BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for Recovery of Program Costs, Lost Distribution Revenue and Performance Incentives Related to Its Energy Efficiency and Demand Response Programs.	))))))	Case No. 14-457-EL-RDR
In the Matter of the Application of Duke Energy Ohio, Inc. for Recovery of Program Costs, Lost Distribution Revenue, and Performance Incentives Relate to its Energy Efficiency and Demand Response Programs for 2014.	))))))	Case No. 15-534-EL-RDR

BRIEF OPPOSING THE PARTIAL SETTLEMENT BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

BRUCE J. WESTON (0016973)
OHIO CONSUMERS' COUNSEL

Terry L. Etter (0067445), Counsel of Record
Kyle L. Kern (0084199)
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: (614) 466-7964 (Etter direct)
Telephone: (614) 466-9585 (Kern direct)
terry.etter@occ.ohio.gov
kyle.kern@occ.ohio.gov

Dane Stinson (0019101)
Bricker and Eckler LLP
100 South Third Street
Columbus, Ohio 43215
Telephone: (614) 227-4854
DStinson@bricker.com

Outside Counsel for the
Office of the Ohio Consumers' Counsel

TABLE OF CONTENTS

PAGE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for Recovery of Program Costs, Lost Distribution Revenue and Performance Incentives Related to Its Energy Efficiency and Demand Response Programs.	))))))	Case No. 14-457-EL-RDR
In the Matter of the Application of Duke Energy Ohio, Inc. for Recovery of Program Costs, Lost Distribution Revenue, and Performance Incentives Relate to its Energy Efficiency and Demand Response Programs for 2014.	))))))	Case No. 15-534-EL-RDR

BRIEF OPPOSING THE PARTIAL SETTLEMENT BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

These cases involve a Partial Settlement[1] that would overturn an Order of the Public Utilities Commission of Ohio ("PUCO" or "Commission")[2] and would cost Ohioans $19.75 million over two years. In the Order, the PUCO ruled that Duke Energy Ohio, Inc. ("Duke") cannot use banked savings[3] to determine the annual shared savings incentive it should receive through its energy efficiency and peak demand reduction

[1] Case Nos. 14-457-EL-RDR ("14-457") and 15-534-EL-RDR ("15-534"), Stipulation and Recommendation (January 6, 2016) ("Partial Settlement"). At hearing, the Partial Settlement was admitted into the record as Joint Exhibit 1. Tr. Vol. 1 at 331. Although the Partial Settlement was filed in both cases, the PUCO has not consolidated the cases.

[2] Case No. 14-457-EL-RDR, Finding and Order (May 20, 2015) at 5. Pursuant to R.C. 4903.15, the Order became effective this same date. Hence the stay provision of R.C. 4903.10 is not applicable to the Order.

[3] Banked savings are energy efficiency savings or peak demand reduction amounts that were achieved in excess of the statutory EE/PDR requirements and which may be applied toward achieving the energy efficiency or peak demand reduction requirements in future years. *See* R.C. 4928.662(G).

("EE/PDR") program. Duke had not met the requirements for a shared savings incentive for 2013 without banked savings, and thus would not receive an incentive for 2013. Whether Duke may receive a shared savings incentive for 2014 is also in doubt.

Despite the PUCO's Order, Duke and the PUCO Staff (collectively, "Signatories") negotiated a settlement that would allow Duke to have a shared savings incentive in the amount of $19.75 million for 2013 and 2014. Contrary to Ohio Supreme Court admonitions and PUCO decrees, no intervenors in the cases were invited to the negotiations.[4]

The Office of the Ohio Consumers' Counsel ("OCC")[5] and other customer parties in these proceedings oppose the unlawful settlement that is before the PUCO.[6] Because *all* customer classes were excluded from the negotiations that led to the Partial Settlement, the settlement is contrary to negotiation standards set forth by the Supreme Court of Ohio. In addition, the Partial Settlement does not meet the PUCO's three-prong test for reviewing and approving settlements.

The PUCO should reject the settlement docketed in these cases. But if the PUCO approves the Partial Settlement (which OCC does not recommend), the PUCO should make any amounts collected from customers subject to refund upon further appeal.

