IN THE SUPREME COURT 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, *et al*.	)	Case No. 2024-1548
	)	Appeal from the Public Utilities Commission of Ohio
	)	PUCO Nos. 21-637-GA-AIR, 21-638-GA-ALT, 21-639-GA-UNC, and 21-640-GA-AAM

MERIT BRIEF OF INTERVENING APPELLEE COLUMBIA GAS OF OHIO, INC.

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I. Introduction

This Court has heard the Appellants' arguments before. And it has rejected them, multiple times. It should do so again here.

This appeal is a challenge to a Stipulation that the Public Utilities Commission of Ohio ("Commission") adopted in a natural gas rate case. In 2021, Columbia Gas of Ohio, Inc. ("Columbia") filed its first application to increase distribution rates since 2008 with the Commission, along with applications to continue its capital investment programs and energy-efficiency portfolio. The next spring, Columbia began a series of negotiations with Staff of the Commission ("Staff") and numerous intervenors in the case, which – after a great deal of time and effort – resulted in a comprehensive settlement with Staff and intervenors representing numerous diverse interests ("Stipulation"). In January 2023, the Commission approved that Stipulation, with two minor modifications.

Three Intervenors – Ohio Partners for Affordable Energy ("OPAE"), Environmental Law & Policy Center ("ELPC"), and Citizens' Utility Board of Ohio ("CUB") – filed applications for rehearing, primarily to challenge two aspects of the Stipulation: its continuation of Columbia's longstanding straight-fixed variable ("SFV") rate design for residential customers, and the signatory parties' agreement that Columbia should only offer energy-efficiency programs for low-income customers.

But the Commission never issued an entry on the merits of those applications. Instead, in September 2024, the Commission issued an Entry concluding that the

applications had been denied by operation of law, pursuant to this Court's decision the previous month, *In re Application of Moraine Wind, L.L.C.*, Slip Opinion No. 2024-Ohio-3224. ELPC and CUB, the only two Appellants here, did *not* seek rehearing of the Commission applying *new law* in the Commission's September 2024 Entry. Instead, in this Court, they are asserting errors alleged in their *February 2023* Applications for Rehearing, and, as such, this matter was not properly preserved for review by this Court.

For the reasons that follow, this Court should either dismiss ELPC and CUB's appeal for lack of jurisdiction, or, alternatively, reject both of their Propositions of Law on the merits. This Court has heard challenges to SFV rate designs twice, and rejected those challenges both times. *See Ohio Consumers' Counsel v. Pub. Util. Comm.*, 2010-Ohio-134, at ¶¶ 4, 30; *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 2010-Ohio-6239. Appellants make no new anti-SFV arguments here. In fact, the Appellants are relying on testimony from some of the same witnesses that the appellants used in those cases, to no avail. Similarly, this Court has heard, and rejected, arguments that Ohio's energy policies require the Commission to approve some arbitrary level of funding for energy efficiency programs that matches an appellant's policy preferences. But this Court has rejected those arguments, holding the Commission is not required to approve *any* specific funding levels for energy-efficiency programs under R.C. 4929.02 or R.C. 4905.70. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 2010-Ohio-134, ¶ 39; *see also Ohio Partners for Affordable Energy*

v. Pub. Util. Comm., 2007-Ohio-4790, at ¶¶ 36-38. If the Court concludes that it has jurisdiction over this appeal, then it should reject Appellants repeated arguments and confirm the Commission's decision below.

II. Statement of the Facts

In May 2021, Columbia filed a notice of intent to increase its rates pursuant to R.C. Chapter 4909. Columbia filed its application the next month. Pursuant to R.C. 4909.19, the Commission's Staff investigated that application and filed a written report of its investigation (the "Staff Report"). In addition to the Appellants here, several interested parties intervened in the case, including the Ohio Energy Group ("OEG"), the Office of the Ohio Consumers' Counsel ("OCC"), Ohio Partners for Affordable Energy ("OPAE"), Interstate Gas Supply, Inc. ("IGS"), Retail Energy Supply Association ("RESA"), Northeast Ohio Public Energy Council ("NOPEC"), Ohio School Council ("OSC"), Ohio Manufacturers' Association Energy Group ("OMAEG"), The Kroger Co. ("Kroger"), and Industrial Energy Users-Ohio ("IEU-Ohio").

After the parties filed their objections to the Staff Report, in May 2022, Columbia, Staff, and the intervenors began a lengthy negotiation process. (*See* Op. & Order, ¶ 105; Appx. 143.)[1] After five months of negotiations, which involved twice-a-week meetings

[1] References herein to the Appendix and Supplement filed by Appellants shall be "Appx." and "Supp.," respectively. References to Columbia's Appendix shall be "COH Appx."

(in-person and virtual), Staff, Columbia, NOPEC, IEU-Ohio, OMAEG, Kroger, OSC, IGS, RESA, and OEG (collectively, the "Signatory Parties") filed a Joint Stipulation and Recommendation ("Stipulation") in October 2022. (*See* Stipulation; Supp. 594 *et seq*.) Only three intervenors – the two Appellants here (ELPC and CUB) and OPAE – filed testimony in opposition to the Stipulation. An evidentiary hearing took place in November 2022. After the hearing, the parties submitted post-hearing briefs.[2]

After reviewing the parties' post-hearing briefs and the evidence in the administrative record, on January 26, 2023, the Commission issued its Opinion and Order. The Commission concluded that the Stipulation meets Ohio's longstanding, three-part test for considering the reasonableness of stipulations and that the Stipulation should be adopted with certain modifications not relevant here. (*Id*. at ¶ 103-206; Appx. 142-187.) The Commission's comprehensive analysis of the three-part test in the Opinion & Order spans more than one hundred paragraphs of text and nearly fifty pages. (*Id*.) Only the second and third prongs of the three-part test are at issue in this appeal.

The Commission confirmed that the Stipulation satisfies the second prong because the Stipulation, as a package, benefits ratepayers and the public interest, holding, in part:

[2] Columbia successfully moved to strike a portion of ELPC's initial post-hearing brief because it contained information that had been stricken by the Administrative Law Judge during the evidentiary hearing. OCC successfully moved to strike a portion of OPAE's reply brief, which also contained facts not in evidence.

> The Commission finds that evidence in the record demonstrates that the Stipulation, as a package, benefits ratepayers and the public interest. Company witness Thompson, OCC witness Adkins, and Staff witness Lipthratt each testified that the Stipulation, as a package, benefits ratepayers and the public interest, and each witness identified numerous provisions that benefit the public (Co. Ex. 35 at 3-4; OCC Ex. 1 at 5-10; Staff Ex. 8 at 4-7). We note that the Stipulation in this case substantially reduces Columbia's requested rate increase while providing Columbia with the opportunity to obtain a reasonable return on its investment (OCC Ex. 1 at 6; Staff Ex. 8 at 4-5). The Stipulation provides for important funding to promote the reliability and safety of natural gas service in Columbia's service area (Columbia Ex. 35 at 4). The Stipulation also provides for significantly lower rider caps than proposed by Columbia and for the filing of a new rate case in 2027 (OCC Ex. 8 at 8-9; Staff Ex. 8 at 6-7).

(Op. & Order, ¶ 169; Appx. 171.) With respect to the third prong of the test, the Commission concluded that the Stipulation violates no important regulatory principle or practice. After eliminating one provision of the Stipulation,[3] the Commission found that the Stipulation, as modified, is entirely consistent with Ohio's regulatory principles. (*Id.* at ¶¶ 179-198; Appx. 176-183.)

The Appellants, ELPC and CUB, filed separate applications for rehearing, but as noted above, and in Columbia's Motion to Dismiss filed herein on February 23, 2025, the Commission never ruled on the merits of those applications. ELPC challenged the

[3] The Commission modified the Stipulation by eliminating a provision in which Columbia agreed it would not pursue, or support others' pursuit, of consumer-funded energy-efficiency programs through legislation because the Commission concluded that it lacked statutory authority to approve or enforce a provision implicating First Amendment rights to petition the government. (Opinion & Order, ¶ 206; Appx. 187.)

Commission's approval of an increased fixed customer charge and the elimination of certain energy-efficiency programs (the non-low-income demand-side management (DSM) programs). (ELPC App. for Rehr'g. at 3; Appx. 207.) CUB, similarly, filed an Application for Rehearing decrying "increases in fixed monthly charges [that] are being coupled with the loss of energy and cost saving programs that, for decades, have been used by these same residential consumers to cushion the impact of those usual rising costs." (CUB App. for Rehr'g. at 3-4; Appx. 222-223.)

Columbia opposed these Applications for Rehearing, noting that ELPC and CUB's arguments regarding the increase in fixed charges resulting from the continued use of straight-fixed-variable ("SFV") rate design "run counter to more than a decade of Commission precedent, affirmed by two Ohio Supreme Court decisions." (Columbia Mem. Opp. Reh'g. at 3; COH Appx. 03.) Columbia noted, further, that ELPC and CUB's arguments against discontinuing the company's non-low-income DSM programs were "inconsistent with the Commission's longstanding application of its three-part test for stipulations, the Commission's recent opinion in Ohio Power's distribution rate case, and Ohio Supreme Court opinions interpreting the state's energy efficiency policies." (*Id.*)

As noted above, the Commission never ruled on the merits of Appellants' Applications for Rehearing. Instead, as Columbia explained in its February 3, 2025, Motion to Dismiss this appeal, the Commission first granted rehearing for the limited

purpose of further consideration – a practice this Court later held, in *Moraine Wind*, has no legal effect. After the Court issued its opinion in *Moraine Wind*, the Commission issued an Entry on September 4, 2024, holding that the Applications for Rehearing had been denied by operation of law. (Entry; Appx. 199-201.) Critically, ELPC and CUB *did not seek rehearing* of that September 2024 Entry, which was a necessary predicate for their appeal here. But even if this Court excuses that key procedural misstep, the Court should reject both of Appellants' Propositions of Law for the following reasons.

III. Law and Argument

A. This Court should dismiss ELPC and CUB's appeal for the reasons Columbia explained in its February 3, 2025, Motion to Dismiss.

On February 3, 2025, Columbia filed a Motion to Dismiss this appeal for lack of jurisdiction. As Columbia explained in that Motion, which remains pending, neither ELPC nor CUB filed an application for rehearing from the Commission's September 2024 Entry, in which the Commission determined that their prior applications for rehearing had been denied by operation of law. For that reason, neither the Commission's January 2023 Opinion and Order, nor the March 2023 Entry on Rehearing, nor the Commission's September 2024 Entry, is properly before this Court, pursuant to R.C. 4903.10 (COH Appx. 21) R.C. 4903.11 (COH Appx. 23), and R.C. 4903.13 (Appx. 241).

