

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke                     )  
Energy Ohio, Inc. for Approval of an                     )  
Alternative Form of Regulation to Establish a            ) Case No. 19-791-GA-ALT  
Capital Expenditure Program Rider                     )  
Mechanism.   )

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

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**I. INTRODUCTION**

Nearly a year into the state of emergency declared by Ohio Governor DeWine, the coronavirus continues to cause health and economic suffering among Ohioans. Job loss has been at historic levels. People can't pay their rent. People can't afford food. Yet now, in a document that no consumer advocate would sign, Duke Energy and the Staff of the Public Utilities Commission of Ohio ("PUCO") have proposed a Settlement<sup>1</sup> for the PUCO to adopt. Their Settlement would allow Duke to charge residential customers nearly \$105 million over the next 2.5 years for ever increasing capital investments made by Duke under the Capital Expenditure Program ("CEP").<sup>2</sup> The PUCO's settlement standard requires parties to prove to the PUCO that, among other things, the Settlement benefits customers and the public interest. This Settlement fails the standard.

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<sup>1</sup> Joint Exs. 1.0 and 2.0 (collectively, the "Settlement").

<sup>2</sup> The Settlement's initial \$3.69/month rate x 406,082 residential customers x 6 months = \$8,990,655. The Settlement's November 1, 2021 – October 31, 2022 \$9.31/month rate x 406,082 residential customers x 12 months = \$45,367,481. The Settlement's November 1, 2022 – October 31, 2023 \$10.31/month rate x 406,082 residential customers x 12 months = \$50,240,465. Therefore, \$8,990,655 + \$45,367,481 + \$50,240,465 = \$104,598,601.

For most of its proposal, Duke wants the PUCO to use alternative ratemaking under a 2011 law instead of using the longstanding traditional ratemaking that is fairer to consumers. But in setting Duke's profits that consumers will pay, Duke and the PUCO Staff want the PUCO to use traditional ratemaking—but from a case decided in 2013—when financial conditions favored higher utility profits. The outdated rate of return adopted in the Settlement would result in a nearly \$7.9 million windfall<sup>3</sup> (higher profits than what Duke is entitled) for Duke over the next four years, all at consumer expense.

OCC respectfully requests that the PUCO reject or modify the Settlement, consistent with our consumer-protection recommendations below. The Settlement imposes substantial costs on consumers that are unjust and unreasonable at a time when the last thing they need is higher utility bills.

## **II. RECOMMENDATIONS**

The Settlement does not pass the PUCO's three-part test for settlements. The Settlement lacks diversity of interests as no consumer advocate signed it. The PUCO should consider the Settlement's lack of diversity of interests, which is a standard the PUCO sometimes uses. It does not benefit customers or the public interest. It violates regulatory principles. For these reasons, OCC opposes the Settlement.

### **A. The PUCO should reject the Settlement given the lack of diversity of those who signed it.**

The Settlement was signed by Duke and the PUCO Staff only. Duke represents its own interests (primarily the financial interests of its shareholders). And the PUCO Staff is supposed to balance the interests of all parties but does not represent any particular interest.

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<sup>3</sup> OCC Ex. 2 (Duann Direct Testimony) at 16.

There are no other parties to this case. OCC represents the interests of residential consumers who will pay millions of dollars in charges under the Settlement. OCC opposes the Settlement under the three-part test governing settlements: 1) Is the settlement the product of serious bargaining among capable, knowledgeable parties, where diversity of interests among signatory parties is a relevant factor? 2) Does the settlement, as a package, benefit consumers and the public interest? 3) Does the settlement package violate any important regulatory principle or practice?<sup>4</sup>

In considering the first prong of the PUCO's three-part test for settlements, the PUCO has at times considered the diversity of the signatory parties. Diversity is not required, and no single party can veto a settlement, but "the diversity of the signatory parties may be a consideration in determining whether a settlement is a product of serious bargaining among capable, knowledgeable parties under the first prong of the Commission's test."<sup>5</sup>

Unfortunately, the PUCO's past application of the diversity principle has been one-sided. In cases where many parties sign a settlement, the PUCO has touted the diversity of the signatory parties as supporting approval of the settlement. For example, in Dayton Power and Light's recent electric security plan case, the PUCO approved a settlement, noting that "it is *helpful* if the signatory parties do represent a variety of interests" and citing the interests of various parties that signed the settlement as supporting approval of the settlement.<sup>6</sup> In another recent case involving AEP, the PUCO again noted that diversity is not required but it then highlighted the diversity of

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<sup>4</sup> See, e.g., *In re Columbia Gas of Ohio, Inc.*, Case No. 17-2202-GA-ALT, Opinion & Order ¶ 45 (November 28, 2018).

<sup>5</sup> *In re Application of Ohio Edison Co., the Cleveland Elec. Illuminating Co., & the Toledo Edison Co. for Approval of their Energy Efficiency & Peak Demand Reduction Program Portfolio Plans*, Case No. 16-743-EL-POR, Opinion & Order ¶ 61 (November 21, 2017).

<sup>6</sup> Case No. 16-395-EL-SSO, Opinion & Order ¶ 21 (October 20, 2017) (emphasis in original).

parties as favoring approval of the settlement.<sup>7</sup> But when very few parties sign a settlement (sometimes, as in this case, as few as two), the PUCO has shrugged off the lack of diversity as irrelevant.<sup>8</sup> If diversity matters—and the PUCO has said that it does—then it must be applied both ways and consistently.

OCC is not suggesting that any party should have the sole authority to veto a settlement for lack of diversity. There may be cases where a settlement should be approved despite a lack of diversity—just as there will be cases where a settlement should be rejected despite it being signed by many parties. The point, however, is that when a settlement lacks diversity, the PUCO should take a close look at the interests of the parties who signed the settlement and a close look at the interests of the parties who did not sign the settlement.

Oftentimes, the signatory parties to a settlement are predominantly the utility and other parties who do not pay for the increased costs (and paid by the general public, mostly residential customers) in the settlement, while consumer representatives—whose constituents *do* pay the costs proposed in the settlement—are on the outside. This is important. When the representatives of those who bear the costs of a settlement oppose the settlement, the PUCO should give those representatives' views substantial weight in considering whether the settlement in fact benefits customers and the public interest, whether the settlement is consistent with regulatory principles, and whether the settlement was the product of serious bargaining.

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<sup>7</sup> Case No. 09-872-EL-FAC, Order on Global Settlement Stipulation ¶ 107 (February 23, 2017).

<sup>8</sup> See, e.g., *In re Application of Duke Energy Ohio, Inc. for an Adjustment to Rider AMRP Rates to Recover Costs Incurred in 2017*, Case No. 17-2318-GA-RDR, Opinion & Order (April 25, 2018) (approving settlement signed by only the utility and the PUCO Staff); *In re Application of Suburban Natural Gas Co. for an Increase in Gas Distribution Rates*, Case No. 18-1205-GA-AIR, Opinion & Order ¶¶ 87-91 (September 26, 2019) (approving settlement signed by only the utility and the PUCO Staff and opposed by consumer representatives OCC and Ohio Partners for Affordable Energy).

OCC's expert Dr. Daniel Duann explained in his testimony why, contrary to the claims by Duke and the PUCO Staff,<sup>9</sup> the Settlement does not represent an accommodation of the diverse interests and is not entitled to a careful consideration by the PUCO.<sup>10</sup> Although OCC was included in settlement discussion, OCC was not able to reach agreement with the other parties.

But the mere acts of phone calls, meetings, or negotiation among parties in crafting a settlement do not meet the requirement that the Settlement be a product of serious bargaining among capable, knowledgeable parties with diverse interests.<sup>11</sup> Rather, both the process of bargaining as well as the end product (the Settlement) of the bargaining process should be considered in applying this prong.<sup>12</sup> Moreover, a settlement reached by parties must reflect a genuine compromise among parties with diverse or competing interests.<sup>13</sup> And if parties with similar interests sign a settlement reflecting very little compromise, then the parties did not really “bargain” for anything.<sup>14</sup>

The Settlement between Duke and the PUCO Staff (the only two parties who signed the Settlement) is not a product of serious bargaining among competing or opposing interests, as evidenced by the close alignment of Duke's and the PUCO Staff's positions.<sup>15</sup>

First, the PUCO Staff and Duke made no attempt to address the excessively high rate of return that was based on the financial market conditions eight years ago when the last gas rate

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<sup>9</sup> See Settlement at 2.

<sup>10</sup> OCC Ex. 2 at 7-10.

<sup>11</sup> OCC Ex. 2 at 7.

<sup>12</sup> OCC Ex. 2 at 7.

<sup>13</sup> OCC Ex. 2 at 7.

<sup>14</sup> OCC Ex. 2 at 7.