---

[4] *See* Tr. Vol. 1 at 103-104, 267, 296; OCC Exhibit 3 (Gonzalez Testimony) at 8, 10; OMA Ex. 15.

[5] OCC is an intervenor in these cases on behalf of all of Duke's 660,000 residential electricity customers. OCC's intervention in Case No. 14-457 was granted in the Order, at 3. OCC filed a motion to intervene in Case No. 15-534 on June 17, 2015.

[6] Other customer parties who have intervened in these proceedings are Ohio Partners for Affordable Energy ("OPAE"), Ohio Manufacturers Association ("OMA"), Ohio Energy Group ("OEG"), and the Kroger Company ("Kroger"). An environmental organization, Environmental Law and Policy Center ("ELPC"), also is an intervenor in these proceedings.

II. STANDARD OF REVIEW

The standard of review for consideration of a stipulation has been discussed in a number of PUCO cases and by the Supreme Court of Ohio. In *Duff*, the Court stated:

> A stipulation entered into by the parties present at a commission hearing is merely a recommendation made to the commission and is in no sense legally binding upon the commission. The commission may take the stipulation into consideration, but must determine what is *just and reasonable* from the evidence presented at the hearing.[7]

The Court in *Consumers' Counsel* considered whether a just and reasonable result was achieved with reference to criteria adopted by the PUCO in evaluating settlements.[8] The criteria are:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties? In this regard, the PUCO considers whether the signatory parties to the stipulation represent a variety of diverse interests.[9]

2. Does the settlement, as a package, benefit ratepayers and the public interest?

3. Does the settlement package violate any important regulatory principle or practice?

In this proceeding, the PUCO should examine whether the representatives of the customer classes had a fair opportunity for meaningful negotiations before they were asked to sign a settlement that already had been negotiated between Duke and the PUCO Staff. The PUCO must ensure that the Partial Settlement complies with Ohio law requiring utilities to charge customers rates that are just and reasonable.[10] The burden of

---

[7] *Duff v. Pub. Util. Comm*. (1978), 56 Ohio St.2d 367 (emphasis added).

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

[9] *See In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company, Individually and, if Their Proposed Merger Is Approved, as a Merged Company (collectively, AEP Ohio) for an Increase in Electric Distribution Rates*, Case No. 11-351-EL-AIR, et al., Opinion and Order (December 14, 2011) at 9.

[10] R.C. 4905.22; R.C. 4909.18.

proving the lawfulness and the reasonableness of the Partial Settlement rests with the proponents of the Partial Settlement.[11]

III. RECOMMENDATION

A. The PUCO should reject the Partial Settlement because the settlement resulted from negotiations that excluded all the customer classes that would pay the $19.75 million shared savings incentive.

The negotiations that led to the Partial Settlement were conducted exclusively between the PUCO Staff and Duke.[12] Intervenors in the cases were not invited to the settlement discussions.[13] The Ohio Supreme Court has disapproved of settlement negotiations that exclude entire customer classes.

In *Time Warner AxS*, the Court overturned on jurisdictional grounds the PUCO's approval of a settlement of an alternative regulation plan for Ameritech Ohio, now known as AT&T. All competitive local exchange companies were excluded from participating in the settlement negotiations.[14] Although the Court ruled on only a jurisdictional issue, it noted its dismay at the conduct of the discussions that led to the settlement:

> The partial stipulation arose from settlement talks from which an entire customer class was intentionally excluded. This was contrary to the commission's negotiations standard in *In re Application of Ohio Edison to Change Filed Schedules for Electric Service*, case No. 87-689-EL-AIR (Jan. 26, 1988) at 7, and the partial settlement standard endorsed in *Consumers' Counsel v. Pub. Util. Comm*. (1992), 64 Ohio St. 3d 123, 125-126, 592 N.E.2d 1370, 1373. … We would not create

[11] *See, e.g., In the Matter of the Application of FirstEnergy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues*, Case No. 99-1212-EL-ETP, Opinion and Order (July 19, 2000) at 32.

