BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of the Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates.	)))	Case No. 21-887-EL-AIR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	))	Case No. 21-888-EL-ATA
In the Matter of the Application of Duke Energy Inc., for Approval to Change Accounting Methods.	)))	Case No. 21-889-EL-AAM

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

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I. INTRODUCTION

At this time of soaring energy prices, inflation and a potential recession, Duke, the Staff of the Public Utilities Commission of Ohio ("PUCO"), Wal-Mart, Retail Energy Supply Association, Nationwide Energy Partners, and others have signed a settlement[1] to increase consumers' electric rates. The settlement provides Duke with a $23.1 million distribution service rate increase, costly add-on charges (riders), a generous profit, and other things at the expense or detriment of residential consumers.

The Ohio Consumers' Counsel ("OCC") recommended a $1,468,961 distribution service *decrease*. OCC is the statutory voice for Duke's 657,000 residential consumers. OCC did not sign the settlement and recommends that the PUCO adopt a fair, just and

[1] Joint Exhibit 1 (Stipulation and Recommendations). On September 19, 2022, Duke filed a Stipulation and Recommendation and a Corrected Stipulation and Recommendation collectively admitted into evidence as Joint Exhibit 1 and referred to in OCC's Initial Brief as the "Settlement."

reasonable resolution of Duke's application *instead of the settlement*. For consumer protection, the PUCO should reject the settlement.

Oddly, the PUCO Staff settled despite the Duke rate increase exceeding even the upper limit of the increase it recommended in its Staff Report. (The Staff initially recommended an increase between $1.86 million and $15.27 million.)[2] Worse news for residential consumers is that the settlement allocates nearly all of the increase to them instead of business customers (with 92.4% or $21.3 million of the $23.1 million increase going to Duke's residential consumers).[3]

The settling parties are allowing Duke a generous profit (return on equity) of 9.5%. OCC is proposing to limit Duke's profit to a reasonable 8.84%.

These days utility proposals tend to include add-on charges, i.e., riders. Indeed, the settling parties propose changes to various riders affecting Duke consumers. On top of the distribution rate increase, the signatory parties agreed to new charges for Duke's Distribution Capital Investment ("DCI") Rider. Those charges exceed the caps on charges that even the PUCO Staff recommended in its Staff Report.[4]

In a win for Duke where consumers lose in the settlement, the new Rider DCI caps for Duke are not dependent on Duke meeting the service reliability standards in the PUCO's rules – despite making consumers pay for reliability through the rider. The settlement is not making Duke adhere to the System Average Interruption Frequency

[2] PUCO Staff Ex. 1 (Staff Report) at 6.

[3] Tr. Vol. I (Lawler Cross) at 197:6-8; OCC Ex. 16 (OCC STIP-INT-01-009); OCC Ex. 7 (Fortney Supplemental) at 10.

[4] *Id.* at 7-9. *See also* OCC Ex. 3 (Williams Supplemental) at 12-13.

Index ("SAIFI") and Customer Average Interruption Duration Index ("CAIDI") set forth in rules.

Instead, the settlement will allow Duke to charge consumers more if it meets a new (less stringent) reliability standard. That new standard is the System Average Interruption Duration Index ("SAIDI").[5] It's a bad deal that the settlement allows Duke to charge consumers more for getting less in reliability.

The settlement by Duke, the PUCO Staff, business customers, and others also lacks OCC's call for a broad-based bill-payment assistance program. That's unfortunate for the at-risk populations throughout Duke's service area that the PUCO is required to protect per R.C. 4928.02(L).

The settlement lacks OCC's proposal for Duke to provide shadow-billing information to reveal if consumers are losing (a lot of) money in buying electricity from energy marketers. With soaring energy prices, protecting consumers with shadow-billing information is all the more important. OCC is concerned that consumers are losing money (lots of money) to energy marketers compared to utility standard offers – and it's past time for the PUCO to take action for consumer protection.

The settlement also lacks OCC's recommendation for an easy online opt-out for consumers to stop Duke from sharing their personal contact information with energy marketers. Ohioans receive way too much invited marketing in general. The PUCO should be part of the solution for protecting Ohioans.

As is unfortunately typical for settlements at the PUCO, some signatories in PUCO settlements have narrow interests and can receive benefits for signing that other

[5] Joint Ex. 1 (Settlement) at 7-9.

similarly situated customers in the service territory do not receive. For example, the settlement contains commitments between Duke and the City of Cincinnati[6] regarding a streetlight replacement project,[7] "Smart City" technology,[8] improving reliability of electric service to water treatment plants,[9] asset relocation,[10] and use of a portion of Duke's franchise fee to the City for weatherization and bill payment assistance for residents within Cincinnati.[11] But the settlement does *not* offer similar commitments by Duke to the many other local governments within its service territory (not that consumers generally should be subsidizing such benefits). Ohio State Professor Ned Hill has criticized such settlement practices, as is described in PUCO orders where the PUCO did not act upon Dr. Hill's recommendations.[12] The law of Ohio (R.C. 4928.02(A)) requires the PUCO to make electric service available that is "nondiscriminatory."

Those signing the settlement are: the PUCO Staff; Duke; business customers Wal-Mart, Sam's, Ohio Energy Group, and One Energy (serving industrial companies with wind power) – with Kroger, Ohio Manufacturers' Association Energy Group and ChargePoint (electric vehicle charging) not opposing; marketers Retail Energy Supply Association and Interstate Gas Supply (IGS); submeterer Nationwide Energy Partners; low-income weatherization providers Ohio Partners for Affordable Energy and People

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[6] *Id.* at 21-25.

[7] *Id.* at 21-22.

[8] *Id.* at 22-23.

[9] *Id.* at 23-24.

[10] *Id.* at 24.

[11] *Id.* at 24-25.

[12] *See, e.g., In re Dayton Power & Light Company Application to Modernize its Distribution Grid,* Case No. 18-1875-EL-GRD, Opinion and Order at 74 (June 16, 2021); *In re FirstEnergy ESP IV,* Case No. 14-1297-EL-SSO, Opinion and Order at 41-45 (March 31, 2016).

Working Cooperatively; the City of Cincinnati; and environmental advocate Citizens Utility Board of Ohio.

The PUCO should reject the settlement. The PUCO should protect consumers with a fair, just and reasonable result, as OCC describes in this brief.

II. THE SETTLEMENT VIOLATES THE PUCO'S THREE-PART TEST FOR CONSIDERING SETTLEMENTS

Settlements are evaluated by the PUCO under a three-part test. The PUCO will adopt a settlement only if it meets the following three criteria: 1. whether the settlement is a product of serious bargaining among capable, knowledgeable parties; 2. whether the settlement, as a package, benefits customers and the public interest; and 3. whether the settlement package violates any important regulatory principle or practice.[13] In addition, the PUCO also routinely considers whether the parties to the settlement represent diverse interests.[14]

OCC presented evidence demonstrating that the settlement violates all three parts of the PUCO's test. The settlement should be rejected.

A. The PUCO should reject the settlement because it is not the product of serious bargaining.

To satisfy the first prong of the PUCO's test to consider settlements, *serious* bargaining must take place. It is not enough simply to hold a series of meetings and invite parties to attend. Duke held settlement meetings where OCC participated, but that does not mean serious bargaining in fact occurred or that OCC's positions were seriously considered.

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[13] *Consumers' Counsel v. Pub. Util. Comm'n*. (1992), 64 Ohio St.3d 123, 126.

[14] OCC Ex. 3 (Williams Supplemental) at 5.

In a case about an electric security plan, Commissioner Cheryl Roberto wrote with great insight that "In the case of an ESP the balance of power created by an electric utility's authority to withdraw a Commission-modified and approved plan creates a dynamic that is impossible to ignore."[15] This rate case does not give Duke the formal veto power over PUCO orders in R.C. 4928.143 that Commissioner Roberto described as unequal bargaining power. But Duke has similar unequal and unfair bargaining power here that is an obstacle to serious bargaining.

Duke has similar unequal and unfair bargaining power here that is an obstacle to serious bargaining. For one thing, there are virtually zero settlements presented to Commissioners in multi-party litigation at the PUCO unless the utility is a settlement party. The same thing applies to the PUCO Staff. That empowerment of utilities like Duke is certainly not the scenario for other parties. This reality bestows bargaining power on the utility, here Duke, and the PUCO Staff. That bargaining power diminishes the standing of others, such as OCC, in settlement negotiations like this one. It is a disruptor of serious bargaining.

Another impediment to serious bargaining that "afflicts"[16] the PUCO's unfair settlement process, as described by OCC witness Jim Williams, is money and how it is used by the utility. OCC witness Williams, with decades of experience in Ohio utility regulation, describes a "major problem" with the PUCO's settlement process as: "The Utility dangles money in front of parties that desperately need money, and those parties sign the Settlement in exchange for the money."

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[15] *In the Matter of the Application of Ohio Edison Company,* et al. Case No. 08-935-EL-SS0, et al., Concurring and Dissenting Opinion of Cheryl Roberto, at 2.

[16] OCC Ex. 3 (Williams Supplemental) at 5.

No other party and certainly not OCC with its state budget can arrange for such funding. The utility, here Duke, then uses this outcome of its *non-serious* bargaining (obtained through its negotiating leverage) to convince the PUCO that the settlement meets the three standards.

An example of Duke's *dangling of money* (consumers' money at that) for such leverage in bargaining relates to PWC. There should be reasonable funding for such groups to perform their services in aid of Ohioans in need. But such groups should not be made dependent on utilities bestowing such funds in exchange for settlement signatures when utilities like Duke happen to have rate-increase cases pending. The funding should be dispensed in generic dockets based on the continuing need of low-income Ohioans to receive services and not on the need for utilities to obtain approval of rate increases and other objectives.

In this regard, OCC witness Williams testified that:

> For example, the important but narrow issue of funding levels for low-income weatherization should be pulled from this case and addressed in a unique PUCO proceeding. Doing this will mitigate this industry's influence and power over entities needing funding. This will prevent the settlement process from being misued [*sic*] to get support for unfair proposals that benefits only the utility at consumer expense.[17]

The PUCO has allowed this ad-hoc recurring utility process of funding low-income weatherization, often when the utility wants something in return, to become institutionalized over decades of regulation. The process is to the advantage of utilities

[17] OCC Ex. 3 at 7.

and to the disadvantage of at-risk Ohioans and organizations serving them. The process needs to be reformed.