<sup>15</sup> OCC Ex. 2 at 8.



case was decided.<sup>16</sup> The PUCO Staff also failed to propose any modification to the pre-tax rate of return of 9.16% requested by Duke.<sup>17</sup>

Second, the first-year Rider CEP charge included in the Settlement, in particular the fixed monthly residential rate of \$3.69,<sup>18</sup> is higher than that recommended in the Audit Report (\$3.68 per month)<sup>19</sup> and only slightly lower than that proposed in Duke's Application (\$3.72 per month).<sup>20</sup> Dr. Duann rightly questioned why the PUCO Staff is negotiating backward by agreeing to a higher rate than proposed in the Audit Report.<sup>21</sup> For example, PUCO Staff abandoned the Audit Report's recommendation that Duke should remove earnings and stock-based performance incentives from the CEP and agreed to increase its recommendation for the initial residential CEP Rider rate from \$3.68 per month to \$3.69 per month, which favors Duke.<sup>22</sup>

Third, the monthly residential caps for Rider CEP proposed in the Settlement,<sup>23</sup> as shown in Table 1, are significantly higher than those proposed in the Staff Report.<sup>24</sup> It appears that PUCO Staff gave up its position regarding the monthly residential caps and largely accepted the position of Duke.<sup>25</sup> There is no evidence of serious bargaining in terms of a meaningful give-and-take between Duke and PUCO Staff that would protect customers from sudden and drastic CEP rate increases.<sup>26</sup> Rather, PUCO Staff mostly gives and Duke mostly takes. Specifically,

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<sup>16</sup> OCC Ex. 2 at 8.

<sup>17</sup> OCC Ex. 2 at 8.

<sup>18</sup> See Settlement at 3.

<sup>19</sup> See Audit Report (May 11, 2020), Exhibit 5-1.

<sup>20</sup> See Application, Exhibit J, Schedule 1.

<sup>21</sup> OCC Ex. 2 at 8.

<sup>22</sup> OCC Ex. 2 at 8.

<sup>23</sup> See Settlement at 4-5.

<sup>24</sup> See Staff Report at 8-9.

<sup>25</sup> OCC Ex. 2 at 9.

<sup>26</sup> OCC Ex. 2 at 9.

PUCO Staff agreed to increase the cap on increases to the CEP Rider rate for 2019 investments from \$1.00 in the Staff Report to Duke’s requested \$2.92 – a 192% increase that favors Duke at customers’ expense.<sup>27</sup> Similarly, for 2020 investments, PUCO Staff again deserted its \$1.00 cap on CEP increases in favor of a \$2.70 cap – a 170% increase that again favors Duke.<sup>28</sup>

**Table 1**  
**Duke’s Monthly CEP Residential Rate Cap**

	<b>Monthly Residential Rate Cap Per Staff Report</b>	<b>Monthly Residential Rate Cap Per Settlement</b>	<b>For CEP Investments Made Before</b>	<b>Expected Effective Date</b>
<b>Year 1</b>	\$3.68	\$3.69	December 31, 2018	2021
<b>Year 2</b>	\$4.68	\$9.31	December 31, 2020	2022
<b>Year 3</b>	\$5.68	\$10.31	December 31,2021	2023
<b>Year 4</b>	\$6.68	\$11.31	December 31,2022	2024

These facts demonstrate there was no serious bargaining or diverse interests (especially representing consumers’ interests) between the signing parties of the Settlement. As a result, the Settlement is not a product of serious bargaining, and fails the first prong.

As explained, the Settlement in this case is supported by only the utility and the PUCO Staff. The utility financially benefits from the Settlement by charging customers millions of dollars for CEP investments, including an unreasonably high rate of return. And the PUCO Staff balances the interests of all parties but does not speak for residential or other consumers.

In contrast, OCC has statutory authority to speak for the interests of Duke’s residential consumers.<sup>29</sup> OCC is the only party in this case representing the interests of parties who will pay the costs proposed in the Settlement. Dr. Duann’s words bear repeating, “There appears to have

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<sup>27</sup> OCC Ex. 2 at 9.

<sup>28</sup> OCC Ex. 2 at 9.

<sup>29</sup> R.C. Chapter 4911.

been no serious bargaining in terms of a meaningful give-and-take between Duke and Staff that would protect customers from sudden and drastic CEP rate increases. Staff mostly gives and Duke mostly takes.”<sup>30</sup>

Under this scenario, the full boundaries of settlement options were not fully explored, and the Settlement result is an outcome that is tethered not far from the utility’s litigation position. That result harms customers and violates regulatory principles. The PUCO should not reject the Settlement *solely* because OCC opposes it. There are numerous reasons, as explained below, that the Settlement should be rejected on its merits. But when determining how much weight to give the Settlement, the PUCO should consider OCC’s opposition to it and conclude that it fails the first prong due to lack of diversity and a lack of serious bargaining among the two parties who signed the settlement (Duke and the PUCO Staff).

**B. The PUCO should reject (or at least modify) the Duke/PUCO Staff Settlement because it does not benefit customers or the public interest.**

**1. Allowing Duke to add substantial new charges to customers’ bills is unjust and unreasonable and would not benefit customers or the public interest, especially during a pandemic and financial emergency.**

The coronavirus pandemic and financial emergency has been devastating for Ohioans. Even before the pandemic, Cincinnati-area consumers were suffering. Poverty levels in Hamilton County are 16.2%, well exceeding the average statewide poverty statistic.<sup>31</sup> Poverty in Cincinnati is even higher with 27.2% of the population in the area living in poverty.<sup>32</sup> But the impacts of poverty are also demonstrated in the food insecurity rates where approximately 14.1% of the population or 115,000 people in Hamilton County live in an environment where they have an

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<sup>30</sup> OCC Ex. 2 at 9.

<sup>31</sup> OCC Ex. 1 (Adkins Direct Testimony) at 24.

<sup>32</sup> *Id.*

insecure access to food.<sup>33</sup> And the projected food insecurity impact in Hamilton County significantly increased to 18% in 2020 due to the Coronavirus pandemic.<sup>34</sup> Also, according to a study, 503,500 renters in Ohio were unable to pay their rent in June.

As OCC witness Adkins explained regarding the need to protect consumers:

[P]eople need protection and people need money now. Imposing a new charge on customers' utility bills is precisely the opposite of what the PUCO should be doing right now. The PUCO should be finding ways to save customers money, not ways to increase their utility bills.<sup>35</sup>

But under the Settlement, Duke would be allowed to immediately begin charging residential customers nearly \$45 each per year<sup>36</sup> until November 1, 2021 when this number more than doubles to nearly \$112,<sup>37</sup> a 152% increase,<sup>38</sup> with substantial increases following year after year. In fact, as described above, under the Settlement Duke's residential consumers could end up paying Duke almost \$105 million over just the next 2.5 years to support Duke's unjust and unreasonable CEP spending increases.

And while it is unknown when the coronavirus pandemic might end, or when the economy will recover to its pre-pandemic state (if ever), the "financial troubles for many affected by the coronavirus and associated protective measures are likely to persist for some time after the emergency resulting from the pandemic is over."<sup>39</sup>

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> OCC Ex. 1 at 24.

<sup>36</sup> See Joint Ex. 2.0 (\$3.69 per month per residential customers, multiplied by 12 months, is \$44.28 per year).

<sup>37</sup> See Joint Ex. 2.0 (\$9.31 per month per residential customers, multiplied by 12 months, is \$111.72 per year).

<sup>38</sup> OCC Ex. 1 at 43.

<sup>39</sup> OCC Ex. 1 at 25.

In other words, the Settlement's timing could not be worse. It is true that the PUCO has taken some steps to protect consumers during the pandemic, including moratoriums on disconnections, limiting door-to-door sales to protect consumers from unnecessary spread of the virus, extending last year's winter reconnect order, and prohibiting utilities from performing non-essential functions that would put customers at risk.<sup>40</sup> Unfortunately for consumers, the PUCO has allowed utilities to end many of these protections for customers. Among other things, disconnections will soon resume,<sup>41</sup> and marketers have already resumed door-to-door sales.<sup>42</sup>

The PUCO has an opportunity to protect consumers by modifying the Settlement so that consumers are not hit with millions of dollars in new utility-bill charges, right in the middle of a once-in-a-lifetime pandemic. If the PUCO authorizes Duke to begin collecting CEP investments and deferred CEP expenses from customers through the CEP Rider, then there should be no new Rider CEP charges to consumers until November 1, 2021—at the earliest.<sup>43</sup> These charges would relate to Duke's CEP investments from 2013 to 2018.<sup>44</sup>

Duke and the PUCO Staff recommend in the Settlement that Duke file an application to update its CEP rider by March 31 of each year with CEP Rider rate increases going into effect on

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<sup>40</sup> See *In re Proper Procedures & Process for the Commission's Operations & Proceedings During the Declared State of Emergency*, Case No. 20-591-AU-UNC, Entry (March 17, 2020) (temporarily suspending door-to-door and in-person marketing activities); Entry (March 20, 2020) (directing utilities to suspend all non-essential functions that might create unnecessary coronavirus risks); *In re the Application of Duke Energy Ohio, Inc. for Approval of Its Temporary Plan and Waiver of Tariffs and Rules Related to the COVID-19 State of Emergency*, Finding & Order (June 17, 2020) (suspending disconnections).

<sup>41</sup> In accordance with the PUCO's August 12, 2020 Finding and Order in Case No. 20-1252-GE-UNC, utility disconnections can resume after April 15, 2021, (Finding and Order at 4).

