raised by OCC in its Application related to the propane facilities, OCC's Application continues to confuse the functionality of plant accounting and rate setting under Ohio law, and further misstates the contents of the record that support the Commission's determination approving the Stipulation.

First, consistent with established prior determinations by the Commission, the "used and useful" standard does not apply here. Specifically, the Commission correctly determined that R.C. 4909.15(A)(4)—not R.C. 4909.15(A)(1)—applies to the propane facilities. Expense from the impairment and recovery of decommissioning costs associated with those facilities constitutes a cost of rendering utility service during the test year in this case. The facilities were not in rate base as of the date certain in this case due to prior accounting adjustments and a settlement previously reached in Case No. 21-1035-GA-AAM (the Deferral Case),[2] and therefore are not property

[2] Order, ¶ 44; *see also* Supplemental Testimony of Sarah E. Lawler on Behalf of Duke Energy Ohio, Inc., in Support of Settlement (May 4, 2023) (Lawler Supp. Test.) (Duke Energy Ohio Ex. 11), 14–17.

subject to the used and useful standard provided in R.C. 4909.15(A)(1). OCC's Application ignores these straightforward facts, effectively seeking to retroactively and untimely attack the Deferral Case outcome.

Second, even if the used and useful standard applied, the record is replete with evidence that the propane facilities were used and useful as of the date certain under R.C. 4909.15(A)(1). While OCC's Application only references the testimony of Company witness Ms. Sarah E. Lawler,[3] the record contains additional and overwhelming evidence that the propane facilities were used and useful on the date certain in these proceedings. This additional evidence includes the direct,[4] supplemental,[5] and live hearing testimony[6] of Company witness Mr. Brian R. Weisker, the Company issued Work Authorization Permits that detailed the steps taken to take the propane facilities out of service after the date certain,[7] and an internal memorandum showing the facilities were disconnected from the natural gas system and retired in mid-April 2022, after the date certain.[8] This conclusion is further supported by evidence submitted into the record by OCC that indicated that the Staff was aware the propane facilities were contemplated to be used and useful even after gas began flowing through the Central Corridor Pipeline (CCP), as indicated in OCC's Joint Exhibit 2, which included the Company's response to OCC-INT-09-004, which provides record citations directly from Case No. 16-253-GA-BTX (the CCP Case), where the Ohio Power

[3] The Company does not dispute the reference to Ms. Lawler's testimony insofar as that testimony provides evidence supporting the Commission's determination that the facilities would be considered used and useful if they were subject to that standard. *See, e.g.*, *id.* (explaining that the propane facilities were not included in rate base in this proceeding due to required accounting adjustments). The Company does, however, dispute OCC's suggestion that Ms. Lawler's testimony is the *only* evidence in the record on which the Commission could have possibly relied. Such an indication is false and misleading, as an array of other evidence supports the Commission's decision in this case.
[4] *See* Direct Testimony of Brian R. Weisker on Behalf of Duke Energy Ohio, Inc. (July 14, 2022) (Weisker Direct Test.) (Duke Energy Ohio Ex. 8), 27–28.
[5] *See* Supplemental Testimony of Brian R. Weisker on Behalf of Duke Energy Ohio, Inc. in Support of Settlement (May 4, 2023) (Weisker Supp. Test.) (Duke Energy Ohio Ex. 9), 6–8, 10–13, Attachment BRW-SUPP-1, Attachment BRW-SUPP-2.
[6] *See* Hearing Tr. Vol. I (Tr. I) 46:20–49:5.
[7] *See* Supplemental Testimony of Brian R. Weisker on Behalf of Duke Energy Ohio, Inc. in Support of Settlement (May 4, 2023) (Weisker Supp. Test.) (Duke Energy Ohio Ex. 9), BRW-SUPP-1. BRW-SUPP-2.
[8] *Id.* at BRW-SUPP-2.

Siting Board authorized the construction of the CCP. Joint Exhibit 2 points to Staff hearing testimony explaining that the propane facilities would not be retired until after (and thus were anticipated to continue to be used and useful as of and after) the CCP's in-service date.[9]

The record in these above-captioned proceedings thus contains considerable evidence that the propane facilities were used and useful as of the date certain, which the Company discussed and cited in post-hearing briefing and which the Commission considered thoroughly in its Order. OCC's failure to acknowledge (and moreover, completely ignore) this conclusive evidence underscores that its position is unsupportable by the overall evidentiary record in this case. Even more, OCC's failure to properly apply Ohio's ratemaking formula under R.C. 4909.15 shows a lack of understanding of Ohio ratemaking law in general and the specific relevant facts here. The Commission should therefore deny rehearing on this assignment of error.