The process needs reform where those serving at-risk Ohioans are given reasonable funding because it's the right thing to do and not because a utility wants a general rate increase or other things. And this case should be part of that reform with reasonable funding for at-risk Ohioans approved *without strings attached for other Duke ratemaking objectives*.

The PUCO takes into account the "diversity of interests" as part of the first part of the stipulation assessment.[18] Duke and the PUCO Staff claim that the settlement represents the interests of all Duke residential consumers.[19] It does not.

1. The PUCO Settlement Standard should include a review for a diversity of interest among the Signatory Parties. Such diversity is clearly lacking in this Settlement and should be a basis for the PUCO to reject this Settlement.

The PUCO should consider whether the Settlement standard can be met where the Signatory Parties agree to allocate over 92% of the rate increase to residential consumers, but the state residential advocate is not a Signatory Party. That is unfair.

As OCC witness Jim Williams testified, there is no signatory to the settlement representing the broad interest of all residential consumers.[20] The Signatory Parties' advocacy does not represent diverse consumer interests, but reflects narrower interests.[21]

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[18] *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Establish a Standard Service Offer*, Case No. 10-388-EL-SSO, Opinion and Order at 48 (August 25, 2010).

[19] Duke Ex. 3 (Spiller Supplemental) at 10.

[20] OCC Ex. 3 (Williams Supplemental) at 5.

[21] OCC Ex. 3 (Williams Supplemental) at 7-8. *Cf* Duke Ex. 3 (Spiller Supplemental) at 10 and Tr. Vol. I (Lawler Cross) at 171:10-13.

Narrow-interest signatories include but are not limited to OPAE which is an association of providers of low-income weatherization and energy assistance programs and to PWC which provides weatherization and home repairs.[22] Programs for the at-risk consumers of utilities are important. But also important are how at-risk consumers are impacted by other settlement terms that affect them and that affect the many non-low-income consumers of the utility, here Duke. That's what the PUCO should also be judging under its settlement standards.

In this regard, the broad interests of all residential customers (including non-low-income and low-income) in moderating or eliminating rate increases and achieving other consumer protections is not represented in the settlement, to the advantage of Duke and the disadvantage of consumers. And it should be noted that a reasonable level of low-income weatherization (that Duke has consumers and not shareholders fund), while helpful, will reach relatively few of all the low-income consumers. It should be realized and not acceptable that the settlement fails to adopt OCC's recommendation for Duke to offer bill-payment assistance that could reach *many* low-income consumers.

The City of Cincinnati likewise has a special and narrower interest instead of a generalized consumer interest like OCC. Naturally, Cincinnati's interest can be seen to be focused on benefits within the City limits, such as its provisions for a higher franchise fee, streetlighting, and bill-payment assistance (albeit limited). Duke is not offering such Cincinnati-type benefits in the settlement to the many, many other local governments and consumers in Duke's service territory outside of the City limits. But the law of Ohio (R.C. 4928.02(A)) requires outcomes the PUCO to be "nondiscriminatory."

[22] https://www.opae.org/about-us/who-we-are/.

The settlement should be rejected because it does not reflect a diversity of interests and instead results from a "redistributive coalition," an issue that has been raised by Ohio State Professor Ned Hill in testimony in other cases.[23] A redistributive coalition occurs where "the Signatory Parties [act] as a relatively small group that [use] the regulatory process to negotiate self-gain, rather than negotiate for the betterment of the overall class of customers."[24] The coalition is "redistributive" because the coalition members gain individual, party-specific benefits paid for by others—those who are not in the coalition—with the PUCO's endorsement. Unfortunately for consumers, the PUCO has not acted upon Professor Hill's recommendations for a fair PUCO settlement process that would provide the greatest good for the greatest number.

Far from representing broad, diverse interests (the public interest), a redistributive coalition has a narrower focus. It favors a small group of interests, by design, so that the small group gains individualized, party-specific benefits which are denied to the broader customer class which is not part of the coalition. Indeed, the settlement is enabled by not addressing the broader interests. The broader group of non-coalition members (and other customers) needs the PUCO to protect them by not approving the settlement, rather than erroneously endorsing the settlement as being in their best interest.

As exampled above, the City of Cincinnati has a narrower interest. OCC has a broad public interest. Addressing a narrower public interest tends to cost utilities like Duke less money in settlements.

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[23] *See, e.g., In re Dayton Power & Light Company Application to Modernize its Distribution Grid,* Case No. 18-1875-EL-GRD, Opinion and Order at 74 (June 16, 2021); *In re FirstEnergy ESP IV,* Case No. 14-1297-EL-SSO, Opinion and Order at 41-45 (March 31, 2016).

[24] *In re Dayton Power & Light Company Application to Modernize its Distribution Grid,* Case No. 18-1875-EL-GRD, Opinion and Order at 74 (June 16, 2021).

Cincinnati's interest was *not* to obtain similar benefits for all local governments in Duke's service area. Cincinnati naturally advocated for its own benefits (streetlighting, franchise fee increase, payment assistance, etc.) from Duke. But Duke is using Cincinnati's natural narrower interest to justify the PUCO's adoption of its settlement that affects the broader interests of *all consumers* in its service territory. That is the problem. And Duke has all consumers paying for Cincinnati's benefits.

The PUCO should reject Duke's use of narrow-interest settlement signatures for justifying the settlement outcome affecting all consumers in the service area. Duke's approach lacks serious bargaining. And the settlement lacks a diversity of interests.

B. The PUCO should reject the settlement because the benefits to customers and the public interest are too little and too narrow to counterbalance the detriments to consumers and the public interest.

1. The PUCO should reject the settlement because it harms consumers and the public interest by allowing Duke to charge excessive costs to consumers.

The PUCO should reject the settlement for failing the second prong of the settlement standard. Reasons include the following.

OCC presented evidence to demonstrate that a rate *decrease* for Duke's consumers is appropriate. OCC witness Mr. Defever testified and provided evidence to support a total revenue requirement of $560.6 million for Duke and a revenue decrease for consumers of $1.5 million.[25] OCC's proposed rate decrease is based on a 6.5% rate of return supported by the extensive testimony and evidence of OCC witness Dr. J. Randall Woolridge, which is comparable to the lower bound of the rate of return (6.52%) initially

[25] OCC Ex. 5 (Defever Direct) at 7, OCC-JD-2.

proposed by the PUCO Staff in the Staff Report.[26] Dr. Woolridge's testimony further supports of a ROE of 8.84%, which is the lower bound initially proposed by the PUCO Staff in the Staff Report.[27] OCC witness Dr. Woolridge proposed a capital structure of 50% equity 50% long term debt.[28]

OCC witness Mr. Defever explained that Duke's proposed rate increase in the settlement contains improper charges related to costs for:

- Gains on disposition of real property;
- Board of Directors fees; and
- Incentive Compensation Expense and Capitalized Incentive Compensation in Rate Base.[29]

OCC witness Mr. Defever testified that nothing in the settlement addresses gains on the disposition of real property.[30] OCC witness Mr. Defever explained that Duke's revenues should be increased to reflect the fact that it received gains of $1,440,850 on sales of real property during 2016-2020.[31] If these gains are not reflected, they will be retained by Duke to the detriment of consumers.[32]

According to Mr. Defever, consumers in effect owned the property because they paid Duke (through their electricity rates) for a return on and of the property.[33] Mr.

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[26] *See e.g.,* OCC Ex. 2 (Woolridge Direct) at 5-6.

[27] *Id.* at 6.

[28] *Id.* at 5.

[29] OCC Ex. 4 (Defever Supplemental) at 3.

[30] OCC Ex. 4 (Defever Supplemental) at 4.

[31] *Id.*

[32] OCC Ex. 5 (Defever Direct) at 11.

[33] OCC Ex. 4 (Defever Supplemental) at 4.

Defever's analysis is consistent with the PUCO's past practice. The PUCO has included the gains on the sale of real property in the utility's revenues, as shown below:

> The Commission's staff has included in its estimation of revenue $59,656 as "Gain from Sale of Utility Property" (S.R. p. 8). The applicant argues in its eleventh objection to the Secretary's Report that the sale of such property was not of a nature proper for inclusion because it was not revenue derived from service to the public and was not recurring as a part of the company's business operations.
>
> However, the applicant's witness Mr. Kemper implied that the company regularly disposes of various parcels of property as their utility to the company ceases. Moreover, this very property once constituted an item in the rate base when it was used for the service of the public. Therefore it is appropriate that the ratepayers benefit from their sale and find this revenue item proper for purposes of this proceeding.[34]

The PUCO should follow its past precedents and adjust the settlement to reflect the gain on sales of real property in Duke's revenues.

Mr. Defever also testified that there should be an adjustment to Board of Directors fees to protect consumers. The settlement will harm consumers by allowing Duke to charge for 100% of the Board of Directors fees. Mr. Defever testified in support of a split for Duke's Board of Directors fees, with shareholders paying 75% of these costs and consumers paying 25%.[35]

Mr. Defever explained that his recommendation is appropriate because the Board of Directors primarily oversee the holding company, such that the holding company's shareholders should pay most of these costs.[36] Duke's website bears this out because it

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[34] *In re the Cleveland Electric Illuminating Company Rate Case,* Case No. 71-634-Y, 73 Ohio PUC Lexis 1, 32 (1973).

[35] OCC Ex. 4 (Defever Supplemental) at 5-6.

[36] *Id.* at 6.

lists Duke's regulated utility operations as merely one part of a diverse international energy holding company operation which includes:

- Duke Energy Sustainable Solutions, a nationwide provider of sustainable energy;
- eTransEnergy, a nationwide provider of logistical services;
- International Energy, which is headquartered in Saudi Arabia and provides international energy services;
- Commercial Transmission, which develops transmission projects in various locations around the country; and
- Duke Energy One, a nationwide provider of nonregulated energy services.[37]

With Duke's focus on these international and nationwide non-utility businesses, it is only fair that Duke's shareholders bear the majority of the cost for Board of Directors fees. Obviously, the Board of Directors has major responsibilities managing these other businesses. Mr. Defever noted that his recommendation is consistent with precedent from the Public Utility Regulatory Authority in Connecticut, which has determined that recovery of board of directors' costs should not be fully paid by consumers because consumers only tangentially benefit from Board of Directors' action.[38] Thus, the settlement harms consumers and the public interest by allowing Duke to charge 100% of these costs to consumers.