<sup>42</sup> See *In re Proper Procedures & Process for the Commission's Operations & Proceedings During the Declared State of Emergency*, Case No. 20-591-AU-UNC, Entry (June 3, 2020) (allowing marketers to resume in-store marketing activities); Entry (June 17, 2020) (allowing marketers to resume door-to-door sales); *In re the Application of Duke Energy Ohio, Inc. for Approval of Its Temporary Plan and Waiver of Tariffs and Rules Related to the COVID-19 State of Emergency*, Supplemental Finding & Order (July 29, 2020) (allowing Duke to resume disconnections as early as September 1, 2020).

<sup>43</sup> OCC Ex. 1 at 25.

<sup>44</sup> OCC Ex. 1 at 25.

November 1 each year.<sup>45</sup> OCC's witness Mr. Adkins, however, recommends that initial Rider CEP rates should go into effect no sooner than November 1, 2021.<sup>46</sup> Mr. Adkins further recommends that Duke's first application to update the CEP Rider be filed on March 31, 2022 with Rider rates effective on November 1, 2022.<sup>47</sup> This is, of course, conditioned on whether Duke files a base rate case by June 30, 2022, as could occur under the Settlement.<sup>48</sup> If Duke does file a base rate case by June 30, 2022, then all CEP investments for 2019 and through the rate case date certain plus applicable deferrals would be recovered in the rate case.<sup>49</sup> If Duke does not file a rate until June 30, 2023, as is possible under the Settlement, then Duke's first update application would cover 2019 investments and deferrals and would go into effect on November 1, 2022.<sup>50</sup> And, because Duke will file a base rate case no later than June 30, 2023 under the Settlement, then 2020 and forward CEP investments and applicable deferrals would be reviewed and recovered in the 2023 rate case.<sup>51</sup>

An even better protection for consumers, as proposed by Mr. Adkins, would be to reject the Rider CEP charges altogether and postpone any charges to consumers for Duke's CEP investments until Duke's next base rate case.<sup>52</sup> This is especially true, given that the proposed rates are based on an unreasonably high rate of return, as explained further below.

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<sup>45</sup> Settlement at 3.

<sup>46</sup> OCC Ex. 1 at 25-26.

<sup>47</sup> OCC Ex. 1 at 26.

<sup>48</sup> OCC Ex. 1 at 26.

<sup>49</sup> OCC Ex. 1 at 26.

<sup>50</sup> OCC Ex. 1 at 26.

<sup>51</sup> OCC Ex. 1 at 26.

<sup>52</sup> OCC Ex. 1 at 18-19 (explaining why single-issue ratemaking harms consumers and eliminates some of the protections they have when a utility is required to seek recovery of its costs through a base rate proceeding instead).

Either way, it does not benefit customers to allow Duke to start charging them millions of dollars now as the pandemic and financial fallout continue to devastate Cincinnati-area consumers. These new charges under the Settlement would actively harm them at a time when they can least bear these additional costs. The PUCO should reject the CEP charges until Duke's next base rate case to protect consumers.

**2. Requiring customers to pay Duke 5.32% on its debt, when Duke's actual weighted cost of debt is merely 4.03%, is contrary to consumers' interest, would be unjust and unreasonable and is otherwise an outrageous example of a failure in a Settlement (if not in Ohio regulation).**

Under the Settlement, Duke would earn a guaranteed 9.16% pre-tax rate of return on its CEP investments, paid by customers.<sup>53</sup> That 9.16% rate of return is based on a 9.84% return on equity (profit) and 5.32% cost of debt.<sup>54</sup> In other words, through charges to customers under the CEP Rider, customers would pay for Duke to make a 9.84% profit on its CEP investments while also paying Duke 5.32% so that Duke can service its debt.<sup>55</sup> That return on equity and cost of debt are based on Duke's most recent base rate case—approved more than seven years ago in 2013. Another problem is that the real interest rate on Duke's debt is not actually 5.32%. It is actually substantially lower at just 4.03%.<sup>56</sup> This results in an outrageous windfall for Duke, at consumer expense.

Overall, the costs of long-term debt has declined drastically from 2012 to 2020, probably more so than the decline in the authorized ROEs.<sup>57</sup> For example, the daily Long-Term Composite

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<sup>53</sup> OCC Ex. 2 at 18.

<sup>54</sup> OCC Ex. 2 at 18.

<sup>55</sup> OCC Ex. 2 at 18.

<sup>56</sup> OCC Ex. 2 at 5.

<sup>57</sup> OCC Ex. 2 at 21.

Rate (defined as the unweighted average of bid yields on all outstanding fixed-coupon bonds neither due nor callable in less than 10 years) published by the U.S. Treasury has decreased from 2.64% in January 3, 2012 to 1.04% in July, 31 2020.<sup>58</sup> The yields of BBB-rated corporate bonds, generally considered by many financial analysts as a proxy for long-term debts of regulated utilities, published by the St. Louis Federal Reserve Bank have shown a similar degree of decline from 4.58 in January 3, 2012 to 2.35% in July 31, 2020.<sup>59</sup> Dr. Duann testified that he “expect[s] this trend of declining cost of equity (or the authorized ROE) and cost of debt for regulated utilities to continue for the next few years based on the struggling U.S. economy and the challenging employment condition.”<sup>60</sup>

Duke’s proposed cost of debt of 5.32% is outdated and overstated.<sup>61</sup> As ordered by the PUCO, Duke submitted supplemental information regarding its costs of debt. Duke calculated its cost of long-term debt to be 4.94% as of December 31, 2018.<sup>62</sup> And according to OCC’s rate of return expert, Dr. Daniel Duann, Duke’s current cost of long-term debt has decreased further from 4.94% because Duke has refinanced its long-term debts totaling \$1.2 billion in 2019 and 2020.<sup>63</sup> Duke has sold three First Mortgage Bonds totaling \$1.2 billion in 2019 and 2020: a \$400 million bond due in 2029 with an interest rate of 3.65%, another \$400 million bond due in 2049 with an interest rate of 4.30%, and a \$400 million due in 2030 with an interest rate of 2.125% on

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<sup>58</sup> See <https://www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/TextView.aspx?data=longtermrate>.

<sup>59</sup> See <https://fred.stlouisfed.org/series/BAMLC0A4CBBBEY>.

<sup>60</sup> OCC Ex. 2 at 21.

<sup>61</sup> OCC Ex. 2 at 24.

<sup>62</sup> See Supplemental Filing, Exhibit I, Schedule D-3A (September 9, 2019). This filing can be accessed at <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=e5c71b3d-cff6-4ef1-9220-46cdd963960f>.

<sup>63</sup> OCC Ex. 2 at 24.



May 21, 2020.<sup>64</sup> Part of the proceeds of the 2019 First Mortgage Bonds was used to retire the First Mortgage Bonds of \$450 million (with an interest rate of 5.45%) that would mature on April 1, 2019.<sup>65</sup> As a result of these debt financings in 2019 and 2020, Dr. Duann updated Duke's current cost of long-term debt to be approximately 4.03%. This calculation is shown in Table 2.

**Table 2**  
**Duke's Updated Cost of Long-term Debt**

	Face Amount Outstanding	Interest rate	Unamortized Discount	Unamortized Debt Expense	Unamortized Loss on Reacquired Debt	Carrying Value	Annual Interest Cost	Cost of Debt
	(1)	(2)	(3)	(4)	(5)	(6) = (1) + (3) – (4) – (5)	(7) = (1) * (2)	
As of 12/31/2018	\$1,575,184,011	varies	(\$30,865,309)	\$6,489,384	\$2,781,185	\$1,535,027,083	\$75,895,057	4.94%
1/8/2019 Debt Finance (1)	\$400,000,000	3.65%	(\$2,600,000)	\$277,000	\$0	\$397,123,000	\$14,600,000	3.68%
1/8/2019 Debt Finance (2)	\$400,000,000	4.30%	(\$3,500,000)	\$277,000	\$0	\$396,223,000	\$17,200,000	4.34%
4/1/2019 Debt Retirement	\$450,000,000	5.45%				\$450,000,000	\$24,525,000	5.45%
5/21/2020 Refinance	\$400,000,000	2.125%	(\$2,600,000)	\$560,000	\$0	\$397,123,000	\$8,600,000	2.17%
Total	\$2,325,184,011	varies	(\$39,586,359)	\$7,603,384	\$2,781,185	\$2,275,313,083	\$116,195,057	4.03%

Also according to Dr. Daniel Duann, customers will pay an additional \$7.9 million to Duke as a result of using the 5.32% cost of debt and the 9.84% return on equity over the next

<sup>64</sup> See PUCO Case No. 18-238-GE-AIS, Report of Issuance (January 8, 2019). This Report can be access at <http://dis.puc.state.oh.us/TiffToPdf/A1001001A19A08B10841D01065.pdf>, and PUCO Case No. 19-637-AIS, Report of Issuance (June 16, 2020). This Report can be access at <http://dis.puc.state.oh.us/TiffToPdf/A1001001A20F16B03433G01413.pdf>.

