
2023

How the Public Utilities Commission of Ohio's Application of the Stipulation Standard Leads to Unbalanced Proceedings

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Recommended Citation

Madeline Mischler, *How the Public Utilities Commission of Ohio's Application of the Stipulation Standard Leads to Unbalanced Proceedings*, 73(3) Case W. Rsrv. L. Rev. 983 (2023)

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— Comment —

HOW THE PUBLIC UTILITIES
COMMISSION OF OHIO'S
APPLICATION OF THE
STIPULATION STANDARD LEADS TO
UNBALANCED PROCEEDINGS

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INTRODUCTION

In 2020, news broke that FirstEnergy put \$61 million of dark money toward electing Larry Householder to the Ohio General Assembly in exchange for Householder ensuring the legislature passed House Bill 6.¹ House Bill 6 included a \$1 billion bailout of FirstEnergy-affiliated nuclear power plants. The entirety of this \$1 billion payment would come directly from FirstEnergy's four million ratepayers.² After the FBI arrested Larry Householder, FirstEnergy ultimately paid “a \$230 million penalty and admitted [to] brib[ing] Householder and [a] Public Utilities Commission of Ohio chairman.”³ This scandal made many people question the fairness and transparency of “the often-subjective

1. Jessie Balmert & Laura A. Bischoff, *Ohio Statehouse Corruption: Who You Need to Know in the Federal Bribery Case*, USA TODAY NETWORK OHIO, <https://www.cincinnati.com/storytelling/news/ohio-corruption-project/> [<https://perma.cc/E54P-EZ2U>] (Oct. 11, 2022, 4:52 PM).

2. *Id.*

3. *Id.*

process” that the Public Utilities Commission of Ohio (PUCO) uses “to determine a fair rate” in electric power rate proceedings.⁴

Investor-owned utilities (IOUs) must submit applications to PUCO for a variety of purposes. In a typical PUCO proceeding over an IOU’s application, the IOU must submit evidence to PUCO to support every aspect of its application.⁵ Similar to many other states,⁶ in proceedings before PUCO, including rate cases, parties may enter into nonunanimous settlement agreements.⁷ These agreements, called “stipulations” in Ohio, are meant to resolve issues between the utility that submitted an application to PUCO and parties who intervene to challenge aspects of that application. But the practical effect that a nonunanimous stipulation agreement has on a proceeding is to allow the utility to avoid fully litigating the aspects of their application that non-signatory intervening parties challenged but are not included in the stipulation.⁸

Part I of this Comment explains why IOUs are regulated at the state level and what proceedings before PUCO look like. Part II explains the stipulation standard that applies in proceedings before PUCO after parties reach a stipulated agreement and why its application makes proceedings unfair to non-signatory parties. Part III provides suggestions for improving upon existing procedural rules for PUCO proceedings along with alternative options to the three-prong stipulation reasonableness test that PUCO applies now.

I. BACKGROUND

Until roughly the 1990s, nearly all IOUs in the United States operated as monopolies.⁹ This meant that they owned the generation, transmission, and distribution components of the electric power

4. Renee Fox, *Scandals Cloud Trust in Ohio's Utility Regulation Commission*, WOSU NPR NEWS (Aug. 9, 2022, 5:00 AM), <https://news.wosu.org/politics-government/2022-08-09/scandals-cloud-trust-in-utility-regulation> [https://perma.cc/KS4D-FEHD]; see *infra* Part II.

5. See generally *infra* Part I.C.

6. See Russel Ernst & Monica Hlinka, *Review of Utility Regulatory Settlements Shows It Pays to Set Aside Differences*, S&P GLOB. MKT. INTEL. (Jan. 5, 2023), <https://www.spglobal.com/marketintelligence/en/news-insights/research/review-of-utility-regulatory-settlements-shows-it-pays-to-set-aside-differences> [https://perma.cc/HW76-9D7Q].

7. See *infra* Part II.

8. See *infra* Part II.

9. See Jim Lazar, *ELECTRICITY REGULATION IN THE U.S.: A GUIDE* 9–10 (2d ed. 2016) [hereinafter RAP], <https://www.raonline.org/wp-content/uploads/2016/07/rap-lazar-electricity-regulation-US-june-2016.pdf> [https://perma.cc/3X5B-4VCF].

supply.¹⁰ State governments granted IOUs with specific service territories but retained authority to set prices and rates.¹¹ Because of this relationship between utilities and the government (also called the “regulatory compact”), a utility has the duty “to serve every customer within its service territory.”¹² This monopoly structure was viewed as an efficient way to ensure that utilities provided customers with “reliable service, fixed prices, and economic stability.”¹³ Further, these fixed prices meant “shareholders were assured a fixed rate of return.”¹⁴

In the 1990s, electric prices under this monopolistic model were rising and harming economic development in service areas with especially high electric rates.¹⁵ Large industrial users of power also started to argue that they should have authority to purchase electric power wholesale from generators directly.¹⁶ In 1996, the Federal Energy Regulatory Commission (FERC) Order No. 888 required utilities to unbundle their generation and transmission electric service components.¹⁷ This effectively forced “unimpeded competition” into sales of wholesale electric power, which the FERC alone regulates.¹⁸

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10. *See id.*; *Bundled Utility Service (Electric)*, U.S. ENERGY INFO. ADMIN., [https://www.eia.gov/tools/glossary/?id=electricity#:~:text=Bundled%20utility%20service%20\(electric\)%3A,are%20provided%20by%20one%20entity](https://www.eia.gov/tools/glossary/?id=electricity#:~:text=Bundled%20utility%20service%20(electric)%3A,are%20provided%20by%20one%20entity) [<https://perma.cc/P4US-KVDB>].
 11. *See* LINCOLN L. DAVIES, ALEXANDRA B. KLASS, HARI M. OSOFSKY, JOSEPH P. TOMAIN & ELIZABETH J. WILSON, *ENERGY LAW & POLICY* 293 (3d ed. 2021).
 12. *Id.*; *see also* Jim Rossi, *The Common Law “Duty to Serve” and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*, 51 *VAND. L. REV.* 1233, 1242–43 (1998) (“[T]he public utility duty to serve entails several obligations, among them duties to interconnect and extend service if requested, to provide continuing reliable service, to provide advanced notice of service disconnection, and to continue service without full payment.”).
 13. Todd A. Snitchler, *Maintaining the Status Quo: Electricity Utility Deregulation Difficulties in Ohio*, 49 *CLEV. STATE L. REV.* 647, 651 (2001).
 14. *Id.* at 652.
 15. W.M. WARWICK, PAC. NW. NAT’L LAB’Y, *A PRIMER ON ELECTRIC UTILITIES, DEREGULATION, AND RESTRUCTURING OF U.S. ELECTRICITY MARKETS* 6.4 (2002), https://www.pnnl.gov/main/publications/external/technical_reports/PNNL-13906.pdf [<https://perma.cc/X5JL-DQYZ>].
 16. RAP, *supra* note 9, at 9.
 17. Jeffery D. Schwartz, Comment, *The Use of the Antitrust State Action Doctrine in the Deregulated Electric Utility Industry*, 48 *AM. U. L. REV.* 1449, 1473 (1999).
 18. *Id.*

Many states also decided to introduce competition in the “retail portion of the electric industry.”¹⁹ To do this, states “‘unbundled’ the electricity-supply function from distribution, on the theory that only the wires (the fixed network system) constituted a natural monopoly, whereas the generation of power did not.”²⁰ Competition in the retail sale of electric power arises because customers, including residential customers, may “shop” for their electric power supplier and choose to “purchase their electricity from other retail suppliers besides their local utility.”²¹ Now, utilities in restructured states function primarily as distribution-only utilities.²² Ohio uses this type of restructured retail electric power market.²³

Even in restructured states where competition for the sale of retail electricity would ideally serve to ensure competitive prices, state governments through their respective public utility commissions (PUCs) still exercise regulatory control over electricity rates and charges.²⁴ Governmental oversight is largely justified because “utilit[ies] provide[] essential services for the well-being of society—both individuals and businesses.”²⁵ Because electric utilities are crucial to a functional modern society, “careful oversight” by state governments is justified “even where there is sufficient competition among the providers of energy supply and/or retail billing service.”²⁶ Additionally, electric power generation usually emits pollution, so it is important that regulators have authority to “impose environmental responsibilities on

19. *Id.*

20. RAP, *supra* note 9, at 9.

21. *Power Market Structure*, EPA, <https://www.epa.gov/green-power-markets/power-market-structure> [<https://perma.cc/2G4K-D6KE>] (Feb. 5, 2023). See *infra* Part I.C.2 for an explanation of standard service offers that local utilities must offer as the default electric power supply for customers who do not wish to shop elsewhere for their power.

22. *Power Market Structure*, *supra* note 21; RAP, *supra* note 9, at 13.