[12] *See* Tr. Vol. I at 61, 156, 161-162, 295-296, 314.

[13] *See id*. at 103-104, 267, 296; OCC Ex. 3 (Gonzalez Testimony) at 8,10; OMA Ex. 15.

[14] *See In the Matter of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, et al., Opinion and Order (November 23, 1994) at 10, 18. *See also id*., Comments on the settlement agreement filed by the competitive carriers (September 20, 1994).

> a requirement that all parties participate in all settlement meetings. However, given the facts in this case, we have grave concerns regarding the commission's adoption of a partial stipulation which arose from the exclusionary settlement meetings.[15]

The PUCO also recently stated that "no particular customer class may be intentionally excluded from negotiations."[16]

The exclusion of customer classes occurred in negotiations over the Partial Settlement, only on a broader scale than in *Time Warner AxS*. Instead of excluding one customer class, the negotiations in these cases excluded *all* customer classes. The Partial Settlement in these cases more egregiously violates the principle against exclusionary settlement discussions than in *Time Warner AxS*.

The discussions resulting in the Partial Settlement were conducted without inviting any of the intervenors to participate in the talks. By reaching an agreement on the most important issue – the shared savings issue – Duke (and the PUCO Staff) gained an unfair advantage over the intervenors in the bargaining process.

In addition, Duke and the PUCO Staff conducted their entire negotiations over a three-day period during the last week of December 2015. The talks were hastily done, especially considering that the settlement was aimed at overturning a PUCO Order that would give Duke no shared savings incentive for 2013 and would serve as precedent for future Duke, and possibly other utilities', cases.

---

[15] *Time Warner AxS v. PUCO* (1996), 75 Ohio St. 3d 229, 234, n. 2.

[16] *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, et al., Opinion and Order (March 31, 2016) at 53.

B. The PUCO should find that the Partial Settlement does not represent serious bargaining among capable and knowledgeable parties with diverse interests.

1. The Partial Settlement was not the product of serious negotiations because Duke and the PUCO Staff were unwilling to compromise over the $19.75 million shared savings incentive that they agreed to in the negotiations that excluded customers.

Settlements based on exclusionary negotiations are tainted, and thus should be rejected by the PUCO. In the 03-93 case, the PUCO rejected the stipulation on remand from the Ohio Supreme Court.[17] There, the PUCO determined that there was "limited evidence regarding the continued presence and participation of the supportive parties during stipulation negotiations, or the willingness of Duke to compromise with parties who may not have been discussing side arrangements…."[18] This led the PUCO to conclude that the stipulation was not the result of serious bargaining:

> Based on the supreme court's expressed concern over the "integrity and openness of the negotiation process" and its requirement that we seek affirmative "evidence that the stipulation was the product of serious bargaining," we now find that we do not have evidence sufficient to alleviate the court's concern. Rather, we find that the existence of side agreements, in which several of the signatory parties agreed to support the stipulation, raises serious doubts about the integrity and openness of the negotiation process related to that stipulation.[19]

Here, there is ample evidence showing that once *Duke and the PUCO Staff* had reached agreement, they were unwilling to compromise with intervenors regarding the settlement overall, and in particular the $19.75 million in shared savings given to Duke.

---

[17] *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify Its Non-Residential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitively-Bid Service Rate Options Subsequent to Market Development Period*, Case No. 03-93-EL-ATA, et al., Opinion and Order (October 24, 2007).

[18] *Id.* at 27.

[19] *Id.*

The settlement agreement that had been negotiated by Duke and the PUCO Staff was emailed to intervenors by counsel for the PUCO Staff after 3:00 p.m. on December 30, 2015. The email stated:

> Duke Energy Ohio and Staff have discussed settlement terms and we captured them in the attached draft document, which covers all of the issues in Case No. 14-457-EL-RDR and only the shared savings mechanism issue in Case No. 15-534-EL-RDR. We believe this proposed draft reasonably resolves all such issues, but mainly the shared savings mechanism, in these two cases pending before the Commission. **Please review the attached proposed settlement draft and let me know by noon on Wednesday, January 6, 2016 whether your client has an interest in being a signatory party**.[20]