<sup>65</sup> See PUCO Case No. 18-238-GE-AIS, Report of Issuance at S-10.

four years.<sup>66</sup> This \$7.9 million goes directly to Duke's shareholders because Duke does not need it to pay down its new, lower-cost debt, thus making Duke's CEP investments very profitable for Duke's shareholders, at the expense of consumers. And as Duke adds more CEP investments and begins charging customers for these new investments in 2021 and beyond, the windfall will only increase, year after year under the CEP Rider.

Duke's shareholders have already been benefitting from the lower cost of debt. In Duke's last rate case (decided long ago in 2013), the PUCO approved a 5.32% cost of debt to be paid by consumers. Customers pay that 5.32% cost of debt through their base rates and will continue to pay that cost of debt through base rates until at least June 30, 2022, when (and if) Duke files a new base rate case.<sup>67</sup>

In sum, since Duke's last rate case, its cost of debt has dropped, allowing Duke to save and retain millions of dollars per year. Customers have received no benefits from the lower cost of debt because, in the absence of a new rate case, they continue to pay Duke 5.32% interest through their base rates.

Adding to the problem for consumers is that *Duke* controls the timing of rate case filings (or the lack of a filing). Duke filed its last rate case nine years ago, in 2012. Now, as if that self-arranged windfall were not enough, Duke is asking the PUCO to authorize *new* charges to consumers, still using the nearly 8-year-old cost of debt that was approved in Duke's rate case. This is just plain unjust and unreasonable. And wrong. The PUCO cannot conclude that customers paying a non-existent 5.32% interest rate on Duke's debt is a benefit for customers and the public interest. At a minimum, the PUCO should require Duke to use its actual cost of

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<sup>66</sup> OCC Ex. 2 at 17.

<sup>67</sup> OCC Ex. 1 at 26.

debt for any charges to customers under the CEP Rider. Indeed, the law applicable to the rate cases that Duke chose not to file requires using the “actual” cost of debt (R.C. 4909.15(E)(2)(a)).

**3. Requiring customers to pay a 9.84% return on equity (profit) is unjust and unreasonable because the 9.84% profit is based on 2012 financial conditions from the last rate case Duke chose to file, and which profit was substantially different (higher) than the lower profit that would result from current financial conditions.**

As explained, the Settlement would allow Duke to charge customers a (high) 9.84% return on equity (another name for utility profits). The only basis for the proposed return on equity is that it is the same return on equity that was approved in Duke’s most recent base rate case—nearly 8 years ago in 2013.<sup>68</sup>

But an approved return on equity is supposed to be based on *current* market conditions. As OCC witness Dr. Duann, a rate of return expert, testified, utility shareholders “should be provided the opportunity (but not a guarantee) to earn a fair (but not excessive) return on their invested capital in comparison to other investments currently available.”<sup>69</sup> In other words, as Dr. Duann testified, the utility’s return should be “based on current market conditions instead of a rate of return set eight years ago.”<sup>70</sup> This is consistent with the longstanding regulatory principle established by the United States Supreme Court that a “rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market, and business conditions generally.”<sup>71</sup>

Current market conditions do not come close to supporting a 9.84% profit on utility equity capital investments. In the last 8 years, there has been a “significant decline in the costs of

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<sup>68</sup> See Application, Exhibit J, Schedule 1.

<sup>69</sup> OCC Ex. 2 at 6 (emphasis added).

<sup>70</sup> OCC Ex. 2 at 26 (emphasis added).

<sup>71</sup> OCC Ex. 2 at 27 (quoting *Bluefield Water Works v. Pub. Serv. Comm’n*, 262 U.S. 679 (1923)).

debt and equity for all businesses including regulated utilities,” as explained by Dr. Duann.<sup>72</sup> In 2012 (when Duke filed its most recent rate case), for example, the average return on equity for gas companies nationwide was 9.94%—nearly identical to the 9.84% return on equity approved for Duke itself in 2012.<sup>73</sup> In 2019, the average had dropped to 9.71%, and in the first half of 2020 it dropped further to 9.40%.<sup>74</sup>

Adding to the problem for consumers is that it is *Duke* who controls the lack of a rate case filing since it last filed in 2012. In short, today’s market no longer supports a 9.84% return on equity or anything close to it. But under the PUCO Staff/Duke Settlement, new charges would be imposed on customers requiring them to pay Duke’s 8-year-old return on equity. That high profit level is from the last rate case that Duke chose to file when conditions produced a higher return on equity for charging consumers. This result does not benefit customers and it does not benefit the public interest—it benefits Duke.

**4. No law or policy requires the PUCO to use the same rate of return for single-issue ratemaking as the one that was approved in the utility’s last base rate case.**

The utility controls the timing of its rate case filings. Contributing to the ability of utilities to stretch time between their rate case filings is the favorable rate making treatment received from single issue ratemaking. If utilities want to rely on single issue ratemaking to stay out longer/avoid traditional rate cases, then consumers should not be held captive to a legacy rate of return from an outdated rate case outcome.

Duke argues that the PUCO should use a 9.84% return on equity and 5.32% cost of debt because those numbers were approved in Duke’s most recent rate case. Duke’s position seems to

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<sup>72</sup> OCC Ex. 2 at 20.

<sup>73</sup> OCC Ex. 2 at 20.

<sup>74</sup> OCC Ex. 2 at 20-21.

be that whenever a utility seeks approval of a rider, the PUCO should automatically use the rate of return from the last rate case, and no further analysis is necessary. This argument fails for several reasons.

First, there is no law requiring the PUCO to use the same rate of return from the utility's most recent base rate case when approving a single-issue ratemaking charge like the CEP Rider. The CEP statute (R.C. 4929.111) says nothing at all about the appropriate rate of return, return on equity, or cost of debt to be used for CEP investments.

Second, the PUCO has already rejected, in this very case, Duke's claim that the rate of return from its most recent rate case is required to be used.<sup>75</sup> Consistent with its prior ruling, the PUCO should update the rate of return.

More specifically, at the outset of the case, Duke sought a waiver of the PUCO's standard filing requirements regarding rate of return.<sup>76</sup> Duke argued that there was no need for any rate of return documents in its application because, according to Duke, the PUCO had already determined that the rate of return from the most recent rate case should be used.<sup>77</sup>

The PUCO denied Duke's request and required it to comply with the standard filing requirements related to rate of return. The PUCO ordered:

Duke is directed to file the information required by the [Standard Filing Requirements] in Chapter II, Section C (Operating Income), Section D (Rate of Return); and the supplemental filing requirements in Section (B)(1) through (B)(6), as well as (B)(8).<sup>78</sup>

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<sup>75</sup> Entry ¶ 18 (June 19, 2019).

<sup>76</sup> Entry ¶ 15 (June 19, 2019).

<sup>77</sup> Entry ¶ 15 (June 19, 2019).

<sup>78</sup> Entry ¶ 18 (June 19, 2019).

If it were true, as Duke suggests, that the rate of return from the most recent rate case is required to be used, then there would have been no reason and no need for the PUCO to order Duke to comply with the rate of return Standard Filing Requirements.

Duke's alternative regulation application should be treated like a rate case application. In other words, Duke has the burden to prove its proposed rate of return in this case is just and reasonable (it isn't). In its revised filings on September 9, 2019, Duke provided its updated cost of debt and capital structure as of December 31, 2018,<sup>79</sup> but chose not to update its cost of common equity. Duke has failed to demonstrate the use of its 8-year-old rate of return is just and reasonable.

Third, use of the utility's most recently approved base rate case rate of return might make sense when the utility's most recent base rate case was in fact recent. But here, Duke's approved rate of return was approved nearly 8 years ago in a substantially different financial climate. While the path of least resistance might be to simply rubber stamp the utility's 8-year-old rate of return, equity and reasonableness require the PUCO to consider whether charging customers that rate remains just and reasonable—and it does not, for all the reasons explained above.

Finally, and adding to the problem for consumers it is no coincidence that it is *Duke* who controls the lack of a rate case filing since it last filed in 2012. Considering that Duke holds the best cards for ratemaking that favors it, the PUCO should be strict in requiring ratemaking that favors customers and the public interest and that also makes regulatory principles work for consumers. The PUCO should reject the Settlement and adopt the OCC position on fair profits that Duke wants to charge consumers.

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<sup>79</sup> See Supplemental Filing, Exhibit I, Schedule D-3A (September 9, 2019). This filing can be accessed at <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=e5c71b3d-cff6-4ef1-9220-46cdd963960f>.

**5. Customers should pay an 8.29% pre-tax rate of return based on a 4.03% cost of debt and 9.36% return on equity instead of the much higher levels of 9.16% proposed in the PUCO Staff/Duke Settlement.**

The record in this case contains the testimony of one rate of return expert and one rate of return expert only: OCC witness Dr. Daniel Duann.<sup>80</sup> Duke chose to submit the testimony of a two witnesses: Jay Brown and Marty Petchul.<sup>81</sup> Mr. Brown and Mr. Petchul, by their own admission, are not rate of return experts:

Q. Are you a rate of return expert?

A. (Brown). I am not.<sup>82</sup>

Q. And are you a rate of return expert?

A. (Petchul). No, I am not. I am an engineer by trade.<sup>83</sup>

The PUCO Staff did not offer a witness on rate of return or any other issue. And neither Duke nor the PUCO Staff asked Dr. Duann a single substantive question on cross examination.<sup>84</sup>

Thus, the *only* expert testimony on rate of return comes from Dr. Duann, and neither Duke nor PUCO Staff (the only parties to the Settlement) challenged Dr. Duann's testimony through their own testimony or through cross examination.

