

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
Energy Ohio, Inc. for an Adjustment to the) Case No. 21-618-GA-RDR
Capital Expenditure Program Rider Rate.)

**INITIAL BRIEF FOR CONSUMER PROTECTION
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

Last year's Settlement between Duke Energy ("Duke") and the PUCO Staff authorized Duke to charge residential consumers nearly \$105 million for 2021 and 2022 for Duke's ever-increasing capital investments. The Settlement also permitted Duke to establish a Capital Expenditure Program (CEP) Rider to collect from consumers CEP expenditures and related accrued deferrals pertaining to investments made between 2013 and 2018.

Under this PUCO-approved Settlement,¹ which the Office of the Ohio Consumers' Counsel ("OCC") opposed, Duke was allowed a two-step process to immediately begin charging each of the utility's residential consumers. Duke was allowed to charge consumers \$3.69 per month (nearly \$45 per year per consumer)² until November 1, 2021 for its CEP spending that occurred in 2013-2018. Beginning

¹ *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Alternative Form of Regulation to Establish a Capital Expenditure Program Rider Mechanism*, Case No. 19-791-GA-ALT Opinion and Order (April 21, 2021).

² Case No. 19-791-GA-ALT, Joint Ex. 2.0 (\$3.69 per month per residential customers, multiplied by 12 months, is \$44.28 per year); *see*, Opinion and Order at 46 (April 21, 2021).

November 1, 2021, Duke was allowed to charge for its 2019 CEP investments up to a cap of \$6.61 (nearly \$80 per year per consumer).³

In this application,⁴ Duke seeks to collect CEP investments for two more investment years, 2019 and 2020. Duke claims that the addition of the 2019 CEP investments causes the rider rate to reach the cap of \$6.61 per month in November 2021. Duke seeks approval to increase the monthly CEP Rider rate even further, to \$9.31 per month (nearly \$112 per year)⁵ beginning May 2022, a 41% increase, in a one year's time frame.

Duke's filed application is not just and reasonable.⁶ First, Duke wants the PUCO to use an outdated rate of return from a distribution rate case decided nine years ago when financial conditions favored higher utility profits. The 9.16% pre-tax rate of return proposed by Duke for its CEP rate base is unjust and unreasonable.⁷ The PUCO should protect Duke's 410,000 residential gas consumers against charges for inflated profits and debt costs that do not reflect the actual market conditions for return on equity or Duke's true cost of debt. The PUCO should adopt a pre-tax rate of return of no higher than 8.29%.⁸

³ Case No. 19-791-GA-ALT, Opinion and Order at 47 (April 21, 2021).

⁴ Case No. 21-618-GA-RDR, Duke Energy Ohio Ex. 1, Application (April 23, 2021).

⁵ Case No. 19-791, Joint Ex. 2.0 (\$9.31 per month per residential customers, multiplied by 12 months, is \$111.72 per year).

⁶ See, Case No. 21-618-GA-RDR, Consumer Protection Comments by Office of the Ohio Consumers Counsel (November 8, 2021).

⁷ Case No. 21-618-GA-RDR, OCC Ex. 1 (Direct Testimony of Daniel J. Duann, Ph.D.) at 4-7 (January 25, 2022).

⁸ *Id.* at 2-3.

Second, Duke's capital spending under CEP has increased significantly in recent years.⁹ CEP charges to consumers should be capped to avoid consumers paying more for these investments than they should. Residential rate caps of \$1.00 per month will be implemented for 2021 and going-forward CEP investments per the approved Settlement in Case No. 19-791-GA-ALT. These rate caps should also be applied to the 2019 and 2020 CEP investments as well, which are the years at issue in this case.

Third, PUCO should not allow Duke to charge consumers for the utility's financial performance incentives benefitting stockholders.¹⁰ Achievement of utility financial performance goals provides no benefit to consumers and is neither just nor reasonable.

Fourth, the PUCO should order Duke to identify and quantify the operation and maintenance ("O&M") savings that are generated as a result of the CEP capital investments and pass these savings back to consumers as reductions to the CEP Rider as is done in similar capital investment programs.¹¹

OCC respectfully requests that the PUCO modify Duke's application, consistent with our consumer protection recommendations below. The application, if approved, would impose substantial costs on consumers that are unjust and unreasonable at a time when the last thing they need is higher utility bills.

⁹ Case No. 21-618-GA-RDR, OCC Ex. 2 (Direct Testimony of Kerry J. Adkins) at 4, 8-11 (January 25, 2022).

¹⁰ OCC Ex. 2 (Adkins Direct Testimony) at 13-20.

¹¹ See, OCC Ex. 2 at 21-23. For example, other programs involving infrastructure replacement and improvement such as Columbia's Infrastructure Replacement Program ("IRP"), Dominion's Pipeline Infrastructure Replacement ("PIR") program, Vectren's Distribution Replacement Rider ("DRR") program, and Duke's AMRP.

