

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

)	Case No. 14-375-GA-RDR
)	Case No. 15-452-GA-RDR
In the Matters of the Applications of Duke)	Case No. 16-542-GA-RDR
Energy Ohio, Inc., for Adjustments to Rider)	Case No. 17-596-GA-RDR
MGP Rates.)	Case No. 18-283-GA-RDR
)	Case No. 19-174-GA-RDR
)	Case No. 20-53-GA-RDR
)	Case No. 14-376-GA-ATA
)	Case No. 15-453-GA-ATA
)	Case No. 16-543-GA-ATA
In the Matters of the Applications of Duke)	Case No. 17-597-GA-ATA
Energy Ohio, Inc. for Tariff Approval.)	Case No. 18-284-GA-ATA
)	Case No. 19-175-GA-ATA
)	Case No. 19-1086-GA-ATA
)	Case No. 20-54-GA-ATA
In the Matter of the Application of Duke)	
Energy Ohio, Inc., for Implementation of the)	Case No. 18-1830-GA-UNC
Tax Cuts and Jobs Act of 2017.)	
In the Matter of the Application of Duke)	
Energy Ohio, Inc., for Approval of Tariff)	Case No. 18-1831-GA-UNC
Amendments.)	
In the Matter of the Application of Duke)	
Energy Ohio, Inc., for Authority to Defer)	Case No. 19-1085-GA-AAM
Environmental Investigation and Remediation)	
Costs.)	

**REPLY BRIEF
BY
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I. INTRODUCTION

RESA and IGS do not like the Settlement.¹ They are disappointed that it includes three market-related provisions. They are disappointed that they were not part of settlement negotiations (which is interesting given they did not intervene in these cases until after the Settlement was filed). But their disappointment does not make the Settlement fail the PUCO's three-part settlement test. No matter how much they complain, the truth is as follows:

All parties who intervened in these cases at the time of the negotiations are either a signatory party or a non-opposing party.

There is no law, rule, policy, procedure, or convention that would require (or even allow) parties to a case to invite non-parties to confidential settlement negotiations.

The Settlement contains numerous benefits to consumers, including substantial financial benefits related to Duke's manufactured gas plant cleanup and tax benefits stemming from the Tax Cuts and Jobs Act of 2017.²

The Settlement's market-related provisions are one piece of a larger settlement. The provisions will benefit the development of a competitive market for Duke's natural gas customers, not hinder it.

The only thing that the Marketers have shown through 67 pages of testimony and 62 pages of briefing is that they dislike the Settlement. They have not refuted the signatory parties' evidence showing that the Settlement was the product of serious bargaining. They have not refuted the signatory parties' evidence showing that the Settlement will provide substantial benefits to customers and the public interest. And they have not refuted the signatory parties'

¹ Joint Ex. 1 (Settlement).

² *See generally* Initial Brief by Office of the Ohio Consumers' Counsel (Dec. 9, 2021).

evidence that the Settlement is consistent with important regulatory principles and practices. The Settlement should be approved without modification. If anything, the PUCO should be adopting more consumer protections from energy marketing, not less. Consumers would benefit from less complaining and more competing by the energy marketers.

II. REPLY

A. The Settlement was the product of serious bargaining among capable and knowledge parties because all parties to these cases at the time of settlement negotiations were invited to and participated in negotiations, and all signatory and non-opposing parties are capable and knowledgeable.

The Marketers argue that the Settlement was not the product of serious bargaining because they were not invited to settlement negotiations.³ And they argue that the signatory parties were not capable and knowledgeable.⁴ Neither argument has merit.

1. There was no reason for marketers to be invited to settlement negotiations because they were not parties to any of these cases until after the Settlement was filed.

The Marketer believe that they should have been invited to settlement negotiations so that they could provide input on the market-related provisions.⁵ They cite no PUCO cases for this claim—not a single case in which the PUCO ruled that *non-parties* must be invited to settlement negotiations. The only precedent they cite for this is *Time Warner AXS v. PUCO*.⁶ But *Time Warner* does not apply.

³ Joint Initial Brief of the Retail Energy Supply Association and Interstate Gas Supply Inc. at 23-27 (Dec. 9, 2021) (the “Marketer Brief”).

⁴ Marketer Brief at 25-26.

⁵ Marketer Brief at 23-27.

⁶ 75 Ohio St.3d 229 (1996).

The Ohio Supreme Court in *Time Warner* stated that it was concerned that “an entire *customer class* was intentionally excluded” from settlement negotiations.⁷ Marketers are not a *customer class*.

Further, in applying *Time Warner*, the PUCO has said that the “primary focus” of the first prong of its settlement test “is whether each *party* was afforded the opportunity to participate in settlement discussions and whether any *class of customers* was *intentionally* excluded from settlement discussions.”⁸ The Marketers were not parties at the time of settlement negotiations. They do not represent a class of customers (or any customers). And there is no evidence that they were intentionally excluded.