23. Snitchler, *supra* note 13, at 662–65. *Constellation NewEnergy, Inc. v. Pub. Utils. Comm’n of Ohio*, 820 N.E.2d 885, 887 (Ohio 2004) (“[Senate Bill 3] provided for restructuring Ohio’s electric-utility industry to achieve retail competition with respect to the generation component of electric service. S.B. 3 required each Ohio electric utility to file a . . . rate-unbundling plan providing for separation of the generation, transmission, and distribution components of electric service.”); see also *Apples to Apples: Electric*, ENERGY CHOICE OHIO, <https://energychoice.ohio.gov/ApplesToApplesCategory.aspx?Category=Electric> [<https://perma.cc/2Z25-G2A6>] (providing charts for consumers to compare electric supplier price options and contract terms).

24. DAVIES ET AL., *supra* note 11, at 308 (“The basic tool used to regulate the electricity industry is price setting.”).

25. RAP, *supra* note 9, at 3 (emphasis removed).

26. *Id.* at 4.

utilities to protect [the] public interest[].”²⁷ Governmental oversight of utilities through state PUCs occurs primarily through adjudicatory proceedings, often in the form of rate cases.²⁸

A. Public Utility Regulation and Environmental Concerns

In 2020, the electric power sector contributed 25 percent of all greenhouse gas (GHG) emissions in the United States.²⁹ As more people begin to purchase electric vehicles and cities work to electrify their grids to meet zero-carbon goals, GHG emissions from the electric sector could rise. Aside from the obvious impacts this could have on climate change, many electric power generation plants are also “placed in environmental justice neighborhoods.”³⁰ To prevent air quality from getting worse in these communities, which federal, state, and local governments have historically left with little protection from environmental harm, regulators must require local utilities to continue to implement energy efficiency programs and grid modernization efforts.³¹

Electric utility customers (“ratepayers”) are the primary funders of a utility’s energy efficiency and grid modernization programs (“energy programs”). The term “ratepayers” includes everyone in each customer class—industrial, commercial, and residential customers.³² Ratepayers pay for these energy programs through specific charges on their electric bills. Notably, charges for these energy programs do not translate to long-term increases in electric bills and, in fact, save ratepayers money³³ in addition to curbing GHG emissions.

27. *Id.* at 5.

28. DAVIES ET AL., *supra* note 11, at 319; *see infra* Part I.C.

29. *Sources of Greenhouse Gas Emissions*, EPA (Aug. 5, 2022), <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> [<https://perma.cc/R4Y4B-RJ4U>].

30. Courtney Lindwall, *Why We Must Electrify Everything Even Before the Grid Is Fully Green*, NAT’L RES. DEF. COUNCIL (Dec. 1, 2022), <https://www.nrdc.org/stories/why-we-must-electrify-everything-even-grid-fully-green> [<https://perma.cc/HXV7-9Z4D>]; *see also* *Learn About Environmental Justice*, EPA (Sept. 6, 2022), <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice> [<https://perma.cc/KH6D-MVLM>] (“Environmental justice (EJ) is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies.”).

31. *See* Lindwall, *supra* note 30; *see also* Shelley Welton & Joel Eisen, *Clean Energy Justice: Charting an Emerging Agenda*, 43 HARV. ENV’T L. REV. 307, 328 (2019) (discussing PUCs’ struggles to fund grid modernization efforts).

32. *See* Welton & Eisen, *supra* note 31, at 324.

33. *Energy Prices*, INT’L ENERGY AGENCY, <https://www.iea.org/reports/multiple-benefits-of-energy-efficiency/energy-prices> [<https://perma.cc>]

States with clean energy goals and statutory requirements implement them through the energy programs that utilities create,³⁴ but in states without stringent clean energy goals and statutory requirements, utilities only implement these energy programs if they voluntarily choose to do so or their state PUC requires it.³⁵ Due to IOUs' "fiduciary duty . . . to maximize returns to shareholders," investing in clean energy is not necessarily an IOU's main focus.³⁶ PUCs across the U.S. also tend to take a restrictive approach (whether on their own or as directed by a state's legislative body) to regulating IOUs and only look at whether an IOU's "investments and business strategies . . . provide . . . short-term economic benefits to current customers."³⁷ So PUCs tend not to consider how an IOU's proposed action might impact the environment.³⁸ Because rate cases and similar proceedings are the primary tool state PUCs have to oversee IOUs,³⁹ environmental and consumer advocacy groups have strong interests in this adjudicatory process. These interests span from ensuring utilities implement any energy programs at all to ensuring that regulators and other interested parties approach the transition from fossil fuels to clean energy through a distributive justice lens.⁴⁰ In addition to these environmental concerns, consumer and environmental groups, as well

[/4Y8R-HM9F] ("Energy efficiency can enable lower energy prices by reducing the need to add expensive new power generation or transmission capacity and by reducing pressure on energy resources. Decreased demand for energy services across several markets can prompt a reduction in energy prices.").

34. See Welton & Eisen, *supra* note 31, at 324 ("[S]tate policies drive most clean energy expenditures.").
35. See Ben Hertz-Shargel, *Grid Edge Infrastructure: Powering the Energy Transition*, FORBES (Nov. 26, 2022, 10:15 AM), <https://www.forbes.com/sites/woodmackenzie/2022/11/26/grid-edge-infrastructure-powering-the-energy-transition/?sh=6b59d84b3641> [<https://perma.cc/KF7D-DHZV>].
36. Inara Scott, *Applying Stakeholder Theory to Utility Regulation*, 42 *ECOLOGY L. CURRENTS* 1, 2, 9 (2015).
37. *Id.* at 2.
38. *Id.* However, "some state legislative schemes purport to allow utility regulators to consider environmental impacts and sustainability issues . . ." *Id.*
39. See *supra* Part I.
40. See generally Welton & Eisen, *supra* note 31, at 316–23. See also Jason F. Moeller, *Distributive Justice and Climate Change: The What, How, and Who of Climate Change Policy 3* (May 2016) (M.A. thesis, University of Montana) (on file with ScholarWorks, a service of the University of Montana Mansfield Library) ("The practice of distributive justice is usually called upon when there is a limited amount of some desired good that is spread out amongst a given population in a seemingly unjust or unfair way.").

as state PUCs, have a particular interest in ensuring utilities are transparent about where ratepayer money goes.⁴¹

B. A Brief Overview of Ohio Energy Policy

Ohio has a history of hostility toward renewable energy and energy efficiency.⁴² Ohio did not implement a renewable portfolio standard (RPS) until 2008, and the RPS faced a “concerted resistance” from industry, utilities, and government officials in the years after it was established.⁴³ The RPS only required Ohio’s electric supply to include 12.5 percent renewable energy by 2024. Then, in 2019, House Bill 6 gutted Ohio’s RPS, reducing it to 8.5 percent by 2026, which is the lowest RPS of any state that has adopted an RPS.⁴⁴ Additionally, Governor DeWine recently signed a law that defined “natural gas as a source of ‘green energy.’”⁴⁵

In addition, companies who would like to voluntarily site utility-scale renewable energy projects, despite this low RPS, have few options for doing so in Ohio. In 2014, Ohio enacted a law that altered the 1,125-foot wind turbine setback measurement process. Formerly, setbacks were measured from “the exterior of the nearest habitable residential structure, if any, located on adjacent property” to the proposed wind turbine location, but the new law measures setbacks from the “property line of the nearest adjacent property.”⁴⁶ In the years since this law passed, the Ohio Power Siting Board has approved very few new wind farm siting applications.⁴⁷ Further, in 2021, the Ohio General Assembly passed legislation permitting county commission

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41. DAVID POMERANTZ, ENERGY & POL’Y INST., GETTING POLITICS OUT OF UTILITY BILLS 3–4 (2023) (describing several utility schemes that used ratepayer money for illegal purposes).
 42. *See generally* LEAH STOKES, SHORT CIRCUITING ENERGY POLICY 194–223 (2020).
 43. *Id.* at 194, 214; Jake Zuckerman, *House Bill 6 Left Ohio with Least Stringent Clean-Energy Program in U.S., Study Shows*, CLEVELAND.COM (Jan. 7, 2023), <https://www.cleveland.com/open/2023/01/house-bill-6-left-ohio-with-least-stringent-clean-energy-program-in-us-study-shows.html> [<https://perma.cc/VW73-QENM>].
 44. Zuckerman, *supra* note 43.
 45. Jake Zuckerman, *With Stroke of His Pen, Gov. Mike DeWine Defines Natural Gas as Green Energy*, CLEVELAND.COM (Jan. 6, 2023, 5:20 PM), <https://www.cleveland.com/open/2023/01/with-stroke-of-his-pen-gov-mike-dewine-defines-natural-gas-as-green-energy.html> [<https://perma.cc/DA34-PAUC>].
 46. MAURA MCCLELLAND, OHIO LEGIS. SERV. COMM’N, GEN. ASSEMB. 132, BILL ANALYSIS S.B. 184 (2017); OHIO REV. CODE ANN. § 4906.20(B)(2)(a) (West Supp. 2022).
 47. WIND CASE STATUS, OHIO POWER SITING BOARD, <https://opsb.ohio.gov/wps/wcm/connect/gov/c48eaa05-9f80-4a6b-bae1-f4cdc6717207/Wind+Map+and+Stats01192023.pdf> [<https://perma.cc/FY7M-9WEA>] (Feb. 16, 2023).