II. RECOMMENDATIONS

- A. The PUCO Staff, the PUCO's Auditor Blue Ridge and Duke would perpetuate the PUCO's past injustice of allowing Duke to overcharge consumers for profits and cost of debt that are outdated and inflated. The PUCO should reject their approach to protect consumers.**

Once again Duke is proposing to overcharge consumers for profits and for its cost of debt based on an outdated case from nine years ago. Duke wants the PUCO to use alternative ratemaking instead of using the longstanding traditional ratemaking that is fairer to consumers. But in setting Duke's profits that consumers will pay, Duke wants 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 would result in a nearly \$2.5 million windfall¹² (higher profits than what Duke is entitled) for Duke over the next twelve-month period covered in this proceeding, all at consumer expense.

Duke proposed a 9.16% pre-tax rate of return to be charged to customers under Rider CEP.¹³ This proposed rate of return is based on the rate of return decided in its last rate case nine years ago in Case No. 12-1685-GA-AIR. The PUCO Staff did not recommend any change to this proposed rate of return, and neither did the Auditor. If this 9.16% pre-tax rate of return were allowed in setting the CEP charges, it would perpetuate the PUCO's past injustice of allowing Dominion to overcharge consumers for profits and cost of debt that are outdated and inflated.

The use of the 9.16% pre-tax rate of return will hurt the consumers that the PUCO is supposed to protect because it will increase the annual CEP Rider revenue requirement (charges) to consumers by approximately \$2.5 million in this proceeding, while providing

¹² See, OCC Ex. 1 (Duann Direct Testimony) at 12.

¹³ Case No. 21-618-GA-RDR, Duke Ex. 1, Application Attachment No. 1 (April 23, 2021).

no offsetting benefits.¹⁴ The 9.16% pre-tax rate of return proposed by Duke for its CEP rate base is unjust and unreasonable.¹⁵ The reliance on a rate of return decided nine years ago under vastly different financial market conditions in setting current rates charged to consumers is problematic and unreasonable. It should not continue.

In a prior Dominion case, Commissioner Conway said during a public meeting announcing the PUCO's Order:

“[W]e have a utility that not unlike some other utilities hasn't been in for a rate case in quite a while so our policy of referring back to cost of capital values that were established in the most recent prior base rate case means that we refer back quite a distance in time, and during that period, as the record in this case and OCC and NOPEC have pointed out, there have been macro changes with regard to capital costs that have undoubtedly caused the cost of capital to decline in a material way.”¹⁶

It is unfortunate (if not inexplicable) for consumers that both the PUCO Staff's Report¹⁷ and the Audit Report by the PUCO-hired Auditor (Blue Ridge Consulting Services, Inc.)¹⁸ did not specifically address this consumer protection issue. This issue of a utility overcharging consumers for its profits and debt costs should have been front and center at the PUCO.¹⁹

Duke has asserted that the pre-tax rate of return of Rider CEP should not be revised.²⁰ This assertion is without merit and should be rejected by the PUCO. First, in

¹⁴ OCC. Ex. 1 (Duann Direct Testimony) at 7.

¹⁵ OCC Ex. 1 (Duann Direct Testimony) at 4-7.

¹⁶ *In the Matter of the East Ohio Gas Company d/b/a Dominion Energy Ohio for Approval of an Alternative Form of Regulation*, Case No. 19-468-GA-ALT, available at https://www.youtube.com/watch?v=d_ozIp9-4tQ (starting at 13:58).

¹⁷ See Staff Ex. 2, Staff's Review and Recommendation (October 22, 2021).

¹⁸ See Staff Ex. 1, Plant-in-Service and Capital Expenditure Program Audit of Duke Energy Ohio, Inc. (October 14, 2021) (“Audit Report”).

¹⁹ See, OCC Ex. 1 (Duann Direct Testimony) at 5.

²⁰ See, Duke Energy Ex. 3, Supplemental Testimony of Jay P. Brown at 18-19 (January 18, 2022).

Case No. 19-791-GA-ALT, the PUCO did not set the pre-tax rate of return to be used for this proceeding. The PUCO Order only approved the CEP program and the first-year CEP Rider charge.²¹

Additionally, the Auditor in this proceeding did not endorse or support a specific pre-tax rate of return. The Auditor simply verified that the 9.16% rate of return, as proposed by Duke in its Application, did reflect the approved pre-tax rate of return that was set in accordance with the rate case settlement in Case No. 12-1685-GA-AIR and adjusted to reflect a reduction in the corporate tax rate from 35% to 21%.²² Consequently, the PUCO can and should re-set the pre-tax rate of return for CEP investments based on consideration of public interest (such as protecting consumers from unjust and unreasonable rates charged by a regulated utility) and sound regulatory principles.²³

Duke's last rate case was resolved more than nine years ago (in 2013). Market conditions have changed. The cost of capital has decreased significantly since 2012. This 9.16% rate of return is based on a 5.32% cost of debt and an allowed profit of 9.84%, and an income tax rate of 21%.²⁴ That outdated debt figure of 5.32% far exceeds Duke's current cost of debt of approximately 4.03% calculated by OCC.²⁵ That allowed profit (return on equity) of 9.84% also exceeds the currently allowed profits of gas distribution companies in Ohio and nationwide.²⁶ The rate of return for charges to consumers under

²¹ See, OCC Ex. 1 (Duann Direct Testimony) at 6.

²² Staff Ex. 1, Audit Report, at 33.

²³ See, OCC Ex. 1 (Duann Direct Testimony) at 6.

²⁴ Duke Ex. 1, Application, Attachment No. 1.

²⁵ OCC Ex. 1 (Duann Direct Testimony) at 11.

