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

APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

On October 26, 2016 in these cases, the Public Utilities Commission of Ohio ("PUCO" or "Commission") issued Decisions[1] that will cost Ohioans $19.75 million for energy efficiency profits to their utility, over two years. Duke convinced the PUCO to reverse its May 2015 Order[2] ruling that consumers would not have to pay a shared savings incentive to Duke Energy Ohio, Inc. ("Duke") for its energy efficiency/peak demand reduction ("EE/PDR") program. In its May 2015 Order the PUCO held that

[1] Case No. 14-457-EL-RDR, Second Entry on Rehearing (October 26, 2016) ("Second Entry on Rehearing"); Case No. 15-534-EL-RDR, Opinion and Order (October 26, 2016) ("O&O") (collectively, "Decisions").

[2] Case No. 14-457-EL-RDR, Finding and Order (May 20, 2015) ("May 2015 Order").

Duke was prohibited from using banked savings[3] to determine whether it is entitled to a shared savings incentive from its EE/PDR program.

The catalyst for changing the PUCO's May 2015 Order was a Partial Settlement[4] negotiated only between Duke and PUCO Staff – without the intervening parties. And the catalyst for the Partial Settlement reversing the May 2015 Order was not based on the record in the proceeding, but the fact that the timing of the order prevented Duke from amending its portfolio plan under SB 310.[5] Hence, the intervening parties, which represented all customer classes, were denied the opportunity to negotiate the shared savings (profits) amount they ultimately would be forced to pay. The PUCO's approval of the Partial Settlement denied the intervening parties their statutory right to protect their interests in PUCO proceedings under R.C. 4903.221.

OCC files this Application for Rehearing of the Decisions.[6] The PUCO's Decisions are unjust, unreasonable, and unlawful for the following reasons:

> Assignment of Error 1: The PUCO's Decisions are contrary to the Ohio Supreme Court's admonition in *Time Warner AxS*[7] against excluding entire customer classes from settlement discussions. The PUCO's finding that Duke's customer classes were not "purposely" excluded from settlement discussions is against the

[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).

[4] Case Nos. 14-457-EL-RDR and 15-534-EL-RDR, 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.

[5] *Id.* at 192, 260-261. Second Entry on Rehearing at 13; O&O at 15.

[6] This Application for Rehearing is filed pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35. OCC seeks rehearing only of the PUCO's approval of the Partial Settlement. OCC does not seek rehearing of the PUCO-approved reductions to the amount Duke will collect from customers. O&O at 16-17. OCC agrees that the expenses identified by the PUCO Staff in Case No. 15-534 were inappropriate for collection from customers. Although the Partial Settlement was filed in both cases, the PUCO has not consolidated the cases, and in fact issued separate decisions in the two cases. Because OCC is seeking rehearing of only the PUCO's decision regarding the Partial Settlement, OCC is filing a single application for rehearing in both cases.

[7] *Time Warner AxS v. PUCO* (1996), 75 Ohio St. 3d 229.

manifest weight of the evidence, violating R.C. 4903.09, and deprives customers of their right to meaningful intervention under R.C. 4903.221.

Assignment of Error 2: The PUCO unreasonably determined that the Partial Settlement was the product of serious bargaining. The record shows that intervenors were excluded from any serious negotiations concerning the Partial Settlement (which increases what consumers pay for energy efficiency), and could offer only non-substantive changes to the Partial Settlement. Thus, the PUCO's Decisions violate R.C. 4903.09.

Assignment of Error 3: The PUCO unreasonably determined that the signatory parties, i.e., only Duke and the PUCO Staff, represent diverse interests. Duke represents itself and the record shows that the PUCO Staff considers itself to be a "neutral arbitrator." Hence, the customers' interests are not represented among the two signatory parties who agreed to increase what consumers pay for energy efficiency. The PUCO's Decisions are not supported by the record in these cases and thus violate R.C. 4903.09.

Assignment of Error 4: The PUCO unreasonably determined that the Partial Settlement benefits the public interest and consumers. The PUCO unreasonably determined that a "compromise" whereby customers pay an exorbitant amount of shared savings (profits) that Duke would not otherwise receive, combined with Duke's agreement not to pursue future shared savings profits, alleviates the risk to customers of having to pay significantly more in shared savings profits for energy efficiency. The PUCO also unreasonably relied on Duke's assertions regarding the amount of the profits it could collect from customers for energy efficiency.