OCC witness Mr. Defever further testified that the settlement harms consumers by imposing additional charges on consumers by not excluding all of Duke's incentive

[37] Duke Energy Corp. web page, About Us, available at: https://www.duke-energy.com/our-company/about-us/businesses.

[38] OCC Ex. 5 (Defever Direct) at 13, Attachment JD-6 (PURA Decision, Docket No. 13-01-19).

compensation expense and capitalized incentive compensation from rate base.[39] While the settlement does provide for crediting rate base for incentive compensation based on financial goals, Mr. Defever testified that consumers should not be forced to pay for any portion of the costs related to Duke's short-term incentive compensation plan.[40] Mr. Defever reasoned that all of the costs should have been removed because the short-term compensation plan actually operated as a bonus plan and did not provide any incentive for employees to work harder.[41] He established that every employee received the short-term incentive pay, regardless of whether their work contributed toward achieving any corporate objectives.[42]

Mr. Defever also gave another reason for removing these costs – the short-term incentive compensation is tied to a financial metric. In other words, the short-term incentive compensation will be paid out only if Duke reaches an Earnings Per Share target.[43] The PUCO Staff removed the costs of incentive compensation directly tied to financial metrics, but it should have removed 100% of the short-term incentive compensation costs because employees are not eligible for any incentive compensation unless the Company meets this Earnings Per Share target. As such, 100% of Duke's short-term incentive compensation is tied to a financial metric. The PUCO Staff acted unreasonably by removing part of the incentive compensation costs on the ground that it

[39] OCC Ex. 4 (Defever Supplemental) at 7.

[40] OCC Ex. 4 (Defever Supplemental) at 7; OCC Ex. 5 (Defever Direct) at 15-16.

[41] OCC Ex. 5 (Defever Direct) at 15-16.

[42] *Id.*

[43] *Id.* at 16-17.

was tied to a financial metric, while overlooking the fact that 100% of the short-term incentive compensation cost is tied to a financial metric.

Accordingly, the settlement harms consumers by allowing Duke to collect a portion of the short-term incentive costs, which provide no real incentive for employees to work harder.

2. The PUCO should reject the settlement because it harms consumers and the public interest by allowing Duke to charge consumers for an inflated profit (return on equity) and a capital structure with excessive equity.

The settlement adopts a return on equity ("ROE" or profit) of 9.5% and a capital structure of 50.5% equity and 49.5% long term debt.[44] OCC witness Dr. Woolridge testified the settlement's ROE and capital structure will result in excessive and unreasonable charges to Duke's consumers. For consumer protection, the PUCO should reject the settlement and adopt OCC's proposed 8.84% ROE and capital structure of 50% equity, which is supported by the extensive testimony presented by Dr. Woolridge.

Dr. Woolridge testified that an 8.84% ROE is reasonable.[45] According to Dr. Woolridge, authorized ROEs for electric and gas utilities have steadily declined.[46] Further, the authorized ROEs for distribution utilities without generation, like Duke, have been 30 to 50 basis points below those of vertically integrated electric utilities in recent years.[47] According to Dr. Woolridge, the average authorized ROEs for electric

[44] Joint Ex. 1 (Settlement) at 3.

[45] OCC Ex. 2 (Woolridge Direct) at 18-23; OCC Ex. 1 (Woolridge Supplemental) at 3.

[46] OCC Ex. 2 (Woolridge Direct) at 18-19.

[47] *Id.* at 19-20.

distribution companies in 2020 and 2021 were 9.10% and 9.04%, and 9.13% in the first half of 2022.[48]

Dr. Woolridge explained that authorized ROEs in Ohio have been out of step with the decline in ROEs nationally in the past decade.[49] According to Dr. Woolridge, authorized ROEs in Ohio were in the 10.0% range a decade ago, which was in-line with national averages.[50] But authorized ROEs in Ohio have only declined to the 9.70%-10.00% range since that time, while national average delivery-only authorized ROEs have declined to 9.0%.[51] Dr. Woolridge testified that authorized ROEs in Ohio have not reflected the lower interest rates and capital costs in the U.S. and have remained at much higher levels than U.S. national averages.[52]

[48] OCC Ex. 2 (Woolridge Direct) at 20.

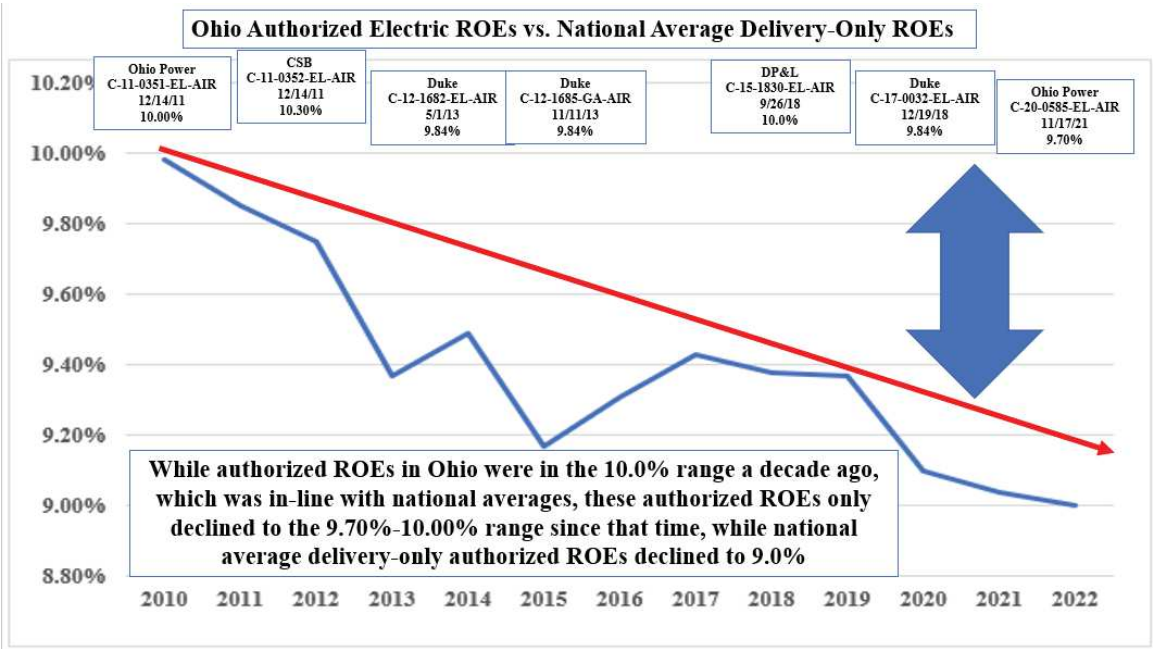
[49] OCC Ex. 2 (Woolridge Direct) at 22.

[50] *Id.*

[51] *Id.*

[52] *Id.*; OCC Ex. 1 (Woolridge Supplemental) at 12-13.

Authorized ROEs for Ohio Electric Utilities vs.
National Average Delivery-Only Authorized ROEs
2010–2022



OCC's ROE recommendation of 8.84 percent is closer to the national average than the settlement ROE of 9.50 percent.[53] The settlement harms consumers because it adopts an outdated and excessive ROE that is in the best interest of the utility, not consumers. The settlement should be rejected.

Dr. Woolridge further testified that the capital structure agreed to in the settlement harms consumers.[54] Specifically, the settlement adopts a capital structure of 50.5% common equity and 49.5% long term debt.[55] According to Dr. Woolridge, Duke's proposed capital structure includes a common equity ratio that is higher than the average common equity ratios employed by the proxy groups and Duke Energy, Inc., the parent

[53] *Id.*

[54] OCC Ex. 1 (Woolridge Supplemental) at 4-6.

[55] Joint Ex. 1 (Settlement) at 3.

of Duke.[56] Duke Energy Inc., has a common equity ratio of 39.57%.[57] This means that the proposed capital structure in the settlement has more common equity and less financial risk than the capital structures of other electric utility companies.[58]

Dr. Woolridge testified that the fact that Duke's parent company has more debt than proposed for Duke is evidence of "double leverage".[59] Moody's Investment Service defines "double leverage" as follows:

> Double leverage is a financial strategy whereby the parent raises debt but downstreams the proceeds to its operating subsidiary, likely in the form of an equity investment. Therefore, the subsidiary's operations are financed by debt raised at the subsidiary level and by debt financed at the holding-company level. In this way, the subsidiary's equity is leveraged twice, once with the subsidiary debt and once with the holding-company debt. In a simple operating-company/holding-company structure, this practice results in a consolidated debt-to-capitalization ratio that is higher at the parent than at the subsidiary because of the additional debt at the parent.[60]

According to Dr. Woolridge, double leveraging allows Duke's parent company to use low-cost debt to purchase equity in the regulated utility (Duke), which could negatively impact the credit ratings of Duke.[61]

The PUCO has rejected the double leverage approach, which entails combining the applicant's capital structure with the parent's cost of equity.[62] PUCO should stand by

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[56] OCC Ex. 2 (Woolridge Direct) at 29-34.

[57] OCC Ex. 2 (Woolridge Direct) at 28.

[58] OCC Ex. 1 (Woolridge Supplemental) at 4.

[59] OCC Ex. 2 (Woolridge Direct) at 28-30.

[60] OCC Ex. 2 (Woolridge Direct) at 29 (quoting *High Leverage at the Parent Often Hurts the Whole Family*, Moody's Investors' Service, May 11, 2015, at 1).

[61] OCC Ex. 2 (Woolridge Direct) at 29-30; OCC Ex. 1 (Woolridge Supplemental) at 4-6.

[62] *See* General Telephone, Case No. 81-383-TP-AIR, Opinion and Order at 34-35 (April 26, 1982); Ohio Bell Telephone, Case No. 79-1184-TP-AIR, Opinion and Order at 33 (December 3, 1981).

its prior decisions and precedents as noted above. Should the PUCO accept Duke's Double leveraging (which it should not), the resulting consumer rates would not be just and reasonable as required under R.C. 4905.22. And this would violate the law's requirement for a "fair and reasonable rate of return" under R.C. 4909.15, by charging consumers in excess of a fair and reasonable return. This double leverage situation harms consumers and the public interest.