First, R.C. 4903.13 (Appx. 241) requires any person appealing a Commission order to specify "the order appealed from and the errors complained of." ELPC and CUB

appealed the September 2024 Entry, but did not state that they are challenging the Commission's retroactive application of *Moraine Wind* to their applications for rehearing. *Second*, R.C. 4903.10 (COH Appx. 21) bars any person from appealing a Commission order without first filing "a proper application . . . for a rehearing." But ELPC and CUB never sought rehearing of the September 2024 Entry. *Third*, R.C. 4903.11 (COH Appx. 23) requires any person seeking to challenge "a final [Commission] order" to file a notice of appeal "within sixty days after the date of denial of the application for rehearing by operation of law or of the entry . . . denying an application for rehearing." According to the Commission's September 2024 Entry – which Appellants did not challenge below -- ELPC and CUB's applications for rehearing were denied by operation of law in March 2023 – *over 17 months before they filed their Notice of Appeal*. Accordingly, this appeal was untimely, and the Court has no jurisdiction over the Opinion and Order, the non-substantive Entry on Rehearing, or the denial of the applications for rehearing by operation of law, either.

For these and other reasons Columbia previously set forth in its Motion to Dismiss, which Columbia reasserts as if fully set forth herein, the Court should dismiss this appeal for lack of jurisdiction and need not reach the merits.

B. If the Court reaches the merits of this appeal, the Court should reject both of Appellants' Propositions of Law.

Even if the Court excuses Appellants' procedural failings, the Court should nonetheless reject both of their Propositions of Law and affirm the Commission's approval of the Stipulation. The Commission did not act unreasonably or unlawfully when it approved a Stipulation that continues a longstanding, straight-fixed-variable ("SFV") rate design (one this Court has previously approved) and also continues some (but not all) of Columbia's energy-efficiency programs.

1. Standard of Review

R.C. 4903.13 (Appx. 241) provides that a Commission order shall be reversed, vacated, or modified by this Court only when, upon consideration of the record, the Court finds the order to be unlawful or unreasonable. *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 2004-Ohio-6767, ¶50. The Court will not reverse the Commission's decision as to questions of fact if the record contains sufficient, probative evidence to show that its decision was not manifestly against the weight of the evidence and not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Monongahela Power Co. v. Pub. Util. Comm.*, 2004-Ohio-6896, ¶29. And although this Court has complete and independent power of review as to all questions of law and need not defer to the Commission's interpretation of ambiguous laws or regulations, the Court has long recognized limitations upon its review of Commission orders that establish rates

and rate-related classifications. *Green Cove Resort I Owners' Assn. v. Pub. Util. Comm.*, 2004-Ohio-4774, ¶ 24. In such cases, this Court has held that its "function is not to weigh the evidence or to choose between alternative, fairly debatable rate structures. That would be to interfere with the jurisdiction and competence of the [Commission] and to assume powers which this court is not suited to exercise." *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 46 Ohio St.2d 105, 108 (1976). Thus, the Court's task is not to set rates; it is only to "ensure that the rates are not unlawful or unreasonable and that the rate-making process itself is lawfully carried out." *Ohio Consumers' Counsel*, 2010-Ohio-6239, ¶ 13 (citing *AT&T Comm. of Ohio, Inc. v. Pub. Util. Comm.*, 51 Ohio St.3d 150, 154 (1990).

2. <u>Response to Appellants' Proposition of Law No. 1</u>: The Evidentiary Record Supports the Commission's Finding that the Stipulation Is in the Public Interest.

The longstanding three-part test for Commission review of stipulations asks:

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

Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm., 68 Ohio St.3d 559, 561 (1994), citing *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126 (1992). This Court has "endorse[d] the commission's effort utilizing these criteria to resolve its cases

in a method economical to ratepayers and public utilities." *Consumers'* Counsel, 64 Ohio St.3d at 126. Although ELPC and CUB originally, in post-hearing briefing, challenged the Commission's application of all three of these factors, they have abandoned their challenge with respect to the first, "serious bargaining" factor.

Appellants' First Proposition of Law focuses on the second factor of the three-prong test, arguing that the Stipulation's increased fixed charges to customers, coupled with the Stipulation's elimination of certain energy-efficiency programs for non-low-income customers, does not benefit ratepayers or the public interest, and that there is no support in the evidentiary record for the Commission to have concluded otherwise. Appellants are mistaken.

a. Substantial record evidence supports the Commission's determination that the Stipulation is in the public interest.

Appellants begin with what amounts to a weight-of-the-evidence challenge to the Commission's conclusion that the Stipulation benefits ratepayers. (Br. at 10-11.) But "an appellant, to succeed, must show that the commission's order was against the manifest weight of the evidence." *Consumers' Counsel*, 64 Ohio St.3d at 126. Here, the manifest weight of the evidence *supports* the Commission's conclusion.

In its analysis of the second factor, the Commission expressly noted substantial record evidence to support its conclusion that the Stipulation, as a package, benefits ratepayers and the public interest, including:

- Evidence that the Stipulation's revenue increase of $68.192 million is substantially lower than the proposed $221.4 million increase requested in Columbia's Application. (Op. & Order, ¶ 133; Appx. 156) (citing Jt. Ex. 1 at 3; Supp. 596 & Columbia Ex. 35 at 1; Supp. 701.)

- Testimony from Staff confirming that the reduction in the Company's requested revenue increase is a key benefit of the Stipulation (Op. & Order, ¶ 133; Appx. 156) (citing Staff Ex. 8.)

- Evidence submitted by Columbia and IEU-Ohio noting that the Stipulation embodies a lower return on equity and lower rate of return, as well as a reduced rate base from $3,560,230,000 to $3,505,491,000 (Op. & Order, ¶ 133; Appx. 156) (citing Columbia Ex. 1 at Sch. A-1; Columbia Ex. 29 at 10; & Columbia Ex. 17 at 1.)

- Evidence submitted by Columbia showing that the combination of a lower rate of return and reduced revenue requirement results in a $3.76 monthly increase to the fixed charge billed to residential customers – far lower than the $11.66 monthly increase to the fixed charge proposed in Columbia's Application. (Op. & Order, ¶ 133; Appx. 156) (citing Columbia Ex. 35 at 3; Supp. 703.)

- Evidence submitted by Columbia showing that the Stipulation preserves over $70 million in funding ($14,867,329 per year) to continue Columbia's WarmChoice© program. (Op. & Order, ¶ 134, Appx. 157) (citing Jt. Ex. 1 at 12 & Columbia Ex. 35 at 4; Supp. 704.)

- Evidence submitted by Columbia showing that the Stipulation continues the Company's Infrastructure Replacement Program, which systematically replaces bare steel and cast-iron mains, along with hazardous service lines, improving safety and reliability. (Op. & Order, ¶ 135; Appx. 157) (citing Jt. Ex. 1 at 15-16 & Columbia Ex. 35 at 4; Supp. 704.)

- Testimony from Columbia witness Melissa Thompson, who noted that the Stipulation maintains the Capital Expenditure Rider ("CEP"), which allows the Company to invest in capital maintenance and betterment of its facilities. (Op. & Order, ¶ 135; Appx. 157) (citing Columbia Ex. 35 at 4; Supp. 704.)

- Evidence that the Stipulation requires the continued deferral of $10 million per year through December 31, 2030, to allow the completion of the remediation of the

Company's GPS data of its facilities. (Op. & Order, ¶ 135; Appx. 157) (citing Jt. Ex. 1 at 10-11; Supp. 603-604 & Columbia Ex. 35 at 4; Supp. 704.)

- Evidence that the Stipulation provides for an incremental $1.5 million in funding for an enhanced Cross Bore Remediation Program and that the continued WarmChoice© program will mitigate several health and safety issues. (Op. & Order, ¶ 135; Appx. 157) (citing Columbia Ex. 35 at 4; Supp. 704.)

The Commission expressly cited all the foregoing evidence of record regarding the many benefits of the Stipulation, Appellants' contention that the evidentiary record does not support the Commission's determination that the Stipulation satisfies the second factor of the three-part test ignores the overwhelming evidence cited by the parties in brief and the Commission in its Opinion and Order.

Notably, the foregoing list of benefits does not even capture the entirety of the Commission's analysis of the evidentiary record. The Commission *also* expressly noted additional evidence submitted by Columbia and other Signatory Parties (such as OCC, OMAEG and Kroger) that:

- The Stipulation benefits all customer classes by limiting increases to the CEP and IRP riders. (Op. & Order, ¶ 136; Appx. 157-158) (citing OCC Ex. 1 at 8-9 & Staff Ex. 8 at 7.)

- The Stipulation provides that if Columbia does not file another rate case on or before September 1, 2027, then it will file revised tariff sheets where the IRP and CEP rider rates charged to customers will be adjusted to $0. (Op. & Order, ¶ 136; Appx. 158) (citing Jt. Ex. 1 at 16; Supp. 609.)

- The Stipulation limits deferral of environmental remediation costs at former manufactured gas plant sites, restricts the number of sites to 15, and imposes

stricter requirements for Columbia to recover those remediation costs. (Op. & Order, ¶ 136; Appx. 158) (citing Jt. Ex. 1 at 9-10; Supp. 602-603.)

- The Stipulation removes $3.866 million of employee incentive compensation from customer charges. (Op. & Order, ¶ 137; Appx. 158) (citing Jt. Ex. 1 at 4; Supp. 597.)

- The Stipulation benefits residential customers by adopting a bill assistance program, free meter tests every three years, an online method for customers to protect their personal contact information, and pro-ration of Small General Service ("SGS") class base rates over three calendar years. (Op. &Order, ¶ 137; Appx. 158) (citing Jt. Ex. 1 at 6, 19, 21; Supp. 599, 612, 614 & Columbia Ex. 35 at 3; Supp. 703.)

- The Stipulation includes additional benefits for non-residential customers, including:

    - A base rate discount of 7.5% for the school rate schedules in the SGS, GS, and LGS rate classes.

    - Unique percentage surcharges for the IRP rider and CEP rider rates for GS and LGS rate classes.

    - Options for GS or LGS rate class customers to locate or relocate service lines or other Columbia facilities in a manner different than that proposed by Columbia

  (Op. & Order, ¶ 138; Appx. 159) (citing Jt. Ex. 1 at 6, 7, 16; Supp. 599, 600, 609.)

The Commission went on in its Opinion & Order to note numerous other benefits of the Stipulation identified by Staff (¶ 140; Appx. 159-160); OCC (¶ 142; Appx. 160); OEG (¶ 143; Appx. 160-161); as well as RESA and IGS (¶ 144; Appx. 161).

