

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

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

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**I. INTRODUCTION**

These cases involve the unusual circumstance where an order of the Public Utilities Commission of Ohio (“PUCO”)<sup>1</sup> would be overturned by a Partial Settlement.<sup>2</sup> Under the Partial Settlement, customers of Duke Energy Ohio, Inc. (“Duke”) would pay \$19.75 million more than they would under the Order.

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<sup>1</sup> Case No. 14-457-EL-RDR (“14-457”), Finding and Order (May 20, 2015) (“Order”) 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.

<sup>2</sup> Case Nos. 14-457-EL-RDR 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.

In its Order, the PUCO ruled that Duke cannot use banked savings<sup>3</sup> to determine the annual shared savings incentive it should receive through its energy efficiency and peak demand reduction (“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. It is also unlikely that Duke would receive a shared savings incentive for 2014.

The Office of the Ohio Consumers’ Counsel (“OCC”) and other customer parties in these proceedings<sup>4</sup> have shown that the PUCO should reject the Partial Settlement. The negotiation process used to reach the Partial Settlement was improper. In addition, the Partial Settlement does not meet the PUCO’s three-prong test for reviewing and approving settlements. 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.<sup>5</sup>

## **II. RECOMMENDATIONS**

### **A. The Partial Settlement is improper because it resulted from negotiations that excluded all the customer classes that would pay the \$19.75 million shared savings incentive.**

The Partial Settlement would have customers pay \$19.75 million more than the PUCO’s Order, even though customers were unlawfully excluded from negotiations

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<sup>3</sup> 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).

<sup>4</sup> 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, also is an intervenor in these proceedings.

<sup>5</sup> If OCC does not address an argument presented in the Signatories’ initial briefs, that should not be construed as OCC’s acquiescence to the argument.

leading to the Partial Settlement. Only Duke and the PUCO Staff were involved in negotiations that led to the Partial Settlement that was distributed to the intervenors in these cases on December 30, 2015.<sup>6</sup> None of the intervenors were invited to the settlement discussions.<sup>7</sup>

The Signatories claim that the customers who have intervened in these proceedings had an opportunity to negotiate before the Partial Settlement was filed on January 6, 2016. The PUCO Staff states: “Staff began settlement discussions with Duke in October, 2015, and drafted a stipulation that was sent to the intervening parties on December 30, 2015. Staff asked the parties to respond to the draft stipulation by noon on January 6, 2016. After failing to receive any input from the intervening parties by the deadline given, Staff and Duke filed the finalized Stipulation late in the afternoon on January 6, 2016.”<sup>8</sup> Duke asserts that the document sent to intervenors on December 30, 2015 was “identified as a draft proposal agreement and was one for which Staff solicited further discussion among the parties.”<sup>9</sup> Duke claims the timeframe given for intervenors to respond – less than four business days<sup>10</sup> – was “an appropriate period of time by which parties were to respond....”<sup>11</sup> To the contrary, the Signatories have demonstrated the exclusionary nature of the negotiations.<sup>12</sup>

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<sup>6</sup> See Tr. Vol. I at 61, 156, 161-162, 295-296, 314.

<sup>7</sup> See *id.* at 103-104, 267, 296; OCC Ex. 3 (Gonzalez Testimony) at 8,10; OMA Ex. 15.

<sup>8</sup> PUCO Staff Brief at 5-6.

<sup>9</sup> Duke Brief at 2-3.

<sup>10</sup> See OCC Brief at 7.

<sup>11</sup> Duke Brief at 3.

<sup>12</sup> OMA Brief at 4-7; OEG Brief at 2-4; OPAE Brief at 2-3.

As the PUCO Staff noted, settlement discussions regarding the shared savings incentive began in October 2015, although the significant discussions did not occur until late December 2015. During that three-month period, neither the PUCO Staff nor Duke approached any of the intervenors regarding settlement in these cases. Instead, the negotiations that led to the Partial Settlement were conducted exclusively between the PUCO Staff and Duke.<sup>13</sup> The intervenors were not contacted about a settlement until after *the PUCO Staff and Duke* had reached an agreement.

The PUCO has recognized that excluding an entire customer class from negotiations is prohibited:

[N]o particular customer class may be intentionally excluded from negotiations. The Ohio Supreme Court has previously expressed grave concern regarding the adoption of a partial stipulation where the stipulation arose from settlement talks from which an entire customer class was intentionally excluded. *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 233, 661 N.E.2d 1097 (1996).<sup>14</sup>

Because the negotiations in these cases excluded *all* customer classes, the conduct of the PUCO Staff and Duke was even more egregious than in *Time Warner AxS*. Their conduct prevented *all* customer classes from having any meaningful input into the amount of shared savings they would pay. The Partial Settlement is contrary to the PUCO's standards for approving partial settlements, as endorsed by the Ohio Supreme

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<sup>13</sup> See Tr. Vol. I at 61, 156, 161-162, 295-296, 314.