To account for the double leverage problem, Dr. Woolridge proposed a modest adjustment resulting in a 50.0% common equity ratio, reflected in the following table.

OCC's Rate of Return Recommendation

Capital Source	Capitalization Ratios	Cost Rate	Weighted Cost Rate
Long-Term Debt	**50.00%**	**4.16%**	**2.08%**
Common Equity	**50.00%**	**8.84%**	**4.42%**
Total Capital	**100.00%**		**6.50%**

Dr. Woolridge testified that his proposed capital structure would provide greater protection to consumers.[63] This is because as the utility's equity ratio increases, the revenue requirement increases, and the charges to consumers increase.[64] This capitalization ratio is not in the public interest and the PUCO should reject the settlement and adopt OCC witness Dr. Woolridge's proposed capital structure.

3. The settlement's proposal allowing Duke to charge residential consumers $21.351 million or 92.45% of Duke's requested base rate increase of $23.095 million does not benefit consumers, nor is it in the public interest.

OCC's expert Bob Fortney has had decades of experience in utility allocations. He testified that the settlement, if approved by the PUCO, will permit Duke to charge

[63] OCC Ex. 2 (Woolridge Direct) at 31.

[64] *Id.*

residential consumers $21.351 million or 92.45% of Duke's requested rate increase of $23.095 million.[65] The settlement provides that all other rate classes *combined* are allocated less than 8% of the overall increase in base distribution rates.[66] Duke (and the other signatory parties to the settlement) failed to demonstrate that alleged benefits from the settlement justify the charges (nearly 93% of the total increase)[67] that residential consumers will be forced to pay.

Under the settlement, the overall base distribution revenues are $565.689 million.[68] And residential consumers are allocated $362.041 million, or 64%.[69] Additionally, the settlement allocates a 6.27% increase in base distribution rates to residential consumers. OCC witness Fortney testified that the overall increase to residential consumers is 4.26%.[70] Mr. Fortney concluded that that residential consumers are allocated an increase which is 147.18% of the average overall increase.[71] In contrast, the Settlement allocates a mere 1.08% increase in base distribution rates to the DS Rate Class, 1.34% to the EH Rate Class and less than 1.33% increase to other rate classes.[72] Thus, the percentage increase for the Residential Rate Class is several times higher than

[65] OCC Ex. 7 (Supplemental Testimony of Robert B. Fortney) at 4.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 5.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.* at 6.

any other rate classes.[73] Table 1,[74] below demonstrates that disparity between the rate classes.

Table 1
Duke's distribution of the stipulated revenue and increase under allocation in the Settlement

	Current Revenues		Proposed Revenues under Stipulation		Revenue Increase under Stipulation		Revenue Increase %
	$	% of Total	$	% of Total	$	% of Total	
Rate RS	340,689,533	62.79%	362,041,019	64.00%	21,351,486	92.45%	6.27%
Rate DS	130,821,757	24.11%	132,235,604	23.38%	1,413,847	6.12%	1.08%
Rate EH	1,489,417	0.27%	1,509,393	0.27%	19,976	0.09%	1.34%
Rate DM	34,019,576	6.27%	34,167,022	6.04%	147,446	0.64%	0.43%
Rate GSFL	795,482	0.15%	806,026	0.14%	10,544	0.05%	1.33%
Rate DP	24,977,696	4.60%	25,184,015	4.45%	206,319	0.89%	0.83%
Rate TS	118,850	0.02%	117,660	0.02%	-1,190	-0.01%	-1.00%
Lighting	9,681,091	1.78%	9,628,354	1.70%	-52,737	-0.23%	-0.54%
Total	542,593,403	100.00%	565,689,093	100.00%	23,095,690	100.00%	4.26%

Mr. Fortney also testified that the allocations in the settlement harm consumers and the public interest.[75] Mr. Fortney testified that it is his professional opinion that "allocating 92.45% of the overall increase to the residential class and allocating an increase to residential consumers which is 147.18% of the overall increase is simply a bad policy: it does not benefit consumers and is not in the public interest.[76] Residential

[73] *Id.*

[74] *Id.* at 5.

[75] *Id.*

[76] *Id.*

consumers have been economically ravished by the financial hardships caused by COVID, high inflation, and escalating generation prices."[77] This is not the time to heap more costs on residential consumers. Public policy should recognize those hardships in allocating increased revenues. The revenue distribution proposed in the settlement violates the second prong of the PUCO's three-part test.

OCC witness Fortney recommended that the PUCO should use Duke's proposed base distribution (allocation) of the proposed revenue, or 63.06%.[78] Mr. Fortney explained that this allocation would *gradually* move the rates of return of each class towards the cost of service.[79] The allocation of the revenue increase to the Residential Class under that proposal and utilizing the revenue increase as proposed in the settlement of $23.10 million should be no more than 69.42%[80], or $16.03 million. This increase would *gradually* move the Residential Class closer to the cost of service while adhering to a public policy of recognizing the economic hardships of the class.[81] OCC's recommendation benefits consumers and is in the public interest.

The disparity between rate classes does not benefit residential consumers, nor is it in the public interest. It should be rejected. Alternatively, the PUCO should modify the Settlement to adopt OCC's recommendation to *gradually* move the Residential Class closer to the cost of service as Mr. Fortney testified.[82]

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[77] *Id.* at 6.

[78] *Id.* at 7.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

4. The settlement's proposal to allocate an additional $5.32 million of the annual base distribution revenue to the Residential Class of consumers does not benefit consumers and it is not in the public interest.

OCC witness Mr. Fortney testified that the settlement's proposal to allocate $5.32 million annual base distribution revenue above his recommendation to Residential Class consumers does not benefit consumers and it is not in the public interest.[83] Duke's rates have not been set solely based upon the cost to serve as determined by a cost-of-service study.[84] As Mr. Fortney testified, the PUCO should take into account other factors such as gradualism.

According to Mr. Fortney, an increase to the allocation to 63.06%, as originally proposed by Duke, already reflects an adequate and sufficient movement toward cost of service.[85]

Accordingly, there is no need nor is there justification to further increase the share of the revenue increase to the Residential Class from $16.03 million to $21.351 million.[86] An allocation of 64% of base distribution revenues is not in the public interest, especially for residential consumers.

5. The settlement's proposed fixed customer charge for the residential class does not benefit consumers, and it is not in the public interest.

The settlement calls for a Residential Customer charge of $8.00, while the current Residential consumer charge is $6.00.[87] This increased consumer charge also violates

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[83] *Id.* at 7.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.* at 8.

Criteria No. 2 of the 3-Prong test according to OCC expert witness Fortney.[88] Mr. Fortney explained in his testimony that an increase of 33.33% to the customer charge does not benefit consumers and is not in the public interest.[89] In fact, high customer charges are contrary to the public interest because they negatively impact low use consumers and are a disincentive for conservation.[90]

The PUCO Staff recommended a residential consumer charge of $7.32, using a minimally compensatory formula.[91] Mr. Fortney calculated a charge of $5.66.[92] This reflects Staff's calculation less the carrying costs ("interest") of on-line transformers.[93] OCC's expert, Mr. Fortney, also disagrees with the assertion by Staff witness Lipthratt that a key benefit of the Settlement is "establishing a $8.00 consumer charge for Duke's residential consumers, which is lower than the $12.00 consumer charge requested in Duke's application."[94] Mr. Fortney testified that he does not consider a customer charge that is lower than that proposed in the Application as a benefit to consumers.[95] And as noted above, Staff's own analysis does not support a $8.00 monthly customer charge for residential consumers. Also, there should be no presumption that what is proposed in the Application is reasonable and justified. If this definition of consumers benefit used by a

[88] *Id.*

[89] *Id.* at 8.

[90] *Id.*

[91] *Id.*

[92] *Id.* at 9.

[93] *Id.*

[94] *Id.*

[95] *Id.*

Staff witness is adopted, it will render any review and regulation by the PUCO meaningless. This is not in the public interest.

The PUCO should reject or modify the Settlement because the consumer charge in the Settlement does not benefit consumers and is not in the public interest. If the PUCO does not reject the Settlement, it should modify the Settlement to adopt OCC's more protective consumer charge of $5.66.

6. The PUCO should reject the settlement because its provisions regarding the Distribution Capital Investment ("DCI") Rider, vegetation management and reduced reliability of Duke's electric service harm consumers and the public interest.

OCC witness Mr. Williams testified that the settlement harms consumers and the public interest through provisions regarding investment in the distribution system, vegetation management and reduced reliability standards that allow the potential for more electric outages. The settlement should be rejected.

First, the settlement allows Duke to charge consumers too much – up to $159 million total – using its Distribution Capital Investment ("DCI") Rider. In Mr. Williams' expert opinion, these charges are "excessively high."[96] The stipulation also does not ensure Duke will provide consumers more reliable service in exchange. PUCO rules[97] require Duke to meet two performance standards – SAIFI[98] and CAIDI.[99] Duke did not meet its SAIFI reliability standard in 2021.[100] Rather than provide more reliable service,

[96] *Id.* at 2: 9-10.

[97] O.A.C. 4901:1-10-10(B).

[98] System Average Interruption Frequency Index.

[99] Customer Average Interruption Duration Index.

[100] OCC Ex. 3 (Williams Supplemental) at 13.

Duke proposes a different target. The settlement uses[101] a third standard – SAIDI[102] – that the PUCO has not approved by rule. If it fails its PUCO-approved standards, Duke can still collect increased DCI revenue.[103] As Mr. Williams testified, this requires consumers "to pay for investments" even if they are not "providing quantifiable reliability benefits."[104] In a heads I win tails consumers lose situation Duke asks more of consumers but promises nothing in return.