In situations like this—where a single expert witness (Dr. Duann) provides uncontroverted testimony—the PUCO lacks the discretion to simply disregard Dr. Duann's expert opinions.

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<sup>80</sup> OCC Ex. 2.

<sup>81</sup> Tr. at 20 (Mr. Brown) and 41 (Mr. Petchul).

<sup>82</sup> Tr. at 20 (Brown).

<sup>83</sup> Tr. at 41 (Petchul).

<sup>84</sup> Tr. at 83-84 (counsel for Duke stating, "Just a very quick clarifying question about the correction [Dr. Duann made]"; counsel for Staff stating, "No questions, your Honor.").

As the Supreme Court of Ohio explained in *State v. White*, a trier of fact “is not required to automatically accept expert opinions.”<sup>85</sup> At the same time, however, the Court stated that an expert opinion “may not be arbitrarily ignored, and some reason must be objectively present for ignoring expert opinion testimony.”<sup>86</sup> More importantly, the Court stated that a trier of fact “may not disregard credible and uncontradicted expert testimony in favor of either the perceptions of lay witnesses or of the court’s own expectations .... Doing so shows an arbitrary, unreasonable attitude toward the evidence before the court and constitutes an abuse of discretion.”<sup>87</sup>

The PUCO has previously recognized the substantial weight afforded uncontroverted testimony. In *In re Investigation of Conrail’s Reciprocal Switching Charges and Supplements*, for example, the PUCO stated, “As a rule, ... while the weight given to evidence is largely discretionary with the Commission, the Commission must act reasonably, and cannot make a finding ... contrary to uncontroverted testimony.”<sup>88</sup> See also *State ex rel. Rogers v. Elbert*, 180 Ohio App. 3d 284 (2008) (Dickinson, concurring) (“Although it has been generally recognized that a trier of fact is free to reject testimony even if that testimony is unrebutted, that is no longer true in civil cases in Ohio.”).

The PUCO, therefore, should give substantial weight to Dr. Duann’s expert opinion in deciding the appropriate rate of return for customers to pay under the CEP Rider. The following Table provides a comparison of the pre-tax rate of return provided by the Settlement and Dr. Duann’s proposed changes.

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<sup>85</sup> 118 Ohio St.3d 12, 23 (2008).

<sup>86</sup> *Id.* (quoting *United States v. Hall*, 583 F.2d 1288, 1294 (5th Cir. 1978)).

<sup>87</sup> *Id.* at 24.

<sup>88</sup> Case No. 79-901-RR-SIN, Opinion & Order (April 23, 1980).



**Table 3**  
**Comparison of Pre-tax Rate of Returns**

		<b>Settlement</b>	<b>OCC</b>
		<b>(based on 2012 gas rate case)</b>	<b>(based on current market condition and updated capital structure)</b>
<b>Cost of Debt</b>	<b>(1)</b>	<b>5.32%</b>	<b>4.03%</b>
<b>Debt Ratio</b>	<b>(2)</b>	<b>0.4670</b>	<b>0.4603</b>
<b>Weighted Cost of Debt</b>	<b>(3) = (1) * (2)</b>	<b>2.48%</b>	<b>1.86%</b>
<b>Cost of Equity (ROE)</b>	<b>(4)</b>	<b>9.84%</b>	<b>9.36%</b>
<b>Equity Ratio</b>	<b>(5)</b>	<b>0.5330</b>	<b>0.5397</b>
<b>Tax Gross-up Factor</b>	<b>(6)</b>	<b>1.2727273</b>	<b>1.2727273</b>
<b>Weighted Cost of Equity</b>	<b>(7) = (4) * (5)</b> <b>* (6)</b>	<b>6.68%</b>	<b>6.43%</b>
<b>Pre-tax Rate of Return</b>	<b>(8) = (3) + (7)</b>	<b>9.16%</b>	<b>8.29%</b>

Dr. Duann testified that a just and reasonable pre-tax rate of return for customers to pay under Rider CEP would be 8.29%—not the 9.16% rate proposed in the Settlement.<sup>89</sup> First, Dr. Duann testified that the appropriate cost of debt would be 4.03%.<sup>90</sup> As Dr. Duann explained, this is Duke’s actual, current cost of debt. It is based on the weighted average interest rate of Duke’s recently refinanced debt.<sup>91</sup> There is simply no justification for charging customers a 5.32% cost of debt when Duke’s actual cost of debt is just 4.03%.

Dr. Duann also testified that in his expert opinion, the appropriate return on equity, based on current market conditions, is 9.36%.<sup>92</sup> Dr. Duann analyzed data on similar gas distribution utilities nationwide from 2019 and 2020 and determined that the average return on equity in rate cases was 9.56%.<sup>93</sup> Dr. Duann then assessed Duke’s risk profile to see how it compares to a typical utility. Dr. Duann found that (i.) Duke, and its parent company, currently has an above-

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<sup>89</sup> OCC Ex. 2 at 5.

<sup>90</sup> OCC Ex. 2 at 5.

<sup>91</sup> OCC Ex. 2 at 25.

<sup>92</sup> OCC Ex. 2 at 26.

<sup>93</sup> OCC Ex. 2 at 26.

average investment-grade credit rating,<sup>94</sup> (ii.) Duke is rated “A-” with a “stable” outlook by S&P Global Ratings, and a “Baa1” with “stable” outlook by Moody’s,<sup>95</sup> and (iii.) Duke’s parent company, Duke Energy Corporation, also has an investment-grade credit rating with “A-” rating and a “stable” outlook by S&P Global Ratings and “Baa1” rating with “stable” outlook by Moody’s.<sup>96</sup> There is no indication that Duke is facing or will face any unusual and distinct business and financial risks that would distinguish it significantly from a typical regulated gas distribution company.<sup>97</sup> Duke’s expected earnings are considered stable especially in the current economic environment with considerable uncertainty due to the coronavirus pandemic and economic dislocations arising from the pandemic.<sup>98</sup> Duke is providing an essential gas utility service that is needed by almost everyone within its service territory.

In addition, under Ohio’s current regulatory environment, Duke has various riders and “credit supportive” rate design in place that would largely insulate Duke from any usage decline due to economic recession or other factors.<sup>99</sup> There is simply no basis whatsoever to consider Duke to be riskier than an average gas utility and to give it a ROE higher than that authorized for an average gas utility in recent years.<sup>100</sup>

In Dr. Duann’s expert opinion, these factors demonstrate that Duke faces less risk than the typical natural gas distribution utility. Accordingly, he recommended a 20-basis point

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<sup>94</sup> OCC Ex. 2 at 21-22.

<sup>95</sup> OCC Ex. 2 at 21-22.

<sup>96</sup> OCC Ex. 2 at 21-22.

<sup>97</sup> OCC Ex. 2 at 21-22.

<sup>98</sup> OCC Ex. 2 at 21-22.

<sup>99</sup> OCC Ex. 2 at 22.

<sup>100</sup> OCC Ex. 2 at 22.

downward adjustment to the 9.56% average return on equity to arrive at a recommended 9.36% return on equity for Duke.<sup>101</sup>

All this testimony was un rebutted. Duke and PUCO Staff offered no testimony on rate of return. And they declined to challenge Dr. Duann’s analysis or conclusions on cross examination. To protect consumers from paying unjust and unreasonable rates, the PUCO should adopt Dr. Duann’s unrefuted testimony and proposal.

**Table 4**  
**Additional Cost of Using the 9.16% Pre-Tax Rate of Return in First Year of Rider CEP**

	Per Settlement Using 9.16% ROR	Per Settlement Using 8.29% ROR	Difference	Using 8.29% ROR and a Lower Net rate Base	Difference
	(1)	(2)	(3) = (1) – (2)	(4)	(5) = (1) – (4)
<b>Net Rate Base</b>	\$96,956,013	\$96,956,013		\$96,037,860	\$918,153
<b>Pre-tax Rate of Return</b>	9.16%	8.29%		8.29%	
<b>Annualized Return on Rate Base</b>	\$8,881,171	\$8,037,653	\$843,517	\$7,961,539	\$919,632
<b>Total Operating Expenses</b>	\$15,809,760	\$15,809,760		\$15,809,760	\$0
<b>Annual Revenue Requirement</b>	\$24,690,931	\$23,847,413	\$843,517	\$23,771,299	\$919,632
<b>Rider CEP Rates</b>					
<b>GSS/ECTA Residential Rates</b>	\$3.69	\$3.57		\$3.56	

As demonstrated in the above Table, using Duke’s 9.16% rate of return would result in substantial overcharges to consumers. But if Dr. Duann’s more reasonable 8.29% rate of return were adopted, then residential customers would pay \$3.56 per month in the first year of the CEP Rider instead of the Settlement’s proposed \$3.69, a 3.6% reduction.<sup>102</sup>

Over a period of four years, the Settlement’s unreasonable 9.16% rate of return would result in a \$7.9 million windfall for Duke—all at consumer expense.<sup>103</sup>

<sup>101</sup> OCC Ex. 2 at 26.