The email sent to intervenors was not an offer to negotiate, for several reasons. First, the document sent to the intervenors was not a term sheet that was open for discussion. Second, the offer to become a signatory party to the settlement was an ultimatum. The intervenors could either sign the document as written, or not.[21]

Third, the intervenors could not reasonably protect their interests under the arbitrary timeline the Signatories set for response. The intervenors were given less than four business days to review the settlement, to discern how the $19.75 million in shared savings was derived, and to respond to the PUCO Staff and Duke about signing the settlement. This is not a reasonable amount of time, especially because half the period given for response was during the holidays.[22]

---

[20] OMA Ex. 21 (emphasis added).

[21] Although Mr. Donlon stated that the PUCO Staff's "intent" was "to have some discussion if people wanted it…" (Tr. Vol. I at 275), no offer to discuss the settlement was made in the email. A reasonable interpretation of the email is that the "draft document" would not be open for changes, at least regarding the major provisions. This interpretation was verified at the January 27, 2016 meeting. See OCC Ex. 3 (Gonzalez Testimony) at 9.

[22] The email was sent during the mid-afternoon of December 30th, which was a Wednesday. Thursday was New Year's Eve, Friday was New Year's Day, followed by Saturday and Sunday, providing the intervenors and their experts only until noon the next Wednesday (January 6) to respond regarding signing the settlement agreement.

In reality, Duke and the PUCO Staff had reached an all-but-final agreement before sending it to the intervenors. The after-the-fact attempts by the PUCO Staff and Duke to add parties to the Partial Settlement could not have been a serious effort to seek intervenors' input for the purpose of significantly revising the document. Once the Signatories reached agreement on settlement terms on December 30, 2015, the primary provision of the settlement – the $19.75 million dollars that customers would pay for shared savings for 2013 and 2014 – was not open to negotiation.

The evidence in these cases shows that the Partial Settlement was not the product of serious bargaining. The Partial Settlement thus fails to meet the first prong of the PUCO's test for approving settlements. The PUCO should reject the Partial Settlement.

2. Because intervenors representing all the customer classes that would pay the shared savings incentive in the Partial Settlement were not invited to participate in negotiations, the Partial Settlement was not the product of negotiations involving diverse interests.

The Partial Settlement claims to represent "a comprehensive compromise of issues raised by Parties with diverse interests."[23] The word "Parties" in the Partial Stipulation refers only to Duke and the PUCO Staff.[24] Duke and the PUCO Staff did not represent diverse interests.

In fact, it is difficult to discern where the interest of the PUCO Staff lies. As PUCO Staff witness Donlon stated during cross-examination at the hearing, the PUCO Staff does not represent one particular interest, but instead is a "neutral" participant in PUCO proceedings:

---

[23] Joint Ex. 1 at 3.

[24] *Id*. at 1.

> Q. (By Mr. Boehm) And in these proceedings, whom, in your mind, were you representing? What interests were you representing?
>
> A. (By Mr. Donlon) Staff's, which Staff represents the entire state of Ohio. We represent the lowest of the low income, the highest of the high income, every single company that exists in Ohio, no matter how big, how small, the utilities. Staff is the neutral arbitrator of the state of Ohio and we look out for the short-term and long-term benefits for all of the energy needs of Ohio.[25]

The PUCO Staff as a "neutral arbitrator" is not an advocate on behalf of any customer class or stakeholder. Thus, while Duke represented its interests during the settlement negotiations, no advocate represented the interests of the customers who would pay the $19.75 million agreed to in the Partial Settlement.[26] This occurred even though nearly all customer classes had intervened in one or both cases addressed in the Partial Settlement. Excluding all the intervenors from negotiations not only violates an important regulatory principle, as discussed below, it also highlights the lack of diversity in the negotiations and in the Signatories' interests.

