

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke	)	
Energy Ohio, Inc. for Approval of its	)	Case No. 16-576-EL-POR
Energy Efficiency and Peak Demand	)	
Reduction Portfolio of Programs.	)	

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**POST-HEARING BRIEF  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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## TABLE OF CONTENTS

	PAGE
I. BURDEN OF PROOF AND STANDARD OF REVIEW .....	2
II. RECOMMENDATIONS .....	4
A. The Settlement does not benefit customers or the public interest. ....	4
1. The PUCO should approve a \$33.8 million annual cost cap to limit the amount that customers will pay for energy efficiency program costs and utility profits (shared savings). ....	4
a. An annual cap on program costs is essential to protect consumers because without one, Duke could charge customers an unlimited amount of money for energy efficiency programs. ....	4
b. Duke can achieve its statutory energy savings mandates under a \$33.8 million cap. ....	6
i. Duke's own projections show that it can achieve its mandates under the proposed \$33.8 million cost cap. ....	6
ii. Duke's historical energy efficiency performance demonstrates that Duke can achieve its statutory mandates at a cost to customers of \$33.8 million (the amount of the proposed cap) or less. ....	7
iii. Duke's rebuttal testimony is unreliable because Duke's witness did not understand the PUCO Staff's cost cap proposal. ....	9
iv. Nonresidential customer opt outs will reduce Duke's statutory benchmarks, which could lower the cost that Duke charges customers for energy efficiency. ....	10
c. The PUCO should reject Duke's counterproposal for a \$52 million annual cost cap. A \$52 million cap would provide limited benefits to customers because it is greater than the projected program costs and shared savings in the Settlement. ....	11

2.	The Settlement's proposed \$12.5 million cap on utility profits is excessive and does not benefit customers or the public interest. The PUCO should modify the Settlement to reduce the amount of profits that customers pay to Duke to \$7.8 million per year or less.	12
a.	The focus of energy efficiency spending should be on benefits that the programs provide to customers, not utility profits.	12
b.	The proposed \$8.0 million after tax shared savings cap in the Settlement would likely provide no benefit to customers.	13
3.	The PUCO should not authorize Duke to charge customers an unknown amount of money on undefined smart thermostat and space heating programs. Before they are to be added to the portfolio, Duke should file a future request for PUCO approval of these programs.	14
4.	The PUCO should not approve retroactive rebates to CRES providers and retailers, paid by customers.	18
5.	The PUCO should not authorize Duke to charge customers for programs in 2017 that have not been approved.	19
B.	The Settlement was not the product of serious bargaining because the residential customer class was excluded from all but one settlement negotiation between Duke and other parties to this case.	21
C.	The Settlement violates regulatory principles and practices.	22
1.	The Settlement violates the regulatory principle that rates must be just and reasonable.	22
2.	The Ohio Supreme Court precedent against retroactive ratemaking prohibits the PUCO from authorizing Duke to charge customers for program costs, lost revenues, and shared savings that accrue before approval of Duke's new portfolio.	23
D.	Any order in this case should clearly state that Duke cannot charge customers for shared savings for any year in which Duke relies on banked energy savings to meet its statutory benchmark.	25
III.	CONCLUSION	26

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The Public Utilities Commission of Ohio ("PUCO") should reject or modify the proposed settlement in this proceeding to ensure that Duke Energy Ohio's ("Duke") 400,000 residential customers are not harmed by paying too much for Duke's energy efficiency programs. Electric energy efficiency programs can benefit electric utility customers. But Duke's proposed utility-administered energy efficiency programs are unnecessarily expensive for customers. Under Duke's settlement in this case (which the PUCO Staff and the Consumers' Counsel did not sign),<sup>1</sup> Duke could charge customers an unlimited amount of money for energy efficiency program costs. It is unjust and unreasonable for Duke to charge customers for energy efficiency programs without any limitations. The Settlement would also permit Duke to charge customers an additional \$37.5 million in utility profits (shared savings). This is too much in profit for customers to pay to Duke.

Early this year, the PUCO addressed the need for limits on what customers pay to utilities for energy efficiency. The PUCO stated: "The addition of an annual cost cap is a reasonable response to concerns which have been raised regarding potential increases in

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<sup>1</sup> Joint Ex. 2 (the "Settlement").

the costs of the EE/PDR programs, and the annual cost cap should incent AEP Ohio to manage the costs of the programs in the most efficient manner possible. In light of the importance of the annual cost cap, the Commission notes that we will be reluctant to approve stipulations in other program portfolio cases which do not include a similar cap on EE/PDR program costs."<sup>2</sup>

Consistent with this ruling, the PUCO should modify the Settlement in Duke's case to require an annual "cost cap" on the total program costs and shared savings that customers will pay. The PUCO Staff, with the Office of the Ohio Consumers' Counsel's ("OCC") support, has proposed an annual cap of 3.5% of Duke's total sales to ultimate customers.<sup>3</sup> This would limit customer energy efficiency charges to about \$33.8 million per year, instead of the unlimited amount that Duke proposes to charge customers in the Settlement.

This \$33.8 million annual cost cap would provide more of the protection that Ohioans need and deserve—protection that the Settlement lacks.

## **I. BURDEN OF PROOF AND STANDARD OF REVIEW**

In PUCO proceedings, the applicant bears the burden of proof.<sup>4</sup> In the context of a stipulation, the signatory parties "bear the burden to support the stipulation" and must "demonstrate that the stipulation is reasonable and satisfies the Commission's three-part

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<sup>2</sup> Opinion & Order ¶ 32, In re Application of Ohio Power Co. for Approval of its Energy Efficiency & Peak Demand Reduction Program Portfolio Plan for 2017 through 2020, Case No. 16-574-EL-POR (Jan. 18, 2017).

<sup>3</sup> PUCO Staff Ex. 1 (Donlon Direct).