<sup>102</sup> OCC Ex. 2 at 12.

<sup>103</sup> OCC Ex. 2 at 10.

**Table 5**  
**Cost of Using the 9.16% Pre-Tax Rate of Return for Year 2 to Year 4**

(1)			Year 2	Year 3	Year 4
(2)	<b>Rate Cap</b>		\$9.31	\$10.31	\$11.31
(3)	<b>Number of Customer Bill</b>		4,836,307	4,836,307	4,836,307
(4)	<b>Residential Revenues</b>	(2) * (3)	\$45,025,018	\$49,862,365	\$54,698,632
(5)	<b>Total Revenues</b>	(4) / 0.7235	\$62,233,612	\$68,918,210	\$75,602,809
(6)	<b>Total Operating Expenses</b>	(5) * 0.6403	\$39,848,182	\$44,128,330	\$48,408,478
(7)	<b>Annualized Return on Rate Base at 9.19%</b>	(5) – (6)	\$22,385,430	\$24,789,880	\$27,194,330
(8)	<b>Projected Net Rate Base</b>	(7) / 0.0916	\$244,382,426	\$270,631,881	\$296,881,335
(9)	<b>Annualized Return on Rate Base at 8.29%</b>	(8) * 0.0829	\$20,259,303	\$22,435,383	\$24,611,463
(10)	<b>Difference in Annualized Return on Rate Base in using different ROR</b>	(7) – (9)	\$2,126,127	\$2,354,497	\$2,582,868

This is unjust and unreasonable. It does not benefit customers. The PUCO should modify the Settlement and require Duke to charge customers a pre-tax rate of return no higher than 8.29%.

**6. The PUCO should find that Duke’s massive increase in CEP expenditures and related CEP Rider increases violate regulatory principles and are unjust and unreasonable and not in the public interest.**

The standard by which settlements are measured requires that the settlement benefit consumers and be in the public interest. The law (and thus regulatory principles) requires Duke’s CEP expenditures to be just and reasonable.<sup>104</sup> Accordingly, before it can approve the Settlement, the PUCO must find that Duke’s 547% increase in CEP spending from 2013 to 2019 benefits consumers, is in the public interest, and is just and reasonable. It should not, and cannot, do so. The PUCO should reject the Settlement.

**i. Alternative Regulation and CEP Law Have Harmed Consumers**

OCC witness Mr. Adkins explained in his testimony that since their adoption, alternative regulation and CEP laws have proven to be one-sided in favor of the gas utilities at customers’

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<sup>104</sup> R.C. 4905.22; R.C. 4929.111.

expense.<sup>105</sup> For the last 67 years, gas utilities such as Duke have been required under Revised Code 4905.22 to “furnish necessary and adequate service and facilities.” Utilities such as Duke did just that without the CEP law (in R.C. 4929.111).<sup>106</sup> With adoption of the CEP law, gas utilities can now defer and collect from customers PISCC and depreciation in addition to property tax expenses.<sup>107</sup> But prior to adoption of the law, they were not allowed to charge consumers for these costs.<sup>108</sup> So now, customers get the same necessary and adequate gas utility services and facilitates that remains required under R.C. 4905.22, but they pay more for it.<sup>109</sup> This is neither just nor reasonable.

In this case, customers will pay Duke approximately \$45 million for deferrals associated with CEP investments made in 2013 – 2018 with more to come in November 2021 and beyond.<sup>110</sup> If these investments were in fact necessary, then Duke would be required to make them to furnish necessary and adequate service and facilities under R.C. 4905.22, even without the CEP.<sup>111</sup> In other words, under the CEP law, customers do not get more, but they pay more.<sup>112</sup>

Additionally, the CEP law can potentially distort gas utility decision-making and incent utilities (Duke in this case) to over-invest in capital assets.<sup>113</sup> Prior to the arrival of the CEPs, utilities made necessary capital investments in response to their obligation to furnish “necessary

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<sup>105</sup> OCC Ex. 1 at 17.

<sup>106</sup> OCC Ex. 1 at 17.

<sup>107</sup> OCC Ex. 1 at 17.

<sup>108</sup> OCC Ex. 1 at 17.

<sup>109</sup> OCC Ex. 1 at 17.

<sup>110</sup> OCC Ex. 1 at 17.

<sup>111</sup> OCC Ex. 1 at 17.

<sup>112</sup> OCC Ex. 1 at 17.

<sup>113</sup> OCC Ex. 1 at 17.

and adequate facilities.”<sup>114</sup> But they would not begin to receive a return of (through depreciation expenses) or return on their investments (rate of return) until the investments were included in the utilities’ plant in-service balance in their next rate case.<sup>115</sup> This delay in cost recovery from customers is commonly called the “regulatory lag.”

Regulatory lag has served as an important financial check on utility capital investment.<sup>116</sup> If a utility had to wait until its next rate case to begin to collect from customers a return of and on capital investments made since the date certain in its last rate case, then it had strong incentives to carefully plan and budget for capital investments and spend only what was necessary.<sup>117</sup> The CEP law, however, gives the utility an incentive to invest more than it otherwise would.<sup>118</sup> It significantly eliminates regulatory lag because the costs that the utility would normally incur while it waits for approval of new rates in a base rate case are all now deferred (with carrying costs) for subsequent collection from customers.<sup>119</sup>

## **ii. Duke’s CEP Spending Has Dramatically Increased, Harming Consumers**

Duke’s CEP spending confirms how utilities have taken advantage of alternative ratemaking and the CEP law, to consumers’ detriment. In 2013, the first year of its CEP, Duke made \$21,877,330 in gross CEP capital additions.<sup>120</sup> But in 2018 (the last year included in the Application in this case), Duke’s gross CEP additions totaled to \$95,136,703,<sup>121</sup> a whopping

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<sup>114</sup> OCC Ex. 1 at 17.

<sup>115</sup> OCC Ex. 1 at 17.

<sup>116</sup> OCC Ex. 1 at 17.

<sup>117</sup> OCC Ex. 1 at 17.

<sup>118</sup> OCC Ex. 1 at 17.

<sup>119</sup> See Averch, Harvey and Johnson, Leland, Behavior of the Firm under Regulatory Constraint (1962).

<sup>120</sup> OCC Ex. 1 at 17.

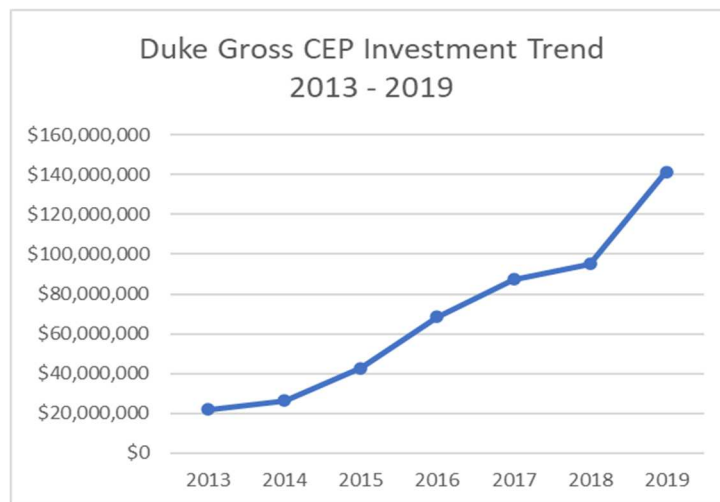
<sup>121</sup> OCC Ex. 1 at 17.

335% increase.<sup>122</sup> And things get worse for customers in 2019 where Duke's gross CEP investments increased to \$141,494,735,<sup>123</sup> a truly astonishing 547% increase over what it invested in 2013 for non-AMRP capital additions in only seven years.<sup>124</sup>

**Table 6**  
**Duke Annual 2013-2019 Gross Capital Expenditures<sup>125</sup>**

2013 (\$)	2014 (\$)	2015 (\$)	2016 (\$)	2017 (\$)	2018 (\$)	2019 (\$)
21,877,330	26,308,530	42,817,578	68,466,517	87,223,575	95,136,703	141,494,735

**Figure 1: Duke Gross CEP Investment Trend 2013-2019**



The availability of the CEP appears to be encouraging Duke to invest more than it otherwise would, thus leading to higher, potentially unnecessary, charges for consumers, Mr. Adkins concludes.<sup>126</sup>

<sup>122</sup> OCC Ex. 1 at 17.

<sup>123</sup> Duke response to PUCO Staff DR-8, 'STAFF-DR-8 Supplemental Attachment,' at Line 9.

<sup>124</sup> OCC Ex. 1 at 17.

<sup>125</sup> 2013-2018 from Application Exhibit J, Schedule 4 at page 5 of 6; 2019 from Duke response to PUCO Staff DR-8, 'STAFF-DR-8 Supplemental Attachment,' at Line 9.

<sup>126</sup> OCC Ex. 1 at 17.

