

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matters of the Applications of Duke Energy Ohio, Inc., for Adjustments to Rider MGP Rates.	)	Case No. 14-375-GA-RDR
	)	Case No. 15-452-GA-RDR
	)	Case No. 16-542-GA-RDR
	)	Case No. 17-596-GA-RDR
	)	Case No. 18-283-GA-RDR
	)	Case No. 19-174-GA-RDR
	)	Case No. 20-53-GA-RDR

In the Matters of the Applications of Duke Energy Ohio, Inc. for Tariff Approval.	)	Case No. 14-376-GA-ATA
	)	Case No. 15-453-GA-ATA
	)	Case No. 16-543-GA-ATA
	)	Case No. 17-597-GA-ATA
	)	Case No. 18-284-GA-ATA
	)	Case No. 19-175-GA-ATA
	)	Case No. 19-1086-GA-UNC
	)	Case No. 20-54-GA-ATA

In the Matter of the Application of Duke Energy Ohio, Inc., for Implementation of the Tax Cuts and Jobs Act of 2017.	)	
	)	Case No. 18-1830-GA-UNC
	)	

In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of Tariff Amendments.	)	
	)	Case No. 18-1831-GA-ATA
	)	

In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Defer Environmental Investigation and Remediation Costs.	)	
	)	Case No. 19-1085-GA-AAM
	)	

**INITIAL BRIEF  
BY  
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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The Public Utilities Commission of Ohio (“PUCO”) should approve, without modification, the August 31, 2021 Stipulation and Recommendation (“Settlement”). The Settlement easily passes the PUCO’s three-part test for evaluating settlements. It was the product of serious bargaining among capable and knowledgeable parties, including representing a

diversity of interests among signatory parties (the Ohio Consumers' Counsel ("OCC"), Duke, the PUCO Staff, and Ohio Energy Group ("OEG")) and non-opposing parties (Ohio Manufacturers' Association Energy Group ("OMAEG"), The Kroger Company, and Ohio Partners for Affordable Energy ("OPAE")). The only parties who oppose the Settlement are marketer Interstate Gas Supply, Inc. ("IGS") and a marketer trade association, the Retail Energy Supply Association ("RESA," and together with IGS, the "Marketers").

As a package, the Settlement benefits consumers and the public interests by (i) resolving years of disputes regarding Duke's manufactured gas plant ("MGP") cleanup, (ii) addressing Duke's obligations to consumers under the Tax Cuts and Jobs Act of 2017 ("TCJA"), and (iii) providing for market-related benefits to consumers like aggregate shadow billing, moving toward transitioning from Duke's gas cost recovery ("GCR") to a competitive auction-based standard service offer ("SSO"), and providing important price-to-compare language on shopping customers' bills. And the Settlement is consistent with important regulatory principles and practices.

OCC respectfully requests that the PUCO approve the Settlement in its entirety and as soon as possible so that the many benefits of the Settlement can accrue to consumers as soon as possible during this winter heating season.

## I. STANDARD OF REVIEW

In PUCO proceedings, the applicant bears the burden of proof.<sup>1</sup> In the context of a settlement, the signatory parties “bear the burden to support the stipulation” and must “demonstrate that the stipulation is reasonable and satisfies the Commission's three-part test.”<sup>2</sup> A settlement is a recommendation to the PUCO on behalf of the settling parties.<sup>3</sup> It is not binding on the PUCO,<sup>4</sup> and ultimately, the PUCO must “determine what is just and reasonable from the evidence presented at the hearing.”<sup>5</sup>

In evaluating settlements, the ultimate issue for the PUCO's consideration is whether the agreement “is reasonable and should be adopted.”<sup>6</sup> In answering this question, the PUCO has adopted the following three-prong test:<sup>7</sup>

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

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<sup>1</sup> *In re Application of the Ottoville Mut. Tel. Co.*, Case No. 73-356-Y, 1973 Ohio PUC LEXIS 3, at \*4 (“the applicant must shoulder the burden of proof in every application proceeding before the Commission”); *In re Application of the Ohio Bell Tel. Co.*, No. 84-1435-TP-AIR, 1985 Ohio PUC LEXIS 7, at \*79 (Dec. 10, 1985) (“The applicant has the burden of establishing the reasonableness of its proposals.”).

<sup>2</sup> *In re Application Seeking Approval of Ohio Power Co.'s Proposal to Enter into an Affiliate Power Purchase Agmt. for Inclusion in the Power Purchase Agmt. Rider*, Case No. 14-1693-EL-SSO, Opinion & Order at 18 (Mar. 31, 2016).