Second, the settlement requires consumers to pay $11,784,211 more annually for vegetation management. It is unclear why. The settlement does not impose costlier tree-trimming obligations on Duke.[105] And, as Mr. Williams testified, the "impact of vegetation caused outages" has "declined in recent years."[106] For this reason, Mr. Williams concluded increasing base rates for vegetation management is "unnecessary."[107] The increase is also "redundant"[108] – Duke's Electric Service Reliability Rider ("ESRR") already supplements vegetation management costs up to $10 million annually.[109] Per Mr. Williams, if Duke increases base rates by nearly $12 million for vegetation management, "there is no longer a need for customers to separately fund tree-trimming costs through the ESRR."[110] Yet, the settlement "does not reduce the amount consumers can be charged

[101] Joint Ex. 1 (Settlement) at 10(c)(1)(a).

[102] System Average Interruption Duration Index.

[103] OCC Ex. 3 (Williams Supplemental) at 2.

[104] *Id.* at 16: 1-2.

[105] *Id.* at 9: 19-21.

[106] *Id.* at 10: 2-3.

[107] *Id.* at 9: 7.

[108] *Id.* at 3: 17-18.

[109] *Id.* at 9: 8-10.

[110] *Id.* at 10: 2-4.

under the ESRR" to compensate for the increase in base rate costs. Duke should not be able to keep both charges.

7. The settlement harms consumers and the public interest because it does not adopt adequate protections for at-risk consumers, that the PUCO must protect per R.C. 4928.02(L).

At-risk consumers are extremely vulnerable to increases in their utility bills and every effort should be made to protect these consumers. The PUCO should reject the settlement because it harms consumers and the public interest by ignoring consumer protection measures OCC witness Mr. Williams proposed.

The settlement does contain weatherization funding for low-income consumers. That can help some. But note that weatherization funding, due to its high cost per property/consumers, reaches relatively few of all the at-risk consumers. Cincinnati is using a portion of its franchise fee in the settlement (funded by all consumers). And will use some funds for bill-payment assistance. But note that Cincinnati's assistance, funded by all consumers, will be used only to benefit consumers residing within City limits. And it involves a relatively small amount of money for assistance.

Mr. Williams proposed a $4.5 million bill payment assistance program for at-risk consumers throughout Duke's service territory. Shareholders, not consumers, would pay per his recommendation. But the settlement requires just $50,000 in bill payment assistance. And, as noted above, that assistance is available only to selected residents of Cincinnati through the WarmUp Cincy program. That's not enough for the settlement to benefit consumers and the public interest.

Also, Mr. Williams recommended that Duke should offer shadow billing. This would provide information on the bills of consumers that buy from competitive suppliers to show the total costs they could have avoided by staying on Duke's Standard Service

Offer ("SSO").[111] Mr. Williams also suggested Duke provide the PUCO reports that include similar information.[112] The settlement does not incorporate either consumer protection.

The settlement provides inadequate relief for at-risk Duke consumers. But the law (R.C. 4928.02(L)) requires the PUCO to protect at-risk Ohioans. The PUCO should protect them and reject the settlement.

8. The settlement harms consumers and the public interest because it results from a redistributive coalition.

As discussed earlier, the settlement arises from a redistributive coalition and does not reflect a true diversity of interests among the residential customer class. The parties who Duke claims represent residential consumers (City of Cincinnati, PWC, OPAE and CUB Ohio) each represent narrower interests.

The City of Cincinnati's interests stop at its geographic boundaries. The settlement provides for several provisions that benefit the City's status as a commercial customer and a bill assistance program for residential consumers in the City, but none of these programs is available to municipalities, townships and villages in other parts of Duke's service area. PWC receives weatherization funding under the settlement but "[g]ifting stipulation signatories with obligation-free energy efficiency dollars does not benefit customers or the public interest…."[113] Similarly, the benefits flowing to OPAE and CUB Ohio do not benefit residential consumers as a whole.

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[111] *Id*. at 4: 5-6.

[112] *Id.* at 4: 4-5.

[113] *In re FirstEnergy ESP,* Case No. 12-1230-EL-ESP, Dissenting Opinion of Commissioner Cheryl L. Roberto at 4 (July 18, 2012).

As a result, the settlement does not reflect the best interests of the residential customer class. The PUCO should therefore reject the settlement.

C. The settlement violates Ohio law and numerous important regulatory principles and practices.

1. The PUCO should reject the settlement because it violates the important regulatory principle that utilities must charge just and reasonable rates, among other principles.

The settlement should be rejected because it is inconsistent with important regulatory principles and practices. As Mr. Williams testified, "it is an important regulatory principle that every public utility must charge 'just, reasonable' rates and furnish 'necessary and adequate facilities and services' in exchange."[114] This is Ohio law under R.C. 4905.22. It is also the state policy, codified in R.C. 4928.02(A), that consumers have access to "reasonably priced" electric service. The settlement fails to satisfy this fundamental regulatory policy.

As explained above in Section B, the settlement imposes unreasonable charges on consumers in numerous ways. OCC witness Mr. Defever testified that the settlement, if approved, will allow Duke to improperly charge consumers for gains in the disposition of property, Board of Directors fees, and incentive compensation that does not benefit consumers.[115] Mr. Defever testified that in addition to harming consumers and the public interest, these excessive charges will result in unjust and unreasonable rates in violation of established regulatory principles.

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[114] *Id.* at 15: 7-9.

[115] *See infra* Section B.1.

With respect to disposition of property, the regulatory principle that the benefit follows the burden is being violated.[116] Consumers have paid return on and of property (the burden) so gains from disposition of property (benefit) should be returned to them or shared.

With respect to the issue of allowing collection of Board Director fees from consumers, this violates the regulatory principle that recognizes Board member activities are intended to benefit shareholders (not consumers). OCC witness Mr. Defever testified that Boards of Directors act in the best interests of shareholders, which may differ from best interest of consumers.[117] Duke Board members act on behalf of all subsidiaries, regulated and non-regulated, including regulated entities outside of Ohio. Ohio consumers of the regulated utility should not be footing entire bill for Board member activities that benefit non- jurisdictional entities.

Utilities may charge consumers under 4909.15 the "cost to the utility of rendering utility service during the test period." That cost does not include non-jurisdictional expenses related to activities undertaken on behalf of other Duke entities. Additionally, 7 of the 14 members on the Board of Directors are inside directors, whose salaries and other benefits should adequately compensate them for their activities on behalf of Duke Energy Corp.

Further, allowing Duke to collect incentive compensation from consumers violates the regulatory principle that financial incentives to employees are not necessary

[116] CEI Opinion and Order 71-634 at 11. Holding that gain from sale of property should be included in revenues because the applicant regularly disposed of property as their usefulness to the company ended, and also because the property had been part of applicant's rate base, so it was appropriate for ratepayers to benefit from its sale.

[117] OCC Ex. 4 (Defever Supplemental) at 6.

in the provision of electric service to consumers.[118] Thus incentive compensation should be paid by shareholders, not consumers. Prior PUCO precedent has held that to the extent that a public utility awards financial incentives to its employees for achieving financial goals, shareholders are the primary beneficiary, and therefore that portion of incentive compensation should not be collected from consumers.[119]

OCC witness Dr. Woolridge testified that the settlement's ROE and capital structure violates the regulatory principle that consumers should pay just and reasonable rates.[120] Dr. Woolridge further explained that his proposed ROE and capital structure for Duke satisfy the guiding principles for the appropriate level of profitability for regulated public utilities as determined by the United States Supreme Court in the *Hope* and *Bluefield* cases.[121] There, the Court recognized that the fair rate of return on equity should be:

(1) comparable to returns investors expect to earn on other investments of similar risk;

(2) sufficient to assure confidence in the company's financial integrity; and

(3) adequate to maintain and support the company's credit and to attract capital.[122]

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[118] R.C. 4909.15.

[119] *See In re Duke Energy Ohio, Inc*., Case No. 18-397-EL-RDR, Finding and Order at ¶ 17 (July 31, 2019); *In re Duke Energy Ohio, Inc*., Case No. 16-664-EL-RDR, Finding and Order at ¶ 16 (May 15, 2019); *In re Duke Energy Ohio, Inc*., Case No. 15-534-EL-RDR, Opinion and Order at ¶ 20, 44 (October 26, 2016).

[120] OCC Ex. 1 (Woolridge Supplemental) at 15.

[121] *Federal Power Commission v. Hope Natural Gas Co*., 320 U.S. 591 (1944) ("*Hope*") and *Bluefield WaterWorks and Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679 (1923) ("*Bluefield*").

[122] OCC Ex. 2 (Woolridge Direct) at 4.

Dr. Woolridge explained that electric utilities and gas distribution companies have been earning ROEs in the range of 8.0% to 10.0% in recent years.[123] With such an ROE, electric utilities such as those Dr. Woolridge's proposed proxy group have strong investment grade credit ratings, their stocks have been selling well over book value, and they have been raising abundant amounts of capital.[124] Thus, Dr. Woolridge explained that OCC's ROE recommendation is consistent with the regulatory principles in *Hope* and *Bluefield*.[125]

OCC witness Mr. Williams further testified that the settlement violates the principle that consumers pay only just and reasonable rates by allowing Duke to collect "more money from consumers even when it provides substandard reliability and service."[126] This is because Duke's increased DCI Rider caps are "not conditioned upon Duke meeting its annual minimum PUCO required reliability standards."[127] The settlement demands consumers pay more, but does not require Duke to provide better service in return. This violates the regulatory principle, set forth in R.C. 4905.22 requiring utilities to provide necessary and adequate facilities and service in exchange for just and reasonable rates.

Because the settlement violates an important regulatory principle and Ohio law, it does not meet the PUCO's three-part standard for approval. The PUCO should reject the settlement.

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[123] OCC Ex. 2 (Woolridge Direct) at 23, JRW-3; OCC Ex. 1 (Woolridge Supplemental) at 13-14.

[124] *Id.*

[125] *Id.*

[126] OCC Ex. 3 (Williams Supplemental) at 16: 12-13.

[127] *Id.* at 13: 7-8.

2. The settlement violates the important regulatory principle that the return on equity must be based on the most recent available information.

