BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

REPLY BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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The PUCO must answer an important question: should there be an annual limit on the amount that Ohio electric distribution utilities can charge their customers for energy efficiency program costs and utility profits? OCC and the PUCO Staff's answer to this question is "yes." The PUCO Staff recommends, and OCC supports, an annual cap of $33.8 million on the amount that customers pay for Duke's energy efficiency programs.

In this case, Duke and other parties propose, in a settlement (the "Settlement"), that Duke be permitted to spend an unlimited amount of customer money on energy efficiency program costs. This would be an unjust result for consumers.

An annual limit on the amount that electric utilities can charge their customers for energy efficiency is sound regulatory policy. It allows electric utilities in Ohio to offer significant, diverse portfolios of energy efficiency programs for their customers while still protecting customers from paying too much for energy efficiency. The PUCO should not deviate from this policy when deciding whether to approve Duke's Settlement. The Settlement should be modified to include a $33.8 million annual limit on total energy efficiency charges to customers. Without this, the Settlement does not benefit customers

or the public interest. It therefore fails the PUCO's three-prong test for approving settlements and should not be approved.

I. REPLY

A. The Environmental Parties ask the PUCO to impose a new, heightened burden of proof on OCC and the PUCO Staff that would require them to demonstrate a "thoroughness of analysis" in opposing the Settlement. The PUCO should reject this invitation.

In describing the standard of review in this case, the Environmental Parties[1] cite the PUCO's well-known three-prong test for settlements.[2] But then they attempt to add a new requirement to the test. According to the Environmental Parties, parties opposing a settlement should be required to meet a new, undefined burden of proof, one that requires a "thoroughness of opposing parties' analysis," or, alternatively, a "rigorous analysis."[3] The PUCO should not adopt the Environmental Parties' new standard.

It is well-settled that the signatory parties to a settlement, and not the opposing parties, bear the burden of proving that the settlement is reasonable and satisfies the PUCO's three-prong test.[4] Parties opposing a settlement have no burden of proof. Instead, they assist the PUCO in determining whether the signatory parties have or have not met their burden and make recommendations to the PUCO to consider as a regulator.

The cases that the Environmental Parties cite are merely cases in which the PUCO evaluated the evidence and disagreed with the positions taken by parties opposing the

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[1] The Environmental Parties are the Environmental Law & Policy Center, Natural Resources Defense Council, Ohio Environmental Council, and Environmental Defense Fund.

[2] Initial Post-Hearing Brief of the Environmental Parties at 6 (Mar. 31, 2017) (the "Environmental Initial Brief").

[3] Environmental Initial Brief at 6-7.

[4] Opinion & Order at 18, In re Application Seeking Approval of Ohio Power Co.'s Proposal to Enter into an Affiliate Power Purchase Agmt., Case No. 14-1693-EL-SSO (Mar. 31, 2017).

settlement.[5] The PUCO did not rule that parties opposing a stipulation must meet the Environmental Parties' proposed, heightened burden of proof.

In this case, the PUCO Staff and OCC have presented substantial evidence that the Settlement as filed fails the PUCO's three-prong test for settlements. Without adequate cost control through an annual cap on charges to customers, the Settlement does not benefit customers or the public interest. And although it isn't clear what the Environmental Parties might have in mind with their proposal for a new, heightened standard of "thoroughness of analysis " or "rigorous analysis," the PUCO should not adopt any new standard that makes it more onerous for parties opposing settlements.

B. The PUCO Staff's proposal for a $33.8 million annual cap on charges to customers for energy efficiency adequately considers the benefits of energy efficiency.

A common theme among the signatory parties' initial briefs is that the PUCO Staff's proposed $33.8 million cost cap is focused only on costs and not on the benefits of energy efficiency.[6] The record does not support this theory. The record contains more than enough information for the PUCO to conclude that customers will receive significant benefits from energy efficiency under the PUCO Staff's proposed cost cap.

Any claim that the proposed $33.8 million cost cap ignores the benefits of energy efficiency is simply untrue. First and foremost, a $33.8 million annual limit on energy

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[5] See Opinion & Order, In re FirstEnergy ESP IV, Case No. 14-1297-EL-SSO (Mar. 31, 2016); Opinion & Order, In re Ohio Power Co., Case No. 14-1693-EL-RDR (Mar. 31, 2016); Opinion & Order, In re Columbia Gas, Case No. 16-1309-GA-UNC (Dec. 21, 2016).