The Marketers’ theory seems to be that the signatory parties should have known that the Marketers would be interested in the Settlement, so the signatory parties should have invited them to participate in settlement negotiations, even though they were not parties to the cases.⁹ But this proposed “duty to invite” standard would be impossible to implement or enforce.

First, if parties had a duty to invite others who might be interested in a settlement, then settlement negotiations could be deterred as parties engage in a search for potential parties that might be interested. This is unreasonable and not feasible.

Second, even in the limited context of this case, who should the signatory parties have invited? IGS and RESA say that they should have been invited. But what about other marketers? There are 60 marketers licensed to provide retail service for Duke’s natural gas customers.¹⁰ Were the signatory parties required to invite every single one? When the Marketers’ witness was

⁷ 75 Ohio St.3d at 233, footnote 2 (emphasis added).

⁸ See *In re Application of Ohio Power Co.*, Case No. 17-1230-EL-UNC, Opinion & Order ¶ 27 (Feb. 27, 2019) (emphasis added).

⁹ See generally Marketer Brief at 23-27.

¹⁰ See RESA/IGS Ex. 3 at 5 (Crist Testimony).

asked how the signatory parties should determine which marketers to invite, he responded only that RESA should be invited.¹¹ And notably, IGS and RESA do not represent the interests of *all* marketers. RESA, for example, represents the interests of RESA members, whose interests might not align with other marketers.¹² And notably absent from the Marketers' testimony is any assertion that they reached out to other marketers to invite them to participate in this case—which one would have expected if the Marketers were as concerned as they claim to be about all interested parties participating in PUCO proceedings.¹³

Third, it would not even be permissible for parties to invite non-parties to settlement negotiations. The PUCO has consistently ruled that the substance of settlement negotiations is confidential.¹⁴ Under the Marketers' proposal, however, parties involved in settlement negotiations would be required to contact non-parties, reveal to those non-parties the substance of settlement negotiations, and then either encourage them to intervene or invite them to participate in the confidential settlement negotiations. It is not clear how the Marketers propose that parties to settlement negotiations invite non-parties to those negotiations without violating the PUCO's rule that settlement negotiations are confidential.

The only plausible way of doing things is as they were done. Parties who have intervened are invited to negotiate. Then, if they reach a settlement, it is publicly filed and available for all to see. Then, if anyone who had not previously intervened is interested in the settlement, they have an opportunity to seek intervention to address any aspects of the settlement. Then, they

¹¹ See Tr. at 191:18-192:5, 192:21-193:11 (Cawley).

¹² See Tr. at 182:25-183:15 (Cawley) (testifying that he doesn't know whether other marketers agree with IGS and RESA and that he did not speak with any other marketers about IGS and RESA's positions).

¹³ See Tr. at 194:10-13 (Cawley); Tr. at 262:24-263:3 (Lacey).

¹⁴ See *In re Complaint of Karl Friederich Jentgen*, Case No. 15-245-EL-CSS, Entry on Rehearing ¶ 33 (Dec. 7, 2016) ("the Commission has long held that settlement negotiations shall remain confidential").

have an opportunity to oppose the settlement by filing testimony, participating in a hearing, and briefing the case. That the Marketers did.

2. The signatory and non-opposing parties are capable and knowledgeable.

The Marketers argue that the Settlement fails the first prong because “none of the evidence presented by Duke Energy demonstrates that the negotiating parties were knowledgeable, capable and experienced on issues affecting competitive retail natural gas suppliers.”¹⁵ This argument fails for several reasons.

First, the signatory and non-opposing parties are indisputably capable and knowledgeable. Each has participated in countless PUCO proceedings over a period of many decades.

Second, the Marketers focus only on the signatory and non-opposing parties’ alleged lack of capability and knowledge regarding competitive retail natural gas markets.¹⁶ But the Settlement is about much more—MGP cleanup and costs and tax cuts, among other things—topics where the Marketers have no dispute about the other parties’ capability and knowledge. Indeed, one of the Marketers’ witnesses testified that each of the PUCO Staff, OCC, Duke, OEG, OMAEG, Kroger, and OPAE is capable and knowledgeable on some issues.¹⁷ There is no requirement, as the Marketers seem to suggest, that every signatory or non-opposing party be the single-most capable and knowledgeable party on every single issue addressed by a settlement.

Third, the signatory parties *are* capable and knowledgeable regarding retail natural gas markets. Duke is a natural gas distribution company that also provides natural gas commodity to

¹⁵ Marketer Brief at 25.

¹⁶ Marketer Brief at 25.

¹⁷ Tr. at 245:21-246:18 (Lacey).

its customers through its GCR, and Duke routinely works with marketers to facilitate the supply of natural gas to customers. Duke's president, Amy Spiller, also testified that she previously provided "legal advice of a business nature or pertaining to a business" to Duke's retail supplier affiliate.¹⁸

It hardly seems necessary to argue that the PUCO should find that its own Staff is a capable and knowledgeable party regarding retail natural gas issues.