Assignment of Error 5: The PUCO unlawfully determined that the Partial Settlement does not violate any important regulatory principles or practices. Representatives of all customer classes were excluded from negotiations that resulted in the Partial Settlement that will increase charges to customers. Hence, the Partial Settlement violates regulatory principles set forth by the Ohio Supreme Court in *Time Warner AxS*.

For the reasons more fully explained in the attached Memorandum in Support, the PUCO should abrogate its Decisions insofar as they approve the Partial Settlement.

Respectfully submitted,

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TABLE OF CONTENTS

PAGE

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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
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MEMORANDUM IN SUPPORT

I. INTRODUCTION

In its May 2015 Order, the PUCO ruled that Duke can use so-called banked savings to meet the EE/PDR benchmarks under Ohio law, but Duke cannot use banked savings to charge its customers the shared savings (profit) incentive under the settlement in Case No. 10-2326-EL-RDR.[8] The PUCO found that the shared savings profit incentive "is designed to motivate and reward the utility for exceeding energy efficiency standards on an annual basis. As the mandated benchmark rises every year, Duke must continue to find ways to encourage energy efficiency."[9] The PUCO determined that a large bank of accrued savings would diminish Duke's motivation to push energy efficiency programs in following years.[10] The PUCO ruled that "in order for the structure

[8] May 2015 Order at 5.

[9] *Id.*

[10] *Id.*

to continue to serve as a true incentive for Duke to exceed the benchmarks, the Commission finds the banked saving cannot be used to determine the annual shared savings achievement level."[11] The May 2015 Order was just and reasonable and protected consumers from paying more unneeded profits to Duke.

But while the May 2015 Order was on rehearing,[12] the PUCO Staff (which had not formally participated in the 14-457 case) negotiated a settlement that would allow Duke to have a shared savings incentive in the amount of $19.75 million total for 2013 and 2014. The negotiations took place over a two-month period, beginning October 20, 2015 and ending December 30, 2015.[13] Intervenors, who represented all of Duke's customer classes in the cases, were not invited to any of the negotiations.[14] On December 30, 2015, Duke and the PUCO Staff sent the intervenors a "draft" settlement document.[15] Duke and the PUCO Staff made clear, however, that no modifications could be made to the substantive portions of the Partial Settlement – including the $19.75 million in shared savings that the excluded customer classes would be required to pay under the Partial Settlement.[16]

Despite these facts, the PUCO issued its Decisions approving the Partial Settlement. The PUCO ruled that the Partial Settlement met the three prongs of the test

[11] *Id.*

[12] Duke filed an application for rehearing of the Order regarding the shared savings issue on June 19, 2015.

[13] *See* OMA Ex. 18.

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

[15] *See* OMA Ex. 21.

[16] *See* OCC Ex. 3 (Gonzalez Testimony) at 9.

for PUCO approval of partial settlements.[17] As discussed herein, the PUCO's Decisions are unjust, unreasonable, unlawful, and against the manifest weight of the evidence. The PUCO should abrogate its approval of the Partial Settlement in the Decisions.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. This statute provides that any party may apply for rehearing on matters decided by the PUCO within 30 days after an order is issued. An application for rehearing must be written and must specify how the order is unreasonable and unlawful.[18]

In considering an application for rehearing, the PUCO may grant the rehearing requested in an application if "sufficient reason therefore is made to appear."[19] If the PUCO grants rehearing and determines that its order is unjust or unwarranted, or should be changed, it may abrogate or modify the order.[20] Otherwise, the order is affirmed. Under R.C. 4903.10(B), the PUCO is limited on rehearing to granting or denying a "matter[] specified in such application [for rehearing]."

OCC meets the statutory conditions applicable to an applicant for rehearing pursuant to R.C. 4903.10 and the requirements of the PUCO's rule on applications for

[17] The criteria adopted by the PUCO in evaluating settlements 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 (*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)); (2) Does the settlement, as a package, benefit ratepayers and the public interest?; and (3) Does the settlement package violate any important regulatory principle or practice? *See Consumers' Counsel v. Pub. Util. Comm'n*. (1992), 64 Ohio St.3d 123, 126.

[18] R.C. 4903.10.

[19] *Id*.