[6] See, e.g., Post-Hearing Brief of Ohio Partners for Affordable Energy at 3 (Mar. 31, 2017) ("Staff's cost cap is being proposed without any regard for energy efficiency program quality and customer demand.") (the "OPAE Initial Brief"); Initial Post Hearing Brief of Duke Energy Ohio, Inc. at 5 (Mar. 31, 2017) (similarly stating that the proposed cost cap is "without any regard for program quality and customer demand") (the "Duke Initial Brief"); Environmental Initial Brief at 2 (the proposed cap "would focus on only the cost part of the equation"); Environmental Initial Brief at 8 (referring to the PUCO Staff's "single-minded focus on cost").

efficiency spending would permit Duke to spend over $100 million on energy efficiency from 2017 to 2019.[7]

Second, as demonstrated in OCC's and the PUCO Staff's initial briefs, Duke can very likely achieve its statutory minimum energy savings—and possibly much more—while spending $33.8 million or less on energy efficiency programs.[8] Again, there can be no dispute that customers would receive significant benefits from energy efficiency programs that save as much energy as is required by law.

Third, the signatory parties are guilty of the same thing they complain about. While the signatory parties complain that the PUCO Staff's cost cap proposal is focused only on cost, they similarly over-rely on the fact that Duke's programs are projected to be cost effective. OPAE, for example, argues that if programs are cost-effective, it would be "counter-intuitive for the Commission to establish a cap . . . ."[9] The Environmental Parties argue that regulatory policy should encourage utilities to "seek out every possible kWh of cost-effective savings, as this provides net benefits—not costs—to customers."[10] But just as the PUCO should not look only at the cost of programs, nor should it look only at cost-effectiveness.

Indeed, as the Environmental Parties acknowledge in their initial brief, the PUCO's rules provide *thirteen* different criteria that a utility must consider when developing its portfolio, only *one* of which is cost-effectiveness.[11] Thus, it is well-settled that the PUCO should not approve an unlimited amount of energy efficiency spending

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[7] $33.8 million * 3 = $101.4 million.

[8] Post-Hearing Brief by the Office of the Ohio Consumers' Counsel at 6-11 (Mar. 31, 2017) (the "OCC Initial Brief"); Post-Hearing Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio at 9-14 (Mar. 31, 2017) (the "PUCO Staff Initial Brief").

[9] OPAE Initial Brief at 3.

[10] Environmental Initial Brief at 10.

[11] Id. at 10-11 (citing OAC 4901:1-39-03(B)).

simply because the programs in question might project to be cost-effective. The PUCO can consider numerous other factors—including the total cost of the programs and the amount of the rider charge to customers.

The PUCO Staff's proposed cost cap is consistent with PUCO precedent; it allows the PUCO to consider not only the costs of the programs but the benefits that customers can receive from energy efficiency programs under the cost cap. The PUCO should not authorize utilities to charge customers an unlimited amount for energy efficiency, even if cost-effective. It is reasonable and sound policy to also consider the amount of the rider charge that all customers pay and to conclude that a cost cap is in customers' best interest.

C. The PUCO Staff's proposed cost cap is consistent with PUCO precedent regarding energy efficiency and protects consumers.

The Environmental Parties argue that the proposed $33.8 million cost cap is inconsistent with PUCO precedent that emphasizes the value of energy efficiency savings and high quality programs.[12] This argument fails because there is ample evidence that a $33.8 million annual budget will allow for significant, high-quality energy efficiency programs.

First, the Environmental Parties cite PUCO cases where, according to the Environmental Parties, the PUCO "rewarded utilities for exceeding their energy efficiency benchmarks."[13] But this remains true under the PUCO Staff's proposed cost cap. The Settlement in this case includes a shared savings mechanism that rewards Duke for exceeding its energy efficiency benchmarks.[14] The PUCO Staff's proposed cost cap does not in any way affect this part of the Settlement. Thus, there is no conflict between

[12] Id. at 8-13.