B. Assignment of Error No. 2: Propane Facilities Deferral

OCC's inattention to Ohio ratemaking law continues in its second assignment of error, where it again misinterprets and misapplies R.C. 4909.15 and other Ohio law. First, as explained above, the Commission did not circumvent Ohio ratemaking law when it approved the propane facilities for deferred asset treatment as part of the Deferral Case. The Commission had the authority to approve deferred accounting treatment for the propane facilities—as it regularly does for other utilities and their assets—given the Company's status as a public utility under R.C.

[9] Response to OCC-INT-09-004 (Joint Ex. 2) (citing to the record from *In the Matter of the Application of Duke Energy Ohio, Inc., for a Certificate of Environmental Compatibility and Public Need for the C314V Central Corridor Pipeline Extension Project*, Case No. 16-253-GA-BTX; *See* Testimony of Staff Witness Andrew Conway acknowledged that the retirement of the propane caverns would occur well after the CCP was eventually placed into service: "I kind of gave that a little less weight because one of my Staff Data Requests *said that these propane facilities would be operated for a few years after—after the Central Corridor Pipeline is in place*, so it's—it would be beneficial if the propane-air peakers are offline or retired . . . But I kind of gave that less weight because it was going to take some time before the pipeline is installed and the peakers are retired."

4905.02, as well as R.C. 4905.20 and 4905.21. The Commission exercised its authority as permitted by Ohio law.

But the Commission's authority to approve deferrals and other accounting mechanisms was not a conversion of cost under R.C. 4909.15(A)(4) as OCC suggests. Rather, it is the accounting treatment of the propane facilities before the order in the Deferral Case was even issued, the types of costs included in the deferral (*i.e.*, costs of winding down and decommissioning the facilities), and the timing of those actions that show that decommissioning costs for the propane facilities are costs of service under R.C. 4909.15(A)(4). The Commission performed a holistic analysis of these facts in its Order.[10] Thus, this is not a case of transforming one type of cost to another, but of analyzing the nature of the cost when the cost is reviewed for recovery, taking into account prior, established decisions of the Commission.

Additionally, while OCC opines on *Office of Consumers' Counsel v. Public Utilities Commission*,[11] it again miscites and misapplies that precedent to the case at bar. With regard to *Office of Consumers' Counsel*, OCC states that "[t]he salient point of the Court's ruling was that the utilities [*sic*] capital investment was not a recurring, normal expense under R.C. 4909.15(A)(4)."[12] But OCC self-servingly omits a critical portion of the Court's statement in this regard: the Court's premise of its decision was that "[t]est period considerations aside, what the company sought and what the commission granted was the amortization as service-related costs of an investment *that never provided any service whatsoever to the utility's customers*."[13] Thus, the projects at issue in *Office of Consumers' Counsel* were never completed and were never used to provide utility service to consumers. In contrast, the propane facilities provided continuous safe

[10] Order, ¶ 44.
[11] *Off. of Consumers' Couns. v. Pub. Utilities Comm'n*, 67 Ohio St. 2d 153 (1981).
[12] OCC's Application for Rehearing, 4–5.
[13] *Off. of Consumers' Couns*., 67 Ohio St. 2d at 164 (emphasis added).

and reliable service to consumers for over 60 years,[14] including on the date certain and during the test period in this proceeding. The "salient point" of the Court's ruling is thus not the point that OCC emphasizes in its Application, which omits the critical facts and rulings of that case.

It is also worth noting that OCC's position misstates the purpose of the used and useful standard. Typically, that standard applies to rate base items on which the utility is seeking to earn a rate of return. In approving deferred accounting for the propane facilities, the Commission explicitly noted that the Company was not to earn a return on the deferred amounts, and the deferred amounts are not in rate base.[15] This deferral without a return is a benefit to all customers in terms of the rates paid for service, as customers pay in rates only the value of the asset without any additional return to which the utility is otherwise entitled. OCC's position in this case seeks to misapply the used and useful standard to simply deny the Company recovery of actual costs of providing service to customers.