<sup>3</sup> *Duff v. PUCO*, 56 Ohio St.2d 367, 379 (1978).

<sup>4</sup> *Id.* See also Ohio Adm. Code 4901-1-30(E).

<sup>5</sup> *Duff*, 56 Ohio St.2d at 379.

<sup>6</sup> *In re Application of Vectren Energy Delivery of Ohio, Inc. for Authority to Amend its Tariffs*, Case No. 04-571-GA-AIR, Opinion & Order at 9, (Apr. 13, 2015).

<sup>7</sup> *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126 (1992).

In considering the first prong, the PUCO can evaluate the diversity of the signatory parties, though no threshold level of diversity is mandatory for approval.<sup>8</sup>

## II. RECOMMENDATIONS

### A. **The Settlement was the product of serious bargaining among capable and knowledgeable parties.**

The signatory parties to the Settlement are OCC, Duke, the PUCO Staff, and OEG.<sup>9</sup> The non-opposing parties are OMA, Kroger, and OPAE.<sup>10</sup> There is no dispute that these parties are capable and knowledgeable.<sup>11</sup>

The evidence also demonstrates that serious bargaining occurred. As Duke witness Lawler testified, “[m]ultiple meetings occurred over many months,” with negotiations taking place in a variety of ways, including via telephone, video conference, and email.<sup>12</sup> All parties to the proceedings at the time of the settlement negotiations “were provided with an opportunity to express their concerns that resulted in the resolution of issues contained in the” Settlement.<sup>13</sup>

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<sup>8</sup> See *In re Application of the Dayton Power & Light Co.*, Case No. 16- 395-EL-SSO, Opinion & Order ¶ 21 (Oct. 20, 2017) (“Although diversity of interests among signatory parties is not necessary for any stipulation to meet the first prong, it is *helpful* if the signatory parties do represent a variety of interests.”) (emphasis in original); *In re Application of [FirstEnergy]*, Case No. 16-743-EL-POR, Opinion & Order ¶ 61 (Nov. 21, 2017) (“While the diversity of the signatory parties may be a consideration in determining whether a settlement is a product of serious bargaining among capable, knowledgeable parties under the first prong of the Commission’s test, there is no diversity requirement that the residential customers’ statutory representative be a signatory party for agreements which may result in increased costs for the residential class.”); *In re Application of Ohio Power Co.*, Case No. 13-1939-EL-RDR, Opinion & Order ¶ 50 (Feb. 1, 2017) (“In determining whether a settlement is the product of serious bargaining among capable, knowledgeable parties, we consider the extent of negotiations and the diversity of the negotiating parties, but there is no requirement that any particular party be a signatory to satisfy this first prong.”).

<sup>9</sup> Joint Ex. 1 at 24-25.

<sup>10</sup> Joint Ex. 1 at 25.

<sup>11</sup> See Duke Ex. 7 (Spiller Testimony) at 21:19-20 (“The capability and knowledge of the Signatory Parties and their counsel is readily apparent.”), at 22:1-4 (“All of these parties regularly participate in rate proceedings before the Commission, are very knowledgeable in regulatory matters, and are represented in these proceedings by experienced, competent counsel.”).

<sup>12</sup> Duke Ex. 6 (Lawler Testimony) at 16:3-8.

<sup>13</sup> Duke Ex. 6 (Lawler Testimony) at 16:10-11.

Further, the Settlement signatories and non-opposing parties represent a diversity of interests, including all residential consumers (OCC), the utility (Duke), large nonresidential customers (OEG), the PUCO Staff, Ohio manufacturers and other businesses (OMAEG and Kroger), and low-income customers and weatherization providers (OPAE).<sup>14</sup>

The only parties opposing the Settlement are the Marketers. But the Marketers were not parties to these cases at the time of settlement negotiations nor when the Settlement was filed. Instead, they were granted very limited intervention after the Settlement was filed, allowing them only to be heard regarding three market-related provisions in the Settlement (the provision of aggregate shadow billing data to OCC, a bill formatting change requiring Duke to provide price-to-compare information to shopping customers, and a requirement that Duke begin the process of transitioning from a GCR to an SSO).<sup>15</sup> Because of their decision not to intervene earlier and the PUCO's ruling that their intervention was limited, their absence as a signatory from the Settlement has no bearing on the first prong of the PUCO's three-part test. The Settlement remains a product of serious bargaining among capable and knowledgeable parties.