boards to ban solar and wind projects countywide.⁴⁸ This legislation permits a “board of county commissioners [to] adopt a resolution designating . . . the unincorporated area of a county as a restricted area.”⁴⁹ The Ohio Power Siting Board is specifically prohibited from allowing any company to construct large wind or solar farms in those restricted areas.⁵⁰ Fossil fuel projects like pipelines and fracking wells are not subject to similar local restrictions.⁵¹ The General Assembly treats these types of projects as subject only to state-level regulation⁵² and prohibits municipalities from enacting ordinances that would ban new buildings from using natural gas.⁵³

Lastly, in addition to reducing Ohio’s RPS, House Bill 6 removed energy efficiency requirements for electric distribution utilities.⁵⁴ In 2008 when Ohio first enacted its RPS, it also established “significant targets for energy efficiency.”⁵⁵ These energy efficiency targets saved ratepayers and “the state billions, and helped to clean up [Ohio]’s dirty air.”⁵⁶ As a result of getting rid of this efficiency requirement, Ohio ranks forty-fourth in the country in terms of energy efficiency.⁵⁷

48. OHIO REV. CODE ANN. § 303.58 (West Supp. 2022).

49. *Id.*

50. Christine M.T. Pirik, Matthew C. McDonnell & Terrence O’Donnell, *Ohio Legislature Adopts New Wind and Solar Siting Law S.B. 52 Requires County Commission Approval*, DICKINSON WRIGHT (June 30, 2021), <https://www.dickinson-wright.com/-/media/files/news/2021/06/dw-ohio-sb-52-summary.pdf> [<https://perma.cc/UUU5-F9XH>]; OHIO REV. CODE ANN. § 303.58 (West Supp. 2022). In lieu of a broad, countywide prohibition, county commissioners may deny solar and wind projects on a project-by-project basis or designate specific sections of unincorporated territory as restricted areas while leaving others open for such projects. *Id.*

51. Erik Lange, *Local Control of Emerging Energy Sources: A Due Process Challenge to Disparate Treatment by States*, 64 CASE W. RES. L. REV. 619, 655–57 (2013).

52. Jake Zuckerman, *DeWine Signs Bill Giving Commissioners “Kill Switch” on Wind, Solar Projects*, OHIO CAP. J. (July 13, 2021, 12:35 AM), <https://ohiocapitaljournal.com/2021/07/13/dewine-signs-bill-giving-commissioners-kill-switch-on-wind-solar-projects> [<https://perma.cc/D3NE-65WJ>].

53. OHIO REV. CODE ANN. § 4933.41(C)(1) (West Supp. 2022); Jake Zuckerman, *DeWine Signs Bill Blocking Ohio Cities from Banning Natural Gas*, OHIO CAP. J. (July 1, 2021, 3:21 PM), <https://ohiocapitaljournal.com/2021/07/01/dewine-signs-bill-blocking-ohio-cities-from-banning-natural-gas/> [<https://perma.cc/YZW2-7UZV>].

54. Zuckerman, *supra* note 43.

55. *See* STOKES, *supra* note 42, at 194.

56. *Id.* at 196.

57. SAGARIKA SUBRAMANIAN, WESTON BERG, EMMA COOPER, MICHAEL WAITE, BEN JENNINGS, ANDREW HOFFMEISTER & BRIAN FADIE, AM. COUNCIL FOR AN ENERGY-EFFICIENT ECON., 2022 STATE ENERGY EFFICIENCY SCORECARD, at xi, fig. ES1 (December 2022).

C. Public Utilities Commission of Ohio

The Ohio General Assembly gave PUCO exclusive “power and jurisdiction to supervise and regulate public utilities.”⁵⁸ In Ohio, an electric power public utility is most often a corporation that sells retail electric power.⁵⁹ The state governor appoints each of the five commissioners to five-year terms,⁶⁰ and all proceedings before PUCO are public record.⁶¹ As a state agency, PUCO may itself “adopt and publish rules to govern its proceedings.”⁶² Public utilities must submit applications to PUCO for a variety of purposes, but two central purposes related to electric utilities are (1) to establish electric power rates and (2) to establish or amend a standard service offer.

1. Rate Cases and Proceedings Before PUCO Generally

PUCO proceedings follow a fairly standard structure among state public utility commissions.⁶³ When a public utility would like to establish or raise its rates, it must submit to PUCO detailed financial information to support and explain why every aspect of its rate increase establishes a “just and reasonable” rate.⁶⁴ Utilities also tend to submit written direct testimony of both experts and nonexperts to support their application, either with or shortly after filing it, and must submit this written testimony within fourteen days of filing an application to increase rates.⁶⁵ A public utility must submit this information to PUCO

58. OHIO REV. CODE ANN. § 4905.04 (West Supp. 2022).

59. *See id.* §§ 4905.02, 4905.03(C).

60. *Id.* § 4901.02.

61. *Id.* § 4901.12 (West 2010).

62. *Id.* § 4901.13.

63. *Compare* Part I.C.1 (providing an overview of PUCO proceedings), *with* RAP, *supra* note 9, at 36–38 (describing the general IOU regulatory process).

64. OHIO REV. CODE ANN. § 4909.18 (West Supp. 2022). The application should include “a schedule of the existing rate, joint rate, toll, classification, charge, or rental, or regulation or practice affecting the same, a schedule of the modification amendment, change, increase, or reduction sought to be established, and a statement of the facts and grounds upon which such application is based.” *Id.*

65. OHIO ADMIN. CODE 4901-7-01 app. A, ch. II(A)(6) (2022), https://codes.ohio.gov/assets/laws/administrative-code/pdfs/4901/0/7/4901-7-01_FF_A_APP2_20220607_1516.pdf [<https://perma.cc/XEQ3-RJ3P>]; *see* Docket, Columbia Gas of Ohio, Inc., Pub. Utils. Comm’n No. 21-0637-GA-AIR (Ohio P.U.C. May 28, 2021); Docket, Ohio Power Company, Pub. Utils. Comm’n No. 20-0585-EL-AIR (Ohio P.U.C. Apr. 9, 2020); Docket, *In re* Application of The Dayton Power and Light Company d/b/a AES Ohio, Pub. Utils. Comm’n No. 22-0900-EL-SSO (Ohio P.U.C. Sept. 26, 2022).

in the form of a written application.⁶⁶ The proceeding before PUCO that follows after a utility files this type of application is called a “rate case.”⁶⁷ PUCO may also initiate its own review of a utility’s rates even if the utility does not increase electric rates on its own.⁶⁸

PUCO staff investigates each application from a public utility and prepares a written staff report based on this investigation. A staff report details PUCO staff’s recommendations as to the reasonableness of a utility’s application.⁶⁹ While PUCO prepares its staff report, interested parties may “file intervention petitions, begin the evidentiary process, and . . . hire experts to prepare testimony.”⁷⁰ Any interested party may file an intervention petition and “intervene in a proceeding upon showing that . . . [t]he person has a real and substantial interest in the proceeding.”⁷¹

After drafting the staff report, PUCO must set a hearing. If an intervening party objects to the staff report, then PUCO, the utility, and interested parties begin the adjudication process.⁷² Parties “may obtain discovery of any matter” that is relevant to the proceeding and not privileged, but parties cannot obtain discovery from commission staff.⁷³ The public utility, not the intervenors in a proceeding, has “the burden of proof to show that the proposals in the application are just