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

test."<sup>5</sup> And in electric energy efficiency cases, whether there is a settlement or not, the utility must prove that its proposed energy efficiency program portfolio is consistent with State policy under R.C. 4928.02 and satisfies the requirements of R.C. 4928.66.<sup>6</sup>

In PUCO proceedings, a settlement is merely a recommendation to the PUCO on behalf of the settling parties.<sup>7</sup> A settlement is not binding on the PUCO,<sup>8</sup> and the PUCO has the discretion to give each settlement the weight that the PUCO believes it deserves. Ultimately, the PUCO is a regulator that must "determine what is just and reasonable from the evidence presented at the hearing."<sup>9</sup>

In evaluating settlements, the ultimate issue for the PUCO's consideration is whether the agreement "is reasonable and should be adopted."<sup>10</sup> In answering this question, the PUCO has adopted the following three-prong test:<sup>11</sup>

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

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<sup>5</sup> Opinion and Order at 18, In re Application Seeking Approval of Ohio Power Co.'s Proposal to Enter into an Affiliate Power Purchase Agmt. for Inclusion in the Power Purchase Agmt. Rider, No. 14-1693-EL-SSO, (Mar. 31, 2016).

<sup>6</sup> Ohio Adm. Code ("OAC") 4901:1-39-04(E).

<sup>7</sup> Duff v. PUCO, 56 Ohio St. 2d 367, 379 (1978).

<sup>8</sup> Id. See also OAC 4901-1-30(E).

<sup>9</sup> Duff, 56 Ohio St. 2d at 379.

<sup>10</sup> Opinion & Order at 9, In re Application of Vectren Energy Delivery of Ohio, Inc. for Authority to Amend its Tariffs, Case No. 04-571-GA-AIR, (Apr. 13, 2015).

<sup>11</sup> Consumers' Counsel v. Pub. Util. Comm., 64 Ohio St. 3d 123, 126 (1992).

The PUCO has often taken into account the diversity of interests among the signatory parties, finding that diversity of interests is indicative of serious bargaining.<sup>12</sup>

## II. RECOMMENDATIONS

### A. **The Settlement does not benefit customers or the public interest.**

#### 1. **The PUCO should approve a \$33.8 million annual cost cap to limit the amount that customers will pay for energy efficiency program costs and utility profits (shared savings).**

##### a. **An annual cap on program costs is essential to protect consumers because without one, Duke could charge customers an unlimited amount of money for energy efficiency programs.**

Energy efficiency can help customers reduce their energy usage and lower their bills. But it is important to place limits on the amount that Duke can charge customers for energy efficiency.

Duke's application includes a proposed energy efficiency program budget of about \$37.8 million per year for three years.<sup>13</sup> But according to Duke, this budget is only an estimate and it does not in any way limit the amount that Duke can charge customers for energy efficiency programs. Duke witness Duff testified that, in Duke's view, when the PUCO approves a budget for an electric utility's portfolio, that budget is not "a firm budget that you have to hit your budget and then you stop spending."<sup>14</sup> Mr. Duff

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<sup>12</sup> See, e.g., In re Application of the Dayton Power & Light Co. for Approval to Modify its Competitive Bid True-up Rider, Case No. 14-563-EL-RDR (Sep. 9, 2015); In re Application of the Columbus S. Power Co. & Ohio Power Co., Case No. 05-376- EL-UNC (Feb. 11, 2015); In re Application of Columbus S. Power Co. & Ohio Power Co., for an Increase in Electric Distrib. Rates, Case No. 11-351-EL-AIR (Dec. 14, 2011); In re Application of Ohio Edison Co., The Cleveland Elec. Illuminating Co. & The Toledo Edison Co. for Authority to Provide a Standard Serv. Offer, Case No. 14-1297-EL-SSO (Mar. 31, 2016).

<sup>13</sup> Duke Ex. 7 (Ziolkowski Direct) at Attachment JEZ-1 (average annual budget for 2017-2019); OCC Ex. 5 (Duke Response to IGS-INT-01-007).

<sup>14</sup> Tr. at 35:25-36:5 (Duff).

continued: "My point is there hasn't been a total budget. There have been projections provided for the years for the portfolios but there's never been a firm budget that the company must stop spending at."<sup>15</sup> Mr. Duff confirmed that Duke does not view the program budgets presented in its application as a limit on Duke's spending of customer money.<sup>16</sup> And Mr. Duff confirmed his belief that Duke can spend an unlimited amount of customer money on programs as long as the programs are cost-effective.<sup>17</sup> Under the Settlement, Duke could charge customers \$40 million, \$50 million, \$60 million a year, or more—plus another \$12.5 million a year for utility profits<sup>18</sup>—despite presenting a much lower budget to the PUCO for approval in this case.

The PUCO should not allow Duke to charge customers an unlimited amount of money for energy efficiency programs. The cost of energy efficiency in Ohio is rising.<sup>19</sup> Duke's energy efficiency rider is one of the highest riders on customers' bills.<sup>20</sup> The Settlement does not benefit customers or the public interest because it "does not adequately protect customers from paying too much for Duke's energy efficiency programs and utility profits (shared savings)."<sup>21</sup>

An annual cap of \$33.8 million, on the other hand, would protect customers from these rising energy efficiency costs. It would "control the cost of energy efficiency."<sup>22</sup> It

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<sup>15</sup> Tr. at 36:13-16 (Duff).

<sup>16</sup> Tr. at 36:17-20 (Duff) ("Q. So it's your understanding then that the projected numbers as recorded in the amended application are not a limit on Duke's spending. A. No.").

<sup>17</sup> Tr. at 36:21-25 ("Q. And so your position is – or your interpretation is that Duke can spend an unlimited amount of money... A. Provided cost effective energy efficiency.").

<sup>18</sup> OCC Ex. 13 (Shutrump Direct) at 5:15-17.

<sup>19</sup> PUCO Staff Ex. 1 (Donlon Direct) at 6:106.

<sup>20</sup> Id. at 6:106-07; Tr. at 160:14-17 (Donlon) (stating that Duke's energy efficiency rider is the third highest rider on customers' bills).

<sup>21</sup> OCC Ex. 13 (Shutrump Direct) at 7:16-18.

<sup>22</sup> PUCO Staff Ex. 1 (Donlon Direct) at 9:172-73.



would "provide some price assurances to customers and mitigate the risk of increasing costs, while still supporting energy efficiency and allowing the utilities to meet or exceed their statutory mandate levels."<sup>23</sup> And it would require Duke to "pick the most cost effective and efficient means of achieving [its] benchmarks, thus avoiding unnecessary charges to customers."<sup>24</sup> The PUCO Staff's proposal is consistent with at least four other states that have imposed similar cost caps.<sup>25</sup>

The PUCO should not allow Duke to spend customer money without limits. To protect customers from unjust and unreasonable energy efficiency charges, the PUCO should modify the Settlement to require an annual limit of \$33.8 million on total program costs and utility profits (shared savings).