²⁶ OCC Ex. 1 (Duann Direct Testimony) at 12-16; See, S&P Global Market Intelligence, Major Rate Case Decisions (July 27, 2021). The average authorized return on equity for gas utilities nationwide in rate cases decided in 2020 is 9.46%.

Rider CEP should be based on current market conditions, including Duke's current cost of debt and capital structure, and a reasonable return on equity of no more than 9.36%.²⁷ OCC has calculated a reasonable pre-tax rate of return for Duke's CEP program should be no higher than 8.29%.²⁸

The use of an outdated and inflated rate of return would unreasonably and unnecessarily increase the financial burden on Duke's residential consumers by at least \$1.85 million for the revenue requirement associated with the 2019 CEP investments, and over \$3.05 million in revenue requirement for the 2020 CEP investments.²⁹ Thus, the use of the 9.16% pre-tax rate of return (vs. the 9.29% pre-tax rate of return OCC recommends) would increase the CEP Rider charges by approximately \$2.5 million (\$2,453,580) for the twelve-month period covered in this proceeding.³⁰

This additional financial burden to consumers from using this outdated and inflated pre-tax rate of return is more alarming now with the very rapid rise in natural gas and other energy costs in recent months and potentially over an extended time into the future. Specifically, the Energy Information Administration recently warned:

“We expect that the nearly half of U.S. households that heat primarily with natural gas will spend 30% more than they spent last winter on average—50% more if the winter is 10% colder-than-average and 22% more if the winter is 10% warmer-than-average.”³¹

²⁷ OCC Ex. 1 (Duann Direct Testimony) at 12.

²⁸ OCC Ex. 1 (Duann Direct Testimony) at 7, 12.

²⁹ OCC Ex. 1 (Duann Direct Testimony) at 13-14.

³⁰ $\$2,453,580 = (\$1,849,894 + \$3,057,267) / 2$.

³¹ See U.S. Energy Information Administration, Winter Fuels Outlook (October 2021). https://www.eia.gov/outlooks/steo/special/winter/2021_Winter_Fuels.pdf.

By all indications, U.S. natural gas prices are likely to remain elevated through the rest of this winter and possibly for a much longer period beyond that. The PUCO may have little control over the gas commodity prices as they are largely determined in the marketplace. But the PUCO does have the power (and responsibility) to set reasonable profits (authorized return on equity) and debt costs for Duke's CEP program to protect consumers from paying unreasonable rates³² for gas distribution and accelerated infrastructure riders. The PUCO should re-double its efforts to lower the costs of gas services, including the CEP charge, to protect consumers, especially the at-risk population, when the gas commodity cost is expected to go much higher in the foreseeable future.

As directed by the PUCO, the PUCO Staff includes a Financial Earnings Review in the Staff Report.³³ The Staff Report concludes that "Staff avers that the metrics indicate that Duke has not significantly over-earned or under-earned."³⁴ However, the Staff Report's Financial Earnings Review is a review of the *overall* profitability of Duke and other local distribution companies (locally and nationwide).³⁵ The Financial Earnings Review is not a review of the earnings contributed by the Capital Expenditure Program to Duke's overall earnings.

³² See, R.C. 4905.22; R.C. 4909.15(E)(2)(a); R.C. 4929.02(A)(1). See also, *Bluefield Water Works v. Pub. Serv. Comm'n*, 262 U.S. 679 (1923) ("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.").

³³ Staff Ex. 2, (Staff Report) at 4-5 (October 22, 2021).

³⁴ *Id.*

³⁵ OCC Ex. 1 (Duann Direct Testimony) at 15-16.

Even if Duke did not significantly over-earn or under-earn over the last three years, as PUCO Staff asserts³⁶ (an assertion with which we do not agree), this does not mean the pre-tax rate of return of 9.16% used in calculating the CEP charge is just and reasonable. The 3-year average median allowed profit (return on equity) of 7.94% nationwide and the profits (return on equity) earned by Ohio local distribution companies shown in the Staff Report further demonstrates that the 9.84% profits (return on equity) proposed by Duke for its CEP Charge is unjust and unreasonable.

The PUCO should protect Duke's 410,000 residential gas consumers against charges for inflated profits and debt costs that do not reflect the actual market conditions for return on equity or Duke's true cost of debt. The PUCO should adopt a pre-tax rate of return, as recommended by OCC witness Dr. Daniel J. Duann, of no higher than 8.29%.³⁷

B. Duke's 2019 and 2020 CEP spending represent an improper and unauthorized acceleration of capital replacements and expenditures that should be capped to avoid consumers paying unjust and unreasonable rates for the CEP investments.

OCC agrees with Blue Ridge's recommended adjustments to Net Rate Base and Operating Expenses for calculating Duke's 2019 and 2020 revenue requirements described on pages 34-37 of Blue Ridge's Audit Report.³⁸ The PUCO should adopt all of these recommended adjustments. However, OCC does not agree with all of Blue Ridge's findings and recommendations. Rate of return was one issue, discussed above. The magnitude of Duke's CEP-related capital spending in 2019 and 2020 is another point of disagreement.

³⁶ Staff Ex. 2 at 4-5.

³⁷ OCC Ex. 1 (Duann Direct Testimony) at 3-4.