[20] *Id*.

rehearing.[21] OCC is a party to these cases and actively participated in both. Thus, OCC may apply for rehearing under R.C. 4903.10. The PUCO should determine that OCC has shown "sufficient reason" to grant rehearing on the matters specified below and should abrogate its approval of the Partial Settlement in its Decisions.

III. ERRORS

Assignment of Error 1: The PUCO's Decisions are contrary to the Ohio Supreme Court's admonition in *Time Warner AxS* against excluding entire customer classes from settlement discussions. The PUCO's finding that Duke's customer classes were not "purposely" excluded from settlement discussions is against the manifest weight of the evidence, violating R.C. 4903.09, and deprives customers of their right to meaningful intervention under R.C. 4903.221.

The Ohio Supreme Court has stated that it has "grave concerns" regarding the PUCO adopting partial settlements arising from settlement meetings that exclude entire customer classes.[22] The PUCO also has stated that "no particular customer class may be intentionally excluded from negotiations."[23]

Although the intervening parties were not invited to any of the settlement meetings that led to the Partial Settlement in these cases, the PUCO found that they were not "purposely" excluded from negotiations.[24] The PUCO gave two reasons. First, the PUCO stated that "[a] proposed settlement was offered to the intervening parties and they were given an opportunity to respond before the stipulation was ultimately filed."[25]

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[21] *See* Ohio Adm. Code 4901-1-35.

[22] *Time Warner AxS*, 75 Ohio St. 3d at 234, n. 2.

[23] *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.

[24] Decisions at 11.

[25] *Id*.

Second, the PUCO concluded that "hearings regarding the stipulation were rescheduled due to a joint request by all of the parties to continue having settlement negotiations."[26] The evidence, however, does not support the PUCO's conclusions.

First, the evidence shows that Duke and the PUCO Staff held four settlement meetings that led to the Partial Settlement. The first was on October 20, 2015 and the last three on December 28, 29, and 30, 2015.[27] In addition, the evidence shows that other "informal" communications between Duke and the PUCO Staff during that timeframe.[28] As the PUCO Staff stated in its reply brief: "Those lengthy meetings were the formal meetings that took place between Staff and Duke's counsel and substantive experts; it does not account for the informal communications that took place between counsel. Those meetings also do not account for the time taken by each signatory party internally to contemplate and discuss the terms presented by the opposing party."[29]

Yet, while Duke and the PUCO Staff were having formal meetings, "informal" communications, and internal meetings concerning the shared savings incentive that customers would pay over the course of that two-month period, neither contacted any of the customer classes to invite them to participate. Intervenors were not made aware of the negotiations until after a settlement agreement had been reached between Duke and the PUCO Staff. And as part of that settlement, Duke and PUCO Staff agreed to a non-negotiable $19.75 million shared savings charge to customers.

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[26] *Id*.

[27] OMA Ex. 18.

[28] PUCO Staff Reply Brief (May 13, 2016) at 4. *See also* Tr. Vol. I at 246, 290.

[29] PUCO Staff Reply Brief at 4 (footnotes omitted).

This is exactly the type of exclusionary negotiations that the Ohio Supreme Court has determined to be "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."[30] There is absolutely no doubt that, over the course of two months, Duke and the PUCO Staff intended only to negotiate between themselves, to customers' detriment.

Second, the email accompanying the "draft" settlement was not an invitation to negotiate. Instead, the email asked intervenors to let PUCO Staff counsel know "whether your client has an interest in being a signatory party."[31] The document itself was not a framework for negotiations, but instead was a complete stipulation and recommendation. These facts, plus the extraordinarily brief amount of time given to intervenors to decide whether to join the agreement (four business days over the holidays[32]) that Duke and the PUCO Staff had taken months to negotiate, show that intervenors were presented with a "take it or leave it" ultimatum. There was nothing unintentional about that.

Third, when "negotiations" with the intervenors *were* held three weeks after the Partial Settlement was filed, Duke and the PUCO Staff made clear that no modifications could be made to the substantive portions of the Partial Settlement.[33] This included the

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[30] *Time Warner AxS*, 75 Ohio St. 3d at 234, n. 2.

[31] OMA Ex. 21.

[32] Intervenors were notified of the Partial Settlement by email 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.

[33] *See* OCC Ex. 3 (Gonzalez Testimony) at 9.