**b. Duke can achieve its statutory energy savings mandates under a \$33.8 million cap.**

Duke witness Timothy Duff contends that the PUCO Staff's proposed \$33.8 million cap "would be insufficient to allow Duke Energy Ohio to meet the State mandates for energy efficiency."<sup>26</sup> The record, however, does not support Mr. Duff's contention. The PUCO Staff's proposed \$33.8 million cost cap will allow Duke to administer significant energy efficiency programs that achieve Duke's statutory mandates.

**i. Duke's own projections show that it can achieve its mandates under the proposed \$33.8 million cost cap.**

The PUCO Staff proposes, and OCC supports, an annual limit of \$33.8 million on the amount that Duke can charge customers for energy efficiency program costs and

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<sup>23</sup> PUCO Staff Ex. 1 (Donlon Direct) at 6:108-11.

<sup>24</sup> Id. at 9:173-75.

<sup>25</sup> OCC Ex. 13 (Shutrump Direct) at 9:14-11:3.

<sup>26</sup> Duke Ex. 13 (Duff Rebuttal) at 4:10-22.

utility profits (shared savings).<sup>27</sup> Duke's annual energy savings mandate is about 203,000 MWh during the 2017-2019 plan period.<sup>28</sup> Thus, under a \$33.8 million cap, Duke would need to achieve energy savings at a cost of about 17 cents per kWh.<sup>29</sup>

In Duke's application,<sup>30</sup> Duke proposed an annual program cost budget of about \$37.8 million per year.<sup>31</sup> Duke's programs were designed to target about 236,694 MWh per year.<sup>32</sup> Thus, under Duke's application, Duke proposed energy efficiency programs that would save energy at a cost of 16 cents per kWh.<sup>33</sup> At a cost of 16 cents per kWh, Duke could achieve its statutory benchmark for a total cost of \$32.5 million,<sup>34</sup> which is under the proposed \$33.8 million cost cap. Duke's own projections, therefore, show that Duke believes that it can achieve its statutory benchmark energy savings under the proposed cost cap.

**ii. Duke's historical energy efficiency performance demonstrates that Duke can achieve its statutory mandates at a cost to customers of \$33.8 million (the amount of the proposed cap) or less.**

Duke's current energy efficiency rider took effect in 2012.<sup>35</sup> Since 2012, Duke has consistently spent less than its proposed budget and achieved energy savings above its projected amount. In 2012, Duke spent 74% of its budget and achieved 140% of its

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<sup>27</sup> PUCO Staff Ex. 1 (Donlon Direct) at 6:91 (proposing an annual cost cap of \$33,820,565); OCC Ex. 13 (Shutrump Direct) at 7:6-9:2.

<sup>28</sup> Duke Ex. 3 (Amended Application) at 12 (Table 3); Tr. at 57.

<sup>29</sup> \$33.8 million / 203,000 MWh = ~16.7 cents per kWh.

<sup>30</sup> Duke Ex. 1 (Initial Application), as amended by Duke Ex. 3 (Amended Application).

<sup>31</sup> Duke Ex. 7 (Ziolkowski Direct) at Attachment JEZ-1 (average annual budget for 2017-2019); OCC Ex. 5 (Duke Response to IGS-INT-01-007).

<sup>32</sup> Duke Ex. 7 (Ziolkowski Direct) at Attachment JEZ-1 (average MWh savings targeted per year); Tr. at 59:2-10 (annual targets agreed to by stipulation at hearing).

<sup>33</sup> \$37.8 million / 236,694 MWh = ~16.0 cents per kWh.

<sup>34</sup> 203,000,000 kWh \* \$0.16 per kWh.

<sup>35</sup> PUCO Staff Ex. 3 (Duke's response to PUCO Staff data request).

projected energy savings.<sup>36</sup> In 2013, Duke spent 86% of its budget and achieved 125% of its projected energy savings.<sup>37</sup> In 2014, Duke spent 97% of its budget and achieved 131% of its projected energy savings.<sup>38</sup> And in 2015, Duke spent 86% of its budget and achieved 130% of its projected energy savings.<sup>39</sup> Since the inception of Duke's current energy efficiency cost recovery mechanism, Duke has spent 85.5% of its budget and achieved 130% of its projected energy savings.<sup>40</sup>

In other words, Duke has consistently demonstrated that it overestimates the amount that it will spend on programs and underestimates the amount of energy that those programs will save. As discussed above, in its application, Duke provided a budget of about \$37.8 million per year and projected energy savings of about 237,000 MWh per year. If Duke continues to spend about 85.5% of its budget, it will spend \$32.3 million<sup>41</sup> per year from 2017-2019—which is below the PUCO Staff's proposed \$33.8 million cap. Likewise, if Duke achieves energy savings of 130% of its projected amount, it would achieve energy savings of about 308,000 MWh,<sup>42</sup> which is substantially above the statutory minimum. Thus, Duke's historical performance demonstrates that Duke can achieve its statutory minimum energy savings (and more) while spending less than the proposed \$33.8 million annual cost cap.

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<sup>36</sup> PUCO Staff Ex. 4 (dividing actual costs by projected costs and actual kWh by projected kWh).

<sup>37</sup> Id.

<sup>38</sup> Id.

<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup>  $37.8 * 0.855$ .

<sup>42</sup>  $237,000 * 1.30$ .