And OCC likewise has been actively involved in issues affecting the retail supply of natural gas from the time competition was allowed. OCC intervened, actively participated, and signed the unopposed settlement in Case No. 08-1344-GA-EXM, where Columbia Gas of Ohio transitioned away from its GCR to an SSO (and later an SCO).¹⁹ OCC intervened, actively participated, and signed the unopposed settlement in Case No. 07-1285-GA-EXM, where Vectren (now CenterPoint) transitioned away from its GCR to an SSO.²⁰ OCC intervened, actively participated, and opposed the settlement in Case No. 05-474-GA-ATA, where Dominion transitioned away from its GCR to an SSO.²¹ Any claim that OCC lacks capability or knowledge with respect to competitive natural gas markets is unfounded.

Finally, the Marketers' own witness admitted that the signatory parties have experience in retail markets and retail market design.²²

¹⁸ Tr. at 103:17-23 (Spiller).

¹⁹ *In re Application of Columbia Gas of Ohio, Inc., for Approval of a General Exemption of Certain Natural Gas Commodity Sales Services or Ancillary Services*, Case No. 08-1344-GA-EXM, Opinion & Order (Dec. 2, 2009).

²⁰ *In re Application of Vectren Energy Delivery of Ohio, Inc., for Approval of a General Exemption of Certain Natural Gas Commodity Sales & Services or Ancillary Services*, Case No. 07-1285-GA-EXM, Opinion & Order (Apr. 30, 2008).

²¹ *In re Application of the East Ohio Gas Co. dba Dominion East Ohio for Approval of a Plan to Restructure its Commodity Service Function*, Case No. 05-474-GA-ATA, Opinion & Order (May 26, 2006).

²² Tr. at 263:24-264:9 (Lacey).

The PUCO should reject the Marketers' unfounded claim that they, and only they, are capable and knowledgeable on issues that pertain to the retail natural gas market.

B. The Marketers' arguments regarding the Settlement's benefits to consumers fail because they do not assess the Settlement as a package and therefore ignore the numerous benefits to consumers related to Duke's MGP cleanup, the Tax Cuts and Jobs Act, consumer education about the market, and the sizeable funds to help at-risk consumers with bill-payment assistance.

The second prong of the PUCO's settlement test requires the PUCO to determine whether the Settlement, *as a package*, benefits customers and the public interest.²³ The Marketers claim that because their intervention was limited to addressing the market-related provisions (SSO transition, price-to-compare, and aggregate shadow billing), they have been "effectively prevented from arguing the 'as a package' element in the second prong."²⁴ Thus, they "limit[ed] their arguments with respect to the second prong of the reasonable test to only addressing the competitive market provisions."²⁵

The Marketers are incorrect. Though their intervention was rightfully limited, they were not prohibited from arguing that the Settlement, as a package, fails the second prong of the PUCO's settlement test. The Marketers were well within their rights to acknowledge the tax and MGP benefits under the Settlement (without challenging those benefits) and to then argue that notwithstanding those many benefits, the Settlement—as a package—still fails the PUCO's three-prong test because of the market-related.

Instead, they *chose* to evaluate the merits of each market-related provision in isolation, debating the merits of each on its own.²⁶ They elected not to consider those provisions in the

²³ *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126 (1992).

²⁴ Marketer Brief at 35.

²⁵ Marketer Brief at 35.

²⁶ *See generally* Marketer Brief at 34-42 (making arguments under the second prong without considering the Settlement as a package).

context of the larger Settlement and the many benefits MGP and tax benefits to consumers. This failure to consider the Settlement as a package is fatal to the Marketers' complaints about the market-related provisions.

C. The market-related provisions benefit consumers, even when evaluated individually on their own merits instead of as a package.

The PUCO evaluates Settlements as a package. Here, it should conclude, contrary to Marketers' arguments, that the market-related provisions benefit customers and the public interest as a package. Even when evaluated individually, the market provisions benefit consumers.

1. The SSO Transition remains subject to PUCO approval in a future case, so the Marketers' complaints about it are unripe.

The Marketers spend significant time explaining (mistakenly) why they believe Duke should not transition to a Standard Service Offer and instead should transition to a Standard Choice Offer.²⁷ Marketer witness Crist's testimony is devoted almost entirely to this topic.²⁸ The Marketers want the PUCO to make what would be a *material modification* to the Settlement to favor a Standard Choice Offer. That would be a double mistake because Standard Service Offers are much more protective of consumers than Standard Choice Offers and because the Marketers' proposal would be a material modification that jeopardizes the Settlement.

The Marketers also claim (wrongly) that it would be bad for consumers if Duke were to add the Settlement's proposed price-to-compare message to customers' bills. The price-to-compare message would actually be great for providing consumers with information and education.

²⁷ Marketer Brief at 36-38.

²⁸ See generally RESA/IGS Ex. 3 (Crist Testimony).