Similarly, the single-issue ratemaking law for gas utilities embodied in Revised Code 4929 has proven to work against consumers and in favor of the gas utilities.<sup>127</sup> Among other things, the single-issue ratemaking law has enabled utilities, such as Duke, to avoid filing base rate cases where all of their revenues, expenses, depreciation rates, cost allocations, return on equity, cost of debt and a fair rate of return can be reviewed, considered and updated simultaneously rather than as single issues.<sup>128</sup> The ability to avoid filing a base rate case has benefited Duke greatly at its customers' expense as described in detail in the testimony of OCC witness Daniel Duann.<sup>129</sup>

As OCC witness Adkins explained, this shows that the availability of alternative regulation and the CEP law has encouraged Duke to substantially increase its CEP spending—more than it otherwise would—which ultimately results in higher charges for consumers.<sup>130</sup> The PUCO should end this practice.

**iii. To protect consumers, the PUCO should reject the Settlement under the settlement standard and governing law.**

The standard by which settlements are measured requires that the Settlement benefit consumers and be in the public interest. The law (and thus regulatory principles) requires Duke's CEP expenditures to be just and reasonable.<sup>131</sup> The PUCO itself said in Case No. 13-2417-GA-UNC that it was going to review the reasonableness of Duke's CEP and the reasonableness of the magnitude of the CEP spending.<sup>132</sup> Additionally, the PUCO is required to provide a rationale for

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<sup>127</sup> OCC Ex. 1 at 17.

<sup>128</sup> OCC Ex. 1 at 17.

<sup>129</sup> OCC Ex. 1 at 17.

<sup>130</sup> OCC Ex. 1 at 19.

<sup>131</sup> R.C. 4905.22; R.C. 4929.111.

<sup>132</sup> See *In re Duke Energy Ohio, Inc. for Approval to Implement a Capital Expenditure Program*, Case No. 13-2147-GA-UNC, Finding and Order at ¶ 22 (October 1, 2014).



its decisions.<sup>133</sup> Accordingly, before it can approve the Settlement, the PUCO must find and explain how Duke's 547% increase in CEP spending from 2013 to 2019 benefits consumers, is in the public interest, and is just and reasonable. The evidence does not permit reaching such a conclusion.

The amount of the increase—547%—in the context of utilities' abuse of alternative ratemaking and the CEP law (described above) itself should be enough. But there's more. Duke's CEP capital spending has increased to the point that in 2019 its CEP gross capital additions exceeded the 2019 CEP investments made by Dominion East Ohio Gas ("Dominion") and was more than three quarters of what Columbia Gas of Ohio ("Columbia") invested in its CEP in 2019 despite the fact that Duke is a much smaller gas utility in Ohio than either Dominion or Columbia.<sup>134</sup> In terms of number of customers, Columbia has nearly 3.5 times more customers than Duke and Dominion has nearly three times more customers than Duke.<sup>135</sup> In terms of miles of mains, Columbia has 3.5 times more miles of mains than Duke and Dominion has slightly less than 3.5 times more miles of main than Duke.<sup>136</sup> Yet, in 2019, Duke spent 76% of what Columbia spent on 2019 CEP investments (\$185,111,735 for Columbia vs. \$141,494,735 for Duke).<sup>137</sup> And Duke spent a little more than three percent more than Dominion on 2019 CEP investments (\$141,494,735 for Duke vs. \$137,076,945 for Dominion).<sup>138</sup>

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<sup>133</sup> R.C. 4903.09.

<sup>134</sup> OCC Ex. 1 at 21-22.

<sup>135</sup> OCC Ex. 1 at 22.

<sup>136</sup> OCC Ex. 1 at 22.

<sup>137</sup> OCC Ex. 1 at 22.

<sup>138</sup> OCC Ex. 1 at 22.

Duke's extravagant CEP spending does not permit the PUCO to find and explain how Duke's 547% increase in CEP spending from 2013 to 2019 benefits consumers, is in the public interest, and is just and reasonable. The Settlement should be rejected.

If the Settlement is not rejected, the PUCO should at least modify it by adopting caps on capital investment as proposed by OCC. The sharp upward trend in Duke's CEP expenditures despite having a much smaller system and several times fewer customers than other gas utilities in Ohio demonstrates the importance of placing meaningful caps on Duke's CEP expenditures.<sup>139</sup> The PUCO itself recognized the importance of limiting Duke's CEP spending when it initially imposed the \$1.50 cap on CEP deferrals in its 13-2417-GA-UNC case. Unfortunately, the \$1.50 cap on deferrals was insufficient to prevent the very large increases in Duke's CEP expenditures described above.<sup>140</sup>

But the PUCO has an opportunity to at least partially rectify the problem now by imposing reasonable limits on Duke's 2019 and forward CEP investment that will be collected through the CEP Rider. In fact, the PUCO stated specifically in its Finding and Order approving Duke's CEP in the 13-2417 case that "The Commission has not granted cost recovery for any CEP-related items, and the prudence *and reasonableness of the magnitude* of Duke's CEP-related regulatory assets and associated capital spending will be considered by the Commission in any future proceedings seeking cost recovery..."<sup>141</sup> Now is the time for the PUCO to find that such spending far exceeded what is just or reasonable. If the PUCO approves the Settlement, it should adopt the CEP spending caps recommended by OCC.

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<sup>139</sup> OCC Ex. 1 at 22-23.

<sup>140</sup> OCC Ex. 1 at 23.

<sup>141</sup> *In re the Application of Duke Energy Ohio, Inc. for Approval to Implement a Capital Expenditure Program*, Case No. 13-2417-GA-UNC, Finding and Order (October 1, 2014) at 13 (italics added).

**7. The so-called “rate caps” under the Settlement do not adequately protect customers from paying too much to Duke under Rider CEP.**

Under the Settlement, residential customers would initially pay \$3.69 per month under the CEP Rider (for less than a year, when the Settlement provides for a much higher \$9.31 per month rate to be charged in November 2021) based on CEP investments and related deferrals for the January 1, 2013 – December 31, 2018 period.<sup>142</sup> Then Duke will calculate annual CEP Rider rates using the most recent known number of customer bills.<sup>143</sup> Next, Duke will file future annual applications to modify Rider CEP no later than March 31 of each year with new rates effective on November 1 of each year.<sup>144</sup>

The first annual application to update Rider CEP will be filed by March 2021 and will seek to collect from customers CEP capital investments and related deferrals for 2019 and 2020.<sup>145</sup> The 2021 CEP Rider residential rate for collecting 2019 and 2020 CEP investments and deferrals will be capped at \$9.31 per month (\$3.69/month initial rate + \$2.92/month for 2019 + \$2.70 for 2020).<sup>146</sup> And future CEP Rider annual residential rate increases for 2021 investments and going forward will be capped at no more than \$1.00 above the prior year’s rate and will apply to both CEP investments and deferrals.<sup>147</sup> But Duke and PUCO Staff’s proposed cap structure is not the best way to protect consumers.

OCC witness Adkins’ testimony explained that customers would be better served with a cap on the amount of capital investment that can be included in the rider rather than a cap on the

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<sup>142</sup> OCC Ex. 1 at 10.

<sup>143</sup> OCC Ex. 1 at 10.

<sup>144</sup> OCC Ex. 1 at 10.

<sup>145</sup> OCC Ex. 1 at 10.

<sup>146</sup> OCC Ex. 1 at 10.

<sup>147</sup> OCC Ex. 1 at 10.

rate. As Mr. Adkins described, a straightforward cap on the annual investments that can be included in Rider CEP is easier to implement and monitor.<sup>148</sup> It is also more predictable because it does not depend on all the many variables that ultimately determine the revenue requirement.<sup>149</sup> Instead, the PUCO would look at a single number (the amount of gross capital CEP investment) and determine whether it was above a certain amount.

Mr. Adkins testified that in his expert opinion, a reasonable annual cap would be approximately \$24 million based on the average CEP investment that Duke made in the early years of the CEP program (2013 and 2014).<sup>150</sup> Such a cap is reasonable because it is tied to Duke's actual CEP investments before Duke started substantially increasing its annual CEP spending while knowing that it would receive cost recovery for that investment on a more expedited basis through single-issue ratemaking.<sup>151</sup> An investment cap<sup>152</sup> would also be easier for Duke to manage because it can simply budget its capital investments based on the cap without having to convert its projected capital investments into a rate to stay under the rate cap.

**8. Consumer protection requires that charges to customers under Rider CEP include a reduction based on Duke's operations and maintenance savings resulting from its CEP investments (that consumers will fund).**

As OCC witness Adkins explained, Duke's CEP investments should result in O&M expense savings for Duke, and these savings should be passed on to customers.<sup>153</sup> Duke currently

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<sup>148</sup> OCC Ex. 1 at 30.

<sup>149</sup> OCC Ex. 1 at 30.

<sup>150</sup> OCC Ex. 1 at 31-32.

<sup>151</sup> OCC Ex. 1 at 32.

<sup>152</sup> As OCC witness Adkins explained, an "investment cap" does not mean that Duke is prohibited from investing. Duke can invest any amount of its own money that it wants. The investment cap simply determines how much investment can be included in the rider charge to consumers. *See* OCC Ex. 1 (Adkins) at 32.