**iii. Duke's rebuttal testimony is unreliable because Duke's witness did not understand the PUCO Staff's cost cap proposal.**

PUCO Staff witness Donlon proposed an annual \$33.8 million limit on charges to customers for energy efficiency program costs and utility profits (shared savings).<sup>43</sup> Mr. Donlon's direct testimony does not state that lost revenues are included under the cap. During his cross-examination, Mr. Donlon confirmed that the PUCO Staff's proposed annual cap includes program costs and shared savings but not lost revenues.<sup>44</sup>

Duke witness Duff reviewed Mr. Donlon's testimony and was present during Mr. Donlon's cross-examination.<sup>45</sup> Mr. Duff, therefore, was informed that the PUCO Staff's proposed cost cap does not impact Duke's collection of lost revenues from customers. But despite this, Duke witness Duff testified, on rebuttal, that Mr. Donlon's proposed cost cap would be insufficient to allow Duke to meet the State energy efficiency mandates in part because "the annual cap would provide ... no compensation for lost distribution revenue."<sup>46</sup> The PUCO should give no weight to the rebuttal testimony of Duke witness Duff regarding the feasibility of the proposed cost cap because Mr. Duff does not understand the proposal. Mr. Duff's testimony regarding the cost cap is therefore unreliable. The PUCO should conclude, based on the record in this case, that Duke can reasonably meet its statutory energy savings benchmarks under the proposed \$33.8 million annual cost cap.

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<sup>43</sup> PUCO Staff Ex. 1 at 4:51-54; 6:91, 103-04.

<sup>44</sup> Tr. at 149:9-12 (Donlon) ("Lost distribution revenues would not be a part of ... the overall cap.").

<sup>45</sup> Tr. at 217:11-16 (Duff).

<sup>46</sup> Duke Ex. 13 (Duff Rebuttal) at 4:16-19.

**iv. Nonresidential customer opt outs will reduce Duke's statutory benchmarks, which could lower the cost that Duke charges customers for energy efficiency.**

Nonresidential customer opt outs have the potential to reduce the cost of utility-administered energy efficiency programs. In 2014, the General Assembly passed Senate Bill 310 ("SB 310").<sup>47</sup> SB 310 added a new opt-out section to R.C. Chapter 4928. This new section, R.C. 4928.6611, permits nonresidential customers to "opt out of the opportunity and ability to obtain direct benefits from the utility's portfolio plan" beginning January 1, 2017.

Nonresidential customer opt outs impact compliance with Ohio's energy savings mandates. By law, each Ohio electric distribution utility is required to achieve energy savings of 1.0% of its baseline in 2017, 2018, and 2019.<sup>48</sup> If an electric distribution utility has a baseline of 10,000,000 MWh for 2017, for example, then it must achieve energy savings in 2017 of 100,000 MWh. The baseline is the average of the utility's three previous years' energy sales, subject to certain adjustments.<sup>49</sup> One of those adjustments is to reduce the baseline to account for nonresidential customer opt outs.

When a nonresidential customer opts out, its energy usage is subtracted from the utility's sales for purposes of calculating the baseline.<sup>50</sup> For instance, if a nonresidential customer uses 500 MWh and opts out of the utility's energy efficiency portfolio, 500 MWh is subtracted from the utility's energy sales. And because the benchmark is 1% of the baseline, a reduction in the baseline also reduces the benchmark. In the example

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<sup>47</sup> [http://archives.legislature.state.oh.us/bills.cfm?ID=130\\_SB\\_310](http://archives.legislature.state.oh.us/bills.cfm?ID=130_SB_310)

<sup>48</sup> R.C. 4928.66(A)(1)(a).

<sup>49</sup> R.C. 4928.66(A)(1)(a); R.C. 4928.66(A)(2)(a).

<sup>50</sup> R.C. 4928.66(A)(1)(a); R.C. 4928.66(A)(2)(a).

above, a 500 MWh reduction in the baseline would result in a 5 MWh reduction in the annual benchmark.

The baselines that Duke used for purposes of the Settlement do not account for nonresidential customer opt outs.<sup>51</sup> That is, Duke assumed, for purposes of calculating its annual energy savings benchmarks, that no customers would opt out.<sup>52</sup> Duke did not provide any justification for this assumption. Duke did not provide any testimony, documents, or other analysis supporting its decision to assume that 100% of eligible nonresidential customers would continue to pay Duke's energy efficiency rider, even though they are able to opt out. As described above, if any Duke nonresidential customers opt out, Duke's annual energy efficiency benchmarks would be lower, thus easing Duke's burden of compliance with its energy efficiency mandates.

In determining whether Duke can comply with the statutory mandates for energy savings, the PUCO should consider that the actual benchmarks for 2017, 2018, and 2019 could be lower than as reported by Duke in its amended application.

**c. The PUCO should reject Duke's counterproposal for a \$52 million annual cost cap. A \$52 million cap would provide limited benefits to customers because it is greater than the projected program costs and shared savings in the Settlement.**

Duke's counterproposal for a \$52 million annual cost cap—a 54% increase over the PUCO Staff's proposed \$33.8 million cap—does not benefit customers. In its amended application, Duke projected an annual program cost budget of about \$37.8

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<sup>51</sup> Tr. at 219:7-10 (Duff).

<sup>52</sup> Id.

million.<sup>53</sup> The Settlement includes an annual shared savings cap of about \$12.5 million.<sup>54</sup> Thus, under the Settlement, customers could expect to pay up to about \$50.3 million per year.<sup>55</sup> Duke's counterproposal for a \$52 million annual cost cap is higher than this amount. Duke's customers, therefore, might not receive any benefit from Duke's proposed \$52 million cost cap. The PUCO should not adopt Duke's counterproposal and instead should adopt the PUCO Staff's reasonable proposal for a \$33.8 million annual cap on program costs and shared savings.

**2. The Settlement's proposed \$12.5 million cap on utility profits is excessive and does not benefit customers or the public interest. The PUCO should modify the Settlement to reduce the amount of profits that customers pay to Duke to \$7.8 million per year or less.**

**a. The focus of energy efficiency spending should be on benefits that the programs provide to customers, not utility profits.**

The focus of utility-administered energy efficiency programs should be on energy savings and cost savings for the utility's customers. Consistent with this policy goal, the costs that consumers pay to their utility for energy efficiency "should be more for programs and less for utility profits."<sup>56</sup>

Duke's Settlement proposes that customers pay up to \$12.5 million to Duke in utility profits (shared savings).<sup>57</sup> This is excessive. As OCC witness Shutrump testified, a \$12.5 million shared savings cap "would allow Duke to charge too much for shared

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<sup>53</sup> Duke Ex. 7 (Ziolkowski Direct) at Attachment JEZ-1 (average annual budget for 2017-2019); OCC Ex. 5 (Duke Response to IGS-INT-01-007).