[13] Id. at 9.

[14] Joint Ex. 2 at 5.

past PUCO cases approving shared savings mechanisms and the $33.8 million annual cost cap.

Second, the Environmental Parties note that the annual statutory benchmarks are a minimum requirement, and the PUCO has encouraged utilities to exceed those benchmarks.[15] But again, there is no conflict between this and the PUCO Staff's proposal for a cost cap. Under the cost cap, Duke retains an incentive to exceed the statutory benchmarks because the more savings it achieves, the higher its profits (shared savings).

Third, the Environmental Parties cite an Opinion and Order from FirstEnergy's most recent electric security plan ("ESP") case, where the PUCO noted that cost-effective energy efficiency programs save money for customers.[16] But the Environmental Parties omit the fact that the PUCO, in a subsequent Entry on Rehearing in the same case, ordered FirstEnergy to lower the cost of its programs and prohibited FirstEnergy from charging customers for programs that exceed the statutory benchmark. The PUCO concluded that the utility should attempt to exceed the statutory minimum energy savings "by efficiently administering the approved programs and achieving energy savings for the least cost," rather than by charging customers more for energy efficiency program costs.[17] The PUCO Staff's proposed cost cap is consistent with the PUCO's directive to lower the cost of energy efficiency.

Fourth, the Environmental Parties cite Ohio Administrative Code 4901:1-39-03, which includes 13 criteria that a utility must consider in developing its portfolio.[18] These 13 criteria include, among other things, cost-effectiveness; benefits to all members of a

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[15] Environmental Initial Brief at 9-10.

[16] Id. at 10 (citing the March 31, 2016 Opinion and Order from FirstEnergy's most recent ESP case, Case No. 14-1297-EL-SSO).

[17] Fifth Entry on Rehearing ¶ 325, Case No. 14-1297-EL-SSO.

[18] Environmental Initial Brief at 10-11.

customer class, including nonparticipants; participation rates; the magnitude of energy savings and peak demand reduction; and equity among customer classes. There is no evidence that the PUCO Staff's proposal for a cost cap in any way prevents Duke from considering these factors in developing its mix of programs.

Finally, the Environmental Parties argue that the PUCO must consider not just the cost of energy efficiency but the benefits. But as discussed above, the PUCO Staff's proposal for a $33.8 million cost cap allows for substantial benefits to customers from energy efficiency, so it is consistent with this precedent.

In short, there is no evidence that the PUCO Staff's proposed cost cap is inconsistent with PUCO precedent or the law. It will allow for substantial energy efficiency programs that can provide substantial benefits to customers, which is consistent with PUCO precedent encouraging energy efficiency.

D. An annual cost cap is necessary to protect consumers because the Settlement does not include any control over charges to customers for energy efficiency program costs.

OPAE and the Environmental Parties suggest that an annual limit on energy efficiency charges to customers is not necessary because there are already cost-control measures in place. OPAE concludes that "a limitation on spending is already embodied in the Commission's approval of a portfolio plan."[19] The Environmental Parties argue that cost control is "already being accomplished through the existing stakeholder collaborative and Commission review process."[20] But Duke's own testimony refutes these conclusions.

Duke witness Duff testified that the PUCO's approval of an energy efficiency portfolio is <u>not</u> a limit on Duke's spending. According to Mr. Duff, when the PUCO

[19] OPAE Initial Brief at 5.

[20] Environmental Initial Brief at 2.

approves a utility's energy efficiency budget, the 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 can charge customers an unlimited amount for energy efficiency program costs.[21] OPAE's and the Environmental Parties' claims that cost control is already embodied in the PUCO's review process ring hollow when Duke itself unambiguously testified that it isn't.

E. Duke can meet its statutory energy efficiency mandates under the proposed $33.8 million annual cap on costs to be collected from customers.

The Environmental Parties argue that Duke cannot meet its statutory mandates under the proposed $33.8 million annual cost cap.[22] The record contradicts this claim.