<sup>153</sup> OCC Ex. 1 at 34.

charges customers for other capital investments through another rider, the Accelerated Mains Replacement (“AMRP”) rider. Under the AMRP rider, customers receive a credit for O&M savings resulting from AMRP investments.<sup>154</sup> And because some of the CEP investments are similar to the types of investments made through Duke’s AMRP, the CEP too should result in O&M savings for Duke that should be passed on to customers.<sup>155</sup>

OCC witness Mr. Adkins recommended that that the PUCO adopt an approach similar to what it did for the other infrastructure replacement programs.<sup>156</sup> The PUCO should direct Duke to form a collaborative group comprised of Duke, PUCO Staff, OCC, and other interested parties to identify the specific expenses and related expense accounts that will be reduced as aging infrastructure is replaced and new capital investments are made.<sup>157</sup> And, again, patterned after the approach taken in similar infrastructure programs, Duke and the collaborative group would develop baseline spending levels for the identified expense categories based on spending levels built into the base rates set in Duke’s last rate case.<sup>158</sup> Expense reductions compared to the baselines resulting from the CEP capital replacements and investments would then reduce the revenue requirement in annual CEP Rider applications.<sup>159</sup>

The PUCO should adopt this collaborative methodology to reduce the revenue requirement in annual CEP Rider applications as recommended.

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<sup>154</sup> OCC Ex. 1 at 34.

<sup>155</sup> OCC Ex. 1 at 34-36.

<sup>156</sup> OCC Ex. 1 at 35-36.

<sup>157</sup> OCC Ex. 1 at 36.

<sup>158</sup> OCC Ex. 1 at 36.

<sup>159</sup> OCC Ex. 1 at 36.

**9. To protect consumers, the Earnings and Stock-Based Incentives should be removed from the Settlement**

The stock-based and earnings-based incentives Duke is permitted to collect from customers under the Settlement and described in Larkin & Associates' Audit Report are designed to reward Duke employees for achieving financial performance goals that benefit Duke's shareholders.<sup>160</sup> Such incentives do not provide a direct and primary benefit to Duke's customers.<sup>161</sup> Therefore, the incentives should not be included in CEP Rider rates that customers will pay.<sup>162</sup> But if the PUCO decides to permit Duke to keep the stock and earnings-based incentives (which it should not), then it certainly should not permit Duke to earn a rate of return on such incentives.<sup>163</sup> In no instance should Duke earn a rate of return on financial performance incentives that are entirely at its discretion.<sup>164</sup> Duke would have the perverse incentive to establish large incentives that are very easy to meet just to garner larger returns.<sup>165</sup>

The earnings and stock-based incentives should be removed from the Settlement. They do not benefit consumers or the public interest.

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<sup>160</sup> OCC Ex. 1 at 37.

<sup>161</sup> OCC Ex. 1 at 37.

<sup>162</sup> OCC Ex. 1 at 37.

<sup>163</sup> OCC Ex. 1 at 37.

<sup>164</sup> OCC Ex. 1 at 37.

<sup>165</sup> OCC Ex. 1 at 37.

**C. The PUCO should reject or modify the Settlement because it violates regulatory principles and practices.**

**1. The Settlement harms consumers by violating the longstanding regulatory rate of return principle that shareholders should be entitled an opportunity to earn a profit (and charge it to consumers) that is no higher than what is consistent with current market conditions.**

By adopting Duke's 8-year-old rate of return from its last rate case, the Settlement violates regulatory principles related to rate of return.

First, it is a fundamental regulatory principle that an approved rate of return gives the utility's shareholders the *opportunity* to achieve that rate of return, but not a guarantee.<sup>166</sup> The Settlement, in contrast, would guarantee Duke a 9.16% pre-tax rate of return on its CEP investments, paid by customers.<sup>167</sup>

Second, it is a longstanding regulatory principle that a utility's return on investment (*i.e.*, rate of return) should be based on current market conditions, thus allowing the utility's shareholders an opportunity to earn a fair return when compared to the return that they might obtain were they to invest their money elsewhere.<sup>168</sup> The Settlement violates this regulatory principle because it gives Duke's shareholders a return on investment that is far greater than they would get in the market when investing in companies with similar risk. As OCC witness Dr. Duann explained, financial conditions in 2012 were far different than they are now. Debt was substantially more expensive, and the average utility return on equity was also substantially

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<sup>166</sup> See *In re Application of Columbus S. Power Co.*, Case No. 11-346-EL-SSO, Opinion & Order (August 8, 2012) (while the utility "should have the opportunity to earn a reasonable rate of return, there is not a right to a guaranteed rate of return"); *In re Application of Dayton Power & Light Co.*, Case No. 78-92-EL-AIR, Opinion & Order (March 9, 1979) ("It is not the function of this Commission to guarantee a particular rate of return to an applicant utility but merely to afford the company an opportunity to earn a fair rate of return.") (quoting Case No. 76-704-GA-CMR (June 29, 1977)). See also OCC Ex. 2 at 15.

<sup>167</sup> OCC Ex. 1 at 36.

<sup>168</sup> OCC Ex. 2 at 15.

higher than it is now.<sup>169</sup> The Settlement's proposed 9.16% pre-tax rate of return bears no relation whatsoever to the risk that Duke's shareholders face in 2020. This is the definition of bad regulatory policy.

Third, by allowing Duke to charge customers a substantially above-market 9.16% pre-tax rate of return, Duke would be charging customers rates that are not just and reasonable, as required by R.C. 4905.22, nor would Duke be providing reasonably priced service, as required by R.C. 4929.02(A)(1).<sup>170</sup>

In short, all applicable regulatory rate of return principles support Dr. Daniel Duann's proposed rate of return. In contrast, Duke's justification for its proposed rate of return is little more than, "that was our rate of return 8 years ago and we like how high it is so please let us keep using it."

The PUCO should find that the Settlement fails the third prong of the PUCO's three-part test. It should modify the Settlement to adopt Dr. Daniel Duann's recommended 8.29% pre-tax rate of return applied to Duke's charges to consumers under Rider CEP.

**2. The Settlement harms consumers by violating the regulatory principle that ratemaking should be equitable for consumers.**

As OCC witness Adkins testified, "good regulatory policy requires the PUCO to consider equity among consumers."<sup>171</sup> The regulatory principle of equity supports a result that treats customers fairly in the context of the requested rate increase. In the past, the PUCO has expressed a need for fair and equitable treatment of consumers. For example, in establishing certain rules under the Ohio Administrative Code, the PUCO expressed its belief that such rules

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<sup>169</sup> OCC Ex. 2 at 15.

<sup>170</sup> OCC Ex. 2 at 14.

<sup>171</sup> OCC Ex. 1 at 45.



were needed “so that all customers are treated equitably and with care.”<sup>172</sup> In another case, the PUCO rejected a utility’s proposal because the utility was trying to maximize profits for shareholders, but the PUCO found it appropriate to “consider the disparate results of the company’s actions on behalf of ratepayers.”<sup>173</sup>

The Settlement violates this principle because it is inequitable to put \$3.69 per month in new charges on customers’ bills followed shortly thereafter by \$9.31 in monthly charges in the middle of the coronavirus pandemic and financial emergency.<sup>174</sup> And the Settlement is inequitable because, as described above, it would require customers to pay a cost of debt that is higher than Duke’s actual cost of debt and a return on equity that is unreasonable in today’s financial markets (this adds an additional \$7.9 million that consumers must pay over four years).

### **3. The Settlement harms consumers by violating the regulatory principle of just and reasonable rates.**

As described earlier,<sup>175</sup> the law (and thus regulatory principles) requires Duke’s CEP spending to be just and reasonable. Duke’s extravagant CEP spending does not permit the PUCO to find and explain how Duke’s 547% increase in CEP spending from 2013 to 2019 is just and reasonable. The Settlement therefore violates regulatory principles. It should be rejected.

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<sup>172</sup> *In re Revision of the Minimum Tel. Serv. Standards*, Case No. 83-869-TP-COI, Finding & Order (October 18, 1988).

<sup>173</sup> *In re Application of the Cincinnati Gas & Elec. Co. for an Increase in Elec. Rates*, Case No. 91-410-EL-AIR (Opinion & Order) (May 12, 1992). *See also In re Application of the Cleveland Elec. Illuminating Co.*, Case No. 86-456-EL-ATA, Opinion & Order (June 17, 1986) (PUCO Staff recognizing the “Commission’s standards of fairness and equity in rate making”).

<sup>174</sup> OCC Ex. 1 at 45.

<sup>175</sup> Section B6, *supra*.

### III. CONCLUSION

The Settlement does not pass the PUCO's three-part test for evaluating settlements as it lacks diversity of interest (by virtue of no consumer advocate signing it) and lacks serious bargaining among the two parties who signed the settlement. The Settlement does not benefit customers and it disserves the public interest. And the Settlement violates regulatory principles by, among other things, making consumers pay Duke for excessive profits and by failing to treat customers equitably during a global pandemic and financial crisis.

The PUCO should protect consumers by rejecting or modifying the Settlement, consistent with OCC's consumer-protection recommendations.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Post-Hearing Brief was served on the persons stated below via electronic transmission, this 24th day of February 2021.

/s/ William J. Michael  
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