The settlement violates an important regulatory principle by failing to calculate the ROE using current information. Dr. Woolridge testified that an 8.84% ROE is reasonable.[128] Dr Woolridge explained how authorized ROEs for electric and gas utilities have steadily declined in recent years.[129] During the past few years, the authorized ROEs for distribution utilities without generation, like Duke, have been 30 to 50 basis points below those of vertically integrated electric utilities.[130] Dr. Woolridge stated that the average authorized ROEs for electric distribution companies in 2020 and 2021 were 9.10% and 9.04%, and 9.13% in the first half of 2022.[131]

The authorized ROEs in recent Ohio cases are not based on current market conditions. As Dr. Woolridge discussed, the ROEs in recent Ohio cases have not reflected the decline in ROEs nationally in the past decade.[132] According to Dr. Woolridge, authorized ROEs in Ohio were in the 10.0% range a decade ago, which was in-line with national averages.[133] The ROEs in Ohio, however, have only declined to the 9.70%-10.00% range since that time, while national average delivery-only authorized ROEs have declined to 9.0%.[134] Dr. Woolridge stated that authorized ROEs on Ohio have not reflected current market conditions (*i.e.,* lower interest rates and capital costs arising

[128] OCC Ex. 2 (Woolridge Direct) at 18-23; OCC Ex. 1 (Woolridge Supplemental) at 3.

[129] OCC Ex. 2 (Woolridge Direct) at 18-19.

[130] *Id.* at 19-20.

[131] OCC Ex. 2 (Woolridge Direct) at 20.

[132] OCC Ex. 2 (Woolridge Direct) at 22.

[133] *Id.*

[134] *Id.*

from the COVID-19 pandemic) and have remained at much higher levels than U.S. national averages.[135]

It is an important regulatory principle that utility rates must reflect investment returns "equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties." *Bluefield Water Works. v. Public Service Comm.,* 262 U.S. 679, 692-693, 43 S. Ct. 675, 679, 67 L.Ed. 1176 (1923).

The PUCO has traditionally followed this important regulatory principle that ROEs must be based on current market conditions. For example, *In re Application of Columbus S. Power Co.,* Case No. 05-1194-EL-UNC, Finding and Order (Dec. 14, 2005), the PUCO had to decide the rate of return to be applied to the utility's transmission charge. The utility proposed that the PUCO use the rate of return from the utility's last base rate case. The PUCO rejected this argument because the utility's last base rate case had occurred thirteen years ago, and the PUCO found that market conditions had changed since that time. The PUCO stated:

> The Companies propose that the rate of equity to be included in the calculation be the rate established in each company's last rate case. The Commission disagrees. The Commission issued its decision in Columbus Southern's last base rate case proceeding in May 1992, more than thirteen years ago. The Commission finds that the financial landscape has changed greatly since the early 1990s. We find it appropriate to use a more recent review of the cost of capital. *Id.* at ¶¶ 7-8.

The PUCO applied the same rate of return for a single-issue cost rider as used in the utility's last base rate case in *In re Application of Columbus S. Power Co.,* Case No.

[135] *Id.*; OCC Ex. 1 (Woolridge Supplemental) at 12-13.

10-155-EL-RDR, Entry on Rehearing (Oct. 22, 2010). The utility's last base rate case had occurred two years earlier. The PUCO stated in dicta:

> If the carrying charge rate *were significantly older than two to three years,* and the economic situation drastically different than when the WACC [weighted average cost of capital] was last determined, the Commission agrees that it may be appropriate to reevaluate the reasonableness of using the company's most recently approved carrying charge rate. *Id. at ¶* 9 (Emphasis added).

In a different context involving the rate of return for a base rate case, the PUCO stated its preference that rates of return be calculated using the most recent data available. In *In re Application of Cleveland Elec. Illum. Co.,* Case No. 81-146-ET-AIR, Opinion and Order (Mar. 17, 1982), the PUCO stated:

> It has always been the Commission's policy in determining the yield component of the return on common equity to use the most recent data available. We do not believe that the use of three-year old yields, although weighted against more recent data, complies with our goal of determining a current cost of equity. *Id.* at ¶ 104.

The PUCO should reject the settlement because it violates the important regulatory principle that ROEs must reflect current market conditions.

3. The settlement violates the important regulatory principles set forth in R.C. 4928.02(A) that requires electric service to be nondiscriminatory and R.C. 4928.02(L) that requires the protection of at-risk populations.

The PUCO should also reject the settlement because its provisions unreasonably favor certain signatory parties to the detriment of others. The state policy codified in R.C. 4928.02(A) and R.C. 4905.33, which require that electric service be nondiscriminatory. However, as discussed above, the settlement has Duke providing several concessions (streetlighting-related, *etc*.) to the City of Cincinnati.

It is natural that Cincinnati would advocate for Cincinnati. But Duke has failed to make those concessions (including some limited funds to be used for bill-payment assistance) available to other local governments and consumers within Duke's service territory. Duke's approach is unfair to other local governments and consumers. (To be fair to consumers, any such concessions should be funded by Duke shareholders and not the general body of consumers).

Duke touts the City of Cincinnati as a signatory party that represents residential consumers.[136] But the benefits from the settlement's provisions pertaining to the City of Cincinnati flow only to Cincinnati consumers. Such benefits should be broadly available to others, to satisfy the settlement standards and more importantly Ohio law. Duke is not being fair (and nondiscriminatory) to other local governments and consumers. And, as stated, R.C. 4928.02(A) requires the PUCO to make electric service nondiscriminatory.

The settlement should be rejected.

4. The PUCO should reject the settlement because it violates the important regulatory principles of gradualism and practicality.

Gradualism refers to the regulatory principle and practice that rates should increase gradually over time, so they don't cause "rate-shock" to consumers.[137] A gradual increase to rates protects consumers from sudden high bills that are unaffordable.[138] The settlement violates the principle of gradualism and it should be rejected.

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[136] OCC Ex. 3 (Williams Supplemental) at 7-8. *Cf* Duke Ex. 3 (Spiller Supplemental) at 10 and Tr. Vol. I (Lawler Cross) at 171:10-13.

[137] OCC Ex. 7 (Forney Supplemental) at 10.

[138] *Id.*

OCC witness Mr. Fortney testified that the settlement allocates 92.45% of the agreed-upon increase to the residential class.[139] All other non-residential rate classes are allocated less than 8% of the agreed-upon increase.[140] Mr. Fortney further explained that under the settlement, 6.27% of the base distribution increase is allocated to residential consumers.[141] However, the overall increase is 4.26%.[142] That means that the settlement allocates an increase in base rates to residential consumers that is ***147.18% of the overall increase***.[143] Mr. Fortney testified that this violates the regulatory principle of gradualism.[144]

Public policy should recognize those hardships in allocating increased revenues.[145] The settlement fails to moderate the level and change of Duke's base rates in a way which will prevent undue financial burden on residential consumers. For this reason, Mr. Fortney testified that the settlement violates the third prong of the PUCO's three part test for evaluating settlements.[146]

OCC witness Fortney proposed a more gradual move of the rates of return for each consumer class towards the cost of service.[147] Mr. Fortney recommended using Duke's proposed base distribution (allocation) of the proposed revenue, or 63.06%,

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[139] *Id.* at 4.

[140] *Id.*

[141] *Id.* at 6.

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.*

which *gradually* moves the rates of return of each class towards the cost of service.[148] The allocation of the revenue increase to the Residential Class under that proposal and utilizing the revenue increase as proposed in the Settlement of $23.10 million should be no more than 69.42%, or $16.03 million.[149] This increase would *gradually* move the Residential Class closer to the cost of service while adhering to the public policy of *gradualism*.[150]

The PUCO should reject the settlement because it violates the important regulatory principle and practice of gradualism and will result in rate shock for consumers. Alternatively, the PUCO should adopt OCC's recommendation to use Duke's proposed base distribution (allocation) of the proposed revenue, or 63.06%, which *gradually* moves the rates of return of each class towards the cost of service.

The settlement should also be rejected because it violates the important regulatory principle of practicality. The regulatory principle of practicality means that a rate should be simple, understandable, acceptable to the public, and feasibly applied.[151] The settlement violates this principle because the significant increase to the residential class will be neither understandable nor acceptable to the residential class that is being asked to pay 92.45% of the proposed rate increase, while all other non-residential consumers ***combined*** are allocated less than 8% of Duke's 23.1 million increase.[152] These increases are not simple, understandable, acceptable to the public or feasibly applied. This

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[148] *Id.*

[149] *Id.* at 11.

[150] *Id.*

[151] *Id.*; James C. Bonbright, *Principles of Public Utilities*, 291 (Columbia University Press, 1st ed. 1961).

[152] Supplemental Testimony of Robert Fortney at 11.

allocation of residential consumer charges fails all aspects of the principle of practicality. For these reasons, the settlement violates regulatory principles and practices, and it should be rejected.

5. The settlement violates the important regulatory principles of equity and utilitarianism.

The PUCO's administrative process should protect Ohio consumers by delivering optimal public policy outcomes. These are the regulatory principles of equity and utilitarianism. Equity simply means fairness. For the reasons explained above, the settlement simply is not fair because it confers benefits on limited groups of signatory parties while forcing all residential consumers within Duke's territory to pay the bulk of a rate increase they did not agree to. Instead of equally allocating the costs the settlement places the majority of the increase on the consumers represented by the party (OCC) that opposed the settlement.

Utilitarianism, a form of equity, is defined as "providing the greatest good to the greatest number by ensuring a long-term, affordable and reliable electricity sector."[153] The PUCO's three-part test for reviewing settlements itself often violates the regulatory principles of equity and utilitarianism. The following example shows this.

The signatory parties, who do not represent the broad interests of residential consumers in the first place, have negotiated individualized, party-specific benefits in return for supporting a rate increase that does not really affect them. *In this way, the settlement is more in the private interest and less in the public interest.*

[153] J. Monast, *Maximizing Utility in Electric Utility Regulation,* 43 Florida St. L. Rev. 135, 185 (2015).

This is plainly evident where the settlement provides for a $23.1 million increase, which well exceeds the upper limit of the increase recommended by PUCO Staff in the Staff Report. (The PUCO Staff initially recommended that Duke's revenue increase be between $1,861,525 and $15,279,698.)[154] In addition, the settlement allocates nearly all of the increase to residential consumers (92.4%, or $21.3 million of the $23.1 million increase).[155]

This violates the regulatory principles of equity and utilitarianism because it is unfair and does not provide the greatest good to the greatest number of stakeholders. To the contrary, it provides the greatest good to the signatory parties who receive the individualized, party-specific benefits from the settlement.