First, OCC and the PUCO Staff explained in detail, in their initial briefs, that there is substantial evidence that Duke can meet its statutory mandates.[23]

Second, the Environmental Parties' argument relies on the false claim that Duke's energy efficiency costs are rising.[24] To the contrary, Duke's own data confirms that Duke expects to achieve energy savings a lower cost than in the past. In 2014, Duke achieved energy savings at a cost of 20.1 cents per kWh.[25] In 2015, Duke achieved energy savings at a cost of 19.2 cents per kWh.[26] In its application in this case, Duke projected that it could save energy at a cost of just 16 cents per kWh from 2017 to 2019.[27] Thus, the

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[21] See OCC Initial Brief at 4-6.

[22] Environmental Initial Brief at 13.

[23] OCC Initial Brief at 6-11; PUCO Staff Initial Brief at 9-13.

[24] Environmental Initial Brief at 15.

[25] PUCO Staff Ex. 4.

[26] Id.

[27] See OCC Initial Brief at 7.

evidence rebuts the Environmental Parties' claim that Duke's energy efficiency costs are rising.

Third, as the PUCO Staff notes in its initial brief, Duke is already two years ahead of its cumulative energy savings requirements.[28] If Duke falls short of its annual compliance requirements, it can use its substantial bank of energy savings to continue to comply with statutory mandates.

The PUCO should conclude that the proposed $33.8 million annual cap on energy efficiency spending provides a more-than-adequate opportunity for Duke to meet or exceed its energy efficiency mandates.

F. Customers who do not participate in Duke's programs pay for the programs but receive, at best, unquantified indirect benefits from the programs.

PUCO should consider the rider charge when deciding how much the utility can charge customers for energy efficiency. All residential customers pay the energy efficiency rider, whether they participate in the programs or not.[29] And all customers, even those who don't participate, can benefit from energy efficiency. OCC witness Shutrump testified that nonparticipating customers do not benefit directly from energy efficiency programs through bill reductions, but can benefit through reduced costs as a result of deferred building of new power plants.[30] And the Environmental Parties argue that electric energy efficiency programs can suppress the wholesale price of electricity.[31]

At the same time, however, the extent of these potential benefits remains undefined. With respect to price suppression, the Environmental Parties presented only

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[28] PUCO Staff Initial Brief at 11.

[29] See R.C. 4928.6611 (allowing nonresidential customers to opt out of energy efficiency programs and costs but not residential customers).

[30] OCC Ex. 13 (Shutrump Direct) at 8.

[31] Environmental Initial Brief at 5, 17.

evidence that there *might* be *wholesale* price suppression at the regional level if the entirety of the PJM market reduced its energy usage by 1%.[32] There is no record evidence (i) that Duke's programs alone cause price suppression, (ii) that wholesale price suppression actually results in lower prices at the retail (*i.e.* customer) level,[33] or (iii) of the magnitude of any potential price suppression from Duke's programs. Nor is there any evidence showing the dollar value savings to customers from deferred building of power plants. Thus, while system-wide benefits exist, they remain difficult to quantify (or generally unquantifiable) and cannot justify unlimited spending on energy efficiency programs.

G. The PUCO should not adopt the Environmental Parties' view that Duke's energy efficiency charges to consumers are "minimal" and therefore not worthy of regulatory scrutiny.

The Environmental Parties downplay the financial impact of Duke's energy efficiency rider by referring to it as a "minimal" charge.[34] But at $2 to $3 per month, the energy efficiency rider has a material impact on many customers and adds to the increasing electric bills customers already pay.

The cost of energy efficiency programs may be "minimal" for parties that do not pay for the programs. But the residential customers that OCC represents pay millions of dollars in program costs, plus millions of dollars for utility profits (shared savings). A $3 monthly rider over a three-year portfolio would cost the typical residential customer over $100.[35] The PUCO should give no weight to the Environmental Parties' suggestion that

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[32] See Environmental Exhibit 6 as 12.

[33] Tr. at 191:23-25 (Donlon) (stating that there is no evidence that wholesale price suppression results in retail price suppression).

[34] Environmental Initial Brief at 3.

[35] $3 * 36 months = $108.

residential customers (including its low-income customers) are indifferent to being compelled to pay $100 each for energy efficiency programs.