**B. The Settlement benefits customers and the public interest.**

The Settlement provides numerous benefits to customers and the public interest. These benefits fall into three primary categories: (i) resolving disputes regarding Duke's MGP cleanup and whether consumers should pay for it (the "MGP Benefits"), (ii) passing to consumers the long-overdue benefits of lower tax rates under the TCJA (the "Tax Benefits"), and (iii) aggregate shadow billing, transitioning from a GCR to an SSO, and providing price-to-compare language

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<sup>14</sup> Joint Ex. 1 at 24-25 (showing signatory parties).

<sup>15</sup> See Entry ¶ 32 (Oct. 15, 2021).



on shopping customers' bills (collectively, the "Market Benefits"). Notable, it would not be possible to provide all these benefits to consumers in the absence of the Settlement.<sup>16</sup>

**1. The Settlement's MGP and Tax Benefits to consumers are substantial.**

The Settlement provides substantial value to consumers through its MGP and Tax Benefits.

First, Duke's charges to consumers for MGP remediation costs are reduced by nearly \$11.4 million.<sup>17</sup>

Second, Duke's natural gas customers are currently owed about \$28.1 million in tax refunds for Duke's unprotected excess accumulated deferred income taxes (unprotected "EDIT").<sup>18</sup> Duke had proposed crediting that money to customers over a six-year period, but under the Settlement, customers will get an immediate credit of the full \$28.1 million.<sup>19</sup> This amount will be used to offset charges that customers would otherwise pay for Duke's MGP cleanup.<sup>20</sup>

Third, Duke currently has in its possession more than \$50 million in insurance proceeds that it recovered from various insurers for claims related to MGP cleanup. The Settlement requires Duke to use \$45.8 million of those insurance proceeds to further offset charges that customers would otherwise pay for Duke's MGP cleanup.<sup>21</sup>

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<sup>16</sup> See Joint Ex. 1 at 8 ("benefits, such as resolution of the MGP disputes without increases in charges, the transition to an SSO auction for natural gas service, immediate bill credits, and other customer protections would not be possible").

<sup>17</sup> Joint Ex. 1 at 8.

<sup>18</sup> Joint Ex. 1 at 9.

<sup>19</sup> Joint Ex. 1 at 9; Duke Ex. 6 (Lawler Testimony) at 17 ("The Stipulation enables customers to receive benefits of the natural gas TCJA on an accelerated basis, even faster than some other Ohio-utilities have agreed.").

<sup>20</sup> Joint Ex. 1 at 9.

<sup>21</sup> Joint Ex. 1 at 9.

TABLE 1:	
Duke Energy Ohio's MGP Remediation Costs	\$85,217,593
MGP Costs to be Disallowed from Charges to Customers	(\$11,357,579)
Duke Energy Ohio's Net MGP Remediation Costs	\$73,860,014
Use of TCJA Unprotected EDITs (3/31/12 valuation)	(\$28,106,996)
Duke Energy Ohio's Remaining Net MGP Remediation Costs	\$45,753,018
Use of the Majority of net Insurance Proceeds to offset MGP Charges to Customers	(\$45,753,018)
Remaining MGP Obligation	\$ 0

Further, customers will not be charged for costs Duke incurs to investigate potential contamination of the Ohio River, and customers will not be charged for cleanup costs related to certain areas that could not be remediated due to safety and integrity of ongoing operations.<sup>22</sup>

Fourth, after waiting too long (nearly four years) for a PUCO decision, customers will finally begin receiving credits for Duke's protected EDITs from the passage of the TCJA.<sup>23</sup> This will provide more than \$147 million in credits to customers.<sup>24</sup>

Fifth, Duke currently owes customers more than \$54 million in credits (and counting) related to the change in income tax rates under the TCJA.<sup>25</sup> These credits are separate and apart from the EDIT-related credits. Under the Settlement, Duke will provide residential consumers with their share of these funds as a one-time credit shortly after the Settlement is approved.<sup>26</sup> It is expected that **each residential consumer will receive a credit of at least \$107.**<sup>27</sup> Duke had

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<sup>22</sup> Joint Ex. 1 at 10.

<sup>23</sup> Joint Ex. 1 at 10-11.

<sup>24</sup> Joint Ex. 1 at 10 (\$147,422,807 in protected EDITs on a grossed up basis).

<sup>25</sup> Joint Ex. 1 at 5-6.

<sup>26</sup> Joint Ex. 1 at 11; Duke Ex. 7 (Spiller Testimony) at 23 ("Immediate bill credits for customers").