<sup>54</sup> OCC Ex. 13 (Shutrump Direct) at 5:15-17.

<sup>55</sup> As discussed below, the Settlement also requests approval of a smart thermostat program and a space heating program with unknown budgets. The PUCO should not approve these programs at this time, but if it does, the costs to consumers could be higher. In addition, as discussed above, Duke does not believe that its proposed budget is an actual limit on spending.

<sup>56</sup> OCC Ex. 13 (Shutrump Direct) at 12:13-14.

<sup>57</sup> Joint Ex. 2 at 5.

savings (profits) to consumers."<sup>58</sup> The PUCO has consistently found that it is appropriate to limit the amount that utilities can charge their customers for utility profits.<sup>59</sup> And at least 19 other states have limited utility profits on energy efficiency programs.<sup>60</sup> The PUCO should modify the Settlement to adopt OCC witness Shutrump's recommendation for a \$7.8 million before tax (\$5.0 million after tax) cap on shared savings.

**b. The proposed \$8.0 million after tax shared savings cap in the Settlement would likely provide no benefit to customers.**

To protect customers from paying too much profit to Duke, there should be an annual limit on the amount of shared savings that Duke can charge to customers. The cap should reduce the amount that customers are likely to pay for energy efficiency. The Settlement proposes a cap of \$8.0 million after tax<sup>61</sup> (about \$12.5 million in actual customer payments<sup>62</sup>). But this is higher than the projected shared savings under the Settlement. In other words, an \$8.0 million after-tax shared savings cap would likely provide no benefit to customers.

Under the amended application, Duke projected net benefits to customers of about \$48.4 million in 2017, \$44.4 million in 2018, and \$42.7 million in 2019.<sup>63</sup> The Settlement provides that customers will pay Duke shared savings up to 12% (after tax) of these net benefits.<sup>64</sup> Thus, if Duke's net benefit projections are accurate, customers could pay up to

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<sup>58</sup> OCC Ex. 13 (Shutrump Direct) at 12:11-12.

<sup>59</sup> Id. at 12:3-5.

<sup>60</sup> Id. at 12:16-13:4.

<sup>61</sup> Joint Ex. 2 at 5.

<sup>62</sup> OCC Ex. 13 (Shutrump Direct) at 12:10-11.

<sup>63</sup> Duke Ex. 7 (Ziolkowski Direct) at Attachment JEZ-1.

<sup>64</sup> Joint Ex. 2 at 5.



\$5.8 million<sup>65</sup> (after tax) in shared savings for 2017, \$5.3 million<sup>66</sup> (after tax) for 2018, and \$5.1 million<sup>67</sup> (after tax) for 2019. But each of these numbers is substantially below the Settlement's proposed annual shared savings cap of \$8.0 million (after tax). In other words, the Settlement's shared savings cap might not provide any benefit at all to customers.

In contrast, OCC witness Shutrump's proposed \$5.0 million after tax annual cap on utility profits would benefit customers by reducing the amount of profit that they pay to Duke for energy efficiency. For the benefit of customers, the PUCO should modify the Settlement to reduce the annual cap on shared savings from \$12.5 million per year before tax (\$8.0 million after tax) to no more than \$7.8 million per year before tax (about \$5.0 million after tax).

**3. The PUCO should not authorize Duke to charge customers an unknown amount of money on undefined smart thermostat and space heating programs. Before they are to be added to the portfolio, Duke should file a future request for PUCO approval of these programs.**

Under the Settlement, Duke proposes that it be permitted, at a later date, to initiate two new programs, a smart thermostat program and a space heating efficiency program.<sup>68</sup> The PUCO should not approve these programs because they are too speculative at this time.

The PUCO's rules require an electric utility to analyze potential programs and measures *before* including them in a portfolio. Under Ohio Administrative Code 4901:1-39-03, the utility must perform an assessment of energy efficiency and peak demand

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<sup>65</sup> \$48.4 million \* 12%.

<sup>66</sup> \$44.4 million \* 12%.

<sup>67</sup> \$42.7 million \* 12%.

<sup>68</sup> Joint Exhibit 2 at 8-11.

technical potential, economic potential, and achievable potential.<sup>69</sup> This assessment (commonly called a "market potential study") must be filed as part of the utility's portfolio application.<sup>70</sup>

Among other things, the utility is required to "conduct an assessment of cost-effectiveness using the total resource cost test" for "each alternate measure identified in its assessment of technical potential."<sup>71</sup> The utility is also required, for each measure considered, to "describe all attributes relevant to assessing its value, including, but not limited to potential energy savings or peak-demand reduction, cost, and nonenergy benefits."<sup>72</sup> In its application, a utility is required to provide the following information for each proposed program:<sup>73</sup>

- a) a narrative describing why the program is recommended pursuant to the program design criteria in OAC 4901:1-39;
- b) program objectives, including projections and basis for calculating energy savings and/or peak-demand reduction resulting from the program;
- c) the targeted customer sector;
- d) the proposed duration of the program;
- e) an estimate of the level of program participation;
- f) program participation requirements, if any;
- g) a description of the marketing approach to be employed, including rebates or incentives offered through each program, and how it is expected to influence consumer choice or behavior;
- h) a description of the program implementation approach to be employed;

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<sup>69</sup> OAC 4901:1-39-03(A)(1)-(3).

<sup>70</sup> OAC 4901:1-39-04(C)(1).

<sup>71</sup> OAC 4901:1-39-03(A)(2).

<sup>72</sup> OAC 4901:1-39-03(A)(4).

<sup>73</sup> OAC 4901:1-39-04(C)(5).

- i) a program budget with projected expenditures, identifying program costs to be borne by the electric utility and collected from its customers, with customer class allocation, if appropriate;
- j) participant costs, if any;
- k) proposed market transformation activities, if any, which have been identified and proposed to be included in the program portfolio plan; and
- l) a description of the plan for preparing reports that document the electric utility's evaluation, measurement, and verification of the energy savings and/or peak demand reduction resulting from each program and the process evaluations conducted by the electric utility.