H. The signatory parties overstate any potential negative impacts of a cost cap based on pure speculation.

The Environmental Parties argue that the proposed cost cap will cause Duke to "rely on an abbreviated portfolio of programs that greatly reduces consumer benefits."[36] Duke claims that under the cost cap, it will have to "discontinue programs when they hit a specific dollar cap."[37] These bare conclusions, however, are not supported by facts.

1. The Environmental Parties' arguments about the impact of a cost cap are internally inconsistent.

The Environmental Parties are concerned that under the PUCO Staff's proposed cost cap, Duke would focus more on programs that result in short-term savings, a result that they consider unfavorable.[38] This argument fails for at least two reasons.

First, the Environmental Parties' concern for overreliance on programs with short-term savings is undermined by their decision to sign the Settlement in the first place. Under the Settlement, more than two-thirds of the first-year savings for residential customers will come from Duke's behavioral My Home Energy Report program, which, as the Environmental Parties' point out, results in savings for only a single year.[39] By signing the Settlement, the Environmental Parties agreed to support a portfolio that already devotes significant resources to Duke's behavioral program. So their argument now that a cost cap will cause Duke to rely too heavily on short-term savings is unconvincing.

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[36] Environmental Initial Brief at 19.

[37] Duke Initial Brief at 5.

[38] Environmental Initial Brief at 21.

[39] See Duke Ex. 3, Appendix A; Environmental Parties' Initial Brief at 21 (chart showing energy savings by program).

Second, under the proposed cost cap, Duke would still have an incentive to administer programs that result in long-term savings. As the Environmental Parties conclude in their initial brief, Duke will "endeavor to achieve the maximum shareholder incentive level possible."[40] To do this, Duke will need to maximize not only the short-term energy savings, but also the long-term benefits that customers receive from its programs.[41] Thus, because Duke's profits depend on both short-term and long-term energy savings, it is simply not true that the PUCO Staff's proposed cost cap will cause Duke to focus exclusively on short-term energy savings.

2. There is no support for Duke's claim that it will have to discontinue programs.

Duke argues against the proposed cost cap in part because, according to Duke, the cost cap "puts the Company in the position of having to discontinue programs when they hit a specific dollar cap so as not to exceed the limit regardless of the success of the programs."[42] This argument fails because there is no evidence that Duke will be forced to discontinue programs.

Duke has been offering energy efficiency programs for 25 years.[43] Under the PUCO Staff's cost cap proposal, Duke will know exactly how much it can spend each year ($33.8 million) in advance. Duke should use its experience as an energy efficiency program administrator to plan for programs within this annual budget to ensure that it does not run out of money. If Duke is forced to discontinue programs for lack of funding, it will be a result of Duke's poor planning, not the $33.8 million annual limit on spending.

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[40] Environmental Initial Brief at 20.

[41] See Joint Ex. 2 at 5-6 (shared savings mechanism); Duke Ex. 7 (Ziolkowski Direct) at JEZ-1 (showing calculation of shared savings based on lifetime net benefits from programs).

[42] Duke Initial Brief at 5.

[43] Duke Ex. 1 (Initial Application) at 1 (stating that Duke has been offering energy efficiency programs since 1992).

I. Energy efficiency cost control is not unique to Ohio.

OCC witness Shutrump testified that at least four other states (Illinois, Texas, Pennsylvania, and Maine) have implemented cost caps similar to the one that the PUCO Staff proposes for Duke in this case.[44] In their initial brief, the Environmental Parties discuss the cost cap in Pennsylvania, arguing that because there are differences between Pennsylvania's cost cap and the cap that the PUCO Staff proposes, the PUCO should disregard Staff's proposal.[45] The Environmental Parties miss the point of Ms. Shutrump's testimony.

OCC witness Shutrump cited Illinois, Texas, Pennsylvania, and Maine as other states that have implemented cost caps. The Environmental Parties do not address Illinois, Texas, or Maine. Ms. Shutrump's testimony on those states, therefore, is unrebutted. And with respect to Pennsylvania, the Environmental Parties do little more than identify some distinctions between Pennsylvania's cost cap and the PUCO Staff's proposed cost cap for Duke in Ohio. But Ms. Shutrump's testimony was not that cost caps in other states were identical. She testified that other states have signaled their concern for the cost that customers pay for energy efficiency. The fact that other states may have taken a different approach to a cost cap is not the point. The point is that there is precedent for the type of proposal that the PUCO Staff recommends. That remains undisputed, even if, as the Environmental Parties claim, the cost caps in other states were not identical to the PUCO Staff's proposed cost cap in this case.