³⁸ Staff Ex. 1, Blue Ridge Audit Report (October 14, 2021).

One important regulatory principle is that, per applicable statutes, rates charged to consumers under alternative rate plans such as CEPs must be just and reasonable. Duke's CEP was developed as an alternative rate plan under Revised Code 4929.05.³⁹ And Revised Code 4929.05(A)(3) provides that alternative rate plans can only be approved after a natural gas utility has made a showing and the PUCO finds that the alternative rate plan is just and reasonable.⁴⁰ Similarly, Revised Code 4929.111(C), governing implementation of capital expenditure programs, provides that the PUCO shall approve a capital expenditure program *only if it finds the program to be just and reasonable*⁴¹ (emphasis added).

In Duke's CEP case last year authorizing charges for the utility's 2013-2018 CEP spending,⁴² OCC expressed a concern that the existence of the CEP has distorted Duke's decision-making, and the lack of regulatory lag associated with traditional rate cases has led Duke to massively increase its CEP capital expenditures.⁴³ OCC witness Adkins expressed a similar concern in this proceeding.⁴⁴ Duke's massive CEP spending increases represent an improper and unauthorized acceleration of capital replacements and other investments.

Under Duke's Accelerated Mains Replacement Program ("AMRP") that was authorized in Case No. 01-1228-GA-AIR, Duke was authorized to accelerate its capital

³⁹ See, *In the Matter of the Application of the East Ohio Gas Company DBA Dominion Energy Ohio for Approval of an Alternative Form of Regulation to Establish a Capital Expenditure Program Rider Mechanism*, PUCO Case No. 19-468-GA-ALT, Opinion and Order (December 30, 2020).

⁴⁰ R.C. 4929.05(A)(3); R.C. 4929.05(B).

⁴¹ R.C. 4905.22; R.C. 4929.05(A)(3); R.C. 4929.111(C).

⁴² Case No. 19-791-GA-ALT.

⁴³ See e.g., Case No. 19-791-GA-ALT, OCC Initial Post Hearing Brief (February 24, 2021) at 25-29.

⁴⁴ OCC Ex. 2 (Adkins Direct Testimony) at 4, 8-11.

spending to replace bare steel and cast-iron mains and service lines.⁴⁵ Duke accelerated its capital investments and replacement of the metallic pipelines between 2001 and 2015. This was done to address the specific safety concerns surrounding the corrosion and leak-prone metallic pipelines. But Duke's capital investments under the CEP do not have such specific safety concerns, yet its capital spending under the CEP has continued to increase dramatically.⁴⁶

As OCC pointed out in Duke's CEP case from last year, and in OCC witness Adkins' testimony in this proceeding, Duke's gross capital expenditure investments have dramatically increased.⁴⁷ The utility's CEP investments have increased from \$21,877,330 in 2013 (the first year of the Program) to \$ 95,136,703 in 2018 (the final year covered under the 19-791-GA-ALT case) – an enormous 335% increase.⁴⁸ And in 2019, Duke's CEP expenditures grew even more to \$141,494,735⁴⁹, a massive 547% increase over the first year of the CEP. And in 2020, the CEP expenditures grew further still. 2020's total CEP expenditures were \$167,271,891 – a truly astounding 665% increase over the first year of the Program.⁵⁰ But Duke does not have the same safety concerns that it did with the AMRP, and more importantly, it does not have PUCO approval to accelerate infrastructure replacements under the CEP that it had with the AMRP. The \$1.00 cap on increases that currently will apply to 2021 and going-forward investments should be

⁴⁵ OCC Ex. 2 (Adkins Direct Testimony) at 10-11.

⁴⁶ *Id.*

⁴⁷ OCC Ex. 2 (Adkins Direct Testimony) at 9-11; Case No. 19-791-GA-ALT, OCC Initial Post Hearing Brief (February 24, 2021) at 25-29.

⁴⁸ OCC Ex. 2 (Adkins Direct Testimony) at 9.

⁴⁹ Duke Ex. 1, Application Schedule No. 4, Line 9 + Line 12 for 2019.

⁵⁰ Duke Ex. 1, Application Schedule No. 4, Line 9 + Line 12 for 2020.

applied to both 2019 and 2020 CEP investments because they were excessive and represent an unapproved acceleration in infrastructure replacements and investments.⁵¹

The PUCO has an opportunity to at least partially rectify the problem now by imposing reasonable limits on Duke's 2019 and forward CEP investments 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..."⁵² Now is the time for the PUCO to find that such spending far exceeded what is just or reasonable.

The PUCO should find that Duke's massive CEP capital spending increases in 2019 and 2020 were not just and reasonable. The PUCO should impose the rate caps that were adopted in Duke's previous CEP case for 2021 and going-forward CEP investments. Specifically, the PUCO should impose the \$1.00 rate caps that were adopted for 2021 and thereafter⁵³ to Duke's 2019 and 2020 CEP investments that are being considered in this case.⁵⁴ In the approved Settlement in the 19-791-GA-ALT case, CEP investments and associated deferrals in excess of what will cause CEP Rider rates to

⁵¹ OCC Ex. 2 (Adkins Direct Testimony) at 11.

⁵² *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 at 13 (October 1, 2014).