Ultimately, the Commission stated that it agreed with the testimony from Columbia, Staff, and OCC's witnesses "identif[ying] numerous provisions [in the Stipulation] that benefit the public" and held "that the Stipulation, as a package, benefits

ratepayers and the public interest." (Op. & Order, ¶ 169; Appx. 171.) The Commission specifically noted "that the Stipulation . . . substantially reduces Columbia's requested rate increase while providing Columbia with the opportunity to obtain a reasonable return on its investment"; "provides for important funding to promote the reliability and safety of natural gas service in Columbia's service area"; "provides for significantly lower rider caps than proposed by Columbia"; and requires "the filing of a new rate case in 2027." (*Id.*)

Appellants attempt to discount the foregoing evidence by arguing that the Commission made only "conclusory" remarks when rejecting Appellants' complaints. Indeed, the word "conclusory" appears no less than thirteen times throughout Appellants' Merit Brief, and no less than eight times in connection with Appellants' First Proposition of Law.[4] Respectfully, however, repeating a characterization of the order does not make it true. And simply because the Commission disagreed with a given

[4] *E.g.*, "The Commission relied on **conclusory** testimony from Signatory Parties, insufficient to support its conclusion that the Stipulation satisfies the second prong of the test." (Br. at 11.) "In its Order, the Commission defends SFV rate design and the allocations approved in the Stipulation by stating that SFV rate design 'sends a true and accurate price signal to customers . . .' . . . However, the Commission fails to support this **conclusory** statement nor does it address the substance of the testimony of the opposing parties." (*Id.* at 13.) "There is no substantive analysis by Columbia or any other party in the record that refutes Witness Rábago's assertions. Instead, the Commission relied exclusively on the **conclusory** testimony of Columbia Witness Feingold . . . ." (*Id.* at 15.) "In contrast, in its decision here, the Commission has relied only on the terms of the Stipulation and **conclusory** testimony in support of them . . . ." (Emphasis added). (*Id.*)

witness's opinion about rate design does not mean the Commission was unreasonable, unlawful, or "conclusory." There was nothing "conclusory" about the Commission's careful assessment of the substantial evidence in the record about the benefits of the Stipulation, including, but by no means limited to, the Stipulation's treatment of fixed charges and energy-efficiency programs.

b. Monthly fixed charges are reasonable and supported by the evidence.

Appellants' next complaint is that the Stipulation allowed Columbia to continue using a straight-fixed-variable ("SFV") rate design.[5] Specifically, Appellants posit that fixed charges do not benefit ratepayers or the public interest because they send customers the "wrong price signal" and "harm low-usage and low-income customers." (Br. at 12.) Appellants' focus on isolated aspects of the Stipulation, to the exclusion of the numerous benefits described above, misapplies the Commission's three-part test for stipulations. As this Court has explained, "the question is not whether one feature of the settlement viewed in isolation is unreasonable; rather, this court must consider the reasonableness of the settlement as a package." *In re E. Ohio Gas Co.*, 2023-Ohio-3289, ¶ 52. The Court cannot simply consider the rate structure and energy-efficiency aspects of the Stipulation

[5] As this Court has previously explained, "The SFV rate design separates or 'decouples' the utility's recovery of its costs of delivering gas (which are predominantly fixed) from the amount of gas that customers actually use (which varies from month to month)." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 2010-Ohio-6239, ¶ 1.

when determining whether the Stipulation, *as a package*, benefits ratepayers and the public interest. Regardless, the Court has previously rejected the very same arguments against SFV rate structures that Appellants make here, and should reject them again here.

Early in 2010, this Court issued its opinion in *Ohio Consumers' Counsel*, *supra*, 2010-Ohio-134. In that case, as here, intervenors in gas company rate cases (Duke Energy Ohio's and Dominion East Ohio's) challenged the Commission's approval of SFV rate design, arguing that it was a deviation from Commission precedent. *Id.* at ¶ 13. This Court affirmed the Commission's approval of SFV rate design. In doing so, this Court noted that SFV rate design "spread[s] fixed costs more evenly among all customers and thereby require[es] low-use customers to pay a more proportionate share" of the fixed costs to deliver gas to all customers. *Id.* at ¶ 30. This Court also noted that SFV rate design has the "added benefit of producing more stable customer bills by spreading the recovery of fixed costs more evenly through all seasons" than volumetric rates would produce. *Id.* at ¶ 36. The Court also credited the Commission's finding that "the SFV rate design provide[s] customers with more accurate and timely pricing signals." *Id.* at ¶ 37.

Later in 2010, this Court issued its opinion addressing Vectren's rate case, in which the Commission likewise approved SFV rate design. *Ohio Consumers' Counsel*, *supra*, 2010-Ohio-6239. Once again, this Court determined that approving an SFV rate design was "within the lawful and reasonable discretion of the PUCO." *Id.* at ¶2. And once

again, this Court expressly recognized benefits of SFV rate design, including potential cost savings for some low-income customers (*id.* at ¶¶ 30-31) and remedying inequities in other rate structures that exist when high-use customers overpay their own fixed costs and thereby subsidize low-use customers (i*d.* at ¶ 34 (citing *Ohio Consumers' Counsel*, 2010-Ohio-134, ¶¶ 30, 33, 46).

Appellants here have simply resurrected the failed arguments from those 2010 opinions and faulted the Commission for not giving those arguments more credence this time around. Here, the Commission weighed the conflicting testimony of the parties and ultimately agreed with the testimony of Columbia witness Russ Feingold, whose testimony was consistent with the Commission findings approved in the 2010 opinions discussed above. Mr. Feingold testified that "fixed charges promote fairness to all customers because the customer's bill reflects the actual average cost of providing gas delivery service[,] rather than being based on the volume of gas consumed." (Op. & Order, ¶ 172; Appx. 172-173) (quoting Columbia Ex. 7 at 31.) SFV rate design also results in rates that track embedded costs more accurately, which eliminates intra-class subsidies and undue discrimination in the residential and small commercial classes. (*Id.*) The Commission found that SFV rate design "promotes cost causation because the costs incurred by Columbia are relatively uniform across the range of customers in the SGS

rate class, and SGS customers pay a flat monthly fee for Columbia's fixed costs of distribution service." (*Id.*, citing Columbia Ex. 7 at 35.)

What Appellants contend is that because *some* witnesses testified that fixed charges (instead of volumetric rates) do not benefit customers or encourage energy efficiency, the Commission cannot approve a Stipulation incorporating fixed charges and eliminating certain energy-efficiency programs But as this Court held in one of its opinions upholding the adoption of an SFV rate structure, it is "not [the Court's] prerogative in PUCO appeals" to "reweigh the evidence [regarding the benefits of SFV rates] and assign greater weight to [the testimony of the appellant's witness] than the commission did." *Ohio Consumers' Counsel*, 2010-Ohio-6239, ¶ 32.[6] Nor does the Court second-guess the Commission's determinations regarding rate design. *Cleveland Elec. Illum. Co.*, 46 Ohio St.2d, at 108; *Ohio Consumers' Counsel*, 2010-Ohio-6239, ¶ 13.

The Commission has approved the adoption or continuation of SFV rate design in a series of prior decisions ranging from 2008 to 2019, and saw "no basis in the record of this case for deviating from those precedents." (Op. & Order, ¶ 60; Appx. 129.) The Commission was correct. The Commission upheld the use of SFV rate designs for natural

[6] Indeed, in that case, OCC criticized the Commission for "summarily dismissing the testimony of OCC's expert witness Roger Colton" (*id.*) – one of the same witnesses that the Appellants fault the Commission for ignoring in this case (*see* Br. at 13).

gas customers in numerous proceedings, including Columbia's 2008 rate case.[7] As recently as 2019, in a Vectren rate case, the Commission rejected the proposition that "factors which the Commission previously used to justify the SFV rate design have changed significantly,"[8] noting that it has long established "that the SFV rate design is the appropriate rate design for natural gas company distribution rates . . . ."[9] In the Vectren case, the Commission found that the evidence demonstrated the SFV rate design "results in rates that track embedded costs more accurately, eliminating intra-class subsidies and undue discrimination in the residential and small commercial classes" and "promotes cost causation because the Company's costs of providing distribution service to the residential class are relatively uniform."[10] The Commission also found that, "the SFV rate design sends a true and accurate price signal to customers for the purpose of making energy efficiency investments."[11] Appellants have not demonstrated that the

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[7] *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. 08-72-GA-AIR, Opinion and Order at 19-20 (Dec. 3, 2008).

[8] *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc., for Approval of an Increase in Gas Rates*, Case Nos. 18-298-GA-AIR, et al., Opinion and Order at ¶ 12 (Aug. 28, 2019) (Appx. 508).

[9] *Id.* at ¶ 47 (Appx. 518).

[10] *Id.*

[11] *Id.* at ¶ 51.

Commission's decision to follow its longstanding, consistent precedent – precedent that this Court has affirmed twice – was contrary to the manifest weight of the evidence.

c. Elimination of energy-efficiency programs for non-low-income customers, while retaining the WarmChoice© program for low-income customers, does not result in a Stipulation that fails the second prong of the three-part test.

Appellants next shift gears from fixed charges to energy efficiency, arguing that "approval of the elimination of Columbia's non-low-income energy efficiency programs is contrary to the public interest." (Br. at 15-17.) The crux of this argument is that because Columbia *previously* had energy efficiency programs, a Stipulation that (as but one component of a multi-faceted, negotiated package) eliminates *some* of those programs *must* necessarily be contrary to the public interest. As noted above, the Court does not look at isolated aspects of a Stipulation to determine whether the entire Stipulation, as a package, is in the public interest. *See In re E. Ohio Gas Co.*, 2023-Ohio-3289, ¶ 52

Regardless, the Commission's approval of a Stipulation that included the elimination of non-low-income energy efficiency programs was not "devoid of evidentiary support," as Appellants contend. (Br. at 15.) Although there was certainly testimony in the record regarding the benefits of such programs, the Commission expressly noted *other* testimony in the record regarding the costs of such programs – costs that Columbia's ratepayers would no longer have to absorb under the Stipulation. For example, the Commission noted that "the discontinuation of [Columbia's] non-low-

income DSM programs will eliminate approximately $120 million in Columbia charges to SGS for the 2023-2027 period." (Op. & Order, ¶ 134; Appx. 059) (citing OCC Ex. 1 at 10.) The Commission also acknowledged evidence from OCC noting that the elimination of the non-low-income DSM programs would prevent Columbia from charging consumers $10 million in shared savings from the DSM program, as Columbia initially proposed. (Op. & Order ¶ 155; Appx. 068.) Moreover, the Commission expressly pointed to acknowledgments by CUB's own hearing witness, Mr. Bullock, that nothing in the Stipulation precludes a customer from getting DSM services from a competitive natural gas supplier if they desire. (*Id.* at ¶ 171; Appx. 074.) Finally, the Commission expressly noted the benefits associated with the Stipulation's *retention* of the WarmChoice© program for low-income customers. (*Id.* at ¶ 165; Appx. 072.) Far from being "devoid of evidentiary support," as Appellants contend, the Commission's consideration of the Stipulation's energy-efficiency provisions was amply supported by the record. Appellants are asking this Court to reweigh the evidence, which, as discussed above, this Court has declined to do in Commission appeals.

d. The Stipulation's continuation of fixed charges and elimination of certain energy-efficiency programs do not, either alone or in combination, cause the Stipulation to fail the second prong of the three-part test.