Further, there is no way to know how diverse the Signatories' interests were. The PUCO Staff did not take a formal position regarding the shared savings mechanism in either the 14-457 or the 15-534 case.[27] The PUCO Staff did not file comments, reply comments, or a staff report in the 14-457 case, and filed comments only regarding the

---

[25] Tr. Vol. I at 246. As a threshold matter, Mr. Donlon's statement is factually and procedurally untenable. As stated above, the PUCO issued its Order in Case No. 14-457 on May 20, 2015. Once issued and entered in the PUCO's journal, the Order became effective. R.C. 4903.15. After that point in time, the PUCO Staff's function was not as a neutral arbitrator or advocate, but its function became to defend the PUCO's lawful Order. The PUCO Staff's failure to defend the PUCO's Order is exacerbated by the unfair manner in which it was abrogated, i.e., by excluding all customer groups from the negotiations.

[26] Even if the PUCO Staff could be considered a "representative" of the interests of customers *and* utilities, as Mr. Donlon suggests, the negotiations would have been unfairly lopsided in favor of Duke. Under Mr. Donlon's rationale, both participants in the negotiations – Duke and the PUCO Staff – represented the interests of the utility in this case. Hence, the interests of the Signatories were not diverse.

[27] Hence, Mr. Donlon's statement regarding the PUCO Staff's position (Tr. Vol. I at 329) is not supported by the record of either case.

need for an audit in the 15-534 case. Because the PUCO Staff's position on substantive issues in both cases is unknown, there is no way to measure whether the PUCO Staff moved from its position or how far it may have moved off whatever position it had taken.

The record in this proceeding does not show that the Partial Settlement involved a diversity of interests. The Partial Settlement fails the first prong of the PUCO's test for stipulations, and the PUCO should reject the Partial Settlement.

C. The PUCO should find that the Partial Settlement fails the second prong of the PUCO's test to evaluate stipulations because, as a package, the Partial Settlement does not benefit customers or the public interest.

Duke and the PUCO Staff claim that the Partial Settlement, as a package, benefits customers and the public interest.[28] To the contrary, the purported benefits to consumers in the settlement are illusory, and are dwarfed by the costs to consumers.

From Duke's perspective, the benefits are based on the assumption that Duke would prevail on its legal challenges to the Order. But that assumption is pure speculation, at best. Duke is more likely **not** to prevail with its legal challenges to the Order, considering that the PUCO already rejected them. Hence, the purported "benefits" that Duke claims are in the Partial Settlement are based on pure conjecture and should be discounted.

The PUCO Staff's position is erroneous and speculative. First, the standing Order is PUCO precedent, and thus addresses the calculation of shared savings concerning Duke's portfolio going forward. Further, it provides real customer and public interest benefits, without customers paying the $19.75 million shared savings incentive in the Partial Settlement. The Order was designed to provide motivation for Duke to "push

[28] *See* Duke Ex. 1 (Duff Testimony) at 6; Staff Ex. 1 (Donlon Testimony) at 5.

energy efficiency programs" and "to continue to serve as a true incentive for Duke to exceed the benchmarks…."[29] Under the Order, Duke cannot use banked savings to achieve a shared savings incentive for any year covered by the current shared savings mechanism. The cost to consumers under the Order is zero dollars, rather than the $19.75 million under the Partial Settlement. That is also a regulatory certainty.

Second, any savings from avoided litigation is pure conjecture. In fact, there will likely be no savings regarding litigation costs. There have already been costs associated with the hearing on the Partial Settlement. These costs would not have been incurred absent the Partial Settlement because the PUCO had already made its decision in the Order without a hearing. And an appeal is just as likely if the PUCO approves the Partial Settlement as it would have been if the rehearing process had been allowed to run its course.

Further, as OCC witness Gonzalez testified, even if the Stipulation sought to reduce the litigation cost risk,[30] the $19.75 million Duke would receive from customers provides Duke with an exorbitant incentive payment.[31] Mr. Gonzalez noted that the $19.75 million represents an average of 38 percent of program spending.[32] Mr. Gonzalez noted that this is exorbitant relative to electric distribution utilities nationwide who do not own generation assets. Mr. Gonzalez stated that such utilities generally receive from one to seven percent of program spending.[33]

---

[29] Order at 5.

[30] The assumed reduction of litigation claim in the Partial Settlement is suspect. Further litigation regarding any Commission Order approving the settlement in this case is likely, since none of the intervenors in the case were included in the negotiations over the Partial Settlement.