<sup>14</sup> *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) ("AEP Ohio PPA Order") at 53.

Court.<sup>15</sup> The Partial Settlement also undermines the integrity and openness of the negotiation process.<sup>16</sup> The PUCO should reject the Partial Settlement.

**B. The Partial Settlement does not represent serious bargaining among capable and knowledgeable parties with diverse interests.**

**1. 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.**

The PUCO Staff claims that “the compromises made by Duke and Staff show that the Stipulation was a product of serious bargaining.”<sup>17</sup> But, as discussed in OCC’s initial brief, it is difficult to know what compromises, if any, were actually made.<sup>18</sup> The PUCO Staff did not file comments, reply comments, or a staff report in the 14-457 case, and filed comments only regarding the need for an audit in the 15-534 case. Hence, the PUCO Staff’s pre-negotiation position in these cases is unknown. One cannot gauge whether there was disagreement between the PUCO Staff and Duke over banked savings, or if so, the nature and depth of that disagreement. The Signatories’ assertions regarding any compromises made during their negotiations cannot be verified, and thus are baseless.

The unwillingness of the Signatories to negotiate the key element of the Partial Settlement<sup>19</sup> – the additional needless \$19.75 million in shared savings that customers

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<sup>15</sup> See *Time Warner AxS v. PUCO* (1996), 75 Ohio St. 3d 229, 234, n. 2.

<sup>16</sup> See *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., Order on Remand (October 24, 2007) at 27; *Ohio Consumers’ Counsel v. Public Utilities Commission*, 111 Ohio St.3d 300, 320, 2006-Ohio-5789, 856 N.E.2d 213.

<sup>17</sup> PUCO Staff Brief at 9. Duke also claims that compromises were made. Duke Brief at 2.

<sup>18</sup> OCC Brief at 9-10.

<sup>19</sup> See OMA Brief at 6-7; OPAE Brief at 3.

will pay – also shows that the Partial Settlement was not the result of serious bargaining.<sup>20</sup> After excluding all the intervenors from the settlement discussions,<sup>21</sup> the Signatories sent the Partial Settlement by email to the intervenors, claiming that it “reasonably resolves all such issues, but mainly the shared savings mechanism....”<sup>22</sup> Hence, *before* sending the “draft” Partial Settlement to intervenors on December 30, 2015, the Signatories’ minds were made up that a deal had been reached, which was final. There was no offer to meet with the intervenors to discuss the Partial Settlement before it was filed.

The record in this proceeding shows that the Partial Settlement was not the result 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. Intervenors representing all the customer classes that would pay the shared savings incentive in the Partial Settlement were excluded from negotiations, and thus 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.”<sup>23</sup> But on brief, Duke makes no claim that its interests are diverse from the PUCO Staff’s. Rather, Duke asserts that a diversity of interests is not needed for a settlement to be approved.<sup>24</sup> Duke is wrong.

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<sup>20</sup> See *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) at 27.

<sup>21</sup> See Tr. Vol. I at 103-104, 267, 296; OCC Ex. 3 (Gonzalez Testimony) at 8, 10; OMA Ex. 15.

<sup>22</sup> OMA Ex. 21.

<sup>23</sup> Joint Ex. 1 at 3. The word “Parties” in the Partial Stipulation refers only to Duke and the PUCO Staff. *Id.* at 1.

<sup>24</sup> Duke Brief at 4, citing AEP Ohio PPA Order at 52.



The diversity of interests among the signatory parties to a settlement should remain a PUCO consideration in reviewing settlements, especially in situations such as this one where no customer class signed the agreement (or was even invited to participate in negotiations). Indeed, the Ohio Supreme Court’s admonition in *Time Warner AxS* shows that the consideration of a diversity of interests is essential in evaluating partial settlements.

Moreover, the PUCO has long considered the diversity of interests among signatory parties when reviewing partial settlements.<sup>25</sup> Most recently, the PUCO reviewed a settlement agreement and concluded that it was supported “by a diverse group of customers....”<sup>26</sup> And despite its statement in the AEP Ohio PPA Order that diversity of interests is not part of the three-prong test, the PUCO nevertheless considered the issue in that case and found that “contrary to OCC/APJN’s position, the signatory parties represent a wide variety of diverse interests.”<sup>27</sup> Hence, it is appropriate for the PUCO to continue considering the diversity of interests among the signatory parties as part of its process for reviewing settlements.