Instead, OCC regurgitates the same arguments already presented in its post-hearing briefing, and again to no avail. OCC argues (without evidence) that the propane facilities necessarily were not used and useful once the CCP went into commercial operation. But in doing so, OCC ignores the definition of "commercial operation" under Ohio law. O.A.C. 4906-1-01(M)(3) defines "commercial operation" of a natural gas pipeline as that time when "gas is being transported through the pipeline in an attempt or offer to exchange the gas for money, barter, or anything of value." Whether a pipeline has begun "commercial operation" is not a subjective determination, and the flow of gas through the CCP does not imply that the propane facilities—which the CCP was, in part, intended to replace[16]—were automatically rendered obsolete. As the

[14] Weisker Supp. Test. (Duke Energy Ohio Ex. 9), 6.
[15] *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Abandon Certain Propane-Air Facilities*, Case No. 21-986-GA-ABN, Opinion and Order at 10, 11 (Oct. 5, 2022).
[16] The Company's post-hearing briefing summarizes the extensive evidence in the record showing that only one of the CCP's primary purposes was to replace the propane facilities. *See, e.g.*, Duke Energy Ohio, Inc. Reply Brief, Section II.B.2.c (July 14, 2023).

evidence presented by the Company demonstrates,[17] the Company maintained use of the propane facilities beyond the time that gas began flowing through the CCP, primarily because its obligations to provide reliable service to customers required its continued use of the propane facilities as back-up peaking resources while the CCP was brought to and tested at full capacity. Record statements from the Commission's Staff in the CCP Case confirm this.[18]

In sum, OCC makes several factually and legally incorrect statements as part of this assignment of error, and the Commission should deny rehearing on this issue for the same reasons it rejected OCC's arguments under its Order. As OCC notes, "Ohio law [is] to be followed, not disregarded." OCC fails to take its own advice with respect to the law as it applies to the used and useful standard and to holistic consideration of the entire record in the case and the Stipulation as a package. The Commission should not endorse this approach.

C. Assignment of Error No. 3: Financial Performance Incentives

Contrary to OCC's third assignment of error, the Stipulation itself is reasonable and lawful, as are its specific terms related to financial performance incentives. Commission precedent on the three-part test for stipulations and settlements has remained unchanged for decades and has been consistently applied to a stipulation "as a package."[19] As OCC's own witness acknowledged, the Commission's analysis of a settlement is holistic.[20] It is *not* an isolated evaluation of each of the proposed settlement's individual terms. Even so, OCC focuses its Application on this point on the purported reasonableness of the Stipulation's terms related to financial performance incentives, arguing that this single component of the Stipulation invalidates the entire package. This is not the

[17] *Id.*
[18] Response to OCC-INT-09-004 (Joint Ex. 2).
[19] *See, e.g.*, *In re Cincinnati Gas & Elec. Co.*, Case No. 91-410-EL-AIR, Order on Remand at 3-4 (Apr. 14, 1994); *Indus. Energy Consumers of Ohio Power Co v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 563 (1994).
[20] Tr. Vol. I at 82:22–83:6.

test. The Stipulation contains financial performance incentive terms that are entirely reasonable in context of the Stipulation and this case at large. The Commission confirmed as much in its Order.[21]

Nevertheless, the Stipulation's terms related to financial performance incentives are also reasonable in isolation. The Company has provided extensive evidence that these incentives are in fact necessary to provide safe, reliable service to Ohio consumers. Specifically, for the Company to remain attractive against its competitors and retain a highly skilled and qualified workforce, the Company must offer a competitive compensation package;[22] this package—which includes financial performance incentives—is customer-focused, as employees are motivated to lower costs, generate efficiencies, and provide exceptional service, all to customers' benefit.[23] Customers therefore receive ample benefit from these incentives. OCC's mere assertions otherwise does not change these facts.