Appellants wrap up the argument in support of their First Proposition of Law by positing that the "interaction" of the Stipulation's provisions on fixed rates and energy

efficiency – *i.e.* the effect of those two provisions in combination – dooms the Stipulation's satisfaction of prong two. Again, however, Appellants are mistaken.

The theory asserted here by ELPC and CUB is that back when the Commission first approved SFV rate design, "[t]his allowed utilities a guaranteed revenue stream through fixed charges which helped to alleviate the reduction in volumetric rate loss from energy efficiency programs." (Br. at 19.) Put another way, Appellants believe that the *only* basis for fixed rates is to guarantee utilities sufficient revenues to offset revenues lost due to increased energy efficiency (and due to less gas sold, because of that efficiency). Under this theory, if *some* energy efficiency programs are eliminated, then that necessarily eliminates the original (and only, in their view) justification for fixed rates. The fundamental defect in this theory is that it ignores *other* justifications for fixed rates that were in the record not only in this case, but also in the older cases that Appellants cite. Simply put, offsetting revenue losses from increased energy efficiency is *not* the only justification for straight-fixed-variable rate design. The two concepts are not inextricably bound together, such that if certain energy efficiency programs are eliminated under a Stipulation, the SFV rate design must also fall away.

For example, the Commission noted testimony in this proceeding for the proposition that fixed charges to customers "promote fairness to all customers" because their bills reflect "the actual average cost of providing gas delivery service[,] rather than

being based on the volume of gas consumed." (Op. & Order ¶ 172; App. 074-075) (quoting Columbia Ex. 7 at 31.) SFV rate design also results in rates that track the utility's embedded costs more accurately, which eliminates intra-class subsidies and undue discrimination in the residential and small commercial classes." (*Id.*) The Commission found, further, that SFV rate design "promotes cost causation because the costs incurred by Columbia are relatively uniform across the range of customers in the SGS rate class, and SGS customers pay a flat monthly fee for Columbia's fixed costs of distribution service." (*Id.*) (citing Columbia Ex. 7 at 35-36.) Moreover, the Commission noted that SFV rate design "eliminates the need for weather normalization in determining base rates that recover fixed costs." (*Id.*) These benefits of SFV rate design exist independently of whether each and every energy-efficiency program that Columbia ever had in place before this rate case will continue in perpetuity.

When this Court has previously approved SFV rate designs, as it has done twice, it has never held that SFV rate designs may only be used when they are inextricably paired with each and every energy-efficiency program that the Commission may have previously approved for the utility. In *Ohio Consumers' Counsel*, *supra*, 2010-Ohio-134, this Court noted that regardless of energy-efficiency programs, SFV rate design "require[es] low-use customers to pay a more proportionate share" of the fixed costs to deliver gas to all customers. *Id.* at ¶ 30. This Court also noted that SFV rate design has

the "added benefit of producing more stable customer bills by spreading the recovery of fixed costs more evenly through all seasons" than volumetric rates would produce. *Id.* at ¶ 36. In other words, this Court recognized meaningful benefits of SFV rate design that are untethered to whether a gas utility continues every energy-efficiency program into perpetuity. Nothing in *Ohio Consumers' Counsel* can be read to hold that SFV rate design may only continue and may only qualify as a benefit under the three-prong test, if all existing energy-efficiency programs are continued into perpetuity. Likewise, in *Ohio Consumers' Counsel*, *supra*, 2010-Ohio-6239, this Court expressly recognized benefits of SFV rate design, including potential cost savings for low-income customers (*Id.* at ¶¶ 30-31) and remedying inequities in other rate structures (*id.* at ¶ 34). And once again, nowhere in its decision approving Vectren's stipulation did this Court insist that SFV rate design can only work, or only benefit consumers, when implemented in perpetual tandem with the continuation of all then-existing energy efficiency programs. *See generally Consumers' Counsel*, 2010-Ohio-6239.

Accordingly, if the Court reaches the merits of Appellants' arguments, the Court should reject Appellants' First Proposition of Law and confirm that the Stipulation challenged here, as a package, benefits ratepayers and the public under the second prong of the three-part test. And for the reasons that follow, Appellants fare no better with their challenge to the third prong of the three-part test.

3. Response to Appellants' Proposition of Law No. 2: The Evidentiary Record Supports the Commission's Finding that the Stipulation Does Not Violate Any Important Regulatory Principles.

Appellants' parting challenge to the Stipulation is their contention that it violates important regulatory principles or practices. If this argument sounds vaguely familiar, that is likely because this Court rejected similar, third-prong challenges asserted by the appellants in the Duke and Vectren rate cases that resulted in the Court's two 2010 opinions above. *Consumers' Counsel*, 2010-Ohio-134, ¶¶ 19-41 (SFV rate design did not violate the regulatory principle of gradualism, other regulatory principles, or state policy promoting energy efficiency); *see also Consumers' Counsel*, 2010-Ohio-6239, ¶¶ 24-25 (finding its decision earlier that year dispositive of OCC's challenge to SFV rate design based on the principle of gradualism).

Here, CUB and ELPC advance three arguments in support of their contention that the Stipulation violates important regulatory principles. First, as they did with respect to prong two of the three-part test, they again assert (wrongly) that the record is "devoid" of evidentiary support for the Commission's conclusion about this prong of the test. Next, they claim that the Stipulation violates three of the so-called Bonbright Principles of ratemaking. Finally, they argue that neither the Commission nor its Staff addressed the *magnitude* of the total fixed charge rate. None of these arguments withstands scrutiny.

a. More than "conclusory" testimony supported the Commission's analysis of whether the Stipulation violates any important regulatory principle.

First, Appellants take issue with the Commission's reliance upon testimony from Columbia, OCC, and Staff to find that the Stipulation violates no important regulatory principles. (Br. at 20-21.) They posit that "the conclusory testimony of those three parties cannot support the Commission's decision." (*Id.* at 20.) Later, they complain that "[t]he Commission's reliance on the conclusory testimony of the three stipulating parties fails to conform to the Commission's own practice, requiring meaningful evidence to approve a settlement." (*Id.* at 21.)

The only paragraph of the Commission's Opinion & Order that Appellants cite for this proposition is Paragraph 198 (Appx. 085.) (*Id.* at 20.) But with their laser-focus on that single Paragraph, Appellants bypass numerous other Paragraphs of the Opinion & Order in which the Commission directly referred to *other* evidence in the record that, like the testimony from Columbia, OCC, and Staff, is relevant to the Stipulation's consistency with important regulatory principles. After all, the Commission's discussion of the third prong of the test, and the evidence relevant to it, begins back in Paragraph 179 of the Opinion & Order (nearly 20 paragraphs *before* Paragraph 198) and does not conclude until Paragraph 206 (eight paragraphs *after* Paragraph 198) (Appx. 078-089.) The Commission did *not*, as Appellants suggest, confine its analysis of the third factor to testimony only from Columbia, OCC, and Staff. Rather, the Commission addressed evidentiary

submissions from other parties (including OMAEG, Kroger, OEG, and Appellants themselves) as part of its comprehensive and adequately supported analysis of whether the Stipulation violates any important regulatory principles.

After their inaccurate depiction of information considered by the Commission, Appellants complain that:

> While a Stipulation fails the test if it violates "any" regulatory principle or practice, the Commission has not established a specified set of principles or practices by which it judges settlements. From case to case, the Commission applies a differing set of principles based on the record and its own discretion.

(Br. at 22.) Appellants cite no authority in the Revised Code, the Administrative Code, or the decisions of this Court compelling the Commission to identify what Appellants describe as "a specified set of principles or practices by which it judges settlements" under prong three of the three-part test. And Columbia is aware of no such rule constraining the Commission's discretion in this regard as it reviews proposed settlements. As the parties challenging the Stipulation, Appellants have the burden to demonstrate that it violates an important regulatory principle or practice; it is not the Commission's burden to anticipate (in its Opinion & Order) every conceivable such principle or practice that one or more intervenors, based on their own unique interests, may deem to be important. And for the reasons discussed next, the three principles that

Appellants focus on in their Merit Brief are *not* violated by the Stipulation; instead, the Stipulation furthers these and other important policy objectives.

b. The Stipulation does not violate the Bonbright principles identified by Appellants.

Appellants claim that the Stipulation violates three of the so-called Bonbright[12] principles of ratemaking: (i) energy efficiency as a principle; (ii) rates should advance economic efficiency and promote the efficient use of energy; and (iii) rates should be fair in apportioning costs. (Br. at 22-25.) Again, Appellants miss the mark.

(i) Energy efficiency

While acknowledging that Ohio's General Assembly has eliminated State goals for energy efficiency programs,[13] Appellants note that the Revised Code continues to include provisions encouraging energy efficiency, such as R.C. 4905.70 and R.C. 4929.02(A)(12). (Br. at 23.) They note, further, that Columbia itself has described its non-low-income DSM programs as being in the "continued best interest of its customers." (*Id.*, citing R. 7 at 11.) From this, Appellants conclude that a Stipulation eliminating non-low-income DSM programs must necessarily violate an important regulatory policy.

As Columbia (and other Signatory Parties) explained in their post-hearing briefs, and as the Commission properly found in its Opinion and Order, the modified

[12] James Bonbright edited *Principles of Public Utility Rates* (ELPC Ex. 1.)

[13] *See* Br. at 23, citing Am. Sub. H.B. No. 6 (2019).

Stipulation's continuation of its long-running low-income DSM program satisfies R.C. 4905.70 and promotes many of the policy considerations in R.C. 4929.02 that the Commission balances when reviewing a proposed stipulation against the three-part test.

As this Court has previously explained, the Commission is not required to approve *any* particular DSM programs or specific funding levels for energy-efficiency programs under R.C. 4929.02 or R.C. 4905.70. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 2010-Ohio-134, ¶ 39; *see also Ohio Partners for Affordable Energy v. Pub. Util. Comm.*, 2007-Ohio-4790, at ¶ ¶ 36-38. The statutes provide guidelines that the Commission may (and did here) consider when exercising its discretion to balance a proposed stipulation's policy implications. *Ohio Consumers' Counsel*, 2010-Ohio-134, ¶ 40. But none of these policies, including energy efficiency, takes precedent over the others; "conservation is just one of many factors set forth in R.C. 4929.02 that the commission must balance in determining an appropriate natural-gas rate design." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 2010-Ohio-134, ¶ 40.