The PUCO addressed this issue in a prior energy efficiency case involving Duke. In Duke's 2011 energy efficiency portfolio case, Duke sought to add three new programs to its existing portfolio.<sup>74</sup> The PUCO found that it had no basis to approve the new programs because Duke failed to comply with the filing requirements under Ohio Administrative Code 4901:1-39-04.<sup>75</sup> In particular, the PUCO concluded: "although Duke requests approval of new programs, the record does not contain all of the content prescribed in Rule 4901:1-39-04(C), O.A.C., which is intended to allow the Commission to properly review Duke's proposed programs."<sup>76</sup> This is precisely the same issue that the PUCO is faced with now regarding the proposed smart thermostat and space heating programs.

The vast majority of this required information regarding the proposed smart thermostat and space heating programs is not included in the Settlement. The Settlement does not provide total resource cost test scores for any of the measures that might be

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<sup>74</sup> Opinion & Order ¶ 2, In re Application of Duke Energy Ohio, Inc. for an Energy Efficiency Cost Recovery Mechanism & for Approval of Additional Programs for Inclusion in its Existing Portfolio, Case No. 11-4393-EL-RDR (Mar. 21, 2012).

<sup>75</sup> Id. ¶ 6 ("the Commission observes that this application has not been made in conjunction with the portfolio planning requirements put forth in Rule 4901:1-39-04, O.A.C.").

<sup>76</sup> Id.

included in these two programs as required by OAC 4901:1-39-03(A)(2). The Settlement does not provide the potential energy savings or peak-demand reduction, cost, and nonenergy benefits as required by OAC 4901:1-39-03(A)(4). The Settlement does not include projections or the basis for calculating energy savings and peak-demand reduction resulting from the programs as required by OAC 4901:1-39-04(C)(5)(b). The Settlement does not include the proposed duration of these programs, as required by OAC 4901:1-39-04(C)(5)(d). The Settlement does not include program participation requirements as required by OAC 4901:1-39-04(C)(5)(f). The Settlement does not include a program budget with projected expenditures as required by OAC 4901:1-39-04(C)(5)(i). The Settlement does not include participant costs for these programs as required by OAC 4901:1-39-04(C)(5)(j). And the Settlement does not include a description of the plan for preparing reports that document Duke's evaluation, measurement, and verification of the energy savings and peak demand reduction resulting from these programs as required by OAC 4901:1-39-04(C)(5)(l). In short, the Settlement does not come close to providing enough information about these two programs for the PUCO to meaningfully evaluate them, let alone authorize Duke to charge customers for them.

OCC's attempts to uncover additional details about these programs were unsuccessful. Duke's witness with respect to these programs was Trisha Haemmerle.<sup>77</sup> But in response to questions regarding the proposed smart thermostat program, Ms. Haemmerle simply responded that she did not know the answer because she "did not write the stipulation."<sup>78</sup> And she generally could not provide any details regarding these

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<sup>77</sup> Tr. at 71:11-15.

<sup>78</sup> Tr. at 70:24-25 (Haemmerle); Tr. at 71:7-8 (Haemmerle).

programs. When asked a question about how the rebates for the smart thermostat program would work, Ms. Haemmerle simply stated: "I don't know."<sup>79</sup> In a follow-up question on the same topic, Ms. Haemmerle stated: "I'm not sure exactly how we plan to implement this at the time."<sup>80</sup> With respect to the proposed space heating program, Ms. Haemmerle admitted that Duke has not determined what the cost of the program will be, Duke did not project any budget for the program, and Duke did not estimate the potential costs of the program.<sup>81</sup>

The PUCO cannot evaluate the proposed smart thermostat or space heating programs based on the record in this case. The vast majority of the information that is required by OAC 4901:1-39-04(C) is not included in the Settlement, Duke's application, or anywhere else in the record. Any request for approval of these programs must follow the PUCO's rules and must allow for adequate review by the PUCO and all stakeholders in a public docket before the PUCO. The proposed smart thermostat and space heating programs should not be approved at this time.

**4. The PUCO should not approve retroactive rebates to CRES providers and retailers, paid by customers.**

While the Settlement is generally devoid of important details regarding the proposed smart thermostat program, one of the few provided details is problematic. Under the Settlement, Duke proposes that CRES providers and other retailers can begin offering thermostat rebates to customers immediately upon approval of the portfolio and months before the thermostat program would begin, and then, Duke will reimburse the

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<sup>79</sup> Tr. at 71:1-7 (Haemmerle).

<sup>80</sup> Tr. at 72:11-18 (Haemmerle).

<sup>81</sup> Tr. at 74:5-19 (Haemmerle).

CRES providers and retailers after the fact with customer funds.<sup>82</sup> The PUCO should not authorize this unjust and unreasonable result for Duke's customers.

When asked about this provision at the hearing, Duke witness Haemmerle was again uncertain about the details. The Settlement uses the similar, but distinct terms "instant discount" and "instant rebate," but Mr. Haemmerle was unsure whether these referred to the same thing.<sup>83</sup> Ms. Haemmerle did not know whether the CRES provider or retailer would be required to disclose to the customer that it might seek reimbursement from Duke using customer money.<sup>84</sup> Ms. Haemmerle conceded, in fact, that if a large national retailer (like Lowe's) were running a sale on smart thermostats for Memorial Day, then it could conceivably receive a retroactive rebate, paid by Duke's customers, for every single smart thermostat it sold in Duke's service territory during that holiday weekend.<sup>85</sup>

The PUCO should not approve the smart thermostat program at all. But if it does, it should modify the Settlement to remove the provision that allows retroactive rebates to CRES providers and retailers, paid by customers. These retroactive rebates would not benefit customers and would be nothing more than a windfall for CRES providers and retailers at the expense of consumers.

**5. The PUCO should not authorize Duke to charge customers for programs in 2017 that have not been approved.**

Since January 1, 2017, Duke has not had any approved energy efficiency programs. In Duke's previous energy efficiency portfolio case, the PUCO approved

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<sup>82</sup> Joint Ex. 2 at 8.

<sup>83</sup> Tr. at 70:21-24 (Haemmerle).

<sup>84</sup> Tr. at 71:1-7 (Haemmerle).

<sup>85</sup> Tr. at 72:11-18 (Haemmerle).

programs for January 1, 2014 to December 31, 2016.<sup>86</sup> Under SB 310, although the state energy efficiency mandates were frozen, Duke was permitted to continue its energy efficiency programs "for the duration that the Public Utilities Commission originally approved," *i.e.*, until December 31, 2016.<sup>87</sup> SB 310 did not authorize Duke or any other utility to continue its programs beyond December 31, 2016.