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66. OHIO REV. CODE ANN. § 4909.18 (West Supp. 2022) (“Any public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, or to modify, amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, shall file a written application with the public utilities commission.”).
67. *See generally* Stefan H. Krieger, *Problems for Captive Ratepayers in Nonunanimous Settlements of Public Utility Rate Cases*, 12 YALE J. ON REGUL. 257, 257 (1995).
68. OHIO REV. CODE ANN. § 4909.27 (West 2010). Although most PUCs across the United States have authority to initiate their own rate case, it is rare that any commission exercises this power. RAP, *supra* note 9, at 40.
69. OHIO REV. CODE ANN. § 4909.19(C) (West Supp. 2023); *Rate Case Process*, PUB. UTILS. COMM’N, <https://puc.ohio.gov/utilities/electricity/resources/rate-case-process> [<https://perma.cc/XFC4-N4AT>] [hereinafter *Rate Case Process*] (“PUCO staff conducts infrastructure inspections, reviews plant and financial records and assesses the quality of service provided to customers.”).
70. OHIO ADMIN. CODE 4901-1-11(A) (2016); *Rate Case Process*, *supra* note 69.
71. OHIO REV. CODE ANN. § 4903.221 (West 2010); OHIO ADMIN. CODE 4901-1-11(A) (2016).
72. OHIO REV. CODE ANN. § 4909.19(C) (West Supp. 2023); *see also* Krieger, *supra* note 67, at 278.
73. OHIO REV. CODE ANN. § 4903.082 (West 2010); OHIO ADMIN. CODE 4901-1-16 (Supp. 2023).

and reasonable.”⁷⁴ In a contested proceeding, parties must file their expert testimony in writing with PUCO and serve it on all parties to the case before PUCO’s scheduled hearing where the testimony will be offered.⁷⁵

PUCO holds several hearings on an application, including “local hearings to take statements from customers and evidentiary hearings for the cross-examination of expert witnesses.”⁷⁶ Parties to the case may submit written briefs after the hearings conclude, and the attorney examiner reviews the record and “prepares a recommendation to the commissioners.”⁷⁷ Within six months after the hearing, PUCO must issue an order on the reasonableness of the proposals in the application.⁷⁸ If PUCO determines that a “rate, fare, charge, toll, rental, or service to be rendered” is unjust or unreasonable, it will “fix and determine the just and reasonable rate, fare, charge, toll, rental, or service to be rendered” and order that a utility adopt PUCO’s rate instead.⁷⁹

PUCO must create a “complete record of all the proceedings” in a “contested case[.]”⁸⁰ When PUCO makes decisions, it “abuses its discretion if it renders an opinion on an issue without record support,”⁸¹ so parties have an interest in ensuring that any issue with a public utility’s application is fully developed in the record. PUCO must also keep state policy goals in mind when issuing decisions, but these goals do not impose any specific procedural requirements on the commission.⁸² State policy goals include “[e]nsur[ing] the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service.”⁸³

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74. OHIO REV. CODE ANN. § 4909.18 (West Supp. 2022).
75. OHIO ADMIN. CODE 4901-1-29(A) (2016).
76. *Rate Case Process*, *supra* note 69; *see* OHIO ADMIN. CODE 4901-1-27 (2016).
77. *Rate Case Process*, *supra* note 69; *see* OHIO ADMIN. CODE 4901-1-31; 4901-1-33 (2016).
78. OHIO REV. CODE ANN. § 4909.18 (West Supp. 2022).
79. *Id.* § 4909.15(E)(2)(b) (West Supp. 2023).
80. *Id.* § 4903.09 (West 2010).
81. *See In re* Complaint of Suburban Nat. Gas Co. v. Columbia Gas of Ohio, Inc., 162 Ohio St. 3d 162, 2020-Ohio-5221, 164 N.E. 3d 425, at ¶ 19 (quoting *Tongren v. Pub. Utils. Comm’n*, 706 N.E. 2d 1255, 1257 (Ohio 1999)).
82. *In re* Application Seeking Approval of Ohio Power Co.’s Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider, 155 Ohio St. 3d 326, 2018-Ohio-4698, 121 N.E.3d 320, at ¶ 49.
83. OHIO REV. CODE ANN. § 4928.02 (West Supp. 2023).

Any party may apply for a rehearing of an order, and if it is granted, the rehearing is also conducted before PUCO.⁸⁴ Parties may then appeal PUCO's decision on rehearing to the Supreme Court of Ohio.⁸⁵ Ohio Revised Code section 4903.13 specifies that the Ohio Supreme Court may only “reverse[], vacate[], or modif[y]” PUCO's opinion if, based on the record, it was “unlawful or unreasonable.”⁸⁶ On appeal, the court may rely on PUCO's expertise if it will help the court with “discerning the presumed intent of [the Ohio] General Assembly.”⁸⁷

2. Standard Service Offers

All “electric distribution utilit[ies]” must provide their customers within their certified territory⁸⁸ with a “standard service offer” (SSO).⁸⁹ An SSO encompasses the cost of all “retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service” and serves as the “default rate” for customers who do not shop elsewhere for their electricity.⁹⁰ To comply with the SSO requirement, electric utilities may use a market rate offer or an electric security plan (ESP).⁹¹ A utility using a market rate offer to comply with the SSO requirement will engage in a “competitive bidding process” with electric suppliers and will base the SSO price on the market rate for electricity.⁹²

84. *Id.* § 4903.10 (West 2010).

85. *Id.* § 4903.13.

86. *Id.*

87. Ohio Consumers' Couns. v. Pub. Utils. Comm'n, 111 Ohio St. 3d 300, 2006-Ohio-5789, 856 N.E.2d 213, at ¶ 12 (quoting Off. of Consumers' Couns. v. Pub. Utils. Comm'n, 388 N.E.2d 1370, 1373 (Ohio 1979)) (“[The Supreme Court of Ohio] may rely on the expertise of a state agency in interpreting a law where ‘highly specialized issues’ are involved and ‘where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly.’”).

88. OHIO REV. CODE ANN. § 4933.81(G) (West 2010) (“‘Certified territory’ means a geographical area . . . within which an electric supplier is authorized and required to provide electric service.”).

89. *Id.* § 4928.141(A). Natural gas utilities must provide their customers with a standard *choice* offer, which is essentially the same thing as an SSO. *How Are Standard Choice Offer Rates Set?*, PUB. UTILS. COMM'N, <https://puco.ohio.gov/utilities/gas/resources/how-are-standard-choice-offer-rates-set> [<https://perma.cc/A84Q-9XSY>].

90. *How Are Electric Generation Rates Set?*, PUB. UTILS. COMM'N, <https://puco.ohio.gov/utilities/electricity/resources/how-are-electric-generation-rates-set> [<https://perma.cc/448R-RKKP>]; OHIO REV. CODE ANN. § 4928.141(A) (West 2010).

91. OHIO REV. CODE ANN. §§ 4928.142(A) (West 2010); 4928.143(A) (West Supp. 2023).

92. *Id.* § 4928.142(A), (C) (West 2010).

An ESP is an electric utility's "plan for the supply and pricing of electric generation service."⁹³ Similarly to a market rate offer, utilities often use a competitive bidding process to secure a standard generation supply price.⁹⁴ A public utility submitting an ESP application carries the burden of proving that the ESP "is more favorable in the aggregate as compared to the expected results" of using a market rate offer.⁹⁵ In addition to simply establishing the baseline generation supply price, a utility may include several riders in its ESP application. These riders are extra charges to ratepayers to fund services a public utility believes are also "necessary to maintain essential electric service to consumers."⁹⁶ Additionally, PUCO must annually consider whether any charges included in a utility's ESP "resulted in excessive earnings."⁹⁷

A central critique of these ESPs⁹⁸ is that they permit utilities to add charges to customers' electric bills without undergoing a full rate case before PUCO.⁹⁹ The only time when a utility must fully disclose its financial information to PUCO is when a utility voluntarily applies to increase its base rate or PUCO calls a utility in for a rate case on its own.¹⁰⁰ Some states require that utilities engage in "a general rate case on a fixed schedule," but most states, including Ohio, do not.¹⁰¹ In theory, riders should be limited only to covering costs of a specific

93. *Id.* § 4928.143(B) (West Supp. 2023); OHIO ADMIN. CODE 4901:1-35-01(F) (Supp. 2023).

94. *See, e.g.*, Application, *In re* Application of Ohio Power Co., Pub. Utils. Comm'n No. 23-23-EL-SSO, at 9 (Ohio P.U.C. Jan. 6, 2023); Application, *In re* Application of The Dayton Power & Light Co. d/b/a AES Ohio, Pub. Utils. Comm'n No. 22-0900-EL-SSO, at 5 (Ohio P.U.C. Sept. 26, 2022).

95. OHIO REV. CODE ANN. § 4928.143(C)(1) (West Supp. 2023).

96. *Id.* §§ 4928.141(A) (West 2010), 4928.143(B)(2)(a)–(i) (West Supp. 2023).

97. *Id.* § 4928.143(F) (West Supp. 2023) ("The burden of proof for demonstrating that significantly excessive earnings did not occur shall be on the electric distribution utility.").

98. ESPs are an adjacent problem to the stipulation standard that this Comment focuses on, but the ESP problem is a helpful example of how little transparency utilities in Ohio must provide to regulators.

99. *In re* Application of Ohio Edison Co., The Cleveland Electric Illuminating Co. & The Toledo Edison Co., Pub. Utils. Comm'n No. 19-361-EL-RDR, 2020 WL 12813035, at *8 (Ohio P.U.C. Jan. 15, 2020) (Conway, Comm'r, dissenting).