$19.75 million in shared savings that customers would pay.[34] The $19.75 million was the most important aspect of the Partial Settlement for the intervenors, including OCC. Yet, Duke and the PUCO Staff precluded the intervening parties from negotiating on the shared savings amount that customers would be forced to pay.

The PUCO's finding that the hearing on the Partial Settlement was rescheduled at the intervenors' request to permit negotiations is of no consequence. Rescheduling the hearing to allow parties to negotiate does not change the critical fact that after the settlement was filed, Duke and the PUCO Staff were resolutely unwilling to negotiate the most crucial term – the $19.75 million shared savings amount that only Duke and the PUCO Staff had decided customers would be required to pay. Indeed, the record shows that the hearing was rescheduled due to several other major, complex proceedings in progress at the time involving many of the parties in these cases, as described in OMA Exhibit 21.

The manifest weight of the evidence shows that entire customer classes (indeed, *all* customer classes) were intentionally excluded from the negotiations. The PUCO's findings to the contrary are thus unjust and unreasonable. Further, the PUCO's findings violated R.C. 4903.09. That statute requires the PUCO to make findings of fact based on the record of the proceedings. Here, the PUCO's findings are contrary to the record, and are thus unlawful.

Further, the exclusionary negotiations over the Partial Settlement violated R.C. 4903.221 by denying customers their right to meaningful intervention in these cases. Duke and the PUCO Staff held numerous meetings and other communications that did

[34] *See id.*

not include the intervenors, but should have. Indeed, the PUCO acknowledges that the intervening parties were excluded from negotiations, but appears to justify the exclusion as not being done "purposely." Intent, however, is irrelevant when exclusionary settlement negotiations impede parties' ability to meaningfully represent their interests. The denial of the parties' right of meaningful intervention under R.C. 4903.221 is the same, whether purposeful or not.

Moreover, the PUCO Staff has stated that it acts as a "neutral arbitrator."[35] An arbitrator, according *Black's Law Dictionary*, is a "neutral person who resolves disputes between parties…."[36] Hence, the "negotiations" were conducted between a utility representing its own interests and a "neutral person who resolves disputes between parties." There was no notice to, or representation of, anyone having an adverse interest to Duke's interest (i.e., the interest of customers).

The PUCO's conclusion that intervenors were not intentionally excluded from the negotiations that resulted in the Partial Settlement is unlawful, unjust, unreasonable, and against the manifest weight of the evidence. The PUCO should abrogate its approval of the Partial Settlement in the Decisions.

[35] Tr. Vol. I at 246.

[36] Black's Law Dictionary, Tenth Edition at 127.

<u>Assignment of Error 2</u>: The PUCO unreasonably determined that the Partial Settlement was the product of serious bargaining. The record shows that intervenors were excluded from any serious negotiations concerning the Partial Settlement (which increases what consumers pay for energy efficiency), and could offer only non-substantive changes to the Partial Settlement. Thus, the PUCO's Decisions violate R.C. 4903.09.

In the Decisions, the PUCO found that the Partial Settlement was the result of serious bargaining.[37] The PUCO reached this conclusion based solely on the "significant compromises made by both Duke and Staff that was the result of several meetings over a three-month span."[38] The PUCO, however, ignored the fact that the intervenors were not included in the negotiations where these "compromises" were discussed. Intervenors were invited to sign on to the Partial Settlement only after the substantive portions of the Partial Settlement were agreed upon between Duke and the PUCO Staff.

The Ohio Supreme Court has been particularly concerned about the integrity and openness of the negotiation process in PUCO proceedings.[39] In *Time Warner AxS*, the Court expressed the basic principle that settlement negotiations be inclusive, rather than exclusive. In that case, the utility negotiated with various parties to the proceeding, as well as the PUCO Staff, but excluded the utility's competitors from the negotiations.[40] By expressing "grave concerns" regarding the exclusionary settlement discussions in that case, the Court recognized that the involvement of the PUCO Staff is not a substitute for the actual participation of customer classes in negotiations.

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[37] Decisions at 11.

[38] *Id.*

[39] *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).

[40] *Time Warner AxS*, 75 Ohio St. 3d at 234, n. 2.