[31] OCC Ex. 3 (Gonzalez Testimony) at 15.

[32] *Id*.

[33] *Id.*

As Mr. Gonzalez also pointed out, the so-called "benefits" under the Partial Settlement are illusory. Mr. Gonzalez noted that without using banked savings, the savings generated by Duke's EE/PDR program portfolio for 2013 and 2014 would not have complied with Ohio's statutory requirements.[34] Because Duke could not use banked savings to obtain a shared savings incentive under the Order, the $19.75 million shared savings payment to Duke in the Partial Settlement is greater than Duke would have otherwise received.

The Partial Settlement's benefits are weighted heavily towards Duke, while customers end up bearing the brunt of Duke's $19.75 million in charges, without receiving any benefit. The Partial Settlement fails the second prong of the PUCO's test for evaluating stipulations, and should be rejected.

D. The PUCO should find that the Partial Settlement fails the third prong of the PUCO's test for evaluating stipulations because it violates Ohio law and several regulatory principles and practices.

1. The Partial Settlement violates the important regulatory principle of integrity and openness in settlement discussions pronounced by the Ohio Supreme Court.

As discussed in Section III.B.1 above, the Ohio Supreme Court has been particularly concerned about the integrity and openness of the negotiation process in PUCO proceedings.[35] The Court has established the basic principle that settlement negotiations be inclusive, rather than exclusive.

[34] *See id*. at 13.

[35] *See Ohio Consumers' Counsel v. Pub. Util. Comm'n.*, 111 Ohio St. 3d 300, 320; 2006-Ohio-5789, P85; 856 N.E.2d 213, 234 (remanding the issue of discoverability of side agreements to a stipulation).

The negotiations that led to the Partial Settlement in these cases violated the principle of inclusive settlement discussions. The settlement talks regarding overturning the PUCO's Order began in earnest on or about December 28, 2015.[36] At that time, Duke and the PUCO Staff had a duty at law, and out of fundamental fairness, to notify the intervenors that negotiations were occurring and to invite intervenors to participate, so they could protect their interests, as contemplated by R.C. 4903.221. Instead, Duke and the PUCO Staff struck a deal on the shared savings incentive issue, without the intervenors' knowledge or participation. The intervenors were informed of the Partial Settlement only after the fact, when it was too late to make any meaningful change to the Partial Settlement.

The Partial Settlement violates the important regulatory principle (and practice) that all customer classes be included in negotiations. The Partial Settlement fails the third prong of the PUCO's test for reviewing stipulations.

2. The PUCO Staff has not been a party in Case No. 14-457, and thus the Partial Settlement violates Ohio Adm. Code 4901-1-30.

Ohio Adm. Code 4901-1-30(A) states: "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." (Emphasis added.) Ohio Adm. Code 4901-1-10(C) sets out the general rule that the PUCO Staff shall **not** be considered a party to any proceeding:

> Except for purposes of rules 4901-1-02, 4901-1-03, 4901-1-04, 4901-1-05, 4901-1-06, 4901-1-07, 4901-1-12, 4901-1-13, 4901-1-15, 4901-1-18, 4901-1-26, **4901-1-30**, 4901-1-31, 4901-1-32, 4901-1-33, and 4901-1-34 of the Administrative Code, the

[36] *See* OMA Ex. 15.

> commission staff shall not be considered a party to any proceeding. (Emphasis added.)

Until the Partial Settlement was docketed, the PUCO Staff had not participated in Case No. 14-457. As discussed above, the PUCO Staff did not file comments or reply comments on the original application in 14-457. Further, prior to signing the Partial Settlement the PUCO Staff took no other action (e.g., the filing of a staff report) in the 14-457 case.[37] Although Ohio Adm. Code 4901-1-10(C) has an exception for entering into settlements, the PUCO Staff's status as a "party" to a case should require more participation than simply signing a settlement that would reverse a PUCO Order.

3. The exclusionary negotiation process leading to the Partial Settlement deprived intervenors of their right to protect their interest in this proceeding under R.C. 4903.221.