That is simply not fair to residential consumers who are forced to pay not only for an increase in excess of the Staff's initial recommendation but also must pay the bulk of the rate increase proposed in the settlement. And they receive relatively little in return. For these additional reasons, the settlement should be rejected.

6. The Settlement violates an important regulatory principle because it provides for Duke Energy to use double leveraging.

The settlement violates an important regulatory principle because it arises from the use of "double leverage." Dr. Woolridge testified that the fact that Duke's parent company has more debt than proposed for Duke Ohio is evidence of double leverage.[156] Double leverage occurs when a utility's operations are financed by debt issued at both the

[154] PUCO Staff Ex. 1 (Staff Report) at 6.

[155] Tr. Vol. I (Lawler Cross) at 197:6-8; OCC Ex. 16 (OCC STIP-INT-01-009); OCC Ex. 7 (Fortney Supplemental) at 10.

[156] OCC Ex. 2 (Woolridge Direct) at 28-30.

holding company level and at the utility operating level.[157] The end result is that it allows Duke's parent company to use low-cost debt to purchase equity in the regulated utility (Duke), which could negatively impact the credit ratings of Duke.[158]

The PUCO has rejected the use of double leverage[159] and it would violate an important regulatory principle to approve the use of double leverage in this settlement. The use of double leverage would result in rates that are not just and reasonable as required under R.C. 4905.22. And this would violate the law's requirement for a "fair and reasonable rate of return" under R.C. 4909.15, by charging consumers in excess of a fair and reasonable return. This double leverage situation harms consumers and the public interest.

III. THE ATTORNEY EXAMINERS ERRED BY SETTING A PROCEDURAL SCHEDULE THAT WAS PREJUDICIAL TO RESIDENTIAL CONSUMERS AND OCC'S CASE PREPARATION

After Duke filed the settlement that will allocate 92.4% of Duke's $23.1 million rate increase onto residential consumers, the Attorney Examiners set a fast-track procedural schedule that impaired OCC's ability to prepare a case for consumer protection in opposition to the settlement. A copy of the Attorney Examiners' original ruling containing the procedural schedule is attached, along with a copy of Attorney Examiner Price's subsequent ruling denying certification on OCC's interlocutory appeal of the procedural schedule ruling. OCC raises this issue again here in accordance with

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[157] OCC Ex. 2 (Woolridge Direct) at 29 (quoting *High Leverage at the Parent Often Hurts the Whole Family*, Moody's Investors' Service, May 11, 2015, at 1).

[158] OCC Ex. 2 (Woolridge Direct) at 29-30; OCC Ex. 1 (Woolridge Supplemental) at 4-6.

[159] *See* General Telephone, Case No. 81-383-TP-AIR, Opinion and Order at 34-35 (April 26, 1982); Ohio Bell Telephone, Case No. 79-1184-TP-AIR, Opinion and Order at 33 (December 3, 1981).

O.A.C. 4901-1-15(F). The procedural schedule set by the Attorney Examiners was patently unfair. This is yet one more reason why the settlement should be rejected.

The settlement was filed with the PUCO on September 19, 2022. A pre-hearing conference, which was scheduled for transcription by a court reporter, was held remotely on September 20, 2022.[160] At the pre-hearing conference, before OCC could even propose a schedule, Attorney Examiner Walstra announced an aggressive schedule that required testimony in support of the proposed settlement to be filed by September 22, testimony in opposition to the proposed settlement to be filed on September 29 and set the evidentiary hearing for October 4, 2022. This schedule was memorialized in the Attorney Examiners' September 20, 2022 Entry.

OCC objected to the procedural schedule. Among other things, OCC made the parties and Attorney Examiners aware of witness conflicts and the need to conduct discovery regarding the settlement, prepare testimony, and prepare for the evidentiary hearing. But OCC's objections were not accepted. OCC's proposal for a more reasonable procedural schedule was denied.

On September 26, 2022, OCC timely filed a request for an interlocutory appeal of the Attorney Examiners' September 20, 2022 Entry. Attorney Examiner Gregory Price denied certification of OCC's interlocutory appeal in an Entry on October 3, 2022, just one day before the evidentiary hearing commenced.

The procedural schedule set by the Attorney Examiners and then upheld when OCC's interlocutory appeal was denied was highly prejudicial to residential consumers. The procedural schedule severely impaired OCC's *ample* discovery rights with respect to

[160] *See* Entry (September 19, 2022).

the settlement filed on September 19, 2022.[161] While the PUCO has discretion to manage its proceedings and regulate its docket, the Supreme Court of Ohio has held that the PUCO cannot do so at the expense of a party's statutory rights of discovery under R.C. 4903.082.[162] And where the PUCO is bound by statutory timeframes, the PUCO "will need to balance the statutory right to discovery and the constraints imposed by the statutory timeframe" of the proceeding.[163]

The Attorney Examiners disregarded OCC's ample rights to discovery. Settlement negotiations between Duke, the PUCO Staff and other parties did not begin until after the Staff Report was filed and initial discovery ended. Therefore, Duke's claim in its memorandum contra OCC's request for an interlocutory appeal that OCC "had over a year since the Company filed its application to ask all the questions it wanted"[164] is simply untrue. The recent settlement gave rise to the need for new and additional discovery.

In addition, not all language ultimately included in the settlement was circulated to all parties until the end of the settlement negotiations. How then could OCC have possibly conducted discovery regarding the settlement until *after* September 19, 2022 when the settlement was filed? OCC couldn't, and Duke's claims to the contrary are disingenuous and wrong.

The September 20 Entry addressing the procedural schedule and discovery required discovery responses within five calendar days. However, even with that

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[161] R.C. 4903.082.

[162] *In re Suvon, LLC*, 2021-Ohio-3630, ¶ 42.

[163] *Id.*

[164] Duke's Memorandum Contra OCC's Interlocutory Review ("Duke Memo Contra"), at 7.

expedited timeframe, OCC's ability to conduct sufficient discovery was still limited. Duke filed ***six sets of new testimony*** in support of the settlement on September 22, 2022. On top of that, OCC had to prepare its own testimony in opposition to the settlement, which was due on September 29, 2022. OCC also had to prepare for the evidentiary hearing, which included cross-examination of Duke's witnesses, who were presented the very first day of the proceeding on October 4, 2022. And of course, this does not even account for constraints on OCC's resources devoted to other pending cases.

In Ohio Power Company's ("AEP") most recent rate case, Case No. 20-585-EL-AIR, *et al*., a settlement was filed that some parties opposed. However, there, the settlement was filed on March 12, 2021, and testimony in opposition to the settlement was not due to be filed until ***over a month later*** on April 16, 2021.[165] And the evidentiary hearing began on May 12, 2021 ***two months after*** the settlement was filed.[166] In its memorandum contra OCC's interlocutory appeal, Duke ignored the date the settlement was filed in the AEP rate case, and wrongly claimed that the AEP rate case procedural schedule was "just like" the prejudicial schedule the Attorney Examiners ordered here.[167] It just wasn't. Parties opposing the AEP rate case settlement had significantly more time to prepare a case in opposition to the AEP rate case settlement than OCC had to prepare its case here.

In the PUCO's settlement process, the deck is already stacked against those opposing the settlement. This case is no longer against an application for an increase in

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[165] *See In the Matter of the Application of Ohio Power Company for an Increase in Electric Distribution Rates*, Case No. 20-585-EL-AIR, et al., Entry (April 5, 2021), at ¶¶ 10, 12, 14.

[166] *Id.* at ¶¶ 10, 14.

[167] Duke Memo Contra, at 4-5.

rates; it is against the PUCO's three-prong test for reviewing settlements. Fundamental fairness requires that parties opposing the settlement have an adequate opportunity to prepare a case. OCC should have been (but was not) afforded an adequate opportunity to explore the underlying facts involving the proposed settlement, which OCC did not sign. To the detriment of Duke's residential consumers, that did not happen here. The procedural schedule established by the Attorney Examiners was unreasonable, unlawful, and inconsistent with the ample discovery rights that are afforded to all parties in PUCO proceedings.[168]

IV. CONCLUSION

For the reasons explained above, the settlement filed by Duke, the PUCO Staff, and others fails the PUCO's three-part test for evaluating settlements. To protect consumers, the PUCO should reject the settlement and adopt OCC's recommendations set forth in its witnesses' testimony.

[168] *See* R.C. 4903.082 and O.A.C. 4901-1-16 et seq.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Initial Brief for Consumer Protection was served by electronic transmission upon the parties below this 31st day of October 2022.

/s/ Angela O'Brien
Angela O'Brien
Assistant Consumers' Counsel

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF DUKE ENERGY OHIO, INC., FOR AN INCREASE IN ITS ELECTRIC DISTRIBUTION RATES.	**CASE NO. 21-887-EL-AIR**
IN THE MATTER OF THE APPLICATION OF DUKE ENERGY OHIO, INC., FOR TARIFF APPROVAL.	**CASE NO. 21-888-EL-ATA**
IN THE MATTER OF THE APPLICATION OF DUKE ENERGY OHIO, INC., FOR APPROVAL TO CHANGE ACCOUNTING METHODS.	**CASE NO. 21-889-EL-AAM**

ENTRY

Entered in the Journal on September 20, 2022

{¶ 1} Duke Energy Ohio, Inc. (Duke) is an electric light company and public utility as defined by R.C. 4905.03(C) and R.C. 4905.02, respectively. As such, Duke is subject to the Commission's jurisdiction pursuant to R.C. 4905.04, 4905.05, and 4905.06.

{¶ 2} On October 1, 2021, Duke filed an application for an increase in electric distribution rates, for approval of tariff modifications, and for approval to changes in certain accounting methods.

{¶ 3} The Commission caused an investigation to be made of the facts set forth in the rate increase application by Duke, the exhibits attached thereto, and other matters connected with the application. On May 19, 2022, Staff filed a written report of its investigation (Staff Report). Copies of the Staff Report were mailed to Duke and other persons deemed to be interested in the case.

{¶ 4} By Entry issued May 20, 2022, the attorney examiner set forth the procedural schedule. Thereafter, the attorney examiner granted several requests to adjust the procedural schedule. In response to a motion to modify the procedural schedule filed by Staff, on September 2, 2022, the attorney examiner issued an Entry vacating the procedural

schedule, including postponing the September 19, 2022 evidentiary hearing. Also, the attorney examiner directed Duke to file a status update every week indicating the status of negotiations and whether a hearing should be scheduled.