As explained below, the Marketers' arguments miss the mark. But the Marketers' arguments are also premature because approval of the Settlement does not require Duke to transition to an SSO. The Settlement merely requires Duke to *file an application* to transition to an SSO: "Within five business days of the Commission's approval of this Stipulation without material modification, Duke Energy Ohio shall file its application to transition to an SSO."²⁹ Thus, any complaints the Marketers might have about Duke's transition to an SSO are more properly raised after Duke files that future application.³⁰

2. Consumers would benefit from Duke transitioning from its current GCR to an SSO.

The PUCO should reject the Marketers' arguments regarding the merits of transitioning to an SSO. The PUCO should instead conclude that an SSO would benefit customers.

Marketer witness Crist testified that Duke should transition to a Standard Choice Offer instead of a Standard Service Offer. But he admitted that an SSO was an improvement over a GCR. In responding to a hypothetical about whether he would choose a GCR or an SSO if those were the only two options, he testified: "I would say an SSO is a step better than a GCR."³¹ According to Mr. Crist, an SSO is better than a GCR because an "SSO involves competitive bidding and auction format."³² Thus, even the Marketers have admitted that a transition to SSO is a benefit to customers, which supports approval of the Settlement.³³

²⁹ Joint Ex. 1 at 16.

³⁰ See *In re Application of Ohio Power Co. for an Increase in Elec. Distrib. Rates*, Case No. 20-585-EL-AIR, Opinion & Order ¶ 131 (Nov. 17, 2021) (rejecting marketers' complaints about a price-to-compare settlement because it required the utility to make a future filing, and the marketers' concerns would be addressed then).

³¹ Tr. at 328:11-23 (Crist).

³² Tr. at 328:23-329:2 (Crist).

³³ Marketer witness Crist was impeached on this issue. After testifying under oath at his deposition, without objection, that an SSO was better than a GCR, he changed his testimony at the hearing to claim that a GCR and SSO were equally beneficial. See Tr. at 326:4-327:25 (Crist). The PUCO should give no weight to Mr. Crist's self-serving testimony at the hearing contradicting his under-oath deposition testimony.

Duke witness Spiller also testified that an SSO benefits customers, saying that “transition to a competitive auction structure” under an SSO was a “significant benefit” of the Settlement that “furthers the competitive natural gas market.”³⁴ And indeed, the other major natural gas distribution utilities (Dominion, CenterPoint, and Columbia) all initially transitioned from a GCR to an SSO.³⁵ The PUCO should follow this precedent and find it would benefit customers for Duke to similarly transition from a GCR to an SSO.

3. Customers would benefit from seeing price-to-compare messaging on their natural gas utility bills. To protect consumers, the PUCO should be shining much more light on marketer charges.

The Marketers claim that adding an SSO price-to-compare message to shopping customers’ bills “will harm the competitive retail natural gas market.”³⁶ But adding price-to-compare information will enhance the market for consumers. To protect consumers, the PUCO should be shining much more light on marketer charges.

According to the Marketers’ witness, the price-to-compare will cause customer confusion because (i) the SSO product is not identical to marketer products, and (ii) the price-to-compare is backward looking and therefore useless.³⁷ *To the contrary, the PUCO should note that the price-to-compare is already a beneficial staple of electric service competition for consumers in Ohio, per O.A.C. 4901:1-10-22(B)(24).*

Regarding the claim that the SSO product is not identical to marketer products, two products need not be identical for their comparison to be relevant to consumer decision-making. Consumers routinely evaluate products that are different and consider both their similarities and

³⁴ Duke Ex. 7 at 20 (Spiller Testimony).

³⁵ Tr. at 236:16-19 (Lacey) (Columbia transitioned to SSO); Tr. at 237:7-13 (Lacey) (Dominion transitioned to SSO); Tr. at 237:14-22 (Lacey) (Vectren transitioned to SSO). Later, the SCO was adopted.

³⁶ Marketer Brief at 38.

³⁷ Marketer Brief at 38-39.

differences in deciding which one to purchase. Knowing the difference in price between two products is relevant, even if the products have differences other than price.

The PUCO should likewise reject the Marketers' argument that price-to-compare information is unhelpful because it is backward-looking. It is very helpful to consumers. For one thing, this claim is speculative. Marketer witness Lacey claims that "the SSO, if adopted, would be a monthly variable rate."³⁸ But the format of the SSO will not be known until the PUCO approves an SSO (which the PUCO should approve as soon as possible for consumer protection).

Further, even if the SSO rate is historical, it is still highly relevant for consumers. People rely on historical data all the time for purposes of decision-making. It is not credible for the Marketers to claim that historical price data is irrelevant and has no bearing whatsoever on future prices. After all, the PUCO's own Apples to Apples website includes both the utility's standard offer price for purposes of comparison, as well as historical rate data.³⁹

Customers receiving price-to-compare messaging can give it whatever weight they deem fit, along with other factors, and use that data to make an informed decision. This information is good for customers—even if it might be bad for those marketers who charge high prices. And that gets to the real effect of the Marketers' position, to avoid the transparency that consumers need about their pricing. If anything, the PUCO should be focused on greater consumer protections from energy marketing, not fewer protections as the Marketers would prefer.