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[44] OCC Ex. 13 (Shutrump Direct) at 9:11-11:3.

[45] Environmental Initial Brief at 18-19.

J. Duke is not entitled to the same result that AEP Ohio achieved through a settlement that included the PUCO Staff's proposed cost cap.

Duke argues that the PUCO Staff's proposed cost cap in this case ($33.8 million) is unfair to Duke because it may be less generous than the terms of the approved settlement in AEP Ohio's case.[46] According to Duke, the proposed $33.8 million cap is unfair because AEP Ohio "will receive 154% of the amount that Duke Energy Ohio will have to spend on a per MWH basis."[47] But this is irrelevant for several reasons.

First, the PUCO Staff's proposal is based on each electric distribution utility's sales to customers, not MWH, so the MWH comparison is unrelated to the PUCO Staff's proposal.

Second, there is no support for Duke's suggestion that Duke and AEP Ohio must be treated identically (or even similarly), especially when AEP agreed to a cost cap as part of a settlement but Duke did not. As PUCO Staff witness Donlon said during his testimony, the imposition of a cost cap in AEP's case was the result of a settlement, "so obviously there was give and take on both sides of those parties to get to that percentage."[48] By now asking the PUCO to use AEP Ohio's settlement as a barometer for Duke's cost cap, Duke wants to take but not give. It also seeks to improperly rely on an approved settlement as precedent. Duke could have included a cost cap in its Settlement, but it chose not to. Now, facing the possibility that its Settlement will be amended to include a cap, it has requested a $52 million[49] cap that is substantially higher than the one that the PUCO Staff proposes.

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[46] Duke Initial Brief at 7-9.

[47] Id. at 7.

[48] Tr. at 156:20-22 (Donlon).

[49] Duke Ex. 13 (Duff Rebuttal).

The PUCO Staff's proposed $33.8 million annual cap is reasonable. The PUCO should not entertain Duke's request for a substantially higher cap.

K. The PUCO has the authority to control the costs of energy efficiency that are charged to customers.

At the hearing in this case, PUCO Staff witness Donlon stated that the PUCO has received a lot of complaints from the General Assembly regarding the cost of energy efficiency.[50] In its initial brief, Duke argues that complaints from the General Assembly to the PUCO are irrelevant because the legislature has the authority to impose a statutory cost cap and has not chosen to do so.[51] The lack of a statutory cost cap, however, is not determinative—or even informative.

Under Ohio law, the PUCO has broad authority over the rates that Ohio electric distribution utilities charge their customers. R.C. 4905.22 requires all utility charges to customers to be just and reasonable. R.C. 4928.02 establishes a state policy that customers are entitled to retail electric service that is reasonably priced. In determining whether to approve the proposed $33.8 million annual cost cap, the PUCO would be exercising its statutory authority over customers' utility rates.

L. Duke and OPAE misstate the record on serious bargaining.

1. OCC witness Shutrump confirmed during cross-examination that the Settlement was not the product of serious bargaining.

In her testimony, OCC witness Shutrump explained that (i) OCC was invited to only a single settlement negotiation between Duke and other parties to the case on November 3, 2016 and (ii) not all parties to the case were invited to that one meeting.[52] In

[50] Tr. at 162:5-9 (Donlon).

[51] Duke Initial Brief at 8.

[52] OCC Ex. 13 (Shutrump Direct) at 6-7.

an attempt to refute Ms. Shutrump's testimony, Duke introduced Duke Exhibit 10. Duke Exhibit 10 is marked "Meeting Sign-In Sheet."[53] But this sheet does not include any relevant information about the meeting. It does not state the date of the meeting. It does not include a PUCO case number. It does not include a topic. It does not include a location. It does not include a list of parties invited.[54] It is also incomplete: it is identified as page 1 of 5, but Duke produced only page 1.[55] In short, there is no way to know what Duke Exhibit 10 is, when any purported meeting associated with Duke Exhibit 10 took place, or whether any such meeting had anything to do with Duke's current energy efficiency portfolio case. Thus, Duke Exhibit 10 in no way rebuts Ms. Shutrump's testimony that the Settlement is not the product of serious bargaining.