100. Hearing on House Bill 317 Before Public Utilities Committee, 134th Gen. Assembly 1 (Apr. 6, 2022) (testimony of Robert Kelter, Env't L. & Pol'y Ctr.) [hereinafter ELPC Testimony]; *see* OHIO REV. CODE ANN. § 4909.18 (West Supp. 2022); *id.* § 4905.04.

101. RAP, *supra* note 9, at 40; *see News Bureau: Learning About Utility Riders*, PUB. UTILS. COMM'N (Jan. 31, 2023), <https://puco.ohio.gov/news/news-bureau-riders> [<https://perma.cc/45ZN-3VHR>].

program,¹⁰² but that is not always how they function. Testimony in support of a bill that would get rid of Ohio's ESPs explained the problem simply:

Utility A comes in for a rate case in 2015. In its test year it states it will need to recover the cost for 200 employees who drive around and read meters. In 2018 Utility A files an ESP case that includes a grid modernization rider replacing the old meters with new automated meters that provide the utility customer usage information, and eliminate the need for employees to go around and read meters. But, the ESP adds the new expense for the meters without taking away the revenue Utility A collects for the meter readers. Until the next rate case the utility still collects the costs of the salaries of those 200 employees.¹⁰³

Ultimately, ESPs serve as an important example of the need for more transparency regarding utility financials.

II. THE PUCO STIPULATION STANDARD

In contested cases before PUCO, including rate and SSO/ESP cases, parties to a matter may enter into a “stipulation” agreement. A stipulation is essentially a settlement agreement meant to facilitate the resolution of all issues in a proceeding.¹⁰⁴ All parties joining the stipulation must sign it, then the utility files it with PUCO and serves it on all parties to the case. Parties may reach a nonunanimous stipulation, meaning an agreement where the utility and at least one other party, but not all parties, join.¹⁰⁵ Parties to the stipulation must “file or provide the testimony of at least one signatory party that supports the stipulation,” and parties who do not join the stipulation may argue against it and present evidence in opposition to it.¹⁰⁶ Many states permit parties to enter into settlement agreements, whether unanimous or not. And the common “independent, non-delegable duty” of any state PUC is “to determine if the settlement is in the public

102. PUB. UTILS. COMM'N, *supra* note 101 (“A rider is a utility charge, not included in standard rates, that allows a utility to recover the costs of specific programs.”).

103. ELPC Testimony, *supra* note 100, at 1. For more information on why customers and consumer advocates disfavor riders, see JIM LAZAR, RATE DESIGN FOR VERTICALLY INTEGRATED UTILITIES: A BRIEF OVERVIEW 6 (2015).

104. OHIO ADMIN. CODE 4901-1-30(A) (2016) (“Any two or more parties may enter into a written or oral stipulation concerning issues of fact, the authenticity of documents, or the proposed resolution of some or all of the issues in a proceeding.”).

105. *Id.* 4901-1-30(A)-(B).

106. *Id.* 4901-1-30(D).

interest.”¹⁰⁷ PUCO gives the terms of a stipulation “substantial weight” when reviewing it for reasonableness.¹⁰⁸

PUCO developed its own three-prong reasonableness test, which the Supreme Court of Ohio also adopted, to review stipulations:

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?¹⁰⁹

The meaning of the first prong of this test is not clearly developed,¹¹⁰ but PUCO and the Supreme Court of Ohio have identified a few factors to explain when “serious bargaining” may take place. One “error in a complex filing” is not evidence of no serious bargaining,¹¹¹ but when parties to a stipulation intentionally exclude an entire customer class, the stipulation likely fails this prong.¹¹² Where all parties are invited and have the opportunity to participate in negotiations, PUCO will typically find that serious bargaining occurred. PUCO usually finds that serious bargaining occurred where the parties to a stipulation “represent a wide variety of diverse interests.”¹¹³ But the presence of diverse interests among signatory parties is not required for

107. Alan P. Buchmann & Robert S. Tongren, *Nonunanimous Settlements of Public Utility Rate Cases: A Response*, 13 YALE J. ON REGUL. 337, 339 (1996); Ernst & Hlinka, *supra* note 6.

108. *Consumers' Couns. v. Pub. Utils. Comm'n*, 592 N.E.2d 1370, 1373 (Ohio 1992).

109. *Id.*

110. *In re Application of Duke Energy Ohio, Inc.*, Publ Utils. Comm'n No. 14-375-GA-RDR, 2022 WL 1303395, at *33 (Ohio P.U.C. Apr. 20, 2022) (“[T]here is no specific checklist that must be applied during the negotiation process in order to demonstrate serious bargaining has occurred.”).

111. *In re Application of Ohio Edison Co.*, 146 Ohio St. 3d 222, 2016-Ohio-3021, 54 N.E.3d 1218 at ¶ 41.

112. *Id.*; *Constellation NewEnergy, Inc. v. Pub. Utils. Comm'n*, 104 Ohio St. 3d 530, 535, 2004-Ohio-6767, 820 N.E.2d 885, 890 (2004). Additionally, when parties are represented by competent counsel, they are considered “capable” and “knowledgeable parties.” *See e.g.*, *Off. of Consumers' Couns. v. Pub. Utils. Comm'n*, 592 N.E.2d 1370, 1373 (Ohio 1992).

113. *In re Application of the Dayton Power & Light Co.*, Pub. Utils. Comm'n No. 14-563-EL-RDR, at 5 (Ohio P.U.C. Sep. 9, 2015); *In re Application of Ohio Edison Co., The Cleveland Elec. Illuminating Co. & The Toledo Edison Co.*, Pub. Utils. Comm'n No. 14-1297-EL-SSO, at 43 (Ohio P.U.C. Mar. 31, 2016).

PUCO to approve a stipulation.¹¹⁴ Additionally, PUCO considers the simple fact that there are differences between a utility's application and a stipulation as evidence of serious bargaining.¹¹⁵ Based on these factors, meeting the first prong is fairly easy for signatory parties.

To meet the second prong of this test, parties to a stipulation need only show that the entirety of the stipulation itself, not the stipulation compared to the original application as a whole, benefits the public. This is also not generally a challenging burden to meet and simply requires the signatory parties to explain which stipulated provisions will help the public and how.¹¹⁶ Notably, the utility does not need to show that the stipulation presents the best “mechanism[] . . . [to] benefit ratepayers and the public interest.”¹¹⁷

To determine if a stipulation meets the third reasonableness prong, PUCO often looks at whether it violates any of the state policy objectives in Ohio Revised Code section 4928.02.¹¹⁸ These state policies include ensuring that customers have access to “adequate, reliable, safe, [and] efficient” electric service.¹¹⁹ The Supreme Court of Ohio has noted, however, that these policies impose no “strict conditions on the commission.”¹²⁰ Instead, section 4928.02 merely sets out policy “guidelines for the commission to weigh” and vests PUCO with authority “to determine how best to carry [those policy goals] out.”¹²¹

The problem with stipulations is that they do not bind the commission. PUCO does not have to accept the terms of a stipulation and must still determine whether the stipulation is just and reasonable

114. *In re* Annual Application of The East Ohio Gas Co. d/b/a Dominion Energy Ohio, Pub. Utils. Comm'n No. 21-619-GA-RDR, 2022 WL 594939, at *8 (Ohio P.U.C. Feb. 23, 2022).

115. *In re* Application of Ohio Power Co. for an Increase in Electric Distribution Rates, Pub. Utils. Comm'n No. 20-585-EL-AIR, 2021 WL 5496172, at *24 (Ohio P.U.C. Nov. 17, 2021).

116. *E.g.*, *In re* Annual Application of The East Ohio Gas Co., 2022 WL 594939, at *14; *In re* Application of The Dayton Power and Light Co., Pub. Utils. Comm'n No. 08-1094-EL-SSO, 2009 WL 1917793, at *7–10 (Ohio P.U.C. June 24, 2009).

117. *In re* Annual Application of The East Ohio Gas Co., 2022 WL 594939, at *14.

118. *E.g.*, *In re* Filing by Ohio Edison Co., The Cleveland Electric Illuminating Co. & The Toledo Edison Co., Pub. Utils. Comm'n No. 16-481-EL-UNC, 2019 WL 6894985, at *44 (Ohio P.U.C. July 17, 2019).

119. OHIO REV. CODE ANN. § 4928.02(A) (West Supp. 2023).

120. *In re* Application of Ohio Power Co., 155 Ohio St. 3d 326, 2018-Ohio-4698, 121 N.E.3d 320, at ¶ 49.