4. The Marketers' complaints about the alleged flaws in aggregate shadow billing data are unpersuasive.

The Settlement provides that "Duke Energy will begin promptly providing the OCC, upon OCC's request, shadow billing information for natural gas customers in a format to be

³⁸ RESA/IGS Ex. 2 at 13 (Lacey Testimony).

³⁹ See <https://energychoice.ohio.gov/ApplestoApples.aspx>.

mutually agreed upon by the OCC and the Company.”⁴⁰ Duke is required to provide OCC with “twenty-four months of data comparing aggregate shopping customer costs to what those customers would have paid had they been served on Duke Energy Ohio’s GCR or SSO.”⁴¹

The Marketers register various complaints about shadow billing, which OCC will address below. But as a threshold matter, the Marketers’ complaints, *even if valid* (which they aren’t), are unpersuasive for the PUCO’s three-prong test. This is because the Settlement requires nothing more than Duke providing data to OCC. The Settlement does not require OCC (or anyone else) to do anything in particular with the data. Going forward, the Marketers can tell their story about shadow billing if that’s what they want to do. If there is a shortcoming here, it’s that Ohioans across the state need more shadow billing for energy choices, not less.

5. Shadow billing data is important for public transparency and consumer protection, and the Marketers’ complaints are nothing more than flawed attempts to hide data from the public that the Marketers would rather keep hidden.

The Marketers’ primary complaint about shadow billing is that it allegedly “does not represent a complete comparison of pricing and savings.”⁴² Shadow billing data is a financial comparison showing the difference between what customers actually paid to marketers and what they would have paid under the utility’s GCR or SSO. The Marketers claim that such data is “misleading” because it does not account for things like carbon offsets or charges to consumers who do not use consolidated billing.⁴³

But shadow billing is an important data point for consumers. If consumers were aware that in the aggregate, shopping for their natural gas commodity has resulted in higher bills, that

⁴⁰ Joint Ex. 1 (Settlement) at 19.

⁴¹ Joint Ex. 1 (Settlement) at 19.

⁴² Marketer Brief at 41.

⁴³ Marketer Brief at 41-42.

would be *one* piece of relevant educational information. Shadow billing can be much more relevant and informational to consumers than other so-called education that merely explains the choice process and invites consumers to choose a marketer (sometimes at their financial peril).

Likewise, if consumers were to find out that shopping for natural gas has resulted in savings, that, too, would be one piece of relevant information. They can consider that information, along with whatever other factors are important to them (carbon offsets, term length, fixed vs. variable rates, etc.).

For consumers, the Marketers' argument—that shadow billing data should be denied because it is not an all-encompassing, single, perfect data point—makes no sense. There is no satisfying the Marketers on the subject of shadow billing, for reasons that should be obvious based on what shadow billing can be expected to reveal about marketer pricing and consumer choice.

The PUCO should approve the Settlement with the aggregate shadow billing provision fully intact.

D. The Settlement is consistent with important regulatory principles and practices.

1. The PUCO should reject the Marketers' improvised claim that there is a regulatory principle for striking alleged "alien provisions" from settlements.

The Marketers argue that the Settlement violates regulatory principles and practices because it includes alleged "alien provisions," meaning the market-related provisions (SSO transition, aggregate shadow billing, and price to compare).⁴⁴ The Marketers are wrong.

⁴⁴ Marketer Brief at 28.

First, the basis for this claimed regulatory principle is the testimony of Marketer witness Cawley.⁴⁵ The PUCO should give no weight to this testimony because Mr. Cawley is unqualified to give it. He lacks any experience whatsoever with settlements or the settlement process in Ohio. He has never participated in a settlement negotiation in a case before the PUCO.⁴⁶ He had never even heard of the PUCO's three-part settlement test until he was hired for this case.⁴⁷ And in fact, other than the Settlement filed in this case, Mr. Cawley has never reviewed a single other settlement filed with the PUCO:

Q. In fact, other than the Stipulation at issue in this proceeding, you have never viewed any other settlement filed in an Ohio case, correct?

A. Correct.⁴⁸

Second, while Mr. Cawley laments the inclusion of the market-related provisions of the Settlement because they are not directly related to Duke's MGP or tax issues, the PUCO has routinely approved settlements that include such provisions (often over OCC's objection). In a recent case involving DP&L, for example, where the subject matter was DP&L's significantly excessive earnings, a quadrennial review of its electric security plan, and its smart grid plan, the PUCO approved a settlement that included numerous provisions unrelated to these issues, including smart thermostat rebates (with no requirement that smart thermostats be used in any way in conjunction with DP&L's smart grid investments), eliminating data fees to marketers like IGS and RESA members, cash payments for weatherization, funding for a water heater pilot program, funding for loans for energy upgrades, "economic development" cash payments and

⁴⁵ See Marketer Brief at 28-30 (supporting this argument with extensive block quotes from Mr. Cawley's testimony).