⁵³ *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Alternative Form of Regulation to Establish a Capital Expenditure Program Rider Mechanism*, Case No. 19-791-GA-ALT Opinion and Order (April 21, 2021).

⁵⁴ OCC Ex. 2 (Adkins Direct Testimony) at 12.

increase by more than \$1.00 per month for residential consumers will not be recoverable through the CEP Rider.⁵⁵

The PUCO should apply the \$1.00 per month residential rate caps for each year 2019 and 2020 in this case. Any 2019 and 2020 CEP investments and deferrals that exceed the rate caps can be eligible for collection in a future base rate case.

C. Duke's financial performance incentives currently included in Duke's CEP rider should not be charged to consumers.

Duke's 2019 and 2020 revenue requirement supporting the CEP Rider in this case includes financial performance incentives. These financial performance incentives should be removed from customer charges because they are counter to the PUCO's stated policies described below regarding collection of financial performance incentives from consumers. It harms consumers and the public interest for consumers to pay more under the CEP Rider than they would otherwise pay just to fund payments to Duke's employees to achieve financial performance targets that benefit only Duke's shareholders. To knowingly require consumers to pay higher charges for something that they receive no benefit from and/or offering only marginal prospective fixes in 2022 or in future rate cases is unconscionable and clearly not beneficial to consumers or in the public interest.

The amount of financial performance incentives included in the 2019 and 2020 CEP revenue requirement is a knowable value that should be removed from the CEP. The PUCO should direct Duke to identify the specific amount of financial performance incentives from all other sources included in the CEP revenue requirement and remove such incentives from the CEP. Duke's witness asserts⁵⁶ that the PUCO approved the

⁵⁵ Case No. 19-791-GA-ALT, Opinion and Order at 18 (April 21, 2021).

⁵⁶ Duke Ex. 3 (Supplemental Testimony of Brown) at 19-20.

inclusion of financial performance incentives in Rider CEP in Case No. 19-791-GA-ALT as part of that Settlement. This case, however, is a contested, litigated case. And the PUCO has found in previous cases that a utility's financial performance incentives should not be charged to a utility's customers, discussed below.

1. The Blue Ridge Audit Report should have recommended removal of utility financial performance incentives as consultants have recommended in other cases.

Curiously, Blue Ridge's Audit Report in this case did not address Duke's inclusion of financial performance incentives in its CEP Rider. But the Auditor did so regarding other utilities' CEP riders. In Case No. 21-619-GA-RDR concerning Dominion's annual CEP Rider, Blue Ridge maintained that the restricted stock incentives "rewards behavior that promotes the interest of shareholders" and that "excessive focus on increasing profitability and share price growth can harm customers."⁵⁷ Therefore, Blue Ridge recommended the adjustment to remove the \$35,348.95 restricted stock financial performance incentive from the CEP plant-in-service balance.⁵⁸ Blue Ridge stated that "these charges are neither a direct nor indirect charge associated with the performance of work" and that "they represent a benefit to only a select group of employees."⁵⁹ These same concerns would also apply to financial performance incentives included in Duke's CEP Rider in this case.

In fact, the independent audit company retained by PUCO to audit Duke's previous CEP application specifically recommended removing financial performance

⁵⁷ Case No. 21-619-GA-RDR, Blue Ridge Audit Report at 30.

⁵⁸ *Id.*

⁵⁹ *Id.*

incentives from the CEP Rider for the 2013 through 2018 period.⁶⁰ Larkin & Associates recommended that the cumulative amounts of earnings-and-stock-based compensation totaling \$775,173 (after factoring in the related depreciation, accumulated depreciation, and ADIT) for the period 2013 through 2018 be removed from the CEP rider.⁶¹ In addition, the Auditor recommended that Duke's calculation reflecting the impact of removing the earnings-based incentive and stock-based compensation on the PISCC deferral in the amount of \$142,980 also be adopted.

The Auditor concluded for certain Duke's financial performance incentives that:

"...the basis for our recommendation is that incentive compensation expense that is tied to a utility's financial performance should not be borne by ratepayers. Specifically, the portion of incentive compensation expense that is directly attributable to meeting financial performance goals, such as net income or earnings per share, is not properly recoverable from ratepayers for several reasons. First, if the financial goals are set properly, achieving the necessary performance should be self-supporting. That is, measures that achieve additional cost savings, improves sales, or otherwise improves financial results of the Company should provide the income necessary to fund the awards. Second, the payouts for financial goal achievement can be distinguished from incentive compensation that is measured for improving the quality of service, efficiency, or safety goals. Finally, the incentive to improve financial performance is not necessarily consistent with ratepayers' interests."⁶²

For other financial performance incentives included in Duke's CEP, the Auditor determined that:

"The cost of these stock-based compensation programs is incurred to improve the Duke Energy financial performance for the benefit of shareholders, not to improve customer service or meet other regulated utility service requirements. In fact, the objectives of maximizing shareholder value on the one hand and minimizing costs to ratepayers on the other hand, are generally opposed to each other. In addition, the hypothetical stock performance pursuant to the

⁶⁰ See, Case No. 19-791-GA-ALT 'Plant in Service and Capital Spending Prudence Audit of Duke Energy Ohio, Inc. (Natural Gas) Covering the Period April 1, 2012 through December 31, 2018' by Larkin & Associates ("Larkin Audit Report" or "Auditor") (May 11, 2020) at 9-9.