Duke cross examined Ms. Shutrump regarding Duke Exhibit 10. Ms. Shutrump pointed out that Duke Exhibit 10 was undated, and therefore she could not confirm that Duke Exhibit 10 was in any way related to any settlement meetings in this case.[56] Duke continued to ask Ms. Shutrump whether it was "possible that there was someone in that meeting on November 3 representing Kroger whom you did not know," to which Ms. Shutrump speculated that "[i]t's possible."[57] From this lone statement, Duke jumps to the conclusion that Ms. Shutrump "admitted . . . that she was simply incorrect in regard to her argument that the Stipulation was not the product of serious bargaining."[58] Ms. Shutrump did no such thing. Ms. Shutrump simply responded to Duke's question about Kroger, noting that something was indeed "possible." Ms. Shutrump did not admit that

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[53] Duke Ex. 10.

[54] Id.

[55] Id.

[56] Tr. at 92:5-9 (Shutrump).

[57] Tr. at 93:4-10 (Shutrump).

[58] Duke Initial Brief at 3.

Kroger was invited to or attended the November 3 meeting. Nor, given the incomplete and confusing nature of Duke Exhibit 10, is there any evidence in the record that Kroger was invited to or attended the November 3 meeting.

Simply put, Ms. Shutrump stood by her expert testimony that the Settlement was not the product of serious bargaining. She did not, at any point, retract that portion of her testimony, as Duke claims.

As explained in OCC's initial brief, and as supported by Ms. Shutrump's testimony, the Settlement was not the product of serious bargaining, and it should not be approved.

2. OPAE's statements regarding its settlement communications with Duke are irrelevant and are not based on record evidence.

OPAE states in its initial brief that the Settlement was the product of serious bargaining because "OCC's participation in the settlement negotiations appears to be roughly equal to OPAE's participation and the participation of other parties." The PUCO should reject this argument.

First, OPAE's argument relies almost entirely on purported facts that are not in evidence. OPAE claims that it "attended no other settlement meetings."[59] OPAE claims that is "had one-on-one conversations with Duke in mid-January that led to OPAE's signature on the Amended Stipulation filed January 27, 2017."[60] OPAE claims that "the negotiations were conducted by email or through one-on-one conversations."[61] OPAE claims that "[e]ven after the December 22, 2016 settlement was filed, OPAE continued to negotiate one-on-one with Duke, as did other parties, which led to the Amended

[59] OPAE Initial Brief at 8.

[60] Id.

[61] Id. at 8-9.

Stipulation."[62] The problem with OPAE's claims, however, is that they are not based on record evidence.

OPAE had an opportunity to file testimony in this case supporting the Settlement. In that testimony, OPAE could have described its settlement negotiations with Duke. But OPAE did not file any testimony, and there is no record evidence supporting OPAE's unverified description of its role in the settlement process. The PUCO should give these arguments no weight, and OPAE's statements based on facts outside the record should be struck.

Second, even if OPAE's statements were supported by the record, they are irrelevant. The fact that OPAE may have engaged in various settlement communications with Duke has nothing to do with Duke's decision to exclude OCC, the sole representative of all residential customers, from all but one settlement meeting with other parties.

The PUCO should reject OPAE's arguments and conclude, for the reasons set forth in OCC's initial brief, that the Settlement was not the product of serious bargaining.

II. CONCLUSION

The Settlement was not the product of serious bargaining, it does not benefit customers or the public interest, and it violates regulatory principles and practices. The PUCO should adopt the PUCO Staff's proposal for a $33.8 million annual limit on the amount that Duke can charge customers for energy efficiency program costs and utility profits. Without this consumer protection, the Settlement is neither just nor reasonable. It is not in the public interest. The PUCO should reject the Settlement.

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[62] Id. at 9.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Reply Brief was served by electronic transmission upon the parties below this 7th day of April 2017.

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Summary: Brief Reply Brief by the Office of the Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Healey, Christopher Mr.