⁴⁶ See Tr. at 180:15-18 (Cawley) (never participated in a settlement negotiation in a case before the PUCO).

⁴⁷ Tr. at 181:19-22 (Cawley).

⁴⁸ Tr. at 168:1-4 (Cawley).

discounts to various signatory parties, *and \$1 million in cash to none other than IGS so that IGS can build a solar farm.*⁴⁹

Mr. Cawley claimed that “alien provisions” must be excluded from the Settlement as a matter of policy. But here in Ohio (as opposed to Pennsylvania, where all of Mr. Cawley’s experience lies), the PUCO has endorsed the opposite approach. The PUCO encourages parties to engage in negotiations, including agreeing to settlements that address issues unrelated to the underlying subject matter of the case.

2. The PUCO should reject the Marketers’ claim that there is a regulatory principle prohibiting a price-to-compare or shadow billing. An actual regulatory principle is the favoring of information and education for consumers, which is what the Marketers wrongly seek to prevent.

The Marketers argue that there is a regulatory principle in Ohio prohibiting a price-to-compare and shadow billing.⁵⁰ That is an interesting claim about a supposed Ohio regulatory principle considering that, for protection of electric consumers, the Ohio Administrative Code requires an electric price-to-compare, in O.A.C. 4901:1-10-22(B)(24).

In support of their argument against shadow billing, the Marketers rely on a PUCO decision in a rulemaking case. There, OCC recommended that the PUCO add a new rule in the Ohio Administrative Code that would require natural gas companies to conduct aggregate shadow billing.⁵¹ In the rulemaking case, the PUCO declined to adopt a rule that would require all natural gas utilities to conduct aggregate shadow billing.⁵² That was unfortunate for consumers. But nowhere in that case did the PUCO rule that natural gas utilities are prohibited

⁴⁹ *In re Application of the Dayton Power & Light Co. for Approval of its Plan to Modernize its Distribution Grid*, Case No. 18-1875-EL-GRD, Opinion & Order (June 2, 2021).

⁵⁰ Marketer Brief at 31-34.

⁵¹ Marketer Brief at 31 (citing PUCO Case No. 19-1429-GA-ORD, Finding & Order (Feb. 24, 2021)).

⁵² PUCO Case No. 19-1429-GA-ORD, Finding & Order ¶ 89 (Feb. 24, 2021).

from *voluntarily* providing shadow billing data to OCC (or anyone else). Indeed, Columbia Gas and AEP provide shadow billing information to OCC.

The Marketers similarly argue that the proposed price-to-compare language in the Settlement violates O.A.C. 4901:1-13-11(B)(13).⁵³ O.A.C. 4901:1-13-11(B)(13) requires natural gas utilities to include the following language on shopping customers' bills:

When shopping for a natural gas supplier, it may be useful to compare supplier offers with the standard choice offer (SCO) rate [or, if applicable, the gas cost recovery (GCR) rate] available to eligible customers, which varies monthly based on the market price of natural gas. Price represents one feature of any offer; there may be other features which you consider of value. More information about the SCO [or GCR, if applicable] and other suppliers offers is available at energychoice.ohio.gov or by contacting the PUCO.

The Marketers' argument fails for two reasons.

First, the Settlement does not propose that the new price-to-compare language in the Settlement will *replace* the required language from the O.A.C. It will be in addition, and thus there is no rule violation.

Second, this O.A.C. rule does precisely the opposite of what the Marketers claim it does—it *supports* the use of the Settlement's proposed price-to-compare (and the proposal for aggregate shadow billing). One of Marketers' primary arguments is that comparing a utility's standard offer to marketer offers is *per se* invalid because the products are not comparable.⁵⁴ But this O.A.C. rule shows that the PUCO does consider it valid to compare the utility's default offer to marketer prices, as one factor among others that a customer might consider. So, if anything, regulatory principles support price-to-compare information for use by consumers.

⁵³ Marketer Brief at 33.

⁵⁴ See generally Marketer Brief at 38-42.

Far from the Marketers' effort to stop the price-to-compare and shadow billing, those measures serve the regulatory principle of favoring consumer information and education.⁵⁵

E. The PUCO should decline the Marketers' invitation to draw unfounded conclusions from the mere fact that Duke was the only party to file testimony in support of the Settlement.

The Marketers' claim that because only Duke filed testimony in support of the Settlement, the PUCO should infer from that fact that "the competitive market provisions are not a necessary part of the" Settlement.⁵⁶ This argument's creativity is exceeded only by its lack of merit.

At the outset, note that OCC's signature is present on the Settlement that includes the market provisions. And note that the Settlement includes a term (paragraph 33) allowing signatories to withdraw from the Settlement if materially modified. For OCC, eliminating or limiting the Settlement's market provisions that protect consumers would be a material modification leading to OCC's withdrawal from the Settlement (following OCC's compliance with all requirements necessary for such withdrawal under the Settlement).