Here, the record shows that once Duke and the PUCO Staff had reached agreement on the substantive portions of the Partial Settlement, they were unwilling to compromise with intervenors regarding the material portions of the settlement, and in particular the $19.75 million in shared savings given to Duke. As discussed above, the December 30, 2015 email accompanying the Partial Settlement was not an offer to negotiate. Further, the intervenors could not reasonably protect their interests under the arbitrary and exceptionally short timeline Duke and the PUCO Staff set for response. Although Duke and the PUCO Staff negotiated for two months, 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.

In order for a Partial Settlement to be the result of serious bargaining, both signatory and non-signatory parties should have a fair opportunity to negotiate. For example, the PUCO has looked at whether there were numerous meetings involving signatory and non-signatory parties, and whether some meetings were held without the utility present.[41] The settlement negotiations must be open and transparent.[42] Such is not the case here.

The evidence in these cases shows that once Duke and the PUCO Staff 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

[41] *See In the Matter of Applications of Ohio Power Company and Columbus Southern Power Company*, Case Nos. 10-2376-EL-UNC, et al., Opinion and Order (December 14, 2011) at 35.

[42] *Id.*

2013 and 2014 – was not open to negotiation. The Partial Settlement thus was not the product of serious bargaining.

The Partial Settlement fails to meet the first prong of the PUCO's test for approving settlements. By finding otherwise, the PUCO's Decisions are contrary to the record in these cases, and thus violate R.C. 4903.09. The PUCO should abrogate its approval of the Partial Settlement in the Decisions.

> **Assignment of Error 3: The PUCO unreasonably determined that the signatory parties, i.e., only Duke and the PUCO Staff, represent diverse interests. Duke represents itself and the record shows that the PUCO Staff considers itself to be a "neutral arbitrator." Hence, the customers' interests are not represented among the two signatory parties who agreed to increase what consumers pay for energy efficiency. The PUCO's Decisions are not supported by the record in these cases and thus violate R.C. 4903.09.**

In the Decisions, the PUCO found that Duke and the PUCO Staff represent diverse interests.[43] The PUCO erred on this point. Duke, of course, represents its own interests, including the interests of its shareholders. The PUCO Staff believes it represents everyone, including utilities.[44] Hence, the parties to the Partial Settlement are a utility and the PUCO Staff, which also represents the interests of the utility. This is not the type of diversity of interests that is a testament to serious bargaining occurring. Outside of the Partial Settlement, however, are a wide variety of customer classes who will be required to pay the shared savings incentive to Duke. Those parties oppose the Partial Settlement.

Settlements should represent a robust mixture of interests. Customers should be well-represented among the signatory parties to ensure that serious bargaining has truly occurred. Because of the exclusionary negotiations that took place in these proceedings,

[43] Decisions at 11.

[44] Tr. Vol. I at 246.

there are no signatories to the Partial Settlement who represent customer classes. The Partial Settlement thus lacks diverse interests.

The record in this proceeding does not support the PUCO's conclusion that the Partial Settlement involved a diversity of interests. Hence, the PUCO's Decisions are contrary to the record in these cases, and violate R.C. 4903.09. The Decisions are unjust, unreasonable, and unlawful, and should be abrogated.

> **Assignment of Error 4: The PUCO unreasonably determined that the Partial Settlement benefits the public interest and consumers. The PUCO unreasonably determined that a "compromise" whereby customers pay an exorbitant amount of shared savings (profits) that Duke would not otherwise receive, combined with Duke's agreement not to pursue future shared savings profits, alleviates the risk to customers of having to pay significantly more in shared savings profits for energy efficiency. The PUCO also unreasonably relied on Duke's assertions regarding the amount of the profits it could collect from customers for energy efficiency.**

The PUCO found that the Partial Settlement serves the public interest and benefits customers. The PUCO claimed the Partial Settlement represents a compromise between Duke and the PUCO Staff that "alleviates the risk" that customers would pay "significantly more" than the $19.75 million Duke would receive from customers through the Partial Settlement.[45] The PUCO's conclusion is unreasonable.

The PUCO unreasonably relied on Duke's assertions regarding the amount of shared savings profits it could collect from customers. Duke claimed that it could collect as much as $55 million from customers for such profits.[46] But Duke's claim was overstated. In fact, the record shows that Duke would likely collect nothing in shared savings for 2013 and 2014.[47] That is because Duke had not met the statutory benchmarks

[45] Decisions at 13.