⁶¹ See, OCC Ex. 2 (Adkins Direct Testimony) at 16-17.

⁶² Case No. 19-791-GA-ALT, Larkin Audit Report, at 9-9.

performance shares should not be considered expense for ratemaking purposes because dividends are considered in the determination of the required return on common equity and stock performance is a component of shareholder return.”⁶³

Larkin & Associates’ recommended adjustments were shown on Attachment LA-1, Schedule 3 of its Audit Report in that case.

The propriety of removing financial performance incentives from capital investment programs has been recognized in other cases and should be recognized in this case as well. For example, the Settlement filed on in Dominion’s CEP Rider case in Case No. 21-619-GA-RDR on September 7, 2021 provides that Dominion will prospectively exclude capitalized amounts from any CEP revenue requirement for two of its three financial performance incentive plans.⁶⁴ And the Settlement filed on October 12, 2021 in Case No. 20-1634-GA-ALT concerning Dominion’s very similar Pipeline Infrastructure Replacement (“PIR”) Program and associated PIR Rider goes even further. Under that Settlement, Dominion will prospectively exclude *all* financial performance incentives from the PIR capital investments for the period January 1, 2021 through December 31, 2026.⁶⁵

These cases recognize that financial performance incentives should not be collected from consumers in capital investment cases. The same should be true for Duke in this case. As OCC witness Adkins testified, “including financial performance incentives in Duke’s CEP Rider harms consumers because it causes them to pay more under the CEP Rider than they would otherwise pay. And the increase in what consumers would pay is just to fund payments to Duke’s employees for achieving financial

⁶³ *Id.*

⁶⁴ Case No. 21-619-GA-RDR Stipulation and Recommendation (September 7, 2021) at 2.

⁶⁵ Case No. 20-1634-GA-ALT Stipulation and Recommendation (October 12, 2021) at 5-6.

performance targets that benefit only Duke's shareholders."⁶⁶ Financial performance incentives should not be included in Duke's CEP Rider to be charged to consumers.

2. The PUCO has recognized that utility financial performance incentives, which benefit the utility and shareholders only, should not be collected from consumers.

The PUCO has spoken many times regarding utility collection from consumers of financial performance incentive costs.⁶⁷ In Case No. 07-551-EL-AIR, the PUCO found that 20% of FirstEnergy's short-term incentive compensation expense should be removed from rates because incentive pay based upon achieving financial goals should be the responsibility of shareholders.⁶⁸ The PUCO also disagreed with FirstEnergy that incentive pay based upon achieving financial goals aligns the interests of shareholders and consumers, because only shareholders benefit.⁶⁹

In Case No. 15-534-EL-RDR involving a Duke rider, the PUCO found that its Staff's recommendations regarding Duke financial performance incentives should be adopted.⁷⁰ Specifically, the PUCO determined that \$409,096 in operations and maintenance costs identified by Staff as tied to achievement of financial performance targets were inappropriately expensed and should be deducted from Duke's rider in that case.⁷¹ Similarly, in Case No. 16-664-EL-RDR/17-781-EL-RDR, another Duke rider

⁶⁶ OCC Ex. 2 (Adkins Direct Testimony) at 17.

⁶⁷ See, OCC Ex. 2 (Adkins Direct Testimony) at 13-20.

⁶⁸ *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co.*, Case No. 07-551-EL-AIR, et al., Opinion and Order at 17 (January 21, 2009), Entry on Rehearing at 4-5 (February 2, 2011).

⁶⁹ *Id.*

⁷⁰ *In re Duke Energy Ohio, Inc.*, Case No. 15-534- EL-RDR, Opinion and Order at 20, 44-45 (October 26, 2016).

⁷¹ *Id.*

case, the PUCO found that financial incentives include “performance awards, restricted stock units, executive incentives, earnings per share, shareholder returns, stock purchases, and/or other financially motivated incentives tied to the Company's bottom line.”⁷² And although not all of the performance goals may be explicitly tied to financial objectives, they were correlated with Duke's bottom line and meeting shareholder interests.⁷³

Because of this, the PUCO found that these expenses should be excluded from charges on consumers.⁷⁴ Finally, in Case No. 18-397-EL-RDR, another Duke rider case, the PUCO adopted Staff's recommendation to exclude incentive pay tied to financial goals.⁷⁵

There is thus ample precedent for removing financial performance incentives currently included in Duke's CEP Rider so that they will not be charged to consumers, and the PUCO should do so here. Consistent with its practice in the numerous cases described above and independent auditor recommendations, the PUCO should order that Duke may not include financial performance incentives of any kind in future CEP Rider cases.⁷⁶

D. The PUCO should identify operation and maintenance (“O&M”) savings that are generated as a result of the CEP capital investments and immediately pass these savings back to consumers as reductions to the CEP Rider as is done in similar capital investment programs.

Duke's CEP provides for replacing and improving older infrastructure and making capital investments to comply with pipeline safety requirements and improve

⁷² *In re Duke Energy Ohio, Inc.*, Case No. 16-664-EL-RDR/17-781-EL-RDR, Finding and Order at ¶ 16 (May 15, 2019).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *In re Duke Energy Ohio, Inc.*, Case No. 18-397-EL-RDR, Finding and Order at ¶ 17 (July 31, 2019).