The PUCO's rules only require the testimony of "at least one signatory party that supports the stipulation."⁵⁷ There is no requirement that every party to a Settlement file testimony. There is no support for the Marketers' claim that any party's decision to not file testimony implies anything about the substance of the Settlement.

⁵⁵ See *In re Commission's Promulgation of Rules for Certification of Providers of Competitive Retail Elec. Service*, Case No. 99-1609-EL-ORD, Entry on Rehearing (June 8, 2000) (in enacting the 1999 energy law, "It is our intent in carrying out SB3 that, in order to ensure that prospective customers could make educated choices regarding CRES, they have adequate information regarding CRES in advance of engaging in contractual agreements. Thus, we provided for an education campaign to provide information on CRES.").

⁵⁶ Marketer Brief at 44.

⁵⁷ O.A.C. 4901-1-30(D).

F. The Marketers’ misread the Settlement’s use of the term “these proceedings” in paragraphs 35 and 36 and thus their claim that the term is a “fatal flaw” is meritless.

The Marketers’ last-ditch effort to oppose the Settlement is a claim that there is a “fatal flaw” “[t]ucked away” in paragraphs 35 and 36 the Settlement.⁵⁸

First, nothing in the Settlement is “tucked away.” All terms of the Settlement are publicly available for all to see, with equal prominence and import.

Second, the Marketers are misreading the Settlement. Paragraph 35 of the Settlement says, “This Stipulation is submitted for purposes of these proceedings only. The term ‘these proceedings’ includes the above-captioned proceedings as well as the subsequent proceeding to implement the SSO auction.”⁵⁹ Paragraph 36 then says, “The Signatory Parties stipulate, agree, and recommend that the Commission issue a final Opinion and Order in these proceedings, ordering the adoption of this Stipulation, including the terms and conditions agreed to in this Stipulation by all Signatory Parties.”⁶⁰

The Marketers argue that the impact of these two paragraphs, and in particular, the fact that both paragraphs use the phrase “these proceedings,” is that the signatory parties are asking the PUCO to approve the future SSO auction application as part of this Settlement.⁶¹ That is a curious argument given that the SSO auction application hasn’t yet been filed. In paragraph 35, “these proceedings” includes the future SSO application for the simple reason that the Settlement requires Duke to take certain steps in that case. The Marketers are incorrect.

⁵⁸ Marketer Brief at 45.

⁵⁹ Joint Ex. 1 (Settlement) at 23.

⁶⁰ Joint Ex. 1 (Settlement) at 23.

⁶¹ Marketer Brief at 44-45.

G. The PUCO should affirm the Attorney Examiners' procedural rulings.

1. The Marketers were provided due process.

The Marketers were granted limited intervention to address only the market-related aspects of the Settlement (SSO transition, price-to-compare, and shadow billing).⁶² In their brief, they argue that this ruling was improper and denied them due process because they should have been granted unlimited intervention in these cases. They also argue that they were not given ample opportunities for discovery.⁶³ The PUCO should reject these arguments and affirm the ruling limiting the Marketers' intervention.

First, the Marketers themselves admit that they have no interest whatsoever in the other issues in these cases (Duke's MGP cleanup and costs and the Tax Cuts and Jobs Act). In their brief, they concede that as to the MGP and tax issues, "there was no reason for either the Retail Energy Supply Association ('RESA'), Interstate Gas Supply Inc. ("IGS") or any supplier to become involved in these proceedings...."⁶⁴ If they were interested in those issues, they should have intervened long ago, which they did not.

Second, the ruling limiting the Marketers' intervention was consistent with the Ohio Revised Code. R.C. 4903.221(B)(1) provides that the PUCO may consider, in deciding whether to grant intervention, the "nature and extent of the prospective intervenor's interest." The PUCO considered the limited "nature and extent" of the Marketers' interests in these proceedings and acted accordingly in limiting their intervention.

Third, the ruling limiting the Marketers' intervention was consistent with the Ohio Administrative Code. O.A.C. 4901-1-11(D) allows the PUCO to grant "limited intervention,

⁶² Entry (Oct. 15, 2021).

⁶³ Marketer Brief at 48-49.

⁶⁴ Marketer Brief at 1.

which permits a person to participate with respect to one or more specific issues, if the person has no real and substantial interest with respect to the remaining issues....” That is precisely what happened here. The Marketers concede that they have no interest in anything but the market-related provisions of the Settlement.⁶⁵ So the PUCO was right to limit their intervention to only those issues affecting the Marketers’ interests.

2. The burden of proof remains with Duke and the signatory parties, and they have met their burden of proving that the Settlement should be approved without modification.

The Marketers argue that when the attorney examiner granted them limited intervention, the burden of proof unlawfully shifted to the Marketers.⁶⁶ This is so, according to the Marketers, because the Entry granting their intervention (i) limited their intervention allowing them only to inquire into and address the market-related provisions of the Settlement and (ii) stated that the Attorney Examiner would “heavily scrutinize any requests from RESA or IGS that are perceived to unnecessarily delay the outcome of these proceedings.”⁶⁷ These arguments fail because the burden has not shifted to the Marketers.