121. *Id.* (quoting *Ohio Consumers' Couns. v. Pub. Utils. Comm'n*, 125 Ohio St. 3d 57, 2010-Ohio-134, 926 N.E.2d 261, at ¶¶ 39–40).

based on the evidence in the record.¹²² This *should* mean that any issue not stipulated to by all parties in a case must be litigated.¹²³ But in practice, stipulations shift a utility's burden of proof. Rather than requiring a utility to prove why each provision of its application is just and reasonable, a utility only has to show that the stipulation it enters into is, as a whole, reasonable under the three-part test. The effect of this shift in burden of proof is that utilities, which already enjoy considerable insulation from public review,¹²⁴ do not need to make as much evidence available to support their stipulation-adjusted applications. Functionally, this removes the requirement for utilities to fully litigate issues that the stipulation does not change from the original application and that non-signatory parties are challenging.¹²⁵

This central problem with the shifting burden of proof is best evidenced by the lack of access to information for non-signatory parties after a stipulation is reached. The Ohio Revised Code and PUCO's own administrative rules do not dictate when in a proceeding parties may begin to engage in stipulation negotiations.¹²⁶ This means parties may begin settlement discussions at any time, including before the end of

122. OHIO ADMIN. CODE 4901-1-30(E) (2016); Off. of Consumers' Couns. v. Pub. Utils. Comm'n., 592 N.E.2d 1370, 1373 (Ohio 1992); *see also* Buchmann & Tongren, *supra* note 107, at 340 ("Since any settlement should be viewed as a whole or 'package,' the relevant record is that developed in support of the settlement.").

123. *See In re Application of Columbus S. Power Co.*, 129 Ohio St. 3d 46, 2011-Ohio-2383, 950 N.E.2d 164, at ¶ 19. ("When the commission reviews a contested stipulation, the requirement of evidentiary support remains operative."); RAP, *supra* note 9, at 45 ("Partial settlements are also possible, in which some issues are resolved through negotiations and a smaller subset of issues are addressed in the hearing process.").

124. *E.g.*, *supra* part I.C.2.

125. A Pennsylvania court cautioned that non-unanimous stipulations can also lead to problems with due process. Specifically, there is a danger that "[w]here the utility can obtain an agreement with some of the parties, a regulatory commission, perhaps eager to resolve a complex matter, might in effect "shift the burden of proof [from the utility] to the non-consenting parties" who are now required to demonstrate the unreasonableness of the proposed settlement." Bohdan R. Pankiw, *Comment on Due Process Cases Involving the Pennsylvania Public Utility Commission: Why Due Process Short Cuts Never Work*, 20 WIDENER L.J. 263, 288 (2010) (quoting *ARIPPA v. Pa. Pub. Util. Comm'n.*, 792 A.2d 636, 659 (Pa. Commw. Ct. 2002)).

126. *See* OHIO ADMIN. CODE 4901-1-30 (2016); *In re Application of Ohio Power Co. for an Increase in Electric Distribution Rates*, Pub. Utils. Comm'n No. 20-585-EL-AIR, 2021 WL 5496172, at *22 (Ohio P.U.C. Nov. 17, 2021) (explaining no denial of info during discovery, either before or after stipulation finalized, indicating stipulation began getting negotiated before end of discovery).

discovery.¹²⁷ Utilities have a clear incentive to do this and enter into stipulations as quickly as possible because as soon as a utility reaches a stipulation, it no longer has to provide full evidentiary support of its application. It only has to prove that its stipulation is reasonable based on the three-prong reasonableness test. For example, in a 2018 grid modernization and ESP case, a utility filed supplemental written direct testimony of an employee in support of a proposed stipulation and called him to testify at the stipulation hearing.¹²⁸ The witness's testimony served to demonstrate that the stipulation met the "serious bargaining" prong of the reasonableness test. The witness only stated that all parties to the proceeding were invited to negotiate at what amounted to a final round of negotiations to review a stipulation that the utility and PUCO staff reached on their own.¹²⁹ Nothing in his testimony suggested that the utility considered any input from intervening parties regarding certain provisions of the draft stipulation, but PUCO concluded that because all parties were invited to negotiate, "serious bargaining" occurred.¹³⁰ Ultimately the stipulation passed all three prongs of the reasonableness test.¹³¹

In nonunanimous settlements, this shifted burden of proof deepens existing power imbalances between negotiating parties.¹³² Utilities and intervening parties with the most resources and better access to information ultimately wield the most power during settlement negotiations.¹³³ The applications involved in PUCO proceedings are complicated, long, and very technical.¹³⁴ Utilities clearly have better access to and understanding of information related to the central issues in their own applications because the information (1) involves their own utility systems and (2) is technical and sometimes protected as "trade

127. Buchmann & Tongren, *supra* note 107, at 339–40.

128. *In re* Filing by Ohio Edison Co., The Cleveland Electric Illuminating Co. & The Toledo Edison Co. of a Grid Modernization Bus. Plan, Pub. Utils. Comm'n No. 16-481-EL-UNC, 2019 WL 6894985, at *15–16 (Ohio P.U.C. July 17, 2019).

129. *Id.*

130. *Id.* ¶ 59.

131. *Id.* ¶¶ 59, 122, 132–33.

132. *See* Krieger, *supra* note 67, at 308–09.

133. *Id.* at 308; *see also* Welton & Eisen, *supra* note 31, at 343 ("Clean energy proceedings contend with outsized influence of repeat player utilities, and the few community groups that invest the time to participate often find their input marginalized by the dominance of technical issues.").

134. *See, e.g.,* Application, *In re* Application of Duke Energy Ohio, Inc., Pub. Utils. Comm'n No. 17-1263-EL-SSO, et al. (Ohio P.U.C. Dec. 19, 2018), 2017 WL 2471335.

secret” information.¹³⁵ Intervening parties need access to all of this information to understand how each proposal in an application will impact the full electric distribution system, meaning utilities have especially more understanding of the underlying information in their applications than intervenors.¹³⁶ Additionally, utilities often have the resources to hire their own teams of permanent experts and to contract with additional consultants as needed.¹³⁷ So, if settlement negotiations begin before the end of discovery, intervenors without the resources of utilities and large companies are unable to fully advocate for themselves because they have not been able to get the same understanding of the technical information in an application as other parties have.

A few specific examples of additional issues related to discovery arise at the stipulation hearing stage. In a 2021 rate case,¹³⁸ the Ohio Power Company (AEP Ohio), an electric distribution utility, submitted an application to PUCO to raise its rates. Pursuant to the Ohio Revised Code,¹³⁹ AEP Ohio submitted written direct testimony of sixteen witnesses and experts in support of its application shortly after.¹⁴⁰ AEP Ohio later entered into a stipulation with several intervening parties that removed a voluntary energy efficiency program that the utility had included in its original application.¹⁴¹ Prior to the hearing on the proposed stipulation, AEP Ohio only offered written supplemental testimony from three witnesses in support of the stipulation, and those three witnesses were the only adverse witnesses made available for

135. Utilities may have to provide redacted versions of technical information that is protected through trade secret, but not until after PUCO has conducted an in camera review and ruled that the utility should disclose the information. *Ohio Consumers' Couns. v. Pub. Utils. Comm'n*, 121 Ohio St. 3d 362, 2009-Ohio-604, 904 N.E.2d 853, at ¶¶ 30–31. And, as explained above, no PUCO regulations prevent parties from entering a stipulation before this occurs.

136. Krieger, *supra* note 67, at 308; *see also* Welton & Eisen, *supra* note 31, at 348–49 (“Utilities dominate energy proceedings with their expertise and resources, allowing them to wield outsized influence in many cases. They have command of the complex technical and economic aspects of the proceedings, and the ability to develop the necessary supporting evidence.”).

137. Krieger, *supra* note 67, at 308.

138. *In re Application of Ohio Power Co.*, Pub. Utils. Comm’n No. 20-585-EL-AIR, et al., 2021 WL 5496172 (Ohio P.U.C. Nov. 17, 2021).

139. *Supra* Part I.C.1.

140. Docket, *In re Application of Ohio Power Co.*, Pub. Utils. Comm’n No. 20-0585-EL-AIR (Ohio P.U.C. April 9, 2020), <https://dis.puc.state.oh.us/CaseRecord.aspx?Caseno=20-0585&link=PDC> [<https://perma.cc/4FGF-J4CL>] (showing sixteen testimony filings on June 15, 2020).