<sup>27</sup> Joint Ex. 1 at 11, footnote 15; Duke Ex. 6 (Lawler Testimony) at 17 ("immediate and significant bill credits").

previously proposed credits to consumers over a one-year period, so the immediate credit gets money into consumers' hands faster.<sup>28</sup>

Sixth, because Duke's natural gas base rates were approved before the TCJA was passed, those rates include charges to consumers based on the former 35% corporate income tax rate instead of the current 21% rate.<sup>29</sup> Under the Settlement, Duke's base distribution revenue requirement will be reduced by approximately \$12.9 million per year, which is a 5.35% reduction in charges to consumers for natural gas service.<sup>30</sup>

Seventh, Duke had previously sought to continue deferring costs for MGP cleanup beyond 2019, but under the Settlement, Duke is withdrawing that request.<sup>31</sup> This means that consumers will not pay for any such costs that Duke previously sought to defer.

Eighth, upon approval of the Settlement, Duke's MGP rider will be terminated.<sup>32</sup> Thus, if Duke ever wants to charge customers in the future for MGP costs, it will need to file a new application. In such future application, Duke will only be permitted to charge consumers (if at all) for Ohio River remediation after an Ohio EPA or U.S. EPA order, consent decree, or settlement has imposed legal obligations to incur costs to remediate in or under the Ohio River, or after a written statement issued by the Ohio EPA or U.S. EPA that remediation in or under the Ohio River is necessary to meet applicable environmental standards.<sup>33</sup> Further, Duke must file any application for deferral authority for cleanup of the Ohio River within five years of approval

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<sup>28</sup> Joint Ex. 1 at 11; Duke Ex. 6 (Lawler Testimony) at 17 ("The Stipulation enables customers to receive benefits of the natural gas TCJA on an accelerated basis, even faster than some other Ohio-utilities have agreed.").

<sup>29</sup> Joint Ex. 1 at 12.

<sup>30</sup> Joint Ex. 1 at 12; Duke Ex. 7 (Spiller Testimony) at 23 ("An approximate 5.4 percent reduction in natural gas base rates"); Duke Ex. 6 (Lawler Testimony) at 17 ("an overall natural gas base rate reduction").

<sup>31</sup> Joint Ex. 1 at 13.

<sup>32</sup> Joint Ex. 1 at 13; Duke Ex. 7 (Spiller Testimony) at 23 ("Termination of Rider MGP").

<sup>33</sup> Joint Ex. 1 at 13.

of the Settlement.<sup>34</sup> These limitations benefit consumers because they reduce the risk of future charges to consumers for Duke's MGP cleanup.<sup>35</sup>

Finally, after the full offset of charges to consumers for MGP cleanup, there remain about \$4.8 million in insurance proceeds in Duke's possession.<sup>36</sup> This insurance money will be used to benefit consumers who have been impacted by the coronavirus pandemic.<sup>37</sup> First, about \$3.8 million will be used for bill payment assistance for qualifying low-income residential consumers and seniors.<sup>38</sup> Second, \$1 million will be allocated to nonresidential customers as bill credits.<sup>39</sup>

## **2. The Settlement's Market Benefits to consumers are substantial.**

The Settlement provides substantial value to consumers through its Market Benefits.

Duke has agreed to file an application to transition from its current gas cost recovery (GCR) process to a standard service offer (SSO).<sup>40</sup> This benefits consumers because the SSO will be a market solution in the form of a natural gas auction.<sup>41</sup> Following approval of this application, Duke will hold its first SSO auction as soon as January 2022, with a goal of beginning to provide SSO service to consumers by November 2022 (*i.e.*, near the beginning of the 2022-23 winter heating season).<sup>42</sup> Duke witness Spiller described the Settlement in this

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<sup>34</sup> Joint Ex. 1 at 13.

<sup>35</sup> Duke Ex. 7 (Spiller Testimony) at 23 ("Certainty regarding the treatment of MGP remediation and investigation costs," "Clarity around the Company's opportunity to seek Commission authority to continue deferring MGP remediation costs if it has to perform remediation work in the Ohio River").

<sup>36</sup> Joint Ex. 1 at 14.

<sup>37</sup> Duke Ex. 7 (Spiller Testimony) at 24 ("Funding for qualifying low-income and seniors who have been impacted by COVID").

<sup>38</sup> Joint Ex. 1 at 14-16 (\$3.3 million, plus an additional \$500,000 allocated to seniors).

<sup>39</sup> Joint Ex. 1 at 16.