In an attempt to extend Duke's programs without PUCO approval, the Settlement contains the following provision: "Signatory Parties acknowledge that the Company will offer programs consistent with its existing approved energy efficiency and peak demand reduction programs during 2017 until such time as the Commission approves a new portfolio."<sup>88</sup> The Signatory Parties also agree to support Duke's request for deferral of program costs and lost revenues associated with the continuation of programs in 2017 and to support Duke's calculation of its shared savings incentive using savings from 2017 that occur before approval of new programs.<sup>89</sup>

The PUCO should reject these provisions and should not authorize Duke to charge customers for programs that the PUCO has not approved. Duke's request to continue its 2016 programs in 2017 prior to approval of a new 2017-2019 portfolio suffers from the same defects as Duke's request for approval of vague smart thermostat and space heating programs. Duke did not provide any details regarding the continuation of its 2016 programs in 2017: the Settlement does not include any program budgets, savings projections for these continued programs, estimated customer participation levels, program participation requirements, a description of Duke's marketing approach, a

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<sup>86</sup> Opinion & Order at 3-4, In re Application of Duke Energy Ohio, Inc. for Approval of its Energy Efficiency & Peak-Demand Reduction Portfolio Programs, Case No. 13-431-EL-POR (Dec. 4, 2013).

<sup>87</sup> SB 310 § 6(A)(1).

<sup>88</sup> Joint Ex. 1 at 4.

<sup>89</sup> Id. at 4-5.

description of Duke's implementation approach, or participant costs, all of which are required under OAC 4901:1-39-04(C).

Without these details, the PUCO cannot meaningfully evaluate Duke's proposal to continue its 2016 programs in 2017. The PUCO should reject Duke's request to charge customers for any costs—program costs, shared savings, or lost revenues—that are associated with the continuation of Duke's 2016 programs in 2017 before approval of a new portfolio.

**B. The Settlement was not the product of serious bargaining because the residential customer class was excluded from all but one settlement negotiation between Duke and other parties to this case.**

Under Ohio Supreme Court and PUCO precedent, a settlement is not the product of serious bargaining if a customer class is excluded from settlement negotiations.<sup>90</sup> In this case, however, OCC was not given any meaningful opportunity to negotiate with Duke or the other settling parties.

Duke filed its initial incomplete application in this case on June 15, 2016.<sup>91</sup> The initial application was supplemented on August 15, 2016 with Duke's market potential study<sup>92</sup> and again on October 15, 2016 with Duke's amended application.<sup>93</sup> With the application finally complete on October 15, Duke scheduled a meeting between OCC and

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<sup>90</sup> Time Warner AxS v. PUCO, 75 Ohio St. 3d 229, 233 n.2 (1995) (stating that the Court had "grave concern" because the settlement "arose from settlement talks from which an entire customer class was intentionally excluded"); Opinion & Order ¶ 51, In re Application of Ohio Power Co. to Initiate Phase 2 of its gridSMART Project, Case No. 13-1939-EL-RDR (Feb. 1, 2017).

<sup>91</sup> Duke Ex. 1.

<sup>92</sup> Duke Ex. 2.

<sup>93</sup> Duke Ex. 3.



most of the other parties to this case for November 3, 2016.<sup>94</sup> Not all parties to this case were invited to this meeting.<sup>95</sup>

The November 3 meeting was the first settlement meeting in this case and, as such, the focus was on attempting to understand Duke's application, as opposed to actual negotiation of a settlement agreement.<sup>96</sup> Six weeks later, on December 22, 2016, Duke filed the Settlement.<sup>97</sup> Between the initial informational meeting on November 6 and the filing of the Settlement on December 22, Duke did not invite OCC to a single meeting between Duke and the other parties to the Settlement.<sup>98</sup> Although Duke and OCC had several one-on-one discussions in December regarding the case, Duke negotiated the terms of the Settlement with the other parties without inviting OCC.<sup>99</sup>

In short, residential consumers were effectively excluded from negotiations, which violates *Time Warner AxS* and PUCO precedent. Thus, the Settlement was not the product of serious bargaining and should not be approved.

**C. The Settlement violates regulatory principles and practices.**

**1. The Settlement violates the regulatory principle that rates must be just and reasonable.**

Under Ohio law, utility rates must be just and reasonable.<sup>100</sup> The Settlement would permit Duke to charge unlimited energy efficiency program costs to customers,<sup>101</sup> which

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<sup>94</sup> OCC Ex. 13 (Shutrump Direct) at 6:9-16.

<sup>95</sup> Id. at 6:16-17.

<sup>96</sup> Tr. at 94:5-9 (Shutrump) ("As far as discussions about a settlement, I think that meeting since it was the initial meeting was more about attempting to understand, better understand Duke's application.").

<sup>97</sup> Joint Ex. 1.

<sup>98</sup> OCC Ex. 13 (Shutrump Direct) at 6:19-7:2.

<sup>99</sup> OCC Ex. 13 (Shutrump Direct) at 6:4-7:4.

<sup>100</sup> R.C. 4905.22. See also R.C. 4909.15 (determinations that the PUCO must make when fixing just and reasonable rates); R.C. 4928.02(A) (State policy is to ensure that customers have "reasonably priced retail electric service").

<sup>101</sup> See *supra* § II.A.i.a.

is neither just nor reasonable. The Settlement would permit Duke to charge its customers up to \$12.5 million per year in utility profits, which is also unjust and unreasonable.<sup>102</sup> Thus, the 2017 Settlement violates the regulatory principle that all rates are required to be just and reasonable.

**2. The Ohio Supreme Court precedent against retroactive ratemaking prohibits the PUCO from authorizing Duke to charge customers for program costs, lost revenues, and shared savings that accrue before approval of Duke's new portfolio.**

The PUCO cannot authorize a utility to charge higher future rates to make up for past losses. This rule is fundamental to utilities regulation and has been recognized in the State of Ohio for decades, including by the Ohio Supreme Court in *Keco*<sup>103</sup> in 1957, *Lucas County*<sup>104</sup> in 1997, and more recently in 2011 in *Columbus Southern*.<sup>105</sup> But here, the Signatory Parties ask the PUCO to allow Duke to charge customers higher future rates through Duke's energy efficiency rider to pay for program costs, lost revenues, and shared savings that are incurred or accrue in 2017 before the PUCO enters an order approving a new portfolio.<sup>106</sup> This is textbook retroactive ratemaking, which the PUCO cannot allow.