141. *In re Application of Ohio Power Co.*, Pub. Utils. Comm’n No. 20-0585-EL-AIR, et al., at ¶ 17, 2021 WL 5496172 (Ohio P.U.C. Nov. 17, 2021).

non-signatory parties to cross-examine at the live stipulation hearing.¹⁴² So, instead of non-signatory parties having an opportunity to obtain evidence related to AEP's application as a whole, they only obtained evidence that those three witnesses could speak on. The Ohio Revised Code specifically permits intervenors to subpoena witnesses for hearings,¹⁴³ but this does not do enough to provide intervening parties with adequate access to information. The utility has the burden of proof to support the reasonableness of its application, and intervening parties do not have the same access to information as the utility. Therefore, intervenors may not know what exactly a utility's expert can speak on until the day of the hearing. This situation is not unique to the above case and is observable often in other proceedings, including ESP proceedings.¹⁴⁴

Another specific problem for non-signatory parties is that signatory parties have no affirmative duty to disclose side agreements to a stipulation, and communications related to those side agreements are not discoverable. In *Ohio Consumers' Counsel v. Public Utilities Commission*,¹⁴⁵ the Supreme Court of Ohio held that side agreements between a utility and parties to the stipulation were discoverable and relevant to determining whether serious bargaining took place.¹⁴⁶ Specifically, the court noted that "[t]he existence of side agreements between [the utility] and the signatory parties entered into around the time of the stipulation could be relevant to ensuring the integrity and openness of the negotiation process."¹⁴⁷ Whether side agreements show evidence of "concessions or inducements apart from the terms agreed to in the stipulation," or that "one or more parties . . . gained an unfair advantage in the bargaining process" is relevant to whether the stipulation meets the first prong of the stipulation reasonableness

142. Docket, *In re Application of Ohio Power Co.*, Pub. Utils. Comm'n No. 20-0585-EL-AIR (Ohio P.U.C. April 9, 2020), <https://dis.puc.state.oh.us/CaseRecord.aspx?Caseno=20-0585&link=PDC> [<https://perma.cc/4FGF-J4CL>] (showing three supplemental testimony filings on April 9, 2021, after parties reached a stipulation).

143. OHIO REV. CODE ANN. § 4903.082 (West 2010).

144. *E.g.*, Docket, *In re Application of Duke Energy Ohio, Inc.*, Pub. Utils. Comm'n No. 17-1263-EL-SSO (Ohio P.U.C. June 1, 2017), <https://dis.puc.state.oh.us/CaseRecord.aspx?Caseno=17-1263&link=PDC> [<https://perma.cc/JU9K-3973>]; Docket, *In re Application of Dayton Power & Light Co.*, Pub. Utils. Comm'n No. 16-0395 (Ohio P.U.C. Feb. 22, 2016), <https://dis.puc.state.oh.us/CaseRecord.aspx?Caseno=16-0395&link=PDC> [<https://perma.cc/MXQ8-Z5TK>].

145. *Ohio Consumers' Couns. v. Pub. Utils. Comm'n*, 111 Ohio St. 3d 300, 2006-Ohio-5789, 856 N.E.2d 213.

146. *Id.* ¶¶ 84-86.

147. *Id.* ¶ 85.

test.¹⁴⁸ But PUCO has interpreted side agreements' relevance as being limited "to information sought at the discovery stage."¹⁴⁹ Further, PUCO has noted that *Ohio Consumers' Counsel* created no requirement for parties to disclose discussions related to any side agreements.¹⁵⁰

As explained earlier in this Comment, to show evidence of serious bargaining, all parties must be invited to negotiate, meaning all parties would have the opportunity to be present during settlement negotiations. But because communications related to side agreements are not discoverable, non-signatory parties have no information on some of the signatory parties' positions on specific aspects of a stipulation. This makes the stipulation bargaining process even more unbalanced. Additionally, PUCs generally do not appreciate when parties engage in these types of agreements because they leave commissioners in the dark in addition to the non-signatory parties.¹⁵¹

Lastly, PUCO staff is not subject to discovery.¹⁵² Recommendations in PUCO staff reports carry significant weight because PUCO staff can sign onto a stipulation. Intervening parties have no way to access the underlying information staff relied on when reaching their staff report recommendations or staff's general communications. This solidifies existing power imbalances even further. For example, in a proceeding regarding a utility's grid modernization plan, PUCO held that all parties had enough time to adequately prepare for settlement negotiations held November 1, 2018, that ended in a nonunanimous stipulation signed November 9, 2018, because a utility had submitted its applications to PUCO well before these specific negotiations took place.¹⁵³ But PUCO did not address the fact that the utility and PUCO staff negotiated privately several times over the course of several

148. *Id.* ¶ 86. In 2004, the Supreme Court of Ohio determined that the existence of side agreements is not relevant to whether a stipulation satisfies the second prong of the test—whether it benefits ratepayers and the public interest as a whole. *Constellation NewEnergy, Inc. v. Pub. Utils. Comm'n*, 104 Ohio St. 3d 530, 2004-Ohio-6767, 820 N.E.2d 885, at ¶ 14. This is because the existence of a side agreement does not change the overall effect of a stipulation. *Id.*

149. *In re Application of Ohio Power Co., Pub. Utils. Comm'n No. 20-585-EL-AIR*, et al., at ¶ 103, 2021 WL 5496172, at *22 (Ohio P.U.C. Nov. 17, 2021).

150. *Id.*

151. *See RAP*, *supra* note 9, at 45 ("Another concern commissions sometimes have is a 'black box' settlement, in which the conclusion is clear, but the trade-offs different parties made are not. Commissions are sometimes presented with a settlement in which the parties explain that any changes will void the settlement. This situation may chafe commissioners who may object to some element, or who may see an opportunity to improve the deal.")

152. OHIO ADMIN. CODE 4901-1-16(I) (Supp. 2023).

153. *In re Application of Ohio Edison Co., Pub. Utils. Comm'n No. 16-481-EL-UNC*, at ¶¶ 53, 60, 2019 WL 6894985 (Ohio P.U.C. July 17, 2019).

months before November 2018.¹⁵⁴ All of these communications between PUCO staff and the utility are not discoverable under section 4901-1-16(I) of the Ohio Administrative Code.

III. POSSIBLE SOLUTIONS

PUCO's stipulation standard as it is currently applied in PUCO proceedings does not ensure a transparent, balanced process for all parties, but Ohio legislators and PUCO have several paths they could take to improve fairness in these proceedings. Either PUCO or the General Assembly could enact policies and laws to (1) ensure fair discovery processes and (2) require all issues not included in a nonunanimous settlement to be fully litigated as if there were no stipulation, which could include requiring that all stipulations are unanimous. Alternatively, although less feasible on a statewide scale, existing municipally owned utilities in Ohio could expand their services to provide electric power services more broadly to municipal residents.

A. Administrative and Legislative Options

First, regulators and legislators should make the stipulation litigation process fair and transparent. Improving transparency of PUCO proceedings would reduce the power imbalance between utilities, large industrial intervenors, and consumer and environmental advocacy groups. In 2021, state representatives presented House Bill 429 (HB 429) to the Ohio General Assembly.¹⁵⁵ Among other issues related to energy, HB 429 specifically targets transparency in stipulation proceedings. It would require that all parties wait to engage in settlement discussions until seven days after the close of discovery,¹⁵⁶ require parties to disclose to PUCO any side agreements made in relation to a stipulation,¹⁵⁷ and require that all intervenors have "full discovery rights" to obtain all documents related to a stipulation.¹⁵⁸ Delaying settlement negotiations specifically until discovery closes will ensure that parties without the same resources as utilities and larger companies have a real opportunity to parse through these technical applications and understand the total effect an application will have on the grid. This understanding will, in turn, help ensure that all parties

154. *Id.* ¶¶ 59–61.

155. The bill was brought to the Public Utilities Committee of the General Assembly and they performed one hearing. It was never brought for a vote and has not been reintroduced since the beginning of the 135th General Assembly in January 2023. *House Bill 429 Status*, OHIO LEGISLATURE, <https://www.legislature.ohio.gov/legislation/134/hb429/status> [<https://perma.cc/GM5U-XRQN>].

156. H.B. 429, 134th Gen. Assemb., Reg. Sess., at 116 (Ohio 2021).

157. *Id.*

158. *Id.* at 117.

can engage in meaningful settlement negotiations and may reduce inherent unfairness in the stipulation process. PUCO could, on its own, adopt some or all of these discovery transparency requirements into the Ohio Administrative Code, or the General Assembly could re-introduce HB 429 and adopt these amendments.

PUCO should also amend Ohio Administrative Code section 4901-1-16(I) to make PUCO staff subject to discovery. PUCO staff reports carry significant weight in any proceeding before PUCO,¹⁵⁹ so ensuring that intervening parties have access to the information PUCO staff used to reach their conclusions would further reduce the power imbalance between parties. PUCO may argue that this will pose too much of a burden on the commission. But if PUCO staff must issue their own recommendation in rate cases and ESP proceedings and may join stipulations as a party, then non-signatory parties should be able to issue discovery requests to staff.