Under R.C. 4903.221, persons who may be adversely affected by a PUCO proceeding have the right to intervene in the proceeding to protect their interests. The intervenors expressed various interests, with a common interest being to ensure that Duke's charges for energy are reasonable and lawful.[38] By ruling that it was improper for Duke to use banked savings to achieve a shared savings incentive, the PUCO's Order established that a shared savings incentive based on the use of banked savings is

[37] Although the PUCO Staff filed comments in the 15-534 case, those comments specifically addressed the need for a financial audit of the application in that case, and suggested further review and true-up of the rider in subsequent proceedings. Case No. 15-534, PUCO Staff Comments (June 17, 2015). The PUCO Staff's comments did not address any of the issues in the 14-457 case, or make specific recommendations regarding the shared savings incentive in the 15-534 case, which the Partial Settlement addresses. In any event, the Partial Settlement purports to settle only some of the issues in the 15-534 case, and should not be used to bestow party status on the PUCO Staff in the 14-457 case where the Partial Settlement supposedly addresses all the issues.

[38] *See* Case No. 14-457, OMA Motion to Intervene (April 28, 2014) at 4; OCC Motion to Intervene (April 30, 2014) at 2; OPAE Motion to Intervene (June 17, 2014) at 1.

unreasonable and unlawful. The intervenors thus have a clear and substantial interest in upholding the PUCO's Order.

Duke and the PUCO Staff's exclusionary Partial Settlement process prevented intervenors from participating in negotiations that would dramatically modify the PUCO's Order and, thus, deprived intervenors of their right to protect their interests. As a result, intervenors' clients may be forced to pay $19.75 million in shared savings incentives, even though the PUCO's Order expressly found that they were not required to do so. The PUCO should not condone the Signatories' actions in depriving intervenors of their rights to protect their interests under R.C. 4903.221.

E. If the PUCO approves the Partial Settlement, which OCC does not recommend, then Duke's collection of the shared savings incentive from customers should be made subject to refund.

OCC has shown that the PUCO should reject the Partial Settlement, based on the three-prong test and the improper negotiations that led to the Partial Settlement. But if the PUCO nonetheless approves the Partial Settlement, it should protect consumers from being forced to pay charges that may later be proven to be unreasonable and unlawful. If the PUCO approves the Partial Settlement, during the pendency of any appeal of the decision it should protect consumers by making Duke's collection of the shared savings incentive subject to refund.

The PUCO has, in the past, ordered utility rates to be subject to refund, and the Ohio Supreme Court has approved such measures. In 1983, for example, the PUCO determined that a portion of the allowance related to Columbus & Southern Ohio Electric Company's construction work in progress for the Zimmer plant would be collected

subject to refund to customers.[39] After the PUCO's action was upheld on appeal,[40] the PUCO ordered the utility to refund approximately $4.5 million to its customers.[41] The PUCO ordered the collection to be subject to refund in order to protect customers in the event of a later decision that the utility was collecting more from customers than warranted by law, rule, or reason.

A more recent example of the PUCO collecting rates subject to refund was in the proceeding concerning the Ohio Supreme Court's remand of AEP Ohio's first electric security plan ("AEP ESP 1"). In that appeal, the Court determined that the provider of last resort ("POLR") rates approved in the AEP ESP 1 Order were not supported by record evidence, and remanded that issue to the PUCO for further consideration.[42] After the Court remanded the POLR issue (and the environmental carrying charges) to the PUCO, OCC and others requested that the PUCO either stay the collections of the POLR charge, or collect the charge subject to refund.[43] Though the PUCO first directed AEP Ohio to remove the rates from tariffs,[44] it subsequently ordered the charges collected subject to refund.[45]

---

[39] *In re Columbus & Southern Ohio Electric Co.*, Case No. 81-1058-EL-AIR, Entry (November 17, 1982).

[40] *Columbus & Southern Ohio Electric Co. v. Pub. Util. Comm.* (1984), 10 Ohio St.3d 12.