<sup>40</sup> Joint Ex. 1 at 16.

<sup>41</sup> Joint Ex. 1 at 16 ("transition to a natural gas auction in the form of an SSO").

<sup>42</sup> Joint Ex. 1 at 17.

regard as “[e]nhancing the competitive market through transition to a competitive natural gas procurement process for non-shopping customers.”<sup>43</sup>

The Settlement also requires Duke to provide added information and transparency for shopping customers regarding what they are paying to their marketer for natural gas relative to Duke’s rates for natural gas (currently a GCR and, if approved, an SSO in the future). It does this in two ways. First, Duke will be required to add the following new language to its shopping customers’ bills: “In order for you to save money, a natural gas supplier must offer you a price lower than \$X.XX per CCF for the same usage that appears on this bill.”<sup>44</sup> Second, the Settlement requires Duke to provide aggregate “shadow billing” data to OCC, including both 24 months of historical data and data in the future at OCC’s request.<sup>45</sup> The shadow billing will be provided in a transparent manner, in the public domain.<sup>46</sup>

Duke witness Spiller testified that these market-related provisions will “enhance[e] the competitive natural gas market and provid[e] more information to customers regarding their natural gas service and related choices.”<sup>47</sup> Duke witness Lawler likewise testified that the Settlement will “enhance [the] competitive natural gas market in Ohio.”<sup>48</sup>

### **C. The Settlement does not violate important regulatory principles and practices.**

The Settlement is consistent with regulatory principles and practices. As Duke witness Spiller testified, the Settlement resolves various cases “in a way that will not result in any rate

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<sup>43</sup> Duke Ex. 7 (Spiller Testimony) at 24.

<sup>44</sup> Joint Ex. 1 at 18-19.

<sup>45</sup> Joint Ex. 1 at 19.

<sup>46</sup> Joint Ex. 1 at 19 (“The aggregated shadow billing information is not to be considered confidential.”).

<sup>47</sup> Duke Ex. 7 (Spiller Testimony) at 23.

<sup>48</sup> Duke Ex. 6 (Lawler Testimony) at 16.

increase for customers,” “reserves funds for bill relief for qualifying customers,” “provides certainty to all stakeholders by resolving complex regulatory proceedings,” and “advances important regulatory policies including enhancing the competitive natural gas market and providing more information to customers regarding their natural gas service and related choices.”<sup>49</sup> Ms. Spiller, who is President of Duke Energy Ohio, concluded, “Based upon my experience, involvement in these proceedings, and review of the Stipulation, I believe that it complies with all relevant and important principles and practices.”<sup>50</sup>

Duke witness Lawler likewise testified that the Settlement “does not result in any anti-competitive subsidies,” is “consistent with principles of gradualism,” “will not produce rate shock,” and “will enhance [the] competitive natural gas market in Ohio.”<sup>51</sup> Ms. Lawler thus concluded, “Based on my experience with regulatory matters, my involvement in these proceedings, and my examination of the Stipulation, I have concluded that the Stipulation does not violate any regulatory ratemaking principles, and in fact, furthers important regulatory principles.”<sup>52</sup>

### **III. CONCLUSION**

The Settlement passes the PUCO’s three-part test for evaluating the reasonableness of settlements. It was the product of serious bargaining among diverse parties—so much so that at the time of its filing, it was a unanimous settlement with all parties signing or not opposing (though Marketers later intervened and opposed). The benefits to consumers under the

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<sup>49</sup> Duke Ex. 7 (Spiller Testimony) at 23.

<sup>50</sup> Duke Ex. 7 (Spiller Testimony) at 23.

<sup>51</sup> Duke Ex. 6 (Lawler Testimony) at 16.

<sup>52</sup> Duke Ex. 6 (Lawler Testimony) at 17.

Settlement package are considerable. And the Settlement is consistent with regulatory principles and practices.

The PUCO should promptly approve the Settlement in its entirety and without modification so that consumers can quickly begin to receive the Settlement's many benefits.

Respectfully submitted,

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It is hereby certified that a true copy of the foregoing Initial Brief was served by electronic transmission upon the parties below this 9th day of December 2021.

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The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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19-0175-GA-ATA, 19-1086-GA-UNC, 20-0054-GA-ATA, 18-1830-GA-UNC, 18-  
1831-GA-ATA, 19-1085-GA-AAM**

**Summary: Brief Initial Brief by Office of The Ohio Consumers' Counsel  
electronically filed by Mrs. Tracy J. Greene on behalf of Healey, Christopher**