First, the PUCO has not yet ruled on the Settlement, so it cannot possibly be true that the burden was shifted to the Marketers. Only after the PUCO rules could one assess whether the PUCO improperly shifted the burden to the Marketers in deciding whether to approve the Settlement.

Second, the October 15, 2021 Entry in no way suggests that the Marketers have the burden of proof. The statements in that Entry serve only to limit the scope of the Marketers’

⁶⁵ Marketer Brief at 1 (as to the MGP and tax issues, “there was no reason for either the Retail Energy Supply Association (‘RESA’), Interstate Gas Supply Inc. (‘IGS’) or any supplier to become involved in these proceedings....”).

⁶⁶ Marketer Brief at 51-53.

⁶⁷ Marketer Brief at 52 (quoting the October 15, 2021 Entry).

intervention, which was appropriate under the circumstances (as described above). As is always the case when there is a contested settlement, the signatory parties have the burden of proving (through testimony, a hearing, and briefs) that the settlement passes the PUCO's three-part test. And any opposing parties have an opportunity to explain to the PUCO (through testimony, a hearing, and briefs) why they believe that burden has not been met. Regardless of anything the Marketers might or might not do in this case, the PUCO will need to determine whether the signatory parties have met their burden of proof—which they have.

3. The record was re-opened to address the Settlement.

Several of the above-captioned cases had previously proceeded to hearing before the Settlement was filed.⁶⁸ The PUCO did not issue a ruling in those cases. Now, the Marketers argue that the evidentiary records in these cases were never reopened, which the Marketers believe to be a procedural error.⁶⁹ This argument is meritless.

O.A.C. 4901-1-34 says that “an attorney examiner may, upon their own motion or upon motion of any person for good cause shown, reopen a proceeding at any time prior to the issuance of a final order.” When the Marketers raised this issue at the hearing, the Attorney Examiner responded, “yes, the proceedings have been reopened, and we are here today. ... We are here, the proceedings have been reopened, and we will be proceeding with the hearing this morning.”⁷⁰ Thus, the Attorney Examiner plainly reopened the evidentiary record.

⁶⁸ Case Nos. 14-375-GA-RDR, 15-452-GA-RDR, 16-542-GA-RDR, 17-596-GA-RDR, 18-283-GA-RDR, 19-174-GA-RDR, 14-376-GA-ATA, 15-453-GA-ATA, 16-543-GA-ATA, 17-597-GA-RDR, 18-284-GA-ATA, and 19-175-GA-ATA went to hearing in November 2019. Case Nos. 18-1830-GA-UNC and 18-1831-GA-ATA went to hearing in August 2019.

⁶⁹ Marketer Brief at 53-56.

⁷⁰ Tr. at 24:3-5.

4. The Attorney Examiners properly struck various parts of the Marketers' testimony.

At the hearing, the Attorney Examiners struck various parts of the Marketers' testimony because it was inadmissible under the Ohio Rules of Evidence. The Marketers argue that these rulings were improper.⁷¹ The PUCO should affirm the Attorney Examiners' rulings.

First, the Attorney Examiner struck a portion of Marketer witness Cawley's testimony where he claimed to have knowledge about what the signatory parties "knew" and where he claimed to know that particular provisions in the Settlement were included at the request of a single signatory party.⁷² But because Mr. Cawley was not involved in settlement negotiations, and because he cannot testify as to what other parties "knew," he lacked personal knowledge of the claims made in his testimony. These statements were properly struck under Rule of Evidence 602, which provides that a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

Second, the Attorney Examiner struck a portion of Mr. Cawley's testimony where he discussed the settlement standard under Pennsylvania law.⁷³ But Pennsylvania law does not apply in proceedings before the PUCO. Mr. Cawley's opinions regarding Pennsylvania law were therefore irrelevant under Rule of Evidence 401 and inadmissible under Rule of Evidence 402.

Third, Marketer witness Lacey, like Mr. Cawley, claimed to know that certain Settlement provisions were included by OCC.⁷⁴ The Attorney Examiner properly struck these statements because Mr. Lacey was not involved in settlement negotiations and thus lacked personal

⁷¹ Marketer Brief at 56-58.

⁷² Tr. at 154:9-156:7.

⁷³ Tr. at 156:13-159:19.

⁷⁴ Tr. at 222:14-224:14.

knowledge under Rule of Evidence 602 regarding which parties were interested in which Settlement terms.

III. CONCLUSION

For the reasons set forth in this reply brief and in the initial briefs of OCC, the PUCO Staff, Duke, and Ohio Energy Group, the PUCO should approve the Settlement promptly and without modification. If anything, the PUCO should be adopting more consumer protections from energy marketing, not less. Consumers would benefit from less complaining and more competing by energy marketers.

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Reply Brief was served by electronic transmission upon the parties below this 23rd day of December 2021.

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