⁷⁶ OCC Ex. 2 (Adkins Direct Testimony) at 20.

operations. But these investments also should result in operation and maintenance (“O&M”) expense savings that should be passed on to customers through an offset to the CEP Rider charge to consumers, similar to the way that operation and maintenance savings resulting from capital replacements reduce other utilities’ infrastructure replacement riders.⁷⁷

Duke’s CEP includes replacement and improvement of the same categories and types of pipelines and infrastructure that are replaced in many of the infrastructure replacement programs. Those programs include O&M savings offsets, and Duke’s CEP should include these savings as well.⁷⁸ Replacing and improving similar pipelines and related infrastructure under the CEP allows Duke to avoid monitoring, maintenance, and repair of aging infrastructure that should generate O&M savings. Similarly, the Compliance/Operations category involves capital investment to improve pipeline integrity among other things. This CEP investment too should generate additional O&M savings.⁷⁹

Blue Ridge’s Audit Report specifically identifies more than \$107 million in system replacements and improvements and almost \$43 million for service line replacements in 2019 and 2020.⁸⁰ These replacements and improvements are very similar to the types of replacements and improvements that were made under Duke’s Accelerated Mains Replacement Program (“AMRP”). The AMRP recognized that system

⁷⁷ Like other programs involving infrastructure replacement and improvement such as Columbia’s Infrastructure Replacement Program (“IRP”), Dominion’s Pipeline Infrastructure Replacement (“PIR”) program, Vectren’s Distribution Replacement Rider (“DRR”) program, and Duke’s AMRP. *See*, OCC Ex. 2 (Adkins Direct Testimony) at 21-23.

⁷⁸ OCC Ex. 2 (Adkins Direct Testimony) at 21.

⁷⁹ *Id.*

⁸⁰ OCC Ex. 2 (Adkins Direct Testimony) at 22.

improvements and replacements would generate O&M savings, thus the AMRP Rider included an O&M savings offset. The CEP Rider should as well.⁸¹

The O&M savings generated as a result of the CEP capital investments should be recognized as reductions to the amount that customers pay to Duke for its CEP Rider.⁸² Reducing the CEP Rider by the O&M savings will recognize that the capital investments that Duke made in 2019 and 2020 and going forward will be paid for by consumers through the CEP Rider. And the operational improvements that these investments are said to produce will enable Duke to save O&M costs. But these are costs that are still built into the original base rates that consumers are paying, base rates that do *not* reflect O&M cost savings.⁸³ Thus, Duke's proposal, which does not reflect the O&M savings in the CEP Rider, will allow Duke to reap an undeserved windfall at consumers' expense.⁸⁴ The PUCO has adopted an approach of recognizing such savings for offsetting charges to consumers in other infrastructure replacement programs,⁸⁵ and it should do so as well for the consumers who will pay Duke for the CEP.

To protect consumers, the PUCO should adopt an approach similar to what it did for the other infrastructure replacement programs.⁸⁶ The PUCO should direct Duke to form a collaborative group comprised of Duke, PUCO Staff, OCC, and other interested

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Like other programs involving infrastructure replacement and improvement such as Columbia's Infrastructure Replacement Program ("IRP"), Dominion's Pipeline Infrastructure Replacement ("PIR") program, Vectren's Distribution Replacement Rider ("DRR") program, and Duke's AMRP. *See*, OCC Ex. 2 (Adkins Direct Testimony) at 21-23.

⁸⁶ OCC Ex. 2 (Adkins Direct Testimony) at 23.

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.⁸⁷ 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*. 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.

E. The PUCO should enforce a maximum cap of \$8.93 per month for Duke's 2020 CEP Rider in order to comply with Case No. 19-791-GA-ALT.

In its initial report, dated October 14, 2021, the auditor recommended making an adjustment (decrease) to Duke's capital expenditures charge for Premature Plant-in-Service (plant that was not in service during the relevant timeframe).⁸⁸ After the auditor filed the report, Duke provided additional information to the auditor sometime between November 3, 2021 and November 8, 2021. Duke's information led the auditor to conclude that its initial adjustment was not warranted.⁸⁹

In the supplemental report, the auditor recommends a monthly charge to residential consumers of \$6.23 for 2019 CEP investments and \$9.31 for 2020 CEP investments.⁹⁰ The PUCO Staff supported the auditor's recommendation to allow Duke to

⁸⁷ *Id.*

⁸⁸ Staff Ex. 1 (Plant-in-Service and Capital Expenditure Program Audit of Duke Energy Ohio, Inc.) October 14, 2021.

⁸⁹ Staff Ex. 3 (Supplement to Report of Plant-in-Service and Capital Expenditure Program Audit) (November 8, 2021) at 2-3.

⁹⁰ *See id.* at 3, Table 3.

charge consumers above the cap.⁹¹ That recommendation reflects a higher increase (\$.38 more) for 2020 than permitted under the Settlement and PUCO Order.⁹² In the Settlement allowing Duke's charges, the PUCO set a cap on what Duke could charge residential consumers.⁹³ Duke's residential charges for these expenditures were capped at increases of \$2.92 (for 2019) and \$2.70 (for 2020).⁹⁴

The auditor's recommended monthly CEP charge for 2020 is above the cap that the PUCO ordered to limit increases for residential consumers. Accepting the auditor's recommendation of a \$6.23 monthly CEP charge for 2019 for purpose of argument, the *most* the 2020 monthly charge can be is \$8.93 (\$6.23+\$2.70).⁹⁵ It cannot be \$9.31, as the auditor has recommended and PUCO Staff has accepted. The PUCO should reject its Staff's recommendation for adoption of the auditor's new recommendation to give Duke more money at consumer expense. The recommendation exceeds the limit in the Settlement and in the PUCO's Order⁹⁶ and should be rejected.