Further, these terms are entirely lawful, despite OCC's claims otherwise. There is no applicable precedent that prohibits inclusion or recovery of financial performance incentives in rates, and OCC indeed cites no precedent suggesting otherwise. The Commission's prior approval of Staff's removal of certain financial incentives related to the Company's energy efficiency and demand response programs as part of a 2017 electric rider case is not binding on its decision here,[24] as the Commission may make a holistic evaluation of each case's facts and circumstances when rendering its order in each proceeding.[25] In fact, the Commission has recently approved the Company's recovery of financial performance incentives in several cases that OCC omits from its

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[21] Order, ¶ 64.
[22] Lawler Supp. Test. (Duke Energy Ohio Ex. 11), 21–22.
[23] *Id.*
[24] *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. 17-0781-EL-RDR, Finding and Order at ¶ 16 (May 15, 2019).
[25] The Commission confirmed this in its Order. *See* Order at ¶ 64 ("[E]ach case must be reviewed on a case-by-case basis and, based upon the facts and circumstances of each case, recovery of financial incentive compensation may be permitted.") (citing *In re the Annual Application of Duke Energy Ohio, Inc.*, Case No. 21-618-GA-RDR, Opinion and Order (July 27, 2022) at ¶ 84; *Rider CEP Case*, Opinion and Order (Apr. 21, 2021) at ¶ 69).

analysis, including Case Nos. 19-0791-GA-ALT[26] and 21-0618-GA-RDR.[27] Moreover, the Commission has similarly and recently authorized recovery of financial performance incentives for other natural gas utilities, including The East Ohio Gas Company d/b/a Dominion Energy Ohio in Case No. 21-0619-GA-RDR[28] and Columbia Gas of Ohio in Case No 21-0637-GA-AIR.[29] The Commission previously authorized recovery much like what it authorized here, and no law, rule, or other binding precedent prevents this.

OCC therefore misconstrues both the applicable facts and law, and the Commission should deny rehearing on this issue. Relitigating the Stipulation's reasonable terms as they relate to financial performance incentives on the same arguments that have already been rejected as contrary to the applicable facts, rules, and policies is unnecessary and inappropriate.

D. Assignment of Error No. 4: Refundability of Propane Facilities

OCC's claim that the Commission erred by not making charges for the propane facilities subject to refund, like its other arguments, is unsupported by Ohio law and applicable precedent.

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[26] *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Alternative Form of Regulation*, Case No. 19-0791-GA-ALT, Opinion and Order at ¶ 69 (Apr. 21, 2021) ("Finally, we find no merit in OCC's arguments related to the Stipulation's provisions imposing rate caps and allowing inclusion of earnings- and stock-based incentives in the CEP Rider. . . . With respect to the latter, the Signatory Parties have explained that their recommendation that earnings- and stock-based incentives be recovered through Duke's CEP Rider is consistent with GAAP, as well as the treatment of such incentives in the Company's natural gas base rates and the CEP riders and base rates for other natural gas companies. Accordingly, the Commission finds that the inclusion of these incentives in Duke's CEP Rider is not unreasonable.") (internal citations omitted).

[27] *In the Matter of the Annual Application of Duke Energy Ohio, Inc. for an Adjustment to the Capital Expenditure Program Rider Rate*, Case No. 21-618-GA-RDR, Opinion and Order at ¶ 64 (July 27, 2022).

[28] *In the Matter of the Annual Application of The East Ohio Gas Company d/b/a Dominion Energy Ohio for an Adjustment to the Capital Expenditure Program Rider Rate¸* Case No. 21-619-GA-RDR, Opinion and Order at ¶ 55–56 (Feb.23, 2022) ("Staff notes that the Commission has previously and consistently permitted the inclusion of LTIP and AIP type of costs in CEP riders for natural gas companies. Staff argues that the Stipulation is, therefore, consistent with Commission precedent and GAAP. Staff notes that no other natural gas utilities in Ohio have been required to remove capitalized incentives from the capital assets included in either CEP rider rate or natural gas base rates and cites to a recent order in which the Commission approved the inclusion of these incentives in a CEP rider.") (internal citations omitted).

[29] *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*,* Opinion and Order at ¶ 71 (Jan. 26, 2023) ("The Stipulated Schedules include all of the capitalized employee incentive compensation associated with Columbia's plant as of March 31, 2021 . . . Columbia agrees not to seek recovery from consumers, for the approved terms of the IRP rider and the CEP rider under this Stipulation, of the capitalized incentive compensation solely attributable to financial performance from all plant-in-service beginning January 1, 2023.") (internal citations omitted).

Most significantly, OCC advocates for a violation of the filed rate doctrine, which is embodied in R.C. 4905.32 and 4905.33. Under this doctrine, a utility may charge only the rates fixed by its current, Commission-approved tariff.[30] While the Commission has the power to invalidate a rate schedule and fix new rates, it may exercise this power prospectively only:[31] "The rule against retroactive ratemaking thus bars the [C]ommission from ordering a refund or otherwise adjusting current rates to make up for overcharges under previously recovered rates. Put most simply, the rule against retroactive rates also prohibits refunds."[32] OCC's assignment of error on this point therefore runs contrary to established Ohio statutory and case law.