In their post-hearing briefs, CUB and ELPC acknowledged that the Commission rejected an argument nearly identical to theirs in AEP Ohio's recent distribution rate case. (*See* CUB Br. at 26; ELPC Br. at 23, citing *In the Matter of the Application of Ohio Power Company for an Increase in Electric Distribution Rates*, Case Nos. 20-585-EL-AIR, *et al.* ("*Ohio Power Company Rate Case*"), Opinion and Order, ¶ 173 (Nov. 17, 2021). In that case, AEP

Ohio agreed, as part of a broader stipulation, to withdraw its proposed DSM program. OPAE, ELPC, The Ohio Environmental Council, and Natural Resources Defense Council argued that eliminating the proposed DSM program violated R.C. 4905.70 and various state policy objectives in R.C. 4928.02. *Id.* at ¶¶ 166-167. The Commission disagreed, holding that "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." *Id.* at ¶ 173. "Neither does R.C. 4928.02 dictate such an outcome. … No part of the Stipulation precludes customers from undertaking energy efficiency measures on their own initiative through market-based products or services." *Id.*

As Columbia explained in its post-hearing briefing, the *Ohio Power Company Rate Case* opinion's treatment of AEP Ohio's withdrawal of its proposed DSM program is distinguishable from this proceeding in only one way: the Stipulation here – unlike AEP Ohio's – did *not* entirely eliminate Columbia's proposed DSM program. The modified Stipulation *continues* Columbia's WarmChoice© program for five years, with an annual budget of up to $14.867 million. (Stipulation at 12; Supp. 605.)

That distinction offers the Court even greater reason to affirm the Commission's reasonable and lawful adoption of the Stipulation. No non-signatory party argues that *continuing* WarmChoice© violates any important regulatory principle or practice. Nor does any party explain why Columbia's continued offering of a low-income DSM

program, funded at almost $15 million per year, would not promote efficient use of energy in furtherance of state policy. To the contrary, the WarmChoice© program contained in the modified Stipulation appropriately furthers state policy to promote energy efficiency and conservation. It also furthers the additional state policies that the Commission expressly recognized in Paragraph 56 of its Opinion & Order. (Appx. 029.)

The Commission properly concluded that the modified Stipulation's continuation of WarmChoice© and discontinuation of Columbia's non-low-income DSM programs does not violate any regulatory principle or practice. This Court should affirm the Commission's reasonable and lawful conclusion, consistent with its prior decisions acknowledging that the Commission need not approve *any* particular DSM programs or specific funding levels for energy-efficiency programs under R.C. 4929.02 or R.C. 4905.70 in order to avoid violating prong three of the three-part test. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 2010-Ohio-134, ¶ 39, citing *Ohio Partners for Affordable Energy v. Pub. Util. Comm.*, 2007-Ohio-4790, at ¶ 36.

(ii) Rates should advance economic efficiency or promote efficient use of energy.

On a topic closely related to energy efficiency, Appellants contend (in a single paragraph in their Merit Brief) that the Commission's approval of the Stipulation, thanks to the Stipulation's continued use of fixed charges, "disincentivizes customers to use gas efficiently and does not send accurate, economically efficient price signals." (Br. at 24.)

However, Appellants acknowledge that the Stipulation does not allow Columbia to recover all of its costs through fixed charges. (*Id.* at 12-13.) According to Appellant ELPC's witness, "thirty cents on every dollar spent on bills correlates to the actual gas [customers] use." (*Id.* at 13.) Residential customers may not reduce consumption in response to fixed costs, but they will reduce consumption in response to high natural gas commodity costs.

Moreover, Appellants ignore that the Stipulation modified and approved by the Commission in this case *does* continue the WarmChoice© program for low-income customers, which *does* incentivize those customers to use gas efficiently. And although Appellants cite testimony from certain witnesses for the proposition that fixed rates do not tend to encourage customers to reduce gas usage, the Commission relied upon a plethora of other testimony and evidence in the record underscoring the fairness and advantages of fixed rates and illustrating inherent problems with volumetric rate design. (*E.g.*, Op. & Order ¶ 152; Appx. 066-067; *see also id.* at ¶ 201; Appx. 086-087) ("Columbia witness Feingold testified that SFV rates minimize the distortion of gas commodity prices and promote more accurate commodity price signals to the customer, providing greater economic efficiency.") As the Court has explained, this Court's "function is not to weigh the evidence or to choose between alternative, fairly debatable rate structures. That would be to interfere with the jurisdiction and competence of the [Commission] and to

assume powers which this court is not suited to exercise." *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 46 Ohio St.2d 105, 108 (1976). The Court should confirm the Commission's decision, in its discretion, to approve Columbia's continued usage of an SFV rate structure for residential customers.

(iii) Rates should be fair in apportioning costs.

The third and final Bonbright principle addressed by Appellants is that rates should be fair in apportioning costs. (Br. at 25-26.) They argue that fixed charges are "unfair" to low-income and low-volume gas users because they "do not put the same strain on the system as high-volume consumers." (*Id.* at 25.) They cite a witness who testified about a consumer living in a 5,000 square-foot house with multiple gas appliances paying the same monthly fixed charge as a consumer in a 500 square-foot apartment with only gas heat. (*Id.* at 25.) According to Appellants, fixed charges are thus "economically regressive and unfair towards low-volume users (more often than not low-income individuals." (*Id.*)

Again, however, this portion of Appellants' Merit Brief omits contrary evidence expressly considered by the Commission as it carefully weighed the costs and benefits embodied in the proposed Stipulation. For example, as the Commission explained in Paragraph 152 of the Opinion & Order:

> Columbia argues that the costs to deliver natural gas to residential customers do not vary by usage. Columbia explains that the delivery service costs of a gas distribution

> utility are primarily fixed costs and do not vary as a function of the volume of gas consumed by customers. Columbia asserts that fixed charges promote fairness to all customers because the customer bill will reflect the average cost to provide customers gas service. Further, Columbia notes that the Commission and Ohio Supreme Court have rejected OPAE's arguments that cost shifting from high use to low-use customers is unfair. Columbia emphasizes that in *Ohio Consumers' Counsel*, [2010-Ohio-134], at ¶ 30, the Supreme Court of Ohio determined that "virtually all" of the utility's distribution costs are fixed, and residential customers' costs are largely the same, despite gas usage levels.

(Appx. 066-067) (Internal record citations omitted). The Commission also explained that SFV rate design provides "a more equitable cost allocation among residential customers because the costs of providing service are principally fixed, and each residential customer should bear an equal proportion of the distribution costs." (*Id.* at ¶ 200; Appx. 086.) In doing so, the Commission expressly relied upon testimony that "fixed charges promote fairness to all customers" and that "SFV rate design results in rates that track embedded costs more accurately, eliminating intra-class subsidies and undue discrimination in the residential and small commercial classes." (*Id.*; citing Columbia Ex. 7 at 36.) As such, the Commission's conclusion that the proposed Stipulation does not violate cost-allocation principles is more than adequately supported by the record, and this Court has no basis to deem it unreasonable or unlawful.

c. Staff and the Commission acknowledged the magnitude of rate impacts resulting from fixed rates.

In their final challenge the Stipulation's satisfaction of the third prong three, Appellants complain that neither Staff nor the Commission discussed the "*magnitude* of the total fixed charge rate increase in its Order, nor did Staff analyze the resulting rate impacts." (Br. at 26; emphasis in original.) This final attack is belied by the plain text of the Opinion & Order and other evidence of record. For example, at Paragraph 133, the Commission expressly acknowledged evidence presented by Columbia regarding the magnitude of the total fixed rate charge increase, saying:

> Staff confirms that the reduction of the revenue increase was a key benefit of the Stipulation. Columbia, as well as IEU-Ohio, note that the Signatory Parties agreed to a lower [Return on Equity] and [Rate of Return, or "ROR"] and a reduced rate base from $3,560,230,000 to $3,505,491,000. Columbia claims that the combination of the lower ROR and reduced revenue requirement *results in a $3.76 monthly increase to the fixed charge billed to residential consumers that is lower than the $11.66 monthly increase to the fixed charge proposed in its Application*.

(Emphasis added) (Op. & Order, ¶ 133; Appx. 058-059.) Later, at Paragraph 147, the Commission again expressly acknowledges the magnitude of the fixed-charge rate increase since Columbia's prior (2008) distribution rate case:

> ELPC highlights that the approved rate in *Columbia Rate Case*, Opinion and Order (Dec. 3, 2008), included a fixed charge of $6.50 per month and increases were authorized to $12.16 and ultimately $17.81. ELPC highlights that only 14 years later, Columbia's Stipulation increases the charge to $58.01 by 2027.

(Op. & Order, ¶ 147; Appx. 064-065.) In the very same Paragraph, the Commission notes Staff witness Bremer's discussion of the proposed increases in fixed rates. (*Id.*) (citing Staff Ex. 7 at 2-3.) Later, the Commission also noted that Columbia witness Feingold, an independent consultant and former Vice President of Black & Veatch Management Consulting LLC, performed a cost-of-service study that determined the cost to serve the SGS rate class was $42.78, which is "significantly more than the current monthly delivery charge for the SGS class or the Stipulated monthly delivery charges." (Op. & Order, ¶ 151; Appx. 066) (citing Columbia Ex. 7 at 34, Attachment RAF-3.)

Thus, it is not, as Appellants argue, that the Commission and/or Staff ignored the proposed increase in fixed rates, as compared to the rates approved in Columbia's 2008 rate case. Instead, the Commission correctly concluded that the rates adopted in the Stipulation were reasonable and lawful, were far less than Columbia initially proposed, and did not violate any important regulatory principle or practice. Appellants provide no reasoned basis for this Court to reach a contrary conclusion.

IV. Conclusion

For the reasons set forth above and in Columbia's February 3, 2025, Motion to Dismiss, Columbia respectfully asks the Court to either dismiss this appeal for lack of jurisdiction or reject Appellants' Propositions of Law on the merits and affirm the Commission's approval of the Stipulation.

Respectfully submitted,

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IN THE SUPREME COURT 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, *et al*.	)	Case No. 2024-1548
	)	
	)	Appeal from the Public Utilities Commission of Ohio
	)	
	)	PUCO Nos. 21-637-GA-AIR, 21-638-GA-ALT, 21-639-GA-UNC, and 21-640-GA-AAM

APPENDIX TO MERIT BRIEF OF

INTERVENING APPELLEE, COLUMBIA GAS OF OHIO, INC.