To protect consumers, the 2020 cap on Duke's CEP charges should be enforced by the PUCO, to prevent a higher charge to consumers. Duke is already proposing to charge consumers more than is reasonable for its CEP, based on a too-high rate of return and for financial incentives for employees that do not benefit consumers.

⁹¹ Staff Ex. 4 (Supplement to Staff Review and Recommendation) (November 8, 2021).

⁹² See, Case No. 21-618-GA-RDR, *Consumer Protection Response to Audit Report Supplement and Staff Review and Recommendation Supplement by Office of the Ohio Consumers' Counsel* (November 18, 2021).

⁹³ Case No. 19-791-GA-ALT, Opinion and Order (April 21, 2021) at para. 83; *see also* Settlement at 4.

⁹⁴ *Id.*

⁹⁵ OCC Ex. 2 (Adkins Direct Testimony) at 6-7.

⁹⁶ Case No. 19-791-GA-ALT, Opinion and Order (April 21, 2021) at para. 83; *see also* Settlement at 4.

F. This proceeding should stand alone on its own merits, as Duke's prior CEP case, 19-791-GA-ALT was a settled case (to which OCC was not a signatory).

Duke witness Brown⁹⁷ attempts to discount most of OCC's concerns raised in this case as having already been considered and decided by the PUCO its decisions in Case No. 19-791-GA-ALT. Specifically, Mr. Brown avers that OCC's position that Duke's rate of return is outdated, inflated, and should be revised was an argument considered and rejected by the PUCO in Case 19-791-GA-ALT. And he posits that OCC's positions that collection of the 2019 and 2020 CEP capital investments should be capped at \$1.00 annual increases, that capitalized employee financial performance incentives should be removed from the CEP, and that the CEP Rider should include an O&M savings offset were similarly considered and rejected by the PUCO in Case No. 19-791-GA-ALT.

However, his arguments to discount OCC's positions have no merit. The PUCO approved a Settlement in Case No. 19-791-GA-ALT as a package deal in that case. The Settlement in that case specifically stated that the "Stipulation is submitted for purposes of this proceeding only" and that it should not "be cited as precedent in any future proceeding for or against any Signatory Party or the Commission itself."⁹⁸ The Settlement stated that it represents a "reasonable compromise involving a balancing of competing positions and it does not necessarily reflect the position that one or more of the Signatory Parties would have taken if these issues had been fully litigated."⁹⁹

⁹⁷ Duke Ex. 3 (Supplemental Testimony of Brown) at 19-20.

⁹⁸ *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Alternative Form of Regulation*, Case No. 19-791-GA-ALT, Stipulation and Recommendation, paragraph 21 (November 16, 2020).

⁹⁹ *Id.*

This case does not involve a settlement and the prior case has no precedential value. Here, the PUCO must determine if each element of Duke's proposed CEP Rider is individually just and reasonable. And for all of the reasons described in this brief, it should not.

Duke's CEP was developed as an alternative rate plan under Revised Code 4929.05. Revised Code 4929.05(A)(3) provides that alternative rate plans can only be approved after a natural gas utility has made a showing (and the PUCO finds) that the alternative rate plan is just and reasonable. Similarly, Revised Code 4929.111(C), governing implementation of capital expenditure programs, provides that the PUCO shall approve a capital expenditure program only if it finds the program to be just and reasonable.

The PUCO stated specifically in its Finding and Order in Case No. 13-2417-GA-UNC (the case initially approving Duke's CEP) that it had "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...."¹⁰⁰

Here, the PUCO should find that Duke's massive CEP capital spending increases in 2019 and 2020 were not just and reasonable. Not allowing an O&M savings offset in the CEP Rider is not just and reasonable. Charging consumers for utility employee financial performance incentives is not just and reasonable. Adopting an outdated and inflated rate of return is not just and reasonable. Duke's capital expenditure program is

¹⁰⁰ *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 at 13 (October 1, 2014).

not just and reasonable and should not be allowed under Revised Code 4929.05(A)(3) and Revised Code 4929.111(C).

III. CONCLUSION

To protect consumers, the PUCO should adopt OCC's recommendations. The PUCO should adjust Duke's rate of return based on current market conditions. The PUCO should implement \$1.00 residential rate caps that were adopted for 2021 and going forward for Duke's 2019 and 2020 CEP investments being considered in this case. The PUCO should not allow Duke to charge consumers for the utility's financial performance incentives benefitting stockholders. The PUCO should identify the O&M savings that are generated as a result of Duke's CEP spending as reductions to the amount that customers pay to Duke for its CEP Rider.

The PUCO should protect consumers by implementing these consumer protection recommendations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Initial Brief for Consumer Protection was served on the persons stated below via electronic transmission, this 10th day of March 2022.

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