The filed rate doctrine aside, OCC also cites to Commission and Supreme Court of Ohio precedent related to refunds that is not relevant here. First, the only recent Commission precedent cited by OCC relates to refunds ordered in the context of rider cases, which are inherently distinct from base rate cases like this one. In rider cases, utilities are seeking to recover discrete costs on a current basis (*i.e.*, before a detailed Commission review occurs) that often are linked to a true-up mechanism that, at times, can lead to refunds to customers. Some riders go into effect automatically and are reviewed by the Commission after the fact, making review and refund safeguards more appropriate to protect customers. This is not true for base rates, which are established after a lengthy and detailed contested case proceeding. Additionally, no new legislation has been enacted during the course of this case that changes Ohio's ratemaking formula or ratemaking practices considered by the Commission, making the procedure of Case No. 77-1073-WS-COI distinct and OCC's citation to this case irrelevant. Finally, OCC neglects to mention that the opinion of Justice Pfeifer of the Supreme Court of Ohio that it cites related to utilities collecting "unjustified charges"

[30] *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257 (1957); *In re Complaint of Pilkington N. Am., Inc.*, 2015-Ohio-4797, ¶ 30, 145 Ohio St. 3d 125, 131.
[31] *Ohio Util. Co. v. Pub. Util. Comm.*, 58 Ohio St.2d 153, 157–158, 389 N.E.2d 483 (1979); *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, 2018-Ohio-229.
[32] *Id.* (internal citations and quotations omitted).

is, in fact, a dissenting opinion.[33] The high court's majority found nothing "unconscionable" or controversial about the subject utility's or the Commission's inability to engage in retroactive ratemaking or refunding,[34] and OCC's failure to indicate otherwise is misleading.

Finally, OCC does not recognize that the Commission expressly found that the propane caverns would meet the used and useful standard of R.C. 4909.15(A)(1) if that standard applied (which, as the Commission held, it does not).[35] OCC's purported policy of refundability—which, as noted above, is not rooted in Ohio law—is therefore irrelevant. OCC once again conflates distinct ratemaking concepts to advance a one-sided narrative.

OCC's argument that costs lawfully included in base rates should be made subject to refund on the off chance that a party wants to seek an appeal creates a slippery slope that will harm customers. If OCC's position carries the day, it injects unnecessary and unreasonable risk and uncertainty into the utility's financial condition that would not go unnoticed by rating agencies and potential investors. This could cause the utility's financing costs to increase, which in turn will provide additional upward pressure on customer rates. To protect Ohio customers, the Commission should reject OCC's efforts.

Thematically, OCC's assignments of error presented in its Application disregard, misinterpret, or wholly misstate applicable Ohio law. This assignment of error is no exception. The Company therefore urges the Commission to deny rehearing on this assignment of error, as well as the others presented in the Application, as inconsistent and entirely unmoored from the rules, standards, and precedent that apply to this case and rehearing in general.

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[33] *See* OCC's Application for Rehearing, 13–14 (citing *In re Application of Columbus S. Power Co.*, 2014-Ohio-462 without indicating that the cited text originates from the dissenting opinion).
[34] *In re Application of Columbus S. Power Co.*, 2014-Ohio-462, ¶ 48 (finding that "the law does not require recovery" of previously over-collected charges and that OCC's request otherwise "would constitute retroactive ratemaking" in violation of Ohio law).
[35] Order, ¶ 45.

III. CONCLUSION

For the reasons set forth above, Duke Energy Ohio respectfully requests that the Commission deny OCC's Application for Rehearing.

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 11th day of December, 2023, upon the persons listed below.

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Summary: Memorandum Duke Energy Ohio, Inc.'s Memorandum Contra Application for Rehearing of the Office of the Ohio Consumers' Counsel electronically filed by Mrs. Tammy M. Meyer on behalf of Duke Energy Ohio Inc. and D'Ascenzo, Rocco and Akhbari, Elyse Hanson and Vaysman, Larisa and Kingery, Jeanne and Brama, Elizabeth and Verhalen, Kodi J..