Second, either the General Assembly or PUCO should require that utilities still adjudicate all issues with an application that the stipulation leaves unresolved to prove that the application is just and reasonable. This would require utilities to meaningfully address intervenors' challenges to a utility's application. HB 429 also proposes this suggestion, explaining that PUCO should "[a]pply the same standards it applies in cases with no settlement" when parties reach a nonunanimous agreement.¹⁶⁰ Importantly here, this is an action PUCO could take on its own, either through amending the Ohio Administrative Code or by simply applying the stipulation standard fairly in future proceedings. Several environmental advocacy groups have urged PUCO to adopt a standard like this, highlighting that other jurisdictions, like Illinois, follow this model.¹⁶¹ This suggestion would

159. Part II.A.

160. H.B. 429, 134th Gen. Assemb., Reg. Sess., at 118 (Ohio 2021). HB 429 would also explicitly allow that any "issue[] not covered by the agreement or stipulation may be adjudicated until agreement is reached regarding those issues." *Id.* at 117.

161. Initial Brief of the Env't L. & Pol'y Ctr, NRDC & Ohio Env't. Council at 16-17, *In re* Application of Ohio Edison Co., Pub. Utils. Comm'n No. 16-481-EL-UNC (Ohio P.U.C. March 1, 2019), 2019 WL 1074243 ("Based on a search of the relevant precedent, the Commission has never found that a Stipulation does not meet the serious bargaining standard. This speaks to the problem for parties facing the choice between signing onto a settlement without a chance for meaningful input or taking their chances in litigation, a dilemma illustrated by this case. Given that the stipulation review standard comes from its own precedent, the Commission can use this case to reject the standard and establish that it will not apply a different standard of review to a stipulation unless it is unanimous. Non-unanimous stipulations may still be filed but they will be subject to the original statutory standard established for their respective subject-matter. This is how it is done in other jurisdictions.").

functionally require that the three-prong stipulation reasonableness test only apply to unanimous stipulations.

Nearly every argument in favor of the continued use of non-unanimous stipulations centers on the belief that the procedures used in a stipulated proceeding are fair to all parties.¹⁶² Proponents often emphasize that because non-signatory parties have the opportunity to present their own evidence against the stipulation, the process is fair.¹⁶³ But as this Comment explains, the stipulation process in practice is not always applied in a fair and transparent manner and tends to solidify power imbalances between parties. Intervening parties with less power rely on procedural protections within the litigation process to counter this power imbalance, but if less powerful parties do not need to be included in the final stipulation, these parties cannot effectively “level [the] playing field.”¹⁶⁴

In addition, the ability to cross-examine witnesses as to all elements of the utility’s application is a crucial step in the evidence-gathering process that, due to how the stipulation standard is applied in practice, intervening parties can be locked out of. Although it is true that intervening parties are able to present evidence and cross-examine the witnesses that a utility calls to testify in support of a stipulation, intervenors cannot cross-examine witnesses that a utility used to support its initial application but did not call to testify at the stipulation hearing. Intervenors could subpoena all witnesses who supplied written direct testimony in favor of the utility’s initial application, but (1) the utility should have the burden of proving its case and (2) the utility is in the better position to know what each of its own witnesses are qualified to testify on, not intervening parties.

Proponents of the current stipulation standard would likely also argue that entering into settlement negotiations, especially early on in a proceeding, ensures the timely resolution of a case.¹⁶⁵ Rate cases and other proceedings before PUCO can last years, even when parties reach

162. *E.g.*, Joseph Doucet & Stephen Littlechild, *Negotiated Settlements: The Development of Legal and Economic Thinking*, 14 UTILS. POL’Y 266, 266 (2006) (“Subject to an adequate process, settlements allow market participants to make their own decisions instead of imposing the judgements, preferences and decisions of the regulatory agency.”); Buchmann & Tongren, *supra* note 107, at 338, 340 (explaining that “[i]f . . . standards are followed, and in the experience of the authors they are followed, the theoretical problems . . . in nonunanimous settlements simply do not arise in practice” and that the stipulation process is fair and not merely a “summary”).

163. Buchmann & Tongren, *supra* note 107, at 338.

164. Krieger, *supra* note 67, at 308–09.

165. Doucet & Littlechild, *supra* note 162, at 267.

a nonunanimous stipulation.¹⁶⁶ This means that by the time a rate case has concluded, the data and needs that a utility based its application on may have changed. Although timeliness of proceedings is of significant interest for utilities and PUCO, it should not outweigh fairness to all parties.

Finally, proponents of nonunanimous settlements focus on how the negotiations process often achieves favorable outcomes that litigation and PUCO cannot achieve alone.¹⁶⁷ But parties can still reach these creative solutions with unanimous stipulations because parties would still engage in negotiations and will not always be unable to reach a unanimous consensus.

B. Expanding Municipally Owned Retail Power Distribution

Another possible solution to the stipulation standard problem is to bypass PUCO review altogether. Municipalities may “acquire, construct, own, lease, and operate” their own electric utilities within municipal boundaries.¹⁶⁸ Any municipally owned or operated electric utility is excluded from the definition of “public utility,” meaning PUCO does not regulate them.¹⁶⁹ Instead, the Ohio Constitution authorizes municipal utilities to operate within the boundaries of a municipality.¹⁷⁰ Many municipally owned electric utilities operate in Ohio already,¹⁷¹ so cities with these municipal utilities could push for more residents to switch to the municipal power service.

Traditionally, municipal utilities have more public oversight than IOUs. Unlike traditional utilities, municipal utilities are directly accountable and responsive to ratepayers and have no duties to shareholders. Municipal utilities are subject to local and state public records laws and must make their financial information public.¹⁷²

166. *E.g.*, Docket, *The Dayton Power & Light Co.*, Pub. Utils. Comm’n No. 16-0395-EL-SSO (Ohio P.U.C. Feb. 22, 2016) (showing that a utility submitted its ESP application in February of 2016 and PUCO did not reach an initial order on the matter until October of 2017).

167. Doucet & Littlechild, *supra* note 162, at 267.

168. OHIO CONST. art XVIII, § 4.

169. OHIO REV. CODE ANN. § 4905.02(A)(3) (West Supp. 2022).

170. OHIO CONST. art XVIII, § 4.

171. *E.g.*, CITY OF COLUMBUS, <https://www.columbus.gov/utilities/about/The-Division-of-Power/> [<https://perma.cc/V2N2-86ZQ>] (Columbus Division of Power); CLEVELAND PUB. POWER, <https://www.cpp.org/> [<https://perma.cc/3G3K-7V6L>] (Cleveland Public Power); HUDSON PUBLIC POWER, <https://www.hudson.oh.us/121/Hudson-Public-Power> [<https://perma.cc/EU69-A7P5>] (Hudson Public Power).

172. REGUL. ASSISTANCE PROJECT, PACE L., CLIMATE CABINET EDUC. & PLEIADES STRATEGIES, *ELECTRIC MUNICIPAL UTILITIES AND THE TRANSITION TO A CLEAN ENERGY FUTURE: A GUIDE FOR MUNICIPAL*

Additionally, municipal utilities are less susceptible to regulatory capture than IOUs and have more incentives to make clean energy decisions that benefit ratepayers but would not necessarily maximize shareholder profits.¹⁷³ Ultimately, municipal utilities can aid in the just transition from fossil fuels to clean energy because they are publicly owned and are not bound to serve shareholders at the expense of ratepayers.¹⁷⁴

CONCLUSION

Ohio is not unique with its lack of transparency in PUCO proceedings,¹⁷⁵ but it should still improve the process to curb power imbalances between parties. IOUs have significant power over ratepayers, whether industrial or residential, and the processes through which PUCO regulates IOUs need to ensure transparency. The stipulation standard as PUCO has applied it in the past decade has served to reduce transparency and entrench already existing power imbalances between consumer and environmental advocacy groups and the utilities themselves. Securing intervenors' discovery rights in PUCO proceedings, delaying settlement negotiations until after the end of discovery, and requiring utilities meet their true burden of proof for each application they submit to PUCO will all serve to create a fairer process.

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UTILITY LEADERS 15 (2022) (“Subject to sunshine laws and public records requests, [municipal] utilities are encouraged to proactively make transparency a part of their operating culture.”); *see also* AM. PUB. POWER ASS'N, PUBLIC POWER FOR YOUR COMMUNITY 17 (2016), https://www.publicpower.org/system/files/documents/municipalization_public_power_for_your_community.pdf [<https://perma.cc/Z4CS-UQXU>].

173. *See* Niko Lusiani, *Power Struggle: How Shareholder Primacy in the Electrical Utility Sector Is Holding Back an Affordable and Just Energy Transition*, ALL ECON. POL'Y IS CLIMATE POL'Y, May 2022, at 7.

174. *See generally id.*; REGUL. ASSISTANCE PROJECT, *supra* note 172.

175. *E.g.*, Pankiw, *supra* note 125, at 287–89 (explaining how Pennsylvania utility proceedings have brought up many due process concerns in the past several decades).

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