[41] *In the Matter of the Application of Columbus & Southern Ohio Electric Company for Authority to Amend and Increase Certain of Its Rates and Charges for Electric Service, Amend Certain Terms and Conditions of Service and Revise its Depreciation Accrual Rates and Reserves*, Case No. 81-1058-EL-AIR, Order on Rehearing (May 1, 1984).

[42] *In re Application of Columbus S. Power Co.*, 128 Ohio St. 3d 512, 518, 2011-Ohio-1788, 947 N.E.2d 655.

[43] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Asset*, Case No. 08-917-EL-SSO, Motion (April 26, 2012).

[44] *Id.*, Entry (May 4, 2012).

[45] *Id.*, Entry (May 25, 2012).

Making collection of the shared savings incentive subject to refund would help to protect consumers and the public interest. The PUCO might not be able to provide post hoc refunds because they may be considered to be retroactive ratemaking, which is prohibited under *Keco*.[46] Without a PUCO order that makes collection of the shared savings incentive subject to refund, any intervenor appealing the decision could win on the merits but customers could still lose because Duke might not have to refund monies collected from customers. For consumers, this would be "a somewhat hollow victory."[47]

Further, obtaining a stay from the Ohio Supreme Court is cost prohibitive because of the bonding requirement in R.C. 4903.16. The $19.75 million bond that would be required for a stay under the statute is likely to be beyond the means of any of the intervenors. The Court has recognized "the difficulty a public agency such as OCC faces in dealing with the bond requirement" under the statute.[48]

Should the PUCO approve the Partial Settlement (which OCC does not recommend), it should act to protect consumers from further harm while any court appeals are pending. To do this, the PUCO should make collection of the shared savings incentive in the Partial Settlement subject to refund.

IV. CONCLUSION

The Partial Settlement fails all three prongs of the PUCO's test for reviewing stipulations. The Partial Settlement fails the first prong because it was not the result of serious bargaining among parties with diverse interests because the interests of Duke and

[46] *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254, 2 O.O.2d 85, 141 N.E.2d 465.

[47] *In re Application of Columbus S. Power Co.*, 128 Ohio St. 3d at 516.

[48] *Id.* at 517.

the PUCO Staff are too closely aligned. In addition, the advocates representing all of Duke's customer classes were not invited to participate in settlement discussions or given a meaningful opportunity to provide input on the Partial Settlement. The Partial Settlement fails the second prong because benefits to customers and the public interest in the Partial Settlement are illusory. And the Partial Settlement fails the third prong because it violates the important regulatory principle, and practice, that all customer classes must be included in settlement discussions. To protect consumers against an unlawful and unreasonable rate increase of $19.75 million, the PUCO should reject the Partial Settlement.

Respectfully submitted,

BRUCE J. WESTON (0016973)
OHIO CONSUMERS' COUNSEL

/s/ Terry L. Etter
Terry L. Etter (0067445), Counsel of Record
Kyle L. Kern (0084199)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: (614) 466-7964 (Etter direct)
Telephone: (614) 466-9585 (Kern direct)
terry.etter@occ.ohio.gov
kyle.kern@occ.ohio.gov
(willing to accept email service)

Dane Stinson (0019101)
Bricker and Eckler LLP
100 South Third Street
Columbus, Ohio 43215
Telephone: (614) 227-4854
DStinson@bricker.com
(willing to accept email service)

Outside Counsel for the
Office of the Ohio Consumers' Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief was served on the persons stated below via electronic transmission this 28th day of April 2016.

/s/ Terry L. Etter
Terry L. Etter
Assistant Consumers' Counsel

SERVICE LIST

Natalia.messenger@puc.state.oh.us
John.jones@puc.state.oh.us
Bojko@carpenterlipps.com
sechler@carpenterlipps.com
Allison@carpenterlipps.com
ghiloni@carpenterlipps.com
cmooney@ohiopartners.org
jvickers@elpc.org
Amy.Spiller@duke-energy.com
Elizabeth.Watts@duke-energy.com
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com
jkylercohn@BKLlawfirm.com
mfleisher@elpc.org
callwein@keglerbrown.com

Attorney Examiners:

Nicholas.walstra@puc.state.oh.us

Summary: Brief Brief Opposing the Partial Settlement by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Etter, Terry L.