{¶ 5} On September 19, 2022, Duke filed a Joint Stipulation and Recommendation (Stipulation) signed by certain parties to the case.

{¶ 6} On the same date, Duke filed an unopposed expedited motion for prehearing conference. Pursuant to a September 19, 2022 Entry granting the request, a prehearing was held on September 20, 2022, and a procedural schedule was discussed.

{¶ 7} Accordingly, the procedural schedule will be as follows:

- The evidentiary hearing in this proceeding will commence on October 4, 2022, at 10:00 a.m. in Hearing Room 11-A at the offices of the Commission, 180 East Broad Street, 11th Floor, Columbus, Ohio 43215.

- All testimony in support of the Stipulation is to be filed by September 22, 2022.

- All testimony in opposition to the Stipulation is to be filed by September 29, 2022.

- Staff testimony in response to objections is to be filed by October 3, 2022.

{¶ 8} In the event that any motion is made in these proceedings prior to the issuance of the Commission's order, any memorandum contra shall be filed within three business days after the service of such motion, and a reply memorandum to any memorandum contra shall be filed within two business days. Parties shall provide service of pleadings via hand delivery or e-mail.

{¶ 9} In addition, consistent with Ohio Adm.Code 4901-1-16(D) and (E), the response time for supplemental discovery is five calendar days. Unless otherwise agreed to by the parties, discovery requests and replies shall be served by hand delivery or e-mail. An attorney serving a discovery request shall attempt to contact, in advance, the attorney upon whom the discovery request will be served to advise the attorney that a request will be forthcoming.

{¶ 10} It is, therefore,

{¶ 11} ORDERED, That the procedural schedule be established as set forth in Paragraph 7. It is, further,

{¶ 12} ORDERED, That all persons comply with the procedural directives as set forth above in Paragraphs 8 and 9. It is, further,

{¶ 13} That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/Nicholas J. Walstra

By: Nicholas J. Walstra
Attorney Examiner

GAP/hac

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in

Case No(s). 21-0887-EL-AIR, 21-0888-EL-ATA, 21-0889-EL-AAM

Summary: Attorney Examiner Entry ordering that the procedural schedule will be as follows: evidentiary hearing will commence on October 4, 2022, at 10:00 a.m. in Hearing Room 11-A at the offices of the Commission, 180 East Broad Street, 11th Floor, Columbus, Ohio 43215; all testimony in support of the Stipulation is to be filed by September 22, 2022; all testimony in opposition to the Stipulation is to be filed by September 29, 2022; staff testimony in response to objections is to be filed by October 3, 2022; and, that all persons comply with the procedural directives as set forth above in Paragraphs 8 and 9 electronically filed by Heather A. Chilcote on behalf of Nicholas Walstra, Attorney Examiner, Public Utilities Commission

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF DUKE ENERGY OHIO, INC., FOR AN INCREASE IN ITS ELECTRIC DISTRIBUTION RATES.	**CASE NO. 21-887-EL-AIR**
IN THE MATTER OF THE APPLICATION OF DUKE ENERGY OHIO, INC., FOR TARIFF APPROVAL.	**CASE NO. 21-888-EL-ATA**
IN THE MATTER OF THE APPLICATION OF DUKE ENERGY OHIO, INC., FOR APPROVAL TO CHANGE ACCOUNTING METHODS.	**CASE NO. 21-889-EL-AAM**

ENTRY

Entered in the Journal on October 3, 2022

{¶ 1} Duke Energy Ohio, Inc. (Duke) is an electric light company and public utility as defined by R.C. 4905.03(C) and R.C. 4905.02, respectively. As such, Duke is subject to the Commission's jurisdiction pursuant to R.C. 4905.04, 4905.05, and 4905.06.

{¶ 2} On October 1, 2021, Duke filed an application for an increase in electric distribution rates, for approval of tariff modifications, and for approval to changes in certain accounting methods.

{¶ 3} The Commission caused an investigation to be made of the facts set forth in the rate increase application by Duke, the exhibits attached thereto, and other matters connected with the application. On May 19, 2022, Staff filed a written report of its investigation (Staff Report). Copies of the Staff Report were mailed to Duke and other persons deemed to be interested in the case.

{¶ 4} By Entry issued May 20, 2022, the attorney examiner set forth the procedural schedule. Thereafter, the attorney examiner granted several requests to adjust the procedural schedule. In response to a motion to modify the procedural schedule filed by Staff, on September 2, 2022, the attorney examiner issued an Entry vacating the procedural

schedule, including postponing the September 19, 2022 evidentiary hearing. Also, the attorney examiner directed Duke to file a status update every week indicating the status of negotiations and whether a hearing should be scheduled.

{¶ 5} On September 19, 2022, Duke filed a Joint Stipulation and Recommendation (Stipulation) signed by certain parties to the case.

{¶ 6} On the same date, Duke filed an unopposed expedited motion for prehearing conference. Pursuant to a September 19, 2022 Entry granting the request, a prehearing was held on September 20, 2022, and a procedural schedule was discussed.

{¶ 7} Accordingly, on September 20, 2022, a procedural schedule was established as follows: The evidentiary hearing in this proceeding was to commence on October 4, 2022, at 10:00 a.m.; all testimony in support of the Stipulation was to be filed by September 22, 2022; all testimony in opposition to the Stipulation was to be filed by September 29, 2022; and Staff testimony in response to objections was to be filed by October 3, 2022.

{¶ 8} Ohio Adm.Code 4901-1-15 sets forth the Commission's requirements for interlocutory appeals. The rule provides that no party may take an interlocutory appeal from a ruling by an attorney examiner unless that ruling is one of four specific rulings enumerated in paragraph (A) of the rule or unless the appeal is certified to the Commission pursuant to paragraph (B) of the rule. Ohio Adm.Code 4901-1-15(B) specifies that an attorney examiner shall not certify an interlocutory appeal unless the attorney examiner finds that the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling that represents a departure from past precedent and an immediate determination by the Commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, if the Commission should ultimately reverse the ruling in question.

{¶ 9} On September 26, 2022, the Ohio Consumers' Counsel (OCC) filed an interlocutory appeal and a request for certification to the Commission. OCC states that the

procedural schedule established by the attorney examiner is a departure from past precedent and prejudices OCC, as a non-signatory party to the Stipulation. According to OCC, the procedural schedule does not provide enough time to prepare intervenor testimony. OCC also states that a discovery response time of five days is insufficient and deprives OCC of necessary time to review and prepare for hearing and infringes on rights under R.C. 4903.082 for full and ample discovery. OCC contends that the schedule is a departure from previous procedural schedules in other Duke rate cases and seeks an immediate ruling.

{¶ 10} Duke submitted a memoranda contra on September 28, 2022. Duke asserts OCC's appeal should not be certified. Duke states that the attorney examiner entry is not a departure from past precedent. As explained by Duke, the Staff Report in this case was filed on May 19, 2022, and the default discovery response time, pursuant to Ohio Adm.Code 4901-1-17(B), is 14 days. Further, adds Duke, the notice requirement of a hearing is only ten days written notice, as described in R.C. 4909.19(C). Duke points out other Commission cases with similar procedural schedules and observes that the schedule established in this case is thus not a departure from past precedent.

{¶ 11} The attorney examiner finds that OCC's interlocutory appeal does not present a new or novel question of law or policy or a departure from past precedent. As the Commission has noted on numerous prior occasions, the Commission and its attorney examiners have extensive experience with respect to establishing procedural schedules and determining filing deadlines, which are routine matters that do not involve a new or novel question of interpretation, law, or policy. *See, e.g., In re Ohio Power Co.*, Case No. 16-1852-EL-SSO, et al., Entry (Feb. 8, 2018) at ¶ 24; *In re The Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, et al., Entry (Jan. 14, 2013) at 5; *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co.*, Case No. 12-1230-EL-SSO, Entry (May 2, 2012) at 4; *In re Duke Energy Ohio, Inc.*, Case No. 08-920-EL-SSO, et al., Entry (Oct. 1, 2008) at 7; *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co.*, Case No. 08-935-EL-SSO, Entry (Sept. 30, 2008) at 3; *In re Vectren Energy Delivery of Ohio, Inc.*, Case No.

05-1444-GA-UNC, Entry (Feb. 12, 2007) at 7; *In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 05-376-EL-UNC, Entry (May 10, 2005) at 2. Further, as to OCC's claim that the procedural schedule is a departure from past precedent, the attorney examiner notes that, even in the cases cited by OCC, the procedural schedules vary, likely based on a number of factors, including, but not limited to, statutory requirements; schedules of the parties, witnesses, Staff, and the attorney examiners; and the availability of Commission resources.

{¶ 12} The attorney examiner also finds that OCC has failed to demonstrate that an immediate determination by the Commission is needed to prevent the likelihood of any undue prejudice resulting from the September 20, 2022 Entry. OCC has had ample time to conduct discovery and prepare for hearing and, in short, has not shown that the procedural schedule is unduly prejudicial or unreasonable under the circumstances of these proceedings. In this instance, the attorney examiner notes that the Commission must also be mindful of the timing requirements in R.C. 4909.42. The statute provides that, where the Commission fails to issue an order within 275 days of the filing of an application under R.C. 4909.18, a public utility requesting an increase on any rate, joint rate, toll, classification, charge, or rental or requesting a change in a regulation or practice affecting the same, the increase shall go into effect upon the filing of a bond or a letter of credit by the public utility, subject to refund.

{¶ 13} It is, therefore,

{¶ 14} ORDERED, That the request for certification of the interlocutory appeal to the Commission be denied. It is, further,

{¶ 15} ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/Gregory A. Price

By: Gregory A. Price
Attorney Examiner

JRJ/mef

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in

Case No(s). 21-0887-EL-AIR, 21-0888-EL-ATA, 21-0889-EL-AAM

Summary: Attorney Examiner Entry denying certification of the interlocutory appeal electronically filed by Ms. Mary E. Fischer on behalf of Gregory A. Price, Attorney Examiner, Public Utilities Commission of Ohio