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<sup>25</sup> See, e.g., *In the Matter of the Restatement of the Accounts and Records of The Cincinnati Gas & Electric Company, The Dayton Power and Light Company, and Columbus & Southern Ohio Electric Company*, Case No. 84-1187-EL-UNC, Opinion and Order (November 26, 1985), 1985 Ohio PUC LEXIS 9, [21], 71 P.U.R.4th 140, 71 P.U.R.4th 140; *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Approval, Pursuant to Revised Code Section 4929.11 of a Tariff to Recover Conservation Expenses and Decoupling Revenues Pursuant to Automatic Adjustment Mechanisms and for Such Accounting Authority as May Be Required to Defer Such Expenses and Revenues for Future Recovery Through Such Adjustment Mechanisms*, Case No. 05-1444-GA-UNC, Supplemental Opinion and Order (June 27, 2007) at 15; *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.

<sup>26</sup> *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case Nos. 14-1297-EL-SSO, et al., Opinion and Order (March 31, 2016) at 43.

<sup>27</sup> AEP Ohio PPA Order at 52.

In its brief, the PUCO Staff did claim that the Signatories represent diverse interests. The PUCO Staff asserted that it is “accountable for balancing the interests of all of Ohio’s ratepayers” and that it “represents the lowest income residential consumers, the largest industrial consumers, and everyone in between.”<sup>28</sup> But that is not the entirety of the PUCO Staff’s claim of representation. As PUCO Staff witness Donlon stated at hearing, the PUCO Staff also believes it represents “the utilities.”<sup>29</sup> But the PUCO Staff cites no legal authority for its claim to represent the interests of any constituency. In fact, there is none.<sup>30</sup>

The PUCO Staff also asserts that “the quality of the signatory parties here is sufficient for a stipulation.”<sup>31</sup> If that were the case, *any* two parties who have expertise in PUCO proceedings similar to that of the Signatories could satisfy the first prong of the PUCO’s test for settlements by reaching an agreement through exclusionary negotiations. Nevertheless, the “quality” of the parties to a settlement is highly subjective, was not a part of the test sanctioned by the Ohio Supreme Court, and should not be a consideration when no customer class was invited to participate in negotiations or signed a settlement. What’s more, the PUCO Staff’s position deprives OCC and other parties of their legal right of intervention under R.C. 4903.221, and foreseeably would set a dangerous precedent under which the PUCO considers only utility interests as supported by the PUCO Staff.

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<sup>28</sup> PUCO Staff Brief at 8, citing Tr. Vol. I at 246-247.

<sup>29</sup> Tr. Vol. I at 246.

<sup>30</sup> Unlike OCC, which statutory authorization to represent residential consumers. R.C. 4911.02.

<sup>31</sup> PUCO Staff Brief at 8.

The record in these proceedings shows that the Partial Settlement does not include 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 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.**

In their briefs, Duke and the PUCO Staff claim that the Partial Settlement, as a package, benefits customers and the public interest.<sup>32</sup> They make many of the same assertions as were found in the testimony of their witnesses. As discussed in OCC's initial brief, these arguments are faulty.<sup>33</sup>

The PUCO Staff claims that the Partial Settlement benefits customers by capping the amount of shared savings incentive that Duke can earn for 2013 through 2016 at \$19.75 million.<sup>34</sup> Duke claims that the Partial Settlement benefits customers because it provides a reduced amount of shared savings for Duke than Duke has claimed for 2013 and 2014.<sup>35</sup> But the Signatories ignore the fact that the Order gives Duke *no* shared savings for 2013,<sup>36</sup> and likely for any year that Duke does not achieve the statutory benchmarks. Hence, their claim of benefits for customers in the Partial Settlement is baseless.

In reality, the Partial Settlement does not benefit customers or the public interest, and in fact harms both. OMA showed that the shared savings provided to Duke through

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<sup>32</sup> Duke Brief at 4-6; PUCO Staff Brief at 10-11.

<sup>33</sup> See OCC Brief at 10-12.

<sup>34</sup> PUCO Staff Brief at 10.

<sup>35</sup> Duke Brief at 5.