In Ohio, after the PUCO approves a rate, that rate is the "only rate which the utility may lawfully charge."<sup>107</sup> This means that "a utility may not increase, decrease, or

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<sup>102</sup> OCC Ex. 13 (Shutrump Direct) at 12:7-14.

<sup>103</sup> *Keco Indus., Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 259 (1957).

<sup>104</sup> *Lucas Cnty. Comm'rs v. PUCO*, 80 Ohio St. 3d 344, 347-48 (1997).

<sup>105</sup> *In re Columbus S. Power Co.*, 128 Ohio St. 3d 512, 514-15 (2011).

<sup>106</sup> Joint Ex. 2 at page 4-5, ¶¶ 1-3.

<sup>107</sup> *Cleveland Elec. Illuminating Co. v. PUCO*, 46 Ohio St. 2d 105, 115 (1976).

change its tariff rates without commission approval."<sup>108</sup> If a utility seeks to change its rates, it must obtain PUCO approval for the change. And when a utility seeks a rate change, the change applies only to future rates—the PUCO cannot change rates retroactively.<sup>109</sup> As the Ohio Supreme Court succinctly concluded in *Lucas County*, "retroactive ratemaking is not permitted under Ohio's comprehensive statutory scheme."<sup>110</sup>

Consistent with *Keco* and its progeny, a utility cannot recover past losses through future rates. In *Columbus Southern*, the utility sought a rate increase effective January 2009, but the PUCO did not issue an order granting the increase until mid-March of that year.<sup>111</sup> The PUCO, however, permitted the utility to recover the full amount of the increase as though the higher rates had been in effect as of January 1, 2009. It accomplished this by setting the utility's rates at a level that would allow it to recover 12 months of rate increases (*i.e.* January through December 2009) in a 9-month period (April through December 2009).<sup>112</sup>

The Ohio Supreme Court ruled that this was retroactive ratemaking.<sup>113</sup> As the Court explained, the PUCO effectively permitted the utility to recover costs incurred from January, February, and March 2009—that is, costs the utility incurred *before* the PUCO's order approving the rate increase.<sup>114</sup> This violated *Keco* and the fundamental rule

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<sup>108</sup> Lucas Cnty., 80 Ohio St. 3d at 347.

<sup>109</sup> Lucas Cnty., 80 Ohio St. 3d at 348 ("[U]tility ratemaking by the Public Utilities Commission is prospective only.").

<sup>110</sup> *Id.*

<sup>111</sup> 67 Ohio St. 3d at 514.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 515.

against retroactive ratemaking.<sup>115</sup> The Ohio Supreme Court has established clear precedent: a utility cannot charge customers for costs that the utility incurred prior to the entry of the order approving such charges.

The Settlement violates this precedent. It asks the PUCO to authorize Duke to charge customers for program costs, lost revenues, and shared savings from the beginning of 2017 *before* a new portfolio is approved.<sup>116</sup> An order approving a new portfolio cannot authorize Duke to increase customer rates based on costs that Duke may have incurred before the order was entered. This is contrary to the rule set forth in *Columbus Southern* and the clear prohibition on retroactive ratemaking established in *Keco* and *Lucas County*.

The PUCO must follow Ohio Supreme Court precedent. It must rule that Duke cannot charge customers for program costs, lost revenues, or shared savings based on Duke's decision to implement energy efficiency programs in early 2017 without prior PUCO approval.

**D. Any order in this case should clearly state that Duke cannot charge customers for shared savings for any year in which Duke relies on banked energy savings to meet its statutory benchmark.**

The Settlement provides that net benefits from "any energy savings previously used in the calculation of a shared savings incentive during a prior year" cannot be counted toward shared savings.<sup>117</sup> At the hearing, Duke confirmed that it is not eligible for shared savings in any year in which it uses banked energy savings to meet its annual

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<sup>115</sup> Id.

<sup>116</sup> Joint Ex. 2 at page 4-5, ¶¶ 1-3.

<sup>117</sup> Joint Ex. 2 at page 5-6, ¶ 7.

energy savings benchmark under R.C. 4928.66(A)(1).<sup>118</sup> To avoid any future ambiguity, OCC requests that any Order in this case approving Duke's application or Settlement, as modified or otherwise, clearly state that Duke will not be eligible for shared savings in any year in which Duke uses banked energy savings to meet its annual energy savings benchmark under R.C. 4928.66(A)(1).

### **III. CONCLUSION**

The Settlement fails the PUCO's three-prong test for approval of settlements because (a) it does not benefit customers or the public interest, (b) it was not the product of serious bargaining, and (c) it violates regulatory principles and practices.

The Settlement does not benefit customers or the public interest because it would permit Duke to charge customers too much for energy efficiency program costs and utility profits. The PUCO should modify the Settlement to impose an annual cap on program costs and utility profits of no more than \$33.8 million. The PUCO should also modify the Settlement to reduce the annual shared savings cap from \$12.5 million (before taxes) to \$7.8 million (before taxes).

The Settlement was not the product of serious bargaining because the residential customer class was excluded from all but one preliminary settlement meeting between Duke and the parties to the Settlement.

The Settlement violates the regulatory principle that rates must be just and reasonable. And it violates the regulatory principle that retroactive ratemaking is prohibited.

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<sup>118</sup> Tr. at 46:11-14 (Duff) (Duke cannot file for recovery of shared savings "in any portfolio plan year after 2014 in which banked savings have been used to meet the annual benchmark"); Tr. at 48:1-4 (Duff) (Duke "won't file for share savings or any net benefits in any year ... in which banked savings have been used to meet the annual benchmark").

The PUCO should not approve the Settlement as filed but instead should modify the Settlement as OCC proposes.

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### **CERTIFICATE OF SERVICE**

It is hereby certified that a true copy of the foregoing Post-Hearing Brief was served by electronic transmission upon the parties below this 31st day of March 2017.

/s/ Christopher Healey

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