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of an Alternative Form of Regulation.	))))	Case No. 21-638-GA-ALT
In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of a Demand Side Management Program for its Residential and Commercial Customers.	))))))	Case No. 21-639-GA-UNC
In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval to Change Accounting Methods.	)))))	Case No. 21-640-GA-AAM

MEMORANDUM CONTRA OF
COLUMBIA GAS OF OHIO, INC.
TO APPLICATIONS FOR REHEARING OF
THE ENVIRONMENTAL LAW & POLICY CENTER,
OHIO PARTNERS FOR AFFORDABLE ENERGY, AND
THE CITIZENS' UTILITY BOARD OF OHIO

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1. Introduction

As the Commission properly concluded in its Opinion and Order, the Joint Stipulation and Recommendation ("Stipulation") between Columbia Gas of Ohio, Inc. ("Columbia"), Staff, the Office of the Ohio Consumers' Counsel ("OCC"), and seven other parties, as modified by the Commission, readily meets the three-part test that the Commission and the Supreme Court of Ohio have used for decades to determine whether a stipulation is reasonable. Nevertheless, three non-signatory parties – Ohio Partners for Affordable Energy ("OPAE"), the Citizens' Utility Board of Ohio ("CUB Ohio"), and the Environmental Law & Policy Center ("ELPC") – have filed Applications for Rehearing ("AFRs"), focusing primarily on their disagreement with the modified Stipulation's continuation of Columbia's existing straight-fixed-variable ("SFV") rate design and its discontinuation of energy efficiency and demand-side management ("DSM") programs for non-low-income customers. But none of the non-signatory parties' arguments justifies any reconsideration or reversal of the Commission's Opinion and Order.

The non-signatory parties' substantive arguments against Columbia's continued use of an SFV rate design run counter to more than a decade of Commission precedent, affirmed by two Ohio Supreme Court decisions. Their arguments against the discontinuation of Columbia's non-low-income DSM programs – mainly, that those programs have provided benefits to consumers in the past – are inconsistent with the Commission's longstanding application of its three-part test for stipulations, the Commission's recent opinion in Ohio Power's distribution rate case, and Ohio Supreme Court opinions interpreting the state's energy efficiency policies. And their non-substantive, procedural arguments regarding the Commission's application of its three-part test for stipulations or the Commission's purported failure to support its conclusions are, again, contradicted by substantial Commission precedent and the evidentiary record in this proceeding. For all of these reasons, as further explained below, the Commission should deny the three non-signatory parties' AFRs and reaffirm its adoption (with modification) of the Stipulation filed by the other, numerous and diverse parties to these proceedings.

2. The Non-Signatory Parties' Applications for Rehearing Lack Merit.

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

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

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

In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Piedmont Gas Company and Related Matters, Case Nos. 22-213-GA-GCR and 22-313-GA-UEX, Opinion and Order, ¶ 34 (Nov. 2, 2022). The Commission and the Supreme Court of Ohio have held that "the terms of a stipulation are properly accorded substantial weight." *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter Into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR (*"Ohio Power PPA Rider Case"*), Second Entry on Rehearing, ¶21 (Nov. 3, 2016), citing *Consumers' Counsel v. Pub. Util. Comm.,* 64 Ohio St.3d 123,125, 592 N.E.2d 1370 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155,157, 378 N.E.2d 480 (1978).

2.2. No applicant for rehearing now argues that the Stipulation was not the result of serious bargaining among capable, knowledgeable parties.

"As part of the first component of the three-part test, the Commission considers whether each party was afforded the opportunity to participate in negotiations, is proficient in the negotiation process, and sufficiently understands the matters at issue." *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of Demand-Side Management Programs for its Residential and Commercial Customers*, Case No. 16-1309-GA-UNC (*"2016 Columbia Gas DSM Case"*), Opinion and Order, ¶ 52 (Dec. 21, 2016). None of the non-signatory parties seeking rehearing now challenges the Commission's determination that the Stipulation was, indeed, the result of serious bargaining among capable, knowledgeable parties.

2.3. The Commission properly concluded that the Stipulation benefits ratepayers and the public interest.

The second part of the Commission's three-part test for considering settlements assesses whether the settlement, as a package, benefits ratepayers and is in the public interest. Under this part of the test, the stipulation offered by the signatory parties "must be viewed as a whole." *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Opinion and Order, at 79 (Mar. 31, 2016). ELPC concedes in its Application for Rehearing that this second prong "is very subjective." (ELPC AFR at 4.) In fact, ELPC does not challenge the Commission's determination in its Order that the Stipulation, as modified, satisfies the second prong.

CUB Ohio and OPAE address the second prong of the three-part test in two ways. First, CUB Ohio and OPAE posit that the Commission utilized "flawed reasoning" to conclude that the difference between Columbia's applied-for rate and the Stipulation rate is evidence of a benefit to ratepayers. (CUB Ohio AFR at 6-7; *see also* OPAE AFR at 7.) Next, CUB Ohio argues that neither the SFV rate design nor the elimination of non-low-income DSM programs benefits ratepayers or the public interest. (*Id.* at 8-12.) For the following reasons, neither of these arguments holds water, and the Commission should not disturb its prior conclusion that the Stipulation, as modified, *and as a package*, benefits ratepayers and is in the public interest.

2.3.1. The Commission properly considered the difference between Columbia's applied-for rate and the stipulation rate as evidence of a benefit to ratepayers.

CUB Ohio first criticizes the Commission for noting that the Stipulation substantially reduces Columbia's originally requested rate increase. (CUB Ohio AFR at 6 (citing Opinion and Order ¶ 169).) CUB Ohio argues that determining the benefit to ratepayers from a stipulation by measuring the difference between the utility's application and the stipulation simply gives the "utility company * * * an incentive to apply for a rate as high as it can," and that coming down from that inflated application "is not prima facie evidence of a benefit to ratepayers or the public." (*Id.*) CUB Ohio notes, in particular, that the Staff Report recommended a revenue deficiency of only $35 million to $58 million, while Columbia calculated a revenue deficiency of over $200 million. (*Id.* at 7.) OPAE makes a similar argument with regard to the Stipulation's elimination of "shared savings" from Columbia's DSM program. (OPAE AFR at 7.) These contentions lack merit for multiple reasons.

First, it should be noted that the Commission's recognition of the significant difference between Columbia's applied-for rate and the stipulated rate was but a single sentence in the Opinion and Order's *nine-paragraph* analysis of numerous other benefits of the Stipulation, which must be considered as a package under the second prong of the three-part test. Opinion and Order at ¶¶ 169-178. Thus, even if it *were* somehow inappropriate for the Commission to consider this difference as a benefit to customers – and it is not, as explained below – that would not undermine the numerous *other* benefits of the Stipulation that the Commission expressly recognized in its Opinion and Order, such as ratepayer savings associated with the elimination of non-low-income DSM programs; fairness to ratepayers and accurate price signaling achieved by the SFV rate design; funding to promote reliability and safety of natural gas service; funding for the WarmChoice® program to achieve weatherization efforts for at-risk populations; and numerous other benefits identified in the Order. *Id.*

Second, public utilities are not going to file frivolous, pie-in-the-sky rate case applications just so the Commission can later consider some difference between the applied-for rates and the stipulated rates as a customer benefit under prong two of the three-part test. Rate cases are a massive undertaking. The governing statute (R.C. 4909.18) and the Commission's standard filing requirements ("SFRs") for rate increase applications (Ohio Adm.Code 4901-7-01, Appendix) require voluminous schedules and detailed, supporting testimony. A utility in a rate case also must respond to hundreds of data requests from Staff, and as many, if not more, discovery requests from intervenors. A public utility is not going to waste hundreds of hours painstakingly compiling the necessary information to support a rate case application that it knows it cannot defend. And the counsel who sign and file the filings and discovery responses in rate cases are bound by ethical rules that police frivolous gamesmanship anyway. *See, e.g.*, Ohio Prof. Cond. R. 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue in a proceeding, unless there is a basis in law *and fact* for doing so that is not frivolous." (emphasis added)). Moreover, the public utility would need to be prepared to defend any rate case application at hearing, if the utility did not reach a stipulation with any party. For that reason as well, a public utility would not file an application for a rate increase with "a revenue requirement, return on equity, and/or high fixed charge * * * that it knows the Commission would not approve * * *." (CUB Ohio AFR at 7.)

In this case, it was both appropriate and logical for the Commission to consider the difference between Columbia's applied-for rate and the stipulated rate as a benefit to ratepayers; Columbia's customers will pay less for natural gas service than they would have paid if the original Application had been approved. And the Commission has made the same comparison to determine a stipulation's benefits in a number of recent cases. *See, e.g., In the Matter of the Application of Ohio Power Company for an Increase in Electric*

Distribution Rates, Case Nos. 20-585-EL-AIR, *et al*, Opinion and Order, ¶ 150 (Nov. 17, 2021) (noting that the stipulation in that case, among numerous other benefits, agreed to a revenue increase that was "significantly lower" than that requested in AEP Ohio's application and a rate of return that was "sizably reduced" from the return "originally proposed by the Company"); *In the Matter of the Application of Suburban Natural Gas Company for an Increase in Gas Distribution Rates*, Case Nos. 18-1205-GA-AIR, *et al.*, Opinion and Order, ¶ 141 (Sept. 26, 2019) (second part of Commission's three-part test met where the stipulation included benefits such as a lower fixed charge than originally proposed, a commitment to file a base rate case, a free meter test for residential customers, and other consumer protections), vacated on other grounds, *In re Application of Suburban Natural Gas Co.*, 166 Ohio St.3d 176, 2021-Ohio-3224; *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Approval of an Increase in Gas Rates,* Case Nos. 18-298-GA-AIR, *et al.*, Opinion and Order ¶ 105 (Aug. 28, 2019) (second part of three-part test met where the stipulation included benefits such as a lower rate of return, revenue increase, and customer charge than originally proposed; a commitment to file a base rate case; funding for safety and reliability programs; and continued replacement of at-risk pipeline). The non-signatory parties offer the Commission no good reason to deviate from the Commission's traditional application of the second prong of its test for stipulations.

2.3.2. The Commission properly concluded that the Stipulation provisions pertaining to SFV rate design and elimination of non-low-income DSM programs benefit ratepayers and the public.

CUB Ohio's next attack on the second prong of the three-part test focuses on the modified Stipulation's continued use of SFV rate design, and the elimination of non-low-income DSM programs. As the Commission explained at length in its Opinion and Order, however, both of these components of the modified Stipulation benefit ratepayers and the public.