<sup>36</sup> Order at 5.

the Partial Settlement contravenes the intent of shared savings.<sup>37</sup> As OMA noted, the PUCO has recognized that a shared savings incentive is meant to motivate electric utilities to exceed energy efficiency benchmarks on an annual basis, when the mandated benchmarks continue to rise.<sup>38</sup> But the Partial Settlement harms customers by increasing the amounts they pay for electricity by allowing Duke to reap a shared savings incentive even though Duke has not met or exceeded the statutory benchmarks.<sup>39</sup>

The Partial Settlement's benefits are weighted heavily towards Duke,<sup>40</sup> while customers end up bearing the brunt of Duke's \$19.75 million in needless 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 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.**

Regarding the third prong of the test, Duke claims that no party has cited a particular law or regulation violated by the Partial Settlement, and thus the Partial Settlement meets the third prong of the test.<sup>41</sup> Duke is wrong. On brief, OCC shows that the intervenors' rights to participate in this proceeding under R.C. 4903.221 were violated when they were excluded from negotiations.<sup>42</sup> What's more, the third prong refers to "regulatory principles or practices," which includes more than just laws and

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<sup>37</sup> OMA Brief at 7-9.

<sup>38</sup> *Id.* at 8, citing Order at 5.

<sup>39</sup> *Id.* at 8-9. *See also* OEG Brief at 5-6.

<sup>40</sup> *See* OMA Brief at 9-13.

<sup>41</sup> Duke Brief at 6.

<sup>42</sup> OCC Brief at 14-15.

regulations. “Regulatory principles and practices” encompasses a broad spectrum of regulatory activities.

OCC witness Gonzalez noted that the Partial Settlement violates important regulatory principles and practices concerning the negotiation of settlements and the overturning of PUCO decisions.<sup>43</sup> As OCC and other intervenors discussed on brief, the Partial Settlement violates the basic principle established by the Ohio Supreme Court that settlement negotiations be inclusive, rather than exclusionary.<sup>44</sup>

The PUCO Staff and Duke each contend that the Partial Settlement creates efficiency for future proceedings because in the future Duke cannot propose a shared savings mechanism that uses banked savings.<sup>45</sup> This is not true.

As pointed out by OPAE witness Rinebolt, the Partial Settlement has an escape clause that allows Duke to seek a shared savings incentive that is consistent with any change in law, regulation, or order,<sup>46</sup> even if the order concerned other utilities.<sup>47</sup> This was confirmed during the cross-examination of Duke witness Duff:

Q. [By Ms. Bojko] Right. And in response to Mr. Boehm, you said that it prohibits the Company from putting forth a mechanism to use banked savings to get an incentive; however, there is an exception provided for in the stipulation; is that correct?

A. [By Mr. Duff] The stipulation says that if there are changes to law, regulation, or order regarding shared savings, then the Company – then obviously the Company could potentially put forward a mechanism, yes.

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<sup>43</sup> OCC Ex. 3 (Gonzalez Testimony) at 22.

<sup>44</sup> OCC Brief at 12-13. *See also* OMA Brief at 15; OEG Brief at 2-4; OPAE Brief at 2-3.

<sup>45</sup> PUCO Staff Brief at 11-12; Duke Brief at 5-6.

<sup>46</sup> OPAE Ex. 3 (Rinebolt Testimony) at 12-13, citing Joint Ex. 1 at 6.

<sup>47</sup> Tr. Vol. I at 163-164.

Q. So it's not an outright prohibition to seeking a shared savings incentive using banked savings in the future; is that correct?

A. No, it's not.

Q. And Duke is permitted to seek a shared savings incentive consistent with any change in law. Could that change in law occur prior to 2017?

A. Yes, I believe it was change in law from the time the stipulation was signed.<sup>48</sup>

The Partial Settlement violates several other important regulatory principles and practices, as discussed by the intervenors on brief.<sup>49</sup> Indeed, the Partial Settlement is contrary to existing precedent disallowing the use of banked savings to trigger shared savings.<sup>50</sup> The Partial Settlement does not meet the third prong of the PUCO's test for reviewing and approving settlements. The PUCO should reject the Partial Settlement.

### **III. CONCLUSION**

The Partial Settlement fails all three prongs of the PUCO's test for reviewing stipulations. To protect consumers against an unlawful and unreasonable rate increase of \$19.75 million, the PUCO should reject the Partial Settlement. If the PUCO approves the Partial Settlement – which OCC does not recommend – the PUCO should make collection of the shared savings incentive subject to refund, as recommended by OCC.<sup>51</sup>

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<sup>48</sup> *Id.* at 78.

<sup>49</sup> OMA Brief at 13-18 (violation of audit practices, utility accounting practices, and PUCO orders); OPAE Brief at 8-9 (violation of PUCO precedent regarding use of banked savings); OEG Brief at 6-8 (violation of PUCO precedent regarding use of banked savings, and state policies ensuring reasonably priced electric service and facilitating Ohio's effectiveness in a global economy).

<sup>50</sup> OPAE Ex. 3 (Rinebolt Testimony) at 13-14.

<sup>51</sup> *See* OCC Brief at 15-17; OCC Ex. 3 (Gonzalez Testimony) at 23.

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