[46] *Id.*

[47] *See* OCC Ex. 3 (Gonzalez Testimony) at 12-14.

for EE/PDR savings during those years.[48] Under the May 2015 Order, Duke thus would collect no shared savings profits because it could not use banked savings to receive a shared savings incentive.

And, under the May 2015 Order, Duke could not use banked savings to achieve a shared savings profit incentive for 2015 and 2016. The situation regarding Duke's inability to use banked savings for shared savings purposes was clear under the May 2015 Order. There was no need for certainty, as the PUCO suggests.[49]

Further, the $19.75 million is an exorbitant amount of shared savings profits for consumers to pay when compared to Duke's program costs. OCC witness Gonzalez testified that the $19.75 million in shared savings "provides Duke with an exorbitant incentive payment for less than stellar effort."[50] Mr. Gonzalez noted that the $19.75 million in profits Duke would collect from consumers represents an average of 38 percent of program spending.[51] Mr. Gonzalez stated that this is exorbitant relative to electric distribution utilities nationwide that do not own generation assets.[52] Such utilities generally receive from one to seven percent of program spending.[53] Mr. Gonzalez' testimony was not refuted by witnesses supporting the Partial Settlement or undermined at hearing.

In addition, the PUCO erred by finding that the Partial Settlement benefitted consumers and the public interest because resolution of the banked savings issues would

[48] *Id.*

[49] Second Entry on Rehearing at 12; O&O at 13.

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

[51] *Id.*

[52] *Id.* at 15-16.

[53] *Id.* at 16.

avoid protracted litigation. Obviously, with this application for rehearing and the probability of future appeals, the protracted litigation continues. In reality, the only effect of the Partial Settlement was to shift the burden of initiating the rehearing requests and future appeals from Duke to the intervening parties.

The PUCO's determination that the Partial Settlement serves the public interest and benefits customers is not supported by the record in these cases. The Partial Settlement gives Duke $19.75 million of consumer money for shared savings profits when absent the Partial Settlement, consumers likely would have paid nothing. The Partial Settlement thus does not meet the second criterion for PUCO approval of partial settlements. The PUCO should abrogate its approval of the Partial Settlement in its Decisions.

Assignment of Error 5: The PUCO unlawfully determined that the Partial Settlement does not violate any important regulatory principles or practices. Representatives of all customer classes were excluded from negotiations that resulted in the Partial Settlement that will increase charges to customers. Hence, the Partial Settlement violates regulatory principles set forth by the Ohio Supreme Court in *Time Warner AxS*.

OCC argued that because of the exclusionary nature of the negotiations in these cases, the Partial Settlement violates important regulatory principle of inclusive settlement discussions.[54] Based on its conclusion that the intervenors were not excluded from negotiations, the PUCO rejected OCC's argument.

But as discussed above, the PUCO's conclusion was erroneous because intervenors representing customer classes were excluded. And when intervenors were finally invited to settlement discussions, Duke and PUCO Staff would accept no

[54] OCC Brief at 14-15. *See also* OCC Ex. 3 (Gonzalez Testimony) at 22.

substantive changes to the Settlement on the table. Hence, the PUCO's rejection of OCC's argument is also erroneous.

The Partial Settlement violates the important regulatory principle (and practice) that all customer classes be included in negotiations. Contrary to the PUCO's determination, the Partial Settlement failed the third prong of the PUCO's test for reviewing stipulations, when the settlement increased charges to consumers without any broad-based representatives of consumers signing the settlement. The PUCO should abrogate its approval of the Partial Settlement in the Decisions.

IV. CONCLUSION

Under the Partial Settlement in these cases, Ohioans will pay $19.75 million more for energy efficiency (in profits to Duke) that they were not required to pay by the PUCO's May 2015 Order. The PUCO's later approval of the Partial Settlement was unjust, unreasonable, and unlawful. The Decisions contravene Ohio Supreme Court directives and PUCO policies that prohibit excluding entire customer classes from settlement negotiations. In addition, there was no support in the record for the PUCO's determination that the Partial Settlement met the three-prong test for approving partial settlements.

OCC has shown sufficient reason to grant rehearing in these cases. The PUCO should abrogate its approval of the Partial Settlement in its Decisions and protect consumers from paying more for energy efficiency.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing was served on the persons stated below via electronic transmission, this 25th day of November 2016.

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Summary: App for Rehearing Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Etter, Terry L.