As for the SFV rate design for SGS customers, the Commission expressly agreed with the testimony of Company witness Russ Feingold, who testified that "fixed charges promote fairness to all customers because the customer's bill reflects the actual average cost of providing gas delivery service[,] rather than being based on the volume of gas consumed." Opinion and Order ¶ 172 (quoting Columbia Ex. 7 at 31.) SFV rate design also results in rates that track embedded costs more accurately, which eliminates intra-class subsidies and undue discrimination in the residential and small commercial classes. *Id.* The Commission found that SFV rate design "promotes cost causation because the costs incurred by Columbia are relatively uniform across the range of customers in the SGS rate class, and SGS customers pay a flat monthly fee for Columbia's fixed costs of

distribution service." *Id.* (citing Columbia Ex. 7 at 35-36.) Moreover, SFV rate design "eliminates the need for weather normalization in determining base rates that recover fixed costs." *Id.* And it sends true and accurate price signals to customers for the purpose of making energy efficiency investments. *Id.* at ¶ 173.

In response, CUB Ohio argues that "fairness" is not properly the subject of the second prong of the three-part test. (CUB Ohio AFR at 8.) But CUB Ohio provides no precedent to support such a counter-intuitive proposition. CUB Ohio also argues that fixed charges are economically regressive, and result in cross-subsidies from low users (and lower-wealth customers) to higher-use (and wealthier) customers. (*Id.*) But the Commission properly rejected this argument when addressing ELPC's second objection to the Staff Report, noting that Mr. Feingold's testimony "demonstrates that SFV rate design results in rates that track embedded costs more accurately, *eliminating intra-class subsidies and undue discrimination* in the residential and small commercial classes." (Emphasis added.) (Opinion and Order ¶ 61 (citing Columbia Ex. 7 at 36.).) CUB Ohio's apparent disagreement with the Commission on this point does not mean the Commission's decision was unreasonable or unlawful and requires rehearing.

Granting rehearing on SFV rate design, moreover, would undermine substantial Commission precedent. After all, as the Commission noted, it established SFV rate design as the appropriate rate design for natural gas distribution rates through a "series of decisions" going back to 2008, and there is "no basis in the record of this case for deviating from these precedents." *Id.* ¶ 60 (internal citations omitted). The Commission has consistently endorsed the SFV rate design for over a decade. *See* CUB Ohio Br. at 3; ELPC Br. at 1, 15; *see also* Columbia Br. at 15. The Supreme Court of Ohio has also twice affirmed the SFV rate designs. *See Ohio Consumers' Counsel v. Pub. Util. Comm.*, 125 Ohio St.3d 57, 2010-Ohio-134, at ¶ 4 (2010); *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 127 Ohio St.3d 524, 2010-Ohio-6239 (2010).[1] Nothing in the Applications for Rehearing justifies deviating from that substantial precedent now.

Nor does CUB Ohio's discussion of non-low-income DSM programs justify rehearing with respect to prong two of the Commission's three-part test. CUB Ohio

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[1] In those cases, appellants argued that the Commission violated various regulatory principles in adopting the SFV rate design, including the statutes cited by the non-signatory parties here in connection with their challenges to the discontinuation of non-low-income DSM programs. *Ohio Consumers' Counsel,* 125 Ohio St.3d 57, at ¶ 27; *Ohio Consumers' Counsel*, 127 Ohio St.3d 524, at ¶ 24. But in each case the Ohio Supreme Court disagreed. *Ohio Consumers' Counsel*, 125 Ohio St.3d 57, at ¶ 15-18 (finding that the Commission's policy decision to adopt SFV was reasonable); *Ohio Consumers' Counsel*, 127 Ohio St.3d 524, at ¶ 2 (affirming the Commission's orders that approved the SFV rate design for Vectren).

asserts that it is "patently unreasonable" for the Commission to state, on the one hand, that SFV rate design sends a price signal to customers for the purpose of making energy efficiency investments, while on the other hand approving a Stipulation that (in CUB Ohio's view) results in "the elimination of the ability to make those investments." (CUB Ohio AFR at 9-10.) The fallacy of CUB Ohio's reasoning here is that the Commission's approval of the Stipulation, as modified, certainly does not "eliminate the ability" of *any* customers to make energy efficiency investments; it simply requires *non*-low-income customers to make those investments through the offerings available in the competitive market.

CUB Ohio and OPAE also complain that the Commission relied upon OCC witness Adkins' testimony that withdrawal of the non-low-income DSM programs would save customers $120 million, without at the same time considering the substantial economic benefits of those programs. (CUB Ohio AFR at 10; *see also* OPAE AFR at 8.) According to CUB Ohio, the Commission should have relied, instead, on CUB Ohio witness Bullock's testimony that the DSM programs (according to the Company's statements in the Energy Efficiency Workshops), if continued, would result in a total annual savings of approximately $780 million. (CUB Ohio AFR at 10-11.) But even if the continuation of *all* current DSM programs would, in fact, result in greater cost savings for customers over the long run than the Stipulation's continuation of only low-income DSM programs, that comparison is not outcome determinative of the test the Commission applies to stipulations. "[T]he Commission's task in evaluating a settlement agreement under the three-part test is not to determine whether it reflects the best possible result or outcome for customers." *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Alternative Form of Regulation to Establish a Capital Expenditure Program Rider Mechanism*, Case No. 19-791-GA-ALT, Opinion and Order, ¶ 63 (Apr. 21, 2021). Instead, it is "whether the Stipulation, as a package, benefits ratepayers and the public interest." (Citation omitted.) *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case No. 21-887-EL-AIR, Opinion and Order, ¶ 121 (Dec. 14, 2022). As such, the Stipulation's elimination of non-low-income DSM programs cannot be considered in isolation; instead, the Commission must remain focused on whether the settlement *as a whole* benefits ratepayers. As discussed above (*supra* at 5) and in the Commission's opinion (*see* Opinion and Order at ¶¶ 169-178), it does, and the Commission properly approved the Stipulation with modifications.

2.4. The Commission properly concluded that the modified Stipulation does not violate any important regulatory principle or practice.

The non-signatory parties also challenge the Stipulation's satisfaction of the third prong of the Commission's three-part test, and seek rehearing on that basis. CUB Ohio

and ELPC contend that the Stipulation, as modified, violates two statutes by eliminating non-low-income DSM programs: (1) R.C. 4929.02(A)(12), which sets forth the public policy of the State of Ohio in favor of aligning company and consumer interests in energy efficiency; and (2) R.C. 4905.70, which provides that the Commission shall initiate programs to promote energy conservation. And OPAE asserts that the Stipulation violates the prohibition on discrimination in R.C. 4905.35(B)(1). The non-signatory parties are mistaken, and the Commission should not grant rehearing on these bases.

2.4.1. The Stipulation's continuation of Columbia's WarmChoice® Program, with almost $15 million per year in funding, furthers Ohio's policies with regard to energy efficiency.

As Columbia (and other Signatory Parties) explained in their respective post-hearing briefs, and as the Commission properly found in its Opinion and Order, the modified Stipulation's continuation of low-income DSM satisfies R.C. 4905.70 and also promotes many of the policy considerations in R.C. 4929.02 that the Commission balances as part of its review of the settlement. (*See, e.g.,* Columbia Br. at 14-15; *see also* Opinion and Order ¶¶ 53-56, 198-206.)

Relying on the previously recognized benefits of DSM programs, CUB Ohio complains that "[t]he Commission agrees that DSM programs are consistent with this state's economic and energy policy objectives, but approves a Stipulation that removes those cost-effective benefits with nothing to replace them except for an admonition that the market should cover it." (CUB Ohio AFR at 18.) ELPC raises the same concern. (ELPC AFR at 7-8.) But the Commission is not required to approve *any* particular DSM programs or specific funding levels under R.C. 4929.02 or R.C. 4905.70. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 125 Ohio St.3d 57, 2010-Ohio-134 at ¶39; *see also Ohio Partners for Affordable Energy v. Pub. Util. Comm.*, 115 Ohio St.3d 208, 2007-Ohio-4790 at ¶¶ 36-38. The provisions of R.C. 4929.02 are guidelines that the Commission may (and did) consider as it exercises its discretion to balance a stipulation's various policy implications. *Ohio Consumers' Counsel* at ¶ 40.

CUB Ohio and ELPC previously acknowledged that the Commission rejected an argument nearly identical to theirs in AEP Ohio's recent distribution rate case. (*See* CUB Ohio Br. at 26 and ELPC Br. at 23, both citing *In the Matter of the Application of Ohio Power Company for an Increase in Electric Distribution Rates,* Case Nos. 20-585-EL-AIR, *et al* ("*Ohio Power Company Rate Case*"), Opinion and Order ¶ 173 (Nov. 17, 2021)). In that case, AEP Ohio agreed, as part of a broader stipulation, to withdraw its proposed DSM program. OPAE, ELPC, the Ohio Environmental Council, and Natural Resources Defense Council argued that "eliminating AEP Ohio's proposed DSM program * * * violates R.C. 4905.70"

and various "state policy objectives in R.C. 4928.02," including "ensuring the availability of efficient, nondiscriminatory, and reasonably priced rates; encouraging innovation and market access for cost-effective supply- and demand-side retail electric service, including DSM; * * * and facilitating the state's effectiveness in the global economy." *Ohio Power Company Rate Case*, Opinion and Order, ¶ 166 (Nov. 17, 2021); *see also id.* at ¶ 167. The Commission disagreed, holding:

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

Id. at ¶ 173. As Columbia explained in its post-hearing briefing, the *Ohio Power Company Rate Case* opinion's treatment of AEP Ohio's withdrawal of its proposed DSM program is distinguishable from this proceeding in only one way: the Stipulation here did not entirely eliminate Columbia's proposed DSM program. The modified Stipulation continues Columbia's low-income program, WarmChoice®, for five years, with an annual budget of up to $14.867 million.

That distinction offers even greater support for the Commission's adoption of the Stipulation (with modifications). No non-signatory party argues that continuing WarmChoice® violates any important regulatory principle or practice. Nor does any party explain why Columbia's continued offering of a low-income DSM program, funded at almost $15 million per year, would not promote efficient use of energy in furtherance of state policy. To the contrary, the WarmChoice® program contained in the modified Stipulation appropriately furthers state policy to promote energy efficiency and conservation. It also furthers the additional state policies that the Commission expressly recognized in Paragraph 56 of its Opinion and Order. The Commission properly concluded that the modified Stipulation's continuation of WarmChoice® and discontinuation of Columbia's non-low-income DSM programs does not violate any regulatory principle or practice.

2.4.2. The Stipulation's limitation on WarmChoice® weatherization to one property per property owner per year does not violate Ohio's statutory policy on discrimination.

OPAE also argues, in passing, that one of the WarmChoice®-related provisions in the Stipulation violates the requirement in R.C. 4905.35 that public utilities offer their

regulated services "to all similarly situated consumers * * * under comparable terms and conditions." R.C. 4905.35(B)(1) (cited in OPAE AFR at 6). The purportedly problematic provision states that "property owners are limited to receiving weatherization assistance for one rental premise per calendar year during the five-year term of the DSM Program." (Jt. Ex. 1 (Stipulation) at 13.) OPAE asserts this limitation discriminates against renters because a low-income homeowner does not have to worry about this limitation, whereas a low-income renter may be barred from participating in WarmChoice® simply because "another renter who shares their landlord has already received service * * * ." (OPAE AFR at 6.) In sum, OPAE argues, the "provision * * * discriminate[s] against low-income renters in favor of low-income homeowners." (*Id.*)

For purposes of clarity, it is important to note that the provision in question does not discriminate against low-income renters; low-income renters can still participate in the WarmChoice® program. The provision also does not exclude low-income renters whose landlords own multiple properties; those renters are free to participate. Nor does the provision exclude low-income renters if their landlords have had other properties weatherized through the WarmChoice® program in the past; those renters can participate too. The "one-property-per-year" limitation simply means that a landlord cannot obtain weatherization services through WarmChoice® for multiple properties *in a given year*. If a particular renter cannot participate in WarmChoice® in a particular year due to this restriction, the renter can participate the following year, or the year after.[2]

The limitation imposed by this provision of the Stipulation is reasonable. Its effect, as OCC has explained, is to "help diversify benefits to more property owners." Opinion and Order ¶ 167; *see* OCC Reply Br. at 18. In this manner, the limitation is akin to the restrictions on participation in pilot programs that the Commission has routinely approved. For example, in Ohio Power Company's 2016 electric security plan proceeding, the Commission rejected an objection to limitations on participation in Ohio Power's Basic Transmission Cost Rider (BTCR) Pilot, holding that such limitations were "reasonable, key to controlling the cost of the pilot, and to facilitating an evaluation of the efficacy of the pilot." *In the Matter of the Application of Ohio Power Co. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case Nos. 16-1852-EL-SSO, Opinion and Order at ¶ 146 (Apr. 25, 2018). WarmChoice®, of course, is far from a pilot program, and its efficacy is proven. But the justification for the limitation is the same: the program cannot accommodate every customer who might want to participate. *See* Opinion and Order ¶ 176 (explaining that "the Commission must balance the need for additional weatherization resources with the

[2] Alternatively, the renter could obtain weatherization services through other programs. *See* Opinion and Order at ¶ 176.

impact upon the customers who fund such resources"). The "one-property-per-year" limitation diversifies participation by preventing a single landlord from using a disproportionate share of the available WarmChoice® funding in any given year.

2.5. The Commission's Opinion and Order complies fully with the requirements of R.C. 4903.09.

Finally, some of the non-signatory parties assert that the Commission failed to satisfy R.C. 4903.09 when it approved two provisions of the Stipulation: the discontinuation of Columbia's non-low-income DSM programs, and the limitation on the number of properties a landlord can have weatherized under the WarmChoice® Program each year. Although the Commission is welcome to provide additional explanation of those decisions in its Entry on Rehearing, if it chooses, no further explanation is required to comply with the statute.

Section 4903.09 states, in its entirety:

> In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

Section 4903.09, Revised Code. To demonstrate that the Commission failed to meet the standard set forth in this statute, ELPC and OPAE would have to demonstrate that "the commission * * * failed to explain a material matter[.]" *In re Application of Columbus Southern Power Co. et al.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 71. The Supreme Court of Ohio has held that "strict compliance with the terms of [Section 4903.09] is not required." *Payphone Assn. v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006-Ohio-2988, 849 N.E.2d 4, ¶ 32, *citing Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 89, 706 N.E.2d 1255 (1999). Instead, "[t]he detail need be sufficient only for [the Supreme Court] to determine the basis of the PUCO's reasoning." *Id.*, *citing Allnet Communications Serv., Inc. v. Pub. Util. Comm.*, 70 Ohio St.3d 202, 209, 638 N.E.2d 516 (1994). In other words, "[t]he PUCO is required only to set forth 'some factual basis and reasoning based thereon in reaching its conclusion.'" *Id.*, *quoting Allnet Communications* at 209. The Opinion and Order met the statute's requirements.

2.5.1. Discontinuation of non-low-income DSM programs

As indicated above, in approving the Stipulation's discontinuation of Columbia's non-low-income DSM programs, the Commission opined that "the General Assembly codified gas choice over twenty years ago * * *. It is time to look to competitive markets to play a more significant role in the provision of energy efficiency services in this state." Opinion and Order at ¶ 56. Much later in the opinion, the Commission reemphasized that "[non-low-income] customers who wish to manage their usage will continue to have access to energy efficiency measures through the competitive marketplace." *Id.* ¶ 171.

The non-signatory parties challenge the evidentiary support for both of these statements. But these evidentiary challenges are simply a recharacterization of their policy arguments against the discontinuation of the non-low-income DSM programs. And as noted above, the Commission is not required to approve *any* particular DSM programs under Ohio law, much less the full package originally proposed by Columbia. *See supra* at 10. Therefore, the Commission did not need to demonstrate the existence of a competitive market for energy efficiency services in Ohio, or justify that market's capacity to serve Columbia's customers, before approving the Stipulation. That said, the Commission's Opinion and Order is adequately explained and supported by the evidentiary record.

According to CUB Ohio, "no evidence was presented that demonstrates that there in fact is a competitive market in the Columbia Gas service territory (or elsewhere) for non-low-income customers to turn for DSM programs." (CUB Ohio AFR at 13.) ELPC similarly asserts that "[t]he record contains no evidence that competitive suppliers currently offer * * * demand-side management services." (ELPC AFR at 10.) However, OPAE introduced testimony from John F. Sarver III, OPAE's Executive Director, which attached comments from Dominion Energy Ohio, Vectren Energy Delivery of Ohio, Inc., and Columbia stating that "non-utilities can and do provide EE services." (OPAE Ex. 1 (Sarver Testimony), Exhibit JFS-2 at 5.) OPAE witness Nicole Peoples similarly testified that there are "state and federally funded energy efficiency programs" that provide services "that are outside the scope of the WarmChoice program." (OPAE Ex. 2 (Peoples Testimony) at 5:22 - 6:2.)

The non-signatory parties also suggest that the Commission failed to demonstrate that the market can replace utility-run energy efficiency programs. CUB Ohio asserts that the Commission failed to cite evidence that the competitive marketplace "will now be able to provide [for] the 1 million customers that would be dependent on such a market."

(CUB Ohio AFR at 14.)[3] And OPAE asserts that "[n]o party offered any evidence that the competitive market can or will fill the hole left by the elimination of the non-low-income programs." (OPAE AFR at 8; *see also id.* at 11.) But this argument second-guesses the state policies in R.C. 4929.02. The Commission concluded that the discontinuation of Columbia's non-low-income DSM programs was consistent with state policy to, among other things, "encourage innovation and *market access* for cost-effective supply- and *demand-side natural gas services* and goods." Opinion and Order ¶ 56 (quoting R.C. 4929.02(A)(4) (emphasis in Commission opinion)).[4] CUB Ohio and OPAE are free to question this state policy, but they cannot require the Commission to substantiate it before following it.

2.5.2. Limitation on weatherization for persons with multiple properties

Lastly, OPAE asserts that the Commission violated R.C. 4903.09 because it "fail[ed] to explain its reasoning for approving" the "one-property-per-year" limitation for the WarmChoice® program, discussed above. (OPAE AFR at 6.) But it did; it explained that the limitation was part of a broader settlement package which, it concluded, benefited ratepayers and the public interest, for the reasons explained in paragraphs 169 through 178 of the Opinion and Order. Of course, on rehearing, the Commission may choose to elaborate on this point and the arguments in favor of the limitation offered by OCC (*see* Opinion and Order at ¶ 167), but no further explanation is required to comply with the statute.

3. Conclusion

For all of the reasons expressed above and in its initial and reply post-hearing briefs, Columbia Gas of Ohio, Inc. respectfully requests that the Commission deny the applications for rehearing filed by The Environmental Law & Policy Center, Ohio Partners for Affordable Energy, and The Citizens' Utility Board of Ohio.

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[3] Incomprehensibly, CUB Ohio also levies the *opposite* critique: that the Commission failed to cite evidence that Columbia's past DSM programs "have deliberately or inadvertently *kept* the competitive market from being promoted or otherwise kept competitive suppliers from offering programs." (CUB Ohio AFR at 14 (emphasis added).)

[4] ELPC similarly cited "Bonbright's principles," which include (among other statements of policy) that "[r]ates should * * * support market growth for competing products and services." (ELPC Br. at 20.)

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 9th day of March, 2023, upon the persons listed below.

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Summary: Memorandum Contra of Columbia Gas of Ohio, Inc. to Applications for Rehearing of the Environmental Law and Policy Center, Ohio Partners for Affordable Energy, and The Citizens Utility Board of Ohio electronically filed by Mr. Lawrence B. Hughes on behalf of Columbia Gas of Ohio, Inc.

Ohio Revised Code

Section 4903.10 Application for rehearing.

Effective: September 29, 1997
Legislation: House Bill 215 - 122nd General Assembly

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission.

Notwithstanding the preceding paragraph, in any uncontested proceeding or, by leave of the commission first had in any other proceeding, any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission. Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

(B) The interests of the applicant were not adequately considered in the proceeding.

Every applicant for rehearing or for leave to file an application for rehearing shall give due notice of the filing of such application to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the commission.

Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application.

Where such application for rehearing has been filed before the effective date of the order as to which a rehearing is sought, the effective date of such order, unless otherwise ordered by the commission, shall be postponed or stayed pending disposition of the matter by the commission or by operation of law. In all other cases the making of such an application shall not excuse any person from complying

with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission.

Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear. Notice of such rehearing shall be given by regular mail to all parties who have entered an appearance in the proceeding.

If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law.

If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing.

If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed. An order made after such rehearing, abrogating or modifying the original order, shall have the same effect as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order prior to the receipt of notice by the affected party of the filing of the application for rehearing.

No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.

Ohio Revised Code

Section 4903.11 Proceeding deemed commenced.

Effective: September 29, 1997
Legislation: House Bill 215 - 122nd General Assembly

No proceeding to reverse, vacate, or modify a final order of the public utilities commission is commenced unless the notice of appeal is filed within sixty days after the date of denial of the application for rehearing by operation of law or of the entry upon the journal of the commission of the order denying an application for rehearing or, if a rehearing is had, of the order made after such rehearing. An order denying an application for rehearing or an order made after a rehearing shall be served forthwith by regular mail upon all parties who have entered an appearance in the proceeding.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief and Appendix of Intervening Appellee Columbia Gas of Ohio, Inc. was sent by e-mail to the following parties of record on March 25, 2025:

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